R

IN THE HIGH COURT OF KARNATAKA
KALABURAGI BENCH

DATED THIS THE 3RD DAY OF FEBRUARY, 2021

BEFORE

THE HON'BLE MR. JUSTICE S.VISHWAJITH SHETTY

CRIMINAL APPEAL No.200021/2017

BETWEEN:

Chemansab S/o Khajasab Almel
AGed about 47 years
Occ: Nil, R/o Mundewadi Colony
Vijayapur. .. APPELLANT

(By Sri.R.S.Lagali and
Sri.Gopalkrishna B.Yadav, Advs.)

AND

The State of Karnataka
By Vijayapur Excise Police, Vijayapur
Now rep. by Addl.SPP
High Court of Karnataka
Kalaburagi Bench. .. RESPONDENT

(By Sri.Gururaj V.Hasilkar, HCGP)

This Criminal Appeal is filed under Section 374(2) of the Code praying to set aside the impugned judgment of conviction and order of sentence dated 11.01.2017 passed in Special (NDPS) Case No.9/2017 by the Special Judge/Prl.Sessions Judge at Vijayapur, by allowing this appeal consequently acquit the appellant/accused of the charges levied against him for the offences under Section

8(c) punishable under Section 20(b)(ii)(C) of the NDPS Act, in the interest of justice and equity.

This Appeal having been heard and reserved for judgment on 18.01.2021 and coming on for Pronouncement of Judgment this day, this Court delivered the following:

JUDGMENT

The accused No.1 in Special (NDPS) Case No.09/2015, who has been convicted by the Court of Special Judge/Principal Sessions Judge, Vijayapura vide its judgment and order of conviction and sentence dated 11th January 2017 for the offence under Section 8(c) which is punishable under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "the NDPS Act") and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- and in default of payment of fine to undergo simple imprisonment for one year, has approached this court in this appeal with a prayer to set aside the said judgment and order of conviction and sentence.

2. Brief facts of the case are:

On 26.02.2015 the complainant/PW-1 on receipt of a credible information that huge quantity of ganja was stored in the house of appellant, after informing his higher officers, at about 2.40 p.m. conducted a raid along with his staff and panch witnesses on the house of the appellant situated near Sadakibawadi and Secab School at Vijayapur. On seeing the raiding party, the appellant, who was allegedly present near the house and was loading ganja bags in a car bearing No.KA-03/MB-4261 ran away from the spot. From the car, seven blue colour carry bags containing 2 kilograms of ganja each and a white colour urea bag containing 15 kilograms of ganja was seized. Inside the house, the raiding party found a concrete tank in which 98 blue colour carry bags containing ganja was found. All the contraband articles were seized by the complainant under a panchanama and after returning to the office with the seized articles, a case was registered on the basis of his complaint, in Vijayapura Excise Police

Station in Crime No.32/2015 for the offences punishable under Sections 8(b) and 8(c) read with Sections 20 and 25 of the NDPS Act. After investigation, charge sheet was filed against two persons. The second accused/Rajesh M.Pachchapur was allegedly the owner of the Tata Indica car bearing No.KA-03/MB-4261. Since accused No.2 was absconding, the case against him was split up.

3. During the course of investigation, the appellant was arrested on 29.09.2015. Charges were framed against him for the offences under Section 8(c) which is punishable under Section 20(b)(ii)(C) and since the accused did not plead guilty and claimed to be tried, the case was posted for trial. During the course of trial, the prosecution in order to establish the guilt of the accused had examined 10 witnesses as PWs-1 to 10 and marked 25 documents as Exs.P1 to P25. In support of its case, the prosecution haD also marked M.Os.1 to 20. After completion of prosecution evidence, the statement of the

appellant/accused under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") was recorded. No defence evidence was led nor any document was marked in support of the defence.

4. The trial court thereafterwards heard the arguments of the learned counsel appearing on both sides and by means of the impugned judgment and order has convicted the appellant for the offences punishable under Section 20(b)(ii)(C) of the NDPS Act.

5. Learned Counsel appearing for the appellant/accused contends that the judgment and order of conviction and sentence is highly illegal and the same is passed without proper application of mind. He submits that the learned Sessions Judge has failed to properly appreciate the oral and documentary evidence available on record. He also submits that the prosecution has failed to examine any independent witnesses in the case. He submits that complainant has not reduced the credible

information in writing nor has he informed his higher officers and obtained any permission in writing and therefore, there is complete non-compliance of Section 42 of the NDPS Act. The trial court, according to him, has erred in relying upon the report - Ex.P16 as the same does not comply the requirement of Section 42 of the NDPS Act. He submits that admittedly the accused had escaped from the spot and therefore, prior to conducting the search and seizure, the complainant ought to have obtained a search warrant from the jurisdictional Magistrate. He also submits that the entire investigation in the case is dishonest and tainted and the same has seriously prejudiced the case of the appellant. He also submits that none of the statements recorded under Section 161 of the Code found along with the charge sheet are dated and therefore, it is not known as to on what date, the said statements have been recorded. He further submits that statement of the complainant, who is the star witness of the prosecution, under Section 161 of the Code has not

been recorded and accused is taken by surprise during trial and this has seriously prejudiced the case of the accused. He submits that Investigation Officer has recorded statements under Section 161 of the Code belatedly and admittedly the Investigating Officer has not maintained the case diary. He also submits that panch witness PW-2 is a stock witness of the prosecution and there is material on record to show that he has been used as a panch by the Department of Excise in other cases also. He also submits that there is an inordinate delay of two months in forwarding the sample contraband articles to the FSL for examination and this again throws a serious doubt with regard to the credibility of the case of the prosecution.

In support of his case, he has relied upon the judgments in the following cases:

1. Rajinder Singh -vs- State of Haryana[1]

[1] (2011) 8 SCC 130

2. State of Rajasthan -vs- Jagraj Singh Alias Hansa[2]

3. Union of India -vs- Bal Mukund and Others[3]

4. State of U.P. -vs- Kapil Deo Shukla[4]

5. Subramanyam -vs- State of Karnataka[5]

6. Per contra, learned High Court Government Pleader arguing in support of the impugned judgment and order of conviction and sentence contended that the trial court has rightly convicted the appellant for the offence punishable under Section 20(b)(ii)(C) of the NDPS Act and the impugned judgment and order of conviction and sentence does not suffer from any irregularity or illegality, which calls for interference at the hands of this court. He submits that there is no irregularity in compliance of the requirement of Section 42 of the NDPS Act and having regard to the fact that the complainant had an apprehension that the appellant/accused was likely to escape with the contraband goods from the spot, the

[2] (2016) 11 SCC 687
[3] (2009) 12 SCC 161
[4] (1972) 3 SCC 504
[5] 2016(4) KCCR 3526

complainant without reducing the information into writing, had hurried to the spot. He submits that the very fact that the higher officers of the complainant were part of the raiding party, would go to show that information was given by the complainant to his higher officers and therefore, there is sufficient compliance of Section 42 of the NDPS Act. He submits that merely for the reason that PW-2 has deposed in some other case also as a panch witness, it does not mean that he is a stock witness and his evidence cannot be relied upon. He submits that the irregularity in the investigation, as pointed out by the learned counsel for the appellant, does not prejudice the case of the appellant in any manner and therefore, for such an irregularity, the appellant cannot be acquitted. He submits that huge quantity of about 171 kilograms of ganja has been seized from the car and the house of the appellant and there are sufficient materials on record to show that the car and the house belonged to the appellant. Since the possession is proved, there is a

presumption against accused under Section 54 of the NDPS Act. He also submits that PW-1 is the complainant and even though his statement under Section 161(3) of the Code is not recorded, his complaint can be used for the purpose of contradicting this witness. He submits that statements under Section 161 of the Code are not admissible in law and therefore, trial of the accused will not be affected for not recording statement of the witnesses under Section 161 of the Code. Under the circumstances, he prays to dismiss the appeal.

7. I have carefully considered the arguments advanced on both sides and also perused the entire oral and documentary evidence available on record. The point that arises for consideration in this appeal is:

> *"Whether the conviction of the appellant by the trial court for the offence under Section 8(c) which is punishable under Section 20(b)(ii)(C) of the NDPS Act is just and proper, having regard to the oral and documentary evidence available on record?"*

8. The prosecution in all examined ten witnesses in support of its case, but none of them can be said to be independent witnesses, except PW-6 who is the wife of accused and she was treated as a hostile witness.

9. PW-1/Abubakar, who was working as an Excise Inspector, is the complainant in this case. He has also conducted the investigation to a considerable extent before handing over further investigation to PW-9. It is relevant to mention here that statement of this witness under Section 161(3) of the Code was not recorded in this case.

10. PW-1 has deposed that on 26.02.2015 when he was in his office at Vijayapura, he had received a credible information with regard to stock of ganja in the house of accused. He has stated that he received the said information at about 1.30 p.m. According to him, he orally informed about this information to his higher officers and thereafterwards at about 2.15 p.m. he along with his higher officers, staff and panch witnesses went

near the house of the accused. On seeing the officers, accused, who was loading his car with some plastic carry bags, ran away from the spot and inspite of all the efforts made by the officers to apprehend him, he managed to escape. Thereafterwards, a search report was prepared by him as per Ex.P1, which has been signed by his higher officer/PW-10 and also by PW-5. After preparing Ex.P1, he searched the car and found seven plastic carry bags which contained ganja weighing 2 kilograms each. He also recovered one Urea bag from the dickey of the car which contained 15 kgs. of ganja. After that, the raiding party entered the house and in a concrete tank inside the house, they found 98 plastic carry bags containing ganja. Out of 98 bags, 30 grams of sample ganja was removed from 11 bags and they were packed separately and sealed and these 11 bags are marked as M.Os.1 to 11 before the trial court. 50 grams of sample ganja was removed from the urea bag and the same was packed separately and sealed. Said packet was marked as M.O.12. From the 7

carry bags, which were found in the car, 30 grams of ganja for the purpose of sample was removed and packed separately and sealed and these packets were marked as M.Os.13 to 19.

11. In the house of the accused, complainant has seized an electricity bill bearing R.R.No.66799 in which the name of Smt.S.C.Alamela was found. The said bill was marked as Ex.P2. According to him, all the samples were taken by him and also sealed by him before taking the same to the Police Station. The panchanama prepared at the time of seizure is marked as Ex.P3 and the certificate issued by the jurisdictional Magistrate with regard to the sealed samples is marked as Ex.P4. The notices issued to the panchas by him are marked as Exs.P6 and P7. Subsequently along with the seized articles, he returned to the Station and lodged the complaint and copy of the complaint is marked as Ex.P8 and his signature is marked as Ex.P8(a). The FIR is

marked as Ex.P9. The P.F. report prepared by him is marked as Ex.P10. Exs.P12 to P15 are also marked through him to establish that the house from which ganja was seized belonged to the wife of the accused. He has also stated that on 29.09.2015 on credible information he went to the house of the accused and had arrested him.

12. From the evidence of this witness, it is clear that immediately after he received the credible information, though he was in his office, he has not reduced such information into writing. He has also not forwarded the said information to his higher officers in writing and obtained any permission from them. He has stated that he has informed his higher officers, but no document is produced before the court to show that the said information was in writing. According to him, the accused after seeing the raiding party, ran away from the spot. Thereafterwards he has prepared Ex.P1/search report and carried on the search and seizure in the car as well as

inside the house of the accused. Though in Ex.P1 he has stated that since he had no sufficient time to obtain search warrant from the court of jurisdictional Magistrate, and therefore, as provided under Section 42 of the NDPS Act he has proceeded to carry on the search of the car and the house belonging to the accused, it has to be taken note of here that admittedly accused had escaped before Ex.P1 was prepared by the complainant/PW-1. Therefore, there was no urgency in the matter so as to invoke the powers provided under Section 42 of the NDPS Act and proceed further to search the car and house of the accused without obtaining a search warrant from the jurisdictional Magistrate.

13. PW-1 has admitted in his cross-examination that in Ex.P8/complaint, he has not mentioned anything about the credible information received by him or about he informing the same to his higher officers or about he conducting raid along with his higher officers, staff and

panch witnesses and about seizure of carry bags from the car and house of the accused after he running away from the spot. Though in the cross-examination he has stated that after receiving the credible information he has reduced the same into writing in the raid register maintained in the office, the said raid register is not produced before the court. For a specific suggestion that he had no authorization from his higher officers to conduct the raid, he has answered that the higher officers themselves have participated in the raid along with him. Therefore, it is very clear that PW-1 had not reduced the credible information allegedly received by him into writing nor there is any material available on record to show that he had informed the same to his higher officers in writing and that they had authorized him to conduct the raid.

14. He has admitted in the cross-examination that there was no case registered in their station against the accused nor did they have any photo of the accused in

their station, but he has said that the accused was shown to him by Baragani (PW-3) on an earlier date and therefore, he knew the accused. During the course of his cross-examination, he has stated that within 72 hours of the raid, he had prepared the list of seized articles and forwarded the same to his higher officers and the copy of the communication under which the list of seized articles was forwarded to his higher officers was marked as Ex.P16 and his signature is marked as Ex.P16(a). He has admitted that in Ex.P16, there is no mention about the number of ganja bags seized and as to how many sample bags were taken. He has stated that about 3-4 persons had come near the house of the accused when the raid was conducted but they had refused to be the panch witnesses. But he has admitted that he has not issued any notice to the said persons asking them to be panch witnesses in the case.

15. The document issued by the Tahsildar to show that in the khata extract of the house from where ganja was seized, the name of the wife of the accused is not mentioned, was marked through PW-1 as Ex.P17. He has admitted that the khata of the said property does not stand in the name of the wife of accused. He has stated that the samples were forwarded to the Forensic Science Laboratory, Bangalore, through PW-7 on 24.04.2015.

16. PW-2 is the panch witness who had accompanied the raiding party on 26.02.2015. He has stated that immediately after reaching near the house of accused, one of the Excise Officers has prepared the search report/Ex.P1 and his signature in the said search report is marked as Ex.P1(d). After preparing the search report, they all went near the house of the accused and on seeing them, he ran away and escaped. He speaks about subsequent seizure of ganja packets from the car and from the house. According to him, 50 grams of ganja is taken

from all seven carry bags found in the car. He has spoken to preparing of Ex.P3/spot panchanama and his signature in the said document is marked as Ex.P3(b). He has also admitted his signature in Ex.P5 which is a specimen seal document and his signature in the said document is marked as Ex.P5(b). He has stated that he does not know as to how many samples were taken from the carry bags seized from the concrete tank inside the house. He has admitted that he often accompanies Excise officials when raid is conducted by them and he has stated that he does not know in how many cases he has accompanied or he has gone along with the Excise officers for raid. According to this witness, Ex.P1 was prepared immediately after reaching the spot and before accused ran away from the spot and this evidence contradicts the evidence of PW-1 insofar as preparation of Ex.P1 is concerned. In the absence of any corroboration, it is not safe to rely upon this witness.

17. PW-3 is the Excise Guard who had accompanied the raiding party. He states that the panch witnesses were brought to the office by him, to whom panch witness notices were issued by PW-1. He also speaks with regard to the seizure of contraband articles and Ex.P2/electricity bill. He states that his statement was recorded by the Investigating Officer on 28.2.2015, but admits that the said statement does not bear any date. During the course of cross-examination, he has stated that he has seen the accused for the first time on the date of raid. The said statement totally contradicts the statement of PW-1, who has stated that he knew accused prior to the date of raid and it is PW-3 who had shown him the accused earlier when accused was sitting near his brother's shop in the market.

18. PW-4 is the Excise Guard, who had accompanied PW-1 on 29.09.2015 to the house of the accused at the time of his arrest. He says that they had credible information that accused would come to his house to

celebrate Bakrid festival and therefore, on 29.09.2015 they had raided the house. During the course of his cross-examination, he has stated that his statement was recorded by the Investigating Officer on 29.9.2015 and he has admitted that in the said statement, the date is not mentioned.

19. PW-5 is the Excise Inspector, who had participated along with PW-1 at the time of raid on 26.02.2015 and also at the time of arrest of the accused on 29.9.2015. According to this witness, after the accused escaped from the spot, the search report/Ex.P1 was prepared. He speaks about the seizure of the ganja packets and also with regard to the samples that were collected from each bag and packed separately and thereafterwards sealed with the office seal bearing No.540 and over the seal, paper with the signature of PW-1 and the panch witnesses was sticked. This witness has stated that his statement was recorded by the Investigating Officer J.H.Muddebihala on 29.9.2015 and he has

admitted that his statement recorded by the Investigating officer does not bear any date.

20. PW-6 is the wife of accused. She has not supported the case of the prosecution and even during her cross-examination, nothing material has been elicited from her by the prosecution.

21. PW-7 is the Excise Inspector who has forwarded the sample material objects to the Forensic Science Laboratory at Bangalore through PW-8 on 24.4.2015.

22. PW-8 is the Excise guard who has stated that as per the instructions of PW-7 on 24.4.2015, he has carried 19 sample material objects to the Forensic Science Laboratory at Bangalore and obtained acknowledgement from them and handed over the same to PW-7 on 26.4.2015. He also states that on 4.5.2015, on the instructions from the Excise Inspector, he had gone to the Forensic Science Laboratory, Bangalore and on 6.5.2015, he has reached back to Vijayapura along with the reports

and the samples and handed over the same to the Excise Inspector. The said sample report is marked as Ex.P20. During the course of his cross-examination, he has stated that his statement was recorded by the Investigating Officer on 26.04.2015 and he admits that his statement does not bear any date.

23. PW-9 is the Sub-Inspector of Excise and he has carried on the further investigation in the case after taking over the same from PW-1 on 6.9.2015. He has recorded the statement of Basavaraj Sandeegwad, Sathish Kagale, S.S.Vodeyar, Prakash Makonda, Ananda Nagoora and B.S.Thadakal - Officers of the Excise Department on 9.6.2015. He has also stated that on 30.9.2015, PW-1 and PW-10 had produced the accused before him. He thereafterwards has clarified that on 29.9.2015 the accused was arrested by PW-1 and produced before the court and on 30.9.2015 he has recorded the statement of PW-10, PW-5, PW-3 and PW-4 and subsequently he has filed the charge sheet on 28.12.2015. He has admitted in

the cross-examination that in column No.4 of FIR Ex.P9, it is mentioned that the ownership of the car and the house is yet to be found out. He has also admitted that no documents are produced before the court to show that the house from where the contraband articles were seized and accused was arrested, belongs to Shamshad Begum, wife of the accused. He has also admitted that in all the statements of the Excise Officers recorded by him on 9.6.2015 and 30.9.2015, the date of recording of such statement is not mentioned. He has also admitted that even in the statement of PW-6 and in the statement of one Sri.Mehaboob Sab, who is another panch witness not examined by the prosecution, the date of recording the statement is not mentioned. He has admitted in his evidence that the delay caused in recording the statement of PW-10/Jagadish Inamdaar and the delay caused in forwarding the samples to the FSL are not explained. He has also admitted that he has not recorded the statement of PW-1, who is the complainant in this case. For a

specific question that Ex.P2/electricity bill does not bear any number or name, he has replied that he is not in a position to answer the same because he had not brought his spectacle to the court. He has admitted that name of Shamshad Begum, wife of accused is not found in Ex.P17/khata extract of the house in question and more importantly he has admitted during the course of cross-examination that in respect of the investigations held by him, he has not made any entries in the case diary, which is a mandatory requirement under Section 161(3) of the Code.

24. PW-10 is the Deputy Superintendent of Excise, the higher officer who is said to have accompanied PW-1 and the raiding party on 26.2.2015. He has spoken with regard to preparation of Ex.P1 after the accused escaped from the spot and also about the subsequent seizure, panchanama, etc. He has admitted that from the perusal of Ex.P2, the entries made in the said document are not visible. He has also stated that name of Shamshad

Begum is not found in the said document. According to him, since the raiding party were in the uniform, number of people had gathered there. Though this witness was the higher officer, who had accompanied the raiding party along with PW-1 on 26.2.2015, surprisingly his statement has been recorded belatedly on 30.9.2015 as admitted by PW-9 who has carried on further investigation in the matter. This witness has not stated anything about receipt of Ex.P-16 which prosecution relies upon heavily to establish that requirements of Section 42 of the NDPS Act is complied. This material witnesses statement has been recorded after a delay of seven months which is totally not explained and additionally the said statement does not bear any date and admittedly no case diary is maintained by the investigating officer, and therefore, Ex.P-16 cannot be cooked into for the purpose of considering compliance of Section 42 of the NDPS Act. This witness has also stated that since the raiding party had gone in uniform, many people had gathered near the house and the said

statement contradicts PW-1's statement, who has stated that not many people had gathered near the house and only 3-4 persons came there and even they refused to be the panch witnesses in the case. Having regard to belated recording of Section 161(3) statement of this witness and the manner in which he has deposed before the court, a serious doubt arises with regard to his participation in the raid and it appears that only to get over the requirement of Section 42 of NDPS Act, prosecution has shown him as a participant in the raid.

25. From the appreciation of the evidence of the witnesses examined by the prosecution, it is found that statements of all these witnesses under Section 161(3) of the Code do not bear any date. Further, statement under Section 161(3) of the Code of PW-1, who is the star witness of the prosecution around whom the entire case of the prosecution revolves, has not at all been recorded. Statements of the witnesses under Section 161 of the Code recorded by the Police during the course of

investigation plays a major role during the course of trial. After lodging of the FIR and registering the case, investigation commences with the Investigating Officer visiting the scene of crime, drawing panchanama, seizing any incriminating articles found at the spot, recording the statements of the witnesses, arrest of accused, recovery, etc., and this part of investigation is covered under Sections 161 and 162 of the Code and the credibility of the witnesses, who are examined before the court, depends largely on this part of investigation. The charge sheet is prepared by the Investigating Officer based on this material and information collected by him during the course of investigation. Sections 161 & 162 of Cr.PC read as under:

> "**161. Examination of witnesses by police.-** (1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the

requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

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

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

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

Provided further that the statement of a woman against whom an offence under section 354, section 354-A, section 354-B, section 354-C, section 354-D, section 376, section 376-A, section 376-AB, section 376-B, section 376-C, section 376-D, section 376-DA,

section 376-DB, section 376-E or section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer.

162. Statements to police not to be signed: Use of statements in evidence.- (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such

witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act.

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

26. Statement under Section 161 of the Code forms a part of the charge sheet and this statement can be used by the accused for the purpose of contradicting the witnesses in the manner as provided under Section 145 of the Evidence Act and the right of accused to cross-examine the witness, who has made a statement under Section 161(3) of the Code is a right guaranteed to the accused under Section 162 of the Code. Even without recording the statement of a witness under Section 161(3) of the Code, the said witness can be examined before the court, but the evidence of such a witness has to be appreciated very carefully and evidence of such witness shall carry less value and credibility.

27. In the case of ***Gopal Krishna -vs- State***[6] at para-22 it is held as under:

> *"22. It is obvious that though the police are not bound to make a record of the statement of the witnesses under S.161 as a matter of obligation, it is their duty to do so when the witness is a material witness for unfolding the prosecution*

[6] AIR 1964 ALLAHABAD 481

story. It is also clear that a failure on their part to comply with the requirements of Section 161(3), though does not render the subsequent statement of the witness at the trial inadmissible, it does greatly impair the value of the evidence of that witness. I fully agree with this view. It is the duty of an Investigating Officer to record the statement of eye-witnesses and of other material witnesses. In a case like this where there is a solitary eye-witness there can be no justification whatsoever for not recording his statement and the conduct of the Investigating Officer in the absence of any plausible explanation must be viewed with suspicion."

28. The High Court of Madhya Paradesh in the case reported in ***Panna Fodaliya -vs- The State of Madhya Pradesh***[7] at para-10 has held as follows:

"10. By not recording the statement of Jagdish during investigation the appellant has been denied a very valuable opportunity of testing the veracity of the witness with reference to his earliest version, and, therefore, it is difficult to attach any weight or value to the statement of Jagdish in court."

[7] 1970 Cri.l.J.1180

29. It is a settled principle of law that non-recording of statement under Section 161(3) of the Code or delayed recording of statement under Section 161(3) of the Code or improper recording of statement under Section 161(3) of the Code is a serious irregularity which is incurable. This irregularity gives rise to infer that prosecution has procured such statement to suit their case and therefore, such statement loses its credibility. When delay in recording statement under Section 161 of the Code itself casts cloud of suspicion on the case of the prosecution, non-recording of such statement or recording of such statement without mentioning the date, totally discredits the evidence of these witnesses. By not recording statement under Section 161(3) of the Code, prosecution takes the accused by surprise and his right to contradict this witness is virtually lost. Material contradictions and material omissions are fatal to the case of the prosecution. Accused will be handicapped to this extent when a witness is cross-examined by him whose statement under Section

161(3) of the Code is not recorded. A witness, who contradicts his earlier statement and makes improvement in his subsequent statement or when there are omissions in his statement, such witness loses credibility.

30. The credibility of a witness in criminal proceedings is tested before the court *vis-à-vis* the statement made by him under Section 161(3) of the Code. Statement under Section 161(3) of the Code is a vital document in criminal prosecution and the court after scrutinizing the same can even discharge the accused. Section 162(1) of the Code contemplates that statement under Section 161 of the Code should not be signed nor the statement could be used for any inquiry or trial, except for the purpose as provided under the said section. Therefore, the accused has an indefeasible right to use the statement under Section 161(3) of the Code to shake the credibility of the witness.

31. The statement of a witness, who is not examined under Section 161(3) of the Code, is likely to seriously prejudice and affect the case of the accused and evidence of such witness in the absence of valid reasons by the Investigating Officer for not recording his statement must be viewed with suspicion, otherwise it would result in miscarriage of justice. In the case on hand, statement of PW-1 under Section 161(3) of the Code is not at all recorded. In the complaint lodged by him, the particulars of the credible information, raid, compliance of Section 42, procedure followed during search and seizure, etc., are not found. Under the circumstances, the evidence of this witness loses its credibility and unless it is corroborated by an independent witness, the same cannot be based for holding the accused guilty of the alleged offences.

32. The contention of the prosecution that though statement of PW-1 under Section 161(3) of the Code is not recorded, but his complaint is on record which can be used for the purpose of contradicting the witness, is

without merit. The complaint or FIR is not a statement hit by Section 162 of the Code because the same is not made during the course of investigation. Therefore, it cannot be considered as statement under Section 161(3) of the Code. In addition to the same, the complaint in this case lacks any material particulars and therefore, for any reason, the complaint cannot be substituted for a statement of the complainant under Section 161(3) of the Code.

33. In the case on hand, non-recording of statement of PW-1 under Section 161(3) of the Code and non-mentioning of the date of recording of statement under Section 161(3) of the Code of all other witnesses is fatal to the case of the prosecution. For an offence punishable under the provisions of the NDPS Act, compliance of the requirement of law has to be scrutinized in a higher pedestal because the penalties imposed under this statute are very severe. The manner in which the investigation has been conducted in this case vitiates the entire investigation and resultantly it also affects the trial of the

case. The order of conviction, therefore, cannot be recorded on the basis of evidence adduced by these witnesses. The investigation in the case appears to be totally tainted and unreliable.

34. Insofar as the contention of the learned counsel for the appellant that the mandatory requirement of Section 42 of the NDPS Act is not complied, it is relevant to note that the complainant/PW-1 had received the credible information at about 1.30 p.m. when he was in his office. He has left his office subsequently at about 2.15 p.m. Therefore, he had sufficient time to record the information in writing and also send the same to his higher officers. This mandatory requirement under Section 42(1) of the NDPS Act has not been complied in this case. Further, though prosecution has tried to make out a case that there is compliance of requirement of Section 42 of the NDPS Act by stating that the complainant/PW-1 had recorded Ex.P1/search report, wherein it is stated that having regard to the urgency, a search warrant from the

jurisdictional Magistrate cannot be obtained, PW-1/complainant as well as PW-3 have clearly stated that Ex.P1 was prepared after the accused ran away from the spot leaving behind the car. Therefore, before conducting search and seizure in the car and the house allegedly belonging to the accused, PW-1 could have complied the requirement of Section 42 of the NDPS Act by obtaining necessary search warrant from the jurisdictional Magistrate.

35. The Hon'ble Supreme Court of India in the case of ***State of Rajasthan -vs- Jagraj Singh alias Hansa***[8] has held as follows:

> *"13. The High Court has come to the conclusion that there is breach of mandatory provisions of Section 42(1) and Section 42(2) and further Section 43 which was relied by the Special Judge for holding that there was no necessity to comply Section 42 is not applicable. We thus proceed to first examine the question as to whether there is breach of provisions of Section 42(1) and Section 42(2). The breach of Section 42 has been found in two parts. The first part is that there is difference between the secret information recorded in Exh. P-14 and Ex.P-21 and the*

[8] (2016) 11 SCC 687

information sent to Circle Officer, Nohar by Exh P-15. It is useful to refer to the findings of the High Court in the above context, which is quoted below:

> *" From the above examination, it is not found that Exh. P-14 the information which is stated to be received from the informer under Section 42(2) of Act or Exh. P-21, the information given by the informer which is stated to be recorded in the Rozanamacha, copy whereof has been sent to C.O. Nohar, who was the then Senior Officer, Rather, Exh. P-15, the letter which was sent, it is not the copy of Exh. P-14, but it is the separate memo prepared of their own. From the above examination, it is not found in the present case that section 42 (2) of Act, 1985 is complied with."*

14. What Section 42(2) requires is that where an officer takes down an information in writing under sub-Section (1) he shall sent a copy thereof to his immediate officer senior . The communication Exh. P-15 which was sent to Circle Officer, Nohar was not as per the information recorded in Exh. P 14 and Exh. P 24. Thus, no error was committed by the High Court in coming to the conclusion that there was breach of Section 42(2).

15. Another aspect of non-compliance of Section 42(1) proviso, which has been found by the High Court needs to be adverted. Section 42 (1) indicates that any authorised officer can carry out search between sun rise and sun set without warrant or authorisation. The scheme indicates that in event the search has to be made between sun set and sun rise, the warrant would be necessary unless officer has reasons to believe that a search warrant or authorisation cannot be obtained without affording the opportunity for escape of offender which grounds of his belief has to be recorded. In the present case,

there is no case that any ground for belief as contemplated by proviso to sub-section (1) of Section 42 or Sub-section (2) of Section 42 was ever recorded by Station House Officer who proceeded to carry on search. Station House Officer has appeared as PD-11 and in his statement also he has not come with any case that as required by the proviso to Sub-section (1), he recorded his grounds of belief anywhere. The High Court after considering the entire evidence has made following observations :

> *"Shishupal Singh PD-11 by whom search has been conducted, on reaching at the place of occurrence by him no reasons to believe have been recorded before conducting the search of jeep bearing HR 24 4057 under Section 42(1), nor any reasons in regard to not obtaining the search warrant have been recorded. He has also not stated any such facts in his statements that he has conducted any proceedings in regard to compliance of proviso of Section 42(1). Since reasons to believe have not been recorded, therefore, under Section 42(2) it is not found on record that copy thereof has been sent to the senior officials. Shishupal Singh could be the best witness in this regard, who has not stated any fact in his statement regarding compliance of proviso to Section 42(1) and Section 42(2), sending of copy of reasons to believe recorded by him to his senior officials."*

36. In the case of ***Sarju alias Ramu -vs- State of U.P.***[9] the Hon'ble Supreme Court at para-17 has observed as follows:

[9] AIR 2009 SC 3214

"17. We must, however, notice that recently a Constitution Bench of this Court in Karnail Singh v. State of Haryana [2009 (10) SCALE 255] in view of difference of opinion in Abdul Rashid Ibrahim Mansuri v. State of Gujarat [(2000) 2 SCC 513] opining that compliance of Section 42 of NDPS Act is mandatory in nature and in Sajan Abraham v. State of Kerala [(2001) 6 SCC 692] holding the said principle to be directory, opined as under:

"(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior .

c) In other words, the compliance with the requirements of Sections 42 (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the

superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

d) While total non-compliance of requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001."

Even, admittedly, Shrikant Mishra had no authority to make search. Nothing has been brought on record to show that the provisions of Section 42 of the NDPS Act were substantially complied with."

37. In a judgment in the case of ***Bal Mukund (supra)***, the Hon'ble Supreme Court at para-28 has observed thus:

"28. Where a statute confers such drastic powers and seeks to deprive a citizen of its liberty for not less than ten years, and making stringent provisions for grant of bail, scrupulous compliance of the statutory provisions must be insisted upon. While considering a case of present nature where two persons may barely read and write Hindi, are said to have been used as carrier containing material of only 1.68% of narcotics, a conviction, in our opinion, should not be based merely on the basis of a statement made under Section 67 of the Act without any independent corroboration particularly in view of the fact that such statements have been retracted.

38. In the case of ***Karnail Singh -vs- State of Haryana***[10], the Hon'ble Supreme Court at para-35 has observed as follows:

"35. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Section

[10] (2009) 3 SCC (Cri) 887

42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows :

> *(a) The officer on receiving the information (of the nature referred to in Sub section (1) of section*
>
> *42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1).*
>
> *(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior .*
>
> *(c) In other words, the compliance with the requirements of Sections 42 (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.*

(d) While total non-compliance of requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001."

39. This High Court in the case of ***Subramanyam (supra)*** in paragraphs-6, 7 and 21 has observed thus:

"6. Point No. 1: CW-18 – Rajanna was working as a PSI in Nandagudi Police Station from July 2011 to September 2012. He is stated to have received a credible information at about 7.30 a.m. when he was in police station to the effect that in one bus

'Madhusudhan' proceeding from Madanapalli to Bangalore, poppy straw (husk) was being illegally transported. He is stated to have reduced the same into writing. Ex.P12 is the copy of the Station House Diary relating to the receipt of information. Of course, Station House Officer has to maintain Station House Diary and credibility of Ex.P12 cannot be found fault with.

7. What is further deposed by him is that he informed the jurisdictional Circle Inspector of Police and Deputy Superintendent of Police over phone and obtained information. Specific suggestions have been put to him stating that he did not inform the Circle Inspector of Police or the Deputy Superintendent of Police, in any manner and therefore statutory provisions of Section 42(2) of the Act have not been complied with. Ex.P12 – copy of the Station House Diary speaks only about the receipt of credible information received by him in regard to the transportation of poppy straw (husk) on the top of a bus proceeding from Madanapalli to Bangalore. But Ex.P20 is a written information stated to have been sent by PW-14 to the Deputy Superintendent of Police requesting permission to continue with the investigation. It bears the signature of Deputy Superintendent of Police. But nothing is mentioned in the Station House Diary about the intimation being given to his immediate higher ups, after coming back to the police Station from the spot. Ex.P20 depicts that soon after the receipt of the information it was communicated to the Deputy Superintendent of Police, but Ex.P12 is silent to that effect.

x x x x x x x x x

21. Even the Circle Inspector of Police to whom the intimation is stated to have been given by PW-14 about the receipt of credible information is neither cited as witness in the charge sheet nor examined.

Therefore, it is very difficult to accept the contention of learned HCGP that the mandatory provision of Section 42 of the Act have been complied with. Therefore, mere production of letter – Ex.P20 stated to have been addressed to the Deputy Superintendent of Police and getting it marked as Ex.P20 would be insufficient. Mere marking of a document does not dispense with the proof of the requirement of Section 42 of the Act."

40. From the pronouncement of the Hon'ble Supreme Court as well as by this court in the above referred judgments, it is very clear that in the case on hand, the prosecution has failed to establish that there is compliance of the requirement of Section 42(1) and 42(2) of the NDPS Act. Even delayed compliance as per Ex.P-16 cannot be considered because PW-10 has not stated he has received Ex.P-16 and because of the delay of seven months in recording this witnesses statement, his evidence looses credentiality.

41. Learned counsel for the appellant has also made a submission that delay in forwarding the sample has not been explained. Though PW-1 has made an attempt to explain the said delay on the ground that since he was in-

charge of another post, he could not send the sample articles to the FSL within time, the said evidence cannot be believed having regard to the evidence of PW-7, who has stated that the sample articles were forwarded by him through PW-8 to FSL for the purpose of obtaining report.

42. PW-9 is the person who has completed the investigation and filed the charge sheet. He has clearly stated that he has not shown any reason in the charge sheet for having belatedly sent the samples to the FSL. There is also no material available on record to show that the seized articles and the sample articles were kept in a safe place. The Hon'ble Supreme Court of India in the case of ***State of Gujarat -vs- Ismail U.Haji Patel and Another***[11] in paragraphs-5 and 6 has observed as follows:

> *"5. We find that there was really no material brought on record to show as to where the seized articles were kept. The High Court after analysing the evidence on record came to hold that the identity of the articles sent for analysis was not established and it was not established that the articles seized were in fact sent*

[11] (2003) 12 SCC 291

for chemical examination. In view of the judgment of this Court in ***Valsala v. State of Kerala 1993 Supp 3 SCC 665*** *the view of the High Court is in order. It is not the delay in sending the samples which is material. What has to be established is that the seized articles were in proper custody, in proper form and the samples sent to the Chemical Analyst related to the seized articles.*

6. Further, there was nothing brought on record to show as to under whose directions the samples were sent for chemical examination. The High Court relied on Section 55 of the Act to hold that the absence of such information also vitiates the proceedings. Section 55 of the Act provides that the officer in charge of the police station has to take charge of and keep in safe custody the seized articles pending orders of the Magistrate. Since there is no material to show that there was any order of the Magistrate as to where the seized articles were to be kept, and there was no material to show that there was safe custody as is required under Section 55 of the Act, the view of the High Court is in order. Judgment of the High Court does not warrant any interference in our hands and the appeal is dismissed."

43. The Hon'ble Supreme Court in the case of ***Bal Mukund (supra)***, at paragraphs-36 and 37 has observed thus:

"36. There is another aspect of the matter which cannot also be lost sight of. Standing Instruction No.

1/88, which had been issued under the Act, lays down the procedure for taking samples. The High Court has noticed that PW-7 had taken samples of 25 grams each from all the five bags and then mixed them and sent to the laboratory. There is nothing to show that adequate quantity from each bag had been taken. It was a requirement in law.

37. There is another infirmity in the prosecution case. Section 55 of the Act reads as under:

> *"55 - Police to take charge of articles seized and delivered An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station."*

PW-7 did not testify as to which of the bags seized had been sent for analysis. No statement had been made by him that the bags produced were the bags in question which were seized or the contraband was found in them."

44. In the case on hand, the prosecution has failed to show that the materials were kept in safe custody as required under Section 55 of the NDPS Act and they have also failed to explain the inordinate delay of nearly two

months in sending the sample articles to the FSL. Having regard to the manner in which investigation is conducted in the case, foul play cannot be completely ruled out.

45. The contention of the learned counsel for the appellant that the evidence of PW-2 should not be believed because he is a stock witness cannot be accepted having regard to the material available on record. The mere fact that PW-2 has accompanied the Excise officials on certain occasions during raid and that he has deposed as a panch witness in one case is not sufficient to term this witness as a "stock witness". However, this witness has made contradictory statement with regard to time of preparation of Ex.P1. In the absence of any corroborative evidence, it would not be safe to entirely believe this witness.

46. On overall appreciation of the oral and documentary evidence available on record, it is evident that for the reasons stated hereinabove, the investigation in the case is vitiated for improper recording and non-

recording of statement of the witnesses under Section 161(3) of the Code, who have been examined in the court. The Investigation Officer has admittedly not maintained a case diary, wherein such statements are required to be recorded which is a mandatory requirement of law under Section 161(3) of the Code. Such an irregularity seriously prejudices the case of the accused and if the order of conviction is required to be based on the evidence of these witnesses, it will result in miscarriage of justice. There is also total non-compliance of mandatory requirements of Section 42 of the NDPS Act and there is an unexplained delay in forwarding the samples to the FSL. Though PW-1 has stated that within 72 hours Ex.P16 was prepared and forwarded to his higher officer, PW-10 does not state that he has received Ex.P16. Further, in view of inordinate delay in recording the statement of this witness, who is a senior officer, under Section 161(3) of the Code, a serious doubt arises with regard to credibility of this witness. The Investigating Officer has further admitted that he has not

maintained the case diary. This further vitiates the entire investigation. Because of these serious infirmities, a serious doubt arises whether PW-10 had really accompanied the raiding squad or whether an attempt is made by prosecution to get over compliance of the mandatory requirement of Section 42 of the NDPS Act.

47. The prosecution has failed to establish that the car and the house from where the contraband articles were seized either belonged to the accused or his wife. It has come on record that the car belonged to accused No.2 and the prosecution has admitted that they have no record to prove that the house stands in the name of wife of the accused. The contraband articles were seized in the absence of the accused. A presumption under Section 54 of the NDPS Act can only be raised after the prosecution has established that the accused was found in possession of the contraband articles in a search conducted in accordance with the mandate of law and illegal search does not entitle the prosecution to raise such a

presumption under Section 54 of the NDPS Act. The prosecution has neither conducted the raid in accordance with law nor have they proved the contraband articles were seized from the possession of the accused.

48. On re-appreciation of the entire evidence on record, this Court is of the considered opinion that the trial court was not justified in convicting the appellant for the offence under Section 8(c) which is punishable under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985. Suffice to say in view of the legal irregularities, infirmities and factual inconsistencies, the prosecution has not been able to prove the guilt of the accused beyond all reasonable doubt. Accordingly, the point for consideration is answered in the *negative.* In view of the same, the appeal has to be allowed and the judgment and order of conviction and sentence will have to be set aside.

49. In the result, the following order is passed:

ORDER

(i) The appeal is allowed.

(ii) The impugned judgment and order of conviction and sentence dated 11th January 2017 in Special (NDPS) Case No.09/2015 passed by the Court of Special Judge/Principal Sessions Judge, Vijayapura, is hereby set aside;

(iii) The appellant is acquitted of the charges leveled against him. The bail bonds, if any, executed by the appellant shall stand cancelled and fine amount, if any, deposited by him shall be refunded to him after expiry of the appeal period.

Sd/-
JUDGE

KNM/-