

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Date of Decision: October 21, 2013

CRA No.569-DB of 2009

Naveed Masih ...Appellant

Versus

State of Punjab ...Respondent

CRA No.318-DB of 2009

Ajit Singh ...Appellant

Versus

State of Punjab ...Respondent

CRA No.251-DB of 2009

Arsal Singh ...Appellant

Versus

State of Punjab ...Respondent

**CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MR. JUSTICE FATEH DEEP SINGH**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Ms. Tanu Bedi, Advocate,
for the appellant in CRA No.569-DB of 2009.

Mr. Karamjit Singh, Advocate,
for the appellant in CRA No.318-DB of 2009.

M/s J.S.Sidhu & S.P.S.Sidhu, Advocates,
for the appellant in CRA No.251-DB of 2009.

Mr. Pavit Mattewal, Addl. AG, Punjab,
for the respondent-State.

Mr. Rajiv Sharma, Advocate,
for the Narcotics Control Bureau.

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HEMANT GUPTA, J.

This order shall dispose of aforementioned three appeals i.e. CRA No.569-DB of 2009; CRA No.318-DB of 2009 & CRA No.251-DB of 2009 preferred by Naveed Masih s/o Sharief Masih; Ajit Singh s/o Tara Singh and Aarsal Singh s/o Bhag Singh respectively, against the judgment of conviction and order of sentence dated 17.02.2009 passed by the Special Court, Amritsar, whereby appellant Naveed Masih was convicted for the offences punishable under Sections 21 & 23 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') and sentenced to undergo rigorous imprisonment for a period of 15 years and to pay a fine of Rs.1 lac each on both counts, whereas appellants Ajit Singh and Aarsal Singh were convicted for an offence punishable under Section 29 of the Act and sentenced to undergo rigorous imprisonment for a period of 15 years and to pay a fine of Rs.1 lac each. In the event of default of payment of fine, the defaulter shall further undergo rigorous imprisonment for a period of one year.

2. The Narcotics Control Bureau (hereinafter referred to as 'NCB') filed a complaint in the Court of Special Judge, Amritsar against the present appellants on 22.12.2005 for the offences punishable under Sections 8, 21, 29 & 60 of the Act. In the complaint (Ex.P48), it is pleaded that on 28.06.2005 at about 1.15 AM, when Constable Satpal Singh - PW4 and Constable Kailash Chand were on duty at naka No.85 of Border Out Post (BOP) Dharma of 'B' coy Papa-I Battalion of Border Security Force, they observed some movement approximately 100 meters ahead of fence near Border pillar 37/8. Constable Satpal Singh alerted Constable Hiralal Yadav and informed post Commander SIO R.D.Parsad, who was on command naka. At the same time, message was

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also conveyed to Sh. Shyam Kumar, AC Coy Commander 'B' Coy Papa-I BN - PW5, who had just arrived from depth patrolling in the AOR Dharma KS Wala and Wan. He also rushed to the spot. In the meantime, the naka party ordered the intruders to surrender and come forward. The intruders stood still for a while, but the man standing behind ran towards international border and escaped by taking advantage of darkness, bushes and broken ground. On reaching at the spot, Company Commander took the other intruder on gun point and sent guard party to bring the intruder to own side through gate No.137. Four rounds were fired from Pakistan side and in retaliation; the troops fired 11 rounds of BDR. When the fire stopped, the party during search recovered one cloth packet containing four bundles packing tape wrapped around each packet having a characteristic pungent smell. It was revealed by Pakistani intruder that it was heroin. During search of the intruder, one mobile phone (Nokia), 100 rupees Pakistani currency, telephone diary and visiting cards were recovered. A memo Ex.P4 of recoveries of articles recovered along with the list of persons involved in the operation was prepared. Intimation with regard to capture of Pakistani intruder along with articles recovered was sent to the Commandant, BSF Ex.P3 and NCB for further action, as BSF authorities being not authorized under the provisions of the Act to conduct further action or investigation. Information to superior officers by way of Ex.P1 was also sent. On receipt of information, an investigating team was constituted. On reaching Wan, a request letter signed by O.P.Sharma, Superintendent NCB, was moved to the Commandant with regard to handing over of Pakistani intruder along with articles recovered from him. In pursuance of such letter, BSF officials handed over the said person along with articles recovered by way of Ex.P2, brief profile of the encounter and the list of the officers, who

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participated in the said encounter. The Investigating Officer of NCB – PW2 prepared recovery memo Ex.P12.

3. At about 8.00 AM on the same day, the officials of the NCB started their investigation after joining two witnesses namely PW Vikram Sharma, Deputy Commandant (General) and PW Inspector Sukhdev Raj. The packet was opened by Balvinder Kumar, Intelligence Officer, who is also the Investigating Officer, which were also wrapped by yellow coloured adhesive tape. After opening all the four packets, two packets each were recovered from each of the four packets i.e. in all eight small packets were recovered. On weighment, all the small eight packets came to 1 Kg. each. Out of these eight packets, three packets bore the inscription of Afgan Co. Limited 2000, Half Moon and a star and on the other side MMCO Ltd. 2000 and picture of lion. The contents of these three packets were transferred into a bigger packet after homogenizing the contents properly. On testing by drug testing kit, the homogenized mixture was revealed as heroin. This mixture was marked as lot-A. After taking two samples of 5 gms. each, which were marked as A-1 and A-2, the remaining lot was heat sealed and then placed in a cloth bag, which was sealed with the seal bearing inscription 'Narcotic Control Bureau-06'. Similarly, a homogenized mixture of other five packets having inscription in urdu and a picture of four flowers, was prepared. On testing by drug testing kit, such homogenized mixture also showed positive result for heroin. This mixture was marked as lot-B. After taking two samples of 5 gms. each, which were marked as B-1 and B-2, the remaining lot was heat sealed and then placed in a cloth bag, which was also sealed with the seal bearing inscription 'Narcotic Control Bureau-06'. A panchnama incorporating the details of seizure made,

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withdrawal of samples, preparation of different lots and packages, drawing of recovery-cum-seizure memo and preparation of test memo, was also prepared, which was signed by witnesses and thumb marked by the accused. All the sealed samples were handed over to O.P.Sharma, Superintendent, NCB, Chandigarh on the same day for safe custody and thereafter information-cum-proceedings Ex.P13 was prepared and the accused Naveed Masih was arrested through Ex.P17 and notice under Section 67 of the Act by way of Ex.P15 was served upon him.

4. Thereafter, accused Naveed Masih tendered voluntary statement Ex.P16 before the Investigating Officer Balvinder Kumar without any threat, inducement or pressure, which was reduced into writing. In his statement, Naveed Masih admitted the manner and factum of recovery. He also volunteered that co-accused Ajit Singh was his accomplice on this side of India along with a Constable of BSF for illegal importation/transportation of the narcotics. The Constable of BSF was later on identified as appellant Aarsal Singh. Such statement was also signed by the witnesses and thumb marked by the accused himself.

5. Information with regard to the seizure arrest of Naveed Masih Ex.P18 was given to SHO, PS Khalra, District Tarn Taran. Message was also sent to the Senior officers in Administration including Pakistan High Commission and the Ministry of External Affairs, Government of India, New Delhi as Ex.P19. The accused was medico legally examined by the Chief Medical Officer, Civil Hospital, Patti on the same day by way of Ex.P21. Notice under Section 57 of the Act Ex.P22 was sent. After completion of other formalities, the accused Naveed Masih was produced before the Judicial

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Magistrate Ist Class, Patti on 29.06.2005 along with case property, samples and relevant papers.

6. On 29.06.2005, O.P.Sharma, Superintendent handed over a covering letter Ex.PA, test memos Ex.PB/Ex.P14 & Ex.P14A as well as original samples in sealed condition to PW-1 Sepoy Ramesh Kumar, NCB, Chandigarh for depositing the same with Central Revenue Control Laboratory (CRCL), New Delhi for chemical analysis, which was deposited on 30.06.2005, regarding which receipt Ex.PD was issued.

7. Accused Ajit Singh was summoned on 12.07.2005 by way of Ex.P28. He also suffered a voluntary statement Ex.P29 without any threat, inducement and pressure. Such statement was also reduced into writing. In his statement, Ajit Singh admitted the manner and factum of recovery and also made confessional statement with regard to his role in illegal importation and transportation of the narcotic drug heroin across the Indo-Pak International Border. He was put under arrest by way of memos Ex.P30 & Ex.P31 at about 7.00 PM on 13.07.2005 after informing him grounds of arrest. Information in respect of his arrest Ex.P32 was also sent to SHO, P.S. Bhikhiwind, Amritsar after medical examination by way of Ex.P33 & Ex.P34. Ajit Singh was sent to judicial custody on 16.07.2005 by the Court of Judicial Magistrate Ist Class, Patti and information Ex.P35 was sent to the Superintendent, NCB. In his statement, Ajit Singh divulged the name of Aarsal Singh, Constable in BSF, who has conspired/abetted in the illegal importation/transportation of narcotic drug across the Indo-Pak International Border.

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8. On 27.07.2005, a request letter Ex.P36 was sent to the Inspector General (G), Punjab Frontiers, Jalandhar to hand over the custody of Constable Aarsal Singh for investigation in the crime of illegal importation/transportation of narcotic drug across Indo-Pak International Border. By issuing summons under Section 67 of the Act Ex.P38, Aarsal Singh was asked to appear before Balvinder Kumar for investigation. He also suffered a statement Ex.P39 admitting his participation in illegal importation of narcotic drug heroin across the Indo-Pak International Border, which was attested by the witnesses and signed by the accused. In pursuance of such statement, Aarsal Singh was also put under arrest vide Ex.P40 and information in this regard Ex.P41 & Ex.P43 were sent to the Commandant, 123 BN BSF, Bhikhiwind, District Amritsar and Superintendent, NCB, Chandigarh respectively by way of Ex.P37. This accused was medically examined by way of Ex.P42. Records of BSF were requisitioned through letter Ex.P44, which were received through letter Ex.P45. The record is Ex.P46.

9. After receipt of report of the CRCL Ex.PC, New Delhi dated 29.07.2005 to the effect that representative samples A-1 & B-1 derived from the seized contraband tested positive for diacetylmorphine on the basis of chemical and chromatographic examination and godown receipt Ex.P47, Balvinder Kumar – the Investigating Officer moved the present complaint by way of Ex.P48.

10. To prove its case, the prosecution examined PW-1 Sepoy Ramesh Kumar, who deposed with regard to the safe deposit of parcels in Central Revenues Control Laboratory (CRCL), New Delhi on 30.06.2005 and that the parcels were not tampered with during the period it remained in his custody.

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11. PW-2 Balvinder Kumar - the Investigating Officer detailed the investigations and the evidence oral as well as documentary collected during the same against the accused. In cross-examination, he stated that he is not in possession of any record showing that he is authorized to file instant complaint on behalf of the NCB though he stated that he can produce the same. He also denied the suggestion that the signatures of Aarsal Singh had been taken under the fear of death, coercion and torture on blank papers and that Aarsal Singh has been falsely implicated in this case.

12. PW-3 is O.P.Sharma, Superintendent, who after receiving telephonic information from BSF authorities brought the same to the notice of Zonal Director of NCB, Chandigarh. He also supported the prosecution version as deposed by PW-2 Balvinder Kumar – the Investigating Officer. He also deposed with regard to the safe custody of the articles recovered.

13. PW-4 Satpal Singh a Constable of BSF, posted at Border Out Post Dharma of 'B' Company, who on 28.06.2005 observed some movement about 100 metres ahead of fence near border at Pillar No.137/8 and informed the higher officials and testified the ocular version as to the apprehension of accused Naveed Masih leading to recovery of the contraband.

14. PW-5 is Shyam Kumar, who was posted as Company Commander 'B' Company, 123 BN BSF in Wan, K.S.Wala Dharma on 28.06.2005. He deposed that on receiving information in respect of some movements, he immediately rushed to the spot and found that naka party along with Post Commander had ordered the intruders to surrender and deposed that arrest of

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Naveed Masih and recovery of 8 Kgs. heroin. Thereafter, the evidence was closed by proving documents Exs.P1 to P48.

15. The incriminating circumstances appearing against all the accused were put to them while recording their statements under Sections 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code'). Appellants Aarsal Singh and Ajit Singh pleaded false implication and stated that their signatures were obtained on blank papers and that they did not give any voluntary statement to NCB Department, whereas Naveed Masih stated that he was watering in his fields near India-Pakistan border and BSF officials have falsely implicated him in this case and that he has no concern with Ajit Singh and Aarsal Singh. In defence, they examined DW-1 Nishan Singh, Sarpanch, who stated that he know Ajit Singh from his childhood and that he cannot speak/write Hindi or English and that he only can put his signatures in Punjabi. DW-2 Pargat Singh is stated to be a neighbourer of accused Ajit Singh. He states that he accompanied Ajit Singh to the police station and that the SHO was not aware why Ajit Singh has been brought to the police station. DW-3 is Constable Jagdish Chander, who brought the original record maintained by the BSF Authorities and stated that accused Aarsal Singh was made to close arrest from 19.07.2005 till 15.10.2005 and on 15.10.2005, he was handed over to NCB.

16. After considering the testimonies of all the witnesses, the learned Special Judge found the appellants guilty of the offences mentioned in the charge-sheet and, therefore, convicted and sentenced them in the manner mentioned above.

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17. Before this Court, learned counsel for the appellants has vehemently argued that the first version i.e. Ex.P3, a communication addressed by the Company Commander to the Commandant, Papa-I, BN BSF, Amarkot (Punjab), is silent about the throwing of packets by appellant Naveed Masih while raising his hands. It is only averred that intruder stood still for a while, but the man behind him ran away towards International Border. Therefore, the conscious possession of the contraband cannot be attributed to the said appellant. It is also argued that the burden of proof of conscious possession is on the prosecution. Reliance is placed upon Noor Agha Vs. Customs (2008) 16 SCC 417; Ritesh Chakraborty Vs. State of M.P. (2006) 12 SCC 321; Bhola Singh Vs. State of Punjab (2011) 11 SCC 653; Delhi Vs. Ram Avtar (2011) 12 SCC 207 and Ashok Kumar Vs. Rajasthan (2013) 2 SCC 67.

18. It is argued that the statements of Constable Satpal Singh and Shyam Kumar, who said to witness the occurrence, particularly throwing of packets, have not been recorded during the course of investigations as contemplated under Section 161 of the Code. The appellants were not aware the purpose of citing of such persons as witnesses in the complaint filed. Therefore, the appellants have been taken by surprise, therefore, the statements of PW-4 Constable Satpal Singh and PW-5 Shyam Kumar cannot be read in to as evidence.

19. Contending that the judgment of the Supreme Court in Kanhaiya Lal Vs. Union of India (2008) 4 SCC 668 is per incurium as the empowerment of as Officer-in-charge of a police station makes such empowered officer, as the police officer as laid down in later judgment in Noor Agha's case (supra).

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20. It is further argued that the confessions recorded under Section 67 of the Act have been retracted subsequently, therefore, such retracted confessions cannot be made basis of conviction of the appellants. Reliance is placed upon Noor Agha's case (supra); Francis Stanley Vs. NCB (2006) 13 SCC 210; Union of India Vs. Bal Mukand (2009) 12 SCC 161; Raju Premji Vs. Customs (2009) 16 SCC 496; Nirmal Pehalwan Vs. Inspector, Customs (2011) 12 SCC 298.

21. It is also submitted that the prosecution has not examined any independent witness of the process of recording of the confessional statements, therefore, the process of recording of confessional statements is highly suspicious and cannot be relied upon. Reliance is placed upon Punjab Vs. Jeet Singh 1992 (3) RCR (Cri.) 15; Bhoolan Vs. Punjab 1995 (3) RCR (Cri.) 505 and Karambir Vs. Haryana 1998 (2) RCR 684.

22. We have heard learned counsel for the parties at length but, we do not find any merit in the present appeals.

23. There is and cannot be any dispute with the argument that the initial burden of proof of commission of an offence is on prosecution. We find that in the present case, not only the prosecution has discharged the burden of proof of commission of offence on the basis of confessions though retracted subsequently, but also on the basis of the corroborative evidence produced on record.

24. The reliance of Ms. Bedi is on the judgment of Supreme Court in Noor Agha's case (supra), wherein while upholding the provisions of Section 35 and Section 54 of the Act, it was held that an empowered officer under the

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Customs Act, 1962, when exercises power under the Custom Act 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. It was, thus, held that confessional statement of an accused cannot be made use of in any manner under Section 138-B of the Customs Act. However, the Bench was not apprised of a Constitutional Bench judgment reported as Ramesh Chandra Mehta Vs. The State of W.B. AIR 1970 SC 940 as well as the judgments of Supreme Court in Raj Kumar Karwal Vs. Union of India (1990) 2 SCC 409 and Kanhaiya Lal Vs. Union of India (2008) 4 SCC 668.

25. A three Judges' Bench judgment reported as The State of Punjab Vs. Barkat Ram AIR 1962 SC 276 that held the Customs Officer is not a Police Officer for the purpose of Section 25 of the Evidence Act. It is the said view, which has been approved in Ramesh Chandra Mehta's case (supra). It was held that the duties imposed upon a Police Officer, the nature of authority conferred and the purpose of the Police Act, the powers which the police officers enjoy are powers for the effective prevention and detection of crime in order to maintain law and order, whereas the Customs Officer is not primarily concerned with the detection and punishment of crime committed by a person, but is mainly interested in the detection and prevention of smuggling of goods and safeguarding the recovery of customs duties.

26. In Raj Kumar Karwal's case (supra), the Supreme Court has held that the investing of powers of an officer-in-charge of Police Station does not make an Officer a 'Police Officer' under Section 25 of the Evidence Act, while examining the provisions of the Act in question itself. The Court observed as under:

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“20.Where, however, the arrest or seizure is effected by virtue of Section 41(2), 42, 43 or 44 the section enjoins upon the officer to forward the person arrested and the article seized to the officer-in-charge of the nearest police station or the officer empowered to investigate under Section 53 of the Act. Special provision is made in Section 52-A in regard to the disposal of seized narcotic drugs and psychotropic substances. Then comes Section 53 which we have extracted earlier. Section 55 requires an officer-in-charge of a police station to take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under the Act within the local area of that police station and which may be delivered to him. Section 57 enjoins upon any officer making an arrest or effecting seizure under the Act to make a full report of all the particulars of such arrest or seizure to his immediate official superior within 48 hours next after such arrest or seizure. These provisions found in Chapter V of the Act show that there is nothing in the Act to indicate that all the powers under Chapter XII of the Code, including the power to file a report under Section 173 of the Code have been expressly conferred on officers who are invested with the powers of an officer-in-charge of a police station under Section 53, for the purpose of investigation of offences under the Act.

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22. For the offences under the Act, the investigation is entrusted to officers in whom powers of an officer-in-charge of a police station are vested by a notification issued under Section 53 of the Act by the concerned government. Thus a special investigating agency is created to investigate the commission of offences under the Act.”

27. In Kanhaiya Lal’s case (supra), the accused were acquitted of the charges under the Act, but the High Court set aside the acquittal and convicted them solely relying upon confessional statement. The said conviction was upheld by the Supreme Court in Kanhaiya Lal’s case (supra).

28. In Francis Stanley’s case (supra), the Supreme Court held that an Officer of the Department of Revenue Intelligence is not a Police Officer and the confession made before such an Officer is not hit by Section 25 of the

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Evidence Act. Having said so, the Court said that confession made to an Officer, who has investigating powers, must be subject to closer scrutiny.

29. Similar view as in Raj Kumar Karwal's case (supra) has been taken later in State of Gujarat Vs. Anirudhsing (1997) 6 SCC 514 in respect of the officers of Bombay State Reserve Police Force Act, 1951; in Union of India Vs. Padam Narain Aggarwal (2008) 13 SCC 305 in respect of the Customs Act and Ram Singh Vs. Central Bureau of Narcotics (2011) 11 SCC 347 in respect of the Act in question. Though in Nirmal Pehalwan's case (supra), the Bench has referred to Noor Agha's case (supra) to hold that the confessional statement is not admissible, but in the said case again the earlier Constitutional Bench judgment was not brought to the notice with which we are bound nor the earlier judgment in Ram Singh's case (supra).

30. A Division Bench of this Court in CRA No.11-DB of 2010 titled 'Fatima Bibi Vs. Inspector of Customs' decided on 26.03.2013 has examined the judgments of Supreme Court in Raj Kumar Karwal; Anirudhsing; Padam Narain Aggarwal and Ram Singh cases (supra) and held that the statement recorded by an empowered officer is not inadmissible in evidence and is relevant for determining the commission of offence by an accused. The said Division Bench has also found that confession recorded under the Customs Act can form sole basis of conviction in criminal trial for offence punishable under Indian Penal Code. Reference was made to Bhagwan Singh V/s. State of Punjab AIR 1952 SC 214 and Pavunny Vs. Assistant Collector 1997 (3) SCC 721. Thus, we find that the empowered officers under the Act are not the police officials and that the confessions recorded by such officers are admissible in evidence.

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31. It is also contended that the NCB is an organization for detection of crime and bringing an accused to book, therefore, it is analogous to police force and is required to lodge an FIR in terms of the provisions of the Code. It is contended that once the officials of the NCB have been invested with the powers of Officers-in-charge of a Police Station in terms of Section 53 of the Act, it necessarily implies that they are required to follow the procedure as contained under Chapter XII of the Code. It is argued that the applicability of different procedure only for the reason that the complaint has been filed by the NCB and not by the Police is discriminatory and violative of Article 14 of the Constitution and, thus, not sustainable.

32. The argument raised by the learned counsel for the appellants is fallacious. The Police Act, 1861 provides for the constitution of the Police Force. Section 2 of the said Act provides that the entire police establishment under a State Government for the purposes of the said Act be deemed to be one Police force and shall be formally enrolled and consisting of such number of Officers and men and shall be constituted in such a manner as ordered by the State Government. An Officer appointed under the said Act is to receive on his appointment a certificate in a form annexed with the Act in terms of Section 8 of the said Act. In Barkat Ram's case (supra), relying upon preamble of the Police Act, it was held that the police is an instrument for the prevention and detection of crime, whereas Sections 23 & 25 of the said Act details the duties of the Police Officers. The important duties are to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances and to detect and bring offenders to justice and to

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apprehend all persons whom the police officer is legally authorized to apprehend.

33. In the Code, Section 2(d) defines ‘complaint’ to mean any allegation made orally or in writing to a Magistrate with a view to his taking action under the Code, but excludes a police report. The ‘police report’ is a report forwarded by a Police Officer to a Magistrate under sub-Section (2) of Section 173 of the Code (*Section 2(r)*). Section 2(s) defines ‘police station’ to mean any post or place declared generally or specially by the State Government to be a police station. Sub-section (2) of Section 4 of the Code contemplates that all offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. The ‘inquiry’ in terms of Section 2 (g) of the Code means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court, whereas ‘investigation’ under Section 2 (h) of the Code includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person other than a Magistrate, who is authorized by a Magistrate.

34. Chapter XII of the Code starting from Section 154 to Section 176 deals with information to the Police and the powers of the police to investigate into the allegations. Section 154 contemplates information relating to commission of a cognizable offence given to an officer-in-charge of a police station. Section 161 deals with examination of witness by a police officer making an investigation. After such investigation is completed in terms of

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Section 2 (h) of the Code, an Officer-in-charge of the police station forwards to a Magistrate a police report in the form prescribed. Therefore, Chapter XII of the Code deals with the jurisdiction of the Police constituted under the Police Act, 1861 and in respect of the activities of such Police in the Police Station.

35. The power of investigation vested with the empowered Officer of the NCB under the Act is not analogous to powers of investigation conferred on a police officer under Chapter XII of the Code. The expression ‘investigation’ of the offences in the Act is restricted to carry out the duties conferred on an empowered officer to give effect to the provisions of the Act. In Ramesh Chandra Mehta’s case (supra), the Constitutional Bench has also examined the scope of the powers of an empowered officer of the revenue. The Court inter-alia observed as under:

“24.He (Police Officer) is, it is true, invested with the powers of an officer in charge of a police station for the purpose of releasing any person on bail or otherwise. The expression “or otherwise” does not confer upon him the power to lodge a report before a Magistrate under Section 173 of the Code of Criminal Procedure. Power to grant bail, power to collect evidence, and power to search premises or conveyances without recourse to a Magistrate, do not make him an officer in charge of a police station. Proceedings taken by him are for the purpose of holding an enquiry into suspected cases of smuggling. His orders are appealable and are subject also to the revisional jurisdiction of the Central Board of Revenue and may be carried to the Central Government. Powers are conferred upon him primarily for collection of duty and prevention of smuggling. He is for all purposes an officer of the revenue.”

36. In Directorate of Enforcement Vs. Deepak Mahajan & another AIR 1994 SC 1775, in an appeal arising out of Foreign Exchange Regulation Act, 1973, the Supreme Court observed that the provisions of the said Act and the Customs Act are vital for the economic development of the country and

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augmentation of revenue. The Court while considering; whether the authorized or empowered officer under FERA or Customs Act exercises all or any of the powers of a police officer outlined under Chapter XII of the Code and conducts any investigation with the meaning of Section 2 (h) of the Code, observed as under:

“115. It should not be lost sight of the fact that a police officer making an investigation of an offence representing the State files a report under Section 173 of the Code and becomes the complainant whereas the prosecuting agency under the special Acts files a complaint as a complainant i.e. under Section 61(ii) in the case of FERA and under Section 137 of the Customs Act. To say differently the police officer after consummation of the investigation files a report under Section 173 of the Code upon which the Magistrate may take cognizance of any offence disclosed in the report under Section 190(1)(b) of the Code whereas the empowered or authorized officer of the special Acts has to file only a complaint of facts constituting any offence under the provisions of the Act on the receipt of which the Magistrate may take cognizance of the said offence under Section 190(1)(a) of the Code. After taking cognizance of the offence either upon a police report or upon receiving a complaint of facts, the Magistrate has to proceed with the case as per the procedure prescribed under the Code or under the special procedure, if any, prescribed under the special Acts.”

37. Still further, Section 190, which is part of Chapter XIV of the Code, empowers a Magistrate to take cognizance of the offences (i) upon receiving a complaint of facts, which constitute an offence; (ii) upon a police report of such facts; (iii) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed. Thus, a Magistrate takes cognizance of an offence not only on the basis of report of the police, but also on the basis of a complaint. Under the Act, the police have also the power to investigate. When the police investigate into an offence under the Act, Chapter XII would be applicable culminating

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with the police report which shall form basis for the Court of Sessions to take cognizance and to conduct inquiry under the Code.

38. Apart from the police constituted under the Police Act, 1861, certain Officers of specified organizations have been invested powers of an Officer-in-charge of a Police Station. With such conferment of powers, the investigation of the offences can be conducted by the officers, but such power of investigation is under a special Act and not under the Code. After such investigation, which is not any way analogous to the investigation carried out by police under Section 2 (h) of the Code, the empowered Officer can file a complaint in terms of Section 190 of the Code.

39. Though Section 193 of the Code prohibits that no Court of Sessions shall take cognizance of any offence as a Court of Original Jurisdiction unless the case has been committed to it by a Magistrate, but such provision being in conflict with Section 36A of the Act, the police report or a complaint can be filed before the Court of Sessions directly. When a complaint is filed, the Court of Sessions commences proceedings regulated by Chapter XV of the Code. Such provision inter alia contemplates that if a complaint is made in writing, the Magistrate is not required to examine the complainant and the witnesses, if a public servant acting or purporting to act in the discharge of his official duties files a complaint. The Code contemplates investigation by the police culminating with the filing of a police report and also proceedings to be initiated on the basis of a complaint by an empowered Officer in terms of Chapter XV of the Code. Therefore, when a police in terms of Code investigates into an offence including an offence under the Act, it files a report under Section 173 of the Code, whereas the investigation by an empowered

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officer under the Act leads to filing of a complaint in terms of Section 190 of the Code.

40. Thus, the argument that the statements of PW-4 Constable Satpal Singh and PW-5 Shyam Kumar were neither recorded nor supplied to the appellants while filing complaint is not tenable in law. Such witnesses were not examined by the “police officials” during the course of investigations so as to record their statements as provided under Section 161 of the Code. It is the duty of the police official to record statement, supply copy of such statement, as part of the report under Section 173 of the Code, so as to enable the defence to contradict a witness while stepping into witness-box. But it is not necessary for the empowered Officer to record statements of the witnesses contemplated under Section 161 of the Code, as such statements can be recorded only by a Police Officer during the course of investigation. In the present case, the empowered Officer produced a list of 40 documents sought to be relied upon to prove the charges against the appellants including the statements recorded under Section 67 of the Act as well furnished list of witnesses to be examined. Since there is no obligation to record statements by the empowered Officer analogous to Section 161 of the Code, the disclosing the names of the witnesses along with the complaint is compliance of Chapter XV of the Code. The providing of different procedures for filing of complaint by the empowered officers and a report by the police cannot be said to be discriminatory as both of these procedures is to enable the court to pronounce on the guilt of an accused.

41. Therefore, we do not find any merit in the argument that the empowered officers of the NCB under the Act are the police officers and are

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bound to carry investigations under the Act in accordance with Chapter XII of the Code after lodging of an FIR.

42. In the light of the judgments and the facts on record as discussed above, now we shall examine the role of the each of the Appellant for the purpose of commission of offences under the Act.

Re.: Naveed Masih

43. The only argument on facts which require examination is that in the first information (Ex.P3) given by the Company Commander to the Commandant, there is no reference to throwing of packet by the appellant Naveed Masih. Therefore, the conscious possession of contraband at the time of his arrest is not proved.

44. The information (Ex.P3) is in brief to inform a superior official about the occurrence. Such information is not encyclopedia of the complainant's case. In the statement recorded on the same day, the appellant Naveed Masih has given graphic details of procurement of heroin, their modus operandi and the circumstances leading to his arrest.

45. Appellant Naveed Masih was produced before the Magistrate on 29.06.2005 and has not made any grievance in respect of recording of any statement by the official of the NCB. He had an opportunity to retract his confession at any time before the filing of the complaint or even during trial. However, appellant Naveed Masih chooses to retract his confession only at the time of recording of his statement under Section 313 Cr.P.C. Apart from the

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fact that such retraction is delayed and is an afterthought, the fact remains that the prosecution has corroborated the circumstances leading of recovery including throwing of packets at the time of raising hands to surrender.

46. The confessional statement suffered by Naveed Masih is corroborated by the statements of PW-4 Constable Satpal Singh and PW-5 Shyam Kumar, who have seen the appellant throwing packet while raising hands. Such packet was subsequently recovered and found to be containing heroin. The testimonies of PW-4 Constable Satpal Singh and PW-5 Shyam Kumar could not be shattered in the cross-examination in any material particulars.

47. The argument that independent witnesses associated at the time of recording of confessional statement were not examined in Court is again untenable. The recording of confessional statement is by an empowered officer, therefore, such statement can be proved by the officer, who recorded such statement as well as by the witnesses, who have present at the time of recording of such statement. It is not necessary for the complainant to examine each and every witness, when the primary witness, who recorded the statement, has been examined in Court. Therefore, we do not find any merit in the said argument as well.

48. Ms. Bedi argued that the appellant Naveed Masih could be convicted for the offences punishable either under Sections 21 & 23 of the Act, but not under both the offences. We do not find any merit in the said argument as well. Section 21 of the Act deals with possession of any manufactured drug or any preparation containing any manufactured drug, whereas Section 23 of

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the Act deals with punishment for illegal import in to India of narcotic drugs and psychotropic substances. Since, the appellant Naveed Masih was found in possession of manufactured drug and was also importing the same to India, therefore, he is liable to be punished both under Sections 21 & 23 of the Act.

49. Thus, we do not find any error in the findings recorded by the learned trial Court that the appellant was in possession of heroin and was importing the said prohibited narcotics to India.

Re.: Ajit Singh

50. The NCB officers while stepping into witness box have proved the confessional statement given by Ajit Singh – appellant as Ex.P29. In his confessional statement, Ajit Singh stated that on 27.06.2005, he along with Balvinder Kumar @ Bhinda, Ranjit Singh son of Didar Singh and Bajja Singh @ Bajja proceeded towards BPO Dharma, BSF at about 9.00 PM as per planning after mobile phone conversation with Chaudhary Mansa Sandhu, resident of Lahore, Pakistan. They hide themselves at a distance of about 500 meters from the fencing. One BSF Constable Aarsal Singh on duty talked to Chaudhary Mansa Sandhu on mobile phone regarding throwing of heroin packet from above the fencing. He stated that as per time fixed with Aarsal Singh, 8 Kg. heroin packet had to be thrown towards Indian territory from above the fencing at about 1.15 AM on 28.06.2005 from Pakistan side on torch light signal, but BSF Constable posted near Naka No.85 challenged that party standing on Pakistan side while Aarsal Singh was ready on the other side. The BSF Constable asked the other party to surrender and also informed to the guard Commander posted at the Border. In between noise of firing/shelling

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from Pakistan side was heard and they all ran and came towards Village Dal. In the meanwhile, Aarsal Singh informed him on mobile phone that the consignment of heroin has been seized. He further stated that with the help of Aarsal Singh, they have been able to get the consignment two times from this area earlier. He stated that after getting consignment from across the border, he used to hand over the same to a man named Chhotu, who comes in a white Maruti-800 car and takes the whole banned materials and in lieu of it gives them Rs.20,000/- per Kg. A perusal of such confessional statement shows that Ajit Singh gave graphic detail of manner of operation regarding importation/transportation of drug. Such statement stands corroborated by the confessional statement of Naveed Masih, the co-accused given to an empowered officer on 28.06.2005. Thus, the appellant has been rightly convicted for an offence under Section 29 of the Act.

Re.: Aarsal Singh

51. The empowered officer has also recorded confessional statement of Constable Aarsal Singh (Ex.P39). In his statement, Aarsal Singh stated that he has been operating the heroin smuggling since the year 2004 with his companions Ajit Singh, Balvinder Singh, Ranjit Singh and Baj Singh and that they had conversation with each other on mobile phone in this context. He stated that for the first time smuggling took place in the first week of February, 2005 and second time in the end of this month. He stated that this all was done as per the directions coming from Pakistani side as per planning and that in lieu of this, he got Rs.20,000/- twice. He stated that he remained on duty from 12.00 mid-night to 0130 hours and in this period, he materialized this smuggling process. He stated that he informed to his companion on mobile

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phone that consignment has been caught today. The said statement of Constable Aarsal Singh stands corroborated by the statements of co-accused Naveed Masih and Ajit Singh. Ex.P46 is the duty roster showing Constable Aarsal Singh to be on duty at Check Post No.85, BSF Company Headquarters on 28.06.2005. Thus, the finding recorded by the learned trial court does not warrant any interference in appeal.

52. The last argument raised by the learned counsel for the appellants Ajit Singh and Aarsal Singh is that no recovery of prohibited narcotic substance has been effected from their person, therefore, they cannot be convicted for an offence under Section 29 of the Act.

53. The statements of the appellants themselves recorded under Section 67 of the Act disclose the active role played by each of the appellant in import and/or transportation of heroin from outside the country. Such statements stand corroborated from the statement of Naveed Masih and of each other.

54. Aarsal Singh was on duty as a Constable in BSF, whose duty was to guard border at the relevant time, but it was he, who gave signal to the intruders from Pakistan side, to facilitate movement of drugs. He is a party to a criminal conspiracy. Though Aarsal Singh was to give torch signal, but the packet to be thrown from above the fence to this side of the country was to be lifted by appellant Ajit Singh. He is also as much part of the conspiracy as Aarsal Singh, as without his active cooperation, smuggling of heroin could not have been completed. Appellants Ajit Singh and Aarsal Singh have been rightly convicted with the aid of Section 29 of the Act as party to conspiracy of illegal

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import of narcotics to India as well as for possessing and transporting the narcotics in terms of Sections 23 & 21 of the Act.

55. Now coming to the question of sentence, we again find no reason to reduce the sentence. Aarsal Singh was a member of disciplined force, deputed to guard the Border of the country, but involved in facilitating the smuggling of heroin, he does not deserve any indulgence in the quantum of sentence. On the other hand, Ajit Singh appellant has helped in smuggling of heroin only for money. As per his statement, this was not his first attempt to smuggle heroin. Therefore, he also does not deserve any leniency in the quantum of sentence. Appellant Naveed Masih is a Pakistani National and has indulged in trade of heroin from across the border. Such person also does not deserve any indulgence in the matter of quantum of sentence.

56. The three appellants have actively conspired with each other to facilitate smuggling of narcotics across the border and as a consequence of this have lent material and constructive support and abetted the commission of offences under the Act. The conduct of the appellants leads to reasonable inference that each of them was conspirators in terms of Section 10 of the Evidence Act. Recovery of huge quantity of 8 Kgs. of heroin rules out any false implication, when the direct & circumstantial evidence materially corroborates it.

57. In view of the above discussion, we find that the judgment of conviction and order of sentence rendered by the Special Court is based on the correct appreciation of evidence, as the prosecution has completed the chain of

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events, which point out to the guilt of the accused. Therefore, the appellants have been rightly convicted and sentenced by the learned trial Court.

58. Consequently, all the appeals are dismissed.

(HEMANT GUPTA)
JUDGE

October 21, 2013
Vimal

(FATEH DEEP SINGH)
JUDGE