REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.152 OF 2013

TOFAN SINGH …Appellant

Versus

STATE OF TAMIL NADU …Respondent

WITH

CRIMINAL APPEAL NO. 1750 OF 2009
CRIMINAL APPEAL NO. 2214 OF 2009
CRIMINAL APPEAL NO. 827 OF 2010
CRIMINAL APPEAL NO. 835 OF 2011
CRIMINAL APPEAL NO. 836 OF 2011
CRIMINAL APPEAL NO. 344 OF 2013
CRIMINAL APPEAL NO. 1826 OF 2013
CRIMINAL APPEAL NO. 433 OF 2014
SPECIAL LEAVE PETITION (CRL.) NO. 6338 OF 2015
CRIMINAL APPEAL NO. 77 OF 2015
CRIMINAL APPEAL NO. 90 OF 2017
CRIMINAL APPEAL NO. 91 OF 2017
SPECIAL LEAVE PETITION (CRL.) NO. 1202 OF 2017

J U D G M E N T

R.F. Nariman, J.

1. These Appeals and Special Leave Petitions arise by virtue of a reference order of a Division Bench of this Court reported as **Tofan Singh v. State of Tamil Nadu** (2013) 16 SCC 31. The facts in that

appeal have been set out in that judgment in some detail, and need not be repeated by us. After hearing arguments from both sides, the Court recorded that the Appellant in Criminal Appeal No.152 of 2013 had challenged his conviction primarily on three grounds, as follows:

> "**24.1.** The conviction is based solely on the purported confessional statement recorded under Section 67 of the NDPS Act which has no evidentiary value inasmuch as:
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> (a) The statement was given to and recorded by an officer who is to be treated as "police officer" and is thus, hit by Section 25 of the Evidence Act.
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> (b) No such confessional statement could be recorded under Section 67 of the NDPS Act. This provision empowers to call for information and not to record such confessional statements. Thus, the statement recorded under this provision is akin to the statement under Section 161 CrPC.
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> (c) In any case, the said statement having been retracted, it could not have been the basis of conviction and could be used only to corroborate other evidence."

2. Under the caption "Evidentiary value of statement under section 67 of the Narcotic Drugs and Psychotropic Substances, Act, 1985 ("**NDPS Act**")", the Court noted the decisions of **Raj Kumar Karwal v. Union of India** (1990) 2 SCC 409 and **Kanhaiyalal v. Union of India** (2008) 4 SCC 668, as also certain other judgments, most notably **Abdul Rashid v. State of Bihar** (2001) 9 SCC 578 and **Noor Aga v. State of Punjab** (2008) 16 SCC 417, and thereafter came to the conclusion that the NDPS Act, being a penal statute, is in contradistinction to the Customs Act, 1962 and the Central Excise Act, 1944, whose dominant object is

to protect the revenue of the State, and that therefore, judgments rendered in the context of those Acts may not be apposite when considering the NDPS Act – see paragraph 33. After then considering a number of other judgments, the referral order states that a re-look into the ratio of **Raj Kumar Karwal** (supra) and **Kanhaiyalal** (supra) would be necessary, and has referred the matter to a larger Bench thus:

> "**41.** For the aforesaid reasons, we are of the view that the matter needs to be referred to a larger Bench for reconsideration of the issue as to whether the officer investigating the matter under the NDPS Act would qualify as police officer or not.
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> **42.** In this context, the other related issue viz. whether the statement recorded by the investigating officer under Section 67 of the Act can be treated as confessional statement or not, even if the officer is not treated as police officer also needs to be referred to the larger Bench, inasmuch as it is intermixed with a facet of the 1st issue as to whether such a statement is to be treated as statement under Section 161 of the Code or it partakes the character of statement under Section 164 of the Code.
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> **43.** As far as this second related issue is concerned we would also like to point out that Mr Jain argued that the provisions of Section 67 of the Act cannot be interpreted in the manner in which the provisions of Section 108 of the Customs Act or Section 14 of the Excise Act had been interpreted by a number of judgments and there is a qualitative difference between the two sets of provisions. Insofar as Section 108 of the Customs Act is concerned, it gives power to the custom officer to summon persons "to give evidence" and produce documents. Identical power is conferred upon the Central Excise Officer under Section 14 of the Act. However, the wording to Section 67 of the NDPS Act is altogether different. This difference has been pointed out by the Andhra Pradesh High Court in *Shahid Khan* v. *Director of Revenue Intelligence* [2001 Cri LJ 3183 (AP)]."

3. Shri Sushil Kumar Jain, learned Senior Advocate appearing for the Appellants in Criminal Appeal Nos. 152 of 2013; 836 of 2011; 433 of 2014; 77 of 2015 and 1202 of 2017, outlined six issues before us, which really boil down to two issues, namely:

> "1. Whether an officer "empowered under Section 42 of the NDPS Act" and/or "the officer empowered under Section 53 of the NDPS Act" are "Police Officers" and therefore statements recorded by such officers would be hit by Section 25 of the Evidence Act; and
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> 2. What is the extent, nature, purpose and scope of the power conferred under Section 67 of the NDPS Act available to and exercisable by an officer under section 42 thereof, and whether power under Section 67 is a power to record confession capable of being used as substantive evidence to convict an accused?"

4. Shri Jain took us through the provisions of the NDPS Act which, according to him, is a special Act, and a complete code on the subject it covers. He referred to how the NDPS Act sometimes overrides the Code of Criminal Procedure, 1973 ("**CrPC**"); sometimes says that it is applicable; and sometimes states that it is made applicable with necessary modifications. According to Shri Jain, section 41(2) and section 42 of the NDPS Act refer to a 'First Information Report' being lodged by the officers referred to therein. As the source of information is required to be kept a secret under section 68 of the NDPS Act, the officer receiving information under these provisions is therefore treated as an informant. The tasks assigned to officers under section 42 of the NDPS Act are four in number, namely, entry, search, seizure or arrest.

As opposed to this, section 53 of the NDPS Act invests the designated officers with all the powers of an 'officer-in-charge of a police station' for the process of investigation, which would then begin after information collected by a section 42 officer is handed over to the officer designated under section 53, and end with a final report being submitted under section 173 of the CrPC to the Special Court under section 36A(1)(d) of the NDPS Act. According to the learned Senior Advocate, section 67 is to be read only with section 42, and is a power to call for information so that the "reason to believe" mentioned in section 42 can then be made out, without proceeding further under the NDPS Act. Thus, "reason to believe", which is at a higher threshold than "reason to suspect" – which phrase has been used in section 49 of the NDPS Act – is a condition precedent to the officer thereafter moving forward. Shri Jain argued that the reason to believe must be formed before the officer acts, and that therefore, section 67 operates at a stage antecedent to the exercise of the powers of the officer designated under section 42. He then went on to argue that these provisions must be construed strictly in favour of the subject, inasmuch as they impinge upon the fundamental right to privacy, recently recognised by this Court in **K.S. Puttaswamy and Anr. v. Union of India and Ors.** (2017) 10 SCC 1. He also argued that the NDPS Act therefore incorporates a legislative balance between powers of investigation and the obligation to uphold privacy rights of the

individual. He then went on to argue that the “information” under section 67 of the NDPS Act cannot be equated with “evidence”, which is only evidence before a court, as per the definition of “evidence” under the Indian Evidence Act, 1872 (“**Evidence Act**”). He cited judgments to show that even witness statements made under section 164 of the CrPC are not substantive evidence. He then contrasted section 67 of the NDPS Act with the power of officers under revenue acts to record evidence, such as section 108 of the Customs Act 1962, and section 14 of the Central Excise Act 1944. He then went on to state that as none of the safeguards contained in sections 161-164 of the CrPC are contained in the NDPS Act when the person is examined under section 67, obviously statements made to officers under section 67 cannot amount to substantive evidence on the basis of which conviction can then take place. An important argument was that it would be highly incongruous if an officer of the police department, empowered under section 42 and exercising the same powers under section 67, records a confessional statement which would be hit by section 25 of the Evidence Act, whereas officers exercising the same powers under the NDPS Act, who are not regular policemen, would be able to record confessional statements, and bypass all constitutional and statutory safeguards. Shri Jain contended that as the provisions of the NDPS Act are extremely stringent, they must be strictly construed, and safeguards

provided must be scrupulously followed. According to him, arbitrary power conferred under section 67 upon an officer above the rank of peon, sepoy or constable, but denied to a senior officer under section 53, would be *ex facie* contrary to Article 14 of the Constitution. On the other hand, section 53 statutorily confers powers on the named officer of an officer-in-charge of a police station for the investigation of the offences under the NDPS Act. This, according to the learned counsel, would contain the entire gamut of powers contained in sections 160-173 of the CrPC, including the power to then file a charge-sheet before the Special Court under section 36A(1)(d) of the NDPS Act. The learned counsel argued that section 53A of the NDPS Act shows that confessional statements that are made under section 161 of the CrPC, which are otherwise hit by section 162 of the CrPC, are made relevant only in the two contingencies mentioned under section 53A of the NDPS Act, being exceptions to the general rule stated in section 162 of the CrPC. He contended, therefore, that section 67 of the NDPS Act cannot be used to bypass section 53A therein and render it otiose. He stressed the fact that all offences under the NDPS Act are cognizable offences, unlike under revenue statutes like the Customs Act, 1962 and Central Excise Act, 1944, and then argued that the “complaint” that is referred to in section 36A(1)(d) of the NDPS Act has only reference to a complaint filed under section 59(3) therein. He also pointed out the

anomalies of granting to the concerned officer under section 53 all the powers of the officer-in-charge of a police station, which, unless it ends up in the form of a final report, would leave things hanging. Thus, if the concerned officer finds that there is no sufficient evidence, and that the accused should be released, section 169 of the CrPC would apply. In the absence of section 169 of the CrPC, as has been contended by the other side, there is no procedure for discharge of the accused if evidence against him is found to be wanting. In a without-prejudice argument that complaints under the NDPS Act can be made outside of section 59(3), Shri Jain stressed the fact that there is in reality and substance no difference between the "complaint" under the NDPS Act and the charge-sheet under the CrPC, as investigation has already been carried out even before the complaint under the NDPS Act is made. He therefore argued that both **Raj Kumar Karwal** (supra) and **Kanhaiyalal** (supra) require to be overruled by us, as they erroneously applied earlier judgments which concerned themselves with revenue statutes, and not penal statutes like the NDPS Act. He then referred us to Article 20(3) of the Constitution, and section 25 of the Evidence Act, and cited a plethora of case law to drive home the point that in this country, as coercive methods are used against persons during the course of investigation, all confessions made to a police officer, whether made during the course of investigation or even before, cannot be relied

upon as evidence in a trial. He then referred to several judgments of this Court to state that the expression “police officer” is not defined, and the functional test therefore must apply, namely, that a person who is given the same functions as a police officer under the CrPC, particularly in the course of investigating an offence under the Act, must be regarded as a police officer for the purpose of section 25 of the Evidence Act. In the course of his submissions, he referred to a number of judgments of this Court, and most particularly, the judgments of **State of Punjab v. Barkat Ram** (1962) 3 SCR 338; **Raja Ram Jaiswal v. State of Bihar** (1964) 2 SCR 752; **Badku Joti Savant v. State of Mysore** (1966) 3 SCR 698; **Romesh Chandra Mehta v. State of West Bengal** (1969) 2 SCR 461; **Illias v. Collector of Customs, Madras** (1969) 2 SCR 613; and **Balkishan A. Devidayal v. State of Maharashtra** (1980) 4 SCC 600. He also provided a useful chart of the difference in the provisions contained in the NDPS Act and the Railway Property (Unlawful Possession) Act, 1966, the Sea Customs Act, 1878, the Central Excise Act, 1944, and the Customs Act, 1962.

5. Shri Puneet Jain supplemented these arguments with reference to a recent judgment of a Constitution Bench of this Court in **Mukesh Singh v. State (Narcotic Branch of Delhi)** 2020 SCC OnLine SC 700, and stated that as some discordant notes are to be found in that judgment, it may be referred to a larger Bench. In any case, he argued that the

comments made in that judgment about investigation starting from the section 42 stage itself were only in the context of the complainant and the investigator being the same, in which case, if prejudice was caused, the trial may be vitiated in terms of the judgment.

6. Shri Anand Grover, learned Senior Advocate, appearing for the Appellant in Criminal Appeal No. 90 of 2017, followed in the wake of the two Jains, père et fils. The learned Senior Advocate stressed the various provisions of the NDPS Act which showed that it was extremely stringent, in that it had minimum sentences for even possession of what is regarded as a "commercial quantity" of a drug or psychotropic substance, being a minimum sentence of rigorous imprisonment of 10 years, going up to 20 years. This, coupled with various presumptions raised against the accused, and stringent bail conditions, all made the NDPS Act a very stringent measure of legislation, which, the more stringent it is, must contain necessary safeguards against arbitrary search, seizure and arrest, or else it would fall foul of the fundamental rights chapter of the Constitution. He argued that the NDPS Act was penal in nature, and contained regulatory provisions as well, but given the fact that we are concerned only with the penal provisions, could be distinguished from the revenue statutes whose dominant object is the collection of revenue, and not the punishment of crime. He stressed the fact that the "enquiry" under section 67 of the NDPS Act is not a judicial

enquiry, but only a preliminary fact-finding exercise before a "reason to believe" is formed under section 42, which could then lead to investigation of an offence under the Act. He also referred to section 50 of the NDPS Act, and stated that given a higher protection as to conditions under which a search of person may be conducted, it would be inconceivable to then conclude that under section 67, confessional statements can be recorded without more, subject to no safeguards whatsoever, on which convictions can then be based. He relied strongly on **State of Punjab v. Baldev Singh** (1999) 6 SCC 172 and its aftermath **Vijaysinh Chandubha Jadeja v. State of Gujarat** (2011) 1 SCC 609 to argue that even after sub-sections (5) and (6) were added to section 50 of the NDPS Act, they did not dilute what was contained in section 50(1)-(4), and could only be used in emergent and urgent situations. He referred to statutes like the Terrorist and Disruptive Activities (Prevention) Act, 1987 ("**TADA**"), and stated that where under certain limited circumstances exceptions were made to section 25 of the Evidence Act, they were hedged in with a number of safeguards, as were laid down by this Court in **Kartar Singh v. State of Punjab** (1994) 3 SCC 569. According to him, therefore, "police officer" needs to be construed functionally to include special police officers under the NDPS Act, in the context of confessions made, with reference to section 25 of

the Evidence Act. He joined Shri Jain in asking for an overruling of **Raj Kumar Karwal** (supra) and **Kanhaiyalal** (supra).

7. Shri S. Nagamuthu, learned Senior Advocate appearing on behalf of the Appellant in Criminal Appeal No. 1826 of 2013, referred to sections 41 to 43 of the NDPS Act, and emphasised the fact that no powers to "investigate" any offences are vested in the officers mentioned in these sections. He then referred to section 36 of the CrPC, and said that the scheme followed in the NDPS Act could be assimilated to section 36, in that, police officers superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station. He emphasised the fact that section 25 of the Evidence Act only applies to confessions made against the maker, as against statements recorded under section 161 of the CrPC, which are completely barred from being received in evidence under section 162 of the CrPC, save and except for purposes of contradiction. He argued that a confessional statement made to a section 41 or section 42 officer was also hit by section 25 of the Evidence Act. He added that the special procedure in section 36A of the NDPS Act applies only qua offences punishable for a term of more than three years, and where offences under the Act are punishable for terms up to three years, they are to be tried by a Magistrate under the CrPC. Obviously, officers

under section 53 of the NDPS Act would investigate an offence under the Act that is punishable for a term up to three years, and file a police report, as no complaint procedure, being the procedure under section 36A of the NDPS Act, would then apply. According to him, this would show that investigation does culminate in a police report for offences punishable for a term up to three years, as a result of which section 36A(1)(d) has to be read as providing two methods of approaching a Special Court – one, by way of a police report, and the other, by way of a complaint to the Special Court.

8. Shri Uday Gupta, learned Advocate appearing on behalf of the Appellant in Criminal Appeal No. 344 of 2013, supplemented the arguments of his predecessors, and stressed the fact that the "enquiry" under section 67 of the NDPS Act cannot possibly be governed by the definition of "inquiry" under section 2(g) of the CrPC, as that "inquiry" relates only to inquiries conducted by a Magistrate or Court. Hence, the expression "enquiry" under section 67 must be given its ordinary meaning, which would indicate that it is only a preliminary fact-finding enquiry that is referred to. He relied strongly on the Directorate of Law Enforcement Handbook, in which the Directorate made it clear that when statements are recorded under section 67 of the NDPS Act by the police, these would amount to statements under section 161 of the CrPC. He contended that if this is so, it would be extremely anomalous

to have statements recorded under section 67 by officers other than the police – mentioned under sections 41 and 42 of the NDPS Act, which are not statements made under section 161 of the CrPC – being admissible in evidence, on which a conviction of an accused can then be based.

9. Shri Gupta was followed by Shri Sanjay Jain, learned Advocate appearing on behalf of the Appellant in Criminal Appeal No. 1750 of 2009, who supplemented the arguments of his predecessors by referring to section 53A, and notifications made under section 53, of the NDPS Act. He reiterated that officers under section 42 and officers under section 53 of the NDPS Act perform different functions, and that a section 53 officer, being empowered to "investigate", most certainly has the power to file a police report before the Special Court.

10. Shri Aman Lekhi, learned Additional Solicitor General, appearing on behalf of the Union of India, took us through the NDPS Act, and said, that read as a whole, it is a balanced statute which protected both the investigation of crime, as well as the citizen, in that several safeguards were contained therein. He was at pains to point out that it was not his case that a confession recorded under section 67 of the NDPS Act, without more, would be sufficient to convict a person accused of an offence under the Act. According to him, this could only be done if section 24 of the Evidence Act was met, and the Court was satisfied that the confession so recorded was both voluntary and truthful. In any

case, he asserted that the safeguards that have been pointed out in **D.K. Basu v. Union of India** (1997) 1 SCC 416 at 435, 436, have now largely been incorporated in Chapter V of the CrPC, which safeguards would also operate qua confessions recorded under section 67 of the NDPS Act. According to him, section 67 on its plain language does not refer to the "information" spoken of in section 42, as it uses the expression "require" any person to produce or deliver a document, as opposed to information "called for" from such persons. He also argued, based on judgments of this Court, that confessions, if properly recorded, are the best form of evidence, as these are facts known to the accused, about which he then voluntarily deposes. He also argued that section 190 of the CrPC is not completely displaced by section 36A(1)(d) of the NDPS Act, in that the requirement of the filing of a complaint and/or a police report contained in section 190 continues to apply, in support of the decision in **Raj Kumar Karwal** (supra). He then referred in detail to **Badku Joti Savant** (supra), and stated that this judgment was not considered in the reference order, and that finally, the only test that is laid down by several Constitution Bench judgments to determine whether a person is or is not a "police officer" is whether such person is given the right to file a report under section 173 of the CrPC. He made it clear that section 53 of the NDPS Act did not deem the officers named therein to be police officers – they were only given certain powers of

investigation, which did not ultimately lead to filing of a charge-sheet under section 173 of the CrPC. What was clear was that only a "complaint" could be filed by such officers under section 36A(1)(d) of the NDPS Act – the police report being only filed by the police force as constituted under the Police Act, 1861. He disagreed vehemently with the submission of Shri Jain that the "complaint" under section 36A(1)(d) would refer only to the complaint under section 59(3) of the NDPS Act, and referred to section 2(xxix) of the NDPS Act to refer to the definition of "complaint" under section 2(d) of the CrPC, which is used in the same sense as in the CrPC. He then pointed out several provisions in the NDPS Act, where the word "police" or "police officer" is used in contrast to the other persons or officers who are part of the narcotics and other setups. According to him, in any case, section 53A makes an inroad into section 25 of the Evidence Act. Equally, according to him, the majority judgment in **Raja Ram Jaiswal** (supra) is *per incuriam,* inasmuch as it does not consider several provisions of the CrPC, and therefore, arrives at the wrong test to determine as to who can be said to be a "police officer" within the meaning of section 25 of the Evidence Act. In any case, he argued that the officers mentioned in sections 41 and 42 of the NDPS Act cannot be tarnished with the same brush as the regular police, as there is nothing to show that these officers use third-degree measures to extort confessions. He then referred to the

language of section 67 of the NDPS Act, in which, according to him, the expression “enquiry” is nothing but an investigation, and the expression “examine” is the same expression used in section 161 of the CrPC, which therefore should be accorded evidentiary value, as no safeguards as provided under section 162 of the CrPC are mentioned qua statements made under section 67 of the NDPS Act. He also argued that investigation begins from the stage of collection of material under section 67, and for this relied strongly upon the recent Constitution Bench judgment in **Mukesh Singh** (supra). According to him, therefore, the reference order itself being flawed, there ought to have been no reference at all, and that the judgments in **Raj Kumar Karwal** (supra) and **Kanhaiyalal** (supra) do not need reconsideration. Later judgments such as **Noor Aga** (supra) ought to be overruled by us, inasmuch as they are contrary to several Constitution Bench judgments of this Court.

11. Shri Saurabh Mishra, learned Additional Advocate General appearing on behalf of the State of Madhya Pradesh in SLP (Crl.) 1202 of 2017, largely reiterated the submissions of learned ASG, adding that when section 67 of the NDPS Act is used to record the confession of an accused, section 164 of the CrPC will not apply, but only section 24 of the Evidence Act makes such confessions relevant, if the conditions laid down in the section apply. He also reiterated that a statement recorded under section 67 of the NDPS Act cannot be assimilated to a statement

under section 161 of the CrPC, for the reasons outlined by the learned ASG.

12. Shri Aniruddha Mayee, learned counsel appearing for the State of Gujarat in Criminal Appeal No. 2214 of 2009; 344 of 2013; and 1750 of 2009, adopted the submissions of Shri Aman Lekhi, learned ASG.

13. Having heard wide-ranging arguments of counsel on both sides, it is first necessary to give a Constitutional backdrop to the points that arise in this case.

FUNDAMENTAL RIGHTS AND THE NDPS ACT

14. The first most important constitutional protection provided in the fundamental rights chapter so far as these cases are concerned is provided by Article 20(3), which is the well-known right against self-incrimination. Article 20(3) reads as follows:

> "(3) No person accused of any offence shall be compelled to be a witness against himself."

15. In an early judgment of this Court, **M.P. Sharma and Ors. v. Satish Chandra** 1954 SCR 1077, an eight-Judge Bench of this Court set out Article 20(3), and then went into the historical origin of this Article in English law. In an important passage, the Court held:

> "In view of the above background, there is no inherent reason to construe the ambit of this fundamental right as comprising a very wide range. Nor would it be legitimate to confine it to the barely literal meaning of the words used, since it is a recognised doctrine that when appropriate a constitutional provision has to be liberally construed, so as to advance the intendment thereof and

to prevent its circumvention. Analysing the terms in which this right has been declared in our Constitution, it may be said to consist of the following components. (*1*) It is a right pertaining to a person "accused of an offence"; (*2*) It is a protection against "compulsion to be a witness"; and (*3*) It is a protection against such compulsion resulting in his giving evidence "against himself"."

(at page 1086)

xxx xxx xxx

Broadly stated the guarantee in Article 20(3) is against "testimonial compulsion". It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions. The phrase used in Article 20(3) is "to be a witness". A person can "be a witness" not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (See Section 119 of the Evidence Act) or the like. "To be a witness" is nothing more than "to furnish evidence" and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes. So far as production of documents is concerned, no doubt Section 139 of the Evidence Act says that a person producing a document on summons is not a witness. But that section is meant to regulate the right of cross-examination. It is not a guide to the connotation of the word "witness", which must be understood in its natural sense i.e. as referring to a person who furnishes evidence. Indeed, every positive volitional act, which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the court room. The phrase used in Article 20(3) is "to be a witness" and not to "appear as a witness": It follows that the protection

> afforded to an accused in so far as it is related, to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case.
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> Considered in this light, the guarantee under Article 20(3) would be available in the present cases to these petitioners against whom a first information report has been recorded as accused therein. It would extend to any compulsory process for *production* of evidentiary documents which are reasonably likely to support a prosecution against them.
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> (at pages 1087-1088)

16. The Court then went on to state that there was no "fundamental right to privacy" under the Indian Constitution, like the Fourth Amendment to the US Constitution, about which more shall be said a little later. What is important, however, is the fact that even in this early judgment, a mere literal reading was not given to Article 20(3). The Court recognised that a person can be said to be a witness not merely by giving oral evidence, but also by producing documents – evidence being furnished through the lips of a person or by production of a thing or of a document or in other modes. It is important to stress that the protection was afforded to a person formally accused of an offence on the basis of a statement that may be compulsorily taken from him even before evidence is given in a court.

17. An eleven-Judge Bench was then constituted in **State of Bombay v. Kathi Kalu Oghad and Ors.** (1963) 2 SCR 10, as certain doubts were raised on some of the propositions contained in the eight-Judge Bench decision of **M.P. Sharma** (supra). In this case, there were three appeals before the Court, one of which involved proof of handwritten evidence, another of which involved comparison of handwriting under section 73 of the Evidence Act, and the third of which involved section 27 of the Evidence Act. After hearing arguments on both sides, the Court first concluded that **M.P. Sharma** (supra) was correctly decided insofar as it stated that the guarantee under Article 20(3) extended to testimony by a witness given in or out of courts, which included statements which incriminated the maker. However, the Court went on to state that "furnishing evidence" would exclude thumb-impressions or writing specimens, for the reason that the taking of impressions of parts of the body often becomes necessary for the investigation of a crime (see page 29). Incriminating information must therefore include statements based on personal knowledge. The Court then went on to consider whether section 27 of the Evidence Act would fall foul of Article 20(3), having already been upheld when a constitutional challenge under Article 14 had been repelled by the Court in **State of U.P. v. Deoman Upadhyaya** (1961) 1 SCR 14. The Court held that if self-incriminatory information is given under compulsion, then the provisions of section 27

of the Evidence Act would not apply so as to allow the prosecution to place reliance on the object recovered as a result of the statement made (see pages 33-34). In the result, the Court held:

> "(*1*) An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.
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> (2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not "compulsion".
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> (3) "To be a witness" is not equivalent to "furnishing evidence" in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.
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> (4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression "to be a witness".
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> (5) "To be a witness" means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in court or otherwise.
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> (6) "To be a witness" in its ordinary grammatical sense means giving oral testimony in court. Case law has gone

> beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in court or out of court by a person accused of an offence, orally or in writing.
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> (7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made."
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> (at pages 36-37)

18. It is important to note that conclusions (1) and (2) were made in the context of repelling a challenge to section 27 of the Evidence Act. **M.P. Sharma** (supra), so far as it held that a person is accused the moment there is a formal accusation against him, by way of an FIR or otherwise, and that statements made by such person outside court, whether oral or on personal knowledge of documents produced, is protected by Article 20(3), remained untouched.

19. It is also important to note that in **Balkishan A. Devidayal** (supra), these judgments were referred to, and the Court then concluded:

> "**70.** To sum up, only a person against whom a formal accusation of the commission of an offence has been made can be a person "accused of an offence" within the meaning of Article 20(3). Such formal accusation may be specifically made against him in an FIR or a formal complaint or any other formal document or notice served on that person, which ordinarily results in his prosecution in court. In the instant case no such formal accusation had been made against the appellant when his statement(s) in question were recorded by the RPF officer."

20. We now come to the judgment of this Court in **Nandini Satpathy v. P.L. Dani** (1978) 2 SCC 424. This case referred to the inter-play between Article 20(3) and section 161 of the CrPC as follows:

> "**21.** Back to the constitutional quintessence invigorating the ban on self-incrimination. The area covered by Article 20(3) and Section 161(2) is substantially the same. So much so, we are inclined to the view, terminological expansion apart, that Section 161(2) of the CrPC is a parliamentary gloss on the constitutional clause. The learned Advocate-General argued that Article 20(3), unlike Section 161(1), did not operate at the anterior stages before the case came to court and the accused's incriminating utterance, previously recorded, was attempted to be introduced. He relied on some passages in American decisions but, in our understanding, those passages do not so circumscribe and, on the other hand, the landmark *Miranda* [*Miranda* v. *Arizona*, 384 US 436 (1966)] ruling did extend the embargo to police investigation also. Moreover, Article 20(3), which is our provision, warrants no such truncation. Such a narrow meaning may emasculate a necessary protection. There are only two primary queries involved in this clause that seals the lips into permissible silence: (*i*) Is the person called upon to testify "accused of any offence"? (*ii*) Is he being compelled to be witness *against* himself? A constitutional provision receives its full semantic range and so it follows that a wider connotation must be imparted to the expressions "accused of any offence" and "to be witness against himself". The learned Advocate-General, influenced by American decisions rightly agreed that in expression Section 161(2) of the Code might cover not merely accusations already registered in police stations but those which are likely to be the basis for exposing a person to a criminal charge. Indeed, this wider construction, if applicable to Article 20(3), approximates the constitutional clause to the explicit statement of the prohibition in Section 161(2). This latter provision meaningfully uses the expression "expose himself to a criminal charge". Obviously, these words mean, not only cases where the person is already exposed to a criminal

charge but also instances which will imminently expose him to criminal charges. In Article 20(3), the expression "accused of any offence" must mean formally accused *in praesenti* not *in futuro* — not even imminently as decisions now stand. The expression "to be witness against himself" means more than the court process. Any giving of evidence, any furnishing of information, if likely to have an incriminating impact, answers the description of being witness against oneself. Not being limited to the forensic stage by express words in Article 20(3), we have to construe the expression to apply to every stage where furnishing of information and collection of materials takes place. That is to say, even the investigation at the police level is embraced by Article 20(3). This is precisely what Section 161(2) means. That sub-section relates to oral examination by police officers and grants immunity at that stage. Briefly, the Constitution and the Code are co-terminus in the protective area. While the Code may be changed, the Constitution is more enduring. Therefore, we have to base our conclusion not merely upon Section 161(2) but on the more fundamental protection, although equal in ambit, contained in Article 20(3).

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57. We hold that Section 161 enables the police to examine the accused during investigation. The prohibitive sweep of Article 20(3) goes back to the stage of police interrogation — not, as contended, commencing in court only. In our judgment, the provisions of Article 20(3) and Section 161(1) substantially cover the same area, so far as police investigations are concerned. The ban on self-accusation and the right to silence, while one investigation or trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter. We are disposed to read "compelled testimony" as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like — not legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully,

cannot be regarded as compulsion within the meaning of Article 20(3). The prospect of prosecution may lead to legal tension in the exercise of a constitutional right, but then, a stance of silence is running a calculated risk. On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes "compelled testimony", violative of Article 20(3).

58. A police officer is clearly a person in authority. Insistence on answering is a form of pressure especially in the atmosphere of the police station unless certain safeguards erasing duress are adhered to. Frequent threats of prosecution if there is failure to answer may take on the complexion of undue pressure violating Article 20(3). Legal penalty may by itself not amount to duress but the manner of mentioning it to the victim of interrogation may introduce an element of tension and tone of command perilously hovering near compulsion.

59. We have explained elaborately and summed up, in substance, what is self-incrimination or tendency to expose oneself to a criminal charge. It is less than "relevant" and more than "confessional". Irrelevance is impermissible but relevance is licit but when relevant questions are loaded with guilty inference in the event of an answer being supplied, the tendency to incriminate springs into existence. We hold further that the accused person cannot be forced to answer questions merely because the answers thereto are not implicative when viewed in isolation and confined to that particular case. He is entitled to keep his mouth shut if the answer sought has a reasonable prospect of exposing him to guilt in some other accusation actual or imminent, even though the investigation under way is not with reference to that. We have already explained that in determining the incriminatory character of an answer the accused is entitled to consider — and the Court while adjudging will take note of — the setting, the totality of circumstances, the equation, personal and social, which have a bearing on making an answer substantially innocent but in effect guilty in import. However, fanciful claims, unreasonable

apprehensions and vague possibilities cannot be the hiding ground for an accused person. He is bound to answer where there is no clear tendency to criminate."

21. In **Kartar Singh** (supra), the majority judgment referred to Article 20(3) in the following terms:

"**205.** In our Constitution as well as procedural law and law of Evidence, there are certain guarantees protecting the right and liberty of a person in a criminal proceeding and safeguards in making use of any statement made by him. Article 20(3) of the Constitution declares that "No person accused of any offence shall be compelled to be a witness against himself".

206. Article 20(3) of our Constitution embodies the principle of protection against compulsion of self-incrimination which is one of the fundamental canons of the British System of Criminal Jurisprudence and which has been adopted by the American System and incorporated in the Federal Acts. The Fifth Amendment of the Constitution of the United States of America provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising … nor shall be compelled in any criminal case to be a witness against himself…".

207. The above principle is recognised to a substantial extent in the criminal administration of justice in our country by incorporating various statutory provisions. One of the components of the guarantee contained in Article 20(3) of the Constitution is that it is a protection against compulsion resulting in the accused of any offence giving evidence against himself. There are a number of outstanding decisions of this Court in explaining the intendment of Article 20(3). We feel that it would suffice if mere reference is made to some of the judgments, those being: (1) *M.P. Sharma* v. *Satish Chandra, District Magistrate, Delhi* [1954 SCR 1077] , (2) *Raja Narayanlal Bansilal* v. *Maneck Phiroz Mistry* [(1961) 1 SCR 417],
(3) *State of Bombay* v. *Kathi Kalu Oghad* [(1962) 3 SCR

10], and (4) *Nandini Satpathy* v. *P.L. Dani* [(1978) 2 SCC 424].

208. Article 22(1) and (2) confer certain rights upon a person who has been arrested. Coming to the provisions of Code of Criminal Procedure, Section 161 empowers a police officer making an investigation to examine orally any person supposed to be acquainted with the facts and circumstances of the case and to reduce into writing any statement made to him in the course of such examination. Section 162 which speaks of the use of the statement so recorded, states that no statement recorded by a police officer, if reduced into writing, be signed by the person making it and that the statement shall not be used for any purpose save as provided in the Code and the provisions of the Evidence Act. The ban imposed by Section 162 applies to all the statements whether confessional or otherwise, made to a police officer by any person whether accused or not during the course of the investigation under Chapter XII of the Code. But the statement given by an accused can be used in the manner provided by Section 145 of the Evidence Act in case the accused examines himself as a witness for the defence by availing Section 315(1) of the Code corresponding to Section 342-A of the old Code and to give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial.

209. There is a clear embargo in making use of this statement of an accused given to a police officer under Section 25 of the Evidence Act, according to which, no confession made to a police officer shall be proved as against a person accused of any offence and under Section 26 according to which no confession made by any person whilst he is in custody of a police officer, unless it is made in the immediate presence of a Magistrate, shall be proved as against such person. The only exception is given under Section 27 which serves as a proviso to Section 26. Section 27 contemplates that only so much of information whether amounts to confession or not, as relates distinctly to the fact thereby discovered, in consequence of that information received from a person

accused of any offence while in custody of the police can be proved as against the accused.

210. In the context of the matter under discussion, two more provisions also may be referred to — namely Sections 24 and 30 of the Evidence Act and Section 164 of the Code.

211. Section 24 of the Evidence Act makes a confession, caused to be made before any authority by an accused by any inducement, threat or promise, irrelevant in a criminal proceeding. Section 30 of the Evidence Act is to the effect that if a confession made by one or more persons, affecting himself and some others jointly tried for the same offence is proved, the court may take into consideration such confession as against such other persons as well as the maker of the confession. The explanation to the section reads that "offence" as used in this section includes the abetment of, or attempt to commit, the offence.

212. Section 164 of the Code speaks of recording of confessions and statements by Magistrates specified in that section by complying with the legal formalities and observing the statutory conditions including the appendage of a Certificate by the Magistrate recording the confession as contemplated under sub-sections (2) to (6) thereof.

213. Though in the old Code, there was a specific embargo on a police officer recording any statement or confession made to him in the course of an investigation embodied in the main sub-section (1) of Section 164 itself, in the present Code the legal bar is now brought by a separate proviso to sub-section (1) of Section 164 which reads:

"Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force."

This is a new provision but conveys the same meaning as embodied in the main sub-section (1) of Section 164 of the old Code.

214. Thus, an accused or a person accused of any offence is protected by the constitutional provisions as well as the statutory provisions to the extent that no self-incriminating statement made by an accused to the police officer while he is in custody, could be used against such maker. The submission of the Additional Solicitor General that while a confession by an accused before a specified officer either under the Railway Protection Force Act or Railway Property (Unlawful Possession) Act or Customs Act or Foreign Exchange Regulation Act is made admissible, the special procedure prescribed under this Act making a confession of a person indicted under the TADA Act given to a police officer admissible cannot be questioned, is misnomer because all the officials empowered to record statements under those special Acts are not police officers as per the judicial pronouncements of this Court as well the High Courts which principle holds the field till date. See (1) *State of U.P.* v. *Durga Prasad* [(1975) 3 SCC 210] , (2) *Balkishan A. Devidayal* v. *State of Maharashtra* [(1980) 4 SCC 600] , (3) *Ramesh Chandra Mehta* v. *State of W.B.* [*Ramesh Chandra Mehta* v. *State of W.B.*, (1969) 2 SCR 46], (4) *Poolpandi* v. *Superintendent, Central Excise* [(1992) 3 SCC 259], (5) *Directorate of Enforcement* v. *Deepak Mahajan* [(1994) 3 SCC 440], and (6) *Ekambaram* v. *State of T.N.* [1972 MLW (Cri) 261] We feel that it is not necessary to cite any more decisions and swell this judgment."

22. Ramaswamy, J. concurring in part, but dissenting on the constitutional validity of sections 9(7) and 15 of the TADA, also referred to Article 20(3) as follows:

"**377.** Custodial interrogation exposes the suspect to the risk of abuse of his person or dignity as well as distortion or manipulation of his self-incrimination in the crime. No one should be subjected to physical violence of the

person as well as to torture. Infringement thereof undermines the peoples' faith in the efficacy of criminal justice system. Interrogation in police lock-up are often done under conditions of pressure and tension and the suspect could be exposed to great strain even if he is innocent, while the culprit in custody to hide or suppress may be doubly susceptible to confusion and manipulation. A delicate balance has, therefore, to be maintained to protect the innocent from conviction and the need of the society to see the offender punished. Equally everyone has right against self-incrimination and a right to be silent under Article 20(3) which implies his freedom from police or anybody else. But when the police interrogates a suspect, they abuse their authority having unbridled opportunity to exploit his moral position and authority inducing the captive to confess against his better judgment. The very fact that the person in authority puts the questions and exerts pressure on the captive to comply (*sic*). Silence on the part of the frightened captive seems to his ears to call for vengeance and induces a belief that confession holds out a chance to avoid torture or to get bail or a promise of lesser punishment. The resourceful investigator adopts all successful tactics to elicit confession as is discussed below.

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396. In the *State of Bombay* v. *Kathi Kalu Oghad* [(1962) 3 SCR 10] a Bench of 11 Judges, per majority, interpreting Article 20(3) held on "testimonial compulsion" that, "[w]e can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions." Indeed every positive act which furnishes evidence is testimony and testimonial compulsion connotes coercion which procures positive oral evidence. The acts of the person, of course, is neither negative attitude of silence or submission on his part, nor is there any reason to think that the protection in respect of the evidence procured is confined to what transpires at the trial in the court room. The phrase used in Article 20(3) is to be a witness and not to appear as a

witness. It follows that the protection accorded to an accused insofar as it is related to the phrase "to be a witness" is not merely in respect of the testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him. The guarantee was, therefore, held to include not only oral testimony given in a court or out of court, but also statements in writing which incriminated the maker when figuring as accused person. In *Nandini Satpathy* v. *P.L. Dani* it was further held that compelled testimony must be read as evidence procured not merely by physical threat or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like — not legal penalty for violation."

23. Sahai, J. in a separate opinion, concurring in part, but dissenting on the constitutional validity of section 15, referred to Article 20(3) as follows:

"**456.** A confession is an admission of guilt. The person making it states something against himself, therefore it should be made in surroundings which are free from suspicion. Otherwise it violates the constitutional guarantee under Article 20(3) that no person accused of an offence shall be compelled to be a witness against himself. The word 'offence' used in the article should be given its ordinary meaning. It applies as much to an offence committed under TADA as under any other Act. The word, 'compelled' ordinarily means 'by force'. This may take place positively and negatively. When one forces one to act in a manner desired by him it is compelling him to do that thing. Same may take place when one is prevented from doing a particular thing unless he agrees to do as desired. In either case it is compulsion. A confession made by an accused or obtained by him under coercion suffers from infirmity unless it is made freely and voluntarily. No civilised democratic country has accepted confession made by an accused before a police officer as voluntary and above suspicion, therefore, admissible in evidence. One of the established rule or norms accepted everywhere is that custodial confession is presumed to be tainted. The mere

fact that the Legislature was competent to make the law, as the offence under TADA is one which did not fall in any State entry, did not mean that the Legislature was empowered to curtail or erode a person of his fundamental rights. Making a provision which has the effect of forcing a person to admit his guilt amounts to denial of the liberty. The class of offences dealt by TADA may be different than other offences but the offender under TADA is as much entitled to protection of Articles 20 and 21 as any other. The difference in nature of offence or the legislative competence to enact a law did not affect the fundamental rights guaranteed by Chapter III. If the construction as suggested by the learned Additional Solicitor General is accepted it shall result in taking the law back once again to the days of *Gopalan* [*A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27] . Section 15 cannot be held to be valid merely because it is as a result of law made by a body which has been found entitled to make the law. The law must still be fair and just as held by this Court. A law which entitles a police officer to record confession and makes it admissible is thus violative of both Articles 20(3) and 21 of the Constitution."

24. A recent judgment in **Selvi v. State of Karnataka** (2010) 7 SCC 263 dealt with the constitutional validity of narco-analysis tests as follows:

"**179.** We now return to the operative question of whether the results obtained through polygraph examination and the BEAP test should be treated as testimonial responses. Ordinarily evidence is classified into three broad categories, namely, oral testimony, documents and material evidence. The protective scope of Article 20(3) read with Section 161(2) CrPC guards against the compulsory extraction of oral testimony, even at the stage of investigation. With respect to the production of documents, the applicability of Article 20(3) is decided by the trial Judge but parties are obliged to produce documents in the first place. However, the compulsory extraction of material (or physical) evidence lies outside the protective scope of Article 20(3). Furthermore, even testimony in oral or written form can be required under compulsion if it is to be used for the purpose of

identification or comparison with materials and information that is already in the possession of investigators.

180. We have already stated that the narcoanalysis test includes substantial reliance on verbal statements by the test subject and hence its involuntary administration offends the "right against self-incrimination". The crucial test laid down in *Kathi Kalu Oghad* is that of

"imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation" (*ibid*. at SCR p. 30.).

The difficulty arises since the majority opinion in that case appears to confine the understanding of "personal testimony" to the conveyance of personal knowledge through oral statements or statements in writing. The results obtained from polygraph examination or a BEAP test are not in the nature of oral or written statements. Instead, inferences are drawn from the measurement of physiological responses recorded during the performance of these tests. It could also be argued that tests such as polygraph examination and the BEAP test do not involve a "positive volitional act" on part of the test subject and hence their results should not be treated as testimony. However, this does not entail that the results of these two tests should be likened to physical evidence and thereby excluded from the protective scope of Article 20(3).

181. We must refer back to the substance of the decision in *Kathi Kalu Oghad* which equated a testimonial act with the imparting of knowledge by a person who has personal knowledge of the facts that are in issue. It has been recognised in other decisions that such personal knowledge about relevant facts can also be communicated through means other than oral or written statements. For example in *M.P. Sharma case*, it was noted that "…evidence can be furnished through the lips or by production of a thing or of a document or in other modes." (*ibid*. at SCR p. 1087) Furthermore, common sense dictates that certain communicative gestures such

as pointing or nodding can also convey personal knowledge about a relevant fact, without offering a verbal response. It is quite foreseeable that such a communicative gesture may by itself expose a person to "criminal charges or penalties" or furnish a link in the chain of evidence needed for prosecution.

182. We must also highlight that there is nothing to show that the learned Judges in *Kathi Kalu Oghad* had contemplated the impugned techniques while discussing the scope of the phrase "to be a witness" for the purpose of Article 20(3). At that time, the transmission of knowledge through means other than speech or writing was not something that could have been easily conceived of. Techniques such as polygraph examination were fairly obscure and were the subject of experimentation in some western nations while the BEAP technique was developed several years later. Just as the interpretation of statutes has to be often re-examined in light of scientific advancements, we should also be willing to re-examine judicial observations with a progressive lens.

183. An explicit reference to the lie detector tests was of course made by the US Supreme Court in *Schmerber* [384 US 757 (1965)] decision, wherein Brennan, J. had observed at US p. 764: (L Ed p. 916)

"…To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment."

184. Even though the actual process of undergoing a polygraph examination or a BEAP test is not the same as that of making an oral or written statement, the consequences are similar. By making inferences from the results of these tests, the examiner is able to derive knowledge from the subject's mind which otherwise would not have become available to the investigators. These two tests are different from medical examination and the analysis of bodily substances such as blood, semen and hair samples, since the test subject's physiological

responses are directly correlated to mental faculties. Through lie detection or gauging a subject's familiarity with the stimuli, personal knowledge is conveyed in respect of a relevant fact. It is also significant that unlike the case of documents, the investigators cannot possibly have any prior knowledge of the test subject's thoughts and memories, either in the actual or constructive sense. Therefore, even if a highly strained analogy were to be made between the results obtained from the impugned tests and the production of documents, the weight of precedents leans towards restrictions on the extraction of “personal knowledge” through such means.

185. During the administration of a polygraph test or a BEAP test, the subject makes a mental effort which is accompanied by certain physiological responses. The measurement of these responses then becomes the basis of the transmission of knowledge to the investigators. This knowledge may aid an ongoing investigation or lead to the discovery of fresh evidence which could then be used to prosecute the test subject. In any case, the compulsory administration of the impugned tests impedes the subject's right to choose between remaining silent and offering substantive information. The requirement of a “positive volitional act” becomes irrelevant since the subject is compelled to convey personal knowledge irrespective of his/her own volition.

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189. In light of the preceding discussion, we are of the view that the results obtained from tests such as polygraph examination and the BEAP test should also be treated as “personal testimony”, since they are a means for “imparting personal knowledge about relevant facts”. Hence, our conclusion is that the results obtained through the involuntary administration of either of the impugned tests (i.e. the narcoanalysis technique, polygraph examination and the BEAP test) come within the scope of “testimonial compulsion”, thereby attracting the protective shield of Article 20(3).

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262. In our considered opinion, the compulsory administration of the impugned techniques violates the "right against self-incrimination". This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to prevent the forcible "conveyance of personal knowledge that is relevant to the facts in issue". The results obtained from each of the impugned tests bear a "testimonial" character and they cannot be categorised as material evidence.

263. We are also of the view that forcing an individual to undergo any of the impugned techniques violates the standard of "substantive due process" which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The impugned techniques cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases i.e. the Explanation to Sections 53, 53-A and 54 of the Code of Criminal Procedure, 1973. Such an expansive interpretation is not feasible in light of the rule of "ejusdem generis" and the considerations which govern the interpretation of statutes in relation to scientific advancements. We have also elaborated how the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to "cruel, inhuman or degrading treatment" with regard to the

language of evolving international human rights norms. Furthermore, placing reliance on the results gathered from these techniques comes into conflict with the "right to fair trial". Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the "right against self-incrimination".

264. In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted in accordance with Section 27 of the Evidence Act, 1872."

25. Equally important is the right to privacy which has been recognised by a number of decisions of this Court, and now firmly grounded in Article 21 of the Constitution of India. In **K.S. Puttaswamy** (supra), several judgments were referred to; and **M.P. Sharma** (supra), where it was held that no such right was recognised in the Constitution of India, was overruled. Thus, in the judgment of Chandrachud, J., it was stated:

"**26.***M.P. Sharma* [1954 SCR 1077] was a case where a law prescribing a search to obtain documents for investigating into offences was challenged as being contrary to the guarantee against self-incrimination in Article 20(3). The Court repelled the argument that a search for documents compelled a person accused of an offence to be witness against himself. Unlike a notice to

produce documents, which is addressed to a person and whose compliance would constitute a testimonial act, a search warrant and a seizure which follows are not testimonial acts of a person to whom the warrant is addressed, within the meaning of Article 20(3). The Court having held this, the controversy in *M.P. Sharma* would rest at that. The observations in *M.P. Sharma* to the effect that the Constitution makers had not thought it fit to subject the regulatory power of search and seizure to constitutional limitations by recognising a fundamental right to privacy (like the US Fourth Amendment), and that there was no justification to import it into a "totally different fundamental right" are at the highest, stray observations.

27. The decision in *M.P. Sharma* held that in the absence of a provision like the Fourth Amendment to the US Constitution, a right to privacy cannot be read into the Indian Constitution. The decision in *M.P. Sharma* did not decide whether a constitutional right to privacy is protected by other provisions contained in the fundamental rights including among them, the right to life and personal liberty under Article 21. Hence the decision cannot be construed to specifically exclude the protection of privacy under the framework of protected guarantees including those in Articles 19 or 21. The absence of an express constitutional guarantee of privacy still begs the question whether privacy is an element of liberty and, as an integral part of human dignity, is comprehended within the protection of life as well.

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100.*M.P. Sharma* dealt with a challenge to a search on the ground that the statutory provision which authorised it, violated the guarantee against self-incrimination in Article 20(3). In the absence of a specific provision like the Fourth Amendment to the US Constitution in the Indian Constitution, the Court answered the challenge by its ruling that an individual who is subject to a search during the course of which material is seized does not make a voluntary testimonial statement of the nature that would attract Article 20(3). The Court distinguished a compulsory search from a voluntary statement of disclosure in

pursuance of a notice issued by an authority to produce documents. It was the former category that was held to be involved in a compulsive search, which the Court held would not attract the guarantee against self-incrimination. The judgment, however, proceeded further to hold that in the absence of the right to privacy having been enumerated in the Constitution, a provision like the Fourth Amendment to the US Constitution could not be read into our own. The observation in regard to the absence of the right to privacy in our Constitution was strictly speaking, not necessary for the decision of the Court in *M.P. Sharma* and the observation itself is no more than a passing observation. Moreover, the decision does not adjudicate upon whether privacy could be a constitutionally protected right under any other provision such as Article 21 or under Article 19.

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316. The judgment in *M.P. Sharma* holds essentially that in the absence of a provision similar to the Fourth Amendment to the US Constitution, the right to privacy cannot be read into the provisions of Article 20(3) of the Indian Constitution. The judgment does not specifically adjudicate on whether a right to privacy would arise from any of the other provisions of the rights guaranteed by Part III including Article 21 and Article 19. The observation that privacy is not a right guaranteed by the Indian Constitution is not reflective of the correct position. *M.P. Sharma* is overruled to the extent to which it indicates to the contrary."

26. The judgment of Nariman, J. held as follows:

"**442.** The importance of *Semayne case* [77 ER 194] is that it decided that every man's home is his castle and fortress for his defence against injury and violence, as well as for his repose. William Pitt, the Elder, put it thus:

"The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake —the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all

his force dare not cross the threshold of the ruined tenement."

A century and a half later, pretty much the same thing was said in *Huckle* v. *Money* [*Huckle* v. *Money* 95 ER 768] in which it was held that Magistrates cannot exercise arbitrary powers which violated the Magna Carta (signed by King John, conceding certain rights to his barons in 1215), and if they did, exemplary damages must be given for the same. It was stated that: (ER p. 769)

"… To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour…."

443. This statement of the law was echoed in *Entick* v. *Carrington* [*Entick* v. *Carrington* 95 ER 807] in which Lord Camden held that an illegal search warrant was "subversive of all the comforts of society" and the issuance of such a warrant for the seizure of all of a man's papers, and not only those alleged to be criminal in nature, was "contrary to the genius of the law of England". A few years later, in *Da Costa* v. *Jones* [*Da Costa* v. *Jones* 98 ER 1331] , Lord Mansfield upheld the privacy of a third person when such privacy was the subject-matter of a wager, which was injurious to the reputation of such third person. The wager in that case was as to whether a certain Chevalier D'eon was a cheat and imposter in that he was actually a woman. Such wager which violated the privacy of a third person was held to be injurious to the reputation of the third person for which damages were awarded to the third person. These early judgments did much to uphold the inviolability of the person of a citizen.

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456. The first thing that strikes one on reading the aforesaid passage is that the Court (in *M.P. Sharma*) resisted the invitation to read the US Fourth Amendment into the US Fifth Amendment; in short it refused to read or import the Fourth Amendment into the Indian equivalent of that part of the Fifth Amendment which is the same as

Article 20(3) of the Constitution of India. Also, the fundamental right to privacy, stated to be analogous to the Fourth Amendment, was held to be something which could not be read into Article 20(3).

457. The second interesting thing to be noted about these observations is that there is no broad ratio in the said judgment that a fundamental right to privacy is not available in Part III of the Constitution. The observation is confined to Article 20(3). Further, it is clear that the actual finding in the aforesaid case had to do with the law which had developed in this Court as well as the US and the UK on Article 20(3) which, on the facts of the case, was held not to be violated. Also we must not forget that this was an early judgment of the Court, delivered in the *Gopalan* era, which did not have the benefit of *R.C. Cooper* or *Maneka Gandhi*. Quite apart from this, it is clear that by the time this judgment was delivered, India was already a signatory to the Universal Declaration of Human Rights, Article 12 of which states:

"12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

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468. It will be seen that different smaller Benches of this Court were not unduly perturbed by the observations contained in *M.P. Sharma* as it was an early judgment of this Court delivered in the *Gopalan* era which had been eroded by later judgments dealing with the interrelation between fundamental rights and the development of the fundamental right to privacy as being part of the liberty and dignity of the individual.

469. Therefore, given the fact that this judgment dealt only with Article 20(3) and not with other fundamental rights; given the fact that the 1948 Universal Declaration of Human Rights containing the right to privacy was not pointed out to the Court; given the fact that it was

delivered in an era when fundamental rights had to be read disjunctively in watertight compartments; and given the fact that Article 21 as we know it today only sprung into life in the post *Maneka Gandhi* era, we are of the view that this judgment is completely out of harm's way insofar as the grounding of the right to privacy in the fundamental rights chapter is concerned.

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472. The majority judgment in *Kharak Singh* [*Kharak Singh* v. *State of U.P.*, (1964) 1 SCR 332] then went on to refer to the Preamble to the Constitution, and stated that Article 21 contained the cherished human value of dignity of the individual as the means of ensuring his full development and evolution. A passage was then quoted from *Wolf* v. *Colorado* [*Wolf* v. *Colorado* 338 US 25 (1949)] to the effect that the security of *one's privacy* against arbitrary intrusion by the police is basic to a free society. The Court then went on to quote the US Fourth Amendment which guarantees the rights of the people to be secured in their persons, houses, papers and effects against unreasonable searches and seizures. Though the Indian Constitution did not expressly confer a like guarantee, the majority held that nonetheless an unauthorised intrusion into a person's home would violate the English Common Law maxim which asserts that every man's house is his castle. In this view of Article 21, Regulation 236(*b*) was struck down.

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475. If the passage in the judgment dealing with domiciliary visits at night and striking it down is contrasted with the later passage upholding the other clauses of Regulation 236 extracted above, it becomes clear that it cannot be said with any degree of clarity that the majority judgment upholds the right to privacy as being contained in the fundamental rights chapter or otherwise. As the majority judgment contradicts itself on this vital aspect, it would be correct to say that it cannot be given much value as a binding precedent. In any case, we are of the view

that the majority judgment is good law when it speaks of Article 21 being designed to assure the dignity of the individual as a most cherished human value which ensures the means of full development and evolution of a human being. The majority judgment is also correct in pointing out that Article 21 interdicts unauthorised intrusion into a person's home. Where the majority judgment goes wrong is in holding that fundamental rights are in watertight compartments and in holding that the right to privacy is not a guaranteed right under our Constitution. It can be seen, therefore, that the majority judgment is like the proverbial curate's egg—good only in parts. Strangely enough when the good parts alone are seen, there is no real difference between Subba Rao, J.'s approach in the dissenting judgment and the majority judgment. This then answers the major part of the reference to this nine-Judge Bench in that we hereby declare that neither the eight-Judge nor the six-Judge Bench can be read to come in the way of reading the fundamental right to privacy into Part III of the Constitution.

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521. In the Indian context, a fundamental right to privacy would cover at least the following three aspects:

• Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relatable to his physical body, such as the right to move freely

• Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognises that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right; and

• The privacy of choice, which protects an individual's autonomy over fundamental personal choices.

For instance, we can ground physical privacy or privacy relating to the body in Articles 19(1)(*d*) and (*e*) read with

> Article 21; ground personal information privacy under Article 21; and the privacy of choice in Articles 19(1)(*a*) to (*c*), 20(3), 21 and 25. The argument based on "privacy" being a vague and nebulous concept need not, therefore, detain us."

27. The NDPS Act is to be construed in the backdrop of Article 20(3) and Article 21, Parliament being aware of the fundamental rights of the citizen and the judgments of this Court interpreting them, as a result of which a delicate balance is maintained between the power of the State to maintain law and order, and the fundamental rights chapter which protects the liberty of the individual. Several safeguards are thus contained in the NDPS Act, which is of an extremely drastic and draconian nature, as has been contended by the counsel for the Appellants before us. Also, the fundamental rights contained in Articles 20(3) and 21 are given pride of place in the Constitution. After the 42nd Amendment to the Constitution was done away with by the 44th Amendment, it is now provided that even in an Emergency, these rights cannot be suspended – see Article 359(1). The interpretation of a statute like the NDPS Act must needs be in conformity and in tune with the spirit of the broad fundamental right not to incriminate oneself, and the right to privacy, as has been found in the recent judgments of this Court.

CONFESSIONS UNDER SECTION 25 OF THE EVIDENCE ACT

28. At this juncture, it is important to set out sections 24 to 27 of the Evidence Act:

> "**24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.**—A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.
>
> **25. Confession to police-officer not to be proved.**—No confession made to a police-officer, shall be proved as against a person accused of any offence.
>
> **26. Confession by accused while in custody of police not to be proved against him**.—No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.
>
> *Explanation.*—In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882).
>
> **27. How much of information received from accused may be proved.**—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

29. Section 25 was originally in the Criminal Procedure Code, 1861 (Act 25 of 1861), and was brought into the Evidence Act of 1872. Section 25 states that a confession made to any police officer, whatever his rank, cannot be relied upon against a person accused of any offence. “Police officer” is not defined in the Evidence Act or in any cognate criminal statute. As to what, therefore, “police officer” means, has been the subject matter of several decisions of this Court, which will be adverted to later. For the time being, section 25 is to be viewed in contrast to section 24, given the situation in India of the use of torture and third-degree measures. Unlike section 24, any confession made to a police officer cannot be used as evidence against a person accused of an offence, the voluntariness or otherwise of the confession being irrelevant – it is conclusively presumed by the legislature that all such confessions made to police officers are tainted with the vice of coercion.

30. The ‘First Report Of Her Majesty’s Commissioners Appointed To Consider The Reform Of The Judicial Establishments, Judicial Procedure And Laws Of India & c.’ (1856) which formed the basis for section 25 of the Evidence Act, stated as follows:

> “Then follow other provisions for preventing any species of compulsion or maltreatment with a view to extort or confession or procedure information. But we are informed, and this information is corroborated by evidence we have examined, that, in spite of this qualification, confessions are frequently extorted or fabricated. A police officer, on receiving intimation of the occurrence of a dacoity or other

> offence of a serious character, failing to discover the perpetrators of the offence, often endeavours to secure himself against any charge of supinates or neglect by getting up a case against parties whose circumstances or characters are such as are likely to obtain credit for an accusation of the kind against them. This is not infrequently done by extorting or fabricating false confession, and when this step is once taken, there is of course impunity for real offenders, and a great encouragement to crime. The *darogah* is henceforth committed to the direction he has given to the case; and it is his object to prevent a discovery of the truth, and the apprehension of the guilty parties, Who, as far as the police are concerned, are now perfectly safe. We are persuaded that any provision to correct the exercise of this power by the police will be futile; and we accordingly propose to remedy the evil, as far as possible, by the adoption of a rule prohibiting any examination whatever of any accused party by the police, the result of which is to constitute a written document."
>
> (at page 110)

31. It is important to emphasise that the interpretation of the term "accused" in section 25 of the Evidence Act is materially different from that contained in Article 20(3) of the Constitution. The scope of the section is not limited by time – it is immaterial that the person was not an accused at the time when the confessional statement was made. This was felicitously put by this Court in **Deoman Upadhyaya** (supra) as follows:

> "By Section 24, in a criminal proceeding against a person, a confession made by him is inadmissible if it appears to the court to have been caused by inducement, threat or promise having reference to the charge and proceeding from a person in authority. By Section 25, there is an absolute ban against proof at the trial of a person accused of an offence, of a confession made to a police officer. The ban which is partial under Section 24 and complete under Section 25 applies equally whether or not the

> person against whom evidence is sought to be led in a criminal trial was at the time of making the confession in custody. For the ban to be effective the person need not have been accused of an offence when he made the confession. The expression, "accused person" in Section 24 and the expression "a person accused of any offence" have the same connotation, and describe the person against whom evidence is sought to be led in a criminal proceeding. As observed in *Pakala Narayan Swami* v. *Emperor* [LR 66 IA 66] by the Judicial Committee of the Privy Council, "Section 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation". The adjectival clause "accused of any offence" is therefore descriptive of the person against whom a confessional statement made by him is declared not provable, and does not predicate a condition of that person at the time of making the statement for the applicability of the ban."
>
> (at page 21)

32. Likewise, in **Agnoo Nagesia v. State of Bihar** (1966) 1 SCR 134, the Court held:

> "Section 25 provides: "No confession made to a police officer, shall be proved as against a person accused of an offence". The terms of Section 25 are imperative. A confession made to a police officer under any circumstances is not admissible in evidence against the accused. It covers a confession made when he was free and not in police custody, as also a confession made before any investigation has begun. The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession."
>
> (at page 137)

33. Thus, whereas a formal accusation is necessary for invoking the protection under Article 20(3), the same would be irrelevant for invoking the protection under section 25 of the Evidence Act.

34. Section 26 of the Evidence Act extends the protection to confessional statements made by persons while "in the custody" of a police-officer, unless it be made in the immediate presence of a Magistrate. "Custody" is not synonymous with "arrest", as has been held in a number of judgments of this Court – custody could refer to a situation pre-arrest, as was the case in **State of Haryana and Ors. v. Dinesh Kumar** (2008) 3 SCC 222 (see paragraphs 27-29). In fact, section 46 of the CrPC speaks of "a submission to the custody by word or action", which would, *inter alia,* refer to a voluntary appearance before a police officer without any formal arrest being made.

PROVISIONS CONTAINED IN THE NDPS ACT

35. At this stage, it is important to notice that the NDPS Act has been held to be a complete code on the subject covered by it. In **Noor Aga** (supra), this Court held:

> "**2.** 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 the accused are in question in this appeal which arises out of a judgment and order dated 9-6-2006 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 Sections 22 and 23 of the Act had been dismissed.
>
> ***xxx xxx xxx***

75. 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.

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80. 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. They also cannot be oblivious of the law that the Act is a complete code in itself and, thus, the provisions of the 1962 Act cannot be applied to seek conviction thereunder."

36. To similar effect, this Court in **Mukesh Singh** (supra) held:

"85. From the aforesaid scheme and provisions of the NDPS Act, it appears that the NDPS Act is a complete code in itself. Section 41(1) authorises a Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under the NDPS Act, or for the search, whether by day or by night……Sub-section 2 of Section 41 authorises any such officer of gazetted rank of the Departments of Central Excise…… as is empowered in this behalf by general or special order by the Central Government, or any such officer of the Revenue…….police or any other department of a State Government as is empowered in this behalf by general or special order, if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under the NDPS Act, authorising any officer subordinate to him but superior in rank to a peon, sepoy or a constable to arrest such a person or search a building, conveyance or place whether by day or by night

or himself arrest such a person or search a building, conveyance or place."

37. The interplay between the CrPC and the provisions of the NDPS Act is contained in several provisions. It will be noticed that the CrPC has been expressly excluded when it comes to suspension, remission or commutation in any sentence awarded under the NDPS Act – see section 32A. Equally, nothing contained in section 360 of the CrPC or in the Probation of Offenders Act, 1958 is to apply to a person convicted of an offence under the NDPS Act, subject to the exceptions that such person is under 18 years of age, and that that offence only be punishable under section 26 or 27 of the NDPS Act – see section 33.

38. On the other hand, the CrPC has been made expressly applicable by the following sections of the NDPS Act: section 34(2), which refers to the form of a security bond; section 36B, which refers to the High Court's powers in appeal and revision; section 50(5), which refers to searching a person without the intervention of a Gazetted Officer or a Magistrate; and section 51, which deals with warrants, arrests, searches and seizures made under the Act. Equally, the CrPC has been applied with necessary modifications under section 36A(1)(b), when it comes to authorising the detention of a person in custody for a period beyond fifteen days; section 37(1)(b), which contains additional conditions for the grant of bail in certain circumstances; and section

53A, which are exceptions engrafted upon statements made in writing under sections 161, 162 and 172 of the CrPC. Read with sections 4(2) and 5 of the CrPC, the scheme of the NDPS Act seems to be that the CrPC is generally followed, except where expressly excluded, or applied with modifications.

39. The Statement of Objects and Reasons for enacting the NDPS Act is important and states as follows:

> "The statutory control over narcotic drugs is exercised in India through a number of Central and State enactments. The principal Central Acts, namely the Opium Act, 1857, the Opium Act, 1878 and the Dangerous Drugs Act, 1930 were enacted a long time ago. With the passage of time and the developments in the field of illicit drug traffic and drug abuse at national and international level, many deficiencies in the existing laws have come to notice, some of which are indicated below:
>
> (i) The scheme of penalties under the present Acts is not sufficiently deterrent to meet the challenge of well organized gangs of smugglers. The Dangerous Drugs Act, 1930 provides for a maximum term of imprisonment of 3 years with or without fine and 4 years imprisonment with or without fine for repeat offences. Further, no minimum punishment is prescribed in the present laws, as a result of which drug traffickers have been some times let off by the courts with nominal punishment. The country has for the last few years been increasingly facing the problem of transit traffic of drugs coming mainly from some of our neighbouring countries and destined mainly to Western countries.
>
> (ii) The existing Central laws do not provide for investing the officers of a number of important Central enforcement agencies like Narcotics,

Customs, Central Excise, etc., with the power of investigation of offences under the said laws.

(iii) Since the enactment of the aforesaid three Central Acts a vast body of international law in the field of narcotics control has evolved through various international treaties and protocols. The Government of India has been a party to these treaties and conventions which entail several obligations which are not covered or are only partly covered by the present Acts.

(iv) During recent years new drugs of addiction which have come to be known as psychotropic substances have appeared on the scene and posed serious problems to national government. There is no comprehensive law to enable exercise of control over psychotropic substances in India in the manner as envisaged in the Convention on Psychotropic Substances, 1971 to which India has also acceded.

2. In view of what has been stated above, there is an urgent need for the enactment of a comprehensive legislation on narcotic drugs and psychotropic substances which, *inter alia*, should consolidate and amend the existing laws relating to narcotic drugs, strengthen the existing controls over drug abuse, considerably enhance the penalties particularly for trafficking offences, make provisions for exercising effective control over psychotropic substances and make provisions for the implementation of international conventions relating to narcotic drugs and psychotropic substances to which India has become a party.

3. The Bill seeks to achieve the above objects."

(emphasis supplied)

40. The very first thing that this Statement addresses is the woeful inadequacy of three old Acts, insofar as the scheme of penalties is concerned, which were not sufficiently deterrent to meet the challenge

of well organised gangs of smugglers, together with the importance of investing, for the first time, the officers of central enforcement agencies with the power of investigation of offences under the new law. Undoubtedly, the NDPS Act is a comprehensive legislation which makes provisions for exercising control over narcotic drugs and psychotropic substances, at the heart of which is the power vested in various officers to investigate offences under the Act, so as to prevent and punish the same against offenders being, *inter alia*, organised gangs of smugglers who indulge in what is considered by Parliament to be a menace to society. Also, the preamble to the NDPS Act states:

> "An Act 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, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances and for matters connected therewith."

41. This itself refers to the Act being a "stringent" measure to combat the menace of crimes relatable to drugs and psychotropic substances. Under Chapter IV, which deals with "Offences and Penalties", sections 15-24 speak of various drugs and psychotropic substances, in which the golden thread running through these sections is that where the contravention involves "small quantity" as defined, there can be a rigorous imprisonment for a term that may extend to one year, or a fine

that may extend to ten thousand rupees or both; where the contravention involves an intermediate quantity, i.e. between "small" and "commercial" quantity, with rigorous imprisonment that may extend to ten years and with fine that may extend to one lakh rupees; and where the contravention involves "commercial quantity" as defined, with rigorous imprisonment for a minimum of ten years but which may extend to twenty years, and also be liable to a fine which shall not be less than one lakh, but which may extend to two lakhs – the court, for reasons to be recorded, is also given the power to impose a fine exceeding two lakhs. Under sections 28 and 29, punishments for attempts to commit offences, and for abetment and criminal conspiracy, are then set out. An extremely important section is section 30, where even preparation to commit an offence is made an offence[1]. Under section 31, where a person is already convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, any of the offences punishable under the NDPS Act, and is subsequently convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence punishable under the NDPS Act, the punishment then goes to up to a term which may extend to one and one-half times the maximum term of

1 It may be remembered that in the Indian Penal Code, 1860 ("**IPC**"), the only section where preparation is made an offence, is "preparation to commit dacoity". See Section 399, IPC.

imprisonment, and shall also be liable to a fine which shall extend to one and one-half times of the maximum amount of fine. In certain circumstances under section 31A, the death penalty is also awarded. Under section 32A, no sentence awarded under the NDPS Act, other than a sentence under section 27, shall be suspended, remitted or commuted. Equally, we have seen how under section 33, the Probation of Offenders Act, 1958 does not apply where the offender is above 18, or if the offence is for offences other than those under sections 26 and 27 of the Act.

42. Several presumptions are also made under the NDPS Act in which the burden of proof is reversed, now being on the accused. They are all to be found in three sections – sections 35, 54 and 66. These sections state as follows:

> "**35. Presumption of culpable mental state.**—(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
>
> *Explanation.*—In this section "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.
>
> (2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."

"**54. Presumption from possession of illicit articles.**— In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of—

(a) any narcotic drug or psychotropic substance or controlled substance;
(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;
(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or
(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured,

for the possession of which he fails to account satisfactorily."

"**66. Presumption as to documents in certain cases.**— Where any document—

(i) is produced or furnished by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law, or

(ii) has been received from any place outside India (duly authenticated by such authority or person and in such manner as may be prescribed by the Central Government) in the course of investigation of any offence under this Act alleged to have been committed by a person, and such document is tendered in any prosecution under this Act in evidence against him, or against him and any other person who is tried jointly with him, the court shall—

(a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person

or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting; and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;

(c) in a case falling under clause (i), also presume, unless the contrary is proved, the truth of the contents of such document."

43. Section 37(1) makes all offences under the Act cognizable and non-bailable, with stringent conditions for bail attached:

"**37. Offences to be cognizable and non-bailable.**—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(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.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail."

44. Under section 40, where a person is convicted of any of the offences punishable under the Act, the court may, in addition, publish at the expense of such person – in a newspaper or other manner – the factum of such conviction. The NDPS Act is said to be in addition to the Customs Act, 1962 and the Drugs and Cosmetics Act, 1940, so that, notwithstanding that offences may be made out under those Acts, offences under the NDPS Act will continue to be tried as such – see sections 79 and 80.

45. Given the stringent nature of the NDPS Act, several sections provide safeguards so as to provide a balance between investigation and trial of offences under the Act, and the fundamental rights of the citizen. Several safeguards are contained in section 42, which states as follows:

> "**42. Power of entry, search, seizure and arrest without warrant or authorisation.**—(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which

may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,—

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that in respect of a holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances, granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

> (2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."

46. From this section it is clear that only when the concerned officer has "reason to believe" from personal knowledge or information given by any person and taken down in writing that an offence has been committed, that the concerned officer may, only between sunrise and sunset, enter, search, seize drugs and materials, and arrest any person who he believes has committed any offence. By the first proviso, this can be done only by an officer not below the rank of sub-inspector. Under sub-section (2) in addition, where the information in writing is given, the officer involved must send a copy thereof to his immediate official superior within seventy-two hours. It is important here to contrast "reason to believe" with the expression "reason to suspect", which is contained in section 49 of the NDPS Act. Thus, "reason to believe" has been construed by this Court in **A.S. Krishnan v. State of Kerala** (2004) 11 SCC 576 as follows:

> "**9.** Under IPC, guilt in respect of almost all the offences is fastened either on the ground of "intention" or "knowledge" or "reason to believe". We are now concerned with the expressions "knowledge" and "reason to believe". "Knowledge" is an awareness on the part of the person concerned indicating his state of mind. "Reason to believe" is another facet of the state of mind. "Reason to believe" is not the same thing as "suspicion" or "doubt" and mere seeing also cannot be equated to believing.

"Reason to believe" is a higher level of state of mind. Likewise "knowledge" will be slightly on a higher plane than "reason to believe". A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same. Section 26 IPC explains the meaning of the words "reason to believe" thus:

"26. '*Reason to believe*'.—A person is said to have 'reason to believe' a thing, if he has sufficient cause to believe that thing but not otherwise.""

47. Section 50 of the NDPS Act contains extremely important conditions under which a search of persons shall be conducted. Section 50 states:

"**50. Conditions under which search of persons shall be conducted.**—(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article

or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

48. In **Baldev Singh** (supra), this Court had held:

"**17.** The trial court in those cases had acquitted the accused on the ground that the arrest, search and seizure were conducted in violation of some of the "relevant and mandatory" provisions of the NDPS Act. The High Court declined to grant appeal against the order of acquittal. The State of Punjab thereupon filed appeals by special leave in this Court. In some other cases, where the accused had been convicted, they also filed appeals by special leave questioning their conviction and sentence on the ground that their trials were illegal because of non-compliance with the safeguards provided under Section 50 of the NDPS Act. A two-Judge Bench speaking through K. Jayachandra Reddy, J. considered several provisions of the NDPS Act governing arrest, search and seizure and, in particular, the provisions of Sections 41, 42, 43, 44, 49, 50, 51, 52 and 57 of the NDPS Act as well as the provisions of the Code of Criminal Procedure relating to search and seizure effected during investigation of a criminal case. Dealing with Section 50, it was held that in the context in which the right had been conferred, it must naturally be presumed that it is imperative on the part of the officer to *inform* the person to be searched of his right that if he so requires he shall be searched before a gazetted officer or Magistrate and on such request being made by him, to be taken before the gazetted officer or Magistrate for further proceedings. The reasoning given in *Balbir Singh case* [(1994) 3 SCC 299] was that to afford an opportunity to the person to be searched "if he so requires to be searched before a gazetted officer or a Magistrate" he must be made aware of that right and that could be done only by the empowered officer

by *informing* him of the existence of that right. The Court went on to hold that failure to inform the person to be searched of that right and if he so requires, failure to take him to the gazetted officer or the Magistrate, would mean non-compliance with the provisions of Section 50 which in turn would "affect the prosecution case and vitiate the trial". The following conclusions were arrived at by the two-Judge Bench in *State of Punjab* v. *Balbir Singh*:

"*25*. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:

(*1*) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(*2-A*) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(*2-B*) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(*2-C*) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(*3*) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(*4-A*) If a police officer, even if he happens to be an 'empowered' officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity.

(*4-B*) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he

would be doing so under the provisions of CrPC namely Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

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

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case."

(emphasis in original)

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57. On the basis of the reasoning and discussion above, the following conclusions arise:

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned

person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing;

(2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;

(3) That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act;

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. 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. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in

breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut-short a criminal trial;

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search;

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act

(9) That the judgment in Pooran Mal's case cannot be understood to have laid down that an illicit article seized

during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search;

(10) That the judgment in Ali Mustaffa's case correctly interprets and distinguishes the judgment in Pooran Mal's case and the broad observations made in Pirthi Chand's case and Jasbir Singh's case are not in tune with the correct exposition of law as laid down in Pooran Mal's case. The above conclusions are not a summary of our judgment and have to be read and considered in the light of the entire discussion contained in the earlier part."

49. Immediately after this judgment, Parliament enacted sub-sections (5) and (6). Despite the enactment of these provisions, this Court in **Vijaysinh Chandubha Jadeja** (supra) specifically held as follows:

"**24.** Although the Constitution Bench in *Baldev Singh case* [(1999) 6 SCC 172] did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to

be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.

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27. It can, thus, be seen that apart from the fact that in *Karnail Singh* [(2009) 8 SCC 539], the issue was regarding the scope and applicability of Section 42 of the NDPS Act in the matter of conducting search, seizure and arrest without warrant or authorisation, the said decision does not depart from the dictum laid down in *Baldev Singh case* [(1999) 6 SCC 172] insofar as the obligation of the empowered officer to inform the suspect of his right enshrined in sub-section (1) of Section 50 of the NDPS Act is concerned. It is also plain from the said paragraph that the flexibility in procedural requirements in terms of the two newly inserted sub-sections can be resorted to only in emergent and urgent situations, contemplated in the provision, and not as a matter of course. Additionally, sub-section (6) of Section 50 of the NDPS Act makes it imperative and obligatory on the authorised officer to send a copy of the reasons recorded by him for his belief in terms of sub-section (5), to his immediate superior officer, within the stipulated time, which exercise would again be subjected to judicial scrutiny during the course of trial.

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29. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict

compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

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31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in *Joseph Fernandez* [(2000) 1 SCC 707] and *Prabha Shankar Dubey* [(2004) 2 SCC 56] is neither borne out from the language of sub-section (1) of Section 50 nor is it in consonance with the dictum laid down in *Baldev Singh case* [(1999) 6 SCC 172]. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf."

50. Thus, this extremely important safeguard continues, as has been originally enacted, subject only to the exceptions in sub-sections (5) and (6), which can only be used in urgent and emergent situations. This Court has clearly held that non-compliance of this provision would lead to the conviction of the accused being vitiated, and that "substantial" compliance with these provisions would not save the prosecution case.

51. Likewise, section 52 of the NDPS Act states as follows:

"**52. Disposal of persons arrested and articles seized.** —(1) Any officer arresting a person under section 41, section 42, section 43 or section 44 shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested and article seized under warrant issued under sub-section (1) of section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.

(3) Every person arrested and article seized under sub-section (2) of section 41, section 42, section 43 or section 44 shall be forwarded without unnecessary delay to—

(a) the officer-in-charge of the nearest police station, or

(b) the officer empowered under section 53.

(4) The authority or officer to whom any person or article is forwarded under sub-section (2) or sub-section (3) shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article."

52. Section 52(1)-(3) contains three separate safeguards, insofar as disposal of persons arrested and articles seized are concerned.

53. Section 57 then speaks of a person making an arrest or seizure having to make a full report of all the particulars of such arrest or seizure to his immediate official superior within forty-eight hours. Equally, under section 57A, whenever any officer notified under section 53 makes an arrest or seizure under the Act, the officer shall make a report of the illegally acquired properties of such person to the jurisdictional competent authority within ninety days of the arrest or seizure. Section 58 is extremely important, and is set out hereinbelow:

"**58. Punishment for vexatious entry, search, seizure or arrest.—**(1) Any person empowered under section 42 or section 43 or section 44 who—

(a) without reasonable ground of suspicion enters or searches, or causes to be entered or searched, any building, conveyance or place;

(b) vexatiously and unnecessarily seizes the property of any person on the pretence of seizing or searching for any narcotic drug or psychotropic substance or other article liable to be confiscated under this Act, or of seizing any document or other article liable to be seized under section 42, section 43 or section 44; or

(c) vexatiously and unnecessarily detains, searches or arrests any person, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.

(2) Any person wilfully and maliciously giving false information and so causing an arrest or a search being made under this Act shall be punishable with imprisonment for a term which may extend to two years or with fine or with both."

54. This, more than any other provision, makes it clear that a person's privacy is not to be trifled with, because if it is, the officer who trifles with it is himself punishable under the provision. Under section 63, which contains the procedure in making confiscations, the first proviso to sub-section (2) makes it clear that no order of confiscation of an article or thing shall be made until the expiry of one month from the date of seizure, or without hearing any person who may claim any right thereto and the evidence which he produces in respect of his claim.

55. Given the stringent provisions of the NDPS Act, together with the safeguards mentioned in the provisions discussed above, it is important to note that statutes like the NDPS Act have to be construed bearing in

mind the fact that the severer the punishment, the greater the care taken to see that the safeguards provided in the statute are scrupulously followed. This was laid down in paragraph 28 of **Baldev Singh** (supra). That the NDPS Act is predominantly a penal statute is no longer *res integra*. In **Directorate of Revenue and Anr. v. Mohammed Nisar Holia** (2008) 2 SCC 370, this Court held:

> "**9.** The NDPS Act is a penal statute. It invades the rights of an accused to a large extent. It raises a presumption of a culpable mental state. Ordinarily, even an accused may not be released on bail having regard to Section 37 of the Act. The court has the power to publish names, address and business, etc. of the offenders. Any document produced in evidence becomes admissible. A vast power of calling for information upon the authorities has been conferred by reason of Section 67 of the Act.
>
> **10.** Interpretation and/or validity in regard to the power of search and seizure provided for under the said Act came up for consideration in *Balbir Singh case* [(1994) 3 SCC 299] wherein it was held:
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> "*10*. It is thus clear that by a combined reading of Sections 41, 42, 43 and 51 of the NDPS Act and Section 4 CrPC regarding arrest and search under Sections 41, 42 and 43, the provisions of CrPC, namely, Sections 100 and 165 would be applicable to such arrest and search. Consequently the principles laid down by various courts as discussed above regarding the irregularities and illegalities in respect of arrest and search would equally be applicable to the arrest and search under the NDPS Act also depending upon the facts and circumstances of each case.
>
> **11.** But there are certain other embargoes envisaged under Sections 41 and 42 of the NDPS Act. Only a Magistrate so empowered under Section 41 can issue a warrant for arrest and search where he has reason to believe that an offence under Chapter IV has been

committed so on and so forth as mentioned therein. Under sub-section (2) only a gazetted officer or other officers mentioned and empowered therein can give an authorisation to a subordinate to arrest and search if such officer has reason to believe about the commission of an offence and after reducing the information, if any, into writing. Under Section 42 only officers mentioned therein and so empowered can make the arrest or search as provided if they have reason to believe from personal knowledge or information. In both these provisions there are two important requirements. One is that the Magistrate or the officers mentioned therein firstly be empowered and they must have reason to believe that an offence under Chapter IV has been committed or that such arrest or search was necessary for other purposes mentioned in the provision. So far as the first requirement is concerned, it can be seen that the legislature intended that only certain Magistrates and certain officers of higher rank and empowered can act to effect the arrest or search. This is a safeguard provided having regard to the deterrent sentences contemplated and with a view that innocent persons are not harassed. Therefore if an arrest or search contemplated under these provisions of NDPS Act has to be carried out, the same can be done only by competent and empowered Magistrates or officers mentioned thereunder."

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 requires 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.

12. This Court in *Balbir Singh* [(1994) 3 SCC 299] referring to *Miranda* v. *State of Arizona* [384 US 436 (1966)] while interpreting the provisions of the Act held that not only the provisions of Section 165 of the Code of

> Criminal Procedure would be attracted in the matter of search and seizure but the same must comply with right of the accused to be informed about the requirement to comply with the statutory provisions.
>
> ***xxx xxx xxx***
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> **16.** It is not in dispute that the said Act prescribes stringent punishment. A balance, thus, must be struck in regard to the mode and manner in which the statutory requirements are to be complied with vis-à-vis the place of search and seizure."

56. Likewise, in **Union of India v. Bal Mukund** (2009) 12 SCC 161, this Court held:

> "**28.** Where a statute confers such drastic powers and seeks to deprive a citizen of its liberty for not less than ten years, and making stringent provisions for grant of bail, scrupulous compliance with the statutory provisions must be insisted upon."

57. With this pronouncement of the law in mind, let us now examine the two questions that have been referred to us.

SCOPE OF SECTION 67 OF THE NDPS ACT

58. Section 67 of the NDPS Act is set out hereinbelow:

> "**67. Power to call for information, etc.**—Any officer referred to in section 42 who is authorised in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contravention of any provision of this Act,—
>
> (a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder;
>
> (b) require any person to produce or deliver any document or thing useful or relevant to the enquiry;

(c) examine any person acquainted with the facts and circumstances of the case."

59. The marginal note to the section indicates that it refers only to the power to "call for information, etc.". As has been held by this Court in **K.P. Varghese v. Income Tax Officer, Ernakulam and Anr.** (1981) 4 SCC 173, a marginal note is an important internal tool for indicating the meaning and purpose of a section in a statute, as it indicates the "drift" of the provision. The Court held as follows:

> "**9.** This interpretation of sub-section (2) is strongly supported by the marginal note to Section 52 which reads "Consideration for transfer in cases of understatement". It is undoubtedly true that the marginal note to a section cannot be referred to for the purpose of construing the section but it can certainly be relied upon as indicating the drift of the section or, to use the words of Collins, M.R. in *Bushel* v. *Hammond* [(1904) 2 KB 563] to show what the section is dealing with. It cannot control the interpretation of the words of a section particularly when the language of the section is clear and unambiguous but, being part of the statute, it prima facie furnishes some clue as to the meaning and purpose of the section (vide *Bengal Immunity Company Limited* v. *State of Bihar* [(1955) 2 SCR 603])."

60. Secondly, it is only an officer referred to in section 42 who may use the powers given under section 67 in order to make an "enquiry" <u>in connection with</u> the contravention of any provision of this Act. The word "enquiry" has been used in section 67 to differentiate it from "inquiry" as used in section 53A, which is during the course of investigation of

offences[2]. As a matter of fact, the notifications issued under the Act soon after the Act came into force, which will be referred to later in the judgment, specifically speak of the powers conferred under section 42(1) read with section 67. This is an important executive reading of the NDPS Act, which makes it clear that the powers to be exercised under section 67 are to be exercised in conjunction with the powers that are delineated in section 42(1). Thus, in **Desh Bandhu Gupta & Co. v. Delhi Stock Exchange Assn. Ltd.** (1979) 4 SCC 565, this Court referred to the principle of "*contemporanea expositio*" in the context of an executive interpretation of a statute, as follows:

> "**9**…The principle of *contemporanea expositio* (interpreting a statute or any other document by reference to the exposition it has received from contemporary authority) can be invoked though the same will not always be decisive of the question of construction (Maxwell 12th ed. p.268). In Crawford on Statutory Construction (1940 ed.) in para 219 (at pp. 393-395) it has been stated that administrative construction (i.e. contemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned; such a construction, commonly referred to as practical construction, although not controlling, is nevertheless entitled to considerable weight; it is highly persuasive. In *Baleshwar Bagarti* v. *Bhagirathi Dass* [ILR 35 Cal 701 at 713] the principle, which was reiterated in *Mathura Mohan*

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2 In Lexico (a collaboration between Oxford University Press and Dictionary.com), it is stated that "the traditional distinction between the verbs enquire and inquire is that enquire is to be used for general senses of 'ask', while inquire is reserved for uses meaning 'make a formal investigation'". (see https://www.lexico.com/grammar/enquire-or-inquire).

Saha v. *Ram Kumar Saha* [ILR 43 Cal 790] has been stated by Mookerjee, J., thus:

> "It is a well settled principle of interpretation that courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it...I do not suggest for a moment that such interpretation has by any means a controlling effect upon the courts; such interpretation may, if occasion arises, have to be disregarded for cogent and persuasive reasons, and in a clear case of error, a court would without hesitation refuse to follow such construction."

61. The officer referred to in section 42 is given powers of entry, search, seizure and arrest without warrant, with the safeguards that have been pointed out hereinabove in this judgment. The first safeguard is that such officer must have "reason to believe", which as has been noted, is different from mere "reason to suspect". It is for this reason that such officer must make an enquiry in connection with the contravention of the provisions of this Act, for otherwise, even without such enquiry, mere suspicion of the commission of an offence would be enough. It is in this enquiry that he has to call for "information" under sub-clause (a), which "information" can be given by any person and taken down in writing, as is provided in section 42(1). Further, the information given must be for the purpose of "satisfying" himself that there has been a contravention of the provisions of this Act, which again goes back to the expression "reason to believe" in section 42. This being the case, it is a little difficult

to accept Shri Lekhi's argument that "enquiry" in section 67 is the same as "investigation", which is referred to in section 53. Section 53 states:

> "**53. Power to invest officers of certain departments with powers of an officer-in-charge of a police station.** —(1) The Central Government, after consultation with the State Government, may, by notification published in the Official Gazette, invest any officer of the department of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces or any class of such officers with the powers of an officer-in-charge of a police station for the investigation of the offences under this Act.
>
> (2) The State Government may, by notification published in the Official Gazette, invest any officer of the department of drugs control, revenue or excise or any other department or any class of such officers with the powers of an officer-in-charge of a police station for the investigation of offences under this Act."

62. "Investigation" is defined under the CrPC in section 2(h) as follows:

> "(h) "investigation" 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 authorised by a Magistrate in this behalf;"

63. By virtue of section 2(xxix) of the NDPS Act, this definition becomes applicable to the use of the expression "investigation" in section 53 of the NDPS Act. It is important to notice that it is an inclusive definition, by which, "evidence" is collected by a police officer or a person authorised by the Magistrate. The "enquiry" that is made by a section 42 officer is so that such officer may gather "information" to satisfy himself that there is "reason to believe" that an offence has been committed in the first place.

64. This becomes even clearer when section 52(3) of the NDPS Act is read. Under section 52(3), every person arrested and article seized under sections 41 to 44 shall be forwarded without unnecessary delay either to the officer-in-charge of the nearest police station, who must then proceed to "investigate" the case given to him, or to the officer empowered under section 53 of the NDPS Act, which officer then "investigates" the case in order to find out whether an offence has been committed under the Act. It is clear, therefore, that section 67 is at an antecedent stage to the "investigation", which occurs *after* the concerned officer under section 42 has "reason to believe", upon information gathered in an enquiry made in that behalf, that an offence has been committed.

65. Equally, when we come to section 67(c) of the NDPS Act, the expression used is "examine" any person acquainted with the facts and circumstances of the case. The "examination" of such person is again only for the purpose of gathering information so as to satisfy himself that there is "reason to believe" that an offence has been committed. This can, by no stretch of imagination, be equated to a "statement" under section 161 of the CrPC, as is argued by Shri Lekhi, relying upon **Sahoo v. State of U.P.** (1965) 3 SCR 86 (at page 88), which would include the making of a confession, being a sub-species of "statement".

66. The consequence of accepting Shri Lekhi's argument flies in the face of the fundamental rights contained in Articles 20(3) and 21, as well as the scheme of the NDPS Act, together with the safeguards that have been set out by us hereinabove. First and foremost, even according to Shri Lekhi, a police officer, properly so-called, may be authorised to call for information etc. under section 67, as he is an officer referred to in section 42(1). Yet, while "investigating" an offence under the NDPS Act i.e. *subsequent* to the collection of information etc. under section 67, the same police officer will be bound by sections 160-164 of the CrPC, together with all the safeguards mentioned therein – firstly, that the person examined shall be bound to answer truly all questions relating to such case put to him, other than questions which would tend to incriminate him; secondly, the police officer is to reduce this statement into writing and maintain a separate and true record of this statement; thirdly, the statement made may be recorded by audio-video electronic means to ensure its genuineness; and fourthly, a statement made by a woman can only be made to a woman police officer or any woman officer. Even after all these safeguards are met, no such statement can be used at any inquiry or trial, except for the purpose of contradicting such witness in cross-examination. In **Tahsildar Singh v. State of U.P.**, 1959 Supp (2) SCR 875, Subba Rao J., speaking for four out of six learned Judges of this Court, had occasion to refer to the history of

section 162 of the CrPC. After setting out this history in some detail, the learned Judge held:

> "It is, therefore, seen that the object of the legislature throughout has been to exclude the statement of a witness made before the police during the investigation from being made use of at the trial for any purpose, and the amendments made from time to time were only intended to make clear the said object and to dispel the cloud cast on such intention. The Act of 1898 for the first time introduced an exception enabling the said statement reduced to writing to be used for impeaching the credit of the witness in the manner provided by the Evidence Act. As the phraseology of the exception lent scope to defeat the purpose of the legislature, by the Amendment Act of 1923, the section was redrafted defining the limits of the exception with precision so as to confine it only to contradict the witness in the manner provided under Section 145 of the Evidence Act. If one could guess the intention of the legislature in framing the section in the manner it did in 1923, it would be apparent that it was to protect the accused against the user of the statements of witnesses made before the police during investigation at the trial presumably on the assumption that the said statements were not made under circumstances inspiring confidence. Both the section and the proviso intended to serve primarily the same purpose i.e., the interest of the accused.
>
> (at pages 889 – 890)
>
> ***xxx xxx xxx***
>
> The object of the main section as the history of its legislation shows and the decided cases indicate is to impose a general bar against the use of statement made before the police and the enacting clause in clear terms says that no statement made by any person to a police officer or any record thereof, or any part of such statement or record, be used for any purpose. The words are clear and unambiguous. The proviso engrafts an exception on the general prohibition and that is, the said statement in writing may be used to contradict a witness in the manner

provided by Section 145 of the Evidence Act. We have already noticed from the history of the section that the enacting clause was mainly intended to protect the interests of accused. At the stage of investigation, statements of witnesses are taken in a haphazard manner. The police officer in the course of his investigation finds himself more often in the midst of an excited crowd and babel of voices raised all round. In such an atmosphere, unlike that in a court of law, he is expected to hear the statements of witnesses and record separately the statement of each one of them. Generally he records only a summary of the laments which appear to him to be relevant. These statements are, therefore only a summary of what a witness says and very often perfunctory. Indeed, in view of the aforesaid facts, there is a statutory prohibition against police officers taking the signature of the person making the statement, indicating thereby that the statement is not intended to be binding on the witness or an assurance by him that it is a correct statement.

At the same time, it being the earliest record of the statement of a witness soon after the incident, any contradiction found therein would be of immense help to an accused to discredit the testimony of a witness making the statement. The section was, therefore, conceived in an attempt to find a happy via media, namely, while it enacts an absolute bar against the statement made before a police officer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by Section 145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction. It cannot be used for corroboration of a prosecution or a defence witness or even a court witness. Nor can it be used for contradicting a defence or a court witness. Shortly stated, there is a general bar against its use subject to a limited exception in the interest of the accused, and the exception cannot obviously be used to cross the bar."

(at pages 894 – 895)

67. Under section 163(1) of the CrPC, no inducement, threat or promise, as has been mentioned in section 24 of the Evidence Act, can be made to extort such statement from a person; and finally, if a confession is to be recorded, it can only be recorded in the manner laid down in section 164 i.e. before a Magistrate, which statement is also to be recorded by audio-video electronic means in the presence of the Advocate of the person accused of an offence. This confession can only be recorded after the Magistrate explains to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him – see section 164(2) of the CrPC. The Magistrate is then to make a memorandum at the foot of the record that he has, in fact, warned the person that he is not bound to make such confession, and that it may be used as evidence against him – see section 164(4) of the CrPC. Most importantly, the Magistrate is empowered to administer oath to the person whose statement is so recorded – see section 164(5) of the CrPC.

68. It would be remarkable that if a police officer, properly so-called, were to "investigate" an offence under the NDPS Act, all the safeguards contained in sections 161 to 164 of the CrPC would be available to the accused, but that if the same police officer or other designated officer under section 42 were to record confessional statements under section 67 of the NDPS Act, these safeguards would be thrown to the winds, as

was admitted by Shri Lekhi in the course of his arguments. Even if any such anomaly were to arise on a strained construction of section 67 as contended for by Shri Lekhi, the alternative construction suggested by the Appellants, being in consonance with fundamental rights, alone would prevail, as section 67 would then have to be “read down” so as to conform to fundamental rights.

69. Take, for example, an investigation conducted by the regular police force of a State qua a person trafficking in ganja. If the same person were to be apprehended with ganja on a subsequent occasion, this time not by the State police force but by other officers for the same or similar offence, the safeguards contained in sections 161-164 of the CrPC would apply insofar as the first incident is concerned, but would not apply to the subsequent incident. This is because the second time, the investigation was not done by the State police force, but by other officers. The fact situation mentioned in the aforesaid example would demonstrate manifest arbitrariness in the working of the statute, leading to a situation where, for the first incident, safeguards available under the CrPC come into play because it was investigated by the local State police, as opposed to officers other than the local police who investigated the second transaction.

70. Take another example. If X & Y are part of a drug syndicate, and X is apprehended in the State of Punjab by the local State police with a

certain quantity of ganja, and Y is apprehended in the State of Maharashtra by officers other than the State police, again with a certain quantity of ganja which comes from the same source, the investigation by the State police in Punjab would be subject to safeguards contained in the CrPC, but the investigation into the ganja carried by Y to Maharashtra would be carried out without any such safeguards, owing to the fact that an officer other than the local police investigated into the offence. These anomalies are real and not imaginary, and if a statute is so read as to give rise to such anomalies, it would necessarily have to be struck down under Article 14 of the Constitution as being discriminatory and manifestly arbitrary.

71. Further, the provisions of section 53A of the NDPS Act militate strongly against Shri Lekhi's argument. Section 53A states as follows:

> "**53A. Relevancy of statements under certain circumstances.**—(1) A statement made and signed by a person before any officer empowered under section 53 for the investigation of offences, during the course of any inquiry or proceedings by such officer, shall be relevant for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,—
> (a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or
>
> (b) when the person who made the statement is examined as a witness in the case before the court and the court is

> of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.
>
> (2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceedings under this Act or the rules or orders made thereunder, other than a proceeding before a court, as they apply in relation to a proceeding before a court."

72. If Shri Lekhi's argument were correct, that a confessional statement made under section 67 is sufficient as substantive evidence to convict an accused under the NDPS Act, section 53A would be rendered otiose. Sections 53 and 53A of the NDPS Act, when read together, would make it clear that section 53A is in the nature of an exception to sections 161, 162 and 172 of the CrPC. This is for the reason that section 53(1), when it invests certain officers or classes of officers with the power of an officer in charge of a police station for investigation of offences under the NDPS Act, refers to Chapter XII of the CrPC, of which sections 161, 162 and 172 are a part. First and foremost, under section 162(1) of the CrPC, statements that are made in the course of investigation are not required to be signed by the person making them – under section 53A they can be signed by the person before an officer empowered under section 53. Secondly, it is only in two circumstances [under section 53A(1)(a) and (b)] that such a statement is made relevant for the purpose of proving an offence against the accused: it is only if the person who made the statement is dead, cannot be found, is incapable

of giving evidence; or is kept out of the way by the adverse party, or whose presence cannot be obtained without delay or expense which the court considers unreasonable, that such statement becomes relevant. Otherwise, if the person who made such a statement is examined as a witness, and the court thinks that in the interest of justice such statement should be made relevant and does so, then again, such statement may become relevant. None of this would be necessary if Shri Lekhi's argument were right, that a confessional statement made under section 67 – not being bound by any of these constraints – would be sufficient to convict the accused.

73. Shri Lekhi then relied strongly upon the recent Constitution Bench judgment in **Mukesh Singh** (supra). This judgment concerned itself with the correctness of the decision in **Mohan Lal v. State of Punjab,** (2018) 17 SCC 627, which had taken the view that in case the investigation is conducted by the very police officer who is himself the complainant, the trial becomes vitiated as a matter of law, and the accused is entitled to acquittal. In deciding this question, the Constitution Bench of this Court referred to various earlier judgments, in particular, the judgment in **State v. V. Jayapaul** (2004) 5 SCC 223**.** After setting out the relevant provisions of the CrPC, the Court concluded:

> "**80**…Thus, under the scheme of Cr.P.C., it cannot be said that there is a bar to a police officer receiving information for commission of a cognizable offence, recording he

same and then investigating it. On the contrary, Sections 154, 156 and 157 permit the officer in charge of a police station to reduce the information of commission of a cognizable offence in writing and thereafter to investigate the same."

74. The Court then set out the provisions of the NDPS Act and concluded:

> "**89.** Section 52 of the NDPS Act mandates that any officer arresting a person under Sections 41, 42, 43 or 44 to inform the person arrested of the grounds for such arrest. Sub-section 2 of Section 52 further provides that every person arrested and article seized under warrant issued under sub-section 1 of Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued. As per sub-section 3 of Section 52, every person arrested and article seized under sub-section 2 of Section 41, 42, 43, or 44 shall be forwarded without unnecessary delay to the officer in charge of the nearest police station, or the officer empowered under section 53.
>
> **90.** That <u>thereafter</u> the investigation is to be conducted by the officer in charge of a police station."
>
> (emphasis supplied)

75. The Court then went on to state:

> "**93.** Section 53 does not speak that all those officers to be authorised to exercise the powers of an officer in charge of a police station for the investigation of the offences under the NDPS Act shall be other than those officers authorised under Sections 41, 42, 43, and 44 of the NDPS Act. It appears that the legislature in its wisdom has never thought that the officers authorised to exercise the powers under Sections 41, 42, 43 and 44 cannot be the officer in charge of a police station for the investigation of the offences under the NDPS Act.
>
> **94.** Investigation includes even search and seizure. As the investigation is to be carried out by the officer in charge of a police station and none other and therefore purposely Section 53 authorises the Central Government or the State Government, as the case may be, invest any officer

of the department of drugs control, revenue or excise or any other department or any class of such officers with the powers of an officer in charge of a police station for the investigation of offences under the NDPS Act.

95. Section 42 confers power of entry, search, seizure and arrest without warrant or authorisation to any such officer as mentioned in Section 42 including any such officer of the revenue, drugs control, excise, police or any other department of a State Government or the Central Government, as the case may be, and as observed hereinabove, Section 53 authorises the Central Government to invest any officer of the department of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government….or any class of such officers with the powers of an officer in charge of a police station for the investigation. Similar powers are with the State Government. The only change in Sections 42 and 53 is that in Section 42 the word "police" is there, however in Section 53 the word "police" is not there. There is an obvious reason as for police such requirement is not warranted as he always can be the officer in charge of a police station as per the definition of an "officer in charge of a police station" as defined under the Cr.P.C."

76. On the basis of this judgment, Shri Lekhi argued that "investigation" under the NDPS Act includes search and seizure which is to be done by a section 42 officer and would, therefore, begin from that stage.

77. In this connection, it is important to advert first to the decision of this Court in **H.N. Rishbud and Inder Singh v. State of Delhi** (1955) 1 SCR 1150. This judgment explains in great detail as to what exactly the scope of "investigation" is under the CrPC. It states:

> "In order to ascertain the scope of and the reason for requiring such investigation to be conducted by an officer of high rank (except when otherwise permitted by a

Magistrate), it is useful to consider what “investigation” under the Code comprises. Investigation usually starts on information relating to the commission of an offence given to an officer in charge of a police station and recorded under Section 154 of the Code. If from information so received or otherwise, the officer in charge of the police station has reason to suspect the commission of an offence, he or some other subordinate officer deputed by him, has to proceed to the spot to investigate the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender. Thus investigation primarily consists in the ascertainment of the facts and circumstances of the case. By definition, it includes “all the proceedings under the Code for the collection of evidence conducted by a police officer”. For the above purposes, the investigating officer is given the power to require before himself the attendance of any person appearing to be acquainted with the circumstances of the case. He has also the authority to examine such person orally either by himself or by a duly authorised deputy. The officer examining any person in the course of investigation may reduce his statement into writing and such writing is available, in the trial that may follow, for use in the manner provided in this behalf in Section 162. Under Section 155 the officer in charge of a police station has the power of making a search in any place for the seizure of anything believed to be necessary for the purpose of the investigation. The search has to be conducted by such officer in person. A subordinate officer may be deputed by him for the purpose only for reasons to be recorded in writing if he is unable to conduct the search in person and there is no other competent officer available. The investigating officer has also the power to arrest the person or persons suspected of the commission of the offence under Section 54 of the Code. A police officer making an investigation is enjoined to enter his proceedings in a diary from day-to-day. Where such investigation cannot be completed within the period of 24 hours and the accused is in custody he is enjoined also to send a copy of the entries in the diary to the Magistrate concerned. It is important to notice that where the investigation is conducted not by the officer in charge of the police station but by a subordinate officer (by virtue of

one or other of the provisions enabling him to depute such subordinate officer for any of the steps in the investigation) such subordinate officer is to report the result of the investigation to the officer in charge of the police station. If, upon the completion of the investigation it appears to the officer in charge of the police station that there is no sufficient evidence or reasonable ground, he may decide to release the suspected accused, if in custody, on his executing a bond. If, however, it appears to him that there is sufficient evidence or reasonable ground, to place the accused on trial, he is to take the necessary steps therefore under Section 170 of the Code. In either case, on the completion of the investigation he has to submit a report to the Magistrate under Section 173 of the Code in the prescribed form furnishing various details. Thus, under the Code investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (*a*) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (*b*) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under Section 173. The scheme of the Code also shows that while it is permissible for an officer in charge of a police station to depute some subordinate officer to conduct some of these steps in the investigation, the responsibility for every one of these steps is that of the person in the situation of the officer in charge of the police station, it having been clearly provided in Section 168 that when a subordinate officer makes an investigation he should report the result to the officer in charge of the police station. It is also clear that the final step in the investigation, viz. the formation of the opinion as to whether or not there is a case to place the accused on trial is to be that of the officer in charge of the police station. There is no provision permitting delegation thereof

but only a provision entitling superior officers to supervise or participate under Section 551."

(at pages 1156-1158)

This statement of the law was reiterated in **State of Madhya Pradesh v. Mubarak Ali** (1959) Supp. 2 SCR 201 at 211, 212.

78. It is important to remember that an officer-in-charge of a police station, when he investigates an offence, begins by gathering information, in the course of which he may collect evidence relating to the commission of the offence, which would include search and seizure of things in the course of investigation, to be produced at the trial. Under the scheme of the NDPS Act, it is possible that the same officer who is authorised under section 42 is also authorised under section 53. In point of fact, Notification S.O. 822(E) issued by the Ministry of Finance (Department of Revenue), dated 14.11.1985, empowered the following officers under section 42 and 67 of the NDPS Act:

"**S.O. 822(E)**.-In exercise of the powers conferred by sub-section (1) of section 42 and section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government hereby empowers the officers of and above the rank of Sub-Inspector in the department of Narcotics and of and above the rank of Inspector in the departments of Central Excise, Customs and Revenue Intelligence and in Central Economic Intelligence Bureau and Narcotics Control Bureau to exercise of the powers and perform the duties specified in section 42 within the area of their respective jurisdiction and also authorises the said officers to exercise the powers conferred upon them under section 67."

79. Notification S.O.823(E), also dated 14.11.1985, the Ministry of Finance (Department of Revenue), empowered the following officers under section 53(1) of the NDPS Act:

> "**S.O. 823(E)**.-In exercise of the powers conferred by sub-section (1) of section 53 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government, after consultation with all the State Governments hereby invests the officers of and above the rank of Inspector in the Departments of Central Excise, Narcotics, Customs and Revenue Intelligence and in Central Economic Intelligence Bureau and Narcotics Control Bureau with the powers specified in sub-section (1) of that section."

80. These notifications indicate that officers of and above the rank of Inspector in the Departments of Central Excise, Customs, Revenue Intelligence, Central Economic Intelligence Bureau and Narcotics Control Bureau were authorised to act under both sections 42 and 53. These notifications dated 14.11.1985 were superseded by the following notifications issued by the Ministry of Finance (Department of Revenue) on 30.10.2019:

> "S.O. 3901(E).—In exercise of the powers conferred by sub-section (1) of section 42 and section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), and in supersession of the notification of the Government of India in the Ministry of Finance, Department of Revenue number S.O. 822(E), dated the 14th November, 1985, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii), except as respects things done or omitted to be done before such supersession the Central Government hereby empowers the officers of and above the rank of sub-inspector in Central Bureau of Narcotics and Junior Intelligence Officer

in Narcotics Control Bureau and of and above the rank of inspectors in the Central Board of Indirect Taxes and Customs, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau to exercise the powers and perform the duties specified in section 42 within the area of their respective jurisdiction and also authorise the said officers to exercise the powers conferred upon them under section 67."

"S.O. 3899(E).—In exercise of the powers conferred by sub-section (1) of section 53 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and in supersession of the notification of the Government of India in the Ministry of Finance, Department of Revenue number S.O. 823(E), dated the 14th November, 1985, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii), except as respects things done or omitted to be done before such supersession, the Central Government after consultation with all the State Governments hereby invests the officers of and above the rank of inspectors in the Central Board of Indirect Taxes and Customs, Central Bureau of Narcotics, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau and of and above the rank of Junior Intelligence Officer in Narcotics Control Bureau with the powers specified in sub-section (1) of that section."

81. Thus, even the new notifications dated 30.10.2019 indicate that the powers under sections 42 and 53 of the NDPS Act are invested in officers of and above the rank of inspectors in the Central Board of Indirect Taxes and Customs, Central Bureau of Narcotics, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau and of and above the rank of Junior Intelligence Officer in Narcotics Control Bureau.

82. The observations of the Constitution Bench in **Mukesh Singh** (supra) are, therefore, to the effect that the very person who initiates the detection of crime, so to speak, can also investigate into the offence – there being no bar under the NDPS Act for doing so. This is a far cry from saying that the scheme of the NDPS Act leads to the conclusion that a section 67 confessional statement, being in the course of investigation, would be sufficient to convict a person accused of an offence.

83. As has been pointed out hereinabove, there could be a situation in which a section 42 officer, as designated, is different from a section 53 officer, in which case, it would be necessary for the section 42 officer to first have "reason to believe" that an offence has been committed, for the purpose of which he gathers information, which is then presented not only to his superior officer under section 42(2), but also presented to either an officer-in-charge of a police station, or to an officer designated under section 53 – see section 52(3). This was clearly recognised by the Constitution Bench in **Mukesh Singh** (supra) when it spoke of the requirements under section 52(2) and (3) being met, and "investigation" being conducted thereafter by the officer in charge of a police station.

84. Take a hypothetical case where an officer is designated under section 42, but there is no designation of any officer under section 53 to conduct investigation. In such a case, the section 42 officer would not

conduct any investigation at all – he would only gather facts which give him "reason to believe" that an offence has been committed, in pursuance of which he may use the powers given to him under section 42. After this, for "investigation" into the offence under the NDPS Act, the only route in the absence of a designated officer under section 53, would be for him to present the information gathered to an officer-in-charge of a police station, who would then "investigate" the offence under the NDPS Act.

85. Also, we must bear in mind the fact that the Constitution Bench's focus was on a completely different point, namely, whether the complainant and the investigator of an offence could be the same. From the point of view of this question, section 53A of the NDPS Act is not relevant and has, therefore, not been referred to by the Constitution Bench. As has been pointed out by us hereinabove, in order to determine the questions posed before us, section 53A becomes extremely important, and would, as has been pointed out by us, be rendered otiose if Shri Lekhi's submission, that a statement under section 67 is sufficient to convict an accused of an offence under the Act, is correct. For all these reasons, we do not accede either to Shri Puneet Jain's argument to refer **Mukesh Singh** (supra) to a larger Bench for reconsideration, or to Shri Lekhi's argument based on the same judgment, as the point

involved in **Mukesh Singh** (supra) was completely different from the one before us.

WHETHER AN OFFICER DESIGNATED UNDER SECTION 53 OF THE NDPS ACT CAN BE SAID TO BE A POLICE OFFICER

86. We now come to the question as to whether the officer designated under section 53 of the NDPS Act can be said to be a "police officer" so as to attract the bar contained in section 25 of the Evidence Act.

87. The case law on the subject of who would constitute a "police officer" for the purpose of section 25 of the Evidence Act begins with the judgment of this Court in **Barkat Ram** (supra). In this judgment, by a 2:1 majority, this Court held that a Customs Officer under the Land Customs Act, 1924 is not a "police officer" within the meaning of section 25 of the Evidence Act. The majority judgment of Raghubar Dayal, J. first set out section 9 of the Land Customs Act as follows:

> ""The provisions of the Sea Customs Act, 1878 (VIII of 1878), which are specified in the Schedule, together with all notifications, orders, rules or forms issued, made or prescribed, thereunder, shall, so far as they are applicable, apply for the purpose of the levy of duties of land customs under this Act in like manner as they apply for the purpose of the levy of duties of customs on goods imported or exported by sea."
>
> Among the sections of the Sea Customs Act made applicable by sub-s. (1) of s. 9 of the Land Customs Act, are included all the sections in Chapters XVI and XVII of the Sea Customs Act viz. ss.167 to 193."
>
> (at page 342)

88. The Court then examined the Police Act, 1861, and found:

“The Police Act, 1861 (Act 5 of 1861), is described as an Act for the regulation of police, and is thus an Act for the regulation of that group of officers who come within the word ‘police’ whatever meaning be given to that word. The preamble of the Act further says: ‘whereas it is expedient to re-organise the police and to make it a more efficient instrument for the prevention and detection of crime, it is enacted as follows’. This indicates that the police is the instrument for the prevention and detection of crime which can be said to be the main object and purpose of having the police. Sections 23 and 25 lay down the duties of the police officers and Section 20 deals with the authority they can exercise. They can exercise such authority as is provided for a police officer under the Police Act and any Act for regulating criminal procedure. The authority given to police officers must naturally be to enable them to discharge their duties efficiently. Of the various duties mentioned in s. 23, the more 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 apprehend all persons whom the police officer is legally authorised to apprehend. It is clear, therefore, in view of the nature of the duties imposed on the police officers, the nature of the authority conferred and the purpose of the Police Act, that the powers which the police officers enjoy are powers for the effective prevention and detection of crime in order to maintain law and order.

The powers of Customs Officers are really not for such purpose. Their powers are for the purpose of checking the smuggling of goods and the due realisation of customs duties and to determine the action to be taken in the interests of the revenues of the country by way of confiscation of goods on which no duty had been paid and by imposing penalties and fines.

Reference to s.9(1) of the Land Customs Act may be usefully made at this stage. It is according to the provisions of this sub-section that the provisions of the Sea Customs Act and the orders, Rules etc. prescribed thereunder, apply for the purpose of levy of duties of land customs under the Land Customs Act in like manner as

they apply for the purpose of levy of duties of customs on goods imported or exported by sea. This makes it clear that the provisions conferring various powers on the Sea Customs Officers are for the purpose of levying and realisation of duties of customs on goods and that those powers are conferred on the Land Customs Officers also for the same purpose. Apart from such an expression in Section 9(1) of the Land Customs Act, there are good reasons in support of the view that the powers conferred on the Customs Officers are different in character from those of the police officers for the detection and prevention of crime and that the powers conferred on them are merely for the purpose of ensuring that dutiable goods do not enter the country without payment of duty and that articles whose entry is prohibited are not brought in. It is with respect to the detecting and preventing of the smuggling of goods and preventing loss to the Central Revenues that Customs Officers have been given the power to search the property and person and to detain them and to summon persons to give evidence in an enquiry with respect to the smuggling of goods.

The preamble of the Sea Customs Act says: "Whereas it is expedient to consolidate and amend the law relating to the levy of Sea Customs-duties". Practically, all the provisions of the Act are enacted to achieve this object."

(pages 343-344)

"The Customs Officer, therefore, 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. He is more concerned with the goods and customs duty, than with the offender."

(page 345)
(emphasis supplied)

89. In an important passage, the Court then concluded that since the expression "police officer" is not defined, it cannot be construed in a

narrow way, but must be construed in a “wide and popular sense”, as follows:

> “There seems to be no dispute that a person who is a member of the police force is a police officer. A person is a member of the police force when he holds his office under any of the Acts dealing with the police. A person may be a member of the police in any other country. Officers of the police in the erstwhile Indian States and an officer of the police of a foreign country have been held in certain decided cases to be police officers within the meaning of Section 25 of the Evidence Act. There is no denying that these persons are police officers and are covered by that expression in Section 25. That expression is not restricted to the police-officers of the police forces enrolled under the Police Act of 1861. The word ‘police is defined in S.1 and is said to include all persons who shall be enrolled under the Act. No doubt this definition is not restrictive, as it uses the expression ‘includes’, indicating thereby that persons other than those enrolled under that Act can also be covered by the word “police”.
>
> Sections 17 and 18 of the Police Act provide for the appointment of special police officers who are not enrolled under the Act but are appointed for special occasions and have the same powers, privileges and protection and are liable to perform the same duties as the ordinary officers of the police.
>
> Section 21 also speaks of officers who are not enrolled as police officers and in such categories mentions hereditary or other village police officers.
>
> The words ‘police officer’ are therefore not to be construed in a narrow way, but have to be construed in a wide and popular sense, as was remarked in R. v. Hurribole [ILR 1 Cal 207] where a Deputy Commissioner of police who was actually a police officer and was merely invested with certain Magisterial powers was rightly held to be a police officer within the meaning of that expression in Section 25 of the Evidence Act.”
>
> (at pages 347-348)

90. The Court then held, in a significant passage, that a confession made to any member of the police – of whatever rank – is interdicted by section 25 of the Evidence Act, as follows:

> "The police officer referred to in Section 25 of the Evidence Act, need not be the officer investigating into that particular offence of which a person is subsequently accused. A confession made to him need not have been made when he was actually discharging any police duty. Confession made to any member of the police, of whatever rank and at whatever time, is inadmissible in evidence in view of Section 25."
>
> (at page 349)

91. The Court then found:

> "The powers of search etc., conferred on the former are, as was observed in *Thomas Dana's case* [(1959) Supp (1) SCR 274, 289] of a limited character and have a limited object of safeguarding the revenues of the State.
>
> 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.
>
> It is well-settled that the Customs Officer, when they act under the Sea Customs Act to prevent the smuggling of goods by imposing confiscation and penalties, act judicially: *Leo Roy Frey* v. *Superintendent District Jail, Amritsar* [1958 SCR 822]; *Shewpujanrai Indrasanrai Ltd.* v. *Collector of Customs* [1959 SCR 821]. Any enquiry under Section 171-A is deemed to be a judicial proceeding within the meaning of Sections 193 and 228

IPC, in view of its sub-section (4). It is under the authority given by this section that the Customs Officers can take evidence and record statements. If the statement which is recorded by a Customs Officer in the exercise of his powers under this section be an admission of guilt, it will be too much to say that that statement is a confession to a police officer, as a police officer never acts judicially and no proceeding before a police officer is deemed, under any provision so far as we are aware, to be a judicial proceeding for the purpose of Sections 193 and 228 IPC, or for any purpose. It is still less possible to imagine that the legislature would contemplate such a person, whose proceedings are judicial for a certain purpose, to be a person whose record of statements made to him could be suspect if such statement be of a confessional nature."

(at page 350-351)

92. The majority concluded:

> "We make it clear, however, that we do not express any opinion on the question whether officers of departments other than the police, on whom the powers of an Officer-in-charge of a Police Station under Chapter XIV of the Code of Criminal Procedure, have been conferred, are police officers or not for the purpose of Section 25 of the Evidence Act, as the learned counsel for the appellant did not question the correctness of this view for the purpose of this appeal."
>
> (at page 352)

93. Subba Rao, J. dissented. He made a neat division of "police officer" into three categories as follows:

> "It may mean any one of the following categories of officers: (*i*) a police officer who is a member of the police force constituted under the Police Act; (*ii*) though not a member of the police force constituted under the Police Act, an officer who by statutory fiction is deemed to be a police officer in charge of a police station under the Code of Criminal Procedure; and (*iii*) an officer on whom a statute confers powers and imposes duties of a police officer under the Code of Criminal Procedure, without

describing him as a police officer or equating him by fiction to such an officer."

(at page 355)

94. He then referred to the "high purpose" of section 25 as follows:

> "It is, therefore, clear that Section 25 of the Evidence Act was enacted to subserve a high purpose and that is to prevent the police from obtaining confessions by force, torture or inducement. The salutary principle underlying the section would apply equally to other officers, by whatever designation they may be known, who have the power and duty to detect and investigate into crimes and is for that purpose in a position to extract confessions from the accused."
>
> (at page 357)

> "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 he does, he will be a police officer."
>
> (at page 358)

95. After referring to various High Court judgments which contained the "broad view" – i.e. Bombay, Calcutta and Madras, which would include all three classes of police officers referred to, as against the "narrow view" of the Patna High Court, where only a person who is designated as a police officer under the Police Act, 1861 was accepted to be a police officer under section 25 of the Evidence Act, Subba Rao, J., then finally concluded that, given the functional test and the object of section 25, a customs officer would be a "police officer" properly so called.

96. *(1)* The majority view in this judgment first emphasised the point that the Land Customs Act, 1924 and the Sea Customs Act, 1878 were statutes primarily concerned with the levy of duties of customs, and ancillary to this duty, officers designated in those Acts are given certain powers to check smuggling of goods for due realisation of customs duties. In a significant sentence, the Court, therefore, stated that a customs officer is more concerned with the goods and customs duty than with the offender. *(2)* The persons who are not enrolled as "police" under the Police Act, 1861, would be included as "police" under the inclusive definition contained in that Act, leading to the acceptance of the "broad view" and rejection of the "narrow view" of the meaning of "police officer". *(3)* The protection of section 25 of the Evidence Act is very wide, and applies to a confession made to any member of the police whatever his rank, and at whatever time it is made, whether before or after being accused of an offence. *(4)* That the powers of search, seizure, etc. that are conferred under the Land Customs Act are of a limited character, for the limited object of safeguarding the revenues of the State. *(5)* That section 171A of the Sea Customs Act, 1878 which empowers the customs officer to summon a person to give evidence, or produce a document in an enquiry which he makes, is a judicial enquiry – as a result, a customs officer can never be said to be a police officer as a police officer never acts judicially. *(6)* The precise question with

which we are concerned in this case, namely, whether officers of departments other than the police on whom the powers of an officer-in-charge of a police station under Chapter XIV of the CrPC have been conferred are police officers within the meaning of section 25 of the Evidence Act, was expressly left open.

97. In **Raja Ram Jaiswal** (supra), this time a majority of 2:1 of this Court held that a confession made to an Excise Inspector under the Bihar and Orissa Excise Act of 1915, would be a confession made to a police officer for the purpose of section 25 of the Evidence Act. The majority judgment of Mudholkar, J. referred to **Barkat Ram** (supra) and held:

> "It has, however, been held in a large number of cases, including the one decided by this court, *The State of Punjab* v. *Barkat Ram* [(1962) 3 SCR p. 338] that the words "Police Officer" to be found in Section 25 of the Evidence Act are not to be construed in a narrow way but have to be construed in a wide and popular sense. Those words, according to this Court, are however not to be construed in so wide a sense as to include persons on whom only some of the powers exercised by the police are conferred."
>
> (page 761)

98. **Barkat Ram** (supra) was again referred to, stating that the question which was before the Court was expressly left open by the majority in that case, and it is precisely this question that arose in this case – see page 762. The Court then held:

> "It is precisely this question which falls for consideration in the present appeal. For, under Section 78(3) of the Bihar and Orissa Excise Act, 1915 (2 of 1915) an Excise Officer

empowered under Section 77, sub-section (2) of that Act shall, for the purpose of Section 156 of the Code of Criminal Procedure be deemed to be an officer in charge of a police station with respect to the area to which his appointment as an Excise Officer extends. Sub-section (1) of Section 77 empowers the Collector of Excise to investigate without the order of a Magistrate any offence punishable under the Excise Act committed within the limits of his jurisdiction. Sub-section (2) of that section provides that any other Excise Officer specially empowered behalf in this by the State Government in respect of all or any specified class of offences punishable under the Excise Act may, without the order of a Magistrate, investigate any such offence which a court having jurisdiction within the local area to which such officer is appointed would have power to enquire into or try under the aforesaid provisions. By virtue of these provisions the Lieutenant Governor of Bihar and Orissa by Notification 470-F dated 15-1-1919 has specially empowered Inspectors of Excise and Sub-Inspectors of Excise to investigate any offence punishable under the Act. It is not disputed before us that this notification is still in force. By virtue of the provisions of Section 92 the Act it shall have effect as if enacted in the Act. It would thus follow that an Excise Inspector or Sub-Inspector in the State of Bihar shall be deemed to be an officer in charge of a police station with respect to the area to which he is appointed and is in that capacity entitled to investigate any offence under the Excise Act within that area without the order of Magistrate. Thus he can exercise all the powers which an officer in charge of a police station can exercise under Chapter XIV of the Code of Criminal Procedure. He can investigate into offences, record statements of the persons questioned by him, make searches, seize any articles connected with an offence under the Excise Act, arrest an accused person, grant him bail, send him up for trial before a Magistrate, file a charge-sheet and so on. Thus his position in so far as offences under the Excise Act committed within the area to which his appointment extends are concerned is no different from that of an officer in charge of a police station. As regards these offences not only is he charged with the duty of preventing their commission but also with

their detection and is for these purposes empowered to act in all respects as an officer in charge of a police station. No doubt unlike an officer in charge of a police station he is not charged with the duty of the maintenance of law and order nor can he exercise the powers of such officer with respect to offences under the general law or under any other special laws. But all the same, in so far as offences under the Excise Act are concerned, there is no distinction whatsoever in the nature of the powers he exercises and those which a police officer exercises in relation to offences which it is his duty to prevent and bring to light. It would be logical, therefore, to hold that a confession recorded by him during an investigation into an excise offence cannot reasonably be regarded as anything different from a confession to a police officer. For, in conducting the investigation he exercises the powers of a police officer and the act itself deems him to be a police officer, even though he does not belong to the police force constituted under the Police Act. It has been held by this court that the expression “police officer” in Section 25 of the Evidence Act is not confined to persons who are members of the regularly constituted police force. The position of an Excise Officer empowered under Section 77(2) of the Bihar and Orissa Excise Act is not analogous to that of a Customs Officer for two reasons. One is that the Excise Officer, does not exercise any judicial powers just as the Customs Officer does under the Sea Customs Act, 1878. Secondly, the Customs Officer is not deemed to be an officer in charge of a police station and therefore can exercise no powers under the Code of Criminal Procedure and certainly not those of an officer in charge of a police station. No doubt, he too has the power to make a search, to seize articles suspected to have been smuggled and arrest persons suspected of having committed an offence under the Sea Customs Act. But that is all. Though he can make an enquiry, he has no power to investigate into an offence under Section 156 of the Code of Criminal Procedure. Whatever powers he exercises are expressly set out in the Sea Customs Act. Though some of those set out in Chapter XVII may be analogous to those of a police officer under the Code of Criminal Procedure they are not identical with those of a police officer and are not derived from or by reference to

the Code. In regard to certain matters, he does not possess powers even analogous to those of a Police Officer. Thus he is not entitled to submit a report to a Magistrate under Section 190 of the Code of Criminal Procedure with a view that cognizance of the offence be taken by the Magistrate. Section 187(*A*) of the Sea Customs Act specially provides that cognizance of an offence under the Sea Customs Act can be taken only upon a complaint in writing made by the Customs Officers or other officer of the customs not below the rank of an Assistant Collector of Customs authorised in this behalf by the Chief Customs Officer.

It may well be that a statute confers powers and impose duties on a public servant, some of which are analogous to those of a police officer. But by reason of the nature of other duties which he is required to perform he may be exercising various other powers also. It is argued on behalf of the State that where such is the case the mere conferral of some only of the powers of a police officer on such a person would not make him a police officer and, therefore, what must be borne in mind is the sum total of the powers which he enjoys by virtue of his office as also the dominant purpose for which he is appointed. The contention thus is that when an officer has to perform a wide range of duties and exercise correspondingly a wide range of powers, the mere fact that some of the powers which the statute confers upon him are analogous to or even identical with those of a police officer would not make him a police officer and, therefore, if such an officer records a confession it would not be hit by Section 25 of the Evidence Act. In our judgment what is pertinent to bear in mind for the purpose of determining as to who can be regarded a “police officer” for the purpose of this provision is not the totality of the powers which an officer enjoys but the kind of powers which the law enables him to exercise. The test for determining whether such a person is a “police officer” for the purpose of Section 25 of the Evidence Act would, in our judgment, be whether the powers of a police officer which are conferred on him or which are exercisable by him because he is deemed to be an officer in charge of police station establish a direct or substantial relationship with the prohibition enacted by

> Section 25, that is, the recording of a confession. In our words, the test would be whether the powers are such as would to facilitate the obtaining by him of a confession from a suspect or delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he is appointed or the question as to what other powers he enjoys. These questions may perhaps be relevant for consideration where the powers of the police officer conferred upon him are of a very limited character and are not by themselves sufficient to facilitate the obtaining by him of a confession.
>
> (at pages 762-766)
> (emphasis supplied)

99. In a significant sentence, the Court held:

> "It is the power of investigation which establishes a direct relationship with the prohibition enacted in Section 25."
>
> (at page 768)

100. After referring to the object sought to be achieved by section 25, the Court went on to hold:

> "This provision was thus enacted to eliminate from consideration confessions made to an officer who, by virtue of his position, could extort by force, torture or inducement a confession. An Excise Officer acting under Section 78(3) would be in the same position as an Officer in charge of a police station making an investigation under Chapter XIV of the Code of Criminal Procedure. He would likewise have the same opportunity of extorting a confession from a suspect. It is, therefore, difficult to draw a rational distinction between a confession recorded by a police officer strictly so called and recorded by an Excise Officer who is deemed to be a police officer."
>
> (at page 769)

101. The Court abjured shortcuts to obtaining convictions under the Act as follows:

"We agree with the learned Judge that by and large it is the duty of detection of offences and of bringing offenders to justice, which requires an investigation to be made, that differentiates police officers from private individuals or from other agencies of State. Being concerned with the investigation, there is naturally a desire on the part of a police officer to collect as much evidence as possible against a suspected offender apprehended by him and in his zeal to do so he is apt to take recourse to an easy means, that is, of obtaining a confession by using his position and his power over the person apprehended by him."

(at page 776)

102. The majority ended the judgment by stating:

"There is one more reason also why the confession made to an Excise Sub-Inspector must be excluded, that is, it is a statement made during the course of investigation to a person who exercises the powers of an officer in charge of a police station. Such statement is excluded from evidence by Section 162 of the Code of Criminal Procedure except for the purpose of contradiction. Therefore, both by Section 25 of the Evidence Act as well as by Section 162 CrPC the confession of the appellant is inadmissible in evidence. If the confession goes, then obviously the conviction of the appellant cannot be sustained. Accordingly we allow the appeal and set aside the conviction and sentences passed on the appellant."

(page 778-779)

103. Raghubar Dayal, J. dissented. His dissent contains a useful summary of **Barkat Ram** (supra) as follows:

"In *State of Punjab* v. *Barkat Ram* this Court held that a customs officer is not a police officer within the meaning of Section 25 of the Evidence Act. The view was based on the following considerations:

(1) The powers which a police officer enjoys are powers for the effective prevention and detection of crime in order to maintain law and order while a 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.

(2) The mere fact that customs officers possess certain powers similar to those of police officers in regard to detection of infractions of customs laws, is not a sufficient ground for holding them to be police officers within the meaning of Section 25 of the Evidence Act, even though the word "police officer" are not to be construed in a narrow way but have to be construed in a wide and popular sense, as remarked in *Queen* v. *Hurribole*. The expression "police officer" is not of such wide meaning as to include persons on whom certain police powers are incidentally conferred.

(3) A confession made to any police officer, whatever be his rank and whatever be the occasion for making it, is inadmissible in evidence but a confession made to a customs officer when he be not discharging any such duty which corresponds to the duty of a police officer will be inadmissible even if the other view be correct that he was police officer when exercising such powers.

(4) The Sea Customs Act itself refers to "police officer" in contradistinction to Customs Officer.

(5) Customs Officers act judicially when they act under the Sea Customs Act to prevent smuggling of goods and imposing confiscation and Penalties, and proceedings before them are judicial proceeding for purpose of Sections 193 and 228 IPC."

(at pages 779-780)

104. The minority judgment held:

"I therefore hold that the Excise Inspector and Sub-Inspector empowered by the State Government under Section 77(2) of the Act are not police officers within the meaning of Section 25 of the Evidence Act and that the aforesaid officers cannot be treated to be police officers for the purposes of Section 162 of the Code of Criminal

> Procedure. Section 162 does not confer any power on a police officer. It deals with the use which can be made of the statements recorded by a police officer carrying out investigation under Chapter XIV of the Code. The investigation which the aforesaid Excise Officer conducts is not under Chapter XIV of the Code, but is under the provisions of the Act and therefore this is a further reason for the non-applicability of Section 162 CrPC to any statements made by a person to an Excise Officer during the course of his investigating an offence under the Act."
>
> (at page 808)

105. The test laid down by the majority in **Raja Ram Jaiswal** (supra) for determining whether a person is a police officer under section 25 of the Evidence Act, is whether a direct or substantial relationship with the prohibition enacted by section 25 is established, namely, whether powers conferred are such as would tend to facilitate the obtaining by such officer of a confession from a suspect or delinquent, and this happens if a power of investigation, which culminates in a police report, is given to such officer.

106. Both these judgments came to be considered in the Constitution Bench judgment in **Badku Joti Savant** (supra). In this case, the appellant was prosecuted under the Central Excise and Salt Act, 1944. The Court expressly left open the question as to whether the "broader" or "narrower" meaning of police officer, as deliberated in the aforementioned two judgments, is correct. It proceeded on the footing that the broad view may be accepted to test the statute in question –

see pages 701, 702. The Court referred to the main purpose of the Central Excise Act as follows:

> "The main purpose of the Act is to levy and collect excise duties and Central Excise Officers have been appointed thereunder for this main purpose. In order that they may carry out their duties in this behalf, powers have been conferred on them to see that duty is not evaded and persons guilty of evasion of duty are brought to book.
>
> ***xxx xxx xxx***
>
> Section 19 lays down that every person arrested under the Act shall be forwarded without delay to the nearest Central Excise Officer empowered to send persons so arrested to a Magistrate, or, if there is no such Central Excise Officer within a reasonable distance, to the officer-in-charge of the nearest police station. <u>These sections clearly show that the powers of arrest and search conferred on Central Excise Officers are really in support of their main function of levy and collection of duty on excisable goods</u>."
>
> (at page 702)
> (emphasis supplied)

107. Section 21 of the Central Excise Act, 1944 was then set out as follows:

> "21.(1) When any person is forwarded under section 19 to a Central Excise Officer empowered to send persons so arrested to a Magistrate, the Central Excise Officer shall proceed to inquire into the charge against him.
>
> (2) For this purpose the Central Excise Officer may exercise the same powers and shall be subject to the same provisions as the officer-in-charge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898, when investigating a cognizable case;
>
> Provided that-
> (a) if the Central Excise Officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him

to bail to appear before a Magistrate having jurisdiction in the case, or forward him to custody of such Magistrate;

(b) if it appears to the Central Excise Officer that there is not sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the Central Excise Officer may direct, to appear, if and when so required before a Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior."

108. The Court therefore held:

"It is urged that under sub-section (2) of Section 21 a Central Excise Officer under the Act has all the powers of an officer in charge of a police station under Chapter XIV of the Code of Criminal Procedure and therefore he must be deemed to be a police officer within the meaning of those words in Section 25 of the Evidence Act. It is true that sub-section (2) confers on the Central Excise Officer under the Act the same powers as an officer in charge of a police station has when investigating a cognizable case; but this power is conferred for the purpose of sub-section (1) which gives power to a Central Excise Officer to whom any arrested person is forwarded to inquire into the charge against him. Thus under Section 21 it is the duty of the Central Excise Officer to whom an arrested person is forwarded to inquire into the charge made against such person. Further under proviso (*a*) to sub-section (2) of Section 21 if the Central Excise Officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate. It does not however appear that a Central Excise Officer under the Act has power to submit a charge-sheet under Section 173 of the Code of Criminal Procedure. Under Section 190 of the Code of Criminal Procedure a Magistrate can take cognizance of any offence either (*a*) upon receiving a complaint of facts

which constitute such offence, or (*b*) upon a report in writing of such facts made by any police officer, or (*c*) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed. A police officer for purposes of clause (*b*) above can in our opinion only be a police officer properly so-called as the scheme of the Code of Criminal Procedure shows and it seems therefore that a Central Excise Officer will have to make a complaint under clause (*a*) above if he wants the Magistrate to take cognizance of an offence, for example, under Section 9 of the Act. Thus though under sub-section (2) of Section 21 the Central Excise Officer under the Act has the powers of an officer in charge of a police station when investigating a cognizable case, that is for the purpose of his inquiry under sub-section (1) of Section 21. Section 21 is in terms different from Section 78(3) of the Bihar and Orissa Excise Act, 1915 which came to be considered in *Raja Ram Jaiswal's case* [(1964) 2 SCR 752] and which provided in terms that "for the purposes of Section 156 of the Code of Criminal Procedure, 1898, the area to which an excise officer empowered under Section 77, sub-section (2), is appointed shall be deemed to be a police-station, and such officer shall be deemed to be the officer in charge of such station". It cannot therefore be said that the provision in Section 21 is on par with the provision in Section 78(3) of the Bihar and Orissa Excise Act. All that Section 21 provides is that for the purpose of his enquiry, a Central Excise Officer shall have the powers of an officer in charge of a police station when investigating a cognizable case. But even so it appears that these powers do not include the power to submit a charge-sheet under Section 173 of the Code of Criminal Procedure for unlike the Bihar and Orissa Excise Act, the Central Excise Officer is not deemed to be an officer in charge of a police station."

(at pages 703-704)
(emphasis supplied)

109. Having regard to the statutory scheme contained in the Central Excise Act, more particularly sections 21(1) and proviso (a) to section 21(2),

the Court held that a Central Excise officer had no power to submit a charge-sheet under section 173(2) of the CrPC, as such officer is only empowered to send persons who are arrested to a Magistrate under these provisions.

110. The Court distinguished **Raja Ram Jaiswal** (supra), and held that this case being under the Central Excise Act, which is a revenue statute like the Land Customs Act, 1924 and the Sea Customs Act, 1878, would be more in accord with the case of **Barkat Ram** (supra) – see page 704.

111. The next judgment in chronological order is **Romesh Chandra Mehta** (supra). Here again, a Constitution Bench was concerned with the same question under section 25 of the Evidence Act when read with enquiries made under section 171-A of the Sea Customs Act, 1878. The Court had no difficulty in finding that such customs officer could not be said to be a police officer for the purpose of section 25 of the Evidence Act, holding:

> "Under the Sea Customs Act, a Customs Officer is authorised to collect customs duty to prevent smuggling and for that purpose he is invested with the power to search any person on reasonable suspicion (Section 169); to screen or X-ray the body of a person for detecting secreted goods (Section 170-A); to arrest a person against whom a reasonable suspicion exists that he has been guilty of an offence under the Act (Section 173); to obtain a search warrant from a Magistrate to search any place within the local limits of the jurisdiction of such Magistrate (Section 172); to collect information by summoning persons to give evidence and produce documents (Section 171-A); and to adjudge confiscation

under Section 182. He may exercise these powers for preventing smuggling of goods dutiable or prohibited and for adjudging confiscation of those goods. For collecting evidence the Customs Officer is entitled to serve a summons to produce a document or other thing or to give evidence, and the person so summoned is bound to attend either in person or by an authorized agent, as such officer may direct, and the person so summoned is bound to state the truth upon any subject respecting which he is examined or makes a statement and to produce such documents and other things as may be required. The power to arrest, the power to detain, the power to search or obtain a search warrant and the power to collect evidence are vested in the Customs Officer for enforcing compliance with the provisions of the Sea Customs Act. For purpose of Sections 193 and 228 of the Indian Penal Code the enquiry made by a Customs Officer is a judicial proceeding. An order made by him is appealable to the Chief Customs Authority under Section 188 and against that order revisional jurisdiction may be exercised by the Chief Customs Authority and also by the Central Government at the instance of any person aggrieved by any decision or order passed under the Act. The Customs Officer does not exercise, when enquiring into a suspected infringement of the Sea Customs Act, powers of investigation which a police officer may in investigating the commission of an offence. He is invested with the power to enquire into infringements of the Act primarily for the purpose of adjudicating forfeiture and penalty. He has no power to investigate an offence triable by a Magistrate, nor has he the power to submit a report under Section 173 of the Code of Criminal Procedure. He can only make a complaint in writing before a competent Magistrate."

(at pages 466-467)
(emphasis supplied)

112. Barkat Ram (supra), **Raja Ram Jaiswal** (supra) and **Badku Joti Savant** (supra) were all referred to. The Court then laid down, what

according to it was the true test for determining whether an officer of customs is to be deemed to be a police officer, as follows:

> "But the test for determining whether an officer of customs is to be deemed a police officer is whether he is invested with all the powers of a police officer qua investigation of an offence, including the power to submit a report under Section 173 of the Code of Criminal Procedure. It is not claimed that a Customs Officer exercising power to make an enquiry may submit a report under Section 173 of the Code of Criminal Procedure."
>
> (at page 469)

113. This judgment was followed by the judgment in **Illias** (supra), in which the same question arose, this time under the Customs Act, 1962. In a significant passage, the Constitution Bench held that there was no conflict between **Raja Ram Jaiswal** (supra) and **Barkat Ram** (supra) as follows:

> "Indeed in a recent decision of this court *P. Shankar Lal* v. *Asstt. Collector of Customs, Madras* [Cr. As 52 & 104/65 decided on 12-12-1967] it has been reaffirmed that there is no conflict between the cases of *Raja Ram Jaiswal* and *Barkat Ram*, the former being distinguishable from the latter."
>
> (at page 616)

114. The Court then referred to the Sea Customs Act, 1878 and the Customs Act, 1962, highlighting the fact that section 108 of the Customs Act, 1962 confers power on a gazetted officer of Customs to summons persons for giving evidence or producing documents - see page 617. Section 104(3) of the Customs Act, 1962 was strongly relied upon by learned counsel appearing on behalf of the appellant in that case, which

section provided that where an officer of customs has arrested any person under sub-clause (1) of section 104, he shall for the purpose of releasing such person on bail or otherwise have the same power and be subject to the same provisions as an officer-in-charge of a police station has and is subject to under the CrPC. It was noticed that the offences under the Customs Act were non-cognizable – see section 104(4). It was then held that the expression "otherwise" clearly relates to releasing a person who has been arrested and cannot encompass anything beyond that – see page 617. **Raja Ram Jaiswal** (supra) was referred to, including the test laid down in that judgment at page 766 – see pages 619, 620. **Badku Joti Savant** (supra) was then referred to. The Court concluded:

> "It was reiterated that the appellant could not take advantage of the decision in *Raja Ram Jaiswal's* case and that *Barkat Ram's* case was more apposite. The ratio of the decision in *Badku Joti Savant* is that even if an officer under the special Act has been invested with most of the powers which an officer in charge of a police station exercises when investigating a cognizable offence he does not thereby became a police officer within the meaning of Section 25 of the Evidence Act unless he is empowered to file a charge-sheet under Section 173 of the Code of Criminal Procedure.
>
> Learned counsel for the appellant when faced with the above difficulty has gone to the extent of suggesting that by necessary implication the power to file a charge-sheet flows from some of the powers which have already been discussed under the new Act and that a customs officer is entitled to exercise even this power. It is difficult and indeed it would be contrary to all rules of interpretation to

spell out any such special power from any of the provisions contained in the new Act."

(at pages 621-622)

115. Two other judgments of this Court, this time under the Railways Property (Unlawful Possession) Act, 1966 held that members of the Railway Protection Force could not be said to be police officers within the meaning of section 25 of the Evidence Act.

116. In **State of U.P. v. Durga Prasad** (1975) 3 SCC 210, a Division Bench of this Court referred to section 8 of the said Act, which is similar to section 21 of the Central Excise Act, as follows:

"**6.** Section 8 of the Act reads thus:

"8. (1) When any person is arrested by an officer of the Force for an offence punishable under this Act or is forwarded to him under Section 7, he shall proceed to inquire into the charge against such person.

(2) For this purpose the officer of the Force may exercise the same powers and shall be subject to the same provisions as the officer in charge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898, when investigating a cognizable case;

Provided that—
(a) if the officer of the Force is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate;

(b) if it appears to the officer of the Force that there is no sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the officer of the Force may direct, to appear, if and

when so required before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior."

117. The Court held:

"**18.** The right and duty of an Investigating Officer to file a police report or a charge-sheet on the conclusion of investigation is the hallmark of an investigation under the Code. Section 173(1)(*a*) of the Code provides that as soon as the investigation is completed the officer-in-charge of the police-station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government. The officer conducting an inquiry under Section 8(1) cannot initiate court proceedings by filing a police report as is evident from the two Provisos to Section 8(2) of the Act. Under Proviso (*a*), if the officer of the Force is of the opinion that there is sufficient evidence or reasonable ground of suspicion against the accused, he shall either admit the accused to bail to appear before a Magistrate having jurisdiction in the case or forward him in custody to such Magistrate. Under Proviso (*b*), if it appears to the officer that there is no sufficient evidence or reasonable ground of suspicion against the accused, he shall release him on a bond to appear before the Magistrate having jurisdiction and shall make a full report of all the particulars of the case to his superior officer. The duty cast by Proviso (*b*) on an officer of the Force to make a full report to his official superior stands in sharp contrast with the duty cast by Section 173(1)(*a*) of the Code on the officer-in-charge of a police station to submit a report to the Magistrate empowered to take cognizance of the offence. On the conclusion of an inquiry under Section 8(1), therefore, if the officer of the Force is of the opinion that there is sufficient evidence or reasonable ground of suspicion against the accused, he must file a complaint under Section 190(1)(*a*) of the Code in order that the Magistrate concerned may take cognizance of the offence.

19. Thus an officer conducting an inquiry under Section 8(1) of the Act does not possess all the attributes of an

officer-in-charge of a police station investigating a case under Chapter XIV of the Code. He possesses but a part of those attributes limited to the purpose of holding the inquiry.

20. That the Inquiry Officers cannot be equated generally with police officers is clear from the object and purpose of The Railway Protection Force Act, XXIII of 1957, under which their appointments are made. The short title of that Act shows that it was passed in order "to provide for the constitution and regulation of a Force called the Railway Protection Force for the better protection and security of Railway property". Section 3(1) of the Act of 1957 empowers the Central Government to constitute and maintain the Railway Protection Force for the better protection and security of Railway property. By Section 10, the Inspector General and every other superior officer and member of the Force "shall for all purposes be regarded as Railway servants within the meaning of the Indian Railways Act, 1890, other than Chapter VI-A thereof, and shall be entitled to exercise the powers conferred on Railway servants by or under that Act". Section 11 which defines duties of every superior officer and member of the Force provides that they must promptly execute all orders lawfully issued to them by their superior authority; protect and safeguard Railway property; remove any obstruction in the movement of Railway property and do any other act conducive to the better protection and security of Railway property. Section 14 imposes a duty on the superior officers and members of the Force to make over persons arrested by them to a police officer or to take them to the nearest police station. These provisions are incompatible with the position that a member of the Railway Protection Force holding an inquiry under Section 8(1) of the Act can be deemed to be a police officer-in-charge of a police station investigating into an offence. Members of the Force are appointed under the authority of the Railway Protection Force Act, 1957, the prime object of which is the better protection and security of Railway property. Powers conferred on members of the Force are all directed towards achieving that object and are limited by it. It is significant that the Act of 1957, by Section 14, makes a distinction between a

member of the Force and a police officer properly so called."

(emphasis supplied)

118. Reference was then made to **Barkat Ram** (supra) and **Badku Joti Savant** (supra), the decision in **Raja Ram Jaiswal** (supra) being distinguished, as follows:

> "**23.** The decision in *Raja Ram Jaiswal* v. *State of Bihar* on which the respondent relies was considered and distinguished in *Badku Joti Savant's* case*. Raja Ram Jaiswal case* involved the interpretation of Section 78(3) of the Bihar and Orissa Excise Act, 1915 which provided in terms that:
>
> "For the purposes of Section 156 of the Code of Criminal Procedure, 1898, the area to which an Excise Officer empowered under Section 7,7 sub-section (2), is appointed, shall be deemed to be a police station, and such officer shall be deemed to be the officer-in-charge of such station."
>
> There is no provision in the Act before us corresponding to Section 78(3) of the Bihar Act and therefore the decision is distinguishable for the same reasons for which it was distinguished in *Badku Joti Savant's* case*."*

119. In **Balkishan A. Devidayal** (supra), the same question as arose in **Durga Prasad** (supra) arose before a Division Bench of this Court. This Court held in paragraph 18 that **Durga Prasad** (supra) really concluded the question posed before the Court. It then held:

> "**20.** From the above survey, it will be seen that the primary object of constituting the Railway Protection Force is to secure better "protection and security of the railway property". The restricted power of arrest and search given to the officers or members of the Force is incidental to the efficient discharge of their basic duty to protect and

safeguard railway property. No general power *to investigate all* cognizable offences relating to railway property, under the criminal procedure code has been conferred on any superior officer or member of the Force by the 1957 Act. Section 14 itself makes it clear that even with regard to an offence relating to "railway property", the superior officer or member of the Force making an arrest under Section 13 shall forthwith make over the person arrested to a police officer, or cause his production, in the nearest police station."

120. The Court noticed that offences under this Act were non-cognizable – see paragraph 27 – and concluded:

> "**30.** Section 7 of the Act provides that the procedure for investigation of a cognizable offence has to be followed by the officer before whom the accused person is produced.
>
> **31.** Reading Section 7 of the 1966 Act with that of Section 14 of the 1957 Act, it is clear that while in the case of a person arrested under Section 12 of the 1957 Act the only course open to the superior officer or member of the Force was to make over the person arrested to a police officer, in the case of a person arrested for a suspected offence under the 1966 Act, he is required to be produced without delay before the nearest officer of the Force, who shall obviously be bound [in view of Article 22(1) of the Constitution] to produce him further before the Magistrate concerned."

121. The Court then referred to section 8 of the Act, making it clear that the enquiry under section 8(1) shall be deemed to be a judicial proceeding – see paragraph 34. Differences between sections 161-162 of the CrPC and sections 9(3) and (4) of the Act were then pointed out as follows:

> "**35.** The fourth important aspect in which the power and duty of an officer of the RPF conducting an inquiry under the 1966 Act, differs from a police investigation under the Code, is this. Sub-section (3) of Section 161 of the Code

says that the police officer may reduce into writing any statement made to him in the course of investigation. Section 162(1), which is to be read in continuation of Section 161 of the Code, prohibits the obtaining of signature of the person on his statement recorded by the investigating officer. But no such prohibition attaches to statements recorded in the course of an inquiry under the 1966 Act; rather, from the obligation to state the truth under pain of prosecution, enjoined by Section 9(3) and (4), it follows as a corollary, that the officer conducting the inquiry may obtain signature of the person who made the statement.

36. Fifthly, under the proviso to sub-section (1) of Section 162 of the Code, oral or recorded statement made to a police officer during investigation may be used by the accused and with the permission of the court by the prosecution to contradict the statement made by the witness in court in the manner provided in Section 145 of the Evidence Act, or when the witnesses statement is so used in cross-examination, he may be re-examined if any explanation is necessary. The statement of a witness made to a police officer during investigation cannot be used for any other purpose, whatever, except of course when it falls within Section 32 or 27 of the Evidence Act. The prohibition contained in Section 162 extends to all statements, confessional or otherwise, during a police investigation made by any person whether accused or not, whether reduced to writing or not, subject to the proviso. In contrast with the Code, in the 1966 Act, there is no provision analogous to the proviso to Section 162(1) of the Code, which restricts or prohibits the use of a statement recorded by an officer in the course of an inquiry under Sections 8 and 9 of the Act."

122. Most importantly, it was then held:

"**37.** Sixthly, the primary duty of a member/officer of the RPF is to safeguard and protect railway property. Only such powers of arrest and inquiry have been conferred by the 1966 Act on members of the RPF as are necessary and incidental to the efficient and effective discharge of the basic duty of watch and ward. Unlike a police officer

who has a general power under the Code to investigate all cognizable cases the power of an officer of the RPF to make an inquiry is restricted to offences under the 1966 Act.

xxx xxx xxx

38…An officer of the RPF making an inquiry under the 1966 Act, cannot, by any stretch of imagination, be called an "officer in charge of a police station" within the meaning of Sections 173 and 190(*b*) of the Code. The mode of initiating prosecution by submitting a report under Section 173 read with clause (*b*) of Section 190 of the Code is, therefore, not available to an officer of the RPF who has completed an inquiry into an offence under the 1966 Act. The only mode of initiating prosecution of the person against whom he has successfully completed the inquiry, available to an officer of the RPF, is by making a complaint under Section 190(1)(*a*) of the Code to the Magistrate empowered to try the offence. That an officer of the Force conducting an inquiry under Section 8(1) cannot initiate proceedings in court by a report under Sections 173/190(1)(*b*) of the Code, is also evident from the provisos to sub-section (2) of Section 8 of the 1966 Act. Under proviso (*a*), if such officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused, he shall either direct him (after admitting him to bail) to appear before the Magistrate having jurisdiction or forward him in custody to such Magistrate. Under proviso (*b*), if it appears to the officer that there is no sufficient evidence or reasonable ground of suspicion against the accused, he shall release him on bond to appear before the Magistrate concerned "and shall make a full report of all the particulars of the case to his superior officer". Provisos (*a*) and (*b*) put it beyond doubt that where after completing an inquiry, the officer of the Force is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused, he must initiate prosecution of the accused by making a complaint under Section 190(1)(*a*) of the Code to the Magistrate competent to try the case.

> **39.** From the comparative study of the relevant provisions of the 1966 Act and the Code, it is abundantly clear that an officer of the RPF making an inquiry under Section 8(1) of the 1966 Act does not possess several important attributes of an officer in charge of a police station conducting an investigation under Chapter XIV of the Code. The character of the "inquiry" is different from that of an "investigation" under the Code. The official status and powers of an officer of the Force in the matter of inquiry under the 1966 Act differ in material aspects from those of a police officer conducting an investigation under the Code."
>
> (emphasis supplied)

123. This Court then referred to all the earlier judgments of this Court, including that of **Durga Prasad** (supra), and concluded:

> "**58.** In the light of the above discussion, it is clear that an officer of the RPF conducting an inquiry under Section 8(1) of the 1966 Act has not been invested with *all* the powers of an officer in charge of a police station making an investigation under Chapter XIV of the Code. Particularly, he has no power to initiate prosecution by filing a charge-sheet before the Magistrate concerned under Section 173 of the Code, which has been held to be the clinching attribute of an investigating "police officer". Thus, judged by the test laid down in *Badku Joti Savant*, which has been consistently adopted in the subsequent decisions noticed above, Inspector Kakade of the RPF could not be deemed to be a "police officer" within the meaning of Section 25 of the Evidence Act, and therefore, any confessional or incriminating statement recorded by him in the course of an inquiry under Section 8(1) of the 1966 Act, cannot be excluded from evidence under the said section."

124. In **State of Gujarat v. Anirudhsing and Anr.** (1997) 6 SCC 514, one of the questions which arose before this Court was as to whether a member of the State Reserve Police Service acting under the Bombay

State Reserve Police Force Act, 1951 could be said to be a police officer within the meaning of section 25 of the Evidence Act. The Court analysed the aforesaid Bombay Act, and set out section 11(1) thereof, which states:

> "When employed on active duty at any place under sub-section (1) of Section 10, the senior reserve police officer of highest rank, not being lower than that of a Naik present, shall be deemed to be an officer-in-charge of a police station for the purposes of Chapter IX of the Code of Criminal Procedure, 1898, Act V of 1898."

125. Since Chapter IX of the Code of Criminal Procedure, 1898, which is the equivalent of Chapter X of the CrPC, deals with 'maintenance of public order and tranquillity', the Court held:

> "**19.** It would, thus, be clear that a senior reserve police officer appointed under the SRPF Act, though is a police officer under the Bombay Police Act and an officer-in-charge of a police station, he is in charge only for the purpose of maintaining law and order and tranquillity in the society and the powers of investigation envisaged in Chapter XII of the CrPC have not been invested with him."

As a result, it was held that such officer could not be said to be a "police officer" within the meaning of section 25 of the Evidence Act.

126. The golden thread running through all these decisions – some of these being decisions of five-Judge Benches which are binding upon us – beginning with **Barkat Ram** (supra), is that where limited powers of investigation are given to officers primarily or predominantly for some purpose *other* than the prevention and detection of crime, such persons

cannot be said to be police officers under section 25 of the Evidence Act. What must be remembered is the discussion in **Barkat Ram** (supra) that a "police officer" does not have to be a police officer in the narrow sense of being a person who is a police officer so designated attached to a police station. The broad view has been accepted, and never dissented from, in all the aforesaid judgments, namely, that where a person who is not a police officer properly so-called is invested with all powers of investigation, which culminates in the filing of a police report, such officers can be said to be police officers within the meaning of section 25 of the Evidence Act, as when they prevent and detect crime, they are in a position to extort confessions, and thus are able to achieve their object through a shortcut method of extracting involuntary confessions.

127. Shri Lekhi's assault on **Raja Ram Jaiswal** (supra), stating that it is wrongly decided and ought to be held to be *per incuriam*, cannot be countenanced. **Raja Ram Jaiswal** (supra) correctly decided that the Court in **Barkat Ram** (supra) had held that the words "police officer" to be found in section 25 of the Evidence Act are not to be construed in a narrow way, but in a wide and popular sense. It is wholly incorrect to say, from a strained reading of **Barkat Ram** (supra) that, in reality, **Barkat Ram** (supra) preferred the "narrow" view over the "broad" view. This is also contrary to the understanding of several judgments of this

Court which refer to **Barkat Ram** (supra), and which continued to adopt the broad, and not narrow, test laid down in the said judgment. Also, **Raja Ram Jaiswal** (supra) has been referred to by several Constitution Benches of this Court, as has been pointed out by us hereinabove, as also other Division Benches, and has never been doubted. In fact, it has always been distinguished in the revenue statute cases as well as the railway protection force cases as being a case in which all powers of investigation, which would lead to the filing of a police report, were invested with excise officers, who therefore, despite not belonging to the police force properly so-called, must yet be regarded as police officers for the purpose of section 25 of the Evidence Act. The vital link between section 25 and such officers then gets established, namely, that in the course of investigation it is possible for such officers to take a shortcut by extorting confessions from an accused person.

128. At this point, we come to the decision in **Raj Kumar Karwal** (supra). In this case, the very question that arises before us arose before a Division Bench of this Court. The question was set out by the Division Bench as follows:

> "**1.** Are the officers of the Department of Revenue Intelligence (DRI) who have been invested with the powers of an officer-in-charge of a police station under Section 53 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called 'the Act'), "police officers" within the meaning of Section 25 of the Evidence Act? If yes, is a confessional statement recorded by such

officer in the course of investigation of a person accused of an offence under the said Act, admissible in evidence as against him? These are the questions which we are called upon to answer in these appeals by special leave."

129. The Court analysed the NDPS Act, and "conceded" that the punishments prescribed for the various offences under the NDPS Act are very severe. It then went on to hold:

> "**11**…We, therefore, agree that as Section 25, Evidence Act, engrafts a wholesome protection it must not be construed in a narrow and technical sense but must be understood in a broad and popular sense. But at the same time it cannot be construed in so wide a sense as to include persons on whom only some of the powers exercised by the police are conferred within the category of police officers. See *State of Punjab* v. *Barkat Ram* and *Raja Ram Jaiswal* v. *State of Bihar*. This view has been reiterated in subsequent cases also."

130. After referring to all the cases that have been cited by us hereinabove, the Court noticed the difference between the NDPS Act and the revenue statutes and railway statute previously considered in some of the judgments of this Court, in that section 37 of the NDPS Act makes offences punishable under the Act cognizable. The judgment then went on to state:

> "**20**… Section 52 deals with the disposal of persons arrested and articles seized under Sections 41, 42, 43 or 44 of the Act. It enjoins upon the officer arresting a person to inform him of the grounds for his arrest. It further provides that every person arrested and article seized under warrant issued under sub-section (1) of Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued. 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."

131. After referring to sections 41, 42, 43, 44, 52, 52A and 57 of the NDPS Act, the Court concluded that these powers are more or less similar to the powers conferred on customs officers under the Customs Act, 1962 – see paragraph 21. The Court then concluded:

> **22**…The investigation which so commences must be concluded, without unnecessary delay, by the submission of a report under Section 173 of the Code to the concerned Magistrate in the prescribed form. Any person on whom power to investigate under Chapter XII is conferred can be said to be a 'police officer', no matter by what name he is called. The nomenclature is not important, the content of the power he exercises is the determinative factor. The important attribute of police power is not only the power to investigate into the

commission of cognizable offence but also the power to prosecute the offender by filing a report or a charge-sheet under Section 173 of the Code. That is why this Court has since the decision in *Badku Joti Savant* accepted the ratio that unless an officer is invested under any special law with the powers of investigation under the Code, including the power to submit a report under Section 173, he cannot be described to be a 'police officer' under Section 25, Evidence Act. Counsel for the appellants, however argued that since the Act does not prescribe the procedure for investigation, the officers invested with power under Section 53 of the Act must necessarily resort to the procedure under Chapter XII of the Code which would require them to culminate the investigation by submitting a report under Section 173 of the Code. Attractive though the submission appears at first blush, it cannot stand close scrutiny. In the first place as pointed out earlier there is nothing in the provisions of the Act to show that the legislature desired to vest in the officers appointed under Section 53 of the Act, all the powers of Chapter XII, including the power to submit a report under Section 173 of the Code. But the issue is placed beyond the pale of doubt by sub-section (1) of Section 36-A of the Act which begins with a non-obstante clause — notwithstanding anything contained in the Code — and proceeds to say in clause (*d*) as under:

"36-A. (d) a Special Court may, upon a perusal of police report of the facts constituting an offence under this Act or upon a complaint made by an officer of the Central Government or a State Government authorised in this behalf, take cognizance of that offence without the accused being committed to it for trial."

This clause makes it clear that if the investigation is conducted by the police, it would conclude in a police report but if the investigation is made by an officer of any other department including the DRI, the Special Court would take cognizance of the offence upon a formal complaint made by such authorised officer of the concerned government. Needless to say that such a complaint would have to be under Section 190 of the Code. This clause, in our view, clinches the matter. We

> must, therefore, negative the contention that an officer appointed under Section 53 of the Act, other than a police officer, is entitled to exercise 'all' the powers under Chapter XII of the Code, including the power to submit a report or charge-sheet under Section 173 of the Code. That being so, the case does not satisfy the ratio of *Badku Joti Savant* and subsequent decisions referred to earlier."

132. Despite the fact that **Raj Kumar Karwal** (supra) notices the fact that the NDPS Act prescribes offences which are "very severe" and that section 25 is a wholesome protection which must be understood in a broad and popular sense, yet it arrives at a conclusion that the designated officer under section 53 of the NDPS Act cannot be said to be a police officer under section 25 of the Evidence Act. The Division Bench also notices that, unlike all the revenue and railway protection statues where offences are non-cognizable, the NDPS Act offences are cognizable. It also notices that the NDPS Act deals with prevention and detection of crimes of a very serious nature. However, **Raj Kumar Karwal** (supra) did not properly appreciate the following distinctions that arise between the investigative powers of officers who are designated in statutes primarily meant for revenue or railway purposes, as against officers who are designated under section 53 of the NDPS Act: *first*, that section 53 is located in a statute which contains provisions for the prevention, detection and punishment of crimes of a very serious nature. Even if the NDPS Act is to be construed as a statute which regulates and exercises

control over narcotic drugs and psychotropic substances, the prevention, detection and punishment of crimes related thereto cannot be said to be ancillary to such object, but is the single most important and effective means of achieving such object. This is unlike the revenue statutes where the main object was the due realisation of customs duties and the consequent ancillary checking of smuggling of goods (as in the Land Customs Act, 1924, the Sea Customs Act, 1878 and the Customs Act, 1962); the levy and collection of excise duties (as in the Central Excise Act, 1944); or as in the Railway Property (Unlawful Possession Act), 1966, the better protection and security of Railway property**.** *Second,* unlike the revenue statutes and the Railway Act, all the offences to be investigated by the officers under the NDPS Act are cognizable. *Third,* that section 53 of the NDPS Act, unlike the aforesaid statutes, does not prescribe any limitation upon the powers of the officer to investigate an offence under the Act, and therefore, it is clear that all the investigative powers vested in an officer in charge of a police station under the CrPC – including the power to file a charge-sheet – are vested in these officers when dealing with an offence under the NDPS Act. This is wholly distinct from the limited powers vested in officers under the aforementioned revenue and railway statutes for ancillary purposes, which have already been discussed by this Court in **Barkat Ram** (supra)**,** with reference to the Land Customs Act; **Badku Joti**

Savant (supra), with reference to the Central Excise Act; **Romesh Chandra Mehta** (supra), with reference to the Sea Customs Act; **Illias** (supra), with reference to the Customs Act; and **Durga Prasad** (supra) and **Balkishan** (supra) with reference to the Railway Act, to be in aid of the dominant object of the statutes in question, which – as already alluded to – were not primarily concerned with the prevention and detection of crime, unlike the NDPS Act. Also, importantly, none of those statutes recognised the power of the State police force to investigate offences under those Acts together with the officers mentioned in those Acts, as is the case in the NDPS Act. No question of manifest arbitrariness or discrimination on the application of Article 14 of the Constitution of India would therefore arise in those cases, unlike cases which arise under the NDPS Act, as discussed in paragraphs 67 to 70 hereinabove.

133. The Bench also failed to notice section 53A of the NDPS Act and, therefore, falls into error when it states that the powers conferred under the NDPS Act can be assimilated with powers conferred on customs officers under the Customs Act. When sections 53 and 53A are seen together in the context of a statute which deals with prevention and detection of crimes of a very serious nature, it becomes clear that these sections cannot be construed in the same manner as sections contained in revenue statutes and railway protection statutes.

134. The language of section 53(1) is crystal clear, and invests the officers mentioned therein with the powers of "an officer-in-charge of a police station for the investigation of the offences under this Act". The expression "officer in charge of a police station" is defined in the CrPC as follows:

> "(o) "officer in charge of a police station" includes, when the officer in charge of the police station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when the State Government so directs, any other police officer so present;"

The expression "police report" is defined in section 2(r) of the CrPC as follows:

> "(r) "police report" means a report forwarded by a police officer to a Magistrate under sub-section (2) of section 173;"

135. Section 173(2) of the Code of Criminal Procedure, then provides as follows:

> "**173. Report of police officer on completion of investigation.—**
>
> ***xxx xxx xxx***
>
> (2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating—
>
> (a) the names of the parties;
>
> (b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody under section 170.

(h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or section 376E of the Indian Penal Code (45 of 1860).

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given."

136. Section 36A of the NDPS Act provides as follows:

"**36A. Offences triable by Special Courts.**—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) all offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;

(b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of

section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:

Provided that in cases which are triable by the Special Court where such Magistrate considers—

(i) when such person is forwarded to him as aforesaid; or

(ii) upon or at any time before the expiry of the period of detention authorised by him,

that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to an accused person in such case who has been forwarded to him under that section;

(d) a Special Court may, upon perusal of police report of the facts constituting an offence under this Act or upon complaint made by an officer of the Central Government or a State Government authorised in his behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 (2 of 1974), and the High Court may exercise such powers including the power under clause (b) of sub-

section (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted under section 36.

(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days":

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offences punishable under this Act with imprisonment for a term of not more than three years may be tried summarily."

137. What is clear, therefore, is that the designated officer under section 53, invested with the powers of an officer in charge of a police station, is to forward a police report stating the particulars that are mentioned in section 173(2) CrPC. Because of the special provision contained in section 36A(1) of the NDPS Act, this police report is not forwarded to a Magistrate, but only to a Special Court under section 36A(1)(d). **Raj Kumar Karwal** (supra), when it states that the designated officer cannot submit a police report under section 36A(1)(d), but would have to submit a "complaint" under section 190 of the CrPC misses the importance of the *non obstante* clause contained in section 36A(1),

which makes it clear that the drill of section 36A is to be followed notwithstanding anything contained in section 2(d) of the CrPC. It is obvious that section 36A(1)(d) is inconsistent with section 2(d) and section 190 of the CrPC and therefore, any complaint that has to be made can only be made under section 36A(1)(d) to a Special Court, and not to a Magistrate under section 190. Shri Lekhi's argument, that the procedure under section 190 has been replaced only in part, the police report and complaint procedure under section 190 not being displaced by section 36A(1)(d), cannot be accepted. Section 36A(1)(d) specifies a scheme which is completely different from that contained in the CrPC. Whereas under section 190 of the CrPC it is the Magistrate who takes cognizance of an offence, under section 36A(1)(d) it is only a Special Court that takes cognizance of an offence under the NDPS Act. Secondly, the "complaint" referred to in section 36A(1)(d) is not a private complaint that is referred to in section 190(1)(a) of the CrPC, but can only be by an authorised officer. Thirdly, section 190(1)(c) of the CrPC is conspicuous by its absence in section 36A(1)(d) of the NDPS Act – the Special Court cannot, upon information received from any person other than a police officer, or upon its own knowledge, take cognizance of an offence under the NDPS Act. Further, a Special Court under section 36A is deemed to be a Court of Session, for the applicability of the CrPC, under section 36C of the NDPS Act. A Court of Session under section

193 of the CrPC cannot take cognizance as a Court of original jurisdiction unless the case has been committed to it by a Magistrate. However, under section 36A(1)(d) of the NDPS Act, a Special Court may take cognizance of an offence under the NDPS Act without the accused being committed to it for trial. It is obvious, therefore, that in view of section 36A(1)(d), nothing contained in section 190 of the CrPC can be said to apply to a Special Court taking cognizance of an offence under the NDPS Act.

138. Also, the officer designated under section 53 by the Central Government or State Government to investigate offences under the NDPS Act, need not be the same as the officer authorised by the Central Government or State Government under section 36A(1)(d) to make a complaint before the Special Court. As a matter of fact, if the Central Government is to invest an officer with the power of an officer in charge of a police station under sub-section (1) of section 53, it can only do so after consultation with the State Government, which requirement is conspicuous by its absence when the Central Government authorises an officer under section 36A(1)(d). Also, both section 53(1) and (2) refer to officers who belong to particular departments of Government. Section 36A(1)(d) does not restrict the officer that can be appointed for the purpose of making a complaint to only an officer belonging to a department of the Central/State Government. There can also be a

situation where officers have been designated under section 53 by the Government, but not so designated under section 36A(1)(d). It cannot be that in the absence of the designation of an officer under section 36A(1)(d), the culmination of an investigation by a designated officer under section 53 ends up by being an exercise in futility.

139. Take the anomalous position that would arise as a result of the judgment in **Raj Kumar Karwal** (supra). Suppose a designated officer under section 53 of the NDPS Act investigates a particular case and then arrives at the conclusion that no offence is made out. Unless such officer can give a police report to the Special Court stating that no offence had been made out, and utilise the power contained in section 169 CrPC to release the accused, there would be a major lacuna in the NDPS Act which cannot be filled.

140. A second anomaly also results from the judgment in **Raj Kumar Karwal** (supra). Ordinarily, after the police report under section 173(2) of the CrPC is forwarded to the Magistrate (the Special Court in the NDPS Act), the police officer can undertake "further investigation" of the offence under section 173(8) of the CrPC. Section 173(8) reads as follows:

> "(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence,

> oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

141. A three-Judge Bench of this Court in **Vinubhai Haribhai Malviya and Ors. v. State of Gujarat and Anr.** 2019 SCC OnLine SC 1346 held that the power to further investigate an offence would be available at all stages of the progress of a criminal case before the trial actually commences – see paragraph 49. If, as is contended by Shri Lekhi, that the officer designated under section 53 can only file a "complaint" and not a "police report", then such officer would be denuded of the power to further investigate the offence under section 173(8) after such "complaint" is filed. This is because section 173(8) makes it clear that the further report can only be filed after a report under sub-section (2) (i.e. a police report) has been forwarded to the Court. However, a police officer, properly so-called, who may be investigating an identical offence under the NDPS Act, would continue to have such power, and may, until the trial commences, conduct further investigation so that, as stated by this Court in **Vinubhai** (supra), an innocent person is not wrongly arraigned as an accused, or that a *prima facie* guilty person is not so left out. Such anomaly – resulting in a violation of Article 14 of the Constitution of India – in that there is unequal treatment between

identically situated persons accused of an offence under the NDPS Act solely due to the whether the investigating officer is a police officer or an officer designated under section 53 of the NDPS Act, would arise only if the view in **Raj Kumar Karwal** (supra) is correct.

142. A third anomalous situation would arise, in that under section 36A(1)(a) of the NDPS Act, it is only offences which are punishable with imprisonment for a term of more than three years that are exclusively triable by the Special Court. If, for example, an accused is tried for an offence punishable under section 26 of the NDPS Act, he may be tried by a Magistrate and not the Special Court. This being the case, the special procedure provided in section 36A(1)(d) would not apply, the result being that the section 53 officer who investigates this offence, will then deliver a police report to the Magistrate under section 173 of the CrPC. Absent any provision in the NDPS Act truncating the powers of investigation for prevention and detection of crimes under the NDPS Act, it is clear that an offence which is punishable for three years and less can be investigated by officers designated under section 53, leading to the filing of a police report. However, in view of **Raj Kumar Karwal** (supra), a section 53 officer investigating an offence under the NDPS Act can end up only by filing a complaint under section 36A(1)(d) of the NDPS Act. Shri Lekhi's only answer to this anomaly is that under section 36A(5) of the NDPS Act, such trials will follow a summary

procedure, which, in turn, will relate to a complaint where investigation is undertaken by a narcotics officer. First and foremost, trial procedure is *post*-investigation, and has nothing to do with the manner of investigation or cognizance, as was submitted by Shri Lekhi himself. Secondly, even assuming that the mode of trial has some relevance to this anomaly, section 258 of the CrPC makes it clear that a summons case can be instituted "otherwise than upon complaint", which would obviously refer to a summons case being instituted on a police report – see **John Thomas v. Dr. K. Jagadeesan** (2001) 6 SCC 30 (at paragraph 8).

143. Section 59 of the NDPS Act is an important pointer to when cognizance of an offence can take place only on a complaint, and not by way of a police report. By section 59(3), both in the case of an offence under section 59(1) [which is punishable for a term which may extend to one year] or in the case of an offence under section 59(2) [which is punishable for a term which shall not be less than 10 years, but which may extend to 20 years], no Court shall take cognizance of any offence under section 59(1) or (2), except on a complaint in writing made with the previous sanction of the Central Government, or, as the case may be, the State Government. Thus, under section 59, in either case i.e. in a case where the trial takes place by a Magistrate for an offence under section 59(1), or by the Special Court for an offence under section

59(2), cognizance cannot be taken either by the Magistrate or the Special Court, except on a complaint in writing. This provision is in terms markedly different from section 36A(1)(d), which provides two separate procedures for taking cognizance of offences made out under the NDPS Act. For all these reasons, it is clear that **Raj Kumar Karwal** (supra) cannot possibly have laid down the law correctly.

144. At this juncture, it is important to state that we do not accept the submission of Shri S.K. Jain that the "complaint" referred to in section 36A(1)(d) refers only to section 59 of the NDPS Act. A complaint can be made by a designated officer qua offences which arise under the NDPS Act – it is not circumscribed by a provision which requires previous sanction for an offence committed under section 58, as that would do violence to the plain language of section 36A(1)(d). This argument is, therefore, rejected. It is always open, therefore, to the designated officer, designated this time for the purpose of filing a complaint under section 36A(1)(d), to do so before the Special Court, which is a separate procedure provided for under the special statute, in addition to the procedure to be followed under section 53, as delineated hereinabove.

145. Shri Lekhi, however, argued that section 53 does not use the expression "deemed" and that therefore, the power contained in section 53(1) is only a truncated power to investigate which does not culminate

in a police report being filed. We cannot agree. The officer who is designated under section 53 can, by a legal fiction, be deemed to be an officer in charge of a police station, or can be given the powers of an officer in charge of a police station to investigate the offences under the NDPS Act. Whether he is deemed as an officer in charge of a police station, or given such powers, are only different sides of the same coin – the aforesaid officer is not, in either circumstance, a police officer who belongs to the police force of the State. To concede that a deeming fiction would give full powers of investigation, including the filing of a final report, to the designated officer, as against the powers of an officer in charge of a police station being given to a designated officer having only limited powers to investigate, does not stand to reason, and would be contrary to the express language and intendment of section 53(1).

146. Another argument of Shri Lekhi is that police officers or policemen who belong to the police force are recognised in the NDPS Act as being separate and distinct from the officers of the Department of Narcotics, etc. This argument has no legs on which to stand when it is clear that the expression “police officers” does not only mean a police officer who belongs to the State police force, but includes officers who may belong to other departments, such as the Department of Excise in **Raja Ram Jaiswal** (supra), who are otherwise invested with all powers of investigation so as to attract the provisions of section 25 of the

Evidence Act. Further, if the distinction between police officer as narrowly defined and the officers of the Narcotics Control Bureau is something that is to be stressed, then any interpretation which would whittle down the fundamental rights of an accused based solely on the designation of a particular officer, would fall foul of Article 14, as the classification between the two types of officers would have no rational relation to the object sought to be achieved by the statute in question, which is the prevention and detection of crime.

147. What remains to be considered is **Kanhaiyalal** (supra). In this judgment, the question revolved around a conviction on the basis of a confessional statement made under section 67 of the NDPS Act. This Court, after setting out section 67, then drew a parallel between the provisions of section 67 of the NDPS Act and sections 107 and 108 of the Customs Act, 1962, section 32 of the Prevention of Terrorism Act, 2002 ("**POTA**") and section 15 of the TADA – see paragraph 41. These provisions are as follows:

Customs Act, 1962

> "**107. Power to examine persons.—**Any officer of customs empowered in this behalf by general or special order of the Principal Commissioner of Customs or Commissioner of Customs may, during the course of any enquiry in connection with the smuggling of any goods,—
>
> (a) require any person to produce or deliver any document or thing relevant to the enquiry;

(b) examine any person acquainted with the facts and circumstances of the case.

108. Power to summon persons to give evidence and produce documents.—(1) Any Gazetted Officer of customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under this Act.

(2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required: Provided that the exemption under section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

(4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, 1860 (45 of 1860).”

POTA

32. Certain confessions made to police officers to be taken into consideration.- (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical or electronic device like cassettes, tapes or sound tracks from out of which sound or images can be reproduced, shall be admissible in the trial of such person

for an offence under this Act or the rules made thereunder.

(2) A police officer shall, before recording any confession made by a person under sub-section (1), explain to such person in writing that he is not bound to make a confession and that if he does so, it may be used against him: Provided that where such person prefers to remain silent, the police officer shall not compel or induce him to make any confession.

(3) The confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the person makes it.

(4) The person from whom a confession has been recorded under sub-section (1), shall be produced before the Court of a Chief Metropolitan Magistrate or the Court of a Chief Judicial Magistrate along with the original statement of confession, written or recorded on mechanical or electronic device within forty-eight hours.

(5) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate, shall, record the statement, if any, made by the person so produced and get his signature or thumb impression and if there is any complaint of torture, such person shall be directed to be produced for medical examination before a Medical Officer not lower in rank than an Assistant Civil Surgeon and thereafter, he shall be sent to judicial custody."

TADA

"**15. Certain confessions made to police officers to be taken into consideration.**—(1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or co-

accused, abettor or conspirator for an offence under this Act or Rules made thereunder:

Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

(2) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily."

148. Even a cursory look at the provisions of these statutes would show that there is no parallel whatsoever between section 67 of the NDPS Act and these provisions. In fact, section 108 of the Customs Act, 1962 expressly states that the statements made therein are evidence, as opposed to section 67 which is only a section which enables an officer notified under section 42 to gather information in an enquiry in which persons are "examined".

149. Equally, section 32 of POTA and section 15 of TADA are exceptions to section 25 of the Evidence Act in terms, unlike the provisions of the NDPS Act. Both these Acts, *vide* section 32 and section 15 respectively, have *non-obstante* clauses by which the Evidence Act has to give way to the provisions of these Acts. Pertinently, confessional statements made before police officers under the provisions of the POTA and TADA are made "admissible" in the trial of such person – see section 32(1), POTA, and section 15(1), TADA. This is distinct from the evidentiary

value of statements made under the NDPS Act, where section 53A states that, in the circumstances mentioned therein, statements made by a person before any officer empowered under section 53 shall merely be "relevant" for the purpose of proving the truth of any facts contained in the said statement. Therefore, statements made before the officer under section 53, even when "relevant" under section 53A, cannot, without corroborating evidence, be the basis for the conviction of an accused.

150. Also, when confessional statements are used under the TADA and POTA, they are used with several safeguards which are contained in these sections themselves. So far as TADA is concerned, for example, in **Kartar Singh** (supra) the following additional safeguards/guidelines were issued by the Court to ensure that the confession obtained in the course of investigation by a police officer "is not tainted with any vice but is in strict conformity with the well-recognised and accepted aesthetic principles and fundamental fairness":

> "**263**…(*1*) The confession should be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him;
>
> (2) The person from whom a confession has been recorded under Section 15(1) of the Act, should be produced before the Chief Metropolitan Magistrate or the Chief Judicial Magistrate to whom the confession is required to be sent under Rule 15(5) along with the original statement of confession, written or recorded on mechanical device without unreasonable delay;

(3) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate should scrupulously record the statement, if any, made by the accused so produced and get his signature and in case of any complaint of torture, the person should be directed to be produced for medical examination before a Medical Officer not lower in rank than of an Assistant Civil Surgeon;

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no police officer below the rank of an Assistant Commissioner of Police in the Metropolitan cities and elsewhere of a Deputy Superintendent of Police or a police officer of equivalent rank, should investigate any offence punishable under this Act of 1987.

This is necessary in view of the drastic provisions of this Act. More so when the Prevention of Corruption Act, 1988 under Section 17 and the Immoral Traffic Prevention Act, 1956 under Section 13, authorise only a police officer of a specified rank to investigate the offences under those specified Acts.

(5) The police officer if he is seeking the custody of any person for pre-indictment or pre-trial interrogation from the judicial custody, must file an affidavit sworn by him explaining the reason not only for such custody but also for the delay, if any, in seeking the police custody;

(6) In case, the person, taken for interrogation, on receipt of the statutory warning that he is not bound to make a confession and that if he does so, the said statement may be used against him as evidence, asserts his right to silence, the police officer must respect his right of assertion without making any compulsion to give a statement of disclosure;

The Central Government may take note of these guidelines and incorporate them by appropriate amendments in the Act and the Rules."

151. Insofar as POTA is concerned, procedural safeguards while recording confessions have been discussed by this Court in **State (NCT of Delhi) v. Navjot Sandhu** (2005) 11 SCC 600 as follows:

> "*Procedural safeguards in POTA and their impact on confessions*
>
> **156.** As already noticed, POTA has absorbed into it the guidelines spelt out in *Kartar Singh* and *D.K. Basu* in order to impart an element of fairness and reasonableness into the stringent provisions of POTA in tune with the philosophy of Article 21 and allied constitutional provisions. These salutary safeguards are contained in Sections 32 and 52 of POTA. The peremptory prescriptions embodied in Section 32 of POTA are:
>
> (a) The police officer shall warn the accused that he is not bound to make the confession and if he does so, it may be used against him [vide sub-section (2)].
>
> (b) The confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the person makes it [vide sub-section (3)].
>
> (c) The person from whom a confession has been recorded under sub-section (1) shall be produced before the Chief Metropolitan Magistrate or Chief Judicial Magistrate along with the original statement of confession, within forty-eight hours [vide sub-section (4)].
>
> (d) The CMM/CJM shall record the statement, if any, made by the person so produced and get his signature and if there is any complaint of torture, such person shall be directed to be produced for medical examination. After recording the statement and after medical examination, if necessary, he shall be sent to judicial custody [vide sub-section (5)].
>
> The mandate of sub-sections (2) and (3) is not something new. Almost similar prescriptions were there under TADA

also. In fact, the fulfilment of such mandate is inherent in the process of recording a confession by a statutory authority. What is necessarily implicit is, perhaps, made explicit. But the notable safeguards which were lacking in TADA are to be found in sub-sections (4) and (5).

157. The lofty purpose behind the mandate that the maker of the confession shall be sent to judicial custody by the CJM before whom he is produced is to provide an atmosphere in which he would feel free to make a complaint against the police, if he so wishes. The feeling that he will be free from the shackles of police custody after production in court will minimise, if not remove, the fear psychosis by which he may be gripped. The various safeguards enshrined in Section 32 are meant to be strictly observed as they relate to personal liberty of an individual. However, we add a caveat here. The strict enforcement of the provision as to judicial remand and the invalidation of the confession merely on the ground of its non-compliance may present some practical difficulties at times. Situations may arise that even after the confession is made by a person in custody, police custody may still be required for the purpose of further investigation. Sending a person to judicial custody at that stage may retard the investigation. Sometimes, the further steps to be taken by the investigator with the help of the accused may brook no delay. An attempt shall however be made to harmonise this provision in Section 32(5) with the powers of investigation available to the police. At the same time, it needs to be emphasised that the obligation to send the confession maker to judicial custody cannot be lightly disregarded. Police custody cannot be given on the mere asking by the police. It shall be remembered that sending a person who has made the confession to judicial custody after he is produced before the CJM is the normal rule and this procedural safeguard should be given its due primacy. The CJM should be satisfied that it is absolutely necessary that the confession maker shall be restored to police custody for any special reason. Such a course of sending him back to police custody could only be done in exceptional cases after due application of mind. Most often, sending such person to judicial custody in compliance with Section 32(5) soon after the proceedings

are recorded by the CJM subject to the consideration of the application by the police after a few days may not make material difference to the further investigation. The CJM has a duty to consider whether the application is only a ruse to get back the person concerned to police custody in case he disputes the confession or it is an application made bona fide in view of the need and urgency involved. We are therefore of the view that the non-compliance with the judicial custody requirement does not *per se* vitiate the confession, though its non-compliance should be one of the important factors that must be borne in mind in testing the confession.

158. These provisions of Section 32, which are conceived in the interest of the accused, will go a long way to screen and exclude confessions, which appear to be involuntary. The requirements and safeguards laid down in sub-sections (2) to (5) are an integral part of the scheme providing for admissibility of confession made to the police officer. The breach of any one of these requirements would have a vital bearing on the admissibility and evidentiary value of the confession recorded under Section 32(1) and may even inflict a fatal blow on such confession. We have another set of procedural safeguards laid down in Section 52 of POTA which are modelled on the guidelines envisaged by *D.K. Basu* [(1997) 1 SCC 416]. Section 52 runs as under:

"52. (1) Where a police officer arrests a person, he shall prepare a custody memo of the person arrested.

(2) The person arrested shall be informed of his right to consult a legal practitioner as soon as he is brought to the police station.

(3) Whenever any person is arrested, information of his arrest shall be immediately communicated by the police officer to a family member or in his absence to a relative of such person by telegram, telephone or by any other means and this fact shall be recorded by the police officer under the signature of the person arrested.

(4) The person arrested shall be permitted to meet the legal practitioner representing him during the course of interrogation of the accused person:

Provided that nothing in this sub-section shall entitle the legal practitioner to remain present throughout the period of interrogation."

Sub-sections (2) and (4) as well as sub-section (3) stem from the guarantees enshrined in Articles 21 and 22(1) of the Constitution. Article 22(1) enjoins that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. They are also meant to effectuate the commandment of Article 20(3) that no person accused of any offence shall be compelled to be a witness against himself."

152. Thus, to arrive at the conclusion that a confessional statement made before an officer designated under section 42 or section 53 can be the basis to convict a person under the NDPS Act, without any *non obstante* clause doing away with section 25 of the Evidence Act, and without any safeguards, would be a direct infringement of the constitutional guarantees contained in Articles 14, 20(3) and 21 of the Constitution of India.

153. The judgment in **Kanhaiyalal** (supra) then goes on to follow **Raj Kumar Karwal** (supra) in paragraphs 44 and 45. For the reasons stated by us hereinabove, both these judgments do not state the law correctly, and are thus overruled by us. Other judgments that expressly refer to and rely upon these judgments, or upon the principles laid down by these judgments, also stand overruled for the reasons given by us.

154. On the other hand, for the reasons given by us in this judgment, the judgments of **Noor Aga** (supra) and **Nirmal Singh Pehlwan v. Inspector, Customs** (2011) 12 SCC 298 are correct in law.

155. We answer the reference by stating:

(i) That the officers who are invested with powers under section 53 of the NDPS Act are “police officers” within the meaning of section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

(ii) That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.

156. I.A. No. 87826 of 2020 for intervention is dismissed. I.A. No. 81061 of 2020 in Criminal Appeal No. 433 of 2014 is dismissed as withdrawn, with liberty to the applicant to avail of such remedies as are available in law.

157. These Appeals and Special Leave Petitions are now sent back to Division Benches of this Court to be disposed of on merits, in the light of this judgment.

……..……J.
(R. F. Nariman)

……..……J.
(Navin Sinha)

New Delhi.
29th October, 2020.