**IN THE HIGH COURT AT CALCUTTA**
**CRIMINAL APPELLATE JURISDICTION**

Present:

**The Hon'ble Justice Joymalya Bagchi**

And

**The Hon'ble Justice Manojit Mandal**

***C.R.A. 667 of 2017***

***Md. Sarfaraz @ Bonu & Anr.*** ***.....Appellants***

**-Vs-**

***The Union of India*** ***....Respondent***

***With***

***C.R.A. 384 of 2017***

***Amirul Rahaman*** ***.....Appellants***

**-Vs-**

***The Union of India*** ***....Respondent***

**For the Appellant** [in C.R.A. 667 of 2017] : Mr. Sandip Chakraborty, Adv.
Mr. Diptendu Banerjee, Adv.
Ms. Sinthia Bala, Adv.

**Amicus Curiae** [in C.R.A. 384 of 2017] : Ms. Meenal Sinha, Adv.

**For the State** : Mr. Sanjoy Bardhan, Adv.
Ms. Trina Mitra, Adv.

**For the Union of India** : Ms. Hasi Saha, Adv.
Mr. Amajit De, Adv.

**For the DRI** : Mr. Kaushik Dey, Adv.

**Heard on** : 26.02.2019, 06.03.2019, 26.03.2019, 03.04.2019, 17.04.2019, 08.07.2019, 11.07.2019, 15.07.2019, 29.07.2019

**Judgment on** : 09.08.2019

**Joymalya Bagchi, J. :-**

Appeals are directed against the judgment and order dated 30.03.2017 and 01.04.2017 passed by the learned Judge, Special Court, NDPS Act, Siliguri in C.R. (NDPS) Case No. 2 of 2012 convicting the appellants for commission of offence punishable under Sections 20(b)(ii)(c) read with section 29 of the NDPS Act and sentencing them to suffer rigorous imprisonment for 10 years and to pay fine of Rs.1,00,000/- in default, to suffer further rigorous imprisonment for six months each.

The prosecution case as alleged against the appellants is as follows:- Pursuant to secret information received by DRI, Deputy Director DRI, Siliguri Regional Unit, that five persons will be carrying narcotic drug (Hashish) coach no. S-7, berth no. 23, 31 and 39 of Kanchankanya Express officers of DRI of Siliguri Regional Unit went to New Jalpaiguri Railway Station on 28.01.2012 around 08:00 p.m. to work out the said information. Kanchankanya Express which was scheduled to arrive at NJP station at 20:15 hours was late by half an hour on that day. At 20:50 hours the train arrived at platform no. 3 of the said railway station. Thereupon, DRI officers boarded sleeper coach no. S-7. One Md. Islam was found occupying berth no. 23 while berth no. 31 was occupied by Nasim Akhter and Amirul Rahaman and berth no. 39 was occupied by Kamaluddin and Md. Sarfaraz. They stated that they were travelling together and

had boarded the train to proceed to Kolkata. They produced their e-ticket bearing PNR No. 6106317529 of 13150 Kanchankanya Express. Out of the five names printed on the ticket four names tallied with the aforesaid persons whereas the name mentioned in serial no.4 of the ticket was Md. Nadim but actually Kamaluddin was found to be travelling in the said seat. On query the aforesaid persons clarified that the said name had been mistakenly given at the time of booking and Kamaluddin was travelling in the name of Md. Nadim. The said persons were directed to produce their luggage. Upon noticing suspicious circumstances and on preliminary checking of the luggage, the said appellants were directed to accompany the officers to the DRI office at Pradhan Nagar along with their luggage. The officers checked the luggage at the DRI office in presence of independent witnesses. From a trolly luggage bag marked 'Corallite', 24 packets wrapped in plastic tapes was recovered. From another luggage bag marked 'Cloudragon', 8 identical packets and 2 packets of cylindrical shape wrapped with adhesive tapes were recovered. On unwrapping the packets, 48 cakes of blackish material suspected to be Hashish were recovered from the trolly bag while 12 cakes of similar material suspected to be Hashish were recovered from the eight packets in other bags. 60 and 59 capsules respectively containing contraband suspected to be Hashish were recovered from the two cylindrical packets. Upon weightment, 60 cakes of black sticky material suspected to be Hashish were found to be 30.440 kgs. Weights of 60 and 59 pieces of capsules were noted as 580 gms. and 590 gms. Respectively. Contraband suspected to be Hashish was found from the 119 capsules as per the accused persons. The contraband articles were seized under a seizure list. In total 100 grams of

representatives samples were drawn from the seized contrabands and sent for chemical examination. The remaining seized material were kept in an envelope in the godown of the Siliguri Customs and was subsequently disposed of under the supervision of the Magistrate under section 52A Cr.P.C. Statements of the appellants were recorded under section 67 of the NDPS Act where they admitted their guilt and claimed that they had received Hashish from Kathmandu and were taking it to Kolkata. Upon receiving of chemical examiner's report disclosing that the contraband contained Hashish, complaint was filed against the appellants.

In conclusion of investigation, charges were framed against the appellants under Section 20 (b)(ii)(c) read with Section 29 of the NDPS Act.

In the course of trial prosecution examined 12 witnesses and exhibited a number of documents.

Defence of the appellants was one of innocence and false implication in the instant case.

In conclusion of trial, the trial Judge by the impugned judgment and order dated 30.03.2017 and 01.04.2017 convicted and sentenced the appellant, as aforesaid.

Mr. Sandip Chakraborty, learned Counsel appearing for the appellants in CRA No. 667 of 2017 argued that the prosecution case has not been proved beyond doubt. Evidence of the officers of DRI have not been corroborated by contemporaneous documentary evidence like platform ticket, etc. to show that they had gone to the railway platform and the appellants boarded with their luggage at coach no.7 of Kanchankanya Express. The e-ticket has not been

exhibited in the instant case. Name of Kalamuddin does not appear in the e-ticket which was produced in Court. Fokra Alam, official e-ticket seller, who sold the e-ticket has not been examined. Rough seizure list has not been exhibited and P.W. 2 admitted that Ext. 24 cannot be treated as a seizure list with regard to seizure of contraband. Appellants were in the custody of DRI officers at the time when they made statements under section 67 NDPS Act. Such statements are involuntary and inadmissible in law. Independent witnesses (P.W.s 9 and 10) did not support the prosecution case that they were present along with the DRI officials at the railway station. They also admitted that they had been witness in earlier cases. No permission was taken from the Court to send seized materials for FSL examination and there is variation in the weight of the materials sent and the articles which were examined in the instant case. Original contraband was not produced in Court. Finally, it was argued that the examination-in-chief of P.W.s 3 to 8, 11 and 12 – DRI officers and their associates were adduced by filing affidavits and were inadmissible in law as their evidence did not fall within the ambit of section 295/296 Cr.P.C. and therefore could not have been adduced by filing affidavits.

Nobody appeared for appellant in CRA No. 384 of 2017. Ms. Meenal, learned Advocate, was requested to assist the Court as amicus curiae. She made elaborate arguments supporting the submission of Mr. Chakraborty. They submitted written submission in support of their oral arguments.

On the other hand, Mr. Dey, learned Counsel appearing for the DRI submitted that the affidavit evidence of the prosecution witnesses were initiated in terms of the directions of the Apex Court in ***Thana Singh Vs. Central Bureau of***

***Narcotics, (2013) 2 SCC 590***. No objection was raised on behalf of the defence in the course of trial. Hence, the appellants cannot raise objection at the appellate stage in that regard. Evidence of the official witnesses have established the prosecution case beyond reasonable doubt. Independent witnesses have also proved their signature on the seizure list and other documents and were present at the time of recovery of the articles from the luggage belonging to the appellants at DRI office. E-ticket handed over to P.W. 1 was produced in Court. Non-examination of railway officials or local passengers do not affect the unfolding of the prosecution case and the said case cannot be disbelieved on such score. They submitted written arguments to bolster their written submission. Mr. Bardhan for the State supported the submissions of Union of India.

An interesting issue has cropped up in the course of hearing of these appellants. During trial, examination-in-chief of P.W.s 3 to 8, 11 and 12 were adduced by way of affidavit statutory evidence. Learned Counsel for the appellants as well as amicus curiae strongly contended that examination-in-chief of prosecution witnesses cannot be adduced by submitting affidavit evidence. Such procedure is not envisaged in Code and the directions in ***Thana Singh (supra)*** cannot be interpreted to permit such a course of action. On the contrary, learned Counsel for the Union of India submitted that the evidence of P.W.s 3 to 8, 11 and 12 fall within the species of 'official evidence' referred to in paragraph 12 of the report and since no objection had been taken during trial, the appellants cannot be permitted to raise objection in this regard at the appellate stage.

In a criminal trial, fact must be proved in accordance with procedure established by law. The Evidence Act and the Code of Criminal Procedure lay down the procedure in which evidence is to be led in a criminal trial, subject, however, to any provision to the contrary in the special law e.g. NDPS Act applicable which is in the present case.

Section 3 of the Evidence Act defines evidence as follows:-

> ***"Evidence". –*** *"Evidence" means and includes –*
>
> *(1) all statements which the Court permits or requires to be made before it by such statements are called oral evidence;*
>
> *(2) all documents [including electronic records] produced for the inspection of the court;*
>
> *such documents are called documentary evidence.*

The aforesaid provision creates two categories of evidence, that is, (i) oral evidence – statement of witnesses made before the Court; and (ii) documentary evidence including electronic records produced before the Court for its inspection. Affidavit of a witness with regard to the facts in issue cannot be treated as a statement of the deponent before the Court. Hence, such affidavit cannot be treated as 'evidence' under section 3 of the Evidence Act unless the law otherwise permits it. In criminal trials affidavit evidence may be given in terms of section 295 and 296 thereof which read as follows:-

> "***295. Affidavit in proof of conduct of public servants. –*** *When any application is made to any Court in the course of any inquiry, trial or other proceeding under this Code, and allegations are made therein respecting any public servants, the applicant may give evidence of the*

*facts alleged in the application by affidavit, and the Court mnay, if it thinks fit, order that evidence relating to such facts be s given.*

***296. Evidence of formal character on affidavit.*** *– (1) The evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code.*

*(2) The Court may, if it thinks fit, and shall, on the applications of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavit."*

Analysis of the aforesaid sections would show that they operate in completely different fact situation than the present one. P.W.s 3 to 8, 11 and 12 are officers of DRI who were members of the raiding party and had deposed by filing affidavit evidence with regard to the facts they saw and did in the course of the raid. Such evidence is neither in response to any application containing allegations against a public servant nor is it of a formal character, e.g. witness producing official records. There is no provision in the NDPS Act also permitting recording of evidence of members of the raiding party by way of affidavit evidence unlike section 145 of the Negotiable Instrument Act wherein a complainant may adduce evidence on behalf of himself and his witnesses by filing affidavits. Directions in ***Thana Singh (supra)*** is to be read in the backdrop of the aforesaid statutory scheme skill relating to criminal trials. In order to ensure enforcement of fundamental rights particularly the cluster of rights incorporated in Article 21 which stood frequently violated due to delay and laches in conducting trials

under NDPS Act, the Apex Court in the said report issued various directions and guidelines under Article 141 read with Article 32 of the Constitution of India. With regard to examination of witnesses in trials in NDPS case, the Apex Court directed as follows:-

> ***"11. It would be prudent to return to the erstwhile method of holding "sessions trials" i.e. conducting examination and cross-examination of a witness on consecutive days over a block period of three to four days. This permits a witness to take the stand after making one-time arrangements for travel and accommodation, after which, he is liberated from his civil duties qua a particular case. Therefore, this Court directs the courts concerned to adopt the method of "sessions trials" and assign block dates for examination of witnesses."***

In view of the difficulty faced by various agencies in procuring attendance of officers who have been transferred from their parent organizations to different places, the Apex Court further directed as follows:-

> ***"12. The Narcotics Control Board also pointed out that since operations for prevention of crimes related to narcotic drugs and substances demands coordination of several different agencies viz. Central Bureau of Narcotics (CBN), Narcotics Control Bureau (NCB), Department of Revenue Intelligence (DRI), Department of Customs and Central Excise, Stat Law Enforcement Agency, State Excise Agency to name a few, procuring attendance of different officers of these agencies becomes difficult. On the completion of investigation for instance, investigating officers return to their parent organizations and are thus, often unavailable as prosecution witnesses. In the light of the recording of such official evidence, we direct the courts concernd to make most of section 293 of the Code of Criminal Procedure, 1973 and save time by taking evidence from official witnesses in the form of affidavits."***

It has been argued in terms of the aforesaid direction evidence of official witnesses were recorded in the form of affidavits. On the other hand, it is argued that the expressions "official evidence" and "official witnesses" in the aforesaid

direction must be restricted to government scientific expert under section 293 Cr.P.C. It is settled law that direction of the Apex Court under Article 141 of the Constitution is in the nature of an imprimatur and is binding on all courts of the country. Whether such declaration of law was made without considering statutory provisions, e.g. section 295/296 Cr.P.C. or not as argued on behalf of the appellants cannot be a matter of adjudication before this Court. It is settled law that a decision of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court. (see ***Director of Settlement, A.P. Vs. M.R. Apparao, (2002) 4 SCC 638***.)

In ***Suganthi Suresh Kumar Vs. Jagdeeshan, (2002) 2 SCC 420***, the Court held as follows:-

> ***"9. It is impermissible for the High Court to overrule the decision of the Apex Court on the ground that the Supreme Court laid down the legal position without considering any other point. It is not only a matter of discipline for the High Courts in India, it is the mandate of the Constitution as provided in Article 141 that the law declared by the Supreme Court shall be binding on all courts within the territory of India. It was pointed out by this Court in Anil Kumar Neotia v. Union of India that the High Court cannot question the correctness of the decision of the Supreme Court even though the point sought before the High Court was not considered by the Supreme Court."***

Furthermore, in this case the objection with regard to admissibility of affidavit evidence has been raised at the appellate stage and not in the course of trial. As the contents of the affidavits are not inherently inadmissible but their mode and manner of leading evidence is in question, I am of the opinion that the objection thereto must have been raised at the earliest and not at the appellate

stage. In this regard, reference may be made to the ratio of the Apex Court relating to objection vis-à-vis proof of electronic evidence sans certification under section 65B of the Evidence Act. The Apex Court in ***Sonu v. State of Haryana, (2017) 8 SCC 570*** held as follows:-

> ***"32. ...Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies."***

Hence, I am of the opinion that the objection raised with regard to the examination-in-chief of P.W.s 3 to 8, 11 and 12 recorded by way of affidavit cannot be permitted to be raised at the appellate stage. However, in future cases the aforesaid direction given by the Apex Court in ***Thana Singh (supra)*** may be considered in the light of advancement in technology particularly availability of video conferencing facilities for recording evidence in criminal cases. Concern expressed in ***Thana Singh (supra)*** with regard to delay in examination of official witnesses, due to transfer from parent organization to different places may be effectively addressed if the said witnesses are permitted to record their evidence via electronic/video linkage available in the district court complex nearest to his present place of posting. In ***State of Maharashtra Vs. Dr Praful B. Desai, (2003) 4 SCC 601*** and ***Sujoy Mitra Vs. State of W.B., (2015) 16 SCC 615***, the Apex Court held that examination of a witness via video conference is permissible in law. In ***Sujoy Mitra (supra)***, the Apex Court permitted examination of a foreign national via video conference by adopting the following procedure:-

***"3.1. The State of West Bengal shall make provision for recording the testimony of PW 5 in the trial court by seeking the services of the National Informatics Centre (NIC) for installing the appropriate equipment for video conferencing, by using "VC Solution" software, to facilitate video conferencing in the case. This provision shall be made by the State of West Bengal in a room to be identified by the Sessions Judge concerned, within four weeks from today. The NIC will ensure, that the equipment installed in the premises of the trial court, is compatible with the video conferencing facilities at the Indian Embassy in Ireland at Dublin.***

***3.2. Before recording the statement of the prosecutrix, PW 5, the Embassy shall nominate a responsible officer, in whose presence the statement is to be recorded. The said officer shall remain present at all times from the beginning to the end of each session, of the recording of the said testimony.***

***3.3. The officer deputed to have the statement recorded shall also ensure that there is no other person besides the witness concerned, in the room, in which the testimony of PW 5 is to be recorded. In case, the witness is in possession of any material or documents, the same shall be taken over by the officer concerned in his personal custody.***

***3.4. The statement of witness will then be recorded. The witness shall be permitted to rely upon the material and documents in the custody of the officer concerned, or to tender the same in evidence, only with the express permission of the trial court.***

***3.5. The officer concerned will affirm to the trial court, before the commencement of the recording of the statement, the fact, that no other person is present in the room where evidence is recorded, and further, that all material and documents in possession of the prosecutrix, PW 5 (if any) were taken by him in his custody before the statement was recorded. He shall further affirm to the trial court, at the culmination of the testimony, that no other person had entered the room, during the course of recording of the statement of the witness, till the conclusion thereof. The learned counsel for the accused shall assist the trial court, to ensure, that the above procedure is adopted, by placing reliance on the instant order.***

***3.6. The statement of the witness shall be recorded by the trial court, in consonance with the provisions of Section 278 of the Code of Criminal Procedure. At the culmination of the recording of the statement, the same shall be read out to the witness in the presence of the accused (if in attendance, or to his pleader). If the witness denies the correctness of any part of the***

> ***evidence, when the same is read over to her, the trial court may make the necessary correction, or alternatively, may record a memorandum thereon, to the objection made to the recorded statement by the witness, and in addition thereto, record his own remarks, if necessary.***
>
> ***3.7. The transcript of the statement of the witness recorded thr*****ough video conferencing (as corrected, if necessary), in consonance with the provisions of Section 278 of the Code of Criminal Procedure, shall be scanned and dispatched through email to the embassy. At the embassy, the witness will authenticate the same in consonance with law. The aforesaid authenticated statement shall be endorsed by the officer deputed by the embassy. It shall be scanned and returned to the trial court through email. The statement signed by the witness at the embassy, shall be retained in its custody in a sealed cover.**
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> **3.8. The statement received by the trial court through email shall be re-endorsed by the trial Judge. The instant statement endorsed by the trial Judge, shall constitute the testimony of the prosecutrix, PW 5, for all intents and purposes."**

Although the aforesaid case related to a witness in a foreign country, the procedure laid down in the aforesaid decision may be utilized while examining official witnesses in narcotic cases subject to the modification that the official witness may depose via video conferencing facility from the district court complex nearest to his place of posting under the supervision of a responsible officer (e.g. Registrar of the said court) so authorized in that regard by the concerned District Judge. Procedure of recording evidence of witness in far off places via video conference in ***Sujoy Mitra (supra)*** were laid down by the Apex Court subsequent to ***Thana Singh (supra)*** and the ratio contained therein may be gainfully utilized for recording evidence of official witnesses who have been transferred to a distant place and their physical attendance in court cannot be promptly procured. In

fact, examination of official witnesses via video conference has two-fold advantages over affidavit evidence. Firstly, when examination-in-chief of a witness is recorded by filing affidavit evidence the witness is not absolved from being physically present in Court as he has to prove the affidavit and offer himself for cross-examination and the wholesome object of saving time by avoiding travel of official witnesses from their place of posting to the trial Court is defeated. On the other hand, if evidence of the said witness is recorded via electronic/video linkage, he need not be physically present in the court premises and thereby the purpose of quick trial would be better served. Secondly, recording of evidence of witnesses via video linkage is better suited to the concept of fair trial than affidavit evidence. If a witness is examined via electronic/video linkage, his demeanour may be watched by the Court enabling it to form an opinion with regard to his creditworthiness. Similarly, it helps the accused to formulate his defence and pose appropriate questions in cross to test the veracity of his deposition. Demeanour of a witness cannot be assessed if his chief is recorded through affidavit evidence. One cannot lose sight of the fact that criminal cases, unlike civil cases, are primarily based on oral evidence of witnesses of fact where demeanour and conduct of the witness during his examination-in-chief play a very vital role in assessing his truthfulness.

Technological progress in recording evidence via electronic/video linkage is a boon and ought to effectively utilized to improve the quality of dispensation of justice by reducing the time taken for conducting trials in narcotic cases involving official witnesses who are posted at far off places and whose attendance in Court cannot be promptly ensured. Special courts conducting such trial

(particularly where under trials are in jail) are directed to avail of electronic/video linkage facilities and examine official witnesses whose attendance cannot be procured without delay, undue expenses and/or other inconveniences so that the fundamental right of speedy and fair trial is effectively enforced and does not become a dead letter of law.

Coming to the evidence on record, I note P.W.s 1, 2, 5, 11 and 12 are members of the raiding party. All of them deposed P.W. 11 had received prior information that five persons would board Kanchankanya Express with Hashish at New Jalpaiguri Railway Station on 28.01.2012. Pursuant to such intelligence, under the leadership of P.W. 11, they went to the railway station. On arrival of the train they boarded coach no. S-7 and identified occupants of berth no. 23, 31 and 39, that is, the appellants herein. The appellants identified their luggage. On preliminary examination of their luggage, it was suspected that they were carrying contraband. The appellants were directed to accompany the members of the raiding party with their luggage to their office. At the office, their bags were opened and contraband articles were recovered. Articles were seized and representatives samples were taken therefrom. Statements of the appellants were recorded under section 67 of the NDPS Act and thereafter they were arrested. Samples were sent for chemical examination and the chemical examiner's report confirmed that the contraband contained Hashish.

P.W.s 6 and 7 were drivers of the vehicles in which the raiding party went to the railway station.

P.W. 8 was one of an associate of the drivers.

P.W.s 9 and 10 are independent witnesses to seizure of narcotics from the luggage of the appellants at DRI office.

The evidence of the official witnesses have been criticised on the ground that contemporaneous document like platform tickets have not been exhibited. Neither railway official nor any passenger of the said train was examined to support the evidence of the prosecution case. Even P.W. 9 and 10 did not admit their presence at the railway station wherefrom the appellants along with their luggage was brought to DRI office. E-ticket produced by the appellants has also not been proved in accordance with law. Fokra Alam, e-ticket seller has also not been examined.

I have given anxious consideration to the aforesaid submission on behalf of the defence. It is a trite law if official witnesses are clear and convincing, mere lack of corroboration from independent witnesses cannot be a ground to reject their evidence. **[Ref. *Sumit Tomar Vs. State of Punjab, (2013) 1 SCC 395, Kulwinder Singh Vs. State of Pubjab, (2015) 6 SCC 674, Baldev Singh Vs. State of Haryana, (2015) 17 SCC 554, Varinder Kumar Vs. State of Himachal Pradesh, 2019 SAR (Criminal) 245*]**

It is the quality and not quantity of evidence which is relevant to prove a fact. Narration of the incident as coming from the mouths of the members of the raiding party particularly P.W. 1 and 2 establish beyond doubt that the DRI officials on the fateful day went to the railway station and upon boarding the train had identified the appellants with their luggage. Upon preliminary examination it appeared the appellants were carrying contraband. Thereupon they were asked to accompany the officials to their office. Evidence has also come

record that the appellants handed over an e-ticket, on which name of Kamaluddin was incorrectly stated as Md. Nadim, which was subsequently seized. These facts have remained unshaken in cross-examination and the fact that the appellants upon being confronted by the DRI officials in their version had accompanied them with the luggage to their office is established beyond doubt. When the evidence of the official witnesses appear to be clear and convincing, non-production of the platform ticket or non-examination of RPF officials including the ticket seller, in my considered opinion, does not render the prosecution case improbable.

It has also been argued that the independent witnesses P.W. 9 and 10 have not supported the prosecution case. In this regard reliance has been placed on ***Naresh Kumar Vs. State of H.P., (2017) 15 SCC 684*** and ***Gorakh Nath Prasad Vs. State of Bihar, (2018) 2 SCC 305***. It has also been submitted that P.W. 9 had deposed earlier in DRI cases. I have examined the evidence of P.W. 9 and 10 from that perspective. Although P.W. 1 and 2 deposed the said witnesses had accompanied them to the platform where the appellants were identified with their luggage and requested to accompany the DRI officials to their office. P.W. 9 and 10 claimed that they came to the DRI office and found appellants present there along with their luggage. P.W. 9 stated DRI officials had told him that there were capsules in the luggage belonging to the appellants. He, thereafter, signed on inventory-cum-seizure list (Ext. 24) and Panchnama (Ext. 25). He also recorded the statements of appellant Nasim Akhtar and Kamaluddin marked as exhibit 5 and 9 respectively. Similarly, P.W. 10 came to the DRI office and found that there were packets on the table which he heard were Hashish. Although he could not

identify the accused persons by face, he stated five persons were arrested and admitted his signature on the inventory-cum-seizure list, Panchnama and other documents.

From the evidence of the aforesaid witnesses it appears that they have not wholly disowned the prosecution case. Although they did not support the evidence of official statement with regard to their presence at the platform but one of them, that is, P.W. 9 claimed that the appellants were present along with their luggage when he arrived at the DRI office and the officials informed him that there was Hashish in their luggage. Accordingly, he put his signature on the inventory-cum-seizure list and Panchnama. He also recorded the statements of two of the appellants in Hindi. P.W. 10 claimed when he arrived at the DRI office there were packets on the table and the officials said they contained Hashish. Four persons were arrested and he admitted his signature on the seizure list. The evidence of the aforesaid witnesses taken as a whole do not render the prosecution case improbable. On the other hand, evidence of P.W.9, independent witness lends credence to the presence of the appellants along with their luggage at the DRI office and recovery of articles which was said to be Hashish. Soon thereafter, voluntary statements of Kalamuddin were recorded by the said witness strongly probabilising his presence at the DRI office at the time of recovery. In these circumstances, I am of the opinion the prosecution case is corroborated with regard to the recovery of narcotic substance from the luggage of the appellants in their presence at the DRI office by the independent witnesses particularly P.W.9. In this factual backdrop the authorities relied on by the defence are clearly distinguishable. In ***Naresh Kumar @ Nitu Vs. State of***

***Himachal Pradesh, (2017) 15 SCC 684***, the independent witness P.W. 2 wholly denied the presence of the appellant at the place of occurrence and the circumstances of the case showed that presence of appellant at the spot was an impossibility. In ***Gorakh Nath Prasad Vs. State of Bihar, (2018) 2 SCC 305***, P.W. 2 and 3 denied recovery and claimed their signatures were obtained in blank papers.

As discussed above in the present case independent witnesses, particularly P.W. 9 admitted with regard to the presence of the appellants along with their luggage at the DRI office and the officials informed him narcotic substance were recovered from such luggage. Thereupon P.W.9 signed on inventory and seizure memo and other documents. He also recorded voluntary statements of Naskar and Kalamuddin. It has been contended that P.W. 9 was a stock witness as he had deposed in other cases. However, prosecution has not been able to show P.W. 9 had any enmity with the appellants or was under any obligation to the DRI officers to support their case. On the other hand, when his evidence is read as a whole it does not appear that he deposed as per dictates of the DRI officers. Merely because a witness has deposed in other cases on behalf of the police his evidence cannot be rejected on such score alone. [see ***Nana Keshav Lagad Vs. State of Maharashtra, (2013) 12 SCC 721, Para 26, Mahesh Janardhan Gonnade Vs. State of Maharashtra, 2008 Cri.L.J. 3602,*** **Para 45]**.

It has been argued that the seizure list has not been exhibited in the instant case. From the evidence on record it appears that the contraband articles were recovered from the luggage of the appellants at the DRI office. At the time seizure list was prepared by P.W.2 (Ext. 24). He also prepared a panchnama (Ext.

25). P.W.2 deposed initially he prepared a rough seizure list and thereafter a typed seizure list (Ext. 24) was prepared by him. Ext. 24 bears signatures of the accused persons and public witnesses and appears to have been contemporaneously prepared at the time of seizure. In the backdrop of the aforesaid fact I am of the opinion that Ext. 24, namely, the inventory-cum-seizure list is a contemporaneous record with regard to the recovery of the articles from the luggage of the appellants and the defence cannot cast doubt with regard to its authenticity on the score of non-production of rough notings of P.W.2 which he has described as rough seizure list.

It has also been argued as the appellants were in custody of DRI officials when their statements recorded under section 67 of the NDPS Act, accordingly such statements are involuntary and inadmissible in Court. Reference has been made to ***Noor Aga Vs. State of Punjab, (2008) 16 SCC 417*** and ***Union of India Vs. Bal Mukund, (2009) 12 SCC 161***. It is further argued that in ***Tofan Singh Vs. State of T.N., (2013) 16 SCC 31***, the issue whether statement recorded under section 67 NDPS is substantive evidence and can be the sole basis of conviction has been referred to a larger bench. It appears from the evidence of the official witnesses that the appellants had not been arrested prior to the recording of their statements under section 67 of NDPS. In fact, statements of two of the appellants, namely Naism Akhtar & Kamaluddin were recorded by an independent witness (P.W.9) in Hindi. The appellants have not retracted their statements under section 67 of the NDPS Act at any point of time. Hence, the facts of the instant case are distinguishable from ***Noor Aga (supra)*** and ***Bal Mukund (Supra)*** where the confessional statements had been retracted.

Furthermore, there is direct evidence with regard to recovery of narcotic substance from the luggage of the appellants. Under such circumstances, the voluntary statements of the appellants recorded under section 67 of NDPS Act can be used as corroborative evidence to bolster the prosecution case. Reference in this regard may be made to ***Daulat Ram Vs. Crime Branch (Narcotics) Mandsaur, (2011) 15 SCC 176***, wherein evidence of official witnesses relating recovery of narcotics corroborated by the statement of accused under section 67 of NDPS was the basis of conviction.

Chain of custody of the seized contraband and the representative samples taken therefrom for chemical examination have been proved. P.W.11 sent the representative samples for chemical examination under cover of letter (Ext. 16/16/1). Chemical examiner's report showing that the samples contain Charas was exhibited as Ext. 17. Variation in weight of the representative samples in the test report and as noted in panchnama are minor and of little relevance as signatures and seals on the envelopes containing the samples were found intact. Remainder of the contraband was kept in Siliguri Customs Godown and destroyed with permission of the Court in terms of section 52 NDPS Act. Hence, non-production of seized contraband in court cannot be a ground to reject the prosecution case.

Accordingly, I uphold the conviction and sentence recorded against the appellants.

The appeals are, accordingly, dismissed.

The period of detention suffered by appellants during investigation, inquiry or trial shall be set off under Section 428 of the Code of Criminal Procedure.

I record my appreciation for the able assistance rendered to this Court by Ms. Meenal Sinha as *amicus curiae* for disposing the appeal.

Copy of the judgment along with L.C.R. be sent down to the trial court at once.

Urgent Photostat Certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

I agree.

**(Manojit Mandal, J.)** **(Joymalya Bagchi, J.)**

PA