

(2008) 12 GUJ CK 0027
In the Gujarat High Court
Case No : Criminal Appeal No. 769 of 2000

Mangilal Hiraram Vishnoi and Another	APPELLANT
Vs	
State of Gujarat and Another	RESPONDENT

Date of Decision : 17-12-2008

Acts Referred:

Constitution of India, 1950 — Article 141
Criminal Procedure Code, 1973 (CrPC) — Section 200, 313, 374, 374[2], 386
Customs Act, 1962 — Section 108
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 10, 2, 21, 25[A], 29
Penal Code, 1860 (IPC) — Section 376

Citation : (2008) 12 GUJ CK 0027

Hon'ble Judges : D.N. Patel, J;C.K. Buch, J

Bench : Division Bench

Advocate : J.M. Panchal, 1, Rajesh M. Agrawal,s 1 - 2, Sunil M. Agrawal,s 1 - 2 and K.J. Panchal, for the Appellant; H.L. Jani, Assistant Public Prosecutor for Opponent 1 and Harin P. Raval, for Opponent 2, for the Respondent

Final Decision : Dismissed

Judgement

C.K. Buch, J.—Present appeal is filed by the appellants, original accused u/s 36[B] of Narcotic Drugs and Psychotropic Substances Act, 1985 [hereafter to be referred to as the "said Act"] read with Section 374[2] of the Code of Criminal Procedure, 1973 challenging the judgment and order of conviction dated 31st July, 2000 rendered by the learned Additional Sessions Judge, Court No. 8 of City Sessions Court, Ahmedabad, in Sessions Case No. 292 of 1998, whereby the appellants-accused have been held guilty of charge of offences punishable u/s 8[c] read with Sections 21 and 29 of the said Act. Under the said judgment and order of conviction, the learned trial Judge has convicted the accused and imposed rigorous imprisonment for 13 years and imposed fine of Rs. 1,50,000/- each for the offence punishable u/s 8[c] read with Sections 21 and 29 of the said Act. Both the accused have been further sentenced to undergo rigorous imprisonment for 13 years and imposed with fine of Rs. 1,50,000/- each for

offence punishable u/s 21 read with Section 29 of the said Act. In default of payment of fine for both the above offences, the learned trial Judge has imposed rigorous imprisonment of one year on both the accused.

2. The appellants have challenged the order of conviction and sentence on various grounds mentioned in para-19 of the memo of appeal alleging that the order of conviction and sentence passed by the learned trial Judge is manifestly erroneous, illegal and the same is violative of principles of appreciation and evaluation of evidence in a criminal trial. Certain mandatory provisions have not been complied with by the investigating agency and the members of the raiding party, and that the accused have been wrongly found linked with the crime. The accused ought to have been acquitted saying that the case of prosecution is highly improbable and that no weightage should be given at least to the statements allegedly recorded u/s 67 of the said Act as a legal piece of evidence. If the statements allegedly recorded u/s 67 of the said Act are taken away from the set of evidence considered by the learned trial Judge, the prosecution case would automatically fail. Each witness examined by the prosecution is a person apparently interested in the result or outcome of the trial. Their evidence was required to be scanned closely and the error committed in evaluating evidence has resulted in conviction of the appellants-accused. On the other hand, respondent No. 2 [original complainant] _ Department of Revenue Intelligence [hereafter to be referred to as "DRI"] has come out with strong resistance against all the grounds agitated by the accused and has submitted that the findings recorded by the learned trial Judge are absolutely legal and there is no element of either perversity or procedural fatal infirmity. Respondent No. 1 _ State of Gujarat has supported the stand taken by the respondent No. 2 DRI. To appreciate the rival contentions before us, it is necessary to state facts emerging from the complaint filed by the respondent No. 2 as "Statutory Officer" in the court of City Sessions Judge, Ahmedabad.

3. For the sake of convenience, the parties in this appeal are referred to as in their original position before the trial court, i.e. appellants as "original accused" and respondents as "complainant" or "DRI".

4. Merrymel George is a public servant being Intelligence Officer of DRI who filed a complaint acting in discharge of his official duty and therefore, the Court decided to register a case against the accused as Sessions Case on 3.10.98 without entering into formality contemplated u/s 200 of Cr.P.C. According to the complainant, officers of DRI, Ahmedabad, had received information revealing that a package containing narcotic drug would be taken delivery of from Diamond Transport Corporation, Ahmedabad on 6th July, 1998. Therefore, the officers of DRI acting on that information kept surveillance over the premises and as no one approached to take delivery of the suspected package, the DRI officers entered into the premises of Diamond Transport Corporation, Ahmedabad and examined the package under the cover of panchnama. At the relevant point of time, the godown keeper did not desire that the search be conducted in presence of a

gazetted officer or in presence of a Magistrate though offered in terms of the scheme of Section 50 of the said Act. On examination of the package in presence of panchas, godown keeper and officers, it was, inter alia, found that there was a light brown coloured powder substance in the parcel in seven polythene bags. These bags were further packed in seven stitched cloth bags and were bearing marks as "555" and they had been concealed in a briefcase, which, in turn, was put in a plastic package. According to the prosecution, it was stated that the said package contained steel utensils weighing 55 kg and 10 packages of iodized salt of 1 kg each of "Captain Cook" brand and 2 pieces of bricks and big hesian cloth bag were also packed in the said package. According to the complainant, the said light brown coloured powder substance found and recovered was tested by the officers in the godown itself in presence of panchas with narcotic testing kit and the test resulted positive for narcotic drug _ white Heroin. It is alleged that when panchnama was being drawn, accused No. 1 entered the premises and inquired about that very package. So, officers present there decided to search accused No. 1. The accused No. 1 was given an option of being searched in presence of a gazetted officer or a Magistrate. The accused No. 1 did not desire to be searched before either of them and therefore, personal search of accused No. 1 was carried out in presence of two panchas who were taken by the Intelligence Officers of the DRI. Accused No. 1 had presented zerox copy of a lorry receipt to the person present in the godown and that lorry receipt was seized during the search panchnama on the very day i.e. on 6th July, 1998. The DRI officers seized 6.480 kgs. of Heroin in the search. The person who had entered the office of the Diamond Transport Corporation and had inquired and claimed package was one Mangilal Bishnoi _ accused No. 1. Search panchnama was concluded at 20.30 hrs on 6.7.98 at the place of search and as mentioned in the panchnama, samples were taken from all 7 polythene bags which were given identification marks and sealed by the DRI officers so that the same can be sent to Forensic Science Laboratory for recording final conclusion as to light brown powder found to be Heroin during the first preliminary test by the testing kit available with the officers. Statement of one Devji Khania, partner of Diamond Transport Corporation was recorded on the very day u/s 67 of the said Act. It is the say of the prosecution that the package in question was booked from Mumbai on 2.7.98 and for taking delivery of the said package, accused No. 1 had approached and search operation was in progress in the premises and during the search, the DRI officers recovered muddamal Heroin packed in polythene bags which were further packed in cloth bag and were put in a VIP briefcase. Devji Khania stated that the package was posing as if the same was containing stainless steel utensils. According to the prosecution, statement of accused No. 1 Mangilal Bishnoi was recorded by DRI officers u/s 67 of the said Act and the accused admitted in his statement that he had arrived from Mumbai on 4.7.98 in the morning at Ahmedabad; that he was residing at Mumbai and on 6th July, 1998, at the instance of one another person, he had approached the office of Diamond Transport Corporation to take delivery of the package booked under lorry receipt No. 041882 from Mumbai. Accused No. 1 was told by that other person that the

package of which delivery was to be taken of, contained Heroin. He was told that other person was not approaching the transport company personally. Say of the accused No. 1 is that in the evening, he was to deliver package to that other person. Accused No. 1 was formally arrested on 7th July, 1998 at Ahmedabad. According to the prosecution, post-seizure investigation was on. On 7th July, 1998, i.e on the next day, accused No. 2 Chautharam Bishnoi approached the office of Diamond Transport Corporation to take delivery of the package which was already opened and Heroin was seized. Accused No. 2 was having consignee and consignor copies of lorry receipts and the key purported to be of VIP briefcase. These articles were recovered and seized from the accused No. 2. Accused No. 2 had approached the transporter for taking delivery and for handing over the said package to the other persons on whose behalf, he had undertaken to receive delivery of the package from the Diamond Transport Company. Authorized officer of the DRI recorded statement of accused No. 2 u/s 67 of the said Act after serving him summons. It is alleged that the accused admitted certain crucial facts. According to accused No. 2, he was asked to take delivery of the package from the Diamond Transport Corporation and for this purpose, he had come to Ahmedabad and was to receive a sum of Rs. 1,000/- for the work entrusted to him. He was also aware that after taking delivery of the package and on its further delivery to the other person, he would receive Rs. 1000/-. Name of the other person was disclosed to be Kirtibhai Vora. Accused No. 2 was told that, that other person, namely, Kirtibhai Vora was not coming to the office of the Diamond Transport Corporation and he was indicated that there was some problem in the package and that is why, other person, namely, Kirtibhai Vora was to pay him the money. Thus, both the accused, according to the prosecution were aware that the substance concealed in the package was objectionable substance and both of them had knowingly come to take delivery of the package containing narcotic drug having misdeclaration. Availability of fax copy of lorry receipt with accused No. 1 and recovery of consignee and consignor copies of the very receipt, that too, with a key of the briefcase, indicated that both the accused had committed an offence punishable u/s 8[c] read with Sections 21 and 29 of the said Act. Accused No. 2 was arrested on 9th July, 1998. Both the accused were produced before the learned Metropolitan Magistrate and remanded to judicial custody. During the post-seizure investigation, one authorized officer of the DRI recorded statement of one Prakash Mayakal u/s 67 of the said Act. According to this witness, both the accused were residing in Room Nos. 2 and 3 of the same building in which this Prakash Mayakal was residing and this witness had identified photographs of both the accused persons. Prosecution is totally silent as to the efforts made to trace out other person revealed to be one Kirtibhai Vora. It is not the say of the prosecution that there is nobody like Kirtibhai Vora. The prosecution has confined its case against both the appellants-accused as persons involved in illicit trafficking of narcotic drug, viz. Heroin. It is alleged that the samples drawn at the time of seizure, sealed and marked specifically were sent to FSL for chemical analysis and test report received from FSL confirmed that the samples answered

positive for Heroin, a prohibited narcotic drug under the provisions of the said Act.

5. Mr. K.J. Panchal, learned Counsel appearing for the appellants-accused has made two-fold arguments. First fold of his arguments is that the finding recorded by learned trial Judge is erroneous and for this purpose, arguments advanced on behalf of the accused persons before the trial court and referred to in the judgment under challenge need a fresh look. When the Court is exercising powers u/s 374 read with Section 386 of Cr.P.C., it has jurisdiction to re-write the entire judgment keeping in mind set of evidence available on record. In the present case, it is necessary to undertake that exercise, because, learned trial Judge has grossly erred in appreciating the evidence in the background of number of other probabilities emerging from the oral as well as documentary evidence. When it is in evidence that no transporter would deliver a package on zerox copy or fax copy, whether accused No. 1 could have ever gone to the godown or office of the Diamond Transport Corporation is a question. Presence of officers of DRI could have been noticed by the accused No. 1. Even for the sake of argument, it is believed that accused No. 1 had gone in the office of Diamond Transport Corporation, he would not have claimed parcel by handing over fax copy of lorry receipt. No convincing proof has been brought on record to show that accused No. 1 is resident of Mumbai and accused Nos. 1 and 2 are neighbours in the same building except bare statement of one witness recorded u/s 67 of the said Act. Bombay being metropolitan city, it was possible for the prosecution to collect better evidence and the prosecution was under an obligation to lead best evidence to convince the court as per the settled rule. Identification by photographs of accused persons was not appropriate procedure. Responsible officers of DRI must be aware that identification of an accused through photograph has been deprecated in number of cases So, to link the accused No. 1 with accused No. 2, nature of evidence led by the prosecution ought not to have been accepted as reliable or cogent piece of evidence. It is also submitted that if accused Nos. 1 and 2 were really neighbours, then, accused No. 2 would not have dared to enter the office of Diamond Transport Corporation on the next day, i.e on 7th July, 1998. When the first person sent for the purpose has not returned either to accused No. 2 or to other person, namely Kirti Vora, accused No. 2 would not have gone in the office of Diamond Transport Corporation with original lorry receipts; both consignor's and consignee's copy. So, the story placed by the prosecution is highly improbable and the case of the prosecution ought to have been disbelieved on the point of absence of probability. It is further say of the accused that the key allegedly recovered from accused No. 2 ought to have been cogently proved by the prosecution by leading independent evidence that the key recovered is, in reality, the key of the briefcase which was broke opened during the search operation. There is no such evidence of convincing nature available on record. According to Mr. Panchal, when it is the case of the prosecution that DRI officers had kept watch and surveillance on the godown, then, what prevented them in continuing

surveillance for some more hours. There is nothing on record to show, prima facie, that the information received by the Revenue Intelligence was indicating something about time of arrival of person at the office of Diamond Transport Corporation. Undue haste made by the officials in showing recovery and seizure of muddamal Heroin makes the case of the prosecution doubtful. It is also submitted by Mr. Panchal that the learned trial Judge has also not considered oral as well as documentary evidence from where it emerges that mandatory procedural scheme of Sections 50 and 41 of the said Act have not been complied with. Rest of the arguments are practically in terms of the grounds mentioned in the memo of the appeal.

6. Second fold of argument of Mr. Panchal is that if the Court is inclined to accept the case of the prosecution as placed and records a finding that conviction recorded by the learned trial Judge is legal and there is no element of perversity in the findings, then, the Court, at least, should reduce substantive sentence from 13 years to 10 years, i.e. punishment minimum prescribed under the Statute. Heroin seized is of commercial quantity. Status of both the accused is apparently of a victim or at the most, a carrier. They cannot be equated with the persons who are responsible for percolating drug habits to the mass and therefore, they are not even as per the case of the prosecution, distributors nor manufacturer of such heinous drug. It is therefore submitted that there is no reason for the trial court to impose punishment more than minimum prescribed and the substantive sentence imposed should be held to be harsh and the same be reduced to the minimum, i.e. of 10 years. In response to a query raised by the Court, Mr. Panchal has fairly accepted that no sustainable argument is possible to be advanced for reduction of the amount of fine imposed by the learned trial Judge and in default punishment.

7. According to Mr. Harin P. Raval, learned Counsel appearing for complainant-Department of Revenue Intelligence, judgment under challenge is absolutely legal and in accordance with law. It is submitted that there was no reason for the learned trial Judge to accept the evidence of the last witness examined during the course of trial, i.e. P.W.5 Prakash Mayakal. Undisputedly, this witness is resident of Mumbai and he has proved that the accused persons are residents of Mumbai. This is not a case of identification of accused through photographs. Photographs were seen at the time of recording of statement of this witness, but the accused persons have been again identified by this witness as persons residing in his neighborhood. Personal knowledge of this witness has not been challenged substantively and this witness has stood to the test of cross-examination. Both the accused must be knowing each other. It is satisfactorily proved by the prosecution that accused No. 1 was apprehended on 6th July, 1998 with fax copy of the lorry receipt. If the original receipt was with accused No. 2 who was apprehended on 7th July, 1998, how that fax copy was found from accused No. 1 on the previous day is a question and the same has not been explained by the accused persons. It is also important to note that how could a person in Ahmedabad receive a lorry receipt of a parcel booked from Mumbai. It

appears that accused No. 1 must have gone to ascertain whether parcel had reached in the office of Diamond Transport Corporation. He may not be aware that some persons were inside the office and they had undertaken some procedure and he was caught. Zerox copy must have been shown to the godown keeper and this sequence of evidence has been proved satisfactorily by examining relevant witnesses and their evidence has been rightly appreciated by the learned trial Judge. It is argued by Mr. Raval that the evidence led by prosecution appears to be more probable. Value of Heroin worth more than 6 Kg was very high. It emerges from the set of evidence that a person keen to have delivery of the material if remains in dark for about 24 hours, then, doubting the bona fide or for any other reason that may be there in the mind of accused No. 2, owner of the material may have attempted to have delivery of the very package with original document. So, visit of accused No. 2 on the next day should not be viewed as highly improbable event. On the contrary, it is most probable situation and visit of both the accused found to be neighbours at Mumbai, in the office of Diamond Transport Corporation shows the conduct of guilty persons. Mr. Raval has drawn our attention to scheme of Section 35 of the said Act which reads as under:

Section 35: Presumption of culpable mental state. 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. 1. Ins. by Act 2 of 1989, Section 9 (w.e.f. 29-5-1989). 2. Ins. by Section 10, ibid. (w.e.f. 29-5-1989). 374 (2) For the purpose of this 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.

8. It has come in evidence that accused No. 1 was aware that the package for which he was going to claim contained Heroin and accused No. 2 was also aware that something objectionable was there in that package and therefore only, he was offered Rs. 1,000/-. As the accused No. 1 had arrived at Ahmedabad on 4th July, 1998 as per the evidence led by prosecution, it was not possible for the officers of DRI to recover railway or bus tickets from accused No. 1. So, both the persons having clear knowledge about the objectionable material had attempted one after another to have possession of that objectionable article. It is possible to infer from the set of evidence that accused persons were aware that they were entrusted the work to see that delivery of Heroin sent from Mumbai to Ahmedabad is taken and the same is delivered to person or persons indicated to them. Disclosure of name of other person by the accused persons themselves or some success in getting clue about the name of another person would not take

out any of the accused from the category of persons against whom presumption of culpable mental state could be made. So, evidence led by the prosecution was required to be appreciated in that background that authorized officers had searched godown of Diamond Transport Corporation. There are no procedural lapses in drawing samples and sending the same to FSL for chemical analysis. Use of test kit available with the DRI was also satisfactorily proved by the prosecution witnesses examined.

9. Mr. Raval, after taking us through provisions of Sections 41 and 50 of the said Act and the documents in this regard produced by the prosecution, has submitted that there is no violation of any of the statutory mandatory provision and all witnesses have stood the test of cross-examination made by the defence counsel. So, it is submitted by Mr. Raval that no error can be said to have been committed by the trial court in evaluating the evidence and basic principles of appreciation of evidence have been taken care of by the learned trial Judge. There was no reason for the learned trial Judge to disbelieve any of the prosecution witnesses examined. Even the panchas have supported the case of prosecution substantially and when the test report of Assistant Director, FSL, Ahmedabad confirming the sample to be narcotic drug, i.e. Heroin was received, this Court may conclude that finding of guilt recorded by the learned trial Judge is absolutely legal and there is no element of either illegality or infirmity. According to Mr. Raval, there is no merit in the appeal and therefore, the same be dismissed.

10. In reference to the alternative submission made by Mr. Panchal, Mr. Raval has pointed out that the offence proved against the accused is an offence of serious nature. Keeping in mind the provisions of the NDPS Act, quantity of Heroin, if is found more than 250 grams, then, the same can be said to be commercial quantity. Mr. Raval has drawn our attention to the Notification-Entry 56, specifying small quantity and commercial quantity. So, any quantity above 5 grams would fall in the category of quantity more than small quantity. In the present case, Heroin seized is 6.480 kg. So percentage wise, stock is much much higher than the commercial quantity notified under the Act. Ultimately, imposition of punishment is a matter of discretion of the Court and the learned trial Judge, when has not imposed punishment which can be said to be unreasonably harsh, then, the quantum of punishment is not required to be reduced by the appellate forum. Good sound reasons have been given by the learned trial Judge as to how offence found proved against the accused persons is grave or serious in nature. So, unless the appellate Court is convinced and it is possible to pass sound reasoned order for reduction in period of substantive sentence imposed, the Court may not reduce the quantum of punishment. According to Mr. Raval, this Court may look to the statement of objects and reasons for enactment of the NDPS Act. Existence and enforcement of NDPS Act is not only important or vital only for our country, but the entire scheme reflects commitment to international community. While introducing the Act in the form of a Bill, all the above aspects were placed before the Parliament. It is not

necessary to reproduce the entire part read over to us by Mr. Raval of statement of object and reasons. But to buttress the arguments, Mr. Raval has specifically drawn our attention to following part from the statement of object and reasons that were considered at the time of giving shape to the NDPS Act:

In view of what has been stated above, there is an urgent need for the enactment of a comprehensive legislation on narcotic drugs and psychotropic substances which, inter alia, should consolidate and amend the existing laws relating to narcotic drugs, strengthen the existing controls over drug abuse, considerably enhance the penalties particularly for trafficking offences, make provisions for exercising effective control over psychotropic substances and make provisions for the implementation of international conventions relating to narcotic drugs and psychotropic substances to which India has become a party.

11. According to Mr. Raval, NDPS Act, 1985 has been amended in 1988 and 2001 and notification published in exercise of powers conferred by Clause [viiiia] and [xxiiia] of Section 2 of the NDPS Act for removal of doubts prescribes commercial quantity of Heroin. Reduction in such substantive sentence in such a case would send wrong message to the society. True it is that the learned trial Judge could have imposed minimum punishment prescribed, but sentence of 13 years imposed is reasonable period of sentence. The accused was found responsible for committing offence qua narcotic drug like Heroin or cocaine in more quantity than the commercial quantity. The Court has to impose minimum punishment prescribed. In the present case, it is 10 years but here, percentage wise stock found is much higher. So, instead of imposing more graver punishment, the learned trial Judge has awarded sentence of reasonable period of 13 years and therefore, the same may not be reduced to minimum i.e. 10 years. The Apex Court, if has imposed minimum punishment in a case where quantity of Heroin was found much more than the quantity seized in the present case, it would not be relevant, because, ultimately, this Court, as appellate Court has to evaluate legality and propriety of the order of sentence imposed. When the appellate Court found that subsequent order of sentence is otherwise reasonable and proper, then, looking to the totality, the period of substantive sentence may not be reduced. According to Mr. Raval, both these accused persons were acting in trafficking or narcotic drug and that too in inter-state trafficking. Logic placed before us by Mr. Raval is that trafficking is more serious offence against the society and these traffickers are responsible persons who are operating as key members in maintaining the network of sale and distribution and for such work, normally, either poor, old or infirm or minor are being used as carriers. These carriers are not loyal to the society but they are loyal to their masters and on account of their loyalty to their masters, police or any other department supervising and controlling illegal activity qua NDPS are not able to reach them. So, no lenient view requires to be taken saying that the accused appear to be only carriers. On the contrary, they should be viewed as key personnel in trafficking narcotic drug or psychotropic substance. So, according to Mr. Raval, alternative submission made by Mr. Panchal may not be accepted.

12. We are taken through the entire oral as well as documentary evidence and relevant statutory provisions by the learned Counsel for the parties. The activity undertaken by the officers of DRI on receipt of information on 6th July, 1998 has been brought on record by more than one witness including the complainant and there are no material conflicts or contradictions in the evidence of these officers examined by the prosecution and their oral evidence is found corroborative by panchnama Exh.23 drawn at the godown premises of Diamond Transport Corporation. The person who was present at the godown is prosecution witness Devji Khania [PW 2], driver of Diamond Transport Company who was served summons so that his statement can be recorded by the officers. This summons is at Exh.64 and duly proved statement dated 6th July, 1998 is at Exh.26. There is no material conflict as to seizure of one important document, i.e fax copy of lorry receipt which was brought by accused No. 1. Statement of accused No. 1 has been recorded which is at Exh.48. He was served and made aware about the scheme of Section 67 of the said Act by document Exh.46 and officers examined on behalf of the prosecution proved this document.

13. P.W.1 Jagdishbhai Naranbhai Koshti [Exh.21] has supported the case of the prosecution. It is proved by this witness that premises of Diamond Transport Corporation was searched under warrant and this warrant has been tendered in evidence by this witness. This witness has proved the entire process that was undertaken from initial stage, i.e from the point when he was called and requested to participate as Panch in raiding process and the panchnama Exh.23 proved by this witness along with documents tagged with the panchnama which also have been proved. Doubt expressed by Mr. Panchal that why this very man was selected for panchnama that has been drawn in the present case when accused No. 2 had entered the godown of Diamond Transport Corporation does not appear to be genuine doubt. This does not emerge as infirmity, because, defence side has failed in bringing out anything during the course of cross-examination of this witness or officers of the DRI that panch witness was a man of department or for department. Independence and objectivity of panch witness has remained intact if his cross-examination is read. This witness has also stated that he was present when the consignor's and consignee's copies were recovered and seized during personal search of accused No. 2. Learned trial Judge was supposed to compare copies and it appears that that exercise has been done by the learned trial Judge. Similarly, this witness has also proved the process undertaken by DRI officers who were present in the godown on 6th July, 1998 and seizure of muddamal Heroin, separation of samples from all 7 polythene bags and sealing and marking of each sample taken out for the purpose of sending the same for FSL examination.

14. P.W.2 Devji Khania examined at Exh. 26 has not made any grievance about procedure adopted by the DRI officers. This witness also corroborated substantial facts stated by P.W.1. P.W.2 is apparently independent witness. This witness also proves the seizure of the muddamal and also the procedure adopted for taking out samples of Heroin. Cross-examination made by this witness, if is read

closely, then, the facts stated by this witness in examination in chief get more strength. Procedure that has been followed by his company has been explained by this witness. It appears that he is genuine person dealing in business of transport. In the cross-examination, he has stated the details as to how samples were drawn from all the packets that were found from the parcel. However, he has admitted that he does not know as to how and in which sequence, these samples were given mark from "A" to "G". He has also stated that he does not recollect that marks were being given at the time of drawing sample from the concerned packets or not. He has also admitted that there is no clear reference in panchnama that some packets were given mark A/1 to G/1. Thus, it is clear from the version of this witness that he has stated on oath the facts that are genuine and it is difficult for us to observe that the version of either P.W.1 or P.W.2 weakens the case of the prosecution.

15. One more witness Khalid Mohammed Abib Pirji, P.W.3 is examined at Exh.30. He is again independent witness and has stated that he was serving with Diamond Transport Corporation for about 9 years as Clerk and P.W.2 Devji Khania was local person looking after the business of the Transport Company at Ahmedabad. He has proved the event that had occurred on 7th July, 1993. He was on duty from 9.30 a.m., and had remained there at the office/godown of the transport company up to 7.30 p.m and accused No. 2 had come at about 3.00 p.m with consignee's and consignor's copy, to get package released which was actually containing muddamal Heroin. He was made aware about the event that had taken place on 6th July, 1998. This witness has proved that P.W.2 Devji Khania had intimated him about the recovery of Heroin from that very package having bilti No. 4188. This witness identified accused No. 2 as Chautharam Bishnoi in the open court during the trial. He stated that this very person had come to him on 7th July. This witness had informed the officers of DRI that one person had come for parcel which was opened and searched by the department and on receipt of information, the officers of the DRI had rushed to the godown. One of the officers was Mr. Merrymel George and other one was Mr. Vadhva. He has stated that it is not required to name all other officers. Personal search of accused No. 2 Chautharam was carried out. It is stated by this witness that before conducting personal search of accused No. 2, he was asked certain questions as to whether he wanted to get himself searched in presence of any gazetted officer or a Magistrate and as the answer given by the accused No. 2 was in affirmative, Mr. Vadhva, being gazetted officer, in his presence, accused No. 2 was searched. This witness has proved that one key of VIP briefcase was recovered from the pocket of pant worn by the accused No. 2 and one copy of lorry receipt, i.e consignor's copy was also recovered and these articles were seized. Evidence of this witness clearly reveals that about 5 to 7 persons are serving as Clerks in the Company. Nothing emerges from the evidence of this witness from which it can be inferred that this witness may not be present at the time when accused No. 2 had visited the godown. When there is evidence that accused No. 2 is resident of Mumbai, why he was present at godown situated in

Ahmedabad is a question. So, his presence of accused No. 2 at godown when he entered the office of the godown appears to be genuine. He does not appear to be planted witness and evidence led by this witness has been rightly appreciated. Evidence of P.W.2 and P.W.3 clears doubt posed by Mr. Panchal as to violation of mandatory provisions of Section 50, because, case of the prosecution in this situation does not depend on the version of officers of DRI only but these officers of DRI who have proved the entire set of evidence placed by the prosecution meticulously get corroboration from P.W.1, P.W.2 and P.W.3, i.e panch and 2 other persons concerned with the business of Diamond Transport Corporation having its office at Ahmedabad. Seized documents Exhs. 38 to 53 [P. 767 to 777 of the paperbook] satisfactorily proves that the parcel searched by the DRI officers was dispatched from Mumbai by one R.S. Sanghvi under a wrong description. Non-availability of Kirti Vora, or lethargy shown or negligence exhibited by the DRI officers in tracing Kirti Vora who has been shown as other person to whom, muddamal Heroin was to be handed over actually, would not make the case of prosecution in any manner weak or infirm.

16. We have considered oral evidence of P.W.4 Sadik Mohd. Bakrawala, Intelligence Officer serving with DRI, Ahmedabad and the documents proved by this witness. This witness has attempted to trace Kirti Vora and this witness has also tried to establish that Kirti Vora is not a ghost, but he is a living person and had business relations with one Kishor Bhutmal Jain. Though department could have linked this Kirti Vora with these offences along with present accused persons, but for the reasons best known to the DRI officers, such attempts have not been made, but existence of Kirti Vora coming on record impliedly proves that both the accused had undertaken to take the delivery of the parcel containing Heroin knowing it fully well that they were indulging in illicit trafficking of narcotic drug. None of these two accused, thus, appear to be a victim. It is also not possible for the Court to reach to a conclusion that any of these two accused may have committed foolish mistake. If the statements of accused Nos. 1 and 2 recorded u/s 67 of the Act are closely read, they tried to put tight curtain on certain facts. So, it is not possible for the Court to infer that they may be simple carrier having no knowledge of the consequences that may follow. Criminal state of mind of the accused persons is emerging from the evidence, more particularly the evidence given by the officers of DRI and the documentary evidence produced and proved by this witness.

17. Anil Rampratap Wadhwa-P.W.7 [Exh.45] has proved the statement of accused No. 2 recorded by him u/s 67 of the said Act. The said statement is at Exh.57. This witness has recorded statement of accused No. 1 also u/s 67 and has proved the statement of accused No. 1. Summons were served to the accused persons and they were made aware about the consequences that may follow qua facts that may be stated by both of the accused persons. This witness has also proved activity that had taken place on both the days, i.e on 6th July and 7th July. There is no challenge as to statutory authority of this witness qua his powers to record statement u/s 67 of the accused or any person concerned qua

narcotic drug. Mr. Wadhwa has recorded three different statements of accused No. 2 Chautharam u/s 67; one on 7th July, second on 8th July and third statement on 9th July. Accused persons were in custody and control of DRI officers. They were produced before the Magistrate. There is no sincere retraction of the statement made by accused persons u/s 67 of the said Act. Learned trial Judge, therefore, has rightly considered the contents of the statement. For the sake of argument, if the contents of the statements are ignored, then also, factum proved on the basis of personal knowledge of DRI officers, panch witness and two witnesses from Diamond Transport Company establishes the case of prosecution beyond reasonable doubt and the learned trial Judge has rightly held that prosecution has exclusively proved its case.

18. Rameshbhai Jagjivandas Thakkar, P.W.8 is examined at Exh.63. He was also serving in the office of the DRI and has proved that how he had rushed to the office in early hours at about 7.00 a.m on telephone call of his department personell Mr. Bakrawala and how the entire team had rushed to the office of the Diamond Transport Corporation. This witness has been examined to corroborate the version of other witnesses. He is a person who was recording panchnama in presence of other officers, namely, Mr. Garg, Mr. Wadhwa and Mr. Patel. He has also proved that panchnama was concluded at about 10.30 a.m on 6th July. Statement of Devji Khania, P.W.2 recorded u/s 67 is in handwriting of this witness recorded by Mr. Wadhwa. Of course, P.W.2 Devji Khania has not disputed genuineness of the statement, but it is necessary to mention that procedure of search and seizure on 7th July was meticulously followed keeping in mind all relevant statutory provisions of Sections 41 and 50 of the said Act. Summons, panchnamas, statements recorded u/s 67, written intimation given to the accused before carrying out personal search in compliance of scheme of Section 50 of the said Act were followed properly. On evaluation of the evidence, we are satisfied that all these steps have been taken in the present case by the raiding officers of the team of DRI assisting the entire process of search and seizure. Arrest of accused persons also has been effected by the officers authorized and these documents have also been tendered in evidence and genuineness of these documents is not under serious challenge. Mere challenge by the defence as to any document duly proved is not legally sufficient. Unless the Court is given clear impression that the document tendered in evidence is not trustworthy for giving sound and logical reasons, then, the documents being documents prepared in due course of business and in discharge of official duties of government officers can be accepted as reliable piece of evidence and the oral evidence of witnesses obviously shall have to be considered in this background. Set of documents duly proved and tendered in evidence, if are found supporting oral version of the witnesses examined by the prosecution, then, it could be said that oral version of particular witness gets corroboration from the documents duly proved and tendered in evidence. In such a case, it cannot be said that testimony of a witness is uncorroborated testimony.

19. P.W.9 Chetankumar Shankerchand Patel [Exh.68] is the witness who had

carried samples in sealed condition to FSL. There is sufficient evidence to show that these samples had reached to FSL intact. There is no confusion as to description of the samples collected, sent and received by the FSL.

20. P.W. 10 Merrymel George who is complainant was examined at Exh. 74. Obviously, he has proved the entire set of evidence as he is the person aware with the entire exercise undertaken by the DRI so that the present appellants-accused can be effectively prosecuted. This witness was asked questions in Hindi, he had answered all questions in Hindi, but deposition has been recorded in the language of the Court, i.e. Vernacular Gujarati. But nobody had objected either before the trial court or before us about the method of deposition of P.W.10. It is also not submitted that any error has been committed in recording deposition of this witness. P.W. 10 was serving as Intelligence Officer with DRI at Ahmedabad since 13th April, 1998 and the present crime has been detected by the officers of DRI on 6th July, 1998. This witness was first informed by the Assistant Director Mr. Garg and when he reached at the office, other officers viz. Mr. Bakrawala, Mr. Garg and Mr. Thakkar were present there and by that time, Mr. Wadhva had also reached. P.W. 10 was made aware about the information received and also about the modus that may be adopted for getting suspected parcel released from Diamond Transport Corporation. The statements made by this witness and other officers have not been challenged. This witness as well as Mr. Thakkar, who was in the company of P.W.10 had introduced themselves as officers of DRI and had made aware about the information received by the department to the partner who was present. Partner was also informed that they had information that parcel booked from Mumbai contained narcotic drug and for that they intended to carry out search under the NDPS Act. Search warrant Exh.22 was shown to the partner and P.W.2 Devji Khania. Signature of P.W. 2 was also obtained on the search warrant Exh.22. Thus, from the beginning till all the formalities came to be over on 9th July, 1998, this witness was aware about each event that had occurred. He has stated these details on oath before the Court and it is important to note that there are no material discrepancies in the version of this witness, who according to us is a star witness being complainant and aware about basic facts relied upon by the prosecution.

21. It is not necessary to discuss and reproduce the facts stated and proved in detail by each witness examined by the prosecution. This Court can legitimately, for reasons, say that the evidence of these witnesses has been correctly appreciated by the learned trial Judge and adopt the reasons given by the trial Judge for its findings.

22. No material contradictions or conflict in the evidence of the officers examined by the prosecution, more particularly, officers of DRI are emerging which can lead this Court to infer that the conflict of evidence or contradictions are of serious nature and the same go to the merits of the case. How parcel was opened, how material, more particularly, muddamal Heroin was weighed, what type of instructions were used in weighing samples and the entire muddamal

Heroin etc. has come on record through the depositions of P.W.9 and P.W.10.

23. Statements of P.W. 2 Devji Khania and Prakash Mayakal P.W.5 are recorded u/s 67[a] of the said Act, because, these two witnesses were able to give necessary information to the DRI officers and the documents recovered from Diamond Transport Corporation's office including xerox copy of lorry receipt and other documents including consignor's and consignee's copy from accused No. 2 can be said to be recovery made under Clause [b] of Section 67. How these documents were there in custody of accused Nos. 1 and 2 respectively is crucial question and the same has been rightly answered by the learned trial Judge. It is rightly submitted by Mr. Raval that these two documents show involvement of both the accused and their mental state in illicit inter-state trafficking of prohibited narcotic drug muddamal Heroin.

24. On marshalling of evidence, it is not possible for us to infer that P.W.5 Prakash Mayakal, Telugu knowing person is a got up witness to establish the link and relationship between accused Nos. 1 and 2. This witness has remained consistent to his statement recorded u/s 67 and no material infirmity is emerging from the evidence of this witness. The entire set of evidence was required to be appreciated in the background of evidence of P.W.11 Vitthalbhai Ranchhodbhai Parmar. This witness P.W.11 was serving as Intelligence Officer, DRI since 1995 at Mumbai and he has inquired about the booking of the parcel from the office of Diamond Transport Corporation from Mumbai on 8th July, 1998. He was requested to record statement of the Manager of Diamond Transport Corporation and on receipt of a clue, this witness had reached to one building at Kamatipura. He was given one telephone number and was able to reach to P.W.5 Prakash Mayakal. This witness had also inquired about Kirti Vora, but he was not able to trace that Kirti Vora. Room No. 2, which was found locked by this witness was required to be searched, but it has come on record that that room was never searched. According to us, this lacuna left is insignificant, because, P.W.5 has clarified as to how rooms were given to accused Nos. 1 and 2 and the extension line on telephone was provided in the room occupied by accused No. 2 Chautharam. This extension was given since January, 1998. Accused No. 2 was earlier paying for the facilities provided to him but thereafter as accused No. 2 did not pay anything, he had disconnected the lines going to the room occupied by accused No. 2 Chautharam. It is very likely that extension given by P.W.5 was unauthorized and thereby he himself had committed punishable wrong, but the option before the DRI was to make this P.W.5 as accused, which was not impossible, but in view of the statements recorded of accused Nos. 1 and 2 u/s 67 and their arrest at Ahmedabad, it appears to have led the DRI officials to make this P.W.5 as witness to establish the link between the accused Nos. 1 and 2 and so also their conduct of dispatching parcel from Mumbai to Ahmedabad. So, keeping all these facts in our mind, we have evaluated the evidence of P.W.5 and P.W.11 and other evidence examined by the prosecution.

25. According to us, there is no gross error in appreciating evidence. We are of

the view that the accused have been rightly held guilty of the charge of offence punishable u/s 8[c] read with Section 21 and Section 8[c] read with Section 29 of the said Act.

26. In case of *State of Himachal Pradesh v. Sardara Singh* reported in [2008] 9 SCC, the Supreme Court, while dealing with the case where the High Court had acquitted the accused without assigning detailed and cogent reasons, held that the Court is supposed to assign good, sound reasons while dealing with a criminal appeal. The Apex Court in para-9 observed as under:

The questions involved were not trivial. The primary ground for acquittal seems to be that the alleged eye-witnesses did not support the prosecution case and, therefore, their presence is doubtful. The High Court has not given any reasons for refusing to grant leave to file appeal against acquittal, and seems to have been completely oblivious to the fact that by such refusal, a close scrutiny of the order of acquittal, by the appellate forum, has been lost once and for all. The manner in which appeal against acquittal has been dealt with by the High Court leaves much to be desired. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind, all the more when its order is amenable to further avenue of challenge. The absence of reasons has rendered the High Court order not sustainable. Similar view was expressed in *State of U.P. v. Battan*.

27. While referring to the judgment of the Apex Court in case of *U.P. Battan*, reported in [2001] 10 SCC 129, the Apex Court referred to para 5 of the said judgment in the judgment of *Sardara Singh* [supra]. It will be beneficial to reproduce relevant para-5 of the said judgment in the case of *U.P. Battan* [supra] which reads as under:

10. 5... About two decades back in *State of Maharashtra Vs. Vithal Rao Pritirao Chawan*, the desirability of a speaking order while dealing with an application for grant of leave was highlighted. The requirement of indicating reasons in such cases has been judicially recognized as imperative. The view was re-iterated in *Jawahar Lal Singh Vs. Naresh Singh and Others*, Judicial discipline to abide by declaration of law by this Court, cannot be forsaken, under any pretext by any authority or Court, be it even the Highest Court in a State, oblivious to Article 141 of the Constitution of India, 1950.

6. Even in respect of administrative orders Lord Denning M.R. in *Breen v. Amalgamated Engineering Union* 1971 (1) All E.R. 1148 observed "The giving of reasons is one of the fundamentals of good administration". In *Alexander Machinery (Dudley) Ltd. v. Crabtree* 1974 LCR 120 it was observed: "Failure to give reasons amounts to denial of justice". Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at". Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face

of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. The "inscrutable face of a sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance.

28. Thus, assigning of reasons is necessary to show link between the mind of decision taken to the controversy in question and the decision or conclusion arrived at. The Apex Court was dealing with the appeal against the order of acquittal, but when the appellate court decides to concur with the findings recorded by the learned trial Judge, detailed reasons are not required to be given. However, this case being a case whereby accused persons have been sentenced for 13 years" rigorous imprisonment and have been imposed with fine of Rs. 1.5 lakhs for each of the offences committed for which they have been held guilty, we have carefully considered the entire set of evidence including the statement recorded u/s 67 of the said Act.

29. Admissions made by the accused persons in statements recorded u/s 67 are not only basis for recording conviction. They have been used carefully as corroborative piece of evidence and their statements recorded u/s 67 of the said Act also have been tested by cross-checking with other set of evidence. All documents have been tendered and received in evidence according to law. It is not possible for us to observe that statements of the accused recorded u/s 67 of the said Act were inadmissible and the learned trial Judge was not legally authorized to consider those statements.

30. Mr. Panchal, learned Counsel for the appellants has drawn our attention to one judgment of the Apex Court in the case of Noor Aga v. State of Punjab and Ors. reported in 2008 [3] GLH 43 . He has taken us through relevant paras 101, 104, 112 and 113 of the judgment. It is submitted by Mr. Panchal that the officers of DRI are police officers clothed in different status, otherwise, they were exercising powers of police and therefore, admission or confession made to such officers is inadmissible in evidence. But according to us, the Apex Court in the cited decision was dealing with a case where prosecution was intending to rely upon a confession recorded by the Customs officials u/s 108 of the Customs Act, 1962 in connection with declaration of a crime. Inquiry was contemplated u/s 108 of the Customs Act and accused was firstly interrogated or was asked certain questions under the inquiry contemplated u/s 108 of the Customs Act. So, statement recorded u/s 108 of the Customs Act if is to be used in prosecution under the NDPS Act, what evidenciary value should be given to such statement was a question before the Apex Court in cited decision. In this very cited decision, the Apex Court has discussed other judgments including judgment in

case of Alope Nath Dutta and Others Vs. State of West Bengal, , Babuhai Udesinh Parmar v. State of Gujarat reported in 2006 [12] SCC 268 and in case of Pon Adithan Vs. Deputy Director, Narcotics Control Bureau, Madras, The Apex Court has observed in the cited decision that search and seizure or an arrest made for the purpose of proceeding against a person under the Act cannot be different only because in one case the authority was appointed under the Customs Act and in the other under another. What is relevant is the purpose for which such arrest or search and seizure is made and investigation is carried out. The law applicable in this behalf must be certain and uniform. [emphasis supplied] According to us, NDPS Act is a complete Code. Here information was received by DRI and the officers authorized u/s 41 of the said Act had carried out the entire process of search and seizure as per the scheme of Section 42 of the said Act and the officers, being authorized to record statement u/s 67 of the very Act, have recorded the statements of P.W.2 Devji Khania, Prakash Mayakal as well as both the accused. Recording of these statements appears to be genuine. When no element of undue coercion or inducement is shown to the accused persons emerging from this evidence, we are of the view that the decision cited by Mr. Panchal would not in any way help the accused and the learned trial Judge was right in convicting the accused persons. We are inclined to observe that statements recorded u/s 67 in the present set of facts available on record are statements recorded by the authorized officer under separate independent procedural Code and therefore, the same can be read as legal piece of evidence. True it is that it would not be safe to record conviction solely on such statement if the same is only a bare confession inspite of disclosure of many other relevant aspects that can be tested and evaluated by the Court.

31. There is no substantive challenge as to finding recorded by the trial court that muddamal article sent for analysis to the FSL was found to be Heroin and this muddamal article had reached to FSL in concealed condition. The defence as such, placed before is that accused cannot be linked with the material recovered by DRI from Diamond Transport Corporation and the entire case was required to be evaluated in this background only.

32. While dealing with the merit of the prosecution case, the Court is supposed to consider the explanation given by the accused u/s 313 of Cr.P.C. examination. Failure to explain incriminating circumstance placed or pointed out to the accused during such examination, if is found useful in evaluating strength of the prosecution case, then, obviously, it can be done. In number of situations, denial as to incriminating circumstance placed to the accused or to show ignorance also can be looked into whether the same is satisfactory explanation or not. Here, accused persons have not explained as to how they were arrested on two different dates at Ahmedabad and that too, when they were in the godown/office of Diamond Transport Corporation. There is independent evidence, oral as well as in the form of certain admissions of both the accused that at relevant dates, they were residing at Mumbai and that the parcel was also dispatched from Mumbai. In one document, name of the person who booked the parcel is shown as R.S.

Sanghvi, lorry receipt given to consignee indicates the name of Ramesh Sanghvi [Exh.38] also. Zerox copy is at Exh.53. Zerox copy of crucial document has been recovered on arrival of accused No. 1 Mangilal at office of Diamond Transport Corporation and original thereof has been recovered from accused No. 2 Chautharam. Accused No. 1 Mangilal was produced before the Magistrate on 8th July, 1998 so that he can be sent to judicial custody. However, he has stated in his statement recorded u/s 313 of Cr.P.C., that he was shown to prosecution witnesses on 9th July, 1998. Prosecution witnesses i.e. panch witness and persons employed in the office of Diamond Transport Corporation had identified both the accused persons who had attempted for release of parcel. It appears that anticipating the arrival of somebody with original lorry receipt _ consignee copy, Diamond Transport Corporation was intimated that if anybody comes and claims the parcel in question, then, the officers of DRI be informed. On receipt of call from the office of Diamond Transport Corporation, the officers had rushed to the said office and accused No. 2 was searched. So, this is a case of independent evidence examined by prosecution, which, according to us, is sufficient to link both the accused with the parcel searched and muddamal Heroin seized. As argued by Mr. Panchal, learned Counsel for the accused persons, at the most, the appellants-accused can be only helping hand to the original traffickers and they should be treated as persons victim to poverty and inadequate education. True it is that the key found from the accused bore mark of "VIP", meaning thereby, the said key was of VIP briefcase, but as per the rule of best evidence, the prosecution ought to have proved that the key was of the VIP briefcase which was broke opened when the muddamal Heroin was seized. According to us, accused No. 2 has denied about the recovery of the key and original lorry receipt-consignee copy. It is the say of the accused No. 2 that the key allegedly recovered from him was not of the VIP briefcase, which the DRI officers claim to have opened on 6th July, 1998. So, there is no reason for us to accept the version of the officers that this key, as stated by the accused persons in their statement recorded u/s 67 of the said Act was of the bag which was broke opened. At no point of time, statements recorded u/s 67 have been retracted. Here, it is also very much relevant to note that during the exercise to reach to real persons, attempt was made to trace out Ramesh Sanghvi, who may have allegedly booked the parcel. It is in evidence that there is nobody like Ramesh Sanghvi. True it is that Kirti Vora is found to be person existing, but is not possible for the Court to say that one Ramesh Sanghvi also must be there and he may have booked the parcel. So, this Court, on the strength of the evidence can reasonably infer that the person who is found in custody of the original consignee and consignor copy, may have booked the parcel but to supress identity, fictitious name may have been given to transport company accepting the delivery of the parcel so that the same can be dispatched to Diamond Transport office at Ahmedabad. If the person who booked the parcel was Kirti Vora, then, the accused persons may be knowing that Kirti Vora is the person who has booked the parcel in the name of Ramesh Sanghvi as both the accused, as claimed by them, were knowing that ultimately, parcel on acceptance of the delivery is to be

handed over to Kirti Vora. Thus, none of the accused has tried to explain that how and why they accepted the lorry receipts from Kirti Vora though same was in the name of one Ramesh Sanghvi.

33. It is not necessary to reproduce definition of either "narcotic drug" or "to import inter-state" etc. pointed out by Mr. Raval from scheme of Sub-section [c] of Section 8 of NDPS Act. Section 21 prescribes punishment for contravention in relation to manufacture of drugs and preparations. Section 29 provides for punishment for abetment and criminal conspiracy. This is a case where both the accused were acting in conspiracy of inter-state trafficking of Heroin and both were abetting each other so that Heroin dispatched from Mumbai can be handed over to specific other person who has been named in the present case as Kirtibhai Vora. So, accused persons have committed two distinct offences, one punishable u/s 8[c] read with Section 21 and another punishable u/s 8[c] read with Section 29 of the said Act.

34. So, more than one circumstance has come on record in the form of legally convincing evidence that both the accused persons were part of conspiracy and working in the network indulging in illicit trafficking of narcotic drug-Heroin or such similar substance. Thus, according to us, there is no merit in the appeal and justification qua the quantum of punishment also needs consideration.

35. As discussed earlier, this Court cannot ignore statement of objects and reasons of the NDPS Act and the punishment prescribed for the offence that has been found proved against the accused. 10 years' imprisonment is the sentence minimum prescribed. According to us, when the Court is inclined to give minimum punishment prescribed from the maximum, then, some good sound reasons are required to be given that under what reason or reasons, punishment imposed is minimum or maximum. Otherwise, it is the discretion of the Court that the accused should be awarded sentence of how many years ranging between 10 years to maximum and for that the Court can consider various aspects including socio-economic background of the accused, their literacy, age of the accused, quality of the narcotic drug and psychotropic substance found, quantum and weight of such drug or substance recovered. In the present case, narcotic drug found is Heroin. It is submitted by Mr. Raval that shot of 1 or 2 gram is sufficient to have its effect and total quantity recovered by the officers in the present case is 6.480 kgs which is much higher than the commercial quantity prescribed under the Schedule to the said Act. We have referred this aspect in the earlier paras in this judgment and therefore, the same is not repeated here. True it is that in the present case, accused were of 22 years and 28 years of age on the date of the offence. The Court, normally, would look to the accused who are within the age range of 17 to 21 years. Both these accused had crossed the effect and impact of teen age. Accused aged about 22 years, if is hand in glove with accused of 28 years of age, he cannot claim that he may be awarded some lesser punishment because he is younger by six years. Such discrimination between the accused found guilty of similar charge and that too, charge of

abatement or conspiracy, would send wrong message to the society, because, age only should not be the criteria for awarding substantive sentence.

36. In case of Union of India (UOI) Vs. Kuldeep Singh, , relied upon by Mr. Panchal, trial court had imposed sentence of 10 years even though quantity recovered was very large. In the said case, the High Court reduced the period of punishment from ten years to six and half years. Union of India approached the Apex Court and the Apex Court restored the period of sentence imposed by the trial Judge, i.e of 10 years. This decision would not help the appellant accused. The learned trial Judge imposed ten years" imprisonment. In the said case, the accused were tried for the offences punishable u/s 9[a] and Section 25[A] read with Section 29 of the NDPS Act. For reducing punishment from maximum to six and half years the High Court considered the age of the accused and one more fact that the accused was not habitual offender and it was his first case. 880 litres of Acitic N Hydride was recovered along with some other contraband from which about 300 kgs of Heroin could have been extracted. In such a serious case, if the Apex Court imposed punishment of ten years, then the punishment in the present case also should be reduced to ten years is the backbone of the argument of learned Counsel for the appellants. But this submission is not found either legal or convincing, because, in the above case, actually Heroin was not found. The case of the prosecution in the said case was that substance recovered i.e. Acitic N Hydride could have been used and a person, if so decides, could extract 300 kgs. of Heroin. So, the nature of offence registered against the accused in the cited case was substantially different and if we see the scheme of the Act, imprisonment for ten years is minimum period of punishment prescribed. Obviously, it is not necessary to reproduce Section 9[a] or Section 25[A]. Therefore, the Apex Court, in the cited decision expressed its disagreement even in reducing punishment from maximum to any lesser period. In the present case before us, punishment imposed is somewhat more than the minimum prescribed. If Heroin recovered in the present case would have been something more than the commercial quantity, then also, minimum 10 years" punishment could have been imposed and the punishment imposed is much less than the maximum prescribed in the present case.

37. We have seen the definition of the terms "narcotic drug" and "to import inter-State" emerging from the scheme of the Act and interpreted in various judgments of this Court and the Apex Court. Section 8[c] of NDPS Act reads as under:

8. Prohibition of certain operations.--No person shall:

[a] xxx xxx xxx

[b] xxx xxx xxx

[c] produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or transship any narcotic drug or psychotropic substance, except for

medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation:

Provided that, and subject to the other provisions of this Act and the rules made thereunder, the prohibition against the cultivation of the cannabis plant for the production of ganja or the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter-State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the Official Gazette, specify in this behalf. 2*[Provided further that nothing in this section shall apply to the export of poppy straw for decorative purposes.]

38. Clause [c] of Section 21 provides that where the contravention involves commercial quantity and the punishment prescribed is rigorous imprisonment for a term which should not be less than ten years and that may extend to twenty years, the Court has jurisdiction to impose fine of any amount upto rupees two lakh, but it should not be less than one lakh. In view of this statutory provision, according to us, there is no scope to reduce punishment from the period of substantive sentence imposed by the learned trial Judge. According to us, the judgment relied upon by Mr. Panchal, if is read, would help the prosecuting agency, namely DRI and the respondent State. The Apex Court has discussed two decisions on the point of punishment; one in the case of Dhananjay Chatterjee alias Dhana Vs. State of W.B., and another in case of Ravji alias Ram Chandra Vs. State of Rajasthan, It would be beneficial to reproduce relevant paragraphs 17 and 18 of the judgment. The same are as under:

An offence relating to narcotic drugs or psychotropic substances is more heinous than a culpable homicide because the latter affects only an individual while the former affects and leaves its deleterious impact on the society, besides shattering the economy of the nation as well. That the legislature intended to make the offences under the Act so serious to be dealt with sternly and with an iron hand is made clear by providing for enhanced penalties, including even death sentence, in certain class of cases, when convicted for the second time.

It is true as contended by learned Counsel for the respondent-accused that no minimum sentence is prescribed, but the sentence imposed should fit in with the gravity of offence committed but in the teeth of the other indications in the enactment, mere absence of a provision for minimum sentence is no reason or justification to treat the offences under the Act as any less serious as assumed by the High Court. It was highlighted by learned Counsel for the respondent that the Court had a discretion which according to him has been rightly exercised. The High Court seems to wholly misdirected itself not only as to the seriousness of the offences but also with reference to the relevant consideration which should weigh with the Court in exercising its discretion.

39. According to us, basic principles of discretion that a presiding officer of trial court enjoys are reflected in paras 21 and 22 of the very judgment, which read as under:

Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection; deliberate judgment; soundness of judgment; a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colorable glosses and pretences, and not to do according to the will and private affections of persons. When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office ought to confine himself (Per Lord Halsbury, L.C., in *Sharp v. Wakefield* (1891) Appeal Cases 173) . Also (See *S.G. Jaisinghani Vs. Union of India (UOI) and Others*,

The word "discretion" standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care; therefore where the legislature concedes discretion it also imposes a heavy responsibility. "The discretion of a Judge is the law of tyrants; it is always unknown. It is different in different men. It is casual, and depends upon constitution, temper, passion. In the best it is often times caprice; in the worst it is every vice, folly, and passion to which human nature is liable," said (Lord Camden, L.C.J., in *Hindson and Kersey*.

40. When statute gives a Judge discretion what is meant is judicial discretion regulated according to known rules of law, and not the mere whim or caprice of the person to whom it is given on the assumption that he is discreet. When we are not able to reach to a conclusion that the period of punishment imposed by the learned trial Judge is unnecessarily harsh and the discretion has not been exercised judiciously, it would not be appropriate for us to interfere with the period of sentence imposed.

41. One judgment of the Apex Court in the case of *State of Punjab v. Prem Sagar and Ors.* Reported in [2008] 3 SCC 183 is about the principles involving penology and criminology. As such, there are no principles of sentencing in India and this has given rise to anomalies is the observation of the Apex Court in the above decision. Ratio of the above judgment is that sentence should be deterrent in offences touching to the social fabric or affect public health. We have gone through carefully paras 8 and 15 of the judgment. It would be beneficial to reproduce paras 14 and 31 of the above judgment.

Recently, in *State of Karnataka v. Raju*, where the facts of the case were that the Trial Court imposed custodial sentence of seven years after convicting the respondent for rape of minor u/s 376 of the Indian Penal Code 1860; on appeal, the High Court reduced the sentence of the respondent to three and half years. This Court held that a normal sentence in a case where rape is committed on a child below 12 years of age, is not less than 10 years" rigorous imprisonment, though in exceptional cases "for special and adequate reasons" sentence of less than 10 years" rigorous imprisonment can also be awarded. It was, thus, opined that socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. To what extent should the judges have discretion to reduce the sentence so prescribed under the statute has remained a vexed question. However, in India, the view always has been that the punishment must be proportionate to the crime. Applicability of the said principle in all situations, however, is open to question. Judicial discretion must be exercised objectively having regard to the facts and circumstances of each case.

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We have noticed the development of law in this behalf in other countries only to emphasise that the courts while imposing sentence must take into consideration the principles applicable thereto. It requires application of mind. The purpose of imposition of sentence must also be kept in mind.

42. In view of the above, we accept the submissions made by Mr. Harin P. Raval, learned Counsel appearing for the DRI and of Mr. Jani, learned APP for the State of Gujarat that this is a case where this Court, while dismissing the appeal may not reduce substantive punishment imposed. On the contrary, we are inclined to observe that it is not possible for us to enhance the period of punishment imposed upto 20 years for want of formal appeal by the State praying for enhancement in the quantum of punishment/substantive sentence, because, according to us, both the accused are found active link or persons operating in the entire network of illicit trafficking of Heroin. Prosecution has successfully established that the accused persons are found involved in inter-State trafficking of Heroin from the State of Maharashtra into State of Gujarat.

43. In view of the above, we hereby dismiss the appeal filed by the appellants. Judgment and order of conviction dated 31st July, 2000 rendered by the learned Additional Sessions Judge, Court No. 8 of City Sessions Court, Ahmedabad City, in Sessions Case No. 292 of 1998, is hereby confirmed.