

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD**

**CRIMINAL APPEAL NO. 708 OF 2016**

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| Narayan Tulshiram Jadhav | ..APPELLANT<br>(Accused no.1) |
| VERSUS                   |                               |

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| State of Maharashtra | ..RESPONDENT |
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**WITH  
CRIMINAL APPEAL NO. 653 OF 2016**

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| Shekhar Ramdas Sharma | ..APPELLANT<br>(Accused no.2) |
| VERSUS                |                               |

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| State of Maharashtra | ..RESPONDENT |
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**WITH  
CRIMINAL APPEAL NO. 678 OF 2016**

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| Datta Vachista Bajgude | ..APPELLANT<br>(Accused no.3) |
| VERSUS                 |                               |

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| State of Maharashtra | ..RESPONDENT |
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**WITH  
CRIMINAL APPEAL NO. 648 OF 2016**

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| Laxman Ashruba Narwade | ..APPELLANT<br>(Accused no.4) |
| VERSUS                 |                               |

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| State of Maharashtra | ..RESPONDENT |
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Mr. G.D. Kale, Advocate for appellant in APEAL/708/16.  
Mr. Joydeep Chatterji, Advocate for appellant in

APEAL/648/16.

Mr. Joydeep Chatterji, Advocate h/f Ms. Monica Purnapatre, Advocate for appellant in APEAL/653/16.

Mr. R.G. Hange, Advocate for appellant in APEAL/678/16.

Mr. A.A. Jagatkar, A.P.P. for respondent - State.

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**CORAM : SANGITRAO S. PATIL, J.**

**DATE : JANUARY 09, 2018**

**COMMON JUDGMENT :-**

The above numbered appeals have arisen out of the same judgment dated 15<sup>th</sup> October, 2016 delivered by the learned Special Judge, Aurangabad in Special Case No. 10 of 2012 thereby convicting the appellants of the offences under Sections 3 and 4 read with Section 25 of the Arms Act, 1959 and also under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "NDPS Act"). Hence they are being decided by this common judgment.

2. Each of the appellants has been sentenced with rigorous imprisonment for three years and fine

of Rs.10,000/- with default clause in respect of the offences under Sections 3 and 4 read with Section 25 of the Arms Act and rigorous imprisonment for ten years and fine of Rs.1,00,000/- with default clause in respect of the offence punishable under Section 22 of the NDPS Act. The substantive sentences of imprisonment have been ordered to run concurrently.

3. The learned Special Judge acquitted the appellants of the offence punishable under Section 399 of the Indian Penal Code. The State/ prosecution has not challenged acquittal of the appellants in respect of the said offence. As such, that part of the judgment has attained finality.

4. The appellants are hereinafter referred to by their respective first names, whenever necessary.

5. It is the case of the prosecution that on 24<sup>th</sup> September, 2012, when P.S.I. Gavali (L.C.B.)

Aurangabad was in his office, P.I. Nandedkar received an information that a Tavera car bearing registration no. MH-23-Y-2404 was carrying dacoits towards Pachod along Beed – Aurangabad road. Therefore, as per the directions of P.I. Nandedkar, P.S.I. Gavali (P.W.2) immediately left for Pachod in a private vehicle alongwith his staff members. He called two panchas at Pachod and arranged for a trap. He instructed Police Naik Deshmukh (P.W.3) to stay near Haryana Rajasthan Dhaba which was at some distance from Pachod and directed to inform on mobile phone immediately after seeing the above numbered car proceeding towards Pachod. P.S.I. Gavali (P.W.2) and other staff members and panchas stayed near Hotel Ekant Dhaba, which was at the distance about 1 k.m. from Pachod. They had placed barricades on the road for stopping the vehicles for checking. P.S.I. Gavali (P.W.2) received a phone call from Police Naik Deshmukh (P.W.3) after he noticed that the above numbered car proceeded towards Pachod. P.S.I. Gavali (P.W.2)

stopped that car near Hotel Ekant Dhaba at about 11.15 p.m. Driver of that car took the car to the extreme left side of the road, switched off the engine and fled away. The appellants were found sitting in that car. A pistol with three live cartridges were found with the appellant – Narayan, a pistol and three live cartridges were found in possession of the appellant Shekhar, a dagger having length of eleven inches was found attached to the waist of the appellant – Datta and a dagger having length of ten inches was found attached to the waist of the appellant – Laxman. The car also was searched, wherein two sticks, a packet of chilly powder and a cotton rope having length of sixteen feet were found. A plastic jar containing a black coloured substance was found under the rear seat of the said car. On being asked, Narayan informed that it was opium and was being carried for being sold near Baba Petrol Pump at Aurangabad. He further informed that the said opium was weighing 2kg. and

500gms. P.S.I. Gavali (P.W.2) informed that fact on mobile phone to the Superintendent and P.I. of the Local Crime Branch. He asked Narayan as to whether he wanted to seize the said contraband in the presence of a gazetted officer. Narayan answered in the negative. P.S.I. Gawali (P.W.2) then got called through Police Naik Ghuge the seal of the police station, photographer and a Tan-Kata (i.e. hanging weighing scale). He seized the jar containing opium. After weighing it in the presence of the panchas and confirming that it was 2 kg. and 500 gms., he took three samples weighing 50 gms. each out of the seized opium and then sealed them with lac. He seized the said jar and above mentioned articles found in possession of the accused as well as in the car under a panchanama in the presence of the panchas. He then went to Police Station, Pachod alongwith the appellants and lodged F.I.R. against them. On the basis of the F.I.R. lodged by P.S.I. Gavali (P.W.2), Crime No. I-137 of 2012 came to be registered against

the appellants for the above mentioned offences. The seized articles were produced by P.S.I. Gavali in the police station. The investigation followed. Statements of witnesses were recorded. The seized revolvers, cartridges, one of the samples of opium was sent to Chemical Analyser for analysis and report. After completion of the investigation, the appellants came to be charge-sheeted.

6. The learned trial Judge framed charges against the appellants for the above mentioned offences vide Exh. 45 and explained the contents thereof to them in vernacular. They pleaded not guilty and claimed to be tried. Their defence is that of total denial and false implication.

7. The prosecution examined eight witnesses to establish guilt of the appellants for the above mentioned offences. After evaluating the evidence on record, the learned trial Judge did not find sufficient evidence to hold the appellants guilty for

the offence under Section 399 of the I.P.C. He, therefore, acquitted them of the said offence. However, he found the appellants guilty of the offences under Sections 3 and 4 read with Section 25 of the Arms Act and under Section 22 of the NDPS Act. He, therefore, convicted and sentenced the appellants as stated above.

8. Mr. Kale, the learned Counsel representing Narayan argued as a lead counsel. His arguments are adopted by the learned Counsel for the remaining three appellants with certain additions. It is contended by the learned Counsel for the appellants that P.S.I. Gavali (P.W.2) was not an officer empowered to search and seize any contraband. His evidence is not supported by independent witnesses in respect of seizure of contraband. They, further contend that conscious and exclusive possession of opium qua the appellants has not been established by the prosecution. Therefore, they cannot be connected

with the opium allegedly seized by P.S.I. Gavali (P.W.2).

9. They further submit that there is no consistent evidence in respect of the actual number of samples taken by P.S.I. Gavali (P.W.2), since P.S.I. Gavali (P.W.2) states that three samples were taken, while Police Naik Ghuge states that only two samples were taken. Therefore, it creates doubt as to which sample was sent for chemical analysis.

10. They further contend that the report of chemical analysis is vague and general. It does not contain the details about the manner in which the analysis was done. It is simply mentioned that there were traces of morphine in the sample that was analysed. However, no percentage of morphine has been given. Therefore, this report would not be helpful for the prosecution to establish that opium as defined in Section 2(xv) of the NDPS Act was actually seized.

11. The learned Counsel further contend that the provisions of NDPS Act are very harsh and stringent, inviting heavy punishment. Therefore, it was necessary for the prosecution to establish strict compliance of the provisions of Sections 42, 50, 55 and 57 of the NDPS Act. However, the prosecution has failed to establish compliance of the provisions of these Sections.

12. The learned Counsel for the appellants submit that there was no sanction under Section 39 of the Arms Act for prosecution of the appellants for the offence under Section 3 of the said Act. Therefore, no cognizance could have been taken against them for the said offence. The conviction of the appellant for the said offence is liable to be set aside for want of sanction under Section 39 of the Arms Act. They further contend that there was no notification issued under Section 4 of the Arms Act. Consequently, no cognisance could have been taken

against the appellants for the offence under Section 4 of the said Act. They could not have been convicted for the offence under Section 4 of the said Act.

13. The learned Counsel for the appellants further contend that the driver of the car fled away after stopping the car. According to them, this conduct of the driver itself indicates that he was guilty conscious and was aware about the presence of the opium allegedly found in the rear seat of the car. The appellants being not aware of presence of the opium, they did not feel guilty for any misdeeds, and therefore, they did not move from the car. The prosecution has not arrested the driver of the car for being prosecuted. Therefore, the appellants cannot be connected with the opium allegedly seized from the car. The learned Counsel relied on certain judgments in support of their contentions which would be considered in the later part of the judgment.

14. On the other hand, the learned A.P.P. submits that since there was no prior information received by P.S.I. Gavali (P.W.2) that opium was being carried in the car, the provisions of Sections 42, 50, 55 and 57 of the NDPS Act would not be applicable to the facts of the present case. He submits that P.S.I. Gavali (P.W.2) followed the provisions of the Code of Criminal Procedure while searching the car and seizing the opium that was found in the car. Only because the independent witnesses turned hostile, the evidence of P.S.I. Gavali (P.W.2) supported by the evidence of Police Naik Deshmukh and Police Naik Ghuge, who were present at the time of the search and seizure of opium cannot be disbelieved. Relying on the judgment in the case of **Baldev Singh Vs. State of Haryana 2015 All M.R. (CRI)4967(SC)**, he submits that the evidence of the police officers cannot be discarded merely on the ground that they belong to police force and interested in investigation and in seeing success in

the case. He submits that there is sufficient evidence on record to show that opium was seized from the car which was owned by the appellant – Datta. Conscious possession of the appellants over the seized opium has been proved by the prosecution, therefore, the presumption under Section 54 of the NDPS Act would be attracted and burden would shift on the appellants to prove that they did not commit any offence in relation to the opium that was found in their possession. They have failed to rebut the said presumption. The learned A.P.P. submits that the trial Judge has rightly considered the evidence on record and has rightly convicted the appellants for the offence under Section 22 of the NDPS Act.

15. The learned A.P.P., however, fairly concedes that for want of sanction for prosecution of the appellants under Section 39 of the Arms Act, they could not have been convicted of the offence under Section 3 of the Arms Act. He, further, concedes

that there was no notification issued under Section 4 of the Arms Act. Consequently, the appellants could not have been convicted for the offence punishable under Section 4 of the said Act as well.

16. Considering the above rival contentions, I propose to scrutinise the evidence on record in respect of the controversial points.

**Seizure of opium from the conscious possession of the appellants.**

17. In order to establish the seizure of opium from the conscious possession of the appellants, the prosecution is mainly relying on the evidence of P.S.I. Gavali (P.W.2) (Exh.76), Police Naik Deshmukh (P.W.3) (Exh.82) and Police Naik Ghuge (P.W.7) (Exh.110). Ram (P.W.1) (Exh.69) and Vasant (P.W.8) (Exh.117) happened to be the punchas to the seizure panchnama (Exh.77). However, they did not support the prosecution. They were cross-examined by the learned

A.P.P. However, nothing has been elicited therein to indicate that opium was seized from the possession of either of the appellants or from the seized car.

18. As seen from the evidence of P.S.I. Gavali (P.W.2), on 24<sup>th</sup> September, 2012 at about 11.15 p.m., a Tavera car bearing registration no. MH-23-Y-2404 came near the spot where he had arranged Nakabandi. He deposes that driver of the car stopped it and ran away immediately. The appellants were found sitting inside the car. Besides the weapons/arms allegedly seized from the possession of the appellants, he found two sticks, chilly powder and cotton rope inside the car. He, further states that he searched the car and found a jar containing opium in the rear side of the car. Police Naik Deshmukh (P.W.3) and Police Naik Ghuge (P.W.7) support the version of P.S.I. Gavali (P.W.2) in respect of finding of the jar containing opium in the rear portion of the car. From the evidence of these witnesses, it is clear

that opium was not seized from the exclusive possession of any of the four appellants.

19. P.S.I. Gavali (P.W.2) admits that opium was not seized from the possession of the appellant – Narayan. He states that during the enquiry, the appellant – Narayan informed that he was carrying opium to Baba Petrol Pump at Aurangabad. However, he has not recorded the statement of the appellant – Narayan. Police Naik Deshmukh (P.W.3) and Police Naik Ghuge (P.W.7), who allegedly were present with P.S.I. Gavali (P.W.2), do not state that the appellant – Narayan had informed that he was carrying opium to Baba Petrol Pump at Aurangabad. Thus, the version of P.S.I. Gavali (P.W.2) in this regard has not been corroborated even by the above named police witnesses. In the circumstances, the bare statement of Gavali (P.W.2) that the appellant – Narayan informed him that he was carrying opium to Baba Petrol Pump at Aurangabad, cannot be believed.

20. It is not the case of the prosecution that anybody out of the remaining appellants gave any statement admitting possession of the opium that was seized from the car. In this background, the conduct of the driver of the car would become significant. As stated by P.S.I. Gavali (P.W.2), after stopping the car, the driver thereof immediately fled away. However, the appellants remained inside the car itself. This fact indicates guilty consciousness on the part of the driver of the car. Had the appellants been carrying the seized opium, they also would have tried to flee away from the spot where the car was stopped. Presence of the appellants inside the car without being disturbed after seeing the Policemen indicates that they were not aware about the opium jar that was in the rear portion of the car. No efforts seem to have been made to arrest the driver of the car and to prosecute him. There is no evidence on record to show that either of the appellants received opium from any particular place

and as such was carrying the same in the car. The jar of opium, thus, cannot be said to be in exclusive and conscious possession of the appellants.

21. The learned Counsel for the appellants cited the judgment in the case of **Santosh Bhagwan Waghmare and Another Vs. State of Maharashtra 2017 (5) Mh.L.J. 429**, wherein a huge quantity of *ganja* was seized from under the seats which were occupied by the accused persons. There was no evidence to show that the said accused persons boarded train carrying with them bags of *ganja* and kept those bags under their seats. Consequently, mere detection of bags of *ganja* under their seats was not held to be sufficient to conclude that they were found in conscious possession of the contraband. In the present case also, the appellants were not found in exclusive and conscious possession of the jar of opium which was in rear portion of the car. Though the appellant – Datta was the owner of the car, he cannot be said to be in exclusive and

conscious possession of the jar of opium in the absence of any specific evidence to establish that he collected that jar from any person or place and kept it in the car for being carried somewhere. As stated above, P.S.I. Gavali (P.W.2) himself states that the appellant – Narayan had informed that he was carrying that opium to Aurangabad. Though the said evidence also is not believable as against the appellant – Narayan, for want of corroboration, it rules out the possibility of seizure of opium from the exclusive or conscious possession of the appellant – Datta. The prosecution, thus, failed to prove conscious possession of the appellants over the seized opium

**Compliance of Section 42 of the NDPS Act.**

22. P.S.I. Gavali (P.W.2) deposes that on 24<sup>th</sup> September, 2012 in the afternoon, P.I. Nandedkar received a secret information about travelling of the dacoits from Beed in the above numbered car and directed him to arrange Naka-bandi on Beed to

Aurangabad road. Accordingly, he went near Hotel Ekant and arranged Naka-bandi. After the above numbered car came there, he seared it and found a jar of opium in the rear portion thereof. From this evidence it is clear that the contraband was seized by P.S.I. Gavali (P.W.2) without prior information. Therefore, the provisions of sub-section (1) of Section 42 of the NDPS Act would not be applicable to the facts of the present case.

23. The learned Counsel for the appellants cited the judgment in the case of **State of Punjab Vs. Balbir Singh AIR 1994 SC 1872**, wherein it is held in sub-para (1) of para 26 of the judgment as under :-

“(1) If a police officer without any prior information as contemplated under the Provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offence as provided under the provisions of Cr.P.C. And when such search is completed at

that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act."

24. The learned Counsel for the appellants contend that P.S.I. Gavali (P.W.2) was not an officer empowered to seize and search any contraband. There is nothing on record to show that P.S.I. Gavali (P.W.2) was authorised to search and seize contraband under NDPS Act. Therefore, it was necessary for him to inform the authorised officer, who should have thereafter proceeded in accordance with the provisions of the NDPS Act. Even if it is accepted

that he was empowered to do so, in view of the observations made in the above referred paragraph, after seizure of opium from the car, it was necessary for him to carry out further investigation in accordance with the other provisions of NDPS Act. Since opium was found in the car i.e. conveyance, provisions of sub-section (1) of Section 42 would have been made applicable had P.S.I. Gavali (P.W.2) received prior information. Therefore, after seizure of opium, it was necessary for P.S.I. Gavali (P.W.2) to comply with the provisions of sub-section (2) of Section 42 of the NDPS Act. It was necessary for him to inform his immediate officer superior about the seizure of opium. However he failed to comply with this mandatory provision which is certainly fatal to the prosecution.

#### **Compliance of Section 50 of the NDPS Act.**

25. From the evidence of P.S.I. Gavali (P.W.2), it is clear that it was a chance recovery of opium

from the car which was not preceded with any information. Therefore, as held in the case of **Balbir Singh** (supra) cited by the learned Counsel for the appellants, the provisions of Section 50 of the NDPS Act would not be applicable to such search.

**Compliance of Sections 55 and 57 of the NDPS Act.**

26. As per Section 55 of the NDPS Act, besides the seal of the officer producing samples of the seized contraband articles, it is necessary for the officer in-charge of the police station to put his seal thereon. As per Section 57 of the said Act, whenever an officer makes any arrest or seizure under this Act, he shall, within 48 hours therefrom, make full report of all particulars of such arrest or seizure to his immediate officical superior. Admittedly, A.P.I. Chikhalikar (P.W.6) (Exh.100), the Investigating Officer and the officer in-charge of the police station did not put his seal to the

samples. As such, he did not comply with the provisions of Section 55 of the NDPS Act. Likewise, neither P.S.I. Gavali (P.W.2), nor A.P.I. Chikhalikar (P.W.6) reported about the arrest of the appellants and seizure of opium to their immediately official superior. The provisions of Section 57 have been held to be directory. However, as held in the case of **Vinayak Dnyanoba Gaikwad and Ors. Vs. State of Maharashtra 2004 All M.R.(CRI) 1922**, the compliance of provisions of Section 55 of the NDPS Act is mandatory. In paragraph no.16 of the judgment, it has been observed that Section 55 clearly shows that all samples taken from the seized material under this Act shall have necessarily to be sealed with the seal of an officer in-charge of a police station. This is a mandate of law and the word used is "shall" leaving no discretion in the hands of the concerned. Considering the severe nature of punishment provided by the Act, every provision of this Act has to be strictly construed and any non-compliance will

automatically render the prosecution a suspect. In the present case, there is no compliance of the provisions of Sections 55 and 57 of the NDPS Act which creates a strong doubt about the case of the prosecution.

**Reliability of the report of Chemical Analyser.**

27. The learned Counsel for the appellants submit that P.S.I. Gavali (P.W.2) states that he took three samples of the seized opium, however Police Naik Ghuge (P.W.7) states that only two samples were taken. Therefore, a doubt is created as to which was the third sample and which sample was actually sent to the Chemical Analyser for analysis and report. They submit that carrier of the sample has not been examined by the prosecution. There is no evidence to show that the sample was duly sealed and was sent to the Chemical Analyser in the same condition in which it was sealed.

28. Indeed, there is material inconsistency in the evidence of P.S.I. Gavali (P.W.2) and Police Naik Ghuge (P.W.7) about the number of samples taken from the seized opium. As stated above, there is no compliance of Section 55 of the NDPS Act. Therefore, a doubt is created as to whether the same sample which was collected at the time of the trap was sent to Chemical Analyser for analysis and report. This doubt is strengthened by non-examination of the carrier of the sample.

29. The learned Counsel for the appellants pointed out to the judgment of **Raju Girdharilal Shrivastav Vs. State of Maharashtra 2004 All M.R. (CRI) 3053**, wherein the sample of the seized Gard (Diacetyl Morphine) was sent for analysis and report to the Chemical Analyser. It was reported by the Chemical Analyser that Heroin (Diacetyl Morphine) was detected alongwith other opium alkaloide. After considering various judgments on the point, this

Court observed that such a report cannot be attached with any value to hold the accused guilty. In the absence of details of tests and the reasons on the basis of which the Chemical Analyser formed his opinion that the sample which was analysed was a contraband article, the report cannot be attached with any evidentiary value. In the present case also the report (Exh.127) of Chemical Analyser is almost identical to that of the above referred case. It simply contains that there were traces of morphine. Such a vague report would not be helpful for the prosecution to establish that the sample was a contraband article.

30. The learned Counsel for the appellants referred to Section 2(xv) wherein opium has been defined as under :-

2(xv) "opium" means -

- (a) the coagulated juice of the opium poppy; and
- (b) any mixture, with or without any

neutral material, of the coagulated juice of the opium poppy, but does not include any preparation containing not more than 0.2 per cent of morphine;

31. From the above mentioned definition it is clear that in order to establish that a particular substance is opium, it should contain more than 0.2 per cent of morphine. It is, therefore, necessary for the Chemical Analyser to mention in his report specifically about the extent/quantity of morphine found in the sample. In the case at hand, the report (Exh.127) of Chemical Analyser simply states that there were traces of morphine. Such finding would not be helpful for the prosecution to establish that the traces of morphine were more than 0.2 per cent and as such, it was opium. In these circumstances, the report (Exh.127) of Chemical Analyser would not be helpful to the prosecution to establish that the sample was opium, as defined under Section 2(xv) of the NDPS Act.

**Non-production of entire seized contraband before the Court.**

32. As seen from the evidence of the witnesses only sample of the seized opium was produced before the trial Court when the evidence was recorded. Though, opium weighting 2 kg. and 500 gms. was allegedly seized, the jar containing remaining opium was not produced before the Court for being identified by the witnesses as the same that was seized at the time of trap. The learned Counsel for the appellants cited the judgment in the case of **Shaikh Mehboob Sheikh Hussain Vs. State of Maharashtra 2017 (6) Mh.L.J. (CRI) 26** wherein this Court held that for establishing that the alleged quantity of contraband was seized from the possession of the accused, the best evidence would have been the seized materials which ought to have been produced during the trial as marked objects. Relying on the judgment in the case of **Jitendra and Another Vs. State of M.P. 2004 SCC (CRI) 2028**, this Court held

that non-production of contraband before the trial Court was fatal to the prosecution.

33. As stated above, the prosecution has failed to establish exclusive and conscious possession of the appellants over the opium allegedly seized in the car. Moreover, there are a number of deficiencies on the part of P.S.I. Gavali (P.W.2) and A.P.I. Chikhalikar (P.W.6) in complying with the above mentioned mandatory provisions. The report (Exh.127) of the Chemical Analyser falls short to establish that the sample of the seized contraband was "opium" as defined in Section 2(xv) of the NDPS Act. In the circumstances, the prosecution cannot be said to have established guilt of the appellants for the offence under Section 22 of the NDPS Act. The learned trial Judge did not at all consider these deficiencies and wrongly convicted the appellants of the said offence. The finding recorded by the learned trial Judge holding the appellant guilty for the offence under

Section 22 of the NDPS Act is not at all sustainable. The impugned judgment and order convicting the appellants for the said offence is liable to be quashed and set aside.

34. The appellants have been charged for the offence punishable under Section 3 of the Arms Act. As per Section 39 of the said Act, no prosecution shall be instituted against any person in respect of any offence under Section 3 of the said Act without previous sanction of the District Magistrate. Admittedly, no sanction has been accorded by the District Magistrate for prosecution of the appellants for the offence under Section 3 of the said Act. Absence of previous sanction would render conviction of the appellants for the said offence as illegal. The learned trial Judge did not at all consider this bar contained in Section 39 of the said Act against the prosecution of the appellants for the offence punishable under Section 3 of the said Act. The

conviction of the appellants for the said offence being illegal, is not sustainable.

35. The appellants have been convicted and sentenced for the offence under Section 4 read with Section 25 of the Arms Act, as well. Section 4 reads as under :-

"4. Licence for acquisition and possession of arms of specified description in certain cases.

If the Central Government is of opinion that having regard to the circumstances prevailing in any area it is necessary or expedient in the public interest that the acquisition, possession or carrying of arms other than firearms should also be regulated, it may, by notification in the Official Gazette, direct that this section shall acquire, have in his possession or carry in that area arms of such class or description as may be specified in that notification unless he holds in this behalf a licence issued in accordance with the provisions of this Act and the rules made thereunder."

36. In the present case, admittedly no notification as contemplated under Section 4 of the Arms Act has been issued. Consequently, the provisions of Section 4 would not be attracted. The appellants were not liable to be convicted for the offence under Section 4 of the said Act. The offence under Section 4 of the said Act cannot be said to have been established against the appellants in the absence of the notification. The conviction and sentence passed against the appellants for the offence under Section 4 of the said Act, thus, is liable to be quashed and set aside.

37. As stated above, the appellant – Datta, who is the owner of the above numbered car cannot be said to be in conscious possession of the seized opium. There is nothing on record to show that he was aware that opium was being carried in his car. No offence has been established against him. In the circumstances, the order passed by the learned trial

Court confiscating the above numbered car cannot be said to be sustainable. It will have to be set aside and the said car will have to be allowed to be retained by the appellant – Datta. The appeals are liable to be allowed. In the result, I pass the following order :-

**ORDER**

- A) Appeals are allowed.
- B) The impugned judgment and order convicting the appellants / accused nos. 1 to 4 are quashed and set aside.
- C) The appellants are acquitted of the offences under Sections 3 and 4 read with section 25 of the Indian Arms Act and of the offence punishable under Section 22 of the Narcotic Drugs and Psycotropic Substances Act.
- D) The appellant/accused nos. 1 and 2 be set at

liberty forthwith, if not required in any other case.

- E) Bail bonds of the appellants/accused nos. 3 and 4 are cancelled. They are set at liberty.
- F) Fine amount deposited by the appellants/accused nos. 3 and 4 be refunded to them.
- G) The order directing auction sale of the Tawera car bearing registration no. MH-23-Y-2404 is set aside and the said car is allowed to be retained by the appellant/accused no.3.
- H) The orders for disposal of rest of the seized articles are maintained as they are.
- I) Appeals are disposed of accordingly.

**[SANGITRAO S. PATIL]**  
**JUDGE**