

Santosh

***IN THE HIGH COURT OF BOMBAY AT GOA***  
***CRIMINAL APPEAL NO. 9/2017.***

Kushal Puri  
 s/o. Ganesh Puri, age 25 years,  
 n/o. Kathmjandu, Nepal,  
 Presently lodged in  
 Colvale Modern Jail,  
 Colvale, Bardez, Goa.

**...Appellant.**

Versus

1) STATE  
 (As represented by the Officer  
 Incharge, Pernem Police Station,  
 Pernem, Goa.

2) The Public Prosecutor  
 High Court Building,  
 Altinho, Panaji, Goa.

**..... Respondents.**

Mr. K. Poulekar, Advocate for the Appellant.

Mr. Mahesh Amonkar, Public Prosecutor for the Respondents.

***Coram : M.S. Sonak, J.***

***Reserved on : 10<sup>th</sup> September, 2020.***

***Pronounced on : 17<sup>th</sup> September, 2020***

**JUDGMENT:**

Heard Mr. Poulekar for the Appellant and Mr. Mahesh Amonkar, learned Public Prosecutor for the State.

2. This Appeal is directed against the Judgment and order dated 19/25<sup>th</sup> November, 2016, made by the learned Sessions Judge, in NDPS Case No.40/2015, convicting the Appellant for offences punishable under Section 20 (b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act), for illegal possession of commercial quantity of charas and sentencing him to undergo imprisonment for a period of 10 years and to pay fine of Rs.1,00,000/- and in default, to undergo simple imprisonment for a period of six months.

3. The Prosecution case is that on 2<sup>nd</sup> July, 2015, between 19.10 hours to 21.40 hours, at Agarwado Junction, Pernem, Goa, when the Police team, headed by the Police Sub-Inspector (PSI) Kishor (PW.6) was patrolling the area, they found the appellant (accused) moving in a suspicious manner. On seeing the police, the accused attempted to run away and therefore, chased and apprehended on the suspicion that he might be carrying narcotics. Thereafter, the Panchas were called. A shoulder bag which the accused was carrying, was first searched. In it, the team found two pieces of sticky substance, wrapped in transparent polythene. This was packed and sealed by following the prescribed procedure. This substance was ultimately analysed and found to be '*charas*', weighing 1.216 kgs., valued at approximately Rs. 1,50,000/-.

4. The charge was framed against the accused and consequent upon his pleading '*not guilty*', the trial ensued. The Prosecution examined 6 witnesses. The accused was questioned under Section 313 Cr.P.C. The accused denied the Prosecution case and examined himself (DW.1) and his brother-in-law (DW.2), as defence witnesses.

5. The learned Sessions Judge, by the impugned Judgment and Order, has convicted and sentenced the accused with the aforesaid terms. Hence, the present appeal.

6. Mr. Poulekar, the learned Counsel for the Appellant submits that in the present case, there was no compliance with the mandate of Section 50 of the NDPS Act inasmuch as, the search was admittedly not undertaken before a Gazetted Officer or Magistrate. He relies on the decision of the Hon'ble Apex Court in *Arif Khan alias Agha Khan vs. State of Uttarakhand*<sup>1</sup>; and the decisions of this Court in *James Sunday Chinonso vs. State and anr.*<sup>2</sup> and *Krishna s/o Kavi Raj Malla vs. State* to submit that that such noncompliance is fatal to the prosecution case.

7. Mr. Poulekar submits that in this case, there has been noncompliance with the provisions of Section 52-A and Section 55 of the NDPS Act, which is again fatal to the prosecution case. He points out that there is overwriting, backed by no initials of the

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<sup>1</sup> (2018) 18 SC 380

<sup>2</sup> Cri. Appeal No.44/2017 decided on 1/10/2019

overwriter. He points out that the seal movement registers are not proved in accordance with law and, in any case, they do not support the prosecution version. He submits that all these factors, coupled with the defence raised by the accused, establish that there has been tampering with the samples. He relies on the decision of the Hon'ble Apex Court in *Union of India vs. Mohanlal and another*<sup>3</sup> in support of his contentions.

8. Mr. Poulekar submits that the testimony of PW.1 – Scientific Expert inspires no confidence and even casts doubt on whether the test/analysis was at all carried out by this so called expert. He points out that there is discrepancy regards weight of the substance and about the date on which the tests were allegedly carried out. He submits that no worksheets are produced and the evidence on record does not establish that the two packets were independently analysed and found to contain charas. He submits that based upon the testimony of PW.1, no conviction could have been recorded against the accused. In any case, he submits that the evidence on record is not sufficient to establish that commercial quantity of charas was indeed found with the accused.

9. Finally, Mr. Poulekar, submits that the Panchas who have deposed to the search, were not at all independent persons who could have been relied upon. One of the Panchas was involved in matka

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<sup>3</sup> 2016(1) Drugs Cases (Narcotics) 1 decided on 28/1/2016

(gambling) and the second was a retired Police Official. He relies on *Rajesh Jagdamba Avasthi vs. State of Goa*<sup>4</sup> to emphasize upon the importance of an independent Pancha witnesses in NDPS matters. For all the aforesaid reasons, Mr. Poulekar submits that the impugned Judgment and Order, in this case, is required to be set aside and the accused is liable to be acquitted of the offences for which he was charged

10. Mr. Amonkar, the learned Public Prosecutor, defends the impugned Judgment and Order on the basis of the reasoning reflected therein. Besides, he refutes all the contentions of Mr. Poulekar and submits that there has been no breach of any of the provisions of the NDPS Act. He submits that in the facts of this case, Section 50 of the NDPS Act was not even attracted and, in any case, the same has been duly complied with by the investigating agencies. He points out that there are no discrepancies in the prosecution evidence and there is no case made out to interfere with the impugned Judgment and Order. He relies on several decisions, which will be considered in the course of this Judgment and Order.

11. The rival contentions now fall for my determination.

12. The first contention of Mr. Poulekar relates to the alleged non-compliance with the provisions of Section 50 of the NDPS Act

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<sup>4</sup> AIR 2005 SC 1389

inasmuch as in the present case, the search of the accused was not undertaken before a Gazetted Officer or a Magistrate.

13. Mr. Amonkar has, however, contended that there was compliance with the provisions of Section 50 of the NDPS Act, though, in the facts and circumstances of the present case, such provisions were not at all attracted. He submits that this was not a case of a raid on the basis of prior information that the accused might be carrying narcotics and, secondly, the narcotics were found in the shoulder bag which was carried out by the accused and not from the person of the accused. In any case, he reiterates that there has been compliance with the provisions of Section 50 of the NDPS Act, as explained by at least two Constitution Bench decisions of the Hon'ble Apex Court in the case of *State of Punjab vs. Baldev Singh*<sup>5</sup> and *Vijaysinh Chandubha Jadeja vs. State of Gujarat*<sup>6</sup>. Mr. Amonkar also relies on *State of H.P. vs. Pawan Kumar*<sup>7</sup> to submit that seizure of contraband from a bag carried by a suspect does not amount to seizure from the person of such suspect, so as to attract the provisions of Section 50 of the NDPS Act.

14. Now, the evidence on record does establish that this was not a case of a raid or a search, based upon any prior information that the accused might be carrying any narcotics. In *Baldev Singh* (supra)

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<sup>5</sup> (1999) 6 SCC 172

<sup>6</sup> (2011) 1 SCC 609.

<sup>7</sup> (2005) 4 SCC 350;

the Constitution Bench, at paragraph 12, has held that on its plain reading, Section 50 would come into play only in case of a search of a person as distinguished from search of any premises etc. If the empowered officer, without any prior information as contemplated by Section 42 of the NDPS Act, makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the NDPS Act are not attracted. Applying this ruling, it is possible to say that the provisions of Section 50 were not attracted to the facts of the present case.

15. The evidence on record, in particular, deposition of the IO (PW.6) which has been sufficiently corroborated by other prosecution witnesses, establishes that the IO first asked the accused to hand over his shoulder bag. On opening the shoulder bag, the IO observed that in the main compartment two chunks of black colour sticky substance, wrapped in transparent polythene bag, which was suspected to be contraband charas. PW.6 has then deposed about the further procedures followed by him in relation to seizure, packing and seling of such substance. PW.6 has deposed that it is only such processes were complete, that the person of the accused was searched. PW.6 has also deposed that right in the beginning, PW.6 had informed the accused that he has right to be searched in the presence of a Gazetted Officer or Magistrate. However, the accused

had declined the offer to be searched before a Gazetted Officer or Magistrate.

16. The aforesid evidence does indicate that the contraband, in this case, was not really found on the person of the accused, but was found, right in the beginning, in the shoulder bag which was being carried by the accused.

17. In *Pawan Kumar* (supra), the Hon'ble Apex Court in the context of the provisions of Section 50 of the NDPS Act, has held that a bag, brief case, or any such article or container, etc. can, under no circumstances, be treated as a body of human being. Therefore, it is not possible to include these articles within the ambit of the word '*person*', occurring in Section 50 of the NDPS Act. This is yet another reason on the basis of which it is possible to say that the provisions of Section 50 of the NDPS Act were not attracted to the facts of the present case.

18. However, since Mr. Poulekar urges that this was a case of composite search and, therefore, the provisions of Section 50 of the NDPS Act ought to have been strictly complied with, the issue of compliance is now examined on the basis that the provisions of Section 50 of the NDPS Act were indeed attracted in the facts of the present case.

19. As noted earlier, PW.6 has clearly deposed that in the presence of the Panchas and other members of the raiding party he had clearly informed the accused of his right to be searched before a Gazetted Officer, or Magistrate. He has also deposed that thereafter, the accused declined to exercise such right. Both these aspects find corroboration in the testimony of other prosecution witnesses. In fact, there was no serious challenge to both these aspects in the cross examination, except some formal and routine denials. Though the accused in this matter led defence evidence, the position, as deposed to by PW.6 and other prosecution witnesses on these two aspects, has remained undented.

20. Therefore, Mr. Poulekar did not emphasise too much on the aforesaid two aspects, but relying upon *Arif Khan* (supra), *James Sunday Chinonso* (supra) and *Krishna Malla* (supra), he submitted that since in this case the search was not undertaken before any Gazetted Officer or Magistrate, the same amounts to breach of the mandatory provisions of Section 50 of the NDPS Act.

21. The provisions of Section 50 of the NDPS Act are no doubt mandatory. However, the mandatory content of the right conferred upon the accused and the corresponding mandatory content of the duty imposed upon the investigating agency, has been spelt out quite clearly by the Hon'ble Apex Court in *State of Punjab vs. Balbir*

*Singh*<sup>8</sup>, *Baldev Singh* (supra) and *Jadeja* (supra).

22. In *Balbir Singh* (supra), at paragraph 25(5), this is the conclusion recorded by the Hon'ble Apex Court :

*“25(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a gazetted officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the gazetted officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. **After being so informed whether such person opted for such a course or not would be a question of fact.**”*

[emphasis supplied]

23. From the aforesaid, it is clear that the mandate of Section 50 of the NDPS Act extends to informing the accused whose personal search is about to be taken, that he has a right, if such person so requires, to be searched before the Gazetted Officer, or the Magistrate. This means that if the evidence on record establishes that such person opts to exercise such right and requires the investigating agencies to undertake the search before the Gazetted Officer or the Magistrate, then, the mandate of Section 50 would extend to holding such search before a Gazetted Officer or the

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<sup>8</sup> (1994) 3 SCC 299

Magistrate. However, if the evidence on record establishes beyond reasonable doubt that the accused does not opt to exercise such right or require the search to be held before a Gazetted Officer or Magistrate, the mandate of Section 50 would not, nevertheless, extend to any insistence on the part of the Investigating Agencies that the search be carried out before a Gazetted Officer or Magistrate. This is very clear from the emboldened portion of paragraph 25(5) in *Balbir Singh* (supra), in which the Hon'ble Apex Court, after explaining the mandatory content of Section 50 of the Act, proceeded to observe “*After being so informed whether such person opted for such a course or not would be a question of fact*”.

24. *Balbir Singh* (supra) was specifically approved by the Constitution Bench in *Baldev Singh* (supra). The Constitution Bench held that when an empowered officer or a duly authorised officer acting on prior information, is about to search a person, it is imperative for him to inform the person concerned of his right under Section 50(1) of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing. Failure to inform the person concerned about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused. That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before Gazetted Officer or a Magistrate for

search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

25. The Constitution Bench, in *Baldev Singh* (supra) did not express any opinion whether the provisions of Section 50 are mandatory or directory, but held that failure to inform the person concerned of his right as emanating from Section 50(1) may render the recovery of the contraband suspect and the conviction and sentence of the accused bad and unsustainable in law.

26. From the aforesaid, it is clear that the mandatory content of Section 50 of the NDPS Act is that when an empowered officer, on prior information seeks to search the person of suspect, then, the empowered officer is duty bound to inform such person that if he so desires, he has a right to be taken before a Gazetted Officer or a Magistrate for search. If the empowered officer fails to inform the suspect of such right and thereafter if the suspect so requires, fails to hold the search before a Gazetted Officer or a Magistrate, then, it could be said that there is a breach of the mandatory content of Section 50 of the NDPS Act. This decision of the Constitution

Bench is significant because it has dealt with the expression '*if such person so requires*' as it appears in Section 50(1) of the NDPS Act.

27. The issue of mandatory content of Section 50 of the NDPS Act, as well as the scope and width of the expression '*if such person so requires*' in Section 50(1) of the NDPS Act again came up for consideration before another Constitution Bench in *Jadeja* (supra). The Constitution Bench not only concurred with the view taken in *Baldev Singh* (supra), but at paragraph 29 expressed the following firm opinion :

*“29. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. **Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.**”*

*[emphasis supplied]*

28. Again, the last and emboldened sentence from paragraph 29 of *Jadeja* (supra) is quite significant in the present context. The statement very clearly lays down that once the suspect is informed of his right to be searched before the Gazetted Officer, or the Magistrate, if he so requires, ***“thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.”***

29. For the aforesaid reasons, it is difficult to accept Mr. Poulekar's contention that the law laid down in *Arif Khan* (supra) is to be read or construed in a manner different from the law laid down by the two Constitution Benches in *Baldev Singh* (supra) and *Jadeja* (supra). In fact, the Division Bench of the Hon'ble Apex Court in *Arif Khan* (supra), at paragraph 20, has explained what has been held by the Constitution Bench in *Jadeja* (supra) in the following terms :

*“20. Their Lordships have held in Vijaysinh Chandubha Jadeja (supra) that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the police officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorised officer to make the suspect aware of the existence of his right to be searched before a gazetted*

*officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a gazetted officer or a Magistrate. (See also Ashok Kumar Sharma v. State of Rajasthan (2013) 2 SCC 67 and Narcotics Control Bureau v. Sukh Dev Raj Sodhi (2011) 6 SCC 392)”*

***[emphasis supplied]***

30. The fact that in *Arif Khan* (supra), the provisions of Section 50 of the NDPS Act were held to have been breached, may have nexus with the fact that the raid in the said case was organized on the basis of secret information received from the informant and the raiding party, upon interception of the accused, did not immediately inform the accused of his right to be searched before the Gazetted Officer or the Magistrate. He was asked by the raiding party whether he was in possession of any contraband charas. Upon the accused allegedly admitting that he was, the raiding party apprehended the accused and only thereafter informed him about his right to be searched before a Gazetted Officer or a Magistrate. Admittedly, this was not a case of some chance recovery. This was a case of raid, based upon a secret information from an informant. Thus, in these peculiar state of facts, the Division Bench in *Arif Khan* (supra) found that the provisions of Section 50 of the NDPS Act had been breached.

31. Therefore, to my mind, the *ratio decidendi* of Arif Khan (supra) is to be found in paragraph 20 quoted above. The ratio does not, in any manner, differ from the law laid down by the Constitution Bench in *Baldev Singh* (supra) or *Jadeja* (supra).

32. Mr. Poulekar's contention appears to ignore, not only the ratio of *Arif Khan* (supra), but unduly focuses upon the generality of some expression found therein. This, according to me, may not be a correct manner to read or construe the decision in *Arif Khan* (supra).

33. The manner in which the precedents are to be read, understood or construed, was explained by Lord Halsbury in *Quinn vs. Leathem*<sup>9</sup>, in the following oft-quoted passage, to be found at page 506 :

*“Now, before discussing the case of Allen v. Flood [1898]A.C.1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning*

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<sup>9</sup> [1901 (A.C.) 495]

*assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all. My Lords, I think the application of these two propositions renders the decision of this case perfectly plain, notwithstanding the decision of the case of Allen v. Flood (supra)."*

34. Now, the aforesaid passage from *Quinn vs. Leathem* (supra) has been quoted with approval by the Hon'ble Apex Court in several decisions, including, but not restricted to *Union of India and ors. vs. Dhanwanti Devi and ors.*<sup>10</sup> ; *AIR India Cabin Crew Association and ors. vs. Union of India*<sup>11</sup>; *Royal Medical Trust and anr. vs. Union of India and anr.*<sup>12</sup>; *Bihar School Examination Board vs. Suresh Prasad Sinha*<sup>13</sup> and *Kalyan Chandra Sarkar vs. Rajesh Ranjan and anr.*<sup>14</sup>.

35. In fact, *Kalyan Chandra Sarkar* (supra) has held that while deciding the cases on facts, more so in criminal cases, the Court should bear in mind that each case must turn on its facts and the similarity of facts in one case cannot be used to bear in mind the conclusion of facts in another case. It is well established principle that while considering the ratio laid down in one case, the Court will have to bear in mind that the other judgment must be read as applicable to the particular facts proved or assumed to be true since

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<sup>10</sup> (1996) 6 SCC 44

<sup>11</sup> (2012) 1 SCC 619

<sup>12</sup> (2017) 16 SCC 605

<sup>13</sup> (2009) 8 SCC 483

<sup>14</sup> (2005) 2 SCC 42

the generality of expressions which may be found therein are not intended to be expositions of the whole of the law, but are governed and qualified by particular facts of the case in which such expressions are to be found. A case is only an authority for what is actually decided in it.

36. Therefore, upon reading and construing *Arif Khan* (supra), in the manner pointed out by House of Lords and the Hon'ble Supreme Court, it is difficult to accept Mr. Poulekar's contention that there has been a breach of the provisions of Section 50 of the NDPS Act, in the present case. However, Mr. Poulekar persists by pointing out that the contention, similar to what he has now raised, was accepted by the learned Single Judge of this Court in at least two cases *i.e. James Sunday Chinonso* (supra) and *Krishna Malla* (supra).

37. In *James Sunday Chinonso* (supra), the acquittal of the accused was based upon several infirmities in the Prosecution version as noted by the learned Single Judge. No doubt, the breach of Section 50 of the NDPS Act was one of the infirmities noted and reference was made to the decision in *Arif Khan* (supra) for this purpose. However, reading of the decision of the learned Single Judge, makes it clear that the issue of breach of the provisions of Section 50 of the NDPS Act was decided on the basis of the concession made by the learned Public Prosecutor in the said matter.

38. The aforesaid is evident from paragraph 14 in *James Sunday Chinonso* (supra), which reads as follows :

*“Shri Rivankar fairly concedes that in view of the judgment of 8 cri a no.44 of 2017 the Supreme Court in the case of Arif Khan (supra) as well as the judgment of this Court in case of Krishna S/o. Kavi Raj Malla V/s. State (Criminal Appeal No.15/2016) the prosecution has no case”*

39. So also the decision of the learned Single Judge in *Krishna Malla* (supra) on the aspect of Section 50 of the NDPS Act proceeds again on the basis of concession made by the learned Public Prosecutor. This is evident from paragraph 8 of the said decision, which reads as follows :

*“8. On the other hand, learned Public Prosecutor Shri Rivankar though submits that there was a due compliance of Section 50 of the NDPS Act so as to say that an option was given to the appellant if he wanted to be searched in the presence of Gazette Officer. However, the appellant had declined the said offer. The learned Public Prosecutor drew my attention to “if said person so required” in the definition of Section 50 of the NDPS Act. However, he fairly concedes that in view of the ratio laid down by the Supreme Court in the case of Arif Khan (Supra), the impugned judgment and order of conviction and sentence would not sustain.”*

40. In *Director of Settlements, A.P. and ors. vs. M.R. Apparao*

*and anr.*<sup>15</sup> the Hon'ble Supreme Court has explained that the statements of the Court on matters other than law, like facts, may have not binding force, as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of fact. It is the principle found out upon a reading of a judgment as a whole in the light of the question before the Court that forms the ratio and not any particular word or sentence to determine whether a decision has '*declared law*'. It cannot be said to be a law when a point is disposed of on a concession and what is binding is a principle underlying the decision.

41. Similarly, in *Ravinder Kaur Grewal and ors. vs. Manjit Kaur and ors.*<sup>16</sup>, the Hon'ble Supreme Court has held that a decision based on concession cannot be treated as a precedent. To the same effect, are the observations in *State of Rajasthan vs. Mahaveer Oil Industries and ors.*<sup>17</sup> In any case, Mr. Poulekar's contention which runs counter to the decisions of the Constitution Benches in *Baldev Singh* (supra) and *Jadeja* (supra), cannot be accepted.

42. Mr. Poulekar's next contention relates to the alleged non-compliance with Section 52-A of the NDPS Act. Section 52-A of the NDPS Act concerns with the disposal of seized narcotic drugs and psychotropic substances. In the case of *Union of India vs. Mohanlal*

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<sup>15</sup> (2002) 4 SCC 638

<sup>16</sup> 2019 (8) SCC 729

<sup>17</sup> 1999 (4) SCC 357

(supra), the Hon'ble Supreme Court has issued several directions in the context of the provisions of Section 52-A of the NDPS Act. In the present case, however, there was no issue raised on behalf of the accused before the learned Sessions Judge regards the disposal of the narcotic drugs and psychotropic substances, so seized. Neither were any questions posed to the Prosecution witnesses in the course of their cross examinations, nor did the defence witnesses depose to any noncompliance with the provisions of Section 52-A of the NDPS Act. Besides, Mr. Poulekar was unable to demonstrate either by reference to the provisions or the decisions in the case of *Mohanlal* (supra) that any alleged noncompliance with the procedure prescribed in Section 52-A of the NDPS Act, must result in acquittal of the person accused for the offence under the NDPS Act. For all these reasons, the contention based upon Section 52-A of the NDPS Act, also cannot be accepted in the facts and circumstances of the present case.

43. The next contention of Mr. Poulekar relates to the alleged non-compliance with the provisions of Section 55 of the NDPS Act and consequent possibility of tampering with the samples, allegedly seized from the accused.

44. Section 55 of the NDPS Act provides that an officer-incharge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under

this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.

45. Now, in the present case, the Prosecution has examined Ladu Shetye (PW.5), who was working as Writer H.C. at the Pernem Police Station on the date on which the contraband was seized from the accused. He has deposed that on 2/7/2015, PSI Kishor (PW.6) collected seal of Pernem Police Station from him. He has described the seal as having inscription "*Police Station Pernem Goa No.1 with Ashoka Emblem at the center*". He has deposed that the seals normally remain in his custody, but are issued to the concerned Police officials as and when required by making entries in the seal movement register.

46. PW.5 has deposed that he was on duty on 2/7/2015 even during the night time *i.e.* until the next day on 3/7/2015. He has deposed that PSI Kishor (PW.6) returned to the Police Station at around 10.20 p.m., along with the accused and PSI Kishor handed over him the muddemal property which he has described in details. PW.5 has then deposed that upon receiving the muddemal property,

which included the suspected contraband substance from PSI Kishor, he made entries in the registers and he even produced such registers in the course of his examination. He has also deposed to handing over of the sealed envelopes containing such substances to PSI Kishor to forward the same to the laboratory through the SDPO, Mapusa. He has deposed to making of entries in the registers which were produced in the course of evidence.

47. The prosecution has also examined Mahesh Gaonkar, SDPO, Mapusa (PW.4), who deposed that on 2/7/2015, he was informed by the P.I. of Pernem Police Station that narcotic seizure has been made at Agarwado Junction from the accused. He has deposed that he waited for some time in his office and thereafter left for his residence, carrying with him seal movement register. He deposed that at about 23.00 hours, P.C. by name Sandeep Gaude of Pernem Police Station (PW.3) came to his residence along with the seal of the Pernem Police Station, bearing description "*Police Station Pernem Goa No.1 with Ashoka Emblem*". He has deposed that he took the custody of the said seal and issued an acknowledgment on the office copy of the letter which PSI Kishor had addressed to him. PW.4 identified the office copy and his signature thereof. PW.4 also produced the seal movement register and an extract of the same was taken on record, after comparing with the original. PW.4 has deposed that the seal remained in his custody till 17.7.2015, when it

was returned to the Pernem Police Station by making necessary entries in the movement register.

48. From the aforesaid evidence of PW.4 and PW.5, it is difficult to accept Mr. Poulekar's contention about breach of the provisions of Section 55 of the NDPS Act, or any tampering with the samples seized from the accused. Though it is true that the NDPS Act may not require the seal with which the envelope containing the contraband is sealed, is to be handed over to the superior Police Officer, the fact that this was done by the investigating agencies by way of abundant caution, does not suggest any tampering with the sample. Rather, the adoption of such procedure suggests that the investigating agencies wanted to be doubly sure that there was no occasion or opportunity for the IO to tamper with such samples. The learned Sessions Judge has dealt with this aspect, in some detail, and there is absolutely no case made out to take any different view on this aspect.

49. The case diary, in the present case, does at one place make reference to Seal No.3 at two places and Seal No.1 at one place. It is also possible to say that there is some sort of overwriting as regards the seal number. However, the testimony of both, PW.4 and PW.5 is quite clear that it was Seal No.1 which was used in this case. This position is also corroborated by other documentary evidence on

record. Therefore, based upon some slight overwriting, which has been explained by the witnesses, it is not possible to hold that there was something seriously amiss in the sealing process and, therefore, the possibility of tampering, could not be ruled out.

50. Mere raising of some hypothetical surmises and conjectures, is neither sufficient to establish the charge of tampering, nor sufficient to raise some reasonable doubt. Although it is true, as contended by Mr. Poulekar that it is sufficient for an accused to only probabilise his defence, mere raising of hypothetical surmises and conjectures is certainly not sufficient to pass even the test of preponderance of probabilities. For all these reasons, it is not possible to accept Mr. Poulekar's contention about possible tampering with the samples or any breach of the provisions of Section 55 of the NDPS Act.

51. Mr. Poulekar's next attack on the testimony of PW.1, Sr. Scientific Officer, is quite unfounded. PW.1 has deposed to her qualifications, experience, nature and the manner in which she conducted the tests on the samples seized from the accused. She has justified her conclusions in scientific terms. There is absolutely no reason to hold that the testimony of PW.1 does not inspire confidence and should, therefore, be discarded.

52. PW.1 has explained the total weight of the substance seized, including wrappings, as 1.220 kgs. She has explained that individual weight of the wrappings in rectangular shape was 0.995 kg. and in square shape was 0.225 kg. The weight of the wrappings, were 6.8 grams and 1.00 gram, respectively. She has explained that there was slight error inasmuch as about 12 gms. of the substance that was utilized for testing purpose and therefore, should have been excluded from the total weight. However, based upon this trivial discrepancy which has been satisfactorily explained by PW. 1, it is not possible to hold that the testimony of PW.1 inspires no confidence or that the same should be discarded in its entirety.

53. Similarly, PW.1 has explained in the course of her cross examination that she had opened the packet on 14/8/2015 and weighed the substance therein. But the tests were actually conducted on 17<sup>th</sup> and 18<sup>th</sup> on the two pieces. Based upon the line in examination in chief that substance taken for analysis on 14/8/2015, it cannot be said that there is some serious discrepancy on the actual dates on which the analysis were undertaken by PW.1. Based upon such trivial and so called discrepancies, it is not possible to discard the entire testimony of PW.1 and to hold that there was no proper analysis of the substance seized from the accused person.

54. In this case, PW.1 has deposed that the substance was found

in two separate wrappings. The first wrapping which was rectangular in shape, weighed 0.995 kg. The second wrapping which was square in shape, weighed 0.225 kg. Mr. Poulekar submitted that it was necessary to have analysed the contents of the two wrappings, separately in order to determine whether both the wrappings contained charas. He further submitted that such individual analysis should have been reflected in the report and since, this has not been done, there is no evidence that the accused was found with contraband in commercial quantity.

55. From the testimony of PW.1, it is clear that she analysed the substance from out of the two wrappings, individually and separately. In fact, from out of the larger wrapping having rectangular shape, about 10 gms. of the substance was taken for analysis and from the smaller wrapping square in shape, about 2 gms. was taken for the purpose of analysis. Thereafter, two samples were analysed independently or separately by performing the tests, which she deposed to in details at page 31 of the paper book. Based upon such independent or separate analysis, she opined that the substance in both the samples, was charas. As such, there is really no scope to contend that there is no evidence about the accused being found in possession of charas less than the prescribed commercial quantity, in the present case.

56. There is also no merit in Mr. Poulekar's contention that the two Panchas *i.e.* Sharad Arolkar (PW.2) and one Balkrishna were not independent Panchas. It is true that one of the members of the raiding party, Sandeep Gaude (PW.3), Police Constable has deposed that Sharad (PW.2) was involved in matka gambling. However, when Sharad was examined as PW.2 by the Prosecution, not even a suggestion was put to PW.2 that he was indeed involved in matka gambling or that he was dependent on the Pernem Police Station authorities, in any manner. Based upon stray statement from the testimony of PW.3, it is not possible to hold that PW.2 was not an independent Pancha. There is no evidence on record that PW.2 was a stock Pancha or that he was, in any manner, dependent upon the Police Authorities. The learned Sessions Judge has quite correctly referred to the decision of the Hon'ble Apex Court in *Ganga Singh vs. State of Madhya Pradesh* (2013 ALL MR (Cri) 3020 (S.C.) to reject the contention that PW.2 was not an independent Pancha. In so far as Pancha Balkrishna is concerned, it cannot be said that this Pancha was not an independent Pancha merely because he may have been a retired Police official

57. In the *State of U.P. vs. Zakullah*<sup>18</sup>, the Hon'ble Supreme Court has explained that as long as the Panchas are not dependent on the Police for their living or liberty, or for any other matter, it cannot be said that they are not independent persons. The

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<sup>18</sup> 1997 (10) Supreme 522

requirement of having independent witnesses to corroborate the evidence of the Police, has to be viewed from a realistic angle. The decision in *Rajesh Avasthi* (supra), turns on its own peculiar facts. For all these reasons, it is not possible to accept Mr. Poulekar's contention on the issue of any lack of independence on the part of the Panchas, in the present case.

58. Now, coming to the defence of the accused, in the first place, the accused in his statement under Section 313 of the Cr.P.C. claimed that he has been falsely implicated in this matter and does not know anything about possession of illegal drugs and that this is a fake case filed by the Police.

59. In his defence, the accused stepped into the witness box as DW.1. In his deposition, he has deposed that on 2/7/2015, at about 6.00 p.m. he came out of his room for some shopping. At that time, he found another person by name Bijoy Lama pushing the scooter towards him while going towards Arambol beach. When the said Bijoy Lama reached near him, some persons came in red colour vehicle and asked the said Bijoy Lama to stop. However, Bijoy Lama dropped the scooter and started running away. The accused has deposed that he was just watching this whole episode when the persons conducted his personal search and took out the jacket he was wearing. Thereafter, he was taken to the Police Station. He was questioned as to whether he knew Bijoy Lama and he responded

that he knew Bijoy Lama who was staying at the guest house.

60. The accused has deposed that after some time two police officers came along with Bijoy Lama and then on the next day, he was produced in the Court. He has also deposed that he was asked to sign some papers, but when he asked the Police officials to allow him to read the contents, he was assaulted and not allowed to read the papers which he was forced to sign.

61. In his cross examination, DW.1 has admitted that he did not disclose to the Magistrate at the time of his first remand that he was assaulted by PSI Kishor and forced to sign any documents. He deposed that he was advised by his Advocate that since commercial quantify is found with him, bail will not be granted. He has also deposed that his Advocate advised him that since he was from Nepal, no bail application will be considered. He denied the suggestion that he along with Bijoy Lama had come from Nepal as drug peddlers and were selling narcotic drugs to the nearby locality.

62. One Stalin Jadhav, the brother in law of the accused was examined as DW.2. He has deposed that on 3/7/2015, he received a phone call from one PSI Kiran, informing him that the accused has been arrested and requested him to attend the police station. He has also deposed to receiving a facebook message from the accused on

2/7/2015 and his reply to it on 3/7/2015. He stated that when he visited the Pernem Police Station on 4/7/2015, he found that a false case was registered against the accused. However, the concerned Police Officer present, advised him not to file any complaint as the same may go against the accused.

63. Upon evaluation of the defence evidence, it cannot be said that the accused has probalised the defence raised by him. The findings recorded by the learned Sessions Judge in the context of the defence raised by the accused, are quite correct and warrant no interference. In any case, the accused has certainly not established even by the test of preponderance of probabilities that the shoulder bag which he was carrying, was never searched and from such shoulder bag, no charas was recovered. Once, there is ample evidence on record that the accused was found in conscious possession of the contraband charas, the defence raised by the accused by attempting to rope in Bijoy Lama, cannot be said to be sufficient to displace the Prosecution case.

64. For all the aforesaid reasons, I am satisfied that there is no error in the view taken by the learned Sessions Judge in this case. I have independently evaluated the evidence on record and even, upon such independent evaluation, there is no case made out to take any different view. The accused, in this case, has not been able to

establish any breach of the mandatory provisions of the NDPS Act. There is no evidence of tampering with samples. The evidence of the Analyst inspires confidence and was not required to be discarded.

65. For all the aforesaid reasons, this Appeal is required to be dismissed and is, hereby, dismissed. There shall be no order as to costs.

***M.S. Sonak, J.***