

(2009) 06 BOM CK 0006
In the Bombay High Court
Case No : Criminal A. No. 234 of 2008

Shahaji Mattapattil and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 30-06-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 313, 465
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2, 20, 21, 27, 42

Citation : (2010) CriLJ 1997

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

Bench : Single Bench

Advocate : R.M. Daga, for the Appellant; Y.B. Mandpe, for the Respondent

Final Decision : Allowed

Judgement

S.R. Dongaonkar, J.—The appellants herein are taking exception to the judgment rendered in Special Case No. 1/2008 by ad hoc Additional Sessions Judge 3, Chandrapur, dated 3.5.2008, whereby each of them was convicted for the offence punishable u/s 20(a) of the Narcotic Drugs & Psychotropic Substances Act, 1985 [hereinafter referred to as N.D.P.S. Act, for the sake of convenience] and sentenced to suffer rigorous imprisonment of 7 years and to pay fine of Rs. 50,000/, in default, to undergo rigorous imprisonment for one year each.

2. Facts on the basis of which the charge-sheet was filed against the appellants are that, on 12.01.2007 one Tulshiram Nitnaware, P.I. was working at Police Station, Ballarshah (P.W.8). He had conducted raid on receipt of information that at mouja Amdi in the field of Rushi Nale (P.W.1), some people of other State have started cultivating cannabis plants. He, on this information, took permission from S.D.P.O. Chandrapur Shri Manere by the letter. Said letter was shown to Panch Bhaskar Sahare (P.W.7) & one Deokumar Kurul. He had gone for raid along with photographer and Naib Tahsildar - Shri Parkhi (P.W.3). Measurer Jawed Khan (P.W.5) was also called. All of them first came to Police Station Ballarshah. Then

they proceeded towards village Amdi. They stopped their jeep near village Yenbodi and then started proceeding towards the field of Rushi Nale by walking. They reached to the spot at about 3.40 p.m. They found six persons cultivating the cannabis plants in the field of Rushi Nale. The present appellants were the same. Then the raiding party offered their search. The accused took their personal search as required under the provisions of N.D.P.S. Act. It is alleged that the appellants had planted cannabis plants in four acres of land which was divided in two parts, one part of 3 acres and other of one acre. The entire field was allegedly having plantation of cannabis. Photographs were taken. All these cannabis plants were uprooted and weighed by the measurer. The weight was found to be 220 kg. Out of that 2 kg. was taken as sample. The same was sealed as per rules and thereafter the same was sent to Chemical Analyser. Investigating Officer Tulshiram Nitnaware, P.I. also took search of the tin shed and found 350 grams seeds of cannabis and so also found other equipments of cultivation i.e. plastic pipes, five spades, two watering container etc. All these articles were seized. He also took two other samples 25 grams each out of the seized cannabis seeds of 350 grams which were sealed by him under the signatures of panchas and by affixing the labels thereon. He prepared spot panchnama Exhibit 19 in detail on the spot and obtained certificate of Naib Tahsildar Shri Parkhi as per Ex. 20. Thereafter I.O. Tulshiram Nitnaware, came to Police Station with all the accused and seized the property. The offence, vide crime No. 3086/2007 for offence punishable under Sections 20, 21 and 27 of the N.D.P.S. Act was registered. The relevant first information report is produced during the trial. After due investigation, the appellants were charge-sheeted for the aforesaid offences. It is alleged that the Investigating Officer had obtained documentary evidence Exhibit 14 from Rushi Nale by which it was revealed that the said portion of land was let out for cultivation by him to one Shankar Ayyar. It is alleged that the appellant No. 3 Polt George was a mediator in the transaction. As stated, the appellants were charge-sheeted after due investigation which includes receipt of the Chemical Analyser's Report which indicated that said plants were cannabis plants and the seeds were of cannabis.

3. Learned Special Judge framed charge against the appellants for the offences u/s 20 of the N.D.P.S. Act. The same was explained to the appellants. They pleaded not guilty. Their defence as appears from Section 313 Cr.P.C. statement is that the case is false and the police had arrested them on road, took them to P.S. Ballarsha and then took them to the spot i.e. plantation of cannabis.

4. Prosecution in order to establish the guilt of the appellants examined in all 10 witnesses. Brief summary at this stage would suffice. P.W. 1 Rushi Nale is the witness, who is owner of the said land & has deposed that some persons came to him, one of them being Sitaram and other being Sattyam who wanted his field on Theka (contract) to cultivate vegetables. After settling the terms; he entered into an agreement, whereby the rent was determined to Rs. 30000/per annum. He accepted Rs. 1000/towards an earnest money. Accordingly, document was executed bearing Exhibit 14. It is stated by him in the evidence that at the time

of agreement the executant had disclosed his name to be Shankar Ayyer. Stamp paper was signed by him in his field before Sattyam. He further stated that after plantation as the plants were of unknown variety, he made an inquiry & he was informed that those are medicinal plants. Later on, this raid was conducted. He identified the appellant No .3 Polt George to be the person who had told his name as Radhakrushna Shankar Ayyar.

P.W. 2 Sattyam Madtani, is examined to show that Polt George had approached to him and asked him to search a field for cultivation purpose for Nilgiri Plants. Later on field of Rushi Nale was taken by him for this purpose, on Theka by executing an agreement -Ex. 14.

P.W. 3 Bhaurao Parkhi is the Naib Tahsildar who was present at the time of raid. He has deposed about the raid as well as issuing certificate Exhibit 20, about the same.

P.W. 4 Kishor Tiple, is Talathi who had issued certificate regarding 7/12 extract as well as map of the field of Rushi Nale bearing Exhibit 25.

P.W. 5 Javedkhan, labourer, had allegedly weighed the seized Ganja Plants (crops). He has, however, turned hostile to the prosecution.

P.W.6 Sitaram Rohankar, is the witness to the alleged agreement.

P.W. 7 Bhaskar Sahare, is Panch witness to the raid.

P.W. 8 Tulshiram Nitnaware, P.I. is Raiding officer and I.O. He deposed about the raid as well as registering of offence and about the investigation.

P.W.9 Sham Choudhari, is the photographer.

P.W. 10 Arun Mogre is Police Constable who had carried seized samples to Chemical Analyser. The relevant reports are also produced on record. They are at exhibit 51 which indicate that the sample of plants was identified to be cannabis Sativa-L, so also the seeds. The opinion of the Chemical Analyser is that the contents of the said sample falls u/s 2(iv) of the N.D.P.S. Act, 1985. With this evidence, the prosecution sought to establish the guilt of the appellants.

5. As stated above, the defence of the appellants is that of denial. According to them, they were caught on the road, brought to Police Station and thereafter to the spot, meaning thereby they were not at all concerned with the said field or the cultivation. Thus, they did not dispute that the plants were cannabis plants and seeds were of cannabis plants. They however have pleaded ignorance about the same.

6. Learned trial Judge by his impugned judgment held that the appellants are guilty of the offence u/s 20(a) of the N.D.P.S. Act and therefore, he passed the impugned order of their conviction and sentence.

7. While challenging this judgment of conviction and sentence, learned Counsel of the appellant has submitted that the prosecution has failed to establish that

the appellants were in fact cultivating the said land. According to him, the land was admittedly belonging to Rushi Nale and he is not made an accused, so also according to him, though the Sattyam was mediator he is only a witness, he is also not made accused. Learned Counsel further contended that there is a breach of mandatory provisions of the N.D.P.S. Act, particularly Sections 42, 52, 52-A and 57 of the N.D.P.S. Act and in view of the judicial pronouncements on the aspect of requirement of compliance of these provisions, the appellants deserve acquittal inasmuch as there was no proper compliance. In short, his contention is that there is no conscious possession of the appellants for the said plants, they are in fact labourers. There was no inventory of the articles seized; prepared. According to him, even if it is assumed for a moment that these cannabis plants were seized from the spot, the matter would be only of small quantity i.e. to the extent of samples; inasmuch as the whole of the property was not at all produced before the trial court and no inventory as required by mandatory provisions of Section 52A was prepared. He has also pointed out that it is the case of the prosecution that about 220 kg. of Ganja - cannabis plants were seized and now the same is reduced to only 53.900 kgs. vide affidavit of P.S.O. Ballarsha, therefore, the property seized is not now tallying with the property which is sought to be produced by P.S.O. Ballarsha. This contention was raised by him in answer to the plea of remand of the matter, raised by the learned A.P.P. in pursuance of the judgment of this Court in 2008 All MR (Cri) 3016 : 2009 (1) AIR Bom R 798, *Sau. Parvatabai Gokulprasad Yadav v. State of Maharashtra*. In that case, it was held that if the property is not produced and is available with the police authorities, the matter can be remanded for a fresh trial.

8. It may be stated that learned Counsel for the appellant has relied on some of the judgments of the Apex Court as well as of this Court in support of his contention that when there is non-compliance of mandatory procedural provisions of the N.D.P.S. Act, the accused would deserve acquittal. At this stage it would be appropriate to refer these decisions.

9. 2004 (1) Crimes 286 : AIR 2004 SC 2007 *Alakh Ram v. State*, wherein in paragraph 4 it was observed thus:

4. We heard the appellant's Counsel and the Counsel for the respondent. u/s 8(b) of the NDPS Act, cultivation of opium poppy or any cannabis plant is prohibited and u/s 20 of the NDPS Act, such cultivation of cannabis plant is made punishable with imprisonment and fine. In order to prove the guilt, it must be proved that the accused had cultivated this prohibited plant. There must be supporting evidence to prove that the accused cultivated the plant and it is not enough that few plants were found in the property of the accused. It is quite reasonable to assume that some times the plants may sprout up, if seeds happened to be embedded in earth due to natural process. If plants are sprouted by natural grown, it cannot be said that it amounts to cultivation.

In *Jitendra and Another Vs. State of M.P.*, the Apex Court has observed thus:

5. The evidence to prove that charas and ganja were recovered from the possession of the accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (P.W.7), Angad Singh (P.W.8) and Sub-Inspector D.J. Rai(P.W.6), there is no independent witness as to the recovery of the drugs from the possession of the accused. The charas and ganja alleged to have been seized from the possession of the accused were not even produced before the trial court, so as to connect them with the samples sent to the Forensic Science Laboratory. There is no material produced in the trial, apart from the interested testimony of the police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the Forensic Science Laboratory were taken from the drugs seized from the possession of the accused. Although the High Court noticed the fact that the charas and ganja alleged to have been seized from the custody of the accused had neither been produced in the court, nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the Chemical Examiner in a properly sealed condition and those were found to be charas and ganja. The High Court observed, "non-production of these commodities before the court is not fatal to the prosecution. The defence also did not insist during the trial that these commodities should be produced." The High Court relied on Section 465 Cr.P.C. to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.

6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned. The suggestion made by the defence in the cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with the police had lodged a false case only for evicting the accused for the house in which they were living. Finally, we notice that the investigating officer was also not examined. Against this background, to say that, despite the panch witnesses having turned hostile, the non-examination of the investigating officer and non-production of the seized drugs, the conviction under the NDPS Act can still be sustained, is far-fetched.

2007 All MR (Cri) 99 : 2007 (4) AIR Bom R 239; Javed A. Bhat v. Union of India, wherein it has been held that the concerned authorities would do better if they

send the entire quantity seized for chemical analysis so that there may not be any dispute regarding the quantity seized. If it is not practicable in a given case to send entire quantity, then sufficient quantity by way of samples from each of the packets recovered should be sent for chemical examination. 2006 All MR (Cri) 3336 Mohd. Akram Mohd. Majij Shaikh v. State of Maharashtra, wherein it has been held thus:

The bald opinion of the Officer who has conducted spot test bereft of reasons and grounds, will not be of any help to the court and it will be unsafe to record conviction on the basis of such opinion alone.

2008 All MR (Cri) 2413 : 2008 (6) ABR (NOC) 1143 (Bom) Anilkumar @ Annu S/o Puranlal Patel v. State of Maharashtra, wherein it was held:

Mudemal property allegedly seized from accused not produced, except samples, the accused would be entitled for acquittal.

2006 All Mah (Cri) 1754 : 2006 (6) ABR (DOC) 113 Ramesh S/o Rangrao Mohite v. State of Maharashtra, wherein the contention that, the prosecution did not bring before the court seized material and therefore, the accused was entitled to acquittal, was upheld.

10. It may be stated at this stage that the judgment of this Court in 2008 All MR (Cri) 3016 : 2009 (1) AIR Bom R 798 Sau. Parwatabai w/o Gokulprasad Yadav v. State of Maharashtra, was sought to be distinguished on the ground that the view taken by this Court in that case is contrary to the law laid down by the Apex Court in Jitendra and Another Vs. State of M.P., .

11. It was also submitted that the learned Single Judge of this Court who had decided the case of Ramesh in favour of the appellant to allow the appeal and acquit him in 2006 All M.R. (Cri) 1754 : 2006 (6) ABR (DOC) 113, had taken a different view in 2008 All MR (Cri) 3016 : 2009 (1) AIR Bom R 798 Sau. Parvatabai's case while ordering remand. The learned Counsel has in alternative also relied on the judgment of this Court in Prakash @ Sanjay S/o Kerbaji Barse v. State of Maharashtra reported in 2009 All MR (Cri) 47 : 2009 (3) AIR Bom R 297, to contend that when no inventory is prepared, and entire seized property was not produced before the court, the accused could be held to have possession only of the property which was sealed and sent to C.A. In that case the conviction was altered from one punishable u/s 20(b)(ii) C in place of conviction u/s 20(b) I (ii)(A) of the N.D.P.S. Act. Learned Counsel therefore pleaded that appellants are already in custody for more period than can be ordered for possession of small quantity of cannabis plants therefore, the facts of the case call for suitable orders.

12. Per contra, learned APP while supporting the conviction as per impugned judgment submitted that the land was being cultivated by the appellants. The cannabis plants were found in the field. They were weighing 220 kg. Sample was sent of the lesser quantity i.e. 2 kg. According to him, the possession of 220 kg.

cannabis plant is established. The appellants did not raise any defence in the trial court regarding plea of possession of small quantity, hence appellants cannot be now allowed to raise such contention in appeal. He further contended that muddemal property which was seized is still available with the police station, though because of drying of the cannabis plants, weight was reduced from 220 kg. to 53.9 kg. By affidavit of P.I. Goraknath Ramnath Jadhav, it is submitted that the said muddemal is still in possession of the police and the same can be produced before the trial court; if the matter is remanded. The prosecution contends that the matter can be remanded in view of the judgment of this Court in 2008 All MR (Cri.) 3016 : 2009 (1) AIR Bom R 798 Sau. Paravatabai w/o Gokulprasad Yadav v. State of Maharashtra.

13. It would be seen that the property which was allegedly seized from the spot, i.e. cannabis plant, is available in the police station and its weight is reduced to 53.9 kg. now. The crucial question would be regarding the propriety of remanding the matter in view of the judgment of this Court in 2008 All MR (Cri) 3016 : 2009 (1) AIR Bom R 798 Sau. Parvatbai w/o Gokulprasad Yadav v. State of Mah.

14. Here is the case where the prosecution has alleged that cannabis plants weighing 220 kg., were found. Admittedly no inventory was prepared. Sample which was sent to Chemical Analyser weighed 2 kg. and the sample of seeds weighed to be 25 grams. The important question would also be whether in view of the judgment of the Apex Court in Jitendra and Another Vs. State of M.P., which was followed in 2006 All MR (Cri) 1754 Ramesh Rangrao Mohite v. State of Maharashtra 2007 All MR (Cri) 3359 : 2008 (1) ABR (NOC) 79(Bom) Hanumantu S/o Gangaram Badawat v. State of Mah; 2008 All MR (Cri) 2413 : 2008 (6) ABR (NOC) 1143 (Bom) Anilkumar @ Annu S/o Puranlal Patel v. State of Maharashtra, would be applicable to the facts of the case and for want of compliance of mandatory provisions of Section 52-A of the N.D.P.S. Act, and observations of the Apex Court in Jitendra's case, the appellants would be entitled for acquittal.

15. The next question again would be whether the appellants can be held guilty of the offences punishable u/s 20(b)(ii)(c) of the N.D.P.S. Act i.e. for possession of small quantity (contraband to the extent of samples).

16. Turning the question of remand of the matter, in view of the judgment of this Court in 2008 All MR (Cri) 3016 : AIR 2009 Bom 798; Sau. Parvatabai S/o Gokulprasad Yadav v. State of Maharashtra, it would be seen that in that case the learned Single Judge has held that this Court is mindful towards the fact that it has come on record . on oath that muddemal is available, this Court cannot turn a dumb spectator or a limb of judicial organism acting as an obedient ministerial staff. It is sought to be contended by learned A.P.P. that if at all the conviction is considered liable to be set aside for non-compliance of provisions of Section 52A of the N.D.P.S. Act. the matter needs to be remanded in view of this decision.

17. On close perusal of that judgment, it would appear that the judgment of the Apex Court in Jitendra and Another Vs. State of M.P., was considered by the learned Single Judge in paragraph 12 of the said judgment wherein it has been observed thus:

12. Judgment of Hon"ble Supreme Court at Serial No. 1 above [Jitendra and Anr. v. State of M.P.][supra] is a binding precedent not on me alone, but the other Hon"ble Judges of this Court have followed this judgment as is seen from other judgments quoted in forgoing para No. 9.

The learned Single Judge however, felt it necessary to remand the matter inasmuch as there was sabotaging of prosecution and entire conduct of the prosecution had led to the situation defeating the enactment of N.D.P.S. Act. Learned Single Judge, has therefore observed in paragraphs 41, 42, 43, and 44 thus:

41. The distinction always would be when the very object of Criminal Law is being defeated by or at the hands of inappropriate approach of the police machinery, a different view of the matter will have to be taken. Moreover, Section 311 of Criminal Procedure Code is a provision would certain aptly apply to situation of the nature which has arisen in the present case upon remand.

42. This apart, when failure of prosecution to bring crucial evidence leads to optionless result of acquittal, it means that judicial discretion is practically enticed or usurped by the Investigating machinery, since, now, there is no arithmetic equation, namely failure to produce the Muddemal property is equivalent to acquittal, and thereby final verdict is exercised by the prosecution in a circuitous manner. Thus, who would decide to acquit will be the prosecution, and not the court.

43. This type of blatant and open abuse of encroachment on judicial function by allowing to take the shelter of Judgments of this Court or Hon"ble Supreme Court cannot be permitted with open eyes.

44. This Court is of the view that this blatant abuse needs to be dealt, with a heavy hand by adopting certain modalities by the Govt. who is at the helm of affairs. In this background, this Court has made observation in para 2 of the Judgment delivered in Criminal Appeal No. 461 of 2007, as noted in para 12 above, and gave certain directions.

With due respect, that cannot be treated as an universal view applicable to all such cases. In my opinion, once the authoritative pronouncement of the Apex Court is available, in Jitendra and Another Vs. State of M.P., , on the subject stated above, in all cases, the view taken in Parvatabai's case 2009 (1) AIR Bom R 798 would not be available to the prosecution to rectify its own faults. In my opinion, it is the court's prerogative whether to remand the matter or not. Investigating authorities cannot commit blatant mistakes, and then ask to rectify them in appeals by way of asking for remand of the matter in all such cases. It

can never be forgotten that in many such cases, the accused has to undergo ordeal of being in jail for considerable period during the trial. If in all cases such approach is followed, it is likely to lead to disastrous effect and perhaps in majority of criminal cases, in appeals, the orders of remand would be required to be passed. Therefore, each case has to be decided, in this regard, on facts and circumstances of that case. In the case in hand order of remand is not possible, in view of the finding recorded below that prosecution has failed to prove cultivation of cannabis plants by the appellants in the spot field.

18. In all such cases, it is necessary for the State to take appropriate departmental action against the investigating officers as may be permitted by disciplinary rules to check such lapses, which may be at times aimed to ensure the acquittal of the accused persons. Therefore, in my view the prayer of the prosecution itself i.e. respondent-State for remand of the matter cannot be accepted. On the contrary if the State wants to check such recurrences it should take a review the cases of acquittal in important cases and take departmental actions for the lapses committed by investigating authorities noted by courts in the Judgments so as to restore the faith of public in prosecuting departments. It neednot be overemphasized that there should be periodic assessment of work done by investigating officers in the matter of investigation of offences, in the light of decisions of the superior courts in the matters investigated by them for taking suitable corrective measures/actions. This can be done by an independent departmental officer like Director of Public Prosecution or alike. Even now it is not too late.

19. As regards the compliance of Section 52A of the N.D.P.S. Act 1985, it is necessary to note the provisions of Section 52A(2) of the said Act, the same reads thus:

52A(2) Where any narcotic drug or psychotropic substances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered u/s 53, the officer referred to in Sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country or origin and other particulars as the officer referred to in Sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of:

- (a) certifying the correctness of the inventory so prepared; or
- (b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or
- (c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples

so drawn.

In the instant case, there is no such procedure followed by the Investigating Officer. As regards non-production of the property before the court, the observations of the Apex Court in *Jitendra and Another Vs. State of M.P.*, need to be borne in mind which I have extracted above.

20. In the present case admittedly the said property is not produced before the trial court. The aforesaid judgment of the Apex Court followed by this Court in 2007 All MR (Cri) 3359 : 2008 (1) ABR (NOC) 79 (Bom) *Hanamantu S/o Gangaram Badawat v. State of Maharashtra*, 2008 All MR (Cri) 2413 : 2008 (6) ABR (NOC) 1143 (Bom) *Anilkumar alias Annu S/o Puranlal Patel v. State of Maharashtra*. It was also followed in 2006 All MR (Cri) 1754 : 2006 (6) ABR (DOC) 113 *Ramesh S/o Rangrao Mohite v. State of Maharashtra*. In these decisions, this Court has taken a view that when whole of the muddemal property is not produced before the trial court for identification by the witnesses, the accused would be entitled for acquittal. In 2008 All MR (Cri) 3016: 2009 (1) AIR Bom R 798 *Sau. Parwatabai w/o Gokulprasad Yadav v. State of Maharashtra*, however, it was found that, when the balance to be struck, it does not, in any manner, undermine the rights of the accused, which are available to him within the four corners of law if the matter is remanded. I have already pointed out above as to why the instant matter does not need remand. It may be added that appellants who are labourers are in custody since the time of raid. In view of this judgment of the Apex Court and the other judgments of this Court referred above, the accused would be entitled for acquittal.

21. As regards the other contentions of the learned Counsel for the appellant, it is necessary to note that the allegations against the appellant are that of cultivating cannabis plants. In a way the allegations against the appellant is that they were found in possession of the said plants, having cultivated the same. In this regard, some of the authorities of this Court need to be referred.

22. In 2000 All MR (Cri) 210, *Mr. Gangaram Khandu Pandagale v. State of Maharashtra*, which was a case of cultivating ganja plants, it was held that when there was evidence to prove possession of land or plantation of trees by the accused, mere nearness or contiguity of land to the house of accused, would not make the accused liable for cultivating plants on gaathan land.

23. Further in 2009 All MR (Cri) 357 : 2009 (2) AIR Bom R 294 *Rupsingh S/o Gopal Barela v. State of Maharashtra*, it was held that possession naturally signifies lawful possession and when there is no possession with intention or consciousness, the prosecution would fail.

24. In view of these reported judgments, it is necessary to find out whether all the accused or any of them were responsible for cultivating possession of the said cannabis plants in the field. Admittedly the field wherein such ganja plants were found; was rented out by witness No. 1 Rushi Nale. None of the appellants have been found to have received possession of the said field as tenant/ lessee

for cultivating the same as per agreement Exhibit 14. These witnesses had during the course of evidence pointed out that accused No. 3 who is sitting before the court in a queue whose name was told as Polt George had told his name to be Radhakrishna Shankar Ayyaar. However, this does not appear to be a matter conspicuous in the charge that was framed. In cross examination, he has stated that it is not true to say that all the accused who are sitting before the court were not present at the time of agreement. Witness volunteered that accused John Pol who is sitting before the court was present at the time of agreement. He has in further cross-examination stated that in the field there is one tin shed and in said tin shed all the accused were residing. He told before the court that he does not know who had supplied the manure and other things to the accused persons for cultivation. He pleaded ignorance as to whether Sattyam and Radhakrishna used to provide manure and other things to the accused or not. The agreement Exhibit 14 shows that field was let out to Radhakrishna Shankar Ayyar for cultivation purpose. There is nothing on record to suggest that all these appellants were engaged or were employed by said Radhakrishna Ayyar for cultivating purpose.

25. Turning to the evidence of P.W. 2 Sattyam, he is a star witness as he was initiator of the agreement between Polt George and said Rushi Nale. In cross-examination this witness had told that, at that time he had no work in Ballarsha , so he could not give the work of painting to Polt George because the Polt George came to Ballarsha with 23 persons and there was no work for them with him. He further stated that Radhakrishna Ayyar had brought written agreement for his signature as a witness. What is specific is that he stated that it is true that Polt George and other five accused were given by him to Radhakrishna Ayyar as labourer. Meaning thereby Polt George is some other person , than Radhakrishna Ayyar. There appears no investigation done by the investigating authority as to whether Polt George and Radhakrishna were the same persons and in fact he had executed agreement with the P.W. 1 Rushi Nale. Had they been different persons, the evidence of Rushi Nale would not be correct.

26. P.W. 3 Bhaurao Parkhi has deposed that accused who are sitting before the court were present in the field. He did not depose as to the actual work they were doing. So also the evidence of P.W. 4 Kishor Tiple is silent in this regard. He has issued only the map. As regards the evidence of P.W. 5 Javedkhan, suffice it to say that he has turned hostile to the prosecution. P.W. 6 Sitaram Rohankar who is on the point of agreement, has stated that at the relevant time he was going to his field at 12. to 12.30 p.m., Sattyam, Alone, Kisan and one Telgu person was sitting with Nale. He further stated that said Telgu person sitting before the court who is accused John Pol who had given money to Rushi Nale. But his evidence does not show that he had signed the agreement as Radhakrishna Ayyar.

27. The most important witness No. 7 Bhaskar Sahare, who is a journalist, is resident of Chandrapur. He has deposed everything in favour of the prosecution,

in detail. However, in cross-examination he has given a startling admission to show that he is no less than a stock witness of the investigating authority as he has admitted that he had acted as State panch in or about 100 cases. It is not the case of the investigating authority or prosecution that no other independent witness was available for the purpose of this raid. Needless to again say that the other eye and panch witnesses who was present was not examined by the prosecution nor any other villagers to show that all these accused or any of them were working/cultivating the said field. The evidence of P.W.7 Bhaskar does not fortify the prosecution case on the contrary it sheds doubts on it.

28. Turning to the evidence of the Investigating Officer, it would be seen from his evidence that he was at P.S. Ballarsha as P.S.O. At 14 hours he had received information that at Mouza Amdi in the field of Rushi Nale some people of out of State have started cultivation of cannabis plants. He sought permission from S.D.P.O. Chandrapur - Shri Manare. Then he gave letter to panch Bhaskar Sahare and Deokumar. He has also stated in cross-examination that at the time of lodging report accused persons had informed that they were doing the work at the instance of one Sattyam. They also informed that Sattyam used to supply all equipments, manure, seeds etc. for cultivation. Why Sattyam is not made accused, remained to be explained by the prosecution. In fact he was examined as P.W. 2. It is also pertinent to note that he has stated that he came to know that accused persons were not knowing Hindi or Marathi and Sattyam played a role of a mediator at the time of agreement between Rushi Nale and Poul. This Sattyam is resident of Ballarsha. Therefore, whatever transaction took place between Rushi Nale and said Radhakrishna Ayyar was within his knowledge, so also he was a person who was knowing Telgu and Marathi and he could interpret the same to the accused/appellants. He has admitted that accused persons were not knowing Hindi or Marathi. Meaning thereby, they were having no knowledge about the transaction between the parties and he was knowing details of cultivation since beginning. Therefore, it was duty of the prosecution to establish that all the things were done by the appellants together or individually and were with the knowledge that cannabis plants were being cultivated and in fact they had done all these things with requisite intention. Not making P.W. Sattyam as an accused deteriorates the prosecution case.

29. It is necessary to bear in mind that as per the photographs which were taken at the relevant time, about the height of plants, would indicate that the same must be of some 4-5 months. It is not the case that there could not be distinguished by any of the villagers from medicinal or vegetable. May be that appellants might have been found at the spot, unless they are found to be cultivating or doing some thing, towards cultivation; in absence of positive evidence, though the alleged offences are serious, they cannot be held guilty. It is for the prosecution to establish the case against all the accused beyond reasonable doubts. Suspicion may be strong against the appellant No. 3, George, but the evidence of Rushi Nale weaken even that.

30. In this case it was the duty of the prosecution to find out who was in real possession of the said land. He might have been the owner or the person who had taken the said field on lease. Then if the appellants would have been employed by him for the illegal act of cultivating cannabis plants, they would have been liable. None of the villagers who might have been witnessing labourers in the said field since beginning are examined. Why Rushi Nale maintained silence for pretty long period is not explained. Same is the case of Sattyam. Even Talathi Kishor Tiple P.W. 4 might have been to spot earlier to the raid but he also did not take any action. As such the case of the prosecution against the appellants appears to be of thick suspicion, but suspicion howsoever strong, cannot take place of proof. I have already pointed out above that the property in this case was not produced before the trial court, therefore, in view of the judgment of the Apex Court cited above, the appellants cannot be convicted.

31. In such cases ownership of the land or land being in possession of accused has to be established. As stated above, this fact is not established. Charge against the appellant is for cultivating cannabis plants, and for possession of ganja seeds. Admittedly, ganja seeds were found from the tin shed. The exclusive possession of the said shed cannot be said to be that of all the appellants, unless the same is established. No doubt it is alleged that these appellants were residing in the same hut. But fact remains that there is no clinching evidence on record about their actual residence in the said hut. Thus possession of Ganja seeds cannot be attributed to any of the accused.

32. Turning to the contention of the learned Counsel for the appellant as regards the applicability of judgment reported in 2009 All MR (Cri) 1754 : 2006 (6) ABR (DOC) 113 Ramesh S/o Rangrao Mohite v. State of Maharashtra, that in such cases, where seizure of whole of the contraband is established but the whole property is not sent to Chemical Analyser, the accused can be held guilty of the offence of possession of contraband of less quantity which was sent to Chemical Analyser. In that case, the question of compliance of Section 42 was considered. The consideration before the court was regarding the aspect of possibility of conviction of the accused for the possession of the contraband which was sent to the Chemical Analyser. This decision is also not attracted considering facts of the case.

33. Taking over all view of the matter, in my opinion, though the allegations are serious, evidence is shaky and the same does not positively point out the guilt of all the accused or any of them. Suspicion howsoever strong cannot take place of proof. As such the order of conviction and sentence passed by trial court cannot be upheld. Order of remand is also not warranted. The appeal therefore, needs to be allowed. The same is allowed.

34. The conviction & sentence of the appellants for the offence punishable u/s 20(a) N.D.P.S. Act is hereby set aside. They are acquitted of the charge punishable for the offence u/s 20(a) of the NDPS Act. They be set at liberty, if

are not required; in any other case. The muddemal property i.e. cannabis plants and seeds, be sent to the relevant Excise department for disposal according to law and rest of the property be destroyed. After compliance of the order i.e. after disposal of the property by the Excise Department, it to inform Special Court and relevant note be taken at property register of the trial Court.