

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.532 OF 2012

Irshad Khan Khansab Pathan
@ Charsi @ Baba Age 52 Yrs.,
Occupation Hawker, R/a. Footpath
of Rey Road Zopda No.3,
Next to Wooden Shop,
Mumbai 400 010

(At present serving sentence) ... **Appellant**

V/s.

The State of Maharashtra ... **Respondent**

.....

Ms.Nasreen S.K.Ayubi, Appointed Advocate for the Appellant.

Mr.S.V.Gavand, APP for the Respondent/State.

....

CORAM : A.M.BADAR J.

DATED : 12th FEBRUARY 2018.

ORAL JUDGMENT :

1 By this appeal, the appellant/accused is challenging the Judgment and Order dated 19th October 2011 passed by the learned Special Judge, Mumbai in N.D.P.S. Special Case No.6 of 2009 between the parties thereby convicting the appellant/accused of the offence punishable under Section 20(c) read with Section 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the N.D.P.S.Act' for the sake of brevity) and sentencing him to suffer rigorous

imprisonment for ten years apart from imposing fine of Rs.One Lakh on him and directing him to undergo rigorous imprisonment for a period of one year in default of payment of fine.

2 Brief facts leading to the prosecution of the appellant/accused can be summarized thus :

- (a) On 28/08/2008, P.W.No.7 Sampat Mane, PSI attached to the Anti-Narcotic Cell (hereinafter referred to as 'ANC' for the sake of brevity), Mumbai received a secret information from his informant. The information was to the effect that at about 3.00 p.m. to 3.30 p.m. on 28/08/2008, a person named Irshad Khan Khansab Pathan @ Charsi @ Baba is coming Ghodapdeo BEST bus stop, Bus route Nos.43, 44 and 45, Barrister Nath Pai Road, Reay Road (West), Mumbai for selling *charas* to his customers. The description of the said person was also given by the informant to P.W.No.7 Sampat Mane, PSI.
- (b) On receipt of the secret information, P.W.No.7 Sampat Mane, PSI conveyed the information to P.W.No.4 Vilas Chavan, PI , who was present at the ANC Unit at Azad Maidan, Mumbai apart from telephonically conveying the same to the Senior Police Inspector, Assistant Commissioner of Police and Deputy Commissioner of Police, ANC Unit, Mumbai. This was done on getting the secret information recorded in the Station Diary

(Exhibit 28) and then by forwarding the same to the DCP, ANC Unit by communication dated 28/08/2008 (Exhibit 28).

- (c) P.W.No.7 Sampat Mane, PSI informed P.W.No.4 Vilas Chavan, PI with ANC that as per directions received from the DCP, P.W.No.4 Vilas Chavan, PI has to work out the said information. Necessary formalities were then undertaken. Two panch witnesses including P.W.No.5 Rehmat Husain Shah were summoned. They were made aware about purpose of calling them. The Police Officers and panchas took search of each others, but nothing incriminating was found during that search. The raiding material was also searched. No narcotic drugs or psychotropic substance was found in that search. Vehicle which was to be used for the said search and seizure was also searched, but no narcotic drug or psychotropic substance was found in that search. Then police team accompanied by panch witnesses left the ANC Unit after taking entry in the station diary for effecting search and seizure by carrying with it the material necessary for conducting raid including the seal. The vehicle was parked at the police station outpost of Beat No.4 of Kala Chowki Police Station. From there, members of the raiding party as well as panch witnesses went by walking to Ghodapdeo BEST bus stop, Bus route Nos.43, 44 and 45, Barrister Nath Pai Road, Reay Road (West), Mumbai.

- (d) At about 15.10 hours, the appellant/accused came on the spot carrying red colour carry bag with him. At about 15.20 hours of 28/08/2008, he came to be apprehended by police team of ANC Unit. The appellant/accused was informed about his right to get his person searched in presence of the nearest Gazetted Officer or the Magistrate. He declined for the same. A notice informing him his rights under Section 50 of the N.D.P.S. Act was served on the appellant/accused. Still, he declined to exercise his rights.
- (e) According to the prosecution case, then search of the polythene bag which was being carried by the appellant/accused was taken. It was found to be containing sticky blackish sticks, pieces of sticks and two flat slabs weighing 2 k.g. The said material was tested by the field testing kit and was found to be a narcotic drug – *charas*. Two samples each weighing 25 gms. were drawn separately. Those samples were packed, sealed and labelled. The remaining muddemal was also packed, sealed and labelled. Personal search of the appellant/accused was then taken by the members of the police team, but no narcotic drug or psychotropic substance was found during his personal search. P.W.No.7 Sampat Mane, PSI then prepared panchanama (Exhibit 33) of these events.

- (f) The police officers, panchas and the appellant/accused then returned to the office of ANC Unit at the Cuff Parade. The seized articles were produced before the Senior P.I. named Chikhale. Special Report (Exhibit 49) then prepared by P.W.No.7 Sampat Mane, PSI and the same was send to the official superiors.
- (g) P.W.No.2 Satyawar Mane, API then lodged the First Information Report (Exhibit 17) against the appellant/accused with the ANC Unit at Mumbai, which resulted in registration of Crime No.534 of 2008 for the offences punishable under Section 8(c) read with Sections 20 and 29 of the N.D.P.S.Act.
- (h) The routine investigation was then followed. Seized muddamal was given in custody of the P.W.No.6 Vijay Nimbalkar, Store Keeper with the ANC Unit. P.W.No.1 Prakash Jummal, a Police Constable was directed to carry the samples drawn from the seized muddamal for delivering the same to the Regional Forensic Laboratory, Kalina for chemical analysis thereof. Statements of witnesses came to be recorded and ultimately the charge-sheet came to be filed against the appellant/accused.
- (i) The learned Special Judge upon taking cognizance of the offence framed charge for the offence punishable under

Section 20 read with Section 8(c) of the N.D.P.S.Act against the appellant/accused for possession of 2 k.g. *charas* a narcotic drug in contravention of the provisions of the N.D.P.S.Act. The appellant/accused abjured his guilt and claimed trial.

- (j) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all seven witnesses. P.W.No.1 is Prakash Jumnal, a Police Constable, who delivered the samples for chemical analysis at the Regional Forensic Laboratory at Kalina. P.W.No.2 Satyawar Mane, API had participated in the search and seizure of the contraband and has lodged report (Exhibit 17), which has resulted in registration of Crime No.534 of 2018 against the appellant/accused. P.W.No.3 Sandip Chetti is a Chemical Analyzer working with the Regional Forensic Laboratory, Kalina. He has conducted chemical analysis of the seized substance from 04/10/2008 to 06/10/2008. Exhibit 23 is the report of the chemical analysis of the seized samples. Police Inspector Vilas Chavan, (P.W.No.4) has conducted the search and seizure of the contraband by heading the police team of which P.W.No.7 Sampat Mane, PSI was the member. P.W.No.5 Rehmat Husain Shah is a panch witness to the search and seizure of the contraband. P.W.No.6 Vijay Nimbalkar, at the relevant time, was Store Keeper of the ANC

Unit, and he had accepted the seized muddemal and had handed over the samples thereof to P.W.No.1 Prakash Jumnal, a Police Constable for reaching the same to the Regional Forensic Laboratory.

- (k) The defence of the appellant/accused before the trial Court was that of total denial.
- (l) After hearing the parties, the learned trial Court by the impugned Judgment and Order was pleased to convict the appellant/accused of the offence punishable under Section 20 read with Section 8(c) of the N.D.P.S.Act for possessing 2 k.g. *charas* – a narcotic drug and accordingly, the appellant/accused came to be sentenced as indicated in the opening paragraph of this Judgment.

3 I heard Ms.Nasreen S.K.Ayubi, the learned appointed Advocate appearing for the appellant/accused. She vehemently argued that all prosecution witnesses except P.W.No.3 Sandip Chetti had described the contraband as black coloured material, whereas P.W.No.3 Sandip Chetti a Chemical Analyzer has described the samples as greenish brown in colour. This, according to the learned Advocate for the appellant/accused, casts a shadow of doubt on the prosecution case, particularly when the samples, according to the prosecution case, were weighing 25

gms. whereas when the sample was actually weighed, the same was found to be 26.0987 gms. Hence, there is possibility of tampering with the muddemal and samples thereof. Possibility of substituting the samples, in submission of the learned Advocate for the appellant/accused, cannot be ruled out. The learned Advocate further argued that when analysis of the samples, as stated by P.W.No.3 Sandip Chetti, was done from 04/10/2008 to 06/10/2008, but evidence of the Chemical Analyzer shows that the graph was acquired on 10/04/2008, which is reflected from the document at Exhibit 22.

4 The learned Advocate appearing for the appellant/accused further argued that evidence of police officers shows that the samples were wrapped in khaki paper whereas Chemical Analysis report Exhibit 23 shows that samples were in a polythene bag. Similarly, there is no documentary evidence to show that a controlled *charas* was supplied to the Chemical Analyzer for undertaking the required test. This also creates doubt in the prosecution case.

5 The learned Advocate further argued that evidence of P.W.No.4 Vilas Chavan, PI coming on record through cross-examination shows that no written information was transmitted to the superior officers and there was no written order of the superior Officers to work out the information. Therefore, the prosecution

has failed to prove its case. The learned Advocate further argued that cross-examination of prosecution witnesses shows that the spot, where the incident allegedly took place, is a populous area having so many shops, however, not a single witness from the spot of the incident came to be examined by the prosecution. This creates doubt regarding the search and seizure of the contraband. Therefore, the appellant/accused is entitled to acquittal.

6 The learned Additional Public Prosecutor supported the impugned Judgment by contending that the contraband was recovered not from the personal search of the appellant/accused, but the recovery was made from the polythene bag carried out by the appellant/accused. Therefore, in view of Judgment of the Honourable Apex Court in the matter of *Ravindra @ John v. Superintendent of Customs*¹, and in *Karnal Singh v. State of Haryana*², there was no need to comply the provisions of Section 42 of the N.D.P.S.Act. The learned APP relied on evidence of P.W.No.4 Vilas Chavan, PI as well as that of other witnesses and submitted that the communication at Exhibit 27 reflects compliance of Section 50 of the N.D.P.S.Act, though it was not necessary, as the recovery was not from personal search of the appellant/accused. The learned APP invited my attention to the observations of the Honourable Apex Court made in paragraph Nos.9 and 11 of its Judgment in the matter of *Ravindra @ John*

1. (2007) 6 SCC 410

2. 2009 Cri.L.J. 4299

(*supra*). The learned APP further relied on Judgment of the learned Single Judge of this Court in ***Chandbi w/o Mustaq Shaikh v. The State of Maharashtra***¹ to demonstrate that even extract of the station diary amounts to full compliance of Section 42 of the N.D.P.S.Act.

7 I have carefully considered the rival submissions and also perused the Record and Proceedings including copies of depositions of prosecution witnesses as well as documentary evidence adduced by the prosecution.

8 According to the prosecution case, the appellant/accused was found in possession of a narcotic drug – *charas* in commercial quantity in violation of provisions of N.D.P.S.Act on 28/08/2008. Let us, therefore, examine and re-appreciate the evidence adduced by the prosecution in order to ascertain whether conscious possession of the narcotic drug in commercial quantity in violation of the provisions of the N.D.P.S.Act by the appellant/accused is proved by the prosecution.

9 It is the case of the prosecution that P.W.No.7 Sampat Mane, PSI has received information regarding possession of the contraband i.e. narcotic drug by the appellant/accused on 28/08/2018. The information was to the effect that on that day,

1. 2002 ALL M.R. (Cri.) 507

at about 3.00 p.m. to 3.30 p.m., the appellant/accused is coming at Ghodapdeo BEST bus stop, Bus route Nos.43, 44 and 45, Barrister Nath Pai Road, Reay Road (West) for selling the *charas* to his customers. Section 43 of the N.D.P.S.Act deals with powers of seizure and arrest in public place. It read thus :

“Section 43 - Power of seizure and arrest in public place.:- Any officer of any of the departments mentioned in section 42 may :

(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled

substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation.-- For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public."

10 The Honourable Apex Court had an occasion to deal with the provisions of Section 42 of the N.D.P.S.Act which deals with powers of entry, search, seizure and arrest without warrant and authorization vis-a-vis the provisions of Section 43 of the N.D.P.S.Act which deals with powers of search and seizure in public place in the matter of ***Ravindra @ John*** (*supra*). In the said matter, the search and seizure of contraband was at the Kayalpattinam bus-stand. In paragraph 7 of its Judgment, the Honourable Apex Court has held that :

"7. We hold that the High Court was right in coming to the conclusion that Section 42 of the Act was not attracted to the facts of this case. In the instant case on information received by PW 2 who communicated the same to PW 1, the witnesses went to the bus stand where the person carrying the drug was expected to arrive. The appellant was arrested at the bus stand.

The appellant was, therefore, not searched and arrested in exercise of power of arrest, search, and seizure under Section 42 of the Act. Section 42 applies to a case where the officers concerned on information received, or having reason to believe from personal knowledge that any offence has been committed in relation to any drug or psychotropic substance etc. and which is kept or concealed in any building, conveyance or enclosed place may, between sunrise and sunset, enter into and search any building, conveyance or place. They are also vested with the power of search and seizure and authorized to arrest the person whom they have reason to believe to have committed any offence punishable under this Act. The facts of this case disclose that the arrest and seizure took place at the bus stand and not in any building, conveyance or enclosed place. The High Court has rightly held that the case was covered by Section 43 of the Act which does not require the information of any person to be taken down in writing. Similarly, there is no requirement that the concerned officer must send a copy thereof to his immediate official superior within 72 hours. We, therefore, hold in agreement with the High Court that Section 42 of the Act was not attracted to the facts of the case. It is, therefore, unnecessary to burden this judgment with decisions cited at the Bar regarding the effect of non-compliance with Section 42 of the Act.”

11 It is thus clear that Section 42 of the N.D.P.S.Act deals with entries, search, seizure and arrest where the officers concerned on information received, or having reason to believe from personal knowledge that any offence has been committed in relation to any drug or psychotropic substance etc. and which is kept or concealed in any building, conveyance or enclosed place. However, search and arrest in public place is dealt with by the provisions of Section 43 of the N.D.P.S.Act. In a case covered by Section 43 of the N.D.P.S.Act, there is no need that the information should be taken down in writing and the copy thereof must be send to the immediate official superior within 72 hours. With this position of law, let us see whether in the case in hand, provisions of Section 42 of the N.D.P.S.Act are applicable or the case is governed by the provisions of Section 43 of the N.D.P.S.Act.

12 Evidence of P.W.No.7 Sampat Mane, PSI is to the effect that immediately on receipt of the information, he made it a part of the record by taking entry thereof in the station diary. Exhibit 28 is the extract of the said station diary. P.W.No.7 Sampat Mane, PSI further deposed that he conveyed the information to P.W.No.4 Vilas Chavan, PI, who was present at the office of ANC Unit, Azad Maidan, Mumbai. P.W.No.4 Vilas Chavan, PI is duly corroborating this version of P.W.No.7 Sampat Mane, PSI. P.W.No.7 Sampat Mane, PSI further deposed that telephonically he conveyed the information so received to the

Senior P.I., ACP and DCP of the ANC Unit and the DCP in turn, directed him that the necessary action be taken under supervision of Police Inspector Vilas Chavan (P.W.No.4). P.W.No.4 Vilas Chavan, PI is vouching about transmission of said information to him by P.W.No.7 Sampat Mane, PSI.

13 Oral evidence of this prosecution witness is gaining corroboration from the station diary entry at Exhibit 48-A Colly, which shows that after recording the information, P.W.No.7 Sampat Mane, PSI telephonically informed about the information so received to his official superiors including DCP and obtained further orders of the said Authority. Section 114 of the Evidence Act gives presumption regarding correctness of such entries as well as the consequent events happening in the police station in pursuant to the record of the station diary.

14 P.W.No.4 Vilas Chavan, PI was heading the raiding team, whereas P.W.No.7 Sampat Mane, PSI was holding the brass seal carried for the purpose of effecting seizure. Exhibit 29 is the communication by which brass seal was requisitioned by P.W.No.7 Sampat Mane, PSI along with other articles for effecting search and seizure. It is seen from the said communication (Exhibit 29) that the brass seal along with other articles were given in possession of P.W.No.7 Sampat Mane, PSI by the in-charge of those articles.

15 Congruous evidence of P.W.No.4 Vilas Chavan, PI and that of P.W.No.7 Sampat Mane, PSI shows that for effecting raid for carrying out search and seizure, two panch witness including P.W.No.5 Rehmat Husain Shah were summoned at the office of ANC on 28/08/2008 itself. Evidence of both these witnesses coupled with that of P.W.No.5 Rehmat Husain Shah panch witness shows that necessary search of police personnels, panchas and vehicle were conducted in order to ascertain whether any narcotic drug or psychotropic substance was being carried by them either on person or on vehicle, but nothing was found in such search. The police team, as seen from evidence of these three witnesses, then left the office of the ANC for effecting raid by a police vehicle accompanied by P.W.No.2 Satyawar Mane, API as well as other police officials. After parking the vehicle at the police station outpost, the police officials including P.W.No.2 Satyawar Mane, API, P.W.No.4 Vilas Chavan, PI and P.W.No.7 Sampat Mane, PSI went to Ghodapdeo BEST bus stop. P.W.No.2 Satyawar Mane, API, P.W.No.4 Vilas Chavan, PI, P.W.No.5 Rehmat Husain Shah a panch witness and P.W.No.7 Sampat Mane, PSI congruously deposed that at about 15.10 hours (3.10 p.m.) a suspect came there carrying reddish coloured plastic bag in his hand. P.W.No.7 Sampat Mane, PSI deposed that as description of the said person was tallying with the description provided by the informant and as the movement of the suspect were found suspicious, he was accosted by the police party and panch witnesses. As seen from

evidence of prosecution witnesses, then identity of the police party was given to the appellant/accused. Purpose of search was also explained to him.

16 What transpires at the time of actual search and seizure is deposed by P.W.No.4 Vilas Chavan, PI as well as P.W.No.2 Satyawar Mane, API, P.W.No.7 Sampat Mane, PSI and panch witness P.W.No.5 Rehmat Husain Shah. I have minutely perused evidence of those witnesses and it is seen that all of them have deposed in unanimous about the search and resultant recovery of the contraband. Their evidence is in general agreement with each other. P.W.No.4 Vilas Chavan, PI has deposed that after suspects introduced himself as Irshad Khan Pathan @ Charsi, he informed him the purpose of search and orally informed him that he has right to ask for his personal search in presence of the nearest Gazetted Officer or the Magistrate. P.W.No.4 Vilas Chavan, PI further deposed that the appellant/accused was informed that if he desirous to be searched in presence of those officers, then the arrangement can be made. However, the appellant/accused declined. P.W.No.4 Vilas Chavan, PI has deposed that then a communication dated 28/08/2008 (Exhibit 27), which is in handwriting of P.W.No.7 Sampat Mane, PSI was served on the appellant/accused in order to make him aware of his rights under Section 50 of the N.D.P.S.Act for getting his personal search in presence of Gazetted Officer or the Magistrate.

17 P.W.No.4 Vilas Chavan, PI has deposed that reddish colour plastic bag which was being carried by appellant/accused was searched and it was found to be containing sticky blackish sticks. The contents thereof were tested by field testing kit and found to be *charas*. Therefore, two samples of 25 gms. each were drawn after weighing the entire contraband and found to be containing 2 k.g. P.W.No.4 Vilas Chavan, PI then deposed about packing, sealing and labelling the samples as well as the remaining contraband and then about preparation of the post event panchanama (Exhibit 33) in respect of search and seizure of the contraband.

18 Cross-examination of P.W.No.4 Vilas Chavan, PI reveals that no written order from his superior was handed over to him for effecting search and seizure. It is further brought on record from evidence of this witness that nobody from the spot was requested to be a witness to the proceedings. This witness denied in cross-examination that contraband was greenish brown in colour. He denied the suggestion that no notice was issued to the appellant/accused, nor his rights under Section 50 of the N.D.P.S.Act were explained to him.

19 P.W.No.2 Satyawar Mane, API, P.W.No.7 Sampat Mane, PSI and P.W.No.5 Rehmat Husain Shah panch witness had accompanied P.W.No.4 Vilas Chavan, PI at the time of search and

seizure. P.W.No.2 Satyawar Mane, API has corroborated the version of P.W.No.4 Vilas Chavan, PI in all material particulars. His evidence is perfectly in tune with the evidence of P.W.No.4 Vilas Chavan, PI, who had actually conducted search and seizure. This witness has deposed that from the carry bag carried by the appellant/accused, black coloured material weighing 2 k.g. came to be recovered and it was found to be *charas* upon testing it by the field testing kit. This witness deposed about taking out two samples from the material found in the carry bag carried by the appellant/accused. P.W.No.2 Satyawar Mane, API has also stated about compliance of Section 50 of the N.D.P.S.Act prior to taking personal search of the appellant/accused. He has then spoken about preparation of the search and seizure panchanama (Exhibit 33) on the spot by P.W.No.7 Sampat Mane, PSI. As per version of this witness, after their return, he lodged the FIR (Exhibit 17) on 28/08/2018 itself, which resulted in registration of Crime No.534 of 2008.

20 From cross-examination of this witness, it was tried to demonstrate that during search and seizure, the mob gathered on the spot and some persons from the mob were asked to act as panch witness, but those persons went away without disclosing their names.

21 P.W.No.7 Sampat Mane, PSI has also reiterated what is stated by P.W.No.4 Vilas Chavan, PI police inspector in respect of

search and seizure of the contraband by disclosing the secret information received by him of which he had taken a note in the station diary (Exhibit 28). Evidence of this witness shows that by letter dated 28/08/2008 itself addressed to the DCP, ANC, he forwarded the extract of station diary entry to the said authority to make the said authority aware about receipt of the secret information regarding possession of the narcotic drug. He has corroborated the version of P.W.No.4 Vilas Chavan, PI in respect of compliance of Section 50 of the N.D.P.S.Act and seizure of 2 kg. of *charas* and taking two samples weighing 25 gms. each from the seized contraband. This witness has described the substance as sticks and two rectangular slabs. He has deposed about packing, sealing and labelling the samples as well as the remaining muddemal. As per version of this witness, he then prepared the post event panchanama reflecting search and seizure of the contraband i.e. *charas* which is at Exhibit 33.

22 Evidence of P.W.No.7 Sampat Mane, PSI shows that he prepared a request letter for depositing the muddemal with the store keeper i.e. P.W.No.6 Vijay Nimbalkar. The said letter is at Exhibit 39 and it reflects that sample marked 'A' was containing 1.950 kilograms. *charas*, whereas Samples Nos.A1 and A2 were containing *charas* weighing 25 gms. each. Even, extract of entry in Muddemal Register to that effect at Exh.40A was produced on record by the prosecution. P.W.No.7 Sampat Mane, PSI then

deposed that on 28/08/2008 itself, he has forwarded the Special Report to the Senior P.I., ACP and DCP. The Special Report is at Exhibit 49.

23 The prosecution has examined panch witness P.W.No.5 Rehmat Husain Shah, who participated in the search and seizure operation. He has also deposed exactly in tune with the version of official witnesses. In cross-examination, this witness denied that he is habitual panch witness or that he acted as a panch in other cases. However, cross-examination of this witness reveals that after acting as a panch witness in this case, he has acted as a panch witness in one another case.

24 The cumulative effect of versions of prosecution witnesses reflects that the search and seizure was conducted on the basis of information received by P.W.No.7 Sampat Mane, PSI. The entire developments which took place after receipt of the secret information are noted down in the station diary of the Police Station. The prosecution has produced on record the photo copy of station diary entries which are at Exhibit Nos.28, 46, 47, 48 Colly. The entries in the station diary recorded contemporaneously fully corroborate versions of the prosecution witnesses and the presumption is attached to such entries to the effect that the corresponding events occurred at the police station.

25 Evidence of prosecution witnesses namely P.W.No.2

Satyawan Mane, API, P.W.No.4 Vilas Chavan, PI , P.W.No.5 Rehmat Husain Shah and P.W.No.7 Sampat Mane, PSI shows that at about 3.20 p.m. on 28/08/2008, black coloured material weighing 2 kg., which was found to be *charas* in the testing at the spot, came to be recovered from the polythene bag carried by the appellant/accused. This seizure was effected on the spot which was near Ghodapdeo BEST bus stop, Bus route Nos.43, 44 and 45, Barrister Nath Pai Road, Reay Road (West). The seizure was at the public place and as such, the case was covered by Section 43 of the N.D.P.S.Act as the arrest and seizure of the contraband took place at the Ghodapdeo BEST bus stop and not in any building, conveyance or enclosed place. The provisions of Section 42 of the N.D.P.S.Act are, as such, not applicable to the case in hand. There was no need to enter into any building, conveyance or enclosed place for effecting search and seizure. As such, formalities such as, forwarding the information taken down in writing to the immediate official superior within 72 hours were not necessary. However, still it is seen that the extract of the station diary entry regarding receipt of secret information in respect of possession of *charas* by the appellant/accused was forwarded on 28/08/2008 itself by a letter Exhibit 28 to which the extract of the station diary entry was annexed. The said communication was addressed to the DCP, ANC, Mumbai which even complies the requirements of Section 42(2) of the N.D.P.S.Act, though no such formality was necessary.

26 So far as compliance of Section 50 of the N.D.P.S. Act is concerned, paragraph No.9 and 11 of the Judgment of the Honourable Apex Court in the matter of **Ravindra @ John** (*supra*) are material. They read thus :

“9 In the instant case, it is not in dispute that the appellant was carrying a plastic bag in which the drug in question duly packed had been kept. Section 50 is, therefore, not attracted to the facts of this case.

11. In our view this question does not survive for our consideration because we have earlier held that Section 50 was not attracted to the facts of this case. If any drug was recovered from the personal search of the appellant as explained in *Pawan Kumar's* case, the appellant could advance this argument to challenge his personal search. That not being the case, the submission must be rejected. An argument was advanced before us that if the search is found to be illegal that is fatal to the case of the prosecution. Apart from the fact that this question does not arise in the instant case, it cannot be said as a general principle of law that the illegality of the seizure would in all cases prove fatal to the case of the prosecution. As held by this Court in *Ritesh Chakarvarti Versus State of M. P.* although the effect of the illegal search may not have any direct effect on the prosecution case, it would all

the same have a bearing on the appreciation of evidence of the official witnesses and other materials depending on the facts of each case.”

27 In the case in hand, what was searched and seized is the material found in the carry bag carried by the appellant/accused. No contraband was seized from the personal search of the appellant/accused. Thus, as the contraband was seized from the plastic bag carried by the appellant/accused, provisions of Section 50 of the N.D.P.S.Act are not applicable to the case in hand. Still P.W.No.4 Vilas Chavan, PI has spoken about informing the appellant/accused his right to get his person searched in presence of the Gazetted Officer or the Magistrate. Apart from that, the appellant/accused was informed in writing about this right and the said communication is at Exhibit 27.

28 Evidence of P.W.No.1 Prakash Jumnal, a Police Constable shows that he was entrusted with the duty of carrying the sample and reaching it to the Regional Forensic Laboratory at Kalina on 29/08/2008. His evidence coupled with P.W.No.6 Vijay Nimbalkar, Store Keeper of the ANC shows that the sample in a sealed condition was entrusted to a police constable P.W.No.1 Prakash Jumnal by taking entry (Exhibit 42) in the Muddemal Register. P.W.No.1 Prakash Jumnal, a Police Constable then delivered the sample in sealed condition to the Regional Forensic Laboratory, Kalina with covering letter Exhibit 11. The said letter

contains an endorsement from the Regional Forensic Laboratory that the samples received in sealed condition. Evidence of both these witnesses is fully corroborated by the documentary evidence placed on record by the prosecution in the form of forwarding letter as well as the extract of the Muddemal Register. P.W.No.3 Sandip Chetti, Chemical Analyzer with the Regional Forensic Laboratory has deposed about four tests and microscopic examination conducted by him on the seized samples in this crime from 04/08/2008. This witness proved Chemical Analysis Report (Exhibit 23) and has produced Case Entry Register, chain of custody form as well as graphs and data sheets before the Court in order to enable the Court to understand the tests performed on the seized samples and the finding of the chemical analysis. The report at Exhibit 23 shows that upon chemical analysis of greenish brown lumps weighing 26.0987 gms., the same was found to be *charas* – a narcotic substance. P.W.No.3 Sandip Chetti has described the seized sample as greenish brown lumps, whereas rest of the prosecution witnesses have stated the same as blackish sticks or black coloured material. The question is whether by describing colour of the seized material itself by different prosecution witnesses, the case of the prosecution can be doubted. In my considered opinion, the colour is described by perception by an individual. What is required to be seen is whether the material was properly seized and sealed. In the case in hand, two samples from the seized muddemal were drawn and they were marked as

A1 and A2. Evidence on record shows that those samples were kept in polythene bag and then those were packed, sealed and labelled. It is not seen from the evidence of prosecution witnesses that the samples were kept in the khaki papers. The prosecution witnesses are specific about use of polythene bag for keeping the samples and then packing those samples. The documentary evidence in the form of letter at Exhibit 39 dated 28/08/2008 itself shows that sealed samples apart from remaining contraband were duly deposited in the store of the ANC. Muddemal Register Exhibit 40A also reflects that entry of the sealed samples and remnant was taken in the Muddemal Register. The entry at Exh.40A, which is extract of the Muddemal Register further shows that on 29/08/2008, one of the sample i.e. A1 was delivered to P.W.No.1 Prakash Jumnal, a Police Constable for reaching it to the Regional Forensic Laboratory. As such, mis-describing the colour of the seized contraband is of no use to doubt the prosecution case. Similar is the case in respect of minor variations in the weight of the samples. The samples were weighted at the time drawing it on the spot. The seizure was effected at the public place. The seized samples were properly sealed. Therefore, minor variations in weight of the sample in the backdrop of documentary evidence regarding the proper keeping of that samples in sealed condition itself is of no assistance to the defence.

29 From the cross-examination of P.W.No.5 Rehmat Husain Shah it is seen that nobody from the spot was taken as a

panch witness. The reason for the same is also reflected from the cross-examination of P.W.No.5. It is seen that when the persons from the mob gathered on the spot were asked to act as panch witness, they left the spot without even disclosing their names. P.W.No.5 Rehmat Husain Shah, it appears that, subsequently acted as panch in one of the case. However, this fact at the most put the Court on bar to scrutinize the evidence of such witness with care. Careful scrutiny of this witness as well as other prosecution witnesses does not show any discrepancy to make them untrustworthy.

30 In the result, even after re-appreciation of the evidence of prosecution witnesses, I am unable to concede with the submission of the learned Advocate for the appellant/accused that the appellant/accused deserves benefit of doubt in the instant case. On the contrary, the prosecution is successful in establishing conscious possession of 2 kg. *charas* – a narcotic drug by the appellant/accused at the public place on 28/08/2008. The sentence imposed on the appellant/accused is perfectly in consonance with the provisions of the N.D.P.S.Act. Hence, the appeal fails and, therefore, the Order :

ORDER

- (i) The appeal is dismissed.

(A.M.BADAR J.)