

Nandu Sharma Vs. State of Bihar

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Court : Patna

Decided On : Jan-22-2008

Judge : Kishore Kumar Mandal, J.

Acts : Narcotics Drugs and Psychotropic Substances Act, 1985 - Sections 21 and 25; Evidence Act - Sections 25, 26 and 27; Code of Criminal Procedure (CrPC) - Sections 293

Appeal No. : Cr. Appeal No. 514 of 2007

Appellant : Nandu Sharma

Respondent : State of Bihar

Advocate for Def. : Satya Narayan Prasad, APP

Advocate for Pet/Ap. : Kanhaiya pd. Singh, Sr. Adv. and Atal Bihari, Adv.

Disposition : Partly allowed

Judgement :

Kishore Kumar Mandal, J.

1. All the three appeals arise out of and are directed against the judgment and order, dated 31st March, 2007, passed by the Additional District and Sessions Judge IX, Patna in Sessions Case No. 75/02 and, as such, they have been heard

together and are being disposed of by this common judgment. In each appeal there is only one appellant.

2. Appellant Nandu Sharma (Cr. Appeal No. 514/2007) has been convicted and sentenced to undergo simultaneously seven years R.I. and a fine of Rs. 50,000/- and in default whereof to undergo six months R.I. for committing the offences punishable under Section 21(b) of Narcotics Drugs and Psychotropic Substances Act 1985 (for short NDPS Act) and 25 of the NDPS Act. The appellant, Krishna Bhagwan Sharma (Cr. Appeal No. 516/2007) and appellant Ram Babu Sharma (Cr. Appeal No. 515/2007) have been found guilty and each of them sentenced simultaneously to undergo R.I. for ten years and were imposed a fine of Rs. one lac and in default whereof to undergo one year R.I. for committing the offences punishable under Section 21(c) and 25 of NDPS Act.

3. The records indicate that altogether five accused persons stood charged for possessing and manufacturing the drug like substance (heroin). The learned trial court acquitted two of them and convicted the present appellants as noticed above.

4. Back ground facts in a nutshell are as follows:

5. On 28.9.2002 at about 9 A.M., the Officer-Incharge of Kankarbagh police station, namely, Shri G.M. Kumar (P.W. 10) received a secret information that a smugglers' group was/were involved in dealing with illegal business of heroine and smack. The information disclosed that some of them were present on Azad path, located at Kankarbagh. On receiving such information, the officer-in-charge entered the same in the station diary and informed his superior officer. Thereafter he constituted a raiding team consisting of several police personnels including the Officer Incharge, Patrakar Nagar police station, namely, Basant Kumar Singh (P.W.11), Ashok Kumar Singh, ASI (P.W.9), S.P. Thakur, S.I. (P.W.7) and constable Ramadhin Prasad (P.W.8). The raiding team proceeded to and reached near the house of Krishna Nandan Sharma situated on Azad Path. Finding a person in suspicious condition, the police personnels commanded him to stop but he escaped into an adjacent house. The raiding team captivated the said man. It is further the prosecution case that before two independent witnesses, namely, Md.

Yaub (P.W. 1) and Shivesh Kumar (P.W.2) the man was apprehended who disclosed his identity as Nandu Sharma (one of the appellants). On search, in presence of witnesses, two plastic small bags containing grey coloured powder from his both pant's pockets were recovered. As the appellant Nandu Sharma admitted the same to be smack weighing 50 gms. each, the packet(s) so recovered was seized in presence of the two independent witnesses under a seizure memo (Ext.2). Aforesaid Nandu Sharma is said to have made a confessional statement before the informant and other police personnels constituting the raiding team disclosing that the business of smack-selling was being managed by Krishna Bhagwan Sharma (Appellant in Cr. Appeal No. 516/07) with the assistance of different persons including one Ashosh Kumar Bhaduri (since tried and acquitted). The appellant, Nandu Sharma is said to have narrated the entire scenario of obtaining, possessing and selling the heroine (smack). He named several persons who were involved in this illegal/clandestine procurement and sale of smack (heroine). On said disclosure, the raiding party reached the house identified by appellant Nandu Sharma at Ashok Nagar where Nandu Sharma (appellant) and his uncle Krishna Bhagwan Sharma (appellant) were said to be the tenant(s) in one room of the said house. This was part of the house of one Jugeshwar Sao (not examined). The room was found locked. Appellant, Nandu Sharma made available the key and with the help of the said key the room was opened in presence of the independent witnesses in the shape of Shyam Kumar Gupta (P.W.4) and Mithilesh Prasad Singh (P.W.6). A search, thereafter, was carried out in presence of those witnesses and nine plastic packets containing smack powder weighing 2 kgs. and 100 gm. were recovered from a bag kept in the room. The appellant, Krishna Bhagwan Sharma was not found present. The articles/substance so recovered in the said room was/were seized in presence of the aforesaid two witnesses (Ext.2/1). Thereafter the raiding team with appellant Nandu Sharma embarked on another house located at Doctors' Colony within Patrakar Nagar police station. It is said that one Maruti van bearing No. B.E.A.-9915 was seen parked in front of the said house wherein the appellant Ram Babu Sharma (Cr. Appeal No. 515/07) was found sitting. The said Maruti van was about to move but the raiding team stopped the said vehicle. The occupant of the said vehicle Ram Babu Sharma was arrested. In presence of two independent

witnesses in the shape of Uday Kumar (P.W.3) and Amrendra Sharma (P.W.5), search of the vehicle was carried out and from its front dickey two plastic bags each containing smacks weighing 250 gms. was/were recovered and seized, (vide ext.2/2). Another raid was thereafter carried out in terms of the disclosure so made by the appellant Nandu Sharma in a different and distinct house where another accused is/was residing. This Court for the purpose of disposal of the present appeals is not concerned therewith and, as such, they have not been set out in great detail.

6. On conclusion of the raids and seizure(s) the informant brought the arrested accused(s) including the appellants Nandu Sharma and Ram Babu Sharma and seized articles/materials to the police station and thereafter a written report (Ext.3) was prepared. The seizure memos and the confessional statement so made by Nandu Sharma formed part of the said written report. On the basis of such report, Kadamkuan (Kankarbagh) p.s. case No. 586/02 was registered under diverse sections of the NDPS Act. The formal FIR is on record as Ext. 3/1. Basant Kumar Singh (P.W. 11) was made the Investigating Officer of the case who made a detailed investigation. On 5.10.2002 samples from the seized packets were drawn and sealed in presence of a Judicial Magistrate, Shri B.B. Singh. The report in this regard is Ext.4. On chemical examination/analysis, a report was submitted, (vide Ext.5). The materials/substance so seized and chemically analyzed was/were found as heroine. On conclusion of investigation, the I.O. submitted the charge-sheet against the appellants and two others (since acquitted).

7. On the basis of the said challan/chargesheet, cognizance was taken and the case was transferred to the present trial judge for hearing and disposal.

8. The defence of the appellants appear to be complete denial. A specific plea of false implication was taken. They further took the plea that nothing was recovered from their respective possession. They thus abjured the guilt.

9. At the trial, the prosecution in order to drive home the charges got examined altogether 11 witnesses. P.W.1 Md. Ayub, P.W.2 Sivesh Kumar, P.W.3 Uday Kumar, P.W.4 Shyam Kumar, P.W.5 Amrendra Sharma and P.W.6 Mithilesh Prasad Singh are the witnesses on the point of the search and seizure(s) at three

different places of occurrence. P. W.7 is the Assistant Sub-Inspector of Police who constituted the raiding team/party. P.W. 8 and 9 are similarly the police personnels who constituted the raiding team on the relevant date. P.W. 10 Giridhar Mohan Kumar, the Officer-In-Charge is the informant of the case who during the relevant time was posted as officer-In-Charge of Kankarbagh police station. P.W.11 is the Investigating Officer of the present case.

10. This Court now proceeds to examine the evidence so adduced on behalf of the prosecution in order to prove the guilt. P.W. 10 is the informant of the present case. This witness in his deposition has supported the prosecution case. In examination-in-chief he has narrated the story compatible with the case set out in the FIR (Ext.3). According to him, on the relevant date, on getting secret information, he constituted a raiding team consisting of different police officials and arrested appellant Nandu Sharma. A search was carried out in presence of witnesses wherein 50 gms. of packet/puria from each pocket was/were recovered. Complying the requirement of law, those articles were seized and sealed in presence of two independent witnesses P.W.1 Md. Ayub and P.W.2 Shivesh Kr. Jha. He has proved the seizure list (Ext.2) and his signature thereon. He has further stated that those articles/substance were seized at the place of seizure itself. According to this witness, a copy of the seizure list was handed over to the arrested accused, appellant Nandu Sharma, who endorsed his signature thereon. P.W. 10 has further stated that he thereafter recorded the confessional statement of Nandu Sharma which was reduced in writing. On his disclosure, a house located in East Ashok Nagar Road No. 14 was searched. He went to the room with raiding team and the arrested accused. The room was part of the house owned by one Yogeshwar Sao. On search nine packets of heroine/smack were recovered therefrom which was/were found kept in a bag. The articles/packets so recovered was weighed and found 2 kgs. 100 gms. These articles/substance were seized and sealed in presence of two witnesses (PWs. 4 and 6) and a seizure memo was drawn which contained his signature. The seizure memo has been proved as Ext. 2/1. In paragraph 5, he has stated that the appellant Nandu Sharma had brought them to the said room. In paragraph 7 this witness stated that after such recovery and seizure made by him from the room they proceeded to Doctors' Colony where the appellant Ram Babu Sharma was found sitting in a van bearing registration

No. B.E.A. 9915. On the disclosure of Nandu Sharma a search was carried out of the said vehicle on which the appellant Ram Babu Sharma was found sitting. In course of search, two plastic/polythene bags each containing 250 gms. of heroine was/were seized from the front dickey of the said vehicle in presence of two independent witnesses (PWs.3 & 5) and a seizure list/memo was drawn by him which contains his signature and the signature of two independent witnesses. A copy of the said seizure list/memo was handed over to the appellant, Ram Babu Sharma who endorsed thereon. He further deposed that a car bearing registration No. BR 7602 was also taken into possession as the confessional statement of the appellant Nandu Sharma also incriminated the said vehicle. Thereafter this witness is, said to have prepared a written report in his own pen containing his signature. The seizure lists drawn and prepared as well as the confessional statement of the appellant Nandu Sharma (signed by him) were made enclosures to the said written report. This witness has proved the said report as Ext.3. A formal FIR was thereafter drawn which has been marked as Ext.3/1. The investigation of the case was handed over to S.I. Basant Kumar Singh (P.W. 11). In his further examination-in-chief he identified the appellants Nandu Sharma and Ram Babu Sharma. The defence cross-examined this witness at a great length. In his cross-examination, this witness has stated that before acting on secret information he had informed the superior police officer on wireless as well as in black and white. He was instructed to act swiftly and sharply and thereafter he constituted a police team and carried out raids and effected seizures and arrests. To a question, this witness has admitted that he did not obtain the signature of the appellant Nandu Sharma on seal. However, the signature of Nandu Sharma was obtained on the seizure memo and a copy whereof was handed over to him. He has denied suggestion that seizure memo was not prepared in presence of the witnesses and that nothing was recovered from the possession of the appellant Nandu Sharma. In paragraph 21 he admits that the confessional statement of Nandu Sharma was taken on the spot which contains his signature as well. In paragraph 24 he discloses about search and seizure being made in presence of independent witnesses at two other places.

11. P.W. 11 is the Investigating Officer of the case. This witness in his deposition has stated that on the relevant date and time he was forming part of the raiding

team/party constituted by the Officer-in-charge (P.W. 10). They proceeded to the house of Krishna Nandan Sharma located in Kankarbagh mohalla. The appellant Nandu Sharma was found escaping from the said place and was apprehended. A search was carried out in presence of two independent witnesses and two packets/purias each containing 50 gms. of heroine like substance was/were seized and a seizure memo was drawn, a copy whereof was made over to the arrested accused. He further states that the arrested accused appellant Nandu Sharma made a confessional statement setting out in detail as to how a gang of persons was involved in procurement and sale of smacks (heroine). The said confessional statement was signed by him. On the basis of such disclosure, they went to Ashok Nagar and searched one of the rooms of the house of Jugeshwar Sao. The said room was found locked and was stated to be taken on rent by the appellant Krishna Bhagwan Sharma. The key of the lock was provided by Nandu Sharma. The room was opened after procuring two independent witnesses and 02 kg 100 gms. of heroine like substance was/were recovered and seized in presence of two independent witnesses who put their respective signatures on the memo. Thereafter the team proceeded to Doctors' Colony and a Maruti van was found parked in front of the house No. 86. Appellant Ram Babu Sharma was found sitting in the said vehicle and was arrested. A search was carried out and two packets each containing 250 gms. of heroine/smack like substance was/were recovered from the front dickey which was/were seized in presence of local independent witnesses (PWs.3 & 5). Thereafter another fiat car standing nearby was also seized under seizure memo. This witness further states that a copy of the seizure list was handed over to the appellant Ram Babu Sharma who put his signature. The packets were seized and sealed (Ext.2/2). Thereafter this witness narrates about subsequent raids undertaken by the raiding team with which this Court is not presently concerned. In paragraphs 8, 9 and 10 the witness has stated about the three places of occurrence and set out the graphic details thereof. As about second place of occurrence he has stated that it was found the house of one Yogeshwar Sao located in Ashok Nagar (Rd. No. 14). The room which was on the rear side of the house was found in possession of the appellant Nandu Sharma from where articles/substance were recovered. In paragraph 13 he stated about recording statements of S.I Vijay Kumar (not examined), ASI Ashok Kumar Singh

(P.W.9), S.P. Thakur (P.W.7), Hawaldar Ramdhani (P.W.8), Laldeo Prasad (not examined) and also the statement of the seizure witnesses, namely P.W.1 (Md. Ayub), P.W.6 Mithilesh Prasad Singh, P.W.4, Shyam Kumar Gupta and P.W.5 Amrendra Sharma. This witness has further stated that before drawing sample(s) from the seized packet(s) he made an application before the Magistrate whereon a Judicial Magistrate was deputed and samples were drawn on 5.10.2002 in presence of the Judicial Magistrate. In order to give credence detailed process was carried out. After drawing samples a memorandum/report of the entire process was drawn up, prepared on his dictation and typed by one Bharat Kr. Singh (not examined). The said memorandum/report contained signatures of this witness, Officer-in-charge and the Judicial Magistrate as also the specimen of the seal put on the samples. This memorandum/report has been marked as Ext.4. Thereafter the samples were sent to forensic science laboratory (FSL) Patna as well as FSL, Gazipur for their chemical examination/analysis. The registered owner of the Maruti van was verified from the office of D.T.O. Patna. The report from the FSL Patna was received and the same has been marked as Ext.5. This witness in paragraph 25 stated that seizure witnesses had supported the factum of search and seizure in his/their presence. In paragraph 35 he has stated that he went to the room in occupation of appellant Krishna Bhagwan Sharma but did not record the statement of the landlord of the said house. In paragraph 36 he is fair in accepting that the appellant Nandu Sharma was found having no house in vicinity wherefrom he was arrested. Further scanning of the evidence of the witnesses shows that he stated about the preparation of material exts. and containing signature of Nandu Sharma thereon. The chemical analysis report was received only from the FSL Patna and not from FSL Gazipur and, as such, on the basis of said forensic report finding the articles/substance seized at the three places to be heroin he concluded the investigation and submitted charge sheet in the case.

12. P.Ws. 1 to 6 are the search and seizure witnesses. As noticed above, the place of occurrence of the present case is at three different places. P.W.1 Md. Ayub and P.W.2 Sivesh Kumar Jha are the witnesses who are said to have signed the seizure list (Ext.2) respecting recovery and seizure from appellant Nandu Sharma. P.W. 4 Shyam Kumar and P.W.6 Mithilesh Kumar Singh are the witnesses who witnessed the recovery and seizure from the room allegedly taken

on rent by appellant Krishna Bhagwan Sharma (Ext.2/1). P.W.3 Uday Kumar and P.W.5 Amrendra Sharma are the witnesses in whose presence recovery of certain packets were made from the front dickey of car occupied by Ram Babu Sharma (Ext. 2/2).

13. This Court proposes to examine their evidence available on record. One aspect which has been highlighted by the counsel for the appellant finds support from their deposition is that all these witnesses to search and seizure have been declared hostile by the prosecution. Ext. 2 concerns seizure and recovery from the possession of the appellant Nandu Sharma. P.W.1 and P.W.2 are the seizure list witnesses. In their examination-in-chief they have flatly refused that any seizure was ever effected in their presence. These witnesses have, however, admitted their respective signatures as Ext. 1 and Ext. 1/2 respectively. In their cross-examination they have denied that any such recovery was effected in their presence from the pant's packet of the appellant Nandu Sharma. The defence has only elicited from them that they were made to sign on a blank paper.

14. P.W.4 and 6 are the witnesses so far as search and seizure (Ext.2/1) from the room allegedly belonging to the appellant Krishna Bhagwan Sharma is concerned. In their respective examination-in-chief, they have accepted their signatures appearing on the seizure list/memo. The prosecution thereafter cross-examined them to get a denial of the suggestion that they had earlier supported the factum of search and seizure.

15. P.Ws.3 and 5 are again the seizure list (Ext.2/2) witnesses with respect to the recovery and seizure of two plastic packets each weighing 250 gms. of smack/heroin from the dickey of vehicle bearing registration No. B.E.A-9915 which was found parked at Doctors' Colony in front of the house No. 86 and occupied by appellant Ram Babu Sharma. These witnesses have admitted their respective signatures appearing on the seizure memo and thereafter they have denied that any such recovery was in fact effected in their presence from the vehicle. The prosecution got them declared hostile and cross-examined them with reference to their earlier statements supporting the search and seizure which they denied. The defence cross-examined them to elicit that the signature(s) of these

witnesses were obtained by the police on a blank paper.

16. Now remains the scanning of evidence of P.Ws. 7, 8 and 9. P.W.7 is the police officer who constituted the raiding team. In his examination-in-chief, this witness has stated that on the date and time of the occurrence he was constituting the raiding team, headed by Shri G.M. Kumar (P.W.10). Appellant Nandu Sharma was apprehended in the morning and thereafter a search was carried out of his paint from which two packets containing powder like substance was/were recovered and seized. In his further evidence this witness has stated that on the basis of the disclosures so made by him the raiding team went to the house located in Kankarbagh and from there also powder like substance weighing about 2 kgs. 100 gms. was/were recovered and seized in presence of the witnesses. This witness further testified that thereafter they went to Doctors' Colony and recovery of packets containing powder like substance was effected from a vehicle. He further says that he does not remember whether such recovery was made from the vehicle or from the house. In his cross-examination, this witness has very clearly stated that seizure memos were prepared in more than one copy. He admits that he is not able to recount who signed which seizure memo. It further appears that this witness at one place said that the seizures were not effected in his presence. In his cross-examination the defence has elicited that recoveries so made were not sealed in his presence.

17. P.W.8 is the another police personnel (Hawaldar), who during the relevant time constituted the raiding team. In his examination-in chief he has stated that he on the relevant date formed the raiding team headed by the Officer-in-charge of Kankarbagh police station. He further deposed to the effect that close to Kankarbagh tempo stand accused Nandu Sharma was arrested and from his possession two packets (purias) were recovered and seized under a seizure memo. Thereafter he was arrested. On his disclosure, the police team went to a room of a house located in Kankarbagh. The said room was found locked. The officer-in-charge unlocked the room and a black bag was found kept inside the room containing powder like substance which was/were recovered and seized under a seizure memo. He further admits that he has not seen the substance/materials which are said to have been recovered at three places. He

denied the suggestion that he signed any of the seizure memo. P.W.9 is another police personnel. During the relevant time he was posted at Patrakarnagar police station. According to him, a raiding team was constituted on the date of occurrence consisting of several police personnels including this witness. This raiding team arrested the appellant Nandu Sharma and a search was carried out in course whereof two purias of powder like substance was/were recovered from his possession which was/were seized under a seizure memo. The said arrested accused made certain confessions and disclosures which prompted the team to go to a house (room) located in Kankarbagh. The said room was found locked. The appellant Nandu Sharma provided the key. The room was unlocked and a black bag was found kept inside the room containing smack/powder which was seized. In his cross-examination this witness appears to have stated that before effecting seizure they had given their own search. This witness has further stated that he is not signatory to the seizure list/memo. He does not recall who signed which seizure list/memo. Thereafter the team of which he was a member went to the Doctors' colony where a car (Maruti van) was found standing in which one person was found sitting. The said person disclosed his name as appellant Ram Babu Sharma. A search was carried out and recoveries of two plastic packets were made from the front dickey of the said car which was seized under a seizure memo. Appellant Ram Babu Sharma was taken into custody. The defence side in cross-examination tried to demolish the witnesses by putting several questions with regard to the actual boundaries of the house located at Ashok Nagar. In his cross-examination he appears to have stated that he did not enter into the house/room. It has further been stated that this witness has not signed the seizure memo. In his further cross-examination he asserts that thereafter they proceeded to house No. 86 located in Patrakar Nagar colony wherefrom a Maruti van was seized. A search was carried out and certain recoveries were effected. This witness has, however, stated that he is not able to recall as to whether any search or recovery/seizure of articles were made or not.

18. Careful perusal of the evidence available on record does indicate that there are three places of occurrence. Recoveries were made at all these three places. At first place of occurrence the recoveries weighing 100 gms. are said to have been made from the pocket of the appellant Nandu Sharma. The second place of

occurrence is a room which was found locked and opened and a bag containing 2 kg. and 100 gm of smack like powder was/were recovered and seized. As per the confessional statement which is part of the FIR (Ext.3), they searched the room belonging to the appellant Krishna Bhagwan. The third place of occurrence is located in Patrakarnagar where a Maruti van is said to have been searched and seized. The appellant Ram Babu Sharma is said to be the occupant of the said vehicle. In the front dickey of this vehicle recovery of two packets of smacks is said to have been made each containing 250 gms.

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19. This Court would like to first deal with the case of the appellant Krishna Bhagwan Sharma. This appellant was not found and arrested at the place of occurrence. It has been alleged on the strength of allegation and evidence in support thereof that the room which was searched and recoveries made therefrom was in possession of the present appellant. This Court, therefore, would like to deal with the evidence available on record in this regard. The best evidence available on record would have been that of the landlord of the house namely Jogeshwar Sao and/or the persons from the neighborhood. The landlord, namely, Jogeshwar Sao was never examined in this case. There is no explanation, whatsoever, on record explaining non-examination of the said landlord of the house. Fortunately, his son P.W.4 Shyam Kumar is a seizure list witness in the present case so far as the recovery from the said room is concerned. This witness has gone hostile. Although, this Court finds that he has proved his signature appearing on the seizure memo (Ext.2/1). This witness could have said about the fact that the room in question was taken on rent by the appellant Krishna Bhagwan Sharma. No such evidence can be seen from his entire evidence. On the contrary, there is evidence in the shape of the deposition of P.W.7 at paragraph 2 that the room was found locked and the appellant Nandu Sharma provided the key of the lock. Thereafter the I.O. opened the locked with the said key. Therefore, except the confessional statement (Ext.3) of appellant Nandu Sharma and some statements of the police personnels that they went to the room allegedly belonging to this appellant there is nothing on record to indicate that the said room was in possession or in occupation of the present appellant.

20. Counsel for the State in order to prove the fact that the room belonged to this appellant has relied on the confessional statement of the appellant Nandu Sharma. According to him, on the basis of such disclosures made by the appellant Nandu Sharma a recovery has been made from room and, as such, the fact that the said room was disclosed to be the room in occupation of the present appellant should also be presumed. Counsel for the State in face of the evidence available on record, therefore, has placed heavy reliance on this document (forming part of FIR) in order to sustain the conviction recorded against this appellant.

21. On the contrary, learned Counsel for the appellants has strongly controverted the said submission of the counsel for the State. According to him, no such presumption can be drawn on the basis of such disclosures incorporated in the confessional statement of co-accused Nandu Sharma. Counsel for the appellant has drawn attention of this Court to the relevant guiding provisions which can be found in Sections 25, 26 and 27 of the Evidence Act. He has placed reliance on a judgment rendered by the Supreme Court in the case of *Anter Singh v. State of Rajasthan*, reported in : 2004 CriLJ1380 . Learned Counsel refers to paragraph 3, 14, and 16 of the said judgment.

Scope and ambit of Section 27 of the Evidence Act as interpreted by the Hon'ble Supreme Court in the case of *Pulukuri Kottaya v. Emperor* AIR 1947 PC 67 has been noticed in this case which is locus classicus on Section 27 of the Evidence Act. On consideration of the particular facts of the case the Supreme Court in paragraph 16 of the report set out the requirements of section which are as follows.

1. The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

2. The fact must have been discovered.

3. The discovery must have been in consequence of some information received from the accused and not by the accused's own act.
4. The person giving the information must be accused of any offence.
5. He must be in the custody of a police officer.
6. The discovery of a fact in consequence of information received from an accused in custody must be deposed to.
7. Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

22. On the strength of the said judgment it has been argued that this Court at best can presume recovery of articles/substance/contraband substance from the room in question. The fact that the said room was/is during the relevant time in possession of the present appellant as tenant will not be admissible and thus presumed. The prosecution, therefore, has to prove the same on the strength of oral/documentary evidence. It has thus been argued that there is complete lack of such evidence adduced by the prosecution to prove that the room in question was hired by the appellant on rent and during the relevant time the same was in his possession.

23. Section 25 of the Evidence Act clearly declares that no confession made to a police officer, shall be proved as against a person accused of any offence. Section 26 of the Act declares that no confession made by any person whilst he is in custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Section 27 which has been heavily relied upon by both sides reads thus:

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.

24. The question which crops up for consideration is whether on the basis of recovery from the said room which subsequently found to be a contraband substance the factum of possession of the said room can also be presumed to have been proved by such recovery/discovery or not.

25. This Court on a careful consideration of material available on record and discussed above is of the view that the prosecution has not been able to prove the fact that the said room was in exclusive possession of the appellant Krishna Bhagwan Sharma. If the confessional statement (Ext.3) is taken out of the consideration to prove the said fact then this Court finds that the evidence is/are frugal. In order to give credence to their case the prosecution could have very well examined the landlord of the house and/or any person of the neighborhood as there is evidence on record that a slew of people of the neighbourhood had assembled there. Unfortunately, no such effort was made. The evidence of the son of the landlord is on the record in the shape of P.W.4 (Shyam Kumar). This Court is unable to draw anything from the evidence regarding the fact that this appellant was a tenant and occupant of the said room of the house. On the contrary, P.W.11 (I.O.) of the case in his deposition at paragraph 9 has stated that the room forming part of the house of Jogeshwar Sao was found in possession of appellant Nandu Sharma and recoveries were made from that room.

26. Taking all these facts and circumstances emanating from the records into consideration and the legal position discussed above, this Court is of the view that the prosecution has not been able to prove beyond doubt that the room in the house of Yogeshwar Sao located in Mohalla Ashok Nagar where from 2 kg. 100 gms. of smacks (heroine) were found and recovered was either in joint or exclusive possession of the present appellant. This appellant, therefore, definitely deserves benefit of doubts and thus acquittal.

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27. In both these appeals the appellants have been found indulged in purchase, possession and sale of contraband substance (smacks). The overall evidence on record is to the effect that on getting secret information a raid was conducted and the appellant Nandu Sharma was arrested. A search was carried out and two

purias/packets each weighing 50 gms. of heroine/smacks was/were recovered and seized. On his disclosure/confession the raiding team searched a Maruti van parked in front of the house No. 86 in Doctors' Colony. The appellant Ram Babu Sharma was found sitting in the said vehicle. A search was carried out in presence of the witnesses and two packets each containing 250 gms. of smacks (heroine) were recovered from the front dickey of the car and seized/sealed in presence of the witnesses, namely, P.Ws. 3 and 5. The search and seizure witnesses namely P.Ws. 1 and 2 so far as the first place of occurrence is concerned, although gone hostile, but in their respective deposition they have accepted to have signed the seizure memo as witnesses to recovery and seizure (Exts. 1/1 &1/2). It appears that under orders of the Court and in presence of a Judicial Magistrate so deputed in this behalf samples were drawn and a memorandum/report was duly drawn which has been signed by the I.O., the Judicial Magistrate and the Officer-in-charge. This document is on record as Ext.4. The report of the forensic science laboratory (FSL) is on record as Ext.5. A perusal whereof definitely indicates that the articles/substance/powder so seized from the possession of these appellants were found to be diacetyl Morphine, commonly known as heroine which is prohibited under NDPS Act, 1985.

28. Counsel for the appellants strenuously argued that the recoveries so effected from the possession of appellant Nandu Sharma and the vehicle occupied by appellant Ram Babu Sharma cannot be relied upon as all the independent witnesses namely P.W. 1 and 2 so far as recoveries from the possessions of the appellant Nandu Sharma and P.W.3 and 5 so far as the recoveries and seizure from the vehicle occupied by Ram Babu Sharma have turned hostile. Counsel for the appellants submits that there is no other independent and/or corroborating evidence on record except the testimony of few police personnels. He draws attention of this Court to the evidence of P.W. 7 appearing at paragraph 1 in order to submit that at least this P.W. appears to have stated that the packets/purias was/were not recovered from the possession of the appellant Nandu Sharma, but the same was/were recovered from the Chauki (cot) occupied by the appellant Nandu Sharma. So far as recovery and seizure from the vehicle found in possession of appellant Ram Babu Sharma, it has been argued that the evidence in this regard is discrepant and as such it has been submitted that the cumulative

effect of the evidence on record falls short of proving the guilt/charge beyond shadow of reasonable doubts.

29. On the contrary, learned APP submits that although the seizure and search witnesses have been declared hostile but they have proved their signatures on Exts. 2 and 2/2. Counsel for the State draws attention of this Court to the evidence of the informant (P.W.10) and the I.O. (P.W.11) to submit that paragraph 14 of the evidence of P.W.11 does indicate that all precautions were taken by the prosecution in drawing samples from the seized packets/purias for dispatching them for chemical examination.

30. Counsel for the appellants referring to the testimony of P.W.10 submits that this witness has stated that he has not recorded about the seizure in his investigation report thus story of search and seizure becomes doubtful. Counsel for the State, on the other hand, submits with reference to evidence of this PW (para 19) that a positive statement has been made that seizure was made and memo was drawn in duplicate and signature of the appellant was obtained thereon. Counsel for the State has further argued that the Court should take judicial notice of the fact that these days the independent witnesses are reluctant to come and depose in the case. This Court finds substance in such submission. Counsel for the appellant then submits that the prosecution has not examined the Magistrate in whose presence samples are said to have been drawn as per Ext.4. According to the learned Counsel, non-examination of the Judicial Magistrate gives a fatal blow to the prosecution story/case. The evidence on record therefore drastically falls short in proving the guilt. Counsel for the State referring to the cross-examination of the seizure witnesses, namely P.Ws.1, 2, 3 and 5 read with the deposition of P.W. 11 (I.O.) appearing at para 25 of his examination-in-chief, submits that the Court would be definitely within its bounds in deriving conclusion that the seizure and search witnesses namely, P.Ws. 1, 2, 3 and 5 in course of investigation supported the factum of search and seizure in their presence. These P.Ws. have admitted their signatures appearing on Exts.2 and 2/2. P.Ws.7, 8 and 9 are the witnesses, constituting the raiding team. They have consistently deposed that the raiding team went to the first place of occurrence and recovered packets/purias containing smacks weighing 50 gms. each from the pocket of the

appellant Nandu Sharma and thereafter they proceeded to the third place of occurrence and effected search of the vehicle on which the appellant Ram Babu Sharma was found sitting. They have stated that in course of such search two packets each containing 250 gms of heroine (smack) was/were recovered and seized under a seizure memo in presence of independent witnesses and copies whereof were made over to the appellants. This court does find that these witnesses have supported the prosecution case as spelt out by the informant (P.W.10). P.W.11 is the Investigating Officer who has supported the factum of search and seizure from both the appellants.

His evidence discloses the manner in which the seizures were effected and seizure memos were drawn after obtaining signatures of independent seizure witnesses and copies whereof were handed over to the accuseds/appellants under endorsement. Paragraph 14 of his evidence spells out the manner in which the entire process was adopted in drawing samples. Ext.4 is on record to support the said statement of this P.W. Paragraph 15 of his deposition lends credence to the process of drawing samples. The entire process was photographed and those photographs are on record as material Ext. (Exts.A to A/11). In paragraph 22 he has proved the FSL report (Ext.5). This is a document which can be safely relied upon in terms of Section 293 of the Code of Criminal Procedure. In face of these evidence non-examination of the Magistrate cannot be held to be fatal.

31. The submission of the Counsel for the appellants that the evidence on record particularly those of the police personnels including P.Ws. 10 and 11 are discrepant and contradictory and, therefore, casts a serious doubt on the prosecution case, does not seem to be correct in view of the evidence available on record and noticed in the previous part of this judgment.

32. On consideration of the entire material available on record and after thoughtfully considering the submissions advanced on behalf of the rival parties, this Court has no hesitation in concluding that the prosecution has been able to prove the charge(s) so far as these two appellants are concerned.

33. Counsel for the appellants then submits that the appellant Nandu Sharma (Cr. Appeal No. 514 of 2007) has been convicted under Section 21(b) read with

Section 25 of the NDPS Act and sentenced to undergo R.I for seven years and also imposed a fine of Rs. 50,000/- and in default whereof to further undergo R.I. for six months. Counsel for the appellant submits and the lower court records do support that this appellant has remained in custody since the date of occurrence, i.e., 28.9.2002. It has been submitted that this appellant had to undergo the rigors of trial and appeal throughout these years. Counsel for the appellants, on instruction, further submits that this appellant does not carry any criminal past as he was not ever found guilty under any offence. Having considered these aspects of the matter, particularly the fact that this appellant has already remained in custody for about six years four months by now, this Court feels that the interest of justice shall be sub served if the sentence is reduced to the period already undergone by this appellant.

34. So far as appellant Ram Babu Sharma is concerned, he has been found guilty under Section 21(c) read with Section 25 of the NDPS Act. He has also remained in jail custody since the date of arrest (28.09.2002) but the rigors of provision of law does not permit any remission in sentence.

35. In the result:

Cr. Appeal No. 515 of 2007 preferred by Ram Babu Sharma stands dismissed. The judgment and order of conviction recorded by Shri Brajendra Kumar Srivastava, Addl. District and Sessions Judge IX, Patna dated 31st March, 2007 in Special Case No. 75 of 2002 is hereby affirmed.

Cr. Appeal No. 514 of 2007 preferred by the appellant Nandu Sharma is dismissed with modification in sentence as period already undergone by him and he is directed to be set free forthwith, if not required to be detained in any other case.

Cr. Appeal No. 516 of 2007 preferred by the appellant Krishna Bhagwan Sharma is allowed and judgment of conviction dated 31st March, 2007 and order of sentence dated 2.4.2007, passed by Sri Brajendra Kumar Srivastava, Addl. District and Sessions Judge IX, Patna in Special Case No. 75 of 2002 is set aside and he is directed to be set free forthwith, if not required to be detained in any other case.

