

Amar Singh Vs. Union of India (Uoi)

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Court : Rajasthan

Decided On : May-04-2001

Reported in : 2001CriLJ2802; 2002(5)WLC301

Judge : Arun Madan, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 2, 8, 21, 25, 29, 35, 41 to 50, 53 and 54, 57, 68; Code of Criminal Procedure (CrPC) - Sections 96 to 103, 165, 173 and 313

Appeal No. : Cri. Appeal No. 779 of 1998

Appellant : Amar Singh

Respondent : Union of India (Uoi)

Advocate for Def. : K.N. Shrimal, S.C.

Advocate for Pet/Ap. : S.R. Bajwa and; V.R. Bajwa, Advs.

Disposition : Appeal dismissed

Judgement :

ORDER

Arun Madan, J.

1. Amar Singh (appellant) has challenged by way of this appeal his conviction imposed by the Special Judge (NDPS Cases), Jhalawar by judgment dated 21-11-98 whereby for offence punishable under Section 8/21 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (for short NDPS Act) the appellant has been sentenced to undergo ten years' RI with a fine of Rupees one lac (in default, further one year's RI).

2. The prosecution case is that upon having received a secret information by the Central Narcotic Bureau that accused Amar Singh had illegally preserved and kept contraband 'heroin', a raid was conducted in the presence of motbir witnesses by the preventive raiding party on 10-4-1997 at 20.30 hours in the house of Amar Singh situated in Panchayat Gali Dharamshala Mohalla, village Choumhalla, Tehsil Gangdhar, District Jhalawar. The raiding party surrounded the house of Amar Singh. Amar Singh was found in his house situated at the above address and after introducing himself, Kawal Singh SI of the Narcotic Bureau asked the accused as to get his house searched in order to find out contraband 'heroin' therein as they have secret information thereto and he was also asked as to his right to get the house searched in the presence of a nearby Magistrate or Gazetted Officer, to which the accused desired to get his house searched in the presence of Gazetted Officer, therefore, through wireless, message was given to R.K. Sinha, Superintendent of the Bureau by Kawal Singh and R.K. Sinha reached the spot house of accused and introduced himself as Gazetted Officer and asked as to whether he had given written consent for search in his presence. Thereupon 'Panchnama' was prepared and Kawal Singh and N.P. Gaur both Sub-Inspectors firstly gave their own persons' search and then both these Inspectors, motbir witnesses and Gazetted Officer entered inside the house and search process commenced. During the search, in a room situated just opposite staircase and near/just ahead 'Chandani', a sack of four square check cloth duly wrapped in a white cloth was found lying below the bed at its leg side and when the sack was duly untied then all the four square packets to it were found having contained pink colour powder substance in plastic sachets. These plastic sachets containing pink colour powder were opened whereupon pink colour powder was got tested by seeking and taking its smell by the members of the raiding party then such contraband powder was found as 'heroin'. Plastic sachets containing contraband

heroin was weighed and its weight was found 1.350 kgs. After observing necessary procedure at the spot, the contraband 'heroin' was seized. Sample weighing 5 gms. each from four square packets of cloth sack was taken and then got them sealed in white envelope duly wrapped in white polythene small sacks while the rest of the seized contraband heroin was got packed and sealed including check cloth bag by duly wrapping with a white cloth. Samples taken from the seized contraband heroin were sent to the Chemical examiner who in his report (Ex. P.8) dated 2-7-97 reported that the sample is found by qualitative/quantitative analysis to be diacetyl morphine (Heroin) within the meaning of Section 2(xvi) of the NDPS Act.

3. It is the prosecution case that after having completed recovery and seizure proceedings, statement of Amar Singh was recorded wherein he admitted his conscious possession of the contraband heroin. Accused Amar Singh was taken into custody and arrested. Thereupon, a detailed report about the raid proceedings was sent to the Superintendent, Preventive Force, Neemuch Under Section 57 of the Act. Accordingly, Mahavir Singh Inspector was appointed to investigate the case but he was changed by appointing V. K. Jain as Investigating Officer. After usual investigation and completion thereof, criminal complaint for Crime No. 23/97 of offence Under Section 8/21 of the NDPS Act for the seizure of 1.350 kgs. of heroin in a raid conducted at the house in possession of accused Amar Singh, was filed before the trial Court. Accused Amar Singh and Om Prakash were charged for having committed offences punishable Under Section 8/21 read with 8/29 of the NDPS Act. They pleaded not guilty and claimed trial. The prosecution examined 12 witnesses and produced 20 documents in support of its case. Two motbir witnesses, however, turned hostile. The accused were examined Under Section 313, Cr. P.C. but did not examine any witness in their defence. After having considered the facts and circumstances emerging from the prosecution evidence the trial Court found that the prosecution have successfully proved that contraband heroin weighing 1.350 kgs. was found in conscious possession of accused Amar Singh and, therefore, the trial Court held accused Amar Singh guilty of offence Under Section 8/21 of the NDPS Act and sentenced him as stated above. However, co-accused Om Prakash was acquitted of the charge levelled against him for offence Under Section 8/21 read with Section 8/29 of the NDPS Act.

Hence, this appeal.

4. Shri S.R. Bajwa, learned Senior Advocate appearing on behalf of accused-appellant Amar Singh firstly contended that in case of the present accused, there has been non-compliance of provisions of Section 42 of the NDPS Act because the authorised officer failed to send such secret information reduced in writing to his immediate-official superior. Second limb of argument urged by Shri Bajwa is that though xerox copy of a memo prepared by the officer of receiving secret information has been produced in evidence but the same is not admissible in evidence under the law of evidence. In other words, the contention is that there is no evidence muchless cogent evidence to show that secret information was ever recorded in writing and that its copy was sent to the immediate superior officer with immediate despatch in consonance with Section 42 of the NDPS Act. His second contention to substantiate aforesaid argument is that in case of search of a building, conveyance or enclosed place being affected by the empowered Officer between sunset and sunrise without obtaining search warrant or authorisation therefor, it is imperative upon such officer to record grounds of belief for making such search between sunset and sunrise and if such grounds of belief are recorded then its copy is necessarily to be sent to the immediate superior officer with immediate despatch, but according to Shri Bajwa, no such exercise whatsoever was at all undergone by recovery officer who had made seizure of the contraband heroin from the possession of the accused, before conducting search of the accused between sunset and sunrise and thereby there has been blatant contravention of statutory and mandatory provisions of the Act. Shri Bajwa placed reliance upon the decisions in

(1) State of Punjab v. Balbir Singh 1994 Cri LR(SC) 241 : 1994 Cri LJ 3702;

(2) Man Bahadur v. State of Goa 1996 Cri LJ 1389 and

(3) P. Simachal Patra v. State 1996

(2) CCR 541.

5. Shri K.N. Shrimal learned Standing Counsel for the Narcotic Department contended that compliance of Sections 41 and 42 of the Act stands proved from the prosecution evidence on record that secret information was recorded in strict compliance of the Act and the same was in original forwarded and given to the superior officer. Shri Shrimal cited decision in (1) *Mirabai v. Jai Singh* AIR 1971 Rajasthan 303 and (2) *Shri Umaid Mills v. Union of India* AIR 1960 Rajasthan 92 and (3) *State of Punjab v. Baldev Singh* AIR 1999 SC 2378 : 1999 Cri LJ.3672.

6. Next contention urged on behalf of the accused-appellant is that the appellant's exclusive and conscious possession of the contraband has not at all been proved by the prosecution evidence because the seizure was made from a house duly inhabited not only by him but also many other members of his family wherein his wife so also son were residing as would be evident from the evidence adduced during trial and thus, in the absence of cogent evidence established beyond doubt, as to the conscious possession of the appellant with the contraband, the appellant cannot be saddled with penal liability Under Section 8/21 of the NDPS Act. Shri Bajwa cited decision in *Ramratan v. State of Punjab* 1980 CAR (SC) 308 : 1979 Cri LJ 791.

7. Shri Bajwa also contended that statement of appellant recorded by seizure officer Kawal Singh by no standards of appreciation of evidence can be read in evidence because Kawal Singh after having effected seizure has lodged a FIR (ExP 19) before Supdt., Narcotic Department and in that eventuality he was the complainant but he ventured to record statement of accused on effecting search and seizure thereby he assumed role of an Investigating Officer and, therefore, in such a situation once complainant assumes role of Investigating Officer, it squarely affects credibility of the investigation vitiating it to the core. He cited the decision in *Bhagwan Singh v. State of Rajasthan* AIR 1976 SC 985 : 1976 Cri LJ 713.

8. Lastly Shri Bajwa on behalf of the accused-appellant urged that the report of the FSL at Government Opium and Alkaloid Works, Neemuch being a bare opinion of the Chemical Examiner could not be relied upon to sustain the impugned conviction inasmuch as this report did not betray details as to the tests conducted

and data collected thereof so also conclusion thereof drawn by the Chemical Examiner. He placed reliance upon the decision in *M.H. Sheikh Ibrahim v. State of Gujarat* (1995) 1 Crimes 274.1

9. I have heard the learned counsel for the parties and have also perused the entire record. In my considered view, search and seizure are essential steps in the armoury of an investigator in the investigation of a criminal case. A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. That being so, the Constitution makers have though fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy. The Code of Criminal Procedure so also the NDPS Act itself recognises the necessity and usefulness of search and seizure during the investigation as is evident from the provisions of Section 96 to 103, 165, Cr. P.C. and 41 to 50 of the NDPS Act.

10. Here first of all I may have a brief resume' of the law laid down in the decisions relied upon by Shri Bajwa in support of his contentions. In *Man Bahadur v. State of Goa* 1996 Cri LJ 1389 the Pariaji Bench of Bombay High Court was concerned with first proviso to Section 42(1) of the NDPS Act, which as per dictum of law laid down in *Balbir Singh's case* AIR 1994 SC 1872 : (1994 Cri LJ 3702) was held to be mandatory. It was a case where search was made of a house between 9.00 p.m. onwards i.e. after sunset and before sunrise, so the High Court held that provisions of Section 42 of the Act are attracted. However, in that case, Investigating Officer had admitted that he had not made any record about reasonable belief as provided under first proviso to Section 42(1) and, therefore, the Court held that the search has vitiated for violation of a mandatory provision and consequently the accused was acquitted.

11. In *P. Simanchal Patra v. State* 1996 (2) CCR 541 also the decision in *State of Punjab v. Balbir Singh* (supra) was relied upon. In that case, without analysing and discussing the relevant evidence of empowered officer who effected the seizure, the Court merely arrived at the conclusion by saying that there was nothing on record to show that reasons of belief were recorded. Having carefully perused the

decision in *P. Simanchal Patra v. State* 1996 (2) CCR 541. I find that it was a case where the Officer claimed to have got prior information but he failed to record reasons of belief and therefore, the Court held that there was clear non-compliance of provisions of Section 42(1) of the Act thereby affecting the prosecution case and vitiating the trial.

12. On the other hand, as would be clear from prosecution evidence which I would discuss a little later, the facts are entirely distinct and being distinguished the decisions relied upon by Shri Bajwa in respect of compliance of Sections 42 and 50 of the NDPS Act do not render any help in advancing any case in favour of the accused.

13. Now I may advert to analyse provisions contained in Section 41(2), 42 and 50 of the NDPS Act which deal with power to issue warrant, entry, search, seizure, without warrant and effect on prosecution case in case of contravention of such provisions.

14. On a bare look at Section 42 of the NDPS Act it makes clear that under first part, in case of a prior information given by any person, the empowered officer should necessarily take down in writing such prior information and then send a copy of such prior information taken down in writing to his immediate official superior as required under Section 42(2) of the Act. However, under second part, in case of the empowered officer having reasons to believe from personal knowledge that offence under Chapter IV have been committed or that materials furnishing evidence of commission of such offence are concealed in any building etc. he may carry out the arrest or search without warrant between sunrise and sunset and in that event, such provision does not mandate that he should record his reasons of belief. Under third part of Section 42 i.e. under the proviso to Section 42(1), if empowered officer has to carry out such search between sunset and sunrise, then he must record the grounds of his belief and in that event also under Section 42(2) he must also send a copy of the grounds of his belief recorded under Section 42(1) to his immediate official superior. Thus recording of prior information and grounds of belief and then sending its copy to the immediate official superior by the empowered officer under Section 42 of the NDPS Act are

held as mandatory and the contravention of the same is held to be fatal to the prosecution.

15. However, on prior information, the empowered officer while acting under Section 41(2) or 42 must also comply with provisions of Section 50 before making search of the person by informing that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided. Thus no doubt it is obligatory on such empowered searching officer to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory, affecting the prosecution case and vitiating the trial. But question whether such person opted for such a course or not would certainly be a question of fact depending upon each case.

16. In the present case, K.P. Pandey (PW8) stated that he reduced an information in writing on a prescribed form and had sent the same to his immediate superior officer Shri Nagpal. Xerox copy whereof has been produced in evidence as Annexure-8. K. P. Pandey being Sub-Inspector was authorised officer as per notification issued as early as on 14-11-1985. I do not find any substance in the argument of Shri Bajwa that xerox copy ought not to have been produced but original should have been exhibited. Such an objection about admissibility of copy of any document cannot be raised at the stage of appeal as it ought to have been raised at the time of marking or exhibiting the document, as has been held in *Kanchanganga Co. v. State* AIR 1973 Cal 325; *Mirabai v. Jaisingh* AIR 1971 Raj 303 and *Umaid Mills v. Union* AIR 1960 Raj 92. Thus as regards secret information recording, compliance of Sections 41 and 42 of the Act has been made by the prosecution and it stood proved that secret information was recorded in strict compliance of the Act and such information recorded in original was onwards transmitted to the officer superior.

17. As regards disclosure of name of person giving secret information, such nondisclosure is not fatal to the prosecution inasmuch as name of such secret informant is not required to be disclosed as is evident from Section 68 of the Act as disclosure of such name is against public interest.

18. As regards requirement of recording of grounds of belief by searching officer in case of the search being made in the night and then sending such recorded grounds of belief to immediate superior officer, though I have analysed the provisions of Sections 41, 42 and 50 of the Act in earlier part of this judgment in the light of the decision of the Apex Court in *State of Punjab v. Balbir Singh* (supra), but after the decision of the Constitution Bench of the Apex Court in *State of Punjab v. Baldev Singh* AIR 1999 SC 2378 : 1999 Cri LJ 3672 I find no substance in the objection raised by Shri Bajwa in this regard, especially when the impugned search in the present case was made in the presence of a Gazetted Officer (Shri R.K. Sinha) by Kawal Singh Sub-Inspector of the Narcotic Department who was authorised by notification dated 14-11-1985.

19. On a careful reading of the decision of the Apex Court in *State of Punjab v. Balbir Singh* AIR 1994 SC 1872 : 1994 Cri LJ 3702, it is clear that two-Judge Bench set conclusions inter alia as under (at page 3719 of Cri LJ) :-

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

20. Thus protection given by Section 50 of the Act is a valuable right to the offender and compliance thereof intended to be mandatory. In case the empowered officer searching the person or place under Section 41(2) or 42, had prior information as mentioned in those sections as to the contraband in unlawful possession and he intends to intercept it, conduct search and consequentially to seize the contraband, such searching officer is required to inform the offender that he has the right that the search will be conducted in the presence of a Gazetted

Officer or a Magistrate. Thereafter, on their agreeing to be searched by the empowered searching officers the search and seizure of the contraband from unlawful possession of the offender would become legal and valid. However, I may add that the evidence collected in breach of mandatory requirement does not become inadmissible. It is settled law that evidence collected during investigation in violation of the statutory provisions does not become inadmissible and the trial on the basis thereof does not get vitiated. Each case has to be considered on its own backdrop. I lend support from *State of Punjab v. Jasbir Singh* 1996 (2) SCC 288.

21. The Constitution Bench of the Apex Court in *State of Punjab v. Baldev Singh* 1999 Cri LJ 3672 (supra) observed as under (at page 3687 of Cri LJ) :--

24. It would thus be seen that none of the decisions of the Supreme Court after *Balbair Singh's* case AIR 1994 SCW 1802 : AIR 1994 SC 1872 : 1994 Cri LJ 3702, have departed from that opinion. At least none has been brought to our notice. There is, thus, unanimity of judicial pronouncements to the effect that it is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has the right -to require his search being conducted in the presence of a Gazetted Officer or a Magistrate and that the failure to so inform the suspect of his right, would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50. Similarly, if the concerned person requires, on being so informed by the empowered officer or otherwise, that his search be conducted in the presence of a Gazetted Officer or a Magistrate, the empowered officer is obliged to do so and failure on his part to do so would also render the search illegal and the conviction and sentence of the accused bad.

25. To be searched before a Gazetted Officer or a Magistrate, if the suspect so require, is an extremely valuable right which the Legislature has given to the concerned person having regard to the grave consequences that may entail the possession of contraband articles under the NDPS Act. It appears to have incorporated in the Act keeping in view the severity of the punishment. The rationale behind the provision is even otherwise manifest. The search before a

Gazetted Officer or a Magistrate would impart much more authenticity and creditworthiness to the search and seizure proceeding. It would also verily strengthen the prosecution case. There is, thus, no justification for the empowered officer, who goes to search the person, on prior information, to effect the search, of not informing the concerned person of the existence of his right to have his search conducted before a Gazetted Officer or a Magistrate so as to enable him to avail of that right. It is, however, not necessary to give the information to the person to be searched about his right in writing. It is sufficient if such information is communicated to the concerned person orally and as far as possible in the presence of some independent and respectable persons witnessing the arrest and search. The prosecution must, however, at the trial, establish that the empowered officer had conveyed the information to the concerned person of his right of being searched in the presence of the Magistrate or a Gazetted Officer, at the time of the intended search. Courts have to be satisfied at the trial of the case about due compliance with the requirements provided in Section 50. No presumption under Section 54 of the Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the Court that the requirements of Section 50 were duly complied with.

26. The safeguard or protection to be searched in presence of a Gazetted Officer or Magistrate has been incorporated in Section 50 to ensure that persons are only searched with good cause and also with a view to maintain veracity of evidence derived from such search. We have already noticed that severe punishment have been provided under the Act for mere possession of Illicit Drugs and Narcotic Substance. Personal search, more particularly for offence under the NDPS Act, are critical means of obtaining evidence of possession and it is, therefore, necessary that the safeguards provided in Section 50 of the Act are observed scrupulously. The duty to inform the suspect of his right to be searched in presence of a Gazetted Officer or Magistrate is a necessary sequence for enabling the concerned person to exercise that right under Section 50....

22. In ultimate conclusions, the Constitution Bench of the Apex Court in *State of Punjab v. Baldev Singh* 1999 Cri LJ 3672 (supra) held as under (at page 3694 of Cri LJ):-

53. We, therefore, hold that an illicit article seized from the person of an accused, during search conducted in violation of the safeguards provided in Section 50 of the Act, cannot by itself be used as admissible evidence of proof of unlawful possession of the contraband on the accused. Any other material/article recovered during that search may, however, be relied upon by the prosecution in other/independent proceedings against an accused notwithstanding the recovery of that material during an illegal search and its admissibility would depend upon the relevancy of that material and the facts and circumstances of that case.

Thus, considered we are of the opinion that the judgment in Ali Mustaffa's case correctly interprets and distinguishes the judgment in Pooran Mal's cases AIR 1974 SC 348 and the broad observations made in Pirthi Chand's case (1996 AIR SCW 42 : AIR 1996 SC 977 : 1996 Cri LJ 1354) and Jasbir Singh's case 1996 (1) SCC 288 are not in tune with the correct exposition of law, as laid down in Pooran Mal's case.

23. After having been benefitted by the conclusions quoted above so also the decisions (supra) I must add that no doubt there is indeed need to protect society from criminals because the societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The investigating agency must, therefore, follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously so that the laxity on the part of the investigating authority is curbed. However, it must be remembered that whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial. However, as expounded by the Constitution Bench in *State of Punjab v. Baldev Singh* (supra) it is explicitly clear that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an

accused bad and unsustainable in law. But, a presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50.

24. Thus applying the aforesaid dictum of law to the present case, in my considered view, the impugned search was made in the presence of the Gazetted Officer (Shri R.K. Sinha) by Kawal Singh, therefore, there was no illegal search, whereas the contraband seized during the impugned search of the present accused, on prior information, conducted in accordance with the mandate of Section 50 of the Act, can be used as evidence of unlawful possession of the illegal articles so as to sustain his impugned conviction. There was no illegality rendering the trial unfair. The prosecution has established beyond reasonable doubt that the accused was found to be in possession of the contraband in search conducted in accordance with the mandate of Sections 42 and 50 of the Act.

25. Further, the heroin weighing 1.350 kg. was recovered from a bag concealed under a bed in the presence of Amar Singh (accused) who was inside the house. During recovery of the heroin while signing recovery memo. Amar Singh never protested by saying that it was not in his possession. Moreover, keeping in view value of heroin worth more than Rs. one lac it cannot be said that the same was not in his conscious possession, because the presence of large quantity weighing 1.350 kg. concealing under the bed in the room being in conscious possession could not have been possible without knowledge and taking Amar Singh into confidence. That apart Amar Singh in his confessional statement admitted that the heroin being dealt with by him was found in the house from his possession and which he received from Om Prakash by its purchase at Rs. 90,000/- for being delivered it to other party for Rs. one lac with a profit of Rs. 10,000/- per kg. on sale. He also admitted that on 10-4-97 his house was searched resulting into recovery of 1.350 kg. heroin from his conscious possession. The recovery memo established that Amar Singh's statement was recorded by Kawal Singh.

26. As regards admissibility of statement recorded by Kawal Singh as he gave information to the Superintendent under Section 57 and assumed role of

Investigating Officer, it is settled law that Narcotic Officer is not a police officer. In *Rajkumar Karwal v. Union of India* AIR 1991 SC 45 : 1991 Cri LJ 97 the Apex Court held that special procedure has been provided for Narcotic Drugs matters. Under Section 53 of the NDPS Act, the officers are invested with powers of officer-in-charge of police station but having no power to submit report under Section 173, Cr.P.C. they are not police officers within the meaning of Section 25 of the NDPS Act. As is well known, as regards violation of the NDPS Act, a report under Section 173, Cr.P.C. is not filed. The Narcotic Department is required to file a complaint and in the case at hand, complaint had been filed.

27. In *Kalematumba v. State of Maharashtra* 1999 (8) SCC 257 : 2000 (1) UJ (SC) 22 : 1999 AIR SCW 4544 despite the fact that the report was of the Chemical Analyser was cryptic, yet the accused was convicted as he had admitted before the Custom Authorities that the article recovered was heroin. That apart in the case at hand, the Chemical Examiner who examined heroin and submitted report, was produced as a witness and in this situation, the accused had an opportunity to cross-examine him in detailed but nothing could be brought on which it can be said that the contraband sample was not properly analysed and besides that, the present case has arisen out of search and seizure resulting filing of complaint by the Narcotic Department's empowered officer under the NDPS Act and as per statements of these expert Narcotic Officers who are also required to deal with opium and heroin day to day, they deposed that upon having its small and testing at their own resources by virtue of their experiences, the contraband seized and searched of the accused was heroin as has been found by their examination during the recovery by these expert officers at the spot itself. Moreover, the accused himself in his statement admitted the seized article as heroin. In this view of distinguishing feature of the present case, *ibid*, where N. K. Mohankumaran (PW3) who has given his Chemical report (Ex.P8) as to the seized contraband heroin has been produced in evidence and who has also been cross-examined by the defence during trial but his testimony could not have been shaken in respect of the objections raised by the defence in this appeal, in my considered opinion, ratio of decision in *M.H.S. Ibrahim v. State of Gujarat* 1995 (1) Crimes 274 (*supra*) does not render any aid to get favour the accused on this aspect of the matter.

28. Since the Narcotic Drugs Officers have to collect information before filing the complaint and the Court takes cognizance of the complaint thereon, therefore, the empowered officer under Section 42 has to collect any information which may be relevant to the proof of commission of offence, right from the time the secret information is recorded, hence it cannot be considered as an FIR because if he would have recorded statement of the accused subsequently after the arrest, then it would thereafter not be possible for the empowered officer to comply with the mandatory provisions of the Act relating to seizure, search, etc. In this view of the matter, I find no merit in the argument of the learned counsel for the accused that Kawal Singh empowered officer had since examined Amar Singh (appellant) prior to sending of the secret information to the higher authorities so he could have such power to record statement only after recording of the first Information. The complaint is lodged by the empowered officer only after collection of material information on the search, seizure etc. under the provisions of the NDPS Act. Merely because statement of accused was recorded before filing of the complaint hence cannot be acted upon, such an argument is devoid of merit, especially in view of special procedure envisaged under the NDPS Act and furthermore when such a statement of the accused has been duly proved by the prosecution during trial and nothing has been shown as to shatter the testimony of the Investigating Officers proving accused's statement recorded during pre or post-investigation stage in the light of the objections raised in this appeal by the defence counsel with a view to develop the defence case for not giving any significance to such statement for being not acted upon to convict the accused. That apart, no complaint was ever made by the appellant when he was produced before the Magistrate either after investigation or after filing of the complaint/charge-sheet nor had he ever made any complaint thereafter till his statement was recorded under Section 313, Cr.P.C. or even during when he was being examined under Section 313, Cr.P.C. no such objections as are being raised by the defence in this appeal were put forth as to admissibility of such statement recorded by the empowered officer during search or seizure or that such statement was recorded under any threat or pressure. Therefore, in my view the trial Court has committed no illegality in relying upon the same holding such confessional statement having been made voluntarily and thus was rightly acted upon in sustaining conviction against the

accused.

29. In *Ramratan v. State of Punjab* 1979 Cri LJ 791 (supra) cited by Shri Bajwa the opium was recovered from a house where the accused was not present at the time of search and as per the evidence in that case the house from where the opium was recovered during search was not in possession of the accused as a tenant, whereas in the case at hand, the appellant was very much there in the house and in the presence of Gazetted Officer as per his own desire, search was made in consonance with the mandate under the provisions of the NDPS Act. Hence ratio of decision cited by Shri Bajwa being distinguished does not help in advancing any case in favour of the defence (accused).

30. Having carefully perused the Impugned judgment, I am of the opinion that the trial Court has rightly considered and scrutinised the prosecution evidence which can safely be relied upon as the statements of the prosecution witnesses consisting of the searching, seizing, investigating and empowered narcotic as well as chemical analysing officer do not suffer from any infirmity nor is there any good reason for not accepting their evidence. Hence in my opinion the trial Court did not commit any error in holding what was found from the appellant was contraband heroin. The Courts are aware of the fact that the Narcotic offences like most contagious dreadly disease, is fast spreading in our society like cancer and AIDS. Hence once a person is found to have committed offence under the NDPS Act, there cannot be any question of showing any mercy to him. The statutory presumption incorporated Under Sections 35 and 54 of the NDPS Act would be attracted only when possession of the contraband articles by the accused is established without doubt. Similarly Section 54 provides statutory presumption of culpable state of the accused. Two statutory presumption have been engrafted in the NDPS Act by the Parliament in its wisdom obviously because of the serious nature of the offence of drug trafficking which affects the society at large, designedly and devisedly. Since the culpable mental state shows the intention, knowledge or motive which at times may be difficult to establish and, therefore, U Section 35 presumption of culpable mental state of the accused is provided for. Hence the Court is empowered to presume the existence of such mental state of an accused and which would come into play only after the link between

contraband drug or articles and the accused is established without doubt. However, it stands propounded from Section 54, itself, that statutory presumption in Section 54 would be attracted upon the proof of the possession of the contraband articles by the accused, inasmuch as the possession by the accused or of the accused is a sine qua non if it is established without doubt and it could be established from the evidence of the police or empowered officer and even in cases of the panchas turning hostile to the prosecution case. Thus having considered overall circumstances emerging from the evidence on record and having given anxious thought to the relevant dictum of law, I have no hesitation in upholding the findings arrived at by the trial Court as to the contraband heroin seized from the possession of the appellant, on the basis of which the appellant has been convicted and sentence for the offence charged under the impugned judgment.

31. As I do not find any substance in any of the contentions raised on behalf of the appellant, resultantly', this appeal fails and is hereby dismissed. The impugned Judgment of the Special Judge (NDPS Cases), Jhalawar (supra), is affirmed. The appellant is in jail. He be detained to serve out the remaining sentence imposed by the trial Court and upheld by this Court. He be accordingly informed.