

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.1012 OF 2017
WITH
CRIMINAL APPLICATION NO.864 OF 2019**

Mgeni Abdullah Aboud
Age - 37 years, Occu : Nil,
Add - S/o. Mr.Aboud Mgeni,
100, Kinondoni, Dare Es Salam
Tanzania
(Presently at Arthur Road Jail)

.. Appellant

Versus

- 1) State of Maharashtra;
- 2) Air Intelligence Unit,
CS International Airport,
Sahar, Mumbai.

.. Respondent

.....

Mr.Dilip Mishra i/b. Mr.Ayaz Khan, Advocate for the Appellant
/Applicant.

Ms.A.A. Takalkar, APP for Respondent-State.

Mr.N. Natrajan, Spl. PP for Respondent No.2-State.

.....

CORAM : PRAKASH D. NAIK, J.

JUDGMENT RESERVED ON : DECEMBER 07, 2020.

JUDGMENT PRONOUNCED ON : MAY 05, 2021

JUDGMENT :

This Appeal under Section 374 of Cr.P.C. is preferred
against the judgment and order dated 18th November, 2017,

rendered by N.D.P.S. Special Judge, Greater Mumbai, in N.D.P.S. Special Case No.177 of 2014. The appellant is convicted for the offence under Section 8(C) read with Section 22 (c) of the Narcotic Drugs and Psychotropic Substance Act, 1985 ("N.D.P.S. Act", for short), and sentenced to suffer rigorous imprisonment for 12 years and to pay fine of Rs.1,00,000/-, in default to suffer further rigorous imprisonment for six months. The appellant is also convicted for the offences under Section 9(A) read with Section 25(A) of NDPS Act, and, sentenced to suffer rigorous imprisonment for 5 years and fine of Rs.50,000/-, in default, further rigorous imprisonment for three months. The appellant was acquitted of the offence punishable under Section 23 read with 29 of NDPS Act.

2 The essential facts of the case, which are necessary for deciding this Appeal are as under:

- (a) Complainant had suspicion about accused while he was on duty and instructed Kenya Airlines check-in counter staff to keep aside the check in baggage of the accused, who had checked in at Kenya Airline Counter No.E-08 for flight no. KQ 203 departing to Nairobi.

- (b) On instructions of complainant, the superintendent of Customs Mr.Girish Tilve, dog handler Mr.S.S. Mahadeshwar accompanied with sniffer dog intercepted accused in presence of panch witnesses. On being asked, the accused identified himself as (Mgeni Abdullah Aboud) holding Tanzanian passport bearing No.AB246937 and stated that he was departing to Johannesburg via Nairobi by flight No.KQ-203 on 2nd July, 2014. The accused identified one checked-in black coloured hard top zipper strolley suitcase of American Tourister make bearing baggage tag No.0706 KQ 249805 and claimed that it belonged to him. He was also found in possession of one E-Ticket No.706542864837C1 and Kenya Airways confirmation no.8LHBVZ issued in his name for sector Nairobi to Johannesburg by Kenya Airways flight No.KQ 203 and another E-ticket no.7065424864837C2 and Kenya Airways confirmation No.8LHBVZ, issued in his name for Sector Nairobi to Johannesburg by Kenya Airways flight No.KQ 762 dated 2nd July, 2014. He was also found in possession of boarding pass of above flight dated 2nd July, 2014, and, baggage claim tag bearing No.0706 KQ249805 of Kenya Airways flight KQ 762 and KQ 203.

- (c) The officers of AIU asked accused whether he was carrying any narcotic drugs in the checked-in baggage or on his person, the accused replied in the negative. The officers of AIU were not satisfied with his reply and asked ASI Mr.Mahadeshwar to instruct his dog to sniff the checked-in bag. Accordingly, in presence of panch witnesses, the dog sniffed the said suitcase and gave positive indication regarding presence of narcotic drug in the baggage by barking and psychotropic substances in his baggage to which he again replied in the negative. The checked-in bag bearing tag No.0706 KQ 249805 was found locked with inbuilt number lock. The accused was asked to unlock the bag. When the bag was opened by the accused, the officers examined the contents of bag. It was found containing seven sets of cotton bed-sheets. Those bed-sheets were examined by the Customs officers and in each set of bed-sheet, one white coloured transparent polythene pack was found. When the said polythene pack was cut and opened, it was found containing some white coloured crystalline powder. The accused was confronted with the said contents, and, he stated that those were some chemicals used as medicine.

- (d) AIU officers decided to carry detailed examination of checked-in bag of the accused in presence of panch witnesses. Since the place of departure area was not found suitable for such detailed examination, the officers of AIU had decided to conduct the same in AIU office situated behind Gate No.67, Level 6, Terminal-2, CSI Airport. The Kenyan Airways checked-in staff were told to offload the accused.
- (e) Examination of checked-in bag of the accused was carried out in the presence of panch witnesses. It was found containing seven bed-sheet sets and one transparent polythene packet in which some drugs were concealed. The entire white coloured crystalline powder was emptied in one large transparent polythene bag. Small quantity of white crystalline powder was tested with testing kit and it was found with white crystalline powder "Methaqualone". The total quantity of white crystalline powder was weighed and it was found weighing 12.9 kilograms worth Rs.6,40,00,000/-, as per prevailing rate of illicit drug market.
- (f) The accused was informed about his right to search under

Section 50 of NDPS Act in presence of Gazetted Officer of Government or Magistrate. The accused replied that he would like to be searched in presence of Gazetted Officer. The accused was told that Mr.Girish Tilve, Superintendent of Customs was Gazetted officer and present at the spot.

- (g) Personal search of the accused was carried out in the adjacent room of AIU office in the presence of panch witnesses. Nothing incriminating was found. Representative samples of 10 grams each were taken from the mixed white crystalline powder. It was put in a small transparent pouch with zip press seal and marked as S-1, S-2 and S-3. Small pouches were also head sealed after labelling and packing of the said samples. The officers of AIU and accused put their signatures on the envelope. Remaining white coloured powder weighing 12.770 grams was also kept in large transparent polythene bag and it was duly sealed with heat seal and yellow tag was affixed on it. Officers packed all the above mentioned exhibits inside the black coloured hard top zipper strolley suitcase of American Tourister make and the said suitcase was tied with the help of jute string from all sides and yellow

coloured paper was affixed on the jute string and sealed with AIU Seal No.133. The AIU officers and the accused put their signatures on the label. Sealing and labelling of other seized articles was completed.

- (h) During the investigation, statement of accused was recorded under Section 67 of NDPS Act, 1985. Statements of other witnesses were recorded. Samples were sent to Dy.CC, New Customs House, Mumbai, for examination. The lab authority had informed that they were not having common standard reference samples of Methaqualone and Mescaline. Second sample S-2 was sent to CFSL, Hyderabad for examination. The CSFL Hyderabad submitted its report stating that Methaqualone could not be detected in Exhibit S-2. Ephedrine Phenmetrazine, Amygdalonitrile and Dimethysulfone have been detected in Exhibit-S-2.

- (I) The complaint was filed before the Special Court. The accused was arrested on 2nd July, 2014.

3 Charge was framed by order dated 29th June, 2016,

for offence under Section 22(c), 9(A) punishable under Section 25(A) of NDPS Act, 1985, and Section 8(c) punishable under Section 23 read with Section 29 of NDPS Act.

4 The prosecution examined eight witnesses. P.W.1 Mr.Sameer Chandrakant Surve was examined as complainant. P.W.2 Mr.Nripesh Kumar Pathak is officer of AIU at CSI Airport, Mumbai, who recorded statements of accused and panch witnesses. P.W.3 Mr.Ajit Anandrao Harane was employee of Khambata Airways and flight handler for Kenya Airways. He acted as panch witness. P.W.4 Mr.Girish Tilwe is the Gazetted officer, P.W.5 Mrs.Margarat Samel was Superintendent of Customs posted as Sahar Airport. She recorded statement of Rajesh Chapadi in AIU office. P.W.6 Mr.Yatin Narvekar was examined as carrier of seized contraband to CSFL, Hyderabad. P.W.7 Mr.S.N. Kasture was custodian of DS-1, P.W.8 Mr.Tessio Ferreira was second panch witness.

5 Statement of the accused was recorded under Section 313 of Cr.P.C. The accused/appellant denied the charge and claimed that he has been falsely implicated in this case.

6 Trial Court held that the prosecution has proved that on 2nd July, 2014, the accused was found in possession of 12.800

kilograms white crystalline powder proved to be Ephedrine, a controlled substance and Phenmetrazine, a psychotropic substance at CSI Airport Mumbai. Prosecution has not proved that on 2nd July, 2014, accused was found to have hatched conspiracy with Naganil Yaqub Macho for committing the offences under NDPS Act.

7 Learned advocate for the appellant urged following submissions:

- (i) Section 42 of the NDPS Act has been violated. P.W.1 has not recorded the reasons of belief contemplated under Section 42 of the said Act.
- (ii) Bulk quantity which was seized from the baggage of the accused was not shown to panch witnesses.
- (iii) Both the panch witnesses did not support the case of the prosecution. However, they were not declared hostile. Prosecution had relied upon their evidence. Reliance is placed on the decision in the case of ***Leen Martin Vs. Union of India delivered n Criminal Appeal No.379 of 2007***, and the judgment of the Supreme Court confirming the said decision reported in ***AIR 2018 (SC) 991***.

- (iv) Panch witnesses have not identified the bulk quantity of drug recovered in the present case. P.W.3 and P.W.8 identified their signatures appearing on the article and not contents. Learned counsel relied upon the judgment of the Division Bench of this Court in the case of ***Milan Sarcaskin Vs. State***¹.
- (v) The officers who are party to panchanama did not speak anything on the said panchanama nor identified the accused;
- (vi) Section 50 of the NDPS Act is violated. P.W.4 was party to the panchanama. On his instructions, P.W.2 conducted personal search of the accused. Evidence of P.W.2, nowhere reflects that he conducted the personal search of the accused. Accused was told that P.W.4 is a Gazetted officer present there. Such introduction of P.W.4 while appraisal of Section 50 is in violation of Section 50 of the Act. Reliance is placed on the decision of Supreme Court in the case of ***State of Rajasthan Vs. Prmanand and Anr.***²
- (vii) Panch witnesses are silent about appraisal to Section 50 of NDPS Act. In the case of ***Shiv Kumar Ashok Mishra Vs.***

1 1996(4) Crimes 491

2 2014(2) SCC (Cri.)563

State³, it was held that in the absence of independent evidence of compliance of Section 50, no conviction can be imposed.

- (viii) P.W.1 is silent regarding the word “right” during appraisal made under Section 50 of NDPS Act. Evidence of P.W.5 reflect that she has recorded statement of Rajesh Chapadi under Section 108 of the Customs Act. Mr.Chapadi is the person who has checked-in the person of the appellant on the date of seizure and issued documents. The evidence of P.W.5 is hearsay. Rajesh Chapadi, Assistant Supervisor, Cambata Aviation, Mumbai, is examined by the prosecution. His statement recorded under Section 108 of the Customs Act, cannot be considered for the prosecution under NDPS Act. Learned counsel relied upon the decision of the Supreme Court in the case of **Noor Aga Versus State of Punjab and Another**⁴. P.W.2 recorded statement of the appellant and panch witnesses P.W.3 and P.W.8 under Section 67 of the NDPS Act. P.W.3 and P.W.8 has not referred to recording of such statement in their evidence before Court. It is submitted that the Apex Court in the

3 1996 Cr.L.J.1454

4 2010(3) SCC (Cri) 748.

recent decision in the case of ***Tofan Singh Versus State of Tamil Nadu delivered in Criminal Appeal No.152 of 2013***, has held that the statement under Section 67 of NDPS Act are inadmissible and hit by Section 25 of the Evidence Act.

- (ix) The report received from CSFL Hyderabad was marked as Exhibit-38. It was admitted by the advocate for the accused. The report refers to opinion regarding existence of drug Ephedrine, phenmetrazine. In the report there is no data sheet indicating what chemicals were used, what was the quantity and on which date tests were performed to identify the identity of sample. Ephedrine is controlled substance and phenmetrazine psychotropic drug. Hence, data sheet is necessary to find out the manner in which samples were examined. Reliance is placed on decision of this Court in the case of ***Mirza Qumer Hyder Versus A.K. Thakker, passed in Criminal Appeal No.554 of 2006***.
- (x) The evidence of P.W.6 mentions that he carried sample S-2 from DS-I warehouse on 2nd July, 2014, and, deposited the same in CSFL Hyderabad on 3rd July, 2014. He identified

Exhibit-42, as an authority letter issued by Assistant Commissioner of Customs for withdrawal of sample S-2. In the cross-examination, he stated that he does not remember the name of the person from DS-1 warehouse from whom he received the sample. He did not identify DS-1 register. Exhibit-42 was signed by Assistant Commissioner of Customs. He has not been examined to prove the contents of Exhibit-42. The sample packet S-2 was not shown to P.W.6 for the purpose of identification that sample S-2 was the same which he carried to the office of CFSL, Hyderabad.

- (xi) P.W.7 was examined as DS-1 in charge. On 2nd July, 2014, he was posted at DS-1 as Custodian and he had received sealed packages of seized articles. The package were brought to him by AIU Intelligence officer alongwith forwarding memo dated 2nd July, 2014 and Exhibit-45. His evidence does not show that he had handed over sample S-2 to P.W.6 on 2nd July, 2014. In cross-examination, he stated that he is not aware that Article S-2 was given to investigating officer for sending it to CFSL Hyderabad. P.W.7 did not state about existence of Exhibit-42 regarding withdrawal of sample packet S-2.

- (xii) The samples in the present case are tampered. They were not received in the condition in which it was packed. Panchanama shows that the samples were head-sealed. The report of the expert reflects that the polythene punch was auto pressed.
- (xiii) Search and seizure report under Section 57 of the NDPS Act is not exhibited in evidence.
- (xiv) Two cases were registered at the same time with the same panchas. On 2nd July, 2014, the appellant and another person Nganila Yakub Macho had checked-in, in the presence of AIU officers. The other person was apprehended at checked-in counter and panchanama was recorded between 1:45 a.m. to 3:00 a.m. The case of the prosecution is that they were known to each other. Prosecution chose to register two separate cases with the help of two panchs i.e. P.W.3 and P.W.8. The case of the appellant and other accused which was separately registered were tried in the same Court. In the statement of appellant, name of Mr.Macho was reflected and similarly in the statement of Mr.Macho, the name of the appellant

was referred. The appellant was not tried with the other person. However, on the basis of similar evidence, Mr.Macho was acquitted by the trial Court subsequently vide judgment dated 17th May, 2018.

- (xv) There are discrepancies in the evidence which creates doubt about the prosecution case. The accused is entitled for benefit of doubt.

8 Learned advocate for the appellant also relied upon the following decisions:

***(1) Union of India Versus Jarooparam⁵; and
(2) Premsingh Hjarilal Jaiswal Versus State of Maharashtra, dated 29th September, 2017, delivered by this Court in Criminal Appeal No.708 of 2010.***

9 Learned advocate for the respondent submitted that there is cogent evidence on record to prove offence against the appellant. Trial Court has appreciated the evidence on record and by assigning reasons convicted the appellant. The appellant was found in possession of the contraband worth Rs.6,40,00,000/-, procedural safeguards were complied. The offence was proved

5 2018(4) SCC 334

beyond all reasonable doubt. Section 42 of the Act is not applicable in this case. Although Section 50 is not attracted, there is compliance of the said provisions. The discrepancies, if any, are minor in nature. Evidence of panch witnesses cannot be discarded in entirety. By not declaring them as hostile witnesses, no adverse inference can be drawn against the prosecution. The decisions relied upon by the learned counsel for the appellant are not applicable in the present case. The recovery of contraband was from public place and hence Section 43 of the Act would apply and not Section 42 of N.D.P.S. Act. There is sufficient evidence to show the involvement of the appellant in the offence. The CA report was admitted by accused. It is admissible in accordance with Section 293 of Cr.P.C. Section 54 of the NDPS Act can be invoked in the present case. It relates to the presumption from possession of illicit articles. Section 66 of the Act is relevant in this case. It relates to presumption as to the documents. Section 35 of the Act refers to presumption of culpable mental state. In any prosecution, for any offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state unless it is proved contrary. It is submitted that the evidence of the witnesses supports prosecution case. There is sufficient evidence

to establish that the baggage from which the drug was recovered belonged to the appellant. The baggage tags tallied with the bag. It is established that the contraband was concealed in the bag. The panch witnesses had admitted their signatures on the panchanama. There is cogent evidence on record in the form of ocular and documentary which proved the offence. The Appeal be dismissed by confirming the conviction.

10 I have scrutinized the evidence on record. P.W.1 Sameer Chandrakant Surve, was posted at CSI Airport Mumbai as Air Intelligence Officer of Air Intelligence Unit of Customs. According to him, he was on duty on 2nd July, 2014 at departure hall of CSI Airport. The officers found one person with black coloured trolley bag. His movements were suspicious. He was in a queue at Kenya Airways counter. The officers approached Kenya Airways officers counter and informed them about the person in the que and instructed them to keep HIS bag aside after check-in. The suspect went to the counter. He gave his passport and E-ticket and got his bag checked-in and took boarding passes. On enquiry, the staff of Kenya Airways officers informed that the suspect was travelling from Mumbai to Nairobi by Kenya Airways flight No.AQ 203. The passenger was further travelling to

Johannesburg from Nairobi by flight No.AQ 762. The Airlines issued boarding passes, baggage tags for the checked in bag to passengers. Two boarding passes were issued to suspect for Mumbai to Nairobi and for Nairobi to Johannesburg. One baggage tag was issued to him. Both flight numbers were mentioned on the baggage tag. On questioning, he stated that he owned the bag and stated that it contains clothes and bed sheets. He denied that he was carrying any narcotic drug. Mr.Mahadeshwar gave instructions to his sniffer dog to sniff the bag of passenger. After sniffing the bag, the dog gave positive indication of presence of narcotic drugs. However, the suspect denied about it. He was requested to open the bag, which was locked with inbuilt number. The suspect opened the bag. On examination they found bed-sheets. The dog again gave positive indication of presence of narcotic drug. On examining bed sheets in the bag, it was found that there was transparent plastic polythene packet containing white crystalline powder concealed inside the bed-sheet. P.W.1 identified the accused, who was present in the Court as same person who was apprehended at the Airport. He further stated that the team along with the accused went to AIU. They conducted detailed examination of baggage. There were seven transparent polythene bags containing white

crystalline powder concealed in the bed-sheets. The accused stated that it was chemical for medicines. He stated that all the transparent packets contain same substance. The weight of the powder was 12 kilogram 900 grams. The test conducted at that place with the kit indicated that it was "Methaqualone". The test was conducted in the presence of Superintendent Mr.Girish Tilve and two panch witnesses, accused and the dog handler. Personal search of the accused was conducted in presence of panch witnesses. Accused was informed that his personal search could be taken before Gazetted officer or Magistrate. Accused preferred his personal search before the Gazetted officer Girish Tilwe (P.W.4) and I.O. Mr.Pathak. Nothing incriminating was found with the accused during his personal search. Three representative samples of 10 grams each from the white crystalline powder found in possession of accused were taken. The samples were put in a plastic pouches and sealed. The plastic pouches were kept in three separate envelopes. Labels were affixed bearing signatures of panch witness and accused. The case details were mentioned on the labels. Lac seal was put up on the envelopes. The polythene bag containing remaining 12 kilogram 770 grams was tied with tape. It was kept in cartoon box. The cartoon box was tagged with yellow tag bearing details

of case, signatures of panch witnesses, accused and P.W.1. He sealed the tag with AIU brass seal. The seven empty bags and bed sheets were kept in trolley bag of the accused. They tagged the bag with yellow tag bearing case details and signatures of panch witness, accused and P.W.1. There was tag on the bag of accused. P.W.1 identified white crystalline powder in plastic pouches in envelopes S-1, S-2 and S-3. They took the tag and kept it with boarding passes, E-Ticket and other travel documents. The said travel documents were kept in green envelope. P.W.1 prepared panchanama of search and seizure of the accused in the presence of accused , superintendent, panch witnesses and dog handler. The panch witnesses have put their signature on each page of panchnama. There are two boarding passes, one baggage claim tag, baggage identification tag, E-Tickets and flight manifest in envelope. These documents bear signatures of panch witnesses, accused and P.W.1. Cartoon box was produced from DSI warehouse. It was tagged with yellow tag. The seals on the tag and the cartoon box were intact. The seals were broken in Court. It was containing crystalline powder. It was the same polythene bag in which the contents of 7 pouches was emptied. On the yellow tag, there were signatures of panch witnesses, the accused and P.W.1. One zipper trolley bag was

shown to P.W.1. Seal was intact. It was broke open in the Court. There were bed-sheets, polythene bags and cardboard. Bed sheets, cardboard, seven polythene bags bear signatures of panch witnesses, accused and P.W.1. The zipper trolley bag and its contents were found in possession of the accused.

11 In the cross-examination, the evidence of this witness was not shaken in any manner. He stated that the movements of the accused were suspicious when he was in the Airport. He was frequently looking at his bag. Once boarding pass is issued to a passenger and as the baggage is checked -in, he loose physical possession over the said baggage. The witness volunteers that the passenger remained at a short distance from his baggage. He had witnessed the Airline staff affixing baggage tag to the baggage of the accused. When he accosted the accused, he was not having a list of Gazetted officers or Magistrate with him. P.W.4 was the Gazetted Officer. The accused was made aware about presence of Gazetted officer Mr.Tilve. Action was taken against a passenger in respect of suspicion of the quantity of contraband found in his possession.

12 Thus, from the evidence of P.W.1, it is established that

the movements of the accused were suspicious. He was boarding flight to Nairobi. His baggage was checked-in. The sniffer dog gave positive indication of drug inside the bag. On checking, it was found that the bag was containing the contraband. The accused was appraised about the compliance of Section 50 of the said Act. Samples were prepared. The contraband and other articles were sealed. The bag in which the contraband was sealed was seized and sealed. The documents, such as ticket, baggage tag and the boarding pass connects the appellant with the bag in which contraband was found. There was recovery of about 12.900 grams of the contraband. The value was around Rs.6,40,00,000/-. The evidence of this witness inspires confidence. I do not find any discrepancies to doubt the veracity of his evidence.

13 The defence has assailed prosecution case on various grounds. One of the primary contention is that Section 42 of the NDPS Act is not complied. It would be relevant to note that the seizure was at the Airport. It is a public place although the entry is restricted to the persons holding tickets. Thus, Section 42 would not be attracted in this case. The provisions of Section 43 of the NDPS Act would come into play. Hence, there is no substance in the submission that on account of non compliance of

Section 42, the conviction should be set aside. Another contention of the defence is based on the compliance of Section 50 of the NDPS Act, but, the evidence on record indicate that the accused was appraised of his right under Section 50 of NDPS Act. He consented for search in the presence of Gazetted Officer. Nothing was seized on his person, although, personal search of the accused was conducted. The packet in which the contraband was found was found checked-in baggage.

14 P.W.2 Nirpesh Pathak is the intelligence officer. He recorded the statements of accused and panchas. He recorded the statement of the accused. He also recorded the statements of panch witnesses. In the cross-examination, he stated that before recording statement of accused he told him that he is recording it in respect of smuggling of 12.800 kilograms of Methaqualone. He denied that signatures of the accused was obtained on blank papers. The entire cross-examination of this witness was devoted to statements of the accused. The Supreme Court in the decision in the case of ***Tofan Singh Versus State of Tamil Nadu (Supra)*** has observed that the statement recorded under Section 67 of the NDPS Act cannot be used as a confession and it is hit by Section 25 of the Evidence Act. However, in this case, there is

independent evidence establishing complicity of the appellant in the offence.

15 P.W.3 Ajit Harne is the panch witness. He stated that he was posted for Kenya Airlines as flight handler. He was employee of Khambata Airways. AIU had informed them to off load one passenger as he is carrying suspicious items in his bag. He cannot recollect the name of the passenger. He was called by AIU. The off loaded passenger was present. He do not recollect the face of the passenger. There were some samples on table. There were 5 to 6 small samples of white powder kept in polythene packets. He has no idea from which place they have obtained white powder. He was asked to become panch. He was given three packets for signing. He was forced to sign on that paper. Samples S-1, S-2 and S-3 were shown to him. He had signed on the said packets. The packets were opened in the Court. He admitted that the polythene packet bears his signature. They were given empty envelope and empty bags to mark their signature. Panchanama was shown to him. He admitted that his signature appears on each page. Two boarding passes were shown to him. One is Bombay to Nairobi and the other is Nairobi to Johannesburg. Checked-in baggage tag were shown to him. The

name of the passenger reflects on the said baggage tag. The passenger claim tag and passenger ticket was shown to him. The offloaded passenger list is shown to him. It reveals the name of the passenger and his signature. He cannot recollect the offloaded passenger. Sealed packet was opened in the Court. The yellow tag attached to sealed packet does not reflect his signature. He did not get chance to see the white powder in AIU office. He was shown ***Exhibit-21***. It is passenger offloaded list. He admitted that his signature is reflected on *Article-4*. Trolley bag was shown to him. Yellow tag is attached to the bag. It bears his signature. He stated that his signature was obtained when yellow tag was blank. He had not seen the bag in AIU office. He was introduced with officers. One person of African origin was present. He denied that in his presence bag was opened and they found polythene bag containing white powder inside the bed-sheets. He denied that they tested white powder in his presence and concluded that it contains Methagualone. It is not correct that, the passenger was asked as to whether he wants to be searched in the presence of Gazetted officer or Magistrate. It is correct that he put his signatures only on three sample packets. It is not correct that contents of panchanma are true. Some part is correct. He admitted that he put his signature only on three

sample packets. The defence did not cross-examine him. The submission of the defence is that although this witness has not supported the prosecution case, he was not declared hostile. The bulk quantity was not shown to him. It is pertinent to note that in the examination-in-chief itself several suggestions were put to him, which were related to his deviation from contents of panchanama. This witness has admitted that his signature is appearing at several places. Although he has denied that the bag was opened in his presence and the contraband was recovered from the bag. Several circumstances deposed by him in his evidence are in-consonance with the prosecution case.

16 P.W.8 Shri Tessio Ferreira is another panch witness. He deposed that he is staff of Kenya Airways. He was called by AIU officers. He do not remember the date on which he was called. But, it was intervening night of 1st July, 2014 to 2nd July, 2014. He was called in the context of contraband, which was seized from foreigner. He was supposed to board flight KQ 203 of Kenya Airlines. Foreign national was taken to AIU office. He will not be in a position to identify the passenger if he is present in the Court. He do not remember which drug was seized by AIU officer from the foreigner. Later on he was called at AIU office.

The contraband was already sealed. He was asked to sign as a witness to panchanama and he had put his signature on the panchanama. If panchanama is shown to him, he can identify his signature. He is identified his signature. He admitted that he signed the panchanama on every page. He had read the panchanama before putting his signature, and, thereafter, signed it. If labels of seized contraband on which he had signed are shown to him, he can identify his signature. Article-1 bears his signature. Article-2 bears his signature. Articles 3 and 4 also bears his signature. He was shown statement ***Exhibit-28***. On every page of ***Exhibit-28*** his signatures are there. His signature is also below the statement. He was shown black coloured suitcase having label. It bears his signature. The carton box was opened. He was shown Article-5. He admitted his signature on the label. In the cross-examination by defence, he stated that he do not remember the date and time when his signatures were obtained. The submission of the defence is that even this witness was not declared hostile. The reason is obvious. He has admitted his presence on the date of seizure. He admitted that he was called to act as panch witness. He admitted his signature on every page of the statements and below the statements. He admitted his signatures on every Articles which are relied upon

by the prosecution. For the reasons best known to him, he did not support the prosecution on material aspects. However, considering the tenor of his evidence, his version cannot be discarded completely.

17 P.W.4 Girish Tilve is the Gazetted Officer. He was posted as Superintendent AIU CSI Airport Mumbai. According to him, they were keeping surveillance in departure area. One passenger, checking in for Kenya Airways was identified on suspicion. Instructions were given to Kenya Airways to keep that passengers baggage on hold for examination. After the passenger checked-in, he was intercepted. On questioning, he denied possession of narcotic drug. He had one checked in baggage. His documents showed that he was travelling from Mumbai to Nairobi and Johannesburg. Sniffer dog gave positive indication of having narcotic drug in his bag. The suspect identified his bag. Contraband was seized from his bag. The accused was explained his right under Section 50 of NDPS Act. He was informed that he has right to be searched in front of Gazetted officer or Magistrate. He opted for search before Gazetted officer. He himself was Gazetted Officer. In his presence and presence of panchas, he was searched by Mr.N.K. Pathak. Nothing incriminating was recovered from his personal search. He

identified the accused in Court,. In the cross-examination by defence, he stated that CCTV cameras are available and cover entire area of Airport. It was operative at the place where the accused was apprehended. After issuance of boarding pass, the passenger loses control over baggage. He do not recollect whether any written correspondence was made with Kenya Airways before asking them to keep the passengers bag. The place was crowded. Bag was separated by Kenya Airlines and given to the passenger. This fact was witnessed by staff of Kenya Airways. He do not recollect as to whether he had requested any staff member of Kenya Airways to act as witness. He do not know procedure for obtaining AIU seal. From the evidence of this witness, it can be seen that he has corroborated the evidence of P.W.1. Cross-examination of this witness has not resulted in causing any damage to his version. He has referred to appraisal of right under Section 50 of NDPS Act, to the accused. This fact is not demolished in any manner in the cross- examination. It is also apparent that personal search of the accused has not resulted in finding of any contraband. Thus, his evidence clearly supports the prosecution case.

18 P.W.5 Smt.Margarat Samel was posted as
Superintendent of Customs at Airport. She issued summons to

Airline Supervisor Mr.Rajesh Chapadi. He stated that some officers had pointed out one passenger who was in queue for Kenya Airways flight. They suspected that he was carrying narcotic drug in his baggage since the dog has given a signal by barking. They were told that the bag of the suspect should be kept aside for examination after the passenger check in. Mr.Chapadi had checked-in the baggage of suspect and issued him boarding card. He was asked what he was carrying. The passenger informed that he is carrying some clothes and bed-sheets. On opening the bag, they found bed-sheets with white coloured polythene bags. The passenger was taken to office of AIU for inquiry. She identified the summons and the statement of Rajesh Chapadi. She also stated that she issued summons to clarify as to why name of passenger was not reflected in manifest. He replied that the passenger was booked for Kenya Airways flight without indicating the sector in which he was intending to travel i.e. flight segment. The flight number, destination and date were not mentioned. That is the reason his name was not mentioned in the manifest. The other reason is that the manifest was issued five hours before the flight departure. Passenger arrived before one hour on the counter. She identified her statement. In the cross-examination she stated that as per

Section 108 of the Customs Act, she has to call a person to record his statement. She did not make any inquiries with Rajesh Chapadi about senior officers of Khambata Airways. No correspondence was made with Khambata Airways.

19 P.W.6 Yatin Narvekar has deposed that he was working at Sahar International Airport, as Intelligence Officer. He was instructed and authorized to collect the sample from DS-1 warehouse and to deposit the same in CSFL at Hyderabad. Accordingly, he carried sample S-2 to CSFL Hyderabad. On 3rd July, 2014, he submitted the same and obtained acknowledgment of Deputy Director CSFL Hyderabad. He was shown letter written by Assistant Commissioner of Customs dated 2nd July, 2014 alongwith annexures and the letter of acknowledgment given by Deputy Director at CFSL Hyderabad dated 3rd July, 2014. These documents were marked as Exhibit-40 (Colly) and Exhibit-41. The Assistant Commissioner had authorized him to withdraw sample by letter dated 2nd July, 2014 (Exhibit-42). In cross-examination, he stated that he had received the samples on 2nd July, 2014 from the concerned officer, who was on duty at DS-1 warehouse, but, do not remember his name. He carried sample S-2 and made endorsement in the register at DS-1 warehouse.

He received the sample on 2nd July, 2014, and, went to CSFL Hyderabad from Mumbai by flight on 3rd July, 2014. In Exhibit-41, the word S-2 is not mentioned in acknowledgment and there is no rubber seal of CSFL Hyderabad on Exhibit-41. He denied that sample S-2 was never kept in safe custody in the AIU office.

20 P.W.7 S.N. Kasture was posted at DS-1 as Custodian. On 2nd July, 2014, he received sealed packages of seized articles. The forwarding memo dated 2nd July, 2014, was marked as Exhibit-44. On the said memo, he had mentioned CBK-V which suggest that the goods were to be kept in the cupboard. He made necessary entries in the register regarding receipt of goods. He produced original register along with true copy of the extract of relevant entry in the register. At page no.141, there is entry number 1910, dated 2nd July, 2017. The said entry was made by officer of AIU in the register. The copy of the extract was marked as Exhibit-45. The black coloured suitcase which was deposited in the godown, there is a label attached to the suitcase bearing number 1910, which is given on the forwarding memo, which is signed by him. He was shown sealed packet bearing VPR No.169 of 2016, which was opened in the presence of both the sides. On the envelope, there was endorsement CBK-5 showing the location

where the article was kept. He was shown envelope of sample S-1 and S-3. On the envelope, there was an endorsement CBK-5 showing the location where the article is kept. He was shown envelope containing mobile phone which was exhibited as Article-C. On the envelope, there is an endorsement CBK-5, showing the location where the article is kept. In the cross-examination, he stated that he had no knowledge about the entry in the register regarding deposit of articles in the Court. If there is any correction in the records, it is required to be initialed by concerned officer. He stated that the correction is overwriting in the figure 1910 and overwriting in figure 4 and 5 below that writing at Exhibit-41, is not made by him. The godown is at close distance from AIU office. If AIU officer want to withdraw the article from godown, he has to bring a letter from the Assistant Commissioner mentioning the name of the officer withdrawing the articles. He is not aware whether Article S-2 was **ever** given to the investigating officer for sending it to CFSL Hyderabad.

21 The statement of accused was recorded under Section 313 of Cr.P.C. His defence is that the prosecution has not proved case. He has given retraction of statement before the Court, which may be considered while deciding the case.

22 The prosecution has placed on record the notification dated 18th December, 2009, issued by Ministry of Finance. The notification mentions that in exercise of powers conferred by Clause (vii a) and (xxiii a) of Section 2 of the N.D.P.S. Act, 1995, the Central Government makes the amendment in the Notification dated 19th October, 2001, namely, in the Table at the end after Note 3, the following Note shall be inserted, namely:-

“(4) The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, others and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.”

23 The defence has assailed the judgment of the trial Court on several grounds, which are reproduced hereinabove. On scrutiny of evidence of the witnesses, I find that the prosecution has established that the appellant was found in possession of contraband. There is cogent evidence on record in the form of ocular evidence of witnesses and the documentary evidence establishing possession of contraband substance with

accused. P.W.1 has proved panchanama Exhibit-13, Articles 1, 2 and 3 i.e. envelope containing plastic pouch and white powder, boarding passes Exhibits-16 and 17, baggage claim tag Exhibit-18, baggage identification tag Exhibit-19, E-ticket Exhibit-20 and manifest Exhibit-21. The envelope containing mobile Article-4, cartoon box containing polythene bag of white crystalline powder Article-5, zipper trolley bag Article-6. It is established that the accused was present at the Airport. His movements were suspicious. Kenya Airways were instructed to keep the bag of the accused aside. The checked-in bag was taken out. The dog handler was summoned. The dog barking indicated presence of the contraband in the bag. The accused denied having contraband in the bag. He opened the bag, it was found containing the contraband valued Rs.6,40,00,000/-. The polythene packet containing contraband were concealed in the bed-sheets kept in the bag. The bag containing contraband was checked-in. There is cogent evidence on record to establish that the bag containing contraband was in possession of the accused. The documents, such as boarding pass, baggage claim tag and E-tickets has proved that the bag was belonging to the appellant. Although he was personally searched, nothing was recovered on his person. The cross-examination of P.W.1 was futile as his

version could not be shaken in any manner. Apart from oral evidence, documentary evidence brought on record could not be discarded in any manner through the cross-examination of P.W.1.

24 The defence has assailed the prosecution case on the ground that there is no independent evidence to support the evidence of interested witnesses. Evidence of P.W.3 Ajit Harne and P.W.8 Mrs.Ferrera, who acted as panch witnesses do not support the prosecution case. The evidence of P.W.1 is contrary to the evidence of the aforesaid witnesses. In the absence of separate independent evidence, it cannot be said that the possession of contraband with the accused has been proved beyond doubt. It is required to be noted that it cannot be said that merely on account of lack of discrepancy in evidence of panch witnesses, it can be said that the prosecution has failed to prove its case. If evidence of witnesses before the Court is cogent and there is no reason to discard such evidence merely on account of the panch witnesses not fully supporting prosecution case. The defence has contended that although P.W.3 and P.W.8 did not support the prosecution case, they were not declared hostile, and, hence, their evidence has to be considered in support of the defence of the accused. The word "hostile" has not

been described in the Law of Evidence. If the witnesses resile from their version, they can be cross-examined by the party on whose behalf they were examined. On perusal of evidence of P.W.3 and P.W.8, it is apparent that there are several admissions on their part which would not discard their evidence in entirety. Apart from that in the examination-in-chief itself, the prosecution has given suggestion to them which would otherwise could have been open to them by seeking permission from the Court. The prosecution did not feel that the said witness has resile from their version completely and on the contrary it was found that their evidence cannot be wiped out in toto. On perusal of evidence of P.W.3 Ajit Harne, it can be seen that he was posted for Kenya Airways as flight handler. The flight No.KQ 203 was scheduled from Bombay to Nairobi on 2nd July, 2017, it was reported to him that one bag is to be kept stand by after the checked-in of passenger. He was informed to off load one passenger since he was having suspicious items. He saw off loaded passenger who was African national. He also noticed that there were 5 to 6 small samples of white powder in polythene packets. He was given packets for signing. He was shown panchanama Exhibit-13. He admitted that his signatures appears on each page. He was shown Exhibit-16. He was shown boarding passes, one from

Bombay to Nairobi and the other was from Nairobi to Johannesburg. He was shown checked-in baggage tag and the name of the passenger on the said baggage tag. He was also shown tickets and the off loaded passengers list, which reflects name of passenger and his signature. His evidence discloses that his services were summoned. He admits his signatures on the documents and also admits the documents shown to him. Similarly, the evidence of P.W.8 who acted as another panch witness shows that he was staff of Kenya Airways. He was called in the context of contraband seized from foreigner. The foreign national was to board flight KQ 203 of Kenya Airways. He was asked to sign as witness to the panchanama and he put his signature on the panchanama. He identified his signature. He was shown panchanama Exhibit-13. He admitted that he had signed the panchanama on every page as panch witness no.2. He identified his signature. He read the panchanama before putting his signature, and, thereafter, had signed it. He identified his signature on the label of seized contraband. He admitted that Article-1 appears his signature and identified the same. He admitted that Article-2 i.e. envelope and Article-3, which is also an envelope contains his signature. He identified the same. He was also shown the envelope Article-4, containing mobile phone,

which appears his signature and identified the same. He was shown statement Exhibit-28, which was recorded after recording the panchanama. He admitted that on several pages there are signatures. Even there is signature below the statements. He identified the same. He was shown Article-6, a black coloured suitcase having label affixed to it. He admitted that the label appears his signature. He was shown Article-5, which is labeled along with lac seal. The labels appears his signature. He admitted that he put his signature on the labels in the AIU office. He was cross-examined by the defence and he stated that he do not remember the date and time when his signatures were obtained, the contraband was seized and his statement was recorded. The defence could not succeed in demolishing the version of this witness about his admission having signed on various documents. His signatures were found on the panchanama. He had read panchanama before signing it. His signatures were found on vital documents, which supports the prosecution case. In the light of his admissions, not declaring this witness hostile or cross-examining him by the prosecution, would not affect the prosecution case.

25 The evidence of P.W.2 supports the prosecution case. He was posted as incharge officer. He recorded the statements of

accused and panch witnesses. He issued a summons to accused and the panch witnesses. The defence has challenged the statement of the accused and the panch witnesses, which were recorded under Section 67 of NDPS Act, on the ground that such statement has no evidentiary value. Reliance is placed on recent decision of the Apex Court in the case of ***Tofan Singh Versus State of Tamil Nadu (Supra)***. In this decision it is held that the officer who had vested with powers under Section 53 of NDPS Act, are police officers within the meaning of Section 25 of Evidence Act as a result of which any confessional statements made to them would be barred under the provisions of Section 25 of the Evidence Act. The statement recorded under Section 67 of the NDPS Act, cannot be used as a confessional statement in the trial of an offence under the NDPS Act. It is true that the statement of the appellant-accused recorded under Section 67 of NDPS Act, cannot be used as a confessional statement in the trial. However, in the present case, there is overwhelming evidence on record to show that the accused was found in possession of contraband.

26 The evidence of P.W.6 and P.W.7 establishes that the samples were sent to CSFL Hyderabad, after obtaining them from DS 1 Warehouse. P.W.7 was the custodian for the sample. There

is nothing on record to doubt the testimony of these two witnesses. There are no reason to doubt the veracity of the CA report.

27 The defence had also agitated that there is non compliance of Section 42 of the NDPS Act. It is submitted that the seizure was from Airport which is not a public place since the entry is restricted to persons holding tickets. Hence, Section 42 would be attracted in this case. It is not possible to agree with this submission. The Apex Court in case of ***Narayanaswami Ravishanker V/s. Assistant Director, Directorate of Revenue Intelligence***⁶ has held that search and seizure taken at Airport which is a public place would invite provisions of Section 43 and not Section 42. The Supreme Court in the case of ***S.K. @ Abdul Haque @ Jajja***⁷ has considered the the issue relating to the compliance of Section 42. The facts of the said case would reveal that the accused was apprehended and was found in possession of contraband. The seizure was made from the open place. The contention of the accused was that there is noncompliance of Section 42 of the NDPS Act. After analyzing the factual aspects, the provisions of Section 42 and 43 of the said Act, the Court was

6 (2002) 8 SCC 7

7 (2018) 9 SCC 708

pleased to observe that it is difficult to accept the submission of learned counsel for the accused that Section 42 is attracted in the facts of the said case. The Court relied upon the observations in the case of ***State of Punjab Vs. Baldev Singh***⁸ and other decisions of the Apex Court. Paragraphs 12, 13 and 14 of the said decision reads thus :

“12 An empowered officer under Section 42(1) is obligated to reduce to writing the information received by him, only when an offence punishable under the Act has been committed in any building, conveyance or an enclosed place, or when a document or an article is concealed in a building, conveyance or an enclosed place. Compliance with Section 42, including recording of information received by the empowered officer, is not mandatory, when an offence punishable under the Act is attracted in situations where the seizure and arrest are conducted in a public place, which includes any public conveyance, hotel, shop or other place intended for use by, or accessible to, the public.

13 The appellant was walking along the Picnic Garden Road. He was intercepted and detained immediately by the raiding party in front of Falguni Club, which was not a building, conveyance or an enclosed place. The place of occurrence was accessible to the public

8 (2005) 4 SCC 350

and fell within the ambit of the phrase “public place” in the Explanation to Section 43. Section 42 had no application.

- 14 *The cases relied on by the learned counsel for the appellant will also not apply in the context of the facts before us. In Mansuri, an auto-rickshaw driver was intercepted by police personnel. Four gunny bags of charas were recovered from the autorickshaw. The police officer who had prior information about transportation of some narcotic substance, had neither taken down the information before carrying out the seizure and arrest, nor apprised his superior officer. He contended that the action taken by him was under Section 43 and not Section 42. Rejecting the argument of the State, this Court held that compliance with Section 42 was required as the autorickshaw was a private vehicle and not a public conveyance as contemplated under Section 43. Similarly, in Jag Raj, contraband was recovered from a jeep which was intercepted by police personnel on a public road after receiving prior information. The police officer who had received the information, admitted to not taking it down in writing, contending that Section 43 would be applicable. Rejecting the argument of the State, this Court held that the jeep which was intercepted, was not a public conveyance within the meaning of Section 43 and compliance with Section 42(1) was*

therefore mandatory. In Holia, Mandrax tablets were recovered from the hotel room of the respondent. The information was not reduced in writing by the officer who had first received the information. The State claimed that compliance with Section 42 was not required as the hotel was a public place. Rejecting the submission of the State, this Court held that while a hotel is a public place, a hotel room inside it is not a public place. This Court held thus :

“14 Section 43, on plain reading of the Act, may not attract the rigors of Section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under subsection (1) of Section 42, need not be complied with, only because the place where at search is to be made is a public place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with. It is also possible to contend that where a search is required to be made at a public place which is open to the general public, Section 42 would have no application but it may be another thing to contend that search is being made on prior information and there would be enough time for compliance of reducing the information to writing, informing the same to the superior officer and obtain his permission as also recording the reasons therefor coupled with the fact that the place which is required to be searched is not open to public although situated

in a public place as, for example, room of a hotel, whereas hotel is a public place, a room occupied by a guest may not be. He is entitled to his right of privacy. Nobody, even the staff of the hotel, can walk into his room without his permission. Subject to the ordinary activities in regard to maintenance and/or housekeeping of the room, the guest is entitled to maintain his privacy. There is hence no substance in the first submission."

28 ***In the case of State of Punjab Vs. Baldev Singh (supra)***, the Supreme Court in para 10 has observed that the material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting u/s 43 of the Act, the empowered officer has the power of seizure of the article etc and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful. In ***Narayan Swami Ravishankar Vs. Directorate of Revenue Intelligence (supra)***, the three Judge bench of Supreme Court considered whether the empowered officer was bound to comply with the

mandatory provisions of Section 42 before recovering heroine from the suitcase of the accused at the airport and subsequently arresting him. Answering the question in the negative the Court held that the search and seizure took place at the airport which is a public place. This being so, it is the provision of Section 43 of the NDPS Act which would be applicable. As Section 42 of the said Act was not applicable, seizure having been effected in a public place, the question of non compliance, if any, of the provisions of Section 42 of NDPS Act, is wholly irrelevant. In another decision in the case of ***Krishna Kanwar (Smt) @ Thakuraeen Vs. State of Rajasthan***⁹, the Supreme Court has considered whether a police officer who had prior information was required to comply with the provisions of Section 42 before seizing contraband and arresting the accused who was travelling on a motor cycle on a highway. The question was answered in the negative. in para 16 it was observed as follows :

“16 The proviso comes into operation if such officer has reason to believe that search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escaped offender; he may enter and search such building, conveyance or enclosed place any time between

9 (2004) 2 SCC 608

*sunset and sunrise after recording grounds of his belief. Section 42 comprises of two components. One relates to the basis of information i.e. : (i) from personal knowledge, and (ii) information given by person and taken down in writing. The second is that the information must relate to commission of offence punishable under chapter IV and/or keeping or concealment of document or article in any building, conveyance or enclosed place which may furnish evidence of commission of such offence. Unless both the components exist Section 42 has no application. Sub section (2) mandates, as was noted in **Baldev Singh (Supra)** case that where an officer takes down any information in writing under sub section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior. Therefore, sub section (2) only comes into operation where the officer concerned does the enumerated acts, in case any offence under Chapter IV has been committed or documents etc are concealed in any building, conveyance or enclosed place. Therefore, the commission of the act or concealment of document etc must be in any building, conveyance or enclosed place.”*

29 Learned advocate for the applicant had submitted that the C.A. is not examined by the prosecution as its witness. It is submitted that although the document was exhibited in

accordance with Section 293 of Cr.P.C. it would not absolve the prosecution from examining the chemical analyser. There are reasons to doubt the genuineness of the report. There are chances of tampering. Reliance is placed on the decision of this Court in the case of ***Mirza Haider Vs. Staet of Maharashtra***¹⁰. The said decision is not applicable in the facts of this case. There is no reason to doubt the C.A. report. Merely on account of non-examining the C.A. report, the C.A. report cannot be discarded. The decision relied upon by the learned counsel for the appellant was delivered in the facts of that case. It would be relevant to advert to Section 293 of Cr.P.C., which reads as follows:

“293. Reports of certain Government scientific experts.

- (1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.*
- (2) The Court may, if it thinks fit, summon and examine any such expert as to the subject- matter of his report.*
- (3) Where any such expert is summoned by a Court and he*

¹⁰ Criminal Appeal 554 of 2006

is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

(4) This section applies to the following Government scientific experts, namely:-

- (a) any Chemical Examiner or Assistant Chemical Examiner to Government;*
- (b) the Chief Inspector of Explosives;*
- (c) the Director of the Finger Print Bureau;*
- (d) the Director, Haffkeine Institute, Bombay;*
- (e) the Director, Deputy Director or Assistant Director] of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;*
- (f) the Serologist to the Government.*
- (g) any other Government scientific expert specified, by notification, by the Central Government for this purpose."*

30 The documents were admitted by the defence. There is nothing on record to doubt the genuineness of the C.A. report. In this circumstances, the turn around by the defence that C.A. ought to have been examined by the prosecution, cannot be accepted.

31 The other decisions relied upon by the defence were delivered in the facts of those cases which are not applicable in this case. It was further submitted that non-compliance of Section 50 of the NDPS Act, learned advocate for appellant had relied upon the judgment of the Apex Court in the case of ***Rajasthan Vs. Pramod and Anr. (Supra)***. It is contended that apart from the search of the bag of the appellant, he was personally searched. Although nothing was recovered from his person, Section 50 would be attracted. It was also contended that P.W.4 cannot be tagged as Gazetted Officer. From the evidence on record, it is evident that there was no prior information. Movements of the accused were found suspicious and he was intercepted. Apart from that as a matter of abundant caution, the appellant was appraised of his right under Section 50 of NDPS Act. He opted for search before Gazetted officer. P.W.1 was the Gazetted officer. In view of the circumstances, compliance of Section 50 of the NDPS Act. In a recent decision of Apex Court in the case of ***State of Pubjb Vs. Baljinder Singh and Another¹¹***, it was observed that, Section 50 affords protection to person in matters of concerning personal search and stipulated various safeguards. The contraband was seized from vehicle of accused.

Personal search was conducted. No recovery from person of

¹¹ (2019) 10 SCC 473

accused. The question that was considered by the Court is that, if a person found to be in possession of a vehicle containing contraband is subjected to personal search, which may not be in conformity with requirements under Section 50 of the Act, but the search of vehicle results in recovery of contraband material, which stands proved independently would the accused be entitled to benefit of acquittal on the ground of non compliance of Section 50 of the Act even in respect of material found in the search of the vehicle. It was held that personal search of accused did not result in recovery of contraband. The search of vehicle and recovery having been proved, merely because there was non-compliance of Section 50 of the Act as far as personal search was concerned, no benefit can be extended to invalidate recovery from vehicle. Apart from that, in the present case, there is compliance of Section 50 of the Act.

32 Learned counsel for the appellant then submitted that on the date of seizure, two persons were apprehended. Source of the alleged contraband was common. On search of their bags, contraband were recovered from them. The *modus* was similar. However, both were tried separately. The panch witnesses were common in both cases. They have not supported the prosecution

in both the cases. Appellant was convicted, however, the other person, namely, Nganila Yaqub Macho was acquitted. It is pertinent to note that the appellant was convicted vide judgment and order dated 18th November, 2017. Whereas, the other person was acquitted by the trial Court vide judgment and order dated 17th May, 2018. While acquitting, the trial Court has observed that the panch witnesses has not supported prosecution, C.C.T.V. at the Airport was not obtained, independent Gazetted officers were not called. It was not a chance recovery and Section 42 of NDPS Act would be attracted. However, on considering the evidence on record, merely on the ground that aforesaid person was acquitted subsequently, the appellant cannot be absolved of the charges. The evidence on record establishes the offence for which appellant is convicted.

33 Considering the evidence before the Court, I am of the considered opinion that the prosecution has established its case beyond all reasonable doubt. The appeal is devoid of merits and deserves to be dismissed.

:: ORDER ::

- (i) Criminal Appeal is dismissed;

- (ii) The impugned judgment and order dated 18th November, 2017, passed by N.D.P.S. Special Judge, City Civil and Sessions Court, Greater Bombay, convicting the appellant, is confirmed;
- (iii) Criminal Appeal stands disposed of accordingly;
- (iv) Criminal Application No.864 of 2019, stands disposed of.

(PRAKASH D. NAIK, J.)