
(2007) 12 KAR CK 0035
In the Karnataka High Court
Case No : Criminal Appeal No. 1593 of 2002

Assistant Director, Directorate of Revenue Intelligence
Regional Unit

APPELLANT

Vs

Syed Rehamat Pasha

RESPONDENT

Date of Decision : 07-12-2007

Acts Referred:

Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 50, 8 C

Citation : (2008) ILR (Kar) 1909 : (2008) 3 KarLJ 626 : (2008) 1 KCCR 405

Hon'ble Judges : H.V.G. Ramesh, J

Bench : Single Bench

Advocate : Arvind Kumar, ASG, for the Appellant; P.N. Hegde, for the Respondent

Judgement

H.V.G. Ramesh, J.—Appeal is by the Assistant Director of Directorate of Revenue Intelligence challenging the order of acquittal passed by the Special Judge, Mangalore in Spi. Case 49/2001 acquitting the accused for the offence u/s 8 C r/ w Section 21 of the Narcotic Drugs & Psychotropic Substances Act, 1995.

2. According to the prosecution, on 7.2.2001 on receiving reliable information, as per the directions of the Assistant Director of Revenue Intelligence, the Senior Intelligence Officer of the DRI proceeding to Suratkal along with his team viz., Prabhakar Poojary, Intelligence Officer, V T Joseph, Sepoy and two independent witnesses. Around 3.45 am at Suratkal Bus Stand, they noticed a person wearing a blue T Shirt with a hand bag. As Ms identity tallied with the information received through the Assistant Director, they stopped the vehicle and on enquiry, the said person revealed his name as Syed Rahmath Pasha and when he was questioned about the contents of the bag, he was hesitant to reply. Thereafter, he was made know by the raiding party that he would be searched and also gave an option whether he would be agreeable to be searched before the Magistrate or a gazetted officer for which he has agreed to be Marched in the presence of the gazetted officer. Since the Senior Intelligence Officer - PW 1 himself was a

gazetted officer, in his presence they search the accused and also the hand bag carried by him and it was noticed that there were five polyethylene bags containing some white colour substance/powder. On further enquiry, he has revealed that it was heroin given to him by one Ganapathi Naik of Kumta. The raiding party is said to have weighed the same in a scale and it was found to be in all, five kgs and the sample of the same was sent for chemical examination. Thereafter, mahazar was conducted and the accused was taken to the Customs Office. On getting the chemical examination report that the sample sent was heroin, after completion of investigation, the police after recording the statement of the witnesses and also the statement of the accused, filed charge sheet before the Special Court Since the accused pleaded not guilty of the charges framed against him, prosecution examined in all five witnesses and got marked about seventeen documents and MOs 1-10. Thereafter, the accused was examined u/s 313, Cr.P.C., His defense was that he was taken from Kumta Bus Stand to the Customs Office and forcibly five signatures were taken by the Customs people and he has also denied all the incriminating circumstances against him. Thereafter, after hearing both sides, learned Special Judge acquitted the accused While acquitting the accused, it has held that the seizure mahazar has to be proved by independent witnesses and the procedure requires it should be devoid of all suspicions. Learned Special Judge has also noted that there is non-compliance of the mandatory provisions of Section 50 of the NDPS Act in that, there is no option or choice given to the accused with regard to the search conducted in the presence of the Magistrate or gazetted officer. Further noting that the signature on the mahazar must have been taken after the spot writing of the mahazar, and that Ex.P1-mahazar cannot be believed and stating that instead of a mahazar it is in the form of narration of event, and noting the version of the independent witnesses that they were not present at the time of seizure, the Special Judge has acquitted the accused. Hence, this appeal by the State through the Directorate of Revenue Intelligence.

3. Heard Mr. Arvind Kumar, Assistant Solicitor General representing the appellant and Mr. P.N. Hogde, representing the respondent

4. It is the submission of the appellant's counsel that the NDPS Act is a special enactment. As per the provisions of the Act, special provisions like Section 35 and Section 66 provides for presumption of culpable mental state on the part of the accused and also presumption as to documents in certain cases as to its validity and primary evidence. It is for the respondent accused to rebut the same and mere has to be initial presumption on the basis of the documents produced and it is not that the case has to be proved initially. It is further submitted that in the case on hand, as the contraband seized was not from the person of the accused but, from a hand bag which he was holding, following the procedure u/s 50 of the NDPS Act is not mandatory. It is also submitted that even in respect to seizure of contraband is concerned, not necessarily mere has to be independent witness like panchas to support the case of the prosecution. Even in the absence of their evidence, the evidence of the prosecution witnesses who are Revenue

Intelligence Officers who are not Police Officers, can be relied upon to hold the accused guilty. The evidence is cogent that is, the samples of the contraband seized from the accused was sent to chemical examination and the report as well as the sample sent were returned under postal acknowledgement and the report is positive as to the presence of heroin. In all about five kgs of heroin was seized from the accused which he has neither explained nor proved his innocence. Even the panchanama was written on the spot itself in the presence of the accused along with the panch witnesses and only the end part of the panchanama has been written in the office in the presence of the accused and the pancha and completed mere and mere is no illegality even in the panchanama conducted and it is specifically mentioned in the panchanama as to under what circumstances and to what extent the panchanama was complete and it was in order. The accused was apprehended near the bus stand in the presence of the panchas, he was also interrogated and was given an opportunity to exercise his option to be searched in the presence of the gazetted officer or before a Magistrate, and the accused agreed to be searched in the presence of the gazetted officer; one of the witnesses who was a gazetted officer and in his presence the seizure was made and accordingly submitted that mere is no irregularity and rather, mere is compliance of procedure on the part of the prosecution as to the seizure of the contraband from the accused.

5. In support of his argument, learned Counsel has relied upon the decision in the case of-

Kalema Tumba Vs. State of Maharashtra and Another, ;

State of Haryana v. Jarnail Singh and Ors. AIR 2004 SCW 2962;

Gurbax Singh Vs. State of Haryana, ;

G Srinivas Goud v. State of AP 2005 AIR SCW 4905;

Amarsingh Ramjibhai Barot v. State of Gujarat AIR 2045 SCW 5075 and,

Sajan Abraham v. State of Kerala (2001) 6 SCC 69.

6. It is also submitted by the learned Counsel that the statement of the accused in his own hand writing at Ex.P 15 also lends credence to the prosecution case and unlike in general offences, the evidence of the revenue intelligence officers can be relied upon to hold the accused guilty if there is cogent evidence as it is equivalent to the provisions u/s 108 of the Customs Act

7. Per contra, counsel representing the respondent submitted that the trial court has rightly acquitted the accused as the independent witnesses have not supported the prosecution case. There is non-compliance of the provisions of Section 42 and other provisions of the NDPS Act. The rebuttal of presumption arises only after the prosecution discharges its burden. Such evidence must be beyond reasonable doubt and the question of rebutting the presumption does not arise unless the case is proved beyond reasonable doubt. Accordingly, he

submitted that the prosecution has not placed any cogent material on record. The panchanama was written in the office; although the seizure is said to have been made in the bus stand, the independent panch witnesses have not supported the prosecution version and there is also non-compliance of the mandatory provisions. Based on the evidence of the raiding party who also acted as gazetted officer and other officials, the accused cannot be held guilty of the offence. Even the Supreme Court insists for want of corroboration from independent witnesses. Accordingly, in support of his argument, learned counsel has relied upon the decision in the case of Ahmed v. State of Gujarat 2000 CrL LJ 4008; Pentapati Venkata Satyanarayana Murthy Vs. State, regarding presumption u/s 35 of the NDPS Act; Bahadur Singh Vs. State of Madhya Pradesh and Another, to contend that the accused cannot be convicted solely on the basis of testimony of the police witnesses.

8. In the light of the arguments advanced, let me consider whether the order of acquittal passed by the Special Court requires interference and whether the prosecution has proved the case beyond reasonable doubt to hold the accused guilty of the offence.

9. At the outset, in so far as seizure of the contraband is concerned and as to the presence of the gazetted officer, several contentions were raised by the respondent's counsel that there is non-compliance of the mandatory provisions, the officer who acted as a gazetted officer is none other than the officer from the Directorate of Revenue Intelligence as such mere is prejudice caused and the accused was not given the option to exercise regarding the search in the presence of a Magistrate. However, as from the facts, it is seen the seizure of the contraband is not from the body or person of the accused rather, it is from the hand bag which the accused was holding. In this regard, in Kalama Tumba's case cited supra, the apex court regarding the mandatory requirement of Section 50 that the accused has to be examined in the presence of the gazetted officer or Magistrate has held that the requirement of informing accused about his right need not be complied with when baggage of accused is to be searched and search of baggage of person is not the same thing as search of the person himself.

10. Similarly in Jarnail Singh's case cited above, in so far as compliance of Section 50 of the NDPS Act is concerned, the Apex court has observed that when it does not involve personal search, the provisions of Section 50 would not apply. So also in the case of Gurbax Singh's case cited above, the Apex Court has held that Section 50 of the NDPS Act is only applicable where search of the person is carried out.

11. In Srinivas Goud's case cited above regarding procedure for search and seizure as per Section 42 of the NDPS Act, the Apex court has held that when it involves recovery of large quantity of contraband, it does not appear to be case of planting and, search was also made early in the morning and non-association of independent witness would not be fatal, It is also noted further, where the

search officer manages to get two independent witnesses one of whom is a reserve police man who also acted as a pancha, the Apex Court has held that there is no bar in law for a policeman to act as a punch witness in view of the fact that the raid was conducted by excise officials and not by the police. The Apex court has also observed regarding compliance of Section 42 of the Act in not sending information to the immediate official superior if the search is conducted by the gazetted officer, as not mandatory.

12. In Bahadur Singh's case cited above, the Supreme Court, having found that there is serious discrepancy in the evidence in respect of recovery and seizure of the drug and the failure on the part of the prosecution as to who made the entries in the arrest memo of accused regarding seizure of the contraband and as to when the same were made, has held that the sole testimony of the police witness cannot be relied upon to hold the accused guilty of the offence.

13. Further, in the decision in Pentapati Ventaka Satyanarayana Murthy's case noted above, the Andhra Pradesh High Court as regards compliance of Section 35 of the NDPS Act has held that presumption as to the culpable mental state would arise or is attracted when all the ingredients of offence are proved against the accused beyond reasonable doubt. Rather when there is failure by the prosecution to prove that the accused was in possession of contraband articles, question of invoking Section 35 for shifting the burden on the accused would not arise.

14. In the instant case, PW 1 who is Senior Intelligence Officer of DRI is the Officer who conducted the raid. PW 2 is also the Senior Intelligence Officer who received the information and passed on the information to PW 1 to conduct the raid. PW 3 is the Intelligence Officer, DRI who accompanied the raiding party and in whose presence the accused was searched and contraband was seized. PW 4 is the pancha for the seizure panchanama and seizure of the contraband in his presence. PW 5 is also one more pancha regarding conduct of search and seizure. Both PW 4 & PW 5 who are panchas have turned

15. As per the evidence of PW 1, on 7.2.2001 as per the directions of the Assistant Director of DRI, he went along with the Intelligence Officer one Prabhakar Poojary and VT Joseph along with two other independent witnesses - PW 4 & 5 in their department vehicle towards Suratkal. Around 3.45 a.m. when they were passing through the bus stand they noticed a person wearing a Hue T Shirt having a hand bag in his hand. On seeing the same, since the description tallied with regard to the identification of the person as per the information given by the Assistant Director, they stopped the vehicle and approached the said person and on enquiry, he revealed his name as Syed Rahmath Pasha and on interrogation as to the contents of the hand bag, he was hesitant to reply. Then after informing him that he would be searched in the presence of the Gazetted Officer or a Magistrate, the accused agreed to be searched in the presence of the gazetted officer. As PW 1 himself was a gazetted officer, he did not seek for the presence of any other gazetted officer. In his presence, the Intelligence Officer

has conducted the search of the accused. On search of the hand bag, it was containing five polyethylene covers containing some white powder and when it was inquired, the accused told that it was heroin given to him by one Ganapathy Naik of Kumta. They have collected the contents from the hand bag from him in the spot itself and on weighing found that they were five kgs. The sample taken from each of the packet was sealed and kept for sending the same for chemical examination. After the seizure was conducted under mahazar at the spot itself, they have taken the signature on the mahazar as per Ex.P1 (a) and also the signature of the accused and so also of the panchas and after returning to the office, he submitted the seized articles and documents to the Assistant Director and further recorded the statement of the accused and the accused gave a statement in his own hand writing. Even they searched the house of the accused and also that of Ganapathy Naik as per the directions of the Assistant Director of Directorate of Revenue Intelligence to find out if any contraband is mere in the house and he has also produced the arrest memo. After securing the statement of Ganapathy Naik and other witnesses, photograph of the accused was also taken. He also received the report from the FSL regarding the sample sent along with the postal acknowledgement and as per the report of the Chemical Examiner, it was disclosed that the samples contained heroin.

16. This witness has been cross-examined at length and it reveals that at the time of seizure two officials were there. He has denied the suggestion that he did not give any option to the accused to be searched in the presence of the gazetted officer or the Magistrate. It is further stated by him, one Mr K. Thomas. Assistant Director of Revenue Intelligence has directed him to go to Suratkal around 2.45 a.m. on 7.2.2001 and he left the office around 2.45 a.m. on 7.2.2001 and that he had received information around 2.00 a.m. while he was in the office. As to the writing of the panchanama is concerned, he has denied the suggestion that Ex.P1 - Panchanama was got written in the office and according to the defense, the accused was apprehended on 6.2.2001 itself and he was kept in their office from the midnight of 6.2.2001 itself. But the same has been denied and he has made clear in his cross-examination that Ex.P1 was written by him on the spot and that, the last portion of the mahazar only was written in the office and after affixing his signature, took the signature of the accused on that and he has denied the suggestion that Ex.P15 - statement said to have been given by the accused is not in his own hand writing and that the accused has not given such a statement only under coercion such signature was taken on Ex.P1 3.

17. PW 2 is another Senior Intelligence Officer in the DRI, Mangalore and according to him on 6.2.2001 around 6.00 pm he received information that the accused will be arriving near Regional Engineering College, near Suratkal with 5 kgs of heroin in the early morning and on receiving the information, he immediately passed on the information to the Assistant Director over phone and also reduced the information received by him in writing and submitted the same to the Assistant Director. In the cross-examination, it is suggested that he has not mentioned about receiving the information or passing on the information or

reducing the same into writing in the complaint lodged by the Assistant Director which he has denied. The statement of this witness clearly speaks to the fact that there is compliance of Section 42 of the NDPS Act that as soon as he received the information, he reduced the same into writing and also informed the same to his official superior viz., the Assistant Director.

18. PW 3 - Prabhakar Poojary, Intelligence Officer accompanied the raiding party he has also spoken as that of PW 1 and has spoken about the seizure of the contraband in his presence. What he has stated is, PW 1 took the sample from each packet after seizure of the contraband and sealed the same separately and also stated that after the mahazar was conducted, all of them went to the office. It is the version of the offense that the accused was taken from Kumta Bus Stand by PW 2 and was detained in their office from 6.2.2001 itself and according to him, the accused was not at all carrying any contraband. However, the same has been denied. Even Ex.P1 - panchanama is written in the hand writing of this witness i.e., PW 3 and bears his signature. What is clarified by him is he started writing the mahazar at the bus stand at Suratkal but he later completed it after reaching the Office. After completion of Ex.P1 in his office, the signatures were also taken in the office.

19. PWs 4 & 5 who are panchas for the seizure of the contraband from the accused, have turned hostile to the prosecution version and although they have been cross-examined to the effect that in their presence the contraband to an extent of 5 kgs was seized, they have denied the same.

20. As noted earlier, the Sessions Judge has acquitted the accused on the ground that there is non-compliance of the mandatory provision of Section 50 of the NDPS Act and also that the independent panch witnesses have not supported the seizure of the contraband and also on the ground that no opportunity was given to the accused to exercise his option in the manner accepted under the NDPS Act and the Sessions Judge was also of the view that PW 1 himself being a member of the raiding party has acted as a gazetted officer. Thereby, disbelieving the version of the prosecution, the trial court has acquitted the accused.

21. The evidence of PW 1 to PW 3 who are the Senior Intelligence Officers and Intelligence Officer of the DRI reveals that they participated in conducting the raid and seizure of the contraband. In addition to that, some officials were also picked up from the Department to conduct the raid. So as to passing information is concerned, PW 2 being another Senior Intelligence Officer, on receiving the information as to the movement of the contraband by the accused, has passed on the information to the Assistant Director of DRI who in turn has ordered PW 1 to conduct the raid and also PW 2 has reduced this information into writing and submitted the same to the Assistant Director. Thereby, there is compliance of Section 42 of the NDPS Act.

22. Further, as noted in the catena of decisions cited supra, when the seizure is sought to be made i.e., in the hand bag which was being carried by the accused,

compliance of the mandatory provision of Section 50 of the NDPS Act would be of no consequence. So also the observation made by the Sessions Judge that opportunity was not given to the accused to exercise Ms option and that the seizure was not conducted in the manner i.e., in the presence of a gazetted officer as required u/s 50, is also of no consequence as, in the event the search and seizure was made from the person or body of the accused, then there should have been strict compliance of the provisions of Section 50 by giving option to the accused. In this regard, what could also be seen from the evidence of PW 1 to 3 is, the accused was asked whether he would be searched in the presence of the gazetted officer and when he agreed, he was searched in the presence of PW 1 who was a gazetted officer. Except that he was not searched in the presence of an independent gazetted officer or Magistrate, it cannot be said that there is non-compliance.

23. Learned Counsel for the appellant has relied upon Ex. P15 which is the statement given by the accused himself. The defense of the accused in his statement u/s 313, Cr.PC is, his signature was taken on the paper under coercion as such, it does not carry any sanctity and such a statement amounts to self incrimination. In this regard, what is argued by the appellant's counsel is, the statement is very much in the hand writing of the accused himself and that he is not an uneducated person but, a double graduate knowing the consequences and he has written the same on his own.

24. As to the presence of the independent witnesses so as to satisfy the seizure, appellant's counsel has relied upon the decision in the case of Khet Singh Vs. Union of India (UOI), wherein the Apex Court has held that though the mahazar was not prepared at the spot where the accused persons were found to be in possession of the contraband article but the same was done only at the office of the Customs Department while the accused persons were very much present throughout, there was no allegation or suggestion that the contraband article was in any way, meddled with by the officers and it cannot be held that the seizure suffers from any infirmity. Further, the Apex Court has observed that the law on the point is very clear even if there is any sort of procedural illegality in conducting the search and seizure, the evidence collected thereby will not become inadmissible and the Court would consider all the circumstances and find out whether any serious prejudice had been caused to the accused. Further, in the decision reported in 2003 DC 322 wherein the Apex Court has held that, the mere fact that a panch witness does not support the prosecution case itself would not make the prosecution case any less acceptable if otherwise the court is satisfied from the material on record and from the evidence of seizing authority that such seizure was genuinely made.

25. In the instant case also, it is stated by PW 1 to 3 that the seizure was made near the bus stand at Suratkal and also part of the panchanama was written there and the final part of the panchanama at Ex.P1 was completed in the office as it was too early in the morning and that the accused was also taken to the

office along with the panchas. Although the panchas have not supported the prosecution version, but there is nothing to discard the evidence of PW 1 to 3 who are the officers of the Department and more over, their evidence cannot be discarded as they cannot be treated as police officers/officials as, as in the case of Customs Act the evidence of the customs officers who are involved in the raid, their evidence can be taken note of for all purposes. Similarly, in this case, the evidence of the Revenue Intelligence Officers who acted as investigating officers can be relied upon to hold that their evidence is worthy.

26. At tills juncture, I may refer to the provisions of Section 35 and 66 of the NDPS Act, which reads-

Section. 35: Presumption of culpable mental state:

1 In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation: In this section, "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact

2. For the purpose of mis section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

Section 66: Possession, etc., of psychotropic substances:

1. No person shall possess any psychotropic substance for any of the purpose covered by the 1945 Rules, unless he is lawfully authorised to possess such substance for any of this said purposes under these Rules.

2. Notwithstanding anything contained in Sub-rule (1) any research institution, or a hospital or dispensary maintained or supported by Government or local body or by charity or voluntary subscription, which is not authorised to possess any psychotropic substance under the 1945 Rules, or any person who is no so authorised under the 1945 Rules, may possess a reasonable quantity of such substance as may be necessity for their genuine scientific requirements or genuine medical requirements, or both for such period as is deemed necessary by the said research institution or, as the case may be, the said hospital or dispensary or person:

Provided that where such psychotropic substance is in possession of an individual for his personal medical use the quantity thereof shall not exceed one hundred dosage units at a time.

3. The research institution, hospital and dispensary referred to in Sub-rule (2) shall maintain proper accounts and records in relation to the purchase and consumption of the psychotropic substance in their possession.

27. Referring to the above sections, it is to be noted as per the documents produced by the prosecution as to the report of the Chemical Examiner, though the Chemical Examiner is not examined before the Court to prove the sample which were seized and sent to him for the purpose of identification whether it is contraband, Ex.P16 is the report sent by the Senior Intelligence Officer to the Assistant Director, DRI. Ex.P14 is the report of the Chemical Examiner wherein she has clearly stated referring to the five samples that each of the five samples is in the form of a mixture of dull white and brown granular powder and each answers test for the presence of Chloroquine Phosphate and Herein and is covered under the NDPS Act. In view of the presumption u/s 65 of the Act, the report sent under postal acknowledgement to the DRI from the Chief Chemical Examiner at Ex.P14, speaks to the authenticity that the sample was sent by the Intelligence Officer to the Chemical Examiner for test and a report Ex.P14 in turn, is the report submitted along with the test memo. In view of the presumptive value coupled with the report of the chemical examiner corroborates the fact of the presence of heroin and the seizure of 5 kgs contraband from the accused which is also supported from the evidence of PW 1 to 3. However, the panchas have not supported the seizure. But the very conducting of the panchanama and seizure is proved by the evidence of the gazetted officer who accompanied the raiding party. Even the information received was communicated to the Assistant Director KA Thomas who in turn directed PW 1 to conduct the search and raid and also the said information was reduced into writing and submitted by PW 2 to the Assistant Director. Thus, there is compliance of Section 42 of the NDPS Act. As regards non-compliance of Section 50 since the department person himself is a gazetted officer, and as contended by the accused, proper option was not given to him whether he would be examined in the presence of the gazetted officer or Magistrate, that would not be mandatory in the context as the seizure was not made on the person and it was only from the hand bag carried by him.

28. As noted above, the Apex Court has noted that, if the evidence of the other officers who are not police officers whose evidence is reliable, it is immaterial whether the panchas who acted as such, have supported the case of the prosecution or not. In the instant case, it is also noted, this PW 1 to 3 have spoken about the conducting of the seizure and raid and they are not police officials and as is under the Customs Act as per Section 108, the evidence of the revenue intelligence officers can very well be believed.

29. Learned Counsel for the appellant has next argued as to the authenticity of the statement given by the accused in his own hand writing at Ex.P1 3. Though it is the argument of the respondent's counsel that they have taken a specific defense that his signatures have been obtained under coercion on such statement and it does not carry any such evidentiary value, even assuming that such a statement of the accused confessing his guilt of carrying 5 kgs of heroin amounts to self incrimination as per Article 20 of the Constitution, but nonetheless there is evidence of the other two officers who have conducted the

raid When mere is evidence of PW 1 to 3 as to the seizure of contraband from the accused, presumption will arise as per Section 35 of the NDPS Act as to culpable mental state of the accused. There is no evidence contrary to the same let in by the accused rebutting such presumption of culpable mental status. In the circumstances, the decision relied upon by the respondent's counsel in this regard will not help him more so, in the instant case when the prosecution has proved that the accused was in possession of the contraband.

30. Further it is seen, the evidence on record also shows that the sample collected was sealed and sent to the Chemical Examiner for his report and the report received states that the samples were received in tact and does not create any doubt in the mind of the court whether there was any tampering in the samples sent immediately after the seizure. The investigating officer has made a full report of all the particulars and also the arrest memo is produced to his official superior. It is also stated, the witnesses themselves have subjected to search before conducting the search and seizure on the accused and only thereafter, such a seizure was made.

31. In Srinivas Good's case cited supra, the Apex Court has observed that the search was made early in the morning around 5.30 a.m. and hence non-association of independent witnesses would not be fatal. In the instant case also, the search was made in the early hours i.e., around 4.00 a.m. Though the intelligence officers managed to carry two of the panch witnesses, they have turned hostile but, nonetheless, there is cogent and believable evidence on record to prove that the search and seizure made does not suffer from any infirmity. Further, in the said case, it is noted that there is no bar under the statute for search and seizure being carried out by a gazetted officer himself acting on their own and they could not have reported to the seniors on such things. It is also noted by the Apex Court that the gazetted rank officers enjoy special position and privileges under the Act. They need not be equated to officers taking action without authorisation or warrants. All the evidence on record points at the guilt of the accused for having committed the offence u/s 8(c) r/w Section 21 of the NDPS Act and the prosecution is able to prove the case beyond reasonable doubt against the accused for the said offences. The accused is unable to discharge the presumption which is available to him as such, the accused has to be held guilty of the above said offences. In view of the above, the accused is convicted for the offence u/s 8(c) r/w Section 21 of the NDPS Act

32. Section 8 provides for prohibition of certain operations and as per Clause (c) no person shall produce, manufacture, possess, sell, purchase, transport, etc., except for medical or scientific purposes and in the manner and to the extent provided by the provisions of the Act and in a case where any such provision, imposes any requirement by way of license, permit or authorisation also in accordance with the terms and conditions of such license, permit or authorisation.

33. In the instant case, when it is proved that the accused was carrying huge

quantify of 5 kgs of heroin and he could neither produce the license or permit and for what purpose he was carrying the narcotic drug that is, for scientific or medical purpose, it is nothing but illegal possession of contraband

34. Section 20 provides for punishment for carrying such contraband and in so far as heroin, carrying 30 grams and above is considered as commercial quantify and the punishment provided is rigorous imprisonment for a term which shall not be less man ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees and which may extend to two lakh rupees.

35. Having regard to the facts and circumstances of the case, when it is noted the accused was carrying contraband - 5 kgs of heroin without any such reason, it cannot be treated as for medical or scientific purpose and when such contraband carried is of more than the exempted quantity, the accused has to be convicted and sentenced for the offence u/s 21(c) of the NDPS Act. Accordingly, the accused is sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs. 1 lakh, in default, to undergo rigorous imprisonment for five years while reversing the order of acquittal passed by the Special Judge, Mangalore. The accused is entitled for the benefit of set of as per Section 428, Cr.PC.