

(2000) 06 BOM CK 0096
In the Bombay High Court
Case No : Criminal A. No. 544 of 1995

Nathubhai Babarbhahi Patel

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 29-06-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 313

Evidence Act, 1872 — Section 25, 26

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 29, 36A, 36A(1), 53

Citation : (2001) CriLJ 535

Hon'ble Judges : S.A. Bobde, J

Bench : Single Bench

Advocate : P.S. Thakur, Vinod L. Desai and A.G. Toraskar, for the Appellant; M.P. Galeria, Addl. P.P., for the Respondent

Final Decision : Dismissed

Judgement

S.A. Bobde, J.—These appeals are from a conviction for offences under the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act"). Appellant No. 1, Mahendra Ramchandra Tendolkar has been convicted for an offence u/s 20(b)(ii) of the NDPS Act. Appellant No. 2, Nathubhai Babarbhahi Patel has been convicted u/s 29 of the NDPS Act. As both the appeals arise from a common judgment and order, both are heard together and decided by this common judgment. The prosecution story, in brief, is as follows :

2. Appellant No. 1, Mahendra Tendolkar was at the relevant time a resident of village Sandore, Vasai. So also appellant No. 2, Nathubhai Patel was resident of Vasai.

3. On 27-10-1990 the Deputy Director of Narcotic Control Bureau (NCB), Mumbai i.e., Mr. Narendra Kakar (PW-6) received information that 850 kgs. of contraband, recorded this information in writing, as required by law, then

reduced it to B.R.I Form, and sent it to the headquarters at Delhi.

4. He then arranged a raid on the farm house. Accordingly, members of the staff of NCB i.e., Superintendent Vijay kumar Shahasane (PW-1), Pandurang Ahire (PW-3), Intelligence Officer, originally an Inspector from the Central Excise Department, Mr. Sidaram Mahendra Dange (PW-4), an Intelligence Officer. Mr. Gohatti, Assistant Director, NCB, Mumbai, and Mr. Sawant, Superintendent, NCB, Mumbai and the informant constituted the raiding party and reached Vasai.

5. Initially, the members of the raiding party positioned themselves near the said farm house and kept a watch on the house during that night.

6. On 28-10-1990 at 9.00 a.m. Mr. Kakar asked the members of the raiding party to accompany him to the farm house and at about 9.30 a.m. entered the premises.

7. The premises, which were raided, have been described as an incompletely constructed farm house which has a temple and situated on land admeasuring about 3 acres and 5 gunthas.

8. On entering the house, the raiding party came across one person who was present in the farm house, that was appellant No. 1, Mahendra Tendolkar. The raiding party disclosed the purpose of the raid i.e., that they were in search of narcotic drug, hashish. The officials offered their personal search. This was, however, declined by appellant No. 1.

9. The search yielded six drums of large size in a passage between the incomplete bungalow and the temple. These drums appeared to have been pulled out of a pit nearby. These drums or barrel had two metal ribs on them and from the markings on the earth it appeared that all the drums had been rolled from the pit to the position in which they were found.

10. When the drums were opened in the presence of the panchas, a brownish black substance in the form of slabs, some of which were broken, was found. This substance was suspected to be cannabis resin, commonly known as hashish. After deriving samples from the drum and other incidental matters, test performed on the substance gave a positive result as to its being hashish.

11. The officers realised that it was inconvenient to conduct a detailed examination of the entire substance of hashish on the spot and question the persons involved and, therefore, decided to carry the seized material to the NCB Office at Mumbai. Before leaving for the NCB office, the entire incomplete bungalow and the temple were searched, during which some documents including the 7 x 12 extract of the land and certain letter heads were found. During the course of interrogation of appellant No. 1, the prosecution case is that he revealed that hashish was kept in the premises at the instance of one Nathubhai Patel, appellant No. 2, and offered to lead the raiding party to the house of Nathubhai Patel. Accordingly, appellant No. 1 took Mr. Sawant, Superintendent, NCB, and one panch to a building called Eva Apartment at Vasai

where appellant No. 2 was found along with his partner Ishwarbhai. Both of the appellants voluntarily accompanied the raiding party to the office of the NCB at Mumbai.

JUNE 29. 2000

12. At the NCB office at Mumbai the drums were unloaded. They were marked for identification. The contents were weighed and the total weight was found to be 795 kgs. Samples of these contents were taken and sealed in packets in the presence of panchas. The slabs of hashish were found embossed with marking like "Pakistan", "Mazhar", "Mazhar Sharif. A detailed inventory was taken, the appellants were given copies of the panchnama. They signed in acknowledgment thereof.

13. The appellants remained in the office of the NCB, Mumbai. The panchas left the office thereafter. The appellants were arrested on 31-10-1990. Thus, the appellants were questioned from about 28-10-1990, the date of the raid up to to 31-10-1990, by the officers of the NCB.

14. Samples were sent for chemical analysis and the report obtained shows that charas was detected in the sample. There is no dispute that charas and hashish are substantially the same.

15. During the course of the investigation, the statements of both the appellants were recorded. The statements are confessional and inculpatory. Statement of appellant No. 1, Mahendra Tendolkar was recorded by Mr. P.K. Ahire, Intelligence Officer. This statement is at Exhibit 46. Statement of appellant No. 2, Nathubhai Patel was recorded by one Mr. S.M. Dange, Intelligence Officer. This statement is at Exhibit 54.

16. When the appellants were produced before the Additional Chief Metropolitan Magistrate, 3rd Court at Mumbai, on 31-10-1990, they both applied for retracting the statements given by them earlier on 29-10-1990. Appellant No. 1 said that he wanted to retract his statement since it was recorded in English and was not explained to him properly in Marathi. Also because, it was taken under coercion. Appellant No. 2 stated that he wanted to retract his statement because it was obtained under force and mental torture by the NCB officers. These two retractions are at Exhibits 49 and 50 respectively.

17. The appellants were charged as follows :

(a) Appellant No. 1 was charged u/s 20(b)(ii) of the NDPS Act for possession of six drums containing hashish weighing 795 kgs.

(b) Appellant No. 2 was charged u/s 29 of the NDPS Act for being a party to the criminal conspiracy along with some absconding accused persons, in pursuance of which he delivered those six drums containing 795 kgs. of hashish to appellant No. 1, who was found in possession of those drums. The charge at Exhibit 22 was framed on 22-12-1993.

18. In all, the prosecution examined the following six witnesses and filed the documents seized from appellant No. 1 on record. PW-6 Kakar was the officer who ordered the raid upon information received by him, PW-1 Shahasane, Superintendent in NCB, Mumbai and who has filed the complaint in the Special Court, PW-3 Ahire who was working as an Intelligence Officer with the NCB and has recorded the statement of appellant No. 1, PW-4 Dange. Intelligence Officer, NCB who has recorded the statement of appellant No. 2, PW-5 Ravindra Vasant Pardeshi, who has recorded the state-ment of some witnesses and PW-2 Vardaram Rathod, who is one of the paneh witnesses in respect of the raid. PW-1, 3, 4 and 6 were also members of the raiding party. No witness has been examined on behalf of the defence.

19. Upon a consideration of the entire evidence and material on record, the Special Judge (NDPS Act), Thane has found the appellants guilty, as charged. The learned Judge convicted appellant No. 1, Mahendra Tendolkar, u/s 20(b)(ii) of the NDPS Act and sentenced him to suffer RI for twelve years and also to pay a fine of Rs. 1,25,000 and in default of payment of fine, to further undergo RI for three years. Appellant No. 2, Nathubhai Patel, is convicted u/s 29 reed with Section 20(b)(ii) of the NDPS Act and is sentenced to suffer RI for twelve years and also to pay a fine of Rs. 1,25,000 and in default of payment of fine, to undergo further RI for three years.

19A. Appellant No. 1, Mahendra has challenged his conviction in Criminal Appeal No. 78 of 1996 and is represented by Mr. A.G. Toraskar, learned counsel appointed by this Court. Appellant No. 2, Nathubhai has challenged his conviction in Criminal Appeal No. 544 of 1995 and is represented by his learned counsel Mr. Vinod L. Desai. The State is represented by Mr. M.P. Galeria, learned Addl. Public Prosecutor, Respondent No. 2, the Narcotic Control Bureau, which was added as respondent with the leave of this Court, appears through Mr. Thakur. Mr. Toraskar and Mr. Desai, learned counsel for the appellants have substantially advanced the same arguments.

20-21. It is contended by the learned counsel for the appellants that the conviction is not sustainable in view of the fact that it is essentially based on the confessional statements made to the respective officers of the NCB and particularly in view of the fact that the said statements have been refracted. With regard to appellant No. 2, in particular, Mr. Desai further submitted that both the statements, which are confessional in nature, made by appellant No. 2 to PW-4 are not admissible as evidence and is barred from reception in evidence by Sections 25 and 26 of the Indian Evidence Act, 1872. Appellant No. 2 has challenged the confessional statement of appellant No. 1 since that statement implicates appellant No. 2 as the person from whom and at whose instance the hashish was stored.

22. This contention is based on the premise that these officers are police officers and statements made to them are not admissible. Even otherwise, according to the learned counsel, no conviction can be based on such statements since there

is no corroboration from an independent source.

23. Having heard learned counsel for the appellants and the learned A.P.P., and after having gone through the evidence on record, I am of the view that there is no merit in the appeal in view of the following facts which emerge from this evidence :

The prosecution has led clear evidence to show that information was received by PW-6 Kakar, who took it down in writing in accordance with law, informed his superiors at Delhi and arranged for the raid. His deposition at Exhibit 66 gives details such as the procedure adopted and the manner in which he arranged for the raid by asking PW-1 Shahasane, Mr. Sawant, PW-3 Ahire, PW-4 Dange and some other officers to get ready for the raid. He accompanied them during the raid and was present through out till the completion of the panchnama.

This witness has also produced the information report at Exhibit 67.

The prosecution has led evidence of PW-1 Shahasane, the complainant, PW-3 Ahire and PW-4 Dange, the Intelligence Officers of the NCB.

The evidence of these officers is consistent and cogent and corroborates the evidence of each other.

24. PW-1 Shahasane tells the Court that that he was informed by his superior, Mr. Kakar that information has been received that about 850 kgs. of hashish has been stored in a farm house at Vasai and that a raid has to be conducted at the farm house. That on 27-10-1990 at about 12.00 noon a raiding party consisting of officers such as Mr. Gohatti, Assistant Director, NCB, Mr. Sawant, Superintendent, NCB left for Vasai with the testing material and other necessary equipments. They kept surveillance on the 27th during the whole night. (sic) to the farm house at Benapatti, village Sandore. He has described the premises as one incomplete bungalow under construction and adjacent to the said construction there was one temple of Devi Anandi Bhavan. Appellant No. 1, Mahendra was present there. The officers of the raiding party offered to have them searched but he declined.

25. In the passage between the temple and the house six large size black colour drums were found. Appellant No. 1 was asked about their contents and he replied that it contained some contraband without naming it.

26. These drums had fresh earth sticking to them. It appears that these drums had been dragged from a pit to where they were found and there were marks of two protruding ribs on the drum on the earth leading towards the pit. This showed that the drums were rolled from the pit to where they were found. The length of the pit was 18 feet and freshly dug out mud was found there. Appellant No. 1 explained that the drums were taken out from the pit in the early morning on that day and were kept at the site for delivery. At that point of time one elderly person entered the farm house. He said that he was the father of appellant No. 1.

27. These drums were then opened in the presence of panchas. All the six drums contained a brownish black substance suspected to be hashish, cannabis resin and it had a typical odour and was in the form of slab, some of which were broken. This substance tested positively on the testing kit and was found to be hashish or cannabis resin. This witness continues that since it was not convenient and also risky to do a detailed examination at the site and since they did not have sufficient facility to do the weighment of such a large quantity, the party decided to conduct the entire examination of the contents of the drum at the NCB office at Mumbai.

28. The incomplete bungalow, cupboard and the heap of papers lying there were searched thoroughly and some incriminating documents, relevant and useful for the purpose of investigation were taken in possession. This witness has stated that the documents recovered were one blank letter head of Sudhajit Caterers, one 7/12 extract i.e., revenue record in respect of the land, in the name of Ramchandra Tendolkar, two declarations in the name of M/s. Highlight Industries and one another firm filed before the Central Excise Department, and one letter head of Balaji Enterprises (Exhibit 291 /B). Thus in all about six documents were recovered and taken charge of. A letterhead of Abina Industries (Exhibit 29-1/C) was also seized. This Abina Industries is a concern owned by (sic) No. 3 in the Factory premises of appellant No. 2. Balaji Enterprises appears to be the name of the shop from where accused No. 2 carried on his business.

29. It is significant to note that appellant No. 1 told this witness that the said farm house belongs to him and the area of the said farm house was about 3 acres and 5 gunthas. Whoever be the recorded owner of the land, having regard to the fact that appellant No. 1 was in possession of the land and the farm house, I am of the view that it must be taken that the drums were found in his possession and control. This would be further clear from what is discussed later.

30. Appellant No. 1 further told this witness that the drums were given to him by appellant No. 2, Nathubhai Patel. Thereafter while returning to Mumbai, appellant No. 1 asked the raiding party to stop the tempo near the Vasai S.T. stand and told them that he would lead them to the place of appellant No. 2, Nathubhai. Accordingly, Mr. Sawant, the Superintendent and other officers and one panch witness went to a building called Eva Apartments at Vasai. There they met appellant No. 2, Nathubhai and his partner Ishwarbhai. Both appellant No. 2 and his partner Ishwarbhai voluntarily accompanied the raiding party to the NCB Office at Mumbai. At Mumbai at the NCB office, all the drums were unloaded in the presence of panch witnesses and were taken to the 3rd floor where the office of the NCB is located.

31. This witness further tells the Court that the total weight of hashish found in those six drums was 795 kgs. Samples of hashish were taken and sent for analysis. Thereafter the black substance was put back into the respective drums and labels were pasted on them on which the panch witnesses put their signatures with date. The drums were then covered and sealed with NCB seal 03.

The markings found on the hashish slabs such as "Pakistan", "Mazhar", "Mazhar Sharif suggested that the source of hashish was from Pakistan, were also noted. A detailed inventory was made in the panchnama the writing of which had begun at the farm house in Vasai. The panchnama was read over and explained to appellant Nos. 1 and 2. They accepted the contents as correctly recorded. The appellants have also signed the panchnama in acknowledgment of their having received a copy.

32. The appellants were then asked to remain in the office for interrogation and for recording their statements.

33. They were arrested on 31-10-1990. In cross-examination this witness has categorically denied that the raiding party foisted hashish on the appellants for falsely involving them in this case. Indeed, the amount of hashish recovered is so large that it is difficult to imagine that the officers could have planted such a huge quantity. It is valued at Rs. 47,70,000/-. This witness has been asked several questions pertaining to the premises. One line of cross-examination which seems to have been adopted by the appellants was that since there was construction going on, some labourers would have had access to the site. But this witness seems to have nipped this line of cross-examination in the bud by stating that it was not true to say that the material required for construction like cement, sand and water were lying there. Apparently, from the version of this witness it was an incomplete house but there was no construction in progress. In cross-examination this witness has further stated that appellant No. 1 claimed that the farm house belongs to Ramchandra Tendolkar as also to himself. He has accepted the position that the 7/12 extract is in the name of Ramchandra Tendolkar. In the question put to him by the Court, he stated that during investigation it was revealed that RamchandraTendolkar, the father of appellant No. 1, was not at all concerned with the contraband articles found in the said farm house and, therefore, he was not made an accused in this case. I see nothing in the deposition of this witness which cast any doubt on the veracity of statements which he has made.

34. It is necessary to next consider the deposition of PW-3 Ahire, who also recorded the confessional statement of appellant No. 1, Mahendra. This statement is at Exhibit 46. PW-3 Ahire has corroborated PW-1 Shahasane in all material particular aspects about the raid and the contraband hashish found in the farm house. This witness has further deposed that Nathubhai had given him those drums and then led this witness and a pancha to a shop, Balaji Enterprises where he pointed out Nathubhai, the appellant No. 2. His deposition does not differ in any material aspect with the deposition of PW-1. It is, therefore, not narrated here in detail.

35. This witness Ahire has deposed that he prepared the statement on the basis of what the appellant No. 1 told him. This statement is in Ahire's own handwriting and bears his signature on each page. This witness has further stated that the statement bears the signature of appellant No. 1 and is at Exhibit

46.

36. This takes us to the contents of Exhibit 46, the confessional statement. In brief, the statement of appellant No. 1 is to the following effect :

37. Appellant No. 1 has stated that he can write, read and understand Marathi, Hindi and English, but is poor in spelling and has therefore requested this witness to record his statement, as above. He plies an auto-rickshaw for a living. After giving details about the other particulars of this family and the extent of his savings with certain banks, appellant No. 1 has stated that he does not pay any Income Tax. This appellant has further stated that the officers visited his farm house in the morning at about 9.30 hours and found these drums, black in colour, lying in the passage. He has then described how he told the officers that he does not know the contents of the drums and how these drums were opened in the presence of himself and the witnesses and family members one by one. He has also described the pit of size of 18 ft. x 4 ft. 8 inches x 2 ft. 6 inches behind the mandir. He further goes on to state that he told the officers that the drums had been stored in the pit and had been taken out of the pit for delivery to appellant No. 2 on the night before. He took some of the officers to the shop of Nathubhai Patel, who had given the drums to him. Nathubhai was found in his shop. The witness has further stated that the officers, along with him, Nathubhai and the panch witnesses and the other persons reached the NCB office at Mumbai at about 17 hours. He has also stated that the quantity found after weighing was 795 kgs.

38. In the next part of his statement he has described how the drums came into his possession. He states that some time in the middle of October, 1990 Nathubhai, to whom he was introduced by a common friend some time in January, 1990, came to his house and asked him if he (Mahendra) could store some drums containing chokes for tube lights in his farm house. He wanted him to do so because according to him (Nathubhai) he wanted to evade the excise duty and sales tax on those goods. This witness has further stated that Nathubhai specifically instructed him not to store the drums in the open and that they should be hidden somewhere in the farm so that nobody could detect them. Apparently, they did not settle the amount Which Nathubhai would pay him for storing the drums, but promised that the consideration would be adequate to make him happy.

39. He then described that he decided to conceal these drums in a pit in the farm and got a pit dug with the help of a labourer and his wife and paid them Rs. 60/- for it.

40. Mahendra has further stated that he got delivery of these six drums from Nathubhai, that as instructed by Nathubhai he went to Nathubhai's factory. There in front of a gala Nathubhai and his accountant Shekhar Shetty were awaiting him. The gala, was opened and there was nothing in it except these drums. He (Mahendra) then brought the drums and cupboard in a tempo to his

farm house and unloaded the drums and kept them in the passage where they were eventually found. In the evening on that day Nathubhai gave him Rs. 500/-.

41. That he has further stated that he Shifted the drums in a pit on the night of 23-10-1990 at about 21.00 hours with the help of his uncle Shrikrishna Balwant Samant, who, however, did not know about the contents of the drums.

42. On 27-10-1990 Nathubhai came to his house and told him that he wanted delivery of the drums which he had given him for storage and he wanted the drums brought near the gate since he intended to send some body to pick them up in the evening. He (Mahendra) told him that it would not be possible to keep the drums ready for delivery that evening and told him to collect them on 28-10-1990. On 28-10-1990 when he met Nathubhai, he told him that nobody had come to collect the drums. At about 9.30 a.m. the same day the officers raided the farm house and seized the drums. In his statement this appellant has also admitted to knowing one Ajit Shetty, a proprietor or owner of Abina Industries, some documents of which were found in the raid; who had lunch at his farm house along with one Jagdish Purohit and his wife. He stated that this people had met him in connection with the storage of these six drums seized from this farm house. That part of the statement, which is in question answer form, reveals that appellant No. 1 attempted to prove that he was not conscious of the contents of the drums. That he believed Nathubhai and there fore he did not examine the contents. He further candidly states that if the drums had contained chokes and was rolled, it would make a peculiar sound which these drums did not and, therefore, admitted that he could make out that the drums did not contain chokes.

43. After this part of the statement, this appellant informed the investigating officer that he was tired and wanted to sleep, which was apparently allowed. Thereafter it appears that the statement was resumed after he had food and a good sleep and rest in the night. This has a bearing on the case of this appellant that the statement was extracted by coercion. This part of the statement does not show any coercion and rough treatment by the officer.

44. On the next day when he resumed his statement, he identified Nathubhai Patel, produced before him, as being the person who delivered the drums to him. He further identified the Ajit Shetty and Jagdish Purohit and his wife and signed on the back side of their photographs which were shown to him. This statement ends with a statement that it is true and voluntarily given without any force, threat or coercion, that it is written correctly as deposed by him. It bears the signature of appellant No. 1 and PW-3 Ahire.

45. Having regard to the evidence referred to above, i.e., the deposition of PW-1 Shahasane and PW-3 Ahire and the confessional statement of the appellant No. 1 recorded by Mr. Ahire, I am of the view that learned Judge was right in finding that appellant No. 1 was found in possession of 795 kgs. of contraband goods and, therefore, he is guilty of the offence committed u/s 20(b)(ii) of the NDPS

Act.

46. This takes us to the deposition of PW-4 Dange, Intelligence Officer, who recorded the confessional statement of appellant No. 2 Nathubhai Patel on 29-10-1990. This statement is at Exhibit 54. Dange's deposition before the Court is corroborated by the other two witnesses with regard to all material particulars pertaining to the receipt of the information, raid, the finding of the drums containing hashish, the fact that appellant No. 1 led them to appellant No. 2.

47. Dange then stated in his deposition that on 29-10-1990 in pursuance of summons issued to Nathubhai on 28-10-1990, appellant No. 2 Nathubhai appeared in his office where he (i.e. Dange) recorded his statement. He has stated that he took care to inform appellant No. 2 that in case he gave statement, it would be used as evidence against him. Appellant No. 2 nevertheless voluntarily gave his statement to Dange. He has stated that appellant No. 2 wrote the statement in his own hand and has identified the statement at Exhibit 54. He has further stated that the 1st paragraph of the statement is in his own handwriting and on each page of the said statement appears the signature of appellant No. 2 and bears his signature on the last page.

48. Mr. Desai, learned counsel for appellant No. 2 contended that this statement is not in the handwriting of appellant No. 2 on the basis of the denial made in the statement recorded u/s 313 of the Code of Criminal Procedure. This does not seem to be correct. From a perusal of the original handwriting and the signature of appellant No. 2, duly identified by this witness PW-4, it clearly seems to be of the same person i.e. appellant No. 2. Mr. Desai further pointed out that while retracting the statement, appellant No. 2 has stated that the statement has been taken under force and mental torture and that no such statement was taken as on behalf of appellant No. 2.

49. Moreover, it is rightly pointed out by Mr. Galeria, learned A.P.P., that apart from what was stated in the applications, the appellants did not make any grievance to the learned Magistrate regarding any ill-treatment and no signs of any ill-treatment were demonstrated by them before the learned Magistrate.

50. PWs-3 and 4 have also denied in the witness box that they used any coercion or force.

51. From the evidence of the three officers examined, I find that the six drums containing hashish, and documents of the business concern of appellant No. 2 were found in possession of appellant No. 1. The reasons why these were found have been stated in the confessional statement of appellant No. 1 - the reason in short is, the appellant No. 2.

52. Now, from the confessional statement itself at Exhibit 54, it is necessary to consider the role of appellant No. 2 in regard to the contraband hashish found in possession of appellant No. 1. This statement was given by appellant No. 2 in

pursuance of a summons served on him (Exhibit 53) by PW-4 S.M. Dange. The relevant portions of the statements are that appellant No. 2 owns an industrial plot at Sangrila Industrial Estate, Vasai-Vajreshwari Road, District Thane, which he purchased in the year 1986. That amongst the several galas in this industrial plot, a firm by name Abina Industries functions from gala No. 3. This firm is a partnership firm having amongst its partners one Ajit Shetty, who is referred to by appellant No. 1. This appellant has further stated that on 28-10-1990 he was picked up in the afternoon from M/s. Balaji Enterprises, Eva Apartments, Anand Nagar, behind S.T. stand, Vasai (W), District Thane by the NCB officers. This was after Mahendra, appellant No. 1, came there along with the NCB officers and identified him. This appellant further states that he voluntarily accompanied the officers to the NCB office at Mumbai at about 17 hours. There the six drums which were transported by a tempo were examined in the presence of appellant No. 1 Mahendra and himself and these drums were found to contain in all 795 kgs. of hashish.

53. When questioned about these drums, he stated that he had given them to Mahendra for storage and further categorically stated that these were the very drums which he had given to Mahendra on 23-10-1990 for storage. He has also stated that before they were given to appellant No. 1, these six drums were stored in gala No. 3 which belongs to Ajit Shetty of M/s. Abina Industries, mentioned above.

54. This appellant then told the investigating officer that he came to know Mahendra through one Mr. Ishwarbhai Patel some time in January when there had been an accident in his factory and he was hospitalised. Mahendra had helped in solving the police case involving the death of a worker in his factory. Incidentally, Mahendra in his confessional statement has also stated that Nathubhai was admitted in hospital in January, 1990. This appellant has stated that he met Mahendra on a couple of occasions at the latter's farm house.

55. Though there is some difference in the version of this appellant and appellant No. 1, one fact is clear that this appellant asked Mahendra, appellant No. 1, when he would take the delivery of the six drums and the latter told him that he would do so after some days. He further states that Mahendra came to his factory and saw the drums stored in gala No. 3 of Ajit Shetty in order to know how big the drums were and how they may be transported. He also says that he gave Mahendra Rs. 500/- for transporting the drums to his farm house. That thereafter Mahendra took these drums and one cupboard in a tempo.

56. This appellant has further made a reference to one Khan who told him that these drums should be delivered, presumably to him (Khan). Khan gave him Rs. 2000/- as storage charges and promised Rs. 3000/- more after the receipt of the drums.

57. On 27-10-1990 he (Nathubhai) went to Mahendra's house and asked if he can take delivery of the drums. Mahendra told him that he would do so and

asked him for some money. Accordingly, Nathubhai paid him Rs. 2000/- which he had taken from Mr. Khan. He further told Mahendra that he would be paid Rs. 3000/- after he takes the drums. This appellant further states that he accordingly told Khan that delivery would be given in the morning of 28-10-1990. This appellant further stated that he was threatened by Khan that if the delivery of the drum is not given, "the party" would shoot him and Mahendra. That thereafter he accompanied Khan to Mahendra's house at about 8.30 hours on 28-10-1990 and showed him the drums in the passage. At that point Mahendra, told that they could take the delivery of the drums. As to the knowledge of this appellant about the contents of the drums, what emerges from his statement is that Ajit Shetty had told him that he is in trouble due to a drug (narcotic) case and that the goods in the drums are similar in nature as seized from Chetan Pharma and hence he asked him to help him in removing the goods from gala No. 3 to avoid further problem. He has further stated that he did not know that the drums contained hashish. In particular, with reference to appellant No. 1 "s claim that he was told by this appellant that the drums contained electrical chokes, this appellant has clearly stated that he did not tell appellant No. 1 that they contained electrical chokes.

58. This appellant's statement as to the reason of his involvement in this matter is that since Ajit Shetty helped him in his factory problems and the accident that occurred in his factory and also in the police case, he helped Ajit Shetty in shifting and transporting the drums containing contraband goods. This is accompanied by a statement where he states clearly that he knew that Ajit Shetty is wanted in narcotic case of Chetan Pharma, which Ajit Shetty had told him about in the past. This statement is followed by a statement which is reproduced here :

I had visited the hotel several times and met Ajit. I have assisted Ajit Shetty in storing the drums in the farm house of Mr. Mahendra. Now I have come to know that these drums contained hashish.

With reference to the manner and circumstance in which this appellant's statement was recorded, there is an indication in his statement where he says that when he was tired and expressly desired to have rest, he was given food and rest, that he voluntarily slept in the office.

59. It is important to note that this appellant, during the course of his statement, has identified Mahendra Tendolkar, appellant No. 1, as Mahendra referred to by him in the statement. As regards rest of the statement, most of which is in the question answer form, the important answers he has given with reference to the questions are as follows :

(a) That Ajit Shetty had told him that the drums contained narcotic drugs i.e., contraband goods and he would be happy if it is removed from there.

(b) That he helped Ajit Shetty and Khan in a friendly manner in storing and transporting the drums containing hashish under seizure and that according to

him Ajit and Khan are owners of the same.

(c) That he had told Mahendra that narcotic drugs are packed in the drums.

60. Having regard to the other evidence and fact that emerges from the statement of this appellant, the learned Special Judge has convicted this appellant u/s 29 of the NDPS Act as an a better and a party to a criminal conspiracy to commit offence under the NDPS Act. I find this finding of the learned Judges sustainable in view of the evidence discussed above.

61. Mr. Desai and Mr. Toraskar, learned counsel for the appellants contended that the statements cannot form the basis of any conviction for two reasons :

(a) that they are not admissible u/s 25 read with Section 26 of the Indian Evidence Act since they are made to police officers, and

(b) that the statements have been retracted.

As far as point (a) is concerned, it is by now settled law that officers empowered u/s 53 of the NDPS Act, with powers of an officer-in-charge of a police station are not "police officers" within the meaning of Section 25 of the Evidence Act. Therefore, a confessional statement recorded by such an officer in the course of an investigation under the Act is admissible in evidence against the person making it. This has been held by the Supreme Court in the case of Raj Kumar Karwal Vs. Union of India and others, where this very question was under consideration. While deciding this question on the basis of the crucial test: i.e. whether such officers are entitled to file a First Information Report u/s 173 of the Criminal Procedure Code laid down in Badku Joti Savant Vs. State of Mysore, Their Lordships have observed in para 22 :

There is nothing in the provisions of the Act to show that the Legislature desired to vest in the officers appointed u/s 53 of the Act, all the powers of Chapter XII, including the power to submit a report u/s 173 of the Code. But the issue is placed beyond the pale of doubt by Sub-section (1) of Section 36-A of the Act which begins with a non-obstante clause notwithstanding anything contained in the Code and proceeds to say in Clause (d) as under :

36-A. (a) a Special Court may, upon a perusal of police report of the facts constituting an offence under this Act or upon a complaint made by an officer of the Central Government or a State Government authorised in this behalf, take cognizance of that offence without the accused being committed to it for trial.

This clause makes it clear that if the investigation is conducted by the police, it would conclude in a police report but if the investigation is made by an officer of any other department including the DRI, the Special Court would take cognizance of the offence upon a formal complaint made by such authorised officer of the concerned Government. Needless to say that such a complaint would have to be u/s 190 of the Code. This clause, in our view, clinches the matter. We must, therefore, negative the contention that an officer appointed u/s 53 of the Act,

other than a police officer, is entitled to exercise all the powers under Chapter XII of the Code, including the power to submit a report or chargesheet u/s 173 of the Code. That being so, the case does not satisfy the ratio of *Badku Joti Savant* and subsequent decisions referred to earlier.

The effect of the law declared by the Supreme Court is therefore that confessional statements made before officers empowered u/s 53 of the Act are not barred by Sections 25 and 26 of the Evidence Act. These officers are not police officers within the meaning of Section 25 of the Evidence Act and therefore statements made before them are admissible in evidence against the person making it.

62. This view has also been taken by this Court in the case of *R.N. Kaker Vs. Shabir Fidahusein* and another, , and by the Patna High Court in the case of *Banshidhar Maharana v. State of Bihar*, reported in 1993 Cri LJ 1310.

63. Nothing to the contrary has been pointed out to me. I, therefore, hold that the confessional statements made by appellant Nos. 1 (Exhibit 46) and 2 (Exhibit 54) before the officers are admissible in evidence and can be looked into. I further find that the statements establish the guilt of the appellants.

64. The next contention advanced on behalf of the appellants is that no reliance ought to be placed on these statements in view of the fact that those statements have been retracted. In this regard, it is important to note that the statements were retracted only when the appellants were produced before the Additional Chief Metropolitan Magistrate, 3rd Court, Mumbai. The reasons given for retracting the statements have already been given above.

65. To recapitulate here, appellant No. 1 sought to retract his statement on the ground that the statement was recorded in English and was not properly explained to him and that it was recorded by force. The reason by appellant No. 2, is simply that his statement was taken under force and mental torture by the NCB officers. Having perused the statements and the depositions of the prosecution witnesses who recorded the statements, there does not appear to be any threat, coercion or force used by them on the appellants for recording their statements.

66. Even otherwise, apart from these confessional statements, the prosecution has clearly established the fact of recovery of 795 kgs. of contraband drug, hashish from six drums from the possession of appellant No. 1, and the identification of appellant No. 2 by appellant No. 1 by taking the officers to his place of business. In the circumstances, I am not inclined to attach/give undue importance to the retraction of the statements by the appellants before the learned Magistrate.

67. Mr. Desai, learned counsel for appellant No. 2 referred to some decisions of the Supreme Court dealing with necessity of corroboration where confession is retracted. Those decisions are under the Penal Code and turn on their own facts.

In particular, Mr. Desai placed reliance on the judgment of Kashmira Singh Vs. State of Madhya Pradesh, . After referring to the danger of relying on the statement of a co-accused who is an accomplice in the crime, Bose J., speaking for the Court observed : But these are only rules of prudence. So far as the law is concerned, a conviction can be based on the uncorroborated testimony of an accomplice, provided the Judge has the rule of caution, which experience dictates, in mind and gives reasons why he thinks it would be safe in a given case to disregard it. In cases under the NDPS Act such as this, the transaction normally takes place by those involved in drug trafficking in great secrecy which is often enforced by threats. The transactions, such as those in this case, rarely take place in public places or in places where the public has access. If the rule is strictly applied, it might become well nigh impossible to get cogent evidence from independent witnesses. In fact any independent witness would normally not be in a position to observe any transaction such as the arrangement made for storing contraband drugs which, as the facts of this case show, were transported from an industrial shed to a farm house, in drums which would appear to any independent witness as innocuous and common place. But for the confessional statements in this case, it would not have been possible to find out how an auto-rickshaw driver was found in possession of hashish worth Rs. 47,70,000/-. I would, therefore, in this case consider it appropriate to deviate from the rule which requires corroboration and rely on the law which does not bar the reception of such evidence, in the interest of justice.

68. Moreover, as I have observed, there is corroboration to the basic facts from the evidence of the officers. It is only as regards the circumstances due to which the contraband was found to be stored in the farm house, that the confessional statements of the two appellants need to be looked into: that too mainly for the culpability of appellant No. 2, Nathubhai.

69. A survey of the evidence led by the prosecution in this case shows that from the evidence of PW-1 Shahasane, PW-3 Ahire and PW-4 Dange, that in fact appellant No. 1 was found in possession of 795 kgs. of hashish. He led them to appellant No. 2 who according to him had asked him to store the said contraband. Appellant No. 1 was also found in possession of certain documents, in particular, the blank letter heads of Balaji Enterprises which is the name of the shop to which appellant No. 1 led the officers to see appellant No. 2. He was also found in possession of a blank letter head of Abina Industries which is the name of the concern of one Ajit Shetty, which does business from gala No. 3 which is situated in the premises of the factory of accused No. 2. The recovery of these documents and the fact of accused No. 1 having led the officers to accused No. 2 is also corroborated by the panchnama (Exhibit 44). This is, therefore, not a case where the only evidence is the confessional statements of the two appellants.

70. Mr. Desai has further pointed out that there is no evidence of pre-arrangement on the part of appellant No. 2, Nathubhai and appellant No. 1, Mahendra to prove conspiracy. That is a kind of evidence that would rarely be

available. From the evidence it does not appear that appellant No. 1, whose occupation was that of plying an auto-rickshaw, was financially capable of acquiring contraband hashish which has been valued at about Rs. 47,70,000/-. His source had to be some one else. He has pointed to appellant No. 2, in his confessional statement. Documents such as letterhead of Balaji Enterprises could not have been found to be in his possession but for some sort of relationship between them. Both the confessional statements and the circumstances of the case when weighed, prove the charge u/s 29 of the NDPS Act. The Trial Court has not committed any error in reaching this finding.

71. In the result, I find that the learned Special Judge has not committed any error of law or fact while convicting appellant Nos. 1 and 2 for offence punishable u/s 20(b)(ii) and Section 29, respectively. Hence, I confirm the judgment in appeal and order passed by the Special Judge (NDPS Act), Thane in Sessions Case No. 33 of 1991 on 25-8-1995 and dismiss both the Appeals, namely, Criminal Appeal No. 544 of 1995 and Criminal Appeal No. 78 of 1996.