

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

**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.43 OF 2017  
WITH  
CRIMINAL APPLICATION NO.1014 OF 2017  
IN  
CRIMINAL APPEAL NO.43 OF 2017**

**KALLUMAL JAIDMAL KUKAREJA @ )  
KALLUMAMA )...APPELLANT**

**V/s.**

**THE STATE OF MAHARASHTRA )...RESPONDENT**

Mr.Taraq Sayyed a/w. Mr.S.S.Bhandary, Advocate for the Appellant.

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

**CORAM : A. M. BADAR, J.**

**RESERVED ON : 6<sup>th</sup> MARCH 2018**

**PRONOUNCED ON : 3<sup>rd</sup> MAY 2018**

**JUDGMENT :**

1 By this appeal, the appellant/accused is challenging the judgment and order dated 23<sup>rd</sup> November 2016 passed by the learned NDPS Special Judge, City Civil and Sessions Court, Greater Bombay, Mumbai, in NDPS Case No.95 of 2008, thereby

convicting the appellant/accused of offence punishable under Sections 8(c) read with 20(b)(ii)(B) of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act for the sake of brevity) and sentencing him to suffer rigorous imprisonment for 10 years as well as to pay fine of Rs.1 lakh, and in default, to undergo further simple imprisonment for 3 months.

2 Facts, in nutshell, leading to the prosecution of the appellant/accused can be summarized thus :

- (a) PW7 Manisha Shirke, Woman Police Sub-Inspector, was attached to Azad Maidan Unit of Anti Narcotic Cell and on 28<sup>th</sup> March 2008, she was present on duty. At about 9.00 a.m. of that day, she received a secret information from her Informer. The information was to the effect that Ashok Sanglani and Deepak Makadwala are dealing in charas, and after arrest of Ashok Sanglani, Deepak Makadwala is looking after the business. The Informer further reported that his agent Kallumal Kukareja @ Kallumama (the

appellant/accused herein) is going to come at the Bus Stop of BEST Bus Route No.154 near Byculla Railway Station for selling charas. Description of the appellant/accused was also given by the Informer to PW7 Manisha Shirke, Woman Police Sub-Inspector.

- (b) PW7 Manisha Shirke, Woman Police Sub-Inspector, then immediately entered the secret information regarding possession of charas in the Station Diary (Exhibit 38) of the Anti Narcotic Cell, Azad Maidan Unit, Mumbai, as entry no.3 on 28<sup>th</sup> March 2008 itself. She shared that information with PW5 Vilas Chavan, Police Inspector, Anti Narcotic Cell, and telephonically informed Assistant Commissioner of Police Shri Koyande and Deputy Commissioner of Police Shri Dilip Shrirao regarding the information received by her. The Deputy Commissioner of Police, Anti Narcotic Cell, Shri Dilip Shrirao gave directions to conduct the raid under leadership of PW5 Vilas Chavan, Police Inspector.

- (c) PW7 Manisha Shirke, Woman Police Sub-Inspector, took the print outs of the Station Diary entry no.3 (Exhibit 38) and along with covering letter (Exhibit 54) had send it to the Deputy Commissioner of Police, Anti Narcotic Cell, as well as the Assistant Commissioner of Police, Anti Narcotic Cell, Mumbai. She also submitted the print out of the Station Diary entry no.3 (Exhibit 38) to PW5 Vilas Chavan, Police Inspector.
- (d) PW5 Vilas Chavan, Police Inspector, called his staff members including PW3 Shivdas Waghchoure, Police Naik and PW7 Manisha Shirke, Woman Police Sub-Inspector. Panch witnesses were summoned. Articles necessary for effecting raid including brass seal were collected and taken in possession. Pre-trap panchnama Exhibit 40 came to be prepared in presence of panch witnesses, on completion of necessary formalities including checking the person of members of the raiding team, panch witnesses, so also checking the vehicle in order to rule out the possibility of planting the contraband.

- (e) After making preparations for raid, the police team under leadership of PW5 Vilas Chavan, Police Inspector, accompanied by panch witnesses, left for the spot of the incident after taking necessary entry in the Station Diary. The vehicle was parked at Khatau Mill premises and members of the team took their position at the spot of the incident, which was Bus Stop of Best Bus Route No.154 near Byculla Railway Station. The appellant/accused arrived at that bus stop at about 12.40 p.m. of 28<sup>th</sup> March 2008. PW5 Vilas Chavan, Police Inspector, ascertained his identity from the Informer. The police team and panchas then surrounded the appellant/accused. After disclosing their identity, the appellant/accused came to be apprehended by members of the police team. The appellant/accused was appraised of his right of personal search before the Magistrate or the Gazetted Officer as envisaged by Section 50 of the NDPS Act, by PW5 Vilas Chavan, Police Inspector. The communication to that effect was also given to the appellant/accused. He, however, declined to exercise the

said right. Thereafter, personal search of the appellant/accused was conducted in presence of panch witnesses. During that search, narcotic drug – charas weighing 110 grams was found in the right pant pocket of the appellant/accused and it was kept in a transparent plastic pouch. Small portion thereof was tested on the field testing kit and the test results were positive for charas.

- (f) Thereafter, sample of 10 grams was separated from the bulk quantity. The sample as well as the bulk were then packed, sealed and seized. Articles found on person of the appellant/accused were also separately packed, sealed and seized. Accordingly, post-trap panchnama Exhibit 40A came to be prepared.
- (g) The appellant/accused, along with seized articles, was then taken to the office of the Anti Narcotic Cell, Cuffe Parade. PW3 Shivdas Waghchoure, Police Naik, then lodged the First Information Report (FIR) Exhibit 26 which resulted in

registration of offences punishable under Sections 20(B) and 29 of the NDPS Act against the appellant/accused. Seized muddemal was then handed over to store-keeper PW2 Vijay Nimbalkar. During investigation, seized sample packet was sent for chemical analysis at the Regional Forensic Laboratory, Kalina, Mumbai. The sample was tested positive for charas on chemical analysis. On completion of investigation, PW7 Manisha Shirke, Woman Police Sub-Inspector, filed charge-sheet against the appellant/accused.

- (h) Charge for offences punishable under Sections 8(c) read with 20B and 29 of the NDPS Act was framed and explained to the appellant/accused. He abjured guilt and claimed trial.
- (i) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all seven witnesses. Carrier Constable Santosh Patil is examined as PW1. Exhibit 13 is the Request Letter by PW7 Manisha Shirke, Woman Police Sub-Inspector, addressed to the Senior Police Inspector for

handing over the muddemal whereas Exhibits 14 and 14A are letters by the Senior Police Inspector, Anti Narcotic Cell, addressed to the Chemical Analyser for forwarding sample packet for chemical analysis. Store-keeper of the Anti Narcotic Cell, Vijay Nimbalkar, is examined as PW2. Exhibit 16 is the letter dated 28<sup>th</sup> March 2008 regarding accepting the seized muddemal packets "A", "A1" and "A2" in Crime No.187 of 2008. Exhibit 17 is the endorsement of PW2 Vijay Nimbalkar on the Property Register regarding deposit of the property at Serial No.34 of 2008. Exhibit 17A is the extract of the Property Register. Exhibit 18 is the entry taken by PW7 Manisha Shirke, Woman Police Sub-Inspector, in Inward/Outward Register about depositing the property. Exhibit 22A is the entry in Inward /Outward Register regarding handing over the sample packet to PW1 Santosh Patil for submitting the same to the Forensic Laboratory for chemical analysis. First Informant Shivdas Waghchoure, Police Naik, is examined as PW3. Report lodged by him on 28<sup>th</sup> March 2008 which resulted in registration of Crime

No.187 of 2008 against the appellant/accused is at Exhibit 26. Assistant Chemical Analyser with the Regional Forensic Laboratory Sandeep Chetty is examined as PW4. Chain of custody form is at Exhibit 29. HPLC graph is at Exhibit 30. Data sheets are at Exhibits 31 and 32. Chemical Analyser's report is at Exhibit 28. Vilas Chavan, Police Inspector, who effected the raid is examined as PW5. Exhibit 38 is the certified copy of the Station Diary entry no.3 regarding receipt of secret information regarding possession of the contraband by the appellant/accused. Exhibit 40 is the pre-trap panchnama. Exhibit 41 is the letter given to the appellant/accused for appraising him of his right to get himself searched in presence of the Gazetted Officer or the Magistrate as per provisions of Section 50 of the NDPS Act. Exhibit 40A is the post-trap panchnama. Panch witness Prema Palanigauli is examined as PW6. However, she turned hostile to the prosecution. Investigating Officer Manisha Shirke, Woman Police Sub-Inspector, is examined as PW7. Exhibit 54 is the covering letter addressed by her to

the Deputy Superintendent of Police, Anti Narcotic Cell, the copy whereof was also endorsed to the Assistant Commissioner of Police, Anti Narcotic Cell, for forwarding the Station Diary entry no.3 (Exhibit 38), whereat secret information received by her was recorded. Exhibit 42 is the special report sent by her to the Deputy Commissioner of Police, Anti Narcotic Cell, Mumbai, on 28<sup>th</sup> March 2008, in terms of provisions of Section 57 of the NDPS Act.

- (j) Defence of the appellant/accused was that of total denial. He, however, did not enter in defence.
- (k) After hearing the parties, the learned trial court came to the conclusion that the appellant/accused was found to be in conscious possession of 110 grams of charas – a narcotic drug, and he, thereby, committed the offence punishable under Section 8(c) read with 20(b)(ii)(B) of the NDPS Act. The appellant/accused, however, was acquitted of the offence punishable under Section 29 of the said Act. He

came to be sentenced to suffer rigorous imprisonment for 10 years apart from direction to pay fine of Rs.1 lakh and in default, to undergo simple imprisonment for a period of 3 months, for the offence of possessing the narcotic drug in intermediate quantity i.e. 110 grams.

3           I have heard Shri Taraq Sayyed, the learned advocate appearing for the appellant/accused at sufficient length of time. He argued that in the case in hand, there is flagrant breach of provisions of Section 42(2) of the NDPS Act. According to the prosecution case, PW7 Manisha Shirke, Woman Police Sub-Inspector, had received the specific information regarding possession of charas by the appellant/accused and she has recorded that information in the Station diary. However, the original Station Diary was not produced before the court. Therefore, the certified copy thereof at Exhibit 38 cannot be read in evidence as the same constitutes secondary evidence. In this view of the matter, in submission of Shri Taraq Sayyed, the learned advocate for the appellant/accused, the prosecution has

failed to prove that the information which was taken down in writing, was transmitted by PW7 Manisha Shirke, Woman Police Sub-Inspector, to her immediate official superior within 72 hours of taking down such information. The search was made by the police officers upon the prior information, and therefore, compliance of Section 42(2) was mandatory. As the prosecution has failed to prove that the information taken down was transmitted to the immediate official superior of PW7 Manisha Shirke, Woman Police Sub-Inspector, the Charge fails. It is further argued that secondary evidence cannot be adduced without permission of the court by following due process, and therefore, the document at Exhibit 38 which is in the nature of secondary evidence, cannot be looked into for proving compliance of Section 42(2) of the NDPS Act.

4           The applicability of sub-section (2) of Section 42, in submission of the learned advocate Shri Taraq Sayyed for the appellant/accused, is not restricted to any building, conveyance or enclosed place. To buttress this submission, he placed reliance on

the following authorities :

- i) State of Punjab vs. Balbir Singh  
AIR 1994 SC 1872
- ii) Abdul Rashid Ibrahim Mansuri vs. State of Gujarat  
AIR 2000 SC 821
- iii) Beckodan Abdul Rahiman vs. State of Kerala  
AIR 2002 SC 1810
- iv) Koluttumottil Razak vs. State of Kerala  
2000 (4) SCC 465
- v) Karnail Singh vs. State of Haryana  
2010 ALL SCR 968
- vi) Directorate of Revenue & Anr. vs. Mohammed Nisar  
Holia  
2008 ALL SCR 602
- vii) Kishan Chand vs. State of Haryana  
AIR 2013 SC 357
- viii) Sukhdev Singh vs. State of Haryana  
AIR 2013 SC 953
- ix) R.V.E.Venkatachala Gounder vs. Arulmigu  
Viswesaraswami and V.P.Temple  
AIR 2003 SC 4548
- x) Criminal Appeal No.356 of 1991 decided by this court  
on 16<sup>th</sup> September 2011  
The State of Maharashtra vs. Ramesh Ramchandra  
Naik

5           The learned advocate for the appellant/accused further argued that in the case in hand, neither PW3 Shivdas Waghchoure, Police Naik, nor PW5 Vilas Chavan, Police Inspector, has identified the bulk quantity or the sample. Infact, during the course of recording their evidence, the bulk was not even produced before the court. Though the bulk was produced when PW7 Manisha Shirke, Woman Police Sub-Inspector, was under examination, only sample was shown to her, but the bulk was not shown to her. With this, it was argued that as the bulk was not identified by the prosecution witnesses, the Charge fails. The alleged contraband was required to be shown to the witnesses in order to enable them to depose that the same has been recovered or seized from the appellant/accused, and in absence of such linking evidence, the benefit goes to the appellant/accused. In support of this contention, reliance is placed on following authorities :

- i) Jitendra and Another vs. State of Madhya Pradesh  
(2004) 10 Supreme Court Cases 562
- ii) Milan Sarcanski vs. The State through its Special P.P.  
1997 ALL MR (Cri) 496

- iii) Gorakh Nath Prasad vs. State of Bihar  
2018 ALL SCR (Cri) 237
- iv) Criminal Appeal No.2150 of 2011 decided by the  
Honourable Supreme Court on 1<sup>st</sup> February 2018  
Union of India vs. Leen Martin & Anr.
- v) Criminal Appeal No.708 of 2010 decided by this court  
on 29<sup>th</sup> September 2017  
Premsingh Hijarilal Jaiswal vs. The State of  
Maharashtra
- vi) Madhukar Swami Pallerala vs. State of Maharashtra  
2011 ALL MR (Cri) 1585

6           As against this, the learned APP supported the impugned judgment and order of conviction and resultant sentence by contending that the Station diary entry at Exhibit 38 is the public document and the certified copy thereof can be produced in evidence. Therefore, even though provisions of Section 42(2) are not applicable to the case in hand, still the prosecution has established compliance of Section 42(2) of the NDPS Act by proving the Station Diary entry at Exhibit 38, which was transmitted with covering letter Exhibit 54 to the immediate official superior of PW7 Manisha Shirke, Woman Police Sub-

Inspector. The learned APP further argued that sample was duly identified by the Investigating Officer and the bulk was before the learned trial court. Hence, no capital on this aspect can be made by the appellant/accused.

7           I have carefully considered the rival submissions and also perused the Record and Proceedings including oral as well as documentary evidence.

8           The appellant/accused is convicted for offences punishable under Sections 20(b)(ii)(B) read with 8(c) of the NDPS Act. Section 8 of the said Act deals with prohibition of certain operations. As per provisions of this Section, a person cannot possess any narcotic drug or psychotropic substance except for medical or scientific purpose and in the manner and to the extent provided by the Act, the Rules framed thereunder or Orders made thereunder. Possession of the narcotic drug is made punishable under Section 20 of the said Act. The offence alleged against the appellant/accused, in this case, is possession of 110

grams of charas i.e. a narcotic drug. Quantum of punishment upon proof of conscious possession of the narcotic drug or psychotropic substance depends on the quantity possessed by the accused. Section 2 (viia) and (xxiia) of the NDPS Act defines commercial quantity and small quantity respectively in relation to narcotic drugs and psychotropic substances. Such quantity is required to be specified by the Central Government by Notification in the Official Gazette. In the case in hand, alleged contravention is possession of 110 grams of charas which is a narcotic drug. The Notification bearing No.S.O.1055(E) dated 19<sup>th</sup> October 2001 specifies small quantity in relation to charas as 100 grams and commercial quantity in respect of charas as 1 kilogram. Thus, the contravention alleged in the instant case relates to intermediate quantity. If an accused is found in conscious possession of such quantity i.e. the quantity lesser than commercial quantity but greater than small quantity, then he is liable for rigorous imprisonment for a term which may extend to 10 years and with fine which may extend to Rupees One lakh. So far as conscious possession of charas in small quantity i.e. 100 grams or below that

is concerned, the accused is made liable for punishment of rigorous imprisonment for a term which may extend to 6 months apart from fine which may extend to 10,000/- rupees, or with both, so far as the case in hand is concerned, as it relates to the offence allegedly committed in the year 2008 i.e. prior to bringing in force the Amending Act 16 of 2014 with effect from 1<sup>st</sup> May 2014.

9           Now let us examine whether the prosecution has proved that the appellant/accused was found to be in conscious possession of the narcotic drug charas weighing 110 grams. According to the prosecution case, it was PW7 Manisha Shirke, Woman Police Sub-Inspector, who had received information about possession of the contraband by the appellant/accused on 28<sup>th</sup> March 2008. As per version of PW7 Manisha Shirke, Woman Police Sub-Inspector, on 28<sup>th</sup> March 2008, at about 9.00 a.m., she received secret information from her Informer, which was to the effect that, agent of one Deepak Makadwala is going to come at about 12.30 p.m. to 1.00 p.m. at BEST Bus Stop of Bus Route

No.154 near Byculla Railway Station, and therefore, she took the entry of this fact in the Station diary of the Anti Narcotic Cell. She shared that information with PW5 Vilas Chavan, Police Inspector, and telephonically informed about the said information to Assistant Commissioner of Police, Shri Koyande, and Deputy Commissioner of Police Shri Dilip Shrirao. She received directions from the Deputy Commissioner of Police Shri Dilip Shrirao to conduct the raid under the leadership of PW5 Vilas Chavan, Police Inspector. PW7 Manisha Shirke, Woman Police Sub-Inspector, further testified that she took out print outs of the Station diary entry containing information reduced in writing by her and along with covering letter Exhibit 54 she had sent copies of Station Diary entry to the Shri Dilip Shrirao, Deputy Commissioner of Police, Anti Narcotic Cell, Mumbai, as well as Shri Koyande, Assistant Commissioner of Police, Anti Narcotic Cell, Mumbai. The witness had given one copy of the Station Diary entry no.3 (Exhibit 38) to PW5 Vilas Chavan, Police Inspector, of Anti Narcotic Cell.

10           Certified copy of the Station Diary entry containing the information reduced into writing by PW7 Manisha Shirke, Woman Police Sub-Inspector, is at Exhibit 38. The covering letter by which PW7 Manisha Shirke, Woman Police Sub-Inspector, had forwarded the Station Diary entry at Exhibit 38, is at Exhibit 54. The Station Diary entry at Exhibit 38 is certified copy of the relevant entry no.3, as certified by PW7 Manisha Shirke, Woman Police Sub-Inspector. This Station Diary entry at serial no.3, recorded at 9.20 a.m. of 28<sup>th</sup> March 2008 is to the effect that PW7 Manisha Shirke, Woman Police Sub-Inspector, has received information from her secret Informer to the effect that Ashok Sanglani and Deepak Makadwala are selling charas in partnership through their agents at Mumbai and Kallumal Kukareja @ Kallumama, aged about 55 to 60 years, is coming to BEST Bus Stop of Bus Route No.154 near Byculla Railway Station for selling charas at 12.30 p.m. to 1.00 p.m. of 28<sup>th</sup> March 2008. This Station Diary entry at Exhibit 38 bears signatures and stamps of the Deputy Commissioner of Police, Anti Narcotic Cell, Mumbai, and Assistant Commissioner of

Police, Anti Narcotic Cell, Mumbai, and that of the Senior Police Inspector of Azad Maidan Unit of Anti Narcotic Cell, Mumbai. The certified copy of the Station Diary entry no.3 at Exhibit 38 does contain an endorsement to the effect that copies thereof are transmitted to the Deputy Commissioner of Police, to the Assistant Commissioner of Police and to the Police Inspector of Anti Narcotic Cell, Mumbai. The forwarding letter at Exhibit 54 written and proved by PW7 Manisha Shirke, Woman Police Sub-Inspector, shows that she had received information regarding possession of charas from her secret Informer at about 9.00 a.m. of 28<sup>th</sup> March 2008, and she has taken entry thereof in writing in the Station Diary of Azad Maidan Unit. The letter at Exhibit 54 further shows that the certified copy of the Station Diary entry no.3 is being forwarded to the Deputy Commissioner of Police and Assistant Commissioner of Police, Anti Narcotic Cell, Mumbai.

11           In tune with evidence of PW7 Manisha Shirke, Woman Police Sub-Inspector, PW5 Vilas Chavan, Police Inspector, has deposed that PW7 Manisha Shirke, Woman Police Sub-Inspector,

had handed over the certified copy of the Station Diary entry no.3 (Exhibit 38) to him on 28<sup>th</sup> March 2008 itself and shared the information with him.

12           There is nothing in cross-examination of PW5 Vilas Chavan, Police Inspector or PW7 Manisha Shirke, Woman Police Sub-Inspector, to doubt their evidence regarding receipt of secret information, recording of that secret information at Station diary entry no.3 at about 9.20 a.m. of 28<sup>th</sup> March 2008 (Exhibit 38), and forwarding the certified copy of this Station Diary entry to the immediate official superiors such as PW5 Vilas Chavan, Police Inspector, the Deputy Commissioner of Police, Anti Narcotic Cell, Mumbai, and the Assistant Commissioner of Police, Anti Narcotic Cell, Mumbai. The certified true copy of Station Diary entry no.3 which is at Exhibit 38 contains acknowledgment of receipt thereof by the Deputy Commissioner of Police, Assistant Commissioner of Police as well as Senior Police Inspector of Anti Narcotic Cell, Mumbai. Thus, with this evidence the prosecution has proved the fact that secret information regarding possession of charas was

received by PW7 Manisha Shirke, Woman Police Sub-Inspector, on 28<sup>th</sup> March 2008. She recorded this secret information in the Station Diary of the Anti Narcotic Cell, Mumbai, at serial no.3 and then forwarded the certified copies of the Station Diary entry no.3 (Exhibit 38) to her immediate official superiors viz., Police Inspector, Assistant Commissioner of Police, and Deputy Commissioner of Police, Anti Narcotic Cell, Mumbai, on 28th March 2008 itself.

13           Now let us examine the prosecution evidence regarding preparations in respect of pre-trap events. For this purpose, evidence of PW3 Shivdas Waghchoure, Police Naik, PW5 Vilas Chavan, Police Inspector, and PW7 Manisha Shirke, Woman Police Sub-Inspector, is relevant. Their congruous evidence shows that after getting themselves acquainted with the secret information received by PW7 Manisha Shirke, Woman Police Sub-Inspector, through Police Constable Sonawane, one male and one female panch witnesses were summoned. PW7 Manisha Shirke, Woman Police Sub-Inspector, collected materials necessary for

effecting raid and seizure of contraband including brass seal by giving letter Exhibit 39. Panchas were informed about the secret information as well as the provisions of the NDPS Act. Evidence of these witnesses also shows precaution taken by effecting personal search of the police staff, panch witnesses as well as search of the vehicle used for effecting raid in order to eliminate the possibility of planting the contraband. These witnesses have spoken that then pre-trap panchnama (Exhibit 40) came to be prepared in presence of panch witnesses.

14            Nothing could be elicited from cross-examination of these three witnesses in order to discard their testimony regarding pre-trap preparations made by them for effecting raid and seizure of the contraband. Non-production of record in writing depicting calling of panch witnesses and telephonic communication with the Deputy Commissioner of Police and Assistant Commissioner of Police as well as their further directions, is not sufficient to dislodge the otherwise trustworthy evidence of all these three official witnesses. For proving a fact, proof of mathematical

accuracy is not required. Relevant documentary evidence is already tendered by the prosecution on the aspect of pre-trap preparations.

15 PW3 Shivdas Waghchoure, Police Naik, PW5 Vilas Chavan, Police Inspector, and PW7 Manisha Shirke, Woman Police Sub-Inspector, have congruously stated that after making preparation for search and seizure, by police vehicle, the police team accompanied by panch witnesses, then went to the spot of the incident. After parking the vehicle near Khatau Mills, they all went to the BEST Bus Stop near Byculla Railway Station. The police team was divided into two groups, each group having one panch witness. As per their version, at about 12.40 p.m., of 28<sup>th</sup> March 2008, a person described in the information came at the Bus Stop and was found waiting for somebody. Then the raiding team surrounded him at about 12.50 p.m. PW5 Vilas Chavan, Police Inspector, then introduced himself to that person, who told his name as Kallumal Kukareja alias Kallumama i.e. the appellant/accused. As per evidence of PW5 Vilas Chavan, Police

Inspector, the appellant/accused told him that he is educated up to 7<sup>th</sup> Standard. All these three witnesses have spoken about compliance of Section 50 of the NDPS Act by PW5 Vilas Chavan, Police Inspector. They have unanimously stated that PW5 Vilas Chavan, Police Inspector, had appraised the appellant/accused about his right to get himself searched in presence of a Magistrate or a Gazetted Officer and accordingly, the letter Exhibit 41 was given to him. The appellant/accused refused to exercise his right to get himself searched before a Magistrate or a Gazetted Officer, as stated by these prosecution witnesses, and therefore, his signature was taken on the letter. Then, as per version of these prosecution witnesses, personal search of appellant/accused was taken and from his right pant pocket a transparent plastic bag containing rectangular black substance came to be recovered. The appellant/accused told them that it is charas. These three prosecution witnesses in unison have stated in their evidence that then small portion thereof was tested on the field testing kit and results were found positive for charas. Therefore, a sample weighing 10 grams was drawn from the bulk quantity which was

found to be weighing 110 grams including the weight of the plastic pouch. The sample of 10 grams was then kept in another pouch, that pouch was stapled and it was kept in brown envelope which was then binded by thread and sealed by applying lac seal. The remaining quantity was kept in the same plastic bag in which it was found. That plastic bag was stapled and kept in brown envelope which was sealed and binded. The other articles such as cash, railway pass, identity card found on person of the appellant/accused, as stated by these witnesses, were kept in another packet and that packet was sealed. The prosecution witnesses have stated that the bulk was kept in the packet titled as "A". The packet "A1" was comprising of sample weighing 10 grams, whereas the packet "A2" was containing cash, railway pass and identity card found on the person of the appellant/accused. There is nothing on record to doubt this factual position brought on record through evidence of PW3 Shivdas Waghchoure, Police Naik, PW5 Vilas Chavan, Police Inspector, and PW7 Manisha Shirke, Woman Police Sub-Inspector. Evidence of these three witnesses is gaining corroboration from the contemporaneous

documentary evidence in the form of post trap panchnama Exhibit 40A prepared on the spot of the incident itself, which shows that charas weighing 110 grams was found in personal search of the appellant/accused, which was conducted after due compliance of the provisions of Section 50 of the NDPS Act by appraising the appellant/accused his right to get himself searched in presence of a Magistrate or a Gazetted Officer.

16 Evidence of PW3 Shivdas Waghchoure, Police Naik, is fully corroborated by the FIR Exhibit 26 lodged by him on 28<sup>th</sup> March 2008, which also shows the events which took place prior to and at the time of search and seizure of the contraband.

17 PW7 Manisha Shirke, Woman Police Sub-Inspector, has deposed about depositing the seized muddemal on 28<sup>th</sup> March 2008 itself in the storeroom of the Anti Narcotic Cell along with her letter Exhibit 16 and this evidence is gaining corroboration from evidence of store-keeper PW2 Vijay Nimbalkar. Relevant documentary evidence in respect of depositing the seized

muddemal in the storeroom of the Anti Narcotic Cell is also produced and proved by the prosecution. Exhibit 17A is the extract of the Property Register bearing Entry No.34 of 2008 which shows that sealed packets “A”, “A1” and “A2” were deposited in the storeroom of the Anti Narcotic Cell. Exhibit 18 is the entry taken by PW7 Manisha Shirke, Woman Police Sub-Inspector, in Inward/Outward Register about depositing of the seized muddemal property.

18           The sample packet “A1” containing 10 grams of charas was sent through PW1 Santosh Patil, Police Constable, to the Regional Forensic Laboratory, Kalina, Mumbai, by the prosecution. As deposed by PW1 Santosh Patil, he tendered letter Exhibit 13 to Store-keeper PW2 Vijay Nimbalkar for handing over the sealed packet containing the seized sample. Evidence of PW1 Santosh Patil further shows that accordingly, PW2 Vijay Nimbalkar then delivered the sealed packet of the sample to him. PW2 Vijay Nimbalkar has proved entry in Inward /Outward Register Exhibit 22A regarding handing over sealed sample packet “A1” to PW1

Santosh Patil. Evidence of carrier Constable PW1 Santosh Patil makes it clear that he had then handed over the sealed packet “A1” to the Forensic Science Laboratory, Kalina, along with the covering letter Exhibit 14. This witness has also proved the letter at Exhibit 14A which contains acknowledgment of the Forensic Science Laboratory regarding receipt of the sample packet in sealed condition. PW2 Vijay Nimbalkar had not weighed the property personally nor mentioned description of seal as well as time of depositing the property in the Property Register but all these aspects are irrelevant as the muddemal property was deposited on the day of which it was seized i.e. on 28<sup>th</sup> March 2008. Similarly, not mentioning the time of receiving and handing over the sample to the Forensic Science Laboratory by PW1 Santosh Patil is of no consequence because he has received the sealed sample on 29<sup>th</sup> March 2008 and the same was delivered on the very same day to the Forensic Science Laboratory. This evidence makes it clear that the seized muddemal was deposited with the store-keeper in the sealed condition on 28<sup>th</sup> March 2008 and the sealed sample packet was deposited in sealed condition

with the Forensic Science Laboratory on the very next day i.e. on 29<sup>th</sup> March 2008 of its seizure.

19            Sealed sample was taken up for chemical analysis by PW4 Sandeep Chetti, Assistant Chemical Analyser on 15<sup>th</sup> April 2008. This witness has testified that he conducted Fast Blue Test, Para Amino Phenol Test, Thin Layer Chromatography Test and High Performance Liquid Chromatography Test on the seized sample from 15<sup>th</sup> April 2008 to 17<sup>th</sup> April 2008 and prepared the data sheet, chain custody form and report of those tests. Evidence of this witness is duly corroborated by his Report Exhibit 28 to Exhibit 32. This witness has vouched that the sample that was tested positive was narcotic drug charas. The Reports at Exhibit 28, 31 and 32 proved by this witness shows that the sample sent for analysis in the packet marked "A1" by the Anti Narcotic Cell is charas falling under Section 2(iii) of the NDPS Act. With this evidence, the prosecution has established that the bulk from which sample of 10 grams was separated was a narcotic drug charas falling under Section 2(iii) of the NDPS Act. Mentioning

the colour of the bulk as black substance by the police witness, whereas mentioning of the sample as greenish brown lump by the Chemical Analyser does not cast a shadow of doubt on the prosecution case. Ultimately, perception of colour changes from person to person. A layman may perceive the colour as black whereas an expert may find it as greenish brown because charas is concentrated resin taken from the leaves and stems of the plant.

20            True it is that PW6 Prema Palanigauli – a panch witness has turned hostile to the prosecution, but it is not necessary that evidence of the Police Officer should always gain corroboration from the independent panch witness. The public at large is insensitive to the crime even if it is committed in their presence. So is the case of panch witness, who despite acting as a panch witness, takes a “U” turn during the course of trial by failing to support the prosecution case. This is routine phenomena which the courts dealing with criminal matters witness day in and day out. In such situation, it becomes the duty of the court to scrutinize evidence of the Police Officers with due care and

caution in order to ascertain whether their testimony is reliable and trustworthy. If, ultimately, the court comes to the conclusion that evidence of such public officers is trustworthy, then the court can definitely act upon the same. In this view of the matter, merely because panch witness fails to corroborate version of the Police Officers, evidence of such Police Officers cannot be viewed with distrust. On the contrary, “Official acts are regularly done” is the wise principle of law even recognized by the legislature. Therefore, in the case in hand, though PW6 Prema Palanigauli – panch witness, has failed to support the prosecution, this fact itself does not render the prosecution case suspect. On the contrary, evidence of the prosecution witnesses namely PW3 Shivdas Waghchoure, Police Naik, PW5 Vilas Chavan, Police Inspector, and PW7 Manisha Shirke, Woman Police Sub-Inspector, which is duly corroborated by contemporaneous documentary evidence is inspiring confidence and is not suffering from any infirmity.

21           It is, thus, clear that the prosecution has established possession of charas – a narcotic drug by the appellant/accused

and his possession over the same in absence of any material in cross-examination of prosecution witnesses as well as in his statement under Section 313 of the Code of Criminal Procedure was certainly conscious. Once possession of the contraband is established, the person who claims that it was not a conscious possession, has to establish such fact as to how he came in possession of contraband, is a fact, which is especially within his knowledge. Section 35 of the NDPS Act prescribe presumption of culpable mental state and it is for the accused to prove the fact that he had no such mental state with respect to the act, charged as an offence in the prosecution. Section 54 of the NDPS Act deals with presumption in respect of possession of illicit articles and the court may presume unless and until contrary is proved that the accused had committed an offence under the NDPS Act in respect of the narcotic drug. The appellant/accused in this case has failed to account satisfactorily his possession over the charas and as such, it needs to be held that he was in conscious possession of the narcotic drug.

22           Now let us deal with the first and foremost contention raised by the learned advocate for the appellant/accused which is regarding alleged non-compliance of provisions of Section 42(2) of the NDPS Act. According to the learned advocate for the appellant/accused, the secret information regarding possession of the contraband, which was allegedly reduced into writing in the form of Station Diary entry no.3 on 28<sup>th</sup> March 2008 by PW7 Manisha Shirke, Woman Police Sub-Inspector, is not proved by the prosecution, in as much as, the original document in the form of Station Diary is not produced before the court. As original Station Diary is not produced, the entry no.3 thereof dated 28<sup>th</sup> March 2008 which is at Exhibit 38 cannot be read in evidence. The learned advocate, thus, submitted that there is no evidence to show that the information was forwarded to the immediate official superior of PW7 Manisha Shirke, Woman Police Sub-Inspector. As against this, according to the prosecution case, the contraband was seized at the public place i.e. at Best Bus Stop of Bus Route No.154 near Byculla Railway Station. On this aspect, the learned APP has relied on judgments in the matter of Mohan Lal vs.

State of Rajasthan<sup>1</sup> wherein the Honourable Apex Court has observed thus in paragraph 25 :

“25 In the present case, the High Court has noted that the information was given to the competent authority. That apart, the High Court has further opined that in the case at hand Section 43 applies. Section 43 of the NDPS Act contemplates seizure made in the public place. There is a distinction between Section 42 and Section 43 of the NDPS Act. If a search is made in a public place, the officer taking the search is not required to comply with sub Sections (1) and (2) of Section 42 of the NDPS Act. As has been stated earlier, the seizure has taken place beneath a bridge of public road accessible to public. The officer, Sub-Inspector is an empowered officer under Section 42 of the Act. As the place is a public place and Section 43 comes into play, the question of non-compliance of Section 42(2) does not arise. The aforesaid view gets support from the decisions in Directorate of Revenue and Anr. v. Mohammed Nisar Holia MANU/SC/8167/2007 : (2008) 2 SCC 370 and State, NCT of Delhi v. Malvinder Singh MANU/SC/2604/2007 : (2007) 11 SCC 314.”

Similarly, the learned APP has placed reliance on judgment of the Honourable Supreme Court in the matter of Girish Raghunath

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<sup>1</sup> MANU/SC/0465/2015

**Mehta Vs. Inspector of Customs and ors.**<sup>2</sup> It is observed thus in paragraph 10 of its judgment :

“10 The contention raised on behalf of the appellant on the basis of judgments of this Court in Abdul Rashid Ibrahim Mansuri, Jag Raj Singh and Sukhdev Singh (supra) cannot be accepted. As already noticed, Section 42 of the Act has no application to the fact situation of the present case. The said section applies when the contraband recovered from a building, conveyance or enclosed place. Where recovery is from a public place, Section 43 applies. This Court reconciled the view taken in Abdul Rashid Ibrahim Mansuri (supra) and Sajan Abraham v. State of Kerala MAN/SC/0424/2001 : (2001) 6 scc 692 in larger bench judgment in Sukdev Singh (supra). It was held that in view of technological advancements, it may not be possible to record information as per the requirement of Section 42. Strict compliance by the investigating agency should not be required in an emergency situation so as to avoid misuse by wrongdoers/ offenders/ drug peddlers<sup>1</sup>. Whether there is adequate substantial compliance is a question of fact in each case. Apart from the finding that present case is governed by Section 43, there is no ground to interfere with the concurrent finding of the Courts below that there is adequate compliance of Section 43 of the Act.

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<sup>2</sup> AIR 2016 SC 4317

Similarly, in the matter of Ravindra @ John vs. Superintendent of Custom<sup>3</sup> it is observed thus in paragraph 7 :

“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

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3 AIR 2007 SC 2040

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.

With the assistance of these judgments, in submission of the learned APP, the case in hand is covered by Section 43 of the NDPS Act, which does not require the information of any person to be taken down in writing and sending a copy thereof to immediate official superior within 72 hours, if the search is made in a public place. According to the learned APP, the BEST Bus Stop, which is near the Byculla Railway Station, Mumbai, is a public place and therefore, Section 42(2) of the NDPS Act has no applicability to the case in hand.

23           Be that as it may, in the instant case, even the prosecution has tendered evidence of compliance of Section 42(2)

of the NDPS Act. PW7 Manisha Shirke, Woman Police Sub-Inspector, in her deposition has categorically stated that she recorded the secret information received by her from her Informer in the Station Diary and then took out print outs of that Station Diary entry. Then, along with the forwarding letter at Exhibit 54, she had send that Station Diary entry to the Deputy Commissioner of Police as well as Assistant Commissioner of Police, Anti Narcotic Cell, Mumbai. She had also handed over the copy of that Station Diary entry no.3 at Exhibit 38 to PW5 Vilas Chavan, Police Inspector, and this fact is vouched by PW5 Vilas Chavan, Police Inspector. Perusal of the certified copy of Station Diary entry no.3 at Exhibit 38 shows that each of the authorities has signed the certified copy in token of receipt thereof. However, according to the learned advocate for the appellant/accused, the Station Diary entry no.3 at Exhibit 38, which is, infact, the certified true copy of the concerned Station Diary is not admissible in evidence and the Station Diary entry no.3 ought to have been proved by placing the entire Station Diary in original before the learned trial court. In my considered opinion, this submission is totally devoid of

substance. Station Diary is maintained at the Police Station in view of provisions of paragraph 226 of the Police Manual. It reads thus :

**“226 Station Diary of the Police Station Officer –  
(1) *Objects of station diary***

The main object of the station diary is to safeguard the interest of the public by chronicling briefly, at the time they take place all important occurrences affecting the Police and the public. A further object to the diary is to keep superior Police officers informed of such occurrences. The diary is not intended to serve as a personal diary of the senior Police Station Officer. For this purpose, separate diary is provided (*vide* Rules 229, 231).

**(2) *Contents of station diary***

Subject to any general or special orders of the Commissioner of Police/Superintendent of Police, the entries should be as brief as possible, consistent with the objects of the diary. The entries should be regarding the following among other occurrences taking place within the Police Station limits :-

**(a) *Charge of Police Station House*** - The taking and handing over charge of the Police Station House.

**(b) *Informations of crime, etc.*** - The receipt and immediate manner of disposal of all information and magisterial orders or directions received under Sections 154, 155, 156, 159, 174 and 202 of the Criminal Procedure Code.

**(c) *Case diaries*** - The preparation and disposal of all case diaries made under Section 172, Criminal Procedure Code, or in accordance with executive orders, and of all copies of such diaries made for submission with copies of station diaries.

**(d) *Arrests*** - The effecting and reporting to the Magistrate of all arrest by the Police with or without warrant and the immediate disposal of the arrested persons, except in the case of arrests shown in the case diaries of the Police Station.

**(e) *Searches*** - The effecting and reporting to the Magistrate of all searches of person or place by the Police, except in the case of searches shown in the case diaries of the Police Station.

**(f) *Seizures*** - The effecting and reporting to the Magistrate of all seizures of property by the Police *suo motu* and the immediate disposal of such property, except in the case of seizures shown in the case diaries of the Police Station.

**(g) *Complaints*** - The lodging of all complaints by the Police to Magistrates under the Indian Penal Code, special and local laws, or otherwise.

**(h) *Police reports*** - The submission of all reports by the Police to Magistrates or superior Police officers for the issue of warrants of arrest, search warrants etc., or with a view to preventive action being taken.

**(i) *Miscellaneous informations*** - The receipt of important miscellaneous information regarding the disappearance of persons, apprehended offences and nuisances, etc.

**(j) *Miscellaneous occurrence*** - The receipt of information regarding local occurrences of importance, such as fires, accidents, strikes, fairs, processions, public meetings, unlawful assemblies, epidemics wandering gangs, the time of registration of all cognizable and non-cognizable cases, showing the sections of law under which recorded; Discharge or release on bail of arrested persons except in cognizable cases actually registered; departure from the Police Station of arrested persons for enquiries or for courts quoting the B. Nos. of the Policemen in charge of each prisoner, time of departure and the name of the court to which sent; time of return of prisoners from Courts or from enquiries with results;

action taken on broadcast messages relating to missing motor cars, murders riots etc., noting the date and serial number of the wireless message; affrays between civilian's and members of the Armed Forces or the Police; escorts of explosives being carried through Greater Bombay; reports on blasting operations in Greater Bombay, up-country police requesting assistance or reporting for any duty; misconduct of Police officers and men calling for disciplinary action; visits paid by superior officers and other high Government officials, etc.

**(C.P's C.O.No.34)**

**(k) *Departmental duties*** - The performance of departmental duties by the Station House Officer, such as parades and inspection held or attended, attendance at Courts, town patrols, night rounds, assistance to officers or other Police Stations, etc.

**(1) *Other occurrences*** - Any other occurrences which the Superintendent of Police Orders to be mentioned or which, the Police Station Officers consider, should be mentioned.

**(3) *Mode of writing diaries***

(a) The diary is to be written up as from midnight to midnight, and the entries therein are to be made

chronologically hour by hour, as the occurrences they record become known to the Station House Officer, the exact time being shown against each entry.

(b) Reference to case diaries or other miscellaneous information should be given at the end of the day's diary.

***(4) Officers responsible for writing diary***

An officer in charge of a Police Station, on leaving the Station house, for any purpose, should give over charge of the Station to the next senior officer present, who, under clause (p) of Section 4, Criminal Procedure Code, becomes vested with all the powers of an officer in charge of a Police Station. The diary is to be written up and signed by the Police officer actually in charge of the Police Station House. The in-charge Police Station Officer and the senior Police Station Officer are responsible for keeping each other informed immediately of public occurrences affecting the Police as soon as they become known to them, when the latter is on tour within the Police Station limits.

***(5) Place of keeping diary***

The diary is on no account to be removed from the

Station House, except on the orders or permission of higher authority.

***(6) Copies of diaries***

The diary in original is to be submitted early on the day following that for which it is written up, to the Sub-Divisional Officer or the Superintendent of Police, and the carbon copy retained in the Police Station as office copy.

***(7) Form of diary***

The diary is to be written in form No.C.P.C. 22-A. The forms will be bound in book form and paged and sealed by the Superintendent of Police.

**(I.G.'s No.20, dated 25<sup>th</sup> July 1939)**

***(8) Procedure in Greater Bombay***

In Greater Bombay, copies of the Station Diaries are not sent to the higher officers as a matter of routine; but only extracts from them are sent to the Superintendent and Deputy Commissioner of Police for their information.

If the officer in charge Police Station goes out on urgent work, the relieving officer takes his place. In case officers are not available, one of the Deputy

Inspectors or Inspector himself holds the charge. If, whilst the Station House Duty Officer is out, the relieving officer has to record any cases, he will carry on with such cases and will not hand them over to the Station House Duty Officer on his return. Any other enquiry etc., that may come to the relieving officer, will be carried on to its conclusion by that officer and not handed over.

Bare perusal of this provision found in Chapter VI of the Police Manual makes it clear that in discharge of their official duty in the interest of public, the Police Officers are required to maintain Station Diary in the prescribed proforma. What should be the contents of the Station Diary are also provided for in paragraph 226 of the Police Manual. Thus, all important events which take place at the Police Station are required to be recorded in the Station Diary in the form of chronological entries.

24           At this juncture, it is apposite to quote provisions of Section 35 of the Evidence Act, which read thus :

**“Section 35 - Relevancy of entry in public record or an electronic record made in performance of**

**duty** — An entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, is itself a relevant fact.”

This provision makes it clear that when it is the duty of a public officer to make some entries in any public or other official book, it is admissible in evidence to prove the truth of the facts entered as well as the facts that the entries were made by the public officer. Section 74 of the Evidence Act defines the term “Public document.” It reads thus :

**“Section 74 - Public documents**

The following documents are public documents :—

- (1) Documents forming the acts, or records of the acts—
  - (i) of the sovereign authority,
  - (ii) of official bodies and tribunals, and
  - (iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country;
- (2) Public records kept in any State of private documents.'

Section 75 of the Evidence Act provides that all other documents besides those mentioned in Section 74 are private documents. Section 76 of the Evidence Act deals with certified copies of public documents and it reads thus :

**“Section 76 - Certified copies of public documents -**

Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.

Explanation - Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.”

25           The Evidence Act lays down the manner in which contents of documents are to be proved before the court of law. The courts cannot look into the document unless the same has

been proved according to the provisions of the Evidence Act. Generally, a document is required to be proved either by the “executant” or the “executee.” However, the Evidence Act carves out the exception from this general principle by way of incorporation of Section 74 therein, so far as proof of public document is concerned. Conjoint reading of Sections 74, 75, 76 and 77 of the Evidence Act makes it clear that Section 74 is only an exception to the provisions of requiring proof under the Evidence Act. The public documents enumerated in Section 74 of the Evidence Act requires no formal proof as laid down in other provisions of the Evidence Act. Public documents form an exception to the hearsay rule and their admissibility in evidence rests on the ground that the facts contained therein are of public interest and the statements are made by authorised and competent agents of the public in the course of their official duty. At this juncture it is apposite to quote Section 77 of the Evidence Act. It reads thus :

**“Section 77 - Proof of documents by production of certified copies** - Such certified copies may be produced in proof of the contents of the public

documents or parts of the public documents of which they purport to be copies.”

This provision makes it clear that a public document can be proved by the production of the certified copy of such document in proof of the contents of such document. The certified copies of the public documents are deemed to be original by virtue of provisions of Section 77 of the Evidence Act. Therefore, production of the certified copy of the Station Diary entry no.3 at Exhibit 38 upon certifying it to be true by PW7 Manisha Shirke, Woman Police Sub-Inspector, can be read in evidence even without production of original Station Diary. The Station Diary is a public record and even a certified copy thereof can be produced in proof of it. In this view of the matter, the prosecution has established the fact that the secret information received by PW7 Manisha Shirke, Woman Police Sub-Inspector, was reduced in the form of Station Diary entry no.3 and the print out of that Station Diary was immediately transmitted to her immediate official superiors along with covering letter Exhibit 54 on 28<sup>th</sup> March 2008 itself. As such, even if it is assumed for the sake of arguments that

Section 42(2) of the NDPS Act is applicable to the case in hand, evidence of the prosecution is demonstrating full and faithful compliance thereof. As such, it is not necessary to burden this judgment with the case laws relied by the learned advocate for the appellant/accused for demonstrating the fact that non-compliance of Section 42(2) makes the prosecution case suspect and the benefit of that doubt goes to the appellant/accused.

26 Evidence of the prosecution shows that during pendency of the trial, by moving an application at Exhibit 55, the prosecution has requested the learned trial court to accept the bulk quantity on record. That application came to be allowed on 8<sup>th</sup> February 2016 by the learned trial court. In submission of the learned advocate for the appellant/ accused, the bulk was not shown to the prosecution witnesses, and therefore, the appellant/accused deserves to be acquitted. In this regard, evidence of PW7 Manisha Shirke, Woman Police Sub-Inspector, is clear. She has duly identified sample weighing 10 grams of the contraband i.e. Police Exhibit "A1" while in the witness box.

During the course of recording of her evidence, the bulk was also deposited with the trial court. This witness as well as PW3 Shivdas Waghchoure, Police Naik, and PW5 Vilas Chavan, Police Inspector, have duly identified the appellant/accused as the person from whom the contraband was seized. Moreover, evidence of all these three witnesses unerringly points out that sample weighing 10 grams was separated from the bulk weighing about 110 grams with the polythene pouch. Thus, what was separated as the sample was the part of the bulk and ultimately the sample was tested positive for charas. In this view of the matter, no overbearing importance can be given to the fact that during recording of their evidence, the learned APP had not showed the bulk to PW3 Shivdas Waghchoure, Police Naik, PW5 Vilas Chavan, Police Inspector, and PW7 Manisha Shirke, Woman Police Sub-Inspector, by recalling PW3 Shivdas Waghchoure, Police Naik, and PW5 Vilas Chavan, Police Inspector. Ultimately, evidence on record shows that the sample was drawn from the bulk possessed by the appellant/accused and it was tested positive for charas.

27           In the matter of Milan Sarcanski vs. The State through its Special P.P. (supra) the item which was shown to the pancha as one which was seized from the bag carried by the accused on 5<sup>th</sup> January 1995, was, infact, not the one seized from the bag carried by the accused on the said day but was a different one. Therefore, this court has held that there is failure on the part of the prosecution to establish the link between the accused and the goods alleged to have been recovered from the person of the accused. In the matter of Jitendra and Another vs. State of Madhya Pradesh (supra) independent witnesses with regard to search and seizure had turned hostile to the prosecution and contraband was not produced before the court as an Exhibit. No explanation was furnished by the prosecution for non-production of the contraband as an Exhibit in the trial, and therefore, benefit of doubt was given to the appellant therein. In the matter of Union of India vs. Leen Martin & Anr.(supra) PW8 and PW9 have portrayed a different story as to the recovery and seizure, and therefore, acquittal recorded by the High Court was

confirmed by the Honourable Supreme Court. In the matter of **Prem Singh Hjarilal Jaiswal vs. The State of Maharashtra (supra)** non-production of the contraband before the trial court was considered as a factor causing prejudice to the accused. In the matter of **Madhukar Swami Pallerala vs. State of Maharashtra (supra)** PW6 Murlidhar Chavan, the Seizing Officer failed to identify the contents of the sample packets. Such is not the case in hand. In the instant case, the bulk was produced before the trial court as an Exhibit and the sample drawn therefrom was identified by PW7 Manisha Shirke, Woman Police Sub-Inspector. Thus, it cannot be said that because of non-showing of the bulk to the prosecution witnesses, a reasonable doubt creeps in the prosecution case. In the result, no infirmity can be found in the impugned judgment and order of the learned trial court holding that the prosecution has proved that the appellant/accused was found in possession of 110 grams of charas which is an intermediate quantity. Though it was weighed with the small polythene pouch in which it was kept, by no stretch of imagination it can be said that the small transparent plastic pouch

can be weighing 10 grams, so as to make the quantity of contraband as the small quantity, as defined by Section 2(xxiii a) of the NDPS Act.

28           Now let us examine whether the learned trial court has properly sentenced the appellant/accused. He is sentenced to suffer rigorous imprisonment for 10 years apart from payment of fine of Rs.1 lakh, and in default, further simple imprisonment for 3 months. As stated in foregoing paragraphs, 100 grams is notified small quantity so far as charas is concerned and 1000 grams / 1 kilogram is the commercial quantity thereof. The offence took place on 28<sup>th</sup> March 2008 and at that time, conscious possession of the narcotic drug in small quantity was punishable with rigorous imprisonment for a term which may extend to 6 months. Possession of intermediate quantity i.e. the quantity more than the small quantity but less than the commercial quantity is punishable with rigorous imprisonment for a term which may extend to 10 years and with a fine which may extend to 1 lakh rupees. The appellant/accused was found to be

possessing charas excess by 10 grams than the small quantity and that weight of 10 grams was also inclusive of some milligrams weight of the plastic pouch. The appellant/accused, as seen from the charge-sheet as well as the impugned judgment and order, was 60 years old at the time of commission of the offence. He is first time offender having no criminal antecedents. The record does not show that he was involved in such type of offences at any other point of time.

29           In the matter of **Shahejadhkhan Mahebubkhan Pathan vs. State of Gujarat**<sup>4</sup> the appellants/accused were found possessing narcotic substance - brown sugar in commercial quantity and they were convicted for offences punishable under Sections 8(c), 21 and 29 of the NDPS Act. They were sentenced to suffer rigorous imprisonment for 15 years apart from imposition of fine of Rs.1.5 lakh on each count as well as default sentence of rigorous imprisonment for 3 years. Considering the fact that the appellants in that case were first time offenders, having no past antecedents about involvement in offences of like nature, the

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<sup>4</sup> 2013(1) SCC 750

Honourable Supreme Court has reduced the sentence to 10 years and the default sentence of 3 years rigorous imprisonment was also reduced to rigorous imprisonment for 6 months. In the case in hand also, the appellant/accused is a senior citizen, now aged about 70 years and he is a first time offender having no criminal antecedents. In such circumstances, harsh and maximum substantive sentence of 10 years rigorous imprisonment, in the wake of finding the contraband which was just more than small quantity by 10 grams (which was inclusive of weight of the transparent plastic bag) is not warranted. It is well settled that it is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The sentence is required to be adequate, just and proportionate with the gravity and nature of the crime. At the same time, circumstances of the accused are also required to be kept in mind while imposing the sentence, as one of

the objects of the criminal justice system is to rehabilitate the transgressors and the criminals.

30           In this view of the matter, considering all attending circumstances, in my considered opinion, sentence of 10 years rigorous imprisonment in the instant case needs to be scaled down to rigorous imprisonment for 2 years. In the result, the appeal is partly allowed with the following order :

**ORDER**

- i) The appeal is partly allowed.
  
- ii) Conviction of the appellant/accused for the offence punishable under Section 8(c) read with 20(b)(ii)(B) of the NDPS Act, 1985 is upheld, so also the sentence of fine at Rs.1 lakh and the default sentence of simple imprisonment for 3 months is maintained. However, substantive sentence of rigorous imprisonment for 10 years awarded to the appellant/accused is reduced to rigorous imprisonment for 2 (two) years.

iii) The appeal is accordingly disposed of.

iv) In view of disposal of the appeal, Criminal Application No.1014 of 2017 stands disposed of accordingly.

**(A. M. BADAR, J.)**