

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.554 OF 2006

Mr.Mirza Qumer Hyder,
Muslim, Indian Inhabitant,
Aged 40 years, Occupation-Business,
Resident of : Orlem Church, 101,
Spring Field No.2, Sunder Lane,
Malad (West), Mumbai
(At present Kolhapur Central Prison.) ... **Appellant**
V/s.

1. Mr.A.K.Thakker I.O.,
Narcotic Control Bureau,
3rd Floor, Exchange Building,
Ballard Peer, Mumbai.

2 The State of Maharashtra ... **Respondents**

WITH
CRIMINAL APPEAL NO.555 OF 2006

Mr.Bhanudas Vasant Rao More,
Hindu, Indian Inhabitant,
Aged 40 years, Occupation-Business,
Resident Of : 12/C, Ganga Smruti,
Phoolpada Road, Virar (East),
Dist. - Thane. ... **Appellant**
V/s.

1. Mr.A.K.Thakker I.O.,
Narcotic Control Bureau,
3rd Floor, Exchange Building,
Ballard Peer, Mumbai.

2 The State of Maharashtra ... **Respondents**

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Mr.Ayaz Khan with Dilip Mishra & Ms.Zehra Charania, Advocate for the Appellant in APEAL/554/2006.

Ms.Nasrren S.K.Ayubi, Appointed Advocate for the Appellant in APEAL/555/2006.

Mr.H.S.Venegaonkar, Advocate Respondent No.1/NCB.

Mr.S.V.Gavand, APP for the Respondent No.2/State.

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CORAM : A.M.BADAR J.

DATED : 31st JANUARY 2018.

ORAL JUDGMENT :

1 Criminal Appeal No.554 of 2006 is filed by original accused No.2 Mirza Qumer Hyder, whereas Criminal Appeal No.555 of 2006 is filed by Bhanudas Vasantrao More – original accused No.3. By these appeals, these appellants are challenging the Judgment and Order passed by the learned Special Judge on 7th April 2006 in N.D.P.S.Special Case No.49 of 2001 thereby convicting them of offences punishable under Sections 8(c) read with Section 22, Section 29 as well as Section 27A read with Section 30 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'N.D.P.S.Act' for the sake of brevity). On each count, they both are sentenced to suffer rigorous imprisonment for 10 years apart from payment of fine of Rs.1,00,000/- by each of them and in default to undergo further rigorous imprisonment for three months.

2 Briefly stated facts leading to the prosecution of these appellants/accused along with the co-accused are thus :

- (a) On 08/02/2001, officers of the complainant – Narcotic Control Bureau (hereinafter referred to as 'N.C.B.' for the sake of brevity), Mumbai Zonal Unit, Mumbai received information to the effect that one mini-truck bearing registration No.MH-04-S-8235 is parked in the premises of M/s.High Point Industries Limited at Plot No.V-9, MIDC Taloja, District Raigad and the same is loaded with more than one tonne of Mandrex Tablets – a psychotropic substance.
- (b) In pursuant to the information, so received, officers of the N.C.B. summoned two panchas and explained them the information so received. The officers along with panchas then visited the premises of M/s.High Point Industries at MIDC Taloja. The mini-truck bearing registration No.MH-04-S-8235 was found parked inside the factory premises. Accused No.1 Shridhar Chennuri, the owner of the factory was also present there. He informed the officers of the N.C.B. that the mini-truck is parked in his factory premises by present appellants/accused Mirza Qumer Hyder and Bhanudas More. They had promised him to pay Rs.1000/- per day for parking the vehicle in the premises.

- (c) The officers of the N.C.B. along with panchas waited in the factory premises for arrival of the appellants/accused Nos.2 and 3. At about 1.15 p.m. of 08/02/2001, both the appellants entered in the premises of M/s.High Point Industries. They were accosted and were explained the purpose of visit of the officers of the N.C.B. According to the prosecution case, then the mini-truck bearing registration No.MH-04-S-8235 came to be searched. Methaqualone tablets weighing 1423.69 kg. stacked in 51 HDPE sacks, which were kept in the boxes were found to be loaded in the said mini-truck. Samples of 10 tablets each from those 51 bags were drawn, sealed and labeled after those were tested positively for Methaqualone. The bulk muddemal property also came to be packed, sealed and labeled.
- (d) After complying with the provisions of Section 50 of the N.D.P.S.Act personal search of appellants/accused Nos.2 and 3 apart from accused No.1 was taken. Some documents, visiting card, driving license as well as cash were found in their possession.
- (e) Search of Maruti car owned by appellant/accused No.2 Mirza Qumer Hyder, which was parked outside the factory premises came to be conducted. Apart from other articles, the same

was found to be containing 22 Mandrex (Methaqualone) tablets. Those were tested positively for Mathaqualone. Samples consisting of 10 tablets came to be drawn, packed, sealed and labeled. Rest of the muddemal was also packed, sealed and labeled.

- (f) Factory premises of the accused No.1 came to be searched, but nothing incriminating was found. Thereafter, panchanama of seizure of the contraband came to be prepared.
- (g) After registering the FIR against accused persons, routine investigation followed. On completion of investigation, the complaint against in all four accused persons including appellants/accused Nos.2 and 3 came to be filed by P.W.No.2 Ashok Thakker, Intelligence Officer of the N.C.B., on 04/05/2001 for contravention of provisions of N.D.P.S.Act. Necessary cognizance of the same came to be taken by issuing the process. The learned trial Court then framed charge and the same was explained to the accused persons including the appellants. They abjured their guilt and claimed trial. In order to bring home the guilt to the accused persons, the prosecution has examined in all 31 witnesses. Investigating Officer Namboodiri Prasannaa Shankar is examined as P.W.No.1. The other important witness examined by the

prosecution is P.W.No.31 Prof.Krishnacharya Govindacharya Akamanchi, Head of the Department of Pharmaceutical Sciences & Technology, Institute of Chemical Technology, University of Mumbai, who claimed to be expert in Pharmaceutical Chemistry as well as in manufacturing process of pharmaceuticals.

- (h) Defence of the accused persons was that of total denial. However, they did not enter into defence. After hearing the parties, the learned Special Judge came to the conclusion that the appellants along with accused No.1 and deceased accused No.4 entered in the criminal conspiracy for manufacturing, acquiring, transporting as well as selling of Mandrex tablets in contravention of provisions of N.D.P.S.Act 1985. The learned Special Judge further held that the prosecution has established that in pursuant to the conspiracy, the present appellants have concealed 22 tablets as well as 1423.69 kg. of Mandrex tablets (Methaqualone) in the Maruti Car bearing registration No.MH-02-N-3317 as well as the mini-truck bearing registration No.MH-04-S-8235 and transported the same to M/s.High Point Industry at Taloja MIDC. The learned trial Court further held that the appellants/accused in pursuant to the criminal conspiracy installed machinery for manufacturing Methaqualone powder required for preparation of Mandrex tablets and the deceased accused

No.4 allowed them to do so and assisted them in such preparation. It is further held that the appellant/accused No.2 Mirza Hyder has financed the appellant/accused No.3 Bhanudas More for purchasing machinery required for manufacturing Methaqualone powder and Mandrex tablets and along with co-accused, they were carrying illicit drug trafficking activities at the factory at Taloja as well as Dombivli. The appellants/accused along with deceased accused used the factory premises at M/s.Arti Chemicals, Phase II, MIDC, Dombivli for manufacturing of Methaqualone powder required for manufacturing of Mandrex Tablet and thereby contravened the provisions of the N.D.P.S.Act. Accordingly, by the impugned Judgment and Order dated 07/04/2006, passed in N.D.P.S. Special Case No.49 of 2001, the learned Special Judge was pleased to convict the appellants/accused along with other co-accused and sentenced them as indicated in opening paragraph of this Judgment.

3 I heard Shri.Ayaz Khan as well as Ms.Nasreen Ayubi, the learned Advocate for the appellants/accused. They vehemently argued that appeal of the co-accused i.e. accused No.1 Shridhar Chennuri bearing Criminal Appeal No.545 of 2006 has already been allowed by this Court vide Judgment and Order dated 6th July 2010 and for the very same reason, these appellants who are

the co-accused are also entitled for acquittal. The learned Advocate appearing for the appellants/accused vehemently argued that copies of six Chemical Analysis Reports were tendered on record during the course of examination of the Investigating Officer and those were marked as exhibits. Those Chemical Analysis Reports are not duly proved and the prosecution has not examined the Chemical Analyzer, who allegedly tested the seized articles in order to demonstrate that the same is Methaqualone – a psychotropic substance. It is further argued that P.W.No.31 Prof.Krishnacharya Govindacharya Akamanchi has not even handled the alleged contraband and he had not analyzed the same in order to conclude that the same is Methaqualone and, therefore, evidence of P.W.No.31 Prof.Krishnacharya Govindacharya Akamanchi, which is relied by the learned trial Court for convicting the appellants/accused is of no assistance. P.W.No.31 Prof.Krishnacharya Govindacharya Akamanchi was not the Analyzer in the case in hand.

4 I have also heard Shri.Venegaonkar, the learned Advocate appearing for the respondent/NCB as well as the learned Additional Public Prosecutor for the respondent/State. Shri Venegaonkar, the learned Advocate appearing for the NCB drew my attention to the provisions of Section 293 of the Code of Criminal Procedure and more particularly to Sub-Section (2) thereof and contended that it is for the Court to call and examine

the Chemical Analyzer if it thinks fit. The Chemical Analysis Report placed on record by the prosecuting agency was not at all disputed by the defence and as such, there was no necessity of proving the same formally by calling the Chemical Analyzer. It is further argued that Section 293 of the Code of Criminal Procedure makes it clear that there is no need of formally proving the Chemical Analysis Report and, therefore, it cannot be said that the learned Special Judge committed any error in convicting and sentencing the appellants/accused for offences under the N.D.P.S.Act.

5 The learned Advocate appearing for appellants have placed reliance on following rulings.

- (1) *State of Maharashtra v. Jagdish Shah* reported in 1992 (1) BCR 405.
- (2) *Raju Shrivastav v. State of Maharashtra* reported in 2004 ALL M.R. (Cri.) 3053.
- (3) Judgment of the Division Bench of Goa Bench of this Court in **Criminal Appeal No.27 of 1997** in the matter of *Deen Khan Mohamed v. State of Goa*.
- (4) *Nicklaus Hell v. State of Goa* reported in 1998 (2) Mh.L.J. 884.
- (5) *Vinod @ Vinay @ Bhokanya v. State of Maharashtra* reported in 2006 ALL M.R. (Cri.) 53.
- (6) Judgment of Nagpur Bench of this Court in **Criminal Appeal No.143 of 2003** in the matter of *Sheikh Salim Sheikh Chand v. State of Maharashtra*.

- (7) *State v. Pali Ram* reported in 1979 AIR (SC) 14.
- (8) *Palaniswamy v. State* reported in 1968 AIR (Bom) 127.
- (9) *Mohammad Hanif Mansoori v. State* reported in 2003 ALL.M.R. (Cri.) 506.

6 I have carefully considered the rival submissions and also perused the Record and Proceedings including the oral as well as documentary evidence adduced by the prosecution.

7 Undisputedly, accused No.1 Shridhar Chennuri had preferred an appeal bearing Criminal Appeal No.545 of 2006 challenging the impugned Judgment and Order of conviction and resultant sentence imposed upon him by the learned Special Judge, Mumbai and the said appeal came to be decided by this Court vide Judgment and Order dated 6th July 2010. The said appeal came to be allowed and the appellant therein i.e. original accused No.1 Shridhar Chennuri came to be acquitted of offences alleged against him by quashing and setting aside the impugned Judgment and Order passed by the learned Special Judge, Mumbai. This Court while deciding the said appeal relied on Judgment in the matter of *Nicklaus Peter Heel (supra) Murarilal v. State of Madhya Pradesh* reported in AIR 1980 SC 531 and *Suleman Usman Menon v. The State of Gujarat* reported in 1961 (2) Cri.L.J. 78. In paragraph 9 and 10 of the Judgment in Criminal Appeal No.545 of 2006 filed by accused No.1 Shridhar

Chennuri, reasons for allowing appeal can be found. Those read thus :

“9. In the present case, the admitted position is that the contents of the C.A. report have not been proved by the PW-31, who has not conducted the chemical analysis of the samples and as such, the Trial Court could not have relied on the C.A. report merely because the accused had not objected to bring the said report on record.

10. In the present case, therefore, the prosecution has failed to establish that the contraband which was seized by the raiding party was Mandrex tablets. In my view, therefore, non-examination of the C.A. in the present case is fatal to the prosecution case. The Apex Court and this Court in the the case of **Nicklaus Peter Heel** (supra) and other cases have held that non-examination of the Chemical Analyzer is fatal to the prosecution case and on that ground alone the Appellant deserves to be acquitted of charges which are levelled against him. In any case, the Appellant has practically undergone the entire sentence.”

Thus, this Court in the case in hand itself has held that the prosecution has failed to establish that the material seized by the prosecuting agency is Methaqualone – a psychotropic substance.

8 Now, let us consider the case of the appellants/accused. As stated earlier, these are appeals at the instance of original accused No.2 Mirza Hyder and No.3 Bhanudas More. It is case of the prosecution that the accused persons entered into criminal conspiracy to manufacture, transport and sale Methaqualone by preparing the tablets known as Mandrex Tablets and in execution of the said conspiracy, accused Nos.1 to 3 were found in possession of 1423.69 kg. as well as 22 tablets of Mandrex i.e. Methaqualone—a schedule psychotropic substance on 08/02/2001. According to the prosecution case, the appellants/accused installed machinery in the factory premises named as M/s.Arti Chemicals, MIDC, Dombivli for manufacturing Methaqualone powder required for preparation of Mandrex Tablets and accordingly, they manufactured Methaqualone powder and converted it into Mandrex Tablets. The illicit trafficking of this psychotropic substance was done with the aid of accused No.1 Shridhar Chennuri and the deceased accused No.4, who supplied necessary material for manufacturing Methaqualone powder and Mandrex tablets.

9 Section 2(xxiii) of the N.D.P.S.Act defines the term 'psychotropic substance'. Any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule to the said Act, is termed as the psychotropic

substance. The Schedule appended to the said Act includes Methaqualone in the list of psychotropic substance at Serial Number 20. The Schedule shows that Methaqualone is international non-proprietary name of psychotropic substance, whereas its chemical name is '2-Methyl-3-O-toly1-4(3H)-quinazolinone'. Bare perusal of this entry No.20 in the Schedule appended to the N.D.P.S.Act, 1985 makes it clear that for establishing contravention of the provisions of the said Act, it is incumbent on the prosecution not only to prove that the substance seized is Methaqualone, but it is also required to prove that the said substance has the same chemical composition as is given in the Schedule. In the case in hand, the prosecution has adduced evidence of P.W.No.1 Namboodiri Prasannaa Shankar Investigating Officer as well as evidence of other officers of the N.C.B. and panch witness in order to establish a fact that from the mini-truck bearing registration No.MH-04-S-8235 parked in the compound of the factory premises known as M/s.High Point Industries, Mandrex tablets weighing 1423.69 kg. came to be seized whereas 22 such tablets came to be seized from the Maruti Car bearing registration No.MH-02-N-3317 owned by appellant/accused No.2 Mirza Hyder, which was parked outside the said factory premises. Evidence on record shows that samples were drawn from the seized material and those were packed, sealed and labeled. P.W.No.1 Namboodiri Prasannaa Shankar, the Intelligence Officer in the N.C.B. has categorically deposed that on

09/08/2001, he has forwarded seized samples for chemical analysis to the office of the 'Deputy C.C.' The manner in which the reports of chemical analysis of the seized samples are produced before the learned Special Judge has also come on record through the evidence of P.W.No.1 Namboodiri Prasannaa Shankar. In paragraph 16 of his chief-examination, this witness has stated thus:

“.....Two copies of test memos were retained by the office of Dy.C.C. and one copy was returned back – after mentioning thereon Lab Number and date. I am filling on record six test memos. They are admitted in the evidence and marked at Ex.33 colly.”

10 This evidence of P.W.No.1 Namboodiri Prasannaa Shankar goes to show that the report of chemical analysis of seized samples forwarded to the Chemical Analyzer were not annexed to the complaint, but those were tendered across the bar by P.W.No.1 Namboodiri Prasannaa Shankar while his evidence was being recorded by the learned Special Judge, Mumbai. The learned Special Judge after tendering of the Chemical Analysis Reports by P.W.No.1 Namboodiri Prasannaa Shankar had taken them on record with an observation that those are admitted in evidence and marked at Exhibit 33 colly. This aspect is relevant because in the impugned Judgment and Order of conviction and resultant sentence, the contents of the Chemical Analysis Report

are accepted with a reasoning that the same needs to be relied as filing of the Chemical Analysis Report is not disputed by the accused persons.

11 Perusal of the impugned Judgment and Order in Special Case No.29 of 2001 shows that on behalf of defence, it was argued that the chemical analysis reports were not duly proved and non-examination of the Chemical Analyzer is fatal to the prosecution. To buttress this submission, the defence has relied on several Judgments. The learned Special Judge in paragraph 224 and more particularly at internal page No.422 of the impugned Judgment and Order has considered the evidence of P.W.No.1 Namboodiri Prasannaa Shankar and stated that Chemical Analysis Reports were taken on record and marked as Exh.34 Colly., since not disputed by the accused. In paragraph 225 of the impugned Judgment and Order, the learned Special Judge has held that the prosecution has rightly contended that no steps are taken by the defence for examination of the Chemical Analyzer and in their statements under Section 313 of the Code of Criminal Procedure, the accused persons have only stated that the contents of the Chemical Analysis Reports are false. The learned Special Judge has further observed that “nothing else is stated by any of the accused”. It was further observed in paragraph 225 of the impugned Judgment and Order by the learned Special Judge that in fact, there was no necessity to put the Chemical Analysis

Reports to the accused for seeking their explanation because the defence had not disputed Chemical Analysis Reports (Exh.34 Colly). In paragraph 226 of the impugned Judgment and Order, the learned Special Judge has reiterated that in the case in hand, on tendering on record, the Chemical Analysis Reports (Exh.34 Colly) by P.W.No.1 Namboodiri Prasannaa Shankar, same came to be admitted since are not disputed by the defence. The learned Special Judge then considered the evidence of P.W.No.31 Prof.Krishnacharya Govindacharya Akamanchi and held that from the evidence of P.W.No.31 Prof.Krishnacharya Govindacharya Akamanchi neither it is brought on record nor it can be said that Methaqualone known by a particular name alone is prosecutable under the provisions of N.D.P.S.Act and though the Chemical Analyzer is not examined, from the evidence on record, it can reliably be held that the contraband recovered in this case and the samples which is tested positive is Methaqualone is prosecutable under the provisions of N.D.P.S.Act. With this reasoning, the reports of chemical analysis (Exh.34 Colly) were accepted by the learned Special Judge for holding that seized substance was a psychotropic substance falling in Entry No.20 i.e. Methaqualone and accordingly, the appellants/accused along with co-accused came to be convicted.

12 Undisputedly, in the case in hand, Chemical Analyzer is not examined by the prosecution as its witness. P.W.No.31 Prof.Krishnacharya Govindacharya Akamanchi, who at the

relevant time was working as Professor of Pharmaceutical Chemistry and Head of the Department of Pharmaceutical Sciences & Technology, Institute of Chemical Technology, University of Mumbai had not analyzed the seized substance at any point of time. It would be apposite to quote the relevant portion of one of the reports of chemical analysis of the seized substance, which came to be marked as Exhibit 34 Colly., by the learned trial Judge. It reads as under :

“Section – II

FOR USE IN THE LABORATORY.

1. Date of Receipt in the Laboratory. 9.2.2001
2. Weight (Net weight as found in the 10.739 gm.
laboratory)
3. Date of Forwarding Test Results : Report : Sample is
thereof in the form of off-white round tablets.
It answers tests for the presence of Methaqualone.
(A) Quantitative Tests
(B) Results of Quantitative Test : Remnant sample
returned Facsimile of the Dy.C.C. seal
(C) General observation of the under for sealing the
Chemist : remnant sample is
given below.

Sd/-
23.2.2001
(U.N.SINHA)

Sd/- 23.2.2001

Name and Signature of the Chemist
B.R.Verma, Chemical Examiner,
Grade-I.”

13 Now, let us examine whether there is positive evidence to conclude that the seized article was a contraband and prohibited substance under the N.D.P.S.Act. The report of the chemical analysis of the seized sample is to the effect that the seized samples answer tests for the presence of Methaqualone. Except this, there is nothing in the reports of the chemical analysis of the seized substance which are six in numbers. The question is whether mere marking the reports of chemical analysis of seized sample as exhibit would amount to proof of contents of those documents in the form of report of chemical analysis. The principle is that documents sought to be tendered in evidence are required to be proved strictly in accordance with the principle provided in the Evidence Act. It is well settled that the documents are required to be proved through primary evidence. Mere marking of exhibit on the document does not amount to proof of their contents. However, Section 293 provides that any document purporting to be a report under the hand of a Government Scientific Expert to whom this Section applies, upon any matter or thing duly submitted to him for analysis, may be used as evidence in any inquiry, trial or other proceeding under this Code. As per provisions of Sub-Section (4) of Section 293, this Section is

applicable to the Director, Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory. In the case in hand, there is no evidence to demonstrate that chemical analysis of the seized substance was conducted by the Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory. It is not demonstrated that chemical analysis of the seized substance was done by the Government Scientific Expert mentioned in Sub-Section (4) of Section 293 of the Code of Criminal Procedure. The reports at Exhibit 34 Colly., are signed by person named B.R.Verma, Chemical Examiner, Grade-I. Further, the reports at Exhibit 34 Colly. are conspicuously silent about the fact that the signatory to those reports is an authority or expert falling in Sub-Section (4) of Section 293 of the Code of Criminal Procedure. P.W.No.1 Namboodiri Prasannaa Shankar, the Intelligence Officer of the N.C.B., in paragraph 6 of his evidence has only stated that he has forwarded the seized sample to “Dy.C.C.”. It is not explained by the prosecution as to whether this Authority (Dy.C.C.) is an Authority to which Section 293 of the Code of Criminal Procedure applies making the report given by it admissible in evidence in the trial.

14 Be that as it may, even if it is admitted that reports of chemical analysis of seized substance at Exhibit 34 Colly. are given by the Authorities or Experts as envisaged by Section 293 of the Code of Criminal Procedure, then also it is clear that the reports at

Exhibit 34 Colly. does not contain any material to point out which scientific tests were conducted on the seized substance in order to come to the conclusion that the same is Methaqualone found under Entry No.20 of the Schedule to the N.D.P.S.Act. Before such C.A.Reports can be accepted and acted upon to pass an order of conviction and sentence, the Court must have an opportunity to independently assess and appreciate such evidence on the basis of scientific test conducted for arriving at a given conclusion. The Court cannot surrender or abdicate its judicial function to the bare opinion of the Chemical Analyzer. Even if Section 293 of the Code of Criminal Procedure provides that the report of the experts mentioned in the said Section can be admitted in evidence and accepted without giving evidence before the Court, that by itself does not mean that the same can be accepted as a gospel truth, particularly when such report is bereft of the details of the tests conducted by the Chemical Analyzer for arrival at the conclusion that the seized substance is Methaqualone as found in Entry No.20 to the Schedule appended to the N.D.P.S.Act. I have already reproduced the contents of Chemical Analysis Report (Exhibit 34 Colly), wherein a sweeping statement is made by the Chemical Analyzer that the sample in the form of off-white round tablets answers test for the presence of Methaqualone. Reports at Exhibit 34 Colly. does not show which tests or experiments were performed by the Chemical analyzer and what was the factual data of such tests and experiments conducted by him leading to

his conclusion that the seized substance is Methaqualone – a psychotropic substance. There is no iota of evidence on record to demonstrate the basis on which the opinion that the seized substance is Methaqualone covered by Entry No.20 of the Schedule is formed. In absence of factual data of tests and experiments, if any, conducted by the Chemical Analyzer, Chemical Analysis Reports at Exh.34 Colly. have no value to come to the conclusion that the seized substance was a psychotropic substance. Valuable reference to this proposition can be had from the Judgment of this Court in the matter of ***Dan Karpman & Anr. v. State of Goa*** reported in IV(1998) CCR 640 (DB). Similarly, in the matter of ***Nicklaus Peter Hell*** (*supra*) relied by the learned Advocate for the appellants/accused, it is held by the Division Bench of this Court that taking into the legislative intent, the evidence of Chemical Analyzer in the case coming under the N.D.P.S.Act has to be strictly and carefully analyzed. The recovery and chemical analysis of the substance covered by the N.D.P.S.Act is very important and the Court must be alive to the situation where innocent people are likely to be implicated and subjected to rigorous imprisonment prescribed by the said Act. The Division Bench of this Court further held that the expert opinion is only an opinion. What amount of credibility or reliability could be attached to this opinion is a matter for the Court depending upon facts and circumstances of each case. In the case in hand, neither the Chemical Analyzer is examined by the prosecution nor the

reports of chemical analysis Exhibit 34 Colly. contains any factual data regarding test or experiments conducted by the Analyzer on the seized substance for arriving at a conclusion that the same is a scheduled psychotropic substance. Thus, the Chemical Analysis Reports which only contains the conclusion or opinion of the Chemical Analyzer is of no avail to the prosecution.

15 This Court in Criminal Appeal No.545 of 2006 filed by the appellant/original accused No.1 has considered the aspect as to whether there is positive evidence to conclude that the seized article was a contraband or prohibited substance and came to the conclusion that the prosecution has failed to establish that the contraband which was seized by the raiding party was Methaqualone/Mandrex Tablet. There is no reason to deviate from this conclusion particularly when in the matter of **Suleman Usman Menon** (*supra*), the Honourable Apex Court has categorically held that the report of the Chemical Analyzer must show the tests or experiments performed by him, the factual data revealed by such tests or experiments and the reasons leading to the formation of the opinion from such factual data. All these factors are missing from the reports of chemical analysis at Exhibit 34 Colly. Therefore, it cannot be positively said that the seized substance is Methaqualone falling in Entry No.20 of the Schedule appended to the N.D.P.S.Act. The appellants/accused, as such, are entitled for the benefit of doubt.

16 In this view of the matter, only because the appellants/accused had not objected to filing of the Chemical Analysis Reports (Exhibit 34 Colly.) the prosecution case cannot be held to be proved. The duty to prove its case by adducing clear and cogent evidence is always on the prosecution and in the case in hand, the prosecution has not discharged his onus to prove beyond all reasonable doubt that the seized article was a contraband or prohibited substance. In the result, the following order :

- (i) Both the appeals are allowed.
- (ii) The appellants/accused are acquitted of the offences with which they were charged. The impugned Judgment and Order of the learned Special Judge convicting and sentencing the appellants/accused for offences under the N.D.P.S. Act is quashed and set aside.
- (iii) The appellants/accused are acquitted of offences alleged against them and they are directed to be released forthwith, if not required in any other case.
- (iv) Fine amount, if any, paid by them be refunded to them.
- (v) It is reported that appellant/accused Mirza Qumer Hyder is on bail. His bail bond stands cancelled.

(A.M.BADAR J.)