
(2014) 12 BOM CK 0213

In the Bombay High Court

Case No : Criminal Appeal Nos. 5, 492 of 2010 and 31 of 2012

Somaskandaraja Vasanthan

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 01-12-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 67
Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 21(1)(c), 21(c), 29, 35, 42

Citation : (2015) ALLMR(Cri) 680 : (2015) 3 BomCR(Cri) 463

Hon'ble Judges : Sadhana S. Jadhav, J

Bench : Single Bench

Advocate : Anil Lalla, Advocate, instructed by Lalla and Lalla, Ayaz Khan and Abhaykumar Apte, Advocates for the Appellant; Rebecca Gonsalves, Advocates for the Respondent

Judgement

Sadhana S. Jadhav, J.—The appellants herein are convicted of the offence punishable under Section 29 read with 8(c) and Section 21(c) read with 8(c) of the Narcotic Drugs and Psychotropic Substances (N.D.P.S.) Act and are sentenced to suffer R.I. for 10 years and to pay fine of Rs. 1 Lakh i.d. S.I. for 6 months on each count by the Special Judge (N.D.P.S. Act) in Special Case No. 88 of 2005 vide Judgment and Order dated 11/12/2009. Being aggrieved by the said Judgment and Order, the appellants herein have preferred the present criminal appeals. Such of the facts necessary for the decision of these appeals are as follows:

On 30/1/2005 the Officer of Narcotics Control Bureau, Mumbai (hereinafter referred as NCB) received a secret information that at Room No. 201 of Pooja Guest House, Sector-1, Plot No. 22/35, Nerul, New Mumbai, Somaskandaraja Vasanthan (accused No. 1) alongwith his associates was to deliver Heroin to Shri Lankan Nationals at around 12 noon. He had intimated the said information to the superior officers and alongwith a team of officers had gone to Pooja Guest House at around 12.30 p.m. A request was made to two persons from the hotel

to act as panchas at room No. 201. It is alleged that the accused No. 1 had opened the door. The Officers had introduced themselves and had further informed him about the purpose of their visit. There were 3 more persons in the said room whose identity was disclosed subsequently. The officers found one black shoulder bag on the bed. They searched the bag. A polythene carry bag was found containing two clear polythene bags containing brown powder. The officer had tested a small quantity of brown powder from both polythene bags, which was detected positive for presence of Heroin. It is alleged that accused No. 1 disclosed the source of the said contraband and had disclosed that he had come with the accused No. 3 for delivering Heroin to accused Nos. 2 and 4. The officers had followed the procedure of taking and sealing samples as well as contraband. The officers had complied with the mandate of Section 50 of the N.D.P.S. Act. In the personal search of accused No. 3 a photocopy of identity card and advance receipt of Pooja Guest House were recovered and was taken into custody. The house search of the accused No. 1 was carried out. Passports of accused Nos. 1 and 3 were found in the said house search. A cell phone handset was also seized. The officer had then taken steps to trace the accused No. 5. He was not found at his residence.

2. On 30/1/2005 statement of accused Nos. 1 to 4 were recorded in the NCB office. It was revealed that there was a conspiracy between the accused and in pursuance to the said conspiracy, 2 kgs. of heroin was procured from the accused No. 5 by accused Nos. 1 and 3 to deliver it to accused Nos. 2 and 4 at room No. 201 of Pooja Guest House. The supervisor of Pooja Guest House i.e. Ravi Naidu disclosed to the police that room No. 201 was booked in the name of Ravindran by two persons who were introduced by accused No. 1. He had identified those two persons as accused Nos. 2 and 4. Further statements of accused Nos. 1 and 2 were recorded under Section 67 of the Act. Original accused No. 5 was arrested on 6/6/2005. His statement was also recorded under Section 67 of the N.D.P.S. Act. He had allegedly admitted that he had supplied Heroin to accused No. 1.

3. After completion of investigation on 10/7/2005 complainant filed complaint before the Court. The case was registered as Special Case No. 88 of 2005. The Special Judge framed charges under Section 29 read with 8(c) and under Section 21(1)(c) read with 8(c) of N.D.P.S. Act, 1985 against all the accused. The prosecution examined 13 witnesses to bring home the guilt of the accused.

4. P.W. 1 Anil Kodnani was working as the intelligence officer with NCB, Mumbai. He has deposed before the Court that on 30/1/2005 (Sunday) Superintendent Mr. Patil summoned him to the office urgently for an operational work. He was informed by Mr. Patil that they have received source information that one person by name S. Vasanthan from Nerul alongwith his associates is going to deliver heroin to two Srilankan nationals at room No. 201 of Pooja Guest House. He was entrusted with the work of search and seizure. Mr. Patil gave him NCB seal No. 03. He left for the said spot alongwith his colleagues. The Superintendent Mr. Patil had also accompanied the team. At Nerul Station intelligence officer Mr. A.K.

Koli joined the raiding team. They reached Pooja Guest House in the noon at about 12.30. The raiding team introduced themselves to the persons at the counter and further informed them that they were to search room No. 201. The staff of Pooja Guest House were requested to witness search proceedings as well as act as panchas. The door of the room No. 201 was opened by one male person who disclosed his name as S. Vasanthan. The raiding party introduced themselves and informed S. Vasanthan that the said room is required to be searched for recovery of Heroin as Narcotic drug. The raiding party found that the room was occupied by 3 more persons namely Thanabalasingham, Nirmal Parera and Nishant Fernandez. The raiding party entered into room No. 201. In the search, the raiding party found a black colour shoulder bag which was kept on the bed. The members of the raiding party opened the shoulder bag and found one plastic bag containing two polythene transparent bags filled with brown colour powder. They extracted a small quantity of the powder to be tested on the Field Testing Kit. The powder tested positive for heroin. The same procedure was carried out in respect of other polythene bag, the contents of which tested positive for heroin. S. Vasanthan confirmed that it was Heroin which he had procured from Ajay and had come alongwith his associates Thanabalasingham, to deliver the same to Nirmal Parera and Nishant Fernandes. The said contraband was seized by the raiding party after they had drawn samples and completed the procedure of search and seizure.

5. P.W. 1 has then deposed before the Court about the steps taken by him in furtherance of the investigation. During search they did not find any incriminating documents and things except photo copy of the identity card and advance receipt of Pooja Guest House which was recovered from accused No. 2. The raiding team had then conducted house search of S. Vasanthan. No incriminating material was found therein. On 6/6/2005 when P.W. 1 was at his residence, he was informed by the Superintendent Mr. Patil to contact Mr. S.A. Khan and proceed to Kalpak Estate, Antop Hill where they would find Ajay Kumar Das @ Ajay Nepali. Accused No. 5 Ajay Nepali was apprehended by the police. P.W. 1 identified all the accused in the court and also identified the articles seized in the course of investigation. He also identified the receipt which was found in the personal search of the accused Nirmal Parera.

6. In the cross-examination P.W. 1 has admitted that the vehicles i.e. Qualis and one Maruti van of NCB were not in operational condition and therefore, raiding party had not proceeded in the said vehicles for conducting raid in the present case. He has admitted that his house is half way to the Nerul from NCB office and that only after reaching the office he had learnt from Mr. Patil that he has to lead the search team. He has admitted that he was not aware as to whether Mr. Koli had located Pooja Guest House prior to arriving of the raiding team which had left the NCB office. He has also admitted that he does not know topography of Pooja Guest House since they had specific information that the raid was to be conducted in room No. 201 which was situated on the second floor. It is also specifically admitted by P.W. 1 that at the reception counter he had not

confirmed as to who was the occupant of room No. 201. They had not checked the register at reception counter. The panch No. 2 namely Ravi Naidu was at the reception counter and he is a member of the staff of Pooja Guest House. There was no enquiry at the counter as to how many persons are there in room No. 201 at the relevant time. There was no lift available and therefore, they had been to room No. 201 by staircase.

7. P.W. 1 has further admitted in the cross-examination that in room No. 201 there was one cupboard and one double bed. The description of the room was not given in the panchanama. He could not recollect at the time of giving evidence whether all 10 members of the raiding party were present when search and seizure was conducted in room No. 201. However, according to him, 3 to 4 members of raiding party who were officers, were standing outside the room No. 201. The entire panchanama was written in room No. 201 by sitting on the bed. P.W. 1 claims to be scribe of the panchanama. It is admitted that room No. 201 was so small that 8 to 10 persons could not have been present in the room at the same time.

8. It is admitted by the P.W. 1 that the contents of black colour shoulder bag were not visible without opening it. That he had gone straight to the black colour bag after completing the formality. The condition, brand of the black colour shoulder bag was not mentioned in the panchanama. It is also not mentioned as to whether the said bag had zip or whether there was any mechanism to open the bag. He admits that in the eventuality that there is any identification on the bag it is necessary to mention about the same in the panchanama.

9. P.W. 1 was shown the said bag which is Article 2/1 and he has admitted that after seeing the bag it cannot be ascertained as to who was the owner of the bag as there is no identification mark or signature of any of the panchas or officers on this bag. That such bag is common and available in the market. It is not mentioned in the panchanama as to which compartment of the bag contained the plastic carry bag containing the contraband. It is also admitted that none of the article 2/2 and 2/3 collectively bear any identification mark of the panchas or seizing officer to connect them with the case. The contents on the label were written by P.W. 1. However, he is not aware as to who had written the crime number and when. That no record is maintained in the office of NCB about articles carried by the officers at the time of raiding.

10. It is also admitted that in the course of cross-examination, that panchanama is absolutely silent about any luggage or belongings of the occupants of the room No. 201. P.W. 1 has also admitted that there is no document to show the connection of accused No. 1 with room No. 201. P.W. 1 has also admitted that he has not inspected any document from Pooja Guest House record during panchanama. At the same time, there is an admission that all events which transpired at Pooja Guest House in presence of panchas before the panchanama and during the panchanama are mentioned in the panchanama. The aspect about recovery of key of room No. 201 and as to what happened to that key are also

important to be mentioned in the panchanama as admitted by P.W. 1. According to the P.W. 1 panchanama is in the narration of the panchas. Both the panchas narrated panchanama simultaneously. Panchas were describing the incident and he was writing the same and that panchas had not made any mistake in describing the incident. It is admitted that the word "officer" in the panchanama refers to P.W. 1. According to P.W. 1, process of writing on the labels and signing by panchas on the label was already over before scribing the panchanama. It is reiterated that there is no particular identification mark on the plastic bag Article-1. The witness was confronted with the plastic bag and upon seeing the same he deposed that black sticky substance in the plastic bag Article-1 is not in the same condition as seen by him on 30/1/2005 when he had seen it in powder condition. The samples sent to the Chemical Analyser (C.A.) were also in powder form. He has admitted that heroin is always in powder form and Hashish is in sticky form.

11. P.W. 1 has further admitted in the cross-examination that there is no record in respect of keeping samples in safe custody before sending to C.A. According to him, it was a mistake which he realised on the date when he was to give his substantive evidence. Exh. 52 does not bear file number, C.R. Number, time of recording document and time of its receipt by Shri Patil.

12. In the cross-examination, it is further admitted that there was no identification mark on the shoulder bag. There was no movement register of seal in his office and therefore, movement of seal are not recorded. It is pertinent to note that P.W. 1 has categorically admitted that the name of accused No. 2 as "Nirmal Parera" is not written on advance receipt. He has voluntarily stated that his "alias" name is "Ravindran" on advance receipt. It is then admitted that no contraband was found in possession of accused Nos. 2 and 4.

13. It is pertinent to note that according to P.W. 1 receipt Exh. 51 bears signature of accused Nirmal Parera and below his signature, the date is written as 31/1/2005. He has feigned ignorance about the fact that accused No. 2 Nirmal Parera was admitted in J.J. Hospital from 31/1/2005 to 5/2/2005 but in the same breath he has deposed that accused No. 2 was sent for taking medical treatment. That the panchanama was effected on 30/1/2005 and the signature of accused No. 2 was obtained on the receipt Exh. 51 on 30/1/2005 but on the receipt the date is 31/1/2005. That there is no documentary evidence besides the statement to show that the accused No. 2 was also known as Ravindran. Evidence as against the accused Nos. 3 and 4 need not be discussed as they have been acquitted by the learned Special Judge.

14. As regards accused No. 5 witness No. 1 has deposed that panchas did not assist him in drawing panchanama. It is true that he has drawn panchanama as per his own choice. Contents of the panchanama were read over to both the panchas. However, it is not mentioned in the panchanama that both the panchas read the panchanama or it was read over to them. Panch No. 1 had signed below endorsement. There is no signature of panch No. 5 below endorsement.

Panchanama concluded with line "to check out from the room at Pooja Guest House." Thereafter, panchanama was read over to the panchas and their signatures were obtained. The endorsement on panchanama speaks about only one person. It is admitted that the accused who hail from Shrilanka were not knowing Indian language. There are no specific details in the panchanama.

15. That Mr. Patil had asked P.W. 1 to apprehend Ajaykumar Das. No letter was given to accused No. 5 at the time of apprehending him. No panchanama was prepared to that effect.

16. Panchanama is at Exh. 51 collectively. The recitals of the panchanama would show that a systematic search of the entire room was taken. During the search the officers and panchas had noticed a black colour shoulder bag which was kept on the bed. In the said bag, the officer found the contraband. It is therefore, clear that the bag was not opened by any of the accused persons. The officers had not enquired with the accused about the ownership of the said bag. The entire exercise of seizure was completed without involving the accused. There was no enquiry by the officer as to whom the bag belongs to.

17. The receipt of Pooja Guest House is also at Exh. 51 which shows that the amount was received from Ravindran on 30/1/2005. The person had checked into the said hotel on 29/1/2005.

18. P.W. 2 Henry Meashery was working as intelligence officer in NCB on 30/1/2005, he had received phone from Mr. Patil that the seizure of two kgs. of heroin had been effected at Pooja Guest House, Nerul and he was instructed to reach the office at about 7 p.m. P.W. 2 was instructed to record statement of Accused No. 3 Thanabalasingham who is acquitted. That according to P.W. 2 the accused No. 3 had identified accused Nos. 1, 2 and 4 as the persons with whom he dealt in the transaction of 2 kgs, heroin. Learned Special Judge has acquitted the accused No. 3 on the ground that he was not conversant with language and hence, the identification would loose significance.

19. P.W. 3 Bipin Nair was working as an Intelligence Officer with NCB on 30/1/2005. He was in the office when the source information was received. He has deposed before the Court that he alongwith Dubey and P.S. Namboodri had collected intelligence about one person by name Vasanthan from Nerul and his associates were going to deliver heroin to two Srilankan nationals at room No. 201, Pooja Guest House. The intelligence was reduced into writing with a suggestion to search the premises. The said note was placed before Superintendent Patil. The witness has proved the said intelligence note which is at Exh. 65. It was signed by P.W. 3 and two other officers. It also bears the endorsement of A.P. Patil.

20. In the cross-examination P.W. 3 has specifically deposed that intelligence means information. That the informant had personally come to the office to give the information and at that time Namboodri and Dubey were also present. Upon enquiry, the informant was unable to give details. The informant had not signed

on any document. That according to P.W. 3 only if an informant is interested in reward, then the information is taken in writing and kept in sealed envelop. That the intelligence note upto first para was in the words of informant. The correctness and genuineness of the said information was not verified before raid. The informant was not a member of raiding party. There is specific admission that he has not given copy of the intelligence note to Mr. Patil. That Mr. Patil had not given written direction. The Zonal Director and Assistant Director were not available in the office on that day. There was no file number to the intelligence note. The said note was in the custody of Mr. Patil. That Mr. Patil had not made any endorsement on Exh. 65. No order was passed by the Superintendent on Exh. 65. Soon after recording Exh. 65, they had moved towards New Bombay to seize the drugs from Vasanthan and his associates, as the officers had a reasonable belief that Vasanthan and others were to commit an offence under N.D.P.S. Act. The reason for belief was confirmed before recording the panchanama.

21. That Exh. 65 is the first document prepared for the purpose of investigation of this case. No crime was registered. It does not have serial number. Exh. 65 was not shown to the panchas and occupants of room No. 201. There is no contemporary record in respect of Exh. 65. The reason for searching the premises are mentioned in Exh. 65. It is admitted by P.W. 3 that the reasons for searching premises are to be informed to the panchas and also to the person whose premises are to be searched. The same has not been carried on. Exh. 66 was prepared on the basis of the information given by the informant. It is admitted that the statement of the informant was not recorded in writing although he was authorised to record statement of informant under Section 67 of the N.D.P.S. Act. It is also admitted that the officers were carrying weapons with them at the time of raid.

22. At this stage, learned Counsel for the appellants has drawn the attention of this Court to Exh. 65. It bears the signature of A.P. Patil dated 30/1/2005. Hence, the averments in the cross-examination is falsified. It would simply mean that Mr. Patil has signed Exh. 65 subsequently and it is an ante-dated endorsement. The learned Counsel further submits that there has been non-compliance of Section 42(2) of the N.D.P.S. Act as the witness has specifically admitted that he had not given the copy of intelligence note to Mr. Patil. The learned Counsel appearing for the respondent submits that what is contemplated under Section 42(2) of N.D.P.S. Act is that a copy of the said information reduced into writing should be sent to Superior officials within 72 hours. The witness has admitted that no order was passed by Superintendent on Exh. 65 and that they had moved towards New Bombay soon after the information was reduced into writing. By inference, it can be said that there is no direction by Mr. Patil to proceed with the investigation and there is no reason to disbelieve P.W. 3 on that count. Hence, as far as the admissions of P.W. 3 are concerned, it can be safely inferred that there has been noncompliance of Section 42(2) of the N.D.P.S. Act.

23. P.W. 4 Variyambat Madhavn Jayaprakash was also attached to NCB on 30/1/2005. That he was directed by the Superintendent to search the premises of accused No. 5. He had been to the premises at Antop Hill alongwith Superintendent Patil, A.K. Singh and driver More. In the said search they found leave and licence agreement, passport application forms, two photographs. Search panchanama is at Exh. 69. On 2/2/2005 he had recorded the statement of Mariappa who identified the accused No. 5 on the basis of the photographs. The said statement is at Exh. 72. Mariappa was the owner of the premises in which the accused No. 5 and his wife was residing. It is not mentioned at Exh. 71 that summons were received by Mariappa. There is no evidence to show that the copy of panchanama was given to Mariappa. The witness states that he does not know in which language Mariappa has signed. They had gone to search the premises without the search warrant.

24. Upon perusal of Exh. 69 it is clear that it is a panchanama dated 30/1/2005. The panchas are Asif Abdulla and Rafiq Ibrahim. The room was open with the duplicate keys which was in the possession of Mariappa. The contents of the panchanama were read over and explained to Mr. Mariappa in Tamil as the panchanama was witnessed by Mariappa. Statement of Mariappa appeared to be recorded on 2/2/2005. The statement is in English and signed by Mariappa in Tamil language. Exh. 72 is the summons which was issued to Mariappa and received by him on 2/2/2005. It is clear from the summons and the statement that in all probabilities the summons was given to him in person in the office of the NCB and soon thereafter, statement was recorded. The summons is in the printed proforma. Blanks have not been filled up and therefore, it is doubtful that all the requisitions of Section 67 of the N.D.P.S. Act were complied with.

25. P.W. 5 Vinodkumar Balvir Singh was working as Assistant Chemical Analyser in DYCC. On 3/2/2005 he has conducted analysis of sample. He had arrived at a conclusion that the sample contained heroin diacetyl morphine. In the cross-examination he has admitted that he has not recorded the distance traveled by a standard sample and the sample tested in the case of TLC test. There is no record to show that the age of the standard sample. He had not tested the said standard sample and therefore, has no record about the quantity of standard sample used for test. It is admitted that the chemical composition of a substance changes by efflux of time. It is also admitted that the report was collected by NCB officer on 25/2/2005 although the test was conducted on 3/2/2005.

26. P.W. 6 is Mariyappa Sinnu Devender. According to him, on 30/1/2005 he had been to temple. 3-4 officers had been to his house. He was called by those officers. There was an enquiry about one person who was staying near his house and who was residing as a tenant. The house was locked by the officer. That he had lost agreement. Nothing was seized by the officers. The man who was staying in their house had signed agreement. P.W. 6 has identified accused No. 5 as his tenant and he further clarified that he had handed over the agreement papers to the officer and signed upon it. The agreement was taken by the officers

at that time.

27. P.W. 7 Ashwinikumar Koli was the intelligence officer. On 30/1/2005 he was summoned by A.P. Patil to remain present at Nerul Railway Station at around 11.30. He was a member of the raiding party. Mr. Patil had informed him that he had special intelligence that there was narcotic transaction likely to take place at Pooja Guest House. Two groups were formed which proceeded to Pooja Guest House. P.W. 7 had followed the raiding party on his motor cycle. He had enquired with the persons at the counter of Pooja Guest House who informed that they were employees namely, Narayan Kundal and Ravi Naidu. The room was opened by Vasanthan. There were 3 more persons present in the room. The purpose of visit was informed to the occupants of the said room. The said four persons had declined to search the officers. Thereafter, the officers started searching room No. 201. The Superintendent Patil had asked P.W. 7 to wait outside the room No. 201 and keep an eye on the activities taking place outside the room. Hence, it is clear that P.W. 7 was not in the room when the search was being conducted.

28. It is admitted that as per directions of A.P. Patil, he alongwith Investigating Officer Nambudri stood near the counter of Pooja Guest House and later on informed by A.P. Patil that 2 kgs. Heroin was recovered from room No. 201 and was seized. Panchanama was drawn by Investigating Officer Anil Kodnani (P.W. 1). He had accompanied A.P. Patil, Nambudri and others alongwith the same panchas to the house of the accused No. 1. In the search of the house of accused No. 1 they had found passport issued by Srilankan authority in the name of accused No. 3. One air ticket issued by Srilankan authority in the name of accused No. 3 and his laminated photo identity card.

29. It is admitted in the cross-examination that on reaching Nerul Railway Station, he had learnt about visit to Pooja Guest House. He had gone directly to Pooja Guest House. He had not made any enquiry at the counter which is at ground floor. That he was outside the room No. 201 for 5 minutes and thereafter, he was directed to remain present at the counter and he has not visited the room No. 201 thereafter. He was not present at the time of panchanama. He was at the counter alongwith Nambudri for about 2 and half hours. P.W. 7 had recorded statement of Ramanjun Naidu. That accused No. 1 had accompanied them to his residence. The statement of Ravi Ramanjulu Naidu is at Exh. 83.

30. Exh. 87 is the bill issued by Pooja Guest House in the name of one Ravindran whose nationality is shown as Indian. He had arrived in the said hotel on 29/1/2005. There is no mention of the name Nirmal Parera on the said bill.

31. P.W. 8 Narayan Kookrakunder was working as a Manager-cum-Receptionist in Pooja Guest House. He was requested by the officers to act as panch on 30/1/2005 and Ravi Naidu had acted as a co-accused. All had entered inside the room. According to P.W. 8, he alongwith officers entered room No. 201 and noticed one black colour bag lying on the bed. 4 persons were present in the room. About one person he has stated that his name may be Pereira or

Fernando. He has further deposed that the bag was opened. Plastic bag was drawn from inside the bag containing two polythene bags filled with brown colour powder. Sample was drawn and tested. The panchas had signed the panchanama. On being asked by the officers about the contents of the bag, the accused persons had declined that the bags contained drugs i.e. heroin. Panchanama was drawn and he signed on the said panchanama. The witness was not able to identify the signatures of other persons who had signed panchanama. The copy of the identity card and the receipt issued by Pooja Guest House were enclosure to the panchanama. They were recovered from room No. 201. P.W. 8 was also a member of raiding party who had searched the residential premises of accused No. 1 Vasanthan. The passport of accused Vasanthan, ration card, telephone bills, electricity bill and some documents in respect of the flat were found and seized. Except passport, he has put his signatures on all documents.

32. The record shows that the matter was scheduled for further cross-examination on 15/10/2007. However, it appears that the witness did not remain present and could not subjected to cross-examination.

33. P.W. 9 Sanjay Annayya Poojari was also attached to NCB Office on 30/1/2005. He was a member of raiding party on 30/1/2005. He had recorded the statement of accused No. 1 Vasanthan on the same day under Section 67 of N.D.P.S. Act. The narration was recorded on the computer. He had identified the accused Nos. 2 and 4 and had also identified accused No. 5 after seeing photographs. P.W. 9 had arrested accused No. 1 by serving upon the memorandum of arrest after explaining him the grounds of his arrest, which is marked as Exh. 99. The statement of accused No. 1 is at Exh. 98. On 2/2/2005 he had recorded supplementary statement of accused No. 1 as per his say. In the said statement, he had given the details of past involvement and information about the involvement of his family members in narcotic cases. Supplementary statement was again recorded on 4/2/2005. On 8/6/2005 the statement of accused No. 1 was again recorded and he had identified the original accused No. 5 when he was brought before him as the same person who had supplied him 3 kgs. of Heroin which was seized from Room No. 201 of Pooja Guest House. The said statement was signed by accused No. 5 and endorsed by accused No. 1.

34. It is admitted in the cross-examination that on 30/1/2005 P.W. 9 was summoned by Superintendent A.P. Patil at around 9.15 a.m. That at the time of raid, he was standing outside the door of room No. 201 and Mr. Kodnani was doing the work of search and seizure and that other officers were assisting him. It is admitted that before recorded the statement of accused No. 1, P.W. 9 had not spoken to him. He had summoned Accused No. 1 orally. Hence, no written summons were issued. That printed proforma of written summons consists of the ingredients of Section 67 of the Code of Criminal Procedure, 1973. The provisions of Section 67 of N.D.P.S. Act were read out to accused in English language. According to P.W. 9 he had informed the accused that he could be prosecuted for making false statement. That according to him, the accused could read, write,

speaking and understanding English. It is not specifically mentioned that since the accused could not read and write English language, P.W. 9 had scribed the statement. No oath was administered to accused No. 1 before recording statement under Section 67 of the N.D.P.S. Act. Although P.W. 9 had realised that on certain aspects it was necessary to interrogate the accused, P.W. 9 had made not such efforts. There was no enquiry in respect of passport. There was no enquiry with accused about ownership of two wheeler Bajaj Safari, nor there was enquiry about Hotel Egmore in Chennai. There is discrepancy in the cell phone number. It is admitted that the cell phone number reflected in Exh. 98 is incomplete. P.W. 9 had not enquired as to whether the statement of the co-accused was recorded. The name of the co-accused was revealed in the statement of accused No. 1 and therefore, other accused were confronted with the statement of accused No. 1. It is pertinent to note that P.W. 9 has evaded to answer as to whether the accused No. 1 had retracted his confession on 22/9/2005 or that rebuttal was filed by N.C.B. on 6/10/2005. It is admitted by P.W. 9 that the report at Exh. 100 does not indicate that P.W. 9 had recorded the statement of the accused. Since the confessional statement has been retracted, it would not be necessary to discuss the discrepancies in confessional statement of the accused as this Court is considering as to whether the prosecution has been able to establish that the contraband was in conscious possession in one or all the accused.

35. P.W. 10 Bhushan Mulay was also intelligence officer of NCB. He has recorded the statement of Nishanta Fernondeo. P.W. 10 has specifically submitted that the statement of the acquitted accused Nishanta was recorded with the help of accused No. 2 since the accused No. 4 was not conversant with any other language except Sinhali. P.W. 10 had recorded the statement of original accused No. 5 under Section 67 of the N.D.R.S. Act. It is pertinent to note that accused No. 5 was not present in room No. 201 at Pooja Guest House. P.W. 10 submits that after completion of investigation, he had filed complaint on 19/7/2005. He has proved the complaint which is at Exh. 1.

36. In the cross-examination P.W. 10 has admitted the lacunas in recording the statement of the accused. It is admitted by P.W. 10 that although the accused No. 5 was well-conversed with English language, he was not allowed to write the statement in his own handwriting since he had very slow speed of writing. P.W. 10 categorically stated that it was not necessary for him to enquire with the accused No. 5 as to whether he was giving his statement under any threat, promise or coercion. It is also admitted that it is not specifically mentioned in the statement of accused No. 5 that the seized two kgs. of Heroin was supplied by him to accused Vasanthan. Hence, the said aspect goes to the root of the matter. There is no documentary evidence to show that the statement was recorded in the presence of Vasanthan.

37. P.W. 10 has further admitted in the cross-examination that it is not specifically mentioned in the statement of accused No. 5 that the seized

contraband was supplied by him to accused Vasanthan. That P.W. 10 had not shown accused No. 5 seizure panchanama which is at Exh. 51. It is admitted that the signature of the accused does not appear at the bottom of the page. In the statement accused No. 5 had disclosed that one Kasim Ajmeri is dealing in drugs business. The said information was not relegated to the superior officers. P.W. 10 had not taken any steps to ascertain identity or the whereabouts of Kasim Ajmeri nor to trace Muslim Bhai. That Vasanthan had written at the instance of P.W. 10 that he was present on 9/6/2005. The accused No. 5 was not served with summons before recording of the statement. P.W. 10 was not specifically authorised by any authority to file complaint.

38. P.W. 11 Mr. Ravi Gokhale was also attached to NCB, Mumbai. He was summoned by his senior Superintendent Patil on 30/1/2005 at about 5 p.m. and was informed that there had been a seizure of 2 kgs. of heroin at Pooja Guest House upon reaching office. At about 7 p.m. he was directed to record the statement of Nirmal Parera. He had gone through the panchanama. He explained the provisions of Section 67 of the N.D.P.S. Act to Nirmal Parera. He learnt that Nirmal Parera was not fluent with English language but the answers were in English. It was disclosed by Nirmal Parera that he had approximately given Rs. 2.5 Lakhs to Vasanthan and that on 30/1/2005 Vasanthan had brought the contraband in the black colour shoulder bag. That Thanabalasingham was accompanying Vasanthan. P.W. 11 had prepared arrest memorandum of Nirmal Parera. P.W. 11 has deposed in his cross-examination that he had summoned original accused Nos. 1, 3 and 4 when he was recording the statement of accused No. 2. He has also admitted that he had not informed Mr. Nirmal Parera that the statement under Section 67 of the N.D.P.S. Act could be used against him at the time of trial. It is admitted that P.W. 11 had not prepared had not prepared said notes about recording of statement or arrest of accused. The case was not produced before the Magistrate within 24 hours after arrest. It is also admitted that the copy of Exh. 122 was not given to the accused.

39. P.W. 12 Narayan Panigrahi was working as a Hawaldar in NCB. He was the carrier of goods to forensic science laboratory at Kalina.

40. PW-13 is Mr. Ajit Patil. He was attached to NCB as the Superintendent. He has deposed before the Court that on 31.1.2005, although it was Sunday, he had gone to the office for some secret official work. That Mrs. Alka Tyagi was his immediate superior officer and she was custodian of the brass seal. At about 9.15 a.m., Shri Vipin Nair placed before him an intelligence note indicating that one person by name Vasanthan and his associate were to deliver substantial quantity of Heroin to two Srilankan Nationals at Room No. 201. The intelligence/information was collected by three officers i.e. Nair, Dubey and Nambudri. It was decided to conduct search and seizure. He had perused the intelligence note and endorsed the same. He contacted his immediate superior specifically and she had directed the Personal Assistant to hand over NCB Seal No. 03 which he collected from Mr. Venu. He had signed the intelligence note on 30.1.2005 which is at

Exhibit 65. As far as the procedure preceding search and seizure is concerned, he has corroborated with the evidence of the other officers. He has further reiterated that the room was opened by Vasanthan. There were three more persons in the room i.e. A-2, A-3 and A-4 were present.

41. In the cross-examination, PW-13 has specifically admitted that there was no material on record to even remotely indicate that Vasanthan had carried Heroin to Room No. 201. It is also admitted that there was no enquiry as to whether the intelligence note which was placed before him was a first copy, xerox copy or a carbon copy. A copy of Exhibit 65 was admittedly not given to him for personal record.

42. The learned counsel for the appellant, at this stage, submits and reiterates that there has been a noncompliance of Section 42 of the N.D.P.S. Act. PW-13 has categorically admitted that the last two lines of Exhibit 65 pertained to seeking directions and they did not form part of the information. According to him, except Exhibit 65, there is no other document to show that on 30.1.2005 before going for raid, he had perused Exhibit 65. Except the oral communication to Alka Tyagi, there was no other communication with her. There is no movement register or document which would indicate carrying of seal to Pooja Guest House and that it has been returned to the custodian after completing search and seizure. PW-13 could not recollect as to whether Room No. 201 was on the first floor or second floor. That he was aware of the occupants of Room No. 201. That name of none of the accused was tallying with the records in the guest house register. No enquiry was made on the spot to find out as to how the bag reached Room No. 201. At the time of recording the panchnama, the door of Room No. 201 was partially opened. That there was no resistance of entry by the occupants of room No. 201. Nobody narrated the contents of panchnama. While scribing the panchnama, Mr. Kodnani did not ask for anybody's assistance. That the panchas were silent spectators. The officers had communication with all the occupants of room No. 201 in Hindi and English language. Upon being confronted with Exhibit 52, PW-13 has admitted that the signature of the Zonal Director Mrs. Alka Tyagi does not show the date. That he had not directed any officer to conduct further investigation in respect of passport and air tickets mentioned at Sr. Nos. 1 and 2. No attempt was made to procure presence of panchas from the locality. Upon being confronted with Exhibit 100, PW-13 has admitted that there is no mention in Exhibit 100 that there was seizure from accused No. 1 and that he was present in Room No. 201. It is specifically admitted that there is no documentary evidence to show that on the relevant date, he had collected NCB Seal No. 03 from Mr. Velu (P.A. To Zonal Director). There is no acknowledgment that the seal was returned to Mr. Kodnani.

43. The learned counsel for the appellants vehemently submits that there has been non-compliance with the mandatory provisions contemplated under Sections 42 and 57 of the N.D.P.S. Act. It is further submitted that the contraband was not in conscious possession of the appellants. The learned

Counsel has rightly submitted that upon entering Room No. 201, the officers found the said bag on the bed. There is no enquiry at that stage to ascertain as to the owner of the said bag. The said bag containing contraband was opened by the officers on their own presuming that it contains contraband. It was not opened by any of the accused persons. Besides that bag, there was no other article in the said room which would indicate that the accused had occupied the said room overnight. The hotel register also does not establish that the said room was booked for Nirmal Pereira or that he had checked into the said room on the previous night. According to the learned counsel, it can therefore be inferred that the said articles/contraband was not in conscious possession of the appellants.

44. The learned counsel for the appellants has placed reliance upon the Judgment of this Court in the case of Antony Sauri Pilley Vs. State of Maharashtra, . It was held specifically that it is essential to establish, particularly in serious cases of the present type (N.D.P.S.) that the accused and he alone was the person from whose possession the contraband was recovered. Mere presence on the premises is not good enough. In the present case, the evidence of the witnesses shows that the bag containing contraband was lying on the bed. The learned Counsel for the appellants rightly submits that it was not seized from the possession of any particular person. That the bag was not opened at the instance or by any one of the accused in particular. The officer had found the bag and the same was opened. There was no enquiry with any of the accused about the contents or the ownership of the said bag. Therefore, it cannot be said that any of the occupants of room No. 201 had specific knowledge about the contents of the said bag.

45. The learned Counsel has then relied upon the Judgment of this Court in the case of Ron Chayak, Presently lodged in Central Jail Aguada Vs. State of Goa, . This Court, in the said Judgment has placed reliance upon the judgment in the case of Vijay Verma vs. State of Goa (unreported Judgment) dated 30/31-8-2001 in Criminal Appeal No. 13 of 2001 and the case of Anadi Charan Parida Vs. The State, wherein it was held that merely because the accused found in the house from where the contraband articles were allegedly seized, it cannot be assumed that he was either the owner of the house or in possession. In the absence of any such evidence, it would not be proper to come to a definite conclusion that the accused was in fact in possession of the house. Merely because he was found in the house at the time of alleged search or seizure. The articles were found from inside the room but not from the possession of the accused.

46. In the present case, the officers of NCB had raided the premises. In the said raid, they had found a bag containing contraband. The search and seizure panchanama of room No. 201 does not indicate even remotely that the room was occupied by any one of the accused overnight as there was absolutely no other article in the said room belonging to any of the accused. Hence, it can be safely said that the prosecution has miserably failed to establish the conscious

possession of the contraband by any of the accused. There is no independent evidence to corroborate the search and seizure. The panchas were the employees of the said hotel. Their evidence is incomplete and hence, conscious possession stand disproved. The learned Counsel for the applicant has submitted that there is a noncompliance of Section 42 of the N.D.P.S. Act. The information placed before Mr. Patil would clearly show that it was a intelligence note seeking direction to investigate into the source information. The information as was received was not placed before the Superintendent Patil.

47. The learned Counsel for the appellants has placed reliance upon the Judgment of this Court in the case of Sardar Wali Mohammad @ Sohail Vs. Union of India and Another wherein this Court has held that NCB had admitted that they have not maintained the special register for recording source information in their office. Even if Section 42 does not prescribe maintenance of register specially for writing down information, it would be in the interest of prosecution to maintain the register. The information written down on a piece of papers and not in an assigned register would amount to noncompliance of section 42 of the N.D.P.S. Act.

48. As far as compliance of Section 67 of the said Act is concerned, there is substantial evidence to the effect that the accused were not informed about the fact that the said statement under Section 67 of the N.D.P.S. Act could be used against them. Moreover, the said statement are retracted. The very fact that the prosecution has failed to establish conscious possession of the contraband would entitle the accused to benefit of doubt.

49. The learned Counsel for the Union of Indian submits that the Judgment in the case of Sardar Wali Mohammad (cited supra) has been challenged by the NCB in the Supreme Court and the said challenge is presently pending. It is further submitted that in the present case there is no cross-examination by the accused on the point of existence/maintenance of a register under Section 42 of the N.D.P.S. Act and the same was not argued before the trial court. Hence, the Judgment in the case of Sardar Wali Mohammad (Cited supra) is not applicable to the facts of the present case.

50. There is no evidence to show as to who/which of the accused had carried the said bag to room No. 201 of Pooja Guest House. Statement of Nirmal Parera would show that he had paid Rs. 2.5 Lakhs to Vasanthan prior to the date of incident. The said aspect is neither corroborated nor substantiated in the given situation.

51. The learned Counsel for the appellants rightly submits that the possibility that the bag was left in room No. 201 by the previous occupant cannot be ruled out and the present appellants cannot be held responsible for the same. The statement as far as noncompliance of Section 50 of the N.D.P.S. Act is concerned, need not be considered as the said contraband was not found in the personal search of any of the accused persons. It is true that Exh. 51 is a receipt

issued by Pooja Guest House which shows that the room was booked and paid for by one Ravindran on 30/1/2005 and that the person had checked into the said hotel on 29/1/2005. However, the identity of Ravindran as Nirmal Parera is not supported by any substantive evidence.

52. The learned Counsel for the Union of India submits that the accused persons were found in room No. 201 of Pooja Guest House and that they have failed to explain the existence of the said bag containing contraband. Hence, it can be said that they were in conscious possession. Needless to say at this stage that the prosecution has not adduced any substantive evidence indicating that the officers who conducted raid had questioned the accused about the existence of the said bag and there was no occasion for them to explain the same.

53. As far as the receipt which is a part of Exh. 51 collectively is concerned, the learned Counsel submits that during the seizure panchanama conducted in room No. 201 on 30/1/2005, an advance receipt issued by Pooja Guest House was found on the personal search of Accused No. 2 i.e. Nirmal Parera @ Ravindran. It is pertinent to note that the register shows an entry dated 29/1/2005 in the name of S. Ravindran and K. Nimalan in room No. 201. That there is no evidence about the identity of K. Nimalan. It was incumbent upon the prosecution to establish that Nirmal Parera was also known as S. Ravindran.

54. The learned Counsel at this juncture has placed reliance upon the statement of accused under Section 67 of the N.D.P.S. Act. The Court cannot be oblivious of the fact that the language of the communication was a major impediment between the raiding officers and the accused.

55. The learned Counsel further submits that the accused No. 2 has signed the receipt at the time of seizure panchanama on 30/1/2005 and secondly he had signed on the said receipt in the course of recording his statement under Section 67 of the N.D.P.S. Act. The learned Counsel for the appellants has reiterated that the said signatures were obtained under coercion.

56. As far as conscious possession is concerned, the learned Counsel for Union of India submits that once prosecution has proved possession, the presumption under Section 35 and 54 of the N.D.P.S. Act come into operation and the person found in possession is presumed to have committed an offence. She has placed reliance upon the Judgment of the Hon'ble Apex Court in the case of Dharampal Singh Vs. State of Punjab, . The Hon'ble Apex Court has held that in the said case the vehicle driven by appellant Dharampal Singh and occupied by Major Singh is not a public transport vehicle. The initial burden of proof of possession lies on the prosecution and once it is discharged legal burden would shift on the accused. Standard of proof expected from the prosecution is to prove the possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. It is further urged that "possession" is a polymorphous word and cannot be uniformly applied and has to be seen with reference to context.

57. As against this, the learned Counsel for the appellant submits that the hotel room was not in exclusive possession of the present appellants although they were found in the said room at the time of raid. The bag was on the bed. NCB officers entered the room, took charge of the bag, opened the bag and found the contraband. It was incumbent upon the prosecution to establish ownership of the bag and knowledge of the other accused that said bag contained contraband. The panchas/staff of the hotel have not fixed the liability on any particular person carrying the said bag to the room. The modes of the bag travelling to the room has not been established. Hence, it cannot be said that all the accused or any one of them was in conscious possession of the said contraband. A hotel room cannot be equated with vehicle which was being exclusively driven by the accused.

58. In the case of Tirupati Walal Vs. The State of Maharashtra , this Court had convicted the driver of the vehicle and had held that driver was in conscious possession. It is held that-

"The fact that original accused Nos. 2 to 4 were sitting on the artificially prepared sheets of ganja which were concealed instead of cushions by itself cannot be sufficient to attribute conscious possession of the articles to them.....The suspicion is not enough to say that it would also be regarded as proof of the actual possession."

However, persons travelling as mere passengers in the Ambassador car were acquitted as there was nothing on record to indicate that the said accused passengers had knowledge about the goods that were being transported in the said bag. In these circumstances, it cannot be presumed that the accused had culpable mental state meaning thereby that they were in conscious possession.

59. The learned Counsel for the Union of India further submits that presumption of conscious possession is available under Section 54 of the Act, which provides that the accused may be presumed to have committed the offence unless he accounts for satisfactorily the possession of contraband.

60. In the present case, there was no occasion for the accused to satisfactorily account for the possession of the contraband as the ownership of the bag itself was not established by the prosecution. Unless the fact is said to be proved, it cannot be disproved in the facts of the case. The room was occupied by persons and all of them cannot be said to be in conscious possession of the contents of the bag.

61. The learned Counsel further submits that the accused No. 1 had named the accused No. 5 as the supplier of the said contraband and had identified him on the basis of the photograph shown to him. Such an identification cannot lead to an inference that the identity of Accused No. 5 as the supplier has been established. Again implicit reliance is being placed upon Exh. 98 which is the statement of the accused. Although a confession made in the course of investigation under the N.D.P.S. Act is admissible in evidence, the retraction of

such a statement would necessitate the prosecution to independently establish the evidence against the accused beyond reasonable doubt. It is true that the said statements of Accused No. 1 is concerned, were retracted after about 8 months of his arrest and 7 and half months of his judicial custody. According to the learned Counsel for the Union of India, the said statements were retracted upon legal advises. Every accused has right to defend himself with the aid of a legal practitioner. Hence, the retraction cannot be deprecated on that ground.

62. The learned Counsel has further submitted that there is nothing on record to show coercion to make the statement. The accused persons were at the goodwill of the investigating agency. They could not have elicited independent evidence to establish that the said statements were recorded under coercion. The same would be applicable in case of accused No. 2 as well as the accused No. 5.

63. It is submitted that the accused Nos. 3 and 4 were acquitted on the ground that the accused No. 3 had accompanied Accused No. 1 and had no knowledge of the contents of the bag whereas Accused No. 4 has accompanied accused No. 2 and had no knowledge about the contents of the bag. In fact, there is no cogent evidence on record that accused No. 3 had accompanied accused No. 1 to the hotel room and that accused No. 4 had accompanied accused No. 2 to the said room. In fact, the prosecution has not adduced any evidence to indicate as to whether all the accused had come to the room at the same time or whether the accused No. 1 and accused No. 2 had come to the room only on 30/1/2005 as the hotel receipt would show that the said room was booked in the name of Ravindran on 29/1/2005. The movement of all the accused has not been investigated into and hence, not proved. There is no evidence to show that the accused Nos. 1 and 2 had carried the said bag to the room at any point of time and hence, it cannot be said that the prosecution has established the case against the present appellants beyond reasonable doubt.

64. The Court cannot be oblivious of the fact that the appellants have almost undergone the substantive sentence as they have been in custody since 30/1/2005.

65. In view of the above observations and submissions, the appellants are entitled to the benefit of doubt and deserves to be acquitted.

66. Hence, following order is passed:

ORDER

(i) The appeals are allowed.

(ii) The conviction and sentence passed vide Judgment and Order dated 11/12/2009 by the Special Judge (N.D.P.S. Act), Gr. Bombay in N.D.P.S. Spl. Case No. 88 of 2005 is quashed and set aside.

(iii) The appellants herein are acquitted.

(iv) The appellants be released forthwith, if not required in any other offence.

(iv) Fine amount, if paid, be refunded.

(v) The writ of the order be expedited.

Appeals are disposed of accordingly.