

**(1990) 01 GUJ CK 0007**  
**In the Gujarat High Court**

State of Gujarat

APPELLANT

Vs

Abdulrasid Ibrahim Mansuri

RESPONDENT

**Date of Decision :** 22-01-1990

**Acts Referred:**

Bombay Prohibition Act, 1949 — Section 66(1)(b)  
Criminal Procedure Code, 1973 (CrPC) — Section 313  
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20(b)(ii),  
25, 42, 42

**Citation :** (1990) 2 GLR 947

**Hon'ble Judges :** V.H. Bhairavia, J; P.M. Chauhan, J

**Bench :** Division Bench

**Judgement**

P.M. Chauhan, J.—Can a person, in possession and transporting in an autorickshaw, without any passenger in it, in a public place 105.700

kgs., of Cannabis Sativa (charas), worth Rs. 5,29,000/-, be held to be in unconscious possession or without knowledge of the contents in the

packets ? Were the provisions of Section 42, Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as "N.D.P.S. Act")

required to be followed or the provisions u/s 43 of the N.D.P.S. Act are applicable in case of seizure in public place ? Are provisions of Chapter

V, N.D.P.S. Act mandatory, the non-compliance of which will vitiate investigation, trial or conviction ipso facto or miscarriage of justice or

prejudice to the accused required to be established ? These are some of the main points requiring consideration in this acquittal appeal preferred

by the State against the respondent.

2. Additional City Sessions Judge, on appreciation of the evidence held that it is amply made out from the evidence on record that the muddamal

articles found from the possession of the respondent and seized under the panchnama (Exhibit 7), received in sealed condition by the Forensic

Science Laboratory on 15-1-1988, happened to be analysed by the Biological Division, are found to contain botanical material of Cannabis Sativa

(charas) and as per the opinion (Exhibit 12), the contents of all the 11 bags are found to contain charas. The learned trial Judge also held that the

identity of the muddamal articles found from the possession of the respondent and analysed by the Forensic Science Laboratory is also duly

established by the prosecution and that part of the prosecution case has not been seriously challenged on behalf of the defence. As recorded by the

learned trial Judge, the only aspect that was seriously pressed before him was that the prosecution has not satisfactorily proved the aspect of

possession much less conscious possession and knowledge on the part of the accused, who happened to be the driver of the authorickshaw, from

which four gunny bags were found, wherein there were 11 packets, the contents of which weighed about 105.700 kgs., in the form of balls of

uneven shape and size, which, according to the analysis and report of the Forensic Science Laboratory, happened to be narcotic drugs, viz.,

Cannabis Sativa. Learned trial Judge also observed that the mandatory provisions of Section 42 N.D.P.S. Act were not complied with as the

information received by the Police Inspector Shri P. M. Vishen was not reduced into writing and he had not sent the copy of the information to the

immediate superior Officer within the requisite time. It appears from the observation that the learned trial Judge referred the judgment in the case of

Hakam Singh Vs. Union Territory, , but did not clearly observe that the mandatory provisions are violated, and therefore, the respondent-accused

was entitled to acquittal. The learned trial Judge ultimately observed that for want of mens rea and intention and/or knowledge on the part of the

respondent-accused, the offences punishable u/s 20(b)(ii) and 25 of N.D.P.S. Act and Section 66(1)(b) of the Bombay Prohibition Act cannot be

said to have been duly brought home beyond all reasonable doubts against the respondent-accused and in view of the nature of the evidence on

record, the respondent-accused is entitled to the benefit of doubt. The learned trial Judge, accordingly extended the benefit of doubt to the

respondent and acquitted. So far as the finding that the respondent was carrying four gunny bags in the rickshaw without any passenger and the

bags contained 11 packets of Cannabis Sativa (charas), having a total weight of 105.700 kgs., and worth Rs. 5,29,000/- is concerned, we agree

with the learned trial Judge as that is borne out from the evidence on record and, therefore, we do not think that it is necessary to discuss the

evidence extensively. We will, however, narrate, in short, the prosecution case, and discuss evidence.

3. Police Inspector Shri P. M. Vishen was the Inspector in charge of Dariapur Police Station and on January 12, 1988, at about 4.00 p.m., Police

Constable Navalsinh informed that charas of one Iqubal Sayedhusen Bappu was to be transported to Shahpur in an autorickshaw and therefore,

he called the Police Sub-Inspector Vaghela, Police Sub-Inspector Vania and other Police Constables and all of them, along with the informant

Police Constable Navalsinh, took position on the main road from Delhi Darwaja Circle to Shahpur and kept watch. At about 5.15 p.m., the

rickshaw was sighted, proceeding from Delhi Darwaja to Shahpur, and in that rickshaw, there was no passenger, but but on the foot-board in the

rickshaw, there were gunny bags. On Police Constable Navalsinh giving signal, the rickshaw was intercepted and all the Police Officers

surrounded it. As people collected, the rickshaw was taken to Shahpur Police Chowky, at a distance of 200 to 250 paces away from there, and

two panch-witnesses were also called. Respondent Abdulrasid was driving the rickshaw No. GTH 3003. All the four gunny bags, which were in

the rickshaw, were removed from the rickshaw in presence of the panches to the Police Chowky and they were opened. There were 11 packets

in four gunny bags. In the plastic bags there were charas balls and the packets were covered with newspaper, 10 packets contained about 10 kgs.,

charas each and one packet contained 5,700 kgs. The value of the charas was assessed at Rs. 5,29,000/-. Photographs were taken by the

Government Photographer. The respondent was asked about the licence for keeping charas, but he had no licence. On personal search, nothing

was found from the respondent. In the rickshaw, there was nothing else except the four gunny bags. The packets containing charas were wrapped

with brown paper, tied with thread, paper slip bearing signatures of panches were fixed and sealed with the seal of the Dariapur Police Inspector.

The bags, in which the above said packets were kept, were also sealed with the paper bearing the signature of panch-witnesses and seal of

Dariapur Police Station. A detailed panchnama was prepared there and the P.S.I. lodged complaint with the Dariapur Police Station. The

respondent was arrested and complaint, panchnama and muddamal along with the respondent were sent to the Dariapur Police Station, along with

Police Sub-Inspector Vaghela. The letter addressed to the Forensic Science Laboratory was written by the P.S.I. and that was also sent to the

Police Station. The Police Station Officer, Dariapur Police Station, registered the offence as Prohibition Crime No. 31 of 1988 and further

investigation was carried out by the Police Sub-Inspector Shri Vaghela. During the course of the investigation, P.S.I. Vaghela came to know that

Iqbal Sayedhusen and Meheboobbhai Rasulkhan, were also involved in the offence, and the charas belonged to Iqbal Sayedhusen and,

therefore, he tried to find them, but they were absconding and, therefore, they were shown as absconding accused in the chargesheet P.S.I.

Vaghela personally carried the muddamal bags to the Forensic Science Laboratory and handed over the muddamal to the Laboratory on January

15, 1988. On chemical and biological tests, the Chemical Analyser and the Director of the Forensic Science Laboratory found that all the 11

packets contained Cannabis Sativa (charas). The Senior Scientific Assistant of the Forensic Science Laboratory and the Assistant Chemical

Examiner, Government of Gujarat, vide their reports, stated that the contents of all the exhibits were found to be charas. The biological Division of

the Forensic Science Laboratory also carried out test and in the report stated that the result of the analysis is that the exhibits contained botanical

material of Cannabis Sativa (charas).

4. At the trial, the prosecution examined P.W. 2 Police Inspector P. M. Vishen (Exh. 8), P. W. 4 Police Sub-Inspector B. S. Vaghela (Exh. 18),

P.W. 3 Head Constable Arjunsinh Vaghela (Exh. 14) and P.W. 1 panch witness Gajendrasinh Chhatrasinh Rajput (Exh. 6). Prosecution produced

the letter dated January 12, 1988, (Exh. 10) and letter by Forensic Science Laboratory and the report by the Forensic Science Laboratory and the

report of the Biology Division of the Forensic Science Laboratory (Exhs. 11, 12 and 13). All these documents were admitted by the learned

Advocate for the respondent, and exhibited with consent.

5. The respondent in the statement u/s 313, Criminal Procedure Code, admitted

that on January 12, 1988, he was driving the autorickshaw No.

GTH 3003 on way from Dariapur to Shahpur and the rickshaw was intercepted nearby Jivan Kamarsinh Pole, opposite Municipal Garden on

road between Delhi Darwaja and Shahpur and in the rickshaw, there were four gunny bags and the rickshaw was taken nearby Shahpur Police

Chowky and the gunny bags were taken out from the rickshaw and taken to the Shahpur Police Chowky and on opening the gunny bags, the

packets were taken out from the gunny bags. He also admitted that the muddamal, charas packets and rickshaw were attached from him. The

respondent then stated in his further statement that he possessed the rickshaw driving licence for 11 years and he secures rickshaw of others and

plies on hire. Two passengers met him at Kalupur Chhoka Bazaar and told him that the goods were to be taken to Shahpur and took his rickshaw

nearby the truck. Two passengers took out four bags from the truck and placed in the rickshaw and both of them started on scooter and told him

to follow the scooter. He was then intercepted nearby the Shahpur Gate and told him to take the rickshaw to Shahpur Police Chowky. In the

statement, the respondent practically admitted the facts, as discussed above, but the defence was that the goods belonged to the two passengers

and not to him. The respondent did not examine any witness. The facts about recovery, packing, sealing to the Forensic Science Laboratory, test

by the Forensic Science Laboratory and finding that the muddamal balls are charas are established by the prosecution and are practically admitted

by the respondent in his statement and were not seriously challenged before the learned trial Judge. That aspect is also clear from the evidence of

the Police Inspector Vishen, Police Sub-Inspector Vaghela and panch-witness Shri Gajendrasinh. We, therefore, do not think it necessary to

discuss their evidence. On scrutiny of the evidence, we agree with the learned Judge on that finding. However, this being an acquittal appeal Shri

Malik, learned Advocate for the respondent, has challenged the report of the Forensic Science Laboratory. We shall discuss it at a later stage.

6. The respondent was charged for the offences punishable u/s 2(b)(ii) and Section 25, N.D.P.S. Act and Section 66(1)(b), Bombay Prohibition

Act, 1949 for possessing and transporting Cannabi's Sativa (charas) without any permit ""Narcotic drug"" as defined in Section 2(xiv) includes

cannabis (hemp) and "cannabis (hemp)" as defined in Section 2(iii) includes charas. Section 8 prohibits the possession, transport, use, consumption

etc., of any narcotic drug except for medical or scientific purposes. u/s 20, N.D.P.S. Act, the contravention of the provisions of the Act relating to

cannabis other than ganja is punishable with rigorous imprisonment for a term, which shall not be less than ten years and fine, which shall not be

less than one lakh rupees. Section 25 provides for the penalty for knowingly permitting any house, or conveyance etc., to be used for the

commission by another person of an offence punishable under the provisions of the Act. In Gujarat, the Bombay Prohibition Act prohibits the

possession and transport of the prohibited articles which include charas and the consumption, possession or transportation of the intoxicant is

punishable under the provisions of Section 66 of the Bombay Prohibition Act.

7. Before proceeding on to consider as to whether conscious possession or transporting or possession with knowledge of the charas or metis rea

are established by the prosecution, we shall refer Sections 35 and 54, N.D.P.S. Act. Section 35 provides:

35. Presumption of culpable mental state: (1) In any prosecution for an offence under this Act which requires a culpable mental state of the

accused, the Court shall presume the existence of such mental state but it shall be defence for the accused to prove the fact that he had no such

mental state with respect to the act charged as an offence in that prosecution.

The Explanation to Sub-section (1) of Section 35 expanding the meaning of "culpable mental state" provides that "culpable mental state" includes

intention, motive, knowledge of a fact and belief in, or reason to believe, a fact. Sub-section (2) of Section 35 provides that for the purpose of

Section 35, a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is

established by a preponderance of probability. The burden, therefore, is shifted on the accused person to prove the fact that he had no culpable

mental state. The statutory presumption, therefore, not only requires the Court to presume the metis rea or the knowledge, intention or reason to

believe, but also shifts the burden on the accused person to prove beyond reasonable doubt and not by mere preponderance of probability. Such

statutory provision appears to have been made as, normally, the defence of the

accused persons may be that the possession was without knowledge or without reason to believe or without conscious knowledge. It appears that as the view expressed by the Courts is that the accused is not required to rebut the presumption, beyond reasonable doubt, but by preponderance of probability, Sub-section (2) of Section 35 is enacted by the Legislature, shifting the burden on the accused to established beyond reasonable doubt his defence of having no knowledge, conscious possession or mens rea and not by preponderance or probability. Another statutory presumption u/s 54, N.D.P.S. Act, is that in the trial under the Act, it may be presumed, unless and until the contrary is proved that the accused has committed an offence under Chapter IV in respect of any narcotic drug or psychotropic substance for the possession on which he fails to account satisfactorily. It is, therefore, clear that in the trial under the Act, the Court may raise a presumption till the contrary is proved that the accused has committed the offence under Chapter IV of the Act in respect of the narcotic drugs or psychotropic substances, for the possession of which he fails to account satisfactorily. By using the word "may" the Legislature appears to have vested the discretion in the Court, but even then, it is clear that the Court may presume the commission of the offence by the accused and that if the accused is in possession of the narcotic drug, it is for the accused to account satisfactorily his possession. u/s 35 N.D.P.S. Act, the presumption is for the existence of culpable mental state and the burden shifts on the accused in case the possession of narcotic drug or psychotropic substance is established and u/s 54, the presumption is for the offence under Chapter IV and the burden shifts on the accused to account satisfactorily for the possession of the narcotic drug or psychotropic substance. The statement of the respondent-accused and his defence is, therefore, required to be considered in view of the above statutory presumptions. As discussed above, the possession of charas is established by the prosecution. Before we consider the presumption and the defence of the accused, we shall consider the evidence irrespective of statutory presumptions as to whether the prosecution has proved the possession with knowledge or conscious possession of the respondent.

8. As discussed above, it is established that the respondent was driving a rickshaw, and carrying four gunny bags in the rickshaw and there was no

passenger in the rickshaw. All the four gunny bags contained 11 packets of charas, weighing 105.700 kgs., and worth Rs. 5,29,000/-. On prior

information, the rickshaw was intercepted by the Police Inspector in charge of Dariapur Police Station and his officers and charas was recovered

from the rickshaw and seized under the panchnama. On information that charas of Iqbal Sayedhusen was to be transported in the rickshaw,

Police Inspector Vishen and his staff were waiting for such rickshaw to pass by that road to proceed to Shahpur. The fact that the rickshaw was

intercepted on the road to Shahpur is established and not denied and, therefore, there is no reason not to believe the evidence of Police Inspector

Vishen that he had information about charas to be transported to Shahpur. If at all there had been no definite information, the Police Officers could

not have waited for such rickshaw to pass by and intercept the rickshaw driven by the respondent. Normally, the passengers in a public

conveyance like rickshaw travel with their goods in the rickshaw and such goods without any passenger may not be transported. That very unusual

circumstance in this case indicates that the transporting of the bags by the respondent was not innocent. Another eloquent circumstance is that an

innocent rickshaw driver driving the rickshaw just on hire basis, when intercepted by the Police, would immediately burst out and say that the

persons proceeding on the scooter are the owners and he was following them: That would have been the spontaneous behaviour of an innocent

rickshaw driver driving the rickshaw just on hire basis. No question was put to the Police Inspector Vishen or Police Sub-Inspector Vaghela that

while the rickshaw was intercepted, the respondent immediately stated that the goods belonged to two persons, who was proceeding on scooter.

In the cross-examination of Police Inspector Vishen or Police Sub-Inspector Vaghela, no question was out as to whether they had seen two

persons proceeding on the scooter just a head or nearby the rickshaw. It cannot be easily believed that if at all two strangers to the respondent

would have placed the goods worth Rs. 5,29,000/- in the rickshaw, they would have allowed the respondent to proceed all alone and would not

have kept themselves nearby. No person with goods valued at Rs. 5,29,000/ - would rely on such rickshaw driver without accompanying in the

rickshaw or nearby the rickshaw and keeping a watch on it. If at all any such persons were proceeding on scooter, the respondent would

immediately burst out, saying that goods belonged to the two person, who were proceeding on the scooter. At least, it should have been asked to

Police Inspector Vishen or Police Sub-Inspector Vaghela in the cross-examination as to whether they had seen two persons proceeding ahead or

nearby the rickshaw when the rickshaw was intercepted. After the arrest, the respondent was taken on police custody remand and the

investigation was carried out by Police Sub-Inspector Vaghela. P.S.I. Vaghela has stated that during the course of the investigation, he had come

to know that Iqubal Sayedhusen and Maheboobkhan Rasulkhan were also involved in the offence and he enquired for them, but they were not

found. Iqubal Sayedhusen is a resident of Popatiawad and Maheboobkhan Rasulkhan is a resident of Jorden Road. Both of them are shown as

absconding accused in the chargesheet. Merely because those two persons are said to have been involved in the offence, that does not necessarily

mean that the petitioner must not have come to know about the contents of the gunny bags. According to the respondent-accused, as stated by

him, two persons had placed gunny bags in the rickshaw and told him that the rickshaw was to be taken to Shahpur. It cannot be believed that any

unknown persons would put that much confidence in a stranger rickshaw driver and put goods worth Rs. 5,29,000/- without sitting in the

rickshaw. All these circumstances clearly establish the complicity of the respondent-accused, conscious possession and transporting of charas from

one place to another place. The learned trial Judge failed to consider all these circumstances and came to the conclusion that the conscious

possession or possession with knowledge was not established. It is true that it is admitted by Police Inspector Vishen and also by the panch-

witness Gajendrasinh that till the plastic packets were opened, smell of charas was not emitting out of the packet. If at all any such smell would

have been emitting, it would have been one of the circumstances to hold the conscious possession, but merely because no such smell was emitting,

that cannot be the only circumstance to hold that the possession was not with knowledge or consciousness. Even if smell is emitting, it may happen

that the innocent rickshaw driver, who might not have experienced smell of charas, would not be in a position to know that the contents were

charas. The circumstance that no smell was emitting by itself, therefore, cannot be attached much importance to hold lack of knowledge of the

contents of the packets. All these circumstances as discussed above clearly establish the complicity, conscious possession and also possession with

knowledge of charas in the gunny bags. The finding by the learned trial Judge, therefore, cannot be accepted. Not only that the finding cannot be

accepted but we would like to observe that the learned trial Judge, without taking into consideration all these circumstances and also the statutory

presumptions, has come to the conclusion, which, in our view, is not reasonable, proper and is perverse.

9. The learned trial Judge did not consider the statutory presumptions u/s 35 and Section 54 of the Act probably because the attention of the

learned trial Judge was not drawn to the said provisions of the Act. Reverting to the provisions of Section 35, the culpable mental state of the

respondent should be presumed and as the fact of possession of charas is established, admitted and not challenged, mens rea, knowledge of a fact

and the reason to believe are, therefore, required to be statutorily presumed against the respondent. It is true that it is open to the accused to prove

the fact that he had no such mental state with respect to the charge as an offence in the prosecution but that is required to be established beyond

reasonable doubt and not merely by preponderance of probability. It may be that in some circumstances, the mere statement may be sufficient to

disprove the allegation against the accused in a prosecution and it may not be possible for the accused to lead any other evidence to dispel the

presumption against him, but in the instant case, the vague statement of the respondent-accused that two persons had placed the goods in the

rickshaw and told him that they had to proceed to Shahpur and both of them proceeded on scooter by itself not only cannot be easily accepted,

but also not sufficient to discharge the burden on the respondent. For various reasons, as discussed above we are not prepared to accept the

existence of such fact. As discussed above, the prosecution has established that the respondent was in conscious possession and in possession

with knowledge and the respondent has failed to discharge the statutory presumption arising against him. We, therefore, hold that the accused was

in unlawful possession of Cannabis Sativa (charas) and was transporting it consciously and with knowledge and mens rea is established and the

prosecution has established the offence.

10. The learned trial Judge has observed that the view expressed by him about the conscious possession or the possession with knowledge is

fortified by the principle laid down in *Jawar Arjan Vs. State of Gujarat*, In that case, u/s 66(1)(b), Bombay Prohibition Act, the appellant rickshaw

driver was driving the rickshaw in which the accused No. 2 was a passenger. When the rickshaw was searched, some balloons kept in a bag,

containing illicit liquor were found. The passenger was the owner of those articles. The rickshaw driver was also convicted as having conscious

knowledge of the fact that the bag contained prohibited articles. The Courts had held that the accused rickshaw driver had conscious knowledge

of the fact that the articles contained illicit liquor and that was based on the information which the Police derived from the sources, which indicated

that the accused was in collusion with the co-accused. It was observed by Their Lordships of the Supreme Court that such information was not

admissible and could not have been used against the appellant. The balloons in the bags were not visible and the bags were kept in the dicky of

the rickshaw. It was held that the appellant was merely a rickshaw driver and the passenger was in the rickshaw and the passenger had placed the

bags containing such articles in the dicky. On that fact, the accused-appellant was acquitted and no other principle of law is laid down in that

judgment. From the facts of the case, Their Lordships observed that even the knowledge could not have been imputed to the mere rickshaw

driver, it is clear that in that case, the passenger with the bag was the rickshaw. In the instant case, no such passenger was there. That judgment,

therefore, is not relevant to the facts of the instant case.

11. The Supreme Court, while considering the relevant provisions of Sections 9 and 10 of the Opium Act, has considered the physical custody of

the opium sufficient to shift the burden on the accused to establish that he was not knowingly in possession of opium. In *Inder Sain Vs. State of*

*Punjab*, the accused got the parcel of apples in which opium was also found. The defence of the accused was that he did not know anything about

the contents of the parcel. In that case, the prosecution had not adduced any evidence to establish that the accused was knowingly in possession of

the opium. The accused had secured endorsement on the railway receipt from the consignee and presented it before the parcel clerk and obtained

the parcel. There was no evidence that the accused was aware that the parcel contained any contraband substance, much less opium. It was urged

on behalf of the prosecution in that case that in most of the cases of unauthorised possession of the contraband, the prosecution will never be able

to prove that the accused was knowingly in possession of the contraband article and that the accused was in conscious possession and by virtue of

Section 10 of the Opium Act, the burden to prove that he was not in conscious possession is upon the accused. Similar argument is also advanced

before us. Referring to Section 10 of the Opium Act, it was observed by Their Lordships of the Supreme Court that:

That section seems to proceed on the assumption, if it is proved that the accused had something to do with opium, then the burden of proof that he

has not committed an offence will be upon the accused. In other words, when once it is proved in a prosecution u/s 9 of the Act that the accused

was in physical custody of opium, it is for the accused to prove satisfactorily that he has not committed an offence by showing that he was not

knowingly in possession of opium. It would, therefore, appear that the prosecution need only show that the accused was directly concerned in

dealing with opium. If the prosecution shows that the accused had physical custody of opium, then, unless the accused proves by preponderance

of probability that he was not in conscious possession of the article the presumption u/s 10 would arise. We do not think that the language of

Section 10 would warrant the proposition that for the presumption in the section to arise it is necessary for the prosecution to establish conscious

possession.

It is also observed that:

18. In our opinion Section 10 would become otiose if it were held that prosecution must prove conscious possession before it can resort to the

presumption envisaged in the section. As we said Section 10 proceeds on the assumption that a person who is in any way concerned with opium

or has dealt with it in any manner, must be presumed to have committed an offence u/s 9 of the Act, unless the person can satisfactorily prove by

preponderance of probability either that he was not knowingly in possession or other circumstances which will exonerate him. The burden to

account will arise only when the accused is in some manner found to be

concerned with opium or has otherwise dealt with it.

After referring judgments in *State v. Sham Singh* ILR P. & H. 130 and in AIR 1944 297 (Oudh) , the penultimate observation by Their Lordships

is:

20. In the last analysis, therefore, it is only necessary for the prosecution to establish that the accused has some direct relationship with the article

or has otherwise dealt with it. If the prosecution proves detention of the article or physical custody of it, then the burden of proving that the

accused was not knowingly in possession of the article is upon him. The practical difficulty of the prosecution to prove something within the

exclusive knowledge of the accused must have made the legislature think that if the onus is placed on the prosecution, the object of the Act would

be frustrated.

It is also observed by Their Lordships:

21. It does not follow from this that the word "possess" in Section 9 does not connote conscious possession. Knowledge is an essential ingredient

of the offence as the word "possess" connotes, in the context of Section 9, possession with knowledge. The legislature could not have intended to

make mere physical custody without knowledge an offence. A conviction u/s 9(a) would involve some stigma and it is only proper then to presume

that the legislature intended that possession must be conscious possession.

22. But it is a different thing to say that the prosecution should prove that the accused was knowingly in possession. It seems to us that by virtue of

Section 10, the onus of proof is placed on the accused when the prosecution has shown by evidence that the accused has dealt with the article or

has physical custody of the same, or is directly concerned with it, to prove by preponderance of probability that he did not knowingly possess the

article.

In that case, Their Lordships of the Supreme Court confirmed the conviction. In the instant case, the circumstances and facts clearly establish that

the accused was in possession and transporting huge quantity of charas. The observations in *Inder Sain's* case are, therefore, applicable on all

fours to the facts of the instant case.

12. Subsequently, in *Kailash Chandra Sahu Vs. Republic of India*, while

considering the provisions of Sections 9 and 10 of the Opium Act, Their Lordships of the Supreme Court, referring the case of Inder Sain (supra), reiterated the same principle of law. The accused in that case was a licence holder in possession of ganja shop, from which 665 gms., of opium was recovered in absence of the accused and in presence of the servant of the accused. The same contention of absence of knowledge and conscious possession was raised, but repelled by Their Lordships. The judgments in Maharaj Prithvisinghji Bhimsinghji Vs. State of Bombay (now Rajasthan), and Radhakishan Vs. State of U.P., were relied on by the accused, but Their Lordships observed that the said decisions are not directly, on the point and the decision of the Supreme Court in Inder Sain (supra) clinches the issue on the point of law.

13. In State of Maharashtra Vs. Natwarlal Damodardas Soni, the accused was found in possession of gold biscuits and question arose for consideration as to whether the accused was in possession with the requisite guilty knowledge or mens rea and it was observed that guilty knowledge or mens rea can be established by circumstantial evidence.

14. In Dhanvantrai Balwantrai Desai Vs. State of Maharashtra, Their Lordships of the Supreme Court while considering the provisions of Section 4(1), Prevention of Corruption Act providing for the presumption observed that in order to raise the presumption u/s 4(1), Prevention of Corruption Act what the prosecution has to prove is that the accused person has received gratification, which was not legal remuneration and when it is shown that he has received a certain sum of money which was not a legal remuneration, then the condition prescribed by Section 4(1) is satisfied and the presumption thereunder must be raised. About the burden on the accused, it is observed that:

The burden resting on the accused person in such a case would not be as light as it is where a presumption is raised u/s 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words "unless the contrary is proved" which occur in this provision make it clear that the presumption has to be rebutted by "proof and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is

directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted.

15. In *Man Singh Vs. Delhi Administration*, the explanation which the accused immediately offered after the raid which was to some extent

corroborated by the witness, was considered sufficient for explaining the possession of the currency note.

16. *Shri Malik*, learned Advocate for the respondent, while asserting that conscious possession with the knowledge of the contraband articles is

required to be established, referred several judgments of the Supreme Court and other High Courts, some of which were referred in the case of

*Inder Sain and Kailash Chandra (supra)*. *Sudhdeo Jha Utpal Vs. The State of Bihar*, referred by *Shri Malik* was a case under Sections 420, 120B

etc., i. P. Code and considering the said provisions and the contention of the accused that he did not consciously make false representation but in

accordance with the practice obtaining in the officer signed the applications placed before him by the subordinate staff as a matter of routine, it was

accepted that no culpability should be attached to the action of the accused and that in such cases, the burden never shifts on the accused. The said

judgment is, therefore, not relevant to the facts of the instant case. The decision in *The State of Himachal Pradesh Vs. Buti Nath*, was u/s 9 of the

Opium Act. Opium was recovered from the motor garage belonging to the accused, to which the driver had access. On fact, it was held that the

opium might have been introduced into the garage either by the accused or by the driver and in absence of the proof and cogent evidence to that

effect, it was not possible to hold that opium was kept in the garage with the knowledge and consent of the accused. On the facts of that case,

acquittal appeal was, therefore, rejected by the Himachal Pradesh High Court.

17. The judgment in *Jhagru Kurmi Vs. State*, is also not relevant as the High Court was considering the provisions of Section 411 of the Evidence

Act (sic Penal Code) and the presumption u/s 114 of the Evidence Act. Similar is the case in *State Vs. Jaigovind*, and AIR 1927 40 (Nagpur)

relied on by *Shri Malik*.

18. Emperor Vs. Latoor, was a case u/s 212 I. P. Code and the point for consideration is not relevant for the purpose of the instant case.

19. Dickins v. Gill 1896 (2) QB 310 was a case under the Post Office (Protection) Act, 1884, Section 7 of which provided that a person shall not

make, or, unless he shows a lawful excuse, have in his possession, any die, plate, instrument, or materials for making any fictitious stamp. On facts, it

was held that the possession was without lawful excuse and the appeal was allowed. I fail to understand the relevance of the authority to the facts

of the instant case.

20. Chedi Mala and Ors. v. The King Emperor 8 CWN 349 was a case under the provisions of Section 9 of the Opium Act. The observations

are against the respondent as it is clearly held that Section 10 of the Opium Act should be read as providing that opium in, respect of which it is to

be presumed that an offence has been committed, must be opium in the possession of the accused and that it is also plain that the possession need

not be to the knowledge of the accused otherwise the section would not be necessary. The section is a penal one and must, therefore, be read

plainly and the plain meaning is that if excessive opium is found in a man's possession, he is liable to be punished unless he is able to account for it

satisfactorily.

21. Cyril C. Baker Vs. Emperor, referred by Shri Malik is also not helpful to the respondent, as ultimately, on facts, it was held that the boy, was

who absconding after the raid, might have placed opium in the cabin. It was only on facts the benefit of doubt was extended.

22. As discussed above, the law laid down by the Supreme Court is that in case of such prohibited articles, wherein the presumption arises, either

under the provisions of Section 10 of the Opium Act or Section 54, N.D.P.S. Act, the prosecution has to establish the possession and it is not

necessary to establish the knowledge or the conscious possession and it is for the accused to account for the possession. In view of the factual

aspect and also the provisions of Section 54, N.D.P.S. Act, as discussed above, we hold that the respondent was admittedly in possession of

charas and that he was in conscious possession of charas or in possession with knowledge. The finding of the learned trial Judge, therefore, cannot

be accepted. The illegal possession of charas is, therefore, established by the

prosecution.

23. The learned Judge has not clearly held that the mandatory provisions of N.D.P.S. Act are violated, and therefore, the respondent should be

acquitted. The learned trial Judge, however, referred the case of Hakam Singh Vs. Union Territory, , and the observation in that Judgment. Even

though the learned trial Judge has not found violation of the mandatory provisions of the N.D.P.S. Act and acquitted on that ground, Shri Malik,

learned Advocate for the respondent, has asserted that the provisions of Sections 41, 42, 43, 52 and 57 of the Act are violated. It is the right of

the respondent to support the acquittal by asserting the other grounds available to the respondent and the appellate Court should consider such

contentions even though not contended or considered by the trial Court. In the submission of Shri Malik, the mandatory provisions of Sections 41,

42 and 43 are violated as the information was not reduced into writing by the Police Inspector Shri Vishen and the seal of the Police Station

Officer was not properly affixed and the full report of the case was not submitted to the immediate superior. Shri Malik also challenged the

evidence establishing that the substance was charas. That aspect will be subsequently dealt with. As Shri Malik, learned Advocate for the

respondent, has raised the above contentions, it is necessary to ascertain (1) Whether Section 41, Section 42 or Section 43, is applicable to the

facts of the instant case ? (2) Whether the offence is a cognizable offence? (3) Whether the Police Inspector had the powers to seize and arrest ?

(4) Whether the provisions of Section 42 regarding taking down the information in writing are mandatory ? (5) Whether the provisions of Section

57 regarding submitting the full report within 48 hours to the immediate superior are mandatory or directory ? (6) Whether procedural provisions

of Chapter V, N.D.P.S. Act are mandatory or directory and (7) Whether infraction of any provision of Chapter V vitiate investigation,

proceedings, trial or conviction ipso facto or prejudice to accused or miscarriage of justice is required to be proved by accused ?

24. Chapter V, N.D.P.S. Act provides for the procedure to be followed for issuing the warrant; for entry, search and seizure and arrest in public

places; power to stop and search the conveyance; conditions under which the search of the person be conducted; informing the ground of arrest to

the accused; forwarding the accused to the Magistrate who has issued the warrant; forwarding the arrested accused and the seized muddamal to

Officer in charge of the nearest Police Station; the Officer in charge of the Police Station taking the charge of the articles seized and delivered to

him; report of the arrest and seizure to superior Officer and application of the provisions of the Code of Criminal Procedure, 1973 in so far as they

are not in consistent with the provisions of the Act to all warrants issued and the arrests, searches and seizures made under the Act.

25. Shri Malik, learned Advocate for the respondent, submits that the provisions of Sections 41 and 42 are offended. We shall, therefore, consider

the provisions of Sections 41, 42 and 43, N.D.P.S. Act, as in our view, the provisions of Sections 43 and 49 of the Act are applicable and not the

provisions of Sections 41 and 42 N.D.P.S. Act. Section 41 empowers the Metropolitan Magistrate, or a Magistrate of the First Class or any

Magistrate of the Second Class specially empowered by the State Government in that behalf, to issue a warrant for the arrest of any person whom

he has reason to believe, has committed any offence punishable under Chapter IV, or for the search, whether by day or by night, of any building,

conveyance or place, in which he has reason to believe any narcotic drug or psychotropic substance in respect of which an offence punishable

under Chapter IV has been committed or any document or any other article which may furnish evidence of the commission of such offence is kept

or concealed. Sub-section (2) of Section 41 authorises Gazetted officers of various departments of the Central Government specified in that

section, empowered by general or special order by the Central Government, or such Officer of the Revenue, Drugs control, Excise, Police, or any

other department of a State Government as is empowered in that behalf by general or special order of the State Government to search a building,

conveyance, or place by himself or authorise an Officer subordinate to him, but superior in rank to a peon, sepoy, or a constable, to arrest such a

person or search a building, conveyance or place. It is evident that the provisions Section 41 are regarding the empowering of such Officers. If the

information is given by any other person, then such empowered Officer should take it down in writing and then take further action for arrest or

search a building, conveyance or place by himself or authorise a subordinate Officer, but above the rank of peon, sepoy or constable, to arrest or

search a building, conveyance or place. Section 41 makes provisions empowering such Officers and also regarding the authority of the empowered

Officer to authorise his subordinate to take action or himself take action of arrest or search. By Notification No. GHL-14 NDS 1082-10577(i)-M

dated June 15, 1987, the Government of Gujarat, in exercise of power under Sub-section (2) Section 41, N.D.P.S. Act, empowered for the

purpose of Sub-section (2) of Section 41, all Officers of the Police Department of and above the rank of Inspector of Police posted in any part of

the State of Gujarat and other Officers of the Prohibition, Excise Department, Drugs, Cosmetics Department etc. The Officer of the rank of and

above Inspector of Police, therefore, can exercise the powers under Sub-section (2) of Section 41, N.D.P.S. Act. u/s 41, N.D.P.S. Act, arrest

and search can be made either under warrant issued by Magistrate or by authorised Officer or under orders of such authorised Officer. Without

being empowered under Sub-section (2), Section 41, N.D.P.S. Act, the Officer cannot arrest and search without warrant or authorise arrest and

search. That, however, does not mean that other Officers who are authorised u/s 42 or who can exercise the power u/s 43 of the Act cannot take

action for arrest and seizure of the prohibited articles. Section 41 is, therefore, not relevant and applicable to the facts of the instant case.

26. Section 42, N.D.P.S. Act provides for the power of entry, search, seizure and arrest without warrant or authorisation. Any Officer (being an

Officer superior in rank to a peon, sepoy or constable) of the departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any

other department of the Central Government or of the Border Security Force as is empowered in that behalf by general or special order by the

Central Government, or any such Officer (being an Officer superior in rank to a peon, sepoy or constable) of the Revenue, Drugs Control, Excise,

Police or any other department of the State Government as is empowered in this behalf by the general or special order of the State Government if

he has reason to believe from personal knowledge or information given by any person, and taken down in writing that any narcotic drug, or

psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article, which

may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may between sunrise

and sunset enter into and search any such building, conveyance of place and in case of resistance, break open any door and remove any obstacle

to such entry and seize the drug and detain and search and if he thinks proper, arrest any person, whom he has reason to believe to have

committed any offence punishable under Chapter IV relating to such drug or substance. The proviso to Sub-section (1) of Section 42 of the Act

authorises such Officer to enter and search the building, conveyance or enclosed place at any time between sunset and sunrise after recording the

grounds of his belief, if such Officer has reason to believe that the search warrant or authorisation cannot be obtained without affording opportunity

for the concealment of evidence or facility for the escape of an offender. Sub-section (2) of Section 42 makes it obligatory on the Officer who

takes down any information in writing under Sub-section (1) or recording the grounds of his belief under the proviso of Sub-section (1) to forthwith

send a copy thereof to his immediate superior. The provisions of Section 42 are applicable in the case in which a building, conveyance or place is

to be entered into and searched. If such places are not to be entered into and searched, the provisions of Section 42 will not be applicable. The

provision of recording in writing the information received by such Officer and forthwith sending the copy of such writing to the immediate official

superior is advisedly made to prevent the empowered Officer from misusing the power of entry into the building conveyance or place, which are

considered to be the protected places for an individual, who has right to exclude the outside and the privacy of the occupants of such places may

not be disturbed. A house or such protected place is considered to be a fortress of a person and he has right to prevent or exclude other persons

and that right is always protected by the State. Such procedure restricting the entry and search is, therefore, made in Section 42. Provision of

Section 42 is, applicable only in the case of entry and search in a building, conveyance or place. As defined in Section 2(viii) N.D.P.S. Act,

conveyance"" means a conveyance of any description whatsoever and includes any aircraft, vessel, and therefore, the rickshaw is a conveyance as

defined in the Act. However, the provisions of Section 42 will be applicable only if the entry is to be made and search is to be carried out. In the

instant case, the question of entry in the rickshaw did not arise and therefore the provisions of Section 42 will not be applicable. Apart from that,

the specific provisions in Section 43 provide for the seizure and arrest in a public place or in transit and that also clearly exclude the application of the provisions of Section 42 in the instant case. It was, therefore, not necessary to record in writing the grounds of the information and to forward such information forthwith to the immediate official superior. So far as the authority under Sub-section (1) of Section 42 is concerned, P. I. Vishen was duly authorised by the State Government by Notification No. GHL-14 NDS 1082-10577(i)-M dated June 15, 1987, by which, in exercise of the powers conferred by Sub-section (1) of Section 42 N.D.P.S. Act, the Government of Gujarat, has invested all the Police Officers of and above the rank of Head Constable in the State of Gujarat, within the limits of their respective jurisdiction, the power of entry, search, seizure, detention and arrest without warrant between sunset and sunrise, exercisable u/s 42 of the Act. By that notification, the powers, which can be exercised under the proviso of Sub-section (1) of Section 42 are also conferred to the said Officers. P.I. Vishen, who was the Police Inspector in charge of the Dariapur Police Station, within the jurisdiction of which the offence occurred, was authorised to exercise the power under Sub-section (1) of Section 42 of the N.D.P.S. Act.

27. Section 43, empowering seizure and arrest in a public place relevant to the facts of the instant case, provides:

43. Power of seizure and arrest in public places- Any Officer of any of the departments mentioned in Section 42 may:

(a) seize, in any public place or in transit, any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence

punishable under Chapter IV has been committed, and along with such drug or substance, any animal or conveyance or article liable to

confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence

punishable under Chapter IV relating to such drug or substance.

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under Chapter IV, and, if such person

has any narcotic drug psychotropic substance in his possession and such possession appears to him to be unlawful, arrest him and any other

person in his company. Explanation : For the purposes of this section, the

expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

Section 43 gives plenary power to the Officers to seize in a public place or in transit any narcotic drug or psychotropic substance and to detain and

search any person, whom he has reason to believe has committed the offence. The only restriction is that such powers can be exercised by the

Officer of any Department specified in Section 42. The Police Department is specifically mentioned in Section 42 and as stated above, even u/s

42, the Police Inspector in charge of the Police Station is empowered to exercise the powers. Police Inspector Vishen was, therefore, an

authorised Officer to exercise the power and take action for seizure, detention search and arrest u/s 43 of the Act. Admittedly, the rickshaw was in

a public place and it is established that the narcotic drug was taken in it and, therefore, the Police Officer had powers to detain, and seize the

narcotic drug and detain and search the rickshaw and the respondent. By explanation, wide connotation is given to the expression "public place

which includes even public conveyance, i.e., autorickshaw, meant for hire. Apart from that, rickshaw itself was at a public place and, therefore, the

power to search and seize the narcotic drug from the rickshaw could be exercised u/s 43 of the Act.

28. In our view, therefore, the provisions of Sections 41 and 42, N.D.P.S. Act are not applicable, but the provisions of Section 43, N.D.P.S. Act

are for any search and seizure of the narcotic drug in a conveyance etc., and detaining and searching any person in a public place. We are fortified,

in our view, by the judgment of this Court in *Aslambhai Ibrahimhai Memon and Another Vs. The State of Gujarat*, , delivered by a Division

Bench of this Court, consisting of M.B. Shah and B.S. Kapadia, JJ., on October 5, 1989, in which the learned Brother Judges, on considering the

relevant provisions of Sections 41, 42 and 43 of the N.D.P.S. Act, have observed (at page No. 158 para 3.11 of GLR):

Thus, the intention of the Legislature in Sections 41 and 42 is different as revealed from the language of sections as stated above from the one in

Section 43 which authorises any Officer of the departments mentioned in Section 42 for search, seizure, arrest and detention in any public place or

in transit in respect of any narcotic drug or psychotropic substance in respect of

which he has reason to believe an offence punishable under

Chapter IV has been committed, and, along with such drug or substance, any animal or conveyance or article is liable to be confiscated under the

Act, or any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under

Chapter IV relating to such drug or substance.

Thus, Section 43 speaks about search and seizure from any building, conveyance or enclosed place, while Section 43 speaks about the search and

seizure from public place or in transit. It is important to note that the wordings of Sections 41 and 42 with regard to information taken in writing

have been deliberately omitted by the Legislature in Section 43 and in our view, that has been done so advisedly inasmuch as the Police Officer

empowered u/s 42 may get information with regard to the person in any public place or in transit at the last moment and if he has to undergo the

procedure of taking that information in writing and recording the reason for his belief, possibly such information may not be useful. When that is so,

whenever any search or seizure is to be made in any public place or in a vehicle in transit or any person is to be arrested or detained from a public

place, it is not intended by the Legislature to take down the said information in writing.

29. Section 49 also empowers the Officer authorised u/s 42 N.D.P.S. Act to stop any animal or conveyance or in the case of an aircraft, compel it

to land and to rummage and search the conveyance or part thereof, examine and search any goods on the animal or in the conveyance and if

necessary, to stop the animal or the conveyance and may use all lawful means for stopping the animal or the conveyance. The only necessary

requisite is that such Officer should have reason to suspect the use of the conveyance for transport of any narcotic drug or psychotropic substance.

That Section does not require that the information should be written down in writing and forwarded to the immediate superior. Police Inspector

Vishen, was exercising the power u/s 49 of the Act also.

30. In view of our finding that the provisions of Section 43 or Section 49, N.D.P.S. Act are applicable and provisions of Section 41 and Section

42 are not applicable and that the provisions of Sections 43 and 49 are not violated, it is not necessary for us to refer to certain judgments by High

Courts on the point. We shall, however, refer some of them as diverse views are expressed by several High Courts. Judgment in the case of Hakam Singh Vs. Union Territory, was referred before trial Court. In that case, the Assistant Sub-Inspector had received secret information that the accused would be passing by the bus stop of village Dhanas carrying crushed poppy heads. The accused, on reaching the bus stop and on seeing the Police party turned back, whereupon he was overpowered on suspicion, and from his right hand, one Jhola was recovered, which contained crushed poppy heads, weighing 1.5 kgs. The defence of the accused was that he was falsely implicated. He was ultimately convicted by the Court, and in appeal, the conviction was challenged, mainly on the ground that the provisions of the Act, being mandatory, were not complied with. Learned single Judge of the Punjab & Haryana High Court considered the provisions of Section 41 and 42, N.D.P.S. Act and observed that the authorised Police Officer could exercise the power only if he had reason to believe from personal knowledge or information given by any person and taken down in writing, but such information was not taken down in writing. According to the learned Judge, the prerequisite is laid down not without any purpose and the contravention would certainly cause prejudice to the accused because in absence of any writing, there will be no chance to cross-examine the Officer with regard to the factum and contents of the information received. The provisions of Sections 43 and 49 are not considered by the learned Judge. We are also not in a position to endorse the view that in absence of writing, there will be no chance to cross-examine the Officer with regard to the factum and contents of the information received and that would cause prejudice to the accused. It is always a question of fact required to be considered in the light of the circumstances and the relevant provisions and to ascertain as to whether prejudice is caused to the accused. Merely because a particular provision is not strictly complied with, the necessary implication may not always be that prejudice is caused to the accused. The learned Judge also considered the provisions of Sections 50, 52 and 74, which we will discuss at a later stage.

31. Karam Singh v. State of Punjab 1987 DC 194 , was a case in which the Head Constable searched the accused and recovered 50 gms. of

opium from the right side pocket of the pant of the accused. It was contended before the learned Judge that the Head Constable was not the

Police Officer, who was empowered by the State Government to exercise the powers. It was urged on behalf of the State that on a combined

reading of Sections 37 and 51 of N.D.P.S. Act the offence is cognizable and the provisions of the Code of Criminal Procedure so far as they are

not inconsistent with the provisions of the Act shall apply to all arrests, searches and seizures under the Act and, therefore, the investigation and

trial of the case has rightly been conducted in accordance with the procedural law laid down in the Code. The learned Judge, considering the

provisions of Section 4 of the Criminal Procedure Code and the observation of the Supreme Court in *State of Gujarat and Another Vs. Lalsingh*

*Kishansingh*, held, in terms, that the offence under the N.D.P.S. Act is a cognizable offence and that the Head Constable Sumel Singh was not

entitled to arrest the accused nor could he conduct the search in violation of the relevant provisions contained in Chapter V, nor the opium

recovered been seized or secured in the manner provided for in the said Chapter. It is also observed that:

It hardly need be emphasised that if the power of the special or authorised police Officer to deal with the offences under the Act and therefore to

investigate which essentially includes the power to arrest the suspected offender be not held exclusive to the Officers specified in Sections 41 to 43

of the Act, there can be two investigations carried on by two different agencies, one under the Act and the other by the ordinary Police.

It is, therefore, clear from the observations that the Head Constable, who exercised the powers, was not authorised under the Act, and therefore,

the search was without any authority and in violation of the provisions, even though the offence was held cognizable. It is clear that the provisions of

Section 43 were not considered by the learned Judge. Even the provisions of Section 74, N.D.P.S. Act providing for transitional powers are also

not considered. The matter was then taken in appeal to the Supreme Court, and the Supreme Court, by order dated August 9, 1988 in the

Criminal Appeal, observing that the High Court lost sight of the provisions of Section 74 of the Act and omitted to consider the said provisions,

though they were relevant for deciding whether the conviction was vitiated in the absence of compliance of Chapter V, allowed the appeal and set

aside the judgment by the High Court and remitted the matter to the High Court for disposal in accordance with law. It appears that, before Their

Lordships of the Supreme Court, the learned Additional Solicitor General, appearing for appellant, contended that the High Court did not examine

the merits of the matter, but came to the conclusion in favour of the accused by accepting the contention that the procedure provided in Chapter V

of the Act had not been complied with. It also appears to have been urged that the High Court further found that under the Act, the offence has

been made cognizable and when a special procedure for investigation has been provided, it necessarily meant that unless the special procedure

was followed, there could be no investigation under the Act so as to end up in conviction in case the charge is made out. It was then observed by

Their Lordships that:

Though learned Additional Solicitor General has challenged the view of the High Court on this score, we find no substance in that contention.

As discussed above, the learned single Judge in the case of Karam Singh (supra) had set aside the judgment mostly on the ground that the Head

Constable was not an authorised Officer under the Act and that observation appears to have been challenged before the Supreme Court and

therefore, Their Lordships of the Supreme Court observed that the provisions of Section 74 of the Act were lost sight of by the learned Judge.

Section 74 provides:

74. Transitional provisions: Every Officer of other employee of the Government exercising or performing, immediately, before the commencement

of this Act, any powers or duties with respect to any matters provided for in this Act, shall, on such commencement, be deemed to have been

appointed under the relevant provisions of this Act to the same post and with the same designation as he was holding immediately before such

commencement.

As these provisions provided for the statutory appointment under the relevant provisions of N.D.P.S. Act, it was necessary for the High Court to

consider the provisions and the powers and authority of the Head Constable taking action for the cognizable offence, and therefore, it appears that

Their Lordships remitted the case for consideration of the said provisions of the Act and the authority of the Head Constable. It also appears that

Their Lordships of the Supreme Court made the said observation with regard to the powers of the Head Constable. From the observations,

therefore, it cannot be called out that except want of authority or power to take action for search, seizure and arrest, the provisions of Sections 41,

42 and 43, N.D.P.S. Act are such mandatory that violation of which would vitiate the proceedings even without establishing any prejudice to the

accused or miscarriage of justice, and therefore, the conviction is bad.

32. Various High Courts have expressed diverse views on the mandatory nature of the procedural provisions of the N.D.P.S. Act and vitiating the

conviction on that ground. The Delhi High Court in *Richhpal v. State* 1989 DC 97 , considering the provisions of Section 42, providing for

reducing the information in writing, observed that there was some sort of urgency for making immediate arrangement for apprehending the accused

and, therefore, even though there was lapse in not reducing the secret information in writing, it did not vitiate the recovery effected from the

accused. Relying on the observation of the Supreme Court in *Radhakishan Vs. State of U.P.*, *Kamalabai Jethamal Vs. The State of Maharashtra*,

and *Khandu Sonu Dhobi and Another Vs. State of Maharashtra*, and extracting the relevant observations of Their Lordships of the Supreme

Court, the learned Judge observed that even if certain statutory provisions are not complied with before effecting the seizures, the seizure does not

become invalid on that score alone. The learned Judge did not agree with the view expressed in *Hakam Singh (supra)* that if the mandatory

provisions of the N.D.P.S. Act are not complied with, then the charge against the appellant must fail and expressed inability to agree with the

broad proposition of law laid down in that judgment, observing that ""the Court must consider the facts of each case in order to determine whether

failure of prosecution to comply with any particular provision of N.D.P.S. Act has the effect of creating any doubt regarding the prosecution case

or not. There cannot be any mechanical application of law to the facts of the case. The salutary provisions introduced into the N.D.P.S. Act

contained in Sections 41 to 55 are not to be obviously ignored by the Courts or by the prosecution, but these provisions have to be kept in view

only to see whether the prosecution case set up is truthful or not or there arises any doubt in respect of the prosecution case for non-compliance of

any of the provisions of N.D.P.S. Act." We are in respectful agreement with the observations by the learned Judge.

33. The Bombay High Court, Panaji Bench (Goa), in *Abdul Sattar v. State* 1989 Drugs Cases 50, while expressing the view that even if the

provisions of Sections 41 to 58 of N.D.P.S. Act are mandatory and were not complied with held that this procedural infirmity would not, by itself,

vitiating the conviction of the appellant. The only question that remains to be determined is whether the non-compliance with the said provisions have

caused any prejudice to the appellant. The answer to this question is manifestly in the negative, the Court held, and observed that:

We indeed do not see, and the learned Counsel for the appellant was unable to satisfy and show us, in what manner the omission in recording in

writing the information received and in reporting it to the superiors could have and in the facts of this case, where the recovery is proved to be

genuine, prejudiced the appellant.

34. In *Jayapalan v. State* 1989 DC 106, the Delhi High Court, considering the provisions of Section 42, observed that in the case, where the

information was taken down by the officer in writing, but the copy was not produced before the Court during the trial, the provisions of Section 42

had not been shown to have been complied with. It was, however, observed that there may be cases where it may become impracticable to

comply with the provisions of Section 42 of the Act. On facts, it was held that the offence was not proved beyond shadow of doubt.

35. In *Bhajan Singh v. State of Haryana* 1988 DC 94. The Punjab and Haryana High Court, relying on *Karam Singh v. State of Punjab* (supra),

observed that the provisions of Sections 41, 42, 43, 50, 51 and 55 of the Act have been held to be mandatory and contravention thereof vitiates

the investigation and trial. With due respect, we are not in a position to agree with such broad proposition of law. Similar view is expressed in

*Harbhajan Singh v. State of Haryana* 1988 DC 81.

36. In *Nand Lal v. State of Rajasthan* 1968 DC 44; *Umrao v. State of Rajasthan* 1989 DC 39, in *Shanti Lal v. State of Rajasthan* 1989 DC 213,

and in *State v. Jagmala Ram* 1989 DC 169, were the cases in which the officers exercising the power of seizure and search u/s 42 of the N.D.P.S.

Act were not authorised by the State Government and, therefore, the accused

were acquitted.

37. In *Sivakumar alias Kumar alias Sugumar v. State* 1989 DC 285, a learned single Judge of the Madras High Court, while considering the

provisions of Sections 41 to 43 of the N.D.P.S. Act, observed that the officers authorised under the said Sections 41 and 42 can only exercise the

powers of seizure, arrest etc. and no other Police Officer, even though the offence is a cognizable offence. Referring to Section 74 of the Act, the

learned Judge observed that it is a transitional provision and meant for a limited period. It is clear that the learned Judge has considered the

provisions of Section 74 as a transitory provision, and not transitional provision. Transitory provision is a provision for a temporary period, while

"transitional" means, changing over to another form, or passage from one State, subject, set of circumstances to another.

38. In view of the discussion above, it is clear that the view of several High Courts is that, if the Officer exercising the powers of seizure, arrest

etc., under the Act is not empowered, either u/s 41 or Section 42, the seizure arrest and investigation etc., are without jurisdiction and violative of

the mandatory provisions and vitiates the investigation and trial. Even though we may be in broad agreement with that view, we do not express our

view on that point as the Division Bench of this High Court in *Aslambhai* (supra), after considering the relevant provisions in Sections 41, 42, 43,

37, 53 and 57 of the N.D.P.S. Act and Section 4 Criminal Procedure Code, expressed the view that the offence is a cognizable offence and,

therefore, investigation is to be carried out in accordance with the provisions of the Code of Criminal Procedure and there is no question of

following any other procedure than the procedure prescribed in the Code. It is observed:

In view of these sections, it is apparent that considering the seriousness of the offence, the legislature thought that apart from investigation by the

Police under the Criminal Procedure Code, some other Officers mentioned in Sections 41, 42, 43 and 53 be empowered to discharge certain

duties as specified therein. But this does not mean that a Police Officer who is investigating the offence under the Act is not required to follow the

procedure prescribed under the Criminal Procedure Code. He has to investigate in accordance with the provisions of the Criminal Procedure

Code. To the other Officers limited powers are given. u/s 53 the Central Government or the State Government as the case may be, is entitled to

invest any Officers of the department mentioned therein with the powers of an Officer in charge of Police Station for the investigation of the

offences under the Act. From the aforesaid discussion it would be clear that if the competent Police Officer has investigated the offence under the

Act, there is no question of following any procedure other than the procedure prescribed under the Criminal Procedure Code.

As the view is expressed by the Division Bench of this High Court, judicial propriety requires that in case we do not agree with the view, reference

should be made to a larger Bench. Even though we have reservations, we do not express any view regarding the observations by the Division

Bench as it is not necessary for us to consider and decide that point in the present case as we hold that the Investigating Officer concerned was

authorised to investigate the offence and seize the contraband.

39. Considering the provisions of Sections 37 and 51 of the Act, we are of the view that the offence under the Act is a cognizable offence.

40. Referring to the provisions of Section 50, N.D.P.S. Act, it is submitted that the respondent should have been informed that if at all he desired,

he may be taken to the nearest Gazetted Officer of the Departments specified in Section 42 or to the nearest Magistrate and in the instant case, the

prosecution has not led any evidence for that end, therefore, the proceedings vitiate. Section 50 provides that in case the Officer, who is authorised

u/s 42, is about to search any person under the provisions of Section 41, Section 42 or Section 43, such Officer should if such person so requires,

take such person to the Gazetted Officer of the Departments specified in Section 42 or to the nearest Magistrate. As provided in Sub-section (2)

in case such requisition is made, the Officer can detain such person till he is taken to the Gazetted Officer or a Magistrate. The Gazetted Officer or

the Magistrate, if he does not see any reasonable ground for the search, may discharge the person, but otherwise shall direct the search to be

made. This Section provides for the additional safeguard for the personal search, probably with a view that the authorised Officer may not misuse

the power. The person, who is to be searched has, however, to require the authorised Officer to take him to the nearest Gazetted Officer of the

Department mentioned in Section 42 or to the nearest Magistrate. If no such requisition is made, it is not necessary for the authorised Officer to take such person to the Gazetted Officer or the nearest Magistrate. The section does not specifically provide that such person should be informed by the authorised Officer that it is his right to be taken to the Gazetted Officer or to the Magistrate nor does it impose any obligation or duty on such Officer to inform such person. In absence of any such provision imposing the duty on the authorised Officer to inform the person, who is to be searched, it cannot be said that the Officer is bound to inform of such right of the person to be searched much less it can be said that in case such person is not reminded of his right, breach of any statutory provision is committed, vitiating the investigation and proceedings. As no specific provision is made imposing the duty on the authorised Officer to inform the person to be searched of his such right, it cannot be said that in case no such information is given, any breach is committed by such Officer or any mandatory provision is violated. As such the Act does not provide for any such mandatory provision and, therefore, not informing such person about his right would not amount to committing breach of the provisions of the statute much less the mandatory provisions of the statute. If such person is not informed, no illegality can be said to have been committed by the authorised Officer nor that would vitiate the investigation or the proceedings. In State of Himachal Pradesh Vs. Sudarshan Kumar and etc., , after referring the provisions of Section 50(1) of the N.D.P.S. Act, the learned Judges proceeded on to observe that:

The rationale behind this provision is manifest. A search before a Gazetted Officer or a Magistrate would impart much more authenticity and credit worthiness to the proceeding. It would, verily, strengthen the prosecution. Thus, there is no conceivable reason why a designated Officer should shirk from affording a real opportunity to the person concerned to avail of his right, if he so desires. But for it, this valuable right would become illusory and a farce. In fact, the designated Officer should, as far as practicable, make the offer in question to the person in the presence of two independent and respectable witnesses of the locality. If he fails to do so, onus would be on prosecution to prove that association of such witnesses was not possible on the facts and circumstances of a particular case. This provision thus cannot but be regarded as mandatory and

violation thereof per se would be fatal to the prosecution case.

We are not in a position to agree and endorse the provisions make it obligatory on the Authorised Officer to make the offer to the person to be

taken before specified Gazetted Officer or Magistrate and in case no such information is given or offer is made, the mandatory provisions are

violated, making per se fatal the prosecution case. As discussed above, the statute does not provide for that and therefore, it cannot be said that

any such obligation is imposed on such Officer. It is, however, clear that in case the person to be searched himself asserts for being taken to the

Gazetted Officer or the nearest Magistrate, it is the obligatory duty on the authorised Officer to take such person to such Gazetted Officer or the

Magistrate and in case it is not done, that would create a shadow of doubt in the search and that may be one of the strongest grounds for not

accepting the evidence of the witnesses about the recovery of the prohibited articles from such person. It may, however, per se not be fatal to the

prosecution case unless it is established or proved or the Court has reason to believe that prejudice is caused to the accused or it has resulted in

miscarriage of justice. Referring to the facts of the instant case, no recovery is made from the person of the accused, but huge quantity of charas is

recovered from the rickshaw. In our view, provisions of Section 50 are applicable only in the case in which search of the person is to be made and

not the search of the conveyance.

40A. Mr. Malik, learned Advocate for the respondent, contends that the provisions of Sections 52 and 55 are not complied with inasmuch as the

Police Station Officer has not put his seal on the muddamal packets and subsequently the muddamal articles were taken to the Dudheshwar Crime

Branch Police Chowky, from where P.I.S. Vaghela has taken the same to the Forensic Science Laboratory. u/s 52, the Officer arresting the

person has to inform him of the grounds of arrest and in case warrant is issued by the Magistrate and on the strength of the warrant, such person in

arrested, then such person should be forwarded to the Magistrate. Sub-section (3) of Section 52 provides that every person arrested and articles

seized under Sub-section (2) of Section 41 or Section 42 or Section 43 or Section 44 shall be forwarded without unnecessary delay to the Officer

in charge of the nearest Police Station or the Officer empowered u/s 53. Under

Sub-section (4) of Section 52, the authority or the Officer, to whom any person or article is forwarded under Sub-section (2) or Sub-section (3) shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article. So far as dealing with such person is concerned, the Officer in charge of the Police Station may either secure police custody remand or send such person to judicial custody under the provisions of the Criminal Procedure Code. So far as the articles, which are produced before the Police Station Officer is concerned, they are required to be dealt with as provided in Section 55 of the Act. Section 55 provides that the Officer in charge of the Police Station has to take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under the Act within the local area of that Police Station and allow any Officer who may accompany such articles to the Police Station or who may be deputed for the purpose, to affix his seal to such articles or take samples of and from them and all samples so taken are also required to be sealed with the seal of the Officer in charge of the Police Station. Section 52 and 55 N.D.P.S. Act deal with the situations after the seizure and arrest. The articles are required to be sealed by the Police Station Officer with a view that they may be protected properly and may not be tampered with. In case such articles are produced before the Officer in charge of the Police Station, the Officer producing such articles should affix his seal to such articles or take samples of such articles. In case the samples are taken, such samples are also required to be sealed with the seal of the Officer in charge of Police Station. The seal of the Officer in charge of the Police Station is to be affixed only on the samples which are taken. It is not necessary that in case the articles are brought and delivered to the Officer in charge of the Police Station by the authorised Officer seizing such goods, then again the second seal of the Officer in charge of the Police Station should be affixed on it. Even when the articles are produced, the Police Station Officer has to allow the Officer seizing the articles or the Officer deputed by such Officer to affix his seal. In case the Officer seizing the articles has affixed the seal at the place of seizing the articles or at any other place and after that, the articles are delivered to the Officer in charge of the Police Station, it will not be necessary for the Officer in charge of the Police Station to

again affix the same. Section 55 does not provide for any such procedure. Submission of Shri Malik that a second seal should have been affixed deserves to be repelled.

41. Reverting to the facts of the instant case, it is clear that the Police Inspector Vishen was in charge of the Police Station and he had affixed the seal and the sealed articles were produced before the Police Station Officer, who took charge of them. The evidence of Police Station Officer Shri

Arjansinh is clear on this point and does not require any discussion. It is, however, submitted by Shri Malik, learned Advocate for the respondent,

that from the evidence of Head Constable Arjansinh and P.S.I., B. S. Vaghela, it is clear that subsequently from Dariapur Police Station,

muddamal articles were taken to the Dudheshwar Crime Branch Police Chowky by Jamadar Narsinhbhai. From the evidence of P.S.I. B. S.

Vaghela, it is clear that he had handed over the muddamal and specifically, 11 packets containing charas in sealed condition to Arjansinh who was

the Police Station Officer, Dariapur Police Station. On January 15, 1988, he personally carried all the 11 packets produced by him from the

Dudheshwar Police Chowky and took them to the Forensic Science Laboratory and delivered them, along with the forwarding letter and secured

the receipt for that. It is clear from the evidence of P.S.I. Vaghela that the articles were taken in sealed condition and were delivered in the same

condition. In the endorsement on the receipt also, there is no mention that the articles were not in sealed condition. Shri Malik submitted that

Jamadar Narsinhbhai, who had carried the muddamal from Dariapur Police Station to Dudheshwar Crime Branch Police Choky, was not examined

by the prosecution. As such, it was not necessary to examine Narsinhbhai, as it is clear that all the muddamal articles were taken to Dudheshwar

Crime Branch Police Chowky and subsequently, P.S.I. Vaghela had secured them in sealed condition and handed over to the Forensic Science

Laboratory. There was no chance for tampering with the muddamal articles.

42. P.S.I. Vishen had written a letter to the Director, Forensic Science Laboratory, on the same day and immediately after seizure and stated in it

that 11 sealed packets were sent to the Forensic Science Laboratory for ascertaining as to whether they contained charas. Specimen of the seal

was also sent along with the letter. The endorsement by the Forensic Science

Laboratory is that all the 11 packets were received by that office on January 15, 1988. There is no endorsement that any of the packets was not in proper seal. It is clear from the evidence that the packets were sealed and slip bearing signature of panch-witness was kept and the seal of Inspector of Police, Dariapur was affixed. The Forensic Science Laboratory, therefore, received all the packets intact and with proper seal. Shri Malik, learned Advocate for the respondent, referred the State of Rajasthan Vs. Daulat Ram, in which opium was seized and after that, it had changed various hands and ultimately, after more than one month, the samples were taken by the Police to the office of the Superintendent of Police, Jodhpur for onward transmission to the Public Analyst, but the sample were not accepted by the office of the Superintendent of Police as the labels were not in order. The prosecution had not taken the Court into confidence in disclosing as to the reasons why the office of the Superintendent of Police refused to take the samples. It was held that as the labels were not in order, it was necessary for the prosecution to prove that the seals were still intact. In the light of that, it was observed by Their Lordships of the Supreme Court that some of the witnesses, who had handed the samples should have been examined. No principle of law is laid down by the Supreme Court that even in the case when the parcels were handed over intact with seal, the witnesses, who even carried the parcel, should be examined by the prosecution. That judgment, therefore, is not relevant to the facts of the instant case.

43. Mr. Malik, learned Advocate for the respondent, asserting that the provisions of Section 57, N.D.P.S. Act, were not complied with, submitted that even though it was obligatory to make a full report of all the particulars of such arrest or seizure, within 48 hours, to the immediate superior official, no such report in writing was sent by Police Inspector Vishen to his immediate official superior. Police Inspector Vishen, in his cross-examination, stated that he had not sent such information in writing, but had orally reported to his immediate superior, the Superintendent of Police, about it. Section 56, N.D.P.S. Act, does not provide that the report in writing should be submitted within 48 hours. Report", as used in context, means "make official or formal statement", "inform against". As Section 57 provides for making full report of all the particulars of such arrest and

seizure, it is desirable to make a report in writing but in absence of specific provision making it obligatory to submit report in writing, it cannot be held that the report should be in writing. Even if it is held that the report is required to be submitted in writing, non-compliance of submitting such report u/s 57, N.D.P.S. Act, by itself, would not vitiate the investigation and the trial. The provisions of Section 57 should not be considered such mandatory, non-compliance of which should be fatal to the prosecution, as such report is to be submitted subsequent to the arrest and seizure and in most of the cases, after filing of the complaint and producing the muddamal before the Police Station Officer. It appears that such provision is made in Section 57, N.D.P.S. Act, with a view to see that the Police Officers or other Officers, who may be authorised to investigate u/s 52, N.D.P.S. Act, may not misuse the power and subsequently create evidence. Normally, the seizure is made under the Panchnama and in presence of panch-witnesses and after that, the complaint is filed and First Information Report is lodged before the Police Station Officer and the muddamal is also normally produced before the Police Station Officer. After the entries are made in the official record, it may not be easily possible to tamper with the evidence or create evidence. The very fact that the First Information Report is made is sufficient security and after that, there may not be any possibility for changing the record. In such circumstances, it should be held that even though compliance of that Section is necessary, non-compliance of it will not be fatal to the prosecution till it is established that it has resulted in miscarriage of justice or prejudice is caused to the accused. When the panchnama is prepared and F.I.R., is lodged and the entry is made in the Police Station Diary or the relevant record and the muddamal is produced before the Police Station Officer, it cannot be accepted that any prejudice is caused to the accused merely because report was not made to the immediate superior in writing within 48 hours.

44. Himachal Pradesh High Court in case of Sudarshan Kumar (supra), while holding the provisions of Section 57 mandatory, observed that non-compliance of it would result into failure of the prosecution case. With due respect, we are not in a position to accept the broad proposition of law. In our view, the prosecution may fail for non-compliance of provisions of Section 57, N.D.P.S. Act, only in case miscarriage of justice or

prejudice to the accused are established.

44A. Mr. G.D. Bhatt, learned Additional Public Prosecutor, asserts that even if the procedural provisions in Sections 41 to 58, N.D.P.S. Act, are

considered mandatory, the non-compliance of such provisions would not be fatal to the prosecution case or conviction would not vitiate till it is

established that prejudice is caused to the accused or it has resulted into miscarriage of justice. In submission of Mr. Bhatt, special procedure is

provided in Chapter V, N.D.P.S. Act, for various reasons, including the protection to the accused as well as to the Officers, who enter in the

premises, conveyance or enclosures and carry out the raid. Mr. Bhatt also submitted that similar provisions are made in Sections 100 and 165,

Code of Criminal Procedure, non-compliance of which is not considered fatal to the prosecution or vitiating the trial or conviction. Refuting the

contention of Mr. Bhatt, Mr. Malik, learned Advocate for the appellant, referring the judgment in Sudarshan Kumar (supra) asserted that the non-

compliance of all the procedural provisions is fatal to the investigation, trial and conviction. As discussed above, the Bombay High Court and the

Himachal Pradesh High Court have expressed divergent views on that. We are of the view that the provisions under Sections 41, 42, 49 and 53,

N.D.P.S. Act, regarding authorisation to an officer only are such mandatory that non-compliance of which may vitiate the trial or the proceedings

and ultimately conviction, if the seizure or arrest is made by the person, who is not duly authorised to do it and such act is without any authority or

power. If the Officers, who are not authorised under the relevant provisions of the Act, either to seize, search or arrest, exercise that power, the

very act should be considered as not authorised by law and, therefore, ab initio ineffective and unauthorised. Any further proceedings after that

also should be considered as ineffective and per se vitiating the trial and conviction. However, the other procedural provisions, even though may be

mandatory, should not be considered as such that the non-compliance per se would be fatal to the prosecution or vitiate the proceedings and

conviction, in case the trial results into conviction and it should be established that non-compliance of such other procedural provisions resulted in

miscarriage of justice or prejudice to the accused.

45. Mr. G.D. Bhatt, learned Additional Public Prosecutor, in support of the above

contention, referred several judgments of the Supreme Court, some of which are referred by the Bombay High Court in Abdul Sattar (supra). In Radhakishan Vs. State of U.P., provisions of Section 103 and 165, Criminal Procedure Code, were contravened, but that was not considered fatal to the prosecution. Their Lordships of the Supreme Court observed.:

It may be that where the provisions of Sections 103 and 165 Criminal Procedure Code are contravened the search can be resisted by the person whose premises are sought to be searched. It may also be that, because of the illegality of the search, the Court may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences no further consequence ensues, and the seizure of the articles is not vitiated.

Same view is reiterated in State of Maharashtra Vs. Natwarlal Damodardas Soni, 46. H.N. Rishbud and Inder Singh Vs. The State of Delhi, Munna Lal Vs. State of Uttar Pradesh, Muni Lal Vs. Delhi Administration, Khandu

Sonu Dhobi and Another Vs. State of Maharashtra, and A.C. Sharma Vs. Delhi Administration, were cases under the Prevention of Corruption

Act, in which certain procedure required to be followed under the Act was not followed and the observation by Their Lordship of the Supreme

Court are that any irregularity or even illegality committed in the course of the investigation does not, by itself, affect the legality of the trial by an

otherwise competent Court unless miscarriage of justice has been caused. It is, therefore, necessary for the prosecution to establish the miscarriage

of justice or prejudice to the accused. In the instant case, no such miscarriage of justice or prejudice to the accused is established or even can be

inferred.

47. Shri Malik, learned Advocate for the respondent, submits that seized material is not proved to be charas and the test is not properly carried

out by the Forensic Science Laboratory. Referring to page 813 of the Book ""Forensic Science in Criminal Investigation and Trials"", by Dr. B.R.

Sharma, Second Edition, it is submitted that the main chemical constituents of charas (Hashish) are:

1. Cannabidiolic acid.

2. Cannabidiol,
3. Cannabinil, and
4. Tetrahydrocannabinol.

and that in the reports of the Chemical Analyser and also the Biology Division, these constituents are not clearly stated. It is clear from the reports

that the contents of all the exhibits are charas. The reports are admitted by consent. As such, there is no reason not to accept the reports, in which

it is specifically stated that muddamal articles contained charas. That submission, therefore, cannot be accepted. Shri Malik also submitted that the

weight was some what different when it was sent to the Forensic Science Laboratory. There is no remarkable difference in the weight. It is clear

that when the charas was seized, it was weighed by the ordinary scales and it is quite possible that when charas was weighed in the Forensic

Science Laboratory, it may be by perfect scales. It is true that when the samples were sent to the Biology Division, the weight differed, but it may

be quite possible that the entire bulk must not have been sent as some of it was required for the test by the Chemical Analyser. No grievance for

that was made before the learned trial Judge. Apart from that, we do not find any substance in that contention.

48. Before ending, we extract the observations by Their Lordships of the Supreme Court in *Durand Didier v. Chief Secretary, Union Territory of*

*Goa*, pointing out the object and purpose of N.D.R.S. Act:

24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and

psychotropic substance into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of

the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent

years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and

deadly impact on the society as a whole, the Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985

xxx xxx xxx

49. In the result, the acquittal by the learned trial judge should be set aside and the appellant should be convicted for the offence punishable u/s

20(b)(ii), N.D.P.S. Act and Section 66(1)(b) of the Bombay Prohibition Act. As the respondent himself was using the vehicle, he should not be

convicted for the offence punishable u/s 25 of the Act even though charged. Offence u/s 25, N.D.P.S. Act is committed only when the conveyance

is permitted knowingly to be used by the owner or the person having control of the vehicle by any other person for the purpose of commission of

the offence punishable under the Act. The rickshaw was not allowed to be used by the other person, but the respondent himself was using the

rickshaw, and therefore, the respondent has not committed the offence under the provisions of Section 25 of the Act.

50. Accordingly, the appeal is allowed to the aforesaid extent and the acquittal by the learned trial Judge is set aside and the appellant is convicted

for the offences Punishable u/s 20(b)(ii), N.D.P.S. Act and Section 66(1)(b) of the Bombay Prohibition Act.

51. Heard the respondent Abdulrasid Ibrahim Mansuri and Mr. G.D. Bhatt, learned Addl. Public Prosecutor, on sentence. The respondent

submitted that he is a poor man having small children and there is no other earning member in his family.

52. Learned Addl. Public Prosecutor Mr. Bhatt submitted that considering the huge quantity of charas maximum punishment should be awarded to

the respondent. It is true that huge quantity of charas was recovered from the possession of respondent but considering the circumstances, we

think that the ends of justice would meet if the minimum sentence provided u/s 20, N.D.P.S. Act, is awarded.

53. The respondent is convicted for the offences punishable u/s 20(b), Narcotic Drugs & Psychotropic Substances Act, 1985 and sentenced to

rigorous imprisonment for ten years and fine of Rs. one lac, in default, rigorous imprisonment for one year.

Even though the respondent is convicted for the offence punishable u/s 66(b), Bombay Prohibition Act, no separate sentence is awarded for the

said offence.