



Judgment

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

CRIMINAL APPEAL NO.238 OF 2023

Dhanesh Puri Guru Prem Puri,
aged about 47 years, occupation Sadhu,
r/o Lonawala Khandala, Gram Godon,
district Pune, presently r/o Great Noida,
Uttar Pradesh.
(Presently at Central Jail, Nagpur) **Appellant.**

:: VERSUS ::

State of Maharashtra,
through Police Sub Inspector,
Railway Police Station, Nagpur. **Respondent.**

**Shri Naman Bhangde, Advocate h/f Shri A.K.Bhangde,
Counsel for the Appellant.
Mrs.S.S.Dhote, Additional Public Prosecutor for the
Respondent/State.**

CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 02/04/2025
PRONOUNCED ON : 23/04/2025

JUDGMENT

1. By this appeal, the appellant (accused) has
challenged judgment and order dated 17.3.2023 passed

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by learned Special Judge (NDPS Court), Nagpur (learned Judge of the trial court) in NDPS Special Case No.24/2017.

2. By the judgment impugned in the appeal, the accused is convicted for offence under Section 20(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act) and sentenced to undergo rigorous imprisonment for 3 years and to pay fine Rs.25000/-, in default, to undergo simple imprisonment for 3 months.

3. Brief facts of the prosecution case emerged from the police papers and recorded evidence are as under:

The report is lodged by PSI Datta Pendke, who was night duty officer on 1.2.2017 at Railway Police Station (RPF), Nagpur. At about 8:54 am, on 2.2.2017, PSI Bose of RPF Nagpur submitted a letter that the

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accused, resident of Lonawala, taluka Khandala, district Pune, is travelling in Vishakhapatnam-Nijamuddin Express by illegally possessing contraband “Ganja” in his bag. Therefore, the accused has been intercepted by conducting a raid in bogie where the accused was sitting. The search was offered by the RPF Officers to the accused and his right to get himself searched before gazetted officer was also informed by a written communication. The investigating officer has also called two panchas and a photographer. The accused was brought on the platform and during search of his bag, contraband article “Ganja” weighing 14.676 kilograms was found in his bag. Accordingly, the panchanama was drawn in presence of panchas. Necessary samples were collected, seizure memo was also drawn. The seized muddemal articles were

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forwarded for the inventory. After registering the offence, the accused has been arrested.

4. During investigation, the investigating officer forwarded the contraband articles to the Chemical Analyzer. Relevant statements were recorded and after completion of investigation, chargesheet was filed against the accused.

5. Learned Judge of the trial court framed the charge vide Exh.19 against the accused. The accused pleaded not guilty and claimed to be tried.

6. In support of the prosecution case, the prosecution examined in all 9 witnesses, as under:

PW Nos.	Names of Witnesses	Exh. Nos.
1	Bhimrao Gajbhiye, photographer	34
2	Rupchand Yadav, pancha on spot	40
3	V.S.Bose, PSI	44
4	Dipti Bende, LPC and carrier	47

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5	Vijay Marape	53
6	Santosh Nimbhorkar	58
7	Kawadu Durge	78
8	Ramesh Chaudhari	80
9	Mukund Jichkar	86

7. Besides the oral evidence, the prosecution placed reliance on requisition letter to photographer Exh.35, spot panchanama Exh.36, inventory panchanama Exh.37, requisition to panchas Exh.41, arrest panchanama Exh.43, report Exh.54, FIR Exh.55, certificate under Section 52-A Exh.73, and CA Report Exh.74.

8. On the basis of the oral as well as documentary evidence, the prosecution claimed that it has proved the case against the accused. All incriminating evidence is put to the accused in order to obtain his explanation by recording his statement under Section 313 of the CrPC.

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The defence of the accused is of total denial and of a false implication.

9. After appreciating the evidence, learned Judge of the trial court convicted the accused as the aforesaid.

10. Being aggrieved with the same, the present appeal is preferred.

11. Heard learned counsel Shri Naman Bhangde h/f learned counsel Shri A.K.Bhangde for the accused and learned Additional Public Prosecutor Mrs.S.S.Dhote for the State. They have taken me through the entire evidence.

12. Learned counsel for the accused submitted that the prosecution could not prove the conscious possession of the contraband article with the accused. During cross examination, it came on record that photographer as well as PW2 pancha Rupchand Yadav

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came on the spot when the accused was already brought at the platform. There is no compliance as to Section 50(1) of the NDPS Act. Exh.42, notice under Section 50(1) of the NDPS Act, is also prepared at about 6.00 am. Thus, there is a long gap between detaining the accused and preparing the panchanama. Though the evidence of the pancha shows that the raid was captured in CCTV camera, no CCTV Footage was produced. The contents of the panchanama are not explained to the pancha in Hindi Language. There is no compliance as to Section 42 of the NDPS Act as secret information was not reduced into writing and forwarded to the superior officer. The conscious possession over the contraband article itself is not established.

13. In support of his contentions, learned counsel for the accused placed reliance on following decisions:

1. Mangilal vs. The State of Madhya Pradesh, reported in 2023(5) Mh.L.J. (Cri) (SC) 321;
2. State of Himachal Pradesh vs. Raghubir Singh and ors, reported in 2024 ALL SCR 1283;
3. Vijay Pandey vs. State of Uttar Pradesh, reported in AIR 2019 SC 3569;
4. Gorakh Nath Prasad vs. State of Bihar, reported in AIR 2018 SC 704;
5. Union of India vs. Jarooparam, reported in AIR 2018 SC 1927;
6. Vijay Jain vs. State of Madhya Pradesh, reported in (2013)14 SCC 527;
7. Pratap Bhimsingh Parera vs. The State of Maharashtra and anr, reported in 2019 ALL MR (Cri) 1212;
8. Santosh s/o Bhagwan Waghmare and anr vs. The State of Maharashtra, reported in 2017 ALL MR (Cri) 2661, and
9. Sathaliya s/o Jalamsingh Wardawal vs. State of Maharashtra, reported in 2008 ALL MR (Cri) 626.

14. Learned Additional Public Prosecutor for the State supported the judgment impugned in the appeal and submitted that the accused was found carrying the contraband articles with him. During the personal search and interrogation with the accused, it revealed that the bag belongs to the accused and his conscious possession over the bag is established by the prosecution. The notice given under Section 50(1) of the NDPS Act shows that there was compliance of mandatory provisions as well as of Section 42 of the NDPS Act as the information was not only reduced into writing but also it was forwarded to the superior officer officer. The evidence on record sufficiently proves the involvement of the accused in the alleged incident. There is a compliance of Section 52-A of the NDPS Act also. Thus, in view of the above evidence, the prosecution has established the charge against the

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accused. Thus, the appeal is devoid of merits and liable to be dismissed.

15. In support of her contentions, learned Additional Public Prosecutor for the State placed reliance on following decisions:

1. Gian Chand and ors vs. State of Haryana, reported in (2013)14 SCC 420;

2. Baldlev Singh vs. State of Haryana, reported in (2015)17 SCC 554;

3. Rakesh Kumar Raghuvarshi vs. State of Madhya Pradesh, reported in 2025 SCC OnLine SC 122, and

4. Criminal Appeal No.250/2025 (Bharat Aambale vs. The State of Chhattisgarh) decided by the Hon'ble Apex Court on 6.1.2025.

16. PSI Datta Pendke, was the person who had set the law into motion. However, he reported to be dead and, therefore, his evidence is not recorded.

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17. PW6 Santosh Nimbhorkar, testified that he was writer of PSI Datta Pendke on 2.2.2017 and he was present in the police station from 9:00 am to 9:00 pm. During his presence, PSI Bose of RPF, Nagpur approached the Railway Police Station and filed a written report that he received the information that in train Samta Express bearing No.12807 one person is travelling in AC Class-III and transporting the contraband "Ganja". He immediately proceeded at the railway station along with the police staff. The train came and platform No.6 at about 12:30 am. He intercepted one person who was in the attire of Sadhu sitting on berth No.56 coach No.B1. On enquiring with him, he disclosed that the green colour bag kept underneath the berth belongs to him and he is proceeding to Gwalior. He also disclosed that the said bag contains contraband "Ganja". He immediately

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submitted report in the police station on which the PSI Datta Pendke was directed to take further action. His evidence further shows that the communication was prepared to forward in the office of SDPO Railway and requisition was also prepared in the name of PC Patre. PC Patre carried the said communication to the SDPO which bears the signature of PSI Datta Pendke, which is at Exhs.59 and 60. The letter was also issued to the Tahsildar for making available a gazetted officer. The said letter is at Exhs.61 and 62. The gazetted officer was not available in tahsil office. Letter was issued to the Chief Officer of Zilla Parishad, Nagpur, which was carried by PW8 Police Constable Ramesh Chaudhari. The said letter is at Exh.63. The gazetted officer was made available at about 5:30 pm and accordingly the entry was taken in the station diary. Thereafter, Police Constable Ravindra Saoji was directed to bring the

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person for taking the weight by issuing letter Exh.65, photographer was also called. Letter was also issued to make available two persons to act as panchas, which is at Exh.69. After the photographer and panchas along with gazetted officer made available, they all proceeded to platform No.6. The accused was in the custody of RPF Police. On enquiring with him, he disclosed his name. Notice Under Section 50(1) of the NDPS Act was given to the accused and it was explained to him and he declined to give his search before the gazetted officer. Thereafter, the search of the bag of the accused was taken in presence of panchas. Two samples of the contraband were drawn and sealed. Rest of the contraband was also seized by drawing panchanama. After drawing of the panchanama, PSI Datta Pendke lodged report which is at Exh.54. During investigation, the passenger ticket was seized from the accused which

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is at Exh.71. Letter was issued to the Magistrate for drawing inventory. The said letter is at Exh.72 and inventory report is at Exh.37. After completion of the investigation, the chargesheet was filed against the accused. PW6 Santosh Nimbhorkar, is cross examined and during cross examination it came on record that when the train came at the railway station, he was not on duty. PSI Bose has not lodged any report. He has not witnessed where the accused was sitting and where he was asked to sit after he was taken into custody. PW5 Vijay Marape, was not aware as to the ticket which the accused was having before drawing the panchanama. Rest of the cross examination is in the denial form. It came on record that the action was delayed due to non-availability of the gazetted officer and the panchas.

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18. To corroborate the version of PW6 Santosh Nimbhorkar, the prosecution has examined photographer PW1 Bhimrao Gajbhiye who testified that since 22 years he is working as photographer for railway police. On 2.2.2017, lady police constable approached him along with the letter and informed that he is called for obtaining the photographs. The said letter is at Exh.35. He immediately rushed to platform Nos.6 and 7 wherein one person in saffron colour attire was sitting and holding green colour bag. In presence of panchas, his bag was checked which was having contraband article "Ganja". The police have drawn the samples, seized the same and he obtained the photographs and, therefore, sealed it. The panchanama is at Exh.36. On 7.2.2017, again he was called in the Court of the Railway Magistrate and in presence of the Magistrate the seal was opened and sample was drawn and he took

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the photographs. Accordingly, inventory panchanama was drawn which is Exh.37.

His cross examination shows that twice he visited the Railway Police Station. He has issued bill to the investigating officer. He has not produced the said bill book.

19. PW2 Rupchand Yadav, is the person who acted as pancha on the spot panchanama. His evidence shows that he is not acquainted with Marathi language. The panchanama was written in Marathi and explained to him in Hindi. On 2.2.2017, he was present in DRM Office. He was called to act as a pancha vide letter Exh.41. When he reached at the platform, photographer, gazetted officer, raiding staff, and one person with scale and weight were present. In his presence, the person who was intercepted was

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interrogated who disclosed his name and also disclosed that in a bag he is carrying the “Ganja”. He was informed about his right to be searched before the gazetted officer, but he denied for the same. The said intimation letter is at Exh.42. The bag of the accused was opened. The contraband was 14.676 kilograms, out of which 50-50 grams were separated and sealed and photographs were obtained. Accordingly, panchanama was drawn. Thereafter, the accused was arrested. The said arrest panchanama is at Exh.43. His cross shows that on the day of the incident, he was serving in RPF Department. His office is situated in DRM Building. Prior to the incident, he never met PSI Datta Pendke. He has not taken any entry in the movement register. He is unable to tell at what time Vishakhapatnam-Nijamuddin Express came on platform Nos.6 and 7. He admitted that he has not put date and

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time below his signature. His cross examination further shows that Exh.42 does not bear the platform number. He was present in GRP Office, till 7:30 to 8:00 pm. On platform, CCTV Cameras were installed. The entire action was recorded in the CCTV Camera. He further admitted that every train coming from south side and proceeding to Delhi always comes on platform No.1.

20. PSI PW3 V.S.Bose, testified that he received a secret information on 1.2.2017 at about 10:00 pm that one person travelling in train No.12807 is transporting the contraband "Ganja". He immediately rushed to platform No.6 where the train halted. He took the custody of person sitting on berth No.56 in coach No.B1 and the bag was underneath of the berth and the accused disclosed that it belongs to him. In presence of panchas and a gazetted officer, the bag was opened which was having the contraband "Ganja" of description

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green colour leaves having flowering tops. His cross shows that he has not taken the entry of the secret information as no such register is maintained in his office. His statement was recorded on 2.2.2017. He is also unable to tell the halt period of the train on the said station.

21. PW4 Dipti Bende, is the Police Constable, who received written order to carry muddemal to hand over it to the forensic laboratory. She has also deposited the documents given to her. Her cross shows that she has not taken the entry in the station diary in the order received by her. Exh.48 is the written directions given to her. Exh.49 is the form which is to be handed over to the Dy.Director, Forensic Laboratory, Nagpur. Exh.50 is the invoice challan.

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22. PW5 Vijay Marape, is the Police Constable. He has registered offence on the basis of the report filed by PSI Datta Pendke. He admitted during cross that he was station diary incharge. Therefore, he has no right to give any directions to the Police Inspector. FIR is lodged after 12 hours of the incident. The report is at Exh.54 and FIR in format is at Exh.56; certificate under Section 52-A of the NDPS Act is at Exh.73; CA Report is at Exh.74, and data sheet of the analysis is at Exh.75.

23. PW7 Kawadu Durge, is examined vide Exh.78, who testified that he was called by the Dy.Chief Executive Officer, Zilla Parishad and was directed to act as pancha. Accordingly, he visited the spot of the incident at platform Nos.6 and 7. One person was sitting on the platform holding a green colour bag. On enquiring, the said person disclosed that the bag contains contraband "Ganja". The notice was issued to

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him under Section 50(1) of the NDPS Act. On search of the bag, the contraband “Ganja” was found from which two samples were drawn. Accordingly, the panchanama was drawn. His cross examination shows that he has not enquired as to where the accused was proceeding on that day.

24. PW8 Police Constable Ramesh Chaudhari, visited the Zilla Parishad Office for calling two persons to act as panchas.

25. On the basis of the above said evidence, the prosecution claimed that the accused was carrying the contraband article and was transporting the same which is of about intermediate quantity.

26. It is vehemently submitted by learned counsel for the accused that there is non-compliance of Sections 42, 50, and 52-A of the NDPS Act.

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As far as compliance of Section 42(a) is concerned, it reveals from the evidence of PW6 Santosh Nimbhorkar that PSI PW3 V.S.Bose approached PSI Datta Pendke and filed a written report as to the information received by him. The said information was immediately forwarded to the SDPO on 2.2.2017.

27. Section 42 of the NDPS Act deals with power of officer of entry, search, seizure, and arrest without warrant or authorization. Sub-section (2) of Section 42 of the NDPS Act states that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior. The said provision states about compliance as to the information or intimation which is to be forwarded to the superior officer.

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Letter Exh.60 discloses about the said compliance.

28. It is further submission of learned counsel for the accused that there is non-compliance of Section 50 of the NDPS Act.

29. Section 50 of the NDPS Act, deals with conditions under which search of persons shall be conducted. The same is reproduced for reference as under:

“50. Conditions under which search of persons shall be conducted.-

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

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(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in subsection (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking

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such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.”

30. The settled position of law is that a person to be searched under the NDPS Act is required to be told about his right, before he is searched, under Section 50 of the NDPS Act and that is the mandatory requirement.

31. Section 50 of the NDPS Act would be applicable in case of personal search of accused and not when it is in respect of baggages; articles, and vehicles and or container. In case, where searching officer fails to

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communicate accused, who are subjected to search that he has a right to search in the presence of the gazetted officer or magistrate, there would be non-compliance of requirement of Section 50 of the NDPS Act.

32. In the present case, admittedly, the search was in respect of the bag. Since the bag was searched and contraband “Ganja” was seized from the said bag, compliance under Section 50 of the NDPS Act was not required. Therefore, submission of learned counsel for the accused that there was no compliance under Section 50 of the NDPS Act is not sustainable.

33. The another submission of learned counsel for the accused is that there is no compliance of Section 52-A of the NDPS Act. He invited my attention towards inventory panchanama and submitted that inventory panchanama nowhere bears the signature of the

Magistrate. The requirement of Section 52-A is that the work of drawing sample shall be in presence of the Magistrate. The samples were drawn by the investigating officer without taking recourse of Sub-section (2) of Section 52-A of the NDPS Act.

34. In the case of **Union of India vs. Mohanlal and anr, reported in (2016)3 SCC 379**, the Hon'ble Apex Court held, as under:

“It is manifest from Section 52A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in

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the presence of the Magistrate and certifying the correctness of the list of samples so drawn. Subsection (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and

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certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.”

35. Here, in the present case, the evidence of PW2 pancha Rupchand Yadav, PW6 Santosh Nimbhorkar, and PW7 Kawadu Durge nowhere discloses that the samples were drawn in presence of the Magistrate.

36. Thus, the seizure is not in conformity with the law laid down by the Hon’ble Apex Court in the case of **Union of India vs. Mohanlal and anr** *supra*.

37. Exh.73 is the certificate issued under Section 52-A of the NDPS Act. It also nowhere discloses that samples were drawn in presence of the Magistrate.

Thus, there is no compliance as to Section 52-A of the NDPS Act.

38. Learned counsel for the accused placed reliance on the decision in the case of **Mangilal vs. The State of Madhya Pradesh** *supra* wherein the Hon'ble Apex Court considered the mandatory provision of Section 52-A of the NDPS Act and observed that Sub-section (2) of Section 52-A of the NDPS Act mandates a competent officer to prepare an inventory of such narcotic drugs with adequate particulars. This has to be followed through an appropriate application to the Magistrate concerned for the purpose of certifying the correctness of inventory, taking relevant photographs in his presence and certifying them as true or taking drawal of samples in his presence with due certification. Such an application can be filed for anyone of the aforesaid three purposes. The objective behind this provision is to

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have an element of supervision by the magistrate over the disposal of seized contraband. Such inventories, photographs and list of samples drawn with certification by Magistrates would constitute as a primary evidence.

39. Learned counsel for the accused further placed reliance on the decision in the case of **Gorakh Nath Prasad vs. State of Bihar** *supra* wherein the Hon'ble Apex Court held that failure of raiding officer to produce seized ganja or sample drawn before the court, mere testimony of police officer itself is not sufficient to prove seizure. Non- production of seized material, fatal to the prosecution case and accused entitled to benefit of doubt.

40. Learned counsel for the accused further relied upon the decision in the case of **Union of India vs. Jarooparam** *supra* wherein the Hon'ble Apex Court

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also laid down the same principle that failure to produce bulk quantity of seized opium raises doubts on genuineness of samples.

41. In the case of **Vijay Jain vs. State of Madhya Pradesh** *supra* the Hon'ble Apex Court held that non-production of seized material before the trial court is fatal to the prosecution.

42. Now, core question is, whether the accused was found in a conscious possession of the contraband ganja.

43. The Hon'ble Apex Court in the case of **Avtar Singh and ors vs. State of Punjab, reported in (2002)7 SCC 419** observed that "possession" is the core ingredient to be established before the accused in the instant case are subjected to the punishment under Section 15. If the accused are found to be in possession

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of poppy straw which is a narcotic drug within the meaning of Clause (xiv) of Section 2, it is for them to account for such possession satisfactorily; if not, the presumption under Section 54 comes into play. We need not go into the aspect whether the possession must be conscious possession. Perhaps taking clue from the decision of this Court in *Inder Sain vs. State of Punjab* (1973 (2) SCC 372) arising under the Opium Act, the learned trial Judge charged the accused of having conscious possession of poppy husk. Assuming that poppy husk comes within the expression poppy straw, the question, however, remains whether the prosecution satisfactorily proved the fact that the accused were in possession of poppy husk. Accepting the evidence of PW 4 the Head constable, it is seen that appellant No.3 (Accused No.4) was driving the vehicle loaded with bags of poppy husk. Appellants 1 and 2 (Accused Nos. 1

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and 2) were sitting on the bags placed in the truck. As soon as the vehicle was stopped by ASI (PW 2), one person sitting in the cabin by the side of the driver and another person sitting in the back of the truck fled. No investigation has been directed to ascertain the role played by each of the accused and the nexus between the accused and the offending goods. The word 'possession' no doubt has different shades of meaning and it is quite elastic in its connotation. Possession and ownership need not always go together but the minimum requisite element which has to be satisfied is custody or control over the goods. Can it be said, on the basis of the evidence available on record, that the three appellants one of whom was driving the vehicle and other two sitting on the bags, were having such custody or control? It is difficult to reach such conclusion beyond reasonable doubt. It transpires from evidence

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that the appellants were not the only occupants of the vehicle. One of the persons who was sitting in the cabin and another person sitting at the back of the truck made themselves scarce after seeing the police and the prosecution could not establish their identity. It is quite probable that one of them could be the custodian of goods whether or not he was the proprietor. The persons who were merely sitting on the bags, in the absence of proof of anything more, cannot be presumed to be in possession of the goods.

44. Thus, expression “possession” is not capable of precise and completely logical definition of universal application in context of all the statutes. Once found probable, the same requires to be accepted. Admittedly, the offence alleged under the NDPS Act being stringent provision higher degree of proof is required to convicted the accused.

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45. As far as the present case is concerned, the evidence of PW1 photographer Bhimrao Gajbhiye shows that he has seen the accused at the platform. Thus, when the accused was firstly intercepted in the train, except PSI PW3 V.S.Bose, no other witness is examined to show that it was the accused who carrying the said bag. The evidence of PW2 pancha Rupchand Yadav and PW7 Kawadu Durge nowhere states that when the accused was seen by them was carrying the bag. When they reached at the platform, the accused was already brought at the platform. Only PSI PW3 V.S.Bose has stated that when he entered in the coach No.B1 at berth No.56, the accused was sitting on the said berth and bag was underneath of the said berth and the accused disclosed him that the bag belongs to him. The evidence of PW6 Santosh Nimbhorkar also shows that when he along with the raiding party members went at

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the Railway Station, the accused was already brought at the platform.

46. On due consideration of submissions advanced by learned counsel for the accused and learned Additional Public Prosecutor for the State, in the light of oral and documentary evidence on record, the prosecution neither examined nor cited a single passenger to show that the accused was travelling by the said train carrying the said green colour bag. Thus, there is no evidence to show that the accused was in conscious possession of the alleged contraband article.

47. The evidence of PSI PW3 V.S.Bose is only to the extent that the bag was underneath the berth. Merely because the bag was found underneath the berth, wherein the accused was sitting, is not sufficient to hold that he was in conscious possession of the said bag.

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48. In order to prove guilt of the accused under Section 20(b) of the NDPS Act, it is incumbent upon the prosecution to prove that the accused was found in conscious possession of the contraband article. The accused was found travelling in AC Class-III bogie and other passengers were also traveling in the said bogie. The railway ticket produced on record shows that the accused was travelling having seat No.56. There is no other evidence to show that the accused boarded the said train with that bag. There is also no evidence to show that the accused kept the bag below the seat whereat he was sitting. Only for the reason that the bag was lying below the seat where he was found to be sitting itself is not sufficient to establish that the accused was found in conscious possession of the alleged contraband article.

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49. The term "possession" consists of two elements. First, it refers to the corpus or the physical control and the second, it refers to the animus or intent which has reference to exercise of the said control. The definition of "possession" given in Black's Law Dictionary is as follows:

“Possession.” Having control over a thing with the intent to have and to exercise such control. The detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Act or state of possessing. That condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons. The law, in general, recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly

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has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint."

50. Section 18 of the NDPS Act has a reference to the concept of conscious possession. The word "possession" refers to a mental state which is noticeable from section 35 of NDPS Act. Perusal of the said provision shows it includes knowledge of fact. Section 35 raises a presumption as to knowledge and culpable mental state

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from the possession of illicit articles. The expression "possess or possessed" is often used in connection with statutory offences of being in possession of prohibited drugs and contraband substances. Conscious or mental state of possession is necessary and that is the reason for enacting section 35 of the NDPS Act. Thus, the term "possession" for the purpose of Section 18 of the NDPS Act would mean with animus custody or domain over the prohibited substance. The animus and the mental intent which is the primary and significant element to show and establish possession.

51. On considering the over all testimony of the prosecution witnesses, there is no cogent and convincing evidence to establish that the bag was belonging to the accused and the accused was found in possession of the contraband article. The prosecution has not proved that the bag found lying below the seat

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and was belonging to the accused as no witness has examined to disclose that the accused was seen carrying the bag and keeping the same below his seat after boarding the train. The other passengers were also traveling by the said train. In the facts and circumstances of the case, the possibility of keeping the said bag by someone else cannot be ruled out. Except PSI PW3 V.S.Bose, no witness is examined by the prosecution to show that the accused was sitting in AC Class-III on seat No.56. Even, if the evidence of PSI PW3 V.S.Bose is accepted, it shows that the bag was kept below the seat. In the above circumstances, the independent corroboration was required which is absent in the present case.

52. In the light of the above discussion, the judgment and order of conviction and sentence impugned in the appeal deserves to be quashed and set aside as the

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prosecution has failed to establish the compliance under Section 52-A of the NDPS Act so also the conscious possession of the accused over the said bag. Therefore, the conviction is not sustainable and the accused is entitled for benefit of doubt. In this view of the matter, I proceed to pass following order:

ORDER

(1) The Criminal Appeal is **allowed**.

(2) The judgment and order dated 17.3.2023 passed by learned Special Judge (NDPS Court), Nagpur in NDPS Special Case No.24/2017 is hereby quashed and set aside.

(3) The accused is hereby acquitted of the offence under Section 20(b) of the Narcotic Drugs and Psychotropic Substances Act and he be set at liberty forthwith, if not required in any other case.

Judgment

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(4) The fine amount, if any, be refunded to the accused.

Appeal stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!

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