

**IN THE HIGH COURT AT CALCUTTA**

**Criminal Application**

**Appellate Side**

Present:

**The Hon'ble Justice Debangsu Basak**

And

**The Hon'ble Justice Md. Shabbar Rashidi**

**CRA (DB) 39 of 2022**

**With**

**CRAN 2 of 2022**

**Vijoy Shaw @ Gora**

**Versus**

**The State of West Bengal**

For the appellant : Mr. Manjit Singh, Adv.  
: Mr. Gaganjyot Singh, Adv.  
: Mr. Biswajit Mal, Adv.  
: Mr. Abhishek Bagal, Adv.  
: Mr. Akbar Laskar, Adv.

For the State : Mr. Partha Pratim Das Adv.  
: Ms. Manasi Roy, Adv.

Heard on : April 27, 2023

Judgement on : July 19, 2023

**Md. Shabbar Rashidi, J.:**

- 1.** The appeal is in assailment of the judgment of conviction dated February 24, 2020 and order of sentence dated February 27, 2020 passed by 12<sup>th</sup> Additional Sessions Judge cum Special Court under Narcotic Drugs and Psychotropic Substances Act in connection with Sessions Trial No. 03 (08) of 2017 arising out of Sessions Case No. 08 (05) of 2017.
- 2.** By the impugned judgment, the appellant was convicted for the offence punishable under Section 20 (b) (ii) (c) of the Narcotic Drugs and Psychotropic Substances Act. By the impugned order of sentence, the appellant was sentenced to undergo 14 years of rigorous imprisonment and to pay a fine of Rs. 150,000 and in default to undergo further rigorous imprisonment for another one year.
- 3.** The fact that gives rise to the instant case in a nutshell is that the de-facto complainant received a source information on February 20, 2017 at about 14.00 hrs to the effect that one male peddler will supply/sell

charas in Watgunge police station area. The information was reduced into writing and was forwarded to the officer-in-charge, Narcotic Cell, D. D. Under due permission from the Assistant Commissioner, Narcotic Cell, D. D. a raiding team was formed and the raiding party proceeded to the spot under Watgunge police station area at about 15.00 hrs. for conducting raid along with the source, testing kit, packing materials, seals et cetra. They reached the spot i.e. D.H. Road in front of R/S Enterprise at about 15.30 hrs being led by the source. At about 16.00 hrs. the source pointed to a young male person coming from D. H. Road from South to North direction.

- 4.** It is further case that the de-facto complainant detained the said person at Diamond Harbor Road in front of R.S. Enterprise, P.S. Watgunge, Kolkata 23 and disclosed their identity. The de-facto complainant requested from amongst the assembled crowd to be witness to the search and seizure to which two persons agreed. The detainee disclosed his name as the appellant.

**5.** The de-facto complainant informed the detainee of his legal rights to be searched in presence of a Magistrate or a Gazetted Officer, by serving written option to which the detainee agreed to be searched on the spot in presence of a Gazetted Officer and refused to go anywhere else. The de-facto complainant searched for a Gazetted Officer in the locality and having failed to find one, he informed his superior. At about 17.30 hrs, PW2 came to the spot in his official vehicle and uniform who was introduced to the detainee and the witnesses as a Gazetted Officer. PW2 served the second option in writing upon the detainee whereupon the detainee reiterated his choice to be searched in presence of a Gazetted Officer on the spot.

**6.** The detainee searched the person of the de-facto complainant and other members of the raiding team but nothing objectionable could be found. Thereafter, the de-facto complainant conducted search on the person of the detainee. A navy blue medium size bag was recovered from his right hand. The said bag was found to contain

black polythene packet containing cannabis resin commonly known as 'charas'. A cash of Rs. 30/- was also found. The recovered contraband was tested with the help of testing kit and has found to be positive for 'charas'. Accordingly, the narcotic contraband and the cash was seized from the possession of the detainee under a seizure list dated February 20, 2017. Two samples of 50 grams each were collected from the mother packet. The samples along with mother packet and the polythene were packed, sealed and labeled and marked. The Gazetted Officer, the detainee and the witnesses put their respective signatures/left thumb impression on the seizure list and the labels. Thereafter, the de-facto complainant examined the witnesses and the Gazetted Officer and recorded their statements under Section 161 of the Code of Criminal Procedure.

- 7.** On completion of the proceedings, the de-facto complainant lodged a written complaint with the Officer-in-charge, Watgunge Police Station. He also handed over the detainee and the seized articles, seizure list and

relevant documents to the Officer-in-charge, Watgunge Police Station for preparation of inventory.

**8.** On the basis of such written complaint, Watgunge Police Station Case No. 49 of 2017 dated February 20, 2017 under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 was started against the appellant. The police took up investigation and on completion of investigation submitted charge sheet against the appellant. On the basis of materials in the case diary, charge under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985, was framed against the appellant on August 11, 2017. The appellant pleaded not guilty to the charge and claimed to be tried.

**9.** At the trial, in order to prove the charge, prosecution examined 7 witnesses. In addition, the prosecution also relied upon certain documentary and material evidences.

**10.** At the time of argument, learned advocate for the appellant submitted that there was a discrepancy in the

weight of the seized contraband seized by the seizing officer and the chemical Examiner who examined the contraband. It was contended that PW 1 has stated in his deposition that at the time of search and seizure, he took two samples weighing 50 grams each, out of the mother packet whereas the chemical Examiner found the sample packets to contain 66 grams of contraband in the sample packets. It was contended that in terms of the ratio laid down in **(2005) 9 SCC 773 (Rajesh jagdamba Avasthi V. State of Goa)**, it was held by the Hon'ble Supreme Court that discrepancy in the weight of the charas as allegedly seized and as received by the chemical expert brings into question the chain of custody and is sufficient to warrant an acquittal in the case under the NDPS Act.

- 11.** Learned advocate for the appellant also submitted that the case was investigated by PW3 initially and thereafter the investigation was transferred to PW7. The Malkhana register of the detective Department has not been produced during the trial which raises a significant doubt over the chain of custody of the samples examined

by the chemical expert. It was further contended that the person who actually carried the sample packets to the Central forensic science laboratory has not been identified.

**12.** The learned advocate for the appellant also submitted that the most natural witnesses that is to say the shop owners of RS Enterprise or the nearby shops and houses have not been arrayed as a witness in this case. This raises all reasonable doubts regarding the veracity of the search and seizure.

**13.** It was also contended on behalf of the appellant that in spite of the appellant conducting search on the person of the raiding party, no seizure list in this regard was prepared and proved. Moreover, the specimen brass seal was not handed over to an independent person.

**14.** Learned advocate for the appellant also contended that the prosecution did not examine the other independent witness to the seizure list and the members of the raiding team. The learned advocate for the appellant relied upon **(2017) 15 SCC 684 (Naresh**

**Kumar@ Nitu V state of Himachal Pradesh)** wherein it was held that if the prosecution seeks to initially rely on any independent witness, the same cannot be discarded subsequently. It was also submitted that the signatures of the members of the raiding team were not obtained on the seizure list and other documents nor their details were disclosed in the written complaint raising serious ground on the veracity of the case.

- 15.** Learned advocate for the appellant also contended that the appellant was found in possession of contraband which was slightly above the commercial quantity and the appellant was convicted for the first time in connection with this case. The learned trial court failed to consider such mitigating circumstances and awarded a punishment of 14 years with a fine of ₹ 1.5 lakhs, instead, learned trial court ought to have awarded the minimum punishment prescribed for the offence which was 10 years. In this regard, the learned advocate for the appellant relied upon **(2013) 1 SCC 570 (Shahejadhkhan Mahebubkhan Pathan Vs. State of Gujarat), (2005) 4**

**SCC 146 (Balwinder Singh Vs Assistant Commissioner, Customs and Central Excise) and (2018)13 SCC 600 (Pradeep Bachhar Vs. State of Chhattisgarh)**

**16.** On the other hand, it was contended on behalf of learned advocate for the State that PW 3 was not the investigating officer of this case at any stage. In fact, PW3 was the recording officer and received the seized alamats. The investigation of the case was handed over to PW 7 from the very beginning. It was also submitted that the deposition of PW7 discloses that he received the seized articles in packed and sealed condition from the Malkhana of the police station under proper receipts which was duly tendered in evidence and marked as Exhibit 12 and 12/1. Such articles were kept in the central Malkhana, Lalbazar and the requisition submitted by PW7 for keeping the seized articles in the Malkhana was also tendered in evidence and marked as Exhibit 9 collectively. The seized articles were sent through a challan containing seal impression of DC, DD

which was also tendered in evidence and marked as Exhibit 21. It is submitted by learned advocate for the State that the chain of custody seized articles were duly proved at the trial and was beyond any doubt.

**17.** Learned advocate for the State further submitted that there was no discrepancy in the weight of the seized contraband in so far as sample packets were prepared by the seizing officer at the spot marking the packets as S1 and S2. The seized contraband was sent for chemical examination under proper challan and was received by chemical Examiner with intact seal. It was stated that the sample was received by chemical Examiner in good condition with its packing and labels; minor difference in weight of the samples does not create any dent in the prosecution case.

**18.** Learned advocate for the State has submitted that the prosecution has been able to bring home the charges leveled against the appellant with the help of cogent and convincing evidence and as such, the impugned

judgment of conviction and order of sentence does not deserve any interference.

**19.** The de-facto complainant deposed as PW1. He has stated that on February 20, 2017 at 14.00 hrs, he received a source information that one drug seller was to come to Watgunge P.S. area in the afternoon. PW1 reduced the information into writing and informed his immediate superior, Inspector Biswajit Banik of Noarcotic Cell D.D and under his direction, PW1 formed a raiding team. He also obtained permission from the Assistant Commissioner of Narcotic Cell.

**20.** The source information reduced into writing was tendered in evidence and marked as Exhibit 1 and the permission letter was marked as Exhibit 2. He further stated that the raiding team left Lalbazar at 15.00 hrs in a vehicle carrying the necessary testing kit, weighing scale, package materials, brass seal and other necessary accessories and reached the spot. The source led the raiding team in front of R.S. Enterprise on the Diamond Harbour Road at about 15.30 hrs and maintained a

watch. After sometimes, the source pointed out the person coming from the north direction having a bag in his right hand about 14.00 hours. PW 1 intercepted him in front of R. S. Enterprise on the road at 70/6 Diamond Harbour Road, Calcutta 23. PW 1 disclosed his identity and explained the purpose of his detention. In the meantime some people started gathering there. PW 1 informed the gathering that the detained persons was carrying narcotic and was liable to be searched. He requested the gathering to be a witness of search and seizure under NDPS Act. Two persons volunteered to be witnesses.

- 21.** PW 1 further stated that he informed the detainee with his legal rights that he might be searched in presence of a Gazetted Officer or a Magistrate at the spot or if he wished he could be taken to the office of a gazetted officer or a Magistrate. He also sought the first option upon the detainee and explained the meaning of a gazetted officer and a Magistrate. The detainee opted to be searched by a gazetted officer at this spot. The

detainee was not able to write down his reply to be first option and as per the request of the detainee, the reply was written by PW 1 in the language of the detainee and he put his left thumb impression on the first option. The first option was tendered in evidence and marked as Exhibit 3.

**22.** PW 1 further stated that he searched for a gazetted officer in the locality but failed to find one. Accordingly, he informed his superior to send a gazetted officer at the spot. At about 17.30 hours, one inspector came to the spot in uniform being PW 2 at the spot to supervise the search and seizure under NDPS Act as a gazetted officer. He was introduced by PW 1 to the detainee and the witnesses. PW 2 informed the detainee of his right to be searched on the spot in presence of a gazetted officer. He also served the second option upon the detainee whereupon; the detainee opted to be searched at the spot in his presence. The detainee also searched the person of the police personnel in the raiding team including that of PW 1 but nothing could be found except the personal

belongings. The detainee was not in a position to write down his option on the second option to and on his request his reply was written by PW 2 to which, the detainee put his left thumb impression. The second option form was also tendered in evidence and was marked as Exhibit 4.

- 23.** Thereafter, PW 1 proceeded to search the person of the detainee on the spot in presence of the gazetted officer and independent witnesses. The Navy blue bag carried by the detainee was searched and found to contain a black polythene packet which, in turn, was found to contain rectangular -shaped slab with Brown coloured adhesive tape. The slab were found to contain black coloured substance which was tested with the testing kit and was found to be positive for charas i.e. cannabis resin. The seized contraband, was found on weighing to be 1 kg and one hundred grams in weight. PW 1 extracted sample packets of 50 grams each from the mother packet and packed, sealed and labeled the sample packets and marked the same as S1 and S2. The

mother packet along with the polythene packet as well as the bag was also sealed and labeled with a marking. A cash of ₹ 30/- was also recovered from the pocket of the detainee which were also sealed and labeled. The recovered articles including a brass seal were seized by PW 1 under a seizure list prepared at the spot in presence of the gazetted officer and the witnesses which was tendered in evidence and marked as Exhibit 5. PW 1 also stated that the detainee failed to give any satisfactory answer for the possession of narcotic contraband, so he was arrested at about 20.00 hours. He proved the memo of arrest and inspection memo prepared in the pen and signature of PW 1 were also marked as Exhibit 6 and Exhibit 6/1. At the trial, PW 1 also identified the sample packets of the contraband and that of the cash money produced in the court which were marked as Mat. Exhibit I and II and the signatures on the labels were marked as Mat. Exhibit I/I and II/I respectively. The mother slab of contraband and

signatures on its labels were also identified by PW1 as Mat. Exhibit III series and IV series respectively.

**24.** PW1 handed over the seized articles, the seizure list and the detainee to the officer-in-charge of Watgunge Police Station which was entered in an inventory list. PW1 also submitted a written complaint (Exhibit-7) with the officer-in-charge of Watgunge Police Station. Although, PW1 was extensively cross examined on behalf of the appellant but nothing favorable could be extracted so far as the search, recovery and seizure of narcotic contraband from the possession of the appellant is concerned.

**25.** The police officer who acted as a Gazetted Officer was examined as PW2. He has stated that on February 20,2017 he was directed by the Deputy Commissioner, Port Division to go to the spot situated in front of R.S. Enterprise on Diamond Harbour Road to act as a Gazetted Officer where a person was detained by the officers of Narcotic Cell on the suspicion of possessing contraband. Accordingly, he informed the Officer-in-

charge, made a note in the GDE (Exhibit 9) and proceeded to the spot. He reached the spot at about 17.30 hrs. Reaching there he saw one person standing in the middle of a crowd. PW1 came to him and disclosed his identity and introduced PW2 with the suspect, the members of the raiding team and the independent witnesses. He identified the appellant in court. PW2 was further informed by PW1 that he had served first option upon the suspect who had opted to be searched on the spot in presence of a Gazetted Officer. PW2 served second option upon the suspect which was tendered in evidence and signature of PW2 thereon was marked as Exhibits.

**26.** PW2 has fully corroborated the statement of PW1 with regard to the manner of search and seizure of narcotic contraband and collection of samples et cetera from the possession of the appellant. PW2 proved his signatures on the seizure list and the labels attached to the seized articles.

**27.** The recording officer deposed as PW3. He stated that on February 20, 2017, he was called upon by the

Officer-in-charge of Watgunge Police Station and directed him to collect the written complaint, seizure list, seized articles and the accused. Accordingly, PW3 lodged a GDE (Exhibit 10) and started a specific Case. He filled up the formal First Information Report and received four packets of seized articles as well as the arrested accused. PW3 proved the endorsement of the Officer-in-charge on the written complaint (Exhibit 7/1) and the formal FIR (Exhibit 11). He also identified the packets containing the seized articles in court. PW3 deposited the seized article with the PS Malkhana, the relevant entry of which was marked as (Exhibit 13). On February 22, 2017 he handed over the case to PW7 under order of Deputy Commissioner, Detective Department by lodging a GDE in this regard (Exhibit 14).

- 28.** One of the independent witnesses was examined as PW4. He stated that on February 20, 2017, he was going to play through the Diamond Harbour Road. He saw a gathering in front of R.S. Enterprise. Going there he found a person standing with a navy blue color bag. One

officer i.e. PW1 came out and told that the man was intercepted on the suspicion of possessing Narcotic substance and requested him to be a witness. He and one Sk. Tarik agreed to be such witness. He identified the appellant in court.

**29.** PW4 also stated that the police officer asked the appellant whether he wanted to be searched in presence of a Magistrate or a Gazetted Officer. The suspect was not able to read and write for which the answer on the option form was written by PW1 as per the version of suspect. PW4 also signed on such paper along with the Gazetted Officer. The suspect also put his Left Thumb Impression on it. He has also stated that on the request of PW1, PW2 came to the spot to act as a Gazetted Officer and served the second option upon the suspect. PW4 also stated that after observing all formalities, the bag of the suspect was searched by PW1 and on such search the bag was found to contain a polythene packet containing some square shape material wrapped with adhesive tape. The said article weighed 1 kilogram and 100 grams. A cash of

Rs.30/- was also recovered. The said articles were seized under a seizure list. PW4 proved his signature on the seizure list and option forms. Samples were also collected in two packets marked S1 and S2 and he signed on the labels attached to such packets (Mat. Ext. III/6, IV/5 and IV/6) respectively.

**30.** The chemical Examiner was examined as PW 5. He stated that on February 23, 2017, his laboratory received one Brown paper packet marked S1 from Watgunge police station in connection with case number 49 dated February 22, 2017. Upon receipt the packet was marked with laboratory number. At the time of receiving, the seal on the packet was found to be intact and tallied with the specimen seal forwarded with the memo. The said packet was found to contain 66 grams of semi-solid lumps. The articles were tested in the laboratory by the chemist under the supervision of PW5. Upon such testing the article was found to be charas. PW5 accordingly, prepared a test report which was tendered in evidence and was marked as Exhibit 15. He also identified the

packet containing the remnants of the contraband and an envelope in which the samples were received by his office. PW5 also identified the Mat. Exhibit I.

- 31.** One of the members of the raiding team was examined as PW 6. He stated that on February 20, 2017, at about 3.00 p.m., he accompanied PW 1 to 70/6, Diamond Harbour Road. After some time one person was seen coming along Diamond Harbour Road. At the indication of the source, the said person was apprehended by the raiding team including PW6. PW 1 disclosed his identity before such person and informed him that he was suspected of possessing narcotic contraband. PW6 also stated that two independent witnesses from amongst the gathered crowd came forward to assist in the search. The suspect was informed of his right if he wanted to be searched in presence of a Magistrate or a Gazetted Officer. In this regard, PW6 signed on a document prepared by PW 1. He further stated that at about 17.30 hours, the Gazetted Officer came to the spot and served the option to the suspect

whether he wanted to be searched in presence of a Magistrate or a Gazetted Officer. PW6 signed on search option besides the witnesses and the detained person (Exhibit 4/5).

**32.** PW6 further stated that the detained person searched the police personnel but nothing objectionable could be found. Thereafter, PW 1 conducted search on the person of the detained person and on such search, a cash of ₹ 30/- was recovered from his pocket. The bag carried by the suspect was found to contain a polythene packet containing charas which was wrapped with Brown paper. The contraband was found to be 1 kg and 100 grams on weighing. PW 1 collected sample packets taking 50 grams each from the seized material. Thereafter, the mother packet and the sample packets were packed, sealed and labeled. PW 6 signed on the labels attached to the mother packet as well as sample packets. The packets were also signed by the independent witnesses and the Gazetted Officer. The articles were seized under a seizure list which was also signed by PW6 along with

others which he identified. PW6 also identified his signature on the seizure list as well as on the labels attached to the mother packet and the sample packets.

**33.** The investigating officer deposed as PW7. He stated that on February 20, 2017, he took up investigation of the case in terms of the order of Deputy Commissioner, Detective Department. He tendered the order of the Deputy Commissioner which was marked as Exhibit 16. He further stated that, in course of investigation, he went to Watgunge police station and took over the charge of investigation. He took over the custody of the accused and seized articles from the police station under a GDE (Exhibit 17). He also received the seized articles under sealed condition from the PS Malkhana by putting his signature on the Malkhana register (Exhibit 12). He took up the custody of the appellant from the lock-up. He also proved the lock-up register (Exhibit 18). He identified the appellant in court.

**34.** PW7 also stated that in course of investigation, he kept the accused in the central lock-up and placed the

seized articles in central Malkhana, Lalbazar under a requisition and receipt to put the alamats at the central Malkhana (Exhibit 19 collectively). He also stated that in course of investigation he visited the place of occurrence, prepared sketch map (Exhibit 20). On February 23, 2017 he sent the seized articles for chemical examination under a challan bearing the official seal and signature of the Deputy Commissioner, Detective Department (Exhibit 21). On completion of investigation, under due permission of his superior, PW7 submitted charge sheet on May 27, 2017 against the appellant under section 20 (b) (ii) (c) of the Narcotic Drugs and Psychotropic Substances Act.

- 35.** On completion of the evidence on behalf of the prosecution, the appellant was examined under Section 313 of the Code of Criminal Procedure. The circumstances appearing against the appellant were placed before him in such examination, whereupon the appellant pleaded his innocence having no knowledge about the incident. He further stated in his examination

under Section 313 of the Code of Criminal Procedure that he was picked up for motor theft. Thereafter he was handed over to Narcotic Cell and was brought to Watgunge police station. His family had filed complaint against the officers in the case for falsely implicating him. He although intended to adduce defense witness but no defense witness appears to have been examined on behalf of the appellant at the trial.

**36.** The prosecution case charges the appellant with the possession of commercial quantity of 'Charas'. He was apprehended with one kilogram and one hundred grams of charas in contravention of the provisions of the Nasrcotic Drugs and Psychotropic Substances Act, 1985.

**37.** According to the prosecution case PW1 received a source information that a person was going to deal in charas in Watgunge police station are on February 20, 2017. PW1 reduced the information into writing (Exhibit 1) and under due permission from his superior (Exhibit 2) formed a raiding team to work out the information. He moved to the reported spot at Diamond Harbour Road in

front of R. S. Enterprise, with all the necessary kit and other accessories accompanied by the raiding team and the source. Reaching there, PW1 intercepted the appellant as per identification of the source.

**38.** After observing all legal formalities, the appellant was searched and narcotic contraband weighing one kilogram and one hundred gram in the form of charas was recovered from the possession of the appellant. The appellant failed to produce any valid document for the possession of contraband for which he was arrested in accordance with law. Samples were collected from the seized contraband in accordance with the established rules for the purpose of chemical examination.

**39.** So far as recovery of the contraband from the possession of the appellant is concerned, it is the case of prosecution that the appellant was intercepted on the Diamond Harbour Road in front of R. S. Enterprise being identified by the source. He was informed that he was being intercepted on suspicion of carrying narcotic contraband. A search of the person and property of the

appellant was proposed to be searched. The seizing officer informed him of his legal rights to be searched in presence of a Magistrate or a Gazetted Officer by serving the first Option form in writing (Exhibit 3). In the meantime, some persons assemble at the spot and two of the crowd volunteered to be independent witnesses to search and seizure. The witnesses signed on Exhibit 3 whereas, the appellant put his left thumb impression.

**40.** The appellant opted to be searched on the spot in presence of a Gazetted Officer whereupon, at the request of PW1, one Gazetted Officer, PW2 arrived at the spot. He served the second option upon the appellant (Exhibit4) which was also signed by the witnesses. The appellant put his left thumb impression on such writing. The appellant also conducted search on the person of the members of the raiding team but nothing objectionable could be found.

**41.** Thereafter, a search was conducted by PW1 and during such search one kilogram and one hundred grams of 'Charas' besides the personal belongings was recovered

from the possession of the appellant. The appellant failed to produce any valid document for the possession of narcotic contraband. The aforesaid contraband along with some cash money recovered so, from the possession of the appellant, were seized by PW1 under a seizure list (Exhibit 5). The seizure list contained the signature of the independent witnesses and left thumb impression of the appellant. The appellant was then arrested at the spot by duly filled memo of arrest and inspection memo. The recovery of contraband from the possession was and the manner of such recovery was fully corroborated by the prosecution witnesses including the independent witness. The seized articles along with the sample packets were produced in court and identified by the witnesses.

**42.** The evidence on record goes to establish without any iota of doubt that the appellant was found carrying narcotic contraband at the relevant date and time and was arrested from the spot situated on the Diamond Harbor Road in front of the shop of R. S. Enterprise.

Although, the appellant, at the time of his examination under Section 313 of the Code of Criminal Procedure made out a case that he was picked up by the police in connection with a case of motor theft and was brought first to Lalbazar and then to the spot from where recovery has been shown. Ultimately, he was implicated in this case. He also stated that he had filed a complaint against the police for false implication.

- 43.** In answer to a question in such examination, the appellant gave out to adduce defense witness. However, neither any defense witness was adduced on behalf of the appellant nor the appellant produced the complaint lodged by him for the false implication in this case. The details of the case regarding motor vehicle theft, in connection of which, the appellant was first arrested, has also not been brought on record. For such reasons, we are of the opinion that the appellant failed to justify his presence at the spot at the relevant date and time. He also appears to have failed to establish that he was falsely implicated in this case.

**44.** The evidence on record also shows that the seized contraband was duly packed, sealed and labeled and was brought to Watgunge police station where it was handed over to PW3 who, in turn, deposited the same with the PS Malkhana on February 20, 2007. Such deposit has been duly proved by production of Malkhana Register (Exhibit 12). Later on, the said articles were handed over to the investigating officer PW7 who received the same upon due receipt endorsed on the Malkhana Register itself. He kept the seized articles in the Central Malkhana, Lal Bazar under proper entry in the Malkhana Register (Exhibit 19) on February 22, 2007.

**45.** The seized articles were sent by PW7 for chemical examination on February 23, 2007. The chemical examiner, PW5, has stated that his office received the seized article marked with S1 on February 23, 2007 in connection with Watgunge PS Case No.49 dated February 22, 2007. He categorically stated in his deposition that the seized articles were sent under a memo and the condition of the seal on the packet at the time of

receiving was found to be intact and tallied with the specimen seal forwarded with the memo. Therefore, it transpires from the evidence on record that the prosecution has convincingly proved the chain of custody of the seized articles from the time it was seized till it was received by the chemical examiner without any reasonable fissure therein.

**46.** Learned advocate for the appellant has doubted the report of the chemical examiner vis-à-vis alleged seizure of contraband from his possession, on the ground that there was notable difference in the weight of the sample sent to it. According to the case of the prosecution, a sample of 50 grams was collected at the time of seizure of the contraband which was sent for chemical examination. However, the gross weight and remnant weight of the packet containing the contraband marked with S1 was found to 66 grams and 59 grams respectively.

**47.** It is trite law that what has to be ensured is that what has been recovered is what has to be sent for

chemical analysis. In case there is any doubt that what was received by the Chemical Analyser is not the same, then the benefit of that doubt could be given to the accused. But in cases where it is proved that what was sent to the Chemical Analyser is the same as what were recovered, minor differences in weight would not vitiate the trial.

**48.** In the instant case, as noted above, a search and seizure was made on February 20, 2017. PW1 has testified that the seized articles were packed, sealed and labeled at the spot itself with collection of samples. Exhibit 5 series is the document which establishes the seizure of not only the mother packet and other items but the sample packets as well. On the same day a complaint was lodged and the seized articles were deposited with the Malkhana of Watgunge police station by Exhibit 12 coupled with Exhibit 10. Later on, the investigation of the case was handed over to PW7, an officer from Narcotic Cell, Detective Department, Lal Bazar. Accordingly, PW7 received the seized articles from Watgunge PS on

February 22, 2017 vide Exhibit 14 and Exhibit 17. He deposited the same with Central Malkhana, Lal Bazar which is duly proved with the help of Exhibit 19. PW7 has stated that he sent the sample contraband for chemical examination on February 23, 2017. Exhibit 15/2 goes to show that the seized alamat marked S1 was received by the chemical examination laboratory on February 23, 2017 and that the seal was found intact which tallied with the specimen seal sent with the memo. Therefore, the aforementioned evidence without any bit of doubt establishes that the articles sent for chemical examination, was the same what were recovered from the appellant on February 20, 2017.

**49.** In the case of **Rajesh jagdamba Avasthi (Supra)** the Hon;ble Supreme Court was pleased to set aside the conviction on the ground that the difference in weight of the contraband in one of the packets was found to be significant while in one of the packets it was minimal. It was also noted in the said case that

*“15. This is not all. We find from the evidence of PW 4 that he had taken the seal from PSI Thorat and after preparing the seizure report, panchnama, etc. he carried both the packets to the police station and handed over the packets as well as the seal to Inspector Yadav. According to him on the next day, he took back the packets from the police station and sent them to PW 3 Manohar Joshi, Scientific Assistant in the Crime Branch, who forwarded the same to PW 1 for chemical analysis. In these circumstances, there is justification for the argument that since the seal as well as the packets were in the custody of the same person, there was every possibility of the seized substance being tampered with, and that is the only hypothesis on which the discrepancy in weight can be explained.*

***The least that can be said in the facts of the case is that there is serious doubt about the truthfulness of the prosecution case.”***

**50.** However, in the case at hand, the seizure was made by PW1. The seized articles were handled by PW1, PW3, PW7 and the officers of two Malkhanas at different times. There is no case that the same person was in possession of the samples and the seal leaving any opportunity of meddling with the seized articles. Moreover, the difference in weight of the contraband received by the chemical analyzer seems to be too minimal to be 59 grams instead of 50 grams. Such minimal difference in weight coupled with the manner of handling the alampats leaves no space for an inference with regard to tampering with it. The prosecution appears to have proved the chain of custody of the seized articles beyond any doubt and it can be safely held that the articles sent for chemical examination was the same which was recovered from the possession of the appellant.

**51.** It is further contention of the appellant that the members of the raiding team were not examined at the trial. One of the independent witnesses who figured in the seizure list has also not been examined by the prosecution. Such conduct on the part of the prosecution amounts to withholding of vital witnesses which tells upon the veracity of the prosecution case. In the case of **Naresh Kumar@ Nitu (Supra)** it was held by the Hon'ble Apex court that,

***“In a case of sudden recovery, independent witness may not be available. But if an independent witness is available, and the prosecution initially seeks to rely upon him, it cannot suddenly discard the witness because it finds him inconvenient, and place reliance upon police witnesses only.....”.***

**52.** In the instant case, however, the recovery cannot be termed as sudden recovery. The searching party moved on a source input received before hand. Moreover,

besides PW1, another member of the raiding team, PW6 has been examined on behalf of the prosecution, who has fully supported the case of the prosecution. To our opinion, it is not at all necessary that each and every member of the raiding team must be examined and non-examination of any of such member is fatal to the case. It is the prerogative of the prosecution to take a call as to what and how much of evidence it requires adducing for proof of its case. Thereafter, it is the court to consider whether the case is proved enough to justify a conviction or otherwise.

**53.** It is the case of the prosecution that two independent persons agreed to be witnesses to search and seizure. The search and seizure was made in their presence and both of them put their signatures on the seizure list, besides others. One of such independent person has deposed in favour of the prosecution as PW4 and supported the case of the prosecution, as made out in the First Information Report. He has sufficiently testified the search and seizure of narcotic contraband

from the possession of the appellant. Non-examination of the other independent witness does, in no way, gives rise to an implication that the other independent witness was discarded for being hostile to the case of the prosecution. He was simply not examined for any reason whatsoever. The case also does not fall in the category where it can be said that the prosecution discarded the independent witnesses and relied solely, upon police witnesses. Therefore, we are of the opinion that in the given facts, ratio laid down in the case of **Naresh Kumar@ Nitu (Supra)** is hardly applicable in the present case.

- 54.** Exhibit 15 series establishes that the articles recovered and seized from the possession of the appellant, on chemical examination, was found to be 'Charas' with the purview of Narcotic Drugs and Psychotropic Substances Act, 2012. The appellant having failed to show any valid document for the possession of narcotic contraband, was surely liable for the violation of the provisions of the said Act of 2012. Therefore, we find no illegality or infirmity in the findings arrived at by the

learned trial court in holding the appellant guilty of the contravention of the provisions of the NDPS Act and ultimately convicting the appellant for the offence punishable under Section 20 (b) (ii) (c) of the Narcotic Drugs and Psychotropic Substances Act, 2012.

**55.** It was also contended by Learned advocate for the appellant that the appellant was found in possession of narcotic contraband which was slightly above the commercial quantity and he was never convicted for a similar offence earlier. The learned trial court failed to appreciate such mitigating circumstances and awarded a punishment of 14 years with a fine of ₹ 1.5 lakhs, instead, learned trial court ought to have awarded the minimum punishment prescribed for the offence which was 10 years.

**56. Shahejadh Khan Mahebub Khan Pathan (Supra),** the Hon'ble Supreme Court laid down that,

***“9. It is projected before us that both the appellants are first-time offenders and***

*there is no past antecedent about their involvement in offence of like nature on earlier occasions. It is further brought to our notice, which is also not disputed by the learned counsel for the State that as on date, the appellants had served nearly 12 years in jail. In view of the same and in the light of the decision of this Court, in Balwinder Singh [(2005) 4 SCC 146 : 2005 SCC (Cri) 1092] , while confirming the conviction, we reduce the sentence to 10 years which is the minimum prescribed sentence under the relevant provisions of the NDPS Act.”*

- 57.** Similarly in the case of **Balwinder Singh (Supra)** the conviction of the appellant therein was reduced from 14 years to 10 years by the Hon’ble Supreme Court, considering the fact that the convict was convicted for the first time in a case under NDPS Act.

**58.** In **Pradeep Bachhar (Supra)**, the Hon'ble Supreme Court, noting the ratio laid down in the case of **Shahejadhkhan Mahebubkhan Pathan Vs. State of Gujrat**, reduced the sentence of 12 years to 10 years, in consideration of certain mitigating circumstances lying in favor of the appellant, including first offence under NDPS Act by the convict.

**59.** In the instant case, the appellant was found in possession of one Kilogram and one hundred grams of charas which is slightly above the commercial quantity of one Kilogram. No material has been brought on record to prove that the appellant was previously involved or ever convicted for an offence for violation of the provisions of NDPS Act. There are no materials on record to consider the other mitigating circumstances like economic condition or the family composition of the convict who would suffer for the appellant remaining in custody. Nevertheless, one consideration, in terms of the ratio laid down in the abovementioned case i.e. criminal

antecedent in connection with similar offence, surely lies in favor of the appellant.

**60.** Therefore, in view of the ratio laid down by the Hon;ble Supreme Court in the cases of **Shahejadkhan Mahebubkhan Pathan (Supra)**, **Balwinder Singh (Supra)** and **Pradeep Bachhar (Supra)** we are of the opinion that the sentence passed by learned trial court be reduced to the minimum punishment prescribed for the offence which is 10 years, instead of 14 years as awarded by learned trial court.

**61.** In the light of the discussions made hereinbefore, the impugned order of conviction dated February 24, 2020 of the appellant is hereby affirmed. The impugned order of sentence dated February 27, 2020 is however, modified as indicated above.

**62.** The instant appeal being **CRA 39 (DB) of 2022** is accordingly disposed of.

**63.** In view of the disposal of the appeal, no interlocutory application survives. Consequently, connected applications, if any, shall stand dismissed.

**64.** Trial Court records along with a copy of this judgment and order be sent/transmitted, at once, to the learned Trial Court for necessary action.

**65.** Period of detention already undergone by the appellants shall be set off against the substantive punishment in terms of the provisions contained in Section 428 of the Code of Criminal Procedure.

**66.** Urgent Photostat certified copy of this order, if applied for, be supplied to the parties on priority basis upon compliance of all formalities.

**[MD. SHABBAR RASHIDI, J.]**

**67.** I agree.

**[DEBANGSU BASAK, J.]**