

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

CRIMINAL APPEAL NO. 6 OF 2020

WITH

INTERIM APPLICATION NO.1351 OF 2020

Ramzan Ali Mohd. Hanif Lokhandwala @ Saeed ...Appellant

Versus

The State Of Maharashtra ...Respondent

WITH

CRIMINAL APPEAL NO. 7 OF 2020

WITH

INTERIM APPLICATION NO.1353 OF 2020

Asif Akbar Khan ... Appellant

Versus

The State Of Maharashtra ...Respondent

WITH

CRIMINAL APPEAL NO. 381 OF 2021

Smt. Shanhaz Siddiq Galiyar ... Appellant

Versus

The State Of Maharashtra ...Respondent

....

Mr. Ayaz Khan, Advocate for the Appellant in Criminal Appeal No.6 of 2020.

Mr. Dilip Mishra, Advocate for the Appellant in Criminal Appeal No.7 of 2020.

Ms. Roshni Singh i/b Dhanashree Lad, Advocate for the Appellant in Criminal Appeal No.381 of 2021.

Ms. S. V. Sonawane, APP for the Respondent – State.

CORAM	:	PRAKASH D. NAIK, J.
RESERVED ON	:	29th APRIL, 2022
PRONOUNCED ON	:	19th DECEMBER, 2022

JUDGMENT -

1. The Appellants are convicted vide judgment and order dated 18th December, 2019 passed by learned NDPS Special Judge,

Sessions Court, Grater Mumbai, in NDPS Special Case No.190 of 2016. The Appellants were convicted for offences punishable under Section 22(c) read with Section 8(c) of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act), 1985 (for short 'NDPS') and sentenced to undergo rigorous imprisonment for ten years (10 years) and to pay fine of Rs.1,00,000/- (one lakh) each. They were also convicted for the offence punishable under Section 29 read with Section 22 (c) of the NDPS, Act, and sentenced to undergo rigorous imprisonment for ten years (10 years) and to pay fine of Rs.1,00,000/- each and in default to suffer further rigorous imprisonment for two years (2 years). The substantive sentence were directed to run concurrently.

2. The brief facts of the prosecution case are as under:-

i. On 6th May, 2016, P. N. Shri Milind Bhosale attached to Anti-Narcotics Cell (for short 'ANC') Bandra Unit, Mumbai, received specific information that, the accused were likely to travel with psychotropic substances (Mephedrone) (M.D.) for sale in car No. MH-02-PA-7188 as agents of one person namely Rajik from South Mumbai, who is allegedly engaged in illicit-traffic of Mephedrone in Mumbai city and Mumbai suburban area. The said information was recorded into writing, panch witnesses were called and by following the pre-trap procedure and compliance of the

provisions of Section 42 of NDPS Act, trap was arranged by Police Officers of A.N.C., Bandra Unit, with panch witnesses at 1.35 p.m., near B.S.T. Bust stop of rout Nos, 185, 452 and 509 on G. R. Jolly road, near Tagore Nagar, Junction, Vikhroli (east).

ii. At about 2.15 p.m. all the accused came in Motor Car No. MH-02-PA-7188 from Kanjurmarg road and stopped near the B.E. S.T. bus stop. Accused No.3 Smt. Shehanaj Siddiq Galiyar was sitting on the driver's seat, whereas accused Nos.1 and 2 were sitting on the rear seat.

iii. Police Inspector Shri Anil Wadhavane under whose supervision, as per directions of official superior, the said raid was arranged, obtained personal information from the accused persons and then, he separately apprised to the accused persons about their legal right under Section 50 of NDPS, Act. The accused persons gave consent for their personal search by the police staff members. Separate personal search of accused Nos.1 to 3 was carried out.

iv. During the personal search, from the possession of accused No.1 Ramjan Ali, one transparent plastic bag containing white powder purported to be Mephedrone weighing about 250 grams was recovered. From possession of accused No.2 Asif Akbar Khan, similar plastic bag containing 250 grams powder purported to be

Mephedrone was seized. From the purse recovered from the hand of accused No.3, Smt. Shehanaj Siddiq Galiyar, one plastic bag containing 45 grams powder purported to be Mephedrone, cash amount of Rs.750/- and mobile phone handset of Samsung Company with sim-card No.8433823235 were recovered. On personal search of accused No.1, cash amount of Rs.1,000/- and mobile phone was recovered. From personal search of accused No.2 cash amount of Rs.500/- and one mobile phone handset of Samsung Company with sim-card No.8419931813 were recovered. Personal search of accused No.3 was conducted by lady Police Head Constable Smt. Shinde in the presence of lady panch witness in the closed room of traffic Police cabin at Tagore Junction. No article was found.

v. From each of the three packets recovered from the accused persons, two samples of 5 grams each i.e. total six samples were drawn and separately sealed. labels under signature of API Shri Katwani and panch witnesses were affixed and PI Shri Wadhavane impressed three seals of brass by using sealing wax on each seized packet. The cash amount found in personal search of accused was separately sealed. The mobile phones were taken in custody by API Shri Katwani for investigation. The signatures of accused persons were obtained on muddemal articles.

vi. On inquiry made by PI Shri Wadhavane, the accused No.3 informed that car No.MH-02-PA-7188 in which they had come there, was owned by the accused No.2 Aasif Akbar Khan. Search was conducted in the said vehicle and below rear seat, one transparent plastic bag containing white substance of 1.355 kg, purported to be Mephedrone was seized. The accused No.1 informed that it was Mephedrone powder. Two samples of 5 grams each were drawn and separately sealed and the remaining bulk quantity powder was also separately sealed. Car was seized. Panchnama regarding all the transactions occurred at the place of incident was prepared. The accused were produced before the senior Police Inspector at ANC, Cuffe Parade office alongwith seized muddemal. P. N. Shri Milind Laxman Bhosale lodged First Information Report (for short 'FIR') against the accused vide C. R. No.59 of 2016 for the offences punishable under Section 22(c) and 29 read with Section 8(c) of NDPS Act, against accused Nos.1 to 3. The seized Muddemal was deposited by Shri API Shri Katwani in Azad Maidan Bhandargrah. The Officer submitted Special report under Section 57 of the NDPS Act, to Assistant Commissioner of Police, Deputy-commissioner of Police and Senior Police Inspector. He recorded statements of PI Shri Wadhavane and panch witnesses. He forwarded sample envelop A-1, B-1, C-1 and D-1 to forensic

science laboratories at Kalina Mumbai, for Chemical Analysis. The Chemical Analyser's reports received positive showing presence of Mephedrone in each samples substance. API Shri Katwani submitted the charge-sheet against the accused before the Special Court.

3. Charge was framed against the accused vide Exh-24, vide order dated 27th September, 2017 for offences punishable under Section 8(c), Section 22(c) and 29 of the NDPS Act. The prosecution has examined seven witnesses. The learned Special Judge vide impugned judgment and order convicted the appellants for the aforesaid offences.

4. The submissions of the learned Advocate Mr. Khan appearing for one of the appellant can be summarized as under:-

a. Section 42 of the NDPS Act, is not complied. To show compliance of Section 42 of the Act, the prosecution has relied on Exh-42 i.e. information register, Exh-43 attested copy of station diary and Exh-44 forwarding letter prepared by PW.6 for sending Exh-42 and 43. Exh-42 is suspicious document. As regards recording of information in the information register vide Exh.45, PW-2 has stated that as told by informant vehicle referred in the information was to come from southern Mumbai side and the said fact is noted by him in the information. It was mentioned in the FIR

that, the vehicle in question had come to the spot from south Mumbai to north Mumbai. The information Exh-42 recorded by PW-2 and the FIR given by PW-2 does not reflect that, the vehicle was coming to the spot from south Mumbai. On the contrary, it is the case of prosecution that the vehicle was coming from Kanjurmarg to Vikhroli. Kanjurmarg is admittedly on the northern side of Mumbai, PW-6 have stated that PW-2 Shri P. N. Bhosale had not stated to him that the vehicle of the accused came from south Mumbai. PW-2 Shri P. N. Bhosale had not prepared any document in which, it was mentioned that, the vehicle of the accused persons came from south Mumbai side. PW-5 have stated that, it did not happen that when the information was discussed with him, he was informed that, the vehicle of the suspect would come from south Mumbai side. Hence Exh-42 is not the information which is allegedly received by PW-2.

b. Station diary entry Exh-43 at Serial No.7 is not recorded by PW-2. It is claimed that PW-6 has recorded the same. PW-6 has prepared Exh-44 wherein it is stated that, the information is recorded in station diary entry at serial No.6. Hence station diary entry Exh-43 at Sr. No.7 appears to be doubtful. The seizure report under Section 57, Exh-94 does not reflect that, the information was reduced into writing in the information register by PW-2.

c. Under Section 42 (2) of the NDPS, Act, it is obligatory on the part of PW-2 i.e. receiver of the information to reduce the information in writing and send copy of the same to the superior officer. The immediate official of PW-2 would be Head constable, A. S. I. PW-2 has admitted that, he is not given copy to his immediate official superior. Exh-42 has an endorsement by PW-5. PW-2 in his examination-in-chief has stated that, he had produced Exh-42 before PW-5. He had made an endorsement on Exh-42. This is an omission, if one peruses FIR. PW-5 stated that, he found the verbatim of Exh-44 were true and correct. The station diary entry Exh-43 was prepared after 10.30 a.m. When the letter Exh-44 was placed before him, either information or station diary were not placed before him for verification. Before signing Exh-44 he had seen entry No.6 of station diary relating to the information of this case. He admitted that, entry No.6 is not related to this case. Exh-44 reflects that copy of Exh-42 and Exh-43 was sent by PW-6 to his superior officer at cuffe parade. The law is settled that, the officer on receiving the information should reduce the same into writing and he should forward the same to his immediate official superior. The same has not been done in the present case. Hence there is violation of Section 42 (2) of the NDPS Act.

d. The accused have procured entries of the logbook of the

vehicle allegedly used in the present case through RTI. PW-6 on confrontation with D/-1 has admitted that as per the entries the driver of the vehicle was Shri Pawar i.e DW-1. As per entry of time 8 a.m. it is indicated that from that point of time on that day the vehicle was used on the road by the driver. As per entry in column No.8, only five persons excluding the driver were the passengers in the said vehicle. All the entries are made by the driver. PW-6 has signed on column No.9. All the entries were made by the driver. PW-6 has signed column No.9. Thus entries were made by driver and PW-6 has counter signed the same. The defence had filed an application vide Exh-124 and it was prayed that, the driver of the vehicle be examined as a Court witness. On 24th September, 2019 the said witness was present in the Court but he was not examined as Court witness and the defence was directed to examine him as a defence witness. The said witness did not get original logbook. He was directed to produce the original logbook. On 3rd October, 2019 the driver was examined as DW-1. The trial court had noted that, though summons was issued to produce original logbook, the same was not produced. The explanation given was that, during the rainy seasons the logbooks were shifted and the same is misplaced. This contention was not supported by any affidavit or document. The trial Court did not accept the said contention. DW-1 has admitted

that he is driver of police jeep MH-01-YA-3519 of Bandra Unit, ANC. Logbook is maintained for movement of vehicle. The entry in Exh-D/1 from 4th May, 2016 to 6th May, 2016 are in his handwriting. Exh-D/1 was marked as Exh-127. On 6th May, 2016 he had taken charge of the vehicle at 8 a.m. and on the same day at 8 p.m. he brought the vehicle back to Bandra Unit. The next entry shows that between 9.00 a.m. to 8.00 p.m. he had taken PSI Khandagale from Bandra Unit to Juhu galli to Versova to Andheri station to Bandra Unit. In column No.8, before the first entry dated 6th May, 2016 it is mentioned that total five persons in addition to the driver had travelled in the said vehicle. At the time of leaving charge of the vehicle relevant entries of travelling of vehicle are made. The logbook is placed before the in-charge officer for his signature. On 6th May, 2016 API Shri Katwani was the in-charge officer. It is submitted that, the logbook entry in respect of vehicle No.MH-01-YA-3519 indicates that, the vehicle was used on the road on 8.00 a.m., from Bandra Unit to the spot, from the spot to cuffe Parade from cuffe parade to G.T. Hospital, from G.T. Hospital to Azad Maidan lockup from Azad Maidan lockup to Bandra Unit wherein the vehicle returned at 8.00 p.m. to Bandra ANC. The logbook entry for the said vehicle for the same date also shows that, the vehicle had travelled from Bandra Unit to Juhu Galli at

9.00 hrs, from Juhu Galli to Versova, from Versova to Andheri Station and from Andheri Station to Bandra Unit at 20.00 hrs. Thus the logbook entry demolishes prosecution case.

e. The FIR and Panchanama indicates that there were seven Police officials, one driver and two panchas who have travelled to the spot. DW-1 has admitted that on 6th May, 2016 only five persons in addition to the driver had travelled in the said vehicle. The logbook shows that, the vehicle returned to Bandra ANC at 8.00 p.m. The logbook also reflects that PW-6 API Katwani has signed in column No.9 being the designated user of the vehicle. The following circumstances are in contrast to logbook entries of return of vehicle at Bandra Unit with the raiding team at 8.00 p.m. The godown register and station diary Exh-36 reflects that at 8.00 p.m., PW-6 API Katwani has deposited the articles at Azad Maidan. The godown register and station diary were exhibited through PW-1. PW-6 has subscribed to the genuineness of Exh-36. PW-6 stated that thereafter he took the accused to G. T. Hospital for medical examination. PW-6 then lodged the accused at Azad maidan general lockup and at 9.00 p.m. they went to Bandra Unit. PW-5 PI Wadhavane has stated that they have returned to ANC, Bandra Unit, at 9.30 p.m. In addition to above the logbook also reflects that, on 6th May, 2016, the vehicle was driven by the same driver

for secret work from 9.00 hrs to 20.00 hrs for some other secret work. It is important to note that, the original register has not been produced despite the direction of the Court.

f. PW-1 (store-in-charge) has exhibited Exh-34 and Exh-36. It shows that property in the present case was deposited at 8.00 p.m. by PW-6 on 6th May, 2016. PW-1 has admitted in cross-examination that, the property was deposited at 8.00 p.m. DW-1 has admitted that Exhibit-127 logbook of police vehicle bearing registration No. MH-01-YA-3519 reflects that, he alongwith raiding party were present at Bandra Unit at 8.00 p.m. on 6th May, 2016. On verification of kilometer reading API Katwani has signed the logbook. PW-3 is the constable attached to Bandra Unit of ANC. He stated that on 6th May, 2016 he had seen PW-6 API Katwani in the office. At 3.00 p.m., both officers were out of office. They had left prior to 3 p.m. They had come back to the office between 7.30 p.m. to 8 p.m. the question is whether PW-6 API Katwani was at Bandra Unit at 8.00 p.m. or depositing the muddemal at godown at Azad Maidan at 8.00 p.m., This creates doubt about the prosecution case.

g. PW-5 has stated that C.R. number is made available only after registration of the case. Hence C.R. number of the present case could only be allotted for the first time at the cuffe parade at 18.45 hrs after the FIR was lodged. While PW-2 was cross

examined in respect to seizure and preparing packets on the spot has stated that crime numbers were mentioned on the label affixed to packets of seized muddemal. He denied that in his presence crime number was not written on those labels. The evidence of PW-3, the carrier of the sample packets to FSL states that when he took samples, each sample envelope had one big label on front, the labels were in typed form but in some places it was hand written and the marking A-1 to D-1 were on the envelope of the label itself. The big label was bearing crime number when he took the custody of the sample from bhandargrah, he confirmed that lac seal was impressed on the label. According to PW-3 the crime number was on the big label having lac seal on same label. Hence considering evidence of PW-2, C.R. Number were written on the big labels at the spot of raid. As per evidence of PW-3, the samples having C.R. number on the big labels should have reached the CA and produced in Court alongwith the lac seals on the big label. If C.R. number was affixed on the sample packet at the time of seizure the entire seizure, sealing and packing is a suspicious act. Crime number cannot be available to the officer before lodging FIR. The samples received by CA when produced in the Court, did not have crime number on the big labels nor were the big labels on the samples were bearing lac seals. The samples appear to be tampered. Hence

benefit of doubt has to be given to the accused.

h. The seizure of contraband from below the rear seat of the vehicle is unbelievable. According to prosecution the plastic bag containing Mephedrone was recovered from below the rear seat of the car. PW-2 has stated that, plastic bag containing 1.355 kg, of Mephedrone was recovered from below the rear seat of the car. In the cross-examination he stated that, the rear seat was not packed seat and to recover the drug from the rear seat, they were required to remove the said seat. He also stated that he had not seen who had removed the rear seat of the car and does not remember whether rear seat was fixed. PW-4 has stated that, the police officer took search of the vehicle under the rear seat of the car one plastic bag containing powder was found. It was containing Mephedrone. In the cross-examination it is stated that, the seat of the vehicle was not taken away and brought outside the car. The seat was not lifted for checking. The muddemal was kept below the rear seat behind the driver seat. PW-5 PI Wadhavane stated that API Katwani took search of vehicle and he found in the boot room below the rear seat one plastic bag containing white powder. In the cross-examination he stated that at the time of search of vehicle they did not remove the rear seat and dicky. It is not mentioned in any document that contraband was found between two seats and that

rear seat was opened. He does not know that, the back seat of the vehicle was made of fiber. On the base on fiber platform of the seat the cushion is placed. PW-6 API Katwani has deposed that on direction of PI Wadhavane he took search of the vehicle and found in the boot room below the rear seat, one plastic transparent bag containing crystalline white powder. In cross-examination he stated that he is not aware whether back side seat in the car was rested on vehicle bars. He does not know whether below the foam seat there was fiber surface and they does not remember when he saw the vehicle in the Court premises he saw or not the rear seat. He stated that below the rear seat in the seized car contraband was found. The vehicle was produced in the Court PW-1, PW-2, PW-4 and PW-5 were re-examined. The evidence of PW-1, PW-2, PW-4 and PW-5 indicates that back seat of the car is fixed on the fiber bottom and the fiber sheet is fixed to the bottom surface of the car. They admitted that one cannot put hand below the seat, as there is no space. Thus, the alleged seizure from the vehicle cannot be believed.

i. The evidence of PW-7 is not reliable. The CA report at Exh-95 indicates that the alleged material is Mephedrone. The CA report is signed by Assistant Chemical Analyzer Mrs. Oberoi. The prosecution has examined PW-7 Mrs. Patil who is not an Assistant

Chemical Analyzer. The prosecution has not claimed that PW-7 has been sent by Assistant Chemical Analyzer Mrs. Oberoi. The prosecution has also not claimed that, Assistant Chemical Analyzer Mrs. Oberoi is not available to depose in Court. In the cross-examination PW-7 has admitted that she is not expert in Mephedrone. She was a rank below Mrs. Oberoi. She is not the Assistant Chemical Analyzer in the office of FSL, kalina she admitted that Mrs. Oberoi was in Hong Kong and PW-7 has no contact with her, after she left the job. The evidence of PW-7 does not indicate that she had given the chemical name of Mephedrone as per NDPS Act.

j. Mr. Khan has relied upon the following decisions:-

- i. Bombay High Court (D B) (Nagpur Bench) Cri. Appeal No.263 of 1996 dated 05/10/1999 Nilkanth Mahadeo Chandekar v/s The State of Maharashtra.*
- ii. Bombay High Court (D B) (Panji Bench) Cri. Appeal No.19 of 1996 dated 23/04/1997 Nicklaus Peter Heel v/s The State of Goa.*
- iii. Criminal Appeal No. 545 of 2006 Order dated 06/07/2010 Bombay High Court Shridhar L Chennuri v/s The Union of India.*
- iv. 1996 (4) Crimes 212 Lamin Bojang v/s State of*

Maharashtra.

v. 1999 (3) RCR (Criminal) 533 Cri. Appeal No.396 of 1990 dated 21/07/1999 State of Punjab v/s Baldev Singh.

vi. Order dated 09/12/2013 Passed in SPL (Cri.) NO.7289 of 2011 U O I v/s A Nasar Cherukara Cri. Appln No.355 of 2010 om Cri. Appeal No.1957 of 2008.

vii. Bombay High Court (D B) Cri. Appeal No.286 of 1991 dated 08/04/1991 Babita @ Tai Mohan Shardul v/s State of Maharashtra.

viii. Criminal Appeal No.424 of 2009 Order dated 31/01/2019 by Hon'ble Supreme Court Kamaljit Singh @ Pappu v/s The State of Punjab.

ix. JT 2002 (8) SC 292 State of Orissa v/s Sitansu Sekhar Kanugo.

5. Learned Advocate Mr. Mishra has submitted that there is non-compliance of Section 50 of the NDPS Act. The prosecution has examined PW-2, PW-4, PW-5 and PW-6 and relied on Exh-47, Exh-52 and Exh-53. The said latters reflect that they were signed by PW-5 PI Wadhavane as Gazetted Officer. The special report Exh-94 reflects PI Wadhawane's participation in raid as 'GO' under NDPS

Act, the short form of Gazetted Officer is 'GO'. PW-2 has stated that he does not know the long form of 'GO'. The letters were not perused by him at the time of raid. PW-5 Mr. Wadhavane and PW-6 Katwani were 'GO'. There was no Dandadhikarii in the raiding party members. He does not know the meaning of the word Dandadhikarii. In his presence PW-5 Wadhavane had not explained the accused persons the meaning of word "Rajpatrit Adhikari and Dandadhikarii". The evidence of complainant PW-2 does not inspire confidence. PW-2 stated that NDPS in Hindi is denoting English initials. PW-6 has explained the meaning of word NDPS. He do not know in which language the said fact was explained by PW-6. PW-4 panch stated that contents of letter is that "if he request for taking his personal search before Gazetted Officer or Magistrate, then the arrangement will be made accordingly". The evidence of panch PW-4 does not reflect that, the accused were informed of their right to be searched before Gazetted Officer or Magistrate. PW-5 has stated that he does not know whether under NDPS Act, there is post of Gazetted Officer. Every Class One Officer of the government is a Gazetted Officer. The Police Inspector is a Gazetted Officer. In none of the documents of this case, it is stated that, he was guidance officer. Under NDPS Act the word guidance officer is not described. The short form of Gazetted Officer can be used as "GO". Exh-47,

Exh-52 and Exh-53 mentions the word 'GO' below signature of PW-5. This would amount to mis-informing the accused that the Gazetted Officer is a member of raiding party. The explanation given by PW-5 that GO means guidance officer is a got up explanation. PW-6 have stated that, there is no document which indicates that "GO" means guidance officer. From the evidence of prosecution witnesses it can be stated that, there is no compliance of Section 50 of the NDPS Act in the letter and spirit.

6. He further submitted that, the evidence of PW-4 Panch witness is not believable. PW-4 has stated that she met PW-6 API Katwani at Bandra Unit. API Katwani told her that, the police officer had received some information about narcotics. Mr. katwani inquired with her whether she acted as panch witness in any other case. Similar inquiry was made with the other panch by Shri Katwani. This evidence is contrary to prosecution case. The above inquiry was made by PW-5 PI Wadhvani and not by PW-6 API Katwani. PW-4 do not depose what are the contents of information in the present case. PW-4 is silent on the issue of search of the raiding party members, search of police vehicles, search of raiding material. She did not see the article which the officers have taken with them. She does not know the exact name of the area. She did not take name of PW-5 in her evidence. Rrealizing that the witness

is deposing contrary to the prosecution case, the prosecution sought an adjournment on the ground of health condition of panch witness and the case was adjourned to 22nd October, 2018. On the next date i.e. 22nd October, 2018 she improvised prosecution case and gave details which she did not depose on 16th October, 2018. PW-4 stated that the label affixed to the sample packets was bearing signatures of two panchas and PW-5 PI Wadhavane. She again improved her evidence on 15th December, 2018 and stated that the contraband recovered from the vehicle was affixed with a label having signature of panchas and API Katwai. PW-4 is silent on the issue regarding the officer who conducted search of accused Nos.2 and 3. PW-4 is silent regarding preparation forwarding letters. She stated that, she had been to Bandra Court for executing affidavit but she does not execute the same. The rubber stamp appearing on the panchanama were affixed in her presence on spot. The rubber stamp seen at the bottom of each alternate page were impressed by his superior officer on the next day of the raid. When he submitted the panchanama before them for verification. PW-4 stated that she does not know the name and occupation of co-panch. She does not know whether co-pancha knows Marathi or not. It did not happen that, the police officer read the panchnama and explained them in Hindi language. She stated that, she read

the panchanama herself and the said fact is reflected in the panchanama. The work of weighing, sampling, packing and ceiling was done by PW-5 PI Wadhavane. She had seen testing kit. Subsequently stated that she had not seen any testing kit. It did not happen that police officer wrote that they had shown the testing kit to the panch witnesses that they were taking with them. She did not remember whether it is mentioned in the panchanama that panchas had checked the testing kit. She does not remember whether or not she had affixed any signature on the documents in the Bandra Unit before going for raid. She does not remember which officer was typing the panchanama. She does not remember whether labels were prepared in her presence. She does not know which officer was affixing the labels. No writing was made on the label in her presence. The labels were in typed form. She does not know who typed it. She does not remember whether the labels were typed before or after the apprehension of accused persons. She does not remember words inscribed on brass seal. She does not remember how sealing wax was melted. She never visited Prakash Karyalaya for any work. On 6th May, 2016 she had not gone in Prakash Karyalaya building. She does not know the building by name Prakashgarh. She had not stated in her statement that, the police had called her from Prakashgarh Karyalaya. She does not

know what is Prakashgarh Karyalaya and where it is. She cannot say whether in her statement it is rightly or wrongly mentioned that police had called her to act as witness from Prakashgarh Karyalaya.

7. Mr. Mishra had relied upon the decision of the Supreme Court in the case of State of Rajasthan v/s Parmanand and another (2014) 2 SCC (Cri.563).

8. Learned Advocate Ms. Roshni Singh appearing for the appellants in Criminal Appeal No.381 of 2021 submitted as follows:

i. The alleged car does not belong to accused No.3. There are no documents produced against ownership of car. There is no license produced to show that, the appellant was driving or capable of driving the car.

ii. PW-4 has stated that, the Police Officers took search of the car. Plastic bag containing Mephedrone was found under the rear seat of the car. In the cross-examination, it is stated that the seat of the vehicle was not taken away and brought outside the car. The seat was not lifted for checking. The muddemal was kept below the rear seat behind driver seat. PW-2 stated that plastic bag containing mephedrone was recovered from below the rear seat of the car. In cross-examination he stated that, the rear seat was not a packed seat and to recover the drug from rear seat they were

required to remove the said seat. He had not seen who removed the rear seat of car and does not remember whether the rear seat was fixed. PW-5 stated that API Katwani took search of vehicle. At the time of search of vehicle, he found plastic bag containing white plastic bag containing white powder. At the time of search of vehicle, they did not remove the rear seat and dicky. PW-6 stated that PW-5 took search of vehicle. He is not aware whether back side seat were vested on bars. It is submitted that in all cars no boot space is provided under rear seat which can be accessible without removing seat. It is not the case of prosecution that special arrangement was made in the car.

iii. The CDR of accused proves that, the prosecution case is false. According to prosecution the accused were found with mobile phone. PW-5 PI Wadhavane has stated that, API Katwani has seen the CDR's of the mobile phone of the accused. He had not given directions to the Investigation Officer to annex the copy of CDR with the charge-sheet. PW-6 has admitted that in Exh-94 he had mentioned that, he was going to call the CDR of mobile phone of accused. During the remand stage in the remand application he had mentioned the phone number of accused and sought custody of the accused for making enquiry about call details. The details of the the phone can be obtained from handset or by calling CDR from

mobile company. The CDR of the phone of accused was not filed alongwith charge-sheet.

iv. The accused No.3 had taken a defence that she is apprehended on 5th May, 2016 from Mumbra and taken to Bandra Unit. Her mobile was with officers. There were calls made and received and false case was registered against her. She filed an application Exh-10 on 26th April, 2017 calling for CDR alongwith tower location of mobile No.8433823235 from 12.00 Hrs, 5th May, 2016 to 17.15 Hrs, on 6th May, 2016. The Court had passed an order on 5th July, 2017 for production of CDR alongwith tower location. The Nodal Officer indicated that, one year has lapsed from 6th May, 2016 and hence the data has been archived by copying the data on magnetic tapes. Exh-23 was filed for production of CDR alongwith tower location of aforesaid mobile number 8433823235 from 12.00 Hrs, on 5th May, 2016 to 17.15 Hrs, on 6th May, 2016. The notice was issued to Nodal Officer. The Nodal Officer filed Exh-32 dated 3rd November, 2017 stating that there are requests from several law enforcement agencies and Courts across the country and they will require time for processing the record. The Nodal Officer was summoned to the Court on 14th November, 2017. He agreed to produce the CDR alongwith tower location of aforesaid mobile number for the aforesaid period. Vide

letter Exh-50 dated 14th March, 2018, the Nodal Officer produced the CDR alongwith tower location of above mobile number from 12.00 Hrs, on 5th May, 2016 to 17.15 Hrs, on 6th May, 2016. PW-6 was confronted with Exh-10, Exh-23 and Exh-50. He admitted that ANC Bandra Unit is adjoining the Bandra Court. The distance may be 300 to 400 mtrs. He had not carried out any investigation after the submission of CDR in the Court. Accused No.3 has examined DW-2 Manoj Patil, the Nodal Officer of Bharti Airtel limited in respect of CDR along with tower location of the aforesaid mobile number for the period mentioned hereinabove. He gave detailed evidence and made out case of secondary evidence of data maintained in the tapes from which the contents of Exh-50 have been made. The CDR and tower location were marked as Exh-50-A and 50-B.

v. The evidence of DW-2 reflects that, the server is the property of Bharti Airtel Limited and the same cannot be produced in Court. After lapse of one year the data is copied into magnetic tapes, which can be accessed only by authorised persons. The backup team had done the job of retrieving the data manually and he had personally confirmed contents of data. Evidence of DW-2 indicate that, the tower location of the aforesaid phone on 6th May, 2016 from 12..19..32 hrs to 12..31..14 hrs in coming / outgoing calls and

SMS were and CDR registered with the cell ID having address Mina Center, Bandra Court road. The Tower location of the said phone number on 5th May, 2016 from 19..36..53 to 19..46..19 hrs incoming calls were registered with cell ID having address Mina Center, Bandra Court road. The tower location on 5th May, 2016 at 19..48..36 hrs SMS message registered with cell ID having address Mina Center, Bandra Court road. This address matches with address of Bandra ANC Unit which is on Bandra Court road. The mobile phone of accused is having location of Bandra Court road from 5th May, 2016 at 19..36..53 hrs to 12..31..41 hrs on 6th May, 2016. This corroborate the defence of the accused that she was in custody of ANC Bandra Unit from 5th May, 2016. Sufficient doubt has been created about genuineness of the prosecution case.

vi. Learned Advocate Mrs. Singh has relied upon the decision of the Supreme court in the case of Shafi Mohammad v/s State of Himachal Pradesh dated 30th January, 2018 delivered in Special Leave Petition (Crl. No.2302 of 2017).

9. Learned APP Ms. Sonawane submitted that, the prosecution has proved its case beyond all reasonable doubts. The safeguards under Section 42 and Section 50 were complied. The appellants were found in possession of Mephedrone. The seizure is proved. All the witness have supported the prosecution case. Contraband was

also found below the seat of the vehicle. There was no effective cross-examination to disbelieve prosecution case. There is nothing on record to suspect that, the vehicle in which the accused were found carrying the Mephedrone was not concerned in the trap. The information was recorded in writing. It was forwarded to Superior Officer. The accused were apprised of the right to have search before Gazetted Officer in compliance with Section 50 of the NDPS Act. There is consistent evidence which establishes that the accused were found in possession of contraband. There were no discrepancies in the evidence of prosecution witnesses. Merely on the ground that CDR was not produced by the prosecution no adverse presumption could be drawn against the prosecution. PW-7 was a competent witness, she has produced analysis report. She has participated in the test. Her evidence has to be appreciated in accordance with Section 293 of Code of Criminal Procedure (for short 'Cr.P.C.'). Report produced by her is required to be taken into consideration. The charge under Section 22(c) and Section 29 read with Section 8(c) of NDPS Act was proved against accused. Specific information was received that the accused are likely to travel with Mephedrone for sale. The information was reduced into writing, panch witnesses were called. Section 42 was complied. Accused were apprehended. All the accused were found in the vehicle. The

accused were informed about their legal right under Section 50 of the NDPS Act. During the personal search, plastic bag containing Mephedrone weighing about 250 grams was recovered from accused No.1. Plastic bag containing 250 grams Mephedrone powder was seized from accused No.2. The accused No.3 was found in possession of plastic bag containing 45 grams powder of Mephadrone. Personal search of accused No.3 was conducted by lady Police Head Constable in close room. Samples were taken and sealed, search was made in the vehicle and transparent bag was recovered from below rear seat containing 1.355 kg of Mephedrone. Report was submitted under Section 57 of the NDPS Act. PW-1 is the store keeper Head constable. PW-2 received the information and participated in the raid and filed FIR. PW-3 is the sample carrier. PW-4 is the panch witness. PW-5 is the Police Inspector. PW-6 is assistant Police Inspector and PW-7 is the Scientific Assistant. There is documentary evidence on record. The evidence of witnesses establishes the facts that the accused were found in possession of contraband. The analysis report supports the prosecution case that, the contraband recovered from the possession of the accused and that found in the car is Mephedrone psychotropic substance. The defence has failed to demolish the prosecution case. The oral evidence of witnesses and the

documents exhibited in evidence proves the compliance of safeguards under Section 42 and Section 50 of the NDPS Act.

10. Learned APP has relied upon following decisions:-

- i. *Saiyad Mohd. Saiyad Umar Saiyad Vs. State of Gujrat.*
- ii. *Vijaysing Chandubha Jadeja Vs. State of Gujrat.*

11. PW-1 S. T. Torne has deposed that on 6th May, 2016 he was on duty at Azad Maidan store room unit from 9.00 a.m. to 10.00 p.m., API Katwani had been to store room at around 7.30 p.m. He was having possession of 16 packets. Entry was made in muddemal register and the muddemal was kept in store room. On 7th May, 2016 muddemal, articles were taken out from store room and handed over to constable Thakur. On 19th October, 2016 API Katwani had visited store room. He received the articles by noting muddemal number. On 6th August, 2016 lady police Naik Smt Vasave brought one sealed envelope from office of Forensic Science Laboratory, kalina, on each envelope which he received was having label pasted on it. On label the details of case had been noted, particularly name of accused and description of property. He identified the vehicle which was produced in the premises. In the cross-examination, he stated that his statement was not recorded. He did not put his initial on any articles. When the vehicle was produced in the Bhandargraha the front bonnet was having wax

seal impressed. At present the said seal was not there.

12. PW-2 Mr. Milind Bhosale stated that he was serving with ANC Unit, Bandra as Police Naik. On 6th May, 2016 at about 10.00 a.m. confident informant came to him and informed him that person namely Rajik was selling narcotic drugs (M.D.) through his agents in Mumbai and Suburban area. The informant also stated that on 6th May, 2016 between 2.00 p.m. to 3.00 p.m. agents of Rajik namely sayeed, Asif and Shanhaz were to come by their car No. MH-02-PA-7188 to Tagore Nagar, Junction Vikhroli, (East) for selling Mephedrone to customers. He noted the information in the information book. He showed the entry made in the information register to Police Inspector Wadhavane. Police Inspector Wadhavane had directed API Katwani to note down entry in respect of said information in the station diary. API Katwani noted down entry into station diary. Police Inspector Wadhavane communicated said information by phone to superior officers at ANC office cuffed parade. ACP, ANC office ordered that after confirmation of the information received further action should be carried out under supervision of Police Inspector Wadhavane. API Katwani obtained copies of station diary in which information received was noted down and sent copies of station diary alongwith forwarding letter through Police Naik Shinde to ACP and Senior Police Inspector ANC

office, cuffe parade. He produced original information book before the Court and identified his handwriting and his signature as well as signature of Wadhavane. Raid was arranged, panchas were called, pre-trap panchanama was recorded. At about 2.45 p.m. vehicle bearing registration No.MH-02-PA-7188 came at Tagore Nagar Junction and stopped near bus stop for BEST, route No.185, 453, 509 at G. R. Jolly road, Vikhroli (East). Raiding party surrounded the Vehicle. Wadhavane introduced raiding party members to suspected persons. The accused disclosed their names. Police Inspector Wadhavane explained the purpose of search to accused No.1. Ramjan Ali and gave letter under Section 50 of the NDPS Act in Hindi to accused about legal rights in respect of search. Contents of letter were read over and explained by Police Inspector Wadhavane to Ramjan Ali. In the letter it was mentioned in Hindi that as per Section 50 of the NDPS Act, he has a right to be searched before the nearest Magistrate or Gazetted Officer. In the event he make such request, the required arrangements would be made. Accused No.1 told them that such search was not necessary and gave written endorsement on copy of letter that police can search him. He signed below the endorsement. Inspector Wadhavane and Police Inspector Katwani conducted personal search of accused No.1. He was found in possession of bag

containing powder. The accused No.1 disclosed that it was Mephedrone. The weight of the powder was 250 grams. Samples were obtained. Mobile handset was found in possession of accused No.1. It was taken into custody by API Katwani for investigation. Mr. Wadhavane explained object of search to accused No.2 Asif Khan and gave letter under Section 50 of NDPS, Act in hindi to accused No.2 about legal rights in respect of search. Contents were explained in Hindi. It was explained by Police Inspector Wadhavane to Asif Khan that as per Section 50 of the NDPS Act, he has right to be searched in the presence of nearest Magistrate or Gazetted Officer. If he demands such arrangement would be made. Accused No.2 was found in possession of powder weighing 250 grams. It was Mephedrone. Samples were obtained. Mobile phone of accused No.2 was taken into custody. Lady suspect (Accused No.3) told her name as Shehnaz Galiyar. PI Wadhavane gave letter under Section 50 of the NDPS Act to her. Contents were explained to her. She was explained that as per Section 50 of NDPS Act she has right to be searched before nearest Magistrate or Gazetted Officer. If she demands, such arrangements would be made. The accused No.3 agreed for search by police, she was searched by women Police constable at chowki. Accused No.3 was carrying purse. On search 45 grams powder was found in the purse. It was Mephedrone.

Samples were obtained. The search was conducted in the car. Plastic bag was found below the rear seat of the car. It was containing powder weighing 1.355 kg. It was Mephedrone. In the cross-examination he stated that Police Havaladar is immediate superior authority to the post of Police Naik. Police sub-Inspector, Police Inspector and all other superior authorities are also immediate superiors to the post of Police havaladar. He did not ask informant details of main person Rajik. API Katwani was immediate subordinate of Police Inspector Wadhavane. API Katwani was immediate superior to the Post of Police Naik. Copy of information was not given by him to API Katwani. Station diary of ANC unit was not in the custody of PI. Wadhavane. After perusing information book PI Wadhavane had not called station diary. In his presence PI Wadhavane told API Katwani to note down entry about information into station diary. API Katwani had not noted down entry about information into station diary in his presence. Copies of information register and station diary annexed to forwarding letter Exh-44 were perused by him. He had not seen the documents which were sent to superior authorities at ANC office cuffe parade. He had not noticed any difference in the entries about information from original information book, station diary and copies of entries. While giving his statement he had not stated before API Katwani

that he had perused documents annexed to forwarding letter. At the time of selling, packing labelling of muddemal accused were not called in Police vehicle. When PI Wadhavane explained accused persons about their right under Section 50 of the NDPS Act, distance between accused was five feet each. He do not remember when PI Wadhavane explained those rights to accused No.1 which accused was with him. When PI Wadhavane explaining Accused No.1 about those rights, other accused were not able to hear it. When letters under Section 50 of the NDPS Act, were given to accused persons, those letters were having signatures of PI Wadhavane. He do not know the long form of 'GO'. Those letters were not perused by him. At the time of raid PI Wadhavane and API Katwani were 'GO'. There was no "Dandadhikarii" in raiding party. He do not know meaning of word "Dandadhikarii". In his presence PI Wadhavane had not explained accused persons the meaning of words "Rajpatrit Adhkari" and "Dandadhikarii". The drug found in the car was kept on the rear seat which was behind driver's seat. He do not know whether rear seat was detachable. He do not know that exactly which accused was occupying the seat which was behind the drivers seat. After raid they were at ANC office at cuffe parade for one hour. From ANC office cuffe parade he went to ANC store room at Azad Maidan alongwith muddemal. For giving

information informant came to ANC unit Bandra and met him. However, informant had not come inside ANC unit. As told by informant vehicle referred in information was to come from southern Mumbai side. Said fact was noted by him in information. While narrating contents of FIR he had not stated that he had gone to cabin of PI Wadhavane to show entry from information register. While narrating contents of FIR he had not stated that PI Wadhavane had written his endorsement on information book. All important facts are necessary to be mentioned in FIR. He is unable to state any reason as to why all above facts were not narrated by him at the time of lodging FIR. ANC brass seal of every ANC unit is having same inscription. Bus stops for route numbers 185, 453, 509 are situated on both sides of Tagore Junction. Trap was arranged on both those bus stops as such on both sides of road. It was mentioned by him in FIR that the vehicle in question had come to the spot from which side i.e. from south Mumbai or North Mumbai. As mentioned in FIR vehicle had come to the spot from South Mumbai side. At the time of lodging FIR he was knowing names of panchas and the names are mentioned in FIR. He is unable to state as to why both above facts are not mentioned in the FIR. At the time of sealing and labeling of seized muddemal PI wadhavane, API Katwani and writer were inside Police Jeep. The word NDPS is

denoting English initials. API Katwani had explained the meaning of word NDPS. It is not mentioned in the FIR that API Katwani had explained accused persons about Section 50 of the NDPS Act. The rear seat from the vehicle seized was not packed seat. For recovery of drug from rear seat they were required to remove the said seat. He had not seen who had removed rear seat of the car and also do not know whether the seat was fixed again in the vehicle crime numbers were mentioned on the labels affixed to packets of seized muddemal. At present there is no label on the vehicle. In FIR he had not mentioned that brass seal using wax seal was impressed on the bonnet of the car. The back seat of the car is fixed on the fiber bottom. The fiber sheet is fixed to the bottom surface of the car. One cannot put hand below the seat as there is no space.

13. PW-3 Nardas Thakur was attached to ANC Unit Bandra. According to him API Katwani told him to take custody of sample packets in C.R. No.59 of 2016 from Azad Maidan, Bhandar room for carrying to CA office Kalina,Mumbai. He collected the samples. He went to the office of Chemical Analyser at Kalina and handed over samples. In cross-examination he stated that there is separate seal to the Unit. He did not remember whether description on the label of each samples on each envelope was in typed form or in handwriting. All the sample envelope had big label on the front.

The label was in typed form but at some places it was handwritten. The big label was bearing crime number. When he took custody of sample envelope from Bhandar he confirmed that lack seal was impressed on the label. On each envelope seals were not impressed on corners of four side. There were three seals on each envelope. In his statement before Investigation Officer he had not stated that there were three seals on each envelope. All the seals on each envelope were to one side of envelope. On 6th May, 2016 he was at Bandra unit. On 6th May, 2016 in the morning he saw API Katwani in office. He left office at 9.00 p.m. At 3.00 p.m. both officers API Katwani and PI Wadhavane were out of office. They left office prior to 3.00 p.m. At about 7.30 p.m. they came to office.

14. PW-4 Savita Tanhaji Bobade has deposed that she was called by Police on 6th May, 2016 to act as panch witness. She did not see articles which police officer had taken with them. Before leaving the office for raid, the police typed something on the computer. Her signature was obtained on the printout of the said writing. She identified her signature, the contents of documents were read by her before signing the documents. She went by police jeep to bus stop below flyover at Kanjurmarg. She don't know the exact name of the area. She signed the panchanama. One vehicle came from Kanjurmarg side. It was stopped by police. One lady was on the

drivers seat and two other persons were sitting on the rear seat. They gave their names as Ramzan, Asif and Shenaz. Shri Wadhavane gave letter under Section 50 of the Act about personal search to accused No.1. It was in Hindi. Contents were explained to accused No.1 that if he request for taking his personal search before Gazetted Officer then arrangement shall be made accordingly. Accused No.1 replied that it was not necessary and the Police Officers can take his search. He made writing to that effect on the letter and affixed his signature. Plastic bag containing M.D. drug was found from accused No.1. Samples were taken. Envelopes of samples were prepared. Signatures of panchas and Police Inspector Wadhavane were affixed. Mr. Wadhavane handed over letter under Section 50 to accused No.2 and explained him the contents of letter by saying that if he request for taking his search in presence of Gazetted Officer or Magistrate, the arrangement shall be made. Accused No.2 replied that it was not necessary and police may take his search. Plastic bag containing Mephedrone weighing 250 grams were recovered from him. Mr. Wadhavane give letter under Section 50 of the Act to accused No.3. It was explained to her by stating that if she request for taking her personal search before Gazetted Officer or Magistrate then arrangement shall be made accordingly. She replied that it is not necessary and search

can be taken by Police. She was having hand bag. Mephedrone was recovered from bag. It was weighing 45 grams. Accused No.3 was taken to nearest bit room. She was accompanied by lady Police. She was searched in the room by lady constable. Nothing objectionable found. Search of car was taken. Plastic bag containing powder was found below the rear seat of the car. It was Mephedrone. In the cross-examination she stated that her house is about fifteen minutes from ANC Bandra Unit. On 6th May, 2016 she had gone to Bandra Court for personal work. She had gone there for executing affidavit. She was waiting in que for executing affidavit. In the mean time Police called her. She could not execute affidavit. She was standing in que before typist who was typing documents. She again stated there was no que as such but there was no sitting arrangement. Therefore she was standing. At that time she was informed that, she would receive witness summons and she would be required to go to Court to give evidence. When she went to ANC Bandra Unit, she was informed that she would be required to go to the Court for giving evidence. She used mobile phone and at that time it was with her. She had informed her family that she would go to the Court for few hours. She had gone to Bandra Court at 11.00 a.m. She had informed her family that she would return at 1.00 p.m. The Police did not inform her how much time she would

remain with them. At that time she did not inform her family that she was working as panch witness and she would return late. The phone number which was available at that time is not presently used by her, therefore she do not remember that phone number. She did not ask Police how much time she would be required to stay with them. She have no documentary proof to show that she had gone there to execute documents. Two male constable in civil dress had come to call her. Envelopes were not shown to her at Bandra Unit. She had not seen the labels at Bandra Unit. The red seal seen on the envelope were not seen by her in the Bandra Unit. Exh-47, Exh-52 and Exh-53 were shown to her. The word senior Police Inspector on the small label and the typed words Police Inspector at of the top of Exh-47 are different. She was not informed before reaching the spot, by which mode the suspected persons would come. At the spot of incident, the work of sampling, packing and sealing was done. She had not seen testing kit. Personally she had not checked vehicle of accused. At the time of checking the vehicle she was standing near door of that vehicle. The seat of the vehicle was not taken away and brought out side the car. The seat was not lifted for checking. The muddemal was kept below rear seat behind the driver seat. She do not remember whether any documents showing the connection of the accused

persons was found or not in the vehicle. She never visited Prakashgarh Karyalaya for any work. In her statement she had stated that on 7th May, 2016 she had gone to Bandra Court for execution of affidavit. She did not state in her statement that on 6th May, 2016 the Police took her from Bandra Court to ANC Bandra Unit. In the cross-examination conducted on behalf of accused No.1, she has for the first time stated that she had gone to Court for the execution of affidavit. She don't know the building by name Prakashgarh. She had never gone to that building. She had not stated in her statement that the Police had called her near from Prakashgarh Karyalaya. As she dont know what is Prakashgarh Karyalaya and where it is she can't say whether in her statement it is rightly or wrongly mentioned that the Police had called her to act as a witness from Prakashgarh Karyalaya. She do not remember whether she had stated in her statement that Shri Katwani told her that the Police Officer had received information regarding Narcotic Drug. She cannot assign any reason why in her statement before Police it was not mentioned that Shri Katwani told her that Police Officer had received information about some Narcotic Drugs. She cannot assign any reason why in her statement before Police it was not mentioned that Shri Katwani asked he whether or earlier occasion she had acted as panch witness.

15. PW-5 Mr. Anil Dnyandeo Wadhavane was Police Inspector in ANC Bandra Unit. According to him Police Naik Bhosale received secret information, and it was noted down in the information register before him in his chamber. He read the information. API Katwani was also present in chamber. It was conveyed to Assistant Police Commissioner by phone. He directed to API Katwani to take note in the station diary. Accordingly he made entry in the station diary. In the information book below the entry of information, he noted the fact of conveying the information to Assistant Police Inspector and his direction for further action. API Katwani submitted photo copies of information register and station diary entry regarding information with forwarding letter addressed to Assistant Police Commissioner. The raiding party went to the spot. Vehicle of the accused came from Dadar Colony side and stopped near Tagore Junction. One lady was on drivers seat. He made enquiry with suspected persons. They gave their names. He gave letter to a accused No.1 and explained him about contents of letter in Hindi that as per Section 50 of the NDPS Act, he has right to be searched before the nearest Magistrate or Gazetted Officer and if he make such request, arrangement would be made. The accused told him that it is not necessary and Police can take his search. Letter was signed by him and Mr. Katwani. There was writing in

Hindi in handwriting of the accused and his signature is below that writing. Below signature of accused he again affixed his signature as Guidance Officer. Contraband was found in possession of accused No.1. Similar procedure is followed with accused No.2 and accused No.3. They were found in possession of the contraband. Samples were obtained. Further procedure was followed. Contraband was seized from boot room below rear seat of car. In the cross-examination he stated that the information register remains in custody of Havaladar. The Havaladar is higher post than Police Naik. The information of this matter recorded in the information register is in the handwriting of Police Naik Shri Bhosale. In his endorsement on this information he has not specifically mentioned that he has received copy of the said entry. After making entry of the information in information register, immediately entry of the said information is not made in the case diary of the case. The entries in the case diary were recorded only after lodging the FIR. In the case diary the verbatim copy of the information is recorded. When the letter Exh-44 was placed before him for signature either information register or station diary were not placed before him for verification. It was his responsibility to forward the documents to superior officer. Before signing the letter Exh-44 he had seen the entry number-6 dated 6th May, 2016 in the

station diary. Entry number-6 was related to the information of this Case. The entry No.6 is not regarding making entry of information. The entry of information is at Sr. No.7. Format of letter under Section 50 is mostly same for all units. It depends on the accused, his known language. Format of letter Exh-47 , Exh-52 and Exh-53 is same. Format of these letters was prepared by him. The meaning of information under Section 50 of NDPS Act which is mentioned in the letter is required to be explained to the suspected persons. The term “Gazetted Officer” and “Magistrate” are related to the post of that officer. It is necessary to explain the meaning of Gazetted Officer and Magistrate to the suspected person. He did not feel it necessary to inform the suspected persons that he was Gazetted Officer. In report Exh-94 it is not mentioned that Police Naik Shri Bhosale had recorded the information in the Information Register. In the said report it is mentioned that, API Shri Katwani made entry of the information in the station diary. In the said report it is not mentioned that the copy of information register was sent to the superior officer. On 6th May, 2016 he was working on the post of Senior Police Inspector. He was Gazetted Officer. In report Exh-94 API Shir Katwani was described as Gazetted Officer as member of raiding team. Personally he had not seen the CDR's of accused. API Shri Katwani had seen the said CDR's. Personally he had not seen

the informant who approached to Police Naik Shri Bhosale. It did not happen that when the information was discussed with him, he was informed that the vehicle of suspected persons would come from south Mumbai side. He was the only officer who talked with accused about appraisal of legal provisions. When he apprised the accused about Section 50 of NDPS Act, in Hindi language, he used NDPS which are English words. They have not prepared any document to show that he had explained the meaning of NDPS in Hindi to accused. Personal search of women cannot be taken in presence of male persons. It is necessary to explain to the women suspected person that her personal search shall be taken in close room by women in the presence of women. He could explain to the lady accused that her personal search would not be taken in the presence of male Gazetted Officer or Magistrate. They have not mentioned in any documents which indicate that he had explained the women accused that her personal search will not be taken in the presence of male Gazetted Officer or Magistrate. It is necessary to explain to the woman suspected person that her personal search shall be taken in closed room by a woman in presence of woman. He could explain to the lady accused that her personal search could not be taken in presence of male Gazetted Officer or Magistrate. They have not mentioned in any document which indicate that he

had explained the woman accused that her personal search could not be taken in presence of male Gazetted Officer or Magistrate. He might have mentioned this fact in the letter under Section 50 of the NDPS Act given to the woman accused. He don't know whether under NDPS Act there is post of Gazetted Officer. Every class one officer of the government is Gazetted Officer. The Police Inspector is the Gazetted Officer. Under the NDPS Act, Senior Police Inspectors are designated as Gazetted Officer. In any documents of this case it is not mentioned that he had stated to the accused persons that he was Guidance Officer. In the NDPS Act, the word guidance officer is not described. The short form of Gazetted Officer can be used as 'GO'. He do not remember whether at the time of personal search of the accused or their vehicle they found driving license of any accused. At the time of search of vehicle they did not remove the rear seat. They did not remove the dicky of the vehicle. In the panchanama or in any other documents, it is not mentioned that the contraband is found in between two seats in the vehicle of the accused. In none of documents it is mentioned that the rear seat was opened. He had not given direction to Investigation Officer to annex CDR to the charge-sheet. The back seat of the car is fixed on the fiber bottom. The fiber seat is fixed on the fiber bottom. One cannot put hand below the seat. There is no

space. The fiber sheet is fixed to the bottom surface of the car.

16. PW-6 Rahul Ramji Katwani was API in ANC Bandra Unit. He deposed that Police Naik Shri Bhosale came in the cabin of Shri Wadhavane with information book. He placed the information register before Wadhavane and informed that he received secret information about contraband M.D. He disclosed the details of information received by him to Shri Wadhavane. He was told by Mr. Wadhavane (PW-5) to take entry of the information in station diary. Accordingly he made entry in the station diary Mr. Wadhavane conveyed the information by phone to police inspector Shri Bhalekar. Shri Wadhavane made endorsement with signature in the information book below the entry of information and noted the fact of conveying the information to Assistant Police Commissioner. He took out copies of station diary entry regarding information and copy of information recorded in the information book. He prepared forwarding letter to Assistant Police Commissioner. He made entry in the station diary about forwarding the copies to Assistant Police Commissioner by hand to Police Naik Shir Shinde. Raid was arranged. The raiding party went to the spot. Vehicle was intercepted. The accused were apprehended. Shri Wadhavane gave letter to the accused and orally stated to him about contents of letter in Hindi that as per Section 50 of NDPS

Act, his search can be taken before nearest Magistrate or Gazetted Officer. If he make demand, such arrangement would be made. The accused agreed for Police search. Contraband was recovered from all the accused. MD was also recovered from the car. The accused No.3 was searched by lady Police Havaladar. Panchanama was recorded. Further procedure was completed. In the cross-examination he stated that Police Havaladar was immediate senior to Police Naik Shri Bhosale. Police Inspector Shri Wadhavane was immediate superior officer of Police Naik Shri Bhosale. After taking entry of information in the station diary, the forwarding letter for sending copy of information was prepared. The entry of information in the station diary was made at Sr. No. 7 but in the letter entry No.6 is mentioned by over-site. Personally he did not know the exact location of suspected spot of incident. They were not aware from which direction the suspected would come. From the spot of incident they went to ANC cufte parade, by their bolero vehicle and thereafter to Azad Maidan and Bandra Unit. The special report Exh-94 was shown to him. In the said report there is entry regarding making the entry of information in the station diary by him and that there is no entry showing that Police Naik Shri Bhosale recording information in the information register. In the special report it is also not mentioned that he had sent copy of

station diary entry regarding information to superior officers. On the copy of information register Exh-42 and copy of station diary Exh-43 there are no acknowledgment signature of Assistant Police Commissioner. The mobile number of accused No.3 was 8433823235. In the remand application he had mentioned the said phone number of accused No.3 and sought her custody for making inquiry with her about call details of the said phone. The accused No.3 had made application Exh-10 for calling CDR of said mobile number and her defence was that she was picked up on 5th May, 2016 and detained in ANC Bandra Unit, and her phone was operational even on 6th May, 2016 showing location of Bandra (east) in the area of narcotic cell. The CDR of said phone was called by order dated 5th July, 2017. The accused No.3 had filed an application, complaining that the order dated 5th February, 2017 was not complied. On 14th March, 2018 CDR record was received by the Court from nodal officer. The certificate under Section 65B of the evidence Act was not annexed to the said report. As per CDR record the tower location of calls / SMS at Sr. Nos.3 and 12 are at Mina Center, Bandra Court road, Bandra (East) Mumbai. The entry No.4 to 6 dated 5th May, 2016, entry No.7 dated 6th May, 2016 and entry No.7 dated 6th May, 2016 are incoming calls and the tower location of the same is Mina center, Bandra Court road, Bandra

(east) Mumbai. Personally he had not apprised any of the accused about their right under Section 50 of the NDPS Act. The appraisal was made by PI Shri Wadhvae. In the FIR or post trap panchanama it is not mentioned that the long form of NDPS Act, was explained to the accused. In the FIR or Panchanma it is not mentioned that the Hindi translation of the NDPS Act, was apprised to the accused. PW-2 had not stated to him that the vehicle of the accused would come from south Mumbai side.

17. PW-7 Varsha Patil has stated that she is attached to Scientific Assistant, General Analytical division in forensic science lab (FSL) Kaleena Mumbai. Her job is to Assist Chemical Analyser in the Chemical Analysis. In the work of Chemical Analysis of samples. On 7th May, 2016 her office had received four parcels from ANC Bandra Unit. They also received forwarding memo. She had worked under Ms. R. K. Oberoi for seven years. The work of analysis of samples started on 20th June, 2016. Ms. Oberoi had obtained the custody of samples from HOD on 20th June, 2016. Both of them conducted Lieberman, Madeline and Solubility test. The data sheet is in the handwriting of Ms. Oberoi which was prepared by her. The CA report is in handwriting of Ms. Oberoi. In the application form of appointment of post of Assistant Analyser they had given all particulars. Since last eight years Ms. Oberoi is

working in their lab. After she left the job she had no contact with her. The Police did not inquire about her. The samples were not in her personal custody at any time. Ms. Oberoi is her superior. They did not take weight of part of substances used for particular tests. They did not mention the starting and ending time of each tests. The names of used chemicals are not mentioned in any document. She is not expert in the subject of Mephedrone.

18. DW-1 Santosh Pawar has stated that he was working as Police Naik driver in ANC Bandra. The Police jeep bolero MH-01-YA-3519 was allotted to ANC Bandra Unit. The logbook for each vehicle is maintained in which the driver of the vehicle is required to make entries with date and time about movement of that vehicle and he is required to place the said logbook at the end of the day before the incharge officer of the unit for checking. During the evidence of this witness, the Court had passed order stating that on the last adjourned date this witness was present before Court for giving evidence as per summons received from defense side. However, he had not brought the original logbook of the said vehicle. Though directions were issued in the summons. Therefore, the matter was adjourned and sufficient time was given to search and produce the logbook before Court. However, even today the witness has not brought the original logbook and orally

contended that in the rainy season the documents in the record room were shifted and as such logbook has been misplaced. This contention is not supported by any affidavit or other documents, therefore, this contention is not acceptable. Hence, the defense side is allowed to use and produce in evidence the copy of logbook obtained under Right to Information Act as secondary evidence. The entries dated 4th May, 2016 and 6th May, 2016 in the logbook are in his handwriting. In column No.4 the timing of commencing and ending journey of particular location is required to be mentioned. At 8.00 a.m. he had taken charge of the vehicle and at 20.00 hrs he brought the vehicle in the premises of the Bandra Unit. He had taken PSI Khandagale from Bandra Unit to Juhu Galli to Varsova to Andheri Station to Bandra Unit. Before the first entry dated 6th May, 2016 in column No.8 if it is mentioned that five persons in addition to the driver had traveled in the vehicle.

19. DW-2 Manoj Patil had deposed that he was working as Nodal Officer in Bharti Airtel limited he received letter from ANC for submitting CDR of phone Number 8433823235. They were directed by Court to supply CDR of the phone from 5th May, 2016 to 6th May, 2016. The said CDR could not be given as it was maintained for one year. However the subscriber details of that phone number were provided by letter dated 3rd November, 2017.

They were asked to submit the CDR for 5th May, 2016 to 6th May, 2016. He could not produce the CDR for the aforesaid reason. CDR of the said phone number was given for the period 5th May, 2016 to 7th May, 2016 as per documents Exh-50 B. The tower location of the number is at Mina center, Bandra Court road, Bandra (east) Mumbai. The second entry dated 6th May, 2016 of the time 12..29..19 was outgoing calls from 8433823235 to the phone number 9833009385. The tower location is the same for the other entries also the tower location was same.

20. On scrutiny of evidence it is apparent that, the prosecution case suffers from serious doubts. The prosecution has not established its case beyond all reasonable doubt. There are discrepancies relating to compliance of Section 42 and Section 50 of the NDPS Act. The evidence of witnesses suffers from serious contradictions. The evidence does not inspire confidence to convict the appellants.

21. Exh-42 is the information register. Exh-43 is the attested copy of station diary and Exh-44 is purported compliance of Section 42(2) i.e. forwarding letter depend by PW-6 for sending Exh-42 and Exh-43. As per the information provided by informant, the information was recorded in the register. According to informant the vehicle referred in the information was to come from southern

Mumbai side. This fact was noted in the information. PW-2 has stated that, it was mentioned in the FIR that the vehicle had in question came to the spot from south Mumbai to northern Mumbai. The information Exh-42 recorded by PW-2 and the FIR given by PW-2 does not reflect that the vehicle was coming to the spot from south Mumbai. It is a prosecution case that the vehicle was coming from Kanjurmarg to Vikhroli. It is not disputed that Kanjurmarg is on the northern side of Mumbai. PW-6 in his cross-examination has stated that PW-2 had not stated to him, that the vehicle of accused came from south Mumbai. PW-2 had not prepared any document in which it was mentioned that the vehicle of the accused came from south Mumbai side. PW-5 in his cross-examination has stated that it did not happened that when the information was discussed with him he was informed that, the vehicle of the suspected person would come from south Mumbai side. Thus there is serious doubt about the information reflected in Exh-42. The station diary entry Exh-43 at serial no.7 is recorded by PW-6 and not by PW-2. PW-6 has prepared Exh-44 wherein it is stated that the information is recorded in station diary entry at serial number 6. The seizure report under Section 57 (Exh-94) does not reflect that the information was reduced into writing in the information register. As per Section 42(2) of the NDPS Act, the receiver of the information

has to reduce the information in writing and send the copy to superior officer. In the present case PW-2 is the receiver of information. The immediate superior of PW-2 is head constable. PW-2 has admitted that he has not given the copy of information to head constable, ASI, Assistant Police Inspector. PW-2 has deposed that he had produced the information book before Police Inspector Wadhavane (PW-5). Mr. Wadhavane has written his endorsement upon it. Exh-42 as an endorsement for PW-5. PW-5 has stated that, station diary entry (Exh-43) was prepared after 10.30 a.m. when the letter Exh-44 was placed before him, the information or station diary were not placed before him for verification. Before signing Exh-44 he had seen entry No.6 of the station diary which was relating to the information of this case, subsequently he has stated that entries are not related to this case. The Exh-44 indicates that copy of Exh-42 and Exh-43 was sent by PW-6 to his superior officer at cuffed parade. The person who received the information has to reduce the same into writing and forward it to his immediate superior. PW-2 has stated that while narrating contents of FIR he had gone to cabin of Police Officer Wadhavane to show entry from information register. While narrating contents of FIR he had not stated the Police Officer Wadhavane had written his endorsement on information book. Important facts are necessary to be

mentioned in the FIR, he is unable to state any reason as to why the above facts were not narrated by him at the time of lodging FIR. It was not mentioned by him in FIR that the vehicle in question had come to spot from which side. PW-5 Mr. Wadhavane has stated that information was received by Mr. Bhosale and noted down in the information register and it was placed before him. He conveyed the information to Assistant Police Commissioner at ANC cufte parade office by phone call. API Katwani submitted photo copies of information register and station diary entry regarding information with forwarding letter to Assistant Police Commissioner. He further stated that information register remains in custody of Havaladar. The Havaladar is the higher post then Police Naik. After Havaladar there is post of ASI, then Police Sub-inspector, Assistant Police Inspector and Police Inspector. In his endorsement on the information he has not specifically mentioned that he has received the copy of the said entry. After making entry in the information register, immediately entry on the said information is not made in the case diary of the case. Before signing letter Exh-44, he had seen entry No.6 dated 6th May, 2016 in the station diary. He initially stated that, the entry No.6 was related to information of this case and then stated that the entry No.6 is not regarding making entry of information. The entry of information is at serial

No.7. PW-2 has stated that while narrating content of FIR he had not stated that, he had gone to cabin of Police Inspector Wadhavane to show entry from information register. So also while narrating contents of FIR he had not stated that Police Inspector Wadhavane had written his endorsement on information book. Thus there are serious discrepancies about compliance of Section 42(2) of the NDPS Act. The version of PW-2, PW-5 and PW-6 creates doubts about recording the information and forwarding it to the superior officer.

22. The learned Advocate for the appellants has strongly urged about non compliance of Section 50 of the NDPS Act. The prosecution has relied upon evidence of PW-2, PW-4, PW-5 and PW-6. Exh-42, Exh-52 and Exh-53 are the letters allegedly given to the accused about their right of search under Section 50 of the NDPS Act. The letters were signed by PW-5 PI Wadhavane as Gazetted Officer. The special report Exh-94 refers to participation of PW-5 in raid as 'GO'. The short form of 'GO' is apparently Gazetted Officer. It is pertinent to note that PW-2 has stated that he does not know the long form of 'GO'. These letters were not perused by him at the time of raid. He do not remember when Police Inspector Wadhavane explained those rights to accused No.1. When Police Inspector Wadhavane was explaining accused No.1 about those

rights, other accused persons were not able to hear it. The letters were having signatures of Police Inspector Wadhnave. Those letters were not perused by him at the time of raid. At the time of raid Police Inspector Wadhavane and API Katawai were 'GO'. There was no Dandadhikarii in the raiding party member . He does not know the meaning of word Dandadhikarii. In his presence PW-5 Wadhavane had not explained the accused person meaning of word "Rajpatrit Adhikari and Dandadhikari". The evidence of PW-2 does not inspire confidence. The evidence of PW-4 does not reflect that, the accused were informed right to be searched before the Gazetted Officer or Magistrate. PW-4 is purportedly a panch witness and independent person. She acted as panch for seizure of contraband from possession of accused and from the car. She has stated that PW-5 gave letter under Section 50 to accused No.1 PW-5 explained contents of letter to accused No.1 that if he requested for taking his personal search before Gazetted Office, than arrangement shall be made accordingly. PW-5 gave letter under Section 50 to accused No.2 and explained him contents of letter by saying that, if he requested for taking his search in presence of Gazetted Officer or Magistrate. The arrangement shall be made PW-5 gave letter under Section 50 to accused No.3. She was explained the contents of letter by saying that if she request for taking her personal search

before Gazetted Officer or Magistrate then arrangement shall be made accordingly. Thus none of the accused were informed, as per version of PW-4 that, they have right to be personally searched before nearest Magistrate or Gazetted Officer. PW-5 has stated that he does not know whether under NDPS Act there is post of Gazetted Officer. He stated that every class one officer of the government is Gazetted Officer. The Police Inspector is a Gazetted Officer. In none of the document it is stated that he was guidance officer. The short form of Gazetted Officer can be used as 'GO'. Exh-47, Exh-52 and Exh-53 mentions the word 'GO' below the signature of PW-5. This would amounts to misinforming the accused that Gazetted Officer is member of raiding party. The explanation by PW-5 that 'GO' means guidance officer is apparently after thought. PW-6 has stated that there is no document which indicates that 'GO' means guidance officer. Thus there is discrepancy about compliance of Section 50, which would affect the prosecution case. Perusal of the letter Exh-47, Exh-52 and Exh-53, it can be seen that the letter does not mentioned in any manner that the accused have declined to have search before the Gazetted Officer or the Magistrate. The letters only contain the alleged endorsement that Police can take search. PW-4 has stated that Shri Wadhavane gave the letter of Section 50 about personal search to accused No.1. He

was explained the contents of letter similarly such letter was handed over to accused Nos.2 and 3. PW-5 have stated that he had explained the accused No.1 the contents of letter about Section 50 of the NDPS Act and the accused told him that there is no necessity and Police can conduct the search. However on perusal of the said letters it does not find any endorsement or writing of the accused that there is no necessity of their search by such officers. PW-5 further stated that when he apprised the accused persons about Section 50 in Hindi language, he used NDPS which are English words. They have not prepared any document to show that he had explained the meaning of NDPS in Hindi to the accused.

23. There is strong doubt about the case of the prosecution that contraband was also recovered from below the rear seat of the vehicle. The evidence on record would indicate that there is no possibility of contraband being concealed below the rear seat. This is evident from the cross-examination of witnesses which has been referred to above. It is not established by prosecution that any contraband could be hidden / kept below rear seat.

24. PW-4 has stated that personally he had not checked the vehicle of the accused. The seat of the vehicle was not taken away and brought out of the car. The seat was not lifted for checking. PW-5 has deposed that at the time of search of the vehicle they did

not remove the rear seat. They did not remove the dickey of the vehicle. In the panchanama or in any other documents. It is not mentioned that, the contraband is found in between two seats in the vehicle of the accused. The base of the fiber platform of the seat, the cushion is placed. In none of the documents it is mentioned that rear seat was opened. The back seat of the car is fixed on the fiber bottom. The fiber sheet is fixed to the bottom surface of the car, one cannot put hand below the seat. There is no space.

25. The accused had relied upon the entries of the logbook of the vehicle. PW-6 API Katwani has stated that the driver of the vehicle was DW-1. As per the entry of time 8.00 a.m. indicates that the vehicle was used for the raid from that point of time. As per entry in column No.8, five persons excluding the driver were passengers in the vehicle. The entries were made by the driver PW-6 has countersigned the entries. The driver of the vehicle was examined as DW-1. The logbook was not produced. It was contended that in rainy season the logbook were shifted and misplaced. DW-1 has stated that, he was driver of Police jeep MH-01-YA-3519. Logbook is maintained for movement of vehicle. The entries are in his handwriting. On 6th May, 2016 he had taken charge of the vehicle and at about 8.00 p.m. he brought the vehicle to Bandra Unit. He had taken PSI Khandagale from Bandra Unit to Juhu Galli to

Versova to Andheri Station to Bandra Unit. At the time of leaving charge of vehicle the entries of travelling of vehicle were made. The entries in the logbook indicate that the vehicle was used from 8.00 a.m. from Bandra Unit to the spot and two other places. The vehicle had travelled to different places. The Panchanama and FIR indicate that there were several Police official, one driver and two panchas while travel to the spot. However, according to DW-1 only five persons excluding driver had travelled in the vehicle. The logbook indicates that vehicle had return to Bandra Unit at 8.00 p.m. The godown register and station diary Exh-36 reflects that at 8.00 p.m. PW-6 has deposited the articles at Azad Maidan. PW-6 has stated that thereafter he took the accused to medical examination. He locked the accused at Azad Maidan lockup and at 9.00 p.m. he went to Bandra Unit. PW-5 have stated that they return to ANC Bandra Unit at 9.30 p.m. The logbook also mentioned that on the same date, the vehicle was driven by same driver for secret work from 9.00 hrs, to 20.00 hrs, which was some other secret work. The original register was not produced before the Court.

26. PW-5 have stated that crime number is made available after registration of the case and crime number was allotted for the first time at cuffe parade at 18.45 hrs, after FIR was lodged. PW-2 has

stated that crime numbers were mentioned on the label affixed to packet of seized muddemal. PW-3 had stated that when he took samples each samples envelop had one big label on front and the labels were in typed form. In some places it was handwritten. The marking A-1 to D-1 were on the envelop on the label itself. The big label was bearing crime number. According to PW-3 crime number was on the big label having lac seal on the same label. Thus evidence of PW-2 indicates that crime numbers were written on the big label at the spot of raid. If crime numbers were affixed on the sample packets at the time of seizure then seizure appears to be suspicious. The samples were produced in the Court and there was no crime number on the big labels.

27. PW 4 has acted as panch witness. According to her she met PW6 in Bandra Unit. PW-6 told her that police have received some information about narcotics. PW-6 inquired with her whether she acted as panch witness in any matter. The evidence indicates that the aforesaid inquiry was made by PW-5 PI Wadhavane and not by PW-6 API Katwani. PW-4 did not depose the contents of information. She is silent on the issue of search on raiding party members, search of Police vehicle, raiding material. She did not see the articles which the officer has taken with them. She does not know the exact name of the area. She is silent on the issue

regarding the officer who conducted the search of accused Nos.-2 and 3. She is silent about preparation of forwarding letters. The rubber stamp were appearing on the panchanama were fixed in her presence. There are discrepancies about place from where Police called her to act as pancha. Her house is situated near office of ANC Bandra. PW-6 have stated that, the rubber stamp is at the bottom of each alternate page were impressed by his superior officer on the next day of the raid. When he submitted the panchnama before them for verification. The work of weighing, sampling, packing and selling was done by PW-5. She had not seen any testing kit. It did not happen that Police wrote that, he had shown the testing kit to panch witness. She did not remember whether it is mentioned in the panchanama that panchas had checked testing kits. She does not remember whether she had affixed any signature on the document in Bandra Unit before going for raid. She does not remember whether the labels were prepared in her presence. She does not know which officer has affixed the labels. No writing was made on the labels in her presence. She does not remember whether the labels were typed before or after the accused were apprehended. She does not remember the words inscribed on the bras seal. She never visited Prakash Karlaya for any work. On 6th May, 2016 she had not gone to Prakash Karyala

building. She does not know the building by name Prakash Ghar. She has not stated in her statement that police had called her from Prakash Ghar Karyalaya.

28. There are serious infirmities in the evidence adduced by the prosecution which speaks volumes of doubt about its case. The accused are entitled for benefit of doubt.

29. The learned counsel for the appellants have relied upon several decisions of this Court and the apex Court in support of the submission that compliance of Section 42 and Section 50 is mandatory. In the case of Nilkanth Mahadev Chandekar (supra), it was held that compliance of Section 50 is mandatory. Accused must be fore warned of his right to be searched in the presence of Gazetted Officer or Magistrate. In the case of Lamin Bojang Vs. State of Maharashtra (supra) this Court has observed that prior written information regarding raid is required to be sent to superior officer as per Section 42. The provisions of Section 42 are mandatory. Information sent to superior officer after registration of FIR does not amount to compliance of Section 42. In the case of State of Punjab Vs. Baldev Singh, it was held that it is imperative on the officer to inform accused that he has right of search before Magistrate or Gazetted Officer. The prosecution has to establish the fact that offer was made. If search is not conducted as

per option of accused, it would vitiate the conviction and sentence of accused. In the case of Babita @ Tai Mohan Shardu Vs. State of Maharashtra (supra), it was observed that the discrepancies in seizure of articles packing, sealing and labeling would affect the prosecution case. In the case of Kamaljit Singh @ Pappu (supra), it was observed that unfairness in investigation has become more glaring. FIR number was noted on the top of panchanama. It is not clear as to how the FIR number could be noted on the search and seizure panchanama. When the same were drawn up at earlier point of time and preceded the registration of FIR. In the case of State of Rajasthan Vs. Parmanand and Others (supra) it is observed that, communication of right under Section 50 of NDPS Act is not empty formality. The communication has to be clear and unambiguous. The accused must be aware of the existence of such a right. In the case of Saeed Mohamad Sayed Umar Sayed and others, it was observed that requirement on the part of officer conducting search to inform the accused of his right to choose to be searched in the presence of Gazetted Officer or Magistrate is mandatory. Prosecution must prove that, the accused was made aware of his right but he did not choose to be searched before Gazetted Officer or Magistrate. In the case of Vijaysingh Jadeja Vs. State of Gujrat (supra), it was observed that informing suspected

person of right under Section 50 to be searched in presence of Gazetted Officer or Magistrate if so desire mandatory. Concept of substantial compliance is not applicable to Section 50.

30. It is a cardinal principle of criminal jurisprudence that the prosecution is required to establish the case against the accused beyond all the reasonable doubt. In the present case, the evidence is full of discrepancies. There is non compliance of procedural safeguards. In this circumstances the benefit of doubt has to be given to the accused. The prosecution has failed to establish its case. Hence the conviction is required to be set aside.

ORDER

- i. Criminal Appeal No. 6 of 2020, Criminal Appeal No. 7 of 2020, Criminal Appeal No. 381 of 2021 are allowed.
- ii. Impugned Judgment and order dated 18th December, 2019 passed by NDPS Special Judge, City Civil and Sessions Court, Grater Mumbai, in NDPS Act, Special Case No. 190 of 2016 convicting the appellants for offences punishable under Section 22 (c) read with Section 8 (c) of NDPS Act and for the offences punishable under Section 29 read with Sections 22 (c) and 8 (c) of the NDPS Act, 1985 is

set aside and the appellants are acquitted for the offences punishable under Section 22 (c) read with Section 8 (c) of the NDPS Act and for the offences punishable under Section 29 read with Section 22 (c) and 8 (c) of the NDPS Act.

iii. The appellants be released from jail forthwith unless required in any other case.

iv. All interim applications stand disposed off.

(PRAKASH D. NAIK, J.)