

IN THE HIGH COURT OF BOMBAY AT GOA.**Criminal Appeal Nos.46, 49, & 50/2014 & 32/2015.****Criminal Appeal Nos.46/2014.**

Kumari Peram Pun,
age 27 years, w/o Pearam Pun,
R/o W.D.No.03, Rolpa, Nepal,
(presently lodged in
Sub-Jail Sada Vasco Goa)

Appellant

Versus

1] State
(as represented by the
Officer In charge,
Anti-Narcotic Police Station,
Panaji Goa.

2] The Public Prosecutor
High Court Building
Altinho, Panaji, Goa.

Respondents

WITH**Criminal Appeal No.49/2014**

Maya Bhim Bahadur
w/o Bhim Bahadur,
age 27 years,
n/o Chunbang-09
Rukum Nepal
(presently lodged in
Sub-Jail Sada Vasco Goa)

Appellant.

Versus

1] State
(as represented by the
Officer In charge,
Anti-Narcotic Police Station
Panaji Goa.

2] The Public Prosecutor
High Court Building

Altinho, Panaji
Goa.

Respondents

**WITH
Criminal Appeal No.50/2014**

Dilkumari Dilbahadur Thapa,
w/o Dilbhadur Thappa,
age 27 years,
n/o W.D.No.07
Rolpa, Nepal,
(presently lodged in
Sub-Jail Sada Vasco Goa)

Appellant.

Versus

1] State
(as represented by the
Officer In charge,
Anti-Narcotic Police Station
Panaji Goa.

2] The Public Prosecutor
High Court Building
Altinho, Panaji
Goa.

Respondents

**WITH
Criminal Appeal No.32/2015**

(1) Shri Bhim Bahadur,
s/o Manjeet Raka,
age 31 years,
N/o Chunbang -09
Rukum, Nepali.

(2) Dhibilal Jaysingh Budha,
s/o Jaysingh Budha,
age 40 years,
N/o W.D.No.03, Begaon,
Bhakia, Khajura, Nepali
Both presently under going
Sentence at Central Jail
Aguada.

Appellants.

Versus

1] State
(Anti-Narcotic Police Station
Panaji Goa.

Respondent

Shri Kamlkant Poulekar, Advocate for the appellant in CRA Nos.46/2014, 49/2014 and 50/2014.

Shri Ryan Menezes with Ms. C.Rebeiro Advocates for the appellant in CRIA No.32/2015.

Shri S.R.Rivankar, Public Prosecutor for the respondents/State in all the appeals.

**CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON :19/07/2017.
PRONOUNCED ON :08/08/2017.**

JUDGMENT:

These appeals can be disposed of by a common judgment since all the appellants herein have been convicted and sentenced by the learned Special Judge, NDPS Court, Mapusa of the offences punishable under Section 20 (b) (ii) (C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "NDPS Act"), as they were individually found in illegal possession of commercial quantity of Charas. The appellants have been sentenced to undergo rigorous imprisonment for ten years and a fine of Rs. One lakh each, in default to suffer rigorous imprisonment for six months.

2. The prosecution case can be stated as follows:-

The complainant – Ms. Mira D'Silva (PW 9), a Lady Police Sub Inspector, attached to Anti-Narcotic Police Station, Panaji-Goa (for short "ANC") received a reliable information on

29.11.2009 at about 20.00 hours that on the same day between 22.15 hours to 23.15 hours, three males and three females of Nepali nationals would be coming to Siolim, Opposite St. Anthony Church Junction, in a taxi to deliver a narcotic substance i.e. Charas to their prospective customers. The information was reduced into writing and its copy was sent to Dy. S.P. - Naresh Mhamal - PW 4, through P.C. Suraj Govekar as the said PW 4 - Naresh Mhamal was deployed for a duty at Kala Academy, where IFFI function was in progress.

3. PW 9 - Mira, immediately secured presence of two panch witnesses namely Vilas Naroji - PW 3 and Jayesh Vasant Naik. On arrival of panchas, they were introduced with the raiding party consisting of P.S.I. Arjun Konduskar - PW 5 and Police Constable - Tukaram Navelkar, Suraj Govekar, PW 7 - Dayanand Parab, Police Constable and Police Constable Ermiya Guraiya of the ANPS. The panchas were shown seal of Anti Narcotic Cell, Panaji Goa-6 with Ashoka Emblem carried by PW 9 Mira along with a kit box containing weighing, packing, sealing materials and other articles required for effecting search and seizure of contraband substance. She also carried a typewriter.

4. The raiding party proceeded in a Police Jeep, bearing Registration No.GA-07-G-0068 and reached Siolim around 20.50

hours. The jeep was followed by PW 7 - Dayanand Parab on a Government motorcycle bearing Registration No. GA-01-G-1706. After parking the jeep near St. Anthony Church Junction, Siolim at about 21.40 hours, the raiding party concealed themselves near the vicinity of the said Church and waited for the taxi with six Nepali occupants about whom an information was received. Around 23.30 hours, a yellow and black colour Maruti Omni taxi bearing Registration No. GA-01-Z-6615 was coming from Bamonwada side towards junction, which was stopped by the raiding party. On being asked, Taxi driver PW 8 - Satish Kalangutkar, informed that he was bringing passengers from Thivim Railway Station. After putting on the lights in the taxi, PW 9 - Mira noticed suspects i.e. six Nepali persons (three males and three females) in the taxi. She informed the panchas and the members of the raiding party that those were the persons about whom an information was received. The members of the raiding party thereafter introduced themselves to the driver PW 8 - Satish Kalangutkar and also the occupants of the taxi. Upon being asked, all the occupants disclosed their names and that they hail from Nepal. PW 9 - Mira, thereafter informed them that they had a right to be searched in presence of a Gazetted Officer or a Magistrate, if they so desired and thereafter their search would be conducted in the presence of Gazetted Officer, to which all of them declined. She also

informed that all of them also had a right to search the members of the raiding party including the panchas, if they so desired. However, they declined that offer also.

5. Thereafter, PW 5 - Arjun Konduskar, P.S.I. effected personal search of accused no.1 - Bhim Bahadur Roka. He too informed accused no.1 - Bhim Roka about his right to get searched before a Gazetted Officer. As the accused declined his personal search, PW 5 - Arjun Konduskar effected search of accused no.1 - Bhim Roka and found that the said accused was carrying a blue coloured bag around his neck in which he noticed five packets individually wrapped with a brown coloured cello tape containing substance in cylindrical shape pieces. There were five packets found in the said bag. The five packets were found containing a blackish substance wrapped individually in transparent polythene wrapper and after smelling, he confirmed the substance as Charas in all the five packets. The packets were weighed collectively along with their individually wrapper and a brown colour wrapper which was found to be 1.670 kgs. He was also found in possession of one Nepali national passport.

6. PW 5 - Arjun Konduskar, P.S.I. thereafter effected search of accused no.2 - Balraj Thappa in the similar manner

and found 1.755 kgs. of Charas in a grey coloured bag, which the said accused was carrying around his neck. In the said bag, the raiding party found 51 pieces of comb shape having blackish substance which also after smelling confirmed to be a substance as Charas which was kept in 12 packets.

7. PW 5 - Arjun Konduskar, P.S.I. similarly effected search of accused no.3 - Dhibilal Budha, wherein he found 1.595 kgs. Charas in his shoulder bag of red and black colour. All the contraband material seized from three Nepali accused had been duly seized and sealed by affixing label of Anti Narcotic Cell, Panaji-Goa-6 with Ashoka Emblem.

8. Thereafter, PW 9 - Mira effected search of accused no.4 - Maya Roka. PW 9 - Mira repeated before conducting search of accused no.4 that she has a right to be searched in presence of a Gazetted Officer or a Magistrate and that if she desires search to be conducted before such Officer, the team would take her to the Officer. However, accused no.4 - Maya declined the offer. During her search, PW 9 - Mira found 1.665 kgs. of Charas in her shoulder bag having red colour designed and round in shape. There were four rectangular shape packets individually wrapped in a brown colour cello tape. After opening of four packets, she found two packets containing cylindrical

shaped Charas pieces individually wrapped in a transparent cellophane paper. In another two packets, comb shaped Charas pieces were found in an auto press transparent two packets. It seems appears that all the accused when asked to sign the sealed envelopes, refused.

9. Thereafter, PW 9 – Mira, in the similar manner, conducted search of accused no.5 - Kumari Peram Pun and found 1.620 kgs. of Charas being carried out in brown coloured rexin shoulder bag. There were four packets containing cylindrical shape pieces individually wrapped in transparent cellophane paper and in fourth packet comb shape and some cylindrical shape pieces were found.

10. Lastly, during the search of accused no.6 - Dilkumari Thappa she found 1.555 kgs. Charas concealed in a yellow colour cloth belt tied around her stomach. On opening the packets concealed by accused no.6 – Dilkumari, P.W.9 – Mira noticed four packets with cylindrical shapes Charas pieces individually wrapped in transparent cellophane paper and comb shape Charas found in auto press transparent packets. All the accused failed to account for the possession of contraband substance.

11. All the contraband articles were weighed on the spot itself. All exercise had been carried out in presence of raiding party and panch witnesses. The taxi of PW 8 - Satish Kalangutkar was attached since it was used for carrying passengers with Charas. During the personal search of PW 8 - Satish Kalangutkar by PW 5 - Arjun Konduskar, nothing incriminating could be noticed on his person. The total weight of contraband seized was approximately 9.860 kgs. worth Rs.9,86,000/-. The panchanama commenced at 20.30 hours and was concluded by 3.30 hours, which was written by PW 9 - Mira on the spot itself in presence of members of raiding party and panchas, which were read over and explained to the accused and panchas.

12. A seizure report was prepared on the spot and copies of seizure report and panchanama were delivered to the accused nos.1 to 6. A letter was addressed to the Director, Food and Drugs Administration (for short "DFDA") Panaji by PW 9 - Mira on the spot itself. She put seal impression of ANC, Panaji Goa -6 with Ashoka Emblem affixed on the said letter.

13. After completing all the formalities, the seal of ANC, Panaji Goa - 6 was sent to PW 4 - Naresh Mahmal, Dy.S.P. ANC through P.C. Dayanand Parab - PW 7 at his residence for safe

custody. The raiding team returned to the Police Station at Panaji along with accused where PW 9 – Mira lodged a complaint on the basis of which an offence came to be registered under Section 20(b) (ii)(C) of NDPS Act.

14. The contraband which was forwarded to DFDA was analysed by PW 1 - Mahesh Kaisare, who conducted various tests while analysing the substance such as microscopic examination being acid test, Neagm's test, Fast blue B Salt test and concluded that the substance forwarded for analysis contained Charas. After completion of the investigation, a charge-sheet came to be filed against the appellants-accused under Section 8 (c) read with Section 20 (b) (ii) (C) of the NDPS Act in the Court of Special Court, NDPS Goa.

15. All the accused appeared before the learned Special Judge on 19.05.2010. The learned Special Judge, after hearing the prosecution, framed a Charge below Exhibit 4 under Section 8 (c) read with Section 20 (b) (ii) (C) of the NDPS Act. The charge was read over and explained to the accused, to which each of the them pleaded not guilty and claimed to be tried.

16. The general defence of all the accused in the light of cross-examination as well as from their statements under

Section 313 of Cr.P.C. is that they have been falsely implicated in this case. The accused denied to have committed the offence as alleged. No defence evidence has been adduced on their behalf.

17. During the course of trial, the prosecution has examined nine witnesses. The following chart at a glance would depict the nature of evidence adduced, during the course of trial:-

Sr. No.	Nature of Witness	Name of witness	Nature of Deposition
PW 1	Chemical Analyst	Mahesh Kaisare	Does Analysis of the contraband substance.
PW 2	Scientific Assistant	Gourish Mapari	Received the sealed parcel from Police and hands over to the Chemical Analyst.
PW 3	Pancha	Vilas Naruli	Witness to the search and seizure panchanama.
PW 4	Dy.SP	Naresh Mahmal	Deposes about the receipt about the prior information, receipt of seal after the raid receipt of information u/s 57 of NDPS Act.
PW 5	Police witness	Arjun Konduskar (PSI) Raiding party	Deposes about the search of three male accused.
PW 6	Writer HC	Anand Salunke	Deposes about the receipt of the sealed parcel and entry in muddemal register.
PW 7	Police Witness	Dayanand Parab (P) Raiding Party	Deposes about carrying of seals after the raid and handing over to the Dy.SP for safe custody.
PW 8	Taxi Driver	Satish Kalangutkar	Deposes about bringing of the accused from Thivim Railway Station in his taxi.
PW 9	I.O.	Mira D'Silva (LPSI) Raiding Party.	Lodges the complaint, writes search panchanama, sealing of items.

18. The learned Special Judge, after going through the evidence and after hearing the prosecution and the defence, by the impugned judgment and order convicted and sentenced the accused. It is pertinent to note that during the proceedings accused no.2 expired and, therefore, the case abated so far as accused no.2 is concerned.

19. I have extensively heard Shri Kamlakant Poulekar, learned counsel appearing for the appellant nos.4, 5 and 6 and Shri Ryan Menezes, learned counsel appearing for appellant nos.1 and 3.

20. Submissions made by Shri Poulekar, learned counsel, can be summarised as follows:-

(i) According to the learned counsel, there is no compliance of Section 50 of the NDPS Act, as none of the accused, were told that the search was taken for the purpose of drugs. There is also no compliance of Section 50 (4) of the NDPS Act, as the search of the female accused was not conducted by female before female panchas but before the male panchas. It is further argued by Shri Poulekar that there was

decrease in weight of the contraband substance when it was alleged to have been seized at the time of raid and when it was weighed by the Chemical Analyser. According to him, there was a difference of 0.017 kg. insofar as contraband seized from accused no.1 is concerned. The difference was further found to be reduced to the extent of 0.017 kg., 0.020 kg., 0.080 kg., 0.070 kg. and 0.055 kg. respectively insofar as accused nos.2 to 6 are concerned, when the substance was weighed by Chemical Analyser. He, therefore, submits that tampering of the muddemal cannot be ruled out, in view of decrease in the weight. There are also discrepancies in packing and sealing of the drugs insofar as accused nos.1, 3 and 5 are concerned, as the contraband was found in bags of different kinds. The prosecution has failed to examine Police Constable Guraiya, who is material witness and, therefore, an adverse inference needs to be drawn against the prosecution for suppressing his evidence. There are also material contradictions in the evidence of PW 5 - Arjun Konduskar and the panch

witnesses. The learned counsel vehemently urged by pointing out different paragraphs of the impugned judgment wherein the learned Judge has failed to bring to the notice of the accused in their statements under Section 313 of the Code of Criminal Procedure, the material evidence appearing against them. He submits that the Statement under Section 313 of Cr.P.C. was very cursorily formulated by the Judge in the sense that the evidence of the Investigating Officer was not properly put to the accused. There are no questions regarding the quantity, seizure panchanama etc. put to accused nos.4, 5 and 6 by the Special Judge. It is also argued that there is no charge under Section 29 of the NDPS Act or Section 34 or 120-B of the IPC. The learned counsel placed reliance on the judgment of the Bombay High Court reported in **CDJ 1996 BHC 862** (Veneela Tilak Vs. Shahasane, Assistant Collector of Customs). The learned counsel also placed reliance on the judgment of the Apex Court reported in **CDJ 2014 SC 161** (State of Rajasthan Vs. Parmanand and another).

(ii) It is further submitted by Shri Poulekar that PW 9 – Mira did not say that she wanted to conduct “search for drugs to individual accused”. Therefore, in the absence of individual offer to each of the accused, it cannot be said to be due compliance of Section 50 of the NDPS Act. It is also submitted by him that seal of ANC was found over the muddemal above the paper label which indicates tampering. He, therefore, placed reliance on the judgment of the Hon'ble Supreme Court in **2004 Drugs Cases (Narcotics) 322** (Rajesh Jagdamba Avasthi Vs. State of Goa).

(iii) He tried to bring forth the discrepancies and inconsistencies in the evidence of the prosecution witnesses. It is also submitted by the learned counsel that there is no proof to show that the taxi was attached and there is also no proof that all the appellants were travelling in the said taxi as the counter part of the slip does not indicate all the details. He also submits that as per the evidence of panch witness, a letter was typed by PW 9 - Mira which

was addressed to the Chemical Analyser, however, the evidence of Chemical Analyser indicates that he received a handwritten letter, which is evident from Exhibit 18 written by PW 9 - Mira.

21. Shri Menezes, learned counsel for appellants no.1 and 3 spoke in a tune with Shri Poulekar, learned counsel for other appellants.

22. On the other hand, Shri Rivankar, learned Public Prosecutor, supported the impugned judgment. He submits that all the accused were found in possession of commercial quantity of Charas when the raid was properly conducted by PW 9 - Mira. He also submits that due compliance of Section 41 and procedure of the NDPS Act had been perfectly followed by the Investigating Officer. According to him, as per Section 50 (4) of the NDPS Act, what is contemplated is that search should be made only by female and, therefore, there is due compliance of the said provision as PW 9 - Mira, being female, conducted the search of accused nos.4, 5 and 6. He also drew my attention to Section 54 of the NDPS Act, which provides for a presumption from possession of illicit articles and submitted that onus is on the accused unlike other criminal trials to satisfactorily account

for the possession of contraband substance. The learned Public Prosecutor submits that PW 3 - Vilas Naruli is the important panch witness of the prosecution, who has rightly deposed as to when they had started from the police station. His evidence is quite trustworthy as he states about the questions put by the Investigating Officer to the accused as regards their search for "drugs", which according to the learned Public Prosecutor, need not be repeated in case of each of the accused. He, therefore, submits that there is due compliance of Section 50 of the NDPS Act. He placed reliance on **AIR 2000 SC 3502** (Joseph Fernandez Vs. State of Goa) and **(1999) 8 SCC 257** (Kalema Tumba Vs. State of Maharashtra and another). He further submits that since there was no search of person of the accused and, therefore, there is no question of compliance of Section 50 of the NDPS Act as to what had been searched were the bags of the appellants. The requirement of Section 50 of the NDPS Act, according to the learned Public Prosecutor, is therefore inconsequential, still it has been followed by the Investigating Officer. According to Shri Rivankar, minor discrepancies in the evidence of the witnesses, who have deposed after lapse of three years has to be overlooked as substantial evidence is satisfactory and proper. There is no reason to disbelieve the prosecution witnesses, who had no reason to depose against the accused. He also drew my attention to the extract of Station

Diary and also the information recorded therein about the time when they had started from the police Station and conducted raid.

23. Insofar as the evidence of PW 1 - Mahesh Kaisare is concerned, different weighing machines were used by Investigating Officer and Chemical Analyser and, therefore, there is insignificant difference in the weight of contraband which is not material and would not go to the root of the case. It is still a commercial quantity of contraband, which was seized from the possession of the appellants. According to learned Public Prosecutor, the defence has not laid foundation during cross in the defence that the samples do not contain Charas. This point cannot be agitated now. He placed reliance on the judgment dated 12.8.2011 of this Court (Coram S.A.Bobde & F.M.Reis, JJ) in the case of **Nandlal Shyamdas s/o Shyamdas Vs. State of Goa** in Criminal Appeal No.39/2009 .

24. The important prosecution witnesses are PW 3 Vilas Naroji, an independent panch witness, on the point of search and seizure of the contraband substance, PW 5 - PSI Arjun Konduskar, who had effected the search of three male appellants-accused and the Investigating Officer PW 9 – Mira.

25. PW 3 - Vilas Naroji is a public servant, who was summoned by PW 9 - Mira D'Silva to act as a panch witness at the time of raid which was conducted on 29.11.2009. He was summoned in the office of ANC at about 8.30 p.m. by a Police Constable when he was watching a programme of IFFI. Another panch Jayesh was also called by PW 9 - Mira. In the office of ANC, this witness was informed about a raid to be conducted on information that three males and three females would be coming with narcotic substance. The witness was shown a kit containing the articles required for the purpose of conducting raid including a seal having "inscription" Anti Narcotic Cell, Panaji, Goa-6 in the centre with Ashoka Emblem. The kit also contained sealing, packing, weighing material as well as typewriter. He boarded the jeep along with raiding party and reached at Siolim, Opposite St. Anthony Church Junction where all of them scattered. Around midnight, PW 9 - Mira intercepted a black and yellow Maruti Omni Van in which the appellants were travelling. PW 3 - Vilas Naroji in a very clear and detailed manner gave a vivid account right from the time he was summoned by the ANC Police Station till the conclusion of the search and seizure on the spot. His Examination-in-chief reveals all minute particulars as per the panchanama (Ex.37) drawn by PW 9 - Mira on the spot. It is pertinent to note that this witness made it very clear that PW 9 - Mira introduced herself to the appellants by displaying her

identity card. She then introduced the members of the raiding party and also informed the appellants that she wanted to carry search of all of them as she had an information that they were carrying drugs. All the appellants disclosed their names. Thereafter PW 9 – Mira also informed each of the appellants that if they wish, they can also effect search of the members of the raiding party which the appellants declined. He also testified that the appellants were asked as to whether they want to be searched before a Gazetted Officer or a Magistrate, which was also declined by them. Thereafter, PW 5 - Arjun Konduskar, as per the instructions of PW 9 – Mira, again repeated the offer to each of the accused before effecting their search as to whether they wanted their search to be conducted before a Magistrate. All the appellants individually declined the offer. Thereafter, PW 3 – Vilas Naroji gave a detailed account of the clothes on the person of each of the appellants and the contraband substance found with them. He further deposed that the contraband substance found with each of the appellants during the search by PW 5 - Arjun Konduskar was weighed and duly sealed by PW 9 - Mira in a envelop by affixing seal of ANC, Goa-6.

26. PW 3 – Vilas Naroji has also categorically and in a detailed manner deposed as to how PW 9 – Mira effected the

search of appellants – Maya Bahadur, Pernem Kumari Pun and Dilkumari Thapa, as already stated hereinabove. While deposing in respect of each of the appellants, PW 3 - Vilas Naroji has made it categorically clear that PW 9 – Mira, before effecting search of each of the female accused, again informed each of them as regards their right to be searched in presence of a Gazetted Officer or a Magistrate. Since all the appellants declined to be searched before such Officer, PW 5 - Arjun Konduskar conducted the search of the male appellants while PW 9 - Mira effected seizure of females respectively. Each of them were found in possession of contraband substance in packets of either cylindrical shape or in the form of comb or rectangular shape.

27. His evidence further reveals that PW 9 - Mira also inquired with PW 8 - Satish Kalangutkar, driver of the taxi, who carried the appellants from Thivim Railway Station. Nothing incriminating was found during his search by PW 5 - Arjun Konduskar. The taxi was attached under a panchanama. PW 3 – Vilas Naroji further testified that PW 9 – Mira communicated with the appellants in Hindi. The panchanama commenced at 11.30 p.m. and was concluded at 3.30 a.m. on the spot itself in the street light. The appellants refused to sign the panchanama. He further deposed that PW 9 Mira thereafter prepared a letter

addressed to DFDA on the spot.

28. Nothing significant could be elicited from the mouth of this witness during his cross-examination on behalf of the appellants. Rather, certain facts have been reiterated and buttress in the sense that PW 3 - Vilas Naruli was summoned as a panch witness before conducting the raid, his accompaniment with the raiding party to the spot and the search and seizure made by PW 9 - Mira. It has been reiterated in the cross-examination of PW 3 - Vilas Naruli that he was close to PW - 9 Mira when the accused were informed that they had a right to be searched before a Gazetted Officer or a Magistrate. Not only that, it has been reiterated in cross of PW 3 - Vilas Naruli by defence that PW 9 - Mira informed the accused in Hindi, *"Tumhara search Gazetted Officer or Magistrate ke samne lene ka tumhe right hai"* to which the appellants replied *"Jaroorat nahi"*. The cross also reveals that weighing of the contraband was done on electronic weighing machine and the entire exercise was carried out by PW 9 - Mira, who herself had prepared the panchanama as well as sealing of the Exhibits on the spot. The evidence of PW 3 - Vilas Naroli has been substantially corroborated by PW 5 - Arjun Konduskar in material particulars on the point of search and seizure of the appellants no.1, 2 and 3. PW 5 - Arjun Konduskar has also given details in a vivid

manner as to how he had effected search of appellants no.1 to 3 one after the another by making it crystal clear that before searching each of the appellants he had categorically asked and informed them about their rights to be searched before a Gazetted Officer or a Magistrate. Apart from the contraband, he had also seized certain cash amount and train ticket from accused no.1 - Bhim Thapa. He found a train ticket of six persons, i.e. of three males and three females travelling from Gonda junction to Lokmanya Tilak Junction, Mumbai and Lokmanya Tilak Junction to Margao in the rear right sides pant pocket of accused no.1 - Bhim Thapa. It is not the case of the appellants that they were tourists and visiting Goa. Since each of them was found in possession of more than 1 kg. of contraband, therefore, it can definitely be said that they were not the tourists. Even during their statements under Section 313 of Cr.P.C. they have not stated the purpose of visiting the State of Goa, which is significant in the light of the fact that all of them were found in conscious possession of the contraband. Though, there is no specific Charge under Section 29 of NDPS Act, as argued by Shri Poulekar, learned counsel for the appellants, yet it can be safely inferred that there was a criminal conspiracy to commit offence punishable under Chapter IV of the NDPS Act for which it is needless to frame in the attending circumstances as it would not vitiate the trial.

29. The evidence of PW 5 - Arjun Konduskar also corroborates the testimony of PW 3 - Vilas Naruli and PW 9 - Mira in material particulars as regards effecting search of appellants no.4, 5 and 6. by PW 9 - Mira as well as drawing of panchanama in all minute details. During his cross-examination by the defence, nothing could be elicited, nor any dent could be made. Rather, certain facts have been reiterated in the cross-examination, for example he testified that after reaching Siolim around 9.40 hours, private vehicles plying by the said road were not searched as the information was about a taxi being used by the appellants and, therefore, it was the only taxi wherein the six appellants were found travelling and, therefore it was intercepted by PW 9 - Mira. The cross also reveals that there was an electronic weighing machine in the kit and that first offer to all six appellants for opting to be searched in presence of a Gazetted Officer or a Magistrate was made by PW 9 - Mira in Hindi to which each of them answered in Hindi that they did not wish to be searched before any Magistrate or a Gazetted Officer. It is also clarified in cross that only one letter was typed by PW 9 - Mira after the raid, on the typewriter, which was addressed to DFDA Panaji. Thus, there is nothing on record by which the evidence of PW 3 - Vikas Naruli and PW 5 - Arjun Konduskar can be said to be unworthy of credit.

30. PW 9 - Mira is the Investigating Officer, who has also in a very detailed manner, deposed as to how on 29.11.2009 at 20.00 hours she received specific and reliable information that on the same day between 22.15 hours to 23.15 hours three males and three females of Nepali National would be coming to Siolim, Opposite St. Anthony Church Junction in a taxi to deliver drugs i.e. Charas to their respective customers. She reduced the said information into writing and thereafter secured presence of panch witnesses. PW 9 - Mira has also clearly deposed about intercepting the said yellow and black coloured Omni taxi, which was coming from Bamonwada side around 23.30 hours. Her introduction to the appellants of the members of the raiding party.

31. She further deposed as regards the information given to the appellants about their right to be searched in presence of a Gazetted Officer. On their refusal, she directed PW 5 - Arjun Konduskar to conduct personal search of male persons. Accordingly, PW 5 - Arjun Konduskar, P.S.I. conducted search of first three appellants while PW 9 - Mira conducted the search of the female appellants which I have already discussed hereinabove. It is needless to go into the minute details of the evidence of this witness, which is quite clear as she kept no stone unturned to follow the procedure scrupulously while

conducting the raid and seizure of the contraband from each of the appellants along with other articles which were found on their persons. There is absolutely no scope to say that the Investigating Officer has not followed the search as per Section 50 of the NDPS Act. There is also nothing on record to say that there is no compliance of Section 50 (4) of the NDPS Act as PW 9 – Mira and the other witnesses have clearly testified that the search of the female appellants was conducted by PW 9 - Mira D'Silva, by taking due care. There is no provision that there is requirement of female panch witnesses. The arguments of the learned counsel for the appellants, therefore, is merit-less. Shri Poulekar, the learned counsel for the appellants, has placed reliance on the case law of Venella Tilak (supra). The relevant paragraph nos.14 and 15 reads thus:-

"14.. *In the instant case, admittedly personal search of the accused was carried out. The search was carried out by a lady. However, it was not carried out in the presence of lady panchas. The question will be whether when a lady is to be searched, is it necessary for the investigating agency to secure the presence of lady panchas. Section 50 of the N.D.P.S. Act, 1985 makes provision for search of a female accused. Sub-section (4) of section 50 says that, no female shall be searched by anyone excepting a female. Section 50 reads thus:*

"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 the 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." A somewhat similar provision is also found in the Customs Act, 1962. Sub-section (5) of section 102 of the Customs Act requires that a female shall be searched by a female. It reads thus :-

"Persons to be searched may require to be taken before gazetted officer of customs or Magistrate.(1) When any officer of customs is about to search any person under the provisions of section 100 or section 101, the officer of customs shall, if such person so requires, take him without unnecessary delay to the nearest gazetted officer of customs or magistrate.

(2) If such requisition is made, the officer of customs may detain the person making it until he can bring

him before the gazetted officer of customs or the Magistrate.

(3) The gazetted officer of customs 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) Before making a search under the provisions of section 100 or Section 101, the officer of customs shall call upon two or more persons to attend and witness the search and may issue an order in writing to them or any of them so to do; and the search shall be made in the presence of such persons and a list of all things seized in the course of such search shall be prepared by such officer or other person and signed by such witnesses.

(5) No female shall be searched by any one excepting a female."

15. *"Now if a woman accused has to be searched, merely calling a female officer to search her will not fulfil the legislative intent. The legislative intent appears to be to protect the lady accused's modesty while conducting her search. The search has to be conducted by having strict regard for decency. Therefore, the officers will necessarily have to secure the presence of lady panchas. If the search is carried out in the presence of male panchas, the very purpose of sub-section (4) of section 50 of the N.D.P.S. Act*

and such similar provisions contained in other statutes would be frustrated. What is sought to be achieved by sub-section (4) of section 50 of the N.D.P.S. Act, the relevant provisions of Criminal Procedure Code quoted hereinabove and similar provisions of the Customs Act and the F.E.R.A. would be lost if the investigating agency does not carry out the search by a female in the presence of female panchas”.

32. In the instant case, admittedly personal search of the female appellants-accused was carried out by a lady (PW 9), however, it was not carried out in presence of lady panchas. It is thus clear from the ratio that the intention of the Legislature is to protect the modesty of a lady accused while conducting a search. The search has to be with strict regards to decency. From the evidence on record in the case at hand, it is clear that PW 9 - Mira had taken utmost care to protect the modesty of the appellants no.4 to 6, as there is nothing on record by which it can be said that modesty and dignity of the female appellants was compromised. PW 9 – Mira herself being lady In-charge Officer has taken sufficient care in that regard. It has come in her cross-examination that at the time of search PW 5 - Arjun Konduskar – P.S.I. was not with her but was present on the other side of Jeep with the male accused. It has also come on record that PW 9 – Mira had not taken search of the private

parts of the female accused, as all the contraband articles were found either in their handbags or in a belt. The authority can accordingly be distinguished. Therefore, there is proper compliance of Section 50 as well as 50 (4) of the NDPS Act. PW 9 - Mira made it clear that when she had a information that there were females, she had sent one constable to arrange for female panch witness but it could not be arranged.

33. The Hon'ble Supreme Court in *Vijaysinh Chandubha Jadeja Vs. State of Gujarat* [**2011 (1) Drugs Cases (Narotics) 12**] after having considered the rulings in the cases of *Joseph Fernandez Vs. State of Goa* 2002 Drugs Cases (Narcotics) 22, *State of Punjab Vs. Baldev Singh* 1999 Drugs Cases (Narcotics) 150 and *Prabha Shankar Dubey Vs. State of M.P.* 2003 Drugs Cases (Narcotics) 327 interpreted the scope of Section 50 of the NDPS Act, which can be culled out from paragraph 22. It reads thus:-

22. In view of the foregoing discussion, we are of the firm opinion that the object with which 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 in so far 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 a 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. As observed in *Re Presidential Poll*¹⁴, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the *animus imponentis*, the intention of the law maker expressed in the law itself, taken as a whole." 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 (supra)* and *Prabha Shankar Dubey (supra)* is neither borne out from the language of sub-section (1) of [Section 50](#) nor it is in consonance with the dictum laid down in *Baldev Singh's case (supra)*. 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. We also feel that though [Section 50](#) gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and

creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of (1974) 2 SCC 33 the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.

34. Thus, the Investigating Officer in the case at hand has made substantial compliance with the requirement of Section 50 of the NDPS Act.

35. Now, coming to the aspect of quantity of contraband seized by the Investigating Officer from the appellants and the discrepancies in the weight, which was noticed by PW 1 Mahesh Kaisare, the Senior Scientific Officer, while deposing as PW1, it is stated by him that on 1st December, 2009 in the office of DFDA, Panaji he received five sealed greenish colour paper envelopes marked as Exhibits I, III, V, VII & IX and one sealed cloth parcel tied with jute thread both vertically and across and marked as Exhibit VIII. There were seven seals of each of the envelopes and also on the cloth parcel, which according to this witness, were intact and individually covered with cello tape and tallied with the specimen of seal impression separately on a letter by the Investigating Officer, ANC, Panaji along with the reference

letter. The PW 1 – Mahesh Kaisare deposed in a chronological manner that he opened the seal of all the exhibits one after another and weighed the substance about which, a reference has already been made in the preceding paragraphs. PW 1 Mahesh – Kaisare, after physically inspecting each stick from each of the five packets, 10 sticks from each packet selected at random as representative sample analysed individually by taking about 1 gram of the substance from each stick as its representative sample and conducted the tests namely Microscopic examination, Identification test for Charas for the presence of THC, Beam's Acid Test, Neagm's Test and Fast Blue B Salt Test. He concluded from the aforesaid tests that the substance analysed from the sealed envelope at Exhibit-I contains Charas. The weight of total substance was found is 1.653 kg without any wrapping (1.670 kgs. at the time of seizure).

36. Similarly, he opened envelop at Exhibit-III, where he noticed a dark brown colour substance superficially appearing as black in the form of flat elongated pieces distributed in the 12 transparent colourless polythene closed bags. 9 bags had four pieces and three bags had five pieces each. He selected 27 pieces distributed in 6 of the polythene bags selected at random as representative sample and analysed individually by taking

about 1 gram of the substances from each of its representative sample. After conducting tests, he concluded that the substance analysed from the sealed envelop Exhibit-III contains Charas. The weight of total substance was found is 1.685 kgs. without any wrapping (1.755 kgs. at the time of seizure).

37. Similarly, so far as sealed envelop at Exhibit-V is concerned, comprising four intact packets with auto press polythin bag and its weight was 1.575 kgs. without wrapping (1.595 kgs. at the time of seizure). Again, after selecting at random, as representative samples by taking 8 sticks from each of the packets as representative sample, he analysed and found that the substance contains Charas.

38. Thereafter he opened Exhibit VII. All the four packets were opened which contained dark brown colour substance and two packets of substance in the form of flat elongated pieces distributed in 6 auto press transparent polythene colourless bags. The weight of four bags with substance was 1.585 kgs. without wrapping (1.665 kgs. at the time of seizure). After analysing the substance by applying the aforesaid tests, he concluded that the substance analysed by him contains Charas at Exhibit VII.

39. Thereafter he opened Exhibit-VIII, having four packets containing a dark brown colour substance and one packet contained substance in the form of flat elongated pieces distributed in 3 colourless auto press bags and 3 sticks individually wrapped in colourless, transparent polythene. Its weight was 1.520 kgs. without wrapper. (1.555 kgs. at the time of seizure). After having analysed, all the substance as above, he concluded that Exhibit VIII contains Charas.

40. Finally, he opened at Exhibit-IX. The envelop contained yellow coloured cloth belt with a pouch containing four packets of rectangular shape individually wrapped in brown cello tape. The first bag contained 12 pieces in colour polythene bag and five sticks individually wrapped in colourless transparent polythene. The second, third and fourth bags contained dark brown coloured substance in the form of sticks. Its total weight was 1.500 kgs. without wrapper (1.555 at the time of seizure).

41. There is no effective cross-examination by the defence nor there is any suggestion in cross that all the contraband was not analysed and that none of the samples contained Charas. Since there is no foundation laid at the time of recording evidence of PW 1 -Mahesh Kaisare, the said point

cannot be raised for the first time in the appeal. Rather, it is reiterated in cross that this witness had personally analysed the sample with the assistance of Laboratory Assistance, Assistance Chemist and Laboratory Attendant. He also clarified in cross-examination that he received all the above samples in the office. In case of Nandalal Shyamdas s/o Shyamdas (supra), while examining the question whether the appellant in that case was found to have possessed Charas in commercial quantity and is, whether liable to suffer imprisonment under Section 20(b)(ii) (C) of the NDPS Act for ten years or above. It is observed thus: paragraphs 6 to 9.:-

6. We, however, find from the reading of the evidence in this case that statement of a witness that the substance analysed by him contains Charas, refers to the existence of Charas having been found throughout the substance that is 1.125 Kg. and not as if a part of substance was Charas. It must be remembered that the statement comes from a person trained in science and that is the way in which scientists state their conclusion about the contents of a substance which is analysed. For instance, a Scientist would state conclusion about analysis of a ring as, "I conclude that the ring which is 10 Tolas, contains gold". This would not lead to the conclusion that the ring is not of pure gold and is mixed with any other metal.

7. There is, therefore, no merit in the contention on behalf of the appellant that the statement of the witness that the substance contains Charas refers only to a part of the sample as being Charas, which means that only 1% may be Charas or even 99% may be Charas and that since there is an ambiguity as to how much of it is Charas, the benefit of this doubt must be given to the accused/appellant. The learned counsel further contended that the appellant was certainly not bound to establish what percentage of the substance was Charas but it was for the prosecution to prove beyond reasonable doubt that more than 1 Kg. from 1.125 Kg. was Charas.

We find that this argument on behalf of the appellant is based on an erroneous assumption that there is nothing in the evidence led by the prosecution that suggests that the substance contains anything other than Charas. There is a categorical assertion that the substance, which was analysed contains Charas. This cannot be interpreted to mean that Charas was only a part of the contents and there were other substances which have not been named and whose quantity or proportion has also not been established and, therefore, there is a doubt as to the quantity that was found in possession of the appellant. There is no foundation led in the evidence i.e. by cross-examination or in any

manner by the appellant for the assumption that the substance contained a mixture of Charas with some other substance and that the weight of Charas in the said mixture was less than 1 Kg.

8. *The learned counsel for the appellant relied on the judgment of this Court in Criminal Appeal No. 19/1991 decided on 23.10.1991. In that case, there is no finding that for want of small quantitative analysis, it may be concluded that the proportion of Charas was "small quantity" as is defined. In fact, the Division bench proceeded to observe about this contention in the following words;*

"In fact, in view of this, it is not necessary for us to examine the other contentions raised by Mr. Chari that no quantitative analysis was done by Chemical Analyser and that the substance found with the appellant would fall under "small quantity".

In any case, we find from the deposition of the witness-Chemical Analyser-reproduced by the Division Bench that some foundation had been led by the accused while cross examining the witness for being able to contend that the proportion of Charas was less than 1 gm. and that the rest may have been impurities.

9. *In the case before us, we find that there is no cross examination whatsoever of the witness on*

this point and the witness has not even been pointing if there was any other substance other than Charas found in the analysis. In fact, on this point, Mr. Carlos Ferreira, the learned Public Prosecutor, has rightly pointed out to the definition of Charas defined in the Act. The definition of Charas is as follows :

Section 2(iii) "cannabis (hemp)" means-

(a) Charas, that is, the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish;

The definition of Charas contemplates that Charas may be crude or refined and there need not be mixture of any other substance along with Charas only because the witness said that the substance "contains Charas."

We find that even if it is assumed that the witness meant that there was some other substance along with Charas while saying that the substance "contains Charas", it need not refer to any other substance, which is not Charas but could very well refer to some impurity in crude Charas.

We make this observation only to point out absence of any foundation having been led for the contention now sought to be advanced.

42. Thus, from the un-impeached evidence of PW 1 Mahesh Kaisare there is absolutely no reason to disbelieve that what has been analysed by him was commercial quantity of Charas in all packets which were received by him intact and were scientifically analysed in the laboratory.

43. So far as difference in weight is concerned, that could be possible, due to use of different weighing machine having different calibration. In the absence of any suggestion, in the cross to PW 1 - Mahesh, it cannot be said that less quantity in few grams was due to tampering at the time of transporting the contraband from the ANC to laboratory.

44. The ratio laid down by the Hon'ble Supreme Court in the case reported in 2004 Drug Cases (Narcotics) 322 (Rajesh Jagdamba Avasthi Vs. State of Goa) can be distinguished as in the said case as a similar question arose as there was discrepancy in the weight of the substance which was sealed at the time of raid and which was received in the laboratory. It is held by the Hon'ble Supreme Court that the High Court has observed that there was no doubt that the envelop B which was said to contain 115 gms. of Charas was found to contain only 82.54 grams of Charas and this could not be considered to be a minor discrepancy. It is observed that the credibility of the

recovery proceeding is considerably eroded if it is found that quantity actually found by PW 1 was less than the quantity sealed and sent to him. The Supreme Court further observed that in the said case prosecution has not been able to explain this discrepancy and, therefore, it rendered the case of the prosecution doubtful. Here, in the case as stated above, difference of weight at the time of seizure and when it was weighed by PW 1 is minimal, as has been rightly pointed out by the Prosecutor that it was due to different weighing machines having different calibrations. In the absence of any evidence of tampering in between, it cannot be said that because of some tampering, there is difference of weight in the contraband substance.

45. It has been strenuously urged by Shri Poulekar, the learned counsel for the appellants that the statement under Section 313 of Cr. P.C. has been very cursory in the sense that all the material evidence has not been properly put to the appellants, and, therefore, the trial is vitiated. I have gone through the statements of each of the appellants under Section 313 Cr.P.C. and found that the learned trial Judge has put most of the incriminating material appearing in the evidence against each of the appellants and, therefore, the argument of learned counsel for the appellants is devoid of merits.

46. The Hon'ble Supreme Court in the case of Shobhit Chamar and another Vs. State of Bihar **(1998) 3 SCC 455**, held in para 24 as under:-

24. We have perused all these reported decisions relied upon by the Learned Advocates for the parties and we see no hesitation in concluding that the challenge to the conviction based on non compliance of [Section 313 Cr.P.C.](#) first time in this appeal cannot be entertained unless the appellants demonstrate that the prejudice has been caused to them. In the present case as indicated earlier, the prosecution strongly relied upon the ocular evidence of the eye witnesses and relevant questions with reference to this evidence were put to the appellants. If the evidence of these witnesses is found acceptable, the conviction can be sustained unless it is shown by the appellants that a prejudice has been caused to them. No such prejudice was demonstrated before us and, therefore, we are unable to accept the contention raised on behalf of the appellants".

47. Thus, there is due compliance of Section 313 of Cr.P.C. by the learned trial Judge and it has not been shown as to what material prejudice has been caused to any of the appellants while challenging their conviction. In my opinion, the statement under Section 313 of Cr.P.C., and the questions therein have been properly formulated in order to bring to the notice of all the appellants the incriminating material against each of them.

48. PW 2 - Gourish Mapari, is a Scientific Assistant in the office of SP CID CB. His evidence is restricted on the point that on 1.12.2009 he had personally handed over sealed exhibits along with letter Inward no.2346 dated 30.11.2009 addressed to the Director, FDA.

49. PW 4 - Naresh Mhamal, who was working as Dy S.P. at the relevant time had received an information from PW 9 - Mira about the appellants bringing contraband near St. Anthony's Church Junction, Siolim. His evidence is restricted to the point that on 30.11.2009 at 4.45 hours he received the seal of ANC No.6 from PSI Mira D'Silve through PW 7 PC. Dayanand Parab and he acknowledged the same by letter Exh.30. He had duly signed the Register at Sr. No.154 in the Receiver's column. There is no rebuttal during his cross-examination.

50. PW 6 - Anand Salunke, Head Constable, was in charge as a Writer Head Constable at ANC Police Station, Panaji on 30.11.2009. As per the direction of PW 5 - Arjun Konduskar he made entries in the Muddemal Register at column no.5 at Sr. Nos.1 to 12 in respect of 12 properties received by him. He has proved his signature in the said Muddemal Register in column no.7. A copy of which is proved at C-62. He also deposed that on the same day at about 17.00 hours he had

handed over Exhibits I, III, V, VII, VIII and IX to the office of the Scientific Assistant, Porvorim, with a forwarding letter addressed to the DFDA Panaji, as per his endorsement in column no.8 of Ex. C-62. Nothing could be brought out in the cross of this witness which would render his testimony unworthy of credit. He admits in cross that there is no timing and date when the endorsement at Ex.61 was made, however, it is pertinent to note that there is no column of timing in the said register and, therefore, there was no question of mentioning any time in column no.7 as to when he received the muddemal property.

51. The genuineness and authenticity of the raid conducted by PW 9 - Mira can be ascertained from the extract of station diary produced on record. At Sr. no.24. There is an entry at 20.50 hours when PW 9 - Mira along with the raiding party comprising PW 5 - Arjun Konduskar and others of ANC along with panchas proceeded for conducting the raid. The station diary extract further reveals that at 4.05 hours she returned to the Police Station along with raiding party, appellants and seized muddemal. It clearly indicates that the appellants were caught red handed with 9.860 kgs. of Charas, cash of Rs.1625/- and mobile phone etc. Therefore, there is absolutely no room for any doubt or any foul play by the Investigating Officer.

52. Thus, all the prosecution witnesses by their unimpeached, clear, trustworthy evidence have substantiated conducting of raid and seizure of contraband from the appellant at the relevant time. Since the prosecution has proved that the appellants were found in possession of commercial quantity of Charas or contraband in contravention of provisions of NDPS Act, the presumption under Section 54 of the NDPS Act comes into play, as the appellants failed to give satisfactorily account for having possessed such contraband. The presumption, under Section 54 of the NDPS Act could not be rebutted by the appellants and, therefore, it can be safely concluded that the appellants have committed an offence under the NDPS Act.

53. The learned trial Court in the impugned judgment has correctly and properly appreciated all the facts, circumstances and evidence on record and reached a correct conclusion by holding the appellants guilty of the offence punishable under Section Section 20 (b) (ii) (C) of the NDPS Act. I, therefore, do not see any reason to interfere with the impugned judgment. Consequently, the appeals stand dismissed.

PRITHVIRAJ K. CHAVAN, J.

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