Tofan Singh vs The State Of Tamil Nadu on 29 October, 2020

Equivalent citations: AIR 2020 SUPREME COURT 5592, AIRONLINE 2020 SC 798

Author: R.F. Nariman

Bench: Indira Banerjee, R.F. Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.152 OF 2013

TOFAN SINGH …Appellant

Versus

STATE OF TAMIL NADU …Respondent

WITH
CRIMINAL APPEAL NO. 1750 OF 2009
CRIMINAL APPEAL NO. 2214 OF 2009
CRIMINAL APPEAL NO. 827 OF 2010
CRIMINAL APPEAL NO. 835 OF 2011
CRIMINAL APPEAL NO. 836 OF 2011
CRIMINAL APPEAL NO. 344 OF 2013
CRIMINAL APPEAL NO. 1826 OF 2013
CRIMINAL APPEAL NO. 433 OF 2014
SPECIAL LEAVE PETITION (CRL.) NO. 6338 OF 2015
CRIMINAL APPEAL NO. 77 OF 2015
CRIMINAL APPEAL NO. 90 OF 2017
CRIMINAL APPEAL NO. 91 OF 2017
SPECIAL LEAVE PETITION (CRL.) NO. 1202 OF 2017

JUDGMENT

R.F. Nariman, J.

1. These Appeals and Special Leave Petitions arise by virtue of a reference order of a Division Bench of this Court reported as Tofan Singh v. State of Tamil Nadu (2013) 16 SCC 31. The facts in that appeal have been set out in that judgment in some detail, and need not be repeated by us. After hearing arguments from both sides, the Court recorded that the Appellant in Criminal Appeal No.152 of 2013 had challenged his conviction primarily on three grounds, as follows:

> "24.1. The conviction is based solely on the purported confessional statement recorded under Section 67 of the NDPS Act which has no evidentiary value inasmuch 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 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 CrPC.

(c) In any case, the said statement having been retracted, it could not have been the basis of conviction and could be used only to corroborate other evidence."

2. Under the caption "Evidentiary value of statement under section 67 of the Narcotic Drugs and Psychotropic Substances, Act, 1985 ("NDPS Act")", the Court noted the decisions of Raj Kumar Karwal v. Union of India (1990) 2 SCC 409 and Kanhaiyalal v. Union of India (2008) 4 SCC 668, as also certain other judgments, most notably Abdul Rashid v. State of Bihar (2001) 9 SCC 578 and Noor Aga v. State of Punjab (2008) 16 SCC 417, and thereafter came to the conclusion that the NDPS Act, being a penal statute, is in contradistinction to the Customs Act, 1962 and the Central Excise Act, 1944, whose dominant object is to protect the revenue of the State, and that therefore, judgments rendered in the context of those Acts may not be apposite when considering the NDPS Act – see paragraph 33. After then considering a number of other judgments, the referral order states that a re-look into the ratio of Raj Kumar Karwal (supra) and Kanhaiyalal (supra) would be necessary, and has referred the matter to a larger Bench thus:

> "41. For the aforesaid reasons, we are of the view that the matter needs to be referred to a larger Bench for reconsideration of the issue as to whether the officer investigating the matter under the NDPS Act would qualify as police officer or not.
>
> 42. 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.
>
> 43. As far as this second related issue is concerned we would also like to point out that Mr Jain argued that the 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 a number of judgments and there is a qualitative difference between the two sets of provisions.

Insofar 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 the Andhra Pradesh High Court in Shahid Khan v. Director of Revenue Intelligence [2001 Cri LJ 3183 (AP)]."

3. Shri Sushil Kumar Jain, learned Senior Advocate appearing for the Appellants in Criminal Appeal Nos. 152 of 2013; 836 of 2011; 433 of 2014; 77 of 2015 and 1202 of 2017, outlined six issues before us, which really boil down to two issues, namely:

> "1. Whether an officer "empowered under Section 42 of the NDPS Act" and/or "the officer empowered under Section 53 of the NDPS Act" are "Police Officers" and therefore statements recorded by such officers would be hit by Section 25 of the Evidence Act; and
>
> 2. What is the extent, nature, purpose and scope of the power conferred under Section 67 of the NDPS Act available to and exercisable by an officer under section 42 thereof, and whether power under Section 67 is a power to record confession capable of being used as substantive evidence to convict an accused?"

4. Shri Jain took us through the provisions of the NDPS Act which, according to him, is a special Act, and a complete code on the subject it covers. He referred to how the NDPS Act sometimes overrides the Code of Criminal Procedure, 1973 ("CrPC"); sometimes says that it is applicable; and sometimes states that it is made applicable with necessary modifications. According to Shri Jain, section 41(2) and section 42 of the NDPS Act refer to a 'First Information Report' being lodged by the officers referred to therein. As the source of information is required to be kept a secret under section 68 of the NDPS Act, the officer receiving information under these provisions is therefore treated as an informant. The tasks assigned to officers under section 42 of the NDPS Act are four in number, namely, entry, search, seizure or arrest. As opposed to this, section 53 of the NDPS Act invests the designated officers with all the powers of an 'officer-in-charge of a police station' for the process of investigation, which would then begin after information collected by a section 42 officer is handed over to the officer designated under section 53, and end with a final report being submitted under section 173 of the CrPC to the Special Court under section 36A(1)(d) of the NDPS Act. According to the learned Senior Advocate, section 67 is to be read only with section 42, and is a power to call for information so that the "reason to believe" mentioned in section 42 can then be made out, without proceeding further under the NDPS Act. Thus, "reason to believe", which is at a higher threshold than "reason to suspect" – which phrase has been used in section 49 of the NDPS Act – is a condition precedent to the officer thereafter moving forward. Shri Jain argued that the reason to believe must be formed before the officer acts, and that therefore, section 67 operates at a stage antecedent to the exercise of the powers of the officer designated under section 42. He then went on to argue that these provisions must be construed strictly in favour of the subject, inasmuch as they impinge upon the fundamental right to privacy, recently recognised by this Court in K.S. Puttaswamy and Anr. v. Union of India and Ors. (2017) 10 SCC 1. He also argued that the NDPS Act therefore incorporates a legislative balance between powers of investigation and the obligation to

uphold privacy rights of the individual. He then went on to argue that the "information" under section 67 of the NDPS Act cannot be equated with "evidence", which is only evidence before a court, as per the definition of "evidence" under the Indian Evidence Act, 1872 ("Evidence Act"). He cited judgments to show that even witness statements made under section 164 of the CrPC are not substantive evidence. He then contrasted section 67 of the NDPS Act with the power of officers under revenue acts to record evidence, such as section 108 of the Customs Act 1962, and section 14 of the Central Excise Act 1944. He then went on to state that as none of the safeguards contained in sections 161-164 of the CrPC are contained in the NDPS Act when the person is examined under section 67, obviously statements made to officers under section 67 cannot amount to substantive evidence on the basis of which conviction can then take place. An important argument was that it would be highly incongruous if an officer of the police department, empowered under section 42 and exercising the same powers under section 67, records a confessional statement which would be hit by section 25 of the Evidence Act, whereas officers exercising the same powers under the NDPS Act, who are not regular policemen, would be able to record confessional statements, and bypass all constitutional and statutory safeguards. Shri Jain contended that as the provisions of the NDPS Act are extremely stringent, they must be strictly construed, and safeguards provided must be scrupulously followed. According to him, arbitrary power conferred under section 67 upon an officer above the rank of peon, sepoy or constable, but denied to a senior officer under section 53, would be ex facie contrary to Article 14 of the Constitution. On the other hand, section 53 statutorily confers powers on the named officer of an officer-in-charge of a police station for the investigation of the offences under the NDPS Act. This, according to the learned counsel, would contain the entire gamut of powers contained in sections 160-173 of the CrPC, including the power to then file a charge-sheet before the Special Court under section 36A(1)(d) of the NDPS Act. The learned counsel argued that section 53A of the NDPS Act shows that confessional statements that are made under section 161 of the CrPC, which are otherwise hit by section 162 of the CrPC, are made relevant only in the two contingencies mentioned under section 53A of the NDPS Act, being exceptions to the general rule stated in section 162 of the CrPC. He contended, therefore, that section 67 of the NDPS Act cannot be used to bypass section 53A therein and render it otiose. He stressed the fact that all offences under the NDPS Act are cognizable offences, unlike under revenue statutes like the Customs Act, 1962 and Central Excise Act, 1944, and then argued that the "complaint" that is referred to in section 36A(1)(d) of the NDPS Act has only reference to a complaint filed under section 59(3) therein. He also pointed out the anomalies of granting to the concerned officer under section 53 all the powers of the officer-in-charge of a police station, which, unless it ends up in the form of a final report, would leave things hanging. Thus, if the concerned officer finds that there is no sufficient evidence, and that the accused should be released, section 169 of the CrPC would apply. In the absence of section 169 of the CrPC, as has been contended by the other side, there is no procedure for discharge of the accused if evidence against him is found to be wanting. In a without-prejudice argument that complaints under the NDPS Act can be made outside of section 59(3), Shri Jain stressed the fact that there is in reality and substance no difference between the "complaint" under the NDPS Act and the charge-sheet under the CrPC, as investigation has already been carried out even before the complaint under the NDPS Act is made. He therefore argued that both Raj Kumar Karwal (supra) and Kanhaiyalal (supra) require to be overruled by us, as they erroneously applied earlier judgments which concerned themselves with revenue statutes, and not penal statutes like the NDPS Act. He then referred us to Article 20(3) of the Constitution, and

section 25 of the Evidence Act, and cited a plethora of case law to drive home the point that in this country, as coercive methods are used against persons during the course of investigation, all confessions made to a police officer, whether made during the course of investigation or even before, cannot be relied upon as evidence in a trial. He then referred to several judgments of this Court to state that the expression "police officer" is not defined, and the functional test therefore must apply, namely, that a person who is given the same functions as a police officer under the CrPC, particularly in the course of investigating an offence under the Act, must be regarded as a police officer for the purpose of section 25 of the Evidence Act. In the course of his submissions, he referred to a number of judgments of this Court, and most particularly, the judgments of State of Punjab v. Barkat Ram (1962) 3 SCR 338; Raja Ram Jaiswal v. State of Bihar (1964) 2 SCR 752; Badku Joti Savant v. State of Mysore (1966) 3 SCR 698; Romesh Chandra Mehta v. State of West Bengal (1969) 2 SCR 461; Illias v. Collector of Customs, Madras (1969) 2 SCR 613; and Balkishan A. Devidayal v. State of Maharashtra (1980) 4 SCC 600. He also provided a useful chart of the difference in the provisions contained in the NDPS Act and the Railway Property (Unlawful Possession) Act, 1966, the Sea Customs Act, 1878, the Central Excise Act, 1944, and the Customs Act, 1962.

5. Shri Puneet Jain supplemented these arguments with reference to a recent judgment of a Constitution Bench of this Court in Mukesh Singh v. State (Narcotic Branch of Delhi) 2020 SCC OnLine SC 700, and stated that as some discordant notes are to be found in that judgment, it may be referred to a larger Bench. In any case, he argued that the comments made in that judgment about investigation starting from the section 42 stage itself were only in the context of the complainant and the investigator being the same, in which case, if prejudice was caused, the trial may be vitiated in terms of the judgment.

6. Shri Anand Grover, learned Senior Advocate, appearing for the Appellant in Criminal Appeal No. 90 of 2017, followed in the wake of the two Jains, père et fils. The learned Senior Advocate stressed the various provisions of the NDPS Act which showed that it was extremely stringent, in that it had minimum sentences for even possession of what is regarded as a "commercial quantity" of a drug or psychotropic substance, being a minimum sentence of rigorous imprisonment of 10 years, going up to 20 years. This, coupled with various presumptions raised against the accused, and stringent bail conditions, all made the NDPS Act a very stringent measure of legislation, which, the more stringent it is, must contain necessary safeguards against arbitrary search, seizure and arrest, or else it would fall foul of the fundamental rights chapter of the Constitution. He argued that the NDPS Act was penal in nature, and contained regulatory provisions as well, but given the fact that we are concerned only with the penal provisions, could be distinguished from the revenue statutes whose dominant object is the collection of revenue, and not the punishment of crime. He stressed the fact that the "enquiry" under section 67 of the NDPS Act is not a judicial enquiry, but only a preliminary fact-finding exercise before a "reason to believe" is formed under section 42, which could then lead to investigation of an offence under the Act. He also referred to section 50 of the NDPS Act, and stated that given a higher protection as to conditions under which a search of person may be conducted, it would be inconceivable to then conclude that under section 67, confessional statements can be recorded without more, subject to no safeguards whatsoever, on which convictions can then be based. He relied strongly on State of Punjab v. Baldev Singh (1999) 6 SCC

172 and its aftermath Vijaysinh Chandubha Jadeja v. State of Gujarat (2011) 1 SCC 609 to argue that even after sub-sections (5) and (6) were added to section 50 of the NDPS Act, they did not dilute what was contained in section 50(1)-(4), and could only be used in emergent and urgent situations. He referred to statutes like the Terrorist and Disruptive Activities (Prevention) Act, 1987 ("TADA"), and stated that where under certain limited circumstances exceptions were made to section 25 of the Evidence Act, they were hedged in with a number of safeguards, as were laid down by this Court in Kartar Singh v. State of Punjab (1994) 3 SCC 569. According to him, therefore, "police officer" needs to be construed functionally to include special police officers under the NDPS Act, in the context of confessions made, with reference to section 25 of the Evidence Act. He joined Shri Jain in asking for an overruling of Raj Kumar Karwal (supra) and Kanhaiyalal (supra).

7. Shri S. Nagamuthu, learned Senior Advocate appearing on behalf of the Appellant in Criminal Appeal No. 1826 of 2013, referred to sections 41 to 43 of the NDPS Act, and emphasised the fact that no powers to "investigate" any offences are vested in the officers mentioned in these sections. He then referred to section 36 of the CrPC, and said that the scheme followed in the NDPS Act could be assimilated to section 36, in that, police officers superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station. He emphasised the fact that section 25 of the Evidence Act only applies to confessions made against the maker, as against statements recorded under section 161 of the CrPC, which are completely barred from being received in evidence under section 162 of the CrPC, save and except for purposes of contradiction. He argued that a confessional statement made to a section 41 or section 42 officer was also hit by section 25 of the Evidence Act. He added that the special procedure in section 36A of the NDPS Act applies only qua offences punishable for a term of more than three years, and where offences under the Act are punishable for terms up to three years, they are to be tried by a Magistrate under the CrPC. Obviously, officers under section 53 of the NDPS Act would investigate an offence under the Act that is punishable for a term up to three years, and file a police report, as no complaint procedure, being the procedure under section 36A of the NDPS Act, would then apply. According to him, this would show that investigation does culminate in a police report for offences punishable for a term up to three years, as a result of which section 36A(1)(d) has to be read as providing two methods of approaching a Special Court – one, by way of a police report, and the other, by way of a complaint to the Special Court.

8. Shri Uday Gupta, learned Advocate appearing on behalf of the Appellant in Criminal Appeal No. 344 of 2013, supplemented the arguments of his predecessors, and stressed the fact that the "enquiry" under section 67 of the NDPS Act cannot possibly be governed by the definition of "inquiry" under section 2(g) of the CrPC, as that "inquiry" relates only to inquiries conducted by a Magistrate or Court. Hence, the expression "enquiry" under section 67 must be given its ordinary meaning, which would indicate that it is only a preliminary fact-finding enquiry that is referred to. He relied strongly on the Directorate of Law Enforcement Handbook, in which the Directorate made it clear that when statements are recorded under section 67 of the NDPS Act by the police, these would amount to statements under section 161 of the CrPC. He contended that if this is so, it would be extremely anomalous to have statements recorded under section 67 by officers other than the police – mentioned under sections 41 and 42 of the NDPS Act, which are not statements made

under section 161 of the CrPC – being admissible in evidence, on which a conviction of an accused can then be based.

9. Shri Gupta was followed by Shri Sanjay Jain, learned Advocate appearing on behalf of the Appellant in Criminal Appeal No. 1750 of 2009, who supplemented the arguments of his predecessors by referring to section 53A, and notifications made under section 53, of the NDPS Act. He reiterated that officers under section 42 and officers under section 53 of the NDPS Act perform different functions, and that a section 53 officer, being empowered to "investigate", most certainly has the power to file a police report before the Special Court.

10. Shri Aman Lekhi, learned Additional Solicitor General, appearing on behalf of the Union of India, took us through the NDPS Act, and said, that read as a whole, it is a balanced statute which protected both the investigation of crime, as well as the citizen, in that several safeguards were contained therein. He was at pains to point out that it was not his case that a confession recorded under section 67 of the NDPS Act, without more, would be sufficient to convict a person accused of an offence under the Act. According to him, this could only be done if section 24 of the Evidence Act was met, and the Court was satisfied that the confession so recorded was both voluntary and truthful. In any case, he asserted that the safeguards that have been pointed out in D.K. Basu v. Union of India (1997) 1 SCC 416 at 435, 436, have now largely been incorporated in Chapter V of the CrPC, which safeguards would also operate qua confessions recorded under section 67 of the NDPS Act. According to him, section 67 on its plain language does not refer to the "information" spoken of in section 42, as it uses the expression "require" any person to produce or deliver a document, as opposed to information "called for" from such persons. He also argued, based on judgments of this Court, that confessions, if properly recorded, are the best form of evidence, as these are facts known to the accused, about which he then voluntarily deposes. He also argued that section 190 of the CrPC is not completely displaced by section 36A(1)

(d) of the NDPS Act, in that the requirement of the filing of a complaint and/or a police report contained in section 190 continues to apply, in support of the decision in Raj Kumar Karwal (supra). He then referred in detail to Badku Joti Savant (supra), and stated that this judgment was not considered in the reference order, and that finally, the only test that is laid down by several Constitution Bench judgments to determine whether a person is or is not a "police officer" is whether such person is given the right to file a report under section 173 of the CrPC. He made it clear that section 53 of the NDPS Act did not deem the officers named therein to be police officers – they were only given certain powers of investigation, which did not ultimately lead to filing of a charge-sheet under section 173 of the CrPC. What was clear was that only a "complaint" could be filed by such officers under section 36A(1)(d) of the NDPS Act – the police report being only filed by the police force as constituted under the Police Act, 1861. He disagreed vehemently with the submission of Shri Jain that the "complaint" under section 36A(1)(d) would refer only to the complaint under section 59(3) of the NDPS Act, and referred to section 2(xxix) of the NDPS Act to refer to the definition of "complaint" under section 2(d) of the CrPC, which is used in the same sense as in the CrPC. He then pointed out several provisions in the NDPS Act, where the word "police" or "police officer" is used in contrast to the other persons or officers who are part of the narcotics and other setups. According to him, in any case, section 53A makes an inroad into section 25 of the

Evidence Act. Equally, according to him, the majority judgment in Raja Ram Jaiswal (supra) is per incuriam, inasmuch as it does not consider several provisions of the CrPC, and therefore, arrives at the wrong test to determine as to who can be said to be a "police officer" within the meaning of section 25 of the Evidence Act. In any case, he argued that the officers mentioned in sections 41 and 42 of the NDPS Act cannot be tarnished with the same brush as the regular police, as there is nothing to show that these officers use third- degree measures to extort confessions. He then referred to the language of section 67 of the NDPS Act, in which, according to him, the expression "enquiry" is nothing but an investigation, and the expression "examine" is the same expression used in section 161 of the CrPC, which therefore should be accorded evidentiary value, as no safeguards as provided under section 162 of the CrPC are mentioned qua statements made under section 67 of the NDPS Act. He also argued that investigation begins from the stage of collection of material under section 67, and for this relied strongly upon the recent Constitution Bench judgment in Mukesh Singh (supra). According to him, therefore, the reference order itself being flawed, there ought to have been no reference at all, and that the judgments in Raj Kumar Karwal (supra) and Kanhaiyalal (supra) do not need reconsideration. Later judgments such as Noor Aga (supra) ought to be overruled by us, inasmuch as they are contrary to several Constitution Bench judgments of this Court.

11. Shri Saurabh Mishra, learned Additional Advocate General appearing on behalf of the State of Madhya Pradesh in SLP (Crl.) 1202 of 2017, largely reiterated the submissions of learned ASG, adding that when section 67 of the NDPS Act is used to record the confession of an accused, section 164 of the CrPC will not apply, but only section 24 of the Evidence Act makes such confessions relevant, if the conditions laid down in the section apply. He also reiterated that a statement recorded under section 67 of the NDPS Act cannot be assimilated to a statement under section 161 of the CrPC, for the reasons outlined by the learned ASG.

12. Shri Aniruddha Mayee, learned counsel appearing for the State of Gujarat in Criminal Appeal No. 2214 of 2009; 344 of 2013; and 1750 of 2009, adopted the submissions of Shri Aman Lekhi, learned ASG.

13. Having heard wide-ranging arguments of counsel on both sides, it is first necessary to give a Constitutional backdrop to the points that arise in this case.

FUNDAMENTAL RIGHTS AND THE NDPS ACT

14. The first most important constitutional protection provided in the fundamental rights chapter so far as these cases are concerned is provided by Article 20(3), which is the well-known right against self- incrimination. Article 20(3) reads as follows:

> "(3) No person accused of any offence shall be compelled to be a witness against himself."

15. In an early judgment of this Court, M.P. Sharma and Ors. v. Satish Chandra 1954 SCR 1077, an eight-Judge Bench of this Court set out Article 20(3), and then went into the historical origin of this

Article in English law. In an important passage, the Court held:

> "In view of the above background, there is no inherent reason to construe the ambit of this fundamental right as comprising a very wide range. Nor would it be legitimate to confine it to the barely literal meaning of the words used, since it is a recognised doctrine that when appropriate a constitutional provision has to be liberally construed, so as to advance the intendment thereof and to prevent its circumvention. Analysing the terms in which this right has been declared in our Constitution, it may be said to consist of the following components. (1) It is a right pertaining to a person "accused of an offence"; (2) It is a protection against "compulsion to be a witness"; and (3) It is a protection against such compulsion resulting in his giving evidence "against himself"." (at page 1086) xxx xxx xxx Broadly stated the guarantee in Article 20(3) is against "testimonial compulsion". It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions. The phrase used in Article 20(3) is "to be a witness". A person can "be a witness" not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (See Section 119 of the Evidence Act) or the like. "To be a witness" is nothing more than "to furnish evidence" and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes. So far as production of documents is concerned, no doubt Section 139 of the Evidence Act says that a person producing a document on summons is not a witness. But that section is meant to regulate the right of cross-examination. It is not a guide to the connotation of the word "witness", which must be understood in its natural sense i.e. as referring to a person who furnishes evidence. Indeed, every positive volitional act, which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the court room. The phrase used in Article 20(3) is "to be a witness" and not to "appear as a witness": It follows that the protection afforded to an accused in so far as it is related, to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case. Considered in this light, the guarantee under Article 20(3) would be available in the present cases to these petitioners against whom a first information report has been recorded as accused therein. It would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against them.

(at pages 1087-1088)

16. The Court then went on to state that there was no "fundamental right to privacy" under the Indian Constitution, like the Fourth Amendment to the US Constitution, about which more shall be said a little later. What is important, however, is the fact that even in this early judgment, a mere literal reading was not given to Article 20(3). The Court recognised that a person can be said to be a witness not merely by giving oral evidence, but also by producing documents – evidence being furnished through the lips of a person or by production of a thing or of a document or in other modes. It is important to stress that the protection was afforded to a person formally accused of an offence on the basis of a statement that may be compulsorily taken from him even before evidence is given in a court.

17. An eleven-Judge Bench was then constituted in State of Bombay v. Kathi Kalu Oghad and Ors. (1963) 2 SCR 10, as certain doubts were raised on some of the propositions contained in the eight-Judge Bench decision of M.P. Sharma (supra). In this case, there were three appeals before the Court, one of which involved proof of handwritten evidence, another of which involved comparison of handwriting under section 73 of the Evidence Act, and the third of which involved section 27 of the Evidence Act. After hearing arguments on both sides, the Court first concluded that M.P. Sharma (supra) was correctly decided insofar as it stated that the guarantee under Article 20(3) extended to testimony by a witness given in or out of courts, which included statements which incriminated the maker. However, the Court went on to state that "furnishing evidence" would exclude thumb-impressions or writing specimens, for the reason that the taking of impressions of parts of the body often becomes necessary for the investigation of a crime (see page 29). Incriminating information must therefore include statements based on personal knowledge. The Court then went on to consider whether section 27 of the Evidence Act would fall foul of Article 20(3), having already been upheld when a constitutional challenge under Article 14 had been repelled by the Court in State of U.P. v. Deoman Upadhyaya (1961) 1 SCR 14. The Court held that if self-incriminatory information is given under compulsion, then the provisions of section 27 of the Evidence Act would not apply so as to allow the prosecution to place reliance on the object recovered as a result of the statement made (see pages 33-34). In the result, the Court held:

> "(1) An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.
>
> (2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not "compulsion".

> (3) "To be a witness" is not equivalent to "furnishing evidence" in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.
>
> (4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression "to be a witness".
>
> (5) "To be a witness" means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in court or otherwise.
>
> (6) "To be a witness" in its ordinary grammatical sense means giving oral testimony in court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in court or out of court by a person accused of an offence, orally or in writing.
>
> (7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made." (at pages 36-37)

18. It is important to note that conclusions (1) and (2) were made in the context of repelling a challenge to section 27 of the Evidence Act. M.P. Sharma (supra), so far as it held that a person is accused the moment there is a formal accusation against him, by way of an FIR or otherwise, and that statements made by such person outside court, whether oral or on personal knowledge of documents produced, is protected by Article 20(3), remained untouched.

19. It is also important to note that in Balkishan A. Devidayal (supra), these judgments were referred to, and the Court then concluded:

> "70. To sum up, only a person against whom a formal accusation of the commission of an offence has been made can be a person "accused of an offence" within the meaning of Article 20(3). Such formal accusation may be specifically made against him in an FIR or a formal complaint or any other formal document or notice served on that person, which ordinarily results in his prosecution in court. In the instant case no such formal accusation had been made against the appellant when his statement(s) in question were recorded by the RPF officer."

20. We now come to the judgment of this Court in Nandini Satpathy v. P.L. Dani (1978) 2 SCC 424. This case referred to the inter-play between Article 20(3) and section 161 of the CrPC as follows:

> "21. Back to the constitutional quintessence invigorating the ban on self-incrimination. The area covered by Article 20(3) and Section 161(2) is

> substantially the same. So much so, we are inclined to the view, terminological expansion apart, that Section 161(2) of the CrPC is a parliamentary gloss on the constitutional clause. The learned Advocate-General argued that Article 20(3), unlike Section 161(1), did not operate at the anterior stages before the case came to court and the accused's incriminating utterance, previously recorded, was attempted to be introduced. He relied on some passages in American decisions but, in our understanding, those passages do not so circumscribe and, on the other hand, the landmark Miranda [Miranda v. Arizona, 384 US 436 (1966)] ruling did extend the embargo to police investigation also. Moreover, Article 20(3), which is our provision, warrants no such truncation. Such a narrow meaning may emasculate a necessary protection. There are only two primary queries involved in this clause that seals the lips into permissible silence: (i) Is the person called upon to testify "accused of any offence"? (ii) Is he being compelled to be witness against himself? A constitutional provision receives its full semantic range and so it follows that a wider connotation must be imparted to the expressions "accused of any offence" and "to be witness against himself". The learned Advocate-

General, influenced by American decisions rightly agreed that in expression Section 161(2) of the Code might cover not merely accusations already registered in police stations but those which are likely to be the basis for exposing a person to a criminal charge. Indeed, this wider construction, if applicable to Article 20(3), approximates the constitutional clause to the explicit statement of the prohibition in Section 161(2). This latter provision meaningfully uses the expression "expose himself to a criminal charge". Obviously, these words mean, not only cases where the person is already exposed to a criminal charge but also instances which will imminently expose him to criminal charges. In Article 20(3), the expression "accused of any offence" must mean formally accused in praesenti not in futuro — not even imminently as decisions now stand. The expression "to be witness against himself" means more than the court process. Any giving of evidence, any furnishing of information, if likely to have an incriminating impact, answers the description of being witness against oneself. Not being limited to the forensic stage by express words in Article 20(3), we have to construe the expression to apply to every stage where furnishing of information and collection of materials takes place. That is to say, even the investigation at the police level is embraced by Article 20(3). This is precisely what Section 161(2) means. That sub-section relates to oral examination by police officers and grants immunity at that stage. Briefly, the Constitution and the Code are co-terminus in the protective area. While the Code may be changed, the Constitution is more enduring. Therefore, we have to base our conclusion not merely upon Section 161(2) but on the more fundamental protection, although equal in ambit, contained in Article 20(3).

xxx xxx xxx

57. We hold that Section 161 enables the police to examine the accused during investigation. The prohibitive sweep of Article 20(3) goes back to the stage of police interrogation — not, as contended, commencing in court only. In our judgment, the provisions of Article 20(3) and Section 161(1) substantially cover the same area, so far as police investigations are concerned. The ban on self-accusation and the right to silence, while one investigation or trial is under way, goes beyond that

case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter. We are disposed to read "compelled testimony" as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like — not legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Article 20(3). The prospect of prosecution may lead to legal tension in the exercise of a constitutional right, but then, a stance of silence is running a calculated risk. On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes "compelled testimony", violative of Article 20(3).

58. A police officer is clearly a person in authority. Insistence on answering is a form of pressure especially in the atmosphere of the police station unless certain safeguards erasing duress are adhered to. Frequent threats of prosecution if there is failure to answer may take on the complexion of undue pressure violating Article 20(3). Legal penalty may by itself not amount to duress but the manner of mentioning it to the victim of interrogation may introduce an element of tension and tone of command perilously hovering near compulsion.

59. We have explained elaborately and summed up, in substance, what is self-incrimination or tendency to expose oneself to a criminal charge. It is less than "relevant" and more than "confessional". Irrelevance is impermissible but relevance is licit but when relevant questions are loaded with guilty inference in the event of an answer being supplied, the tendency to incriminate springs into existence. We hold further that the accused person cannot be forced to answer questions merely because the answers thereto are not implicative when viewed in isolation and confined to that particular case. He is entitled to keep his mouth shut if the answer sought has a reasonable prospect of exposing him to guilt in some other accusation actual or imminent, even though the investigation under way is not with reference to that. We have already explained that in determining the incriminatory character of an answer the accused is entitled to consider — and the Court while adjudging will take note of — the setting, the totality of circumstances, the equation, personal and social, which have a bearing on making an answer substantially innocent but in effect guilty in import. However, fanciful claims, unreasonable apprehensions and vague possibilities cannot be the hiding ground for an accused person. He is bound to answer where there is no clear tendency to criminate."

21. In Kartar Singh (supra), the majority judgment referred to Article 20(3) in the following terms:

> "205. In our Constitution as well as procedural law and law of Evidence, there are certain guarantees protecting the right and liberty of a person in a criminal proceeding and safeguards in making use of any statement made by him. Article 20(3) of the Constitution declares that "No person accused of any offence shall be compelled to be a witness against himself".

206. Article 20(3) of our Constitution embodies the principle of protection against compulsion of self-

incrimination which is one of the fundamental canons of the British System of Criminal Jurisprudence and which has been adopted by the American System and incorporated in the Federal Acts. The Fifth Amendment of the Constitution of the United States of America provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising ... nor shall be compelled in any criminal case to be a witness against himself...".

207. The above principle is recognised to a substantial extent in the criminal administration of justice in our country by incorporating various statutory provisions. One of the components of the guarantee contained in Article 20(3) of the Constitution is that it is a protection against compulsion resulting in the accused of any offence giving evidence against himself. There are a number of outstanding decisions of this Court in explaining the intendment of Article 20(3). We feel that it would suffice if mere reference is made to some of the judgments, those being: (1) M.P. Sharma v. Satish Chandra, District Magistrate, Delhi [1954 SCR 1077] , (2) Raja Narayanlal Bansilal v. Maneck Phiroz Mistry [(1961) 1 SCR 417], (3) State of Bombay v. Kathi Kalu Oghad [(1962) 3 SCR 10], and (4) Nandini Satpathy v. P.L. Dani [(1978) 2 SCC 424].

208. Article 22(1) and (2) confer certain rights upon a person who has been arrested. Coming to the provisions of Code of Criminal Procedure, Section 161 empowers a police officer making an investigation to examine orally any person supposed to be acquainted with the facts and circumstances of the case and to reduce into writing any statement made to him in the course of such examination. Section 162 which speaks of the use of the statement so recorded, states that no statement recorded by a police officer, if reduced into writing, be signed by the person making it and that the statement shall not be used for any purpose save as provided in the Code and the provisions of the Evidence Act. The ban imposed by Section 162 applies to all the statements whether confessional or otherwise, made to a police officer by any person whether accused or not during the course of the investigation under Chapter XII of the Code. But the statement given by an accused can be used in the manner provided by Section 145 of the Evidence Act in case the accused examines himself as a witness for the defence by availing Section 315(1) of the Code corresponding to Section 342- A of the old Code and to give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial.

209. There is a clear embargo in making use of this statement of an accused given to a police officer under Section 25 of the Evidence Act, according to which, no confession made to a police officer shall be proved as against a person accused of any offence and under Section 26 according to which no confession made by any person whilst he is in custody of a police officer, unless it is made in the immediate presence of a Magistrate, shall be proved as against such person. The only exception is given under Section 27 which serves as a proviso to Section 26. Section 27 contemplates that only so much of information whether amounts to confession or not, as relates distinctly to the fact thereby discovered, in consequence of that information received from a person accused of any offence while in custody of the police can be proved as against the accused.

210. In the context of the matter under discussion, two more provisions also may be referred to — namely Sections 24 and 30 of the Evidence Act and Section 164 of the Code.

211. Section 24 of the Evidence Act makes a confession, caused to be made before any authority by an accused by any inducement, threat or promise, irrelevant in a criminal proceeding. Section 30 of the Evidence Act is to the effect that if a confession made by one or more persons, affecting himself and some others jointly tried for the same offence is proved, the court may take into consideration such confession as against such other persons as well as the maker of the confession. The explanation to the section reads that "offence" as used in this section includes the abetment of, or attempt to commit, the offence.

212. Section 164 of the Code speaks of recording of confessions and statements by Magistrates specified in that section by complying with the legal formalities and observing the statutory conditions including the appendage of a Certificate by the Magistrate recording the confession as contemplated under sub-sections (2) to (6) thereof.

213. Though in the old Code, there was a specific embargo on a police officer recording any statement or confession made to him in the course of an investigation embodied in the main sub-section (1) of Section 164 itself, in the present Code the legal bar is now brought by a separate proviso to sub-section (1) of Section 164 which reads:

> "Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force." This is a new provision but conveys the same meaning as embodied in the main sub-section (1) of Section 164 of the old Code.

214. Thus, an accused or a person accused of any offence is protected by the constitutional provisions as well as the statutory provisions to the extent that no self- incriminating statement made by an accused to the police officer while he is in custody, could be used against such maker. The submission of the Additional Solicitor General that while a confession by an accused before a specified officer either under the Railway Protection Force Act or Railway Property (Unlawful Possession) Act or Customs Act or Foreign Exchange Regulation Act is made admissible, the special procedure prescribed under this Act making a confession of a person indicted under the TADA Act given to a police officer admissible cannot be questioned, is misnomer because all the officials empowered to record statements under those special Acts are not police officers as per the judicial pronouncements of this Court as well the High Courts which principle holds the field till date. See (1) State of U.P. v. Durga Prasad [(1975) 3 SCC 210] , (2) Balkishan A. Devidayal v. State of Maharashtra [(1980) 4 SCC 600] , (3) Ramesh Chandra Mehta v. State of W.B. [Ramesh Chandra Mehta v. State of W.B., (1969) 2 SCR 46], (4) Poolpandi v. Superintendent, Central Excise [(1992) 3 SCC 259], (5) Directorate of Enforcement v. Deepak Mahajan [(1994) 3 SCC 440], and (6) Ekambaram v. State of T.N. [1972 MLW (Cri) 261] We feel that it is not necessary to cite any more decisions and swell this judgment."

22. Ramaswamy, J. concurring in part, but dissenting on the constitutional validity of sections 9(7) and 15 of the TADA, also referred to Article 20(3) as follows:

> "377. Custodial interrogation exposes the suspect to the risk of abuse of his person or dignity as well as distortion or manipulation of his self-incrimination in the crime. No one should be subjected to physical violence of the person as well as to torture. Infringement thereof undermines the peoples' faith in the efficacy of criminal justice system. Interrogation in police lock-up are often done under conditions of pressure and tension and the suspect could be exposed to great strain even if he is innocent, while the culprit in custody to hide or suppress may be doubly susceptible to confusion and manipulation. A delicate balance has, therefore, to be maintained to protect the innocent from conviction and the need of the society to see the offender punished. Equally everyone has right against self-incrimination and a right to be silent under Article 20(3) which implies his freedom from police or anybody else. But when the police interrogates a suspect, they abuse their authority having unbridled opportunity to exploit his moral position and authority inducing the captive to confess against his better judgment. The very fact that the person in authority puts the questions and exerts pressure on the captive to comply (sic). Silence on the part of the frightened captive seems to his ears to call for vengeance and induces a belief that confession holds out a chance to avoid torture or to get bail or a promise of lesser punishment. The resourceful investigator adopts all successful tactics to elicit confession as is discussed below.
>
> xxx xxx xxx
>
> 396. In the State of Bombay v. Kathi Kalu Oghad [(1962) 3 SCR 10] a Bench of 11 Judges, per majority, interpreting Article 20(3) held on "testimonial compulsion" that, "[w]e can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions." Indeed every positive act which furnishes evidence is testimony and testimonial compulsion connotes coercion which procures positive oral evidence. The acts of the person, of course, is neither negative attitude of silence or submission on his part, nor is there any reason to think that the protection in respect of the evidence procured is confined to what transpires at the trial in the court room. The phrase used in Article 20(3) is to be a witness and not to appear as a witness. It follows that the protection accorded to an accused insofar as it is related to the phrase "to be a witness" is not merely in respect of the testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him. The guarantee was, therefore, held to include not only oral testimony given in a court or out of court, but also statements in writing which incriminated the maker when figuring as accused person. In Nandini Satpathy v. P.L. Dani it was further held that compelled testimony must be read as evidence procured not merely by physical threat or violence but by psychic torture, atmospheric pressure, environmental

> coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like — not legal penalty for violation."

23. Sahai, J. in a separate opinion, concurring in part, but dissenting on the constitutional validity of section 15, referred to Article 20(3) as follows:

> "456. A confession is an admission of guilt. The person making it states something against himself, therefore it should be made in surroundings which are free from suspicion. Otherwise it violates the constitutional guarantee under Article 20(3) that no person accused of an offence shall be compelled to be a witness against himself. The word 'offence' used in the article should be given its ordinary meaning. It applies as much to an offence committed under TADA as under any other Act. The word, 'compelled' ordinarily means 'by force'. This may take place positively and negatively. When one forces one to act in a manner desired by him it is compelling him to do that thing. Same may take place when one is prevented from doing a particular thing unless he agrees to do as desired. In either case it is compulsion. A confession made by an accused or obtained by him under coercion suffers from infirmity unless it is made freely and voluntarily. No civilised democratic country has accepted confession made by an accused before a police officer as voluntary and above suspicion, therefore, admissible in evidence. One of the established rule or norms accepted everywhere is that custodial confession is presumed to be tainted. The mere fact that the Legislature was competent to make the law, as the offence under TADA is one which did not fall in any State entry, did not mean that the Legislature was empowered to curtail or erode a person of his fundamental rights. Making a provision which has the effect of forcing a person to admit his guilt amounts to denial of the liberty. The class of offences dealt by TADA may be different than other offences but the offender under TADA is as much entitled to protection of Articles 20 and 21 as any other. The difference in nature of offence or the legislative competence to enact a law did not affect the fundamental rights guaranteed by Chapter III. If the construction as suggested by the learned Additional Solicitor General is accepted it shall result in taking the law back once again to the days of Gopalan [A.K. Gopalan v. State of Madras, AIR 1950 SC 27] . Section 15 cannot be held to be valid merely because it is as a result of law made by a body which has been found entitled to make the law. The law must still be fair and just as held by this Court. A law which entitles a police officer to record confession and makes it admissible is thus violative of both Articles 20(3) and 21 of the Constitution."

24. A recent judgment in Selvi v. State of Karnataka (2010) 7 SCC 263 dealt with the constitutional validity of narco-analysis tests as follows:

> "179. We now return to the operative question of whether the results obtained through polygraph examination and the BEAP test should be treated as testimonial responses. Ordinarily evidence is classified into three broad categories, namely, oral testimony, documents and material evidence. The protective scope of Article 20(3)

> read with Section 161(2) CrPC guards against the compulsory extraction of oral testimony, even at the stage of investigation. With respect to the production of documents, the applicability of Article 20(3) is decided by the trial Judge but parties are obliged to produce documents in the first place. However, the compulsory extraction of material (or physical) evidence lies outside the protective scope of Article 20(3). Furthermore, even testimony in oral or written form can be required under compulsion if it is to be used for the purpose of identification or comparison with materials and information that is already in the possession of investigators.
>
> 180. We have already stated that the narcoanalysis test includes substantial reliance on verbal statements by the test subject and hence its involuntary administration offends the "right against self-incrimination". The crucial test laid down in Kathi Kalu Oghad is that of "imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation" (ibid. at SCR p. 30.).

The difficulty arises since the majority opinion in that case appears to confine the understanding of "personal testimony" to the conveyance of personal knowledge through oral statements or statements in writing. The results obtained from polygraph examination or a BEAP test are not in the nature of oral or written statements. Instead, inferences are drawn from the measurement of physiological responses recorded during the performance of these tests. It could also be argued that tests such as polygraph examination and the BEAP test do not involve a "positive volitional act" on part of the test subject and hence their results should not be treated as testimony. However, this does not entail that the results of these two tests should be likened to physical evidence and thereby excluded from the protective scope of Article 20(3).

181. We must refer back to the substance of the decision in Kathi Kalu Oghad which equated a testimonial act with the imparting of knowledge by a person who has personal knowledge of the facts that are in issue. It has been recognised in other decisions that such personal knowledge about relevant facts can also be communicated through means other than oral or written statements. For example in M.P. Sharma case, it was noted that "...evidence can be furnished through the lips or by production of a thing or of a document or in other modes." (ibid. at SCR p. 1087) Furthermore, common sense dictates that certain communicative gestures such as pointing or nodding can also convey personal knowledge about a relevant fact, without offering a verbal response. It is quite foreseeable that such a communicative gesture may by itself expose a person to "criminal charges or penalties" or furnish a link in the chain of evidence needed for prosecution.

182. We must also highlight that there is nothing to show that the learned Judges in Kathi Kalu Oghad had contemplated the impugned techniques while discussing the scope of the phrase "to be a witness" for the purpose of Article 20(3). At that time, the transmission of knowledge through means other than speech or writing was not something that could have been easily conceived of. Techniques such as polygraph examination were fairly obscure and were the subject of experimentation in some western nations while the BEAP technique was developed several years

later. Just as the interpretation of statutes has to be often re-examined in light of scientific advancements, we should also be willing to re-examine judicial observations with a progressive lens.

183. An explicit reference to the lie detector tests was of course made by the US Supreme Court in Schmerber [384 US 757 (1965)] decision, wherein Brennan, J. had observed at US p. 764: (L Ed p. 916) "...To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment."

184. Even though the actual process of undergoing a polygraph examination or a BEAP test is not the same as that of making an oral or written statement, the consequences are similar. By making inferences from the results of these tests, the examiner is able to derive knowledge from the subject's mind which otherwise would not have become available to the investigators. These two tests are different from medical examination and the analysis of bodily substances such as blood, semen and hair samples, since the test subject's physiological responses are directly correlated to mental faculties. Through lie detection or gauging a subject's familiarity with the stimuli, personal knowledge is conveyed in respect of a relevant fact. It is also significant that unlike the case of documents, the investigators cannot possibly have any prior knowledge of the test subject's thoughts and memories, either in the actual or constructive sense. Therefore, even if a highly strained analogy were to be made between the results obtained from the impugned tests and the production of documents, the weight of precedents leans towards restrictions on the extraction of "personal knowledge" through such means.

185. During the administration of a polygraph test or a BEAP test, the subject makes a mental effort which is accompanied by certain physiological responses. The measurement of these responses then becomes the basis of the transmission of knowledge to the investigators. This knowledge may aid an ongoing investigation or lead to the discovery of fresh evidence which could then be used to prosecute the test subject. In any case, the compulsory administration of the impugned tests impedes the subject's right to choose between remaining silent and offering substantive information. The requirement of a "positive volitional act" becomes irrelevant since the subject is compelled to convey personal knowledge irrespective of his/her own volition.

xxx xxx xxx

189. In light of the preceding discussion, we are of the view that the results obtained from tests such as polygraph examination and the BEAP test should also be treated as "personal testimony", since they are a means for "imparting personal knowledge about relevant facts". Hence, our conclusion is that the results obtained through the involuntary administration of either of the impugned tests (i.e. the narcoanalysis technique, polygraph examination and the BEAP test) come within the scope of "testimonial compulsion", thereby attracting the protective shield of Article 20(3).

xxx xxx xxx

262. In our considered opinion, the compulsory administration of the impugned techniques violates the "right against self-incrimination". This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to prevent the forcible "conveyance of personal knowledge that is relevant to the facts in issue". The results obtained from each of the impugned tests bear a "testimonial" character and they cannot be categorised as material evidence.

263. We are also of the view that forcing an individual to undergo any of the impugned techniques violates the standard of "substantive due process" which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The impugned techniques cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases i.e. the Explanation to Sections 53, 53-A and 54 of the Code of Criminal Procedure, 1973. Such an expansive interpretation is not feasible in light of the rule of "ejusdem generis" and the considerations which govern the interpretation of statutes in relation to scientific advancements. We have also elaborated how the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to "cruel, inhuman or degrading treatment" with regard to the language of evolving international human rights norms.

Furthermore, placing reliance on the results gathered from these techniques comes into conflict with the "right to fair trial". Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the "right against self-incrimination".

264. In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted in accordance with Section 27 of the Evidence Act, 1872."

25. Equally important is the right to privacy which has been recognised by a number of decisions of this Court, and now firmly grounded in Article 21 of the Constitution of India. In K.S. Puttaswamy (supra), several judgments were referred to; and M.P. Sharma (supra), where it was held that no such right was recognised in the Constitution of India, was overruled. Thus, in the judgment of

Chandrachud, J., it was stated:

> "26.M.P. Sharma [1954 SCR 1077] was a case where a law prescribing a search to obtain documents for investigating into offences was challenged as being contrary to the guarantee against self-incrimination in Article 20(3). The Court repelled the argument that a search for documents compelled a person accused of an offence to be witness against himself. Unlike a notice to produce documents, which is addressed to a person and whose compliance would constitute a testimonial act, a search warrant and a seizure which follows are not testimonial acts of a person to whom the warrant is addressed, within the meaning of Article 20(3). The Court having held this, the controversy in M.P. Sharma would rest at that. The observations in M.P. Sharma to the effect that the Constitution makers had not thought it fit to subject the regulatory power of search and seizure to constitutional limitations by recognising a fundamental right to privacy (like the US Fourth Amendment), and that there was no justification to import it into a "totally different fundamental right" are at the highest, stray observations.
>
> 27. The decision in M.P. Sharma held that in the absence of a provision like the Fourth Amendment to the US Constitution, a right to privacy cannot be read into the Indian Constitution. The decision in M.P. Sharma did not decide whether a constitutional right to privacy is protected by other provisions contained in the fundamental rights including among them, the right to life and personal liberty under Article 21. Hence the decision cannot be construed to specifically exclude the protection of privacy under the framework of protected guarantees including those in Articles 19 or 21. The absence of an express constitutional guarantee of privacy still begs the question whether privacy is an element of liberty and, as an integral part of human dignity, is comprehended within the protection of life as well.

xxx xxx xxx

100.M.P. Sharma dealt with a challenge to a search on the ground that the statutory provision which authorised it, violated the guarantee against self-incrimination in Article 20(3). In the absence of a specific provision like the Fourth Amendment to the US Constitution in the Indian Constitution, the Court answered the challenge by its ruling that an individual who is subject to a search during the course of which material is seized does not make a voluntary testimonial statement of the nature that would attract Article 20(3). The Court distinguished a compulsory search from a voluntary statement of disclosure in pursuance of a notice issued by an authority to produce documents. It was the former category that was held to be involved in a compulsive search, which the Court held would not attract the guarantee against self-incrimination. The judgment, however, proceeded further to hold that in the absence of the right to privacy having been enumerated in the Constitution, a provision like the Fourth Amendment to the US Constitution could not be read into our own. The observation in regard to the absence of the right to privacy in our Constitution was strictly speaking, not necessary for the decision of the Court in M.P. Sharma and the observation itself is no more than a passing observation. Moreover, the decision does not adjudicate upon whether privacy could be a

constitutionally protected right under any other provision such as Article 21 or under Article 19.

xxx xxx xxx

316. The judgment in M.P. Sharma holds essentially that in the absence of a provision similar to the Fourth Amendment to the US Constitution, the right to privacy cannot be read into the provisions of Article 20(3) of the Indian Constitution. The judgment does not specifically adjudicate on whether a right to privacy would arise from any of the other provisions of the rights guaranteed by Part III including Article 21 and Article 19. The observation that privacy is not a right guaranteed by the Indian Constitution is not reflective of the correct position. M.P. Sharma is overruled to the extent to which it indicates to the contrary."

26. The judgment of Nariman, J. held as follows:

> "442. The importance of Semayne case [77 ER 194] is that it decided that every man's home is his castle and fortress for his defence against injury and violence, as well as for his repose. William Pitt, the Elder, put it thus:
>
> "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake —the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dare not cross the threshold of the ruined tenement." A century and a half later, pretty much the same thing was said in Huckle v. Money [Huckle v. Money 95 ER 768] in which it was held that Magistrates cannot exercise arbitrary powers which violated the Magna Carta (signed by King John, conceding certain rights to his barons in 1215), and if they did, exemplary damages must be given for the same. It was stated that: (ER p. 769) "... To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour...."
>
> 443. This statement of the law was echoed in Entick v. Carrington [Entick v. Carrington 95 ER 807] in which Lord Camden held that an illegal search warrant was "subversive of all the comforts of society" and the issuance of such a warrant for the seizure of all of a man's papers, and not only those alleged to be criminal in nature, was "contrary to the genius of the law of England".

A few years later, in Da Costa v. Jones [Da Costa v. Jones 98 ER 1331] , Lord Mansfield upheld the privacy of a third person when such privacy was the subject-matter of a wager, which was injurious to the reputation of such third person. The wager in that case was as to whether a certain Chevalier D'eon was a cheat and imposter in that he was actually a woman. Such wager which violated the privacy of a third person was held to be injurious to the reputation of the third person for which damages were awarded to the third person. These early judgments did much to uphold the inviolability of the person of a citizen. xxx xxx xxx

456. The first thing that strikes one on reading the aforesaid passage is that the Court (in M.P. Sharma) resisted the invitation to read the US Fourth Amendment into the US Fifth Amendment; in short it refused to read or import the Fourth Amendment into the Indian equivalent of that part of the Fifth Amendment which is the same as Article 20(3) of the Constitution of India. Also, the fundamental right to privacy, stated to be analogous to the Fourth Amendment, was held to be something which could not be read into Article 20(3).

457. The second interesting thing to be noted about these observations is that there is no broad ratio in the said judgment that a fundamental right to privacy is not available in Part III of the Constitution. The observation is confined to Article 20(3). Further, it is clear that the actual finding in the aforesaid case had to do with the law which had developed in this Court as well as the US and the UK on Article 20(3) which, on the facts of the case, was held not to be violated. Also we must not forget that this was an early judgment of the Court, delivered in the Gopalan era, which did not have the benefit of R.C. Cooper or Maneka Gandhi. Quite apart from this, it is clear that by the time this judgment was delivered, India was already a signatory to the Universal Declaration of Human Rights, Article 12 of which states:

> "12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." xxx xxx xxx
>
> 468. It will be seen that different smaller Benches of this Court were not unduly perturbed by the observations contained in M.P. Sharma as it was an early judgment of this Court delivered in the Gopalan era which had been eroded by later judgments dealing with the interrelation between fundamental rights and the development of the fundamental right to privacy as being part of the liberty and dignity of the individual.
>
> 469. Therefore, given the fact that this judgment dealt only with Article 20(3) and not with other fundamental rights;

given the fact that the 1948 Universal Declaration of Human Rights containing the right to privacy was not pointed out to the Court; given the fact that it was delivered in an era when fundamental rights had to be read disjunctively in watertight compartments; and given the fact that Article 21 as we know it today only sprung into life in the post Maneka Gandhi era, we are of the view that this judgment is completely out of harm's way insofar as the grounding of the right to privacy in the fundamental rights chapter is concerned.

xxx xxx xxx

472. The majority judgment in Kharak Singh [Kharak Singh v. State of U.P., (1964) 1 SCR 332] then went on to refer to the Preamble to the Constitution, and stated that Article 21 contained the cherished human value of dignity of the individual as the means of ensuring his full development and evolution. A passage was then quoted from Wolf v. Colorado [Wolf v. Colorado 338 US 25

(1949)] to the effect that the security of one's privacy against arbitrary intrusion by the police is basic to a free society. The Court then went on to quote the US Fourth Amendment which guarantees the rights of the people to be secured in their persons, houses, papers and effects against unreasonable searches and seizures. Though the Indian Constitution did not expressly confer a like guarantee, the majority held that nonetheless an unauthorised intrusion into a person's home would violate the English Common Law maxim which asserts that every man's house is his castle. In this view of Article 21, Regulation 236(b) was struck down.

xxx xxx xxx

475. If the passage in the judgment dealing with domiciliary visits at night and striking it down is contrasted with the later passage upholding the other clauses of Regulation 236 extracted above, it becomes clear that it cannot be said with any degree of clarity that the majority judgment upholds the right to privacy as being contained in the fundamental rights chapter or otherwise. As the majority judgment contradicts itself on this vital aspect, it would be correct to say that it cannot be given much value as a binding precedent. In any case, we are of the view that the majority judgment is good law when it speaks of Article 21 being designed to assure the dignity of the individual as a most cherished human value which ensures the means of full development and evolution of a human being. The majority judgment is also correct in pointing out that Article 21 interdicts unauthorised intrusion into a person's home. Where the majority judgment goes wrong is in holding that fundamental rights are in watertight compartments and in holding that the right to privacy is not a guaranteed right under our Constitution. It can be seen, therefore, that the majority judgment is like the proverbial curate's egg—good only in parts. Strangely enough when the good parts alone are seen, there is no real difference between Subba Rao, J.'s approach in the dissenting judgment and the majority judgment. This then answers the major part of the reference to this nine-Judge Bench in that we hereby declare that neither the eight-Judge nor the six-Judge Bench can be read to come in the way of reading the fundamental right to privacy into Part III of the Constitution.

xxx xxx xxx

521. In the Indian context, a fundamental right to privacy would cover at least the following three aspects:

> • Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relatable to his physical body, such as the right to move freely • Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognises that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right; and • The privacy of choice, which protects an individual's autonomy over fundamental personal choices.
>
> For instance, we can ground physical privacy or privacy relating to the body in Articles 19(1)(d) and (e) read with Article 21; ground personal information privacy under Article 21; and the privacy of choice in Articles 19(1)(a) to

(c), 20(3), 21 and 25. The argument based on "privacy" being a vague and nebulous concept need not, therefore, detain us."

27. The NDPS Act is to be construed in the backdrop of Article 20(3) and Article 21, Parliament being aware of the fundamental rights of the citizen and the judgments of this Court interpreting them, as a result of which a delicate balance is maintained between the power of the State to maintain law and order, and the fundamental rights chapter which protects the liberty of the individual. Several safeguards are thus contained in the NDPS Act, which is of an extremely drastic and draconian nature, as has been contended by the counsel for the Appellants before us. Also, the fundamental rights contained in Articles 20(3) and 21 are given pride of place in the Constitution. After the 42 nd Amendment to the Constitution was done away with by the 44 th Amendment, it is now provided that even in an Emergency, these rights cannot be suspended – see Article 359(1). The interpretation of a statute like the NDPS Act must needs be in conformity and in tune with the spirit of the broad fundamental right not to incriminate oneself, and the right to privacy, as has been found in the recent judgments of this Court.

CONFESSIONS UNDER SECTION 25 OF THE EVIDENCE ACT

28. At this juncture, it is important to set out sections 24 to 27 of the Evidence Act:

"24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.––A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

25. Confession to police-officer not to be proved.––No confession made to a police-officer, shall be proved as against a person accused of any offence.

26. Confession by accused while in custody of police not to be proved against him.––No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Explanation.––In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882).

27. How much of information received from accused may be proved.––Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

29. Section 25 was originally in the Criminal Procedure Code, 1861 (Act 25 of 1861), and was brought into the Evidence Act of 1872. Section 25 states that a confession made to any police officer, whatever his rank, cannot be relied upon against a person accused of any offence. "Police officer" is not defined in the Evidence Act or in any cognate criminal statute. As to what, therefore, "police officer" means, has been the subject matter of several decisions of this Court, which will be adverted to later. For the time being, section 25 is to be viewed in contrast to section 24, given the situation in India of the use of torture and third- degree measures. Unlike section 24, any confession made to a police officer cannot be used as evidence against a person accused of an offence, the voluntariness or otherwise of the confession being irrelevant – it is conclusively presumed by the legislature that all such confessions made to police officers are tainted with the vice of coercion.

30. The 'First Report Of Her Majesty's Commissioners Appointed To Consider The Reform Of The Judicial Establishments, Judicial Procedure And Laws Of India & c.' (1856) which formed the basis for section 25 of the Evidence Act, stated as follows:

> "Then follow other provisions for preventing any species of compulsion or maltreatment with a view to extort or confession or procedure information. But we are informed, and this information is corroborated by evidence we have examined, that, in spite of this qualification, confessions are frequently extorted or fabricated. A police officer, on receiving intimation of the occurrence of a dacoity or other offence of a serious character, failing to discover the perpetrators of the offence, often endeavours to secure himself against any charge of supinates or neglect by getting up a case against parties whose circumstances or characters are such as are likely to obtain credit for an accusation of the kind against them. This is not infrequently done by extorting or fabricating false confession, and when this step is once taken, there is of course impunity for real offenders, and a great encouragement to crime. The darogah is henceforth committed to the direction he has given to the case; and it is his object to prevent a discovery of the truth, and the apprehension of the guilty parties, Who, as far as the police are concerned, are now perfectly safe. We are persuaded that any provision to correct the exercise of this power by the police will be futile; and we accordingly propose to remedy the evil, as far as possible, by the adoption of a rule prohibiting any examination whatever of any accused party by the police, the result of which is to constitute a written document." (at page 110)

31. It is important to emphasise that the interpretation of the term "accused" in section 25 of the Evidence Act is materially different from that contained in Article 20(3) of the Constitution. The scope of the section is not limited by time – it is immaterial that the person was not an accused at the time when the confessional statement was made. This was felicitously put by this Court in Deoman Upadhyaya (supra) as follows:

> "By Section 24, in a criminal proceeding against a person, a confession made by him is inadmissible if it appears to the court to have been caused by inducement, threat or promise having reference to the charge and proceeding from a person in authority. By Section 25, there is an absolute ban against proof at the trial of a person accused of an offence, of a confession made to a police officer. The ban which is partial under Section 24 and complete under Section 25 applies equally whether or not the person against whom evidence is sought to be led in a criminal trial was at the time of making the confession in custody. For the ban to be effective the person need not have been accused of an offence when he made the confession. The expression, "accused person" in Section 24 and the expression "a person accused of any offence" have the same connotation, and describe the person against whom evidence is sought to be led in a criminal proceeding. As observed in Pakala Narayan Swami v. Emperor [LR 66 IA 66] by the Judicial Committee of the Privy Council, "Section 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation". The adjectival clause "accused of any offence" is therefore descriptive of the person against whom a confessional statement made by him is declared not provable, and does not predicate a condition of that person at the time of making the statement for the applicability of the ban." (at page 21)

32. Likewise, in Agnoo Nagesia v. State of Bihar (1966) 1 SCR 134, the Court held:

> "Section 25 provides: "No confession made to a police officer, shall be proved as against a person accused of an offence". The terms of Section 25 are imperative. A confession made to a police officer under any circumstances is not admissible in evidence against the accused. It covers a confession made when he was free and not in police custody, as also a confession made before any investigation has begun. The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession." (at page 137)

33. Thus, whereas a formal accusation is necessary for invoking the protection under Article 20(3), the same would be irrelevant for invoking the protection under section 25 of the Evidence Act.

34. Section 26 of the Evidence Act extends the protection to confessional statements made by persons while "in the custody" of a police-officer, unless it be made in the immediate presence of a Magistrate. "Custody" is not synonymous with "arrest", as has been held in a number of judgments of this Court – custody could refer to a situation pre-arrest, as was the case in State of Haryana and Ors. v. Dinesh Kumar (2008) 3 SCC 222 (see paragraphs 27-29). In fact, section 46 of the CrPC speaks of "a submission to the custody by word or action", which would, inter alia, refer to a voluntary appearance before a police officer without any formal arrest being made.

PROVISIONS CONTAINED IN THE NDPS ACT

35. At this stage, it is important to notice that the NDPS Act has been held to be a complete code on the subject covered by it. In Noor Aga (supra), this Court held:

> "2. Several questions of grave importance including the constitutional validity of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act"), the standard and extent of burden of proof on the prosecution vis-à-vis the accused are in question in this appeal which arises out of a judgment and order dated 9- 6-2006 passed by the High Court of Punjab and Haryana in Criminal Appeal No. 810-SB of 2000 whereby and whereunder an appeal filed by the applicant against the judgment of conviction and sentence dated 7-6-2000 under Sections 22 and 23 of the Act had been dismissed.
>
> xxx xxx xxx
>
> 75. The Act is a complete code by itself. The Customs Officers have been clothed with the powers of police officers under the Act. It does not, therefore, deal only with a matter of imposition of penalty or an order of confiscation of the properties under the Act, but also with the offences having serious consequences.

xxx xxx xxx

80. The constitutional mandate of equality of law and equal protection of law as adumbrated under Article 14 of the Constitution of India cannot be lost sight of. The courts, it is well settled, would avoid a construction which would attract the wrath of Article 14. They also cannot be oblivious of the law that the Act is a complete code in itself and, thus, the provisions of the 1962 Act cannot be applied to seek conviction thereunder."

36. To similar effect, this Court in Mukesh Singh (supra) held:

> "85. From the aforesaid scheme and provisions of the NDPS Act, it appears that the NDPS Act is a complete code in itself. Section 41(1) authorises a Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under the NDPS Act, or for the search, whether by day or by night……Sub-section 2 of Section 41 authorises any such officer of gazetted rank of the Departments of Central Excise…… as is empowered in this behalf by general or special order by the Central Government, or any such officer of the Revenue…….police or any other department of a State Government as is empowered in this behalf by general or special order, if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under the NDPS Act, authorising any officer subordinate to him but superior in rank to a peon, sepoy or a constable to arrest such a person or search a building, conveyance or place whether by day or by night or

himself arrest such a person or search a building, conveyance or place."

37. The interplay between the CrPC and the provisions of the NDPS Act is contained in several provisions. It will be noticed that the CrPC has been expressly excluded when it comes to suspension, remission or commutation in any sentence awarded under the NDPS Act – see section 32A. Equally, nothing contained in section 360 of the CrPC or in the Probation of Offenders Act, 1958 is to apply to a person convicted of an offence under the NDPS Act, subject to the exceptions that such person is under 18 years of age, and that that offence only be punishable under section 26 or 27 of the NDPS Act – see section 33.

38. On the other hand, the CrPC has been made expressly applicable by the following sections of the NDPS Act: section 34(2), which refers to the form of a security bond; section 36B, which refers to the High Court's powers in appeal and revision; section 50(5), which refers to searching a person without the intervention of a Gazetted Officer or a Magistrate; and section 51, which deals with warrants, arrests, searches and seizures made under the Act. Equally, the CrPC has been applied with necessary modifications under section 36A(1)(b), when it comes to authorising the detention of a person in custody for a period beyond fifteen days; section 37(1)(b), which contains additional conditions for the grant of bail in certain circumstances; and section 53A, which are exceptions engrafted upon statements made in writing under sections 161, 162 and 172 of the CrPC. Read with sections 4(2) and 5 of the CrPC, the scheme of the NDPS Act seems to be that the CrPC is generally followed, except where expressly excluded, or applied with modifications.

39. The Statement of Objects and Reasons for enacting the NDPS Act is important and states as follows:

> "The statutory control over narcotic drugs is exercised in India through a number of Central and State enactments. The principal Central Acts, namely the Opium Act, 1857, the Opium Act, 1878 and the Dangerous Drugs Act, 1930 were enacted a long time ago. With the passage of time and the developments in the field of illicit drug traffic and drug abuse at national and international level, many deficiencies in the existing laws have come to notice, some of which are indicated below:
>
> (i) The scheme of penalties under the present Acts is not sufficiently deterrent to meet the challenge of well organized gangs of smugglers. The Dangerous Drugs Act, 1930 provides for a maximum term of imprisonment of 3 years with or without fine and 4 years imprisonment with or without fine for repeat offences. Further, no minimum punishment is prescribed in the present laws, as a result of which drug traffickers have been some times let off by the courts with nominal punishment. The country has for the last few years been increasingly facing the problem of transit traffic of drugs coming mainly from some of our neighbouring countries and destined mainly to Western countries.
>
> (ii) The existing Central laws do not provide for investing the officers of a number of important Central enforcement agencies like Narcotics, Customs, Central Excise, etc.,

with the power of investigation of offences under the said laws.

(iii) Since the enactment of the aforesaid three Central Acts a vast body of international law in the field of narcotics control has evolved through various international treaties and protocols. The Government of India has been a party to these treaties and conventions which entail several obligations which are not covered or are only partly covered by the present Acts.

(iv) During recent years new drugs of addiction which have come to be known as psychotropic substances have appeared on the scene and posed serious problems to national government. There is no comprehensive law to enable exercise of control over psychotropic substances in India in the manner as envisaged in the Convention on Psychotropic Substances, 1971 to which India has also acceded.

2. In view of what has been stated above, there is an urgent need for the enactment of a comprehensive legislation on narcotic drugs and psychotropic substances which, inter alia, should consolidate and amend the existing laws relating to narcotic drugs, strengthen the existing controls over drug abuse, considerably enhance the penalties particularly for trafficking offences, make provisions for exercising effective control over psychotropic substances and make provisions for the implementation of international conventions relating to narcotic drugs and psychotropic substances to which India has become a party.

3. The Bill seeks to achieve the above objects." (emphasis supplied)

40. The very first thing that this Statement addresses is the woeful inadequacy of three old Acts, insofar as the scheme of penalties is concerned, which were not sufficiently deterrent to meet the challenge of well organised gangs of smugglers, together with the importance of investing, for the first time, the officers of central enforcement agencies with the power of investigation of offences under the new law. Undoubtedly, the NDPS Act is a comprehensive legislation which makes provisions for exercising control over narcotic drugs and psychotropic substances, at the heart of which is the power vested in various officers to investigate offences under the Act, so as to prevent and punish the same against offenders being, inter alia, organised gangs of smugglers who indulge in what is considered by Parliament to be a menace to society. Also, the preamble to the NDPS Act states:

"An Act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances and for matters connected therewith."

41. This itself refers to the Act being a "stringent" measure to combat the menace of crimes relatable to drugs and psychotropic substances. Under Chapter IV, which deals with "Offences and Penalties",

sections 15-24 speak of various drugs and psychotropic substances, in which the golden thread running through these sections is that where the contravention involves "small quantity" as defined, there can be a rigorous imprisonment for a term that may extend to one year, or a fine that may extend to ten thousand rupees or both; where the contravention involves an intermediate quantity, i.e. between "small" and "commercial" quantity, with rigorous imprisonment that may extend to ten years and with fine that may extend to one lakh rupees; and where the contravention involves "commercial quantity" as defined, with rigorous imprisonment for a minimum of ten years but which may extend to twenty years, and also be liable to a fine which shall not be less than one lakh, but which may extend to two lakhs – the court, for reasons to be recorded, is also given the power to impose a fine exceeding two lakhs. Under sections 28 and 29, punishments for attempts to commit offences, and for abetment and criminal conspiracy, are then set out. An extremely important section is section 30, where even preparation to commit an offence is made an offence 1. Under section 31, where a person is already convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, any of the offences punishable under the NDPS Act, and is subsequently convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence punishable under the NDPS Act, the punishment then goes to up to a term which may extend to one and one-half times the maximum term of 1 It may be remembered that in the Indian Penal Code, 1860 ("IPC"), the only section where preparation is made an offence, is "preparation to commit dacoity". See Section 399, IPC.

imprisonment, and shall also be liable to a fine which shall extend to one and one-half times of the maximum amount of fine. In certain circumstances under section 31A, the death penalty is also awarded. Under section 32A, no sentence awarded under the NDPS Act, other than a sentence under section 27, shall be suspended, remitted or commuted. Equally, we have seen how under section 33, the Probation of Offenders Act, 1958 does not apply where the offender is above 18, or if the offence is for offences other than those under sections 26 and 27 of the Act.

42. Several presumptions are also made under the NDPS Act in which the burden of proof is reversed, now being on the accused. They are all to be found in three sections – sections 35, 54 and 66. These sections state as follows:

> "35. Presumption of culpable mental state.—(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
>
> Explanation.—In this section "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.
>
> (2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability." "54. Presumption from possession of illicit articles.— In trials under this Act, it may be presumed, unless and until the

contrary is proved, that the accused has committed an offence under this Act in respect of—

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

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

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

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily." "66. Presumption as to documents in certain cases.— Where any document—

(i) is produced or furnished by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law, or

(ii) has been received from any place outside India (duly authenticated by such authority or person and in such manner as may be prescribed by the Central Government) in the course of investigation of any offence under this Act alleged to have been committed by a person, and such document is tendered in any prosecution under this Act in evidence against him, or against him and any other person who is tried jointly with him, the court shall—

(a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting; and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;

(c) in a case falling under clause (i), also presume, unless the contrary is proved, the truth of the contents of such document."

43. Section 37(1) makes all offences under the Act cognizable and non- bailable, with stringent conditions for bail attached:

> "37. Offences to be cognizable and non-bailable.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in clause
>
> (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail."

44. Under section 40, where a person is convicted of any of the offences punishable under the Act, the court may, in addition, publish at the expense of such person – in a newspaper or other manner – the factum of such conviction. The NDPS Act is said to be in addition to the Customs Act, 1962 and the Drugs and Cosmetics Act, 1940, so that, notwithstanding that offences may be made out under those Acts, offences under the NDPS Act will continue to be tried as such – see sections 79 and 80.

45. Given the stringent nature of the NDPS Act, several sections provide safeguards so as to provide a balance between investigation and trial of offences under the Act, and the fundamental rights of the citizen. Several safeguards are contained in section 42, which states as follows:

> "42. Power of entry, search, seizure and arrest without warrant or authorisation.—(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 personal 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 of 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 has reason 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 in respect of a holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances, granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub- inspector:

Provided further that if such officer has reason to believe that a search warrant or authorisation 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 sub-section (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."

46. From this section it is clear that only when the concerned officer has "reason to believe" from personal knowledge or information given by any person and taken down in writing that an offence has been committed, that the concerned officer may, only between sunrise and sunset, enter, search, seize drugs and materials, and arrest any person who he believes has committed any offence. By the first proviso, this can be done only by an officer not below the rank of sub-inspector. Under sub-section (2) in addition, where the information in writing is given, the officer involved must send a copy thereof to his immediate official superior within seventy-two hours. It is important here to

contrast "reason to believe" with the expression "reason to suspect", which is contained in section 49 of the NDPS Act. Thus, "reason to believe" has been construed by this Court in A.S. Krishnan v. State of Kerala (2004) 11 SCC 576 as follows:

> "9. Under IPC, guilt in respect of almost all the offences is fastened either on the ground of "intention" or "knowledge" or "reason to believe". We are now concerned with the expressions "knowledge" and "reason to believe". "Knowledge" is an awareness on the part of the person concerned indicating his state of mind. "Reason to believe" is another facet of the state of mind. "Reason to believe" is not the same thing as "suspicion" or "doubt" and mere seeing also cannot be equated to believing.
>
> "Reason to believe" is a higher level of state of mind.
>
> Likewise "knowledge" will be slightly on a higher plane than "reason to believe". A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same. Section 26 IPC explains the meaning of the words "reason to believe" thus:
>
> "26. 'Reason to believe'.—A person is said to have 'reason to believe' a thing, if he has sufficient cause to believe that thing but not otherwise.""

47. Section 50 of the NDPS Act contains extremely important conditions under which a search of persons shall be conducted. Section 50 states:

> "50. Conditions under which search of persons shall be conducted.—(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.
>
> (2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).
>
> (3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.
>
> (4) No female shall be searched by anyone excepting a female.
>
> (5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted

Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

48. In Baldev Singh (supra), this Court had held:

"17. The trial court in those cases had acquitted the accused on the ground that the arrest, search and seizure were conducted in violation of some of the "relevant and mandatory" provisions of the NDPS Act. The High Court declined to grant appeal against the order of acquittal. The State of Punjab thereupon filed appeals by special leave in this Court. In some other cases, where the accused had been convicted, they also filed appeals by special leave questioning their conviction and sentence on the ground that their trials were illegal because of non- compliance with the safeguards provided under Section 50 of the NDPS Act. A two-Judge Bench speaking through K. Jayachandra Reddy, J. considered several provisions of the NDPS Act governing arrest, search and seizure and, in particular, the provisions of Sections 41, 42, 43, 44, 49, 50, 51, 52 and 57 of the NDPS Act as well as the provisions of the Code of Criminal Procedure relating to search and seizure effected during investigation of a criminal case. Dealing with Section 50, it was held that in the context in which the right had been conferred, it must naturally be presumed that it is imperative on the part of the officer to inform the person to be searched of his right that if he so requires he shall be searched before a gazetted officer or Magistrate and on such request being made by him, to be taken before the gazetted officer or Magistrate for further proceedings. The reasoning given in Balbir Singh case [(1994) 3 SCC 299] was that to afford an opportunity to the person to be searched "if he so requires to be searched before a gazetted officer or a Magistrate" he must be made aware of that right and that could be done only by the empowered officer by informing him of the existence of that right. The Court went on to hold that failure to inform the person to be searched of that right and if he so requires, failure to take him to the gazetted officer or the Magistrate, would mean non-compliance with the provisions of Section 50 which in turn would "affect the prosecution case and vitiate the trial". The following conclusions were arrived at by the two-Judge Bench in State of Punjab v. Balbir Singh:

"25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the

> NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal. (2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an ‘empowered’ officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 CrPC and if

there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial. The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a gazetted officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the gazetted officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case." (emphasis in original) xxx xxx xxx

57. On the basis of the reasoning and discussion above, the following conclusions arise:

> (1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing;
>
> (2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;
>
> (3) That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act;
>
> (4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence

against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut-short a criminal trial;

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search;

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act (9) That the judgment in Pooran Mal's case cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person

from whom the contraband has been seized during the illegal search;

(10) That the judgment in Ali Mustaffa's case correctly interprets and distinguishes the judgment in Pooran Mal's case and the broad observations made in Pirthi Chand's case and Jasbir Singh's case are not in tune with the correct exposition of law as laid down in Pooran Mal's case. The above conclusions are not a summary of our judgment and have to be read and considered in the light of the entire discussion contained in the earlier part."

49. Immediately after this judgment, Parliament enacted sub-sections (5) and (6). Despite the enactment of these provisions, this Court in Vijaysinh Chandubha Jadeja (supra) specifically held as follows:

"24. Although the Constitution Bench in Baldev Singh case [(1999) 6 SCC 172] did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.

xxx xxx xxx

27. It can, thus, be seen that apart from the fact that in Karnail Singh [(2009) 8 SCC 539], the issue was regarding the scope and applicability of Section 42 of the NDPS Act in the matter of conducting search, seizure and arrest without warrant or authorisation, the said decision does not depart from the dictum laid down in Baldev Singh case [(1999) 6 SCC 172] insofar as the obligation of the empowered officer to inform the suspect of his right enshrined in sub-section (1) of Section 50 of the NDPS Act is concerned. It is also plain from the said paragraph that the flexibility in procedural requirements in terms of the two newly inserted sub-sections can be resorted to only in emergent and urgent situations, contemplated in the provision, and not as a matter of course. Additionally, sub-section (6) of Section 50 of the NDPS

> Act makes it imperative and obligatory on the authorised officer to send a copy of the reasons recorded by him for his belief in terms of sub-section (5), to his immediate superior officer, within the stipulated time, which exercise would again be subjected to judicial scrutiny during the course of trial.

xxx xxx xxx

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

xxx xxx xxx

31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in Joseph Fernandez [(2000) 1 SCC 707] and Prabha Shankar Dubey [(2004) 2 SCC 56] is neither borne out from the language of sub-section (1) of Section 50 nor is it in consonance with the dictum laid down in Baldev Singh case [(1999) 6 SCC 172]. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf."

50. Thus, this extremely important safeguard continues, as has been originally enacted, subject only to the exceptions in sub-sections (5) and (6), which can only be used in urgent and emergent situations. This Court has clearly held that non-compliance of this provision would lead to the conviction of the accused being vitiated, and that "substantial" compliance with these provisions would not save the prosecution case.

51. Likewise, section 52 of the NDPS Act states as follows:

> "52. Disposal of persons arrested and articles seized. —(1) Any officer arresting a person under section 41, section 42, section 43 or section 44 shall, as soon as may be, inform him of the grounds for such arrest.
>
> (2) Every person arrested and article seized under warrant issued under sub-section (1) of section 41 shall be forwarded without unnecessary delay to the Magistrate by

whom the warrant was issued.

(3) Every person arrested and article seized under sub-

section (2) of section 41, section 42, section 43 or section 44 shall be forwarded without unnecessary delay to—

(a) the officer-in-charge of the nearest police station, or

(b) the officer empowered under section 53.

(4) The authority or officer to whom any person or article is forwarded under sub-section (2) or sub-section (3) shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article."

52. Section 52(1)-(3) contains three separate safeguards, insofar as disposal of persons arrested and articles seized are concerned.

53. Section 57 then speaks of a person making an arrest or seizure having to make a full report of all the particulars of such arrest or seizure to his immediate official superior within forty-eight hours. Equally, under section 57A, whenever any officer notified under section 53 makes an arrest or seizure under the Act, the officer shall make a report of the illegally acquired properties of such person to the jurisdictional competent authority within ninety days of the arrest or seizure. Section 58 is extremely important, and is set out hereinbelow:

> "58. Punishment for vexatious entry, search, seizure or arrest.—(1) Any person empowered under section 42 or section 43 or section 44 who—
>
> (a) without reasonable ground of suspicion enters or searches, or causes to be entered or searched, any building, conveyance or place;
>
> (b) vexatiously and unnecessarily seizes the property of any person on the pretence of seizing or searching for any narcotic drug or psychotropic substance or other article liable to be confiscated under this Act, or of seizing any document or other article liable to be seized under section 42, section 43 or section 44; or
>
> (c) vexatiously and unnecessarily detains, searches or arrests any person, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.
>
> (2) Any person wilfully and maliciously giving false information and so causing an arrest or a search being made under this Act shall be punishable with imprisonment for a term which may extend to two years or with fine or with both."

> 54. This, more than any other provision, makes it clear that a person's privacy is not to be trifled with, because if it is, the officer who trifles with it is himself punishable under the provision. Under section 63, which contains the procedure in making confiscations, the first proviso to sub-

section (2) makes it clear that no order of confiscation of an article or thing shall be made until the expiry of one month from the date of seizure, or without hearing any person who may claim any right thereto and the evidence which he produces in respect of his claim.

55. Given the stringent provisions of the NDPS Act, together with the safeguards mentioned in the provisions discussed above, it is important to note that statutes like the NDPS Act have to be construed bearing in mind the fact that the severer the punishment, the greater the care taken to see that the safeguards provided in the statute are scrupulously followed. This was laid down in paragraph 28 of Baldev Singh (supra). That the NDPS Act is predominantly a penal statute is no longer res integra. In Directorate of Revenue and Anr. v. Mohammed Nisar Holia (2008) 2 SCC 370, this Court held:

> "9. The NDPS Act is a penal statute. It invades the rights of an accused to a large extent. It raises a presumption of a culpable mental state. Ordinarily, even an accused may not be released on bail having regard to Section 37 of the Act. The court has the power to publish names, address and business, etc. of the offenders. Any document produced in evidence becomes admissible. A vast power of calling for information upon the authorities has been conferred by reason of Section 67 of the Act.
>
> 10. Interpretation and/or validity in regard to the power of search and seizure provided for under the said Act came up for consideration in Balbir Singh case [(1994) 3 SCC 299] wherein it was held:
>
> "10. It is thus clear that by a combined reading of Sections 41, 42, 43 and 51 of the NDPS Act and Section 4 CrPC regarding arrest and search under Sections 41, 42 and 43, the provisions of CrPC, namely, Sections 100 and 165 would be applicable to such arrest and search. Consequently the principles laid down by various courts as discussed above regarding the irregularities and illegalities in respect of arrest and search would equally be applicable to the arrest and search under the NDPS Act also depending upon the facts and circumstances of each case.
>
> 11. But there are certain other embargoes envisaged under Sections 41 and 42 of the NDPS Act. Only a Magistrate so empowered under Section 41 can issue a warrant for arrest and search where he has reason to believe that an offence under Chapter IV has been committed so on and so forth as mentioned therein. Under sub-section (2) only a gazetted officer or other officers mentioned and empowered therein can give an authorisation to a subordinate to arrest and search if such officer has reason to believe about the commission of an offence and after reducing the information, if any, into writing. Under Section 42 only officers mentioned therein and so

> empowered can make the arrest or search as provided if they have reason to believe from personal knowledge or information. In both these provisions there are two important requirements. One is that the Magistrate or the officers mentioned therein firstly be empowered and they must have reason to believe that an offence under Chapter IV has been committed or that such arrest or search was necessary for other purposes mentioned in the provision. So far as the first requirement is concerned, it can be seen that the legislature intended that only certain Magistrates and certain officers of higher rank and empowered can act to effect the arrest or search. This is a safeguard provided having regard to the deterrent sentences contemplated and with a view that innocent persons are not harassed. Therefore if an arrest or search contemplated under these provisions of NDPS Act has to be carried out, the same can be done only by competent and empowered Magistrates or officers mentioned thereunder."
>
> 11. Power to make search and seizure as also to arrest an accused is founded upon and subject to satisfaction of the officer as the term "reason to believe" has been used.

Such belief may be founded upon secret information that may be orally conveyed by the informant. Draconian provision which may lead to a harsh sentence having regard to the doctrine of "due process" as adumbrated under Article 21 of the Constitution of India requires striking of balance between the need of law and enforcement thereof, on the one hand, and protection of citizen from oppression and injustice on the other.

12. This Court in Balbir Singh [(1994) 3 SCC 299] referring to Miranda v. State of Arizona [384 US 436 (1966)] while interpreting the provisions of the Act held that not only the provisions of Section 165 of the Code of Criminal Procedure would be attracted in the matter of search and seizure but the same must comply with right of the accused to be informed about the requirement to comply with the statutory provisions.

xxx xxx xxx

16. It is not in dispute that the said Act prescribes stringent punishment. A balance, thus, must be struck in regard to the mode and manner in which the statutory requirements are to be complied with vis-à-vis the place of search and seizure."

56. Likewise, in Union of India v. Bal Mukund (2009) 12 SCC 161, this Court held:

> "28. Where a statute confers such drastic powers and seeks to deprive a citizen of its liberty for not less than ten years, and making stringent provisions for grant of bail, scrupulous compliance with the statutory provisions must be insisted upon."

57. With this pronouncement of the law in mind, let us now examine the two questions that have been referred to us.

SCOPE OF SECTION 67 OF THE NDPS ACT

58. Section 67 of the NDPS Act is set out hereinbelow:

> "67. Power to call for information, etc.—Any officer referred to in section 42 who is authorised 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 provisions 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."

59. The marginal note to the section indicates that it refers only to the power to "call for information, etc.". As has been held by this Court in K.P. Varghese v. Income Tax Officer, Ernakulam and Anr. (1981) 4 SCC 173, a marginal note is an important internal tool for indicating the meaning and purpose of a section in a statute, as it indicates the "drift" of the provision. The Court held as follows:

> "9. This interpretation of sub-section (2) is strongly supported by the marginal note to Section 52 which reads "Consideration for transfer in cases of understatement". It is undoubtedly true that the marginal note to a section cannot be referred to for the purpose of construing the section but it can certainly be relied upon as indicating the drift of the section or, to use the words of Collins, M.R. in Bushel v. Hammond [(1904) 2 KB 563] to show what the section is dealing with. It cannot control the interpretation of the words of a section particularly when the language of the section is clear and unambiguous but, being part of the statute, it prima facie furnishes some clue as to the meaning and purpose of the section (vide Bengal Immunity Company Limited v. State of Bihar [(1955) 2 SCR 603])."

60. Secondly, it is only an officer referred to in section 42 who may use the powers given under section 67 in order to make an "enquiry" in connection with the contravention of any provision of this Act. The word "enquiry" has been used in section 67 to differentiate it from "inquiry" as used in section 53A, which is during the course of investigation of offences2. As a matter of fact, the notifications issued under the Act soon after the Act came into force, which will be referred to later in the judgment, specifically speak of the powers conferred under section 42(1) read with section 67. This is an important executive reading of the NDPS Act, which makes it clear that the powers to be exercised under section 67 are to be exercised in conjunction with the powers that are delineated in section 42(1). Thus, in Desh Bandhu Gupta & Co. v. Delhi Stock Exchange Assn. Ltd. (1979) 4 SCC

565, this Court referred to the principle of "contemporanea expositio" in the context of an executive interpretation of a statute, as follows:

> "9...The principle of contemporanea expositio (interpreting a statute or any other document by reference to the exposition it has received from contemporary authority) can be invoked though the same will not always be decisive of the question of construction (Maxwell 12th ed. p.268). In Crawford on Statutory Construction (1940 ed.) in para 219 (at pp. 393-395) it has been stated that administrative construction (i.e. contemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned; such a construction, commonly referred to as practical construction, although not controlling, is nevertheless entitled to considerable weight; it is highly persuasive. In Baleshwar Bagarti v. Bhagirathi Dass [ILR 35 Cal 701 at 713] the principle, which was reiterated in Mathura Mohan 2 In Lexico (a collaboration between Oxford University Press and Dictionary.com), it is stated that "the traditional distinction between the verbs enquire and inquire is that enquire is to be used for general senses of 'ask', while inquire is reserved for uses meaning 'make a formal investigation'". (see https://www.lexico.com/grammar/enquire-or-

inquire).

Saha v. Ram Kumar Saha [ILR 43 Cal 790] has been stated by Mookerjee, J., thus:

> "It is a well settled principle of interpretation that courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it...I do not suggest for a moment that such interpretation has by any means a controlling effect upon the courts; such interpretation may, if occasion arises, have to be disregarded for cogent and persuasive reasons, and in a clear case of error, a court would without hesitation refuse to follow such construction."

61. The officer referred to in section 42 is given powers of entry, search, seizure and arrest without warrant, with the safeguards that have been pointed out hereinabove in this judgment. The first safeguard is that such officer must have "reason to believe", which as has been noted, is different from mere "reason to suspect". It is for this reason that such officer must make an enquiry in connection with the contravention of the provisions of this Act, for otherwise, even without such enquiry, mere suspicion of the commission of an offence would be enough. It is in this enquiry that he has to call for "information" under sub-clause (a), which "information" can be given by any person and taken down in writing, as is provided in section 42(1). Further, the information given must be for the purpose of "satisfying" himself that there has been a contravention of the provisions of this Act, which again goes back to the expression "reason to believe" in section 42. This being the case, it is a little difficult to accept Shri Lekhi's argument that "enquiry" in section 67 is the same as "investigation", which is referred to in section 53. Section 53 states:

> "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 any other department of the Central Government including para-military forces or armed forces or any class of such officers with the powers of an officer-in-charge of a 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 other department 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."

62. "Investigation" is defined under the CrPC in section 2(h) as follows:

> "(h) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf;"

63. By virtue of section 2(xxix) of the NDPS Act, this definition becomes applicable to the use of the expression "investigation" in section 53 of the NDPS Act. It is important to notice that it is an inclusive definition, by which, "evidence" is collected by a police officer or a person authorised by the Magistrate. The "enquiry" that is made by a section 42 officer is so that such officer may gather "information" to satisfy himself that there is "reason to believe" that an offence has been committed in the first place.

64. This becomes even clearer when section 52(3) of the NDPS Act is read. Under section 52(3), every person arrested and article seized under sections 41 to 44 shall be forwarded without unnecessary delay either to the officer-in-charge of the nearest police station, who must then proceed to "investigate" the case given to him, or to the officer empowered under section 53 of the NDPS Act, which officer then "investigates" the case in order to find out whether an offence has been committed under the Act. It is clear, therefore, that section 67 is at an antecedent stage to the "investigation", which occurs after the concerned officer under section 42 has "reason to believe", upon information gathered in an enquiry made in that behalf, that an offence has been committed.

65. Equally, when we come to section 67(c) of the NDPS Act, the expression used is "examine" any person acquainted with the facts and circumstances of the case. The "examination" of such person is again only for the purpose of gathering information so as to satisfy himself that there is "reason to believe" that an offence has been committed. This can, by no stretch of imagination, be equated to a "statement" under section 161 of the CrPC, as is argued by Shri Lekhi, relying upon Sahoo v. State of U.P. (1965) 3 SCR 86 (at page 88), which would include the making of a confession, being a sub-species of "statement".

66. The consequence of accepting Shri Lekhi's argument flies in the face of the fundamental rights contained in Articles 20(3) and 21, as well as the scheme of the NDPS Act, together with the safeguards that have been set out by us hereinabove. First and foremost, even according to Shri Lekhi, a police officer, properly so-called, may be authorised to call for information etc. under section 67, as he is an officer referred to in section 42(1). Yet, while "investigating" an offence under the NDPS Act i.e. subsequent to the collection of information etc. under section 67, the same police officer will be bound by sections 160-164 of the CrPC, together with all the safeguards mentioned therein – firstly, that the person examined shall be bound to answer truly all questions relating to such case put to him, other than questions which would tend to incriminate him; secondly, the police officer is to reduce this statement into writing and maintain a separate and true record of this statement; thirdly, the statement made may be recorded by audio-video electronic means to ensure its genuineness; and fourthly, a statement made by a woman can only be made to a woman police officer or any woman officer. Even after all these safeguards are met, no such statement can be used at any inquiry or trial, except for the purpose of contradicting such witness in cross-examination. In Tahsildar Singh v. State of U.P., 1959 Supp (2) SCR 875, Subba Rao J., speaking for four out of six learned Judges of this Court, had occasion to refer to the history of section 162 of the CrPC. After setting out this history in some detail, the learned Judge held:

> "It is, therefore, seen that the object of the legislature throughout has been to exclude the statement of a witness made before the police during the investigation from being made use of at the trial for any purpose, and the amendments made from time to time were only intended to make clear the said object and to dispel the cloud cast on such intention. The Act of 1898 for the first time introduced an exception enabling the said statement reduced to writing to be used for impeaching the credit of the witness in the manner provided by the Evidence Act. As the phraseology of the exception lent scope to defeat the purpose of the legislature, by the Amendment Act of 1923, the section was redrafted defining the limits of the exception with precision so as to confine it only to contradict the witness in the manner provided under Section 145 of the Evidence Act. If one could guess the intention of the legislature in framing the section in the manner it did in 1923, it would be apparent that it was to protect the accused against the user of the statements of witnesses made before the police during investigation at the trial presumably on the assumption that the said statements were not made under circumstances inspiring confidence. Both the section and the proviso intended to serve primarily the same purpose i.e., the interest of the accused.
>
> (at pages 889 – 890) xxx xxx xxx The object of the main section as the history of its legislation shows and the decided cases indicate is to impose a general bar against the use of statement made before the police and the enacting clause in clear terms says that no statement made by any person to a police officer or any record thereof, or any part of such statement or record, be used for any purpose. The words are clear and unambiguous. The proviso engrafts an exception on the general prohibition and that is, the said statement in writing may be used to contradict a witness in the manner provided by Section 145 of the Evidence Act. We have already noticed from the

history of the section that the enacting clause was mainly intended to protect the interests of accused. At the stage of investigation, statements of witnesses are taken in a haphazard manner. The police officer in the course of his investigation finds himself more often in the midst of an excited crowd and babel of voices raised all round. In such an atmosphere, unlike that in a court of law, he is expected to hear the statements of witnesses and record separately the statement of each one of them. Generally he records only a summary of the laments which appear to him to be relevant. These statements are, therefore only a summary of what a witness says and very often perfunctory. Indeed, in view of the aforesaid facts, there is a statutory prohibition against police officers taking the signature of the person making the statement, indicating thereby that the statement is not intended to be binding on the witness or an assurance by him that it is a correct statement.

At the same time, it being the earliest record of the statement of a witness soon after the incident, any contradiction found therein would be of immense help to an accused to discredit the testimony of a witness making the statement. The section was, therefore, conceived in an attempt to find a happy via media, namely, while it enacts an absolute bar against the statement made before a police officer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by Section 145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction. It cannot be used for corroboration of a prosecution or a defence witness or even a court witness. Nor can it be used for contradicting a defence or a court witness. Shortly stated, there is a general bar against its use subject to a limited exception in the interest of the accused, and the exception cannot obviously be used to cross the bar." (at pages 894 – 895)

67. Under section 163(1) of the CrPC, no inducement, threat or promise, as has been mentioned in section 24 of the Evidence Act, can be made to extort such statement from a person; and finally, if a confession is to be recorded, it can only be recorded in the manner laid down in section 164 i.e. before a Magistrate, which statement is also to be recorded by audio-video electronic means in the presence of the Advocate of the person accused of an offence. This confession can only be recorded after the Magistrate explains to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him – see section 164(2) of the CrPC. The Magistrate is then to make a memorandum at the foot of the record that he has, in fact, warned the person that he is not bound to make such confession, and that it may be used as evidence against him – see section 164(4) of the CrPC. Most importantly, the Magistrate is empowered to administer oath to the person whose statement is so recorded – see section 164(5) of the CrPC.

68. It would be remarkable that if a police officer, properly so-called, were to "investigate" an offence under the NDPS Act, all the safeguards contained in sections 161 to 164 of the CrPC would be available to the accused, but that if the same police officer or other designated officer under section 42 were to record confessional statements under section 67 of the NDPS Act, these safeguards would be thrown to the winds, as was admitted by Shri Lekhi in the course of his arguments. Even if any

such anomaly were to arise on a strained construction of section 67 as contended for by Shri Lekhi, the alternative construction suggested by the Appellants, being in consonance with fundamental rights, alone would prevail, as section 67 would then have to be "read down" so as to conform to fundamental rights.

69. Take, for example, an investigation conducted by the regular police force of a State qua a person trafficking in ganja. If the same person were to be apprehended with ganja on a subsequent occasion, this time not by the State police force but by other officers for the same or similar offence, the safeguards contained in sections 161-164 of the CrPC would apply insofar as the first incident is concerned, but would not apply to the subsequent incident. This is because the second time, the investigation was not done by the State police force, but by other officers. The fact situation mentioned in the aforesaid example would demonstrate manifest arbitrariness in the working of the statute, leading to a situation where, for the first incident, safeguards available under the CrPC come into play because it was investigated by the local State police, as opposed to officers other than the local police who investigated the second transaction.

70. Take another example. If X & Y are part of a drug syndicate, and X is apprehended in the State of Punjab by the local State police with a certain quantity of ganja, and Y is apprehended in the State of Maharashtra by officers other than the State police, again with a certain quantity of ganja which comes from the same source, the investigation by the State police in Punjab would be subject to safeguards contained in the CrPC, but the investigation into the ganja carried by Y to Maharashtra would be carried out without any such safeguards, owing to the fact that an officer other than the local police investigated into the offence. These anomalies are real and not imaginary, and if a statute is so read as to give rise to such anomalies, it would necessarily have to be struck down under Article 14 of the Constitution as being discriminatory and manifestly arbitrary.

71. Further, the provisions of section 53A of the NDPS Act militate strongly against Shri Lekhi's argument. Section 53A states as follows:

> "53A. Relevancy of statements under certain circumstances.—(1) A statement made and signed by a person before any officer empowered under section 53 for the investigation of offences, during the course of any inquiry or proceedings by such officer, shall be relevant for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,—
>
> (a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or
>
> (b) when the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

> (2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceedings under this Act or the rules or orders made thereunder, other than a proceeding before a court, as they apply in relation to a proceeding before a court."

72. If Shri Lekhi's argument were correct, that a confessional statement made under section 67 is sufficient as substantive evidence to convict an accused under the NDPS Act, section 53A would be rendered otiose. Sections 53 and 53A of the NDPS Act, when read together, would make it clear that section 53A is in the nature of an exception to sections 161, 162 and 172 of the CrPC. This is for the reason that section 53(1), when it invests certain officers or classes of officers with the power of an officer in charge of a police station for investigation of offences under the NDPS Act, refers to Chapter XII of the CrPC, of which sections 161, 162 and 172 are a part. First and foremost, under section 162(1) of the CrPC, statements that are made in the course of investigation are not required to be signed by the person making them – under section 53A they can be signed by the person before an officer empowered under section 53. Secondly, it is only in two circumstances [under section 53A(1)(a) and (b)] that such a statement is made relevant for the purpose of proving an offence against the accused: it is only if the person who made the statement is dead, cannot be found, is incapable of giving evidence; or is kept out of the way by the adverse party, or whose presence cannot be obtained without delay or expense which the court considers unreasonable, that such statement becomes relevant. Otherwise, if the person who made such a statement is examined as a witness, and the court thinks that in the interest of justice such statement should be made relevant and does so, then again, such statement may become relevant. None of this would be necessary if Shri Lekhi's argument were right, that a confessional statement made under section 67 – not being bound by any of these constraints – would be sufficient to convict the accused.

73. Shri Lekhi then relied strongly upon the recent Constitution Bench judgment in Mukesh Singh (supra). This judgment concerned itself with the correctness of the decision in Mohan Lal v. State of Punjab, (2018) 17 SCC 627, which had taken the view that in case the investigation is conducted by the very police officer who is himself the complainant, the trial becomes vitiated as a matter of law, and the accused is entitled to acquittal. In deciding this question, the Constitution Bench of this Court referred to various earlier judgments, in particular, the judgment in State v. V. Jayapaul (2004) 5 SCC 223. After setting out the relevant provisions of the CrPC, the Court concluded:

> "80...Thus, under the scheme of Cr.P.C., it cannot be said that there is a bar to a police officer receiving information for commission of a cognizable offence, recording he same and then investigating it. On the contrary, Sections 154, 156 and 157 permit the officer in charge of a police station to reduce the information of commission of a cognizable offence in writing and thereafter to investigate the same."

74. The Court then set out the provisions of the NDPS Act and concluded:

> "89. Section 52 of the NDPS Act mandates that any officer arresting a person under Sections 41, 42, 43 or 44 to inform the person arrested of the grounds for such arrest. Sub-section 2 of Section 52 further provides that every person arrested and article seized under warrant issued under sub-section 1 of Section 41 shall be forwarded

without unnecessary delay to the Magistrate by whom the warrant was issued. As per sub-section 3 of Section 52, every person arrested and article seized under sub-section 2 of Section 41, 42, 43, or 44 shall be forwarded without unnecessary delay to the officer in charge of the nearest police station, or the officer empowered under section 53.

90. That thereafter the investigation is to be conducted by the officer in charge of a police station." (emphasis supplied)

75. The Court then went on to state:

"93. Section 53 does not speak that all those officers to be authorised to exercise the powers of an officer in charge of a police station for the investigation of the offences under the NDPS Act shall be other than those officers authorised under Sections 41, 42, 43, and 44 of the NDPS Act. It appears that the legislature in its wisdom has never thought that the officers authorised to exercise the powers under Sections 41, 42, 43 and 44 cannot be the officer in charge of a police station for the investigation of the offences under the NDPS Act.

94. Investigation includes even search and seizure. As the investigation is to be carried out by the officer in charge of a police station and none other and therefore purposely Section 53 authorises the Central Government or the State Government, as the case may be, invest any officer of the department of drugs control, revenue or excise or any other department or any class of such officers with the powers of an officer in charge of a police station for the investigation of offences under the NDPS Act.

95. Section 42 confers power of entry, search, seizure and arrest without warrant or authorisation to any such officer as mentioned in Section 42 including any such officer of the revenue, drugs control, excise, police or any other department of a State Government or the Central Government, as the case may be, and as observed hereinabove, Section 53 authorises the Central Government to invest any officer of the department of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government....or any class of such officers with the powers of an officer in charge of a police station for the investigation. Similar powers are with the State Government. The only change in Sections 42 and 53 is that in Section 42 the word "police" is there, however in Section 53 the word "police" is not there. There is an obvious reason as for police such requirement is not warranted as he always can be the officer in charge of a police station as per the definition of an "officer in charge of a police station" as defined under the Cr.P.C."

76. On the basis of this judgment, Shri Lekhi argued that "investigation" under the NDPS Act includes search and seizure which is to be done by a section 42 officer and would, therefore, begin from that stage.

77. In this connection, it is important to advert first to the decision of this Court in H.N. Rishbud and Inder Singh v. State of Delhi (1955) 1 SCR 1150. This judgment explains in great detail as to what exactly the scope of "investigation" is under the CrPC. It states:

"In order to ascertain the scope of and the reason for requiring such investigation to be conducted by an officer of high rank (except when otherwise permitted by a Magistrate), it is useful to consider what "investigation" under the Code comprises. Investigation usually starts on information relating to the commission of an offence given to an officer in charge of a police station and recorded under Section 154 of the Code. If from information so received or otherwise, the officer in charge of the police station has reason to suspect the commission of an offence, he or some other subordinate officer deputed by him, has to proceed to the spot to investigate the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender. Thus investigation primarily consists in the ascertainment of the facts and circumstances of the case. By definition, it includes "all the proceedings under the Code for the collection of evidence conducted by a police officer". For the above purposes, the investigating officer is given the power to require before himself the attendance of any person appearing to be acquainted with the circumstances of the case. He has also the authority to examine such person orally either by himself or by a duly authorised deputy. The officer examining any person in the course of investigation may reduce his statement into writing and such writing is available, in the trial that may follow, for use in the manner provided in this behalf in Section 162. Under Section 155 the officer in charge of a police station has the power of making a search in any place for the seizure of anything believed to be necessary for the purpose of the investigation. The search has to be conducted by such officer in person. A subordinate officer may be deputed by him for the purpose only for reasons to be recorded in writing if he is unable to conduct the search in person and there is no other competent officer available. The investigating officer has also the power to arrest the person or persons suspected of the commission of the offence under Section 54 of the Code. A police officer making an investigation is enjoined to enter his proceedings in a diary from day-to-day. Where such investigation cannot be completed within the period of 24 hours and the accused is in custody he is enjoined also to send a copy of the entries in the diary to the Magistrate concerned. It is important to notice that where the investigation is conducted not by the officer in charge of the police station but by a subordinate officer (by virtue of one or other of the provisions enabling him to depute such subordinate officer for any of the steps in the investigation) such subordinate officer is to report the result of the investigation to the officer in charge of the police station. If, upon the completion of the investigation it appears to the officer in charge of the police station that there is no sufficient evidence or reasonable ground, he may decide to release the suspected accused, if in custody, on his executing a bond. If, however, it appears to him that there is sufficient evidence or reasonable ground, to place the accused on trial, he is to take the necessary steps therefore under Section 170 of the Code. In either case, on

the completion of the investigation he has to submit a report to the Magistrate under Section 173 of the Code in the prescribed form furnishing various details. Thus, under the Code investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under Section 173. The scheme of the Code also shows that while it is permissible for an officer in charge of a police station to depute some subordinate officer to conduct some of these steps in the investigation, the responsibility for every one of these steps is that of the person in the situation of the officer in charge of the police station, it having been clearly provided in Section 168 that when a subordinate officer makes an investigation he should report the result to the officer in charge of the police station. It is also clear that the final step in the investigation, viz. the formation of the opinion as to whether or not there is a case to place the accused on trial is to be that of the officer in charge of the police station. There is no provision permitting delegation thereof but only a provision entitling superior officers to supervise or participate under Section 551." (at pages 1156-1158) This statement of the law was reiterated in State of Madhya Pradesh v. Mubarak Ali (1959) Supp. 2 SCR 201 at 211, 212.

78. It is important to remember that an officer-in-charge of a police station, when he investigates an offence, begins by gathering information, in the course of which he may collect evidence relating to the commission of the offence, which would include search and seizure of things in the course of investigation, to be produced at the trial. Under the scheme of the NDPS Act, it is possible that the same officer who is authorised under section 42 is also authorised under section 53. In point of fact, Notification S.O. 822(E) issued by the Ministry of Finance (Department of Revenue), dated 14.11.1985, empowered the following officers under section 42 and 67 of the NDPS Act:

"S.O. 822(E).-In exercise of the powers conferred by sub- section (1) of section 42 and section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government hereby empowers the officers of and above the rank of Sub-Inspector in the department of Narcotics and of and above the rank of Inspector in the departments of Central Excise, Customs and Revenue Intelligence and in Central Economic Intelligence Bureau and Narcotics Control Bureau to exercise of the powers and perform the duties specified in section 42 within the area of their respective jurisdiction and also authorises the said officers to exercise the powers conferred upon them under section 67."

79. Notification S.O.823(E), also dated 14.11.1985, the Ministry of Finance (Department of Revenue), empowered the following officers under section 53(1) of the NDPS Act:

"S.O. 823(E).-In exercise of the powers conferred by sub- section (1) of section 53 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government, after consultation with all the State Governments hereby invests the officers of and above the rank of Inspector in the Departments of Central Excise, Narcotics, Customs and Revenue Intelligence and in Central Economic Intelligence Bureau and Narcotics Control Bureau with the powers specified in sub-section (1) of that section."

80. These notifications indicate that officers of and above the rank of Inspector in the Departments of Central Excise, Customs, Revenue Intelligence, Central Economic Intelligence Bureau and Narcotics Control Bureau were authorised to act under both sections 42 and 53.

These notifications dated 14.11.1985 were superseded by the following notifications issued by the Ministry of Finance (Department of Revenue) on 30.10.2019:

"S.O. 3901(E).—In exercise of the powers conferred by sub-section (1) of section 42 and section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), and in supersession of the notification of the Government of India in the Ministry of Finance, Department of Revenue number S.O. 822(E), dated the 14th November, 1985, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii), except as respects things done or omitted to be done before such supersession the Central Government hereby empowers the officers of and above the rank of sub-inspector in Central Bureau of Narcotics and Junior Intelligence Officer in Narcotics Control Bureau and of and above the rank of inspectors in the Central Board of Indirect Taxes and Customs, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau to exercise the powers and perform the duties specified in section 42 within the area of their respective jurisdiction and also authorise the said officers to exercise the powers conferred upon them under section 67." "S.O. 3899(E).—In exercise of the powers conferred by sub-section (1) of section 53 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and in supersession of the notification of the Government of India in the Ministry of Finance, Department of Revenue number S.O. 823(E), dated the 14th November, 1985, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii), except as respects things done or omitted to be done before such supersession, the Central Government after consultation with all the State Governments hereby invests the officers of and above the rank of inspectors in the Central Board of Indirect Taxes and Customs, Central Bureau of Narcotics, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau and of and above the rank of Junior Intelligence Officer in Narcotics Control Bureau with the powers specified in

sub-section (1) of that section."

81. Thus, even the new notifications dated 30.10.2019 indicate that the powers under sections 42 and 53 of the NDPS Act are invested in officers of and above the rank of inspectors in the Central Board of Indirect Taxes and Customs, Central Bureau of Narcotics, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau and of and above the rank of Junior Intelligence Officer in Narcotics Control Bureau.

82. The observations of the Constitution Bench in Mukesh Singh (supra) are, therefore, to the effect that the very person who initiates the detection of crime, so to speak, can also investigate into the offence – there being no bar under the NDPS Act for doing so. This is a far cry from saying that the scheme of the NDPS Act leads to the conclusion that a section 67 confessional statement, being in the course of investigation, would be sufficient to convict a person accused of an offence.

83. As has been pointed out hereinabove, there could be a situation in which a section 42 officer, as designated, is different from a section 53 officer, in which case, it would be necessary for the section 42 officer to first have "reason to believe" that an offence has been committed, for the purpose of which he gathers information, which is then presented not only to his superior officer under section 42(2), but also presented to either an officer-in-charge of a police station, or to an officer designated under section 53 – see section 52(3). This was clearly recognised by the Constitution Bench in Mukesh Singh (supra) when it spoke of the requirements under section 52(2) and (3) being met, and "investigation" being conducted thereafter by the officer in charge of a police station.

84. Take a hypothetical case where an officer is designated under section 42, but there is no designation of any officer under section 53 to conduct investigation. In such a case, the section 42 officer would not conduct any investigation at all – he would only gather facts which give him "reason to believe" that an offence has been committed, in pursuance of which he may use the powers given to him under section

42. After this, for "investigation" into the offence under the NDPS Act, the only route in the absence of a designated officer under section 53, would be for him to present the information gathered to an officer-in-

charge of a police station, who would then "investigate" the offence under the NDPS Act.

85. Also, we must bear in mind the fact that the Constitution Bench's focus was on a completely different point, namely, whether the complainant and the investigator of an offence could be the same. From the point of view of this question, section 53A of the NDPS Act is not relevant and has, therefore, not been referred to by the Constitution Bench. As has been pointed out by us hereinabove, in order to determine the questions posed before us, section 53A becomes extremely important, and would, as has been pointed out by us, be rendered otiose if Shri Lekhi's submission,

that a statement under section 67 is sufficient to convict an accused of an offence under the Act, is correct. For all these reasons, we do not accede either to Shri Puneet Jain's argument to refer Mukesh Singh (supra) to a larger Bench for reconsideration, or to Shri Lekhi's argument based on the same judgment, as the point involved in Mukesh Singh (supra) was completely different from the one before us.

WHETHER AN OFFICER DESIGNATED UNDER SECTION 53 OF THE NDPS ACT CAN BE SAID TO BE A POLICE OFFICER

86. We now come to the question as to whether the officer designated under section 53 of the NDPS Act can be said to be a "police officer" so as to attract the bar contained in section 25 of the Evidence Act.

87. The case law on the subject of who would constitute a "police officer" for the purpose of section 25 of the Evidence Act begins with the judgment of this Court in Barkat Ram (supra). In this judgment, by a 2:1 majority, this Court held that a Customs Officer under the Land Customs Act, 1924 is not a "police officer" within the meaning of section 25 of the Evidence Act. The majority judgment of Raghubar Dayal, J. first set out section 9 of the Land Customs Act as follows:

> ""The provisions of the Sea Customs Act, 1878 (VIII of 1878), which are specified in the Schedule, together with all notifications, orders, rules or forms issued, made or prescribed, thereunder, shall, so far as they are applicable, apply for the purpose of the levy of duties of land customs under this Act in like manner as they apply for the purpose of the levy of duties of customs on goods imported or exported by sea." Among the sections of the Sea Customs Act made applicable by sub-s. (1) of s. 9 of the Land Customs Act, are included all the sections in Chapters XVI and XVII of the Sea Customs Act viz. ss.167 to 193." (at page 342)

88. The Court then examined the Police Act, 1861, and found:

> "The Police Act, 1861 (Act 5 of 1861), is described as an Act for the regulation of police, and is thus an Act for the regulation of that group of officers who come within the word 'police' whatever meaning be given to that word. The preamble of the Act further says: 'whereas it is expedient to re-organise the police and to make it a more efficient instrument for the prevention and detection of crime, it is enacted as follows'. This indicates that the police is the instrument for the prevention and detection of crime which can be said to be the main object and purpose of having the police. Sections 23 and 25 lay down the duties of the police officers and Section 20 deals with the authority they can exercise. They can exercise such authority as is provided for a police officer under the Police Act and any Act for regulating criminal procedure. The authority given to police officers must naturally be to enable them to discharge their duties efficiently. Of the various duties mentioned in s. 23, the more important duties are to collect and communicate intelligence affecting the public peace, 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 authorised to apprehend. It is clear, therefore, in view of the nature of the duties imposed on the police officers, the nature of the authority conferred and 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.

The powers of Customs Officers are really not for such purpose. Their powers are for the purpose of checking the smuggling of goods and the due realisation of customs duties and to determine the action to be taken in the interests of the revenues of the country by way of confiscation of goods on which no duty had been paid and by imposing penalties and fines.

Reference to s.9(1) of the Land Customs Act may be usefully made at this stage. It is according to the provisions of this sub-section that the provisions of the Sea Customs Act and the orders, Rules etc. prescribed thereunder, apply for the purpose of levy of duties of land customs under the Land Customs Act in like manner as they apply for the purpose of levy of duties of customs on goods imported or exported by sea. This makes it clear that the provisions conferring various powers on the Sea Customs Officers are for the purpose of levying and realisation of duties of customs on goods and that those powers are conferred on the Land Customs Officers also for the same purpose. Apart from such an expression in Section 9(1) of the Land Customs Act, there are good reasons in support of the view that the powers conferred on the Customs Officers are different in character from those of the police officers for the detection and prevention of crime and that the powers conferred on them are merely for the purpose of ensuring that dutiable goods do not enter the country without payment of duty and that articles whose entry is prohibited are not brought in. It is with respect to the detecting and preventing of the smuggling of goods and preventing loss to the Central Revenues that Customs Officers have been given the power to search the property and person and to detain them and to summon persons to give evidence in an enquiry with respect to the smuggling of goods.

The preamble of the Sea Customs Act says: “Whereas it is expedient to consolidate and amend the law relating to the levy of Sea Customs-duties”. Practically, all the provisions of the Act are enacted to achieve this object.” (pages 343-344) “The Customs Officer, therefore, is not primarily concerned with the detection and punishment of crime committed by a person, but is mainly interested in the detection and prevention of smuggling of goods and safeguarding the recovery of customs duties. He is more concerned with the goods and customs duty, than with the offender.” (page 345) (emphasis supplied)

89. In an important passage, the Court then concluded that since the expression “police officer” is not defined, it cannot be construed in a narrow way, but must be construed in a “wide and popular sense”, as follows:

> "There seems to be no dispute that a person who is a member of the police force is a police officer. A person is a member of the police force when he holds his office under any of the Acts dealing with the police. A person may be a member of the police in any other country. Officers of the police in the erstwhile Indian States and an officer of the police of a foreign country have been held in certain decided cases to be police officers within the meaning of Section 25 of the Evidence Act. There is no denying that these persons are police officers and are covered by that expression in Section 25. That expression is not restricted to the police-officers of the police forces enrolled under the Police Act of 1861. The word 'police is defined in S.1 and is said to include all persons who shall be enrolled under the Act. No doubt this definition is not restrictive, as it uses the expression 'includes', indicating thereby that persons other than those enrolled under that Act can also be covered by the word "police".
>
> Sections 17 and 18 of the Police Act provide for the appointment of special police officers who are not enrolled under the Act but are appointed for special occasions and have the same powers, privileges and protection and are liable to perform the same duties as the ordinary officers of the police.
>
> Section 21 also speaks of officers who are not enrolled as police officers and in such categories mentions hereditary or other village police officers.
>
> The words 'police officer' are therefore not to be construed in a narrow way, but have to be construed in a wide and popular sense, as was remarked in R. v. Hurribole [ILR 1 Cal 207] where a Deputy Commissioner of police who was actually a police officer and was merely invested with certain Magisterial powers was rightly held to be a police officer within the meaning of that expression in Section 25 of the Evidence Act." (at pages 347-348)

90. The Court then held, in a significant passage, that a confession made to any member of the police – of whatever rank – is interdicted by section 25 of the Evidence Act, as follows:

> "The police officer referred to in Section 25 of the Evidence Act, need not be the officer investigating into that particular offence of which a person is subsequently accused. A confession made to him need not have been made when he was actually discharging any police duty. Confession made to any member of the police, of whatever rank and at whatever time, is inadmissible in evidence in view of Section 25." (at page 349)
>
> 91. The Court then found:
>
> "The powers of search etc., conferred on the former are, as was observed in Thomas Dana's case [(1959) Supp (1) SCR 274, 289] of a limited character and have a limited object of safeguarding the revenues of the State.

It is also to be noticed that the Sea Customs Act itself refers to police officer in contradistinction to the Customs Officer. Section 180 empowers a police officer to seize articles liable to confiscation under the Act, on suspicion that they had been stolen. Section 184 provides that the officer adjudging confiscation shall take and hold possession of the thing confiscated and every officer of police, on request of such officer, shall assist him in taking and holding such possession. This leaves no room for doubt that a Customs Officer is not an officer of the Police.

It is well-settled that the Customs Officer, when they act under the Sea Customs Act to prevent the smuggling of goods by imposing confiscation and penalties, act judicially: Leo Roy Frey v. Superintendent District Jail, Amritsar [1958 SCR 822]; Shewpujanrai Indrasanrai Ltd. v. Collector of Customs [1959 SCR 821]. Any enquiry under Section 171-A is deemed to be a judicial proceeding within the meaning of Sections 193 and 228 IPC, in view of its sub-section (4). It is under the authority given by this section that the Customs Officers can take evidence and record statements. If the statement which is recorded by a Customs Officer in the exercise of his powers under this section be an admission of guilt, it will be too much to say that that statement is a confession to a police officer, as a police officer never acts judicially and no proceeding before a police officer is deemed, under any provision so far as we are aware, to be a judicial proceeding for the purpose of Sections 193 and 228 IPC, or for any purpose. It is still less possible to imagine that the legislature would contemplate such a person, whose proceedings are judicial for a certain purpose, to be a person whose record of statements made to him could be suspect if such statement be of a confessional nature." (at page 350-351)

92. The majority concluded:

"We make it clear, however, that we do not express any opinion on the question whether officers of departments other than the police, on whom the powers of an Officer- in-charge of a Police Station under Chapter XIV of the Code of Criminal Procedure, have been conferred, are police officers or not for the purpose of Section 25 of the Evidence Act, as the learned counsel for the appellant did not question the correctness of this view for the purpose of this appeal." (at page 352)

93. Subba Rao, J. dissented. He made a neat division of "police officer" into three categories as follows:

"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." (at

page 355)

94. He then referred to the "high purpose" of section 25 as follows:

"It is, therefore, clear that Section 25 of the Evidence Act was enacted to subserve a high purpose and that is 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." (at page 357) "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." (at page 358)

95. After referring to various High Court judgments which contained the "broad view" – i.e. Bombay, Calcutta and Madras, which would include all three classes of police officers referred to, as against the "narrow view" of the Patna High Court, where only a person who is designated as a police officer under the Police Act, 1861 was accepted to be a police officer under section 25 of the Evidence Act, Subba Rao, J., then finally concluded that, given the functional test and the object of section 25, a customs officer would be a "police officer" properly so called.

96. (1) The majority view in this judgment first emphasised the point that the Land Customs Act, 1924 and the Sea Customs Act, 1878 were statutes primarily concerned with the levy of duties of customs, and ancillary to this duty, officers designated in those Acts are given certain powers to check smuggling of goods for due realisation of customs duties. In a significant sentence, the Court, therefore, stated that a customs officer is more concerned with the goods and customs duty than with the offender. (2) The persons who are not enrolled as "police" under the Police Act, 1861, would be included as "police" under the inclusive definition contained in that Act, leading to the acceptance of the "broad view" and rejection of the "narrow view" of the meaning of "police officer". (3) The protection of section 25 of the Evidence Act is very wide, and applies to a confession made to any member of the police whatever his rank, and at whatever time it is made, whether before or after being accused of an offence. (4) That the powers of search, seizure, etc. that are conferred under the Land Customs Act are of a limited character, for the limited object of safeguarding the revenues of the State. (5) That section 171A of the Sea Customs Act, 1878 which empowers the customs officer to summon a person to give evidence, or produce a document in an enquiry which he makes, is a judicial enquiry – as a result, a customs officer can never be said to be a police officer as a police officer never acts judicially. (6) The precise question with which we are concerned in this case, namely, whether officers of departments other than the police on whom the powers of an officer-in-

charge of a police station under Chapter XIV of the CrPC have been conferred are police officers within the meaning of section 25 of the Evidence Act, was expressly left open.

97. In Raja Ram Jaiswal (supra), this time a majority of 2:1 of this Court held that a confession made to an Excise Inspector under the Bihar and Orissa Excise Act of 1915, would be a confession made to a police officer for the purpose of section 25 of the Evidence Act. The majority judgment of Mudholkar, J. referred to Barkat Ram (supra) and held:

> "It has, however, been held in a large number of cases, including the one decided by this court, The State of Punjab v. Barkat Ram [(1962) 3 SCR p. 338] that the words "Police Officer" to be found in Section 25 of the Evidence Act are not to be construed in a narrow way but have to be construed in a wide and popular sense. Those words, according to this Court, are however not to be construed in so wide a sense as to include persons on whom only some of the powers exercised by the police are conferred." (page 761)

98. Barkat Ram (supra) was again referred to, stating that the question which was before the Court was expressly left open by the majority in that case, and it is precisely this question that arose in this case – see page 762. The Court then held:

> "It is precisely this question which falls for consideration in the present appeal. For, under Section 78(3) of the Bihar and Orissa Excise Act, 1915 (2 of 1915) an Excise Officer empowered under Section 77, sub-section (2) of that Act shall, for the purpose of Section 156 of the Code of Criminal Procedure be deemed to be an officer in charge of a police station with respect to the area to which his appointment as an Excise Officer extends. Sub-section (1) of Section 77 empowers the Collector of Excise to investigate without the order of a Magistrate any offence punishable under the Excise Act committed within the limits of his jurisdiction. Sub-section (2) of that section provides that any other Excise Officer specially empowered behalf in this by the State Government in respect of all or any specified class of offences punishable under the Excise Act may, without the order of a Magistrate, investigate any such offence which a court having jurisdiction within the local area to which such officer is appointed would have power to enquire into or try under the aforesaid provisions. By virtue of these provisions the Lieutenant Governor of Bihar and Orissa by Notification 470-F dated 15-1-1919 has specially empowered Inspectors of Excise and Sub-Inspectors of Excise to investigate any offence punishable under the Act. It is not disputed before us that this notification is still in force. By virtue of the provisions of Section 92 the Act it shall have effect as if enacted in the Act. It would thus follow that an Excise Inspector or Sub-Inspector in the State of Bihar shall be deemed to be an officer in charge of a police station with respect to the area to which he is appointed and is in that capacity entitled to investigate any offence under the Excise Act within that area without the order of Magistrate. Thus he can exercise all the powers which an officer in charge of a police station can exercise under Chapter XIV of the Code of Criminal Procedure. He can investigate into offences, record statements of the persons

questioned by him, make searches, seize any articles connected with an offence under the Excise Act, arrest an accused person, grant him bail, send him up for trial before a Magistrate, file a charge-sheet and so on. Thus his position in so far as offences under the Excise Act committed within the area to which his appointment extends are concerned is no different from that of an officer in charge of a police station. As regards these offences not only is he charged with the duty of preventing their commission but also with their detection and is for these purposes empowered to act in all respects as an officer in charge of a police station. No doubt unlike an officer in charge of a police station he is not charged with the duty of the maintenance of law and order nor can he exercise the powers of such officer with respect to offences under the general law or under any other special laws. But all the same, in so far as offences under the Excise Act are concerned, there is no distinction whatsoever in the nature of the powers he exercises and those which a police officer exercises in relation to offences which it is his duty to prevent and bring to light. It would be logical, therefore, to hold that a confession recorded by him during an investigation into an excise offence cannot reasonably be regarded as anything different from a confession to a police officer. For, in conducting the investigation he exercises the powers of a police officer and the act itself deems him to be a police officer, even though he does not belong to the police force constituted under the Police Act. It has been held by this court that the expression "police officer" in Section 25 of the Evidence Act is not confined to persons who are members of the regularly constituted police force. The position of an Excise Officer empowered under Section 77(2) of the Bihar and Orissa Excise Act is not analogous to that of a Customs Officer for two reasons. One is that the Excise Officer, does not exercise any judicial powers just as the Customs Officer does under the Sea Customs Act, 1878. Secondly, the Customs Officer is not deemed to be an officer in charge of a police station and therefore can exercise no powers under the Code of Criminal Procedure and certainly not those of an officer in charge of a police station. No doubt, he too has the power to make a search, to seize articles suspected to have been smuggled and arrest persons suspected of having committed an offence under the Sea Customs Act. But that is all. Though he can make an enquiry, he has no power to investigate into an offence under Section 156 of the Code of Criminal Procedure. Whatever powers he exercises are expressly set out in the Sea Customs Act. Though some of those set out in Chapter XVII may be analogous to those of a police officer under the Code of Criminal Procedure they are not identical with those of a police officer and are not derived from or by reference to the Code. In regard to certain matters, he does not possess powers even analogous to those of a Police Officer. Thus he is not entitled to submit a report to a Magistrate under Section 190 of the Code of Criminal Procedure with a view that cognizance of the offence be taken by the Magistrate. Section 187(A) of the Sea Customs Act specially provides that cognizance of an offence under the Sea Customs Act can be taken only upon a complaint in writing made by the Customs Officers or other officer of the customs not below the rank of an Assistant Collector of Customs authorised in this behalf by the Chief Customs Officer.

> It may well be that a statute confers powers and impose duties on a public servant, some of which are analogous to those of a police officer. But by reason of the nature of other duties which he is required to perform he may be exercising various other powers also. It is argued on behalf of the State that where such is the case the mere conferral of some only of the powers of a police officer on such a person would not make him a police officer and, therefore, what must be borne in mind is the sum total of the powers which he enjoys by virtue of his office as also the dominant purpose for which he is appointed. The contention thus is that when an officer has to perform a wide range of duties and exercise correspondingly a wide range of powers, the mere fact that some of the powers which the statute confers upon him are analogous to or even identical with those of a police officer would not make him a police officer and, therefore, if such an officer records a confession it would not be hit by Section 25 of the Evidence Act. In our judgment what is pertinent to bear in mind for the purpose of determining as to who can be regarded a "police officer" for the purpose of this provision is not the totality of the powers which an officer enjoys but the kind of powers which the law enables him to exercise. The test for determining whether such a person is a "police officer" for the purpose of Section 25 of the Evidence Act would, in our judgment, be whether the powers of a police officer which are conferred on him or which are exercisable by him because he is deemed to be an officer in charge of police station establish a direct or substantial relationship with the prohibition enacted by Section 25, that is, the recording of a confession. In our words, the test would be whether the powers are such as would to facilitate the obtaining by him of a confession from a suspect or delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he is appointed or the question as to what other powers he enjoys. These questions may perhaps be relevant for consideration where the powers of the police officer conferred upon him are of a very limited character and are not by themselves sufficient to facilitate the obtaining by him of a confession.
>
> (at pages 762-766) (emphasis supplied)

99. In a significant sentence, the Court held:

> "It is the power of investigation which establishes a direct relationship with the prohibition enacted in Section 25." (at page 768)

100. After referring to the object sought to be achieved by section 25, the Court went on to hold:

> "This provision was thus enacted to eliminate from consideration confessions made to an officer who, by virtue of his position, could extort by force, torture or inducement a confession. An Excise Officer acting under Section 78(3) would be in the same position as an Officer in charge of a police station making an investigation under Chapter XIV of the Code of Criminal Procedure. He would likewise have the same opportunity of extorting a confession from a suspect. It is, therefore, difficult to draw a rational distinction between a confession recorded by a police officer strictly

> so called and recorded by an Excise Officer who is deemed to be a police officer." (at page 769)

101.The Court abjured shortcuts to obtaining convictions under the Act as follows:

> "We agree with the learned Judge that by and large it is the duty of detection of offences and of bringing offenders to justice, which requires an investigation to be made, that differentiates police officers from private individuals or from other agencies of State. Being concerned with the investigation, there is naturally a desire on the part of a police officer to collect as much evidence as possible against a suspected offender apprehended by him and in his zeal to do so he is apt to take recourse to an easy means, that is, of obtaining a confession by using his position and his power over the person apprehended by him." (at page 776)

102. The majority ended the judgment by stating:

> "There is one more reason also why the confession made to an Excise Sub-Inspector must be excluded, that is, it is a statement made during the course of investigation to a person who exercises the powers of an officer in charge of a police station. Such statement is excluded from evidence by Section 162 of the Code of Criminal Procedure except for the purpose of contradiction. Therefore, both by Section 25 of the Evidence Act as well as by Section 162 CrPC the confession of the appellant is inadmissible in evidence. If the confession goes, then obviously the conviction of the appellant cannot be sustained. Accordingly we allow the appeal and set aside the conviction and sentences passed on the appellant." (page 778-779)

103.Raghubar Dayal, J. dissented. His dissent contains a useful summary of Barkat Ram (supra) as follows:

> "In State of Punjab v. Barkat Ram this Court held that a customs officer is not a police officer within the meaning of Section 25 of the Evidence Act. The view was based on the following considerations:
>
> (1) The powers which a police officer enjoys are powers for the effective prevention and detection of crime in order to maintain law and order while a customs officer is not primarily concerned with the detection and punishment of crime committed by a person but is mainly interested in the detection and prevention of smuggling of goods and safeguarding the recovery of customs duties.
>
> (2) The mere fact that customs officers possess certain powers similar to those of police officers in regard to detection of infractions of customs laws, is not a sufficient ground for holding them to be police officers within the meaning of Section 25 of the Evidence Act, even though the word "police officer" are not to be construed in a narrow way but have to be construed in a wide and popular sense, as remarked in

> Queen v. Hurribole. The expression "police officer" is not of such wide meaning as to include persons on whom certain police powers are incidentally conferred.
>
> (3) A confession made to any police officer, whatever be his rank and whatever be the occasion for making it, is inadmissible in evidence but a confession made to a customs officer when he be not discharging any such duty which corresponds to the duty of a police officer will be inadmissible even if the other view be correct that he was police officer when exercising such powers.
>
> (4) The Sea Customs Act itself refers to "police officer" in contradistinction to Customs Officer.
>
> (5) Customs Officers act judicially when they act under the Sea Customs Act to prevent smuggling of goods and imposing confiscation and Penalties, and proceedings before them are judicial proceeding for purpose of Sections 193 and 228 IPC." (at pages 779-780)

104. The minority judgment held:

> "I therefore hold that the Excise Inspector and Sub- Inspector empowered by the State Government under Section 77(2) of the Act are not police officers within the meaning of Section 25 of the Evidence Act and that the aforesaid officers cannot be treated to be police officers for the purposes of Section 162 of the Code of Criminal Procedure. Section 162 does not confer any power on a police officer. It deals with the use which can be made of the statements recorded by a police officer carrying out investigation under Chapter XIV of the Code. The investigation which the aforesaid Excise Officer conducts is not under Chapter XIV of the Code, but is under the provisions of the Act and therefore this is a further reason for the non-applicability of Section 162 CrPC to any statements made by a person to an Excise Officer during the course of his investigating an offence under the Act." (at page 808)

105.The test laid down by the majority in Raja Ram Jaiswal (supra) for determining whether a person is a police officer under section 25 of the Evidence Act, is whether a direct or substantial relationship with the prohibition enacted by section 25 is established, namely, whether powers conferred are such as would tend to facilitate the obtaining by such officer of a confession from a suspect or delinquent, and this happens if a power of investigation, which culminates in a police report, is given to such officer.

106.Both these judgments came to be considered in the Constitution Bench judgment in Badku Joti Savant (supra). In this case, the appellant was prosecuted under the Central Excise and Salt Act, 1944. The Court expressly left open the question as to whether the "broader" or "narrower" meaning of police officer, as deliberated in the aforementioned two judgments, is correct. It proceeded on the footing that the broad view may be accepted to test the statute in question – see pages 701, 702. The Court referred to the main purpose of the Central Excise Act as follows:

> "The main purpose of the Act is to levy and collect excise duties and Central Excise Officers have been appointed thereunder for this main purpose. In order that they may carry out their duties in this behalf, powers have been conferred on them to see that duty is not evaded and persons guilty of evasion of duty are brought to book.
>
> xxx xxx xxx Section 19 lays down that every person arrested under the Act shall be forwarded without delay to the nearest Central Excise Officer empowered to send persons so arrested to a Magistrate, or, if there is no such Central Excise Officer within a reasonable distance, to the officer- in-charge of the nearest police station. These sections clearly show that the powers of arrest and search conferred on Central Excise Officers are really in support of their main function of levy and collection of duty on excisable goods." (at page 702) (emphasis supplied)

107.Section 21 of the Central Excise Act, 1944 was then set out as follows:

> "21.(1) When any person is forwarded under section 19 to a Central Excise Officer empowered to send persons so arrested to a Magistrate, the Central Excise Officer shall proceed to inquire into the charge against him.
>
> (2) For this purpose the Central Excise Officer may exercise the same powers and shall be subject to the same provisions as the officer-in-charge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898, when investigating a cognizable case;
>
> Provided that-
>
> (a)if the Central Excise Officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him to custody of such Magistrate;
>
> (b)if it appears to the Central Excise Officer that there is not sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the Central Excise Officer may direct, to appear, if and when so required before a Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior."

108. The Court therefore held:

> "It is urged that under sub-section (2) of Section 21 a Central Excise Officer under the Act has all the powers of an officer in charge of a police station under Chapter XIV of the Code of Criminal Procedure and therefore he must be deemed to be a police officer within the meaning of those words in Section 25 of the Evidence Act. It is true

> that sub-section (2) confers on the Central Excise Officer under the Act the same powers as an officer in charge of a police station has when investigating a cognizable case; but this power is conferred for the purpose of sub-section (1) which gives power to a Central Excise Officer to whom any arrested person is forwarded to inquire into the charge against him. Thus under Section 21 it is the duty of the Central Excise Officer to whom an arrested person is forwarded to inquire into the charge made against such person. Further under proviso (a) to sub-section (2) of Section 21 if the Central Excise Officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate. It does not however appear that a Central Excise Officer under the Act has power to submit a charge-sheet under Section 173 of the Code of Criminal Procedure. Under Section 190 of the Code of Criminal Procedure a Magistrate can take cognizance of any offence either (a) upon receiving a complaint of facts which constitute such offence, or (b) upon a report in writing of such facts made by any police officer, or (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed. A police officer for purposes of clause (b) above can in our opinion only be a police officer properly so-called as the scheme of the Code of Criminal Procedure shows and it seems therefore that a Central Excise Officer will have to make a complaint under clause (a) above if he wants the Magistrate to take cognizance of an offence, for example, under Section 9 of the Act. Thus though under sub-section (2) of Section 21 the Central Excise Officer under the Act has the powers of an officer in charge of a police station when investigating a cognizable case, that is for the purpose of his inquiry under sub-section (1) of Section 21. Section 21 is in terms different from Section 78(3) of the Bihar and Orissa Excise Act, 1915 which came to be considered in Raja Ram Jaiswal's case [(1964) 2 SCR 752] and which provided in terms that "for the purposes of Section 156 of the Code of Criminal Procedure, 1898, the area to which an excise officer empowered under Section 77, sub-

section (2), is appointed shall be deemed to be a police- station, and such officer shall be deemed to be the officer in charge of such station". It cannot therefore be said that the provision in Section 21 is on par with the provision in Section 78(3) of the Bihar and Orissa Excise Act. All that Section 21 provides is that for the purpose of his enquiry, a Central Excise Officer shall have the powers of an officer in charge of a police station when investigating a cognizable case. But even so it appears that these powers do not include the power to submit a charge-sheet under Section 173 of the Code of Criminal Procedure for unlike the Bihar and Orissa Excise Act, the Central Excise Officer is not deemed to be an officer in charge of a police station." (at pages 703-704) (emphasis supplied)

109.Having regard to the statutory scheme contained in the Central Excise Act, more particularly sections 21(1) and proviso (a) to section 21(2), the Court held that a Central Excise officer had no power to submit a charge-sheet under section 173(2) of the CrPC, as such officer is only empowered to send persons who are arrested to a Magistrate under these provisions.

110.The Court distinguished Raja Ram Jaiswal (supra), and held that this case being under the Central Excise Act, which is a revenue statute like the Land Customs Act, 1924 and the Sea Customs Act, 1878, would be more in accord with the case of Barkat Ram (supra) – see page 704.

111.The next judgment in chronological order is Romesh Chandra Mehta (supra). Here again, a Constitution Bench was concerned with the same question under section 25 of the Evidence Act when read with enquiries made under section 171-A of the Sea Customs Act, 1878. The Court had no difficulty in finding that such customs officer could not be said to be a police officer for the purpose of section 25 of the Evidence Act, holding:

> "Under the Sea Customs Act, a Customs Officer is authorised to collect customs duty to prevent smuggling and for that purpose he is invested with the power to search any person on reasonable suspicion (Section 169); to screen or X-ray the body of a person for detecting secreted goods (Section 170-A); to arrest a person against whom a reasonable suspicion exists that he has been guilty of an offence under the Act (Section 173); to obtain a search warrant from a Magistrate to search any place within the local limits of the jurisdiction of such Magistrate (Section 172); to collect information by summoning persons to give evidence and produce documents (Section 171-A); and to adjudge confiscation under Section 182. He may exercise these powers for preventing smuggling of goods dutiable or prohibited and for adjudging confiscation of those goods. For collecting evidence the Customs Officer is entitled to serve a summons to produce a document or other thing or to give evidence, and the person so summoned is bound to attend either in person or by an authorized agent, as such officer may direct, and the person so summoned is bound to state the truth upon any subject respecting which he is examined or makes a statement and to produce such documents and other things as may be required. The power to arrest, the power to detain, the power to search or obtain a search warrant and the power to collect evidence are vested in the Customs Officer for enforcing compliance with the provisions of the Sea Customs Act. For purpose of Sections 193 and 228 of the Indian Penal Code the enquiry made by a Customs Officer is a judicial proceeding. An order made by him is appealable to the Chief Customs Authority under Section 188 and against that order revisional jurisdiction may be exercised by the Chief Customs Authority and also by the Central Government at the instance of any person aggrieved by any decision or order passed under the Act. The Customs Officer does not exercise, when enquiring into a suspected infringement of the Sea Customs Act, powers of investigation which a police officer may in investigating the commission of an offence. He is invested with the power to enquire into infringements of the Act primarily for the purpose of adjudicating forfeiture and penalty. He has no power to investigate an offence triable by a Magistrate, nor has he the power to submit a report under Section 173 of the Code of Criminal Procedure. He can only make a complaint in writing before a competent Magistrate." (at pages 466-467) (emphasis supplied)

112.Barkat Ram (supra), Raja Ram Jaiswal (supra) and Badku Joti Savant (supra) were all referred to. The Court then laid down, what according to it was the true test for determining whether an officer of customs is to be deemed to be a police officer, as follows:

> "But the test for determining whether an officer of customs is to be deemed a police officer is whether he is invested with all the powers of a police officer qua investigation of an offence, including the power to submit a report under Section 173 of the Code of Criminal Procedure. It is not claimed that a Customs Officer exercising power to make an enquiry may submit a report under Section 173 of the Code of Criminal Procedure." (at page 469)

113.This judgment was followed by the judgment in Illias (supra), in which the same question arose, this time under the Customs Act, 1962. In a significant passage, the Constitution Bench held that there was no conflict between Raja Ram Jaiswal (supra) and Barkat Ram (supra) as follows:

> "Indeed in a recent decision of this court P. Shankar Lal v. Asstt. Collector of Customs, Madras [Cr. As 52 & 104/65 decided on 12-12-1967] it has been reaffirmed that there is no conflict between the cases of Raja Ram Jaiswal and Barkat Ram, the former being distinguishable from the latter." (at page 616)

114.The Court then referred to the Sea Customs Act, 1878 and the Customs Act, 1962, highlighting the fact that section 108 of the Customs Act, 1962 confers power on a gazetted officer of Customs to summons persons for giving evidence or producing documents - see page 617. Section 104(3) of the Customs Act, 1962 was strongly relied upon by learned counsel appearing on behalf of the appellant in that case, which section provided that where an officer of customs has arrested any person under sub-clause (1) of section 104, he shall for the purpose of releasing such person on bail or otherwise have the same power and be subject to the same provisions as an officer-in-charge of a police station has and is subject to under the CrPC. It was noticed that the offences under the Customs Act were non-cognizable – see section 104(4). It was then held that the expression "otherwise" clearly relates to releasing a person who has been arrested and cannot encompass anything beyond that – see page 617. Raja Ram Jaiswal (supra) was referred to, including the test laid down in that judgment at page 766 – see pages 619, 620. Badku Joti Savant (supra) was then referred to. The Court concluded:

> "It was reiterated that the appellant could not take advantage of the decision in Raja Ram Jaiswal's case and that Barkat Ram's case was more apposite. The ratio of the decision in Badku Joti Savant is that even if an officer under the special Act has been invested with most of the powers which an officer in charge of a police station exercises when investigating a cognizable offence he does not thereby became a police officer within the meaning of Section 25 of the Evidence Act unless he is empowered to file a charge-sheet under Section 173 of the Code of Criminal Procedure.
>
> Learned counsel for the appellant when faced with the above difficulty has gone to the extent of suggesting that by necessary implication the power to file a charge-sheet

> flows from some of the powers which have already been discussed under the new Act and that a customs officer is entitled to exercise even this power. It is difficult and indeed it would be contrary to all rules of interpretation to spell out any such special power from any of the provisions contained in the new Act." (at pages 621-622)

115.Two other judgments of this Court, this time under the Railways Property (Unlawful Possession) Act, 1966 held that members of the Railway Protection Force could not be said to be police officers within the meaning of section 25 of the Evidence Act.

116.In State of U.P. v. Durga Prasad (1975) 3 SCC 210, a Division Bench of this Court referred to section 8 of the said Act, which is similar to section 21 of the Central Excise Act, as follows:

> "6. Section 8 of the Act reads thus:
>
> "8. (1) When any person is arrested by an officer of the Force for an offence punishable under this Act or is forwarded to him under Section 7, he shall proceed to inquire into the charge against such person.
>
> (2) For this purpose the officer of the Force may exercise the same powers and shall be subject to the same provisions as the officer in charge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898, when investigating a cognizable case;
>
> Provided that—
>
> (a) if the officer of the Force is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate;
>
> (b) if it appears to the officer of the Force that there is no sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the officer of the Force may direct, to appear, if and when so required before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior."

117.The Court held:

> "18. The right and duty of an Investigating Officer to file a police report or a charge-sheet on the conclusion of investigation is the hallmark of an investigation under the Code. Section 173(1)(a) of the Code provides that as soon as the investigation is completed the officer-in- charge of the police-station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report

in the form prescribed by the State Government. The officer conducting an inquiry under Section 8(1) cannot initiate court proceedings by filing a police report as is evident from the two Provisos to Section 8(2) of the Act. Under Proviso (a), if the officer of the Force is of the opinion that there is sufficient evidence or reasonable ground of suspicion against the accused, he shall either admit the accused to bail to appear before a Magistrate having jurisdiction in the case or forward him in custody to such Magistrate. Under Proviso (b), if it appears to the officer that there is no sufficient evidence or reasonable ground of suspicion against the accused, he shall release him on a bond to appear before the Magistrate having jurisdiction and shall make a full report of all the particulars of the case to his superior officer. The duty cast by Proviso (b) on an officer of the Force to make a full report to his official superior stands in sharp contrast with the duty cast by Section 173(1)(a) of the Code on the officer-in-charge of a police station to submit a report to the Magistrate empowered to take cognizance of the offence. On the conclusion of an inquiry under Section 8(1), therefore, if the officer of the Force is of the opinion that there is sufficient evidence or reasonable ground of suspicion against the accused, he must file a complaint under Section 190(1)(a) of the Code in order that the Magistrate concerned may take cognizance of the offence.

19. Thus an officer conducting an inquiry under Section 8(1) of the Act does not possess all the attributes of an officer-in-charge of a police station investigating a case under Chapter XIV of the Code. He possesses but a part of those attributes limited to the purpose of holding the inquiry.

20. That the Inquiry Officers cannot be equated generally with police officers is clear from the object and purpose of The Railway Protection Force Act, XXIII of 1957, under which their appointments are made. The short title of that Act shows that it was passed in order “to provide for the constitution and regulation of a Force called the Railway Protection Force for the better protection and security of Railway property”. Section 3(1) of the Act of 1957 empowers the Central Government to constitute and maintain the Railway Protection Force for the better protection and security of Railway property. By Section 10, the Inspector General and every other superior officer and member of the Force “shall for all purposes be regarded as Railway servants within the meaning of the Indian Railways Act, 1890, other than Chapter VI-A thereof, and shall be entitled to exercise the powers conferred on Railway servants by or under that Act”.

Section 11 which defines duties of every superior officer and member of the Force provides that they must promptly execute all orders lawfully issued to them by their superior authority; protect and safeguard Railway property; remove any obstruction in the movement of Railway property and do any other act conducive to the better protection and security of Railway property. Section 14 imposes a duty on the superior officers and members of the Force to make over persons arrested by them to a police officer or to take them to the nearest police station. These provisions are incompatible with the position that a member of the Railway Protection Force holding an inquiry

under Section 8(1) of the Act can be deemed to be a police officer-in-charge of a police station investigating into an offence. Members of the Force are appointed under the authority of the Railway Protection Force Act, 1957, the prime object of which is the better protection and security of Railway property. Powers conferred on members of the Force are all directed towards achieving that object and are limited by it. It is significant that the Act of 1957, by Section 14, makes a distinction between a member of the Force and a police officer properly so called." (emphasis supplied)

118.Reference was then made to Barkat Ram (supra) and Badku Joti Savant (supra), the decision in Raja Ram Jaiswal (supra) being distinguished, as follows:

> "23. The decision in Raja Ram Jaiswal v. State of Bihar on which the respondent relies was considered and distinguished in Badku Joti Savant's case. Raja Ram Jaiswal case involved the interpretation of Section 78(3) of the Bihar and Orissa Excise Act, 1915 which provided in terms that:
>
> "For the purposes of Section 156 of the Code of Criminal Procedure, 1898, the area to which an Excise Officer empowered under Section 7,7 sub-section (2), is appointed, shall be deemed to be a police station, and such officer shall be deemed to be the officer-in-charge of such station." There is no provision in the Act before us corresponding to Section 78(3) of the Bihar Act and therefore the decision is distinguishable for the same reasons for which it was distinguished in Badku Joti Savant's case."

119.In Balkishan A. Devidayal (supra), the same question as arose in Durga Prasad (supra) arose before a Division Bench of this Court. This Court held in paragraph 18 that Durga Prasad (supra) really concluded the question posed before the Court. It then held:

> "20. From the above survey, it will be seen that the primary object of constituting the Railway Protection Force is to secure better "protection and security of the railway property". The restricted power of arrest and search given to the officers or members of the Force is incidental to the efficient discharge of their basic duty to protect and safeguard railway property. No general power to investigate all cognizable offences relating to railway property, under the criminal procedure code has been conferred on any superior officer or member of the Force by the 1957 Act. Section 14 itself makes it clear that even with regard to an offence relating to "railway property", the superior officer or member of the Force making an arrest under Section 13 shall forthwith make over the person arrested to a police officer, or cause his production, in the nearest police station."

120.The Court noticed that offences under this Act were non-cognizable – see paragraph 27 – and concluded:

> "30. Section 7 of the Act provides that the procedure for investigation of a cognizable offence has to be followed by the officer before whom the accused person is produced.

> 31. Reading Section 7 of the 1966 Act with that of Section 14 of the 1957 Act, it is clear that while in the case of a person arrested under Section 12 of the 1957 Act the only course open to the superior officer or member of the Force was to make over the person arrested to a police officer, in the case of a person arrested for a suspected offence under the 1966 Act, he is required to be produced without delay before the nearest officer of the Force, who shall obviously be bound [in view of Article 22(1) of the Constitution] to produce him further before the Magistrate concerned."

121.The Court then referred to section 8 of the Act, making it clear that the enquiry under section 8(1) shall be deemed to be a judicial proceeding – see paragraph 34. Differences between sections 161-162 of the CrPC and sections 9(3) and (4) of the Act were then pointed out as follows:

> "35. The fourth important aspect in which the power and duty of an officer of the RPF conducting an inquiry under the 1966 Act, differs from a police investigation under the Code, is this. Sub-section (3) of Section 161 of the Code says that the police officer may reduce into writing any statement made to him in the course of investigation. Section 162(1), which is to be read in continuation of Section 161 of the Code, prohibits the obtaining of signature of the person on his statement recorded by the investigating officer. But no such prohibition attaches to statements recorded in the course of an inquiry under the 1966 Act; rather, from the obligation to state the truth under pain of prosecution, enjoined by Section 9(3) and (4), it follows as a corollary, that the officer conducting the inquiry may obtain signature of the person who made the statement.

36. Fifthly, under the proviso to sub-section (1) of Section 162 of the Code, oral or recorded statement made to a police officer during investigation may be used by the accused and with the permission of the court by the prosecution to contradict the statement made by the witness in court in the manner provided in Section 145 of the Evidence Act, or when the witnesses statement is so used in cross-examination, he may be re-examined if any explanation is necessary. The statement of a witness made to a police officer during investigation cannot be used for any other purpose, whatever, except of course when it falls within Section 32 or 27 of the Evidence Act. The prohibition contained in Section 162 extends to all statements, confessional or otherwise, during a police investigation made by any person whether accused or not, whether reduced to writing or not, subject to the proviso. In contrast with the Code, in the 1966 Act, there is no provision analogous to the proviso to Section 162(1) of the Code, which restricts or prohibits the use of a statement recorded by an officer in the course of an inquiry under Sections 8 and 9 of the Act."

122.Most importantly, it was then held:

> "37. Sixthly, the primary duty of a member/officer of the RPF is to safeguard and protect railway property. Only such powers of arrest and inquiry have been conferred by the 1966 Act on members of the RPF as are necessary and incidental to the efficient and effective discharge of the basic duty of watch and ward. Unlike a police officer who has a general power under the Code to investigate all cognizable cases the

power of an officer of the RPF to make an inquiry is restricted to offences under the 1966 Act.

xxx xxx xxx 38...An officer of the RPF making an inquiry under the 1966 Act, cannot, by any stretch of imagination, be called an "officer in charge of a police station" within the meaning of Sections 173 and 190(b) of the Code. The mode of initiating prosecution by submitting a report under Section 173 read with clause (b) of Section 190 of the Code is, therefore, not available to an officer of the RPF who has completed an inquiry into an offence under the 1966 Act. The only mode of initiating prosecution of the person against whom he has successfully completed the inquiry, available to an officer of the RPF, is by making a complaint under Section 190(1)(a) of the Code to the Magistrate empowered to try the offence. That an officer of the Force conducting an inquiry under Section 8(1) cannot initiate proceedings in court by a report under Sections 173/190(1)(b) of the Code, is also evident from the provisos to sub-section (2) of Section 8 of the 1966 Act. Under proviso (a), if such officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused, he shall either direct him (after admitting him to bail) to appear before the Magistrate having jurisdiction or forward him in custody to such Magistrate. Under proviso (b), if it appears to the officer that there is no sufficient evidence or reasonable ground of suspicion against the accused, he shall release him on bond to appear before the Magistrate concerned "and shall make a full report of all the particulars of the case to his superior officer". Provisos (a) and (b) put it beyond doubt that where after completing an inquiry, the officer of the Force is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused, he must initiate prosecution of the accused by making a complaint under Section 190(1)(a) of the Code to the Magistrate competent to try the case.

39. From the comparative study of the relevant provisions of the 1966 Act and the Code, it is abundantly clear that an officer of the RPF making an inquiry under Section 8(1) of the 1966 Act does not possess several important attributes of an officer in charge of a police station conducting an investigation under Chapter XIV of the Code. The character of the "inquiry" is different from that of an "investigation" under the Code. The official status and powers of an officer of the Force in the matter of inquiry under the 1966 Act differ in material aspects from those of a police officer conducting an investigation under the Code." (emphasis supplied)

123.This Court then referred to all the earlier judgments of this Court, including that of Durga Prasad (supra), and concluded:

"58. In the light of the above discussion, it is clear that an officer of the RPF conducting an inquiry under Section 8(1) of the 1966 Act has not been invested with all the powers of an officer in charge of a police station making an investigation under Chapter XIV of the Code. Particularly, he has no power to initiate prosecution by filing a charge-sheet before the Magistrate concerned under Section 173 of the Code,

> which has been held to be the clinching attribute of an investigating "police officer". Thus, judged by the test laid down in Badku Joti Savant, which has been consistently adopted in the subsequent decisions noticed above, Inspector Kakade of the RPF could not be deemed to be a "police officer" within the meaning of Section 25 of the Evidence Act, and therefore, any confessional or incriminating statement recorded by him in the course of an inquiry under Section 8(1) of the 1966 Act, cannot be excluded from evidence under the said section."

124.In State of Gujarat v. Anirudhsing and Anr. (1997) 6 SCC 514, one of the questions which arose before this Court was as to whether a member of the State Reserve Police Service acting under the Bombay State Reserve Police Force Act, 1951 could be said to be a police officer within the meaning of section 25 of the Evidence Act. The Court analysed the aforesaid Bombay Act, and set out section 11(1) thereof, which states:

> "When employed on active duty at any place under sub- section (1) of Section 10, the senior reserve police officer of highest rank, not being lower than that of a Naik present, shall be deemed to be an officer-in-charge of a police station for the purposes of Chapter IX of the Code of Criminal Procedure, 1898, Act V of 1898."

125.Since Chapter IX of the Code of Criminal Procedure, 1898, which is the equivalent of Chapter X of the CrPC, deals with 'maintenance of public order and tranquillity', the Court held:

> "19. It would, thus, be clear that a senior reserve police officer appointed under the SRPF Act, though is a police officer under the Bombay Police Act and an officer-in-charge of a police station, he is in charge only for the purpose of maintaining law and order and tranquillity in the society and the powers of investigation envisaged in Chapter XII of the CrPC have not been invested with him." As a result, it was held that such officer could not be said to be a "police officer" within the meaning of section 25 of the Evidence Act.

126.The golden thread running through all these decisions – some of these being decisions of five-Judge Benches which are binding upon us – beginning with Barkat Ram (supra), is that where limited powers of investigation are given to officers primarily or predominantly for some purpose other than the prevention and detection of crime, such persons cannot be said to be police officers under section 25 of the Evidence Act. What must be remembered is the discussion in Barkat Ram (supra) that a "police officer" does not have to be a police officer in the narrow sense of being a person who is a police officer so designated attached to a police station. The broad view has been accepted, and never dissented from, in all the aforesaid judgments, namely, that where a person who is not a police officer properly so-called is invested with all powers of investigation, which culminates in the filing of a police report, such officers can be said to be police officers within the meaning of section 25 of the Evidence Act, as when they prevent and detect crime, they are in a position to extort confessions, and thus are able to achieve their object through a shortcut method of extracting involuntary confessions.

127.Shri Lekhi's assault on Raja Ram Jaiswal (supra), stating that it is wrongly decided and ought to be held to be per incuriam, cannot be countenanced. Raja Ram Jaiswal (supra) correctly decided that the Court in Barkat Ram (supra) had held that the words "police officer" to be found in section 25 of the Evidence Act are not to be construed in a narrow way, but in a wide and popular sense. It is wholly incorrect to say, from a strained reading of Barkat Ram (supra) that, in reality, Barkat Ram (supra) preferred the "narrow" view over the "broad" view. This is also contrary to the understanding of several judgments of this Court which refer to Barkat Ram (supra), and which continued to adopt the broad, and not narrow, test laid down in the said judgment. Also, Raja Ram Jaiswal (supra) has been referred to by several Constitution Benches of this Court, as has been pointed out by us hereinabove, as also other Division Benches, and has never been doubted. In fact, it has always been distinguished in the revenue statute cases as well as the railway protection force cases as being a case in which all powers of investigation, which would lead to the filing of a police report, were invested with excise officers, who therefore, despite not belonging to the police force properly so-called, must yet be regarded as police officers for the purpose of section 25 of the Evidence Act. The vital link between section 25 and such officers then gets established, namely, that in the course of investigation it is possible for such officers to take a shortcut by extorting confessions from an accused person.

128.At this point, we come to the decision in Raj Kumar Karwal (supra). In this case, the very question that arises before us arose before a Division Bench of this Court. The question was set out by the Division Bench as follows:

> "1. Are the officers of the Department of Revenue Intelligence (DRI) who have been invested with the powers of an officer-in-charge of a police station under Section 53 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called 'the Act'), "police officers" within the meaning of Section 25 of the Evidence Act? If yes, is a confessional statement recorded by such officer in the course of investigation of a person accused of an offence under the said Act, admissible in evidence as against him? These are the questions which we are called upon to answer in these appeals by special leave."

129.The Court analysed the NDPS Act, and "conceded" that the punishments prescribed for the various offences under the NDPS Act are very severe. It then went on to hold:

> "11...We, therefore, agree that as Section 25, Evidence Act, engrafts a wholesome protection it must not be construed in a narrow and technical sense but must be understood in a broad and popular sense. But at the same time it cannot be construed in so wide a sense as to include persons on whom only some of the powers exercised by the police are conferred within the category of police officers. See State of Punjab v. Barkat Ram and Raja Ram Jaiswal v. State of Bihar. This view has been reiterated in subsequent cases also."

130.After referring to all the cases that have been cited by us hereinabove, the Court noticed the difference between the NDPS Act and the revenue statutes and railway statute previously considered

in some of the judgments of this Court, in that section 37 of the NDPS Act makes offences punishable under the Act cognizable. The judgment then went on to state:

> "20... Section 52 deals with the disposal of persons arrested and articles seized under Sections 41, 42, 43 or 44 of the Act. It enjoins upon the officer arresting a person to inform him of the grounds for his arrest. It further provides that every person arrested and article seized under warrant issued under sub-section (1) of Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued. Where, however, the arrest or seizure is effected by virtue of Section 41(2), 42, 43 or 44 the section enjoins upon the officer to forward the person arrested and the article seized to the officer-in-charge of the nearest police station or the officer empowered to investigate under Section 53 of the Act. Special provision is made in Section 52-A in regard to the disposal of seized narcotic drugs and psychotropic substances. Then comes Section 53 which we have extracted earlier. Section 55 requires an officer-

in-charge of a police station to take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under the Act within the local area of that police station and which may be delivered to him. Section 57 enjoins upon any officer making an arrest or effecting seizure under the Act to make a full report of all the particulars of such arrest or seizure to his immediate official superior within 48 hours next after such arrest or seizure. 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."

131.After referring to sections 41, 42, 43, 44, 52, 52A and 57 of the NDPS Act, the Court concluded that these powers are more or less similar to the powers conferred on customs officers under the Customs Act, 1962 – see paragraph 21. The Court then concluded:

> 22...The investigation which so commences must be concluded, without unnecessary delay, by the submission of a report under Section 173 of the Code to the concerned Magistrate in the prescribed form. Any person on whom power to investigate under Chapter XII is conferred can be said to be a 'police officer', no matter by what name he is called. The nomenclature is not important, the content of the power he exercises is the determinative factor. The important attribute of police power is not only the power to investigate into the commission of cognizable offence but also the power to prosecute the offender by filing a report or a charge-sheet under Section 173 of the Code. That is why this Court has since the decision in Badku Joti Savant accepted the ratio that unless an officer is invested under any special law with the powers of investigation under the Code, including the power to submit a report under Section 173, he cannot be described to be a 'police officer' under Section 25, Evidence Act. Counsel for the appellants, however argued that since the Act does not prescribe the procedure for investigation, the officers invested with power under Section 53 of the

> Act must necessarily resort to the procedure under Chapter XII of the Code which would require them to culminate the investigation by submitting a report under Section 173 of the Code. Attractive though the submission appears at first blush, it cannot stand close scrutiny. In the first place as pointed out earlier there is nothing in the provisions of the Act to show that the legislature desired to vest in the officers appointed under Section 53 of the Act, all the powers of Chapter XII, including the power to submit a report under Section 173 of the Code. But the issue is placed beyond the pale of doubt by sub-section (1) of Section 36-A of the Act which begins with a non-obstante clause — notwithstanding anything contained in the Code — and proceeds to say in clause (d) as under:
>
> "36-A. (d) a Special Court may, upon a perusal of police report of the facts constituting an offence under this Act or upon a complaint made by an officer of the Central Government or a State Government authorised in this behalf, take cognizance of that offence without the accused being committed to it for trial." This clause makes it clear that if the investigation is conducted by the police, it would conclude in a police report but if the investigation is made by an officer of any other department including the DRI, the Special Court would take cognizance of the offence upon a formal complaint made by such authorised officer of the concerned government. Needless to say that such a complaint would have to be under Section 190 of the Code. This clause, in our view, clinches the matter. We must, therefore, negative the contention that an officer appointed under Section 53 of the Act, other than a police officer, is entitled to exercise 'all' the powers under Chapter XII of the Code, including the power to submit a report or charge-sheet under Section 173 of the Code. That being so, the case does not satisfy the ratio of Badku Joti Savant and subsequent decisions referred to earlier."

132.Despite the fact that Raj Kumar Karwal (supra) notices the fact that the NDPS Act prescribes offences which are "very severe" and that section 25 is a wholesome protection which must be understood in a broad and popular sense, yet it arrives at a conclusion that the designated officer under section 53 of the NDPS Act cannot be said to be a police officer under section 25 of the Evidence Act. The Division Bench also notices that, unlike all the revenue and railway protection statues where offences are non-cognizable, the NDPS Act offences are cognizable. It also notices that the NDPS Act deals with prevention and detection of crimes of a very serious nature. However, Raj Kumar Karwal (supra) did not properly appreciate the following distinctions that arise between the investigative powers of officers who are designated in statutes primarily meant for revenue or railway purposes, as against officers who are designated under section 53 of the NDPS Act: first, that section 53 is located in a statute which contains provisions for the prevention, detection and punishment of crimes of a very serious nature. Even if the NDPS Act is to be construed as a statute which regulates and exercises control over narcotic drugs and psychotropic substances, the prevention, detection and punishment of crimes related thereto cannot be said to be ancillary to such object, but is the single most important and effective means of achieving such object. This is unlike the revenue statutes where the main object was the due realisation of customs duties and the consequent ancillary checking of smuggling of goods (as in the Land Customs Act, 1924, the Sea

Customs Act, 1878 and the Customs Act, 1962); the levy and collection of excise duties (as in the Central Excise Act, 1944); or as in the Railway Property (Unlawful Possession Act), 1966, the better protection and security of Railway property. Second, unlike the revenue statutes and the Railway Act, all the offences to be investigated by the officers under the NDPS Act are cognizable. Third, that section 53 of the NDPS Act, unlike the aforesaid statutes, does not prescribe any limitation upon the powers of the officer to investigate an offence under the Act, and therefore, it is clear that all the investigative powers vested in an officer in charge of a police station under the CrPC – including the power to file a charge-sheet – are vested in these officers when dealing with an offence under the NDPS Act. This is wholly distinct from the limited powers vested in officers under the aforementioned revenue and railway statutes for ancillary purposes, which have already been discussed by this Court in Barkat Ram (supra), with reference to the Land Customs Act; Badku Joti Savant (supra), with reference to the Central Excise Act; Romesh Chandra Mehta (supra), with reference to the Sea Customs Act; Illias (supra), with reference to the Customs Act; and Durga Prasad (supra) and Balkishan (supra) with reference to the Railway Act, to be in aid of the dominant object of the statutes in question, which – as already alluded to – were not primarily concerned with the prevention and detection of crime, unlike the NDPS Act. Also, importantly, none of those statutes recognised the power of the State police force to investigate offences under those Acts together with the officers mentioned in those Acts, as is the case in the NDPS Act. No question of manifest arbitrariness or discrimination on the application of Article 14 of the Constitution of India would therefore arise in those cases, unlike cases which arise under the NDPS Act, as discussed in paragraphs 67 to 70 hereinabove.

133.The Bench also failed to notice section 53A of the NDPS Act and, therefore, falls into error when it states that the powers conferred under the NDPS Act can be assimilated with powers conferred on customs officers under the Customs Act. When sections 53 and 53A are seen together in the context of a statute which deals with prevention and detection of crimes of a very serious nature, it becomes clear that these sections cannot be construed in the same manner as sections contained in revenue statutes and railway protection statutes.

134.The language of section 53(1) is crystal clear, and invests the officers mentioned therein with the powers of "an officer-in-charge of a police station for the investigation of the offences under this Act". The expression "officer in charge of a police station" is defined in the CrPC as follows:

> "(o) "officer in charge of a police station" includes, when the officer in charge of the police station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station- house who is next in rank to such officer and is above the rank of constable or, when the State Government so directs, any other police officer so present;" The expression "police report" is defined in section 2(r) of the CrPC as follows:
>
> "(r) "police report" means a report forwarded by a police officer to a Magistrate under sub-section (2) of section 173;"

135.Section 173(2) of the Code of Criminal Procedure, then provides as follows:

"173. Report of police officer on completion of investigation.— xxx xxx xxx (2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating—

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody under section 170.

(h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or section 376E of the Indian Penal Code (45 of 1860).

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given."

136.Section 36A of the NDPS Act provides as follows:

"36A. Offences triable by Special Courts.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) all offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;

(b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period

not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:

Provided that in cases which are triable by the Special Court where such Magistrate considers—

(i) when such person is forwarded to him as aforesaid; or

(ii) upon or at any time before the expiry of the period of detention authorised by him, that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to an accused person in such case who has been forwarded to him under that section;

(d) a Special Court may, upon perusal of police report of the facts constituting an offence under this Act or upon complaint made by an officer of the Central Government or a State Government authorised in his behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 (2 of 1974), and the High Court may exercise such powers including the power under clause (b) of sub-

section (1) of that section as if the reference to “Magistrate” in that section included also a reference to a “Special Court” constituted under section 36.

(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) thereof to “ninety days”, where they occur, shall be construed as reference to “one hundred and eighty days”:

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the

said period of one hundred and eighty days.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offences punishable under this Act with imprisonment for a term of not more than three years may be tried summarily."

137.What is clear, therefore, is that the designated officer under section 53, invested with the powers of an officer in charge of a police station, is to forward a police report stating the particulars that are mentioned in section 173(2) CrPC. Because of the special provision contained in section 36A(1) of the NDPS Act, this police report is not forwarded to a Magistrate, but only to a Special Court under section 36A(1)(d). Raj Kumar Karwal (supra), when it states that the designated officer cannot submit a police report under section 36A(1)(d), but would have to submit a "complaint" under section 190 of the CrPC misses the importance of the non obstante clause contained in section 36A(1), which makes it clear that the drill of section 36A is to be followed notwithstanding anything contained in section 2(d) of the CrPC. It is obvious that section 36A(1)(d) is inconsistent with section 2(d) and section 190 of the CrPC and therefore, any complaint that has to be made can only be made under section 36A(1)(d) to a Special Court, and not to a Magistrate under section 190. Shri Lekhi's argument, that the procedure under section 190 has been replaced only in part, the police report and complaint procedure under section 190 not being displaced by section 36A(1)(d), cannot be accepted. Section 36A(1)(d) specifies a scheme which is completely different from that contained in the CrPC. Whereas under section 190 of the CrPC it is the Magistrate who takes cognizance of an offence, under section 36A(1)(d) it is only a Special Court that takes cognizance of an offence under the NDPS Act. Secondly, the "complaint" referred to in section 36A(1)(d) is not a private complaint that is referred to in section 190(1)(a) of the CrPC, but can only be by an authorised officer. Thirdly, section 190(1)(c) of the CrPC is conspicuous by its absence in section 36A(1)(d) of the NDPS Act – the Special Court cannot, upon information received from any person other than a police officer, or upon its own knowledge, take cognizance of an offence under the NDPS Act. Further, a Special Court under section 36A is deemed to be a Court of Session, for the applicability of the CrPC, under section 36C of the NDPS Act. A Court of Session under section 193 of the CrPC cannot take cognizance as a Court of original jurisdiction unless the case has been committed to it by a Magistrate. However, under section 36A(1)(d) of the NDPS Act, a Special Court may take cognizance of an offence under the NDPS Act without the accused being committed to it for trial. It is obvious, therefore, that in view of section 36A(1)(d), nothing contained in section 190 of the CrPC can be said to apply to a Special Court taking cognizance of an offence under the NDPS Act.

138.Also, the officer designated under section 53 by the Central Government or State Government to investigate offences under the NDPS Act, need not be the same as the officer authorised by the Central Government or State Government under section 36A(1)(d) to make a complaint before the Special Court. As a matter of fact, if the Central Government is to invest an officer with the power of an officer in charge of a police station under sub-section (1) of section 53, it can only do so after consultation with the State Government, which requirement is conspicuous by its absence when the Central Government authorises an officer under section 36A(1)(d). Also, both section 53(1) and (2) refer to officers who belong to particular departments of Government. Section 36A(1)(d) does not restrict the officer that can be appointed for the purpose of making a complaint to only an officer

belonging to a department of the Central/State Government. There can also be a situation where officers have been designated under section 53 by the Government, but not so designated under section 36A(1)(d). It cannot be that in the absence of the designation of an officer under section 36A(1)(d), the culmination of an investigation by a designated officer under section 53 ends up by being an exercise in futility.

139.Take the anomalous position that would arise as a result of the judgment in Raj Kumar Karwal (supra). Suppose a designated officer under section 53 of the NDPS Act investigates a particular case and then arrives at the conclusion that no offence is made out. Unless such officer can give a police report to the Special Court stating that no offence had been made out, and utilise the power contained in section 169 CrPC to release the accused, there would be a major lacuna in the NDPS Act which cannot be filled.

140.A second anomaly also results from the judgment in Raj Kumar Karwal (supra). Ordinarily, after the police report under section 173(2) of the CrPC is forwarded to the Magistrate (the Special Court in the NDPS Act), the police officer can undertake "further investigation" of the offence under section 173(8) of the CrPC. Section 173(8) reads as follows:

> "(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

141.A three-Judge Bench of this Court in Vinubhai Haribhai Malviya and Ors. v. State of Gujarat and Anr. 2019 SCC OnLine SC 1346 held that the power to further investigate an offence would be available at all stages of the progress of a criminal case before the trial actually commences – see paragraph 49. If, as is contended by Shri Lekhi, that the officer designated under section 53 can only file a "complaint" and not a "police report", then such officer would be denuded of the power to further investigate the offence under section 173(8) after such "complaint" is filed. This is because section 173(8) makes it clear that the further report can only be filed after a report under sub-section (2) (i.e. a police report) has been forwarded to the Court. However, a police officer, properly so-called, who may be investigating an identical offence under the NDPS Act, would continue to have such power, and may, until the trial commences, conduct further investigation so that, as stated by this Court in Vinubhai (supra), an innocent person is not wrongly arraigned as an accused, or that a prima facie guilty person is not so left out. Such anomaly – resulting in a violation of Article 14 of the Constitution of India – in that there is unequal treatment between identically situated persons accused of an offence under the NDPS Act solely due to the whether the investigating officer is a police officer or an officer designated under section 53 of the NDPS Act, would arise only if the view in Raj Kumar Karwal (supra) is correct.

142.A third anomalous situation would arise, in that under section 36A(1)(a) of the NDPS Act, it is only offences which are punishable with imprisonment for a term of more than three years that are exclusively triable by the Special Court. If, for example, an accused is tried for an offence punishable under section 26 of the NDPS Act, he may be tried by a Magistrate and not the Special Court. This being the case, the special procedure provided in section 36A(1)(d) would not apply, the result being that the section 53 officer who investigates this offence, will then deliver a police report to the Magistrate under section 173 of the CrPC. Absent any provision in the NDPS Act truncating the powers of investigation for prevention and detection of crimes under the NDPS Act, it is clear that an offence which is punishable for three years and less can be investigated by officers designated under section 53, leading to the filing of a police report. However, in view of Raj Kumar Karwal (supra), a section 53 officer investigating an offence under the NDPS Act can end up only by filing a complaint under section 36A(1)(d) of the NDPS Act. Shri Lekhi's only answer to this anomaly is that under section 36A(5) of the NDPS Act, such trials will follow a summary procedure, which, in turn, will relate to a complaint where investigation is undertaken by a narcotics officer. First and foremost, trial procedure is post-investigation, and has nothing to do with the manner of investigation or cognizance, as was submitted by Shri Lekhi himself. Secondly, even assuming that the mode of trial has some relevance to this anomaly, section 258 of the CrPC makes it clear that a summons case can be instituted "otherwise than upon complaint", which would obviously refer to a summons case being instituted on a police report – see John Thomas v. Dr. K. Jagadeesan (2001) 6 SCC 30 (at paragraph 8).

143.Section 59 of the NDPS Act is an important pointer to when cognizance of an offence can take place only on a complaint, and not by way of a police report. By section 59(3), both in the case of an offence under section 59(1) [which is punishable for a term which may extend to one year] or in the case of an offence under section 59(2) [which is punishable for a term which shall not be less than 10 years, but which may extend to 20 years], no Court shall take cognizance of any offence under section 59(1) or (2), except on a complaint in writing made with the previous sanction of the Central Government, or, as the case may be, the State Government. Thus, under section 59, in either case i.e. in a case where the trial takes place by a Magistrate for an offence under section 59(1), or by the Special Court for an offence under section 59(2), cognizance cannot be taken either by the Magistrate or the Special Court, except on a complaint in writing. This provision is in terms markedly different from section 36A(1)(d), which provides two separate procedures for taking cognizance of offences made out under the NDPS Act. For all these reasons, it is clear that Raj Kumar Karwal (supra) cannot possibly have laid down the law correctly.

144.At this juncture, it is important to state that we do not accept the submission of Shri S.K. Jain that the "complaint" referred to in section 36A(1)(d) refers only to section 59 of the NDPS Act. A complaint can be made by a designated officer qua offences which arise under the NDPS Act – it is not circumscribed by a provision which requires previous sanction for an offence committed under section 58, as that would do violence to the plain language of section 36A(1)(d). This argument is, therefore, rejected. It is always open, therefore, to the designated officer, designated this time for the purpose of filing a complaint under section 36A(1)(d), to do so before the Special Court, which is a separate procedure provided for under the special statute, in addition to the procedure to be followed under section 53, as delineated hereinabove.

145.Shri Lekhi, however, argued that section 53 does not use the expression "deemed" and that therefore, the power contained in section 53(1) is only a truncated power to investigate which does not culminate in a police report being filed. We cannot agree. The officer who is designated under section 53 can, by a legal fiction, be deemed to be an officer in charge of a police station, or can be given the powers of an officer in charge of a police station to investigate the offences under the NDPS Act. Whether he is deemed as an officer in charge of a police station, or given such powers, are only different sides of the same coin – the aforesaid officer is not, in either circumstance, a police officer who belongs to the police force of the State. To concede that a deeming fiction would give full powers of investigation, including the filing of a final report, to the designated officer, as against the powers of an officer in charge of a police station being given to a designated officer having only limited powers to investigate, does not stand to reason, and would be contrary to the express language and intendment of section 53(1).

146.Another argument of Shri Lekhi is that police officers or policemen who belong to the police force are recognised in the NDPS Act as being separate and distinct from the officers of the Department of Narcotics, etc. This argument has no legs on which to stand when it is clear that the expression "police officers" does not only mean a police officer who belongs to the State police force, but includes officers who may belong to other departments, such as the Department of Excise in Raja Ram Jaiswal (supra), who are otherwise invested with all powers of investigation so as to attract the provisions of section 25 of the Evidence Act. Further, if the distinction between police officer as narrowly defined and the officers of the Narcotics Control Bureau is something that is to be stressed, then any interpretation which would whittle down the fundamental rights of an accused based solely on the designation of a particular officer, would fall foul of Article 14, as the classification between the two types of officers would have no rational relation to the object sought to be achieved by the statute in question, which is the prevention and detection of crime.

147.What remains to be considered is Kanhaiyalal (supra). In this judgment, the question revolved around a conviction on the basis of a confessional statement made under section 67 of the NDPS Act. This Court, after setting out section 67, then drew a parallel between the provisions of section 67 of the NDPS Act and sections 107 and 108 of the Customs Act, 1962, section 32 of the Prevention of Terrorism Act, 2002 ("POTA") and section 15 of the TADA – see paragraph 41. These provisions are as follows:

> Customs Act, 1962 "107. Power to examine persons.—Any officer of customs empowered in this behalf by general or special order of the Principal Commissioner of Customs or Commissioner of Customs may, during the course of any enquiry in connection with the smuggling of any goods,—
>
> (a) require any person to produce or deliver any document or thing relevant to the enquiry;
>
> (b) examine any person acquainted with the facts and circumstances of the case.

108. Power to summon persons to give evidence and produce documents.—(1) Any Gazetted Officer of customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under this Act. (2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required: Provided that the exemption under section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section. (4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, 1860 (45 of 1860)." POTA

32. Certain confessions made to police officers to be taken into consideration.- (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical or electronic device like cassettes, tapes or sound tracks from out of which sound or images can be reproduced, shall be admissible in the trial of such person for an offence under this Act or the rules made thereunder.

(2) A police officer shall, before recording any confession made by a person under sub-section (1), explain to such person in writing that he is not bound to make a confession and that if he does so, it may be used against him: Provided that where such person prefers to remain silent, the police officer shall not compel or induce him to make any confession.

(3) The confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the person makes it.

(4) The person from whom a confession has been recorded under sub-section (1), shall be produced before the Court of a Chief Metropolitan Magistrate or the Court of a Chief Judicial Magistrate along with the original statement of confession, written or recorded on mechanical or electronic device within forty-eight hours. (5) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate, shall, record the statement, if any, made by the person so produced and get his signature or thumb impression and if there is any complaint of torture, such person shall be directed to be produced for medical examination before a Medical Officer not lower in rank than an Assistant Civil Surgeon and thereafter, he shall be sent to judicial custody." TADA "15. Certain confessions made to police officers to be taken into consideration.—(1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such

person or co- accused, abettor or conspirator for an offence under this Act or Rules made thereunder:

> Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused.
>
> (2) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily."

148.Even a cursory look at the provisions of these statutes would show that there is no parallel whatsoever between section 67 of the NDPS Act and these provisions. In fact, section 108 of the Customs Act, 1962 expressly states that the statements made therein are evidence, as opposed to section 67 which is only a section which enables an officer notified under section 42 to gather information in an enquiry in which persons are "examined".

149.Equally, section 32 of POTA and section 15 of TADA are exceptions to section 25 of the Evidence Act in terms, unlike the provisions of the NDPS Act. Both these Acts, vide section 32 and section 15 respectively, have non-obstante clauses by which the Evidence Act has to give way to the provisions of these Acts. Pertinently, confessional statements made before police officers under the provisions of the POTA and TADA are made "admissible" in the trial of such person – see section 32(1), POTA, and section 15(1), TADA. This is distinct from the evidentiary value of statements made under the NDPS Act, where section 53A states that, in the circumstances mentioned therein, statements made by a person before any officer empowered under section 53 shall merely be "relevant" for the purpose of proving the truth of any facts contained in the said statement. Therefore, statements made before the officer under section 53, even when "relevant" under section 53A, cannot, without corroborating evidence, be the basis for the conviction of an accused.

150.Also, when confessional statements are used under the TADA and POTA, they are used with several safeguards which are contained in these sections themselves. So far as TADA is concerned, for example, in Kartar Singh (supra) the following additional safeguards/guidelines were issued by the Court to ensure that the confession obtained in the course of investigation by a police officer "is not tainted with any vice but is in strict conformity with the well-recognised and accepted aesthetic principles and fundamental fairness":

> "263...(1) The confession should be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him;

(2) The person from whom a confession has been recorded under Section 15(1) of the Act, should be produced before the Chief Metropolitan Magistrate or the Chief Judicial Magistrate to whom the confession is required to be sent under Rule 15(5) along with the original statement of confession, written or recorded on mechanical device without unreasonable delay;

(3) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate should scrupulously record the statement, if any, made by the accused so produced and get his signature and in case of any complaint of torture, the person should be directed to be produced for medical examination before a Medical Officer not lower in rank than of an Assistant Civil Surgeon;

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no police officer below the rank of an Assistant Commissioner of Police in the Metropolitan cities and elsewhere of a Deputy Superintendent of Police or a police officer of equivalent rank, should investigate any offence punishable under this Act of 1987.

This is necessary in view of the drastic provisions of this Act. More so when the Prevention of Corruption Act, 1988 under Section 17 and the Immoral Traffic Prevention Act, 1956 under Section 13, authorise only a police officer of a specified rank to investigate the offences under those specified Acts.

(5) The police officer if he is seeking the custody of any person for pre-indictment or pre-trial interrogation from the judicial custody, must file an affidavit sworn by him explaining the reason not only for such custody but also for the delay, if any, in seeking the police custody; (6) In case, the person, taken for interrogation, on receipt of the statutory warning that he is not bound to make a confession and that if he does so, the said statement may be used against him as evidence, asserts his right to silence, the police officer must respect his right of assertion without making any compulsion to give a statement of disclosure;

The Central Government may take note of these guidelines and incorporate them by appropriate amendments in the Act and the Rules."

151.Insofar as POTA is concerned, procedural safeguards while recording confessions have been discussed by this Court in State (NCT of Delhi) v. Navjot Sandhu (2005) 11 SCC 600 as follows:

"Procedural safeguards in POTA and their impact on confessions

156. As already noticed, POTA has absorbed into it the guidelines spelt out in Kartar Singh and D.K. Basu in order to impart an element of fairness and reasonableness into the stringent provisions of POTA in tune with the philosophy of Article 21 and allied constitutional provisions. These salutary safeguards are contained in Sections 32 and 52 of POTA. The peremptory prescriptions embodied in Section 32 of POTA

are:

(a) The police officer shall warn the accused that he is not bound to make the confession and if he does so, it may be used against him [vide sub-section (2)].

(b) The confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the person makes it [vide sub-section (3)].

(c) The person from whom a confession has been recorded under sub-section (1) shall be produced before the Chief Metropolitan Magistrate or Chief Judicial Magistrate along with the original statement of confession, within forty-eight hours [vide sub-section (4)].

(d) The CMM/CJM shall record the statement, if any, made by the person so produced and get his signature and if there is any complaint of torture, such person shall be directed to be produced for medical examination. After recording the statement and after medical examination, if necessary, he shall be sent to judicial custody [vide sub-

section (5)].

The mandate of sub-sections (2) and (3) is not something new. Almost similar prescriptions were there under TADA also. In fact, the fulfilment of such mandate is inherent in the process of recording a confession by a statutory authority. What is necessarily implicit is, perhaps, made explicit. But the notable safeguards which were lacking in TADA are to be found in sub-sections (4) and (5).

157. The lofty purpose behind the mandate that the maker of the confession shall be sent to judicial custody by the CJM before whom he is produced is to provide an atmosphere in which he would feel free to make a complaint against the police, if he so wishes. The feeling that he will be free from the shackles of police custody after production in court will minimise, if not remove, the fear psychosis by which he may be gripped. The various safeguards enshrined in Section 32 are meant to be strictly observed as they relate to personal liberty of an individual. However, we add a caveat here. The strict enforcement of the provision as to judicial remand and the invalidation of the confession merely on the ground of its non-compliance may present some practical difficulties at times. Situations may arise that even after the confession is made by a person in custody, police custody may still be required for the purpose of further investigation. Sending a person to judicial custody at that stage may retard the investigation. Sometimes, the further steps to be taken by the investigator with the help of the accused may brook no delay. An attempt shall however be made to harmonise this provision in Section 32(5) with the powers of investigation available to the police. At the same time, it needs to be emphasised that the obligation to send the confession maker to judicial custody cannot be lightly disregarded. Police custody cannot be given on the mere asking by the police. It shall be remembered that sending a person who has made the confession to judicial custody after he

is produced before the CJM is the normal rule and this procedural safeguard should be given its due primacy. The CJM should be satisfied that it is absolutely necessary that the confession maker shall be restored to police custody for any special reason. Such a course of sending him back to police custody could only be done in exceptional cases after due application of mind. Most often, sending such person to judicial custody in compliance with Section 32(5) soon after the proceedings are recorded by the CJM subject to the consideration of the application by the police after a few days may not make material difference to the further investigation. The CJM has a duty to consider whether the application is only a ruse to get back the person concerned to police custody in case he disputes the confession or it is an application made bona fide in view of the need and urgency involved. We are therefore of the view that the non-compliance with the judicial custody requirement does not per se vitiate the confession, though its non-compliance should be one of the important factors that must be borne in mind in testing the confession.

158. These provisions of Section 32, which are conceived in the interest of the accused, will go a long way to screen and exclude confessions, which appear to be involuntary. The requirements and safeguards laid down in sub- sections (2) to (5) are an integral part of the scheme providing for admissibility of confession made to the police officer. The breach of any one of these requirements would have a vital bearing on the admissibility and evidentiary value of the confession recorded under Section 32(1) and may even inflict a fatal blow on such confession. We have another set of procedural safeguards laid down in Section 52 of POTA which are modelled on the guidelines envisaged by D.K. Basu [(1997) 1 SCC 416]. Section 52 runs as under:

> "52. (1) Where a police officer arrests a person, he shall prepare a custody memo of the person arrested.
>
> (2) The person arrested shall be informed of his right to consult a legal practitioner as soon as he is brought to the police station.
>
> (3) Whenever any person is arrested, information of his arrest shall be immediately communicated by the police officer to a family member or in his absence to a relative of such person by telegram, telephone or by any other means and this fact shall be recorded by the police officer under the signature of the person arrested.
>
> (4) The person arrested shall be permitted to meet the legal practitioner representing him during the course of interrogation of the accused person:
>
> Provided that nothing in this sub-section shall entitle the legal practitioner to remain present throughout the period of interrogation." Sub-sections (2) and (4) as well as sub-section (3) stem from the guarantees enshrined in Articles 21 and 22(1) of the Constitution. Article 22(1) enjoins that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. They are also meant to effectuate the commandment of Article 20(3) that no person accused of any offence shall be compelled to be a witness against

himself."

152.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.

153.The judgment in Kanhaiyalal (supra) then goes on to follow Raj Kumar Karwal (supra) in paragraphs 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.

154.On the other hand, for the reasons given by us in this judgment, the judgments of Noor Aga (supra) and Nirmal Singh Pehlwan v.

Inspector, Customs (2011) 12 SCC 298 are correct in law.

155.We answer the reference by stating:

(i) 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.

(ii) 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.

156.I.A. No. 87826 of 2020 for intervention is dismissed. I.A. No. 81061 of 2020 in Criminal Appeal No. 433 of 2014 is dismissed as withdrawn, with liberty to the applicant to avail of such remedies as are available in law.

157.These Appeals and Special Leave Petitions are now sent back to Division Benches of this Court to be disposed of on merits, in the light of this judgment.

.....J. (R. F. Nariman) .....J. (Navin Sinha) New Delhi.

29th October, 2020.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 152 OF 2013

Tofan Singh ...Appellant

versus

The State of Tamil Nadu ….Respondent

WITH

Crl. A. No. ……..2020

Crl. A. No. …….2020

JUDGMENT

Indira Banerjee, J.

I have gone through the draft judgment prepared by my esteemed brother, Rohinton F. Nariman, J. but have not been able to persuade myself to agree that the officers invested with powers under Section 53 of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act) are police officers within the meaning of Section 25 of the indian Evidence Act, 1872 or that any confessional statement made to them would be barred under the provisions of Section 25 or 26 of the Evidence Act. In my view, any statement made or document or other thing given to an authorised officer referred to in Section 42 of the NDPS Act or an officer invested under Section 53 with the powers of

an Officer in Charge for the purpose of investigation of an offence under the said Act, in the course of any inquiry, investigation or other proceeding, may be tendered in evidence in the trial of an offence under the said Act and proved in accordance with law. I am also unable to agree that a statement recorded under Section 67 of the NDPS Act cannot be used against an accused offender in the trial of an offence under the NDPS Act.

2. The illicit production, distribution, sale and consumption of drugs and psychotropic substances, is a crime of multi-dimensional magnitude, that imposes a staggering burden on the society. In an Article "Narcotic Aggression and Operation Counter Attack" published in the Mainstream dated March 7, 1992, V.R. Krishna Iyer, J. said:-

> "Religion is opium of the people, but today opium is the religion of the people, and like God, is omnipresent, omnipotent and omniscient. Alas! Opium makes you slowly ill and eventually kills, makes you a new criminal to rob and buy the stuff, tempts you to smuggle at risk to become rich quick, makes you invisible trafficker of psychotropic substances and operator of a parallel international illicit currency and sub rosa evangelist mafia culture. Drug business makes you if not killed betimes, the possessor of pleasure, power and empire. What noxious menace is this most inescapable evil that benumbs the soul of student, teacher, doctor, politician, artists and professional, and corrupts innocent millions of youth and promising intellectuals everywhere."

3. In the words of Krishna Iyer, J., "the global scenario in its sombre macabre, devouring delinquency, is dominated by drug abuse and narcotic trade. Trafficking in drugs and psychotropic substances is not any local or regional crime confined only to India and third- world countries, but is a worldwide phenomenon. All nations including India, had huge drug abuse as a threat to the survival of human beings."

4. Illicit drug trafficking is an organised crime, highly sophisticated and complex. This illicit traffic, cleverly carried out by hardened criminals with dexterity and skill, not only violates national drug laws and international conventions, but also involves many other criminal activities, including racketeering, conspiracy, bribery and corruption of public officials, tax evasion, banking law violations, illegal money transfers, import/export violations, crimes of violence and terrorism.

5. Narcotics are often supplied for money and also in exchange for weapons. There are numerous drug trafficking mafia yielding, immense power in various regions of the world, including India. The far-reaching consequences of illicit drug trade, even threatens the integrity and stability of governments and renders law enforcement action vulnerable.

6. Considering the huge profits derived by drug barons from rampant consumption of opium and other narcotic drugs, tycoons of the drug cartels, who have international links, go to any extent, to exploit and manipulate unhealthy economic conditions, as well as corruption and weaknesses in the administration, to push drugs into the society, in complete disregard of the health, morality and well- being of the people.

7. India has been directly engulfed in drug trafficking by virtue of its geographical location, flanked on three sides by illicit narcotic drug production regions. To the West lies the Golden Crescent, comprising Iran, Afghanistan and Pakistan, which illegally produce a huge volume of opium, converted into heroin in illicit factories. In the East, the Golden Triangle is made up of Burma, Thailand and Laos, which produce thousands of tons of opium, cultivated over thousands of hectares of land. The third flank is along the 1,568 km border with Nepal in the North. The Himalayan foot hills and the Terrai regions of Nepal produce inter alia 'cannabis restin'. The long land border with Pakistan and a network of airports and seaports linking India to other countries has facilitated illegal trafficking in drugs.

8. India is not only a transit point for the export of narcotic drugs from the regions surrounding it, to Western and other countries. India also provides a lucrative market for narcotic drugs and psychotropic substances. That apart, there is widespread illicit cultivation of plants yielding narcotic drugs, like opium and ganja in India.

9. Illicit drugs from the Golden Crescent, the Golden Triangle, as well as from Nepal and China, are smuggled into India for consumption and sale and also onward transmission to other countries. Illicit drugs find their way, inter alia, into metropolitan cities of India like Delhi, Mumbai, Bengaluru etc. The amount of illicit narcotic drugs that are seized in India by law enforcement authorities, only constitute the tip of the iceberg.

10. The menace of illicit, manufacture and sale of narcotic drugs and psychotropic substances has been of international concern. As early as in July 1906, Reverend Brent wrote a letter to President Roosevelt expressing his anxiety over the increasing illicit traffic in opium and the necessity of curbing the same. That was followed by a series of meetings amongst various nations of the world, at regular intervals, leading to the enactment of several Drug Laws in those nations.

11. An International Convention was held at Hague in 1912, to inter alia regulate the preparation and sale of raw and prepared opium and other derivatives like Morphine and Cocaine etc. However, the enforcement of the said Convention was kept in abeyance for nearly six years, presumably due to the first World War, and came into force in the middle of 1919.

12. In 1920-1923, the Council of the League of Nations, entrusted the control, manufacture, trade and traffic in drugs inter alia to the Assembly and Council of the League of Nations, the Advisory Committee on the subject relating to traffic in opium and other dangerous drugs, the Health Committee of the League of Nations and its Supervisory Body.

13. The second International Opium Convention, held in Greece in 1925 led to the Geneva Opium Agreement, 1925 which came into force in 1926. The Geneva Opium Agreement made elaborate recommendations in respect, of the problems relating to intake and illicit traffic of opium. The next Convention was held at Geneva in 1931 for limiting the manufacture as well as regulating the distribution of Narcotic drugs. In 1936, another Convention for the suppression of illicit traffic in dangerous drugs was held in Geneva. The Resolutions adopted in the convention came into force in 1939.

14. In 1946, the United Nations established the Commission for Narcotic Drugs as a functional Commission of the Economic and the Social Council. In 1953, the Commission formulated Protocols for limiting and regulating the cultivation of opium plant, international whole-sale trade in opium and the use of opium.

15. In 1961 a Single Convention of Narcotic Drugs was adopted by the United Nations with the objects of: -

> 1. Codification of the existing multilateral Convention on drugs.
>
> 2. Simplification of the International Control Machinery.
>
> 3. Extension of the Control System to the cultivation of other natural products like Cannabis, Resin and Coca leaves in addition to opium and poppy straw and
>
> 4. Adoption of appropriate measures for the treatment and rehabilitation of drug addicts.

16. Schedules I to IV of the said Convention included almost all drugs and Narcotics substances, as well as preparations thereof, which were then in use. The Convention was signed in New York on March 31, 1961 and came into force on December 13, 1964.

17. A Convention of Psychotropic Substances was held at Vienna from 11th January, 1971 to 21st February, 1971. The Resolutions adopted in the Convention of Psychotropic Drugs, which came into force with effect from August,1971, contemplated restriction of the use and preparation of psychotropic substances. It was also resolved that stringent penal provisions be made to control the use of psychotropic substances.

18. In 1981, the General Assembly of the United Nations adopted an International Drug Abuse Control Strategy and a five-year Action Plan for 1982-86. In 1984 the U.N. General Assembly adopted the declaration on the Control of Drug Trafficking and Drug Abuse. Again, there was an International Conference on drug abuse and illicit trafficking held in Vienna from June 17 to June 26, 1987. The principal document prepared before the Conference by the United Nations was a comprehensive multi-disciplinary plan of future activities to control drug abuse.

19. The United Nations Conference held at Vienna from 25 th November to 20th December, 1988 expressed concern at the magnitude of and rising trends in the illicit production of, demand for and traffic in Narcotic Drugs and Psychotropic Substances all over the world and therefore adopted the Convention against illicit traffic in Narcotic Drugs and Psychotropic Substances, 1988. The purpose of the Convention was as follows:

> “1. The purpose of this Convention is to promote co-operation among the parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. In carrying

> out their obligations under the Convention, the parties shall take necessary measure, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems.
>
> 2. The parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and affairs of other States.
>
> 3. A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other party by its domestic law".

20. The Resolutions passed in the said Convention pertained to offences and sanctions relating to illicit trafficking in narcotic drugs and psychotropic substances, exercise of Jurisdiction, confiscation, extradition, mutual legal assistance, transfer of proceedings, co- operation and training, international cooperation and assistance, controlled delivery, enactment of provisions to prevent diversion of trade, materials and equipment for illicit production of narcotic drugs and psychotropic substances, measures to eradicate illicit cultivation of narcotic plants and elimination of illicit demand for narcotic drugs and psychotropic substances.

21. India participated in many of the international conferences and/or conventions. India had participated in the Second International Opium Conference at Geneva on 17th November, 1924 and again on 19th February, 1925, and adopted the convention relating to dangerous drugs. Being a signatory to the said Convention, which resolved to take further measure to suppress the contraband traffic in and abuse of Dangerous Drugs especially those derived from Opium, Indian Hemp and Coca Leaf, the Indian Legislature passed the Dangerous Drugs Act, 1930 to control certain operations relating to dangerous drugs and provide for increased penalties for the offences relating to such operations. The said Act was amended from time to time by various legislations.

22. It may be pertinent to point out that, even before the enactment of the Dangerous Drugs Act of 1930, there was statutory control over Narcotic Drugs in India through enactments like the Opium Acts of 1857 and 1878.

23. With the developments in the field of illicit drug traffic and drug abuse at the National and International level, many flaws were noticed in the laws. It was realised that the provisions of the Acts were not stringent enough to effectively control drug abuse and related crimes like preparation, transport, sale etc. of narcotic drugs and psychotropic substances. The laws in existence were not a deterrent to illicit business in narcotic drugs and psychotropic substances. An urgent need was, therefore, felt for introducing a comprehensive legislation on Narcotic Drugs and Psychotropic Substances.

24. The NDPS Act has been enacted, inter alia, to implement International Conventions relating to narcotic drugs and psychotropic substances to which India has been a party and also to implement the Constitutional policy enshrined in Article 47 of the Constitution of India, which casts a duty

upon the State to improve public health and also to prohibit consumption, except for medicinal purposes, of drugs which are injurious to health.

25. As stated in its Preamble, the NDPS Act has been enacted to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances and for matters connected therewith. It is not a penal statute like the Indian Penal Code (IPC).

26. The Statement of Objects and Reasons for the NDPS Act as laid before Parliament is as under:

> "The statutory control over narcotic drugs is exercised in India through a number of Central and State enactments. The Principal Central Acts, namely, the Opium Act, 1857, the Opium Act, 1878 and the Dangerous Drugs Act, 1930 were enacted a long time ago. With the passage of time and the developments in the field of illicit drug traffic and drug abuse at national and international level many deficiencies in the existing laws have come to notice, some of which are indicated below:
>
> (i) The scheme of penalties under the present Acts is not sufficiently deterrent to meet the challenge of well organised gangs of smugglers. The Dangerous Drugs Act, 1930 provides for a maximum term of imprisonment of three years with or without fine and four years imprisonment with or without fine with repeat offences. Further, no minimum punishment is prescribed in the present laws, as a result of which drug traffickers have been sometimes let off by the courts with nominal punishment. The country has for the last few years been increasingly facing the problem of transit traffic of drugs coming mainly from some of our neighbouring countries and destined mainly to western countries.
>
> (ii) The existing central laws do not provide for investing the officers of a number of important central enforcement agencies like narcotics, customs, central excise etc., with the power of investigation of offences under the said laws.
>
> (iii) Since the enactment of the aforesaid three Central Acts a vast body of international law in the field of narcotics control has evolved through various international treaties and protocols. The Government of India has been a party to these treaties and conventions which entail several obligations which are not covered or are only partly covered by the present Acts.
>
> (iv) During the recent years new drugs of addiction which have come to be known as psychotropic substances have appeared on the scene and posed serious problems to national governments.

There is no comprehensive law to enable exercise of control over psychotropic substances in India in the manner as envisaged in the Convention on Psychotropic Substances, 1971 to which also India has acceded."

27. The NDPS Act was prompted by an urgent need to enact a comprehensive legislation to, inter alia, consolidate and amend the existing laws relating to narcotic drugs and psychotropic substances, strengthen the existing controls over drug abuses, prevent the funding of illicit trade in narcotic drugs and psychotropic substances enhance the penalties particularly for trafficking offences, make provisions for exercising effective control over psychotropic substances and to make provisions for the implementation of international conventions relating to narcotic drugs and psychotropic substances, which India has endorsed. The NDPS Act also envisages the Constitution of a National Fund for the control of drug abuse.

28. There are two main enactments on the subject, the NDPS Act and the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, hereinafter refered to as the 1988 Act.

29. The NDPS Act consolidated and amended the existing laws relating to narcotic drugs, strengthened the existing control over drug abuse, considerably enhanced the punishments particularly for trafficking offences, made provision for exercising effective control over psychotropic substances and provided for the implementation of the then existing international conventions.

30. The NDPS Act with Chapters I to VIII, comprises 83 sections. Chapter I contains the short title of the Act, definitions of various words and expressions used therein and a provision enabling addition to and deletion from the list of psychotropic substances.

31. Chapter II of the NDPS Act enables the Central Government to take measures for preventing and combating the abuse of narcotic drugs and psychotropic substances and the illicit traffic therein and also empowers the Central and/or State Government to appoint inter alia a Commission, a Consultative Committee, other authorities and officers for the purposes of the said Act. Chapter IIA inter alia provides for the constitution of a National Fund for control of drug abuse.

32. In exercise of power conferred by Section 4(3) of the NDPS Act, the Central Government constituted the Narcotics Control Bureau, hereinafter referred to as NCB. The officers of the NCB are not police officers, but are from different departments of the Government, including officers of the Directorate of Revenue Intelligence, Customs Officers and Central Excise Officers.

33. The Narcotics Control Bureau (NCB) has been combating drug trafficking in India. Moreover, in view of India's commitment to international cooperation for suppression of drug trafficking, NCB has also been playing a key role in assisting authorities in foreign countries to suppress illicit drug trade.

34. Chapter III of the NDPS Act comprising Sections 8 to 14 prohibits and/or controls and/or regulates certain operations and activities relating to narcotic drugs and psychotropic substance,

and also relating to property derived from an offence under the NDPS Act, as well as property including any building, warehouse or vehicle used in connection with an offence under the NDPS Act.

35. Sections 15 to 32B in Chapter IV provide for punishment for contraventions in relation to poppy straw, coca plant and coca leaves, prepared opium, opium poppy and opium, cannabis plant, manufactured drugs and preparations, psychotropic substances, illegal import or export of narcotic drugs and psychotropic substances, external dealings in narcotic drug and psychotropic substances, etc. 36 Section 35(1) of the NDPS Act provides that 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. " As per the Explanation to Section 35(1) "culpable mental state includes intention motive, knowledge of a fact and belief in, or reason to believe, a fact." Section 35(2) provides that for the purpose of Section 35 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."

37. The constitutional vires of Section 35 of the NDPS Act has been upheld by this Court in Noor Aga v. State of Punjab and Anr.3. This Court held:-

> "23. Section 35 of the Act provides for presumption of culpable 3 (2008) 16 SCC 417 mental state. It also provides that an accused may prove that he had no such mental state with respect to the act charged as an offence under the prosecution. Section 54 of the Act places the burden of proof on the accused as regards possession of the contraband to account for the same satisfactorily.
>
> xxx xxx xxx
>
> 34. The Act contains draconian provisions. It must, however, be borne in mind that the Act was enacted having regard to the mandate contained in International Conventions on Narcotic Drugs and Psychotropic Substances. Only because the burden of proof under certain circumstances is placed on the accused, the same, by itself, in our opinion, would not render the impugned provisions unconstitutional.
>
> 35. A right to be presumed innocent, subject to the establishment of certain foundational facts and burden of proof, to a certain extent, can be placed on an accused. It must be construed having regard to the other international conventions and having regard to the fact that it has been held to be constitutional. Thus, a statute may be constitutional but a prosecution thereunder may not be held to be one. Indisputably, civil liberties and rights of citizens must be upheld.
>
> xxx xxx xxx

> 55. The provisions of Section 35 of the Act as also Section 54 thereof, in view of the decisions of this Court, therefore, cannot be said to be ex facie unconstitutional. We would, however, keeping in view the principles noticed hereinbefore examine the effect thereof, vis-`-vis the question as to whether the prosecution has been able to discharge its burden hereinafter. "

38. Section 36 of the NDPS Act provides for the constitution of Special Courts for speedy trial of offences under the said Act. Section 36A(1) inter alia provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973 all offences under the NDPS Act, which are punishable with imprisonment for a term of more than three years are to be triable only by the Special Court constituted under the said Act.

39. Section 36A(5) of the NDPS Act provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, the offences punishable under NDPS Act, with imprisonment for a term of not more than three years, may be tried summarily.

40. Chapter V of the NDPS Act comprising Sections 41 to 68 prescribes the procedures to be followed by the officers appointed under the NDPS Act, for exercise of the powers of entry, search, seizure arrest, disposal of seized materials, inquiry and investigation for implementation of the provisions of the said Act.

41. Chapter VA consisting of 25 sections, inserted in the NDPS Act by the NDPS Amendment Act, 1988, provides for forfeiture of income, earnings or assets derived from or attributable to the contravention of the NDPS Act.

42. Chapter VI being the last chapter contains miscellaneous provisions including Sections 79, 80 and 81 set out hereinbelow:-

> "79. Application of the Customs Act, 1962.—All prohibitions and restrictions imposed by or under this Act on the import into India, the export from India and transhipment of narcotic drugs and psychotropic substances shall be deemed to be prohibitions and restrictions imposed by or under the Customs Act, 1962 (52 of 1962) and the provisions of that Act shall apply accordingly: Provided that, where the doing of anything is an offence punishable under that Act and under this Act, nothing in that Act or in this section shall prevent the offender from being punished under this Act.
>
> 80. Application of the Drugs and Cosmetics Act, 1940 not barred.—The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Drugs and Cosmetics Act, 1940 (23 of 1940) or the rules made thereunder.
>
> 81. Saving of State and special laws.—Nothing in this Act or in the rules made thereunder shall affect the validity of any Provincial Act or an Act of any State Legislature for the time being in force, or of any rule made thereunder which imposes

> any restriction or provides for a punishment not imposed by or provided for under this Act or imposes a restriction or provides for a punishment greater in degree than a corresponding restriction imposed by or a corresponding punishment provided for by or under this Act for the cultivation of cannabis plant or consumption of, or traffic in, any narcotic drug or psychotropic substance within India."

43. The scheme of the NDPS Act makes it patently clear that it essentially makes provisions, as are deemed necessary, for preventing and combating the abuse of and illicit trade and trafficking in narcotic drugs and psychotropic substances, including the financing of (i) the cultivation of coca plant; (ii) cultivation of opium poppy or any cannabis plant; (iii) the production, manufacture, possession, sale, purchase, transportation, warehousing, concealment, use, consumption, import inter-State, export inter- State, import into India, export from India or transhipment of narcotic drugs or psychotropic substances; (iv) dealing in any activities in narcotic drugs or psychotropic substances other than those referred to above or (v) the hiring or letting out any premises for the carrying on of any of the activities referred to above.

44. The NDPS Act has been amended by the NDPS (Amendment) Act, 1988, to provide for some stringent measures, including provision for death penalty in certain cases of commission of offence after previous conviction and most of the offences under the Act have been made non-bailable. It also introduced a new Chapter V A to the NDPS Act, based on the Vienna Convention of 1988, which provided for forfeiture of property derived from or used in illicit traffic.

45. The object of the aforesaid amendment as stated in the Objects and Reasons of the NDPS (Amendment) Act, 1988 placed before Parliament is as follows:-

> "6. Statement of objects and reasons of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 1988.- (1) In recent years, India has been facing a problem of transit traffic in illicit drugs. The spill over from such traffic has caused problems of abuse and additction. The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishments for drug trafficing offences. Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of the Narcotic Drugs and Psychotropic Substances Act, 1985, the need to amend the law to further strengthen it, has been felt.
>
> (2) A Cabinet Sub-Committee, which was constituted for combating drug traffic and preventing drug abuse, also made a number of recommendations of the Cabinet Sub-Committee and the working of the Narcotic Drugs and Psychotoripc Substances Act, in the last three years, it is proposed to amend the said Act.

The amendments, inter alia, provide for the following :

(i) to constitute a National Fund for control of Drugs abuse to meet the expenditure incurred in connection with the measures for combating illicit traffic and preventing drug abuse;

(ii) to bring certain controlled substances, which are used for manufacture of Narcotic drugs and Psychotropic Substances, under the ambit of Narcotic Drugs and Psychotropic Substances Act and to provide deterrent punishment for violation thereof;

(iii) to provie that no sentence awarded under the Act shall be suspended, remitted or commuted;

(iv) to provide that no sentence awarded under the Act shall be suspended, remitted or commuted;

(iv) to provide for pre-trial disposal of seized drugs;

(v) to provide death penalty on second conviction in respect of specified quantities of certain drugs;

(vi) to provide for forfeiture of property and detailed procedure relating to the same; and

(vii) to provide that the offences shall be congnizable and non-

bailable.

(3) The Bill seeks to achieve the above objectives."

46. The NDPS Act was further amended by the NDPS (Amendment) Act, 2001, to rationalize the sentence structure to ensure that drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, but addicts and others who commit less serious offences, are sentenced to less severe punishment. There were further amendments by the NDPS (Amendment) Act 2014 and the Finance Act 2016 (28 of 2016).

47. However, despite an elaborate statutory framework, the NDPS Act is not being effectively implemented. It is difficult to check the expanding network of drug-traffickers. To evade the enforcement authorities, the drug traffickers take recourse to the most ingenious and devious ways of trading illicitly in narcotic drugs and psychotropic substances. Investigations are often half-hearted, for various reasons including underhand deals.

48. Illicit business in and consumption of narcotic drugs and psychotropic substances is endangering the social and economic stability of India and the developing countries, adversely affecting the health of the people, causing malnutrition related ailments, causing a spurt in crimes

and increase in the spread of communicable diseases such as AIDS (Acquired Immuno Deficiency Syndrome), caused by sharing of needles for administration of narcotic drugs. The lure of money, vulnerability of adolescents, poverty and other facets of socio-economic deprivations aggravate this menace and provide sustenance to the racketeers involved in this flourishing illicit business.

49. The Law Commission of India, in its 155 th Report on Narcotic Drugs and Psychotropic Substances Act, 1985, submitted in July, 1997, inter alia, stated: -

> "The crimes are generally of two kinds:
>
> (a) Traditional crimes affecting individual persons, like murder, theft, assault, etc.;
>
> (b) White-Collar Crimes or Socio Economic Crimes affecting the public at large like smuggling, hoardings, adulteration, illicit trafficking and sale of narcotic drugs and psychotropic substances etc. White-

collar crimes are of recent origin and may be defined as all illegal acts committed by unlawful means — the purpose being to obtain money or property or business or personal gain or profit. Such crimes are committed by the organised gangs having influence. Some of the salient features of the white-collar crimes are as under:

> (a) there is no social sanction against such white-collar crimes;
>
> (b) these crimes are committed by organised gangs equipped with most modern technology;
>
> (c) there is generally a nexus between the politicians, law enforcing agencies and the offenders indulging directly in such crimes;
>
> (d) there is no organised public opinion against such crimes; and
>
> (e) the traditional crimes are isolated crimes, while the white-collar crimes are part and parcel of the society.

1.3. Drug Trafficking and illicit use of Narcotic Drugs and Psychotropic Substances.—The genesis and development of the Indian drug trafficking scenario are closely connected with the strategic and geographical location of India which has massive inflow of heroin and hashish from across the Indo-Pak border originating from "Golden Crescent" comprising of Iran, Afghanistan and Pakistan which is one of the major illicit drug supplying areas of the world. On the North Eastern side of the country is the "Gold Triangle" comprising of Burma, Loas and Thailand which is again one of the largest sources of illicit opium in the world. Nepal also is a traditional source of cannabis, both herbal and resinous. Cannabis is also of wide growth in some states of India. As far as illicit drug trafficking from and through India is concerned, these three sources of supply have been instrumental in drug trafficking. Prior to the enactment of the Narcotic Drugs and Psychotropic

Substances Act, 1985, the statutory control over narcotic drugs was exercised in India through a number of Central and State enactments. The principal Central Acts were (a) the Opium Act, 1857, (b) the Opium Act, 1878 and

(c) the Dangerous Drugs Act, 1930."

50. Socio-economic crimes such as trafficking in narcotic drugs and psychotropic substances, food adulteration, black marketing, profiteering and hoarding, smuggling, tax evasion and the like, which are "white collar crimes" affect the health and material welfare of the community as a whole, as against that of an individual victim, and are, by and large, committed not by disadvantaged low class people, but by very affluent and immensely powerful people, who often exploit the less advantaged, to execute their nefarious designs. Such crimes have to be dealt with firmly and cannot be equated with other crimes, committed by individual offenders against individual victims.

51. There can be no doubt at all, that the right to a fair trial, encompassing fair procedure is guaranteed under Article 21 of the Constitution of India. It is too late in the day to contend otherwise. The safeguards provided in a statute, are always scrupulously to be adhered to, more so when the punishment is very severe. However, in my view, each case has to be decided taking into account all relevant factors, particularly, the evidence against the accused.

52. It is a well settled principle of criminal jurisprudence that an accused is presumed innocent, unless proved guilty beyond reasonable doubt, except where the statute, on existence of certain circumstances, casts a reverse burden on the accused, to dispel the presumption of guilt, as in the case of Section 304B of the Indian Penal Code and many other statutes, particularly those dealing with socio economic offences. The Legislature may, in public interest, create an offence of strict liability where mens rea is not necessary. There are presumptive provision in the NDPS Act, such as Sections 35, 54 and 66. Under Section 54 of the NDPS Act presumption of commission of an offence may, inter alia, be drawn from the possession of any narcotic drug or psychotropic substance, or any apparatus for manufacture or preparation thereof. The presumption is rebuttable.

53. The punishments prescribed for many of the offences under the NDPS Act are very severe, as observed by my esteemed brother, Nariman J. Sections 21(b), 22(b), 23(b) and 25A prescribe punishment of rigorous imprisonment, which may extend to ten years. Sections 21(c) and 23(c), 24 and 27A prescribe the punishment of rigorous imprisonment for a term which shall not be less than ten years but may extend to twenty years. Offences under Section 27B are punishable with rigorous imprisonment of not less than 3 years which may extend to 10 years. Under Section 28, attempts to commit an offence entail punishment for the offence. Section 29 makes abetment of and criminal conspiracy to commit an offence, under the NDPS Act punishable with the punishment for the offence. Section 30 prescribes punishment of rigorous imprisonment for preparation for offences, for a term which is not to be less than one half of the minimum term if any, but might extend to one half of the maximum term of imprisonment, which might have been awarded for committing the offence. Section 31 provides for enhanced punishment for offences repeated after previous conviction including death sentence in some exceptional cases. Certain provisions, such as Sections 35, 54 and 66 for presumptions, though rebuttable, also operate against the accused under the

NDPS Act. When a statute has drastic penal provisions, the authorities investigating the crime under such law, have a greater duty of care, and the investigation must not only be thorough, but also of a very high standard.

54. There are inbuilt safeguards in the NDPS Act to protect a person accused of an offence under the said Act, from unnecessary harassment, or malicious or wrongful prosecution. Reference may in particular be made to Section 58, set out hereinafter, which provides for punishment of any person, authorized under Section 42 or 43 or 44 for vexatious entry, search, seizure, or arrest.

"58. Punishment for vexatious entry, search, seizure or arrest.— (1) Any person empowered under section 42 or section 43 or section 44 who— (a) without reasonable ground of suspicion enters or searches, or causes to be entered or searched, any building, conveyance or place;

(b) vexatiously and unnecessarily seizes the property of any person on the pretence of seizing or searching for any narcotic drug or psychotropic substance or other article liable to be confiscated under this Act, or of seizing any document or other article liable to be seized under section 42, section 43 or section 44; or (c) vexatiously and unnecessarily detains, searches or arrests any person, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both. (2) Any person wilfully and maliciously giving false information and so causing an arrest or a search being made under this Act shall be punishable with imprisonment for a term which may extend to two years or with fine or with both.

55. As argued by Mr. Sushil Kumar Jain, Senior Advocate appearing for the Appellant, the process under the NDPS Act begins, when a competent officer, as specified in Section 41(2), empowered by a general order of the Central Government or the State Government, has reason to believe, either from his personal knowledge or from information given by any person, whose name need not be disclosed, and taken down in writing, that any person has committed an offence punishable under the NDPS Act or any narcotic drug, psychotropic substance or any document, article etc. as mentioned in Section 41(2) is kept concealed in any building conveyance or place.

56. The power of an officer empowered under Section 41(2) to authorize arrest or search, is subject to his having reason to believe from personal knowledge or information given by any person and taken in writing, that the person has committed an offence punishable under the NDPS Act or that any narcotic drug or psychotropic substance or controlled substance in respect of which any offence under the NDPS Act has been committed, or any document or other article which may furnish evidence of 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 place.

57. Section 42 enables a duly empowered officer to enter any building, conveyance or place, conduct a search, seize narcotic drugs, psychotropic substances, and other articles in accordance with Section 42(1)(c), and detain, search or even arrest any person, subject to his having " the reason to believe, from personal 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 of 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 V-A of this Act is kept or concealed in any building, conveyance or enclosed place."

58. Section 42(2) requires the officer taking down information and/or recording the grounds of his belief, to send a copy thereof to his immediate superior within 72 hours. Section 43 enables any officer of any of the departments mentioned in Section 42 to make arrests and seizures of inter alia narcotic drugs and psychotropic substances in public places, subject to his having reason to believe that an offence under the NDPS Act has been committed, and along with such drug or substance, any animal or conveyance or article liable to confiscation under the NDPS Act, any document or other article, which he has reason to believe may furnish evidence of the commission of an offence punishable under the NDPS Act, 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 the NDPS Act. The safeguards in Sections 41(2), 42 and 43 also apply to the exercise of powers under Section 44 of entry, search, seizure and arrest in relation to coca plant, opium, poppy and cannabis plant by officers empowered and/or authorized under Section 42. The Power of an officer empowered under Section 42 to attach opium, poppy, cannabis plant or coca plant under Section 48 is subject to his having reason to believe that the same have illegally been cultivated.

59. The condition precedent for exercise of power under Sections 41(2), 42(1), 43 or 44 is "reason to believe" and not just reason to "suspect" that the circumstances specified in the aforesaid provisions for action thereunder exist. The use of the words "reason to believe" in Sections 41, 42, 43 and 48 is in contradistinction with use of the phrase "Reason to Suspect", in Section 49 of the NDPS Act.

60. In A. S. Krishnan and Ors. v. State of Kerala 4, cited by Mr. Sushil Kumar Jain, this Court held:-

> "9. ...."Reason to believe" is another facet of the state of mind. "Reason to believe" is not the same thing as "suspicion" or "doubt" and mere seeing also cannot be equated to believing. "Reason to believe" is a higher level of state of mind. Likewise "knowledge" will be slightly on a higher plane than "reason to believe". A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same.

61. In Income Tax Officer, I Ward, District VI, Calcutta and Ors. v. Lakhmani Mewal Das5 cited by Mr. Jain, this court held:-

> "8. .....The expression "reason to believe" does not mean a purely subjective satisfaction on the part of the Income Tax Officer. The reason must be held in good faith. It cannot he merely a pretence. It is open to the court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant for the

purpose of the section." 4 (2004) 11 SCC 576 5 (1976) 3 SCC 757

62. The absence of "reasons to believe" would render entry, search, seizure or arrest, Sections 41(2) 42, 43 and 44 of the NDPS Act bad in law and also expose the officer concerned to disciplinary action as also punishment under Section 58 for a "vexatious" entry, search, seizure or arrest, as argued by Mr. Jain.

63. The power of an officer authorised under Section 42, to stop and search conveyance under Section 49, is subject to his having reasons to suspect that any animal or conveyance is, or is about to be, used for the transport of any narcotic drug or psychotropic substance or controlled substance, in respect of which he suspects that any provision of the NDPS Act has been, or is being, or is about to be, contravened.

64. Section 50(1) gives the option to a person, to be personally searched under Section 41/42, to require that he be taken before the nearest Magistrate or Gazetted Officer, in whose presence he might be searched. If he cannot be taken to the nearest Magistrate or Gazetted Officer, for the reasons contained in Section 50(5), the officer authorized under Section 42 may proceed to search him, as provided under Section 100 of the Cr.P.C.

65. Section 50(5), inserted by amendment in 2001, does not dilute the safeguards in the preceding sub-sections for search of a person in the presence of a Magistrate or Gazetted Officer, if such person so requires. It is only in very urgent cases, that a person can be examined in accordance with Section 50(5). After the search is so conducted in terms of Section 50(5), the Officer would have to record the reasons for the belief, which necessitated such search, in the absence of a Magistrate or Gazetted Officer, and send a copy thereof to his immediate superior officer within 72 hours. [Section 50(6)]. Section 51 makes the provisions of the Cr.P.C. applicable to all warrants, arrests, searches and seizures under the NDPS Act, insofar as they are not inconsistent with the NDPS Act.

66. Section 52(1) of the NDPS Act provides that a ny officer arresting a person under Section 41, Section 42, Section 43 or Section 44 shall, as soon as may be, inform him of the grounds for such arrest. Section 52(2) requires that every person arrested and article seized under warrant issued under sub-section (1) of Section 41, shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued. Sub-section (3) of Section 52 requires that every person arrested and article seized under sub-section (2) of Section 41, Section 42, Section 43 or Section 44 shall be forwarded without unnecessary delay to—

(a) the Officer-in-Charge of the nearest Police Station, or

(b) the officer empowered under Section 53.

67. For imposing a punishment higher than the minimum term of imprisonment or amount of fine prescribed, the Court is required to take into account, in addition to such factors as it deems fit, the following factors:

(a) the use or threat of use of violence or arms by the offender;

(b) the fact that the offender holds a public office and that he has taken advantage of that office in committing the offence;

(c) the fact that the minors are affected by the offence or the minors are used for the commission of an offence;

(d) the fact that the offence is committed in an educational institution or social service facility or in the immediate vicinity of such institution or faculty or in other place to which school children and students resort for educational, sports and social activities;

(e) the fact that the offender belongs to organised international or any other criminal group which is involved in the commission of the offence; and

(f) the fact that the offender is involved in other illegal activities facilitated by commission of the offence.

68. The NDPS Act is a complete code. The NDPS Act specifically makes some provisions of the Cr.P.C applicable to proceedings under the NDPS Act. The Act is very specific on which of the provisions of the Cr.P.C. are to apply to proceedings under the NDPS Act.

69. A careful reading of the provisions of the NDPS Act show:

(i) Words and expressions used in the NDPS Act and not defined in the said Act, but defined in the Cr.P.C. would, unless the context otherwise requires, have the meanings assigned to such words and expressions in the Cr.P.C. [Section 2(xxix)]

(ii) Nothing contained in section 360 of the Criminal Procedure Code, 1973 or in the Probation of Offenders Act, 1958 is to apply to a person convicted under the NDPS Act, unless such a person is under 18 years of age. [Section 33].

(iii) Notwithstanding anything contained in the Cr.P.C, Special Courts constituted under Section 36 of the NDPS Act are to try all offences punishable with imprisonment for a term of more than three years.

[Section 36A(1)(a)].

(iv) The Cr.P.C does not apply to the power of a Judicial Magistrate to authorize the detention of a person accused or suspected of an offence under the NDPS Act, produced before him, in such custody as he thinks fit, for a period not exceeding 15 days, and that of an Executive Magistrate to do so for a period not exceeding 7 days. [Section 36A(1)

(b)].

(v) Where a person accused or suspected of an offence under the NDPS Act, is forwarded to a Special Court under Clause (b) of Section 36A of the NDPS act, the Special Court shall have the same power which a Magistrate, having jurisdiction to try a case, may exercise under Section 167 of the Cr.P.C., notwithstanding anything to the contrary in the Cr.P.C. [Section 36A(1)(c)].

(vi) While trying an offence under the NDPS Act, the Special Court may also try an offence other than an offence under the NDPS Act, with which the accused may under the Cr.P.C. be charged at the same trial. [Section 36A(2)].

(vii) Nothing contained in Section 36A of the NDPS Act is to be deemed to affect the special powers of the High Court regarding bail under Section 439 of Cr.P.C. [Section 36A(3)].

(viii) In respect of offences under the NDPS Act punishable under Sections 19 or 24 or 27A thereof involving commercial quantity, the references in Section 167(2) of the Cr.P.C. to "90 days" where they occur, are to be construed as reference to 180 days. [Section 36A(4)].

(ix) Notwithstanding anything contained in the Cr.P.C., offences punishable under NDPS Act, with imprisonment not exceeding three years might be tried summarily. [Section 36 A(5)]

(x) The High Court might exercise, so far as may be, all the powers of Appeal and Revision conferred by Chapter XXIX and XXX of the Cr.P.C. as if a Special Court within the limits of its territorial jurisdiction were a Court of Session. [Section 36 B]

(xi) Save as otherwise provided in the NDPS Act, the provisions of the Cr.P.C., (including provisions as to bails and bonds) are to apply to proceedings before a Special Court and for the purpose of the said provisions, the Special Court is deemed to be a Court of Session and the person conducting prosecution before Special Court is deemed to be a Public Prosecutor. [Section 36 C]

(xii) Until a Special Court is constituted as per the NDPS (Amendment) Act, 1988, any offence triable by a Special Court, is, notwithstanding anything in the Cr.P.C., triable by a Court of Session. [Section 36 D]

(xiii) The power of the High Court under Section 407 of the Cr.P.C. to transfer cases is not affected by Section 36 D (2) in view of the proviso thereto.

(xiv) Notwithstanding anything in the Cr.P.C. every offence punishable under the NDPS Act is cognizable. [Section 37(1)(a)]

(xv) Notwithstanding anything in the Cr.P.C., no person accused of the offences specified in section 37(1)(b) is to be released on bail, on his own bond, unless the Public Prosecutor has been given the opportunity to oppose the release on bail, or where the Public Prosecutor has opposed the release on bail, the Court is satisfied that there are reasonable grounds for believing that the person is not

guilty of such offence and that he is not likely to commit any offence, while on bail.

(xvi) The limitations in the Cr.P.C. on grant of bail, are in addition to the limitations in Section 37(1)(b) of the NDPS Act. [Section 37(2)] (xvii) Personal search is to be made in accordance with Section 100 of Cr.P.C. if the person to be searched cannot be taken to the nearest Magistrate or Gazetted Officer inspite of exercise of option to be searched before such Magistrate or Gazetted Officer. [Section 50(5)] (xviii) The provisions of the Cr.P.C. are to apply to all warrants issued and searches and seizures made under the NDPS Act in so far as they are not inconsistent with any provision of the NDPS Act. [Section 51] (xix) Notwithstanding anything contained in the Indian Evidence Act, 1872 or the Cr.P.C., every Court is to treat the inventory, photographs of narcotic drugs, psychotropic substances etc. as primary evidence of offence under the NDPS Act. [Section 52A(4)]

70. Under Section 4 of the Cr.P.C all offences under the Indian Penal Code, 1960, hereinafter referred to as 'IPC' are to be investigated, inquired into and tried or otherwise dealt with according to the provisions of the Cr.P.C. Offences under any other law might also be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any other enactment in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Section 4 of the Cr.P.C. is set out hereinbelow:

> 4. Trial of offences under the Indian Penal Code and other laws.
>
> —(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.
>
> (2) 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.

71. Referring to Section 4(2) of the Cr.P.C Mr. Sushil Kumar Jain, argued that provisions of the Cr.P.C would apply to all proceedings under the NDPS Act, unless intention to the contrary was shown. Mr. Jain also referred to Section 2(xxix) of the NDPS Act in support of his aforesaid submission.

72. However, Section 5 of the Cr.P.C., set out hereinbelow for convenience, provides:-

> "5. Saving.—Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

73. Mr. Jain's argument that the Cr.P.C. would apply to all proceedings under the NDPS Act, unless a contrary intention is shown, by reference to Section 4(2) of the Cr.P.C., cannot be sustained, as

Section 5 specifically provides that nothing in the Cr.P.C shall, in the absence of a specific provision to the contrary, affect any special law in force or any special jurisdiction or power conferred by any other law. The NDPS Act being a special enactment, nothing in the Cr.P.C can affect any investigation or inquiry under the NDPS Act, in the absence of any provision to the contrary in the NDPS Act.

74. Section 2(xxix) of the NDPS Act does not make the provisions of the Cr.P.C. applicable to any investigation or enquiry under the NDPS Act. The said Section only provides that words and expressions used in the NDPS Act, and not defined, but defined in the Cr.P.C. have the meanings assigned in the Cr.P.C., unless the context otherwise requires.

75. Section 53 of the NDPS Act provides:

> 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 any other department of the Central Government including para-military forces or armed forces or any class of such officers with the powers of an officer-in-charge of a 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 other department 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.

76. Section 53 is an enabling provision, which enables the Central Government or the State Government, by notification in the Official Gazette, to invest any officer of the Departments mentioned in the said Section, or any other Department of the Government, with the powers of an Officer in Charge of a Police Station for the investigation of offences under the said Act.

77. If the provisions of the Cr.P.C were to apply to investigations under the NDPS Act, it would not have been necessary to invest any officer under the NDPS Act with the powers of an Officer in Charge of a Police Station, for the purpose of investigation of an offence under the NDPS Act, by notification in the Official Gazette. The provisions of Section 50(5) and 51 of the NDPS Act would also not have been necessary.

78. There does not appear to be any bar in Section 53 or anywhere else in the NDPS Act, to officers empowered under Sections 41(2) or 42, also being invested under Section 53, with the powers of an Officer in Charge of a Police Station for investigation of offences under Section 53 of the NDPS Act. There being no bar under the NDPS Act, the same officer empowered under Section 42, who had triggered the process of an enquiry, and made any search seizure or arrest under Chapter V of the NDPS Act, on the basis of information provided by an informant, or on the basis of his own personal

knowledge, might investigate into the offence if he is also invested under Section 53, with the powers of investigation of an Officer in Charge of a Police Station, for the purpose of investigation of an offence under the NDPS Act.

79. There does not appear to be any provision in Chapter V or elsewhere in the NDPS Act, which can reasonably be construed to render an officer under Section, 41(2) or 42(1) of the NDPS Act 'functus officio' once the entry, search, seizure or arrest has been made. What Section 42(2) requires is that, an officer who takes down any information in writing under Section 42(1) or records the grounds of his belief under the proviso thereto, should send a copy of the information with the grounds of belief to his immediate official superior, within 72 hours.

80. Section 53A of the NDPS Act provides:

> 53-A. Relevancy of statements under certain circumstances.— (1) A statement made and signed by a person before any officer empowered under Section 53 for the investigation of offences, during the course of any inquiry or proceedings by such officer, shall be relevant for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,—
>
> (a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or
>
> (b) when the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. (2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceedings under this Act or the rules or orders made thereunder, other than a proceeding before a court, as they apply in relation to a proceeding before a court.

81. Section 53A of the NDPS Act is ex facie contradictory to Section 162 of the Cr.P.C, which provides that no statement made to a police officer, in course of an investigation under Chapter XII of the Cr.P.C shall, if reduced to writing, be signed by the person making it, or used for any purpose at any inquiry or trial in respect of the offences under investigation, except inter alia to confront him if he gives evidence as a witness.

82. Section 53A covers any statement made and signed by any person, before any officer empowered under Section 53 for the investigation of offences, during the course of any proceedings by such officer, under the NDPS Act, be it an inquiry or investigation. This provision makes it abundantly clear that the principles embodied in Sections 161/162 of the Cr.P.C have no application to any inquiry or other proceeding under the NDPS Act, which would include an investigation.

83. The judgments of this Court in State of Delhi v. Shri Ram Lohia6 and George v. State of Kerala and Anr. 7, cited by Mr. Jain, which were rendered in the context of statements under Section 164 of the Cr.P.C. The judgments are of no assistance to the Appellants as they are not binding precedents in respect of the issues referred to this Bench. Sections 161 to 164 of the Cr.P.C. have no application to proceedings under the NDPS Act, as discussed earlier.

84. The judgment of this Court in Munshi Prasad and Ors. v. State of Bihar8 cited by Mr. Jain, in the context of reliance on a post mortem report in a murder trial, is also of no assistance to the appellant, as this Court had no occasion to deal with Section 52A(4) or 54 or 66 or any other provision of the NDPS Act.

85. The NDPS Act, being a special statute, and in any case a later Central Act, the provisions of the NDPS Act would prevail, in case of any inconsistency between the NDPS Act and the Evidence Act. Section 52A(4) expressly provides:

> "Notwithstanding anything contained in the Indian Evidence Act, 1872 or the Code of Criminal Procedure, 1973, every Court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

86. The Evidence Act would however apply to a trial under the NDPS Act in other respects, unless a contrary intention appears from 6 AIR 1960 SC 490 7 (1998) 4 SCC 605

8. (2002) 1 SCC 351 any specific provision of the NDPS Act. The previous statement of a witness, even if admissible in evidence cannot be used against the witness unless the witness is confronted with the previous statement and given an opportunity to explain, as held by this Court in Murli and Anr. v. State of Rajasthan9 cited by Mr. Jain. However, certain documents not otherwise admissible under the Evidence Act, unless proved by evidence, may be admissible under Section 52A(4) of the NDPS Act, subject to the fulfilment of the conditions of that section.

87. Section 54 of the NDPS Act, the constitutional vires whereof has been upheld in Noor Aga (supra) provides:

> 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 .

88. Section 66 of the NDPS Act provides:-

> "66. Presumption as to documents in certain cases.—Where any document— 9 (2009) 9 SCC 417
>
> (i) is produced or furnished by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law, or
>
> (ii) has been received from any place outside India (duly authenticated by such authority or person and in such manner as may be prescribed by the Central Government) in the course of investigation of any offence under this Act alleged to have been committed by a person, and such document is tendered in any prosecution under this Act in evidence against him, or against him and any other person who is tried jointly with him, the court shall—
>
> (a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reason ably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting; and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;

(c) in a case falling under clause (i), also presume, unless the contrary is proved, the truth of the contents of such document."

89. Section 67 of the NDPS Act provides that any officer referred to in Section 42, who is duly authorized in this behalf by the Central or State Government, may during the course of any inquiry:

> (i) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder;
>
> (ii) require any person to produce or deliver any document or thing useful or relevant to the enquiry;
>
> (iii) examine any person acquainted with the facts and circumstances of the case.

90. Legislature has in its wisdom used the expression "investigation of the offence" in Section 53, and the term "inquiry" in Section 67. Even though in common parlance "inquiry" and "investigation" are used interchangeably, "investigation" in Section 53 and "inquiry" in Section 67 cannot be construed to mean the same.

91. It is well settled that, when different words are used in the same statute, there is a presumption that they are not used in the same sense. Accordingly, in T.A. Krishnaswamy v. State of Madras10, this Court held that the words "test" and "analysis" used in Rule 40 of the Central Rules under the Drugs Act 1940 were to be given different meanings.

92. Of course, too much weight cannot be given to the presumption arising out of use of different words in different parts of a statute, when dealing with a long complicated statute, for example a consolidating statute, with incongruous provisions lumped together. Even otherwise, the context in which the words have been used is relevant, as a less careful draftsman may use different words to convey the same meaning, in a hurriedly enacted statute. This proposition finds support from Kanhaiyalal Vishindas Gidwani v. Arun Dattatreya Mehta11. A construction deriving support from differing phraseology in different sections of a statute, may be negatived if it leads to unreasonable or irrational results.

10. AIR 1966 SC 1022

11. (2001) 1 SCC 78

93. In the NDPS Act, the Legislature appears to have consciously intended "inquiry" and "investigation" to convey a different meaning. Accordingly Section 53A refers to a statement before any officer empowered under Section 53 for the investigation of offences during the course of any inquiry or proceeding by such officer.

94. The NDPS Act does not define the expression "investigation" or the expression "inquiry". However, Section 2(xxix) of the NDPS Act provides:

> "2(xxix). words and expressions used herein and not defined but defined in the Code of Criminal Procedure, 1973 (2 of 1974) have the meanings respectively assigned to them in that Code."

95. The definition of the terms 'inquiry' and 'investigation' as contained in Sections 2(g) and 2(h) of the Cr.P.C. are as follows:

> "2.(g) "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court;
>
> (h) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf"

96. The meaning of a word or expression used in a statute can be construed and understood as per its definition, unless the "context otherwise requires". The definition of inquiry in Section 2(g) of the Cr.P.C. does not help to interpret the word inquiry in Section 67 of the NDPS Act or in any other provision of Chapter V thereof, since an inquiry under Chapter V of the NDPS Act is not by any Magistrate or Court.

97. It is well settled that a word not specifically defined in a statute may be interpreted as per its ordinary meaning, which may be ascertained by reference to a dictionary. As per the Concise Oxford English Dictionary (Eleventh Edition) the word investigate means 'carry out a systematic or formal enquiry into an incident or allegation as to establish the truth'. Investigation, is the act of investigating. The word "enquire" is, as per the same dictionary, to ask for information. It also means "investigate". Enquiry is the act of asking for information. It is an official investigation. Words and phrases in a statute have to be construed in the context in which they have been used. The statute has to be read as a whole.

98. The words "inquiry" and "investigation" have also been used in statutes such as the Central Excise Act 1944, the Customs Act 1962, the Railway Property (Unlawful Possession) Act 1966, and the Cr.P.C. which also prescribe a procedure for proceeding against offenders. These statutes may be taken into consideration to construe the meaning of the expression "inquiry" in Section 67 of the NDPS Act and the difference, if any, between the expression "inquiry" as used in Section 67 of the NDPS Act and the expression "investigation" as used in Section 53 of the said Act. While Sections 155-157 of the Cr.P.C. speak of investigation of cognizable offences, Section 8 of the Railway Property (Unlawful Possession) Act, speaks of inquiry into the charge of commission of an offence under that Act, Section 14 of the Central Excise Act contemplates inquiry for the purposes of the Central Excise Act which could also include inquiry for the prosecution of an offence under the said Act and Section 107 of the Customs Act speaks of inquiry in connection with smuggling.

99. It seems that the word 'inquiry' has been used in the Railway Property (Unlawful Possession) Act, Customs Act, Central Excise Act in the same sense as the word 'investigation' in the Cr.P.C. in respect of an offence. The choice of the expression 'inquiry' in preference to investigation, in the statutes named above, except the Cr.P.C., may perhaps be linked to the definition of 'inquiry' in the Cr.P.C. to mean an inquiry other than a trial by a Magistrate or a Court, since inquiry under those statutes enjoy the status of judicial proceedings, for the purposes of Sections 193 and 228 of the IPC. However, it is patently clear that the two expressions do not convey the same meaning in the NDPS Act.

100. Having regard to the meaning of the expressions investigate/investigation and enquire/enquiry given in the Dictionary referred to above, the use of the expressions in the statutes referred to above and having regard to the language and tenor of Sections 53, 53A, and Section 67 of the NDPS Act, the expression "inquiry" may reasonably be construed as a generic expression, which could include the investigation of an offence. An inquiry as contemplated in Section 67 is the collection of information generally, to find out if there has been any contravention of the NDPS Act, whereas investigation is the probing of an offence under the NDPS Act and collection of materials to find out the truth of the case sought to be made out against an accused offender. However investigation may

follow an enquiry or be part of an enquiry. This is evident from a reading of the NDPS Act as a whole.

101. The difference between the terms "investigation" and "inquiry" is, however, not really material to the issue of whether an officer invested under Section 53 with the powers of the Officer in Charge of a Police Station for investigation of an offence under the NDPS Act, is a police officer within the meaning of Section 25 of the Evidence Act or whether a statement made in an inquiry as contemplated in Section 67, can be used against an accused offender in the trial of an offence under the NDPS Act.

102. An officer empowered under Section 53 with the powers of an Officer in Charge of a Police Station for the investigation of an offence, also has the power to make an inquiry. This is clear from the language used in Section 53A(1) of the NDPS Act. The words "A statement made and signed by a person before any officer empowered under Section 53 for the investigation of offences, during the course of any inquiry or proceedings by such officer " clinches the issue. The officer empowered under Section 53, with the power of an Officer in Charge of a Police Station, can obviously make an inquiry within the meaning of Section 67 to find out whether there has been any contravention of the NDPS Act. A statement made before such an officer in course of any inquiry or other proceeding, which is taken down in writing and signed by the person making it, may in certain circumstances, be relevant for the purpose of proving, in any prosecution for an offence under the NDPS Act, the truth of the facts it contains.

103. The power of an officer to investigate is not derived from Section 53, which as observed earlier in this judgment, is an enabling provision, which empowers the Central/State Government to invest an officer with the powers of an Officer in Charge of a Police Station, for the purpose of investigation of an offence under the NDPS Act. The power to invest an officer with the powers of an Officer in Charge of a Police Station flows from Section 53. The authority to investigate into an offence is implicit in the wider power to make an inquiry in connection with the contravention of any provision of the NDPS Act.

104. An enquiry may be carried out by an officer referred to in Section 42 of the NDPS Act, if empowered in this behalf. This is clear from Section 67. The same officer can also investigate an offence under the NDPS Act, if he is also invested under Section 53, with the powers of an Officer in Charge of a Police Station, for the purpose of investigation of an offence under the NDPS Act.

105. The power of an authorized officer referred to in Section 42, to make an inquiry is not derived from Section 67. This is clear from the language used in Section 67, which reads "any officer referred to in Section 42 who is authorised 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 provisions of this Act call for information etc." The power to make an enquiry flows from the various provisions of Chapter V of the NDPS Act.

106. Section 67 empowers an authorized officer, referred to in Section 42, to do the following acts during the course of an enquiry:

> "(a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions 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."

107. Investigation of an offence under the NDPS Act, is a part of an inquiry under Chapter V of the said Act. Investigation of an offence under the NDPS Act can be carried out by the same officer empowered under Section 42, who triggered the proceedings under Chapter V of the NDPS Act and carried out search, seizure and/or arrest, if that officer is also invested under Section 53 of the NDPS Act, with the powers of an Officer in Charge of a Police Station, for the purpose of investigation.

108. In Mukesh Singh v. State (Narcotic Branch of Delhi) 12 a Constitution Bench of this Court, unanimously held that an investigation is not vitiated only because the same officer, who was the complainant against the accused offender also investigated into the offence as Investigating Officer. The investigation may also be carried out by a different officer, invested under Section 53 with the powers of an Officer in Charge of the Police Station for the purpose of investigation under the NDPS Act. Section 52(3) of the NDPS Act, thus, provides:-

> "(3) Every person arrested and article seized under sub-section (2) of Section 41, Section 42, Section 43 or Section 44 shall be forwarded without unnecessary delay to—
>
> (a) the officer-in-charge of the nearest police station, or
>
> (b) the officer empowered under Section 53."

109. If the officer empowered under Section 53, is the same person as the officer empowered under Section 42, every arrested person and article seized under Sections 41(2), 42, 43 or 44 will have to be forwarded, without delay, to the Officer in Charge of the nearest Police Station. If the officer referred to in Section 42, is not invested with powers under Section 53, persons arrested and the articles seized by him under Sections 41(2), 42 etc. might be forwarded either to the Officer in Charge of the nearest Police Station or to the officer invested under Section 53 of the NDPS Act, with the powers of an Officer in Charge of a Police Station, for the purpose of investigation of an offence.

110. The language and tenor of Section 67 or Sections 41/42 does not support the contention that an inquiry can only be made by an officer referred to in Section 42, who is duly authorized, before exercise of the powers of entry, search, seizure or arrest, or at the

12. (2020) SCC Online SC 700 stage of entry, search, seizure and arrest, but not afterwards. The exercise of power under Sections 41/42 of the NDPS Act does not necessarily have to be preceded by

an inquiry. If an inquiry were to be restricted to the stage prior to the exercise of the power of entry, search, seizure and arrest or to the stage of making an entry, search, seizure or arrest, the NDPS Act would have specifically provided so. There is no such provision, either express or implied. It is not permissible to read into Sections 41, 42 etc the words "after an inquiry" which do not exist in those provisions. Nor is it permissible to read the words "before or at the time of entry, search, seizure or arrest" after the words "during the course of any enquiry" in Section

67.

111. The power conferred by Section 67 on an officer referred to in Section 42, duly authorised by the Central/State Government in this behalf, to call for information, require production of any document or thing or to examine any person, etc. is exercisable in course of any inquiry. The power could be exercised at any stage of the enquiry, before a complaint is filed. The powers can be exercised prior to or after exercise of powers under Sections 41/42 and would include the stage of investigation of an offence by an officer referred to in Section 42, if he is also invested with powers under Section 50 of the NDPS Act.

112. An officer referred to in Section 42 of the NDPS Act, if not invested with powers under Section 53 of the said Act, derives the power to call for information, require production of documents and things and to examine persons from Section 67 of the NDPS Act. The powers of investigation of an Officer in Charge of a Police Station include such powers. An officer invested with powers under Section 53 can also make an enquiry. This is clear from the use of the words "A statement made and signed by a person before any officer empowered under Section 53 for the investigation of offences, during the course of any inquiry or proceedings by such officer, shall be relevant..." in Section 53A(1). The benefit of Section 53A(1) would not be available in the case of a similar statement made before an officer empowered under Section 42, but not under Section 53 of the NDPS Act.

113. If, after an inquiry or investigation, a complaint is filed, and the Special Court takes cognizance of the offence, any statements, documents or other things obtained in the inquiry/investigation may be tendered and proved by the prosecution in the trial against the offender unless the statement and/or document and/or thing has been obtained by any promise, inducement, coercion, threat, or intimidation. The question of whether any statement has been obtained by promise, coercion, threat etc. and/or whether any particular officer, is authorized under Section 42 or invested with powers under Section 53 are matters of trial. The Prosecution has to establish the charges against the offender, in accordance with law, at the trial.

114. Chapter XII of the Cr.P.C governs information to the police and the power of the police to investigate into offences. The relevant provisions of the Chapter XII are set out hereinbelow:-

> "154. Information in cognizable cases.—(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof

> shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. ***** (3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-

section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

155. Information as to non-cognizable cases and investigation of such cases.—(1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate. (2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable.

156. Police officer's power to investigate cognizable case.—(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII. (2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate. (3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned.

157. Procedure for investigation.—(1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender: Provided that—

(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in

person or depute a subordinate officer to make an investigation on the spot;

(b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

158. Report how submitted.—(1) Every report sent to a Magistrate under section 157 shall, if the State Government so directs, be submitted through such superior officer of police as the State Government, by general or special order, appoints in that behalf. (2) Such superior officer may give such instructions to the officer in charge of the police station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate.

xxx xxx xxx

160. Police officer's power to require attendance of witnesses. —(1) Any police officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the facts and circumstances of the case; and such person shall attend as so required:

> Provided that no male person under the age of fifteen years or above the age of sixty-five years or a woman or a mentally or physically disabled person shall be required to attend at any place other than the place in which such male person or woman resides. (2) The State Government may, by rules made in this behalf, provide for the payment by the police officer of the reasonable expenses of every person, attending under sub-section (1) at any place other than his residence.

161. Examination of witnesses by police.—(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

Provided that statement made under this sub-section may also be recorded by audio-video electronic means.

162. Statement to police not to be signed- Use of statements in evidence.- (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to

writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

> Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act , 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re- examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination. (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872); or to affect the provisions of section 27 of that Act.

Explanation.—An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.

163. No inducement to be offered.—(1) No police officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in section 24 of the Indian Evidence Act, 1872 (1 of 1872).

(2) But no police officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will: Provided that nothing in this sub-section shall affect the provisions of sub-section (4) of section 164.

164. Recording of confessions and statements.—(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

> Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence:
>
> Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.
>
> (2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be

used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

****

165. Search by police officer.—(1) Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station. (2) A police officer proceeding under sub-section (1), shall, if practicable, conduct the search in person.

(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing, require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the place to be searched, and so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.

(4) The provisions of this Code as to search-warrants and the general provisions as to searches contained in section 100 shall, so far as may be, apply to a search made under this section.

(5) Copies of any record made under sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence, and the owner or occupier of the place searched shall, on application, be furnished, free of cost, with a copy of the same by the Magistrate.

****

168. Report of investigation by subordinate police officer.— When any subordinate police officer has made any investigation under this Chapter, he shall report the result of such investigation to the officer in charge of the police station.

169. Release of accused when evidence deficient.—If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer

shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial.

170. Cases to be sent to Magistrate, when evidence is sufficient.—(1) If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial, or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

172. Diary of proceedings in investigation.—(1) Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation. (1A) The statements of witnesses recorded during the course of investigation under section 161 shall be inserted in the case diary. (1B) The diary referred to in sub-section (1) shall be a volume and duly paginated.

(2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. (3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of section 161 or section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply.

173. Report of police officer on completion of investigation.—(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(1A) The investigation in relation to rape of a child may be completed within three months from the date on which the information was recorded by the officer in charge of the police station. (2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating—

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody under section 170.

(h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under section 376, 376A, 376B, 376C 2 [376D or section 376E of the Indian Penal Code (45 of 1860)].

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

**** (5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report—

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses. (6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub-section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).”

115. Reference may also be made to Section 190 of the Cr.P.C set out hereinbelow:-

> “190. Cognizance of offences by Magistrates.—(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence—

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

116. Chapter XII of the Cr.P.C comprising Sections 154 to 176 relating to information to the police and their powers to investigate have no application to any inquiry or investigation under the NDPS Act, except to the extent expressly provided in the NDPS Act. Sections 161 and 162 of the Cr.P.C. are not attracted in the case of any inquiry or investigation by the officer designated under the NDPS Act.

117. The provisions of the Cr.P.C. only apply to all warrants issued and searches and seizures made under the NDPS Act, in so far as they are not inconsistent with the provisions of the NDPS Act, as provided in Section 51 of the NDPS Act and to the search of a person, without complying with the requirement to take the person to be searched, to the nearest Gazetted Officer or Magistrate, as provided in Section 50(5) of the NDPS Act. Of course, the principles of Section 163 of the Cr.P.C. are implicit in the provisions of the NDPS Act relating to inquiry and investigation though the said Section may not apply to such inquiry or investigation. This is because the bar of Article 20(3) of the Constitution of India has to be read into every statute in spirit and substance. There can be no question of obtaining any statement by any inducement, promise or threat.

118. The NDPS Act as observed above, is a complete code. A comparison of the various provisions of Chapter XII of the Cr.P.C with those of Chapter V of the NDPS Act also makes it clear that the provisions in Chapter V of the NDPS Act are independent of, and not controlled by the provisions of the Cr.P.C except as provided in Sections 50(5) and 51 of the NDPS Act. There are differences between the procedure of inquiry/investigation under Chapter V of the NDPS Act and the procedure of investigation and/or enquiry under the Cr.P.C.

119. Some of the notable differences in the procedure of inquiry/investigation under Chapter V of the NDPS Act with the procedure of inquiry/investigation under the Cr.P.C are as follows:

(i) Under Section 68 of the NDPS Act, the name of the informant is not to be disclosed. The officer who takes down the information becomes the complainant. However, under Section 154 of the Cr.P.C information is required to be signed by the person giving it. (Section 154(1) Cr.P.C)

(ii) The power under Section 41(2) of the NDPS Act, to authorize arrest or search under the said Section as also the power of entry, search seizure and arrest under

> Section 42 and other similar provisions is conditional upon reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under this Act, or that any narcotic drug or psychotropic substance or controlled substance in respect of which any offence under this Act has been committed, or any document or other article which may furnish evidence of 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 the NDPS Act, is kept or concealed in any building, conveyance or place.

On the other hand, the powers of the police under Section 165 of the Cr.P.C to make a search or authorize a search are much wider.

(iii) In the case of an inquiry/investigation under the Cr.P.C it is not necessary to send a copy of the information as recorded, with the grounds of belief of the necessity to take action, to a superior officer.

(iv) The power to conduct personal search under the NDPS Act is circumscribed by Section 50. If the person to be searched, so requires, he has to be taken to the nearest Magistrate. As observed above, Section 50(5) specifically requires searches of person to be made under Section 100 of the Cr.P.C. only in the circumstances specified in the said provisions.

(v) Section 53A of the NDPS Act, which expressly provides that a statement made and signed by a person before any officer empowered under Section 53 for the investigation of offences, during the course of any inquiry or proceedings by such officer, shall be relevant for the purpose of proving in any prosecution under the NDPS Act, the truth of the facts which it contains, in the circumstances stated in the said Section, is patently contrary to and/or inconsistent with Sections 161/162 of the Cr.P.C. Under Section 162, a statement made to a police officer, if taken down in writing, is not to be signed by the person making it, and not used for any purpose in any inquiry or trial in Court, except to confront him if he appears as a witness and gives evidence to the contrary. Section 53 A (2) makes it abundantly clear that the provision of sub-section (1) of Section 53A, to the extent feasible, applies to all proceedings under the NDPS Act or the Rules or orders thereunder, other than proceedings before a Court, as they apply in relation to a proceeding in Court.

(vi) Section 173(1) read with Section 173(2) of the Cr.P.C makes it obligatory for a police officer to complete an investigation and file a report to the Magistrate empowered to take cognizance. Under the NDPS Act no report is required to be submitted to the Special Court, or to any Magistrate, after completion of an inquiry and/or investigation of an offence under the said Act. Officers under the NDPS Act do not have the power to submit a report to the Magistrate/Special Court in terms of Section 173 of Cr.P.C.

120. Section 36A(1)(d) of the NDPS Act provides that “a Special Court may, upon perusal of police report of the facts constituting an offence under the NDPS Act or upon complaint made by an officer of the Central Government or a State Government authorised in his behalf, take cognizance of that

offence, without the accused being committed to it for trial". Section 36A (1)(d) is similar to Section 190 of the Cr.P.C.

121. A complaint, as defined in Section 2(d) of the Cr.P.C., means any allegation made to a Magistrate orally or in writing, to enable the Magistrate to take action under the Cr.P.C. A complaint need not be on a Police Report. However, as per the Explanation to Section 2(d), a report of a police officer, which discloses a cognizable offence is to be deemed to be a complaint and the police officer who made the complaint, shall be deemed to be the complainant.

122. An inquiry and/or investigation is conducted under the NDPS Act to enable the concerned officer/officers to satisfy themselves, whether the information gathered or the materials obtained in course of such inquiry/investigation warrant the filing of a complaint.

123. If upon inquiry/investigation, the authorities concerned find that there are materials in the form of any statements, documents, or other things which show prima facie that an offence has been committed under the NDPS Act, a complaint may be made. If the information gathered and/or materials obtained do not make out an offence a complaint may not be made. Similarly a complaint may not be made, if upon inquiry/investigation, the information of an offence received by the appropriate officer is found false or frivolous.

124. Section 36A(1)(d) enables the police to file a report, before the Special Court, of facts constituting an offence under the NDPS Act, which, as per the definition of police report in Section 2(d) of the Cr.P.C., means a report forwarded under Section 173(2) of the Cr.P.C. Such a police report is deemed to be a complaint. Such police report can be filed after an investigation under Chapter XII of the Cr.P.C. There is no provision in the NDPS Act, which makes it incumbent upon the concerned officers who make any inquiry/investigation under the NDPS Act, to prepare or file any report.

125. If the police investigate any offence under the NDPS Act and submit a report before the Special Court, all the relevant provisions of the Cr.P.C. would have to be complied with, including in particular Sections 161, 162, 163, 164 and 173. A statement before the police can neither be signed nor relied upon for any purpose in a Court of law, except for the purpose specified in the said section, that is, inter alia to confront the person making the statement in cross examination in the trial.

126. The Legislature has in its wisdom differentiated between a police report, which is deemed to be a complaint, and a complaint made by an officer of the Central or State Government, authorized in this behalf. It is not for this Court to question the wisdom of the Legislature. The fact that the Special Court may take cognizance of an offence, upon a complaint made by an officer of the Central or State Government, authorized in this behalf, and not a report, as required in case of the police, also shows that an inquiry or investigation under the NDPS Act is not to be treated in the same way, as a police investigation into an offence.

127. The argument advanced by the appellants represented by Mr. Nagamuthu, that officers invested under Section 53 of the NDPS Act with the powers of an officer in charge of a Police Station for investigation of an offence under the NDPS Act would necessarily have to file a police report under Section 173 of the Cr.P.C. before a Magistrate, in respect of an offence punishable with imprisonment of less than three years, which is not triable by the Special Court, but by a Magistrate, since Section 36A(1)(d) would not apply, is flawed. In case of an offence punishable with imprisonment of less than three years, triable by a Magistrate, the authorized officer under the NDPS Act would have to file a complaint under Section 190(1)(a) of the Cr.P.C.

128. The expression "police" is ordinarily understood to mean that executive civil force of the State, entrusted with the duty of maintenance of public order, and also the prevention and detection of crime.

129. The expression "police" or "police officer" is not defined either in the Evidence Act 1872 or in the Cr.P.C. Police officers are governed inter alia by the Police Act 1861, enacted to make the police an effective instrument for the prevention and detection of crime.

130. Some of the relevant provisions of the Police Act 1861 are set out hereinbelow:

> 5. Powers of Inspector-General—Exercise of powers.—The Inspector General of Police shall have the full powers of a Magistrate throughout the general police district; but shall exercise those powers subject to such limitation as may from time to time be imposed by the [State Government].
>
> xxx xxx xxx
>
> 8. Certificates to police-officers.—Every police-officer appointed to the police force other than an officer mentioned in section 4 shall receive on his appointment a certificate in the form annexed to this Act under the seal of the Inspector-General or such other officer as the Inspector-General shall appoint by virtue of which the person holding such certificate shall be vested with the powers, functions and privileges of a police officer.
>
> xxx xxx xxx
>
> 20. Authority to be exercised by police officers.—Police-officers, enrolled under this Act shall not exercise any authority, except the authority provided for a police officer under this Act and any Act which shall hereafter be passed for regulating criminal procedure.
>
> xxx xxx xxx
>
> 23. Duties of police officers.- It shall be the duty of every police-officer promptly to obey and execute all filers and warrants lawfully issued to him by any competent

> authority; to collect and communicate intelligence affecting the public peace; to prevent the commission of offences and public nuisances, to detect and bring offenders to justice and to apprehend all persons whom he is legally authorised to apprehend and for whose apprehension sufficient ground exists; and it shall be lawful for every police officer, for any of the purposes mentioned in this section, without a warrant, to enter and inspect any drinking-shop gaming-house or other place of resort of loose and disorderly characters.
>
> xxx xxx xxx
>
> 24. Police-officers may lay Information, etc.—It shall be lawful for any police officer to lay any information before a Magistrate, and to apply for a summons, warrant, search warrant or such other legal process as may by law issue against any person committing an offence."

131. The Police Act, 1888, an Act to amend the law relating to the regulation of Police, inter alia, provide:-

> "3. Employment of police-officers beyond the State to which they belong.- Notwithstanding anything in any of the Acts mentioned or referred to in the last foregoing section, but subject to any orders which the [Central Government] may make in this behalf, a member of the [police force] of any [State] may discharge the functions of a police- officer in any part of [any other State] and shall, while so discharging such functions be deemed to be a member of the [police-force] of that part and be vested with the powers, functions and privileges and be subject to be liabilities, of a police officer belonging to [that police- force].
>
> 4. Consent of State Government to exercise powers and jurisdiction.— Nothing in this Act shall be deemed to enable the police of one State to exercise powers and jurisdiction in any area within another State, not being a railway area, without the consent of the Government of that other State."

132. The Police Act 1949, enacted for the constitution of a general police-district embracing two or more Union Territories, and for the establishment of a police force therefor, extends the application of the Police Act, 1861 to police officers in Union Territories.

133. There are several other statutes such as the Delhi Special Police Establishment Act 1947, enacted to investigate into offences and/or class of offences notified under the said Act, the Central Reserve Police Act, 1949, the Bombay Police Act 1951, the Calcutta Police Act 1866, the Bengal Police Act, 1869, the Madras City Police Act 1888, the Assam Rifles Act, the Nagaland Armed Police Act, 1966, to name a few.

134. The powers of an Officer in Charge of a Police Station are not exhaustively specified in the Cr.P.C. in any specific chapter or any set of provisions grouped together. The duties and powers of

an Officer in Charge of a Police Station are implicit in interspersed provisions of the Cr.P.C., many of which relate to the duties and powers of all police officers in general. It is however, axiomatic, that the Officer in Charge of a Police Station is, as a police officer, entitled to exercise all the powers of a police officer, whether under any of the Police Acts, the Cr.P.C or any other law, apart from the additional powers for discharge of duties and responsibilities as Officer in Charge of a Police Station.

135. Under Section 37 of the Cr.P.C. every person is bound to assist a police officer reasonably demanding his aid (i) in taking or preventing the escape of any other person, the police is authorized to arrest (ii) to prevent the breach of peace or (iii) in the prevention of any injury attempted to be committed to any railway, public property etc.

136. Section 41 of the Cr.P.C. confers on police officers, wide powers of arrest without an order of a Magistrate or warrant. The power extends to the arrest of any person, if amongst other reasons, the police officer has reason to believe on the basis of any complaint, information, or suspicion that such person has committed a cognizable offence punishable with imprisonment which may be less than or may extend upto seven years. Such powers can be exercised:

> (i) if the police officer is satisfied that such arrest is necessary--
>
> (a) to prevent such person from committing any further offence; or
>
> (b) for proper investigation of the offence; or
>
> (c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or
>
> (d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or
>
> (e) unless such person is arrested, his presence in the Court whenever required cannot be ensured,
>
> (ii) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence;
>
> (iii) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(iv) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody.

137. The Police officers have further powers and duties as specified in Sections 47, 48, 51, 52, 91, 129 and 133 of the Cr.P.C., which include the power of search of any place entered by a person sought to be arrested (Section 47), the power to compel production of documents or other things (Section 91), dispersal of any assembly likely to cause disturbance of public peace including arrest and action for punishment of those who form part of it (Section 129). Under Section 133 of the Cr.P.C. an order of a Magistrate for removal of obstruction or nuisance could be based on a police report. This could even include an order to stop any construction, to remove construction, to desist from carrying on any trade or business etc.

138. Chapter XI of the Cr.P.C. empowers the police to take action to prevent the commission of a cognizable offence. Section 151 of the Cr.P.C. confers on police officers the power of arrest without warrant or orders of a Magistrate, to prevent the commission of a cognizable offence. These powers are capable of being misused.

139. The police officers have enormous powers. The powers of a police officer are far greater than those of an officer under the NDPS Act invested with the powers of an Officer in Charge of a Police Station for the limited purpose of investigation of an offence under the NDPS Act. The extensive powers of the police, of investigation of all kinds of offences, powers to maintain law and order, remove obstruction and even arrest without warrant on mere suspicion, give room to police officers to harass a person accused or even suspected of committing an offence in a myriad of ways. The police are, therefore, in a dominating position to be able to elicit statements by intimidation, by coercion, or by threats either direct or veiled. The powers of NDPS officers being restricted to prevention and detection of crimes under the NDPS Act and no other crime, they do not have the kind of scope that the police have, to exert pressure to extract tailored statements.

140. To summarize, the provisions of the Cr.P.C do not apply to any inquiry or investigation or other proceeding under the NDPS Act, except to the extent expressly provided by the NDPS Act, in view of Section 4(2) read with Section 5 of the Cr.P.C.

141. Officers under the NDPS Act have the power to call for information, to require production of documents and other things, to examine persons and record their statements by virtue of the powers conferred by Sections 53 and 67 read with Section 53A of the NDPS Act.

142. As Officers empowered under Section 53 have all the powers of an Officer in Charge of a Police Station to conduct investigation of an offence under the NDPS Act, which includes the powers of calling for information, examining persons or requiring production of documents and other things, such powers have expressly been conferred by Section 67 to authorised officers referred to in Section 42, who may or may not be invested with powers under Section 53.

143. Officers under the NDPS Act, invested under Section 53 with the powers of an Officer in Charge of a Police Station, for the purpose of investigation of an offence under the NDPS Act, do not

exercise all the powers of police officers. They do not have the power to file a police report under Section 173 Cr.P.C which might be deemed a complaint. There is no provision in the NDPS Act which requires any officer investigating an offence under the said Act or otherwise making an inquiry under the said Act to file a report.

144. Officers under the NDPS Act not being police officers, Sections 161/162 of the Cr.P.C have no application to any statement made before any officer under the NDPS Act, in the course of any inquiry or other proceedings under the NDPS Act.

145. In any case, Section 53A is clearly contrary to and thus overrides Section 162 of the Cr.P.C. While Section 162(1) of the Cr.P.C. provides that no statement made by any person to a police officer, when reduced to writing shall be signed by the person making it, or used for any purpose, save as provided in the proviso to the said section, that is, to confront the person making the statement, if he gives evidence as a witness, Section 53A(1) provides that "a statement made and signed by a person before any officer empowered under Section 53 for the investigation of offences, during the course of any inquiry or proceedings by such officer, shall be relevant for the purpose of proving, in any prosecution for an offence under this Act" in certain circumstances specified in the said section.

146. The statements made in any inquiry or investigation may be recorded in writing and even signed by the person making it. In the absence of any provision similar to Section 162, in the NDPS Act, a statement made before an officer under the NDPS Act in the course of any inquiry, investigation or other proceedings, may be tendered in evidence and proved in a trial for prosecution of an offence under the NDPS Act in accordance with law. A statement confessional in nature is in the genre of extra judicial confessions.

147. Section 24 of the Indian Evidence Act, 1872 provides as follows:-

> "24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.–– A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

148. A confession made by an accused person is irrelevant in a criminal proceeding, if it appears to the Court that the confessions may have been elicited by any inducement, threat or promise from a person in authority and sufficient, in the opinion of the Court, to give the accused person reasonable grounds, for supposing that by making the confession, he would gain any advantage or avoid any disadvantage in respect of proceedings against him.

149. As observed by this Court in the State of Rajasthan v. Raja Ram13 "confessions may be divided into two classes i.e. judicial and extra-judicial. Judicial confessions are those which are made before a Magistrate or a Court in the course of judicial proceedings. 13 (2003) 8 SCC 180 Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or Court. Extra-judicial confessions are generally those that are made by a party to or before a private individual which includes even a judicial officer in his private capacity. It also includes a Magistrate who is not especially empowered to record confessions under Section 164 of the Code or a Magistrate so empowered but receiving the confession at a stage when Section 164 does not apply. As to extra-judicial confessions, two questions arise: (i) were they made voluntarily and

(ii) are they true?".

xxx xxx xxx "An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the Court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession." xxx xxx xxx "If the evidence relating to extra-judicial confession is found credible after being tested on the touchstone of credibility and acceptability, it can solely form the basis of conviction. The requirement of corroboration as rightly submitted by the learned counsel for the respondent-accused, is a matter of prudence and not an invariable rule of law."

150. In Gura Singh v. State of Rajasthan14 this Court held:-

> "6. It is settled position of law that extrajudicial confession, if true and voluntary, it can be relied upon by the court to convict the accused for the commission of the crime alleged. Despite inherent weakness of extrajudicial confession as an item of evidence, it cannot be ignored when shown that such confession was made before a person who has no reason to state falsely and to whom it is made in the circumstances which tend to support the statement. Relying upon an earlier judgment in Rao Shiv Bahadur Singh v. State of Vindhya Pradesh [AIR 1954 SC 322 : 1954 SCR 1098 : 1954 Cri LJ 910] this Court again in Maghar Singh v. State of Punjab [(1975) 4 SCC 234 : 1975 SCC (Cri) 479 : AIR 1975 SC 1320] held that the evidence in the form of extrajudicial confession made by the accused to witnesses cannot be always termed to be a tainted evidence. Corroboration of such evidence is required only by way of abundant caution. If the court believes the witness before whom the confession is made and is satisfied that the confession was true and voluntarily made, then the conviction can be founded on such evidence alone. In Narayan Singh v. State of M.P. [(1985) 4 SCC 26 : 1985 SCC (Cri) 460 : AIR 1985 SC 1678] this Court cautioned that it is not open to the court trying the criminal case to start with a presumption that extrajudicial confession is always a weak type of evidence. It would depend on the nature of the 14 (2001) 2 SCC 205 circumstances, the time when the

> confession is made and the credibility of the witnesses who speak for such a confession. The retraction of extrajudicial confession which is a usual phenomenon in criminal cases would by itself not weaken the case of the prosecution based upon such a confession. In Kishore Chand v. State of H.P. [(1991) 1 SCC 286 : 1991 SCC (Cri) 172 :
>
> AIR 1990 SC 2140] this Court held that an unambiguous extrajudicial confession possesses high probative value force as it emanates from the person who committed the crime and is admissible in evidence provided it is free from suspicion and suggestion of any falsity. However, before relying on the alleged confession, the court has to be satisfied that it is voluntary and is not the result of inducement, threat or promise envisaged under Section 24 of the Evidence Act or was brought about in suspicious circumstances to circumvent Sections 25 and 26. The court is required to look into the surrounding circumstances to find out as to whether such confession is not inspired by any improper or collateral consideration or circumvention of law suggesting that it may not be true. All relevant circumstances such as the person to whom the confession is made, the time and place of making it, the circumstances in which it was made have to be scrutinised. To the same effect is the judgment in Baldev Raj v. State of Haryana [1991 Supp (1) SCC 14 : 1991 SCC (Cri) 659 : AIR 1991 SC 37] . After referring to the judgment in Piara Singh v. State of Punjab [(1977) 4 SCC 452 : 1977 SCC (Cri) 614 : AIR 1977 SC 2274] this Court in Madan Gopal Kakkad v. Naval Dubey [(1992) 3 SCC 204 : 1992 SCC (Cri) 598 : JT (1992) 3 SC 270] held that the extrajudicial confession which is not obtained by coercion, promise of favour or false hope and is plenary in character and voluntary in nature can be made the basis for conviction even without corroboration."

151. It is one thing to say that a piece of evidence is inadmissible and another thing to assess two or more pieces of evidence on their probative value. A confession before a Judicial Magistrate under Section 164 of the Cr.PC may have higher probative value than other confessions. However, on that parameter alone other confessions for example, extra judicial confession cannot be rendered inadmissible in law.

152. It is true that some statutes such as Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA), Prevention of Terrorism Act, 2002 (POTA) and Maharashtra Control of Organised Crime Act, 1999 (MCOCA) expressly empower the authorized officers to record confession. Investigation under those statutes is however carried out by police officer, as pointed out by the learned Addl. Solicitor General Mr. Aman Lekhi.

153. Whether the officer concerned is duly empowered and/or authorised to make an enquiry/investigation, whether any statement or document has improperly been procured, etc. are factors which would have to be examined by the Court on a case to case basis. Needless to mention that , having regard to all relevant facts and circumstances, the Court may not base conviction solely on a statement made in an inquiry which is confessional, in the absence of other materials with which the statement can be linked. It is for the Special Court to weigh the statement and assess its

evidentiary value, having regard to all relevant factors. All statements and documents tendered in evidence have to be proved at the trial in accordance with law.

154. Section 25 of the Evidence Act reads "No confession made to a police officer shall be proved against a person accused of any offence", and Section 26 reads "No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person". Thus, a confession made by any person to a police officer, or while in police custody, unless made in the immediate presence of a Magistrate cannot be tendered in evidence, against a person accused of an offence.

155. For a long time, there had been differences of opinion in judicial verdicts, in construing the expression 'police officer' in Section 25 of the Evidence Act. While the expression 'police officer' has in some judgments been construed to include officers, whether or not police officers, but vested with the powers of a police officer, in respect of offences under specific enactments, other judgments have construed the expression to mean a police officer as ordinarily understood, and not officers of other departments, with authority to exercise the powers of a police officer for investigation of offences under special enactments.

156. In Amin Sharif v. Emperor15, a full Bench of Calcutta High Court held that an officer other than a police officer, who in the 15 AIR 1934 Cal 580 conduct of investigation of an offence exercise the powers conferred by the Cr.P.C., upon an Officer in Charge of a police station for investigation of a cognizable offence, is a police officer within the meaning of Section 25 of the Evidence Act. Similar view was taken by the Full Bench of Bombay High Court in Nanoo Sheikh Ahmed and Another v. Emperor16

157. On the other hand in Radha Kishun Marwari v. King- Emperor17 a Special Bench of Patna High Court took a contrary view and held that Section 25 of the Evidence Act applies to a police officer alone and not any other person invested with powers of a police officer for a limited purpose. Confession to an Excise Inspector with power to search and investigate was held to be inadmissible in evidence.

158. In the State of Punjab v. Barkat Ram18, the majority of the judges on the Bench held (Subba Rao, J., dissenting) that a Customs Officer under the Land Customs Act 19 of 1924 or under the Sea Customs Act 8 of 1878 is not a police-officer for the purpose of Section 25 of the Indian Evidence Act, 1872, and that conviction of the offender on the basis of his statements to the Customs Officer for offences under Section 167(8) of Sea Customs Act, 1878, and Section 16 AIR 1927 Bom 4 17 AIR 1932 Patna 293

18. AIR 1962 SC 276 23(1) of the Foreign Exchange Regulation Act, 1947, is not illegal. Raghubar Dayal, J., who delivered the majority judgment of this Court observed:

> "... 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.

The powers of customs officers are really not for such purpose. Their powers are for the purpose of checking the smuggling of goods and the due realisation of customs duties and to determine the action to be taken in the interests of the revenues of the country by way of confiscation of goods on which no duty had been paid and by imposing penalties and fines".

159. In Barkat Ram (supra), Dayal, J. speaking for the majority observed.

18. We now refer to certain aspects which lead us to consider that the expression "police officer" has not such a wide meaning as to include persons on whom certain police powers are conferred. The object of enacting Section 25 of the Evidence Act, whose provisions formerly formed part of the Code of Criminal Procedure, was to exclude from evidence confessions made to the regular police which had a very bad reputation for the methods it employed in investigation, especially in forcibly extracting confessions with the object of securing a conviction. The past conduct of the members of the police organization justified the provision. It is too much to suppose that the legislature did intend that all persons, who may have to investigate or arrest persons or seize articles in pursuance of any particular law of which at the time it had no conception, should be considered to be so unreliable that any confession made to them must be excluded just as a confession made to a regular police officer. If it could not contemplate the later creation of offences or of agencies to take action in respect to them under future legislation, it could not have intended the expression "police officer" to include officers entrusted in future with the duty of detecting and preventing smuggling and similar offences with the object of safeguarding the levying and recovery of Customs duties. If the legislature had intended to use the expression "police officer" for such a wide purpose, it would have used a more comprehensive expression. It could have expressed its intention more clearly by making any confession made to any officer whose duty is to detect and prevent the commission of offences inadmissible in evidence."

160. In Raja Ram Jaiswal v. State of Bihar 19, the majority (Raghubar Dayal, J. dissenting) held that the test for determining whether a person was a "police officer" for the purpose of Section 25 of the Evidence Act would be whether the powers of a police officer which were conferred on him, or which were exercisable by him because he was deemed to be an officer in charge of a Police Station, established a direct or substantial relationship with the prohibition enacted by Section 25 of the Evidence Act. This Court held that the object of enacting Section 25 of the Evidence Act was to eliminate from consideration confession to an officer, who by virtue of his position could extract by force, torture or inducement, a confession.

If the power of investigation established a direct relationship with prohibition under Section 25 of the Evidence Act, the mere fact that the officer might possess some other powers under some other law, would not make him any less a police officer, for the purpose of Section 25 of the Evidence Act.

161. In Raja Ram Jaiswal (supra) this Court found it difficult to draw a rational distinction between a confession recorded by a police officer strictly so called, and the evidence recorded by an Excise Officer, acting under Section 78(3) of the Bihar and Orissa Excise Act,

19. AIR 1964 SC 828 1915, who was deemed to be a police officer. Section 78(3) provided that an Excise Officer empowered under Section 77(2) of the Bihar and Orissa Excise Act, 1915 shall for the purpose of Section 156 of the Cr.P.C., be deemed to be an officer in charge of a Police Station with respect to the area to which his appointment as an Excise Officer extends. This Court, therefore found such an officer to be in the same position as an officer in charge of a Police Station, making an investigation under Chapter XIV of the Cr.P.C.

162. This Court held that officers under the Bihar and Orissa Excise Act, 1915 not only had the duty to prevent commission of offences under the said Act but were entrusted with the duty of detection of offences under the said Act, as well and for these purposes they were empowered in all respects as an officer in charge of a Police Station.

163. Drawing a distinction with officers under the Sea Customs Act, 1878 and/or the Customs Act, 1962, the Court held that though the Customs Officer can make an inquiry, he has no power to investigate into offences under Section 156 of the Cr.P.C. Whatever power he exercises are expressly those set out in Chapter XVII which might be analogous to those of a police officer under the Cr.P.C but not identical with those of a police officer. Thus , the Customs Officer is not entitled to submit a report to a Magistrate under Section 190 of the Cr.P.C. with a view that cognizance of the offence be taken by the Magistrate. Section 187(a) of the Sea Customs Act specifically provides that cognizance of an offence under the Sea Customs Act can be taken only upon a complaint in writing made by the Customs Officer or other officer of the Customs, not below the rank of an Assistant Collector of Customs authorised by the Chief Customs Officer.

164. It is true that in drawing a distinction between an Excise Officer under the Bihar and Orissa Excise Act and a Custom Officer under the Sea Customs Act, this Court noticed the following differences.

(i) The Excise Officer does not exercise any judicial power as the Customs Officer does under the Sea Customs Act, 1878.

(ii) The Customs Officer is not deemed to be an Officer in charge of a police station and therefore can exercise no powers under the Cr.P.C. and certainly not those of an Officer in charge of a police station.

(iii) Though he can make an inquiry he has no power to investigate into an offence under Section 156 of the Cr.P.C. Whatever powers he exercises are expressly set out in the Sea Customs Act.

(iv) Though some of those powers set out in Chapter XVII might be analogous to those of a police officer under the Cr.P.C., they were not identical to those of a police officer. The Customs Officer is not entitled to submit a report to a Magistrate under Section 190 of the Cr.P.C. Section 187(a) of the

Sea Customs Act specially provides that cognizance of an offence under the Sea Customs Act can be taken upon a complaint in writing made by the Customs Officer or other officer of the Customs of a specified rank. ..

165. In Badku Joti Savant v. State of Mysore 20 the question of whether a Central Excise Officer under the Central Excise and Salt Act 1944 was a police officer within the meaning of Section 25 of the Evidence Act, fell for consideration before a five-Judge Constitution Bench, in the context of Section 21 of the Central Excise and Salt Act, 1944 (now known as the Central Excise Act, 1944), set out hereinbelow for convenience:

> 20. AIR 1966 SC 1746 "21. (1) When any person is forwarded under Section 19 to a Central Excise Officer empowered to send persons so arrested to a Magistrate, the Central Excise Officer shall proceed to inquire into the charge against him.

(2) For this purpose the Central Excise Officer may exercise the same powers and shall be subject to the same provisions as the officer incharge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898, when investigating a cognizable case:

> Provided that...."

166. In Badku Joti Savant (supra) the Constitution Bench distinguished Raja Ram Jaiswal (supra) held:

> "9. ....It is true that sub-section (2) confers on the Central Excise Officer under the Act the same powers as an officer incharge of a police station has when investigating a cognizable case;.....A police officer for purposes of clause (b) above can in our opinion only be a police officer properly so-called as the scheme of the Code of Criminal Procedure shows and it seems therefore that a Central Excise Officer will have to make a complaint under clause (a) above if he wants the Magistrate to take cognizance of an offence, for example, under Section 9 of the Act. Thus though under sub-section (2) of Section 21 the Central Excise Officer under the Act has the powers of an officer incharge of a police station when investigating a cognizable case, that is for the purpose of his inquiry under sub-section (1) of Section 21. Section 21 is in terms different from Section 78 (3) of the Bihar and Orissa Excise Act, 1915 which came to be considered in Raja Ram Jaiswal case (1964) 2 SCR 752 and which provided in terms that "for the purposes of Section 156 of the Code of Criminal Procedure, 1898, the area to which an excise officer empowered under Section 77, sub- section (2), is appointed shall be deemed to be a police-station, and such officer shall be deemed to be the officer incharge of such station". It cannot therefore be said that the provision in Section 21 is on par with the provision in Section 78 (3) of the Bihar and Orissa Excise Act. All that Section 21 provides is that for the purpose of his enquiry, a Central Excise Officer shall have the powers of an officer incharge of a police station when investigating a cognizable case. But even so it appears that these powers do not include the power to submit a charge-sheet under Section 173 of the

Code of Criminal Procedure for unlike the Bihar and Orissa Excise Act, The Central Excise Officer is not deemed to be an officer incharge of a police station.

xxxxx xxxxx

11. In any case unlike the provisions of Section 78(3) of the Bihar and Orissa Excise Act, 1915, Section 21(2) of the Act does not say that the Central Excise Officer shall be deemed to be an officer-in-charge of a police station and the area under his charge shall be deemed to be a police station. All that Section 21 does is to give him certain powers to aid him in his enquiry. In these circumstances we are of opinion that even though the Central Excise Officer may have when making enquiries for purposes of the Act powers which an officer incharge of a police station has when investigating a cognizable offence, he does not thereby become a police officer even if we give the broader meaning to those words in Section 25 of the Evidence Act."

167. In Romesh Chandra Mehta v. State of West Bengal 21 five judge Constitution Bench of this Court considered the question of whether a Customs Officer under the Sea Customs Act 1878, was a police officer within the meaning of Section 25 of the Evidence Act and whether confessional statements made to the Customs Officer were inadmissible in evidence. The Constitution Bench held:

"5. ..... The broad ground for declaring confessions made to a police officer inadmissible is to avoid the danger of admitting false confessional statements obtained by coercion, torture or ill-treatment. But a Customs Officer is not a member of the police force. He is not entrusted with the duty to maintain law and order. He is entrusted with powers which specifically relate to the collection of customs duties and prevention of smuggling. There is no warrant for the contention raised by counsel for Mehta that a Customs Officer is invested in the enquiry under the Sea Customs Act with all the powers which a police officer in charge of a police station has under the Code of Criminal Procedure..."

10. Counsel for Mehta contended that a Customs Officer who has power to detain, to arrest, to produce the person arrested before a Magistrate, and to obtain an order for remand and keep him in his custody with a view to examine the person so arrested and other persons to collect evidence, has opportunities which a police officer has of extracting confessions from a suspect, and if the expression police officer be not narrowly understood, a statement recorded by him of a person who is accused of an offence is inadmissible by virtue of Section 25 of the Indian Evidence Act. But the test for determining whether an officer of customs is to be deemed a police officer is whether he is invested with all the powers of a police officer qua investigation of an offence, including the power to submit a report under Section 173 of the Code of Criminal Procedure. It is not claimed that a Customs Officer exercising power to make an enquiry may submit a report under Section 173 of the Code of Criminal Procedure.

24. He is, it is true, invested with the powers of an officer in charge of a police station for the purpose of releasing any

21. AIR 1970 SC 940 person on bail or otherwise. The expression "or otherwise" does not confer upon him the power to lodge a report before a Magistrate under Section 173 of the Code of Criminal Procedure. Power to grant bail, power to collect evidence, and power to search premises or conveyances without recourse to a Magistrate, do not make him an officer in charge of a police station."

168. In Illias v. Collector of Customs, Madras22 a Constitution Bench of five judges examined the earlier decisions of this Court, compared the duties and functions of police officers and Customs Officers and held that statements of the nature of a confession made before a Customs Officer would not be inadmissible in evidence on the ground that Customs Officers were Police Officers within the meaning of Section 25 of the Evidence Act. The Constitution Bench held:

"...(1) The police is the instrument for the prevention and detection of crime which can be said to be the main object of having the police. The powers of customs officers are really not for such purpose and are meant for checking the smuggling of goods and due realization of customs duties and for determining the action to be taken in the interest of the revenue country by way of confiscation of goods on which no duty had been paid and by imposing penalties and fines. (2) The customs staff has merely to make a report in relation to offences which are to be dealt with by a Magistrate. The customs officer, therefore, is not primarily concerned with the detection and punishment of crime but he is merely interested in the detection and prevention of smuggling of goods and safeguarding the recovery of customs duties.

(3) The powers of search etc. conferred on the customs officers are of a limited character and have a limited object of safeguarding the revenues of the State and the statute itself refers to police officers in contradiction to customs officers;

(4) If a customs officer takes evidence under Section 171-A and there is an admission of guilt, it will be too much to say that that statement is a confession to a police officer as a police officer never acts judicially and no proceeding before him is deemed to be a judicial proceeding for the purpose of Sections 193 and 228 of the Indian Penal Code or for any other purpose."

22. AIR 1970 SC 1065

169. As found in Illias (supra) the main function of the police is prevention and detection of crime. The Police Officers have powers wide enough to extract confessions by intimidation or use of force or veiled threats of implication in some other crime. On the other hand, the powers of officers under the NDPS Act are not for the prevention and detection of crimes generally. These officers are only concerned with detection and prevention of trafficking of and/or illegal trade/business in narcotic drugs and psychotropic substances. Powers of search, seizure etc. conferred on officers of the NCB

or other officers under the NDPS Act are of a limited character. The NDPS Act itself refers to police officers in contra distinction to other officers under the NDPS Act.

170. In the State of Uttar Pradesh v. Durga Prasad 23 this Court considered the question of whether an enquiry under Section 8(1) of the Railway Property(Unlawful Possession) Act 1966, was an investigation under Section 156 of the Cr. P C, and if so, whether statements recorded in course of investigation were hit by Section 162 of Cr. P C and if confessional in nature, inadmissible in evidence under Section 25 of the Evidence Act. This Court held:

> "The right and duty of an Investigating Officer to file a police report or a charge-sheet on the conclusion of investigation is the hallmark of an investigation under the Code. Section 173(1)(a) of the Code provides that as soon as the investigation is completed the officer-in-charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government. The officer conducting an inquiry
>
> 23. (1975) 3 SCC 210 under Section 8(1) cannot initiate court proceedings by filing a police report as is evident from the two provisos to Section 8(2) of the Act.....

On the conclusion of an enquiry under Section 8(1), therefore, if the officer of the Force is of the opinion that there is sufficient evidence or reasonable ground of suspicion against the accused, he must file a complaint under Section 190(1)(a) of the Code in order that the Magistrate concerned may take cognizance of the offence. Thus an officer conducting an inquiry under Section 8(1) of the Act does not possess all the attributes of an officer-in-charge of a police station investigating a case under Chapter XIV of the Code. He possesses but a part of those attributes limited to the purpose of holding the inquiry".

171. In Balkishan A Devidayal vs State of Maharashtra 24, this Court considered the question of whether an Inspector of the Railway Protection Force enquiring into an offence under Section 3 of the Railway Property (Unlawful Possession) Act, 1966, could be said to be a "police officer" under Section 25, Evidence Act. This Court, after a review of the case law, concluded as under:

> "In the light of the above discussion, it is clear that an officer of the RPF conducting an enquiry under Section 8(1) of the 1966 Act has not been invested with all the powers of an officer-in-charge of a police station making an investigation under Chapter XIV of the Code. Particularly, he has no power to initiate prosecution by filing a charge-sheet before the Magistrate concerned under Section 173 of the Code, which has been held to be the clinching attribute of an investigating 'police officer'. Thus, judged by the test laid down in Badku Joti Savant 6, which has been consistently adopted in the subsequent decisions noticed above, Inspector Kakade of the RPF could not be deemed to be a 'police officer' within the meaning of Section 25 of the Evidence Act...". (emphasis supplied)

172. In Raj Kumar Karwal v. Union of India and Ors. 25 referred to this Court for reconsideration, this Court considered the judgments of this Court in Balbir Singh v. State of Haryana 26; State of

24. (1980) 4 SCC 600

25. (1990) 2 SCC 409

26. (1987) 1 SCC 533 Punjab v. Barkat Ram27; Raja Ram Jaiswal v. State of Bihar28, Badku Joti Savant v. State of Mysore 29, (Constitution Bench), Romesh Chandra Mehta v. State of West Bengal 30 (Constitution Bench); State of U.P. v. Durga Prasad31; Balkishna A Devidayal v. State of Maharashtra32 and held that even if an officer is invested under any special statute with powers analogous to those exercised by a police Officer in Charge of a Police Station investigating a cognizable offence, he does not thereby become a police officer under Section 25 of the Evidence Act unless he has the power to lodge a report under Section 173 of the Cr.P.C. This Court held:

> "22. ...That is why this Court has since the decision in Badku Joti Savant [(1966) 3 SCR 698 : AIR 1966 SC 1746 : 1966 Cri LJ 1353] accepted the ratio that unless an officer is invested under any special law with the powers of investigation under the Code, including the power to submit a report under Section 173, he cannot be described to be a 'police officer' under Section 25, Evidence Act. Counsel for the appellants, however argued that since the Act does not prescribe the procedure for investigation, the officers invested with power under Section 53 of the Act must necessarily resort to the procedure under Chapter XII of the Code which would require them to culminate the investigation by submitting a report under Section 173 of the Code. Attractive though the submission appears at first blush, it cannot stand close scrutiny. In the first place as pointed out earlier there is nothing in the provisions of the Act to show that the legislature desired to vest in the officers appointed under Section 53 of the Act, all the powers of Chapter XII, including the power to submit a report under Section 173 of the Code. But the issue is placed beyond the pale of doubt by sub-section (1) of Section 36-A of the Act which begins with a non-obstante clause — notwithstanding anything contained in the Code — and proceeds to say in clause (d) as under:

27. AIR 1962 SC 276

28. AIR 1964 SC 828

29. AIR 1966 SC 176

30. AIR 1970 SC 940 31 (1975) 3 SCC 210

32. (1980) 4 SCC 600 "36-A. (d) a Special Court may, upon a perusal of police report of the facts constituting an offence under this Act or upon a complaint made by an officer of the Central Government or a State Government authorised in this behalf, take cognizance of that offence

without the accused being committed to it for trial." This clause makes it clear that if the investigation is conducted by the police, it would conclude in a police report but if the investigation is made by an officer of any other department including the DRI, the Special Court would take cognizance of the offence upon a formal complaint made by such authorised officer of the concerned government. Needless to say that such a complaint would have to be under Section 190 of the Code. This clause, in our view, clinches the matter. We must, therefore, negative the contention that an officer appointed under Section 53 of the Act, other than a police officer, is entitled to exercise 'all' the powers under Chapter XII of the Code, including the power to submit a report or charge-sheet under Section 173 of the Code. That being so, the case does not satisfy the ratio of Badku Joti Savant [(1966) 3 SCR 698 : AIR 1966 SC 1746 :

1966 Cri LJ 1353] and subsequent decisions referred to earlier.

173. In Raj Kumar Karwal (supra), this Court further held:

"At least three Constitution Benches consisting of five Judges have clearly and unequivocally held that, the test of whether an officer other than a police officer properly so called, of some other departments, investigation of an offence under a Special Act such as the Customs Act, was to be deemed to be a police officer was whether he was invested with all the powers of a police officer qua investigation, including the power to submit a report under Section 173."

174. In Kanhaiyalal v. Union of India33 this Court followed the earlier judgment in RaJ Kumar Karwal v. Union of India and Ors.34 and held that officers of the Department of Revenue Intelligence invested under Section 53 with the powers of an Officer in Charge of a Police Station for the purpose of investigation of an offence under the NDPS Act were not police officers within the meaning of Section 25 of the Evidence Act and a statement made under Section 67 of the NDPS Act was not the same as a statement

33. (2008) 4 SCC 668

34. (1990) 2 SCC 409 made to the police under Section 161 of the Cr.P.C. The judgments do not require reconsideration.

175. It is not in dispute that officers under the NDPS Act are drawn from different Government Departments and are not necessarily police officers as such. The NDPS Act also specifically differentiates police officers from other officers entrusted with powers under the NDPS Act, as will be evident, inter alia, from Sections 41(2), 42(1), 52(3)(a), 53(1) and (2), 55, 68T.

176. As observed above, Section 53 of the NDPS Act confers power on the Central Government to invest any officer of the Department of Central Excise, Narcotics, Customs, Revenue, Intelligence or any other Department of the Central Government, including para military or armed forces or any such class of officers with the powers of an Officer in Charge of a Police Station for the investigation

of offences under the NDPS Act.

177. Similarly Section 53(2) empowers the State Government to invest any officer of the Department of Drugs Control, Revenue or Excise or any other Department, or any class of officers with the powers of an Officer in Charge of a Police Station for the investigation of offences under the NDPS Act.

178. The proposition of law which emerges from the three Constitution Bench judgments referred to above is that, for determining whether an officer of any other department of the Government, such as a Central Excise Officer or Customs Officer, conducting an inquiry and/or investigation of an offence, could be deemed to be a police officer, the test is, whether such officer had been invested with all the powers of a police officer qua investigation, including the power to submit a police report under Section 173 of the Cr.P.C.

179. In Badku Jyoti Savant (supra), the Constitution Bench of this Court clearly held in effect and substance that conferment of the powers of an Officer in Charge of a Police Station, on a government officer, for the purpose of investigation of an offence under a special act, would not include the power to submit a report under Section 173 of the Cr.P.C, which a police officer has. This view was reiterated by the Constitution Bench in Romesh Chandra Mehta (supra).

180. The powers of investigation conferred on Central Excise Officers under Section 21(2) of the Central Excise Act and on officers of the Railway Protection Force under Section 8(2) of the Railway Property (Unlawful Possession) Act are almost identical to the powers of investigation, with which an officer may be invested under Section 53 of the NDPS Act. In Badku Joti Savant (supra) the Constitution Bench interpreted Section 21(2) of the Central Excise Act (then titled the Central Excise and Salt Act) and held that the power did not include the power to submit a report under Section 173 of the Cr.P.C. The Central Excise Officers were, accordingly, held not to be Police Officers within the meaning of Section 25 of the Evidence Act. The judgment of this Court in Raja Ram Jaiswal (supra) was distinguished by the Constitution Bench of this Court in Badku Joti Savant (supra). In Raj Kumar Karwal (supra) the Bench rightly followed the larger five Judge Bench decision, following the established norms of judicial discipline.

181. In Abdul Rashid v. State of Bihar35, this Court considered the admissibility of a confessional statement to a Superintendent of Excise under Bihar and Orissa Excise Act, 1915. The issue was covered by Raja Ram Jaiswal (supra), which has been distinguished by the Constitution Bench in Badku Joti Savant (supra) since the officer was deemed to be an Officer in Charge of a police station. Officers under the NDPS Act are not deemed to be Officers in Charge of a police station. They exercise the power of an Officer in Charge of a police Station for the limited purpose of investigation of an offence under the NDPS Act with no power to file a Police Report.

182. In Pon Adithan v. Deputy Director, Narcotics Control 35 (2001) 9 SCC 578 Bureau, Madras36, this Court held that it could not be laid down as a proposition of law that in the absence of independent evidence and supporting documentary evidence, the oral evidence of a witness conducting the search could not be recorded as sufficient for establishing compliance with the

requirement of Section 50(1) of the NDPS Act. This Court also held that confessional statement made by the Appellant while in custody of Intelligence Officer, Narcotics Intelligence Bureau was admissible in evidence in the absence of any complaint or threat or pressure made by the accused when produced before the Magistrate.

183. The NDPS Act may loosely have been described as a penal statute in some judgments of this Court in the sense that the NDPS Act contains stringent penal provisions including punishment of imprisonment of twenty years and even death sentence in certain exceptional cases of offence repeated after earlier conviction.

184. To quote V. Sudhish Pai form, his book 'Constitutional Supremacy – A Revisit' "Judgments and observations in judgments are not to be read as Euclid's theorems or as provisions of statute. Judicial utterances/pronouncements are in the setting of the facts of a particular case. To interpret words and provisions of a statute it may become necessary for judges to embark upon lengthy discussions, but such discussion is meant to explain not define. Judges interpret statutes, their words are not to be interpreted as statutes. Thus, precedents are not to be read as statutes." 36 (1999) 6 SCC 1

185. Constitution benches are constituted to resolve a constitutional issue, harmonize conflicting views and settle the law. A Constitution bench decision might only be reconsidered by a Constitution Bench of a larger strength and that too in exceptional and compelling circumstances. An interpretation which has held the field for over fifty years should not be upset for the asking. A Change in the legal position which has held the field through judicial precedents over a length of time can only be considered when such change is absolutely imperative.

186. The dominant object of the NDPS Act is to control and regulate operations relating to narcotic drugs and psychotropic substances, to provide for forfeiture of property derived from or used in illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Drugs and Psychotropic Substances, and for matters connected therewith.

187. On the other hand, the dominant object of a penal statute is to provide for punishment of a range of intentional acts and omissions of different types, enumerated in the statute. The Indian Penal Code is a typical penal statute. Statutes like the Prevention of Corruption Act 1988 and the Protection of Children from Sexual Offences Act 2012, which mainly provide for punishment of specific offences are also penal statutes.

188. In any case, it is well settled that penal statutes enacted to deal with a social evil should liberally be construed to give effect to the object for which the statute has been enacted as held by Nariman, J. in Rajindere Singh v. State of Punjab37 In M. Narayanan Nambiar v. State of Kerala 38, a Constitution Bench of this Court construed Section 5(1) (d) of the Prevention of Corruption Act, 1947. In construing the said Act, a penal statute, Subba Rao, J. stated:-

> 9. "The Preamble indicates that the Act was passed as it was expedient to make more effective provisions for the prevention of bribery and corruption. The long title as well as the Preamble indicate that the Act was passed to put down the said social evil i.e. bribery and corruption by public servant. Bribery is a form of corruption. The fact that in addition to the word 'bribery' the word 'corruption' is used shows that the legislation was intended to combat also other evil in addition to bribery. The existing law i.e. the Penal Code was found insufficient to eradicate or even to control the growing evil of bribery and corruption corroding the public service of our country. The provisions broadly include the existing offences under Sections 161 and 165 of the Penal Code, 1860 committed by public servants and enact a new rule of presumptive evidence against the accused. The Act also creates a new offence of criminal misconduct by public servants though to some extent it overlaps on the pre-existing offences and enacts a rebuttable presumption contrary to the well-

known principles of criminal jurisprudence. It also aims to protect honest public servants from harassment by prescribing that the investigation against them could be made only by police officials of particular status and by making the sanction of the Government or other appropriate officer a pre-condition for their prosecution. As it is a socially useful measure conceived in public interest, it should be liberally construed so as to bring about the desired object i.e. to prevent corruption among public servants and to prevent harassment of the honest among them.

37 (2015) 6 SCC 477 38 AIR 1963 SC 1116

10. A decision of the Judicial Committee in Dyke v. Elliott, The Gauntlet [(1872) LR 4 PC 184] , cited by the learned counsel as an aid for construction neatly states the principle and therefore may be extracted: Lord Justice James speaking for the Board observes at LR p. 191:

> '... No doubt all penal statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a casus omissus, that the thing is so clearly within the mischief that it must have been intended to be included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair commonsense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.' In our view this passage, if we may say so, restates the rule of construction of a penal provision from a correct perspective."

> 189. In Standard Chartered Bank v. Directorate of Enforcement39 the majority Judges held:-

"23. The counsel for the appellant contended that the penal provision in the statute is to be strictly construed. Reference was made to Tolaram Relumal v. State of Bombay [AIR 1954 SC 496 : 1954 Cri LJ 1333 : (1955) 1 SCR 158] , SCR at p. 164 and Girdhari Lal Gupta v. D.H. Mehta [(1971) 3 SCC 189 : 1971 SCC (Cri) 279] . It is true that all penal statutes are to be strictly construed in the sense that the court must see that the thing charged as an offence is within the plain meaning of the words used and must not strain the words on any notion that there has been a slip that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. All penal provisions like all other statutes are to be fairly construed according to the legislative intent as expressed in the enactment. Here, the legislative intent to prosecute corporate bodies for the offence committed by them is clear and explicit and the statute never intended to exonerate them from being prosecuted. It is sheer violence to common sense that the legislature intended to punish the corporate bodies for minor and silly offences and extended 39 (2005) 4 SCC 530 immunity of prosecution to major and grave economic crimes.

24. The distinction between a strict construction and a more free one has disappeared in modern times and now mostly the question is 'what is true construction of the statute?' A passage in Craies on Statute Law, 7th Edn. reads to the following effect:

'The distinction between a strict and a liberal construction has almost disappeared with regard to all classes of statutes, so that all statutes, whether penal or not, are now construed by substantially the same rules. "All modern Acts are framed with regard to equitable as well as legal principles." "A hundred years ago", said the court in Lyons case [R. v. Lyons, 1858 Bell CC 38 : 169 ER 1158] , "statutes were required to be perfectly precise and resort was not had to a reasonable construction of the Act, and thereby criminals were often allowed to escape. This is not the present mode of construing Acts of Parliament. They are construed now with reference to the true meaning and real intention of the legislature."

190. In Balram Kumawat v. Union of India40, a three-Judge Bench of this Court held:-

"23. Furthermore, even in relation to a penal statute any narrow and pedantic, literal and lexical construction may not always be given effect to. The law would have to be interpreted having regard to the subject-matter of the offence and the object of the law it seeks to achieve. The purpose of the law is not to allow the offender to sneak out of the meshes of law. Criminal jurisprudence does not say so."

191. In Reema Aggrawal v. Anupam41, this Court construing the provisions of Dowry Prohibition of Act followed Lord Denning's judgment in Seaford Court Estates Ltd. V Asher42 and held :-

40 (2003) 7 SCC 628 41 (2004) 3 SCC 199 42 (1949) 2 ALL ER 155(CA) "...He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature."

192. In Rajinder Singh v. State of Punjab (supra0, Nariman J., reiterated the proposition laid down in the judgments referred to above and held " a fair and pragmatic construction keeping in mind the great social evil that has led to the enactment of Section 304-B would make it clear that the expression "soon" is a relative expression. Time-lags may differ from case to case. The expression "soon before" is a relative term to determine what period which can come within the terms "soon before" is left to be determined by the Courts depending upon the facts and circumstances of the case.

193. The Central Excise Act may be a revenue law aimed at the imposition, collection and/or realisation of Excise duty on notified goods. The purpose of the NDPS Act is obviously different. It cannot, however, be said that the NDPS Act, being a penal statute, in contradistinction to the Customs Act and the Central Excise Act, whose dominant object is to protect the revenue of the State, judicial interpretation of powers of investigation under those Acts, which are almost identical to the powers of investigation of an officer under the NDPS Act, would not be relevant to investigation under the NDPS Act.

194. The Central Excise Act has stringent penal provisions for effective implementation of the said Act. Offences punishable under clauses (b) and (bbbb) of sub-section (1) of Section 9 for serious duty evasion and contravention of any of the provisions of the Central Excise Act or Rules made thereunder in relation to credit of any duty allowed to be utilised towards payment of excise duty on final products, are also cognizable and non bailable. Many of the offences under the Central Excise Act, 1944 are punishable with imprisonment, which may extend to seven years.

195. Some of the provisions of the Central Excise Act 1944, are set out hereinbelow:

"9. Offences and Penalties.—(1) Whoever commits any of the following offences, namely:— (a) contravenes any of the provisions of Section 8 or of a rule made under clause (iii) or clause (xxvii) of sub-section (2) of Section 37;

(b) evades the payment of any duty payable under this Act; (bb) removes any excisable goods in contravention of any of the provisions of this Act or any rules made thereunder or in any way concerns himself with such removal;

(bbb) acquires possession of, or in any way concerns himself in transporting, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with any excisable goods which he knows or has reason to believe are liable to confiscation under this Act or any rule made thereunder;

(bbbb) contravenes any of the provisions of this Act or the rules made thereunder in relation to credit of any duty allowed to be utilised towards payment of excise duty on final products;

(c) fails to supply any information which he is required by rules made under this Act to supply, or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information;

(d) attempts to commit, or abets the commission of, any of the offences mentioned in clauses (a) and (b) of this section; shall be punishable,—

(i) in the case of an offence relating to any excisable goods, the duty leviable thereon under this Act exceeds fifty lakh of rupees, with imprisonment for a term which may extend to seven years and with fine:

> Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court such imprisonment shall not be for a term of less than six months;
>
> (ii) in any other case, with imprisonment for a term which may extend to three years or with fine or with both.] (2) If any person convicted of an offence under this section is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to seven years and with fine:
>
> Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court such imprisonment shall not be for a term of less than six months.
>
> 9-C. Presumption of culpable mental state.— (1) In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
>
> Explanation.— In this section, “culpable mental state” includes intention, motive, knowledge of a fact, and belief in, or reason to believe, a fact. (2) For the purposes of this section, a fact is said to be proved only when the Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

9-D. Relevancy of statements under certain circumstances.— (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,—

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court.

xxx xxx xxx 12-F. Power of search and seizure.— (1) Where the Joint Principal Commissioner of Central Excise or Commissioner of Central Excise or Additional Principal Commissioner of Central Excise or Commissioner of Central Excise] or such other Central Excise Officer as may be notified by the Board has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any Central Excise Officer to search and seize or may himself search and seize such documents or books or things.

(2) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to search and seizure shall, so far as may be, apply to search and seizure under this section subject to the modification that sub- section (5) of Section 165 of the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the words "Principal Commissioner of Central Excise or Commissioner of Central Excise]" were substituted.

13. Power to arrest.— Any Central Excise Officer not below the rank of Inspector of Central Excise may, with the prior approval of the Principal Commissioner of Central Excise or Commissioner of Central Excise], arrest any person whom he has reason to believe to be liable to punishment under this Act or the rules made thereunder. (2) Any person accused or reasonably suspected of committing an offence under this Act or any rules made thereunder, who on demand of any officer duly empowered by the Central Government in this behalf refuses to give his name and residence, or who gives a name or residence which such officer has reason to believe to be false, may be arrested by such officer in order that his name and residence may be ascertained.

14. Power to summon persons to give evidence and produce documents in inquiries under this Act.— (1) Any Central Excise Officer duly empowered by the Central Government in this behalf shall have power to summon any person whose attendance he considers necessary either to give evidence or to

produce a document or any other thing in any inquiry which such officer is making for any of the purposes of this Act. A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned. (2) All persons so summoned shall be bound to attend, either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required:

> Provided that the exemptions under Sections 132 and 133 of the Code of Civil Procedure, 1908 (5 of 1908) shall be applicable to requisitions of attendance under this section.
>
> (3) Every such inquiry as aforesaid shall be deemed to be a "judicial proceeding" within the meaning of Section 193 and Section 228 of the Indian Penal Code, 1860 (45 of 1860).

Sections 36(A) and 36(B)(1) of the Central Excise Act provide as follows:

> 36-A. Presumption as to documents in certain cases.—Where any document is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the Court shall,—
>
> (a) unless the contrary is proved by such person, presume—
>
> (i) the truth of the contents of such document;
>
> (ii) that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the Court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;
>
> (b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence.

36-B. Admissibility of microfilms, facsimile copies of documents and computer printouts as documents and as evidence.—(1) Notwithstanding anything contained in any other law for the time being in force,—

(a) a microfilm of a document or the reproduction of the image or images embodied in such microfilm (whether enlarged or not); or

(b) a facsimile copy of a document; or

(c) a statement contained in a document and included in a printed material produced by a computer (hereinafter referred to as a "computer printout"), if the conditions mentioned in sub-section (2) and the other provisions contained in this section are satisfied in relation to the statement and the computer in question, shall be deemed to be also a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible."

196. The Customs Act, 1962 has been enacted to consolidate and amend the law relating to customs. The Customs Act regulates import and export of goods to and from India, apart from levy and collection of customs duty. One of the dominant objects of the Customs Act is to prevent smuggling of goods. Chapter IV of the Customs Act enables the Central Government to prohibit the import or export of goods of any specified description for various reasons, including prevention of shortage, the protection of human, animal or plant life or health, the protection of trade marks, patent, copyright, prevention of deceptive practices, implementation of any treaty or convention etc. The examples are illustrative and not exhaustive.

197. The said Act contains stringent penal provisions to enforce compliance with the said Act. Offences under sub-Section 4 of Section 9 of the Customs Act, for example, any offence relating to prohibited goods or evasion or attempted evasion of duty exceeding a certain value, or fraudulent availing of or attempt to avail drawback or exemption etc. are cognizable offences.

198. Some of the offences under the Customs Act are punishable with imprisonment which may extend to seven years apart from fine. Under Section 135(A) of the Customs Act, even a person who makes preparation to export any goods in contravention of the provisions of the Customs Act, is punishable with imprisonment for a term which may extend to three years, or with fine or with both. The Customs Officers are conferred with powers of search, seizure and arrest under the Customs Act. When any goods are seized under the Customs Act in the belief that they are smuggled, the burden of proving that the goods were not smuggled is on the person from whose possession, the goods were seized. If the person from whom the goods are seized is not the owner, the burden would fall on the person who claims to be the owner. Chapter XIII of the Customs Act 1962 relates to searches, seizure and arrest under the said Act.

199. Some of the provisions of the Customs Act are set out hereinbelow:

> "100. Power to search suspected person entering or leaving India, etc. —(1) If the proper officer has reason to believe that any person to whom the section applies has secreted about his person, any goods liable to confiscation or any documents relating thereto, he may search that person.

(2) This section applies to the following persons, namely—

(a) any person who has landed from or is about to board or is on board any vessel within the Indian customs waters;

(b) any person who has landed from or is about to board, or is on board a foreign-going aircraft;

(c) any person who has got out of, or is about to get into, or is in, a vehicle, which has arrived from, or is to proceed to any place outside India;

(d) any person not included in clauses (a), (b) or (c) who has entered or is about to leave India;

(e) any person in a customs area.

101. Power to search suspected persons in certain other cases.— (1) Without prejudice to the provisions of Section 100, if an officer of customs, empowered in this behalf by general or special order of the Commissioner of Customs, has reason to believe that any person has secreted about his person any goods of the description specified in sub-

section (2) which are liable to confiscation, or documents relating thereto, he may search that person.

102. Persons to be searched may require to be taken before gazetted officer of customs or magistrate.—(1) When any officer of customs is about to search any person under the provisions of Section 100 or Section 101, the officer of customs shall, if such person so requires, take him without unnecessary delay to the nearest gazetted officer of customs or magistrate.

(2) If such requisition is made, the officer of customs may detain the person making it until he can bring him before the gazetted officer of customs or the magistrate.

(3) The gazetted officer of customs or the magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) Before making a search under the provisions of Section 100 or Section 101, the officer of customs shall call upon two or more persons to attend and witness the search and may issue an order in writing to them or any of them so to do; and the search shall be made in the presence of such persons and a list of all things seized in the course of such search shall be prepared by such officer or other person and signed by such witnesses. (5) No female shall be searched by anyone excepting a female.

103. Power to screen or X-ray bodies of suspected persons for detecting secreted goods.—(1) Where the proper officer has reason to believe that any person referred to in sub-section (2) of Section 100 has any goods liable to confiscation secreted inside his body, he may detain such person and shall,—

(a) with the prior approval of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as soon as practicable, screen or scan such person using such equipment as may be available at the customs station, but without prejudice to any of the rights available to such person under any other law for the time being in force, including his consent for such screening or scanning, and forward a report of such screening or scanning to the nearest magistrate if such goods appear to be secreted inside his body; or

(b) produce him without unnecessary delay before the nearest magistrate.

104. Power to arrest.—(1) If an officer of customs empowered in this behalf by general or special order of the Commissioner of Customs has reason to believe that any person * * *has committed an offence punishable under Section 132 or Section 133 or Section 135 or Section 135-A or Section 136, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.] (2) Every person arrested under sub-section (1) shall, without unnecessary delay, be taken to a magistrate.

105. Power to search premises.—(1) If the Assistant Commissioner of Customs, or in any area adjoining the land frontier or the coast of India an officer of customs specially empowered by name in this behalf by the Board, has reason to believe that any goods liable to confiscation, or any documents or things which in his opinion will be useful for or relevant to any proceeding under this Act, are secreted in any place, he may authorise any officer of customs to search or may himself search for such goods, documents or things.

(2) The provisions of the Code of Criminal Procedure, 1898 (5 of 1898), relating to searches shall, so far as may be, apply to searches under this section subject to the modification that sub-section (5) of Section 165 of the said Code shall have effect as if for the word “Magistrate”, wherever it occurs, the words “Commissioner of Customs” were substituted.

106. Power to stop and search conveyances.—(1) Where the proper officer has reason to believe that any aircraft, vehicle or animal in India or any vessel in India or within the Indian customs waters has been, is being, or is about to be, used in the smuggling of any goods or in the carriage of any goods which have been smuggled, he may at any time stop any such vehicle, animal or vessel or, in the case of an aircraft, compel it to land, and—

(a) rummage and search any part of the aircraft, vehicle or vessel;

(b) examine and search any goods in the aircraft, vehicle or vessel or on the animal;

(c) break open the lock of any door or package for exercising the powers conferred by clauses (a) and (b), if the keys are withheld.

107. Power to examine persons.—Any officer of customs empowered in this behalf by general or special order of the Commissioner of Customs may, during the course of any enquiry in connection with the smuggling of any goods,—

(a) require any person to produce or deliver any document or thing relevant to the enquiry;

(b) examine any person acquainted with the facts and circumstances of the case.

108. Power to summon persons to give evidence and produce documents.—(1) Any gazetted officer of customs * * *, shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under this Act.] (2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required:

> Provided that the exemption under Section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.
>
> (4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code (45 of 1860).” xxx xxx xxx
>
> 123. Burden of proof in certain cases: (1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be—
>
> (a) in a case where such seizure is made from the possession of any person,—
>
> (i) on the person from whose possession the goods were seized; and
>
> (ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also, on such other person;

(b) in any other case, on the person, if any who claims to be the owner of the goods so seized.

(2) This section shall apply to gold and manufactures thereof, watches and any other class of goods which the Central Government may by notification in the Official Gazette specify.” xxx xxx xxx "138. Offences to be tried summarily —Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898) an offence under this Chapter other than an offence punishable under

clause (i) of sub-section (1) of Section 135 or under sub-section (2) of that section may be tried summarily by a Magistrate.

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

Explanation.—In this section, "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact. (2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability. 138-B. Relevancy of statements under certain circumstances.— (1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,—

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court.] 138-C. Admissibility of micro films, facsimile copies of documents and computer print outs as documents and as evidence.—(1) Notwithstanding anything contained in any other law for the time being in force,—

(a) a micro film of a document or the reproduction of the image or images embodied in such micro film (whether enlarged or not); or

(b) a facsimile copy of a document; or

(c) a statement contained in a document and included in a printed material produced by a computer (hereinafter referred to as a "computer print out"), if the conditions mentioned in sub-section (2) and the other provisions contained in this section are satisfied in relation to the statement and the computer in question, shall be deemed to be also a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder, without further proof of production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer print out shall be the following, namely:—

(a) the computer print out containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, there was regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of the contents; and

(d) the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether—

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings under this Act and the rules made thereunder where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it. (5) For the purposes of this section,—

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment. Explanation.—For the purposes of this section,—

(a) “computer” means any device that receives, stores and processes data, applying stipulated processes to the information and supplying results of these processes; and

(b) any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.]

139. Presumption as to documents in certain cases.—Where any document—

(i) is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law, or

(ii) has been received from any place outside India in the course of investigation of any offence alleged to have been committed by any person under this Act, and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the court shall—

(a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;

(c) in a case falling under clause (i) also presume, unless the contrary is proved, the truth of the contents of such document.] Explanation.—For the purposes of this section, 'document' includes inventories, photographs and lists certified by a Magistrate under sub- section (1-C) of Section 110."

200. Sections 100 and 101 empower the proper officer of customs to conduct personal search. Section 103 enables the proper officer to screen or x-ray the bodies of persons if he has reason to believe that any person referred to in Section 100(2) has any goods, liable to confiscation, secreted inside his body. An empowered officer of customs has power of arrest under Section 104, powers to search premises under Section 105, power to stop and search conveyances under Section 106.

201. Section 107 of the Customs Act enables any officer of customs, duly empowered by general or special order of the Principal Commissioner of Customs/Commissioner of Customs to require any person to produce or deliver any document or thing relevant to the enquiry and to examine any person acquainted with the facts and circumstances of the case, during the course of any enquiry in connection with the smuggling of any goods.

202. Section 108 (1) empowers any gazetted officer of customs to summon any person, whose attendance he considers necessary, either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under the Customs Act. Under Section 108(3) all persons so summoned are bound to attend, either in person or by an authorised agent, as may be directed. All persons so summoned shall be bound to state the truth. Section 108(4) provides that every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code. In Union of India v. Padam Narain Aggarwal and Ors.43, this Court held that statements recorded under Section 108 are distinct and different from statements recorded by the police officer during the course of investigation under the Code of Criminal Procedure.

203. It is well settled that statements recorded under Section 108 are admissible in evidence. Reference may be made to K. I. Pavunny v. Assistant Collector (H.Q.) Central Excise Collectorate, Cochin 44. In N. J. Sukhawani v. Union of India45, this Court held that the statement made under Section 108 of the Customs Act is a material piece of evidence collected by customs officials. A statement made by the co accused can be used against others.

204. The Foreign Exchange Regulation Act, 1973 (FERA) was an Act to amend the law regulating dealings in foreign exchange and

43. (2008) 13 SCC 305

44. (1997) 3 SCC 721

45. AIR 1996 SC 522 securities, transactions indirectly affecting foreign exchange and the import and export of currency, for the conservation of foreign exchange resources of the country and proper utilization thereof in the interest of the economic development of the country. The FERA was repealed by the Foreign Exchange Management Act (FEMA). Some of the relevant provisions of the

FERA are set out hereinbelow:-

> "34 Power to search suspected persons and to seize documents.-
>
> (1) If any officer of Enforcement authorised in this behalf by the Central Government, by general or special order, has reason to believe that any person has secreted about his person or in anything under his possession, ownership or control any documents which will be useful for, or relevant to, any investigation or proceeding under this Act, he may search that person or such thing and seize such documents. (2) When any officer of Enforcement is about to search any person under the provisions of this section, the officer of Enforcement shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of Enforcement superior in rank to him or a magistrate.
>
> (3) If such requisition is made, the officer of Enforcement may detain the person making it until he can bring him before the Gazetted Officer of Enforcement or the magistrate referred to in sub-section (2).
>
> 4) The Gazetted Officer of Enforcement or the magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.
>
> (5) Before making a search under the provisions of this section, the officer of Enforcement shall call upon two or more persons to attend and witness the search and may issue an order in writing to them or any of them so to do; and the search shall be made in the presence of such persons and a list of all documents seized in the course of such search shall be prepared by such officer and signed by such witnesses. (6) No female shall be searched by any one excepting a female.

35. Power to arrest.- (1) If any officer of Enforcement authorised in this behalf by the Central Government, by general or special orders has reason to believe that any person in India or within the Indian customs waters has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform hi m of the grounds for such arrest.

(2) Every person arrested under sub-section (1) shall without unnecessary delay, be taken to a magistrate.

(3) Where any officer of Enforcement has arrested any person under sub-section (1), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police station has, and is subject to, under the Code of Criminal Procedure, 1973 (2 of 1974).

36. Power to stop and search conveyances.- If any officer of Enforcement authorised in this behalf by the Central Government, by general or special order has reason to believe that any document

which will be useful for, or relevant to, any investigation or proceeding under this Act is secreted in any aircraft or vehicle or on any animal in India or in any vessel in India or within the Indian customs waters, he may at any time stop any such vehicle or animal or vessel or, in the case of an aircraft, compel it to stop or land, and-

(a) rummage and search any part of the aircraft, vehicle or vessel;

(b) examine and search any goods in the aircraft, vehicle or vessel or on the animal;

(c) seize any such document as is referred to above;

(d) break open the lock of any door or package for exercising the powers conferred by clauses (a), (b) and (c), if the keys are withheld.

37. Power to search premises.- (1) If any officer of Enforcement, not below the rank of an Assistant Director of Enforcement, has reason to believe that any documents which, in hi s opinion, will be useful for, or relevant to any investigation or proceeding under this Act, are secreted in any place, he may authorise any officer of Enforcement to search for and seize or may himself search for and seize such documents. (2) The provisions of the1 [Code of Criminal Procedure, 1973 (2 of 1974)] relating to searches, shall, so far as may be, apply to searches under the section subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the words "Director of Enforcement or other officer exercising hi s powers" were substituted.

38. Power to seize documents, etc.- Without prejudice to the provisions of section 34 or section 36 or section 37, if any officer of Enforcement authorised in this behalf by the Central Government, by general or special order, has reason to believe that any document or thing will be useful for, or relevant to, any investigation or proceeding under this Act or in respect of which a contravention of any of the provisions of this Act or of any rule, direction or order thereunder has taken place, he may seize such document or thing.

39. Power to examine persons.- The Director of Enforcement or any other officer of Enforcement authorised in this behalf by the Central Government, by general or special order may, during the course of any investigation or proceeding under this Act,-

(a) require any person to produce or deliver any document relevant to the investigation or proceeding;

(b) examine any person acquainted with the facts and circumstances of the case.

40. Power to summon persons to give evidence and produce documents.- (1) Any Gazetted Officer of Enforcement shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document during the course of any investigation or proceeding under this Act. (2) A summon to produce documents may be for the production of

certain specified documents or for the production of all documents of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by authorised agents, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents as may be required:

> Provided that the exemption under section 132 of the Code of Civil Procedure, 1908 (5 of 1908) shall be applicable to any requisition for attendance under this section.
>
> (4) Every such investigation or proceeding as aforesaid shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code, 1860 (45 of 1860) xxx xxx xxx
>
> 56. Offences and prosecutions.- (1) Without prejudice to any award of penalty by the adjudicating officer under this Act, if any person contravenes any of the provisions of this Act [other than section 13, clause (a) of sub-section (1) of1 [section 18, section 18A), clause
>
> (a) of sub-section (1) of section 19, sub-section (2) of section 44 and sections 57 and 58], or of any rule, direction or order made thereunder he shall, upon conviction by a court, be punishable,-

(i) in the case of an offence the amount or value involved in which exceeds one lakh of rupees, with imprisonment for a term which shall not be less than six months, but which may extend to seven years and with fine:

> Provided that the court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months;
> (
>
> ii) in any other case, with imprisonment for a term which may extend to three years or with fine or with both.
>
> (2) If any person convicted of an offence under this Act [not being an offence under section 13 or clause (a) or sub-section (1) of1 [section 18 or section 18A) or clause (a) of sub-section (1) of section 19 or sub-

section (2) of section 44 or section 57 or section 58] is again convicted of an offence under this Act [not being an offence under section 13 or clause (a) of sub-section (1) of [section 18 or section 18A] or clause (a) of subsection (1) of section 19 or sub-section (2) of section 44 or section 57 or section 58], he shall be punishable for the second and for every subsequent offence with imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine:

Provided that the court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months.

(3) Where a person having been convicted of an offence under this Act, [not being an offence under section 13 or clause (a) of sub-section (1) of1 [section 18 or section 18A] or clause (a) of sub-section (1) of section 19 or sub-section (2) of section 44 or section 57 or section 58], is again convicted of offence under this Act [not being an offence under section 13 or clause (a) of sub-section (1) of1 [section 18 or section 18A] or clause (a) of sub-section (1) of section 19 or sub-section (2) of section 44 or section 57 or section 58], the court by which such person is convicted may, in addition to any sentence which may be imposed on him under this section, by order, direct that that person shall not carry on such business as the court may specify, being a business which is likely to facilitate the commission of such offence for such period not exceeding three years, as may be specified by the court in the order.

(4) For the purposes of sub-sections (1) and (2), the following shall not be considered as adequate and special reasons for awarding a sentence of imprisonment for a term of less than six months, namely:-

(i) the fact that the accused has been convicted for the first time of an offence under this Act;

(ii) the fact that in any proceeding under this Act, other than a prosecution, the accused has been ordered to pay a penalty or the goods in relation to such proceedings have been ordered to be confiscated or any other penal action has been taken against him for the same offence;

(iii) the fact that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party in the commission of the offence;

(iv) the age of the accused.

(5) For the purposes of sub-sections (1) and (2), the fact that an offence under this Act has caused no substantial harm to the general public or to any individual shall be an adequate and special reason for awarding a sentence of imprisonment for a term of less than six months.

(6) Nothing in the proviso to section 188 of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply to any offence punishable under this section.

xxx xxx xxx

> 59. Presumption of culpable mental state.- (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

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

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

(3) The provisions of this section shall, so far as may be, apply in relation to any proceeding before an adjudicating officer as they apply in relation to any prosecution for an offence under this Act.

xxx xxx xxx

62. Certain offences to be non-cognizable.- Subject to the provisions of section 45 and notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence punishable under section 56 shall be deemed to be non-cognizable within the meaning of that Code."

205. The Railway Property (Unlawful Possession) Act, 1966, as stated in its preamble, is a comprehensive Act to deal with unlawful possession of goods entrusted to the Railways as a common carrier and to make the punishment for such offences more deterrent. The dominant object, or to be precise, the only object of the Railway Property (Unlawful Possession) Act, 1966 is to punish theft, dishonest misappropriation or unlawful possession of railway property.

206. Some of the provisions of the Railway Property (Unlawful Possession) Act are:-

> 3. Penalty for theft, dishonest misappropriation or unlawful possession of railway property.— Whoever commits theft, or dishonestly misappropriates or is found, or is proved] to have been, in possession of any railway property reasonably suspected of having been stolen or unlawfully obtained shall, unless he proves that the railway property came into his possession lawfully, be punishable—
>
> (a) for the first offence, with imprisonment for a term which may extend to five years, or with fine, or with both and in the absence of special and adequate reasons to be mentioned in the judgment of the court, such imprisonment shall not be less than one year and such fine shall not be less than one thousand rupees;

(b) for the second or a subsequent offence, with imprisonment for a term which may extend to five years and also with fine and in the absence of special and adequate reasons to be mentioned in the

judgment of the court, such imprisonment shall not be less than two years and such fine shall not be less than two thousand rupees.

Explanation.—For the purposes of this section, "theft" and "dishonest misappropriation" shall have the same meanings as assigned to them respectively in section 378 and section 403 of the Indian Penal Code (45 of 1860).

4. Punishment for abetment, conspiracy or connivance at offences.- Whoever abets or conspires in the commission of an offence punishable under this Act, or any owner] or occupier of land or building, or any agent of such owner or occupier incharge of the management of that land or building, who wilfully connives at an offence against the provisions of this Act, shall be punishable with imprisonment for a term which may extend to five years, or with fine, or with both.

Explanation.—For the purposes of this section, the words "abet" and "conspire" shall have the same meanings as assigned to them respectively in sections 107 and 120A of the Indian Penal Code (45 of 1860.)

5. Offences under the Act not to be cognizable.—Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), an offence under this Act shall not be cognizable.

6. Power to arrest without warrant.—Any superior officer or member of the Force may, without an order from a Magistrate and without a warrant, arrest any person who has been concerned in an offence punishable under this Act or against whom a reasonable suspicion exists of his having been so concerned.

xxx xxx xxx

8. Inquiry how to be made.—(1) When an officer of the Force receives information about the commission of an offence punishable under this Act, or when any person is arrested] by an officer of the Force for an offence punishable under this Act or is forwarded to him under section 7, he shall proceed to inquire into the charge against such person (2) For this purpose the officer of the Force may exercise the same powers and shall be subject to the same provisions as the officer incharge of a police-station may exercise and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898), when investigating a cognizable case:

Provided that—

(a) if the officer of the Force is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate;

(b) if it appears to the officer of the Force that there is not sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the

> accused person on his executing a bond, with or without sureties as the officer of the Force may direct, to appear, if and when so required before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior.

9. Power to summon persons to give evidence and produce documents.—(1) An officer of the Force shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document, or any other thing in any inquiry which such officer in making for any of the purposes of this Act. (2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(3) All persons, so summoned, shall be bound to attend either in person or by an authorised agent as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required:

> Provided that the exemptions under sections 132 and 133 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to requisitions for attendance under this section.
>
> (4) Every such inquiry as aforesaid, shall be deemed to be a "judicial proceeding" within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860)."
>
> 207. Even though the offences under the Railway Property (Unlawful Possession) Act are not cognizable, they entail punishment of imprisonment for a term which may extend to five years. Any member of the force may exercise power of arrest without an order from a magistrate and without warrant even on mere suspicion, if reasonable.
>
> 208. An officer of the force on receipt of information about commission of the offences punishable under the Act may inquire into the charges against the person and for this purpose the officer might exercise "the same powers and shall be subject to the same provisions as the Officer in Charge of a Police Station may exercise and is subject to under the Code of Criminal Procedure, 1898, when investigating a cognizable case." Proceedings before the officer are in the nature of judicial proceedings.
>
> 209. It is true, as argued by Mr. Jain, that an enquiry under the Central Excise Act, 1944 or the Customs Act 1962 is a judicial proceeding within the meaning of Sections 193 and 198 of the Indian Penal Code, by virtue of Section 14(4) of the Central Excise Act and Section 108(4) of the Customs Act, which are identical provisions and read "Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code (Act 45 of 1860)" Section 40(4) of FERA and Section 9(4) of the Railway Property (Unlawful

Possession Act) 1966 are also identical to and/or verbatim reproductions of Section 14(4) of the Central Excise Act and Section 108(4) of the Customs Act.

210. Sections 193 and 228 of the IPC are set out hereinbelow for convenience:

"193. Punishment for false evidence.—Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1.—A trial before a Court-martial * * * is a judicial proceeding.

Explanation 2.—An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of judicial proceeding, though that investigation may not take place before a Court of Justice.

228. Intentional insult or interruption to public servant sitting in judicial proceeding.—Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

211. An offence punishable with imprisonment under the Central Excise Act, the Customs Act, the FERA, the Railway Property (unlawful possession) Act or any other similar enactment is triable by the Court of competent jurisdiction.

212. Investigation into offences under the Acts mentioned above, namely the Central Excise Act, the Customs Act, the FERA (now repealed), the Railway Property (unlawful possession) Act, termed as inquiry, are held by departmental officials duly authorized to enable the concerned authorities to decide whether a complaint should be filed before the Competent Court. If the information gathered and/or materials obtained so warrant, a complaint is filed.

213. An inquiry under the Central Excise Act by any Central Excise Officer, empowered by the Central Government, or under the Customs Act, by any officer of customs empowered by general or special order of the Principal Commissioner/Commissioner of Customs or under the FERA by an Enforcement Officer or under the Railway Property (Unlawful Possession) Act 1961 by an officer of the Railway Protection Force is not the same as a proceeding in a Court of Law or Tribunal. Such an inquiry is preliminary to trial by a Court of competent jurisdiction.

It is akin to an enquiry conducted by a public servant under any other law with penal provisions including an enquiry under the NDPS Act.

214. Investigation under these Acts have been given the status of judicial proceedings within the meaning of Sections 193 and 228 of the IPC, unlike investigation of an offence under the NDPS Act. The only difference is that the person making a statement in an investigation under any of these Acts, is burdened with the consequences of giving false evidence in any other judicial proceedings including proceedings in a Court of Law, punishable with imprisonment which may extend to three years and also fine [Section 193 IPC] or of intentional insult or interruption to a public servant at any stage of a "judicial proceeding" punishable with imprisonment which might extend to six months or with fine or both [Section 228 IPC].

215. Since investigation under the Acts referred to above, namely the Central Excise Act, the Customs Act, the Railway Property (Unlawful Possession) Act has been given the status of judicial proceedings to deter persons from making false statements or otherwise intentionally hampering the investigation, the Legislature has deemed it appropriate to use the expression "shall have power to summon any person whose presence he considers necessary either to give evidence or to produce a document"

216. The expression 'evidence' has apparently been used to create an aura of proceedings, akin to proceedings in a Court of Law. However the admissibility of the statements and/or documents obtained is not any higher only because the proceedings are judicial proceedings and the expression "evidence" has been used. The prosecution would still have to prove its case at the time of trial by adducing evidence. The so called 'evidence' in the inquiry is not the same as evidence in a trial. Documents would still have to be tendered and proved at the time of trial. Whether any documents and/or statements obtained in course of investigation would at all be admissible in evidence at the trial and if so, the extent to which they would be relevant, would be decided by the Court trying the offence, having regard to the applicable law.

217. It is true that an Inquiry or investigation under the NDPS Act is not a judicial proceeding, just as an Inquiry or investigation by the police under the Cr.P.C. is not a judicial proceeding. However, a casual observation in a judgment of this Court, that "a police officer never acts judicially" in the context of an analysis of the reasons for inclusion of Section 25 of the Evidence Act, under which no confession to a police officer is to be proved as against a person accused of any offence, cannot be construed to lay down the proposition of law, that a confessional statement made to an officer in course of an enquiry before that officer cannot be tendered or proved in evidence, if the enquiry is not a judicial proceeding. Nor can such an observation be construed as a reverse proposition that all confessions in an enquiry before an officer, who is not police officer, but deemed to be a police officer for all purposes, with all the powers of a police officer including the power akin to Section 173(2) of the Cr.P.C, can be tendered and proved in evidence, only because the enquiry is a judicial proceeding within the meaning of Section 193 or 228 of the IPC, in the sense that a person intentionally giving false evidence in such proceeding, or intentionally insulting or causing interruption to a person holding such an enquiry is punishable with imprisonment.

218. Significantly the Constitution Benches in Romesh Chandra Mehta (supra) and Illias (supra) have made a distinction between police officers and other officers exercising the powers of a police officer for investigation of an offence under a special act by comparing the restricted police powers of the latter with the far wider powers of the former including those under the Police Acts.

219. The fact that the provisions of Chapter V of the NDPS Act, which confer powers of entry, search, seizure, arrest, investigation and inquiry on certain officers, do not expressly use the phrase "collect evidence" is not really material to the issue of whether such officers are police officers to attract the bar of Section 25 of the Evidence Act.

220. Section 67 of the NDPS Act enables an officer referred to in Section 42 authorized by the Central or State Government to (i) call for information from any person, (ii) require any person to produce or deliver any useful or relevant document or thing and (iii) to examine any person acquainted with the facts and circumstances of the case, during the course of any inquiry in connection with the contravention of any provision of the NDPS Act.

221. Similarly, an officer invested under Section 53 of the NDPS Act with the power of Officer in Charge of a Police Station for the purpose of investigation of an offence under the NDPS Act has the power to require the attendance of any person who appears to be acquainted with the facts and circumstances of the case and to examine such person.

222. It is difficult to appreciate how the fact that an inquiry under the Central Excise Act or the Customs Act or the FERA or any other Act which might be deemed to be a judicial proceeding to attract the penal provisions of Sections 193 and 228 of IPC, should make any difference to the admissibility in evidence, of the statements made in an enquiry under the NDPS Act.

223. It is true that all offences under the NDPS Act are cognizable under Section 37 of the NDPS Act. As observed above, some of the offences under the Central Excise Act and the Customs Act are also cognizable. Under Section 2(c) "cognizable offence" means an offence for which a police officer may arrest without warrant and under Section 2(l) defines "non cognizable offence" to mean an offence for which a police officer has no authority to arrest without warrant. Even though offences under the Railway Property (Unlawful Possession) Act are not cognizable, Section 6 of the said Act empowers any superior officer or member of the Railway Protection Force to arrest any person concerned with an offence under the said Act, without an order from a Magistrate and without a warrant.

224. Section 25 of the Evidence Act does not differentiate between evidence in a trial for non cognizable offence and evidence in a trial for cognizable offence. The admissibility of evidence does not depend on whether an offence is 'cognizable' or non-cognizable'. The mere fact that an offence was cognizable, enabling the police to arrest without warrant, should not make any difference to the admissibility or the probative value of the evidence adduced by the prosecution during the trial of the offence.

225. Significantly, as observed above, some of the offences under the Central Excise Act and the Customs Act are also cognizable. It may also be pertinent to point out that while all offences under

the NDPS Act including those punishable with imprisonment up to one year are cognizable, offences in the Railway Property (Unlawful possession) Act 1966, punishable with imprisonment of seven years, have been made non cognizable.

226. There can be no doubt that the mandatory provisions of the NDPS Act to ensure fair trial of the accused must be enforced. However, over-emphasis on the principles of natural justice in drug-trafficking cases can be a major hindrance to the apprehension of offenders. In offences under the NDPS Act, substantial compliance should be treated as sufficient for the procedural requirements, because such offences adversely affect the entire society. The lives of thousands of persons get ruined.

227. There can be no doubt that the fundamental rights under Article 20(3) and 21 are important fundamental rights which occupy a pride of place in the Indian Constitution. These rights are non negotiable and have to zealously be protected, with alacrity.

228. Legislature lacks the power to enact any law which contravenes fundamental rights guaranteed under the Constitution. Any statute and/or statutory provision which violates a fundamental right is liable to be struck down as ultra vires, unless protected from challenge on the ground of violation of fundamental rights by Article 31(A), 31(B) or 31(C) of the Constitution of India.

229. While Article 21 of the Constitution of India provides that no person shall be deprived of his life or liberty, except according to procedure established by law, Article 20 (3) provides that no person accused of any offence shall be compelled to be a witness against himself.

230. The right to live has liberally been construed by this Court to mean the right to live with dignity. All the human rights enumerated in the Universal Declaration of Human Rights (UDHR) adopted on 10 th December 1948 by the United Nations come within the ambit of the right to live under Article 21, of which no person can be deprived except by following a procedure established by law.

231. The Right to live under Article 21 also includes the right to privacy. This right is an extremely valuable right, intrinsic in Article

21. In K. S. Puttaswamy and Anr. v. Union of India and Ors. 46, a nine-Judge Bench of this Court unanimously held that the right to privacy is a fundamental right. However, the question of whether provisions of entry, search, seizure and arrest would violate the right to privacy of a person accused of an offence was not in issue. Be that as it may, reference may be made to the following observations of this Court:-

> “Chandrachud, J. (for Khehar, CJ., Agrawal, J., himself and Nazeer, J.
>
> “313. Privacy has been held to be an intrinsic element of the right to life and personal liberty under Article 21 and as a constitutional value which is embodied in the fundamental freedoms embedded in Part III of the Constitution. Like the right to life

> and liberty, privacy is not absolute. The limitations which operate on the right to life and personal liberty would operate on the right to privacy. Any curtailment or deprivation of that right would have to take place under a regime of law. The procedure established by law must be fair, just and reasonable. The law which provides for the curtailment of the right must also be subject to constitutional safeguards." Chelameswar, J.
>
> "377.It goes without saying that no legal right can be absolute. Every right has limitations. This aspect of the matter is conceded at the Bar. Therefore, even a fundamental right to privacy has limitations. The 46 (2017) 10 SCC 1 limitations are to be identified on case-to-case basis depending upon the nature of the privacy interest claimed. There are different standards of review to test infractions of fundamental rights. While the concept of reasonableness overarches Part III, it operates differently across Articles (even if only slightly differently across some of them).

Having emphatically interpreted the Constitution's liberty guarantee to contain a fundamental right to privacy, it is necessary for me to outline the manner in which such a right to privacy can be limited. I only do this to indicate the direction of the debate as the nature of limitation is not at issue here.

xxx xxx xxx

380.The just, fair and reasonable standard of review under Article 21 needs no elaboration. It has also most commonly been used in cases dealing with a privacy claim hitherto. [District Registrar and Collector v. Canara Bank, (2005) 1 SCC 496 : AIR 2005 SC 186] , [State of Maharashtra v. Bharat Shanti Lal Shah, (2008) 13 SCC 5] Gobind [Gobind v. State of M.P., (1975) 2 SCC 148 : 1975 SCC (Cri) 468] resorted to the compelling State interest standard in addition to the Article 21 reasonableness enquiry. From the United States, where the terminology of "compelling State interest" originated, a strict standard of scrutiny comprises two things—a "compelling State interest" and a requirement of "narrow tailoring" (narrow tailoring means that the law must be narrowly framed to achieve the objective). As a term, "compelling State interest" does not have definite contours in the US. Hence, it is critical that this standard be adopted with some clarity as to when and in what types of privacy claims it is to be used. Only in privacy claims which deserve the strictest scrutiny is the standard of compelling State interest to be used. As for others, the just, fair and reasonable standard under Article 21 will apply. When the compelling State interest standard is to be employed, must depend upon the context of concrete cases. However, this discussion sets the ground rules within which a limitation for the right to privacy is to be found." Bobde, J.

"403. ..... Nor is the right to privacy lost when a person moves about in public. The law requires a specific authorization for search of a person even where there is suspicion." Nariman, J.

"525..... In the ultimate analysis, the fundamental right to privacy, which has so many developing facets, can only be developed on a case-to-case basis. Depending upon the particular facet that is

relied upon, either Article 21 by itself or in conjunction with other fundamental rights would get attracted.

526. But this is not to say that such a right is absolute. This right is subject to reasonable regulations made by the State to protect legitimate State interests or public interest. However, when it comes to restrictions on this right, the drill of various articles to which the right relates must be scrupulously followed. For example, if the restraint on privacy is over fundamental personal choices that an individual is to make, State action can be restrained under Article 21 read with Article 14 if it is arbitrary and unreasonable; and under Article 21 read with Article 19(1)(a) only if it relates to the subjects mentioned in Article 19(2) and the tests laid down by this Court for such legislation or subordinate legislation to pass muster under the said article. Each of the tests evolved by this Court, qua legislation or executive action, under Article 21 read with Article 14; or Article 21 read with Article 19(1)(a) in the aforesaid examples must be met in order that State action pass muster. In the ultimate analysis, the balancing act that is to be carried out between individual, societal and State interests must be left to the training and expertise of the judicial mind.

536. This reference is answered by stating that the inalienable fundamental right to privacy resides in Article 21 and other fundamental freedoms contained in Part III of the Constitution of India. M.P. Sharma [M.P. Sharma v. Satish Chandra, AIR 1954 SC 300 :

> 1954 Cri LJ 865 : 1954 SCR 1077] and the majority in Kharak Singh [Kharak Singh v. State of U.P., AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332] , to the extent that they indicate to the contrary, stand overruled. The later judgments of this Court recognising privacy as a fundamental right do not need to be revisited. These cases are, therefore, sent back for adjudication on merits to the original Bench of three Hon'ble Judges of this Court in light of the judgment just delivered by us." Kaul, J.

"629. The right of an individual to exercise control over his personal data and to be able to control his/her own life would also encompass his right to control his existence on the internet. Needless to say that this would not be an absolute right. The existence of such a right does not imply that a criminal can obliterate his past....."

232. In Maneka Gandhi v. Union of India 47, this Court held that the procedure established by the law for depriving a person of his life or personal liberty must be fair, reasonable and free of arbitrariness. A procedure for deprivation of liberty, which is arbitrary and oppressive can not be said to be in conformity with Article 14 and would thus not clear the test of fair and reasonable procedure in Article 21 of the Constitution.

233. While the right to a fair trial by an impartial Court and/or Tribunal is a human right under the UDHR and an essential concomitant of the fundamental rights, at the same time, the fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. A crime under the NDPS Act is a crime against society and not just an individual or a group of individuals. While the safeguards in the NDPS Act must scrupulously be

adhered to prevent injustice to an accused, the Court should be vigilant to ensure that guilty offenders do not go scot free by reason of over emphasis on technicalities. Substantial justice must be done. Every piece of evidence should be objectively scrutinized, evaluated and considered to arrive at a final decision.

234. Article 20(3) of the Constitution gives protection to a person:

(i) accused of an offence
(ii) against compulsion “to be a witness”and

47. AIR 1978 SC 597

(iii) against himself

235. Compulsion is an essential ingredient of the bar of Article 20 (3) of the Constitution. Article 20 (3) does not bar the admission of a statement, confessional in effect, which is made without any inducement, threat or promise, even though it may have subsequently been retracted. The article also does not debar the accused from voluntarily offering himself to be examined as a witness. The constitutional protection against compulsion to be a witness is available only to persons “accused of an offence”, and not persons other than the accused. It is a protection against compulsion to be a witness and it is a protection against compulsion resulting in giving evidence against himself.

236. As held in Balkishan A Devidayal vs State of Maharashtra48, a formal accusation may be made in an FIR or a formal complaint or any other formal document or notice served which ordinarily results in his prosecution in court. The protection would not apply before the person is made as an accused in a formal complaint.

237. In Nandini Satpathy v. P.L.Dani and Anr. 49 cited by Mr. Jain, a three-Judge Bench of this Court held that the protection of Article 20(3) goes back to the stage of investigation and that accordingly he is entitled to refuse to answer incriminating questions.

48. (1980) 4 SCC 600

49. (1978) 2 SCC 424 An accused has the right of silence. As held in Nandini Satpathy (supra) any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, becomes compelled testimony. This principle would apply with equal force to any testimony in an investigation before a person other than a police officer including an officer under the NDPS Act.

238. Compulsion may be in many forms. It may be physical or mental. However, mental compulsion takes place when the mind has been so conditioned by some extraneous process, as to render the

making of the statement involuntary and therefore, extorted. This proposition finds support from the judgment of this Court in State of Bombay v. Kathi Kalu Oghad50; Poolpandi and Ors. v. Superintendent Central Excise and Ors.51. Statements obtained by continuous and prolonged interrogation for hours at a stretch in unhealthy, unhygienic, uncomfortable and inconvenient conditions, without proper food, drinking water, washroom facilities etc. may not be accepted as voluntary.

239. The immunity under Article 20(3) does not extend to compulsory production of documents or material objects or to compulsion to give specimen writing, specimen signature, thumb impression, finger prints or blood samples. However, compulsion

50. AIR 1961 SC 1808

51. AIR 1992 SC 1795 regarding documents attracts the bar of Article 20 (3) if the documents convey personal knowledge of the accused relating to the charge. Reference may be made to the judgments of this Court in Mohamed Dastagir v. State of Madras 52 and State of Bombay v. Kathi Kalu Oghad53. Similarly, this Court has frowned upon narco analysis as the statement so made is induced and, therefore, involuntary.

240. In Sampath Kumar v. Enforcement Office, Enforcement Directorate, Madras54, this Court held that when a person was summoned and examined under Section 40 of the Foreign Exchange Regulation Act, 1973, it could not be presumed that the statement was obtained under pressure or duress. The statement cannot be attacked on the ground of infringement of the constitutional guarantee of protection against is incrimination under Article 20(3) of the Constitution of India.

241. There can be no doubt that any confession made under compulsion to any person whether or not a police officer would attract Article 20(3) of the Constitution. Any confession made under compulsion would also be hit by Section 24 of the Evidence Act. Confession under compulsion is no evidence in the eye of law. 52 AIR 1960 SC 756 53 1961 SC 1808 54 1997 8 SCC 358

242. A confessional statement, if not obtained by compulsion, as judicially explained, would be hit by Sections 25 and 26 only if such statement is made to a police officer (Section 25 of the Evidence Act) or while in the custody of a police officer and not in the presence of a Magistrate (Section 26 of the Evidence Act). It is now settled by the Constitution Bench in Badku Joti Sawant (supra) and Romesh Chandra Mehta (supra) and a plethora of judgments of this Court that Section 25 would only apply to a police officer or an officer who exercises all the powers of a police officer including the power of filing a police report under Section 173 of the Cr.PC. An officer under the NDPS Act does not have the power to file a police report under Section 173 of the Cr.P.C.

243. A confessional statement does not automatically result in the conviction of an accused offender. Such statements have to be tendered and proved in accordance with the law. The evidentiary value of the statement which is confessional in nature has to be weighed and assessed by the Court at the trial.

244. As stated by this Court in Vishnu Pratap Sugar Works Pvt. Ltd. v. Chief Inspector of Stamp, U.P. 55, a Statute is an edict of the legislature and has to be construed according to "the intent of those that make it".

55. AIR 1968 SC 102

245. If a statutory provision is open to more than one interpretation, the Court has to choose that interpretation which represents the true intention of the legislature. It is to be presumed that in enacting a post constitutional law the legislative intent could not have been to violate any fundamental right.

246. In ascertaining the intention of the legislature the Court is to examine two aspects, the meaning of the words and phrases used in the statute and the purpose and object or the reason and spirit pervading through the statute.

247. Legislative intention, that is the true legal meaning of an enactment, is deduced by considering the meaning of the words used in the enactment, in the light of any discernible purposes or object of the enactment. When any question arises as to the meaning of any provision in a statute, it is proper to read that provision in the context of the intention of the legislature. The intention of the Legislature must be found by reading the statute as a whole.

248. A statute or any statutory provision must be construed and interpreted in a manner that makes the statute effective and operative on the principle expressed in the maxim ut res magis valeat quam pereat and/or in other words, the principle that courts while pronouncing on the constitutionality of a statute starts with the presumption in favour of constitutionality and prefer a construction which keeps the statute within the competence of the legislature.

249. Thus when a statute is vague, the Court will give such an interpretation that keeps the statute in conformity with the fundamental rights. Similarly, if a statute is capable of two interpretations one of which violates the fundamental rights and the other of which protects the fundamental rights the court would opt for the latter.

250. When a statutory provision is clear and there is no ambiguity, this Court cannot alter that provision by its interpretation. To do so, would be to legislate, which this Court is not competent to do. If a provision is free from ambiguity or vagueness, and is clear, but violative of a fundamental right, the Court will have to strike the same down. Any omission in a statute cannot be filled in by Court as to do that would amount to the legislation and not construction. The Court cannot fill in casus omissus and language permitting Court should avoid creating casus omissus where there is none. In the interpretation of statute the Courts must always presume that legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect.

251. The attention of this Bench has not been drawn to any ambiguous provision capable of two or more interpretations, one of which would be in consonance with the fundamental rights and the

other violative of the fundamental rights. Counsel appearing in support of the appeals have in effect invited this Court to introduce further safeguards, not contemplated by the legislature in the NDPS Act through the process of interpretation.

252. The proposition of law in Directorate of Revenue and Another v. Mohammed Nisar Holia 56 cited by Mr. Jain is well settled. There is no doubt that the NDPS Act contains severe penal provisions. There can also be no dispute with the proposition that when harsh provisions, lead to a severe sentence, a balance has to be struck between the need of the law and enforcement thereof on the one hand and the protection of a citizen from oppression and injustice. The requirements of Section 42 and 43 have to be complied with strictly and in letter and spirit.

253. There can be no quarrel with the proposition that the power of search, seizure and arrest is founded upon the competent officer duly empowered having "reason to believe", which might be based on personal knowledge, or secret information provided by an informant whose name need not be disclosed.

254. It is also obvious that a person who does not break the law is entitled to enjoy his life and liberty, which includes the right not to be disturbed in his room, or for that matter elsewhere, without complying with the mandatory safeguards of the NDPS Act. The presumption under Section 66 of the NDPS Act in respect of the truth 56 (2008) 2 SCC 370 and contents of documents seized, would not apply to an illegible fax, the contents of which could not be proved. Mohammad Nisar Holia (supra) does not say that a statement made to an officer invested with powers under Section 53 or 67 cannot be used against the accused. The findings with regard to the illegible fax were rendered in the facts and circumstances of the case.

255. In State of Punjab v. Baldev Singh57, this Court observed that the question of whether or not the procedure prescribed under the NDPS Act for personal search had been followed and the requirements of the relevant sections in this regard satisfied was a matter of trial. It would neither be feasible nor possible to lay down any absolute formula. The observation is equally applicable to entry, search, seizure, arrest, holding of inquiry/investigation including the examination of persons.

256. As observed above, an inquiry/investigation under the NDPS Act does not culminate in any report. The inquiry is in the nature of a preliminary inquiry which may lead to the filing of a complaint in the Special Court. The Prosecution has to prove its case before the Special Court which would examine, analyze, assess and weigh the evidence on record. Suspicion can in no circumstances be a substitute for evidence. As held by this Court in State of Punjab v. 57 (1999) 6 SCC 172 Baldeo Singh58, Ritesh Chakaravarty v. State of Madhya Pradesh59, Noor Aga (supra) and numerous other cases, the severer the punishment for the offence, the stricter is the degree of proof. All the safeguards provided in the NDPS Act must be scrupulously followed.

257. In Badku Jyoti Savant (supra), the Constitution Bench of this Court considered Section 21(2) of the Central Excise Act (then known as Central Excise and Salt Act) which provided "for this purpose the Central Excise Officer may exercise the same powers and shall be subject to the same provisions as the officer-in-charge of a police station may exercise and is subject to under the Code of Criminal

Procedure, 1898 (5 of 1898), when investigating a cognizable case".

258. The powers conferred on Central Excise Officer by Section 21(2) of the Central Excise Act (then known as Central Excise and Salt Act) are identical to those of an officer under the NDPS Act, invested with the powers of an Officer in Charge of a police station for the purpose of investigation of an offence under the NDPS Act.

259. Construing Section 21(2) in Badku Joti Savant (supra), the Constitution Bench held that Central Excise Officers do not have all the powers of a police officer qua investigation, which necessarily includes the power to file a report under Section 173 of the Cr.P.C. 58 (1999) 6 SCC 172 59 (2006) 12 SCC 321

260. The Constitution Bench judgment has been followed by two Constitution Bench judgments that is Ramesh Chandra Mehta (supra) and Illias v. Collector of Customs (supra) referred to above and has held the field for over 50 years. As observed above, in Raj Kumar Karwal (supra), this Court made a comparison of the power of a Central Excise Officer under Section 21(2) with those of officer under NDPS Act under Section 50 as also a comparison of Section 36A(1)(d) with Section 190 of the Cr.P.C regarding the manner of taking cognizance of offences and found that the judgment of three Constitution Benches was binding on a two Judge Bench.

261. It is obvious that no two statutes can be identical. There may be differences. If there were no differences, It would not be necessary to enact a separate statute. The question is whether there were any such differences which can logically lead to the conclusion that the law as interpreted in those judgments would not apply to the NDPS Act.

262. For the reasons discussed, I am firmly of the view that the differences adverted to, do not make any difference to the law laid down in Badku Joti Savant (supra) followed and affirmed in Romesh Chandra Mehta (supra) and Iliyas (supra) and subsequent decisions, which have held the field for over fifty years.

263. The proposition of law laid down by the Constitution Bench in the judgments referred to above and, in particular, Romesh Chandra Mehta (supra) is that, the test to determine whether an officer is deemed to be a police officer within the meaning of Section 25 of the Evidence Act is, whether such officer has all the powers of a police officer including the power to file a report under Section 173 of the Cr.P.C.

264. In my view, the question of whether in reality or substance there is any difference between a complaint under Section 36A (1)(d) of the NDPS Act filed by an authorized officer of the Central Government or the State Government and a police report filed under Section 173 of the Cr.P.C, raised by the Appellant cannot be decided by this Bench of three-Judges in view of three five-Judge Constitution Bench judgments referred to above, which are binding on this Bench.

265. Similarly, the question of whether an investigating officer invested with the powers of Officer in Charge of a police station for the purpose of investigation of an offence under a special Act like the

NDPS Act is empowered to file a police report under Section 173 of the Cr.P.C cannot also be reopened by this Bench, in view of five- Judge Constitution Bench judgments referred to above.

266. The law which emerges from the Constitution Bench judgments of the Supreme Court in Badku Joti Savant (supra), Romesh Chandra Mehta (surpa() and Iilias (supra) is that, an officer can be deemed to be a police officer within the meaning of Section 25 of the Evidence Act:

> (i) if the officer has all the powers of a police officer qua investigation, which includes the power to file a police report under Section 173 of the Cr.P.C.,
>
> (ii) the power to file a police report under Section 173 of Cr.P.C is an essential ingredient of the power of a police officer and
>
> (iii) the power to file a police report under Section 173 of Cr.P.C has to be conferred by statute.

267. A statute may expressly make Section 173 of the Cr.P.C applicable to inquiries and investigations under that statute. However, in the case of a statute like the NDPS Act, where the provisions of the Cr.P.C do not apply to any inquiry/investigation, except as provided therein, it cannot be held that the officer has all the powers of a police officer to file a report under Section 173 of the Cr.P.C. The NDPS Act does not even contain any provision for filing a report in a Court of law which is akin to a police report under Section 173 of the Cr.P.C.

268. As per the well established norms of judicial discipline and propriety, a Bench of lesser strength cannot revisit the proposition laid down by at least three Constitution Benches, that an officer can be deemed to be a police officer within the meaning of Section 25 of the Evidence Act only if the officer is empowered to exercise all the powers of a police officer including the power to file a report under Section 173 of the Cr.P.C.

269. With the greatest of respect, Counsel appearing in support of the appeals have made general arguments with regard to the differences between provisions of the Central Excise Act or the Customs Act with the NDPS Act. However, they have not specifically shown how exactly the powers of NDPS officers conducting an investigation of an offence under the NDPS Act are different from those of the Central Excise Officers, Customs officers and/or Railway Protection Force Officers conducting an inquiry into an offence under the provisions of those Acts.

270. As observed above, the provisions of the Cr.P.C do not apply to an inquiry/investigation under the NDPS Act except to the limited extent provided in Section 50(5) and 51. Section 173 of the Cr.P.C has not been made applicable to the NDPS Act.

271. For the reasons discussed above, I am of the view that the Judgment of this Court in Raj Kumar Karwal (supra), which has reaffirmed the verdict of three Constitution Benches does not require reconsideration. Nor does Kanhaiyalal (supra) require reconsideration.

.....J. [Indira Banerjee] NEW DELHI OCTOBER 29, 2020