

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO. 57/2016

Ivan Miguel,
s/o. Falcao Patricio,
age 33 years, Portuguese National,
r/o. Ashwem, Pernem, 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.

Ms. Dolorosa Chiquita Tulkar, Advocate for the Appellant.

Mr. Pravin Faldessai, Additional Public Prosecutor for the
Respondents.

Coram : M.S. Sonak,
Smt. M.S. Jawalkar, JJ.

Reserved on : 6th October, 2020.
Pronounced on : 12th October, 2020

JUDGMENT: (M.S. Sonak, J.)

Heard Ms. Dolorosa Tulkar, the learned Counsel for the

Appellant and Mr. Pravin Faldessai, the learned Additional Public Prosecutor for the State.

2. This Appeal is directed against the Judgment and order dated 30th June/14th July, 2016, made by the learned Special Judge, in NDPS Criminal Case No.16/2014, by which the Appellant was held guilty of the offences under Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced to undergo rigorous imprisonment for 15 years and payment of fine of Rs.1,00,000/-, and in default of payment of the fine, to undergo further rigorous imprisonment for one year.

3. The Appellant, by the same Judgment and Order, was also held guilty of the offences under Sections 21(b) and 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and sentenced to undergo rigorous imprisonment for 7 years and payment of fine of Rs.50,000/- for each of the offences and in default of payment of fine, to undergo further rigorous imprisonment for one year and six months, respectively.

4. The Prosecution case is that on 14/1/2014, the Investigating Officer (IO) Dinesh Gadekar (PW.9), the Police Sub-Inspector of ANC Police Station, received reliable information that one foreign national, male person, aged between 30-35 years,

medium built, fair complexion, average height, wearing a green colour T-shirt and white colour pant, will be coming to deliver narcotic drugs on 14/1/2014 between 0.00 hours to 01.00 hours to his prospective customers at Football Ground, Ashvemwado, Mandrem, Pernem, Goa. Thereupon, PW.9 reduced this information into writing and sent a copy of the same to Dy. S.P. VamanTari (PW.3) for his information. He then secured the presence of two Panchas, informed them about the information received, showed them the seal of the Anti Narcotic Cell Police Station 4, with Ashoka Emblem, along with the Panchas and some other officers of the ANC proceeded to the stated spot for the raid. At about 0.10 hours, they saw the Appellant coming towards the football ground. Thereupon, the raiding party members surrounded the Appellant. PW.9 introduced himself and other members of the raiding party to the Appellant. He was informed about the information received and that his search was to be conducted. The Appellant was informed of his right to be searched before a Gazetted Officer or a Magistrate. The Appellant was also given the offer to search the members of the raiding party if he so desired. The Appellant declined both the offers. The bag carried by the Appellant was first searched. In it the raiding party found one transparent autopress polythene packet, containing whitish brownish colour crystal form substance, one autopress polythene packet containing whitish colour powder and one whitish

colour plastic bottle with a white colour cap containing some liquid. The raiding party, with the drug detection kit which they had with them, carried out tests and found that one of the substances was MDMA which was then packed, sealed and marked as Exhibit I. The whitish colour powder was found to be cocaine. It was packed, sealed and marked Exhibit II. The liquid was poured in a vial, and it was tested and found to be LSD. This was marked as Exhibit III. The bottle in which the liquid was found, was also weighed, packed, sealed and was marked Exhibit IV. The raiding party found another polythene packet containing pieces of black substance in different sizes and shapes in the bag of the Appellant. This was tested and found positive for charas. This was packed, sealed and marked as Exhibit V. All such substances were weighed. The weight of the MDMA was found to be 72 grams, cocaine 5.5 grams, LSD liquid 2.5 grams and charas 785 grams. All these substances were sent for chemical analysis, and the chemical analysis officers confirmed that these substances were indeed MDMA, cocaine, LSD and charas, respectively.

5. The Prosecution accordingly filed charge-sheet against the Appellant for the offences punishable under Sections 22(c), 21(b) and 20(b)(ii)(B) of the NDPS Act. The Special Court, upon assessing the material on record, framed charge against the Appellant, which was duly explained to him. The Appellant pleaded '*not guilty*' and

claimed to be tried.

6. The Prosecution examined in all 8 witnesses. Thereafter, the statement of the Appellant under Section 313 of Cr.P.C. was recorded, in which he stated that he was innocent and that he was picked up from a rented room and falsely implicated in this case. Despite the opportunity, no defence evidence was led by the Appellant. By the impugned Judgment and Order, the learned Special Judge has convicted and sentenced the Appellant as aforesaid. Hence, the present appeal.

7. Ms. Tulkar contended that the two Chemical Analysts PW.1 and PW.5 examined on behalf of the Prosecution, have not furnished adequate details as to how, at what time, and in what manner, the tests were conducted to arrive at their opinion. She submits that neither the reports of the so-called experts nor their depositions shed any light upon the process undertaken by them for concluding that the substances allegedly found in the bag of the Appellant, were narcotic drugs or psychotropic substances. She submits that in the absence of adequate details, it cannot be said that the Prosecution has proved beyond reasonable doubt that any contraband was found with the Appellant. She placed reliance on the decisions of this Court in *Nicklaus Peter Heel v. State of Goa*¹ and

¹ 1998 (5) BCR 438

*Deen Khan Mohamad v. State of Goa*² to submit that in almost identical circumstances and by rejecting the testimony of KM Varshney who is, incidentally, the same Chemical Analyst who was examined as PW.1 by the Prosecution, the Court acquitted the accused persons involved in said matters. She submits that even the testimony of PW.5, the other so-called expert examined by the Prosecution, is equally vague and bereft of any details. For all these reasons, Ms. Tulkar submits that the Prosecution, in this case, has failed to prove its case beyond reasonable doubt.

8. Ms. Tulkar also pointed out that the Appellant, in this case, was released on bail by order dated 30/10/2018 made by the learned Single Judge in Criminal Application (Bail) No.294/2018. She pointed out that at the hearing of the bail, the learned Public Prosecutor had not disputed that the Chemical Analyser from the Office of the CFSL, Hyderabad had neither mentioned about the details in the report nor in his evidence before the learned Special Judge. This concession was one of the reasons why the Appellant was released on bail by the learned Single Judge, after taking into consideration the law laid down by in *Deen Khan Mohamad* (supra). Ms. Tulkar submits that same position holds even at this stage and, therefore, based upon the law laid down in *Deen Khan Mohamad* (supra) and *Nicklaus Peter Heel* (supra) the Appellant is

² Cri.Appeal No.27/1997 decided on 24/11/1997

entitled to an acquittal in this matter.

9. Ms. Tulkar then submits that in this case, there has been no compliance with the mandatory provisions of Section 50 of the NDPS Act, inasmuch as the raiding party despite claiming to have had prior information, neither made any arrangements for carrying out the search before a Gazetted Officer or a Magistrate nor was such search carried out in the presence of any Gazetted Officer or a Magistrate. She points out that the law laid down by the Hon'ble Apex Court in *Arif Khan alias Agha Khan v. State of Uttarakhand*³ is quite clear, in that such searches are mandatorily required to be undertaken before a Gazetted Officer or a Magistrate irrespective of whether the suspect requires this or not. She points out that in this case, the only independent witness to the raid/search was PW. 6 (Pancha). This witness was quite ambivalent as to his knowledge of the English language. In these circumstances, it is difficult to accept that the IO, in the present case, did inform the Appellant about his right to be searched before a Gazetted Officer or a Magistrate. For all these reasons, Ms. Tulkar submits that this is a clear case where a breach of the mandatory provisions of Section 50 of the NDPS Act is established and, therefore, the Appellant ought to be acquitted of the charges levelled against him.

³ AIR 2018 SC 2123

10. Ms. Tulkar submits that the decisions of the learned Single Judge in *Kushal Puri v. State and anr.*⁴ and *Raymond Locke v. State of Goa*⁵ may not reflect the correct position in law, post the decision of the Hon'ble Apex Court in *Arif Khan* (supra). She points out that there may be no inconsistency between the decisions in *Arif Khan* (supra) and *Vijaysinh Chandubha Jadeja v. State of Gujarat*⁶ particularly when reference is made to the observations in paragraph 32 which, in terms, provides that though Section 50 gives an option, the empowered officer must take the suspect either before a Gazetted Officer or a Magistrate in order to impart authenticity, transparency and creditworthiness to the entire proceedings. She submits that the view taken in *Arif Khan* (supra) is entirely consistent with the law laid down in paragraph 32 of *Jadeja* (supra). She submits that the decisions in *Kushal Puri* (supra) and *Raymond Locke* (supra) are in conflict with the decisions in *James Sunday Chinonso v. State and anr.*⁷ and *Krishna s/o Kavi Raj Malla v. State*⁸. For all these reasons, Ms. Tulkar submits that following the law laid down in *Arif Khan* (supra), the Appellant is entitled to be acquitted in this matter.

11. Ms. Tulkar then points out that though, in the present case, the raid was conducted allegedly on the basis of prior information,

⁴ Cri. Appeal No.9/2017 decided on 17/9/2020

⁵ Cri. Appeal No.82/2018 decided on 4/9/2020

⁶ (2011) 1 SCC 609

⁷ MANU/MH/2746/2019

⁸ Cri. Appeal No.15/2016 decided on 10/6/2019

there is no contemporaneous evidence produced by the Prosecution to substantiate such prior information. She points out that the procedural safeguards as set out in Sections 42 and 43 of the NDPS Act have been observed only in breach by the investigating agencies. She submits that this is an additional ground to upset the conviction of the Appellant.

12. Ms. Tulkar finally submits that in this case, there has been a total breach of the provisions of Sections 52 and 52 A of the NDPS Act. The investigating agencies, in this case, have adopted a procedure which is quite alien to the statutory procedure set out in Sections 52 and 52 A of the NDPS Act. On account of the adoption of this alien procedure, between 15/1/2014 and 17/1/2014 both, the muddemal property (alleged contraband) and the seals which were allegedly put on the envelopes carrying alleged contraband, were with or under the control of the ANC.

13. Ms. Tulkar submits that in all such matters though the proof of actual tampering may be difficult to come by, even the possibility of tampering is sufficient to vitiate the Prosecution case. She refers to the testimonies of the Prosecution witnesses, including, in particular, the testimony of PW.8 (at page 213 of the paper book) to point out that the officials of the Crime Branch handed over the muddemal property to PC B. No.5824, Rupesh Kandolkar of ANC

Police Station on 15/1/2014. She pointed out to the testimony of Dy.S.P. VamanTari (PW.3) who also deposed that on 15/1/2014 he returned the seal to the ANC. She pointed out that the CFSL reports from Hyderabad indicate that they received samples/MO only on 17/1/2014.

14. Ms. Tulkar submits that from this, it is clear that both, the muddemal property, as well as the seal, were with the ANC between 15/1/2014 and 17/1/2014. She submits that this is contrary to both, letter as well as the spirit of the various provisions of the NDPS Act. She submits that in such circumstances, a strong possibility of tampering cannot be ruled out, and the Appellant is entitled at least to the benefit of reasonable doubt, which clearly arises in this matter.

15. Ms. Tulkar submits that in this case, the Prosecution witness (PW.7) deposed that the envelopes in which the attached material was placed after the raid, were packed, sealed and sellotaped, and only thereafter necessary details were written in handwriting on these envelopes. She points out to the testimony of PW.7, where he admitted that at least on two envelopes writing was found below the sellotape portion. She contends that this is evidence to support tampering with the muddemal property.

16. Ms. Tulkar submits that even the forwarding note is alleged

to have been prepared at the spot of the raid between midnight and 1.00 a.m. on 14/1/2014. However, on perusal of the same, it is seen that case number of this matter is found on the forwarding note. The case diary produced, indicates that such case number was given only at or about 10.00 a.m. on 14/1/2014. She submits that this again suggests that the documents were fabricated by the Prosecution only in order to implicate the Appellant herein.

17. For all the aforesaid reasons, Ms. Tulkar submits that the impugned Judgment and Order may be set aside, and the Appellant be acquitted of the charges levelled against him.

18. Mr. Faldessai, the learned Additional Public Prosecutor for the Respondents defends the impugned Judgment and Order on the basis of the reasoning reflected therein. He points out that in this case, both, PW.1 and PW.5, have explained the tests which were carried out by them and the basis of their opinion. He submits that the decisions in the case of *Nicklaus Peter Heel* (supra) and *Deen Khan Mohamad* (supra) are, therefore, distinguishable. He relies on *Bhabani Basu v. State of Goa*⁹ to point out the manner in which the two decisions relied upon by Ms. Tulkar were distinguished by another Division Bench of this Court.

⁹ Cri. Appeal No.44/1997 decided on 13/02/1998

19. Mr. Faldessai submits that in this case, the provisions of Section 50 of the NDPS Act were not even attracted since the contraband has been recovered from the bag held by the Appellant and not from the person of the Appellant. He relies on *State of HP v. Pawan Kumar*¹⁰ and *State of Punjab v. Baljinder Singh and anr.*¹¹. In any case, he submits that even assuming that Section 50 of the NDPS Act was indeed attracted in this case, the same has been complied with and, therefore perhaps such an issue of alleged non-compliance was not even raised before the learned Special Judge. Mr. Faldessai submitted that the decisions in *Kushal Puri* (supra) and *Raymond Locke* (supra) represent the correct position in law and the decisions in *James Sunday Chinonso* (supra) and *Krishna Malla* (supra) could never have been regarded as binding precedents since the same were based upon concession made by the Public Prosecutor.

20. Mr. Faldessai submits that the concession made by the Public Prosecutor at the stage of grant of bail can neither bind the Prosecution at the stage of final hearing when the entire evidence is required to be looked into nor can the decision of this Court at the stage of grant of bail, be construed as some binding precedent. Besides, Mr. Faldessai points out that since the sentence, in this case, was of 15 years, this matter pertained to the assignment of Division

¹⁰ (2005) 4 SCC 350

¹¹ Cri. Appeal Nos.1565-66 of 2018 decided on 15/10/2019

Bench. However, this matter was initially placed before the learned Single Judge and the order on bail dated 30/10/2018, which is relied upon, was also made by the learned Single Judge. For all these reasons, Mr Faldessai submits that the Appellant may not be permitted to rely upon the bail order dated 30/10/2018, at this stage.

21. Mr. Faldessai submits that the provisions of Sections 42 and 43, upon which the reliance was placed by Ms. Tulkar, are directory and not mandatory. In any case, he submits that the evidence on record clearly indicates that even such provisions were duly complied with in this case.

22. Mr. Faldessai points out that the provisions of Sections 52 and 52A of the NDPS Act are not mandatory and, in any case, they were complied with in the present case. He submits that the Appellant may not be permitted to draw undue mileage out of the testimony of PW.8 in an attempt to create some disputes regards one of the circumstances in this matter. He submits that the principles relating to presumption of innocence and benefit of doubt in favour of the accused person, are well settled and these settled principles do not countenance the benefit of doubt, which may not even be a reasonable doubt.

23. For all the aforesaid reasons, Mr. Faldessai submits that this appeal may be dismissed.

24. Rival contentions now fall for our determination.

25. The first contention, in this case, concerns the testimony of the Chemical Analysers PW.1 and PW.5, examined on behalf of the Prosecution. Before we go to the depositions of these two witnesses, it is necessary to refer to the decisions in *Nicklaus Peter Heel* (supra) and *Deen Khan Mohamad* (supra), upon which considerable reliance was placed by Ms. Tulkar.

26. In *Nicklaus Peter Heel* (supra), PW.1 – the Chemical Analyser deposed thus :

“I analyzed the substance from the envelope Exh. 1 by suitable chemical method with positive test for the presence of LSD. I also performed suitable chemical test for the substance from envelope Exh. 2 which were marked by me Exh.2a-I and 2a-b and 2a-1 to 2b-4 and found that it gave positive test for the presence of charas.”

27. Based upon the aforesaid, this Court held that an expert's opinion is only an opinion. What amount of credibility or reliability could be attached to this opinion is a matter for the Court depending upon facts and circumstances of each case. The Court has to scan through the evidence of analyst, with reference to the certificate

issued by him and find out whether his evidence inspires confidence and can be relied upon. From the aforesaid deposition, it was pointed out that this witness had not stated what kind of tests he had conducted with the contraband articles and he had not mentioned what was the chemical data that he had observed when analyzing the contraband materials. This Court concluded that the evidence of PW.1 in the said case was cryptic and any reliance upon the same might occasion a miscarriage of justice. On this basis, the Court held that no reliance could have been placed upon the testimony of PW.1-Chemical Analyzer.

28. In *Deen Khan Mohamad* (supra), PW.1-Chemical Analyzer was incidentally KM Varshney, who also was examined as PW.1 in the present case. In his deposition in the said case, the Chemical Analyser stated that all the exhibits were analyzed by him by '*suitable chemical methods*' and according to the results obtained, the exhibits were found to contain heroin. In the entire evidence of the Chemical Analyser, there was no reference to the tests actually conducted by him or the basis of chemical methods applied by him for reaching the conclusion that the material was indeed the contraband or for that matter, heroin. It is in the light of such vague testimony that this Court held that the soundness of the expert's opinion is always measured by the reasons for reaching that opinion, which, in turn,

must be based on the tests conducted and results obtained and that must be made known to the Court.

29. Besides, in *Deen Khan Mohamad* (supra), the learned Public Prosecutor conceded that if the testimony of the Chemical Analyser was vague or bereft of any details, then, no conviction can be based upon such testimony. Therefore, taking into consideration the vague deposition of the Chemical Analyser, together with the concession of the Public Prosecutor, the Appellant in the said decision, was acquitted.

30. In contrast, the testimony of PW.1-Chemical Analyzer in the present case, cannot be said to be vague or bereft of any details, so as to attract the principles laid down in *Nicklaus Peter Heel* (supra) and *Deen Khan Mohamad* (supra), simply because PW.1, in this case, happened to be PW.1 in *Deen Khan Mohamad* (supra). In both the cases relied upon by Ms. Tulkar, the Chemical Analysers had merely stated that they had adopted '*suitable chemical methods*' or that they had carried out '*suitable chemical tests*' and on such basis, concluded that the material recovered from the accused persons was contraband.

31. In the present case, PW.1 has deposed that he carried out tests from 19/3/2014 to 9/4/2014 on the exhibits which were

forwarded to him in duly sealed envelopes. He has deposed that the exhibits were analyzed by Scott Tests, Marquis Test, Ehrlich reagent test, Frohde test, Meck test, Fluorescence test, Thin layer Chromatography and Spectrophotometry and Gas Chromatography-Mass Spectrometry (GC-MS). He has deposed that based upon the results obtained by these methods, that he detected MDMA, cocaine and LSD in the exhibits forwarded to him.

32. Mr. Faldessai, pointed out that these tests are well known and that is probably the reason why there was no serious cross-examination on the issue of the qualifications of the witness, as also the nature of the tests undertaken by him. The only suggestion which was put to this witness in the course of cross-examination is that the tests undertaken are not sufficient to establish the presence of MDMA, cocaine and LSD. The other suggestion put to PW.1 was that the results, as stated by him in his report, are not valid.

33. PW.1, in this case, has deposed that the basic characteristic of the substances examined by him does not disappear with the passage of time. He has deposed that the chances of liquid LSD evaporating are remote if the sample is properly sealed. He has deposed that the samples forwarded to him, had their seals intact and tallied with the specimen seal provided by the Police along with the

case. PW.1 has deposed, in great details, about the transparency of the process, as also the methods employed by him for the purpose of weighing the material. The testimony of PW.1, in the present case, cannot be said to be the same as the testimony of PW.1 in the cases of *Nicklaus Peter Heel* (supra) and *Deen Khan Mohamad* (supra) where the Chemical Analyser had vaguely deposed having conducted suitable chemical tests, without even bothering to indicate which tests were actually conducted by him.

34. Similarly, the Prosecution has examined PW.5- Jr. Scientific Officer (Drugs) in the DFDA Laboratory, at Bambolim. This was in the context of the exhibit, which was suspected to be charas. PW.5 has deposed in great detail about the analysis of the substance. She has deposed to the description of the substance, its microscopic examination for the purpose of her analysis. PW.5 has deposed to her conducting Beam's Acid Test and Negm's Test for the presence of THC. In the course of cross-examination, this witness may have admitted that no details of the three tests conducted by her have been mentioned in her report. Thereafter, this witness has deposed, in some details, as to the various tests carried out by her and the basis for the conclusions which have been drawn by her. She has deposed that THC is an active ingredient of charas and Beam's Acid Test and Negm's Test was undertaken for determining the presence of THC

and were positive. She has also deposed to the transparency of the entire process, and her testimony has not at all been dented in the course of cross-examination.

35. The testimony of PW.5, is also not at all comparable to the testimony of the Chemical Analysers in the case of *Nicklaus Peter Heel* (supra) and *Deen Khan Mohamad* (supra). Thus, on the basis of the said two decisions, the clear and cogent testimonies of PW.1 and PW.5 in the present case, cannot be discarded. Mr. Faldessai pointed out that in *Bhabani Basu* (supra), contentions based upon *Nicklaus Peter Heel* (supra) and *Deen Khan Mohamad* (supra,) were rejected after this Court noticed that the experts were reexamined and had provided sufficient details in support of their opinion.

36. According to us, no reliance whatsoever can be placed on the bail order dated 30th October, 2018 made in Criminal Application (Bail) No.294/2018, by which the Appellant was released on bail, pending disposal of this appeal. In the first place, this order was made at the stage of considering the bail application of the Appellant. Secondly, this order was made by the learned Single Judge though, in terms of the Rules this matter pertained to the assignment of the Division Bench. Thirdly, and most importantly, the order was made on the basis of a concession made by the learned Public

Prosecutor. The concession was made without even going through the depositions of PW.1 and PW.5 in the present case and on the presumption that there was no difference in the deposition of the Chemical Analyser in the case of *Deen Khan Mohamad* (supra) and the Chemical Analyser in the present case. Therefore, the order dated 30/10/2018 does not advance the case of the Appellant any further.

37. Therefore, in this case, it cannot be said that the evidence of two Chemical Analysers viz. PW.1 and PW.5 are infirm or that the Prosecution has failed to establish that the materials attached from the bag of the Appellant, were not narcotic drugs and psychotropic substances.

38. The next contention of Ms. Tulkar relates to the alleged non-compliance with the provisions of Section 50 of the NDPS Act. In this case, almost all the witnesses who formed part of the raiding party, have clearly and cogently deposed that the Appellant was informed about his right to be searched before a Gazetted Officer or a Magistrate. But the Appellant declined to exercise this right. The Pancha (PW.6) who was admitted to be an independent Pancha, was not ambiguous about his knowledge of English, as urged by Ms. Tulkar. In fact, PW.6 has clearly deposed that he can understand English, but cannot speak any English. Mr. Faldessai pointed out

that the entire cross-examination of this witness was in the English language and from the answers given by PW.6, it is more than evident that PW.6 understands English very well. Even if we exclude this contention, there is no reason to exclude the testimony of PW.6, when he states that he understands English, though he may not be able to speak in English. All the witnesses who formed part of the raiding party, including PW.6, have clearly and cogently deposed to compliance in terms of Section 50 of the NDPS Act, inasmuch as, the Appellant, in this case, was clearly informed that he has right, if he so requires, to be searched in the presence of a Gazetted Officer or a Magistrate and that the Appellant declined to exercise such right.

39. The Evidence on record also establishes, beyond any reasonable doubt, that to begin with PSI Dinesh Gadekar, after having informed the Appellant of his right to be searched before a Gazetted Officer or a Magistrate, requested the Appellant to hand over the black colour shoulder bag carried by him. Upon the Appellant handing over the bag, PSI Dinesh Gadekar (PW.9), the contraband was found in the bag, which was tested with the help of the detection kit which the raiding party had carried with it and was found to contain narcotic drugs and the psychotropic substances. It is only thereafter that person of the Appellant was searched, but no further contraband was found.

40. 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, briefcase, 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. Therefore, where the contraband is recovered from a bag, briefcase, or a container, it cannot be said that the provisions of Section 50 of the NDPS Act are attracted.

41. Ms. Tulkar, however, referred to *Sk. Raju v. State of West Bengal*¹² to submit that where the bag of the suspect, as well as the trouser of the suspect were searched, the provisions of Section 50 of the NDPS Act, could be attracted. In *Sk. Raju* (supra), the Hon'ble Supreme Court has relied upon its earlier decision in *Dilip & anr. v. State of MP* (2007) 1 SCC 450 in which it was held that if merely a bag carried by a person is searched, without there being any search of his person, Section 50 of the NDPS Act will have no application. But, if the bag carried by him is searched and if his person is also searched, Section 50 of the NDPS Act will have application.

42. Quite recently, in the case of *Baljinder Singh* (supra),

¹² Cri. Appeal No.459/2017

decided on 15/10/2019, the Hon'ble Apex Court referring to the decision of the Constitution Bench in *State of Punjab v. Baldev Singh* - (1999) 6 SCC 172 and *Vijaysinh Chandubha Jadeja (supra)*, held that the mandate of Section 50 of the NDPS Act is confined to '*personal search*' and not to search of a vehicle or a container or premises. The Apex Court noted that the conclusion (3) recorded by the Constitution Bench in para 57 of its Judgment in *Baldev Singh (supra)* clearly states that the conviction may not be based '*only*' on the basis of possession of an illicit article recovered from personal search in violation of the requirements under Section 50 of the NDPS, but if there be other evidence on record, such material can certainly be looked into.

43. The Apex Court in *Baljinder Singh (supra)* finally held that since the two-Judge Bench of the Hon'ble Apex Court in *Dilip (supra)* has not adverted to the distinction pointed out in the decisions of the two Constitution Benches and proceeded to confer an advantage upon the accused even in respect of recovery from the vehicle on the ground that the requirements of Section 50 relating to personal search were not complied with, the law laid down in *Dilip's* case cannot be said to be correct and is in fact opposed to the law laid down in *Baldev Singh* and other Judgments.

44. In *Baljinder Singh (supra)* reference was also made to the

decision in *Ajmer Singh v. State of Haryana* – [(2010) 3 SCC 746], where the accused had contended that the provisions of Section 50 of the NDPS Act would also apply while searching a bag, briefcase, etc. carried by the person and its non-compliance would be fatal to the proceedings initiated under the NDPS Act. The Hon'ble Apex Court, however, found no merit in the contention of the learned Counsel and held that it required to be noticed that the question of compliance or non-compliance with Section 50 of the NDPS Act is relevant only where the search of a person is involved, and the said section is not applicable nor attracted where no search of a person is involved. Search, and recovery from a bag, briefcase, container, etc. does not come within the ambit of Section 50 of the NDPS Act, because, firstly, Section 50 expressly speaks of search of person only. Secondly, the section speaks of taking of the person to be searched by a Gazetted Officer or a Magistrate for the purpose of the search. Thirdly, this issue is no more *res integra* in view of the observations made by the Apex Court in *Madan Lal v. State of HP* - (2003) 7 SCC 465.

45. From all this, it cannot be said that in the facts and circumstances of the present case, the provisions of Section 50 of the NDPS Act were indeed attracted. However, rather than rest here, even if we were to proceed on the basis that Section 50 of the NDPS Act was indeed attracted, this being some sort of a composite search,

even the evidence on record overwhelmingly establishes compliance with the mandate of Section 50 of the NDPS Act.

46. The contention of Ms. Tulkar, in the context of the decisions in *Kushal Puri* (supra) and *Raymond Locke* (supra) has been considered by us. In *Kushal Puri* (supra), the contentions based upon *Arif Khan* (supra) have been considered in some details. It is pointed out that the decisions in *James Sunday Chinonso* (supra) and *Krishna Malla* (supra) were based upon the concession made by the Public Prosecutor and, therefore, the said two decisions could not have been regarded as binding precedents. For the reasons adopted in *Kushal Puri* (supra), we are unable to accept Ms. Tulkar's contention based upon her reading of the decision in *Arif Khan* (supra).

47. Ms. Tulkar, however, pointed out that in *Kushal Puri* (supra), the learned Single Judge has failed to take cognizance of the following observations in paragraph 32 of *Jadeja* (supra) :

“32. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it

may verily strengthen the Prosecution as well.”

48. Ms. Tulkar submits that *Jadeja* (supra) is also an authority for the proposition that though Section 50 of the NDPS Act refers to an option, the investigating authorities must conduct a search before a Gazetted Officer or a Magistrate in order to impart authenticity, transparency and creditworthiness to the entire proceedings in the first instance. She submits that the view taken in *Arif Khan* (supra) is entirely consistent with the observations in paragraph 32 of *Jadeja* (supra) and, therefore, irrespective of the Appellant having declined to exercise the option contained in Section 50 of the NDPS Act, it was the duty of the raiding party to have searched the Appellant in the presence of nearest Gazetted Officer or a Magistrate.

49. In paragraph 29 of *Jadeja* (supra), the Constitution Bench has made it clear that the mandate of Section 50 of the NDPS Act is to apprise the person intended to be searched of his right to be searched before a Gazetted Officer or a Magistrate. Thereafter, the suspect may or may not exercise the right provided to him under the said provision.

50. A careful reading of paragraph 32 of *Jadeja* (supra) would indicate that the Constitution Bench was not at all referring to the option which a suspect has of being searched before a Gazetted

Officer or a Magistrate, but the reference really is to the option which empowered officer has to take the suspect either before the nearest Gazetted Officer or a Magistrate. In this context, the Constitution Bench has observed in paragraph 32 that if the suspect requires that the search be held before a Gazetted Officer or a Magistrate, then, the empowered officer, in the first instance, should endeavour to produce the suspect before the nearest Magistrate, as opposed to the Gazetted Officer, since, the nearest Magistrate would enjoy more confidence of the common man compared to any other officer. The Constitution Bench observed that such a course of action would not only add legitimacy to such search proceedings, it may verily strengthen the Prosecution as well.

51. Therefore, Ms. Tulkar's reading of paragraph 32 in *Jadeja* (supra) may not be correct inasmuch as she suggests that paragraph 32 of *Jadeja* (supra) requires that the suspect be searched before a Magistrate, irrespective of whether or not the suspect chooses to exercise the right provided to him under Section 50 of the NDPS Act. As noted above, this was not at all what was stated in paragraph (32) of *Jadeja* (supra).

52. For all the aforesaid reasons, we are unable to agree with Ms. Tulkar's contention that *Kushal Puri* (supra) and *Raymond*

Locke (supra), do not reflect a correct position in law or the said two decisions are in conflict with *James Sunday Chinonso* (supra) and *Krishna Malla* (supra).

53. Ms. Tulkar's contention based upon the provisions of Sections 42 and 43 of the NDPS Act, also cannot be accepted in the facts and circumstances of the present case. In the first place, the provisions of Sections 42 are attracted when the search is to be undertaken in any building or enclosed place. In the present case, the search was to take place at a public place, *i.e.* football ground. To such search, the provisions of Section 43 of the NDPS Act were attracted and not the provisions of Section 42 of the NDPS Act. There is absolutely nothing in the evidence on record to indicate that there was any breach in complying with the provisions of Section 43 of the NDPS Act. In fact, Ms. Tulkar was unable to substantiate her contention about any breach of the provisions of Section 43 of the NDPS Act.

54. Similarly, in this case, it is not possible to hold that there has been any breach of the provisions of Section 52 and 52 A of the NDPS Act. The Investigating Agencies took all possible care to see that the muddemal property and the seals were not under the control of the ANC, so as to offer any temptation for tampering. However,

Ms. Tulkar pointed out from the testimony of PW.8 that the Crime Branch Officials had, in fact, handed over the muddemal property through PC B. No.5824, Rupesh Kandolkar of ANC Police Station on 15/1/2014 for onward despatch to the CFSL at Hyderabad. She also pointed out that Dy. S.P. VamanTari (PW.3) had also deposed that on 15/1/2014, he returned the seal to the ANC.

55. On this basis, Ms. Tulkar contended that at least on 15/1/2014 and possibly on 16/1/2014, both the muddemal property, as well as the seal were under the control of ANC and this is sufficient to either infer tampering with the muddemal property or, in any case, sufficient to grant the Appellant benefit of reasonable doubt that tampering may have taken place in this matter. She pointed out that there is a presumption of innocence in such matters and burden is always on the Prosecution to prove that there was not even the possibility of tampering with the muddemal property, particularly cases under the NDPS Act. She contends that from the testimony of PW.8 and PW.3, a case is certainly made out for grant of benefit of reasonable doubt to the Appellant.

56. Although it is true that the evidence of PW.8 and PW.3, in the manner in which the same is read by Ms. Tulkar, suggests that for some brief period it is possible to say that the muddemal property and the seal were with the ANC, such inference may not be justified

if the entire evidence on record is considered cumulatively. The testimony of various witnesses speaks about compliance with the procedural safeguards in this matter. The Prosecution witnesses speak about packaging and sealing of the muddemal property and thereafter dispatching the same out of the control of the ANC. The Prosecution witnesses speak about the movement of the seal and how the seal was kept beyond the control of the ANC until the muddemal property was despatched to the CFSL, Hyderabad. Therefore, based upon the testimony of PW.8, which is mostly sought to be read *dehors* the entire context in which it appears, it cannot be said that the possibility of tampering of the muddemal property has been made out by the Appellant.

57. The contention-based upon some writings have been found below the sellotaped portion, is also not indicative of any tampering with the samples. Only a small portion of writing was noticed below the sellotaped portion and that too, in case of only two of the envelopes. PW.7 explained that a portion of sellotape was extra or loose and, therefore, when it was creased out, some portion of the writing was seen below the sellotape. There is absolutely no good reason not to accept such an explanation of PW.7. Besides, based upon some trivial inconsistency, the testimony of several of the Prosecution witnesses that all safeguards were duly taken to see that there was no scope for tampering, cannot simply be discarded.

58. Similarly, mention of case number on the forwarding note, is also not some discrepancy that casts any doubt upon the paperwork, or the documentation in this matter. Significantly, there was no cross-examination on this aspect and, therefore, there was no opportunity to the Prosecution witnesses to explain this aspect. However, Mr. Faldessai pointed out that case number, once the same is allotted, is required to be entered into the forwarding note for the convenience of reference. He submits that this is hardly any evidence of tampering or fabrication as alleged.

59. Ultimately, in all such matters, even we have to evaluate the evidence in its entirety. Some trivial discrepancies here and there, or rather failure to explain some trivial matters which are sought to be projected as discrepancies, more so because such explanations were not even elicited in the course of cross-examination of the Prosecution witnesses, cannot be the basis to urge invocation of the doctrine of reasonable doubt. The Court is required to separate the chaff from the grain and where the prosecution evidence is undented, in so far as the grain of matter is concerned, there is no question of unduly extending the benefit of reasonable doubt to the accused person. The legal position supports such a view in criminal matters.

60. In *HP Administration vs. Om Prakash*¹³, the Hon'ble Apex

¹³ (1972) 1 SCC 249

Court, has explained the concept of proof beyond reasonable doubt and the circumstances in which a benefit of doubt can be extended to the accused persons. The Hon'ble Apex Court has held that it is not beyond the ken of experienced, able and astute lawyers to raise doubts and uncertainties in respect of the prosecution evidence either during the trial by cross-examination or by the marshalling of that evidence in the manner in which the emphasis is placed thereon. But what has to be borne in mind is that the penumbra of uncertainty in the evidence before a court is generally due to the nature and quality of that evidence. It may be the witnesses as are lying or where they are honest and truthful; they are not certain. It is, therefore, difficult to expect a scientific or mathematical exactitude while dealing with such evidence or arriving at a true conclusion. Because of these difficulties corroboration is sought wherever possible and the maxim that the accused should be given the benefit of doubt becomes pivotal in the Prosecution of offenders which in other words means that the Prosecution must prove its case against an accused beyond reasonable doubt by a sufficiency of credible evidence. The benefit of doubt to which the accused is entitled is reasonable doubt – the doubt which rational thinking men will reasonably, honestly and conscientiously entertain and not the doubt of a timid mind which fights shy – though unwittingly it may be – or is afraid of the logical consequences if that benefit was not given. Or as one great Judge said

it is “*not the doubt of a vacillating mind that has no moral courage to decide but shelters itself in a vain and idle scepticism*”. It does not mean that the evidence must be so strong as to exclude even a remote possibility that the accused could not have committed the offence. If that were so the law would fail to protect society as in no case can such a possibility be excluded. It will give room for fanciful conjectures or untenable doubts and will result in deflecting the course of justice if not thwart it altogether. It is for this reason the phrase has been criticized. Lord Goddard, C.J., in *Rox v. Kritz* – [1950] 1 KB 82 said that when in explaining to the juries what the Prosecution has to establish a Judge begins to use the words “*reasonable doubt*” and try to explain what is reasonable doubt and what is not, he is much more likely to confuse the jury than if he tells them in plain language. ‘*It is the duty of the prosecution to satisfy you of the prisoner’s guilt*’. What in effect this approach amounts to is that the greatest possible care should be taken by the Court in convicting an accused who is presumed to be innocent till the contrary is clearly established which burden is always in the accusatory system, on the Prosecution. The mere fact that there is only a remote possibility in favour of the accused is itself sufficient to establish the case beyond reasonable doubt. This then is the approach.

61. Similarly, in *Shivaji Sahabrao Bobade v. State of*

*Maharashtra*¹⁴, the Hon'ble Supreme Court has cautioned against the dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittal is always good regardless of justice to the victim and the community. The Apex Court has held that the judicial instrument has public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go, but one innocent martyr shall not suffer a false dilemma. Only reasonable doubts belong to the accused. Otherwise, any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person lightheartedly goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this, in turn, leads to public demand for harsher legal presumptions against indicted *'persons'* and more severe punishment to those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that *"a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction*

¹⁴ (1973) 2 SCC 793

of the innocent....” In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents.

62. In *Harijana Thirupala v. Public Prosecutor*¹⁵ the Hon’ble Apex Court has held that in our administration of criminal justice an accused is presumed to be innocent unless such a presumption is rebutted by the Prosecution by producing the evidence to show him to be guilty of the offence with which he is charged. Further, if two views are possible on the evidence produced in the case, one indicating to the guilt of the accused and the other to his innocence, the view favourable to the accused is to be accepted. In cases where the Court entertains reasonable doubt regarding the guilt of the accused the benefit of such doubt should go in favour of the accused. At the same time, the Court must not reject the evidence of the Prosecution taking it as false, untrustworthy or unreliable on fanciful grounds or on the basis of conjectures and surmises. The case of the Prosecution must be judged as a whole, having regard to the totality of the evidence. In appreciating the evidence, the approach of the Court must be integrated not truncated or isolated. In other words,

¹⁵ (2002) 6 SCC 470;

the impact of the evidence in totality on the prosecution case or innocence of the accused has to be kept in mind in coming to a conclusion as to the guilt or otherwise of the accused. In reaching a conclusion about the guilt of the accused, the Court has to appreciate, analyze and assess the evidence placed before it by the yardstick of probabilities, its intrinsic value and the animus of witnesses. It must be added that ultimately and finally, the decision in every case depends upon the facts of each case.

63. Applying the aforesaid principles to the present case, it will really not be possible to extend the benefit of doubt to the Appellant despite forensic skills employed by Ms. Tulkar to substantiate her contentions on this issue. In such matters, we have to evaluate the entire evidence on record, without focusing exclusively upon some statements made by PW.8, which again, if construed from the context, hardly lead to the inference of possibility of tampering with the muddemal property in this case. It is necessary to record that even PW.1 – the Chemical Analyser has deposed in great details about the seals being intact upon comparing with the sample seal despatched for their record. For all these reasons, and upon taking into consideration the legal position explained by the Hon'ble Apex Court, it will not be possible to extend the benefit of doubt to the Appellant in the present case.

64. For all the aforesaid reasons, we are satisfied that the conviction of the Appellant, in this case, warrants no interference since the Prosecution has proved its case beyond reasonable doubt. Besides, in this case, we find that the Special Court has also marshalled and evaluated the evidence on record by applying the correct legal principles and, therefore, there is no case made out to interfere with the impugned Judgment and Order, in so far as the aspect of conviction of the Appellant is concerned.

65. However, when it comes to the issue of sentence under Section 22(c) of the NDPS Act for possessing MDMA and LSD, we feel that the sentence of rigorous imprisonment of 15 years is too severe in the facts and circumstances of the present case. It is true that the Appellant was found in possession of commercial quantities of the narcotic drugs and psychotropic substances. However, the record indicates that the Appellant was a relatively young person when he was apprehended for the commission of the offences. The Appellant had contended that he has the responsibility to maintain his sister in Portugal. In matters of sentencing, the reformatory element is now an accepted part of our criminal jurisprudence and sentencing policies. Upon cumulative consideration of all these factors, the interests of justice would be met if the sentence of 15 years of rigorous imprisonment is substituted with a sentence of 12 years of rigorous imprisonment for the offence under Section 22(c) of

the NDPS Act. Rest of the sentences, fines and in default sentences need not be modified in the facts and circumstances of the present case.

66. Therefore, we dispose of this Appeal by making the following order :

- (i) This Appeal is partly allowed;
- (ii) The conviction of the Appellant, as recorded in the impugned Judgment and Order, is hereby maintained;
- (iii) However, the sentence under Section 22(c) for possession of MDMA and LSD is reduced from rigorous imprisonment of 15 years to rigorous imprisonment of 12 years. The fine amount and the in default sentence for the offences under Section 22(c) of the NDPS Act is, however, maintained.
- (iv) The sentence, fine and the in default sentences in respect of other offences for which the Appellant stands convicted, are not disturbed.
- (v) The Appellant to surrender forthwith, before the NDPS. Court, failing which the Court to take steps to apprehend the Appellant and make him serve the balance period. In this interregnum, if any, the Respondents to take necessary steps to ensure that the Appellant does not flee from justice.
- (vi) In the facts and circumstances of the present case, there

shall be no order as to costs.

67. Though, we may not have accepted the submissions made by Ms. Dolorosa Tulkar in this matter, we must record our appreciation for both, the contents of her submissions, as well as the manner of her presentation before the Court. Further, we appreciate the efforts put in by the learned Additional Public Prosecutor Mr. Pravin Faldessai in this matter.

68. This Appeal is, accordingly, disposed of in aforesaid terms.

Smt. M.S. Jawalkar, J.

M.S. Sonak, J.

69. At this stage, Ms. Tulkar, the learned Counsel for the Appellant submits that the Appellant in this case may be granted four weeks' time to surrender, so that, in the meanwhile, the Appellant can also institute appropriate proceedings before the Hon'ble Supreme Court and seek for appropriate interim reliefs. She submits that the Appellant is willing to give an undertaking to this Court that if, within the period of four weeks there is no interim relief granted, then, the Appellant will surrender before the NDPS Court in order to serve out the balance sentence. Ms. Tulkar submits that some conditions may be imposed upon the Appellant to attend the NDPS Court, or the concerned Police Station, once or twice a week.

70. The learned Additional Public Prosecutor submits that though, the Appellant was released on bail earlier, now that the Appellant thinks that he has been convicted by this Court, there is a possibility that he might flee from justice.

71. Upon taking into consideration the submissions of the learned Counsel for the parties, we grant the Appellant four weeks time to surrender before the NDPS Court, subject to the following conditions :

(a) The Appellant, latest by tomorrow, to appear before the NDPS Court and furnish an undertaking that he will surrender to

the NDPS Court if, within a period of four weeks from today, there is no interim relief obtained from the Hon'ble Apex Court;

(b) Further, the Appellant to report once in three days before the concerned Police Station *i.e.* Anti Narcotic Cell, at Panaji, and mark his presence.

(c) Earlier terms and conditions, subject to which the Appellant was enlarged on bail, to continue during this period.

72. In addition to the aforesaid, the concerned officials of the ANC, to also take steps to ensure that the Appellant does not flee from justice.

73. We make it clear that in case the Appellant does not surrender before the NDPS Court by tomorrow itself, then, the time which we have now granted to the Appellant to surrender, shall stand recalled. The NDPS Court and the Respondents will then have to take immediate steps to apprehend the Appellant in order that the Appellant serves the balance period of sentence.

Smt. M.S. Jawalkar, J.

M.S. Sonak, J.