

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.456 OF 2010

WITH

CRIMINAL APPLICATION NO.303 OF 2017

AND

CRIMINAL APPLICATION NO.907 OF 2016

AND

CRIMINAL APPLICATION NO.909 OF 2015

AND

CRIMINAL APPLICATION NO.1065 OF 2010

IN

CRIMINAL APPEAL NO.456 OF 2010

SHAKEEL HABIB KHAN @ PAPU PAGER)
S/o.HABIBKHAN)...APPELLANT

V/s.

A.B.KODNANI AND ANOTHER)...RESPONDENTS

WITH

CRIMINAL APPEAL NO.471 OF 2010

WITH

CRIMINAL APPLICATION NO.647 OF 2013

AND

CRIMINAL APPLICATION NO.762 OF 2014

IN

CRIMINAL APPEAL NO.471 OF 2010

JAYRAM HARICHANDRAI WADHWA)
@ KARA)...APPELLANT

V/s.

A.B.KODNANI AND ANOTHER)...RESPONDENTS

Mr.Ayaz Khan a/w. Mr.Dilip Mishra, Ms.Zehra Charania, Advocates for the Appellant in Criminal Appeal No.456 of 2010.

Mr.Mandar Goswami a/w. Ms.Tanaya Goswami, Ms.Sneha G. Sanap, Advocate for the Appellant in Criminal Appeal No.471 of 2010.

Mr.H.S.Venegaonkar, Advocate for Respondent No.1 - Narcotic Control Bureau.

Mr.V.V.Gangurde, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

**DATE : 7th FEBRUARY 2018,
8th FEBRUARY 2018 &
9th FEBRUARY 2018**

ORAL JUDGMENT :

1 Criminal Appeal No.456 of 2010 is filed by appellant/accused no.3 Shakeel Habib Khan @ Papu Pager, whereas, Criminal Appeal No.471 of 2010 is filed by appellant/accused no.1 Jayram Wadhwa @ Kara. Both these appeals are being decided by common judgment as they are arising out of the same case.

2 Both the appellants/accused nos.3 and 1 respectively, by these appeals, are challenging the judgment and order dated 19th May 2010 passed by the learned Special Judge under Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act) for Greater Mumbai, in NDPS Case No.215 of 2007. The learned trial court by this impugned judgment and order is pleased to convict both these appellants/accused nos.3 and 1 respectively along with co-accused (accused no.2) Nasirali Sher Ali Khan for offences punishable under Sections 8(c) read with 20(b)(ii)(c) as well as for the offence punishable under Section 29 of the NDPS Act. Each of them is sentenced, on each count, to undergo rigorous imprisonment for 10 years and to pay fine of Rs.1 lakh, by each of them, on each count. In default of payment of fine, they are directed to undergo simple imprisonment for 1 year. By the impugned judgment and order, the learned trial court directed that the substantive sentences of imprisonment shall run concurrently.

3 Brief facts, leading to the prosecution of the appellants herein, along with the co-accused, are thus :

- (a) On 3rd July 2007, PW1 Chandrakant Kedare, Intelligence Officer of the Narcotics Control Bureau received secret information in the matter regarding the criminal conspiracy, interstate transport of the narcotic drugs as well as possession thereof by the appellants/accused persons. The said information was then submitted to the Zonal Office and as directed by the Zonal Director, search authorization in respect of the house and vehicle came to be prepared. Surveillance was kept outside the second gate of Nutan Nagar Society, Bandra (West), Mumbai, after summoning panch witnesses PW10 Sandeep Joil and PW11 Rajesh Motwani. Ultimately, on 7th July 2007, at about 22.30 hours, four wheeler vehicle of brand Tavera bearing registration no.MH-43-N-4631 came in the premises of Nutan Nagar Society. Thereafter, according to the prosecution case, appellant/accused no.1 Jayram Wadhwa came out of the society and approached the driver of that vehicle. The

appellant/accused no.3 Shakeel Khan along with Papu Pager and co-accused Nasirali Khan were present in that four wheeler vehicle. The officers and the raiding team encircled them, showed their identity and after conducting statutory formalities, they recovered a zipper bag containing 20 kgs of *hashish/charas* from accused no.2 Nasirali Khan. The prosecution averred that the said narcotic drug was brought for selling it out to appellant/accused no.1 Jayram Wadhwa. Subsequent thereto, officers of the Narcotics Control Bureau took appellant/accused no.1 Jayram Wadhwa to his house, which is a flat bearing no.A-13, situated in Nutan Nagar Society. Appellant/accused no.1 Jayram Wadhwa then produced 11 carry bags containing *hashish/charas* by taking them out from the cupboard in the bedroom of that flat. The officers of the Narcotics Control Bureau took out two samples each weighing 24 gms from the contraband weighing 11 kgs found in zipper bag delivered by accused no.2 Nasirali Khan, so also two samples each weighing 24 gms from the contraband recovered from the flat of

appellant/accused no.1 Jayram Wadhwa. Samples were duly packed, sealed and labelled, so also, rest of the contraband. Search of the flat of appellant/accused no.1 Jayram Wadhwa was conducted. Personal search of accused persons was also conducted. The four wheeler vehicle was also searched during the course of the raid.

- (b) During the course of investigation, PW4 Sanjay Sinha, Intelligence Officer of Narcotics Control Bureau, recorded statement of appellant/accused no.3 Shakeel Khan. PW5 Shrikant Fansekar, Intelligence Officer of the Narcotics Control Bureau, recorded statement of appellant/accused no.1 Jayram Wadhwa. Statement of accused no.2 Nasirali Khan came to be recorded by Sanjay Poojari. Samples were sent to the Forensic Laboratory for chemical analysis thereof through PW7 Narayan Panigrahi. Chemical analysis of the samples came to be conducted by PW2 Bijendra Kumar, Assistant Chemical Analyser. After completion of investigation, the complaint came to be lodged against

accused persons by PW3 Anil Kodnani, Investigating Officer of the Narcotics Control Bureau. Accordingly, NDPS Case No.215 of 2007 came to be registered on taking cognizance of alleged offences.

- (c) The Charge came to be framed against the appellants/accused persons as well as the co-accused and the same was explained to them. They abjured their guilt and claimed trial.
- (d) In order to bring home the guilt to the accused persons, the prosecuting agency has examined in all twelve witnesses. PW1 Chandrakant Kedare is the Intelligence Officer of the Narcotics Control Bureau, who had received the information about the conspiracy, transport and possession of the narcotic drugs and he had prepared search authorization, upon being authorized by the Zonal Director. Assistant Chemical Analyser Bijendra Kumar is examined as PW2 and Exhibits 21 to 23 are the test reports. Complainant Anil

Kodnani, Intelligence Officer of the Narcotics Control Bureau is examined as PW3. PW4 Sanjay Sinha, PW5 Shrikant Fansekar, PW6 Variyambat Jayprakash, PW9 Ashish Mangaonkar and PW12 Sanjay Poojari are officers of the Narcotics Control Bureau, who were present during search and seizure of the contraband. As stated earlier, PW7 Narayan Panigrahi is the carrier of the samples and he delivered the samples to the Central Forensic Science Laboratory, Hyderabad. PW8 Muzaffar Sofi had given the four wheeler vehicle of Tavera brand on rent to accused no.2 Nasirali Khan. PW10 Sandeep Joil and PW11 Rajesh Motwani are the panch witnesses who were summoned by the Narcotics Control Bureau for the purpose of effecting raid, search and seizure. Both these witnesses failed to support the case of prosecution.

- (e) The defence of the appellants/accused persons as well as the co-accused was that of total denial. However, they did not enter in defence.

- (f) The learned Special Judge, after examining the accused persons under Section 313 of the Code of Criminal Procedure and after hearing the learned advocates, by the impugned judgment and order, came to the conclusion that the prosecution has proved that all accused persons entered into a conspiracy to commit the offence punishable under the NDPS Act and in execution of the ultimate goal of that conspiracy, accused no.2 Nasirali Khan along with appellant/accused no.3 Shakeel Khan @ Papu Pager transported 20 kgms of *hashish/charas* interstate and they were found in possession of the said contraband in the premises of Nutan Nagar Society, Bandra. The learned Special Judge further held that, in pursuant to the conspiracy entered into by the accused persons, appellant/accused no.1 Jayram Wadhwa @ Kara was found in possession of 40 kgms of *hashish/charas* stored in the cupboard of his flat. Accordingly, accused persons are convicted of offences punishable under Sections 8(c) read with 20(b)(ii)(c) and under Section 29 of the NDPS Act.

They were accordingly sentenced as indicated in the opening paragraph of this judgment.

4 I have heard Shri Goswami, the learned advocate appearing for appellant/accused no.1 Jayram Wadhwa as well as Shri Ayaz Khan, the learned advocate appearing for appellant/accused no.3 Shakeel Khan @ Papu Pager at sufficient length of time. The learned advocates appearing for both these appellants/accused persons, considering the material placed by the prosecution, have not disputed conviction of the appellants/accused persons recorded by the learned trial court for offences held to have been proved against them. However, both the learned advocates disputed the sentence in default by pointing out various aspects including the fact that the appellants/accused persons are suffering from penury and they are first time offenders. The learned advocates argued that both the appellants/accused persons are behind bars right from 8th July 2007 and they have already completed substantive sentence imposed on both of them. They are undergoing default sentence.

The learned advocate for appellant/accused no.1 Jayram Wadhwa further argued that appellant/accused no.1 Jayram Wadhwa, while lodged in the prison, has recently suffered heart attack, and his condition is pitiable. The learned advocates for the appellants/accused persons further argued that it is trite that the default sentence cannot be harsh. The same is required to be imposed, considering the financial condition of the accused, and as in the case in hand, the default sentence is for 1 year on each count, because of inability of the appellants/accused persons to pay the fine, serious prejudice is caused to them as well as their family members. Reliance is placed by the learned advocates appearing for the appellants/accused persons on the judgment of the Honourable Apex Court in the matter of Shahejadhkan Mahebubkhan Pathan vs. State of Gujarat¹ to buttress this contention. The learned advocates, therefore, prayed for modifying the default sentence, to the sentence already undergone by both the appellants/accused persons, as they have undergone total sentence of more than 10 years and 7 months.

¹ 2013 (1) SCC 570

5 I have also heard Shri Vengaonkar, the learned advocate appearing for the prosecuting agency. He argued that the prosecution has proved guilt of the appellants/accused persons beyond all reasonable doubts and considering the nature of offence, the appellants/accused persons deserve no leniency. In submission of Shri Venegaonkar, the learned advocate for the prosecuting agency, default sentence of 1 year on each count is perfectly justifiable, and as such, the same is not required to be interfered.

6 I have carefully considered the rival submissions and also perused the Record and Proceedings including deposition of witnesses and documentary evidence produced on record.

ADJOURNED AS COURT TIME IS OVER
RESUMED ON 8th FEBRUARY 2018 AT 1.30 p.m.

According to the prosecution case, under conspiracy, the accused persons were indulged in interstate transport of drug *hashish* /*charas* and possession thereof in commercial quantity. In the wake of material produced on record by the prosecution supporting its case, the learned advocates appearing for

appellant/accused no.1 Jayram Wadhwa and appellant/accused no.3 Shakeel Khan have not disputed conviction of the appellants/accused persons for the offence punishable under Section 29 as well as under Sections 8(c) read with 20(b)(ii)(c) of NDPS Act. However, still, this being the first appeal, let us scrutinize the evidence in order to ascertain whether the conviction of the appellants/accused persons for the offences alleged against them is justifiable.

7 Evidence of PW1 Chandrakant Kedare, Intelligence Officer, reflects that, on 7th July 2007, he received information about transport, possession and delivery of *hashish/charas* in substantial quantity by the accused persons and location of the spot was also brought to his knowledge, which was at Nutan Nagar Society of Bandra. As seen from evidence of PW1 Chandrakant Kedare, Intelligence Officer, he transcribed the said information and submitted the same to the Zonal Director, who in turn had directed him to prepare search authorization in the name of PW3 Anil Kodnani, Intelligence Officer. This witness has proved

the information at Exhibit 16 and search authorization at Exhibit 17.

8 It is seen from evidence of PW3 Anil Kodnani, Intelligence Officer, that on 7th July 2007, PW1 Chandrakant Kedare, Intelligence Officer, had given him intelligence note and informed him about directions of the Zonal Director. This witness was supplied with search authorization signed by the Zonal Director, as seen from his evidence.

9 PW3 Anil Kodnani, Intelligence Officer, then called his fellow officers and made them aware about the information, in order to take up the steps regarding search and seizure. This fact is recorded in evidence of PW5 Shrikant Fansekar, Intelligence Officer, and PW12 Sanjay Poojari, Intelligence Officer.

10 The prosecution has relied on evidence of PW3 Anil Kodnani in respect of the search and seizure of the contraband i.e. *hashish/charas* from the accused persons and according to the

prosecution case, evidence of this witness is further corroborated by evidence of other witnesses including PW4 Sanjay Sinha, PW5 Shrikant Fansekar, PW6 Variyambat Jayprakash, PW9 Ashish Mangaonkar and PW12 Sanjay Poojari. It is seen from evidence of PW3 Anil Kodnani, Intelligence Officer, that, armed with search kit and drug testing kit, along with his fellow officers, he reached at second gate of Nutan Nagar Society, at about 9.30 p.m. of 7th July 2007. Two panch witnesses, namely, PW10 Sandeep Joil and PW11 Rajesh Motwani were summoned and they were made known purpose of summoning them.

11 As seen from evidence of PW3 Anil Kodnani, at about 10.30 p.m. of 7th July 2007, a Tavera four wheeler vehicle bearing registration no.MH-43-N-4631 had reached the second gate of Nutan Nagar Society and halted there. It was being driven by appellant/accused no.3 Shakeel Khan with a co-passenger Nasirali Khan - accused no.2. Within a short time, appellant/accused no.1 Jayram Wadhwa approached the inmates of that vehicle and then all of them were surrounded by the search team of the Narcotics

Control Bureau. Then, accused no.2 Nasirali Khan handed over a zipper bag containing 20 kgs. of *hashish/charas*. Thereafter, PW3 Anil Kodnani, his fellow officers and the accused persons went to the flat of appellant/accused no.1 Jayram Wadhwa. There, the contents of the zipper bag handed over by accused no.2 Nasirali Khan were tested by the field testing kit and found to be *hashish/charas* weighing 20 kgs. Two samples each of 24 gms were drawn, packed, sealed and labelled. Rest of the muddemal was also packed, sealed and labelled.

12 As seen from evidence of PW3 Anil Kodnani, then the officers of the Narcotics Control Bureau informed that they went to take search of the flat of appellant/accused no.1 Jayram Wadhwa. Accompanied by panch no.2 and officers of the Narcotics Control Bureau, appellant/accused no.1 Jayram Wadhwa went to the bedroom of the flat and took out 11 polythene carry bags and handed over the same to PW3 Anil Kodnani. Substance in those carry bags came to be tested by the field testing kit and found to be *hashish*. Again two samples each

weighing 24 gms were drawn from the contents of those 11 carry bags weighing 40 kgs. The samples were packed, sealed and labelled, so also the rest of the muddemal. Other formalities were then undertaken.

13 Evidence of PW3 Anil Kodnani is gaining corroboration from evidence of PW4 Sanjay Sinha, PW5 Shrikant Fansekar and PW6 Variyambat Jayprakash, who are Intelligence Officers of the Narcotics Control Bureau, who were accompanying PW3 Anil Kodnani. PW9 Ashish Mangaonkar has also spoken about the events that took place during search and seizure, so also PW12 Sanjay Poojari, Intelligence Officer.

14 Evidence on record shows that the samples taken from seized contraband were forwarded to the office of the Chemical Analyser through PW7 Narayan Panigrahi. Evidence of PW2 Bijendra Kumar, Assistant Chemical Analyser, shows the tests conducted by him while examining the samples forwarded by the Narcotics Control Bureau and the result thereof. Evidence of PW2

Bijendra Kumar shows that the samples were of Tetra Hydro Cannabinol i.e. *hashish/charas*. Evidence of this Chemical Analyser is backed by the data regarding his examination as well as finding in arriving at the said conclusion, reflected from the contemporaneous documents at Exhibits 21 to 23A.

15 It is also seen that, after search and seizure of contraband, statement of appellant/accused no.1 Jayram Wadhwa came to be recorded by PW5 Shrikant Fansekar, as deposed by this witness. PW4 Sanjay Sinha, Intelligence Officer, has deposed about recording statement of appellant/accused no.3 Shakeel Khan.

16 There is no evidence on record to infer that Narcotics Control Bureau has no right to lodge complaint in respect of the offences punishable under the NDPS Act. Similarly, evidence of PW1 Chandrakant Kedare, Intelligence Officer, coupled with evidence of PW3 Anil Kodnani, sufficiently demonstrates substantial compliance of provisions of Section 42 of the NDPS

Act. The information received by PW1 Chandrakant Kedare, Intelligence Officer, as seen from his deposition, was transcribed by him and was placed before the Zonal Director, who signed the same and further directed for issuing search authorization in the name of PW3 Anil Kodnani. The necessary documentary evidence is also placed on record by the prosecution on this aspect, and as such, it is not possible to conclude that the conviction is vitiated due to non-compliance of Section 42. Even from the evidence of prosecution witnesses, it is seen that the contraband was not seized from the vehicle after search thereof.

17 In the light of these observations, it is found that the conviction of the appellants/accused persons for offences punishable under Sections 8(c) read with 20(b)(ii)(c) as well as Section 29 of the NDPS Act is perfectly justifiable.

18 Now let us examine whether the learned trial court has imposed proper substantive sentence as well the default sentence on the appellants/accused persons. The learned trial court has

imposed sentence of 10 years rigorous imprisonment on the appellant/accused for offences punishable under Section 8(c) read with 20(b)(ii)(c) of the NDPS Act and sentence of similar term is separately imposed for the offence punishable under Section 29 of the NDPS Act. Similarly, on both counts, the learned trial court has imposed fine of Rs.1 lakh each on both the appellants/accused persons apart from the default sentence of 1 year each, on both counts. Undisputedly, both the appellants/accused persons were arrested on 8th July 2007. They have already undergone the entire substantive sentence of 10 years as the impugned judgment and order directs that the substantive sentences shall run concurrently. Substantive sentence imposed on the appellants/accused persons is the minimum sentence which can be imposed in such offences, and as such, I do not see any illegality or impropriety in imposing sentence of 10 years rigorous imprisonment on both counts, separately.

19 The learned advocates appearing for both the appellants/accused persons seriously challenged the default

sentence imposed on both the appellants/accused persons. In default of payment of fine of Rs.1 lakh on each count, the learned trial court had directed them to undergo simple imprisonment for 1 year on each default. This, according to the learned advocates appearing for the appellants/accused persons, is very harsh sentence, and in their submission, the learned trial court ought to have kept due regard to the pecuniary position of the appellants/accused persons to pay fine. In addition, it is further argued that both the appellants/accused persons are first time offenders having no criminal antecedents and they have already undergone the substantive sentence imposed upon them and in addition they have also undergone default sentence of more than 7 months, as they are unable to pay fine imposed upon them.

20 In the matter of **Shahejadjkhan (supra)**, the Honourable Apex Court had brought down the substantive sentence of rigorous imprisonment for the period of 15 years to 10 years and default sentence of 3 years to 6 months, in identical situation with similar offences punishable under the NDPS Act.

The Honourable Apex Court in the said matter has considered its earlier judgments in the matter of Shantilal vs. State of M.P.² as well as Adamji Umar Dalal vs. State of Bombay³. In the matter of Shantilal (supra) it is held thus, in paragraphs 31 and 32 by the Honourable Apex Court :

“31.....The term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision or in other appropriate judicial proceedings or otherwise. A term of imprisonment ordered in default of payment of fine stands on a different footing. A person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. He, therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount. It is, therefore, not only the power, but the duty of the court to keep in view the nature of offence, circumstances under which it was committed, the

2 (2007) 11 SCC 243

3 AIR 1952 SC 14

position of the offender and other relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine.”

32 A general principle of law reflected in [Sections 63](#) to [70](#), [IPC](#) is that an amount of fine should not be harsh or excessive. The makers of [IPC](#) were conscious of this problem. The Authors of the Code, therefore, observed;

“Death, imprisonment, transportation, banishment, solitude, compelled labour, are not, indeed, equally disagreeable to all men. But they are so disagreeable to all men that the legislature, in assigning these punishments to offences, may safely neglect the differences produced by temper and situation. With fine, the case is different. In imposing a fine, it is always necessary to have as much regard to the pecuniary circumstances of the offender as to the character and magnitude of the offence.’ (Ratanlal & Dhirajlal's Law of Crimes, 26th Edn., 2007, p. 221)

The authors further stated : (Ratanlal & Dhirajlal at pp.226-227)

'.....when a fine has been imposed, what measures shall be adopted in default of payment? And here two modes of proceeding, with both of which we were familiar, naturally occurred to us. The offender may be imprisoned till the fine is paid, or he may be imprisoned for a certain term, such imprisonment being considered as standing in place of the fine. In the former case, the imprisonment is used in order to compel him to part with his money; in the latter case, the imprisonment is a punishment substituted for another punishment. Both modes of proceeding appear to us to be open to strong objections. To keep an offender in imprisonment till his fine is paid is, if the fine be beyond his means, to keep him in imprisonment all his life; and it is impossible for the best Judge to be certain that he may not sometimes impose a fine which shall be beyond the means of an offender. Nothing could make such a system tolerable except the constant interference of some authority empowered to remit sentences; and such constant interference we should consider as in itself an evil. On the other hand, to sentence an offender to fine and to a certain

fixed term of imprisonment in default of payment, and then to leave it to himself to determine whether he will part with his money or lie in goal, appears to us to be a very objectionable course....

.....We propose that, at the time of imposing a fine, the Court shall also fix a certain term of imprisonment which the offender shall undergo in default of payment. In fixing this term, the Court will in no case be suffered to exceed a certain maximum, which will vary according to the nature of the offence. If the offence be one which is punishable with imprisonment as well as fine, the term of imprisonment in default of payment will not exceed one-fourth of the longest term of imprisonment fixed by [the Code](#) for the offence. If the offence be one which by [the Code](#) is punishable only with fine, the term of imprisonment for default of payment will in no case exceed seven days.”

21 In the matter of **Palaniappa Gounder vs. State of T.N.**⁴, the Honourable Apex Court has considered the issue of

4 (1977) 2 SCC 634

sentence in default of payment of fine and has held that legitimacy is not to be confused with propriety and the fact that the court possesses a certain power does not mean that it must always exercise it. It is further held that though there is power to combine a sentence of death with a sentence of fine, that power is to be sparingly exercised because the sentence of death is an extreme penalty to impose and adding to that grave penalty a sentence of fine is hardly calculated to serve any social purpose. The Honourable Apex Court also observed that, infact, the common trend of sentencing is that even a sentence of life imprisonment is seldom combined with a heavy sentence of fine. These observations were relied by the Honourable Apex Court while deciding the case of **Shahejadjkhan (supra)** in which the substantive sentence of imprisonment was brought down from 15 years to 10 years and that of default sentence from 3 years to 6 months. Relevant observations of the Honourable Apex Court in the matter of **Shahejadjkhan (supra)** can be found in paragraphs 12, 13 and 15, which read thus :

“12 It is clear and reiterated that the term of

imprisonment in default of payment of fine is not a sentence. To put it clear, it is a penalty which a person incurs on account of non-payment of fine. On the other hand, if sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in the judicial proceedings. However, the imprisonment ordered in default of payment of fine stands on a different footing. When such default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. Accordingly, he can always avoid to undergo imprisonment in default of payment of fine by paying such an amount. In such circumstance, we are of the view that it is the duty of the Court to keep in view the nature of offence, circumstances in which it was committed, the position of the offender and other relevant considerations such as pecuniary circumstances of the accused person as to character and magnitude of the offence before ordering the offender to suffer imprisonment in default of payment of fine. The provisions of Sections 63 to 70 of IPC make it clear that an amount of fine should not be harsh or excessive. We also reiterate that where a substantial term of imprisonment is

inflicted, an excessive fine should not be imposed except in exceptional cases.”

“13 While taking note of the above principles, we are conscious of the fact that the present case is under the NDPS Act and for certain offences, the Statute has provided minimum sentence as well as minimum fine amount. In the earlier part of our judgment, taking note of the fact that the appellants being the first time offenders, we imposed the minimum sentence, i.e., 10 years instead of 15 years as ordered by the trial Court. In other words, the appellants have been ordered to undergo substantive sentence of RI for 10 years which is minimum.”

“15 It is clear that clause (b) of sub-section (1) of Section 30 of the Code authorizes the Court to award imprisonment in default of fine up to 1/4th of the term of imprisonment which the Court is competent to inflict as punishment for the offence. However, considering the circumstances placed before us on behalf of the appellants-accused, viz., they are very poor and have to maintain their family, it was their first offence and if they fail to pay the

amount of fine as per the order of the Additional Sessions Judge, they have to remain in jail for a period of 3 years in addition to the period of substantive sentence because of their inability to pay the fine, we are of the view that serious prejudice will be caused not only to them but also to their family members who are innocent. We are, therefore, of the view that ends of justice would be met if we order that in default of payment of fine of Rs.1.5 lakhs, the appellants shall undergo RI for 6 months instead of 3 years as ordered by the Additional Sessions Judge and confirmed by the High Court.”

22 In the wake of this law laid down by the Honourable Apex Court as well as in view of the fact that both appellants/accused persons are first time offenders having no criminal antecedents and that they have already undergone the entire substantive sentence of 10 years rigorous imprisonment, I am of the considered opinion that default sentence of simple imprisonment for 1 year on both counts, in default of payment of fine of Rs.1 lakh on both counts, is harsh and excessive. In the law laid down by the Honourable Apex Court in the matter of

Shahejadxhan (supra), the same is brought down to 3 months and 15 days on each default for payment of fine of Rs.1 lakh each, imposed for the offence punishable under Section 8(c) read with 20(b)(ii)(c) as well as under Section 29 of the NDPS Act. In every probability, the appellants/accused persons must have undergone this default sentence by now, and therefore, they shall be set at liberty, unless they are required in any other offence. If the appellants/accused persons have not completed the modified period of sentence, they shall be released after the period indicated hereinabove is over.

23 Therefore, the appeals are partly allowed, by maintaining the conviction as well as sentence imposed on both the appellants/accused persons for offences punishable under Sections 8(c) read with 20(b)(ii)(c) as well as under Section 29 of the NDPS Act, by modifying the default sentence, by reducing the same as indicated in the above paragraph.

24 The appeals are accordingly disposed of.

25 In view of disposal of appeal, all pending criminal applications stand disposed of.

26 Parties to act on authenticated copy of this judgment.

(A. M. BADAR, J.)