

(2019) 04 BOM CK 0106
In the Bombay High Court
Case No : Criminal Appeal No. 256 Of 2004

Sau Mankarna And Ors

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 18-04-2019

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 2(iii)(b), 2(iii)(c), 2(xxiiiia), 2(viia), 20(B)(2)(c), 20(b)(ii)(B), 42, 43, 50, 50(6), 52, 52A, 52A(1), 52A(4), 57

Citation : (2019) 04 BOM CK 0106

Hon'ble Judges : S.M. Modak, J

Bench : Single Bench

Advocate : R.M. Daga, S.A. Ashirgade

Final Decision : Disposed Off

Judgement

1. The appellants were found in possession of contraband article 'ganja' kept in five bundles (in local language called as 'chungadi') in the intervening night of 2.9.2003 and 3.9.2003. It weighs about 45 kg. 545 grams (in total). It was at the 'T' Point on a road in front of Sushil Himmatsingh Vidyalaya near Sewagram Railway Station, Wardha.

2. Raju Kaurati (PW-10), while on patrolling duty, first noticed three suspected persons standing at the spot possessing bundles containing ganja. He informed to Superior P.S.I. Gopalsing Kuware (PW-9). In turn, this message was also forwarded to other patrolling party members. Siddharth Korake (PW-1) is one of them. He confirmed the information by visiting spot. In turn, he informed to P.I. Giri of Wardha Police Station. P.S.I. Kuware and P.I. Giri completed formalities at the Police Station and then visited the spot. During search, they found appellants possessing following description of contraband ganja :-

Sr. No.

Name

Weight

Articles given by police

1.

Mankarna (Appellant No.1.)

12.200 Kg.

'C'

2.

Panchafula (Appellant No.2)

9.300 Kg.

'D'

3.

Panchafula (Appellant No.2.)

5.200 Kg.

'E'

4.

Udaybhan (Appellant No.3)

7.725 Kg.

'A'

5.

Udaybhan (Appellant No.3)

11.345 Kg.

'B'

3. After completing the formalities, the appellants along with muddemal were brought to Wardha Police Station and P.S.I. Kuware lodged the Complaint and offence under Section 20(B)(2)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the N.D.P.S. Act") was registered. P.S.I. Shamrao Salve (PW-11) carried out investigation and filed Charge-sheet in the Court of Special Judge, Wardha. After usual procedure of framing of Charge and conducting trial, Additional Session Judge, Wardha convicted all the appellants and sentenced them to five years' imprisonment and fined them to Rs.40,000/- each.

4. The appellants were unhappy with the verdict and complained to this Court. They are on bail. I have heard learned Advocate Mr.R.M.Daga for the Appellants/

accused and learned Additional Public Prosecutor Mr.S.A.Ashirgade for the Respondent/State. With their assistance, I have read the record. As every one knows that there are various provisions of the N.D.P.S. Act which are required to be followed while searching and charge-sheeting a person. There is always an emphasis by defence to point out non-performance of these compliances. However, when I heard the arguments, Mr.R.M.Daga, learned defence Counsel laid emphasis only on one non-compliance. It is in respect of non-production of muddemal property at the time of adducing evidence before the trial Court. It is strongly opposed on behalf of prosecution.

5. This was the only point raised before us during oral arguments. But we will not restrict our findings to that objection only. We are conscious of the fact that we are dealing with first appeal and this Court is last fact finding Court. So we do not want to leave any room for grievance that first Appellate Court has not dealt with their grievances. So with that exercise in mind, we have perused the grounds of objections taken in the appeal memo. So I will deal with them also.

NON-PRODUCTION OF MUDDEMAL

6. When we read the evidence, we find that through Chemcial Analyser Chandrashekhar Kshatriya (PW-7), five parcels were opened. It is altogether different question whether it is sufficient compliance or not. He has categorically deposed about substance found in those parcels. Through him, chit and envelope in those parcels were marked as Exhibits. Those details are as follows :-

S.No.

Appellants

Chit

Envelope

1.

Udhaybhan

Exh.75

Exh.75A

2.

Udhaybhan

Exh.76

3.

Mankarna

Exh.77

Exh.77A

4.

Panchfula

Exh.78

Exh.78A

5.

Panchfula

Exh.79

Exh.79A

In all these parcels, substance was found. The papers marked as Exhibits were kept in the record and substance kept in plastic bag was deposited.

7. When the evidence of Chemical Analyser is read in detail, it is seen that he has used three grams of quantity for analysis from samples and on that basis, he gave his opinion. The unused quantity after sealing was returned to the Police. The parcels/substance shown to him in the Court is nothing but the unused quantity returned by him to Police. He gave his opinion below Exh.74. The samples contain flowering tops, leaves and stalks means 'Ganja'.

8. There are questions raised about a) not mentioning the exact quantity of ganja used by him for analysis and b) not mentioning exact weight of each sample in Exh.74. Exh.74 is his opinion. These are important questions. He has given description of five parcels and what was found in each sample. For that, it will be material to consider the evidence of a witness who delivered sealed parcels to the Office of C.A.

CARRIER

9. It is Police Constable Dilip Masram (PW-6) who took five packets and delivered it to the Office of C.A. He took a letter along with him. He brought acknowledgment from the Office of C.A. It is at Exh.70. The forwarding letter is not exhibited through him but through C.A. It is at Exh.73. The acknowledgment mentions about receipt of five parcels in sealed condition and reference of buckle number of witness Masram. It has got limited meaning. The purpose is to acknowledge delivery of parcels after verifying its condition. If we read the forwarding letter at Exh.70, we can find various particulars mentioned in it. It contains total weight and weight of a sample. It also contains details of the accused etc. On considering these aspects, non- mentioning the weight of each sample by C.A. in Exh.74 is not a major lacunae. This can be said also about non-mentioning the weight of sample used by him. If C.A. could have mentioned

these weights, it ought to have shown more transparency. However, it does not persuade us to disbelieve the procedure followed by the C.A.

NON-SEALING

10. At this juncture, only I deem it proper to deal with the grievance about non-sealing the parcels properly and tampering with them. This grievance was not raised during oral arguments. It is pleaded in memo of appeal. This Court does not want to keep open room for making grievance. With this perspective, when record is perused, we find that right from seizing the bundles, samples at the spot till the time it reaches the Court during evidence, no major lacunae was found in the procedure for sealing. The following are the stages :-

- a) First it started at the spot at the hands of P.S.I. Kuware PW- 9, then it reaches to PW-5 A.S.I. Wanjari (deposit of muddemal in Police Station).
- b) From Moharir Wanjari, the parcels reaches to the hands of P.S.I. Salve PW-11 for producing in the Court of Chief Judicial Magistrate.
- c) From there again parcels came back to Moharir A.S.I. Wanjari.
- d) From A.S.I. Wanjari, PW-6 P.C. Masram took five parcels (out of 15) and delivered it to the Office of C.A.
- e) After analysis, unused quantity was returned to Police and then it is produced in the Court.

11. We have perused the evidence of the witnesses referred above.

Broadly we are convinced that procedure for sealing was followed. At some places, at the most, we find that there are incomplete particulars while mentioning the details in one document. For e.g. non-mentioning details of articles in Station diary, but only mentioning total number of samples at the same time. However, these details find place in Seizure Panchanama. At the same time, giving details of samples in forwarding letter to C.A. on one hand, but not mentioning the details of samples when carrier (after delivery to C.A. returned) mentions them in Station diary are minor issues and they are not sufficient enough to disbelieve about tampering.

12. We find no document about handing over the samples containing unused quantity by C.A. to Police. But compliance can be ascertained from another angle. We find article number given by police to five samples tallied with article number appearing on parcels when opened in the Court at the time of evidence. Hence, we find the link is established. C.A. Kshatriya has also confirmed about sealing when he completed analysis. For above discussion, we discard the objection.

13. It is true that there is evidence to suggest that the Office of Chemical Analyser received five parcels, each containing 50 grams of ganja. It is also true that there is no document to show exact quantity of ganja returned by C.A. to

Police (orally he has said about using three grams). We can always insist on documentary evidence of every fact. So also, we can always insist on one fact corroborated by another fact. But merely because these facts are absent, it does not mean that first fact is to be disbelieved in every contingency. It is only a question of putting the record straight. This is more true in case of recording a fact at one place and recording the same fact at other place. Now it will be material to verify whether the substance found in parcels/envelopes is sufficient compliance and whether, apart from it, is there any other quantity of ganja and what has happened about that.

EVIDENCE ABOUT OTHER QUANTITY

14. It will be relevant to consider the evidence of P.S.I. Salve (PW-11). Apart from taking down the F.I.R. of P.S.I. Kuware and filing Charge-sheet, he has taken steps to comply with the provisions of Section 52-A of the N.D.P.S. Act. After complying with the written formalities, he took seized property along with C.A. samples and took it to the Chief Judicial Magistrate. He took fifteen samples/parcels along with him. The forwarding letter is at Exh.107. There are details of Exhibit Number mentioned in the letter. It is clear from his evidence that Rajendra Satpute (PW-8) (person who weighed the samples) was present before the C.J.M. There is a Certificate (Exh.108) issued by C.J.M. about compliance of formalities before him. There is statutory recognition once Certificate of compliance of Section 52A of the N.D.P.S. Act is produced.

15. Once the inventory of articles is taken, it is primary evidence in respect of the offence [Section 52-A(4) of N.D.P.S. Act]. The Certificate is at Exh.108. It gives description of five sealed bags and ten sealed sample bundles. Their details are as follows :

S.No.

Article Number

Weight

1.

'A'

7 Kg. 400 Grams

2.

'B'

11 Kg. 245 Grams

3.

'C'

12 Kg. 100 Grams

4.

'D'

9 Kg. 200 Grams

5.

'E'

5 Kg. 100 Grams

6.

A-1

50 Grams

7.

A-2

50 Grams

8.

B-1

50 Grams

9.

B-2

50 Grams

10.

C-1

50 Grams

11.

C-2

50 Grams

12.

D-1

50 Grams

13.

D-2

50 Grams

14.

E-1

50 Grams

15.

E-2

50 Grams

TOTAL

45 Kg. 545 Grams

After taking samples, net weight is mentioned and marked as Articles 'A' to 'E'.

16. After weighing all bags and samples, they were sealed and handed over to P.S.I. Salve. In order to know the details of these article numbers, evidence of P.S.I. Kuware is relevant. In his evidence, we get the details of article numbers given to samples and article numbers given to 'ganja' which remained after drawing up samples. The details are as follows :-

Appellant

Article Numbers given by Police for CA analysis

Remaining Bundle/Chungdi

1.Manakarna

C1, C2

C

2.Panchfula

D1, D2

D

Panchfula

E1, E2

E

3.Udaybhan

A1, A2

A

Udaybhan

B1, B2

B

It is clear that one bundle/chungadi was found with appellant no.1 Manakarna and two chungadis each were found with other two appellants. P.S.I. Kuware took one sample each from one chungadi and gave article number to it and gave separate article number to remaining quantity. These facts are documented in Seizure Panchanama at Exh.54. Seizure Panch Anil Gawande (PW-2) has not supported and another panch was not being examined.

17. On this background, if we read the evidence of Chemical Analyser Chandrashekhar Kshatriya (PW-7), we find certain exhibit numbers given to parcels/envelopes received from Police for analysis. The forwarding letter at Exh.73 contains exhibit number of five samples. It means that P.S.I. Kuware does not sent all samples of all appellants. He only sent one sample from each bundle per appellant. They are as follows :-

Appellant

Article Number sent to C.A.

3. Udaybhan

A1, B1

1. Manakarna

C1

2. Panchafula

D1, E1

We could find out similar exhibit numbers as C.A. report at Exh.74. We have also confirmed exhibit numbers mentioned on envelope cover/parcel exhibited through C.A. in the Court. Their exhibit numbers are 75A, 76, 77-A, 78-A and 79- A (given by the Court). The exhibit number of samples given by Police does appear on the envelope cover/parcel. It verifies the fact that five sealed samples sent by Police were received by the Office of C.A., analysed by them and the remaining substance was sent in a sealed parcel to Police. It confirms the fact that they are samples/parcels which were shown to C.A. Kshatriya in the Court.

18. P.S.I. Kuware made mention of fifteen article numbers given to fifteen parcels (five for C.A. and ten remaining) in the Seizure Panchanama. But, when corresponding entry is taken in Station diary, there is only mention of Article Nos.'A' to 'D' and ten samples (no specific mention of Article Nos. 'A' to 'E2'). We do not think it material, because entry in Station diary is secondary and entry in Seizure Panchanama is primary.

19. For above discussion, we hold that parcels/envelopes/samples (five in numbers) shown to C.A. Kshatriya are nothing but parcels sent by P.S.I. Kuware for analysis. It is not used but unused quantity returned by C.A. During evidence,

C.A. Kshatriya has said in general terms 'substance' (and not 'ganja'). But there is reason to believe that substance was 'ganja'. These parcels are duly verified by P.S.I. Kuware (Seizure Officer).

DISPOSAL OF SEIZED PROPERTY

20. Section 52A(1) of the N.D.P.S. Act says about disposal of seized property by Competent Officer as per guidelines issued by the Government. The Police Officer must have done that compliance. In the final order, learned Additional Sessions Judge has given directions to dispose of 45 Kg. 545 grams to Narcotic Cell. As discussed above, we find entire seized ganja into three categories as follows :-

(a) samples sent to C.A. and produced before the Court.

(b) another part of samples not sent to C.A. by police.

(c) remaining quantity.

We would like to give certain directions. We are cautious of the directions given by Hon'ble Apex Court in the case of Union of India .vs. Mohanlal and another reported in (2016) 3 SCC 379.

CITATIONS BY APPELLANTS

21. On this background, we will turn to the ratios laid down in the Judgments relied upon by the appellants. Hon'ble Supreme Court set aside the conviction in case of Ashok @ Dangra Jaiswal vs. State of Madhya Pradesh reported in (2011) 5 SCC 123. One of the ground was - non-production of Narcotic powder before the trial Court as a material exhibit and not giving explanation for it's non-production. There was report of Forensic Science Laboratory. Non-production was considered to be a material irregularity. On similar lines in case of Gorak Nath Prasad .vs. State of Bihar reported in (2018) 2 SCC 305, non-production of seized ganja was considered as fatal to the prosecution case. Similarly, learned Single Judge of this Court in case of Majjikhda s/o. Hanifkha Khan vs. State of Maharashtra (Criminal Appeal No.431 of 2005) considered the lacuna in not producing contraband ganja before the trial Court and benefit was given.

22. I have perused the facts narrated in the above referred Judgments. With respect to the observations made therein, I conclude that they are not useful to the appellants. The reason is that the facts are different. From the above referred Judgments, it does depict that the seized property was not produced and there was total failure to produce it before the trial Court. The issue has never arisen in those cases that the samples returned by C.A. were produced before the trial Court. In the case before us, the unused quantity of ganja returned by the C.A. was produced before the Court and they were identified by the C.A. and P.S.I. Kuware. I am of the considered opinion that there is compliance about production of part of seized muddemal before the trial Court. The objections taken by the appellants are turned down.

23. For the above discussion, I hold that the samples produced before the Court

is sufficient compliance and two witnesses have identified them. So I do not find any lacuna in the prosecution evidence to that effect.

NOT EXCLUSIVE GANJA BUT MIXTURE

24. Ganja is one of the types of cannabis. Meaning of 'Ganja' is given in Section 2 (iii)(b) of the N.D.P.S. Act. It says about what should be the Ganja and what should not be the Ganja, particularly when there are flowering tops or not. On reading its meaning, we can gather that -

[a] If flowering tops are there, those tops including seeds and leaves becomes Ganja and;

[b] If flowering tops are not there, Ganja does not include seeds and leaves.

25. It means, it is the growing of flowering tops that makes the parts of Ganja tree as a prohibited 'ganja'. The reason is only after growing of flowering tops, a stupefying substance might develop. In the case before us, Chemical Analyzer has found tops, seeds, leaves and stalks. So the seized material is certainly 'ganja' as required by the law. The learned Additional Sessions Judge while elaborating on that, has taken assistance of Section 2(iii)(c) of the N.D.P.S. Act. It says about the mixture of Charas or Ganja with or without neutral material. Probably, the learned trial Judge has considered the factual observation of mixture of tops, seeds, leaves and stalks by the Chemical Analyzer. These inputs are within the meaning of 'ganja' only. These inputs form 'ganja' as a separate category. For that purpose, there is no need to take assistance of Clause (c). Clause (c) will come into picture only when there is a mixture of Charas with other material or mixture of ganja with other material. So also, the law pre-supposes seeds, leaves, stalks as a 'ganja' flowering tops being there. Flowering tops are noticed by the C.A. Hence, defence's objection is turned down.

NON-COMPLIANCE OF MANDATORY PROVISION

26. As noticed above, this ground is taken only in the appeal memo and it was not argued. We find that the provisions of Sections 42, 43, 50, 52A and 57 are relevant.

SEARCH AT PUBLIC PLACE

27. In this case, search was conducted near 'T' Point near Sushil Himmatsingh Vidyalaya, Sewagram Railway Station. Admittedly, it is a public place. So, the provision of Section 42 of the N.D.P.S. Act will not be applicable, but it is the provision of Section 43 of the N.D.P.S. Act that will be applicable. There is a necessity to note down the information received by the prescribed Officer about commission of an offence under the N.D.P.S. Act. This is a pre-requisite before searching a building and taking further steps. These wordings do not find place in Section 43 of the N.D.P.S. Act. Even otherwise, when I perused the evidence of relevant witnesses, I do find about documenting the information about seizure of ganja.

28. As said above, Raju Kaurati (PW-10) is the first person who noticed the appellants in suspicious circumstance. He informed P.S.I. Kuware; whereas Siddhartha Korake (PW-1) patrolling from another party also got information and he informed to P.I. Giri. When we read the evidence of P.S.I. Kuware (PW-9), we find that necessary documentation is done. P.S.I. Kuware sought permission of P.I. Giri and it was also given. Necessary entries in the Station diaries were also taken. P.I. Giri gave direction to secure presence of photographer and weighman. It has come in the evidence that weighman Rajendra Satpute (PW-8) did visit the spot and weighed the contraband.

29. P.S.I. Kuware was cross-examined on the point of omission to make entries in Station diary. There is omission to mention in Station diary about presence of these two persons and also of the fact of carrying sealing materials with them. All minute details need not be mentioned in the Station diary. There is corroboration to the presence of weighmen at the spot and sealing evidence in the parcels provided through C.A. in the Court. Hence, omission is not material. I find sufficient compliance of Section 43 of the N.D.P.S. Act.

SEARCHING THE SUSPECT

30. When we talk about compliance of Section 50 of the N.D.P.S. Act, there are two contingencies. One is searching the body of person and second is searching the articles found with the person. It may happen that, during bodily search, nothing contraband could be found and that it could be found in the articles found with the person. In that eventuality also, it is held that compliance of Section 50 of the N.D.P.S. Act is necessary. It gives an option to the suspected person to insist for taking search in presence of a Gazetted Officer or a Magistrate. In this case, we find that this part of the procedure was taken care of by P.I. Giri (PW-12). Letter asking willingness of appellants is at Exh.121. All appellants refused to take search in presence of independent Gazetted Officer or Magistrate. Appellant Udhaybhan signed and other two lady appellants have put thumb impressions.

31. Defence tries to contradict in between contents of Exh.84 and Exh.121. Exh.84 is a request letter given by P.S.I. Kuware to P.I. Giri taking permission to lay a trap. Letter at Exh.121 was given at a later stage. It is improper to expect contents of letter at Exh.121 to be written in Exh.84.

32. Apart from P.I. Giri, Siddharth Korake (PW-1) and P.S.I. Kuware (PW-9) were the police who were present at the spot at the time of raid. I have read the evidence of both these witnesses minutely. Siddharth Korake (PW-1) is one of the patrolling party member who visited the spot earlier to raid. His case is that, from the spot, he went to Wardha Police Station and informed to P.I. Giri. And again he visited the spot on the instructions of P.I. Giri. His evidence suffers from improvement. Certain particulars were told by him in the Court and they were not stated by him while giving police statement. He has admitted the same. Facts about "meeting P.I. Giri, P.I. Giri following him to the spot, refusal given by the

accused to conduct search in the presence of I.O./Magistrate" are improvements. I do not find evidence of Siddharth Korake (PW-1) on the point of raid reliable.

33. There is also an attempt to discard the evidence of P.S.I. Kuware. He was cross-examined on the point of his oral evidence on the point of raid on one hand and contents mentioned in Seizure Panchanama at Exh.54. Omission to mention 'refusal by the appellants about search' in Exh.54 is not material. After taking overall view of the evidence, I am convinced about evidence about compliance of Section 50 of the N.D.P.S. Act.

INTIMATION TO SUPERIORS

34. I have already discussed about compliance of Section 52 of the N.D.P.S. Act. The N.D.P.S. Act requires intimation to Superiors once raid is conducted. Law expects such raid should not be a private affair. In two eventualities, the Officer is supposed to inform to his immediate Superior when search of a person is conducted in absence of a Gazetted Officer or a Magistrate. The Seizure Officer has to record the reasons and send copy within 72 hours to his immediate Superior as contemplated under Section 50(6) of the N.D.P.S. Act. This has not happened in the case before us, because the appellants were given option and they have refused because the appellants were given option and they have refused it. Similarly, report to immediate Superior is required within 48 hours when any person is arrested or seizure is affected. It is contemplated under Section 57 of the N.D.P.S. Act.

35. For above discussion, I am convinced about substantial compliance of relevant provisions of the N.D.P.S. Act.

CONSCIOUS POSSESSION

36. Possession of contraband is essential. There are various facets of possession. There must be intention/knowledge to possess. Possessor must know. It implies custody or control over the articles. These contraband may be on the person of suspect or in any of the articles found on the person of suspect or it may be in any of the articles away from the person of suspect still under his control. In case before us, contraband were not found on the person or in the articles found on the person of the appellants. But they were found in five bundles/chungadis found with three appellants. All the bundles/chungadis are same. Some one called them as 'bundles'. Some one called them as 'chungadis'. Siddharth Korake (PW-1) was cross-examined on this aspect. Chungadi may be described as 'gunny bag'.

37. Even though Raju Kaurati (PW-10) firstly and Siddhartha Korake (PW-1) later on went to the spot and had seen the appellants with chungadis, raid was conducted when P.S.I. Kuware and other police staff went there. Evidence of P.S.I. Kuware inspires confidence on the point of possession of contraband by three appellants. About quantity of contraband, there is evidence of weighman Rajendra Satpute (PW-8). He has weighed it in three manners. Weight of

contraband with Chungadi, only of contraband was taken by him and only of chungadi/bundle.

38. These seized articles were produced after some days before Chief Judicial Magistrate by P.S.I. Salve. They were found correct. Witness Satpute though needs police help as his son is facing prosecution, he will not give false report altogether. Out of two patrolling party members, Raju Kaurati (PW-10) has limited role to play. After informing P.S.I. Kuware, he left the spot and not witnessed the raid.

39. To prove possession of appellants, evidence of P.S.I. Kuware is material. His evidence and that of Rajendra Satpute (PW-8) shows the following particulars of quantity vis-a-vis the appellants :-

Appellant

Bundle with substance

Only substance

Articles

Udaybhan

7.500 Kg.

7.725 Kg.

'A'

Udaybhan

11.500 Kg.

11.345 Kg.

'B'

Mankarna

12.500 Kg.

12.200 Kg.

'C'

Panchfula

9.600 Kg.

9.300 Kg.

'D'

Panchfula

5.500 Kg.

5.200 Kg.

'E'

Appellant Udaybhan and Panchfula with two bundles each and appellant Mankarna was found with one bundle. From every bundle, sample of 50 grams was taken. There are two aspects. First is reliability of prosecution story and second is procedural compliances.

40. There is a time gap in between visit to the spot (by Raju Kaurati (PW-10) and Siddhartha Korake (PW-1) one after another) and visit by P.S.I. Kuware for raid. It is but natural because certain formalities need to be completed prior to raid. The Seizure Panchanama at Exh.54 was performed in between 3.45 a.m. to 6.45 a.m. on 3.9.2003. These appellants were found with those bundles/gunny bags by P.S.I. Kuware. There may be lapses on the point of documenting the events. But I do not think that evidence on the point of possessing gunny bag containing ganja by appellants was seriously challenged. Seizure panch Anil Gawande (PW-2) has not supported and another panch is not being examined. It is not a universal rule that if panchas do not support, you will have to discard the evidence of Police. If we consider the quantity of ganja we find that it is difficult to implant on the person of appellants.

41. I noticed certain short-comings in the documentation. That is to say, one fact is mentioned in Seizure Panchanama at Exh.54, but not mentioned in Station diary entries and in F.I.R. I do not consider these omissions of vital importance. Reason is Exh.54 is vital document and entries in Station diaries are made just to have more reliability about timing. So also, one may not mention all the minute particulars in F.I.R., when they are mentioned in Seizure Panchanama. I am inclined to believe the evidence of P.S.I. Kuware more. I conclude in favour of prosecution on the point of conscious possession.

MATERIAL DISCREPANCIES AND APPROACH

42. I do find certain discrepancies. But Court cannot discard the evidence just because there are discrepancies. Court has to see to which subject those discrepancies relates, whether there are other documents and what is the effect. As said above, I find in respect of some of the particulars, contents of primary documents (e.g. Seizure Panchanama) do not support secondary document (e.g. Station diary entry). This can also be said about willingness letter of search and Station diary entries. I do not consider them as major lacunae. If the omission could have been in primary documents, certainly benefit ought to have been given to defence.

43. This can be also said about corroborating the oral evidence with earlier statements. I find some areas in the evidence of Siddharth Korake (PW- 1). From the spot till going to Police Station, his evidence is consistent. But from the time of leaving Police Station to the spot on the say of P.I. Giri, I noticed inconsistency

in between his evidence and his previous statement. I discard his evidence on the point of raid. These improvements were recorded in para 12 onwards. His evidence is only reliable on the point of first visit and noticing three appellants with five bundles. He and Raju Kaurati (PW-10) have identified all the appellants before the Court.

44. Appellant Udhaybhan tried to take the defence of alibi. But the evidence of Prabhakar Bhandarkar (PW-3) - Station Manager and Bholashankar Rajgire (PW-4) - Deputy Station Manager clearly show that Udaybhan has attended the duty in between 2.9.2003 and 3.9.2003 and at material time, he was absent from duty. Appellant Udaybhan was also examined by doctor Dr.Gopal Bhagat of Civil Hospital, Wardha on 4.9.2003 on account of urinary problem. But his examination is after the incident.

45. When I read the trial Court Judgment, I find that the trial Court has not paid any attention to the lacunae in the prosecution evidence as discussed by me hereinbefore. Even I find one more area where the trial Court has not given categorical finding. It is in respect of exact quantity of ganja possessed by each of the appellants.

46. Be that as it may, even after discarding that portion of evidence as discussed above, remaining evidence is reliable. Even though there are more than one Police Officers present at the spot, all need not tell all the particulars. Though the trial Court has not given due weightage to the lacunae, overall appreciation of evidence is not erroneous.

47. I conclude that the offence is proved beyond reasonable doubt. The quantity possessed by each of the appellant needs to be considered.

QUANTITY

48. There is an evidence to suggest that appellant No.1 was found with one chungadi and other two appellants with two chungadi each. There is an evidence to show their weights; i.e. to say chungadi is with substance and substance separately. So, we can infer that appellants were found with following quantities of Ganja.

Appellant No.1 Mankarna

12.200 kgs. (Article C)

Appellant No.2 Panchfulla

9300 kg (Article D) + 5200 kg (Article 'E')

Appellant No.3 Udaybhan

7.725 kgs. (Article A) + 11.345 kgs. (Article B)

49. Only net weight of Ganja is given. The weight of the bag cannot be considered. Prosecution has taken precaution in giving separate weight. The

weight is important because there is a different punishment depending upon the weight. Small quantity and commercial quantity is defined in Section 2 (xxiia) and (viiia) of the NDPS Act. Standing Order dated 19th October, 2001 prescribes 1000 grams as a small quantity and 20 kgs. as a commercial quantity for Ganja (Sr. No.55). All the two appellants were possessing a quantity greater than small quantity but lesser than a commercial quantity. Section 20(b)(ii)(B) of the NDPS Act prescribes imprisonment up to 10 years and Rs.1.00 lakh fine for intermediate quantity. The learned trial Judge has convicted all the appellants for the offence punishable under Section 20(b)(ii)(B) of the NDPS Act and sentenced them to 5 years imprisonment and fine of Rs.40,000/-. I do not find any discussions about the quantity possessed each of the appellants. There is general discussions in paragraph 55 of the judgment as total weight was 45.545 kgs.

SENTENCE :

50. The appellants relied upon Judgment in the case of Javed A. Bhat vs. Union of India reported in 2007 ALLMR (Cri) 99. I have perused the facts very minutely. In that case, there was seizure of Cigarrates or flat substance weighing 380 grams. Two representative samples of 50 grams were taken and one such sample was sent for analysis. The C.A. analysed five grams out of 50 grams. Hon'ble High Court reduced the sentence by opining that entire quantity of 380 grams was not sent for analysis, but only 50 grams was sent. The observations in the case of Mr.Gaunter Edwin Kircher .vs. State of Goa (1993(1) Crimes 1183) were relied upon. In that case, two pieces of Charas weighing 7 grams and 5 grams were seized and only one piece was sent for analysis. Benefit was given because sufficient quantity from both the samples was not sent for analysis. With respect to the ratio laid down therein, I am of the considered opinion that it will not help the appellants in persuading me to reduce the sentence by considering only the quantity sent for analysis to Chemical Analyser. So also, in that case, it does not disclose about compliance of provisions of Section 52-A of N.D.P.S. Act about disposal of seized property. In view of that the punishment has to be decided on the basis of entire quantity of ganja found with each of the appellants.

51. Learned Advocate Shri Daga for the appellants prayed for leniency on the ground of appellant nos. 1 and 2 being the ladies and their present age being of 50 and 60 years respectively. Leniency is also prayed for appellant no.3 for the reason that he has also suffered a lot since 2004. Whereas learned Additional Public Prosecutor supported the sentence awarded by the trial Court. I am of the considered opinion of altering the sentence. Gender of appellant nos. 1 and 2 and passage of 15 years since 2004 weighed my mind to do that. Admittedly, except this case, no other past record is pointed out to me. There is nothing on record to show that these appellants were engaged in the business of the ganja or they were found while selling it to some one. They are only the possessors. I do agree that maximum imprisonment of ten years is not awarded and as such, five years' imprisonment was reasonable by the trial Court. But, at appellate level, I am inclined to reduce that imprisonment. I am also influenced while

altering the sentence due to the fact that appeal was not argued substantially (though I have given findings by considering the grounds in the memo of appeal). So, I am inclined to award one year rigorous imprisonment on one hand and inclined to increase the amount of fine from Rs.40,000/- to maximum fine of Rs.1,00,000/-.

DISPOSAL OF PROPERTY

52. The learned trial Judge has given direction to Narcotic Cell to dispose of entire quantity of 45 Kg. 0.45 grams after period of appeal is over. There is evidence to show that there is a compliance of Section 52-A of N.D.P.S. Act before the Court of C.J.M., Wardha. There are Circulars issued by the Government under Section 52-A of N.D.P.S. Act relating to disposal of the property after following the procedure laid down in that Section. This Court is not aware whether any property is disposed of as per that provision. This Court is also not aware about disposal of those samples which are not sent to Chemical Analyser. Hon'ble Supreme Court in case of Mohan Lal as referred above has taken serious cognizance of blatantly violating the provisions of law relating to disposal of property. So, I also deem it proper to issue certain directions to the concerned Authorities. I intend to issue these directions only for verifying the fact that the muddamal property was and should be disposed of as per law. This Court is conscious of the time elapsed since 2004. But, it does not mean that we should not insist for compliance.

53. When both the sides appeared before me for pronouncement of Judgment, they expressed desire to argue on the point of sentence. Hence, I have heard them. Mr.R.M.Daga, learned Counsel for the appellants/accused requested to give substantive sentence only for the period already undergone by the appellants. According to him, during pendency of the trial and till the time sentence is suspended by the Appellate Court, the period of detention of appellants is almost seven months. He also brought to my notice copy of Disability Certificate of Appellant no.3 Udaybhan s/o. Sitaram Dhongade mentioning that right portion of his body is suffering from stroke. The said Certificate is taken on record and marked as "X" for identification. The prayer is opposed by learned Additional Public Prosecutor. I am inclined to accept the request. Considering the gender of appellant no.1 Sau.Mankarna w/o. Mohan Jadhav and Sau.Panchafula w/o. Baburao Bajirao Shinde @ Wanjari and disability of appellant no.3 Udaybhan s/o. Sitaram Dhongade, I do not think that any purpose will be served by sending them to jail for undergoing the remaining sentence. Hence, I am inclined to sentence them for the period already undergone by them. Eight weeks' time is granted to deposit the amount of fine.

1) The appeal is partly allowed.

2) The conviction of appellant nos. 1 to 3 for the offence punishable under Section 20(b)(ii)(B) of N.D.P.S. Act is maintained.

3) The appellant nos. 1 to 3 are sentenced to undergo rigorous imprisonment for

seven months and to pay a fine of Rs.1,00,000/- (Rupees One Lakh) each and to undergo further period of rigorous imprisonment to one year in case of default to pay the amount of fine.

4) They are entitled to set off for the imprisonment already undergone and also set off if the fine amount of Rs.40,000/- if paid earlier.

5) Eight weeks' time is granted to pay the amount of fine.

6) The Superintendent of Police, Wardha is directed to see that entire quantity of 45 Kg. 545 grams of ganja be destroyed as per the law if not already disposed of.

7) The Superintendent of Police is further directed to strictly comply with the disposal directions and to conduct a departmental inquiry if required if he finds that any of the seized ganja is not found or if disposal record is not coming forward.