IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1034 OF 2008
[Arising out of SLP (Crl.) No. 5597 of 2006]

Noor Aga …Appellant

Versus

State of Punjab & Anr. …Respondents

J U D G M E N T

S.B. SINHA, J :

Leave granted.

INTRODUCTION

Several questions of grave importance including the constitutional validity of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act"), the standard and extent of burden of proof on the prosecution vis-à-vis accused are in question in this appeal which arises out of a judgment and order dated 9.06.2006 passed by the High Court of Punjab and Haryana in Criminal Appeal No. 810-SB of 2000 whereby and whereunder an appeal filed by the applicant against the judgment of

conviction and sentence dated 7.6.2000 under Section 22 and 23 of the Act has been dismissed.

PROSECUTION CASE

Appellant is an Afghan national.

He was arrested and later on prosecuted under Sections 22 and 23 of the Act allegedly for carrying 1 kg 400 grams of heroin as a member of crew of Ariana Afghan Airlines.

Appellant arrived at Raja Sansi Airport at about 6 p.m. on 1.08.1997. He presented himself before the authorities under the Customs Act, 1962 (for short "the Customs Act") for customs clearance. He was carrying a carton with him said to be containing grapes. The cardboard walls of the said carton were said to have two layers. As some concealment in between the layers was suspected by one Kulwant Singh, an Inspector of the Customs Department, the appellant was asked as to whether he had been carrying any contraband or any other suspicious item. Reply thereto having been rendered in the negative, a search was purported to have been conducted.

Kulwant Singh, who examined himself as PW-1 before the trial court, allegedly asked the appellant as to whether he intended to be searched by a Magistrate or a Gazetted officer of the Customs Department; in response whereto, he exercised his option for the latter, whereupon one Shri K.K. Gupta, Superintendent of the Customs Department and two independent witnesses, Mohinder Singh and Yusaf were sent for. K.K. Gupta disclosed his identity to the appellant as a Gazetted officer working in the Customs Department.

The layers of the walls of the carton were thereafter separated, wherefrom 22 packets of polythene containing brown powder were allegedly recovered. The same was weighed; the gross weight whereof was found to be 1 kg. 400 grams. Representative homogeneous samples from each packet in small quantities were taken weighing 5 gms. each. They were purported to have been sealed with a seal bearing No. 122 of the Customs Department. The cardboard carton was also sealed with the same seal. The recovered item being of brown colour was taken in possession vide recovery memo (Ex. PB), Panchanama (Ex. PC) prepared by Shri Kulwant Singh. The entire bulk was put into cotton bags and sealed.

ARREST AND PURPORTED CONFESSION

Although the appellant had all along been in the custody of the Customs Department, he was formally arrested at about 3 p.m. on 2.08.1997, i.e., 15 hours after the recovery having been effected. Grounds of arrests allegedly were supplied to him. His body was also searched wherefor his jamatalashi was prepared which was marked as Ex. PE.

Appellant purported to have confessed his guilt on 2.08.1997 as also on 4.08.1997.

INVESTIGATION

Samples were sent to the Central Forensic Laboratory on 5.08.1997. The weight of the said samples was found to be 8.7 gms. The document is said to have been tinkered with, as the words "net weight" were crossed and converted into 'gross weight'.

The alleged contraband was found to be of white colour containing Diacetyl Morphine. The report was submitted on 2.09.1997; on the basis whereof a complaint Ex. PL was filed in the Court and in a consequence thereof, appellant was to put on trial having been charged under Sections 22 and 23 of the Act.

The contraband articles were produced before the Magistrate on 30.01.1999. The purpose for production is mired in controversy. Whereas the appellant contends that the same was done for the purpose of authentication, according to the respondent, it was produced for the purpose of obtaining a judicial order for destruction thereof. No order, however, was passed by the learned Magistrate for destruction of the contraband. No application for destruction was also filed.

PROCEEDINGS

At the trial, the following witnesses were examined on behalf of the State:

PW-1 Kulwant Singh-lnspector Customs
(Complainant and investigating officer)

PW-2 KK Gupta- Superintendent-Customs (A Gazzeted Officer)

PW-3 Ashok Kumar- Inspector, Customs Department (Deposited sample)

PW-4 Rajesh Sodhi-Deputy Commissioner
Custodian of case property from 1-8-97 to 4-897

PW-5 KK Sharma-lnspector Incharge- Malkhana

Appellant, in his examination under section 313 of the Code of

Criminal Procedure in categorical terms denied that the carton belonged to him. He also retracted from his alleged confession.

The learned Additional Sessions Judge by his order and judgment dated 7.06.2000 convicted the appellant under Sections 22 and 23 of the Act and sentenced him to undergo rigorous imprisonment for 10 years and also imposed a fine of Rs. 1 lakh on him.

Aggrieved by and dissatisfied with the said judgment and order of the learned Additional Sessions Judge, the appellant filed an appeal before the High Court of Punjab and Haryana. The High Court dismissed the said appeal by a judgment and order dated 9.06.2006. Appellant is, thus, before us.

CONTENTIONS

Ms. Tanu Bedi, learned counsel appearing on behalf of the appellant, in support of this appeal, submits:

(i) The provisions of Sections 35 and 54 of the Act being draconian in nature imposing reverse burden on an accused and, thus, being contrary to Article 14 (2) of the International Covenant on Civil and Political Rights providing for 'an accused to be innocent until proved guilty' must be held to be ultra vires Articles 14 and 21 of the Constitution of India.

(ii) Burden of proof under the Act being on the accused, a heightened standard of proof in any event is required to be discharged by the prosecution to establish the foundational facts and the same having not been done in the instant case, the impugned judgment is liable to be set aside.

(iii) The prosecution having not produced the physical evidence before the court particularly the sample of the purported contraband materials, no conviction could have been based thereupon.

(iv) Independent witnesses having not been examined, the prosecution must held to have failed to establish actual recovery of the contraband from the appellant.

(v) There being huge discrepancies in the statements of official witnesses in regard to search and seizure, the High Court judgment is fit to be set aside.

(vi) The purported confessions of the appellant before the customs authorities are wholly inadmissible in evidence being hit by Section 25 of the Indian Evidence Act, as Section 108 of the Customs Act should be read in terms thereof coupled with Sections 53 and 53A of the Act.

Mr. Kuldip Singh, learned counsel appearing on behalf of the State,

on the other hand, would contend:

(i) The learned Trial Judge as also the High Court upon having examined the materials brought on records by the prosecution to hold that the guilt of the accused sufficiently has been established in the case, this Court should not interfere with the impugned judgment.

(ii) Appellant having exercised his option of being searched by a Gazetted Officer; and the legal requirements of Sections 42 and 50 of the Act must be held to have been fully complied with. In any event, search and seizure of the carton did not attract the provisions of Section 50 of the Act.

(iii) Despite some discrepancies in the statements of the witnesses as regards recovery, the same cannot be said to be a vital flaw in the case of the prosecution so as to make the impugned judgment unsustainable. The learned Trial Judge as also the High Court had considered the practices prevailing in the Customs Department for the purpose of appreciating the evidence brought on record, and having recorded their satisfaction with regard thereto, the impugned judgments do not warrant any interference.

(iv) Any confession made before the customs authorities in terms of

Section 108 of the Customs Act is not hit by Section 25 of the Indian Evidence Act and the same, thus, being admissible in evidence could have been relied upon for the purpose of recording a judgment of conviction.

AN OVERVIEW OF THE STATUTORY PROVISIONS

Before embarking upon the rival contentions of the parties, as noticed hereinbefore, it is appropriate to notice the relevant provisions of the Act as also the Customs Act, 1962.

The purported recovery was made by the Customs Department. In terms of the provisions of the Act they were entitled to make investigations as also file the chargesheet.

The Act was enacted to consolidate and amend the law relating to narcotic drugs to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances. It was enacted to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances and the matters connected therewith.

Section 2(xiv) of the Act defines "narcotic drug" to mean coca leaf, cannabis (hemp), opium poppy straw and includes all manufactured drugs.

"Illicit traffic", in relation to narcotic drugs and psychotropic substances, has been defined in Section 2(viiia) of the Act, inter alia, to mean:

> "(iv) dealing in any activities in narcotic drugs or psychotropic substances other than those referred to in sub-clauses (i) to (iii); or
>
> (v) handling or letting out any premises for the carrying on of any of the activities referred to in sub-clauses (i) to (iv);"

"Commercial quantity" has been defined in Section 2(viia) to mean any quantity greater than the quantity specified by the Central Government by notification in the official gazette.

Indisputably, the commercial quantity prescribed for heroin is only 250 gms.

"International Conventions" have been specified in Section 2(ix) of the Act.

Chapter II of the Act enables the Central Government to take measures as may be necessary or expedient inter alia for the purpose of

preventing and combating abuse of and illicit traffic therein including constitution of an authority or hierarchy of authorities by such name or names as may be specified in the order for the purpose of exercising such of the powers and functions of the Central Government under the Act and for taking measures with respect to such of the matters referred to in sub-section (2) as being specified therein, subject, of course, to the supervision and control of the Central Government.

Chapter III provides for prohibition, control and regulation. Section 8 inter alia bars possession, sale, purchase, transport of any narcotic drugs except for medical or scientific purposes and in the manner and the extent provided by the provisions of the Act or the Rules or orders framed thereunder. Section 9 of the Act empowers the Central Government to make rules inter alia permitting and regulating possession of narcotic substance, subject, however, to the provisions contained in Section 8 thereof.

Chapter IV provides for offences and penalties. Section 22 provides for punishment for contravention in relation to psychotropic substances. Section 23 provides for punishment for illegal import into India, export from India or transshipment of narcotic drugs and psychotropic substances.

The punishment under both the provisions in case of commercial quantity provides for rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may be extended to two lakh rupees. The proviso appended thereto, however, empowers the court, for reasons to be recorded in the judgment, to impose a fine exceeding two lakh rupees.

Section 35 of the Act provides for presumption of culpable mental state. It also provides that an accused may prove that he had no such mental state with respect to the act charged as an offence under the prosecution. Section 54 of the Act places the burden of proof on the accused as regards possession of the contraband to account for the same satisfactorily.

Section 37 of the Act makes offences cognizable and non-bailable. It contains a non-obstante clause in terms whereof restrictions have been imposed upon the power of the court to release an accused on bail unless the following conditions are satisfied:

> "(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not

> guilty of such offence and that he is not likely to commit any offence while on bail."

The said limitations on the power of the court to grant bails as provided for in clause (b) of Section (1) of Section 37 of the Act are in addition to the limitations provided for under the Code of Criminal Procedure, 1973 or any other law for the time being in force.

Section 39 provides for the power of the court to release certain offenders on probation.

We may notice that the restrictions on the power of the court to suspend the sentence as envisaged in Section 39 of the Act has been held to be unconstitutional in Dadu @ Tulsidas v. State of Maharashtra [(2000) 8 SCC 437**],** subject, of course, to the restrictions for grant of bail as contained in Section 37 of the Act.

Section 42 provides for power of entry, search, seizure and arrest without any warrant or authorization by an officer who is otherwise empowered by the Central Government by general or special order.

If the authorities or officers specified therein have any reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug or psychotropic substances in respect of which an offence punishable under the Act has been committed,

they may enter into and search such building, conveyance or enclosed place at any time between sunrise and sunset and detain, search and arrest any person whom he has reason to believe to have committed an offence punishable under the Act.

Section 43, however, empowers an officer of any department mentioned in Section 42 to detain and search any person who he has reason to believe has committed an offence punishable under the Act in a public place. Section 50 provides for the conditions under which search of persons are to be conducted. Section 51 provides for application of the Code of Criminal Procedure, 1973 insofar as they are not inconsistent with the provisions of the Act. Section 52 provides for disposal of persons arrested and articles seized. Section 52-A provides for disposal of seized narcotic drugs and psychotropic substances; sub-section (2) whereof reads as under:

> "(2) Where any narcotic drugs or psychotropic substances has been seized and forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or, psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the

> narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any purpose of,-
> (a) Certifying correctness of the inventory so prepared; or
> (b) Taking, in the presence of such Magistrate, photographs substances and certifying such photographs as true; or
> (c) Allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn."

Indisputably, the proper officers of the 1962 Act are authorized to take action under the Act as regards seizure of goods, documents and things.

We may notice Section 110 of the 1962, sub-section (1) whereof reads as under:

> "110. Seizure of goods, documents and things. -
> (1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods:
> Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.
> (1A) The Central Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification in the Official Gazette, specify the goods or class of goods which shall, as soon as may be after its seizure under subsection (1), be

> disposed of by the proper officer in such manner as the Central Government may, from time to time, determine after following the procedure hereinafter specified.
> (1B) Where any goods, being goods specified under sub-section (1A), have been seized by a proper officer under sub-section (1), he shall prepare an inventory of such goods containing such details relating to their description, quality, quantity, mark, numbers, country of origin and other particulars as the proper officer may consider relevant to the identity of the goods in any proceedings under this Act and shall make an application to a Magistrate for the purpose of -
> (a) certifying the correctness of the inventory so prepared; or
> (b) taking, in the presence of the Magistrate, photographs of such goods, and certifying such photographs as true; or
> (c) allowing to draw representative samples of such goods, in the presence of the Magistrate, and certifying the correctness of any list of samples so drawn.
> (1C) Where an application is made under sub-section (1B), the Magistrate shall, as soon as may be, allow the application."

Indisputably, the Central Government has issued guidelines in this behalf being Standing Order No. 1 of 1989 dated 13.06.1989 which is in the following terms:

> "WHEREAS the Central Government considers it necessary and expedient to determine the manner in which the narcotic drugs and psychotropic substances, as specified in Notification No. 4/89 dated the 29th May, 1989 (F. No. 664/23/89-

> Opium, published as S.O. 381(E)), which shall, as soon as may be, after their seizure, be disposed of, having regard to their hazardous nature, vulnerability to theft, substitution and constraints of proper storage space;
>
> Now, therefore, in exercise of the powers conferred by sub-section (1) of Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), (hereinafter referred to as 'the Act'), the Central Government hereby determines that the drugs specified in the aforesaid Notification shall be disposed off in the following manner…"

These guidelines under the Standing order have been made under Statute, and Heroin is one of the items as substances listed for disposal under Section I of the Standing Order.

Paragraphs 3.1 and 6.1 of the Standing Order read as under:

> "Preparation of inventory
>
> 3.1 After sampling, detailed inventory of such packages/containers shall be prepared for being enclosed to the panchnama. Original wrappers shall also be preserved for evidentiary purposes.
>
> Certificate of destruction
>
> 6.1 A certificate of destruction (in triplicate (Annexure III) containing all the relevant data like godown entry, no., file No., gross and net weight of the drugs seized etc. shall be prepared and duly endorsed by the signature of the Chairman as well as Members of the Committee. This could also serve the purpose of panchanama. The original

> copy shall be posted in the godown register after making necessary entries to this effect, the duplicate to be retained in the seizure case file and the triplicate copy will be kept by the Disposal Committee. ”

CONSTITUTIONALITY

Presumption of innocence is a human right as envisaged under Article 14(2) of the International Covenant on Civil and Political Rights. It, however, cannot per se be equated with the fundamental right and liberty adumbrated in Article 21 of the Constitution of India. It having regard to the extent thereof would not militate against other statutory provisions (which, of course, must be read in the light of the constitutional guarantees as adumbrated in Articles 20 and 21 of the Constitution of India).

The Act contains draconian provisions. It must, however, be borne in mind that the Act was enacted having regard to the mandate contained in International Conventions on Narcotic Drugs and Psychotropic Substances. Only because the burden of proof under certain circumstances is placed on the accused, the same, by itself, in our opinion, would not render the impugned provisions unconstitutional.

A right to be presumed innocent, subject to the establishment of certain foundational facts and burden of proof, to a certain extent, can be

placed on an accused. It must be construed having regard to the other international conventions and having regard to the fact that it has been held to be constitutional. Thus, a statute may be constitutional but a prosecution thereunder may not be held to be one. Indisputably, civil liberties and rights of citizens must be upheld.

A Fundamental Right is not absolute in terms.

It is the consistent view of this Court that 'reason to believe', as provided in several provisions of the Act and as defined in Section 26 of the Indian Penal Code, on the part of the officer concerned is essentially a question of fact.

The procedures laid down under the Act being stringent in nature, however, must be strictly complied with.

In Directorate of Revenue and Another v. Mohammed Nisar Holia [(2008) 2 SCC 370], this Court held:

> "11. Power to make search and seizure as also to arrest an accused is founded upon and subject to satisfaction of the officer as the term "reason to believe" has been used. Such belief may be founded upon secret information that may be orally conveyed by the informant. Draconian

> provision which may lead to a harsh sentence having regard to the doctrine of "due process" as adumbrated under Article 21 of the Constitution of India require striking of balance between the need of law and enforcement thereof, on the one hand, and protection of citizen from oppression and injustice on the other."

Application of international law in a case involving war crime was considered by the Constitutional Court of South Africa in State v. Basson [2004 (6) BCLR 620 (CC)] opining:

> "The rules of humanitarian law constitute an important ingredient of customary international law. As the International Court of Justice [("the ICJ)] has stated, they are fundamental to the respect of the human person and "elementary considerations of humanity. The rules of humanitarian law in armed conflicts are to be observed by all States whether or not they have ratified the Conventions that contain them because they constitute intransgressible principles of international customary law. The ICJ has also stressed that the obligation on all governments to respect the Geneva Conventions in all circumstances does not derive from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression."

It was furthermore observed:

> "When allegations of such serious nature are at issue, and where the exemplary value of constitutionalism as against lawlessness is the very

> issue at stake, it is particularly important that the judicial and prosecutorial functions be undertaken with rigorous and principled respect for basic constitutional rights. The effective prosecution of war crimes and the rights of the accused to a fair trial are not antagonistic concepts. On the contrary, both stem from the same constitutional and humanitarian foundation, namely the need to uphold the rule of law and the basic principles of human dignity, equality and freedom."

[See also 'War, Violence, Human Rights, and the overlap between national and international law: Four cases before the South African Constitutional Court' by Albie Sachs, 28 Fordham International Law Journal 432]

The provision for reverse burden is not only provided for under the special acts like the present one but also under the general statutes like the Indian Penal Code. The Indian Evidence Act provides for such a burden on an accused in certain matters, as, for example, under Section 113A and 113B thereof. Even otherwise, this Court, having regard to the factual scenario involved in cases, e.g., where husband is said to have killed his wife when both were in the same room, burden is shifted to the accused.

Enforcement of law, on the one hand and protection of citizen from operation of injustice in the hands of the law enforcement machinery, on the other, is, thus, required to be balanced.

The constitutionality of a penal provision placing burden of proof on an accused, thus, must be tested on the anvil of the State's responsibility to protect innocent citizens.

The court must assess the importance of the right being limited to our society and this must be weighed against the purpose of the limitation. The purpose of the limitation is the reason for the law or conduct which limits the right. {See S v. Dlamini; S v. Dladla and others 1999(7) BCLR 771 (CC)}

While, however, saying so, we are not unmindful of serious criticism made by the academies in this behalf.

In Glanville Williams, Textbook of Criminal Law (2nd Edn.) page 56, it is stated:

> "Harking back to *Woolmington*, it will be remembered that Viscount Sankey said that "it is the duty of the prosecution to prove the prisoner's guilt, subject to the defence of insanity and subject also to any statutory exception". … Many statutes shift the persuasive burden. It has become a matter of routine for Parliament, in respect of the most

> trivial offences as well as some serious ones, to enact that the onus of proving a particular fact shall rest on the defendant, so that he can be convicted "unless he proves" it."

But then the decisions rendered in different jurisdictions are replete with cases where validity of the provisions raising a presumption against an accused, has been upheld.

The presumption raised in a case of this nature is one for shifting the burden subject to fulfillment of the conditions precedent therefor.

The issue of reverse burden vis-à-vis the human rights regime must also be noticed. The approach of the Common Law is that it is the duty of the prosecution to prove a person guilty. Indisputably this common law principle was subject to parliamentary legislation to the contrary. The concern now shown worldwide is that the Parliaments had frequently been making inroads on the basic presumption of innocence. Unfortunately unlike other countries no systematic study has been made in India as to how many offences are triable in the Court, where the legal burden is on the accused. In the United Kingdom it is stated that about 40% of the offences triable in the Crown Court appear to violate the presumption. (See – The Presumption of Innocence in English Criminal Law, 1996 Crim.L.R. 306, at 309).

In Article 11(1) of the Universal Declaration of Human Rights (1948) it is stated :-

> "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law…."

Similar provisions have been made in Article 6.2 of the European Convention for the protection of Human Rights and Fundamental Freedoms (195) and Article 14.2 of the International Covenant on Civil and Political Rights (1966).

The legal position has, however, undergone a drastic change in the United Kingdom after coming into force of the Human Rights Act, 1998. The question as to whether on the face of Article 6.2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the doctrine of reverse burden passes the test of constitutionality came up for consideration before the House of Lords in Regina v. Lambert : ([2001] UKHL 37 : [2001] 3 All ER 577) wherein the following two questions came up for consideration:–

> "The first is whether a defendant is entitled to rely on convention rights when the court is hearing an appeal from a decision which was taken before the Human

> Rights Act, 1998 came into effect. The second is whether a reverse burden provision in section 28(2) and (3) of the Misuse of Drugs Act, 1971 is a compatible with the presumption of innocence contained in article 6.2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."

Sub-section (2) of Section 28 of the Misuse of Drugs Act, 1971, with which the House was concerned, reads as under:-

> "(2) Subject to sub-section (3) below, in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged."

Lord Steyn stated the law thus :-

> "Taking into account that section 28 deals directly with the situation where the accused is denying moral blameworthiness and the fact that the maximum prescribed penalty is life imprisonment, I conclude that the appellant's interpretation is to be preferred. It follows that section 28 derogates from the presumption of innocence. I would, however, also reach this conclusion on broader grounds. The distinction between constituent elements of the crime and defensive issues will sometimes be unprincipled and arbitrary. After all, it is sometimes simply a matter of which drafting technique is adopted: a true constituent element can be removed from the definition of the crime and cast as a defensive issue whereas any definition of an offence can be reformulated so as to include all possible defences within it. It is

> necessary to concentrate not on technicalities and niceties of language but rather on matters of substance. I do not have in mind cases within the narrow exception "limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities";

Section 28 of the Misuse of Drugs Act, 1971 was read in the manner which was compatible with convention rights opining that Section 28(2) and (3) create an evidential burden on the accused.

Applicability of the doctrine of compatibility may be somewhat equated (essential differences although cannot be ignored) with the applicability of the doctrine of constitutionality in our country.

Sections 35 and 54 of the Act may have to be read in the light of Articles 14 and 21 of the Constitution of India.

We may notice that Sachs, J. in State v. Coetzee [(1997) 2 LRC 593] explained the significance of the presumption of innocence in the following terms :-

> "There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must

> be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences massively outweighs the public interest in ensuring that a particular criminal is brought to book… Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption . . . the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases".

In R. v. Hansen [(2007) NZSC 7], while construing Section 6(6) of the Misuse of Drugs Act, 1975 the New Zealand Supreme Court held as under :

> "In the context of a prosecution for an offence of possession of controlled drugs for the purpose of supply, that reversal of the onus of proof is obviously inconsistent with the aspect of the presumption of innocence that requires the Crown to prove all elements of a crime beyond reasonable doubt. While the Crown must prove to that standard that the person charged was in possession of the stipulated quantity of drugs, the jury can

> convict even if it is left with a reasonable doubt on the evidence over whether the accused had the purpose of supply of the drugs concerned. Indeed, as Lord Steyn pointed out in R v Lambert, the jury is obliged to convict if the version of the accused is as likely to be true as not."

However, in our opinion, limited inroad on presumption would be justified. We may consider the question from another angle.

The doctrine of *res ipsa loquitur* providing for a reverse burden has been applied not only in civil proceedings but also in criminal proceedings. [See Alimuddin Vs. King Emperor (1945 Nagpur Law Journal 300]. In Home vs. Dorset Yacht Company [1970 (2) ALL E.R. 294], House of Lords developed the common law principle and evolved a presumptive duty to care.

It is, however, of some interest to note that in Syed Akbar vs. State of Karnataka [AIR 1979 SC 1848] this Court held:

> **"28.** In our opinion, for reasons that follow, the first line of approach which tends to give the maxim a larger effect than that of a merely permissive inference, by laying down that the application of the maxim shifts or casts, even in the first instance, the burden on the defendant who in order to exculpate himself must rebut the presumption of negligence against him, cannot, as such, be invoked in the trial of criminal cases where the accused stands charged for causing injury or death by

> negligent or rash act. The primary reasons for non-application of this abstract doctrine of res ipsa loquitur to criminal trials are: Firstly, in a criminal trial, the burden of proving everything essential to the establishment of the charge against the accused always rests on the prosecution, as every man is presumed to be innocent until the contrary is proved, and criminality is never to be presumed subject to statutory exception. No such statutory exception has been made by requiring the drawing of a mandatory presumption of negligence against the accused where the accident "tells its own story" of negligence of somebody. Secondly, there is a marked difference as to the *effect* of evidence viz. the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment. As pointed out by Lord Atkin in *Andrews* v. *Director of Public Prosecutions*, "simple lack of care such as will constitute civil liability, is not enough"; for liability under the criminal law "a very high degree of negligence is required to be proved. Probably, of all the epithets that can be applied 'reckless' most nearly covers the case".
>
> (emphasis supplied)

The said dicta was followed in Jacob Mathew vs. State of Punjab [(2005) 6 SCC 1]. We may, however, notice that the principle of '*res ipsa loquitur*' has been applied in State of A.P. v. C. Uma Maheswara Rao &

Anr. [2004 (4) SCC 399] {see also B. Nagabhushanam v. State of Karnataka (2008) 7 SCALE 716}.

The Act specifically provides for the exceptions.

It is a trite law that Presumption of innocence being a human right cannot be thrown aside, but it has to be applied subject to exceptions.

Independence of judiciary must be upheld. The superior courts should not do something that would lead to impairment of basic fundamental and human rights of an accused. We may incidentally notice a decision of the Privy Council in an appeal from the Supreme Court of Mauritius in The State v. Abdul Rashid Khoyratty, [2006] UKPC 13. In that case, an attempt on the part of the Parliament to curtail the power of the court to grant bail in respect of the Dangerous Drugs Act (Act No.32 of 1986) was held to be unconstitutional being contrary to the doctrine of separation of power, necessary to protect individual liberty stating that the power to grant bail is exclusively within the judicial domain. A constitutional amendment to overcome the impact of the said decision was also held to be unconstitutional by the Supreme Court of Mauritius. In Abdul Rashid Khoyratty (supra), the Privy Council upheld the said view.

Dealing with the provisions of Sections 118(b) and 139 of the Negotiable Instruments Act, 1881 in Krishna Janardhan Bhat v. Dattatraya G. Hegde [2008 (1) SCALE 421] this Court upon referring to Hiten P. Dalal v. Bratindranath Banerjee [(2001) 6 SCC 16], opined:

> "32. But, we may at the same time notice the development of law in this area in some jurisdictions.
>
> The presumption of innocence is a human right. [See Narender Singh & Anr. v. State of M.P. (2004) 10 SCC 699, Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Anr. (2005) 5 SCC 294 and Rajesh Ranjan Yadav @ Pappu Yadav v. CBI through its Director (2007) 1 SCC 70] Article 6(2) of he European Convention on Human Rights provides : "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". Although India is not bound by the aforementioned Convention and as such it may not be necessary like the countries forming European countries to bring common law into land with the Convention, a balancing of the accused's rights and the interest of the society is required to be taken into consideration. In India, however, subject to the statutory interdicts, the said principle forms the basis of criminal jurisprudence. For the aforementioned purpose the nature of the offence, seriousness as also gravity thereof may be taken into consideration. The courts must be on guard to see that merely on the application of presumption as contemplated under Section 139 of the Negotiable Instruments Act, the same may not lead to injustice or mistaken conviction. It is for the aforementioned reasons that we have taken into

> consideration the decisions operating in the field where the difficulty of proving a negative has been emphasized. It is not suggested that a negative can never be proved but there are cases where such difficulties are faced by the accused e,g,. honest and reasonable mistake of fact. In a recent Article "The Presumption of Innocence and Reverse Burdens : A Balancing Duty" published in [2007] C.L.J. (March Part) 142 it has been stated :-
>
> "In determining whether a reverse burden is compatible with the presumption of innocence regard should also be had to the pragmatics of proof. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden? But courts will not allow these pragmatic considerations to override the legitimate rights of the defendant. Pragmatism will have greater sway where the reverse burden would not pose the risk of great injustice – where the offence is not too serious or the reverse burden only concerns a matter incidental to guilt. And greater weight will be given to prosecutorial efficiency in the regulatory environment."

The above stated principles should be applied in each case having regard to the statutory provisions involved therein.

We may, however, notice that recently in M/s. Seema Silk & Sarees & Anr. v. Directorate of Enforcement & Ors. [2008 (7) SCALE 624], in a

case where the constitutionality of the provisions of Sections 18(2) and 18 (3) of the Foreign Exchange Regulation Act, 1973 were questioned on the ground of infringing the 'equality clause' enshrined in Article 14 of the Constitution of India, this Court held:

> "16. A legal provision does not become unconstitutional only because it provides for a reverse burden. The question as regards burden of proof is procedural in nature. [See Hiten P. Dalal v. Bratindranath Banerjee,(2001) 6 SCC 16 and M.S. Narayana Menon v. State of Kerala, (2006) 6 SCC 39]
> 17. The presumption raised against the trader is a rebuttable one. Reverse burden as also statutory presumptions can be raised in several statutes as, for example, the Negotiable Instruments Act, Prevention of Corruption Act, TADA, etc. Presumption is raised only when certain foundational facts are established by the prosecution. The accused in such an event would be entitled to show that he has not violated the provisions of the Act. In a case of this nature, particularly, when an appeal against the order of the Tribunal is pending, we do not think that the appellants are entitled to take the benefit thereof at this stage. Such contentions must be raised before the criminal court.
> 18. Commercial expediency or auditing of books of accounts cannot be a ground for questioning the constitutional validity of a Parliamentary Act. If the Parliamentary Act is valid and constitutional, the same cannot be declared ultra vires only because the appellant faces some difficulty in writing off the bad debts in his books of accounts. He may do so. But that does not mean the statute is unconstitutional or the criminal prosecution becomes vitiated in law.

Provisions imposing reverse burden, however, must not only be required to be strictly complied with but also may be subject to proof of some basic facts as envisaged under the statute in question.

The provisions of Section 35 of the Act as also Section 54 thereof, in view of the decisions of this Court, therefore, cannot be said to be ex facie unconstitutional. We would, however, keeping in view the principles noticed hereinbefore examine the effect thereof, vis-à-vis the question as to whether the prosecution has been able to discharge its burden hereinafter.

BURDEN OF PROOF

The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the Court to impose fine of more than maximum punishment of Rs.2,00,000/- as also the presumption of guilt emerging from possession of Narcotic Drugs and Psychotropic substances, the extent of burden to prove the foundational facts on the prosecution, i.e., 'proof beyond all reasonable doubt' would be more onerous. A heightened scrutiny test would be

necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance of the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of 'wider civilization'. The courts must always remind itself that it is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In State of Punjab v. Baldev Singh, (1999) 3 SCC 977, it was stated:

> "It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed."

[See also Ritesh Chakravarty v. State of Madhya Pradesh, JT 2006 (12) SC 416]

It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court

but it is well settled that suspicion, however high may be, can under no circumstances, be held to be a substitute for legal evidence.

Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is 'preponderance of probability'on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the

general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt.

Whether the burden on the accused is a legal burden or an evidentiary burden would depend on the statute in question. The purport and object thereof must also be taken into consideration in determining the said question. It must pass the test of doctrine of proportionality. The difficulties faced by the prosecution in certain cases may be held to be sufficient to arrive at an opinion that the burden on the accused is an evidentiary burden and not merely a legal burden. The trial must be fair. The accused must be provided with opportunities to effectively defend himself. In Sheldrake v. Director of Public Prosecutions [(2005) 1 All ER 237] in the following terms:

> "21. From this body of authority certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirements of mens rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the

> presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case."
>
> (emphasis added)

It is, however, interesting to note the recent comments on Sheldrake (supra) by Richard Glover in an Article titled "Sheldrake Regulatory Offences and Reverse Legal Burdens of Proof" [(2006) 4 Web JCLI] wherein it was stated:

> "It is apparent from the records in Hansard (implicitly if not expressly) that the Government was content for a legal onus to be on the defendant when it drafted the Road Traffic Act 1956. An amendment to the Bill was suggested in the Lords "which puts upon the accused the onus of showing that he had no intention of driving or attempting to drive a motor vehicle" (Lord Brabazon 1955, col 582). Lord Mancroft, for the Government, although critical of the amendment stated: "…the Government want to do exactly what he wants to do. We have, therefore, to try to find some means of getting over this technical difficulty" (Lord Mancroft 1955, col 586). It is submitted that this

tends to suggest that the Government intended a reverse legal burden.

The reverse legal burden was certainly in-keeping with the tenor of the 1956 Act to "keep death off the road" (Lord Mancroft 1954, col 637) by increased regulation of road transport, particularly in the light of a sharp increase in reported road casualties in 1954 - there was an 18 per cent increase (Lord Mancroft 1954, col 637). The Times lead article for the 4 July 1955 (at 9d) stressed the Bill's importance for Parliament: "They have the casualty lists – 5,000 or more killed on the roads every year, 10 times as many killed and more than 30 times as many slightly hurt". This was "a national scandal". The Earl of Selkirk, who introduced the Bill in the Lords, remarked that "we require a higher standard of discipline on the roads" (The Earl of Selkirk 1954, col 567) and Lord Mancroft commented specifically in relation to 'being drunk in charge' that "…we should be quite right if we erred on the side of strictness" (Lord Mancroft 1955, col 586).

Notwithstanding this historical background it was, of course, open to their Lordships in Sheldrake to interpret section 5(2) as only imposing an evidential burden on the defendant. Lord Bingham referred to the courts' interpretative obligation under the Human Rights Act 1998 s3 as "a very strong and far-reaching one, and may require the court to depart from the legislative intention of Parliament" ([2004] UKHL 43, para 28). However, he must also have had in mind further dicta from the recent judgment in Ghaidan v Godin-Mendoza:

"Parliament is charged with the primary responsibility for deciding the best way of dealing with social problems. The court's role is one of review. The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's Convention rights" (Lord Nicholls, [2004] UKHL 30, para 19. Also see Johnstone [2003] UKHL 28, para 51).

That is, the Courts should generally defer (11) to the Legislature or, at least, allow them a discretionary area of judgment (R v DPP, ex p Kebilene [1999] UKHL 43; [2000] 2 AC 326, 380-381). (Lord Hoffman has criticised the use of the term 'deference' because of its "overtones of servility, or perhaps gratuitous concession" R (ProLife Alliance) v BBC [2003] UKHL 23, paras 75-762; WLR 1403, 1422.) This principle now appears firmly established, as is evident from the decision of an enlarged Privy Council sitting in Attorney-General for Jersey v Holley [2005] UKPC 23. Lord Nicholls, who again delivered the majority judgment (6-3), stated:

"The law of homicide is a highly sensitive and highly controversial area of the criminal law. In 1957 Parliament altered the common law relating to provocation and declared what the law on this subject should thenceforth be. In these circumstances it is not open to judges now to change ('develop') the common law and thereby depart from the law as declared by Parliament" (para 22).

Parliament's intentions also appear to have been of particular importance in the recent case Makuwa [2006] EWCA Crim 175, which concerned the

application of the statutory defence provided by the Immigration and Asylum Act 1999 s31(1) to an offence under the Forgery and Counterfeiting Act 1981 s3 of using a false instrument. The question was whether there was an onus on a refugee to prove that he (a) presented himself without delay to the authorities; (b) showed good cause for his illegal entry and (c) made an asylum claim as soon as was reasonably practicable. Moore-Bick LJ's judgment was, with respect, rather confused. He appeared to approve gravamen analysis when he stated that the presumption of innocence was engaged by a reverse burden (paras 28 and 36). However, he then stated that the statutory defence did not impose on the defendant the burden of disproving an essential ingredient of the offence (para 32), in which case it is clear that the presumption of innocence was not engaged. Nonetheless, he did, at least, recognise the limits of gravamen analysis, which was clearly inapplicable to sections 3 and 31 as the statutory defence applied to a number of other offences under the same Act and the Immigration Act 1971 (para 32). His Lordship acknowledged that particular attention should be paid to Parliament's actual intentions (para 33), as had been the case in Sheldrake.

In light of the above it is submitted that their Lordships in Sheldrake, as in Brown v Stott [2000] UKPC D3; [2003] 1 AC 681, 711C-D, PC, were entitled to uphold a legal rather than an evidential burden on the defendant and to take into account other Convention rights, namely the right to life of members of the public exposed to the increased danger of accidents from unfit drivers (European Convention on Human Rights and Fundamental Freedoms, article 2). That is, there were sound policy reasons for imposing a reverse legal burden,

> which will be the subject of further discussion in the second part to this article."

Whereas in India the statute must not only pass the test of reasonableness as contained in Article 14 of the Constitution of India but also the 'liberty' clause contained in Article 21 of the Constitution of India, in England it must satisfy the requirements of the Human Rights Act 1998 and consequently the provisions of European Conventions of Human Rights.

Placing persuasive burden on the accused persons must justify the loss of protection which will be suffered by the accused. Fairness and reasonableness of trial as also maintenance of the individual dignity of the accused must be uppermost in the court's mind.

In a case involving infringement of trade mark, the House of Lords in R. v. Johnstone [(2003) 3 All ER 884] stated the law, thus:

> "[52] I turn to s 92. (1) Counterfeiting is fraudulent trading. It is a serious contemporary problem. Counterfeiting has adverse economic effects on genuine trade. It also has adverse effects on consumers, in terms of quality of goods and, sometimes, on the health or safety of consumers. The Commission of the European Communities has noted the scale of this 'widespread phenomenon with a global impact.' Urgent steps are needed to combat counterfeiting and piracy (see the Green Paper, Combating Counterfeiting and Piracy in the Single Market

(COM (98) 569 final) and its follow up (COM (2000) 789 final). Protection of consumers and honest manufacturers and traders from counterfeiting is an important policy consideration. (2) The offences created by s 92 have rightly been described as offences of 'near absolute liability'. The prosecution is not required to prove intent to infringe a registered trade mark. (3) The offences attract a serious level of punishment: a maximum penalty on indictment of an unlimited fine or imprisonment for up to ten years or both, together with the possibility of confiscation and deprivation orders. (4) Those who trade in brand products are aware of the need to be on guard against counterfeit goods. They are aware of the need to deal with reputable suppliers and keep records and of the risks they take if they do not. (5) The s 92 (5) defence relates to facts within the accused person's own knowledge: his state of mind, and the reasons why he held the belief in question. His sources of supply are known to him. (6) Conversely, by and large it is to be expected that those who supply traders with counterfeit products, if traceable at all by outside investigators, are unlikely to be co-operative. So, in practice, if the prosecution must prove that a trader acted dishonestly, fewer investigations will be undertaken and fewer prosecutions will take place.

[53] In my view factors (4) and (6) constitute compelling reasons why the s 92(5) defence should place a persuasive burden on the accused person. Taking all the factors mentioned above into account, these reasons justify the loss of protection which will be suffered by the individual. Given the importance and difficulty of combating counterfeiting, and given the comparative ease with which an accused can raise an issue about his honesty, overall it is fair and

> reasonable to require a trader, should need arise, to prove on the balance of probability that he honestly and reasonably believed the goods were genuine."

The same principle applies to this case.

CASE AT HAND

Confession of the Appellant

With the aforementioned principles in mind, let us consider the evidence brought on record by the respondents.

We may, at the outset, notice that a fundamental error has been committed by the High Court in placing explicit reliance upon Section 108 of the Customs Act.

It refers to leading of evidence, production of document or any other thing in an enquiry in connection of smuggling of goods. Every proceeding in terms of sub-section (4) of Section 108 would be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code. The enquiry contemplated under Section 108 is for the purpose of 1962 Act and not for the purpose of convicting an accused under any other statute including the provisions of the Act.

Appellant contended that the purported confessions recorded on 2.08.1997 and 4.08.1997 were provided by an officer of the Customs Department roughly and later the same were written by him under threat, duress and under gun point and had, thus, not been voluntarily made.

The High Court should have considered the question having regard to the stand taken by the appellant. Only because certain personal facts known to him were written, the same by itself would not lead to the conclusion that they were free and voluntary.

Clause (3) of Article 20 of the Constitution provides that no person accused of any offence shall be compelled to be a witness against himself. Any confession made under Section 108 of the Customs Act must give way to Article 20(3) wherefor there is a conflict between the two. A retracted confessional statement may be relied upon but a rider must be attached thereto namely if it is made voluntary. The burden of proving that such a confession was made voluntarily would, thus, be on the prosecution. It may not be necessary for us to enter into the question as to whether the decisions of this Court that a Custom Officer is not a Police Officer should be revisited in view of the decision of this Court in Balkrishna Chhaganlal Soni v. State of West Bengal [(1974) 3 SCC 567, wherein it was stated :

> "On the proved facts the gold bar is caught in the criminal coils of Section 135, read with Sections 111 and 123, Customs Act, as the High Court has found and little has been made out before us to hold to the contrary."

It may also be of some interest to note the decision of this Court in State of Punjab v. Barkat Ram [AIR 1962 SC 276], holding:

> "17. There has, however, arisen a divergence of opinion about officers on whom some powers analogous to those of police officers have been conferred being police officers for the purpose of S. 25 of the Evidence Act. The view which favours their being held police officers, is based on their possessing powers which are usually possessed by the police and on the supposed intention of the legislature at the time of the enactment of S. 25 of the Evidence Act to be that the expression 'police officer, should include every one who is engaged in the work of detecting and preventing crime. The other view is based on the plain meaning of the expression and on the consideration that the mere fact that an officer who, by no stretch of imagination is a police officer, does not become one merely because certain officers similar to the powers of a police officer are conferred on him."

It was pointed out that the power of a Police Officer as crime detection and custom officer as authorities invested with a power to check the smuggling of goods and to impose penalty for loss of revenue being

different, they were not Police Officers but then the court took notice of the general image of police in absence of legislative power to enforce other law enforcing agencies for the said purpose in the following terms :

> "23. It is also to be noticed that the Sea Customs Act itself refers to police officer in contradistinction to the Customs Officer. Section 180 empowers a police officer to seize articles liable to confiscation under the Act, on suspicion that they had been stolen. Section 184 provides that the officer adjudging confiscation shall take and hold possession of the thing confiscated and every officer of police, on request of such officer, shall assist him in taking and holding such possession. This leaves no room for doubt that a Customs Officer is not an officer of the Police.
>
> 24. Section 171-A of the Act empowers the Customs Officer to summon any person to give evidence or to produce a document or any other thing in any enquiry which he be making in connection with the smuggling of any goods."

The extent of right to a fair trail of an accused must be determined keeping in view the fundamental rights as adumbrated under Article 21 of the Constitution of India as also the International Convention and Covenants chartered in Human Rights. We cannot lose sight of the fact that criminal justice delivery system prevailing in our country lacks mechanisms to remedy systemic violations of the accused's core constitutional rights which include the right to effective assistance of counsel, the right to have

exculpatory evidence disclosed, and the right to be free from suggestive eyewitness identifications, coerced custodial interrogation and the fabrication of evidence. (See Aggregation in Criminal Law by Brandon L. Garrett : April 2007 California Law Review Vol. 95 No.2 page 385 at 393).

When, however, the custom officers exercise their power under the Act, it is not exercising its power as an officer to check smuggling of goods; it acts for the purpose of detection of crime and bringing an accused to book.

This Court in Barkat Ram (supra) left the question, as to whether officers of departments other than the Police on whom the powers of Officer-in-charge of a Police Station under Chapter XIV of the Code of Criminal Procedure has been conferred are police officers or not for the purpose of Section 25 of the Act, open, stating:

> 34. In the Oxford Dictionary, the word "police" is defined thus :
>
> > "The department of government which is concerned with the maintenance of public order and safety, and the enforcement of the law; the extent of its functions varying greatly in different countries and at different periods.
> >
> > The civil force to which is entrusted the duty of maintaining public order, enforcing regulations for the prevention and

> punishment of breaches of the law and detecting crime; construed as plural, the members of a police force; the constabulary of a locality."
>
> Shortly stated, the main duties of the police are the prevention and detection of crimes. A police officer appointed under the Police Act of 1861 has such powers and duties under the Code of Criminal Procedure, but they are not confined only to such police officers. As the State's power and duties increased manifold, acts which were at one time considered to be innocuous and even praiseworthy have become offences, and the police power of the State gradually began to operate on different subjects. Various Acts dealing with Customs, Excise, Prohibition, Forest, Taxes etc., came to be passed, and the prevention, detection and investigation of offences created by those Acts came to be entrusted to officers with nomenclatures appropriate to the subject with reference to which they functioned. It is not the garb under which they function that matters, but the nature of the power they exercise or the character of the function they perform is decisive. The question, therefore, in each case is, does the officer under a particular Act exercise the powers and discharge the duties of prevention and detection of crime? If be does, he will be a police officer."

Section 25 of the Evidence Act was enacted in the words of Mehmood J in Queen Empress v. Babulal [ILR (1884) 6 All. 509] to put a stop to the extortion of confession, by taking away from the police officers

as the advantage of proving such extorted confession during the trial of accused persons. It was, therefore, enacted to subserve a high purpose.

The Act is a complete code by itself. The customs officers have been clothed with the powers of police officers under the Act. It does not, therefore, deal only with a matter of imposition of penalty or an order of confiscation of the properties under the Act but also with the offences having serious consequences.

Section 53 of the Act empowers the customs officers with the powers of the Station House Officers. An officer invested with the power of a police officer by reason of a special statute in terms of sub-section (2) of Section 53 would, thus, be deemed to be police officers and for the said purposes of Section 25 of the Act shall be applicable.

A legal fiction as is well known must be given its full effect. [See UCO Bank and Anr. v. Rajinder Lal Capoor 2008 (6) SCALE 1]

Section 53A of the Act makes such a statement relevant for the purposes of the said Act. The observations of the High Court, thus, that confession can be the sole basis of conviction in view of Section 108 of the Customs Act, thus, appear to be incorrect.

An inference that the appellant was subject to duress and coercion would appear from the fact that he is an Afgan National. He may know English but the use of expressions such as 'homogenous mixture', 'drug detection kit', 'independent witnesses' which evince a knowledge of technical terms derived from legal provisions, possibly could not be attributed to him. Possibility of fabrication of confession by the officer concerned, thus, cannot altogether be ruled out.

The constitutional mandate of equality of law and equal protection of law as adumbrated under Article 14 of the Constitution of India cannot be lost sight of. The courts, it is well settled, would avoid a construction which would attract the wrath of Article 14. It also cannot be oblivious of the law that the Act is complete code in itself and, thus, the provisions of the 1962 Act cannot be applied to seek conviction thereunder.

This Court in Alok Nath Dutta v. State of West Bengal [2006 (13) SCALE 467], stated :

> "We are not suggesting that the confession was not proved, but the question is what would be the effect of a retracted confession. It is now a well-settled principle of law that a retracted confession is a weak evidence. The court while relying on such retracted confession must satisfy itself that the same is truthful and trustworthy. Evidences brought on records by way of judicial confession

> which stood retracted should be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the court that it may seek to rely thereupon."

[See also Babubhai Udesinh Parmar v. State of Gujarat, (2006) 12 SCC 268].

In Pon Adithan v. Deputy Director, Narcotics Control Bureau, Madras [(1999) 6 SCC 1], whereupon reliance has been placed by the High Court, this Court had used retracted confession as a corroborative piece of evidence and not as the evidence on the basis whereof alone, a judgment of conviction could be recorded.

There is another aspect of the matter which cannot also be lost sight of.

A search and seizure or an arrest made for the purpose of proceeding against a person under the Act cannot be different only because in one case the authority was appointed under the Customs Act and in the other under another. What is relevant is the purpose for which such arrest or search and seizure is made and investigation is carried out. The law applicable in this behalf must be certain and uniform.

Even otherwise Section 138B of the 1962 Act must be read as a provision containing certain important features, namely:

(a) There should be in the first instance statement made and signed by a person before a competent custom official.

(b) It must have been made during the course of enquiry and proceedings under the Customs Act.

Only when these things are established, a statement made by an accused would become relevant in a prosecution under the Act. Only then, it can be used for the purpose of proving the truth of the facts contained therein. It deals with another category of case which provides for a further clarification. Clause (a) of sub-section (1) of Section 138B deals with one type of persons and clause (b) deals with another. The Legislature might have in mind its experience that sometimes witnesses do not support the prosecution case as for example panch witnesses and only in such an event an additional opportunity is afforded to the prosecution to criticize the said witness and to invite a finding from the court not to rely on the assurance of the court on the basis of the statement recorded by the Customs Department and for that purpose it is envisaged that a person may be such whose statement was recorded but while he was examined before the court, it

arrived at an opinion that is statement should be admitted in evidence in the interest of justice which was evidently to make that situation and to confirm the witness who is the author of such statement but does not support the prosecution although he made a statement in terms of Section 108 of the Customs Act. We are not concerned with such category of witnesses. Confessional statement of an accused, therefore, cannot be made use of in any manner under Section 138B of the Customs Act. Even otherwise such an evidence is considered to be of weak nature.

{See Gopal Govind Chogale v. Assistant Collector of Central Excise and another, [1985 (2) BomCR 499 Paras 12-14]}

NON PRODUCTION OF PHYSICAL EVIDENCE

The prosecution alleged that 1.4 kgs heroin was concealed in a cardboard container for carrying grapes and were recovered from the appellant at Raja Sansi Airport. Essential key items necessary to prove the same were:

> "i) The cardboard carton allegedly used for carrying the heroin to test the veracity.

ii) The bulk, which establishes the quantity recovered.

iii) The three homogenous samples of five grams each taken from the bulk amount of heroin, which would be essential in ascertaining whether the substance that the accused was allegedly in possession of was, in fact, heroin."

Indisputably, the cardboard carton was not produced in court being allegedly missing. No convincing explanation was rendered in that behalf. The High Court, in its judgment, stated:

> "The case set up by the prosecution is that the appellant being a member of a crew party, was in possession of his luggage, which included the cardboard carton, from which the recovery of heroin was allegedly effected. The appellant himself had presented the said carton along with the other luggage for custom clearance. From these facts, at least one thing is clear that the carton which was carrying the contraband, was under his immediate control. The argument advanced by Mr. Guglani is that the luggage which was being carried by the crew members, had no specific identification slips as in the case of an ordinary passenger travelling in an aircraft. So what was being carried in the carton was within the knowledge of the appellant alone and, therefore, the element of possession and control of the contraband qua the appellant is writ large and the presumption of culpable mental state under Section 35 and 54 of the Act has to be drawn against him."

The inference was drawn only on the basis of a mere assertion of the witness that the cardboard carton wherefrom the contraband was allegedly recovered as the one which had been in possession of the appellant without any corroboration as regards the purported "apparent practice of crew members carrying their own luggage" and there being no identification marks on the same. No material in this behalf has been produced by the respondent. No witness has spoken of the purported practice. For all intent and purport another presumption has been raised by the High Court wherefor no material had been brought on record. No explanation has been given as to what happened to the container. Its absence significantly undermines the case of the prosecution. It reduces the evidentiary value of the statements made by the witnesses referring the fact of recovery of the contraband therefrom.

Preservance of original wrappers, thus, comes within the purview of the direction issued in terms of Section 3.1 of the Standing Order No. 1 of 1989. Contravention of such guidelines could not be said to be an error which in a case of this nature can conveniently be overlooked by the Court.

We are not oblivious of a decision of this Court in Chief Commercial Manager, South Central Railway, Secunderabad & Ors. v. G. Ratnam &

Ors. [(2007) 8 SCC 212] relating to disciplinary proceeding, wherein such guidelines were held not necessary to be complied with but therein also this Court stated:

> "In the cases on hand, no proceedings for commission of penal offences were proposed to be lodged against the respondents by the investigating officers."

In Moni Shankar v. Union of India & Anr. [(2008) 3 SCC 484], however, this Court upon noticing G. Ratnam (supra), stated the law thus:

> "15. It has been noticed in that judgments that Paras 704 and 705 cover the procedures and guidelines to be followed by the investigating officers, who are entrusted with the task of investigation of trap cases and departmental trap cases against the railway officials. This Court proceeded on the premise that the executive orders do not confer any legally enforceable rights on any persons and impose no legal obligation on the subordinate authorities for whose guidance they are issued.
>
> 16. We have, as noticed hereinbefore, proceeded on the assumption that the said paragraphs being executive instructions do not create any legal right but we intend to emphasise that total violation of the guidelines together with other factors could be taken into consideration for the purpose of arriving at a conclusion as to whether the department has been able to prove the charges against the delinquent official.

17. The departmental proceeding is a quasi judicial one. Although the provisions of the Evidence Act are not applicable in the said proceeding, principles of natural justice are required to be complied with. The Court exercising power of judicial review are entitled to consider as to whether while inferring commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded therefrom. Inference on facts must be based on evidence which meet the requirements of legal principles. The Tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the department, even if it is taken on its face value to be correct in its entirety, meet the requirements of burden of proof, namely - preponderance of probability. If on such evidences, the test of the doctrine of proportionality has not been satisfied, the Tribunal was within its domain to interfere. We must place on record that the doctrine of unreasonableness is giving way to the doctrine of proportionality. (See - State of U.P. v. Sheo Shanker Lal Srivastava [(2007) 4 SCC 669] and Coimbatore District Central Cooperative Bank v. Coimbatore Distarict Central Cooperative Bank Employees Association and Anr. [2004 QB 1004]."

It was furthermore opined :

> "It may be that the said instructions were for compliance of the Vigilance Department, but substantial compliance therewith was necessary, even if the same were not imperative in character. A departmental instruction cannot totally be ignored. The Tribunal was entitled to take the same into consideration along with other materials brought on record for the purpose of arriving at a

> decision as to whether normal rules of natural justice had been complied with or not."

Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-à-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

Recently, this Court in State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582], following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1] held that statutory instructions are mandatory in nature.

Logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating

authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.

Omission on the part of the prosecution to produce evidence in this behalf must be linked with second important piece of physical evidence that the bulk quantity of heroin allegedly recovered indisputably has also not been produced in court. Respondents contended that the same had been destroyed. However, on what authority it was done is not clear. Law requires that such an authority must flow from an order passed by the Magistrate. Such an order whereupon reliance has been placed is Exhibit PJ; on a bare perusal whereof, it is apparent that at no point of time any prayer had been made for destruction of the said goods or disposal thereof otherwise. What was necessary was a certificate envisaged under Section 110(1B) of the 1962 Act. An order was required to be passed under the aforementioned provision providing for authentication, inventory etc. The same does not contain within its mandate any direction as regards destruction. The only course of action the prosecution should have resorted to is to obtain an order from the competent court of Magistrate as envisaged under Section 52A of the Act in terms whereof the officer empowered under Section 53 upon preparation of an inventory of narcotic

drugs containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as he may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings thereunder make an application for any or all of the following purposes :

> "(a) Certifying correctness of the inventory so prepared; or
>
> (b) Taking, in the presence of such Magistrate, photographs substances and certifying such photographs as true; or
>
> (c) Allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn."

Sub-section (3) of Section 52A of the Act provides that as and when such an application is made, the Magistrate may, as soon as may be, allow the application. The reason wherefor such a provision is made would be evident from sub-section (4) of Section 52A which reads as under :

> "**52A. Disposal of seized narcotic drugs and psychotropic substances.**

> (4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every Court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

Concededly neither any such application was filed nor any such order was passed. Even no notice has been given to the accused before such alleged destruction.

We must also notice a distinction between Section 110(1B) of the 1962 Act and Section 52A(2) of the Act as sub-section (4) thereof, namely, that the former does not contain any provision like sub-section (4) of Section 52A. It is of some importance to notice that paragraph 3.9 of the Standing Order requires pre-trial disposal of drugs to be obtained in terms of Section 52A of the Act. Exhibit PJ can be treated as nothing other than an order of authentication as it is a certificate under Section 110(1B) of the 1962 Act as the aspect of disposal clearly provided for under Section 52A of the Act is not alluded to. The High Court in its judgment purported to have relied upon an assertion made by the prosecution with regard to prevalence of a purported general practice adopted by the Customs Department to

obtain a certificate in terms of the said provision prior to destruction of case property, stating:

> "To a specific query put to Mr. Guglani by the Court with regard to aforesaid arguments, he fairly states that the general practice adopted by the Customs Department is that before destroying the case property, a certificate is obtained u/s 100 (1B) of Customs Act. He states that in this regard, a sample as per the provisions contained in sub clause (c) to clause (1B) is also drawn for the purposes of certification of correctness so that at a later stage, the identity of the case property is not disputed.
>
> May be, in my view, some irregularities are committed in this case by the Customs Department while obtaining the order Exhibit PJ) from the court for the reason that if the case property was to be destroyed, at least a notice should have been given to the accused on the application moved u/s 100 (1B) of the Customs Act or at least a specific request in this regard should have been made in the application but at the same time, the aforesaid irregularity cannot be said to be a vital flaw in the case of the prosecution for which the appellant can derive any benefit especially under the circumstances when confessional statements made by the appellant are held to be made voluntary as observed by me hereinabove… Similarly, non-production of cardboard card board carton is also not fatal to the prosecution."

The question which arises for our consideration is as to whether it is permissible to do so. Evidently it is not. Firstly because taking recourse to

the purported general practice adopted by the Customs Department is not envisaged in regard to prosecution under the Act. Secondly, no such general practice has been spoken of by any witness. A statement made at the Bar as regards existence of such a purported general practice to say the least cannot be a substitute of evidence whereupon only the court could rely upon. Secondly, the High Court failed to take into consideration that a certificate issued under Section 110(1B) of the 1962 Act can be recorded as a certificate of authentication and no more; authority for disposal would require a clear direction of the Court in terms of Section 52A of the Act. Thirdly, the High Court failed and/or neglected to consider that physical evidence being the property of the Court and being central to the trial must be treated and disposed of in strict compliance of the law.

The High Court proceeded on the basis that non-production of physical evidence is not fatal to the prosecution case but the fact remains that a cumulative view with respect to the discrepancies in physical evidence creates an overarching inference which dents the credibility of the prosecution. Even for the said purpose the retracted confession on the part of the accused could not have been taken recourse to.

The last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin were also not produced. Even if it is

accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52A of the Act.

The fate of these samples is not disputed. Two of them although were kept in the malkahana along with the bulk but were not produced. No explanation has been offered in this regard. So far as the third sample which allegedly was sent to the Central Forensic Science Laboratory, New Delhi is concerned, it stands admitted that the discrepancies in the documentary evidence available have appeared before the court, namely:

i) While original weight of the sample was 5 gms, as evidenced by Ex. PB, PC and the letter accompanying Ex.PH, the weight of the sample in the laboratory was recorded as 8.7 gms.

ii) Initially, the colour of the sample as recorded was brown, but as per the chemical examination report, the colour of powder was recorded as white.

We are not oblivious of the fact that a slight difference in the weight of the sample may not be held to be so crucial as to disregard the entire prosecution case as ordinarily an officer in a public place would not be carrying a good scale with him. Here, however, the scenario is different.

The place of seizure was an airport. The officers carrying out the search and seizure were from the Customs Department. They must be having good scales with them as a marginal increase or decrease of quantity of imported articles whether contraband or otherwise may make a huge difference under the Customs Act.

We cannot but also take notice other discrepancies in respect of the physical evidence which are:

i) The bulk was kept in cotton bags as per the Panchnama, Ex PC, while at the time of receiving them in the malkhana, they were packed in tin as per the deposition of PW 5.

ii) The seal, which ensures sanctity of the physical evidence, was not received along with the materials neither at the malkhana nor at the CFSL, and was not produced in Court.

Physical evidence of a case of this nature being the property of the court should have been treated to be sacrosanct. Non-production thereof would warrant drawing of a negative inference within the meaning of Section 114(g) of the Evidence Act. While there are such a large number of discrepancies, if a cumulative effect thereto is taken into consideration on the basis whereof the permissive inference would be that serious doubts are

created with respect of the prosecution's endeavour to prove the fact of possession of contraband from the appellant.

This aspect of the matter has been considered by this Court in Jitendra v. State of U.P. [(2004) 10 SCC 562], in the following terms :

> "In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchanama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS, Act."

Several other lacunae in the prosecution case had been brought to our notice. The samples had been kept at the airport for a period of three days. They were not deposited at the malkhana. It was obligatory on the part of the Customs Department to keep the same in the safe custody. Why such precautions were not taken is beyond anybody's comprehension.

The High Court, however, opined that the physical evidence was in safe custody. Such an inference was drawn on the basis that the seals were

intact but what was not noticed by the High Court is that there are gaping flaws in the treatment, disposal and production of the physical evidence and the conclusion that the same was in safe custody required thorough evidence on the part of the prosecution which suggests that the sanctity of the physical evidence was not faulted. It was not done in the present case.

PW-1 Kulwant Singh, Inspector-Customs, in his deposition, stated:

> "I had told the accused that I asked the accused that his search be conducted under Section 50 of the N.D.P.S. Act before a gazetted officer or a magistrate. I did not mention this fact in the panchanama Ex. PC. It is incorrect to suggest that version in Ex. PA was roughly drafted by the department and given to the accused for writing. It is also incorrect to suggest that the accused was not aware of the provisions of Section 50 of the N.D.P.S. Act, 1985. It is incorrect to suggest that after the recovery of heroin from the cartoon, the option for the personal search of the accused was given to the accused that whether he be searched before a gazetted officer or before a magistrate. It is correct that on the panchanama Ex. PC on thumb impression mark 'A', witness No. 2 is written but his name is not specifically written."

The samples taken allegedly contained the signature of the appellant as also those of the custom officials. PW-1, in his deposition, stated:

> "I have also not brought the relevant samples in the court today. It is incorrect to suggest that I have deliberately not produced the samples in the

> court today. So far as I remember, three seals were affixed on the test memo sent to the Chemical Examiner. The sample was sent to the office of Chemical Examiner on 4.8.1997. I do not send the samples myself. The signatures of both the independent witnesses were not appended on the sealed samples and the case property. Volunteered, the accused had signed the remaining bulk and the samples. It is incorrect that portion Ex.PG/1 was later on incorporated at my instance."

However, in Exhibit PH against the column 'marking on envelope (s)/ packet (s)' there was a blank line. It did not say a word with regard to the accused's signature on the sample. Exhibit PC, however, suggests that the samples bore the appellant's signature. The sample, thus, with only a seal of custom by itself cannot be stated to be one recovered from the appellant specially when the prosecution case is that it contained accused's signature and date of it which is not found on the original. The independent witnesses did not sign the samples. The original seal was not produced. It is a mystery to whom the seal was entrusted. Thus, the change in colour, weight of the sample as also the absence of the accused's signature thereupon cannot be totally ignored.

PW-2 Shri K.K. Gupta stated:

> "The panchnama was prepared after the recovery at about 8.30 P.M. before me. I did not make offer to the accused myself regarding the search of the accused that whether he wants to be searched before a gazetted officer or before a magistrate. In my presence, the panchnama was not read over to the accused. It is correct that the only signatures of the accused were obtained on panchnama Ex. PC in my presence. I had gone through the panchnama and then I signed the same."

He furthermore accepted:

> "It is correct that many recoveries have been effected from the passengers Arian Afghan Airlines earlier to this recovery and cases are pending before this court."

PW-1 stated that seal had been given to PW-4, Rajesh Sodhi, Deputy Commissioner, but PW-4 denied the same.

His deposition, inter alia, is to the following effect:

> "In August 1997, I was posted at A.C. In charge Raja Sansi Airport. On 1.8.1997, heroin One kg. 460 grams was recovered from the accused (1.460 Kgs.). This recovery was made by Inspector Kulwant Singh and K.K. Gupta Supdt. Customs and I was informed of this recovery. Samples and remaining bulk were handed over to me by Kulwant Singh, Inspector bearing seal No.122 of the Customs Divn. Amritsar. There is no Malkhana of the Customs department at the Raja Sansi Airport. On 4.8.1997 samples were handed over to Ashok Kumar for taking to the Central Revenue Control Laboratory, Delhi. Remaining

> case property was given to Kulwant Singh for depositing the same in Malkhana at Amritsar. So long as the case property remained in my possession the same was not tampered with.
>
> Cross-examination by Sh. D.S. Attari, Adv.
>
> I was not given sample seal along with the case property by Inspector Kulwant Singh. Sample was of 5 grams. I do not remember whether 5 grams weight was gross or net. I did not made entry regarding receipt of sample and the case property. I also did not make any entry regarding sending the samples to the Central Revenue Control Laboratory at New Delhi. It is wrong to suggest that sample and the case property was not deposited with me by Kulwant Singh. I also did not produce the case property in the court. It is wrong to suggest that I have deposed falsely being official witness."

The seal was not even deposited in the malkhana. As no explanation whatsoever has been offered in this behalf, it is difficult to hold that sanctity of the recovery was ensured.

Even the malkhana register was not produced. There exist discrepancies also in regard to the time of recovery. The recovery memo Exhibit PB shows that the time of seizure was 11.20 pm. PW1, Kulwant Singh and PW2, K.K. Gupta, however, stated that the time of seizure was 8.30 pm. Appellant's defence was that some carton left by some passenger

was passed upon him being a crew member in this regard assumes importance (See Jitendra (supra) Para 6).

Panchnama was said to have been drawn at 10.00 pm as per PW1 whereas PW2 stated that panchnama was drawn at 8.30 pm. Exhibit PA, containing the purported option to conduct personal search under Section 50 of the Act, only mentioned time when the flight landed at the airport.

In Baldev Singh (supra), it was stated :

> "28. This Court cannot overlook the context in which the NDPS Act operates and particularly the factor of widespread illiteracy among persons subject to investigation for drug offences. It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed. We are not able to find any reason as to why the empowered officer should shirk from affording a real opportunity to the suspect, by intimating to him that he has a right "that if he requires" to be searched in the presence of a Gazetted Officer or a Magistrate, he shall be searched only in that manner. As already observed the compliance with the procedural safeguards contained in Section 50 are intended to serve dual purpose - to protect a person against false accusation and frivolous charges as also to lend credibility to the search and seizure conducted by the empowered officer. The argument that keeping in view the growing drug menace, an insistence on compliance with all the safeguards contained in Section 50 may result in more acquittals does not

> appeal to us. If the empowered officer fails to comply with the requirements of Section 50 and an order or acquittal is recorded on that ground, the prosecution must think itself for its lapses. Indeed in every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the Court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted."

Independent Witnesses

It is accepted that when the appellant allegedly opted for being searched by a Magistrate or a Gazetted Officer, Kuldip Singh called K.K. Gupta, Superintendent Customs, PW2) and independent witnesses Mahinder Singh and Yusaf. Whereas K.K. Gupta was examined as PW2, the said Mahinder Singh and Yusuf were not examined by the prosecution. There is nothing on record to show why they could not be produced. Their status in life or location had also not been stated. It is also not known as to why only the said two witnesses were sent for. The fact remains that they had not been examined. Although examination of independent witnesses in all

situations may not be imperative, if they were material, in terms of Section 114(e) of the Evidence Act, an adverse inference could be drawn.

In a case of his nature, where there are a large number of discrepancies, the appellant has been gravely prejudiced by their non-examination. It is true that what matters is the quality of the evidence and not the quantity thereof but in a case of this nature where procedural safeguards were required to be strictly complied with, it is for the prosecution to explain why the material witnesses had not been examined. Matter might have been different if the evidence of the Investigating Officer who recovered the material objects was found to be convincing. The statement of the Investigating Officer is wholly unsubstantiated. There is nothing on record to show that the said witnesses had turned hostile. Examination of the independent witnesses was all the more necessary inasmuch as there exist a large number of discrepancies in the statement of official witnesses in regard to search and seizure to which we may now take note of.

Discrepancies in the Statements of Official Witnesses

Section 50 of the Act provides for an option to be given. This Court in Baldev Singh (supra) quoted with approval the decision of the Supreme

Court of United States in Miranda v. Arizona [(1966) 384 US 436] in the following terms :

> "The Latin maxim *salus populi suprema lex* (the safety of the people is the supreme law) and *salus republicae suprema lex* (safety of the State is the supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. *The action of the State, however, must be 'right, just and fair'*."

Justness and fairness of a trial is also implicit in Article 21 of the Constitution.

A fair trial is again a human right. Every action of the authorities under the Act must be construed having regard to the provisions of the Act as also the right of an accused to have a fair trial.

The courts, in order to do justice between the parties, must examine the materials brought on record in each case on its own merits. Marshalling and appreciation of evidence must be done strictly in accordance with the well known legal principles governing the same; wherefor the provisions of the Code of Criminal Procedure and Evidence Act must be followed.

Appreciation of evidence must be done on the basis of materials on record and not on the basis of some reports which have nothing to do with the occurrence in question.

Article 12 of the Universal Declaration of Human Rights provides for the Right to a fair trail. Such rights are enshrined in our Constitutional Scheme being Article 21 of the Constitution of India. If an accused has a right of fair trial, his case must be examined keeping in view the ordinary law of the land.

It is one thing to say that even applying the well-known principles of law, they are found to be guilty of commission of offences for which they are charged but it is another thing to say that although they cannot be held guilty on the basis of the materials on record, they must suffer punishment in view of the past experience or otherwise.

PW1 states that he had asked the accused that a search be conducted under the Act before a Gazetted Officer or a Magistrate but the same was not mentioned in the panchnama Exhibit PC. If the evidence of PW1 in that behalf is correct, we fail to understand how PW2 satisfied himself that an

option had been given to the accused to be searched before a gazetted officer. Exhibit PA shows that option to search was given after the recovery was made since it is stated therein:

> "After recovery the custom officer informed his senior officer and was asked whether I would like to present myself for personal search before a Magistrate or a Gazetted Officer"

The said document, therefore, indicates that the gazetted officer or the independent witnesses were not present at the time of purported recovery. Exhibit PC, however, shows the presence of independent witnesses at the time of recovery. The credibility of the statements, having regard to these vital discrepancies stands eroded.

A person who is sought to be arrested or searched has some rights having regard to the decision of this Court in D.K. Basu v. State of West Bengal [(1997) 1 SCC 416]. D.K. Basu rule states that if a person in custody is subjected to interrogation, he must be informed in clear and unequivocal terms as to his right to silence. This rule was also invoked in Balbir Singh (supra).

We are not oblivious that the decision of State of Himachal Pradesh v. Pawan Kumar [(2005) 4 SCC 350] wherein Section 50 of the Act having

been held to be inapplicable in relation to a search of a bag but in this case the appellant's person had also been searched. The High Court disregarded that although Exhibit PA may not affect a technical compliance of Section 50 of the Act on taking a complete and circumspect view of the materials brought on record, but the same, in our opinion, affect the credibility of the documentary evidence and the statements of the official witnesses, namely, PW1 and PW2. If origin of principle has not been followed and discrepancies and contradictions have occurred in the statements of PW1 and PW2 the same would cause doubt on the credibility of prosecution case and their claim of upholding procedure established by law in effecting recovery.

CONCLUSION

Our aforementioned findings may be summarized as follows :

1. The provisions of Sections 35 and 54 are not ultra vires the Constitution of India.

2. However, procedural requirements laid down therein are required to be strictly complied with.

3. There are a large number of discrepancies in the treatment and disposal of the physical evidence. There are contradictions in the

statements of official witnesses. Non-examination of independent witnesses and the nature of confession and the circumstances of the recording of such confession do not lead to the conclusion of the appellant's guilt.

4. Finding on the discrepancies although if individually examined may not be fatal to the case of the prosecution but if cumulative view of the scenario is taken, the prosecution's case must be held to be lacking in credibility.

5. The fact of recovery has not been proved beyond all reasonable doubt which is required to be established before the doctrine of reverse burden is applied. Recoveries have not been made as per the procedure established by law.

6. The investigation of the case was not fair.

We, therefore, are of the opinion that the impugned judgment cannot be sustained which is set aside accordingly.

Before, however, parting with this judgment, we would like to place emphasis on the necessity of disposal of such cases as quickly as possible. The High Courts should be well advised to device ways and means for

stopping recurrence of such a case where a person undergoes entire sentence before he gets an opportunity of hearing before this Court.

The appeal is allowed with the aforementioned observations.

…….J.
[S.B. Sinha]

..…….J.
[V.S. Sirpurkar]

New Delhi;
July 09, 2008