

Om Prakash Vs. State

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Court : Delhi

Decided On : May-23-2014

Judge : S. Muralidhar

Appellant : Om Prakash

Respondent : State

Advocate for Def. : Ms. Aashaa Tiwari

Advocate for Pet/Ap. : Mr. Sanjeev Bhatnagar, Mr. Sounak S. Das, Ms. Rubi Sagar

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI CRL.A. 453 of 2014 & Crl. M.(B) 763 of 2014 Reserved on:

15. h May 2014 Delivered on:

23. d May 2014 OM PRAKASH Appellant Through: Mr. Sanjeev Bhatnagar with Mr. Sounak S. Das and Ms. Rubi Sagar, Advocates. versus STATE Respondent Through: Ms. Aashaa Tiwari, APP for State with ASI Narendra Kumar, Narcotics Cell. CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

235.2014 1. This appeal is directed against the judgment dated 15th February 2014 convicting the Appellant under Section 18(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and the order on sentence of the same date sentencing him to undergo rigorous imprisonment (RI) for 15 years and a fine of Rs.2 lakhs and in default to undergo simple imprisonment (SI) for two years. Case of the Prosecution 2. On 9th July 2011, at around 6.30 pm, a secret informer is stated to have come to the office of the Narcotics Cell at Shakar Pur, Delhi. He is stated to have given information to the effect that two persons, namely Om Prakash, the Appellant and Inder Dev, residents of District Mandsaur, Madhya Pradesh, who supplied opium in Delhi, Haryana and Punjab, would come in their own vehicle between 8.30 and 9 pm on the Outer Ring Road near Kali Mata Mandir, Rohini to supply opium to some person and that they could be apprehended at that time. This information was received by SI Rajbir (PW-10) who, upon being satisfied on making enquiries from the informer, produced him before Inspector Kuldeep Singh (PW-8). PW-8, after verifying the said information and being satisfied, informed Assistant Commissioner of Police (ACP) Bir Singh (PW-11) who in turn instructed him to carry out the raid proceedings.

3. The secret information was recorded in daily diary (DD) No.13 (Ex.PW-8/A) by PW-10 and countersigned by PWs-8 and 11. A copy of the said DD entry (Ex.PW-8/A) was retained in the Narcotics Cell by PW-10.

4. A raiding team of PW-10, HC Laxman Prasad (PW-6) and Constable Sohan Pal (PW-1) was formed. The raiding party left the Narcotics Cell in an official car and reached the spot at around 8.20 pm. According to PW-10, at the time of leaving, the raiding party had taken an Investigation Officer (IO) bag, Field Testing Kit (FTK), weights of 20 Kg, 10 Kg, 5 Kg, 1 Kg, 500 gms, 100 gms and 50 gms with a traditional weighing instrument. The informer also accompanied them. The departure of the team was recorded in DD No.14. The vehicle was driven by HC Satyavan.

5. According to PW-10, on the way to the spot, he asked, five people near the Narcotics Cell to join the raiding party after briefing them about the secret information. They refused to join. He is stated to have asked five other persons at

Burari Chowk Red Light who also refused. Finally, again, at the spot, he asked some passers-by to join the proceedings, all of whom expressed their inability to do so. The government vehicle was parked at a distance of about 35 meters from Kali Mata Mandir towards Dipali Chowk and HC Satyavan, the driver, was given instructions to reach the spot after receiving the signal. PW10, along with PWs-1 and 6, took their positions at the Kali Mata Mandir at 8.30 pm and waited for the accused persons to arrive.

6. According to PW-10, at about 8.35 pm, the Appellant came from the side of Peeragarhi in a Silver-White colour Wagon-R bearing No.RJ30A1015 He stopped the car at a distance of 5 to 7 meters ahead of the Mandir. He got down from the car and started waiting for someone, whilst looking around. When, after about 10 minutes, he was about to sit in the car to leave, he was apprehended by the raiding party, after being identified by the informer. PW-10 introduced himself and, upon enquiry, the Appellant disclosed his details. According to PW-10, thereafter, the Wagon-R car was locked and the keys were handed over to the Appellant. He was told about his legal rights, and that he was required to be searched and that he could have his search done before a Gazetted Officer or before a Magistrate, and that he could also take a search of the government vehicle and the raiding party members. PW10 stated that a carbon copy of the notice under Section 50 of the NDPS Act was served upon the Appellant. He was also told about the meaning of Gazetted Officer and Magistrate. According to PW-10, the Appellant declined to avail his legal rights and wrote his refusal on the original notice under Section 50 of the NDPS Act (Ex.PW-1/B). PW10 stated that, at this point, he asked 6 to 7 passers-by who had gathered there to join the raiding party after telling them about the secret information but all of them refused to join the proceedings and gave no names and addresses.

7. PW-10 stated that he took a cursory search of the Appellant and from him no narcotic substance was recovered. Non-recovery memo (Ex.PW-1/C) was prepared. Thereafter, PW-10 took the keys of the Wagon-R car from the Appellant and opened the vehicle. On checking, he found three plastic dibbas of off white colour on the rear seat of the Wagon-R. The mouths of the plastic dibbas were tied with the lids. The three dibbas were opened, checked and found containing

transparent polythenes in each of them. The mouths of the plastic dibbas were tied with sutli and were apparently containing a black colour sticky substance. The polythenes were untied and the foul smelling sticky black colour material was checked separately. It was sniffed and checked with the FTK and found to be opium. The boxes were given marks A, B and C.

8. PW-10 then stated that three polythenes containing opium were weighed separately at the spot with the balance that was carried by the raiding party. The weight of the three polythenes was found to be 13 Kg, 13 Kg and 14 Kg respectively. Two samples of 50 gms each were taken from each dibba. The six samples were kept in separate transparent polythenes tied with rubber band and, with the help of white cloth, six sample pullandas were prepared. Marks-A1 and A2 were given to the samples taken out from dibba Mark-A. Marks-B1 and B2 were given to the samples taken out from dibba Mark-B and Marks C1 and C2 were given to the samples taken out from dibba Mark-C. The remaining opium was kept in the dibbas tied with the lids and each dibba was kept in a separate white colour plastic katta and the kattas were given Marks-A, B and C corresponding to the marks given to the dibbas. The Forensic Science Laboratory (FSL) Form was filled at the spot. PW-10 stated that he affixed the official seal 2A PS NB Delhi on all the nine pullandas and the FSL Form. The pullandas and the FSL Form were taken into possession by a memo (Ex.PW-1/D).

9. PW-10 is then stated to have prepared the rukka (Ex.PW-1/DA) and handed over the same to PW-1 along with the case property, pullandas, carbon copy of the seizure memo and FSL Form. He was instructed to hand over the case property to the Station House Officer (SHO), Police Station (PS) Crime Branch, Nehru Place and produce the rukka before the Desk Officer (DO) for registration of the FIR. PW-1 left in the government vehicle with HC Satyavan at around 12.45 am for the PS Crime Branch.

10. PW-1 in his evidence more or less corroborated what was stated by PW-10. He stated that after leaving the spot in the government vehicle at 12.45 am, he reached the PS Crime Branch, Nehru Place at 2.05 am and handed over the rukka to the Duty Officer. He produced the articles before the SHO C.R.Meena (PW-3)

who then fixed his seal of CRM on the 9 pullandas and the Form FSL. He also put his signatures and the FIR number. The SHO then called the HC Jag Narain (PW-5), MHC(M) to his office with Register No.19 and handed over the case property pullandas to him. PW-5 then made the relevant entries in Register No.19. PW-3 also recorded DD No.11 at 2.45 am.

11. The investigation of the case was entrusted to Assistant Sub Inspector (ASI) Mahender Singh (PW-7). He reached the spot at around 7 am. There, PW-10 handed over to him all the relevant documents, the Wagon-R car, a seizure memo and also produced the Appellant before him. At the instance of PW-10, a site plan (Ex.PW7/B) was prepared by PW-7. He recorded the statement of PW-6. After interrogating the Appellant, PW-7 arrested the Appellant and prepared an arrest memo (Ex.PW-6/A) at 5.15 am.

12. PW-7 prepared a report under Section 57 of the NDPS Act regarding the arrest of the Appellant (Ex.PW-7/E). In it, he stated that the Appellant was arrested at 5.15 am on 10th July 2011 from the spot near Kali Mata Mandir, Ring Road, Delhi and that the information of arrest has been conveyed to his wife Smt. Saraswati Devi on Mobile No.07424244664 as per his desire. A special report was also prepared by PW-10 regarding the seizure (Ex.PW-11/B) which was forwarded to PW-8 and also to PW-11.

13. HC Dalbir (PW-4) stated that at 2.05 am, on receipt of the rukka brought by PW-1, he made an endorsement (Ex.PW-4/B) thereon and registered the FIR (Ex.PW-4/A). HC Jag Narain (PW-5) deposed that PW-3 had called him to his office with Register No.19 at 2.30 am on 10th July 2011 and handed over to him the carbon copy of the seizure memo, 9 pullandas, the FSL Form all sealed with seals of 2A PS NB Delhi and CRM. PW-2, HC Braham Dev, deposited the sample pullandas in the FSL. He stated that he had collected the three pullandas, the FSL Form having seals of 2A PS NB Delhi and CRM on 19th July 2011 and deposited the same at FSL, Rohini. He, thereafter, handed over the receipt acknowledgment to MHC (M). He stated that he had not tampered with the case property.

14. SI Kuldeep Singh (PW-8) and ACP Bir Singh (PW-11) corroborated the evidence of PW-10. Alok Chaturvedi (PW-9), a clerk in the RTO Office,

Chittorgarh, Rajasthan brought the record of the Wagon R car from which the recovery was purportedly made. It was shown to have been initially registered on 12 th August 2008 in the name of one Pooja Sanghnani. Later it was transferred to Mr. Raj Mal Bhim on 26th April 2011.

15. The IO/ASI Mahender Singh (PW-7) stated that he recorded the statements of SHO and MHC (M) at 7.15 am, then left at 7.45 am with PW-1 and the Appellant and reached the Narcotics Cell, Shakarpur at 8.30 am. He handed over the report under Section 57 of the NDPS Act (Ex.PW-7/E) regarding the arrest of the Appellant to PW-8 on 11th July 2011 for forwarding it to seniors. The Appellant was then taken in police custody for five days. After completion of investigation, PW-7 handed over the case property to MHC (R). The charge sheet was thereafter filed by the first IO.

16. It must be noted at this stage that the report of the FSL, Rohini was prepared by Dr. S. Sudhakar, Senior Scientific Officer (Chemistry) [Ex.PY].. Samples A1, B1 and C1 were found to contain morphine, codeine, Thebaine, Narcotine and Papaverine which are the main constituents of opium. The percentage of morphine in samples A1, B1 and C1 were 2.41%, 2.67%, 2.96% respectively and gave a positive test for opium.

17. The trial Court record shows that on 28 th January 2012, charge was framed against the appellant stating that he was found in illegal and unlawful possession of 40 kg of opium kept in three plastic dibbas in a Wagon R car, in which he was travelling, on 9th July 2011, at about 8.45 pm near Kali Mata Mandir, Ring Road, Rohini. Thus he had committed an offence under Section 18 of the NDPS Act. The Appellant pleaded not guilty and claimed trial. Applications by the Appellant 18. The trial commenced with the examination of PWs-1 and 2 on 16th April 2012. On 17th April 2012, PWs-3, 4 and 5 were examined and discharged. The next dates of trial were fixed as 7th and 8th June 2012. At that stage, two applications were filed by the Appellant. One was for summoning the Call Detail Records (CDRs) of some mobile numbers. This was in the context of the stand taken by the Appellant that he and his brother Inder Dev had been abducted by the Crime Branch, Delhi on 9th July 2011 from Kishan Garh in Rajasthan. He had named Constable Kheta

Ram, PW-6, PW-10, HC Rathore, HC Satyavan, PW-7 and PW-8 as his captors. The operative portion of the order passed by the trial Court in the said application on 21 st April 2012 reads:

In order to know the truth such CDRs are very much material. IO is directed to collect CAF and CDRs of following phone numbers from 5th July 2011 to 13th July 2011: Sl. No. Mobile No. Name of User Name of Service Provider 1. 08447386638 Sh. Kheta Ram Vodafone, Mobile Service Ltd. C-48, Okhla Indl. Area 2. 09289696520 3. 09213421243 4. 09560369790 5. 09810756351 6. 09990460100 7. 09968388886 8. 09868070290 9. 09968788745 CRL.A. No.453 of 2014 Phase-II, New Delhi. Sh. Kheta Ram Tata Docomo, 2A, Old Ishwar Nagar Main Mathura Road, Delhi-65. Ct. Satyawan Tata Docomo As above. HC Laxman Airtel Parsad Bharti Airtel Ltd. Vasant Kunj, Phase II, New Delhi-70. Insp. Kuldeep Airtel Singh As above. SI Rajvir Singh Idea Idea Cellular Ltd. Corporate Office, 1005/06 Kailash Building, First Floor, Kasturba Gandhi Marg, Connaught Place, New Delhi-1 Sh. Rathor MTNL Regional Manager Sh. B.K. Tiwari, Bhikaji Place New Delhi-66 ASI Mahender MTNL As above Ct. Sohan Pal MTNL As above Page 10 of 56 10. 09425107225 Inder Dev 11. 09424834623 Sh. Om Prakash BSNL Regional Manager BSNL Office, Nai Abadi, Police Colony, Mandisor MP-458002 BSNL As above 19. Another application was filed by the Appellant seeking CCTV footage of 9th July 2011 between 12.30 pm and 1.30 pm of the cameras installed at Kishan Garh Toll Point, GVK, Jaipur Expressway. On the said application, a separate order was passed by the trial Court on 21 st Aril 2012. The operative portion of the said order reads as under:

In order to know the truth such CCTV footage are very much material. So, Manager Mr. Manish Sharma, GVK, Jaipur, Kishan Garh having office at Kishangarh Express Way Toll Point, District Ajmer, Rajasthan is directed to produce CCTV footage dated 9th July 2011 between 12.30 pm to 1.30 pm of the cameras installed at that point for watching the movement of the vehicles and persons on the road from Kishangarh to Jaipur.

20. On 10th July 2012, as a follow up on the above two orders passed on 21st April 2012, the Court passed the following order:

An application of the accused for calling CDRs and CAFs of some of the police officials, accused himself and his brother Inder Dev is pending disposal. On 21st April 2012, police was directed to collect the CAF and CDRs of Kheta Ram, Ct. Satyawar, HC Laxman Prasad, Insp. Kuldeep Singh, SI Rajbir Singh, Mr. Rathore, ASI Mahender, Ct. Sohan Pal, Inder Dev and accused Om Prakash. On the same day, it was also directed to produce CCTV footage dated 9th July 2011 between 12.30 pm to 1.30 pm of the vehicles passing through Kishangarh toll point. Police has filed reply stating that CCTV at the said barrier is not available because it is kept only for seven days and accused is demanding it after elapse of several weeks. About CAF and CDRs, it is stated in the reply that the telephone numbers are in the name of SI Rajbir Singh and ASI Mahender Singh. CAF also stand in their names. Regarding other police officials and their telephone number, it is stated that those numbers are not owned by those officials and they are also not users. So, this Court cannot direct police to place on record CAFs and CDRs of the persons who are not parties before this Court and are also not the witnesses. The other reason is that the police officials Kheta Ram, Ct. Satyawar, HC Laxman Prasad, Insp. Kuldeep Singh, Mr. Rathore and Ct. Sohan Pal are not using, as per reply, those numbers. So, police is directed to place on record the CAFs and CDRs of the phones of SI Rajbir Singh, ASI Mahender, public person Inder Dev and accused Om Prakash. Today, these have been placed on record and copies have been supplied to accused.

21. It appears that the above orders were not fully complied with and another application was filed by the Appellant. The following order was passed by the trial Court on it on 23rd August 2012:

This order shall decide the application of the accused for compliance of order dated 21st April 2012. An order dated 10th July 2012 was passed in the presence of the counsel for accused directing the CAFs and CDRs of ASI Mahender, SI Rajbir Singh, public person Inder Dev and accused Om Prakash to be placed on record. Vide order dated 21st April 2012, only direction to the IO was to collect CAFs and CDRs of eleven phone numbers. Police collected those documents but took objection to the filing of some CAFs and CDRs of some telephone numbers. At that time, the application of the accused was pending and that application was

decided vide order dated 10th July 2012 holding that only the CDRs and CAFs of above said persons shall be taken on the record. So, the present application is maintainable only in respect of the direction to the police to place on record the CDRs of above said four persons dated 9th July 2011 and for filing their BTS addresses. Police is directed to collect the CDRs of telephone Numbers- 0999460100 of SI Rajbir Singh, 0986807290 of ASI Mahender, 09425107225 of Inder Dev and 09424834623 of accused Om Prakash dated 9th July 2011 and to place it on record. Police is further directed to collect the location charts/BTS addresses of above said phone numbers from 5th July 2011 to 13th July 2011 and file report on record. Put up on 24th September 2012 and 25th September 2012 for P.E.

22. The CDRs of SI Rajbir and SI Mahender were filed on 24th September 2012. On 27th November 2012, the police filed a reply that the BTS addresses of some of the telephone numbers desired by the Appellant were not available. On 15th January 2013, inter alia, the following order was passed by the trial Court:

SHO was required to file the BTS addresses of some of the telephone numbers. He stated that Cell Ids have been mentioned in the CDRs which have already been filed. He stated that he will take a copy of locations of those towers as mentioned in the CDRs. Put up on the date fixed i.e. 7/8th February 2013.

23. On 8th February 2013, PW-10 was examined in chief and partly cross-examined. PW-11 was examined and discharged. The CDRs with BTS address records brought by PW-8 was taken on record. Statement of the Appellant under Section 313 Cr PC On 15th May 2013, the statement of the Appellant under Section 313 Cr PC was recorded. He maintained that he was taken with his brother Inder Dev from Kishan Garh Toll Plaza on 9 th July 2011 and brought to Delhi at around 8.30 pm. Thereafter, a false case was fabricated against the Appellant. He stated that his brother Inder Dev was freed when he promised to pay Rs.5 lakhs. He denied the entire prosecution story as being false and fabricated. He maintained that on 9th July 2011, PW-10 was at Kotputli in a vehicle with other policemen on the way to Delhi. As far as the arrest, seizure memos and other documents are concerned, he stated that they were all false and

forged and prepared at the Narcotics Cell, Shakar Pur, Delhi. He further stated that fake recovery has been fabricated and nothing was recovered or no incident ever happened at Kali Mandir as alleged in the statement. The recovery is planted with conspiracy of rivals and political enemies of my brother in my area with the collusion of crime branch personnel.

25. The Appellant maintained that he neither knew where the opium was brought or who had brought it. In response to a specific question as to why all the prosecution witnesses have deposed against him, the Appellant stated as under:

The conspiracy started by Ct. Kheta Ram of Crime Branch with collusion to Ishwar Singh Pahalwan of Distt. Neemach, who is Zila Panchayat Adhyaksh and Ganesh Rao of Rajasthan, who was to pay for the Jeera crop of the present accused and instead of paying the money, under conspiracy, called me and my brother at Kishangarh, Rajasthan on 9th July 2011 at about 1 pm, I was abducted along with my brother Inder Dev and forcefully shifted to another vehicle at Kishangarh toll plaza. I was brought to Delhi along with my brother Inder Dev, our mobile phones and money/purse etc. were taken away by the SI Rajbir Singh and his colleagues Sohan Pal, Kheta Ram, HC Laxman Prasad and Satyawan, whose names have come to my knowledge after coming here at Delhi. A false case of recovery of alleged opium 40 Kg. has been fabricated, while no such incident happened at Kali Mandir as per the prosecution case. My brother Inder Dev has been freed with the ransom of Rs.5 lacs out of which, Rs.3 lacs was given to Kheta Ram on 12th July 2011 after withdrawing from State Bank of India, Malargarh and another cash of Rs.2 lacs was given after borrowing from brother in law Kanwar Lal at Naraingarh. The case of abduction has been lodged at Kishangarh, Rajasthan against the crime branch SI Rajbir Singh, Kheta Ram, Satyawan, Laxman Prasad and Sohan Pal. The driver of the taxi Wagon R freed by the crime branch people and his car has been brought alleging Wagon R to be of mine. The conspiracy of Kheta Ram is the result of the suffering of the present accused here.

26. When asked whether he had anything further to say, the Appellant stated:

I am innocent and has been falsely implicated due to rivalry and conspiracy of Ct. Kheta Ram who is close associate of Ganesh Ram who had to pay Rs.1 lac

balance as promised through Ct. Kheta Ram while Kheta Ram called from his mobile to my brother Inder Dev on his mobile and we both brothers hired a taxi for Rs.1600/- for Kishangarh and were abducted from there. I am innocent and was Pradhan of Gram Panchayat Richha.

Defence witnesses 27. The Appellant examined Mr. Narender Patidar as DW-1. He stated that at around 5 am, on 9th July 2011, he was present at his home at Narain Garh. In the morning at around 5 am, his father, the Appellant, and his uncle, Inder Dev, proceeded to Kishangarh for recovery of the money for the sale of cumin seeds. He stated that Constable Kheta Ram of the Delhi Police called Inder Dev from his mobile phone and, thereafter, the Appellant and Inder Dev went to Kishangarh. At around 9 pm, his father called him for getting the motor of the well checked. At around 1.30 pm, on 9th July 2011, when DW-1 rang up the Appellant on his mobile, it failed to connect. He could not connect to Inder Devs mobile either. Thereafter, he called his cousin Dilkush who works at a shop at Peepliya Mandi. When they could not locate the Appellant and his brother, DW-1 and Dilkush started for Kishan Garh at around 5 pm on 9th July 2011. They reached Nasirabad at 12.30 am and Kishan Garh in the morning at around 7 am. They were orally informed by the police officials at Kishan Garh that two persons had been picked up but that they would come back. At around 2 pm, on 10th July 2011, DW-1 received a call from an unknown mobile number. Inder Dev spoke to him and informed him that they had been cheated and no money had been paid to them. Rather, their entire money and mobile phones had been snatched away. He stated that he was coming back to Jaipur and would give the details when they met in person.

28. DW-1 and his friend Dilkush then met Inder Dev at around 7 pm at the bus stand at Jaipur and, thereafter, on the way to Narain Garh, Inder Dev disclosed to DW-1 as to what had transpired. Inder Dev further told DW-1 that they had been detained in a multi-storey building on the third floor and Inder Dev was released for a sum of Rs.5 lakhs to be paid as early as possible. Further, Constable Kheta Ram made the Appellant and Inder Dev sign certain blank papers. DW-1 stated that Constable Kheta Ram was a crony of Ishwar Singh Pehalwan who was the District Panchayat Chairman of Neemuch in Madhya Pradesh. Inder Dev was the

Panchayat Chairman of Narain Garh and the Appellant was the sitting Sarpanch of Village Panchayat Reecha and both belong to Congress party whereas Ishwar Singh Pehalwan belongs to the BJP. DW-1 stated that Ishwar Singh Pehalwan had also got gundas to attack the shop of the Appellant and Inder Dev in order to get them to vacate the shops. Arising out of the said incident, an FIR had been lodged.

29. DW-1 explained that they reached Naraingarh at around 2 am on the night of 10th /11th July 2011. On 11th July 2011, at around 9.30 am, Kheta Ram made a call from his mobile number 9289696520 to the landline number of DW-1 (07424244664). He asked him to tell Inder Dev to keep the money ready as they were coming on the following day. Thereafter, Inder Dev went to the State Bank of India and withdrew Rs.3 lakhs. The remaining Rs.2 lakhs was borrowed from one Mr. Kanwar Lal, uncle of DW-1.

30. DW-1 further stated that on 12th July 2011, Constable Kheta Ram came with ASI Mahender (PW-7), Constable Rajesh and the Appellant in an Innova car at 9 pm and took the money. Prior to that, Kheta Ram had left a message on the landline number with the lady at home, giving his mobile number for contact purposes to ensure the timing of the collection of the money. He further added that when after a month and a half, he along with Inder Dev, Dilkush and Rajesh went to the Toll Plaza and requested for the CCTV footage, the manager Mr. Manish Sharma declined to give it stating that it could be given if the Court or the Police demanded.

31. Inder Dev filed a complaint before the Kishangarh Court under Section 156 (3) Cr PC in February 2012. On that basis, FIR No.49 of 2012 (Ex.DW-1/A) was registered at PS Kishan Garh. DW-1 also obtained the TRs of the officers of the Crime Branch. Their mobile numbers were 8447386638 (Delhi Kheta Ram), 9289696520 (Kheta Ram), 9990460100 (Rajbir Singh Nar), 9560369790 (Laxman), 9213421423 (Satyavanji), 9810756351 (Kuldeep Singh), 9425106022 (Ishwar Singh Pahalwan) and 7423261611 (Chauhan Pahalwan Pan). The TRs were exhibited as Ex.DW-1/1 to DW-1/8. Request was made for the call details from the Kishangarh Court of the Additional Civil Judge and Judicial Magistrate

(First Class), Kishangarh. On the orders passed by the said Court, certified copies of the call detail records (CDRs) were obtained. They were exhibited as Ex.DW1/C-1 to Ex. DW1C-56. DW-1 also exhibited the certified copies of the Court proceedings of the Additional Civil Judge and Judicial Magistrate (First Class), Kishan Garh as Ex.DW-1/D-1 to Ex.DW-1/D-13. The certified copy of the application filed by Inder Dev seeking the call details of the mobile phones used by the abductors in the Kishan Garh incident were exhibited as Ex. DW1/E-1 to Ex. DW1/E-6.

32. DW-1 also exhibited the following documents: (i) certified copy of the order dated 28th March 2012 (Ex.DW-1/F) (ii) certified copy of the letter of the Superintendent of Police (SP), Ajmer dated 7th May 2012 (Ex.DW-1/H). (iii) certified copy of the order passed in Criminal Revision No.17/2012 (Ex.DW-1/J-1 to DW-1/J-5). (iv) certified copy of the order dated 4th July 2012 of the Additional Civil Judge and Judicial Magistrate (First Class), Kishangarh. (Ex. DW-1/K). (v) certified copy of the order dated 31st July 2012 passed by the Additional Civil Judge and Judicial Magistrate (First Class) (Ex.DW1/L) (vi) certified copy of the statement of SI Rajbir Singh under Section 161 Cr PC (Ex. DW1/M-1 to 1/M-4). (vii) certified copy of the statement of Constable Sohan Pal under Section 161 Cr PC (Ex. DW-1/N-1 to N-3). (viii) certified copy of the order dated 14th February 2013 passed by the Additional Civil Judge and Judicial Magistrate (First Class), Kishangarh (Ex. DW1/O-1 to O-3). (ix) certified copy of the election of Inder Dev as Chairman, Nagar Panchayat, Naraingarh dated 25th November 2004 (Ex.DW-1/P). (x) certificate of the election of Om Prakash as Sarpanch, Panchayat, Reechha dated 3rd February 2010 (Ex. DW-1/Q). (xi) certified copy of the Khasra of Smt. Sharda Bai, W/o Shri Inder Dev for the year 2010-11 for the production of cumin seed crop (Ex.DW-1/R). (xii) certified copy of the khasra of Inder Dev (Ex. DW-1/S). (xiii) certified copy of the FIR, site plan, Panchnama and statements in FIR No.206 of 2010 dated 31st July 2010 registered at Mandsaur (M.P.) with regard to an assault incident at the behest of Pahalwan Ishwar Singh (Ex. DW-1/T-1 to T-8). (xiv) copy of the complaint dated 15th October 2011 sent to the Union Home Minister and State Ministers (Ex.DW-1/U-1 to Ex. DW-1/U-5).

33. DW-1 also produced, among other things, the following documents: (a) reply dated 5th November 2011 from BSNL giving the detailed CDRs of mobile phones of the Appellant (Ex. DW-1/X-1 to X-7). (b) reply dated 22nd November 2011 from BSNL with the detailed roaming CDR record of the mobile of the Appellant (Ex. DW-1/Y-1 to Y-3). (c) computerised bank statement of his account with State Bank of India, Malhargarh (Ex. DW-1/Z-1 and Z-2) (d) call details of mobile used by Inder Dev from 20 th June to 15th July 2011 (Ex. DW1/1 to Ex. DW1/10). (e) The original cuttings of the front pages of six newspapers exhibited as Ex.DW-1/36 to 1/41.

34. DW-1 was cross-examined at length by the Additional Public Prosecutor (APP). DW-1 stated that he did not note the original number of the Wagon-R taxi in which Inder Dev had gone to Kishan Garh. He also did not note the name and address of the taxi driver. He did not have any document to show that cumin seeds were sold to Ganesh Ram. He had not made any complaint to any authority about the abduction of his father and uncle. He denied the suggestion that he had not made any payment of Rs.3 lakhs after borrowing from Inder Devs uncle or that no payment of Rs.2 lakhs was made to any police official. He admitted that initially the police had filed a cancellation report in the Kishan Garh Court regarding the case under Section 342/364 IPC. He placed on record the photocopy of the CAF of the mobile phone belonging to Kheta Ram (Mark DW-1/P-4 and 1/P-5). He volunteered that one Rajni Sharma was living with Kheta Ram after the death of her husband as well as the death of the wife of Kheta Ram.

35. On 30th August 2013, DW-1 placed on record the original video tape and DVD of the place of occurrence and its surroundings. The video tape was marked as Ex. D-1 and DVD as Ex. D-2. Although he was cross-examined by learned APP on 31st October 2013, nothing was elicited to discredit his evidence.

36. DW-2 Prabhu Ram Chaudhary, an agriculturist, was a resident of village Pratap Pura, Tehsil Sanchaur, District Jalaur, Rajasthan. He talked to Kheta Ram on his mobile on 6 th July 2011 between 4 and 5 pm. Kheta Ram was a neighbour of DW-2. A printout of the computer application Truecaller bearing the mobile number of the witness was shown to DW-2. He admitted that it was his mobile

number. This printout is exhibited as Ex. DW-2/A. In his cross-examination, he pointed out that Constable Kheta Ram had a residence 15 Km away from his village and was known to the Appellant. Kheta Ram is stated to have called DW-2 on his mobile on two or three occasions on 6th July 2011.

37. Ganesha Ram, an agriculturist and resident of village Sarnau, Tehsil Sanchaur, District Jalaur, Rajasthan was examined as DW-3. He stated that he had purchased 10 quintals of cumin seeds from Inder Dev on 1st May 2011 at Rs.16,000 per quintal. He had paid Rs.60,000 and the balance had to be paid as early as possible. Constable Kheta Ram, a resident of the neighbouring village, had some transaction with DW-3 and promised to pay the money to Inder Dev. Although he was subjected to intense cross-examination, he remained firm.

38. Moti Ram Chaudhary, an agriculturist, was examined as DW-4. He identified Kheta Ram as being a resident of village Mokhatra which is about 13-14 kms away from his village. On 10th July 2011, he had talked to Constable Kheta Ram on his mobile number. This he maintained in his cross-examination as well.

39. Inder Dev was examined as DW-5. He stuck to his version about selling 10 quintals of cumin seeds to Ganesh Ram for Rs.1,60,000. He stated that Rs.60,000 was paid in cash and Rs.1 lakh was due. Kheta Ram had called him on the phone and informed him that the sum of Rs.1 lakh due from Ganesh Ram would be paid to him by Kheta Ram in 15 to 20 days. On 8th July 2011, Kheta Ram stated that he would not be able to come to Naraingarh and that Inder Dev would have to come to Kishangarh on 9th July 2011 to collect Rs.1 lakh. Om Prakash and Inder Dev left Naraingarh at 5 am and reached Kishangarh at around 12.45 pm on 9th July 2011. They came by bus from there to Nimbhara and from there they went to Kishan Garh by taxi. On reaching Kishan Garh, DW-5 called the mobile of Kheta Ram to ask about his whereabouts. He also disclosed the registration number of the car to Kheta Ram. When they reached the Toll Plaza, while the driver was paying the toll and taking the receipt, a Tata Safari and an Indica car came from the back and two persons armed with machine guns alighted from the Tata Safari and pointed the guns at both Inder Dev and the Appellant. When Inder Dev and the Appellant sought to alight from the car, they were forcibly pushed in the Tata

Safari and their mobile phones and purses were snatched. They were threatened with death if they made a noise.

40. Thereafter, the Appellant and Inder Dev reached Delhi at around 8.15 to 8.30 pm and were confined to the third floor of a building located at PS Shakarpur. Kheta Ram, arrived there and threatened and beat them. He demanded Rs.5 lakhs and stated that if DW-5 paid the money, he would be released. DW-5 was released on that condition. He reached Naraingarh on 11th July 2011 at 2 am. After again receiving a call from Kheta Ram, he went to the State Bank of Indore, Mallargarh and withdrew Rs. 3 lakhs. He further borrowed Rs.2 lakhs from his brother-in-law. On 12th July 2011, he gave Rs.5 lakhs to Kheta Ram. He also spoke of the unsuccessful attempts of getting the CCTV footage. He confirmed the long standing dispute with Ishwar Singh Pehalwan.

41. In his cross-examination, DW-5 stated that he sold cumin seeds to Ganesh Ram for the first time on credit on 1st May 2011. He stated that the distance between Ganesh Rams village and the village of the Appellant was around 600 to 700 Kms. He stated that 5 to 6 kidnappers made the Appellant and his brother vacate the Wagon-R car and move to a white colour Tata Safari. DW-5 admitted as correct that in FIR No.49 of 2012, there was no mention of the involvement of Ishwar Singh Pehalwan or the threats given by Kheta Ram for vacating the shop. The trial Court judgment 42. In the impugned judgment dated 15th February 2014 of the trial Court, it was held as under: (i) The accused could not be acquitted on the sole ground that no public witness was associated in the raid or at the time of search and arrest. In the event of non-joinder of independent witnesses, the evidence of the official witnesses had to be approached with suspicion and corroboration of their evidence should be insisted upon. (ii) Notice under Section 50 of the NDPS Act was not required in the search of baggage, article or container carried by the persons searched and, therefore, there was no violation of the said provision only because the word nearest in relation to the availability of the gazetted officer and/or Magistrate was not mentioned in the notice. (iii) Since SI Rajbir Singh was acting under an authorisation of ACP Bir Singh, who was a gazetted officer of the Delhi Police, and since sufficient time was not available to get a written authorisation, there was no violation of Section 42(1) of the NDPS

Act. Further, since the recovery was effected from a public place, no authorisation or search warrant was required in terms of Section 43 of the NDPS Act. (iv) Although the police did not comply with Section 52 of the NDPS Act in letter and spirit by depositing the case property and producing the accused at the nearest police station, there was substantial compliance since the Crime Branch was also a police station and had jurisdiction to register and investigate cases all across the territory of Delhi. (v) Since in the present case the report regarding the seizure had reached ACP Bir Singh through PW-8, police officials up to the gazetted rank had come to know of the facts and there was nothing stated by ACP Bir Singh to suggest that the recovery and arrest were false. Since, in any event, the provisions of Section 57 of the Act were directory, there was no violation as such of that provision. (vi) Section 52A was not for the benefit of the accused and pertained only to the destruction of the case property and, therefore, there was no question of violation of that provision. (vii) Even if the second IO Mahender Singh (PW-7) was subordinate to first IO ASI Rajbir Singh (PW-10), it made no difference to the prosecution case because nothing effective was done by the second IO. (viii) There was no difference in the seals bearing words 2A PS NB Delhi affixed by the IO and those appearing on the sample parcels A1, B1 and C1 sent to the FSL since generally the seals are round and if it is read from the other side, the word Delhi would be common since it is in the centre of the seal. (ix) There was no merit in the submission that since the charge sheet was filed without the FSL report, an inference should be drawn that the samples had been tampered with by the police. The recovered opium, when tested at the spot with the FTK, gave a positive result and, therefore, that itself constituted a sufficient basis for the police to file the charge sheet. (x) There was no merit in the argument that there was no service lane near the temple since temporary barricades had been erected by the police in order to control the crowd of the temple and, therefore, the service lanes were closed. The fact that the government vehicle and the Wagon-R were shown parked in the service lane did not, therefore, mean that the site plan was not consistent with the testimonies of the recovery witnesses. (xi) As regards the failure to produce the log book for the car in which the police travelled, the reliance placed on *Kishan Chand v. State of Haryana* 2013 1 EFR310 was misplaced since the facts of that case were distinguishable. (xii) The defence version was not

believable since the prosecution had proved that it was the son of PW-10 who was using the mobile phone between 8th and 10th July 2011. DWs-2 and 3 did not produce their mobile sets to show the Court that they had received calls from Kheta Ram and did not place on record their CDRs. As regards the Truecaller Details, since there was no certificate under Section 65B of the Indian Evidence Act to prove their contents, it was not admissible in evidence. (xiii) It was unbelievable that DW-3, Ganesha Ram, a resident of village Sarnau, Tehsil Sanchaur, District Jalaur, Rajasthan would travel 433 Kms to purchase 10 quintals of cumin and that it would be sold to him on credit by DW-5 and his brother to DW-3, who were strangers to him. Further, the defence did not examine the witnesses to establish a connection between Constable Kheta Ram and Ishwar Singh Pehalwan. (xiv) If Constable Kheta Ram had threatened DW-5 for vacating the shop, then it was unlikely that he would accept a proposal from DW-3 that Kheta Ram would pay DW-5 Rs.1 lakh and that DW-5 would travel to collect the said amount from Kheta Ram at Kishangarh. It was beyond comprehension that a person would travel 433 Kms to Kishangarh just to collect Rs.1 lakh. Further, Kheta Ram was merely a Constable and could not be expected to wield so much influence that he would manage ASI, SIs, two Inspectors and even the ACP of Crime Branch, Delhi. (xv) Constable Kheta Ram was to pay Rs.1 lakh to DW-5 whereas the value of the recovered opium which was to the extent of 40 Kg would be more than Rs.40 lakhs. It was unlikely that Kheta Ram would spend Rs.40 lakhs to ward off a liability of Rs.1 lakh. Since 40 kg of opium required a lot of space, the police could not be expected to have planted such a huge quantity on the Appellant. (xvi) The delay in filing a complaint regarding the alleged abduction of the Appellant and DW-5 raised doubts as to the truthfulness of their version. There was no explanation as to why the accused did not obtain the CCTV footage from GVK. Further, in the abduction case, the Rajasthan police had already filed a cancellation report under Section 169 Cr PC. The statements given by Mr. Shailesh Sethi, Supervisor, Mr. Kesar Singh, Incharge and Mr. Prem Balra Chamoli, Road and Safety Officer at Kishan Garh Toll Plaza revealed that they were present throughout on 9th July 2011 and there was no incident of kidnapping of any person by armed persons.

43. The Appellant was accordingly held guilty of the offence under Section 18 (b) of the NDPS Act and by the order on sentence of the same day sentenced to 15 years RI with fine of Rs.2 lakhs and in default to undergo SI for two years. Reliability of the site plan 44. Mr. Sanjeev Bhatnagar, learned counsel for the accused first relied on the video recording of the place of occurrence which showed that it was a crowded area with the service lane around the Kali Mata Mandir being totally blocked. Referring to the rough site plan (Ex. PW-7/B) prepared by ASI Mahender Singh (PW-7), it was submitted that it was inconceivable that both the government vehicle and the Wagon R car were parked in the service lane as shown in the site plan.

45. It is seen from the record of the trial Court that the video prepared by DW-1 was indeed marked as an exhibit in the evidence of DW-1 Narender Singh, son of the Appellant. In his cross-examination on 31st October 2013, DW-1 confirmed that he himself had prepared the video. He explained in detail how he prepared the DVD. There was nothing in his cross-examination to doubt the veracity of the DVD.

46. Ms. Aashaa Tiwari, learned APP for the State also viewed the same DVD along with the Court when it was played and has not doubted its correctness. The time of occurrence is shown around 8.30 pm on the evening of 9th July 2011 which happens to be a Saturday. The area is obviously a busy one and it is not in doubt that the temple was open even at that time. It has come in the evidence of PW-10 that there was a crowd. In the cross-examination of PW-10, he states that there were 50 to 60 persons present near the Mandir. He admitted that in the vicinity of the Mandir, at a distance of about 100 meters, there was a Mall on the eastern side and a petrol pump on the western side along with various shops and houses. He also admitted that these were not shown in the site plan for some reason. Although in his examination-in-chief he has stated that he had asked some persons to join in the investigation and they refused, he admitted in his cross-examination that he did not join the priest of the temple in the investigation. What is interesting is the deposition of Constable Sohan Pal (PW-1). In his cross-examination, PW-1 stated that none of the police officials went himself or were sent by the IO to summon a public person from the above stated places (bus

depot, petrol pump, Tarun Enclave) either before or after the apprehension of the accused. He admitted that it is also correct that there is a worship in Kali Mata Mandir for long hours on Saturday. It is also correct that 500 to 700 people are present on Saturday at the time of Aarti. Generally, the Aarti is done in the night time.

47. The Court finds that the site plan is wholly inadequate to give a clear picture as to the surroundings of the Kali Mata Mandir. It must be noticed at this stage that the site plan showed the main road in front of the Kali Mata Mandir with the writing patri on it. The two vehicles i.e. the Wagon-R car which was supposedly driven by the Appellant is shown parked at point A at a point behind the footpath. Likewise, the government vehicle in which the raiding party was travelling is shown at point B which is also behind the footpath. In his cross-examination, PW-10 stated that we entered the service lane towards Mandir side after taking U turn from Dipali Chowk. This does not appear to be possible at all since the service lane is barricaded. It is also unlikely that any vehicle could have been parked in front of the temple as indicated in the site plan when one views the area in front of the temple as depicted in the video. Clearly, the site plan has not correctly depicted the location of the temple and its surroundings. Importantly, it omits to show the surrounding structures/buildings and the residential locality across the road (Tarun Enclave), the petrol pump in the vicinity and most importantly the Rani Bagh Police Station which is visible from the temple itself as can be seen from the video. The existence of all these other places have been admitted by PWs-1 and 10 in their cross-examinations.

48. The trial Court appears to have overlooked the objections raised by the counsel for the Appellant on this aspect by simply stating that the vehicles were parked on the outer Ring Road. This was a statement which is not supported by even PW-10 who states that they entered the service lane towards the Mandir side after taking a U turn from Diplai Chowk. Also, the submission is not that there were no service lanes but with the service lane being completely blocked, the prosecution had to explain how both vehicles i.e. the Wagon-R car supposedly driven by the Appellant and the government vehicle were both shown in the site plan as being parked in the service lane. In a case where the prosecution alleges

that the recovery was effected from a vehicle parked in a busy locality outside a temple on the main road or on the service lane, it was important for the prosecution to have presented a correct site plan, if not a scaled site plan, instead of a rough sketch which has been drawn in the most casual manner and which gives rise to several questions which remain unanswered. False implication 49. The central thrust of the submission of Mr. Sanjeev Bhatnagar was that the entire case was a false and fabricated one. He submitted that both the Appellant and his brother had been picked up from Kishangarh Toll Plaza at around 1 pm on 9th July 2011 and brought to Narcotics Cell in Shakarpur by about 8.30 pm and that Constable Kheta Ram, who interestingly was not examined as a prosecution witness, was involved in the abduction of the Appellant and his brother. Five witnesses have been examined by the defence to prove the above stand of the Appellant.

50. The information noted in DD No.13 (Ex.PW-8/A) was to the effect that on 9th July 2011 there would be two persons i.e. Om Prakash and Inder Dev, residents of District Mandsaur, Madhya Pradesh coming to Delhi near the Kali Mata temple in the Outer Ring Road between 8.30 and 9 pm to deliver a consignment of opium. Yet, when the raiding party purportedly went to the spot, they found only the Appellant and not the other person i.e. Inder Dev. Strangely, neither in the report of arrest or seizure submitted by PW-10 to his superiors nor at any subsequent point in time did the police find out about the other person who was also supposed to travel with the Appellant on that day.

51. The trial Court failed to note that in the complaint filed against the police officials of Police Station Shakarpur in Kishangarh, Rajasthan (FIR No.49 of 2012), statements were recorded under Section 161 Cr PC of both SI Rajbir Singh (PW-10) and Constable Sohan Pal (PW-1). These were placed on record before the trial Court. In his statement, ASI Rajbir Singh stated that on 9th July 2011 when they reached the Kali Mata Mandir at around 8.30 pm, a Wagon-R car came and they had stopped it and enquired about the driver who disclosed his name as Om Prakash. He further stated that the person sitting next to him disclosed his name to be Inder Dev. In the statement of Constable Sohan Pal, it was again stated that while the driver disclosed his name to be Om Prakash, the person sitting next to

him disclosed his name to be Inder Dev. Neither PW-1 nor PW-10 have in the present case stated as to what happened to Inder Dev but the statements of PWs-1 and 10, made to the Rajasthan police on 22nd April 2012, do indicate that there were two persons present in the Wagon-R car.

52. In the present case, PW-1, who was examined on 16th April 2012, stated nothing about another person being present in the Wagon-R car. Likewise, PW-10 was examined on 8th February 2013 but he did not mention the presence of Inder Dev in the car. If there was secret information about the Appellant and Inder Dev proceeding to Delhi to deliver a consignment of opium, then it is indeed strange that there is no mention about the police making efforts to find out the other person.

53. The specific case of the defence was that Inder Dev was released by the police after being abducted on his promising to pay Rs.5 lakhs. In order to demonstrate that Constable Kheta Ram along with Rajbir and ASI Mahender were involved in the abduction, the defence has placed reliance on CDRs of the mobile phones of both Constable Kheta Ram and PW-10 Rajbir Singh. Mr. Bhatnagar was able to show to the Court how the CDRs of Kheta Rams Mobile Nos. (8447386638 in the name of Rajni Sharma and 9289696520) show his movement from Delhi to Kishangarh on 8th July 2011, reaching Kishangarh on 9th July 2011 and thereafter returning to Delhi at around 8.30 pm on 9 th July 2011. The submission of learned counsel for the defence that the so-called secret informer could indeed have been Constable Kheta Ram stands probablised because there is no suggestion made to the defence witnesses, and in particular DW-1, that the CDRs of the said mobile number, certified copies of which were exhibited as DW-1/C-1 to C-56, were not genuine.

54. The CDR of Kheta Rams mobile phone shows his presence at Kishangarh on 9th July 2011 at around 1 pm and his movement through Rajasthan back to Delhi and his reaching Delhi at around 7 pm. The other mobile phone used by Kheta Ram also probablizes his presence at Kishangarh on 9th July 2011 from around 10 am in the morning till about 1 pm and thereafter moving through Tilonia Patan, Amer, Gurgaon and then reaching Delhi at around 8 pm.

55. Mr. Bhatnagar submitted that the CDR for the mobile No.9990460100 showed that SI Rajbir Singh was also present in Alwar and Jaipur in Rajasthan on 8th July 2011 as well as 9th July 2011. He pointed out that in his cross-examination PW-10 stated:

I cannot admit or deny that my mobile No.9990460100 was used on 9 th July 2011 at 1.04 am to make a call to Ct. Kheta Rams mobile No.8447386638.

56. Indeed, the CDR of the above mobile phone of Rajbir Singh reveals that he travelled for a good part of 8 th July 2011 from 9.18 pm onwards in Rajasthan. The calls on the 8th July 2011 end at 11.55 pm in Virat Nagar district, Jaipur. A call was made to mobile No.8447386638 (used by Kheta Ram) at 1.04 am on 9th July 2011 from a bus stand at Manoharpura, Sahapura district, Jaipur. It appears that the mobile phone was switched off at that point because the next entry is only on 10th July 2011. The next call, thereafter, is at 9.40 am on 10 th July 2011 at Aram Park in Delhi.

57. Having realised that the CDRs would now show the movement of the holder of the aforesaid mobile number on 9th July 2011, PW-10 explained as under:

On that day (9th July 2011) the said phone was not available with me as it was taken by my son to Jaipur. He had gone to Jaipur on 8th July 2011 in my absence. I do not know when he left the house for Jaipur. He had taken mobile with my consent for one day. My sons name is Gaurav Bhatti. During those days my son Gaurav Bhatti was using No.9718391704. Vol. During those days my son Gaurav Bhatti was using No.9718391704. Vol. During those days battery of his phone was working only for one hour due to dampness and hence he took my phone. My sons phone was with me.

58. It seems highly improbable that a police officer would exchange, for no apparent reason, his mobile phone which he obviously uses in the course of his official duty, with his son and agree to take his sons mobile with him. It is not understood why the trial Court accepted this kind of an incredible explanation. PW-10 did not stop at that. The further answers given by him in his cross-examination make his version even more improbable. He stated:

It is incorrect to suggest that on 8th July 2011 at 11. 27, I used my mobile phone No.9990460100 to call my son Gaurav Bhatti on his mobile No.9718391704 and at that time my location was at Kotputli. Vol. At that time either I had called or I had received call from Gaurav Bhatti regarding his wellness. I do not know to whom phone No.8447386638 belonged and who was its user. I do not remember if I ever called or received call from that number. I do not remember if I was calling and receiving call from that number frequently. It is incorrect to suggest that that number belongs to Kheta Ram and I am not deliberately disclosing that fact before the Court. Me and my son exchanged phones on 8th July 2011 between 6.30-7.00 am. I cannot admit or deny that my phone was used on 8 th July 2011 at 7.29 pm to call Inspt. Kuldeep Singh for one minute and he reciprocated by calling at 7.30 pm and we talked for 52 seconds. Vol. At that time my phone was with my son. I cannot admit or deny that at 2020 hours a outgoing call was made from my cell number to HC Laxman Prasad mobile No.9560369790 and similarly at 8.27 pm on 8th July 2011 a call from my cell number was made to mobile number user Kheta Ram and the location of my cell number was Mehram Nagar. Similarly, various calls from Inspector Kuldeep Singhs number, ASI Mahender number 9868070290 was also made for 75 seconds and the location was Mehram Nagar.

59. Why the son of Rajbir Singh (PW-10) would make so many calls to other police officers on 8th July 2011 while moving from Delhi to Jaipur is beyond comprehension. A careful examination of the CDRs exposes the hollowness of the above story of PW-10. He went to the extent of saying that I had exchanged SIM also along with handset because he was taking it only for one day. And yet somehow the mobile phone is back with PW-10 at 10 am on 10th July 2011.

60. In a further cross-examination, PW-10 had to admit that:

it is correct that from my mobile number 9990460100 calls were done to mobile No.9968388886 on 1st July, 2nd July, 5th July, 6th July, 7th July, 10th July and 11th July 2011. I dont remember whose number is this. I dont know any Govind Rajpt. I dont know any Rajni Sharma also. It is correct that from my mobile No.9990460100 I had calls on 8th July 2011 at 17:27, 17:48, 18:24, 18:39, 18:45, 18:53, 19:52, 20:27, 22:38, 22:53, 22:59, 23:05, 23:13, 23:27, 23:55 with a person

(the witness is claiming that he had talked to informer at that time and so mobile no is not written in the evidence). Similarly on 9th July 2011 I called this number at 01-04 and on 10th July 2011 at 13:57, 14:22, 18:21 and on 12th July 2011 at 9:29, 9:41, 9:52, 12:51, 19:43, 20:35, 20:38, 20:48 and 22:15. During some period my phone was with my son and informer would have talked to him. It is correct that my Narcotics cell Land line number of Duty Officer is 22048331 and when this number would be called from any mobile then it would appear as 01122048331. It is correct that I had phone calls from my mobile no.9990460100 to aforesaid number on 1st July 2011 at 09:05, on 2nd July 2011 at 08:00, 09:29, 09:35, on 4th July 2011 at 12:00, 12:05, 12:26 and on 5th July 2011 at 12:41, on 7th July 2011 at 12:00, on 8th July 2011 at 19:26, on 10th July 2011 at 09:43, 19:56, on 11th July 2011 at 11:51 and on 12th July 2011 at 09:31, 10:04. I dont remember to whom I talked on the aforesaid dates. On 6th July 2011 I had called mobile number 9810756351 and I called the same number on 8th July 2011 at 19:26, 19:30, 21:18 and similarly on 11th July 2011 at 20:49 and on 12th July 2011 at 11:01. I do not remember whose number is this. I cannot admit or deny that this number belongs to Insp. Kuldeep Singh. I do not remember the mobile numbers of my colleagues HC Laxman and Ct. Sohan Pal. It is incorrect to suggest that I am intentionally concealing the truth and not telling the correct facts.

61. It is surprising that the trial Court had completely overlooked the above answers given by this witness and had rejected the entire evidence produced in this regard even though certified copies of the CDR was produced. The fact that the certificate under Section 65B of the Indian Evidence Act did not accompany the CDRs should not have deterred the trial Court since the witness himself was not in a position to deny the making of the above calls from his mobile phone. Not once in his cross-examination did he suggest that the CDR was fabricated.

62. On the aspect of the CDRs, the Court finds it odd that the trial Court has failed to note the orders passed by it on 21st April 2012 in the applications filed by the Appellant and the partial compliance with those orders by the prosecution. To recall, in its orders dated 21st April 2012 the trial Court noted the Appellant's defence that he was abducted by Crime Branch, Delhi on 9th July 2011 from Kishangarh and that he had named officials Kheta Ram, HC Laxman Parsad, SI

Rajvir Singh Bhati, HC Rathor, HC Satyawar, SI Mahendra Singh and Inspt. Kuldeep Singh for abduction. The order further noted the mobile numbers of Constable Kheta Ram, Constable Satyawar, HC Laxman Parsad, Inspector Kuldeep Singh, SI Rajvir Singh, Shri Rathor, ASI Mahender, Constable Sohan Pal with the names of service providers. The trial Court had thereafter on two occasions directed the prosecution to comply with its orders regarding production of CDRs. The prosecution itself admitted the mobile numbers of SI Rajvir Singh and ASI Mahender but declined to comply with the direction to produce the CDRs of the other police officers only because they are not using, as per reply, those numbers.

The question was not whether they were continuing to use those numbers at the time the orders were passed but whether on the crucial dates i.e. on 8th, 9th and 10th July 2011 they were using those mobile phones. This aspect of the matter has been unsatisfactorily dealt with by the trial Court.

63. The trial Court was not justified in observing that the Appellant had not been able to prove that the above mobile numbers belonged to the police officers named by him as being responsible for his abduction and that he also failed to produce the CCTV footage. On his part, the Appellant had filed an application on which the trial Court has passed a separate order and there was no convincing reason why the said order was not complied with. He had also filed a separate application for production of the CCTV footage on which again a separate order was passed by the trial Court on 21st April 2012 noting that such CCTV footage was "very much material". The Manager, Mr. Manish Sharma, GVK, Jaipur, Kishangarh was directed to produce the CCTV footage dated 9th July 2011 between 12.30 pm and 1.30 pm of the camera installed at that point. This order was also not complied with. In these circumstances, to place the burden on the defence to produce the CCTV footage and to reject the defence by asking the question Why the accused did not get preserved CCTV footage dated 9 th July 2011?. is overlooking the trial Courts own order dated 21st April 2012.

64. The specific case of the defence was that Inder Dev was the former President of Nagar Panchayat, Naraingarh and belongs to the Congress party. A certificate

to this effect was placed on record and has not been disputed by the prosecution. Another certificate to show that the Appellant was the Sarpanch of village Richha, Tehsil Malhargarh, District Mandsaur has also been placed on record. This has also not been disputed by the prosecution. The evidence of DW-1 that Ishwar Singh Pehalwan belongs to the BJP and was District Panchayat Chairman of Neemach, Madhya Pradesh has also not been disputed by the prosecution. In his evidence, DW-1 has spoken about Constable Kheta Ram being a person working for Ishwar Singh Pehalwan. He has placed the CDRs to show the calls made by Kheta Ram on 11 th July 2011 from his mobile number to the landline number. The details of withdrawal of Rs.3 lakhs from the ATM of Inder Dev has also been placed on record and not disputed. In other words, sufficient evidence has been placed on record to substantiate the case of the Appellant that Inder Dev did pay the ransom money to Kheta Ram after he was released. The trial Court has not appreciated the exhaustive material placed on record by the defence witnesses. Their depositions have also not been adequately discussed.

65. The trial Court has also not appreciated the evidence regarding the truecaller details although in para 20 (iii) of the impugned judgment there is a lengthy discussion on how the truecaller system works. The material produced by the defence has been disregarded only because no certificate under Section 65B of the Indian Evidence Act was produced. Learned APP has also placed reliance on the decision in Ravi Kant Sharma v. State 183 (2011) DLT248 and Rakesh Kumar v. State 163 (2009) DLT658 in this regard.

66. While it is correct that no certificate under Section 65B of the Indian Evidence Act has been produced by the defence, an important fact that has been overlooked is that DWs 2 and 4, when shown the TDs, admitted that they were correct as regards their own mobile numbers. Therefore, to that extent the TDs could not be rejected as being inadmissible. In any event, the CDR of the mobile phone of PW10 has not been disputed by the prosecution. In discarding the evidence of the defence, the trial Court has overlooked the fact that the presence of Kheta Ram at Kishangarh on 9th July 2011 and Rajbir Singh at various locations in Rajasthan on 8th and 9th July 2011 has been probablised through the CDRs of the mobile phones used by them. This also has to be appreciated in the

context of the fact that the CDRs of the mobile phones used by the other police officials of the raiding party on the relevant dates and times were not produced before the trial Court by the prosecution.

67. Learned counsel for the Appellant was also justified in questioning why no CDRs were produced to show the location of the police men on the date when the raid took place i.e. 9 th July 2011. It is highly unlikely that the members of the raiding party were moving without any mobile phones whatsoever. In light of the evidence produced by the defence as discussed above, and in the absence of public witnesses to the apprehension, search and recovery of contraband from the Appellant or even his arrest, it was necessary for the prosecution to have established, if not by other independent evidence, through the CDRs of the mobile phones used by the police party, that on the relevant date and time i.e. 9th July 2011 at around 8.30 pm they were near the Kali Mata Mandir at Rohini. The failure to do so not only probablises the defence but also raises reasonable doubts about the prosecution version.

68. The Appellant filed a complaint before the Magistrate in Kishangarh under Section 156 (3) Cr PC in regard to his abduction pursuant to which an FIR was registered. The trial Court appears to have erred in observing that a cancellation report had been filed in the said case without noticing that on a protest petition filed by the Appellant and Inder Dev, an order was passed for further investigation of the case. The order dated 14th February 2013 passed by the learned Additional Civil Judge (Judicial Division) has been placed on record before the trial Court as Ex. DW1/01-03. The said order has not even been referred to although it was placed on record by DW-1 in his examination-in-chief.

69. The evidence placed on record by the Appellant to show the involvement of Constable Kheta Ram who was also part of PS Shakarpur has not been rebutted by the prosecution. His association with Ishwar Singh Pehalwan has been spoken of by DWs-1 and 5. They have not been shaken on this aspect in their cross-examination by the APP. It is possible that in the FIR that was initially registered, the fact of Ishwar Singh Pehalwan being behind the incident might have not come on record. The explanation offered that at that time the full facts had not emerged

appears plausible. Without further commenting on this evidence, as the case arising out of the FIR at PS Kishangarh is pending, the Court would only like to observe that sufficient material has been placed on record in these proceedings to probablise the case of the defence. Failure to associate independent witnesses 70. As regards the absence of independent witnesses, PWs-1 and 6 have contradicted PW-10 and have stated that no attempt had been made to associate any independent witnesses at the spot. It is not disputed that the place of alleged apprehension of the Appellant on 9th July 2011 was crowded. It was outside a temple at around 8.30 pm, when aarti and pooja usually takes place. In the circumstances, the failure to even record the names of the public witnesses who allegedly refused to join the raid, creates a reasonable doubt on the truthfulness of the prosecution version, especially that of PW-10. The trial Court has observed:

So it is held that public witnesses were definitely available at the spot in large numbers because recovery was effected from the bank of outer ring road but despite it not a single public witness was joined.

71. Routinely, no attempt is being made by the police in such cases to associate public witnesses. In the absence of clear evidence to show that a sincere effort was made, the Court should not simply accept the proposition that generally in such cases no member of the public comes forward to help the prosecution. In *Ajmer Singh v. State of Haryana* (2010) 3 SCC746 it was held that in such circumstances the Court will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence. In the present case, given the shoddy investigation, the failure to associate any independent witness constituted an additional factor to disbelieve the case of the prosecution. Non-compliance with Section 42 NDPS Act 72. Learned counsel for the Appellant submitted that there is a violation of Section 42 of the NDPS Act inasmuch as PW-10 Rajbir Singh did not record grounds of belief and send it to his superior officer.

73. Learned APP, on the other hand, referred to the trial Court judgment in which it has been held that there was no violation of Section 42 because PW-10 had communicated the information given to him by the secret informer to a superior

officer by means of DD No.13 and that since the recovery was from a public place only Section 43 would apply. There was no need to comply with Section 42.

74. In the first place it should be observed that Section 43 of the NDPS Act would apply when a police officer apprehends narcotics drugs and psychotropic substances from a person in a public place without any prior intimation. In such a scenario, obviously, there will be no occasion for recording in advance the grounds of belief or communicating it to any superior officer. However, where the raiding officer proceeds to a public place on the basis of prior information which he has recorded in writing, then the question of applicability of Section 43 would not arise. In such circumstances, the proviso to Section 42 mandates that the officer must record the grounds for his belief. If he proceeds to the spot without a search warrant, the evidence may be concealed or the offender may escape.

75. The mandatory nature of the above requirement of law regarding recording the grounds of belief was explained in *Karnail Singh v. State of Haryana* (2009) 8 SCC539 as under:

In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows: (a) The officer on receiving the information (of the nature referred to in Sub-section (1) of Section

42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of Clauses (a) to (d) of Section 42(1). (b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per Clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior. (c) In other words, the compliance with the

requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency. (d) While total non-compliance of requirements of Sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

76. In the present case, DD No.13 only records the fact that the secret informer told PW-10 about the possibility of the Appellant and his brother Inder Dev coming to the Kali Mata Mandir at around 8.30 pm for handing over a consignment of opium. The recording in DD No.13 does not state that PW-10 believes that if a search warrant was sought to be obtained, the offender might suspect apprehension or that the evidence may be concealed. The above mandatory requirement of law has been reiterated in *State of Orissa v. Laxman Jena* JT2002(5) SC1 wherein para 7 it was observed as under:

7. The mandate of law, as incorporated under the Act, is required to be strictly complied in view of the grave consequences which are likely to be followed on

proof of illicit article under the Act. The legislature had enacted and provided certain safeguards in various provisions of the Act including Sections 42 and 50, in all cases which must be proved to have been strictly followed. The harsh provisions of the Act cast a duty upon the prosecution to strictly follow the procedure and comply with of safeguards."

77. To the same effect is the decision in *Kishan Chand v. State of Haryana* (2013) 2 SCC502. In the present case, therefore, the Court is of the view that the trial Court erred in overlooking the obvious violation of the mandatory requirement of Section 42 of the Act. Non-compliance with Sections 50 and 52 NDPS Act 78. Section 50 of the Act mandates that the officer who is about to search a person under Section 42 of the NDPS Act if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. Only when it is not possible to take the person to the nearest Gazetted Officer that, in terms of Section 50(5), the Officer can proceed to search the person as provided under Section 100 Cr PC. After the search, under Section 50(6) the officer shall record the reason for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.

79. In the present case, undoubtedly, the Appellant was searched by PW-10 although that search did not lead to recovery of any narcotic substance. The fact that the person of the Appellant was searched has been admitted by PW-10. He was served with the notice under Section 50 of the NDPS Act. The Court is unable to agree with the submission of the learned APP, which appears to have found favour with the trial Court, that in the present case there existed no reason to issue a Section 50 notice since the recovery was effected from the Wagon-R car. The evidence makes it clear that PW-10 did issue a Section 50 NDPS Act notice since he believed that apart from the Wagon-R car, the Appellant himself might be carrying some prohibited substance and it was not possible for him at that stage to rule out such a contingency. PW-10 served a copy of the notice on the Appellant. Since the Appellant was, in fact, searched pursuant to the notice issued, it is not open now for the prosecution to contend that there was no need to issue such notice and, therefore, the failure to observe the requirement of Section 50 of the

NDPS Act was not fatal to the prosecution.

80. The admitted position is that the notice under Section 50 of the NDPS Act that was served to the Appellant did not mention that he could be taken to the nearest Magistrate or Police Station which had a gazetted officer. In fact, he was not taken to the nearest Police Station but to one that was 20 Kms away at Shakarpur. As already earlier noticed, the nearest Police Station was the one at Rani Bagh which was visible even from the Kali Mata Mandir. There was no explanation why the Appellant was not first told about the nearest Police Station and thereafter taken there. The mandatory requirement under Section 50 of the NDPS Act as explained in *Ashok Kumar Sharma v. State of Rajasthan* 2013 (2) SCC67 has not been observed by the prosecution in the present case.

81. As regards the non-compliance of Section 52 of the NDPS Act, the trial Court has itself in para 13 of the judgment observed that police did not comply with Section 52 in every respect but there is a substantial compliance. There is no question of substantial compliance as far as the NDPS Act is concerned. If, indeed, there has been non-compliance of Section 52 of the NDPS Act, the failure to do so would be fatal to the case of the prosecution. Non-compliance with Section 52 A (2) NDPS Act 82. Section 52 A (2) of the NDPS Act reads as under:

(2) Where any narcotic drugs or psychotropic substances has been seized and forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in subsection (1) shall prepare an inventory of such narcotic drugs or, psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any purpose of, (a) Certifying correctness of the inventory so prepared; or (b) Taking, in the presence of such Magistrate, photographs substances and certifying such photographs as true; or (c) Allowing to draw representative samples of such drugs or substances, in the presence of

such Magistrate and certifying the correctness of any list of samples so drawn.

83. The trial Court was not right in observing that the above requirement applies only in the case of disposal of the seized narcotic drugs and not at the stage of seizure. Unless the details of the seized substance are noted at the earliest opportunity, there is every possibility of the samples being tampered with. In the present case, although it was stated that the three plastic dibbas were marked A, B and C at the spot, when during the cross-examination of PW-1 they were opened in Court, those marks were not found. There was no explanation for this. This does give rise to doubts about the preservation of the seized samples. Preservation, weight and value of the seized consignment 84. There is also doubt whether the seals used to seal the pullandas were in fact deposited in the malkhana. The entries in the malkhana register do not reflect the deposit of the seals. In the evidence of PW-6, it is seen that according to him he handed over the seals back to PW-10 Rajbir Singh who was himself the IO. This raises sufficient doubt on whether there was an opportunity for the samples to be tampered.

85. The case of the prosecution is that the weight of the three polythene packets in the dibbas were 13kg, 13 kg and 14 kg respectively. The further case is that the raiding party carried a weighing balance with weights of 20 Kg, 10 Kg, 5 Kg, 1 Kg, 500 gm, 100 gm and 50 gm. They were apparently carrying only one of each of the above weights. Therefore, while they could have weighed a packet of 14Kg, they could not have weighed packets of 13 Kg. Faced with this obvious conundrum, the prosecution witnesses have tried to improve their versions during examination by suggesting that they were carrying two weights of 1 kg. The fact remains that there is no record of the raiding party taking the weighing balance and weights from the malkhana or elsewhere while leaving for the raid. This adds to the several factors that give rise to doubts about the prosecution version.

86. It is seen from the judgment of the trial Court that in para 20 (x), one of the reasons for not believing the defence version is that the recovered opium was 40 Kg and its price would be more than Rs.40 lakhs. This appears to be something that the trial Court has stated on its own without there being any evidence. Learned counsel for the Appellant has produced before the Court the prevalent

rates for 100% pure opium that is legally grown which is Rs.1630 per Kg. At the time of making payment, 10% is held back. It is stated that the rate officially fixed is for opium of 10% purity and here the purity percentage was only 2.64% as per the FSL report. It was contended that going by the said rate, the value of 40 Kg opium would not even be Rs.16,000. Be that as it may, the fact is that there was no material before the trial Court to conclude that the value of the consignment was Rs. 40 lakhs. Other lapses of the prosecution 87. The trial Court observed that the second IO did not do any substantial work when the record shows otherwise. The second IO was subordinate to the first IO although the trial Court has observed to the contrary. The failure of the prosecution to produce the log book of the Maruti 800 car carrying the raiding party also was not a minor lapse that could have been simply brushed aside. Such a log could have corroborated the prosecution version as to whether they had apprehended the Appellant from outside the Kali Mata Mandir and at the date and time as alleged. In the absence of production of the log book, an adverse inference should have been drawn against the prosecution.

88. Since the above grounds by themselves are sufficient to give the benefit of doubt to the Appellant, the Court does not consider it necessary to discuss the further grounds put forth by the counsel for the Appellant regarding the inconsistencies in the versions of the police witnesses, the failure to communicate the seizure report by PW10 to his superior PW-8 or the FSL Form not being exhibited in the Court. Conclusion 89. For all of the above reasons, the Court is of the view that the trial Court was in error in concluding that the prosecution had been able to prove the case against the Appellant beyond all reasonable doubt. Having examined the evidence, this Court is of the view that the defence of the Appellant stood probablised and that the prosecution has failed to prove its case against the Appellant beyond all reasonable doubt.

90. Accordingly, the impugned judgment dated 15th February 2014 of the trial Court is hereby set aside. The Appellant is acquitted of the offence under Section 18(b) of the NDPS Act. The bail bond and surety bonds of the Appellant are discharged. He will be released forthwith if not wanted in any other case.

91. The appeal is allowed in the above terms. The application is disposed of.

92. The trial Court record be returned forthwith. S. MURALIDHAR, J.

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