

(2006) 08 GUJ CK 0059
In the Gujarat High Court
Case No : Criminal Appeal No. 1008 of 2002

Lataben Manilal Luka and Another

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 03-08-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 102, 102(3), 165, 313, 374(2)
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 29, 41, 41(2), 42

Citation : (2006) 08 GUJ CK 0059

Hon'ble Judges : S.R. Brahmbhatt, J

Bench : Single Bench

Advocate : Pravin Gondaliya, s 1 - 2, for the Appellant; I.M. Pandya, Addl PP, for the Respondent

Final Decision : Allowed

Judgement

S.R. Brahmbhatt, J.—This appeal is preferred by the appellants convicts u/s 374(2) of the Code of Criminal Procedure against the judgment and order of conviction dated 23.9.2002 passed by the Sessions Court at Rajkot in N.D.P.S. (Special) Case No. 5 of 2002 convicting the appellant No. 1 for the offence punishable u/s 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (herein after referred to as "the Act" for short) and sentencing her to suffer Rigorous Imprisonment for a period of 5 years and fine of Rs. 20,000/- and in default thereof, ordered to suffer further Rigorous Imprisonment for a period of one year. The appellant No. 1 is further held guilty and convicted for the offence punishable u/s 29 of the Act and was ordered to suffer Rigorous Imprisonment for a period of 5 years and fine of Rs. 20,000/-, and in default thereof, ordered to suffer further Rigorous Imprisonment for a period of one year.

The appellant No. 2 is also held guilty and convicted for the offence punishable u/s 20 of the Act and was ordered to suffer Rigorous Imprisonment for a period of 7 years and fine of Rs. 20,000/- and in default thereof, ordered to suffer further

Rigorous Imprisonment for a period of one year. The appellant No. 2 is further held guilty and convicted for the offence punishable u/s 29 of the Act and was ordered to suffer Rigorous Imprisonment for a period of 7 years and fine of Rs. 20,000/-, and in default thereof, ordered to suffer further Rigorous Imprisonment for a period of one year. All the sentences were ordered to run concurrently.

2. On 8.2.2002, one Surveillance Head Constable Prafulbhai Devshankar Joshi informed the Police Inspector in Pratapnagar Police Station, Rajkot that in Santoshnagar of Popatpara area, the appellants have been storing contraband substance of Charas and they are dealing in this contraband goods. This information was received at 14-00 hrs. and the same was entered into the station diary vide entry No. 29/2002. The extract thereof was forwarded to the DCP. Thereafter, Police Head Constable Prafulbhai Joshi was sent for fetching the panch and other person was sent for calling the officer from FSL. The panch witness and the FSL Officer were apprised of the information received by the Inspector concerned and search of all the members of the raiding party was made and panchnama to that effect was made between 15-10 hrs. to 15-30 hrs. in presence of the panchas and the panchas have signed the said panchnama. Before proceeding for raid, the necessary entry at 15-35 hrs. in the Station diary at Entry No. 30/2002 was made. The raiding party alongwith panchas had proceeded to the place in a private vehicle. The raiding party had raided the premises as per the information received. In the residential premises, in one room, the appellant No. 1 was sitting on the floor near cot and the appellant No. 2 was found to be sitting on the cot. After introducing themselves, they said that they had come to inquire in respect of contraband goods and inquired about their names. The appellant No. 1 has introduced herself as Lataben Manilal Luka and the appellant No. 2 had introduced himself as Iqbal Harun Miyana. After informing them about their intention to search their premises and informing them that the search could be carried out in the presence of the Gazetted Officer or Magistrate and after ascertaining their unwillingness to have such search being made in presence of Gazetted Officer or Magistrate, the search was undertaken. Firstly, the appellant No. 1 was asked to search the lady constable, who had accompanied the raiding party and then the lady constable took search of the appellant No. 1. It may be noted that the appellant No. 2 was firstly asked to search the staff of raiding party and the panch witnesses and then the appellant No. 1 was asked to search the lady constable accompanied with the raiding party and no contraband was found. The search was carried out on appellant No. 2. Before taking of the search, he was categorically asked as per the provisions of Sub-Section 50 of the Act that whether he would like to get himself searched in presence of either the Magistrate or the Gazetted Officer and he declined. This inquiry about his willingness to be searched in presence of either Magistrate or Gazetted Officer has been recorded in a report, which is signed by panch and the accused. The search of appellant No. 2 yielded two substance of round shape and the search of appellant No. 1 by lady constable yielded two oblong substance of black colour from ash colour cloth bag lying in

the lap of appellant No. 1. The FSL Officer was requested to examine the substance, who in turn opined that the same was Charas. The drawing of panchnama started at 16-40 hrs. which was stopped as the Head Constable Shri Joshi was sent for fetching someone to weigh the recovered substance, at 17-10 hrs. Shri Joshi fetched one person, who gave his name as Rajeshbhai Rameshbhai resident of Parsananagar, who weighed the substance. Firstly, the substance, which was recovered from the appellant No. 1 was weighed and found to be of 340 grams and the substance recovered from the appellant No. 2 weighed 470 grams. The certificate signed by the weighing man Shri Rajeshbhai was obtained to this effect. Thereafter, panch lifted the mattresses and recovered xerox copy of ration card, which contained the name of the appellant No. 1. As per the say of the complainant, thereafter, an amount of Rs. 10,900/- was recovered from Lataben i.e. the appellant No. 1. The substance recovered from appellant No. 2 was sealed and the seal of Police Inspector, Rajkot City was affixed thereon. Thereafter, the substance recovered from appellant No. 1 was also sealed and the seal of Police Inspector, Rajkot City was affixed thereon. The amount of Rs. 10,900/- was also sealed and the seizure list was prepared, whereon the signatures of the accused and panchas were taken. The first copies were given to the accused and after the panchnama was over at 18-30 hrs., the accused were arrested and the arrest information was given to them as per the requirement of the NDPS Act and thereon the signatures of panchas were also taken. Thereafter, the panchnama was stated to be over. It was inquired as who is to be informed about the arrest, then, the appellant No. 2 informed that his brother should be informed and appellant No. 1 informed that her husband should be informed. Thereafter, the complaint came to be lodged and on further inquiry, it was revealed that Charas in question was brought from one Chand Mohmad residing in U.P. The complaint was completed at about 19-30 hrs. and about 19-30 hrs. they started from Popatpara for their return journey to Police Station and thereafter, the PSO was handed over all the articles like panchnama, muddamal articles, arrest memo, seizure memo and accused Nos. 1 and 2 etc. and the investigation was ordered to be handed over to Shri Vala, PSI. After completion of the investigation, the police report was filed and charge came to be framed against the appellants for the commission of offences u/s 20 and 29 of the NDPS Act. The charge was framed on 24th April, 2002. The accused Nos. 1 and 2 denied the charge and demanded that they be tried.

3. Thereafter, the prosecution had examined various witnesses in support of the case and documentary evidence. The trial Court thereafter recorded further statement of the accused u/s 313 of the Code of Criminal Procedure. Both the accused have completely denied the allegation. The trial Court after considering the depositions and documentary evidences, come to the conclusion that the prosecution has successfully proved its case and convicted the accused the appellants for the commission of offences u/s 20 and 29 of the Act.

4. Learned Counsel Shri Gondalia for the appellants has assailed the impugned judgment on the following grounds:

(i) The prosecution cannot be said to have proved their case successfully in view of the contradictions coming on record in respect of the evidence of complainant, prosecution witness No. 1 and prosecution witness No. 2. He has also submitted that the person, who weighed the muddamal has also clearly stated that he has weighed the muddamal article in the police station, whereas, it was the case of the prosecution, more particularly in the deposition of complainant that the entire proceedings of drawing panchnama and weighing muddamal was completed at the scene of offence, where the raid was carried out and therefore, the case of the prosecution cannot be believed.

(ii) The second contention of Shri Gondalia for assailing the judgment and order is that the prosecution witness Shri Pawar has unequivocally stated that the information with regard to appellants dealing with contraband articles was received from one Shri Joshi, the Police Constable, who had accompanied the raiding party all throughout. Shri Joshi has not been examined by the prosecution. This omission on the part of the prosecution also deserves to be viewed in its proper perspective, which raises reasonable doubt. The non-examining of Shri Joshi has remained unexplained.

(iii) The third contention of Shri Gondalia is that the mandatory provisions of Section 102 of the Code of Criminal Procedure is violated by the Investigating Officer and benefit thereof should accrue to the accused. He relies upon the decision of this Court reported in 1996(2) GLR p.64 in support of his submission. The Division Bench of this Court has held that the prosecution stands vitiated when it is established that the mandatory provisions of Section 102(3) of the Code of Criminal Procedure is not complied with.

(iv) The fourth contention of Shri Gondalia is in respect of improbability of the case of the prosecution that the substance was said to be recovered from lap of appellant No. 1, whereas, it is stated on record that lady constable was first searched by the appellant No. 1 before her search was being conducted. Now, if the lady constable has been searched by the accused No. 1, as it is stated on record, then naturally, the goods lying in the lap would not have been there and there is no explanation as to how the goods come in her lap, when the accused No. 1 was searched. The gap has remained unexplained and therefore, to that extent, it cannot be said that the prosecution has proved its case beyond doubt.

(v) The fifth contention of Shri Gondalia is that the FSL Officer Shri Naina, who was independent witness, was not examined nor he was named as witness by the prosecution.

5. Shri Gondalia has submitted that the aforesaid contradictions in the deposition of the witnesses and glaring discrepancy in the case of the prosecution should persuade this Court to believe that the entire case is got up or at least the prosecution cannot be said to have proved its case beyond doubt. Though, there is no specific contention with regard to any breach of mandatory provisions but the deposition of various witnesses especially the Investigating Officer, the

person who weighed the muddamal article and the panch witnesses would go to show that even the mandatory provisions were not complied with. From the depositions of two witnesses namely the person who weighed the contraband article and the panch witnesses, have shown that the panchnama was drawn right in the police station itself and it was not drawn at the place of offence as alleged and as the panchnama was not drawn at the scene of offence, there remains doubt about the compliance with the mandatory provisions. Shri Gondalia has relied upon the decision of this Court in case of Lakhiram Narandas Bawasadhu Vs. State of Gujarat, in support of his submission that when there are such glaring contradictions in the prosecution case, then it cannot be said that the prosecution has proved its case beyond reasonable doubt and therefore, the benefit of doubt at least have been accorded to the appellants.

6. Shri Gondalia has further submitted that the panch witnesses have not supported entirely the case of the prosecution. The prosecution has not declared the panch witnesses hostile. In this view of the matter, the deposition of the panch witnesses deserve to be taken at its face value, which would go to show that the mandatory provisions of NDPS Act had not been complied with. Similarly, the witness namely Rajeshbhai, who weighed the muddamal article has also not been declared hostile and therefore, his deposition also deserves to be taken at its face value, which would go to show that when he was summoned to the police station for weighing the muddamal, he did not even find any one including the accused in the police station. What he said was that it was only police personnels present in the police station and he weighed the muddamal article right in the police station. This admission which have come in the depositions of the witnesses, should be sufficient to persuade this Court to raise reasonable doubt in case of the prosecution and therefore, at least, the benefit of doubt deserves to be accorded to the appellants.

7. Shri Gondalia in the alternative submitted that in case the court is not inclined to accord the benefit of doubt and acquit the appellants reversing the order of conviction recorded by the trial Court, then looking to the quantity of Charas seized from both these appellants, which is admittedly far below than the commercial quantity prescribed under the NDPS Act, the quantum of sentence deserves to be reduced to the imprisonment undergone or to any other period lesser than one imposed by the trial Court.

8. Shri I.M. Pandya, learned Addl. P.P. has submitted that the judgment of the trial Court is unassailable. The trial Court has rightly ignored the minor contradictions seen here and there in the depositions of the prosecution witnesses. He submits that the offence under NDPS Act is a serious offence affecting the entire society and it deserves to be viewed very seriously. Shri Pandya has submitted that the appellants have failed in demonstrating any breach of the provisions of the NDPS Act. Shri Pandya has submitted that the factum of recovery is established. The accused have failed in explaining their presence in the house of appellant No. 1 with sizable amount of cash and the

contraband article of Charas, in as much as, one is found with 370 grams of Charas and other one is found with 470 grams of Charas. He submits that if these quantity of Charas combined, then, it is very much near to the commercial quantity. Of course, the quantity is rightly not combined and it is imputed to the individual concerned. However, as the offence is very serious affecting the entire society, no leniency deserves to be shown to the accused.

9. Against these back drop of submissions of both learned Counsels, this Court has to assess and examine the evidences on record.

10. In this case, the all contradictions could be assessed by assessment of witnesses namely, the complainant, the panch witnesses, the person who weighed the contraband article, in order to appreciate the case of the prosecution.

02/08/2006:

11. Learned Advocate Shri Gondalia has made submission that in view of the panch witnesses's deposition that the panchnama was drawn in the police station and they have not visited the place of offence, it would be sufficient to bring home the fact that there was non compliance with mandatory provisions of NDPS Act. The panch witness Kirtisinh Bhavansinh Bhatti was examined and his deposition has been recorded vide Ex. 11. The following facts emerge from his examination-in-chief, which deserves to be noted:

11.1 This panch had in fact, gone to the house of accused No. 1 alongwith raiding party. The accused No. 1 and 2 were spotted sitting in the house of accused No. 1. The accused were informed that the premises was to be searched and whether they wanted to have it searched by Magistrate or by the police party. The panch has also deposed in his examination-in-chief that both the accused have stated that you (i.e. Police party) can search the premises and they have no objection in their searching the premises. The panch witness has deposed that the accused No. 1 had searched Police Constable Bhagwatiben and accused No. 2 had taken search of "D" staff members. The panch has deposed that the articles were recovered from the trouser of accused No. 2, which appeared like ash colour substance of square shape. The panch has further deposed that accused No. 1 was sitting on the floor and she had a bag in her lap. That bag contained ash colour two to three oblong substance wrapped into polythene. The panch witness has also deposed that the expert Mr. Naina had opined that it was Charas. The panch has deposed that some one was sent for fetching the person for weighing the Charas and one Rajeshbhai had weighed the substance. The substance recovered from accused No. 1 weighed 470 grams and substance recovered from accused No. 2 weighed 340 grams. and the accused were informed that these being contraband goods and narcotic substance, they were required to be arrested and the substance was sealed. The panch has deposed that on searching underneath the cot, the xerox copy of ration card was found containing the name of accused No. 1 and the bag was also found

containing currency notes worth Rs. 10,900/-. He further deposed that after sealing procedure, they had gone to Pradhyumnagar Police Station. The panch witness admits that the muddamal article No. 1 is a sealed packet and he admits his signature on the slip in the packet. The slip is at Ex. 12. The panch witness has also admitted that muddamal article No. 2 was also a sealed packet and on opening the seal, and that muddamal article was recovered from accused No. 2. He identified the muddamal and signatures on the slips.

11.2 The following things deserve to be noted, which has come on record during the cross-examination of this witness:

The panch witness admits that the office of stock holding is near the Pradhyumnagar Police Station. He admits that he had not seen the narcotic substance on any earlier occasion. He admits that he had gone to Pradhyumnagar Police Station at 3-10 PM and remained there upto 6-30 PM. He admits that he has no knowledge that Bhagwatiben, Police Constable came to the police station but he says that she was there when he came to the police station. He admits that he signed all the papers only in the police station. He admits that all the writing was done in the police station after collecting the recovered articles from the house of accused No. 1. He further admits that all the signatures were made only in the police station. He admits that one signature he made in the police station and remaining signatures he made after 6-00 O'clock in the police station. He admits that expert Shri Naina was present in the police station. He admits that the expert Shri Naina did not carryout any chemical test to examine the substance recovered. He admits that the expert opined that it was a Charas only after seeing and smelling the substance. He admits that Shri Naina had accompanied thereafter only upto the police station. He admits that expert had issued certificate in the police station. He also admits that muddamal was sealed in a "D" staff room of police station. He admits that it is the same seal, which was applied on the muddamal. He admits that he has been shown the muddamal article No. 1 and 2 packets, which does not contain his signature. He admits that "D" staff of police knew the location of accused No.1's residence. He admits that the entire party had remained for about hour and half at the residence of accused No. 1. He admits that it took about half an hour to 45 minutes in searching the room of accused No. 1. He admits that except recovering and searching, no other proceedings were done at the place of accused No. 1. He admits that substance was weighed with weighing scale. He admits that in the weighing scale, at one place there was a space for placing the measuring unit and on other place, it was a space for weighing substance. He admits that there were different measuring units like 10 grams, 50 grams etc. He admits that there was a 10 gram measuring unit also. He admits that certificate for weighing was obtained in the police station itself. He admits that panch No. 2 Milanbhai appended his signature only in the police station.

11.3 It is pertinent to note that this witness has not been declared as hostile despite these contradictions in his cross-examination.

12.The prosecution witness No. 2 - Shri Atmaram Pawar, the complainant is examined at Ex. 15. The following deserves to be noted in his examination-in-chief.

12.1 He had received information that accused were dealing with Charas from his Surveillance Head Constable Shri Prafulbhai D. Joshi at about 14-30 hrs. when he was on duty at Pradhyumannagar Police Station on 8.2.200-2. He has stated in his examination-in-chief that the required entry was made by him in his police station diary as entry No. 29/2002 of aforesaid information. The extract thereof was forwarded to the Dy. Commissioner of Police and Assistant Commissioner of Police, West Zone with Police Constable Pradipsinh. He admits that Head Constable Shri Pradip Joshi was sent for fetching two respectable panch and Police Constable Shri Mahavirsinh was sent for fetching FSL Officer Shri Naina. Thereafter, after fetching the witnesses, the raiding party, panchas and expert proceeded to the place of raid. Before that, a first part of the panchnama was drawn at 15-10 hrs to 15-30 hrs., whereon, the signatures of panch were obtained in his presence. It is deposed by PW-2 that before proceeding for raid at 15-35 hrs., the entry No. 30 of 2002 was made in the police station diary. The witness has deposed in examination-in-chief that after inquiring about the names and addresses in the house of accused No. 1, they were informed that there personal search is required to be carried out and whether they would like to be searched by and/or in presence of either Gazetted Officer or Magistrate and has informed that he was a Gazetted Officer, therefore, the accused Nos. 1 and 2 stated that they were not desirous of having themselves searched by any other person and he can carryout the search. He has deposed in his examination-in-chief that entire staff and panch were searched by accused No. 2 and thereafter, accused No. 1 had searched lady constable Bhagwatiben. Nothing objectionable was found. Thereafter, first of all, the panchas had searched the person of accused No. 2 and he was informed in accordance with Section 50 of the NDPS Act in writing and orally and his signature was obtained thereon alongwith signature of panch. During the search of accused No. 2, the faded black colour square substance were found from the front portion of his trouser and light black colour two pieces in oblong shape were recovered from the rear pocket of trouser. He has stated in his deposition that thereafter, accused No. 1 was searched with the help of lady constable and she recovered ash colour bag from the lap of accused No.1 containing two oblong substance and the said substance were examined by FSL Officer and on his examination, he opined that it was Charas. Thereafter, the panchnama was stopped at 16-40 hrs. and Police Constable Shri Joshi was sent for fetching the person for weighing the substance and at 17-10 hrs. Shri Joshi had fetched one person with weighing scale namely Rajeshbhai. First he weighed the substance recovered from accused No. 2, which weighed 340 grams and thereafter, he weighed the substance recovered from accused No. 1, which weighed 470 grams. His signature was obtained. Thereafter, the panch had lifted the mattresses on the cot and found xerox copy of the ration card containing the name of accused No. 1. Thereafter, on searching

the person of accused No. 1, an amount of Rs. 10,900/- was recovered. First in order of time, the substance recovered from accused No. 1 was sealed and the seal of PI, Rajkot City was affixed on it and thereafter, the substance recovered from accused No. 2 was sealed and seal of PI, Rajkot City was affixed on it. The slips containing the signatures of panchas were placed therein. The money recovered and xerox copy of ration card were also sealed and seizure list was prepared wherein the signatures of panch witnesses were obtained. After completion of panchnama at 18-30 hrs., the arrests of the accused were effected and after reaching the police station, the complaint for commission of offence under Sections 20 and 29 of the NDPS Act was lodged. In addition, on inquiry from accused No. 1 as to from where did she gets this quantity of Charas, it was revealed that it was received from one Chand Mohmad resident of U.P. This complaint was completed at that place at 19-30 hrs and entire party came to the police station via Popatpara and PSO was handed over the copy of complaint, panchnama, muddamal articles, arrest memo, seizure memo etc. and the accused. He has identified the signatures on the forwarding letter at mark 6/1, which is exhibited at Exh.18. He is shown the mark 6/3, panchnama and he has identified his signature on each page of the panchnama and states that the last page contains the signature of both the panch witnesses and accused and deposed that the facts recorded therein is true and correct. It is exhibited at Exh.19. He has also identified his signature on the complaint, which is exhibited at Ex. 20. He has identified his signature on document, mark 6/4, report to the Deputy Police Commissioner, Rajkot dated 8.2.2002, which is exhibited at Ex.21. He has also identified the signature on document at mark 6/5, letter addressed to Assistant Police Commissioner, which has been given exhibit No. 22. Letter addressed to the Scientific Officer signed by the Investigating Officer is produced at Ex.23. He is shown document at mark 6/7 purported to his written information about the accuseds" right about search and the same also bears the signature of accused and it has given Exh.24. He has also identified two seizure memos, which are given at Exh. 25 and 26. The arrest memos are produced at Exh. 27 and 28.

12.2 The following things emerge from the cross-examination of this prosecution witness No. 2:

He admits that in earlier six cases of narcotic detected by him, in no case, the respective accused were searched in presence of either the Magistrate or Gazetted Officer. He admits that there is no list of Gazetted Officer in the Police Station in Rajkot. He admits that the constable Prafulbhai had not arrested the accused before giving him information. No watch was arranged by the constable when he came to inform that the accused were dealing in contraband articles. He admits that during this period, he had not tried to obtain the search warrant. He admits that one hour is sufficient for searching the premises of accused. He admits that when there is no search warrant, the premises of accused can be searched. He says that such search can be performed u/s 165 of Cr.P.C. However, he admits that required Resolution u/s 42 was not written by him and he also

admits that the required Resolution u/s 165 of the Code of Criminal Procedure is not done by him. He admits that Police Constable Shri Prafulbhai Joshi had seen the house of the accused. He admits that he had not taken any complaint from Shri Prafulbhai about the incident. He admits that the entire details were given by Prafulbhai, when he was giving information about the accused dealing in contraband articles. He admits that he cannot explained as to why FIR was not lodged right then. He admits that they were to be searched for narcotic substance and therefore, they would have to search the members of the raiding party and thereafter, they were informed in writing that whether there search should be carried out by Gazetted Officer. He admits that all these papers were prepared right at the place of incident and they were written in hand writing of his writer Shri Balvantbhai. He also admits that panchnama was written by his writer. He admits that Ex. 19 - panchnama and Ex. 24, letter are written in two different hand writing. He admits that one Vinubhai had accompanied the raiding party, whose presence is not recorded in the station diary. He admits that when they started from Police Station, the gum was not taken with him, however, slip was pasted right at the place of incident. He admits that the ration card recovered from the place of accused No. 1 contains her addressed to be of Rokadia Colony and he had not inquired from the neighbours as to whether accused No. 1 was staying there or not, nor had he inquired from the landlord whether the accused No. 1 stays there or not? He admits that Ex. 21 does not contain endorsement it having been received by the addressee. He also admits that there is no endorsement as to at what time the said document was sent. Similarly, Ex. 22 document also does not contain any endorsement of it having been received. He admits that the Scientific Officer has given his opinion after smelling and examining the substance with some instrument, name of the instrument cannot be said, as he is not knowing the same. He states that the Scientific Officer has applied some liquid but the colour of it was not known to him. He admits that Charas cannot be said to be Charas merely on seeing it. He says that the person, who weighed the substance was throughout with them and the weighing scale was of steel colour. He admits that electronic weighing machine needs battery. He admits from the panchnama Ex.19 that the said panchnama does not contain the details of measuring units. He is shown the document mark 6/12, which refers to electronic weighing machine. He admits that he had not informed the nearest Magistrate about the seizure etc. He admits that, however, the incident was reported to the Judicial Magistrate First Class. He admits that muddamal was not sealed in presence of Judicial Magistrate First Class. He admits that he has not told in categorical words to the accused that they have a "right" to have themselves searched in presence of either Magistrate or a Gazetted Officer. He admits that Ex. 24 containing information about search to the accused is in his own hand writing. The words "you can search" were written in Gujarati by himself. He is not sure as to when this writing was made. Ex. 18 was in hand writing of his writer and he says that Ex. 18 was prepared right at the place of offence.

13. The prosecution witness No. 3 - Shri Rajeshbhai Rameshkumar is examined at Ex. 31. The following deserves to be noted in his examination-in-chief.

13.1 He states in his Chief that he had gone to the Police Station. He had took alongwith him the electronic weighing machine. He admits his signature at Ex. 30. He admits that the certificate was written at the Police Station as it was dictated by the police. He says that electronic weighing machine was working on battery.

13.2 The following things have come in his cross-examination.

He admits that the document at Ex. 30 was written as per the dictation given by police. He says that at that time, PW-2 had remained present. He admits that he does not know Shri Pawar, the complainant. He admits in his cross-examination that he was aware about the weight of the material but he did not know as to wherefrom it was seized or from whom the pieces were seized. He says that in the police station he has not seen anybody except the police personnels. No re-examination of this witness is done. This witness has also not been declared hostile. This fact deserves to be noted.

14.The prosecution witness No. 4 - Shri Amrutlal Galabhai Makwana is examined at Ex. 32. The following things deserves to be noted.

14.1 He was handed over the muddamal packets by PSO on 9.2.2002 for taking it to the FSL, Ahmedabad. He has received three packets in sealed condition, which were pertaining to NDPS Case No. 1 of 2002. He deposed that as it was public holiday, he had returned back from Ahmedabad without delivering the packets to the FSL and entry to this effect was made in the police station. Thereafter, again on 11.2.2002, the muddamal was received from Writer Head at 8=15 hrs. and the same was taken to Ahmedabad Office of FSL at about 13=00 hrs. and in the sealing condition, the muddamal was handed over to the officer of the FSL, who issued receipt. He has stated that muddamal was received in the sealed condition and it was delivered in sealed condition to the Officer of the FSL. He identified that muddamal Articles 1, 2 and 3 were the same, which he had handed over to the officer at FSL at Ahmedabad. He admits that when he received the muddamal articles on 9.2.2002, he was not aware that there was a public holiday on 9.2.2002.

15.The prosecution witness No. 5 - Shri Gokulbhai Vasantbhai Parmar is examined at Ex. 33. The following things deserves to be noted.

15.1 He deposed that muddamal in sealed condition was handed over to Police Constable Amrutbhai Galabhai PW-4 on 9.2.2002 but as it was a public holiday on that day, FSL Officer had not accepted the muddamal articles and he had received the muddamal articles back on 9.2.2002. Again on 11.2.2002, at 8-15 hrs. he had handed over the muddamal articles to PW-4 for taking it to the FSL. The entries were made of these effect in the register. The entry No. 103 is produced at Ex.34. In cross-examination, he has admitted that he was aware

that there was public holiday on 9.2.2002.

16.The prosecution witness No. 6 - Shri Indrajitsinh Balvantsinh is examined at Ex. 35. The following things deserve to be noted.

16.1 He deposed that he was working as PSO on 8.2.2002, who registered the offence. He admits that muddamal was handed over in sealed condition and in station diary, the same is noted. On page no. 76, the entry is made at No. 37 at 19-45 hrs. In cross-examination, he admits that the complaint is registered at 20-05 hrs.... It is vaguely recorded in his cross-examination both in affirmative and in negative that it is correct that he was on duty after 20=00 hrs. on 8.2.2002 and it is ended with sentence that it is not correct. He admits that muddamal was handed over to the writer head on the same day. He admits that the seal was with PSO. He also admits that on that day P.I. had taken the seal.

17.The prosecution witness No. 7 - Shri Mahipatsinh Bhikhubha Vala, Investigating Officer, is examined at Ex. 41. This prosecution witness has more or less supported the case of the prosecution, however, in his cross-examination, he admits that he has not taken the statement of Dispatch Clerk of Commissioner Officer.

18.Forwarding letter of FSL is produced at Ex. 44. The relevant documents have produced on record. Thus, this Court has examined and scrutinized the depositions of witnesses as recorded by the trial Court.

03/08/2006.

19. The close scrutiny and appreciation of testimony of PW-1 panch witness, deserves to be appreciated with utmost care and caution. It is very important to note at this stage that he has not completely supported the version of prosecution. The PW-1 has in his examination-in-chief also stated that the accused were informed that the police had received information about their possessing and dealing in Charas and their house was to be searched; whether they would be desirous of having that search being made by Magistrate or by the members of the raiding party. The PW-1 has further deposed in his examination-in-chief that the accused said that they (police party) can search the house and they have no objection. This testimony of the panch witness recorded by the trial Court unequivocally reveals that the accused were informed about the information that was received by police about their dealing in Charas and for that house i.e. the premises was required to be searched. It has not come out anywhere in the examination-in-chief of the panch witness that the accused were categorically informed that on account of information with regard to accused possessing and dealing in Charas, their "persons" were required to be searched and they have right to have their "persons" be searched either in presence of the Magistrate or a Gazetted Officer. Even the answer given by the accused as stated by the panch in para 3 of his deposition at Ex. 11 indicates that the accused also stated that they have no objection if the premises i.e. the house, wherein, they were sitting was searched by the members of raiding party. It is not stated by

the PW-1 in his examination-in-chief that accused categorically stated that they have no objection if the members of the raiding party also carried out search of their "persons". In view of this, it can well be said that the panch witness has not supported or rather given a contradictory version about the compliance with Section 50 of the NDPS Act. The PW-1 panch witness has also stated in his deposition recorded at Ex. 11 that on searching underneath the cot, whereon accused No. 1 was sitting, the xerox copy of ration card was found and underneath the cot, an amount of Rs. 10,900/- was found. This deposition is also contrary to the version of the complainant and the case of the prosecution. Thereafter, PW-1 Panch Witness has identified his signature on the slip, which was found from the packet containing muddamal article No. 1, which was a sealed packet. He also identified his signature on the slip found in the muddamal article No. 2 packet. Muddamal article Nos. 5 and 6 according to his say, were recovered from beneath the cot of accused No. 1. He also identified the signature on the xerox copy of the ration card. This deposition of PW-1, thus, cannot be said to be completely supporting the version of prosecution. The prosecution has not either declared him hostile or attempted to explain the contradictions which have been recorded in his examination-in-chief. It deserves to be noted that in his cross-examination, he has admitted that his say with regard to visiting the place on raid in respective private vehicle was not correct. He admits in his cross-examination unequivocally that he visited the Pradhyumannagar Police Station in the afternoon at 3-10 and stayed there at 6-30 in the evening. He admits that the articles were seized from the house of accused No. 1 and entire writing was prepared by the police in the police station. He admits that his all signatures on all papers were obtained in the police station itself. He admits that no chemical analysis was done by Expert Shri Naina and he has opined that the substance was Charas only after smelling the same. He also admits that Shri Naina had issued certificate that the substance was Charas in the Police Station itself. He admits that the muddamal was sealed in the room of "D" staff in the police station. He admits that on packet Nos. 1 and 2, signature of his or panch No. 2 and 3 were not there. He also admits that "D" staff of police appeared to be aware of the place and location of the house of the accused No. 1. He admits that except the searching of the house of accused No. 1, no other proceedings had taken place at her premises. He admits that the substance was weighed in the police station. He also admits that the substance was weighed with different weighing units. The measuring units were of 10 grams, 500 grams. etc. He admits that weighing person had brought the weighing scale with him and weight measuring units also. He admits that till the weighing man came, no writing was made at all. He also admits that certificate of weight was obtained in the police station itself. He admits that panch witness No. 2 had also appended his signature in the police station itself. The prosecution has not attempted even to explain the contradictions and admission by asking for re-examination or even seeking permission to declare him hostile. The testimony of PW-1, therefore, is required to be viewed carefully. The facts remain that this witness has stated about recovery of Charas from the house of accused No. 1 but he has also stated

that the accused were informed about requirement of searching the house and he has not stated that they were categorically informed that they have a right to be searched or to have their persons searched in presence of either Magistrate or by the Gazetted Officer. In view of the Apex Court decision in case of Jagan M. Seshadri v. State of Tamil Nadu reported in 2002 SC .2399, it has been observed that the witness of prosecution, if not declared hostile, then, the prosecution cannot be permitted to wriggle out of the same. This proposition gets further fortified by the Apex Court decision in case of State of H.P. v. Pawan Kumar reported in AIR 2005 SC 350 and also 2000(5) SCC p.272. In view of this, the deposition of PW-1 cannot be discarded and it has to be taken with due care and caution. It can be said that witness No. 1 has strangely deposed that entire proceedings was held at the police station itself and in his Chief, he has clearly stated that the accused were asked that as their house was required to be searched, whether they would like it to be searched by the members of the raiding party or they would like it to be searched in presence of either Magistrate or the Gazetted Officer. Thus, the compliance with mandatory provision of Section 50 of the NDPS Act, at least so far as PW-1 is concerned, cannot be said to be proved through his deposition or rather, it can be said that there is a serious doubt about the compliance of mandatory provision of Section 50.

20. Similarly, the factum of recovery of Rs. 10,900/- is also said to have been recovered from under the cot of accused No. 1, whereas, as per the story of prosecution, it was recovered from the bag lying in lap of accused No. 1, which also contained the Charas. It may be noted that panchnama had not been exhibited during the course of recording the testimony of panch witness, neither the panch has been confronted with it as to whether the panchnama was correctly recorded or not? These contradictions have remained unchallenged or unexplained.

21. The prosecution witness No. 2 - Complainant is a Police Officer, who had received the information and who had arranged the raid, has deposed at Ex.15. He has supported the version of prosecution. However from his deposition and testimony also, the certain aspects deserves to be recorded, which raise doubt about the entire case of the prosecution. This prosecution witness No. 2, in his examination-in-chief has stated that he had informed the accused that search is required to be carried out and if they were desirous of having been searched either in the presence of Gazetted Officer or Magistrate, they may say so. He also states that he told them that he is also a Gazetted Officer and therefore, the accused No. 1 and accused No. 2 said that they did not mind if the search is carried out by them. Now, this prosecution witness No. 2, who has otherwise, supported the entire case of the prosecution as stated in the complaint, has stated in his Chief that the accused were informed that their persons were required to be searched and it can be done either in presence of Magistrate or a Gazetted Officer. At that time, he says that he himself is also a Gazetted Officer and therefore, the accused stated that they did not mind if they be searched by him. Now, as per the decision of the Apex Court in case of In the Matter of:

Ahmed Vs. State of Gujarat, it is observed that when the search is made by an empowered officer, who also happened to be Gazetted Officer, it is still obligatory for the prosecution to inform the accused of his right to have search being carried out of his person in presence of either Magistrate or a Gazetted Officer. The Apex Court in para 4 has observed as under:

The learned Counsel appearing for the respondent, on the other hand contended that in the case in hand, the search itself having been made by a Gazetted Officer namely PW2, it cannot be said that there has been an infraction of Section 50 of the Act, and, therefore, the conviction cannot be held to be invalid. The question for consideration, therefore, is whether when a search is made by a Gazetted Officer, is it obligatory for the prosecution to inform the accused of his right to be searched before a Gazetted Officer or before a Magistrate, as provided u/s 50 of the Act? According to the learned Counsel for the respondent, it is only when a search is made by an authorized officer u/s 41(2) of the Act, it is only then, the provisions of Section 50 can be attracted but when a search is made by an officer of gazetted rank of the department of Central Excise, who is empowered under Sub-section (2) of Section 41, then the provisions of Section 50 are not required to be complied with inasmuch the empowered officer himself is a Gazetted Officer. According to the learned Counsel for the accused-appellant, however the provisions of Section 50 are required to be complied with irrespective of the fact whether the search is being made by the empowered officer, who may be an officer of the gazetted rank or by an officer duly authorized by the empowered officer u/s 42 of the Act. To ensure fairness in the search itself and for compliance of Section 50 of the Act, no differentiation can be made whether the search is being made by the empowered officer, who obviously is an officer of a gazetted rank or the authorized officer, who may be a subordinate officer to whom the empowered officer authorizes. To appreciate the point in issue, it is necessary to extract the provisions of Sections 41, 42 and 50 of the Act:

Section 41. Power to issue warrant and authorization.- (1) A Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of the Second Class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV, or for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed.

(2) Any such officer of gazetted rank of the departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer of the

Revenue, Drugs Control, Excise, Police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under Chapter IV or that any narcotic drug, or psychotropic substance in respect of which any offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence has been kept or concealed in any building, conveyance or place, may authorise any officer subordinate to him but superior in rank to a peon, sepoy, or a Constable, to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest a person or search a building, conveyance or place.

(3) The officer to whom a warrant under Sub-section (1) is addressed and the officer who authorized the arrest or search or the officer who is so authorized under Sub-section (2) shall have all the powers of an officer acting u/s 42.

Section 42. Power of entry, search, seizure and arrest without warrant or authorization.- (1) Any such officer (being an officer superior in rank to a peon, sepoy or Constable) of the departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or Constable) of the Revenue, Drugs Control, Excise, Police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance:

Provided that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sun set and sun rise after recording the grounds of his belief.

(2) 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 forthwith send a copy thereof to his immediate official superior.

Section 50. Conditions under which search of persons shall be conducted.- (1) When any officer duly authorized u/s 42 is about to search any person under the provisions of Sections 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.

(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 Sub-section (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.

An analysis of the aforesaid provisions, unequivocally indicate that under Sub-section (2) of Section 41, an officer of a gazetted rank of the department of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government or the Border Security Force, can be empowered by a general or special order by the Central Government, conferring the power to arrest a person or search a building, conveyance or place, if he has reason to believe from personal knowledge or information that the person concerned has committed an offence punishable under Chapter IV or that any narcotic drug or psychotropic substance, in respect of which any offence punishable under Chapter IV, has been committed or any document or other article which may furnish evidence of the commission of such offence, has been kept or concealed in any building, conveyance or place. Sub-section (2) of Section 41 further enables the State Government to empower any officer of the gazetted rank of the Revenue, Drug Control, Excise, Police or any other department by a general or special order to perform the said function. The said sub-section also confers power on such empowered Gazetted Officer to authorize any officer, subordinate to him but superior in rank to a peon, sepoy or a Constable to perform the said function, for which the general or special order has empowered him. Section 42 is the power of entry, search, seizure and arrest without any warrant or authorization. Section 50, which is supposed to be the minimum safeguard afforded to an accused, provides that when a search is

about to be made of a person u/s 41 or Section 42 or Section 43, and if the person so requires, then the said person of whom, search is about to be made has to be taken to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. The argument of the learned Counsel for the respondent is based upon the expression used in Section 50 to the effect "any person duly authorized u/s 42" and, therefore, a distinction is sought to be made in case of a search between an empowered officer and a search made by an authorized officer. But the said argument is devoid of any substance, since Section 42 itself also speaks of search to be made by an officer, as is empowered by a general or special order by the Central Government or as is empowered by a general or special order by the State Government. A combined reading of the provisions of Section 42 and Section 50 would make it crystal clear that whenever a search of a person is about to be made on the basis of personal knowledge or information received in that behalf, then if the person to be searched requires to be taken to a Gazetted Officer or the nearest Magistrate, the same must be complied with and failure to compliance of the same would constitute a infraction of the requirements of the provisions of Section 50, which would ultimately vitiate the conviction. For the purpose of complying with the provisions of Section 50, no differentiation can be made on a plain reading of the language used in Section 50, depending upon the officer who is going to search the person concerned. In our considered opinion, since the search is about to be effected on the basis of any prior information or personal knowledge, which the person going to search has the reasons to believe that an offence under the Act is being committed, then for the sanctity of the search itself, the person to be searched has been afforded the minimum right to be searched before another Gazetted Officer or the Magistrate and that right cannot be taken away, merely because the officer going to search happens to be a Gazetted Officer, who has been empowered either by the Central Government or by the State Government by a general or special order. In fact the legislature has enacted the safeguard contained in Section 50 to obviate any doubt of the illicit articles under the Act and this provision was engrafted having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act, namely, the shifting of the onus to the accused and the severe punishment to which he becomes liable. It is in this connection, it would be appropriate to extract the observations made by a Three-Judge Bench of this Court in case of Saiyad Mohd. Saiyad Umar Saiyad and Others Vs. State of Gujarat,

It is to be noted that under the NDPS Act, punishment for contravention of its provisions can extend to rigorous imprisonment for a term which shall not be less than 10 years but which may extend to 20 years and also to fine which shall not be less than Rupees one lakh but which may extend to Rupees two lakhs, and the Court is empowered to impose a fine exceeding Rupees two lakhs for reasons to be recorded in its judgment. Section 54 of the NDPS Act shifts the onus of providing his innocence upon the accused; it states that in trials under the NDPS

Act it may be presumed, unless and until the contrary is proved, that an accused has committed an offence under it in respect of the articles covered by it "for the possession of which he fails to account satisfactorily.

Having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act, namely, the shifting of the onus to the accused and the severe punishment to which he becomes liable, the Legislature has enacted the safeguard contained in Section 50. To obviate any doubt as to the possession by the accused of illicit articles under the NDPS Act, the accused is authorized to require the search for such possession to be conducted in the presence of a Gazetted Officer or a Magistrate. We endorse the finding in Balbir Singh's case 1994 AIR SCW 1802 : AIR 1994 SC 1872 : 1994 Cri LJ 3702, that the provisions in this behalf are mandatory and the language thereof obliges the officer concerned to inform the person to be searched of his right to demand that the search be conducted in the presence of a Gazetted Officer or a Magistrate."

In the aforesaid judgment, not only the decision of this Court in Balbir Singh's case 1994 AIR SCW 1802 : AIR 1994 SC 1872 : 1994 Cri LJ 3702, to the effect that the provisions of Section 50 are mandatory, has been endorsed but also, it further indicates that it obliges the officer concerned to inform the person to be searched of his right to demand that the search be conducted in the presence of a Gazetted Officer or a Magistrate.

22. Thus, now against this back-drop if the testimony of complainant PW-2 is examined, then, it can well be said even as per his own say, the accused did not opt for having themselves searched either in presence of Magistrate or in presence of Gazetted Officer, only because, he informed them that he was also a Gazetted Officer. One more infirmity noticed that he has not very categorically informed the accused that they have right to have themselves searched either in presence of Gazetted Officer or Magistrate. The deposition indicates that no particular effort was made to make accused aware about the right or rather accused were misinformed that they can be searched in presence of either Magistrate or Gazetted Officer but he is also a Gazetted Officer and therefore, the accused did not opt for having the presence of either Magistrate or Gazetted Officer during the search.

23. It is further required to be noted that this PW-2 has not stated in his examination-in-chief that the amount of Rs. 10,900/- alleged to have been recovered was received wherefrom, he narrates sequence that first of all, the accused No. 2 searched the raiding party and panch witness. Thereafter, accused No. 1 took search of Lady Police Constable Bhagwatiben and no objectionable article was found. Thereafter, the panch firstly searched the person of accused No. 2 and the substance was recovered from his pocket of trouser. Thereafter, lady constable had searched the person of accused No. 1 and the substance article No. 1 was recovered from bag lying in the lap of accused No. 1, which was given to the expert for analysis. Thereafter, the expert was asked to examine it and he opined that the substance was Charas. Thereafter, the panchnama was

stopped and a Police Constable was sent to fetch the person for weighing the article. Thereafter, weighing man come and he weighed the substance and issued certificate about the weight of the substance and he says that after this, the panchas were asked to lift the mattresses lying on the cot, whereunder, the copy of ration card containing the name of accused No. 1 was found. Thereafter, on further search of accused No. 1, an amount of Rs. 10,900/- was found. Now at this sequence, it can well be said that the recovery of amount of Rs. 10,900/- is not clearly established in as much as if you go by deposition as it is made before the trial Court, then, it emerges that when accused No. 1 was firstly searched, only the substance Charas was found and there is no whisper about finding of money and thereafter the search was carried out on accused No. 2 and thereafter, the panchnama was stopped and the weighing man was fetched and again on searching the person of accused No. 1, the amount is said to have been recovered or found. He states that after completing everything at 19-30 hrs., they started returning to the Police Station via Popatpara.

24. In cross-examination, this witness has identified the signature of panch and produced the panchnama during his testimony. He has admitted in his cross-examination that he had received the information on 8.2.2002 from Prafulbhai, Surveillance Head Constable and it was recorded at 14-30 hrs. He has also admitted that he had not made any Resolution as required u/s 42 of the NDPS Act nor he has made any Resolution as required u/s 165 of the Code of Criminal Procedure. He admits that as per requirement of Section 42 of the NDPS Act, the Resolution, which is required to be made about informing the accused, that he had not made. He admits that all these papers were prepared right at the place of incident and they were written in hand writing of his writer Shri Balvantbhai. He also admits that panchnama was written by his writer. He admits that Ex. 19 - panchnama and Ex. 24 are written in two different hand writing. He admits that one Vinubhai had accompanied the raiding party, whose presence is not recorded in the station diary. He admits that the ration card recovered from the place of accused No. 1 contains her addressed to be of Rokadia Colony (different then the place of raid) and he had not inquired from the neighbours as to whether accused No. 1 was staying or not, nor had he inquired from the landlord whether the accused No. 1 stays there or not? He admits that Ex. 21 does not contain endorsement of it having been received by the addressee. He also admits that there is no endorsement as to at what time the said document was sent. Similarly, Ex. 22 document also does not contain any endorsement of it having been received. He admits from the panchnama Ex.19 that the said panchnama does not contain the type of measuring units. He was shown the document mark 6/12, which refers to electronic weighing machine. He admits that he has not told in categorical words to the accused that they have a right to have the search themselves in presence of either Magistrate or by a Gazetted Officer. He admits that Ex. 24 containing information about search to the accused is in his own hand writing. The words "you can search us" were written by himself and he is not sure as to when this writing was made. Ex. 18 was in hand writing of his

writer and he says that Ex. 18 was prepared right at the place of offence. This deposition indicates that accused were not informed about their right to have themselves searched in presence of either the Magistrate or Gazetted Officer. The contradictions in respect of weighing scale and the place of drawing panchnama also are capable of creating reasonable doubt in the case of the prosecution.

25. The prosecution witness No. 3, who is said to have weighed the article is examined at Ex.31. This person has in his examination-in-chief deposed that he was summoned for weighing Charas. He had gone to Police Station and he carried alongwith him the weighing scale. The weighing scale was electronic and it used to run on battery. He had gone to Pradhyumnagar Police Station alongwith his electronic weighing scale. He states in his deposition that there, he has weighed the muddamal article and given certificate about its weight. He identified his signature. He says that it was in his own hand writing. This witness in his cross-examination has admitted that Ex. 30, the certificate of weight was dictated by police and he has taken down the dictation. He has admitted in his cross-examination that he is not aware wherefrom the said article were seized and recovered and from whom they were seized and recovered. He has admitted that at that time, one lady constable was present in the police station. He has also admitted that at that time, except police personnels, there was no one else present in the police station. The prosecution has not either re-examined this witness or sought any permission to declare him as hostile. Thus, the testimony of this witness also deserves to be considered in its proper prospective. The prosecution cannot wriggle out of this as this being a prosecution witness, who has either not been declared hostile or his contradictions have not been even explained as there was no re-examination. From his testimony also, it can be said that the case of the prosecution cannot be said to be free from reasonable doubt.

26. The prosecution witness No. 4, has in his deposition stated that he had been given the muddamal articles on 9.2.2002 for carrying it to the FSL at Ahmedabad. However, on 9.2.2002, there was a public holiday, he had returned back the muddamal articles to the PSO. He had deposed that again on 11.2.2002, he was handed over the muddamal articles in sealed packets and he has handed over the same to the FSL Officer, Ahmedabad in sealed cover. Nothing further is required to be noted in the deposition of this witness.

27. Similarly, in respect of prosecution witness No. 5, there is a corroboration with the testimony of the said witness No. 4.

28. The documents also indicate at Ex. 34 that the muddamal was taken on 9.2.2002 and it was returned back on 9.2.2002 to the PSO Incharge of it as on that day, there was a public holiday and again on 11.2.2002, the said muddamal articles were sent to FSL, Ahmedabad. The PW-7, Investigating Officer has supported the case of the prosecution.

29. In conviction appeal as it is observed by the Apex Court in case of Toran

Singh Vs. State of Madhya Pradesh, the Appellate Court has to scrutinize and appreciate the evidences as they are recorded by the trial Court. The decision of the trial Court does not contain an elaborate discussions on the salient aspects narrated herein above. The contradictions, which have been noted herein above cannot be simply brushed aside by characterizing them to be minor contradictions. The contradictions which have been recorded herein above in the depositions of prosecution witnesses, who have not been declared hostile nor have they been re-examined to explain away the contradictions are sufficient enough to raise doubt that the compliance of procedure. These are the contradictions which are capable of raising serious doubt about the entire case of the prosecution. From the deposition of PW-1 and PW-2, it can certainly be said that the mandatory provision of Section 50 of the NDPS Act was not complied with. Thus, in view of aforesaid decision of the Apex Court, it can very well be said that there was absolute breach of Section 50 of the NDPS Act, which render very recovery doubtful.

30. In view of these, this Court is left with no alternative but to observe that the order impugned in the present Criminal Appeal is not sustainable and the same is required to be quashed and set aside. The appeal stands allowed. The judgment and order of the trial Court dated 23.09.2002 passed in NDPS Special [Sessions] Case No. 5 of 2002 is hereby quashed and set aside. The appellants are hereby ordered to be set at liberty forthwith if they are not required to be in custody for any other offence.