

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

CRIMINAL APPEAL NO.615 OF 2017

Samual Josef Beera, Age 29 years,
R/o.Baripdar Village, Kirama City,
District Gajpati, State-Orissa
(Presently at Nagpur Central Prison).

Appellant/
Accused No.1

versus

The State of Maharashtra

Respondent

Ms.Shraddha Sawant, Advocate for Appellant.
Ms.PN.Dabholkar, APP, for Respondent-State.

CORAM : PRAKASH D. NAIK, J.

Date of Reserving the Judgment	:	22 nd April 2022
Date of Clarification/Hearing	:	20 th April 2023
Date of Pronouncing the Judgment	:	27 th April 2023

JUDGMENT :

1. Appellant is convicted vide Judgment and Order dated 23rd May 2017 passed by Special Judge (NDPS) for Greater Bombay in NDPS Case No.94 of 2015 for the offence under Section 8(c) r/w Section 20(b)(ii) C of Narcotic Drugs and Psychotropic Substances Act,1985 (NDPS Act) and sentenced to suffer rigorous imprisonment for a period of ten years and to pay fine of Rs.1,00,000/-. In the event of default in payment of fine, he shall undergo further period of rigorous imprisonment for three months. Appellant is further convicted for the offence punishable u/s.8(c) r/w Section 29 of NDPS Act and sentenced to suffer rigorous imprisonment for a period of ten years and to pay fine of Rs.1,00,000/- and in default of payment of fine, he shall undergo a further period of rigorous

imprisonment for three months. The substantive sentences to run concurrently.

2. Accused no.2 was convicted for the offence punishable u/s.8(c) r/w S.20(b)(ii) B of NDPS Act and sentenced to suffer rigorous imprisonment for a period of two years and to pay fine of Rs.20,000/- and in default of payment of fine, to undergo a further period of rigorous imprisonment for two months. Accused no.2 was further convicted for the offence punishable u/s.8(c) r/w S.29 of NDPS Act and sentenced to suffer rigorous imprisonment for a period of two years and to pay fine of Rs.20,000/- and in default to pay fine, to undergo a further period of rigorous imprisonment for two months. The substantive sentences to run concurrently.

3. The brief facts of the prosecution case can be summarized as under :-

(i) Police Constable Satyavijay Sahebrao Baisane attached to Anti Narcotic Cell, Worli, Mumbai lodged the complaint on 22nd February 2015 alleging that he received a secret information from his informer that two persons by name Samuel Josef Beera and Dineshkumar Sunderlal Sahu are dealing in commercial quantity of contraband and will be coming to Mumbai for selling the same to their customers at Balwadi Sanskrutik Kendra and Samajkalyan Kendra, Nehru Nagar, Vileparle (West), Mumbai. The informer also provided described the description of suspects;

(ii) Mr.Baisane noted the said information in the information register and forwarded the same to his immediate official superior Police Inspector Shelke. The said information was also transmitted to the Deputy Commissioner of Police and Assistant

Commissioner of Police at Cuffe Parade Office, who in turn directed to work out the information under the supervision of P.I.Shelke. Accordingly P.I.Shelke summoned the staff in his cabin, briefed them the information received and directed them to prepare for the raid;

(iii) P.I.Shelke obtained the raiding material including the brass ANC seal into his custody. The extract of information register and station diary were forwarded to the Head Office through Head Constable Shingte. By that time, Police Constable Belikatte returned to Unit Office with two panchas. They were briefed about information received and the intention to raid the suspects. Panchas agreed to witness the search. They were appraised of legal provisions regarding the search, seizure and arrest of accused under NDPS Act. The team members took search of panchas and vice-versa. Nothing objectionable was found in the respective search. The panchas also took search of the raiding material. Pre-trap panchanama was prepared. It was read over and explained to the panchas. It was signed by them. P.I.Shelke and API Kharade also signed the panchanama. API Kharade maintained station diary entry in respect of raid;

(iv) The raiding party came out of unit office. The panchas took inspection of vehicle. Nothing found concealed therein. The team members proceeded to the spot by vehicle. It was parked at some distance from spot. The team members along with panchas alighted from the vehicle and proceeded to the spot. P.I.Shelke took inspection of the spot and issued necessary directions to the team members;

(v) At about 14.40 hours two persons resembling with the description given in the information came to the spot. One of them was having a large nylon bag in his hand and other one was having a

small nylon bag in his hand. They came to the spot and halted on the footpath. Surveillance was mounted on their movements. On ensuring the identity of suspects, P.I.Shelke gave signal to the team members and both the persons were apprehended;

(vi) P.I.Shelke disclosed his Identity to the suspects and briefed the information received by them and the intention of raiding team to take their search. On enquiring the suspects disclosed their names as Samual Josef Beera, r/o.Baridpar, City Kirama, District Gajpati, Orissa, and Dineshkumar Sunderlal Sahu, r/o.Nalasopara, District Thane.

(vii) P.I.Shelke orally and individually appraised both the suspects regarding their right of being searched in presence of nearest Magistrate or Gazetted Officer and if they demand so, necessary arrangements will be made to that effect. Individual letter to that effect as contemplated u/s.50 of NDPS Act was also tendered to both the accused. Both the accused declined to be searched before the independent Gazetted Officer or Magistrate and expressed their readiness to be searched by the officers present in the team. Both of them endorsed to that effect on the copy of letter tendered to them. Panchas put their signatures on the letter tendered to the suspects. Opportunity to take search of the raiding team members and panch witnesses was offered to suspects. They declined for the same;

(viii) Search of the suspects was conducted by API Kharade. The first suspect Samual Josef Beera was found carrying large nylon bag in which another blue colour plastic carry bag was found. On opening the same, it was found containing green colour flowering and footing tops with the stalks, emitting pungent smell. On being inquired, the suspect disclosed it as Ganja. P.I.Shelke took some

leaves on his palm, crushed the same, taken its smell and assured that the same was Ganja. On weighing the same with the help of spring scale, it was found 22 kgs.

(ix) Two samples of 25 grams each were taken. Labels with signatures were affixed. The balance 21.950 kgs of Ganja was kept in plastic bag and then in nylon bag. The label bearing signatures of API Kharade and both the panchas affixed on it and marked 'A';

(x) On taking further search of second suspect Dineshkumar Sahu, he was found in possession of same substance. He disclosed it as Ganja. It was tested by taking some substance on the palm and it was assured that the substance was Ganja. The weight was 2 kgs. Two samples of 25 grams each was drawn by following procedure. The remaining 1.950 kgs of Ganja was kept in original bag and seized and sealed. The accused put their signatures on the seized articles. They disclosed the source of contraband by giving name of person from Orissa and also stated that they were intending to sell contraband to the customers in Mumbai. The accused were explained the grounds of arrest. They were asked whether they can be produced before Magistrate or Gazetted Officer, if they have any grievance in respect of search, seizure and arrest. They declined for the same. The post trap panchanama was drawn;

(xi) FIR was registered vide C.R No.124 of 2015. During investigation API Kharade deposited seized samples and bulk articles in ANC Godown. The samples were sent to FSL, Kalina, Mumbai for analysis. Report was received. Statement of witnesses were recorded. After completing necessary formalities of investigation, charge sheet was filed.

4. Charge was framed vide order dated 12th January 2016 for

offences under Sections 8(c) r/w 20(b)(ii)C of NDPS Act against accused no1. Both the accused were charged for conspiracy and commission of offence u/s.8(c) r/s 29 of NDPS Act.

5. The prosecution examined seven witnesses. Statements of accused were recorded u/s.313 of Cr.P.C. Both the accused were convicted for the offences as stated hereinabove and sentenced to suffer imprisonment and payment of fine.

6. Learned advocate for Appellant submitted that prosecution has failed to prove its case beyond doubt. Evidence of witnesses suffers from serious doubts. Section 42(2) of NDPS Act was not complied. Section 50 of NDPS Act was violated. There was no individual appraisal of right under Section 50 of the Act to the accused. Evidence of witnesses is contradictory. The only independent witness examined in this case do not depose about compliance of Section 50 of NDPS Act. Muddemal deposit memo reflects that seized articles were deposited in the godown at 21.10 hours. The C.R number reflects in memo. The godown register also reflects C.R number. However, in the FIR it is stated that C.R number was registered at 22.40 hours. Hence C.R number ought not to have been reflected on Muddemal Deposit Memo. The prosecution has not explained how Muddemal articles, Muddemal Deposit Memo and Muddemal bears C.R number before registration of FIR. PW-1 has stated that seal on the sample was having description of Senior Police Inspector. PW-7 has contradicted PW-1 and stated that seal used by them was of Police Inspector, not narcotic seal. The evidence of police witnesses does not inspire confidence. PW-5 has stated that he explained the accused meaning of Gazetted Officer as

the officer of State Government of Class-II rank having authority to attest documents with other powers and Magistrate means person of a rank of Deputy Collector having magisterial powers. This evidence is not corroborated by PW-2 or PW-7. PW-7 has stated that PI Shelke appraised suspects his intention to take search and tendered letters to that effect. The panch witness (PW-6) is amenable to police. He stated that he is resident of Sewree and he visited ANC Worli for his personal work. In the cross-examination he stated that he had signed on some papers at police station. He does not remember whether bigger and smaller labels on all the articles were affixed at Vileparle or ANC Worli. Initially he signed at Worli and then at police station. He was at the spot for two hours and in ANC unit for two hours and after returning from spot. His evidence is contrary to prosecution case. Section 313 of Cr.PC was not complied in proper perspective. The questions relating to incriminating evidence were combined/clubbed together, thereby not giving proper opportunity to the Appellant to tender explanation. The co-accused was convicted and sentenced to lesser punishment. There is non compliance to Sections 55 and 57 of NDPS Act. There are serious discrepancies in the evidence. During the search the contraband allegedly recovered contained flowering and fruiting tops. The weight of Ganja allegedly recovered from Appellant is 22 kg. Flowering fruiting tops/stalks are required to be excluded. The weight could be less than 20 kgs and thereby the case of Appellant would fall under non-commercial quantity for which he could be convicted and sentenced for a lesser punishment.

7. Learned Advocate for Appellant has relied upon following decisions :-

- (a) Naval Kishore Singh Vs. State of Bihar¹;
- (b) Sandip Ashok Raut Vs. The State of Maharashtra²;
- (c) Shaikh Maqsood Vs. State of Maharashtra³;
- (d) K.V.Ramasamy Vs. The Superintendent of Police, Preventive Unit, Salem⁴.

8. Learned APP submitted that prosecution has proved the charges against Appellant beyond reasonable doubt. There is no reason to doubt testimony of witnesses examined by the prosecution. The contraband was seized in open place and hence Section 42 of NDPS Act is not applicable. The defence could not extract anything to rebut the presumption in favour of prosecution. There is compliance of Section 50 of NDPS Act. Evidence on record establishes that Appellant-accused was appraised of his right to be searched before Gazetted Officer or Magistrate and the accused had declined for search before such officers. Minor discrepancies are not fatal to the prosecution case. All the incriminating circumstances were put to the accused in statement u/s.313 of Cr.P.C. It is established that Appellant was found in possession of commercial quantity of Ganja. Merely on the ground that panch witness is silent about appraisal of right to search under Section 50 of NDPS Act, the seizure would not get vitiated. The evidence of other witnesses proves that the Appellant was appraised of right to be searched before Gazetted Officer/Magistrate. The Trial Court has analyzed the evidence and by assigning reasons convicted Appellant. Conviction deserves to be confirmed.

1 AIR-2004-SC-4421

2 2015-SCC OnLine-Bom-4543

3 (2009)6-SCC-583

4 Decision of Madras High Court in Criminal Appeal No.685/2004, dated 9-9-2009

9. Learned APP has relied upon following decisions :

- (a) Mohanlal Vs. State of Rajasthan⁵;
- (b) Raveen Kumar Vs. State of Himachal Pradesh⁶;
- (c) Yogesh Singh Vs. Mahabeer Singh⁷.

10. PW-1 Mahesh Bapurao Shikhre was attached to ANC Unit, Worli. According to him, API Kharade directed him to carry the sample from ANC Godown, Azad Maidan, Mumbai to FSL, Kalina, Mumbai. He took sample with letter to FSL. He took sample to FSL, Kalina. In the cross-examination he stated that there were three labels on each envelope. They maintained personal diary relating to work. The diary is verified by superior. The diary is not brought on record. The seal was having description of Sr.PI. The letter Exh.17 does not show his name. On 22nd February 2015, in-charge Police Inspector of their unit was Mr.Shelke. There is only one seal in their unit. There is no marking on the envelope to show that he had carried the envelope A1 and B1. He is not aware who prepared the letter and at what time. He is not aware when the seal was affixed on letter Ex.17.

11. PW-2 Mr.Satyavijay Sahebrao Baisane was attached to ANC Unit, Worli. He deposed that 22nd February 2015 he received information from his informer that one person namely Samuel r/o.Orissa and Mr.Dineshkumar r/o.Nalasopara, are arriving at Balwadi Sanskrutik Kendra and Samajkalyan Kendra, Neharu Nagar, Vileparle (W), Mumbai, to sell the drug i.e. Ganja to their customer. The informer gave description of suspects. He took entry of said information in information register and API Kharade took the entry

⁵ (2015)6-SCC-222

⁶ AIR-2020-SC-5375

⁷ (2017)11-SCC-195

of the said information in the station diary. He gave information to PI.Shelke and thereafter it was communicated to in-charge Constable Tanvade. He communicated the received information to ACP and Senior Police Inspector, Cuffe Parade on telephone. ACP directed him to proceed further under the supervision of PI.Shelke. The staff members were called and told about information received by him. Panchas were called. Raiding material was collected. PI.Shelke directed PCSHINGATE to carry the copies of information register and station diary to submit the ACP and Sr.PI, Cuffe Parade. The panchas were appraised of the information and given instructions about raid. Pre-trap panchanama was prepared. The team proceeded at the spot of incident and at about 2.40 pm the suspects came to the spot. Both persons were carrying nylon bags. Their conduct was suspicious. They were apprehended by team. Team disclosed their identity to the suspects. Suspects gave their names as Samuel Josef Beera and Dineshkumar Sudarlal Sahu. PI.Shelke appraised them about information received and their legal rights. The object of search was informed to the accused. Appellant was informed that he has right to get searched in the presence of Gazetted Officer or Magistrate u/s.50 of NDPS Act and if he demands arrangements would be made. The accused declined to have search before such officers. The letters of intimation regarding right u/s.50 was signed by accused. The co-accused was also appraised of his right u/s.50 of NDPS Act. Both the suspects declined to have searched before such officers. The bag which was in possession of accused no.1 was opened and it was found containing leaves, flowers, branches, seeds. It was ascertained to be Ganja. The weight of substance was 22 kgs. Samples of 25 gms each were taken. The remaining substance of Ganja 21 kgs 950 gms was kept

in same bag, closed and tied. The bag of accused no.2 was opened. It was found containing substance having pungent smell. The substance was leaves, flowers, branches, seeds. The accused said it is Ganja. P.I.Shelke verified it as Ganja. It was weighing 2 kgs. Two samples of 25 gms each were taken. Panchanama was recorded. FIR was registered. He identified the accused.

12. In the cross-examination he stated that he did not write separately the reasons for believing the information received from informer. After the informer narrated the information he ascertained about its truth and wrote it down. After recording the information he informed about it to API Kharade and thereafter to P.I Shelke. There is only one information book maintained in the office. At the relevant time the information book was in custody of unit in-charge. The information book does not bear signature of API Kharade and P.I.Shelke to show that they received its copy. API Kharade was his immediate superior officer on that day present in the office. He is not aware whether any separate seal of Police Inspector and Senior Police Inspector was provided for every unit. He is not aware that seal movement register is maintained in the unit office. On 22nd the seal was in custody of P.I.Shelke. He was aware that presence of Gazetted Officer or Magistrate was required before proceeding for raid. No Gazetted Officer or Magistrate was called in the unit office before proceeding for raid. P.I.Shelke was making conversation with accused. It was jointly done. P.I.Shelke did not identify himself as Gazetted Officer. The signatures of API Kharade, both panchas and accused were obtained on spot on labels affixed on the seal articles. The entry regarding movement of Muddemal was effected in the station diary. Copy of information book was given to P.I.Shelke.

13. PW-3 Deepak Yadav-Kudekar is the Assistant Chemical Analyser. He was serving at FSL, Kalina, Mumbai. He stated that on 23rd February 2015 the head office received sealed parcel from ANC, Worli Unit in connection with C.R No.124 of 2015. He received two parcels from HOD. The seals were intact. He checked C.R number on parcel and opened it and found flowering fruiting tops with greenish leaves and stalks in two polythene bags. On 4th April 2015 he received two sealed parcels with FSL seal from HOD. The seals were intact. He performed test and came to the conclusion that Exhibits-1 and 2 were Ganja. He submitted forwarding letter dated 23rd February 2015 and examination report. He also submitted original data sheet. C.A Report was marked as Exh.No.41. He was shown envelope of FSL, Kalina (Article `1'). It is bearing Lab No.N.777/15, CR No.124/2015 from Worli Unit. It contained one sealed envelope bearing two FSL seal and three ANC seal having Lab No.777/15. It was marked as Article 1/1. He was shown inner substance containing flowering fruiting tops bearing label of Lab Number N.777/2015, Exh.1 bearing his signature and handwriting. It was marked as Article 1/2. As per analysis Exhibit No.1 is `Ganja'. He was shown second sample, Exhibit 2. It is marked Article `2' and bears five seals of FSL bearing Lab No.N.777/15, bearing CR No.124/2015 from Worli Unit. It contains sealed envelope, bearing two FSL Seal and three ANC seal having Lab No.N.777/2015. It is marked at Article 2/1. He was shown inner substance, containing flowering fruiting tops bearing Lab Number N.777/2015, Exh.1 bearing his signature and handwriting. It is marked Article `2/2'. As per analysis Exh.No.2 is `Ganja'. In the cross-examination it was stated that there is no date mentioned on the polythene bag containing Ganja. In Data sheet there is no reference about seal. It

is mentioned in his examination report. In Data sheet there is no mention of number of seals affixed in Data sheet. It is mentioned in examination report. He did not conduct Tetra Hydro Cannibol (THC) test. In the said test the percentage of THC is 0.225% of Ganja. In 'Bhang' the percentage of THC is lesser than Ganja. In Ganja the most active substance is THC. He did not conduct test for measuring percentage of THC. He conducted Thin Layer Chromatographic and HPLC analysis. Hence he stated that it was 'Ganja'. He cannot state exact quantity of Ganja in the TLC test.

14. PW-4 Shivaji Laxman Mane was attached to ANC, Azad Maidan Unit, Mumbai, as Store Keeper. He stated that on 22nd February 2015, API Kharade of ANC Worli Unit met him with letter with direction to receive muddemal in CR No.124/2015. He verified the Muddemal. He made entry in the Muddemal register. He took signature of API Kharade on Muddemal register. API Kharade maintained station diary of ANC store. On 23rd February 2015 PN.Shikre came along with letter for withdrawing A1 and B1. He withdrew samples A1 and B1 in sealed condition from godown and handed over to PN.Shikre. He took his signature in Muddemal register. On 11th June 2015 PC Dhanawade came along with sealed envelope from C.A. He took entry on package of Muddemal register. He accepted the packet in store and made station entry to that effect. Envelope A1, Envelope B1, Envelope A2, Envelope B2, Envelopes A3 and B3 bears signatures of API kharade. In the cross-examination he stated that he did not receive summons. His statement was not recorded by API Kharade. API Kharade has not written Muddemal number on the articles. API Kharade came in between 9.10 p.m for depositing muddemal.

15. PW-5 Divakar Bhaskar Shelke was attached to ANC, Worli Unit as Unit In-charge. He deposed that on 22nd February 2015 PC Baisane reported that his informer informed him that two persons namely Samuel and Dineshkumar would be coming to Vile Parle along with contraband substance Ganja for selling it to customers. The entry was taken in station diary. P.C.Baisane telephonically informed at Head Office regarding the information received. ACP, Cuffe Parade, directed to work out information under his supervision. He called API Kharade, API Naik, PC Belkatte, PC Mane and PC Bade in his cabin and briefed them the information received by PC Baisane. Panchas were called. He took copy of information register and station diary and along with his forwarding letter referred it to Cuffe Parade through H.C Shingte. He briefed to panchas about information received and obtained their permission to witness search proceedings. API Kharade took search of panchas and panchas took search of Police team. He took custody of brass seal and other raiding material. Raiding party proceeded to the spot. Before proceeding for raid, pre-trap panchanama was prepared. Two suspects/accused came to the spot. They were apprehended. The witnesses informed the suspects about the information received by police. He appraised them about the legal provisions about search, seizure and arrest under NDPS Act. They were individually appraised and handed over letters by informing that they have right of being search in presence of Gazetted Officer or Magistrate and if they so demand, necessary arrangement will be made to that effect. However, the accused declined for the same. He obtained signatures of I.O, panchas on the letters Exhibits-48 and 49. Search of accused was conducted. The bags were containing greenish flowering tops with leaves and stalks. Accused

disclosed them to be Ganja. He took small substance and crushed it on his palms. It was emitting pungent smell. He ascertained that it was Ganja. Samples were obtained. They were found in possession of Ganja weighing 22 kgs and 2 kgs respectively. Procedural formalities were completed. Samples were drawn. Accused were arrested. Samples were sealed. Bulk quantity was sealed. In the cross-examination it was stated that all the articles produced before the Court do not bear his signature. FIR register was in the custody of WPI Salunkhe. P.C.Baisane did not introduce informer to him. SHO was having custody of information register. The extract of information register does not bear his endorsement or signature to show that it was received by him. Only one seal was allotted to Worli Unit. He cannot tell whether any officer of gazetted rank was present in team apart from himself. He did not call independent gazetted officer or Magistrate before proceeding for raid. However, he was carrying the list of those officers. The raiding team was knowing that he was a Gazetted Officer. It is not true that he was making conversation with accused jointly. Panchanama was prepared on the spot by using table and chairs lying in the premises of Sanskrutik Kendra. He did not remember name of nearest Gazetted Officer or Magistrate. He explained the accused meaning of Gazetted Officer as an officer of the State Government of Class-II rank having authority to attest documents with other powers. The Magistrate means a person of the rank of Deputy Collector having Magisterial powers. All the documents prepared in this case are produced before superior officers for their endorsement. Accused had stated before him that they do not want to be searched in the presence of Magistrate or any Gazetted Officer. Before registration of FIR, crime number is not given to the case.

16. PW-6 Tabrej Noor Ali Khan has acted as panch witness. He stated that he has received witness summons in this case. As he was out of station on account of his work, he could not attend the Court proceedings. He received threats from some of the jail inmates that he shall not depose in this case. He was called in Worli ANC Unit on 22nd February 2015. He was requested to act as pancha. On account of his personal work he had been to Worli ANC Office. His search was conducted. Search of police was conducted by him. He was informed about the purpose of raid. He went to the spot with raiding team. Two persons arrived at the spot having bags in their hand. They were apprehended by police. The police disclosed that they intend to conduct search. He do not remember if anything else was stated to those persons. He identified them in Court. From the possession of suspects 22 kgs and 2 kgs Ganja was recovered. Samples were drawn from both the substance. Samples and bulk was sealed. His signature was obtained on the articles seized at Worli ANC Unit. The document of search and seizure was prepared. He signed on it with other pancha. P.I.Shelke also signed it. He identified his signatures on post trap panchanama. He identified his signature on sample articles and bulk. During further search of accused some cash was recovered from accused. Mobile phones were recovered. He was shown the copies of letter tendered to accused on which signatures of panchas and accused were obtained. It is marked as Exh.48 and 49. He identified signatures on label on envelope Art.10, label on Art.7, label on Article 5. In the cross-examination it is stated that he received the message from some person for not attending proceedings. He do not remember the name of said person or the date. He had not seen personally the person who sent the said message. He received it through his family

members. He did not ask his family member to ascertain the name of person nor they asked about it. He do not remember the number of signatures made by him at police station. He is not aware about scribe of panchanama. He do not remember the time spent at police station. He signed on some small and some large papers at police station. HE do not remember whether the bigger and smaller labels on articles were affixed either in Vile Parle or ANC Worli He do not remember whether contents of label were typed or written. Letters Exh.48 and 49 were tendered to accused after recovery of muddemal.

17. PW-7 Praveen Vijay Kharade was attached to ANC, Worli Unit as API. He stated that information was received by PC Baisane about two persons dealing in Ganja. PI Shelke summoned the team members and briefed them about the information received by PC Baisane and direction of superior officer to effect raid under supervision of PI.Shelke. Panchas were called. Raid was conducted. Accused came to the spot. They were found in possession of Ganja. PI.Shelke appraised them his intention to take search and tendered a latter to that effect. The accused were orally appraised in Hindi that they have right of being searched in the presence of nearest Magistrate or Gazetted Officer and if they demand necessary arrangement would be made, The appraisal was made individually. Accused no.1 stated that it was not necessary to conduct search in the presence of aforestated officers and endorsement was made on the copy of letter tendered to him. The letters were signed by panchas and PI.Shelke. On opening green coloured leaves, flowering fruiting tops and stalk was found. It was emitting pungent smell. The accused disclosed it to be Ganja. PI.Shelke crushed some

part of the leaves on his palm and assured that it was Ganja. The contraband of Ganja weighing 22 kgs and 2 kg respectively was recovered from both the accused. Samples were obtained. Articles were seized. Panchanama was recorded. Samples were forwarded for examination. In the cross examination he stated that he did not see informer in Worli Unit office on the date of receiving the information. He did not put endorsement on the information register. He noted information in station diary. Except him the information register is not signed by superior officer. P.I.Shelke was his immediate superior officer. He has no document to show that extract of information register was forwarded to P.I.Shelke. Letter Exhibit-48 was prepared in the handwriting of P.I.Shelke. The signatures are undated. The entry in station diary was taken in respect of staff present on 22nd February 2015. When the FIR was lodged, the seized Muddemal was in his custody at Cuffe Parade. It did not happen before lodging the FIR that C.R number was given to case. He do not remember the time of lodging FIR. It will not be correct to say that before lodging FIR, the property was deposited in godown. In FIR Exh.25, the time is correctly mentioned. He did not carry the list of gazetted officer or Magistrate with him. He cannot state the time required for sealing and labelling of each sample. He maintained station diary at Cuffe Parade when they reached there. He has deposited the articles in godown.

18. Statements of both the accused were recorded under Section 313 of CrPC. All the incriminating circumstances appearing through evidence of witnesses were put to the accused no.1 (appellant). The accused has denied the evidence. It was put to accused that as per evidence of PW-2, PW-5 and PW-7 information was received through

informer and he was apprehended. Right of search under Section 50 was appraised to him. Search was conducted. He was found in possession of Ganja. Evidence of PW-1 who carried samples, evidence of PW-4 store keeper, evidence of PW-3, Assistant Chemical Analyser and panch witness was put up to appellant which is answered by him by stating it to be false or that he do not know.

19. The accused no.2 is not before this Court. Probably he did not prefer an appeal since lesser sentence was imposed upon him for his conviction which he must have undergone.

20. From the version of witnesses and documents on record it is apparent that procedural safeguards contemplated under the provisions of NDPS Act were complied by investigating agency. Appellant was found in possession of 22 kgs of Ganja. It is commercial quantity. Section 43 deals with power of seizure and arrest of suspect in a public place. While acting u/s.43 of NDPS Act, the empowered officer has the power of seizure of article and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in public place where such position appears to him to be unlawful. If a search is made in a public place, the officer taking search is not required to comply with sub-sections (1) and(2) of Section 42 of NDPS Act. Section 42 applies when contraband is recovered from a building, conveyance or enclosed place. Where recovery is from public place, Section 43 applies. In the present case, PW-2 PC Baisane has reduced the information into writing and forwarded the same to his immediate superior officer PI.Shelke. Although Section 42 is not applicable in the present case, apparently it has been complied by PW-2.

21. Section 50 of NDPS Act is mandatory in nature. The defense has argued that independent witness PW-6 is silent in respect of appraisal of right u/s.50 of NDPS Act. On scrutiny of evidence of PW-6 it reveals that said witness has admitted his presence during pre-trap as well as post-trap panchanama. The search of accused in his presence resulted in recovery of commercial quantity of contraband from accused no.1 and intermediate quantity of contraband from accused no.2. The witness has established the contents of panchanama Exhibit-23. Mere silence of panch witness with regards to appraisal u/s.50 of the Act which is spelt out otherwise from the evidence of other witnesses as well as documentary evidence, would not vitiate the seizure. Evidence of PW-2, PW-5 and PW-7 substantiate due compliance of Section 50 of NDPS Act. PW-2 has deposed that PI.Shelke has appraised both the accused orally and individually in respect of their right of being searched in the presence of Gazetted Officer or a Magistrate and also tendered copy of letter to that effect. He further deposed that the accused put endorsement with signature and acknowledged that he do not want the search to be taken before any independent Gazetted Officer or a Magistrate. PW-5 stated that he individually appraised accused that he has right of being searched in presence of nearest Magistrate or a Gazetted Officer and if he demands necessary arrangement will be made to that effect. Accused declined for the same by putting endorsement and signature on the letter tendered to them. PW-7 has deposed that PW-5 has appraised both the accused individually that they have right of being searched in presence of Gazetted Officer and Magistrate. However, accused declined for the same and expressed their readiness for being searched by the team

members. Testimony of PW-5 P.I.Shelke is corroborated by PW-2 PC Baisane and PW-7 API Kharade. The compliance of Section 50 is also spelt out from letter of intimation Exh.48.

22. From the aforesaid evidence it is clear that prosecution has duly established compliance of Section 50 of NDPS Act. There is nothing on record to discard and disbelieve the testimony of police officers whose evidence inspires confidence.

23. Packets of samples drawn from the seized contraband and packets of remaining substance were sealed by PW-5 with the help of ANC seal and thereafter were kept in ANC godown as per godown register entry proved by PW-4 HC Mane. After depositing samples in ANC godown, representative samples were withdrawn vide memo of withdrawal and were sent to FSL, Kalina for analysis through PW-1 P.N.Shikre. PW-3 Assistant Chemical Analyser received samples in sealed condition and contraband was tested positive for Ganja. There is compliance of Section 55 of NDPS Act.

24. The testimony of PW-7 API Kharade discloses that he prepared report regarding seizure and arrest and sent the same to superior officers in compliance with Section 57 of NDPS Act.

25. The defense of accused is that Muddemal property was deposited in the godown before FIR was lodged. The FIR (Exhibit-25) mentions time of its registration as 22.40 hours while as per Exhibit-43 Muddemal deposit memo mentions as 21.10 hours i.e. prior to registration of FIR. The Trial Court has observed that it is quite possible that while P.I.Shelke (PW-5) was at Cuffe Parade Office, he directed the staff for depositing the Muddemal property to

the godown after its verification by Senior Police Inspector at Cuffe Parade office. Only on account of such discrepancy, it is not possible to discard the veracity of prosecution case. I do not find any reason to deviate from the findings of Trial Court.

26. Prosecution has proved that Appellant was in possession of 22 kgs of Ganja. Section 35 of the NDPS Act gives statutory recognition to the position that once possession is established, the person who claims that it is not conscious possession, has to establish it. Presumption is also available u/s.54 of NDPS Act. The prosecution has established conscious possession of contraband with Appellant. Evidence on record proves that there was conspiracy between accused. They were found together. They were found in possession of Ganja.

27. There is no infirmity in recording statement of accused u/s.313 of Cr.P.C. All the requisite circumstances were put to him and accused have denied the same. Learned advocate for Appellant submitted that question Nos.8 and 9 was clubbed together. It is pertinent to note that the evidence of PW-2, PW-5 and PW-7 on the issue of receiving information, conducting raid, recovery of contraband, appraisal of right under Section 50 of NDPS Act etc is similar. All the circumstances are clearly and categorically covered in those questions. No prejudice is caused to the Appellant.

28. In the case of Shaikh Maqsood vs. State of Maharashtra (supra), the contention of Appellant was that the case is based on circumstantial evidence. Section 304-B and 302 are conceptually different. In the examination under Section 313 of Cr.P.C no question was asked even remotely regarding existence of any

material to hold the appellant guilty. Reference was made to decision in the case of *Hate Singh Bhagat Singh Vs., State of Madhya Bharat* (AIR-1953-SC-468), wherein it was observed that question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. It is not sufficient compliance to string together a long series of facts. In the case for adjudication before Apex Court it was held that no question was put to the accused which established that he was the author of crime. In *Naval Kishore Singh Vs. State of Bihar* (supra), it was the grievance of appellant that the Trial Court committed serious error in not properly examining the accused under Section 313 of Cr.P.C. Only three questions were put to the accused. The first question was whether he heard the statement of witnesses and the second question was that evidence given by the witnesses showed that he committed the murder of the deceased and whether he had to say anything in defense. It was held that the questioning of the accused under Section 313 of Cr.P.C was done in the most unsatisfactory manner. Under Section 313 of Cr.P.C the accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him. No such opportunity was given to the accused. Both the cases decided by Apex Court were based on peculiar facts. In the present case requisite circumstances are put to

the accused. In the case of *Srivijaya Singh Rathi, ACP Vs. State through CBI* (AIR-2011-SC-1748), it was observed that prejudice must be shown by the accused before it could be held that he was entitled for acquittal over a defective and perfunctory statement under Section 313 of Cr.P.C. In the present case, apparently no grievance is made before Trial Court. The appellant could not satisfy that there is defect in charge or any prejudice is caused to him.

29. In the case of *Mohanlal Vs. State of Rajasthan* (supra), it was held that search and seizure of contraband substance made at public place by empowered officer would attract Section 43 of NDPS Act and compliance with Section 42 is not required. In the case of *Raveen Kumar Vs. State of Himachal Pradesh* (supra), it is held that lack of independent witnesses is not fatal to the prosecution case. In the case of *Yogesh Singh Vs. Mahabeer Singh* (supra), it is observed that minor discrepancies are not to be given undue emphasis and evidence is to be considered from the point of view of truthfulness. In case the case is based on ring of truth, it is cogent, credible and trustworthy, it can and certainly should be relied upon.

30. Another contention of learned advocate for Appellant is that the Appellant has been convicted for being in possession of Ganja of commercial quantity i.e. 22 kgs of Ganja. The prosecution has failed to establish that the total weight of Ganja was 22 kgs. As per notification specifying small quantity and commercial quantity the commercial quantity prescribed for Ganja is 20 kgs. If the weight of Ganja is less than 20 kgs, the Appellant could be convicted under Section 8(c) r/w 20(b)(ii) B of NDPS Act which provides imprisonment for a term which may extend to ten years and with

fine which may extend to one lakh. The Court is empowered to impose imprisonment of less than ten years. Whereas conviction under Section 8(c) r/w 20(b)(ii) C of NDPS Act provides minimum imprisonment of ten years. The sentence of imprisonment may be reduced to already undergone by the Appellant. It is submitted that what was recovered from Appellant is greenish flowering fruiting tops with leaves and stalks. The stalks and leaves are required to be excluded. In the event the leaves and stalk is excluded, the weight could be less than 20 kgs. Reliance is placed on definition of Ganja in Section 2(iii)(b) of NDPS Act. It is pertinent to note that the evidence of witnesses depicts that flowering fruiting tops with leaves and stalks were recovered from possession of accused. The panchanama of seizure refers to leaves, flowers, fruits, seeds and stalks. The C.A Report refers to receipt of Exhibit Nos.1 and 2 viz Flowering/fruiting tops with greenish leaves and stalks. The result of analysis as per Section 2(iii)(b) of NDPS Act is Ganja. There was no cross-examination by defense to suggest that what was recovered is not Ganja or not a commercial quantity. The definition of Ganja reads as follows :

“2(iii) `Cannabis (hemp) means -

(b) Ganja, that is, the flowering of fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the top), by whatever name they may be known or designated”

Reading the aforesaid definition seeds and leaves can be excluded when not accompanied by the tops. It is evident that flowering and fruiting tops were found with other material.

The decision of Karnataka High Court in the case of K.V.Ramasamy Vs. Superintendent of Police (supra) relied upon by learned advocate for Appellant is delivered in facts of that case and not applicable in this case. In the same decision reference is made to the decision of this Court in the case of Raju Mohanrao Rathod Vs. State of Maharashtra (2008-Cri.L.J.-1131) wherein it was observed as follows:-

“12. A bare reading of the above definition would make it manifest that the seeds and the leaves are excluded from the operation of the definition of word “ganja” only when the same are not accompanied by the flowering tops or the fruiting tops. The report of the C.A reveals that greenish leaves, seeds and stalks were noticed at the time of analysis. Thus, when the leaves and seeds were accompanied by the fruiting tops then it will have to be said that the seized stock was of ganja”.

There is no evidence to indicate that the quantity is less than 20 kgs. Even assuming that the quantity is not commercial, the Court can impose sentence of imprisonment upto ten years. The submission is devoid of merits.

31. There is sufficient evidence to convict the Appellant. The Trial Court has assigned cogent reasons in support of finding of conviction which does not require interference.

ORDER

- (i) Criminal Appeal No.615 of 2017 is dismissed;
- (ii) Copy of Judgment be forwarded to Appellant through the Superintendent of Jail where the Appellant is undergoing sentence.

(PRAKASH D. NAIK, J.)