

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD.

CRIMINAL APPEAL NO.265 OF 2014.

WITH

CRIMINAL APPEAL NO.105 OF 2016.

- 1) Santosh s/o Bhagwan Waghmare,
age 28 years, Occu. Labour,
r/o Mahatma Gandhi Kushtadham Colony,
Latur.
 - 2) Madhav @ Sadhu s/o Rama Ambade,
age 21 years, Occu. Labour,
r/o Mahatma Gandhi Kushtadham
Colony, Latur.
- ... APPELLANTS.**
(Ori. Accused Nos.1 & 4)

Versus

The State of Maharashtra. **... RESPONDENT.**

...
Advocate for appellants : Mr.Zia Ul Mustafa & Smt.Preeti
R. Wankhede (appointed).
APP for State : Mr.A.A. Jagatkar.

...

WITH

CRIMINAL APPEAL NO. 105 OF 2016

- 1) Kacharu s/o Shesherao Jogeshwari,
age major, occu. Nil,
Orig. r/o Mahatma Gandhi Kusthdham,
Colony, Latgur, Dist. Latur,
presently at Central Prison,
Aurangabad.
- ... APPELLANT.**
(Ori. Accused No.2)

Versus

The State of Maharashtra. **... RESPONDENT.**

...
Advocate for Appellant : Mr.R.D. Sanap (appointed).
APP for State : Mr.A.A. Jagatkar.
...

CORAM : V.L. ACHLIYA, J.

Reserved on: 21.02.2017.
Pronounced on: 04.05.2017.

JUDGMENT:

These appeals are directed against the judgment and order dated 25.03.2014 passed by the Additional Sessions Judge-2, Ambejogai in Special Case No.01/2007. By the impugned judgment and order, the appellants are held guilty of the offence punishable under Section 20(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "N.D.P.S. Act") and sentenced to suffer R.I. for ten years and to pay fine of Rs.1,00,000/- each, in default of payment of fine, to suffer S.I. for two years and six months.

2. Briefly stated, the case of the prosecution is that on 10.9.2007 Moinkhan Sattarkhan Pathan (P.W.1) Police

Head Constable attached to Railway Police Station, Parali was assigned patrolling duty. Police Constable Tapade B.No.458 and Police Constable Siddiqui B.No.312 were also assigned patrolling duty. At about 21.15 Hrs. all of them boarded the train going towards Hyderabad. They alighted at Udgir station. At about 4 a.m. in the midnight, they boarded Hyderabad - Aurangabad passenger train and started checking the bogie at each railway station. At about 4.45 a.m., while they were checking the bogie No.87401. They found accused persons sitting at Seat Nos.12, 13, 14 and 15. On suspicion, they made enquiry with the accused persons. They gave evasive reply and found to be frightened. Therefore, they made enquiry with the accused about the goods lying below their seats. When they took out those two bags for checking, they found the bags to be containing contraband article "*Ganja*". On making enquiry, the accused disclosed that they had purchased the said contraband article from Bidar and they are going to sell the same at Latur. All the four accused persons were brought to Parali Railway Police Station

and produced before P.S.I. Shaikh Aslam Abdul Rahim Bamusa Chause (P.W.5) then called the Naib Tahsildar, Panchas and the official from Weights and Measures department for taking search and weighing the contraband article. Ganpat Sirsat (P.W.4) as well as Dadarao Munde (P.W.2) Panch witnesses, Somnath Rajaram Mahajan, Inspector of legal metrology (P.W.3) measured Ganja found in the bags in possession of accused persons. Samples were drawn for the purpose of sending the same to Chemical Analyzer. Panchanama was drawn. P.S.I. Chause (P.W.5) informed his superior officer about the persons found with huge quantity of contraband article. The accused were found to be possessing about 30 Kgs. of contraband article. P.S.I. Chause (P.W.5) lodged complaint in respect of incident. On the basis of complaint lodged, offence under Section 20(b) of the N.D.P.S Act came to be registered against accused vide CR No.6001/2007. Muddemaal property seized was deposited in Maalkhana. Later on, the samples drawn were referred to Chemical Analyzer. On completion of investigation, charge-sheet was prepared

and filed in the Court of Additional Sessions Judge, Ambejogai, District Beed. The accused were charged under Section 20(b) of the N.D.P.S Act with allegation that they were found in possession of 30 Kgs. and 900 gms of Ganja. All the accused pleaded not guilty and claimed to be tried.

3. In order to prove its case, the prosecution has examined five witnesses. The accused have not entered into defence. On the basis of the evidence of the prosecution witnesses and the statements of the accused recorded under Section 313 of Cr.P.C., defence of the accused appears to be of total denial and false implication. In nutshell, the accused have taken defence that they were caught while travelling without ticket. Later on, they were falsely implicated in the case of possessing contraband article. On conclusion of trial, the appellants i.e. accused Nos.1, 2 and 4 are held guilty of offence punishable under Section 20(b) of the N.D.P.S Act and sentenced to suffer R.I. for ten years and to pay fine of Rs.1,00,000/- each, in default of payment of fine,

to suffer S.I. for two years and six months. Accused No.3 Suresh s/o Nivrutti Shinde was held guilty of offence punishable under Section 20(b) of the N.D.P.S. Act and sentenced to suffer R.I. for fifteen years and to pay fine of Rs.1,50,000/- each, in default of payment of fine, to suffer S.I. for three years. Being aggrieved, accused No.3 has not preferred appeal. However, appellants i.e. accused Nos.1, 2 and 4 preferred the present appeals.

4. I have heard submissions advanced by learned Counsel for appellants and APP for the State at length and carefully considered the record & proceedings.

5. In order to prove its case, prosecution has examined five witnesses. The conviction of the appellant is mainly based upon the testimony of Moinkhan Pathan (P.W.1) who is alleged to have found the accused in possession of contraband article i.e. Ganja in a train proceeding from Hyderabad towards Aurangabad. He is testified before the Court as per (Exh.38). He deposed that on 10.9.2007, he was assigned patrolling duty along

with Police Constables Tapade and Siddiqui. In discharge of their duty, they were checking the passenger train. In the midnight i.e. on 11.9.2007 at about 4 a.m., he boarded in train No.359 proceeding from Hyderabad towards Aurangabad. At 4.45 a.m., while the train was proceeding from Chakur to Latur and he was checking passengers in bogie No.87401, he found accused Nos.1 to 4 travelling in that bogie and sitting on seat Nos.12, 13, 14 and 15. The conduct of the accused persons was found to be suspicious. When he made enquiry with accused, they gave evasive answers and also found to be frightened. He, therefore, along with two constables accompanying him, made enquiry with the accused about the goods lying below their seats, the accused told them that the bags belong to them. On checking the bags, those bags were found to be containing Ganja. He, therefore, brought those persons to Police Station Parli (Railway) with the help of other two constables accompanying him. On making enquiry with the accused persons, they disclosed their names and further revealed that they had purchased the contraband article

Ganja from Bidar and they were proceeding to Latur to sell the same. He further deposed that after reaching police station Parali, he gave report to P.S.I. Chause (P.W.5) vide Exh.39 and produced the accused with the bags which they were found in possession. In the cross-examination, the witness has admitted that except two bogies, all other bogies attached to the said train were general bogies. He admitted that the bogies in which the accused were travelling, each and every seat was occupied by the passengers. He has admitted that he had not checked tickets of accused persons. He had also admitted that he has not taken any personal search of the accused. He deposed that he and his colleagues took out bags lying below the seats of the accused persons and also admitted that those bags were in their custody till they reached Parli Vajjnath railway station. In further cross-examination, the witness admitted that he had given report at Parli Vajjnath Police station at 7.30 a.m. He had admitted that in the report made by him, he has not given description of bags.

6. In order to corroborate the testimony of the Moinkhan Pathan (P.W.1), prosecution has not examined any independent witness. So also, constables who accompanied Moinkhan Pathan (P.W.1) were also not examined by the prosecution.

7. Prosecution has examined Dadarao Munde (P.W.2) panch witness. His testimony is at Exh.46. He deposed that on 11.9.2007 at about 1.15 p.m. he was called at police station Parli by PSI Chause (P.W.5). When he came to police station, the another panch Syed was accompanying him. PSI Chause (P.W.5), Naib Tahsildar and Inspector, Weights and Measures and Railway Superintendent were present in the police station. So also, accused were present at the police station. He deposed that PSI Chause (P.W.5) told him that he is about to take personal search of four accused persons and asked him to help him in taking search. He deposed that accused were asked to open the bags. The bags were found to be containing Ganja. Inspector Mahajan then measured the quantity of Ganja in each bags and

sample containing 100 gms of Ganja was separately drawn from each of the bags and then sealed and labeled the same. The seizure panchanama is at Exh.47.

8. Prosecution has further examined Somnath Mahajan (P.W.3) Inspector of Legal Metrology Department, who measured the quantity of Ganja. He deposed that on 11.9.2007 at about 9.50 a.m. while he was present in his office, police Naik attached to police station Parli came with a letter addressed to him from PSI, Railway Police Station, Parli. By the said letter, PSI has informed that four persons were illegally found in possession of Ganja in Hyderabad – Aurangabad passenger train and asked him to attend the police station with weights and measure. Accordingly, he visited police station at 1 p.m. He further deposed in detail about the quantity of Ganja found in each of the bags. He categorically deposed that from each bag, sample of 100 gms was drawn. The sample of 100 gms drawn from each bag was then divided into four parts weighing 25 gms each and put in separate envelope and

those envelopes were sealed, labeled with signatures of panch witnesses.

9. Prosecution has examined the Naib Tahsildar Ganpat Sirsat (P.W.4) vide Exh.60. He deposed that on 11.9.2007 he received letter from Officer of Railway Police Station, Parli. By the said letter, the Officer had requested him to attend police station for panchanama in respect of narcotic substance. He attended the police station at 1 p.m. In his presence, the Inspector of Weights and Measures Department and in presence of two witnesses, the bags were opened and in those bags, Ganja was found; the same was measured. After separately measuring the quantity of Ganja from each of the bags, sample admeasuring 100 gms was drawn and same was sealed and labeled. He deposed that accused were present at the police station and the bags were lying in front of the accused persons.

10. Prosecution has lastly examined PSI Chause (P.W.5) - the Investigating Officer. He deposed as per

case of the prosecution. He deposed that on 11.9.2007 he received information on his mobile phone from police constable Moinkhan Pathan (P.W.1) that while he was on patrolling duty with other two constables, they found four suspected persons in bogie No.87401 and on checking their baggage, they were found to be containing Ganja. They informed him that they are at police station with those four suspects. After receiving information on mobile phone, he informed the fact to his superior and then sent letter to Tahsildar to attend his office and also instructed to bring two respectable panchas. He further deposed that he also gave letter to the Inspector, Weights and Measures to attend the police station with weights and measure. He deposed that in presence of panch witnesses, *Naib Tahsildar* the bags found in possession of the accused were opened and the quantity of *Ganja* found in the bags was separately measured and then, *panchanama* was prepared. He further deposed that *muddemal* property seized, was deposited in the safe custody and later on, samples were sent to the Chemical Analyzer.

11. On due consideration of the submissions advanced by the learned Counsel for the appellants and APP appearing for the State in the light of oral and documentary evidence on record, I am of the view that the prosecution has failed to prove its case beyond reasonable doubt. As discussed, the case of the prosecution is mainly based upon the testimony of Police Head Constable Moinkhan Pathan (P.W.1). Prosecution has neither cited nor examined any independent witness. It is strenuously contended by the learned Counsel for the appellants that there is no cogent, convincing and reliable evidence to sustain conviction. It is pointed out that except the testimony of Moinkhan Pathan (P.W.1), there is no other corroborative evidence to show that the appellants – accused were travelling in the Hyderabad – Aurangabad passenger train and they were in conscious possession of the contraband article i.e. Ganja. By referring the testimony of Moinkhan Pathan (P.W.1), it is pointed out that all the seats in the railway bogie were occupied by passengers. Not a single passenger has

been cited as a witness for prosecution. Except the testimony of Police Head Constable Moinkhan Pathan (P.W.1), there is no evidence to show that the accused were travelling by the said train on seat Nos.12, 13, 14 and 15. So also there is no credible evidence that the bags in question were lying below the seats where the accused were sitting. So also, there is no evidence to show that the accused were in conscious possession of alleged contraband article. Moinkhan Pathan (P.W.1) has deposed that the personal search of accused was not taken. He had not checked as to whether accused were carrying railway tickets. Nothing was found in the alleged bags to connect the appellants with the bags in which alleged contraband article was detected.

12. On the other hand, learned APP appearing for the State submitted that only for the reason that no independent witnesses have been examined, the case of the prosecution cannot be rejected. In support of the submission, learned APP has referred and relied upon the decision of the Apex Court in the case of **Kul Winder**

Singh and another vs. State of Punjab¹.

13. On the other hand, learned Counsel representing appellants submits that no reliance can be placed upon the sole testimony of Moinkhan Pathan (P.W.1), Police Head Constable as he is an interested witness. It is further submitted that the testimony of Moinkhan Pathan (P.W.1) is shrouded with suspicion. It is pointed out that as per the testimony of Moinkhan Pathan (P.W.1), the alleged checking was made at around 4.45 a.m. Moinkhan Pathan (P.W.1) has deposed that he reached Parli Police Station at around 7 to 7.30 a.m. The alleged panchanama is shown to have been made in between 1 to 1.45 p.m. Offence was registered at about 5 p.m. No explanation has been put forth as to the delay in carrying out panchanama as well as lodging F.I.R. It is further pointed out that P.S.I. Chause (P.W.5) who lodged the complaint, he himself conducted the investigation. It is further submitted that in order to establish the guilt under Section 20(b) of the N.D.P.S.

¹ 2016(2) Mh.L.J.(Cri.)(S.C.)7;

Act, it is not sufficient for the prosecution to show that accused was found in possession of contraband article; but, it is incumbent upon the prosecution to prove that the accused were found in conscious possession of the contraband article.

14. In the case of **Girija Prasad (Dead) through L.Rs. vs. State of M.P.**², the Apex Court has observed that the credibility of witness has to be tested on the touchstone of truthfulness and trustworthiness. It is further observed that it is quite possible that in a given case, a Court of Law may not base conviction solely on the evidence of Complainant or a Police Official but it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. It is further observed that there is no rule of law which lays down that no conviction can be recorded on the testimony of Police Officials even if such evidence is otherwise reliable and trustworthy. What is

² (2007)7 SCC 265;

required is the rule of prudence to be more careful while scrutiny of evidence of such witness. Once the Court is convinced that what was stated by a witness has a ring of truth, conviction can be based on such evidence. Thus, the legal position is quite settled as to acceptance of testimony of police official. In this view, the testimony of Moinkhan Pathan (P.W.1) cannot be rejected or discarded for the reason that the prosecution has not examined any independent witness. However, the rule of prudence requires that before acting upon the testimony of such witness, testimony of such witness needs to be scrutinized very carefully and to guarantee truthfulness of fact deposed of such witness, insist for corroboration. On careful and close scrutiny of testimony of Moinkhan Pathan (P.W.1), I am of the view that his testimony is not of such a nature on which court can place implicit reliance without corroboration. In order to prove guilt for the offence punishable under Section 20(b) of N.D.P.S. Act, it is incumbent upon the prosecution to prove that the accused was found in conscious possession of the contraband article. It has come on record that all the

seats in the railway bogie in which accused are alleged to have been travelling, were occupied. The accused were found travelling in general bogie. There is no iota of evidence to show that the accused were travelling in the said bogie. No railway tickets or any evidence gathered to establish that they were travelling in the said bogie and the alleged bags were kept by them below the seats where they were found to be sitting. There is no other evidence to show that the accused were found boarding the train with those bags. So also, there is no evidence to show that the accused had kept the bags below the seats where they were sitting. If we consider the testimony of Moinkhan Pathan (P.W.1), then according to him, the accused were sitting on seat nos.12,13,14 and 15. On suspicion, enquiry was made and they found to be frightened. On checking the bags lying below their seats, the alleged contraband article was found in the bags. Thus, the testimony of Moinkhan Pathan (P.W.1) no way establishes the link that the accused boarded the train with the alleged bags and they kept the bags below their respective seats. Only for the reason that the

bags were lying below the seats where they were found to be sitting in itself is not sufficient to establish that the accused were found in conscious possession of the alleged contraband article. In this context, learned Counsel appearing for the appellants has placed reliance on the decision of this Court in the case of **Pralhad s/o Lalna Koylawar vs. The State of Maharashtra**³, wherein, in a case similar to the facts of the prosecution case, the conviction was set aside and accused were acquitted. In para 8, the Court has observed, as under:

“8. The version of PW Devidas reveals that the bag was found lying unattended on the rack. He suspected that the appellants were the owners of the bag. No witness was examined to show that either of the appellants was found entering the bogie No.4 alongwith the said bag. The solitary version of PW Devidas falls too short to establish into “conscious possession” of the said bag with the appellants. The offence is of serious nature. Obviously, the prosecution is required to prove the offence beyond reasonable realm of doubt. The presence of the cloth bag on a berth / rack of the Railway compartment coupled with the presence of the appellants in the same compartment by itself is insufficient to positively infer their complicity.”

3 [2008(2) B Cr.C 39];

15. The learned Counsel for the appellants further placed reliance on the decision in case of **Mahant Bal Giri and Anr vs. State of H.P.**⁴ wherein, it has been held that unless the possession is coupled with the requisite mental element i.e. conscious possession, Section 20 of the N.D.P.S.Act is not at all attracted.

16. On the other hand, learned APP strenuously contended that once the possession is proved, the accused is presumed to be in conscious possession. In support of the submission, learned APP has referred and relied upon the decision of the Apex Court in case of **Kul Winder Singh and another** (supra). He has further submitted that once physical possession of contraband article by accused is proved by prosecution, presumption as to the culpable mental state that accused were in conscious possession of contraband article raises in favour of prosecution and burden shifts on accused to prove that he was not in conscious possession of contraband article. In support of this submission,

4 2008 CRI.L.J. 2648 (HP);

learned APP placed reliance upon the decision of Apex Court in case of **Baldev Singh vs. State of Haryana**⁵.

17. On due consideration of the submissions advanced, the question which poses for my consideration is whether the prosecution has proved that accused were found in possession of contraband article. As discussed above, except the testimony of Moinkhan Pathan (P.W.1), there is no other evidence to show that the accused were found in possession of alleged contraband article. The testimony of Moinkhan Pathan (P.W.1) is not such to place implicit reliance on it. Although, independent witnesses were available, the prosecution has not recorded the statement of the witnesses who were travelling in the same bogie and particularly, the compartment in which the accused were alleged to be travelling with the alleged contraband article. As per the testimony of Moinkhan Pathan (P.W.1), the fact regarding finding of the accused in possession of contraband article, revolves around 4.45 a.m. in the midnight on

5 2015 ALL MR (Cri) 4967(S.C.);

11.9.2007. There was no information passed on by Moinkhan Pathan (P.W.1) to his superior officer immediately after the contraband article found in possession of the accused. It has come on record that the train was stopped at each and every stoppage. There is no station entry to show that immediately the information was passed on to concerned police station. Moinkhan Pathan (P.W.1) has deposed that the bogie was heavily crowded by passengers travelling to Shirdi. He deposed that he reached police station (Railway), Parli Vajjnath at 7.30 a.m. He nowhere deposed that he contacted the superior officer i.e. Officer-in-Charge of the police station and informed him about the accused being caught with huge quantity of Ganja.

18. If we consider the testimony of Investigating Officer, P.S.I. Chause (P.W.5), then he deposed that on 11.9.2007, he received information on mobile phone from Police Head Constable Moinkhan Pathan (P.W.1) that four suspected persons were found in the bogie No.8740 with bags containing Ganja lying below their seats and

they were at Parli Police Station (Railway). However, Moinkhan Pathan (P.W.1) did not depose that he made phone call to PSI Chause (P.W.5). Though Moinkhan Pathan (P.W.1) reached the police station with the accused and alleged bags at 7.30 a.m., no panchanama was carried out immediately thereafter.

19. Dadarao (P.W.2) panch witness examined by prosecution has deposed that at about 1 p.m., he was called at the police station Parli for the purpose of panchanama. Somnath Mahajan (P.W.3) has deposed that he received letter from officer of police station, Parli at about 9.50 a.m. to attend police station with weighing machine and weight measures for weighing Ganja found in illegal possession of four persons travelling in Hyderabad – Aurangabad passenger train. He deposed that he went to police station at 1 p.m.

20. Ganpat Sirsat (P.W.4) has deposed that one letter came to the Tahsildar from Railway Police Station requesting the Tahsildar to attend for panchanama of

narcotic substance. On the direction of Tahsildar, he attended the police station and in his presence, contraband articles found in the bags were measured. Seizure panchanama at Exh. 47 reflects that the panchanama of all four bags was made at same time i.e. in between 1 to 1.45 p.m. No explanation has been offered as to the delay in carrying out the panchanamas. So also the F.I.R. was registered at around 3.30 p.m. Therefore, the delay in carrying out the panchanama and registration of FIR raises suspicion as to the truthfulness of the overall case of the prosecution and the testimony of Moinkhan Pathan (P.W.1) and PSI Chause (P.W.5). The evidence of Moinkhan Pathan (P.W.1) is not as such which can be relied in absence of corroboration that too in an offence relating to N.D.P.S. Act. I am, therefore, of the view that in absence of independent witness, it is highly unsafe to base the conviction on the sole testimony of Moinkhan Pathan (P.W.1).

21. As discussed, there is no cogent and convincing evidence to sustain the conviction. The prosecution has

not proved that the bags found lying below the seats were belonging to the accused, as no witness has been examined to tell that he had seen the accused carrying those bags and keeping the same below their seats after boarding the train. The train was full of passengers. The bogie was general compartment. In the facts and circumstances of the case, the possibility cannot be ruled out that some one else may have kept those bags below the seats where the accused found to be sitting. In absence of evidence to establish the nexus between the accused and the bags lying below their seats, it is highly unsafe to base the conviction on the sole testimony of Moinkhan Pathan (P.W.1). Failure to establish the possession, there is no question of any presumption being drawn that the accused were found in conscious possession of the contraband article and to lead evidence in rebuttal on the part of the accused to dispel the presumption.

22. If, we consider the overall testimony of the prosecution witnesses, then there is no cogent and

convincing evidence to establish that the accused were found in possession of contraband article. The testimonies of witnesses examined by the prosecution are inconsistent and contradict each other. If we consider the testimony of Moinkhan Pathan (P.W.1) then he has not specifically stated as to how many bags were lying below the seats where the accused were found sitting. Moinkhan Pathan (P.W.1) has deposed that two bags and two *Pishvis* were found below the seats and in those bags and *Pishvis*, contraband article Ganja was found. Moinkhan Pathan (P.W.1) has filed report vide Exh.39 with P.S.I. Chause (P.W.5) after reaching to Police Station. In the report filed, no description of the bags has been given. He has also not mentioned as to how many bags were found below the seats. He has admitted that in report Exh.39, he has not given description of the bags. He admitted that it is not mentioned in the report Exh.39 that there were two airbags and two bags found below the seats. Moinkhan Pathan (P.W.1) has not deposed as to the quantity of Ganja in each bag.

23. If we consider the testimony of Dadarao (P.W.2) then according to him, Inspector Mr. Mahajan from Weights and Measurement Department has measured quantity of Ganja from each bag separately. He has deposed that from each of the bags after weighing Ganja, 100 gms of Ganja was taken out as sample and same was put in a packet and sealed and labeled with their signatures. Thus, if we consider the testimony of panch witness Dadarao (P.W.2), then according to him from each bag sample of 100 gms was drawn and they were separately put in packet, sealed and labeled as a sample to be sent to Chemical Analyzer. If we consider the seizure panchanama (Exh.47), then it is recorded that from each bag sample of 100 gms of contraband article was taken out, put in packet and sealed with labels containing signatures of panch witnesses. Whereas, Somnath Mahajan (P.W.3), Inspector of Legal Metrology Department, who was summoned for measuring the contraband article has given altogether different version and deposed that from each of the bags, initially 100 gms of contraband article was taken out. He had handed

over that quantity of Ganja to PSI Chause (P.W.5). PSI Chause (P.W.5) then divided each sample of 100 gms in four part with each packet of 25 gms and then each of those 25 gms packets was separately sealed and labeled with the signatures of panch witnesses. Thus, according to Somnath Mahajan (P.W.3), from each bag sample of 100 gms was taken out. The Investigating Officer, then divided that 100 gms into four parts of 25 gms each and put in separate packet and sealed and labeled each packet of 25 gms each. Thus, there is no consistency amongst the testimonies of Dadarao (P.W.2) and Somnath Mahajan (P.W.3) about drawing of samples of the contraband article for the purpose of sending to Chemical Analyzer. Thus, it raises serious doubt as to overall seizure made as well as sample drawn for the purpose of Chemical Analyzer. In the requisition letter dated 17.9.2007 sent to the Chemical Analyzer, there is a reference of forwarding of only four packets of sample containing 100 gms of Ganja. If we consider the testimony of Somnath Mahajan (P.W.3), then no such sealing of four packets containing 100 gms of Ganja was

made at the time of effecting panchanama for sending the samples to the Chemical Analyzer.

24. Prosecution has not examined the carrier who collected the sample and deposited with the Chemical Analyzer. There is no evidence adduced by the prosecution to show at what time and with whom the Muddemaal property was deposited by the concerned official. There is no evidence to show as to when the Muddemaal property was taken out for sending to Chemical Analyzer. In this view, there is no cogent and convincing evidence to establish and prove that the samples, which were drawn vide panchanama (Exh.47), were sent in same condition to the Chemical Analyzer. If we believe the testimony of Somnath Mahajan (P.W.3), then no such packets containing 100 gms of contraband articles were prepared, sealed and affixed with label containing signatures of panch witnesses. As per the fact deposed by Ganpat Sirsat (P.W.4), though 100 gms sample was drawn from each of the bags, the Investigating Officer divided the same into four parts of

25 gms each and those packets were separately sealed and labeled. Whereas, as per requisition letter Exh.79 four packets containing 100 gms of Ganja were sent to Chemical Analyzer for analysis. Thus, there is no satisfactory evidence that samples sent to Chemical Analyzer were sent in same condition as they were sealed. P.S.I. Chause (P.W.5) has not deposed anything about the same.

25. If we consider the overall evidence, then there is no cogent, convincing and reliable evidence to conclusively establish that accused were found in possession of contraband article. As discussed, the fact regarding the alleged possession of contraband article and commission of offence was disclosed at 4.45 a.m. on 11.9.2007. The offence was registered on the basis of complaint lodged by PSI Chause (P.W.5) vide Exh.69 at about 15.30 Hrs. on 11.9.2007. No explanation has been put forth as to why offence was not registered when the accused produced in the police station with contraband article at 7.30 a.m. and Moinkhan Pathan (P.W.1) submitted

report vide Exh.39. In absence of explanation as to delay in lodging report as well as panchanama and overall facts of the case and evidence discussed as above, the possibility cannot be ruled out that the complaint was lodged after due discussion and deliberation. The delay in panchanama and registration of offence itself raise serious doubt as to truthfulness of overall case of prosecution.

26. In my view, the judgment and order passed by the trial Court is perverse and based upon improper appreciation of evidence on record. There is no cogent, convincing and reliable evidence to sustain the conviction. The conviction is based upon sole testimony of Police Head Constable Moinkhan Pathan (P.W.1). There is no independent corroboration to the testimony of the said witness. Although, number of passengers were travelling in the bogie, none of them was cited and examined as a witness to corroborate the testimony of Moinkhan Pathan (P.W.1). No one has seen the accused carrying the bags and putting them below the seats

where they were sitting. There was delay in conducting panchanamas as well as lodging report. No explanation has been put forth as to the delay made in that regard. There is no consistency in the testimonies of the prosecution witnesses as to drawing and sealing of the sample. The charge framed against the accused is also found to be defective. There are no cogent and convincing reasons recorded by the learned Judge in support of conclusion of guilt of the accused under Section 20(b) of the N.D.P.S. Act. On the contrary, the reasons recorded by the learned Judge appears to be very cryptic. No evidence as such has been discussed in the judgment to support the conclusions.

27. If we consider the judgment, then it is nothing but narration of the testimonies of the witnesses and arguments advanced by the learned APP and the Advocate defending the accused. It is rather surprising to take note that the learned Judge himself observed that prosecution has proved its case more than 50% and therefore, accused are not entitled for benefit of doubt

and required to be held guilty of offence punishable under Section 20(b) of the N.D.P.S. Act. The observations made in para 32 of the judgment reads, as under:

“32. The prosecution has proved their case from probability to possibility and more than 50% certainty. In that event accused Nos.1 to 4 are not entitled for benefit of doubt. Hence, I answer point No.1 and 2 in affirmative holding that accused Nos.1 to 4 are guilty of offence under Section 20(b) of the N.D.P.S. Act.”

28. What has been observed itself reflects that the learned Judge of the trial Court has convicted the accused though found prosecution has failed to prove the guilt beyond reasonable doubt. In this context, the learned Counsel for appellants have placed reliance on decision of apex Court in the case of **Sohan and another vs State of Haryana and another**⁶ wherein, in para 21 the Court has observed, as under:-

“21. An accused is presumed to be innocent until he is found guilty. The burden of proof, that he is guilty, is on the prosecution and that the prosecution has to establish its case beyond all reasonable doubts. In other words, the innocence of an accused can be dispelled by

6 (2001) 3 SCC 620;

the prosecution only on establishing his guilt beyond all reasonable doubts on the basis of evidence. In this case, if only the Sessions Judge had reminded himself of the above-mentioned basic or fundamental principles of criminal jurisprudence, direction of his approach and course of his appreciation of evidence would have been different and thereby perversity in appreciation of evidence could have been avoided.”

29. In this view, the judgment and order passed by the trial Court is perverse and liable to be set aside. In the facts and circumstances of the case and evidence as discussed above, the conviction is not sustainable. The accused deserves to be given benefit of doubt. I am, therefore, inclined to allow the appeals and set aside the impugned judgment and order passed by the trial Court and acquit the appellants by giving them benefit of doubt. Hence, the following order:

: ORDER :

- i) Criminal Appeal No.265/2014 and Criminal Appeal No.105/2016 are allowed;
- ii) The judgment and order dated 25.03.2014 passed by the Additional Sessions Judge-2, Ambejogai in Special Case No.01/2007 is set aside to the extent of appellants;

iii) Appellants in Criminal Appeal No.265/2014 i.e. Santosh s/o Bhagwan Waghmare (Ori. accused No.1) and Madhav @ Sadhu s/o Rama Ambade (Ori. Accused No.4) and appellant in Criminal Appeal No.105/2016 i.e. Kacharu s/o Shesherao Jogeshwari (Ori. Accused No.2) are hereby acquitted of the offence punishable under Section 20(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985. They be set at liberty forthwith, if not required in any other case. Fine amount, if any, deposited by them, be refunded;

iv) Fees of Mr.R.D. Sanap, Advocate (appointed) for the appellant in Criminal Appeal No.105/2016 and Smt. P.R. Wankhede, Advocate (appointed) for appellants in Criminal Appeal No.265/2014 is quantified at Rs.3000/- (Rupees Three thousand) to be payable to each of them. The High Court Legal Services Sub Committee, Aurangabad to pay the same.

[V.L. ACHLIYA, J]

Kadam.