

(2009) 10 BOM CK 0062
In the Bombay High Court
Case No : Criminal Appeal No. 20 of 2009

Yair Daniel Lavon

APPELLANT

Vs

The State of Goa

RESPONDENT

Date of Decision : 16-10-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2, 20, 27,
35, 42

Citation : (2009) 111 BOMLR 4573

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : J.P. D'Souza, for the Appellant; C.A. Ferreira, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

N.A. Britto, J.—This appeal has been filed by the accused who has been convicted and sentenced u/s 20(b)(ii)(C) of the N.D.P.S. Act, 1985 Act, for short) in Special Criminal Case No. 8/2008 by Judgment dated 19-1-2009.

2. The raid in this case was conducted by Police Inspector Suraj Halarnkar/PW7 of ANC Police Station, Panaji on 8-1-2008 on the basis of prior information and the accused was arrested and subsequently a charge-sheet was filed against the accused.

3. The accused was charged and tried with the allegation that on 8-1-2008 between 10.45 to 13.45 hours behind Badem Church, Assagao, the accused was found in illegal possession of 1.765 gms of charas, possession of which he could not account, thereby committing an offence punishable u/s 8(c) r/w Section 20(b)(ii)(C) of the said Act. To prove its case, the prosecution examined seven witnesses.

4. The case of the accused was that a false case was filed against him and he

was taken from his residence at 7.00 a.m. and nothing was attached from him. The accused did not examine any witnesses.

5. The learned Special Judge after considering and assessing the evidence led by the prosecution came to the conclusion that the prosecution had proved its case against the accused beyond reasonable doubt for having found in possession of commercial quantity of charas, and the accused had failed to rebut the presumption available to the prosecution in terms of Sections 35 and 54 of the said Act. The learned Special Judge also found that the provision of Section 42 of the Act was inapplicable though otherwise it was complied with. Likewise, the learned Special Judge also held that the provision of Section 50 of the Act was also inapplicable, since the seized article was found in the bag carried by the accused though otherwise the said provision was also complied with.

6. The case of the prosecution, can be seen in greater detail from the version given by P.I. Suraj Halarnkar/PW7. According to him, on 8-1-2008 at about 8.00 hours, he received reliable and specific information through his source that an Israeli National of stated description would be coming behind Badem Church, under a banyan tree to deliver narcotic drugs at about 10.30 to 11.00 hours to his prospective customers whereupon he reduced the said information into writing, and copy of the same was forwarded to Dy. S. P. Dinraj Govekar/PW4 along with a covering letter through Constable Divkar, and thereafter at about 9.15 hours he directed Constables S. Parab and S. Pokle to secure the presence of two panch witnesses and about 9.25 hours Constable Parab came to the Police Station along with panch witness Dilip Bhandari/PW3 and Constable Pokle came with other panch witness by name Swapnil Ghadi and he briefed both the panch witnesses about the information received and about the raid to be conducted, and thereafter introduced the members to the raiding party, including himself and thereafter he took with him the seal of Anti Narcotic Police Station having inscription Anti Narcotic Cell, Panaji Goa-7 with Ashoka Emblem and Constable Parab took with him the kit box containing weighing and sealing material and Constable Palyekar took the typewriter and they left in police jeep bearing No. GA-01-G-3128 while Constable Mandrekar and Bhanji followed the jeep on a private motor-cycle and then they reached near Badem Church, near the said banyan tree and parked their vehicles at a distance of 100 meters from the said Church and then they concealed their presence behind the Church near the banyan tree and waited for the person in respect of whom the information was received while the driver of the jeep and Constable Palyekar stayed in the jeep. He stated that at about 10.40 hours they saw the person coming, of the stated description, and he informed the members of the raiding party and then surrounded the said person and then he disclosed his identity to the said person and then introduced the members of the raiding party to the said person i.e. the accused who disclosed his name as Yair Daniel Lavon, and then he told the accused about the information he had received and about his intention to take his personal search and that of the bag, and before commencing the search he informed the accused that he had a right to be searched in the presence of a

Gazetted Officer or a Magistrate but the accused declined the offer. He stated that he also requested the accused that he had a right to take the search of the raiding party but he declined and then the police jeep was brought to the spot through Police Constable Mandrekar, and then he told the accused to hand over the shoulder bag carried by him and after the shoulder bag was handed over he opened the zip of the main compartment and inside it there were three packets wrapped in transparent polythene containing black colour substances and then he opened the transparent polythene of the first packet and found to contain black colour sticky substances of spherical ball shape, and then he opened the second packet which was found to contain black colour sticky substances of spherical shape and then he opened the third packet which was auto pressed, having bean shaped black colour substance individually wrapped in wrappers and after verification of the black colour substances from all the three packets he suspected them to be charas, and then he weighed the said three packets and found them to be 1.765 kgs. and then he inserted the three packets back in the main compartment of the said black bag and closed the compartment with zip and then wrapped the bag in white cloth and tied it with jute thread, and a label was prepared mentioning the details of contents of the parcel and was signed by the two panchas and by himself, and the accused refused to sign. He stated that the label was then affixed on the white cloth parcel and seven seals were put on the said cloth parcel out of which one was partly on the paper label, and partly on the cloth. He stated that the personal search yielded cash of Rs. 1000/-and 100 US Dollars and a passport of the accused, and thereafter he inserted the cash in Rupees and Dollars into a light green envelope, packed and sealed it at seven places and then prepared the panchanama and the seizure report which was signed by him and the two panchas but the accused refused to sign. He stated that the weighing, packing and sealing was done by him with the assistance of Constable Parab and then a letter was typed addressed to the Director, F & DA for examination of the seized drugs and then he affixed the seal impression of the said letter and then he wrote a letter addressed to the Dy. S. P. regarding handing over the seal and sent it along with the seal through Constable Mandrekar to be handed over to the Dy. S. P. and thereafter they returned back to the Police Station along with the accused and the attached property, and upon returning to the Police Station, he handed over the muddemal property along with the note to Writer Constable by name Ashwini Dessai/PW6. He stated that he also handed over the letter addressed to F & DA to the said Constable Dessai and then he lodged his complaint against the accused for possessing the said charas illegally which was registered under Crime No. 1/2008 at about 15.45 hours, and thereafter he submitted the intimation u/s 57 of the said Act to his superior officer on the same day, and then he requested the Assistant Engineer, PWD to draw the sketch of the scene of offence which was prepared and sent to him vide letter Exh. 40. He stated that he effected entries in the station diary regarding the raid and the investigations and copy of it was produced at Exh. 41. In cross- examination he stated that the information was received by him outside the Police Station at around 7.55 hours which he

immediately reduced to writing at about 8.00 hours. In further cross-examination he stated that Constable Mandrekar, while recording his statement had stated that the name of the other panch was Gajanan Chopdekar but the said name was disclosed by Constable Mandrekar inadvertently. He denied the suggestion that the accused was picked up from his residence at Anjuna. He also denied the suggestion that he had filed a false charge-sheet against the accused.

7. The prosecution examined Pw3/Dilip Bhandari who was panch witness at the time of seizure. Pw3/Bhandari had been to the police station in connection with some work of his friend by name Ramdas Pujari, when he was requested by Pw7/Suraj Halarnkar through Constable Parab to act as a panch witness to which he agreed. Pw3/ Dilip Bhandari is a Sales Representative who has his own business and office situated at Patto, Panaji. The evidence of Pw3/D. Bhandari is consistent with the panchanama Exhibit-22 and otherwise he has corroborated the version given by Pw7/P.I. Suraj Halarnkar. There is nothing in his cross-examination to doubt either about his presence at the scene or the version given by him, and in fact nothing has been pointed out in that regard, by the Learned Counsel appearing on behalf of the accused. However, what is pointed out is that Pw5/Constable Dina Mandrekar in his statement earlier recorded as well as before the Court, had stated that the other pancha was one Gajanan V. Chopdekar and since Pw5/Constable Mandrekar is a pivot on which the entire case of the prosecution rests, the version of Pw3/D. Bhandari needs to be rejected. This submission, in my view, cannot be accepted for the simple reason that Pw5/Constable Mandrekar, though had stated that the other pancha was Gajanan V. Chopdekar, he corrected himself in his re-examination and stated that the other person who acted as panch witness was one Swapnil Ghadi and this is in conformity with the case of the prosecution. Pw3/Dilip Bhandari is an independent witness and he as well as Pw7/P.I. Suraj Halarnkar have stated that the other panch was one Swapnil, and this is in conformity with the contemporaneous records maintained and produced in the case. Pw3/Dilip Bhandari, besides identifying his own signature on the panchanama and the seizure report has also identified the signature of the said Swapnil Ghadi, and besides that, that of the P.I. The station diary Exhibit-41 shows that Constable Pogle Buckle No. 6158 had returned to the police station along with Shri Swapnil Ghadi and that is at about 9.25 hours and in such a situation the inadvertent statement made by Pw5/Constable Mandrekar could certainly be ignored without giving much importance to it. I have concluded that Pw3/D. Bhandari is an independent witness and in that regard referring to certain observations of the Apex Court, would not be out of place. The Apex Court in *Hazari Lal Vs. State (Delhi Administration)*, has observed that every citizen of India must be presumed to be an independent witness until it is proved that he was dependent on the police or other officers for any purpose or whatsoever. Further, the Apex Court has stated that the necessity for independent witness" in cases involving police raid or police search is incorporated in the statute not for the purpose of helping the indicted person to bypass the evidence of those panch witnesses who

have had some acquaintance with the police or officers conducting the search at some time or the other. Acquaintance with the police by itself would not destroy a man's independent outlook. In a society where police involvement is a regular phenomenon many people would get acquainted with the police. But as long as they are not dependent on the police for their living or liberty or for any other matter, it cannot be said that those are not independent persons. If the police in order to carry out official duties, have sought the help of any other person he would not forfeit his independent character by giving help to police action. The requirement to have independent witness to corroborate the evidence of the police is to be viewed from a realistic angle.

8. Another related submission made by the Learned Counsel, on behalf of the accused, is that the accused was arrested not in the manner claimed by the prosecution, but on the previous day from his residence at about 7.00 p.m. As regards this aspect, the only solitary suggestion put on behalf of the accused, to Pw7/P.I. Halarnkar is that he had picked up the accused from his residence at Badem, Anjuna, and a false complaint was filed against him. In the suggestion neither the date nor the time was mentioned. In his statement recorded u/s 313 of the Code, the accused has stated that he was taken from his residence, and we can proceed with the assumption that the time recorded therein is 7.00 p.m. Learned Counsel on behalf of the accused submits that in case the accused was arrested at about 14.45 hours on 8.1.08, the friend of the accused by name Leor along with Advocate Raju Poulekar could not have reached at the police station to assist the accused at 15.55 hours on the same date. I am not impressed with the said submission at all. Firstly, nothing prevented the accused from examining the said Leor in support of his plea that he was arrested earlier and not at the time and in the manner claimed by the prosecution or for that matter examining the said Raju Poulekar. By now it is common knowledge that some of these foreigners who visit this State are well aware through the internet about the facilities available here including the places where cheap and good food is available or whom to approach in case of difficulties. The accused could have certainly examined the said two witnesses including Shri Poulekar and Shri Leor with a view to jerk or jolt the evidence of Pw7/ P.I. Halarnkar and Pw3/D. Bhandari whose evidence is otherwise convincing and reliable and can be accepted in support of the facts stated by them. There is no doubt at all that the accused was arrested and the property seized from his possession in the manner deposed to by the prosecution witnesses, and particularly by Pw7/P.I. S. Halarnkar and Pw3/D. Bhandari. The statement by the accused, recorded on remand application Exhibit 41 was made after the accused had benefit of legal advice and therefore is not sufficient to displace consistent and corroborative evidence given by Pw7/P.I. Halarnkar and Pw3/D. Bhandari.

9. The second aspect is as regards the custody of the seized article and its subsequent analysis. As far as the seal used to seal the seized article is concerned, Pw3/D. Bhandari has stated that the seal was immediately forwarded from the spot and this has been confirmed not only by Pw7/P.I. S. Halarnkar but

also by Pw5/Constable Mandrekar as well as Pw4/Dy.S.P. Govekar. According to Pw5/Constable Mandrekar, after completion of weighing, packing and sealing, Pw7/P.I. S. Halarnkar handed over the seal to him along with the covering letter and directed to hand over the seal to Dy.S.P. Shri Govekar, and accordingly he left the spot on his motorcycle and went to the office of Dy.S.P. Shri Govekar at Panaji and handed over the seal and the letter at about 14.45 hours and obtained the acknowledgment from Dy.S.P. Shri Govekar and came back to the police station. Pw4/Dy. S.P. Govekar has in turn confirmed that he had not only received the copy of the information-Exhibit 25 sent to him but also the intimation sent u/s 57 of the Act-Exhibit 27 and has further confirmed that on the same date at about 14.45 hours he received the seal of A.N.C., Panaji Goa-7 with Ashoka Emblem along with the forwarding letter of Pw7/Suraj Halarnkar through Constable Dina Mandrekar. He produced the said letter at Exhibit-26 and identified his signature thereon. Pw4/Dy.S.P. Govekar also produced the Seal Movement Register-Exhibit 28 from which it can be seen that he had received the said seal on 8.1.2008 at about 14.45 hours. It is therefore obvious that there is consistent evidence supported by documentary evidence to say that the seal was not retained by Pw7/P.I. S. Halarnkar for a time more than required and was immediately sent to Pw4/Dy. S.P. Govekar.

10. As far as the seized article-Exhibit 1 is concerned, Pw7 P.I. Halarnkar stated that after returning to the police station along with the accused and the attached property, he handed over the attached property along with a note to writer Head Constable Ashwini Dessai of A.N.C. Police Station. It has come on record that at the relevant time, it is P.I. Shri A. Shirodkar who was the in charge of the police station and was also otherwise a member of the raiding party. Pw6 /L.H.C. Ashwini Dessai has confirmed that on 8.1.08 Pw7/P.I. S. Halarnkar had handed over to her one sealed cloth parcel containing one black and brown colour shoulder bag containing in it 1.765 kgs. of suspected charas, etc. and a light green colour envelope and a passport. She stated that the said articles were handed over to her along with a note and she acknowledged the same at 14.45 hours on 8.1.08. She produced the said note at Exhibit-31 and a copy of the muddemal property register at Exhibit-32 and further stated that she had personally made the entry in the muddemal register in Crime No. 1/08. The evidence of Pw7/P.I. Halarnkar when considered along with the evidence of Pw6/L.H.C. Ashwini Dessai is more than sufficient to conclude that the seized article had changed hands from the hands of Pw7/P.I. S. Halarnkar and had gone 15 into the hands of Pw6/L.H.C. Ashwini Dessai who was then working under P.I. Shirodkar who was in charge of the police station. However, Counsel on behalf of the accused, submits that Pw6/Ashwini Dessai has stated in her evidence and the muddemal property register Exhibit-32 otherwise shows, that the seized article was sent with Constable Morajkar to be delivered to the Scientific Assistant/Pw2/ Gaurish Mapari at 5.30 p.m. and if that be the case, Learned Counsel contends, that Pw2/Mapari could not have received it at Porvorim which is at least at a distance of five kilometres from A.N.C. Police Station at 5.30 p.m. and according

to the Learned Counsel this creates a doubt as regards the custody of the seized article on the intervening night of 8th and 9th January, 2008, when it was received in the office of the Directorate of Food and Drugs Administration, Panaji and therefore the accused deserves to be given benefit of doubt. Learned Counsel further submits that Constable Morajkar who is stated to have carried the seized article from A.N.C. Police Station to Pw2/Gaurish Mapari, the Scientific Assistant, has not been examined.

11. Learned Counsel is right that Constable Morajkar has not been examined. However, the fact remains that Pw2/Constable Mapari has stated that in this case he had received letter No. 60/08 on 8.1.08 at about 5.30 p.m. addressed to S.P., C.I.D. from L.H.C. Ashiwini Dessai of A.N.C. Police Station, Panaji and letter No. 58 dated 8.1.08 from P.I. A.N.C. Police Station addressed to the Director, FDA, Panaji-Goa in duplicate bearing specimen seal impression Anti Narcotic Cell, Panaji Goa-7 with Ashoka Emblem on both the copies and one sealed cloth parcel tied with jute thread vertically and across having seven seals marked as exhibit-1 stated to contain 1.765 kgs. of suspected charas from Constable Narayan Morajkar, Buckle No. 4994 of A.N.C. Police Station. This witness was cross examined at length but defence was not able to make any dent into his evidence by cross examination. The station diary of A.N.C. Police Station Exhibit-41 under entry at serial No. 38 has recorded the time as 5.00 p.m. and the said recording has been done by none other than Pw6/Ashwini Dessai herself and in fact none drew her attention to the discrepancy of recording the timing at 5.30 p.m. on the muddemal register. The station diary also records the return of Constable Morajkar under serial No. 39 at 18.10 hours having returned to the police station after handing over the muddemal property Exhibit-1 to the Scientific Assistant. In the light of the evidence of Pw2/Gaurish Mapari, the Scientific Assistant, which is supported by the entry in the station diary, in my view, no much importance could be given to the mistake made by Pw6/Ashwini Dessai on the muddemal register. That little molehill, if I may use that expression, need not be made into a mountain, to throw down the case of prosecution. It is more than probable that the first entry made by her on the station diary is correct and it was made as the property left the police station and therefore the entry made by her on the muddemal register cannot be given undue importance so as to discard the evidence of Pw2 which is otherwise supported by the station diary entry-Exhibit 41. It is to be noted that both Pw2/Constable Mapari as well as Pw1/Mahesh Kaisare, Senior Scientific Assistant in the Directorate of Food and Drugs Administration have confirmed that the sealed parcel-Exhibit 1 was properly sealed and the seals were intact individually covered with cello tapes and the latter has further confirmed that the seals tallied with the specimen seal impression and there has been no discrepancy in the quantity which was dispatched and the quantity which was received and analyzed in this regard. Learned Public Prosecutor has placed reliance on para 15 of Ketil Mardal v. State of Goa 1997 Cri. L.J. 3581 to which, in my view, no reference is required to be made. Suffice it to say that as far as the facts of the case are

concerned, the article was properly seized, sealed and thereafter it was dispatched and all along it was in proper custody and there is no scope to doubt the evidence of the prosecution on that aspect of the case. In other words, there is no room to doubt that the article seized and sealed by Pw7/S. Halarnkar was not the article which was analyzed by Pw1/Kaisare.

12. Another submission made by the Learned Counsel on behalf of the accused is that the station diary entry at serial No. 31(at page 163) made at 14.45 hours ought to have been treated as F.I.R. and not the F.I.R-Exh. 38 which has been reproduced in entry at serial No. 34 at 15.45 hours. Learned Public Prosecutor submits that the said entry at serial No. 31 at page 163 is only of return of the raiding team and at entry at serial No. 34 (at page 165) is the complaint. Learned Public Prosecutor submits that the entry No. 31 at page 163 itself mentions that the offence is being registered and further submits that the entry at serial No. 34 at page 165 is regarding the complaint and although there is a gap of about one hour between both the said entries, the complaint itself was of four pages and certainly it would have taken some time to write it down and register the same and it is for this reason that it was registered at 15.45 hours. Learned Public Prosecutor therefore submits that the submission made on behalf of the accused ought not be accepted. The summary of the complaint, which is otherwise in more detail and which is registered against entry No. 34 at 15.45 hours, is contained in entry No. 31 at 14.45 hours which was made upon the return of the raiding party to the police station. It is not the case of the defence that there is any material difference in the facts stated in either of the said two entries. Whether one or the other is ought to be treated as an F.I.R. is a matter which is only of an academic interest for both the said entries would be available to the prosecution for the purpose of corroboration of the testimony of the author of the said entries and to the accused for the purpose of contradiction.

13. The third and the most important aspect argued on behalf of the accused as well as on behalf of the prosecution is regarding the quantity of the seized article which according to Shri D'Souza, the Learned Counsel on behalf of the defence is not sufficient to conclude that the seized article found in possession of the accused is commercial in quantity to warrant the sentence u/s 20(b)(ii)(C) of the N.D.P.S. Act as quantitative analysis of the seized article was never done and therefore it has to be considered that the quantity found with the accused was small quantity for which punishment could not have been more than six months and which period the accused has already undergone. Learned Counsel further submits that the view held by this Court earlier in the case of Shri Vijaykumar Ghale v. The State (unreported Judgment dated 15.6.2006 in Criminal Miscellaneous Application No. 196 of 2006) and in the case of Shri Susai Raju v. State (unreported Judgment dated 7.10.2006 in Criminal Appeal No. 16 of 2005 and that of the Division Bench of this Court in Ketil Mardal v. State of Goa (supra) must now give way to the law laid down by the Apex Court in E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau 2008 Drugs Case (Narcotics) 243 and which is in conformity with the view held in Dharam Pal and Ors. v.

State of H.P. and Anr. 2007 DC (Narcotics) 656 and Salim Ibrahim Chouhan v. State of Maharashtra (unreported Judgment dated 2.7.2008 in Criminal Appeal No. 268 of 2008 as well as Criminal Appeal No. 325 of 2008.

14. On the other hand, Shri Ferreira Learned Public Prosecutor relying on an opinion given by the Director of C.F.S.L., Hyderabad, by letter dated 5.3.2009 submits that qualitative analysis of charas is possible, quantitative analysis of charas is not possible and since charas is a multi component natural product, its percentage purity also cannot be given. At this very stage, I may observe that the opinion given by the said Director of C.F.S.L. cannot be accepted without the same being tested in cross examination and otherwise it also does not appear to be correct in the light of opinion given by experts examined in cases relied upon, some of which I have already referred to, and others would be referred to herein after.

15. Learned Public Prosecutor further submits that it is not possible to ascertain the weight of charas and the earlier view held by this Court is sound in as much as the THC content is also not required to be ascertained for the purpose of the Act. According to the Learned Public Prosecutor, the Judgment of the Apex Court in E. Micheal Raj (supra) and Ouseph Thankachan (infra) are distinguishable and so the Judgments of this Court in Salim Ibrahim Chouhan (supra) and that of Himachal Pradesh High Court in Dharam Pal and Ors. (supra). Learned Public Prosecutor further submits that the contention that the drug is less potent or dangerous has no application when the statute has prescribed the quantities and in any event this submission has already been repelled by this Court in the case of Laxman Santro Musale v. The State of Maharashtra (unreported Judgment of this Court dated 30.4.2009 in Criminal Appeal No. 118 of 2008).

16. The case at hand pertains to charas (hashish) which is a derivative substance of cannabis (referred to as marijuana by Americans). Section 2(iv) defines cannabis plant to mean any plant of the genus cannabis. Cannabis is a unique plant, having unique properties and has always been an enigma to men. Since both the Learned Counsels have produced some material on this plant, which throws much light on the plant and its products, it will not be out of context to refer to some of it, particularly because some of the observations made earlier in the case of Shri Vijaykumr Ghale (supra) and Shri Susai Raju (supra) may not be all correct and the Expert Pw1/Shri Kaisare himself does not know how charas are prepared. This cannabis plant has a partnership with mankind for centuries and is world's most widely cultivated and consumed illicit drug. Its discovery goes back to the discovery of agriculture itself and it was a five purposes plant: used as a source to hamper fibres; for its oil; for its alkenes or seeds consumed by man for food; for its narcotic properties; and therapeutically to treat a wide spectrum of ills in folk medicine and in modern pharmacopoeias, according to Richard Evans Schultes and Albert Hofmann, in their Book known as Plants of the Gods (Healing Art Press). According to Peter Stafford, (in his Psychedelics Encyclopedia, Third Expanded Edition), the earliest reference to mind-altering

effects from cannabis appears in the Atharva- Veda wherein it was recorded as one of the five sacred plants of India. Schultes and Hofmann also say that the Tibetans considered it to be sacred. According to him, cannabis is an unique plant having unique properties and it has been classified and re-classified several times and presently and botanically it is now assigned to a special family known as cannabaceae in which only cannabis and humulus, the genus of hops are members. According to Peter Stafford, the law is beginning to accommodate three species of cannabis namely, cannabis sativa, cannabis indica and cannabis ruderalis, but even then, there are some who still argue that cannabis belongs to a single species. As stated in the United Nations Office on Drugs and Crimes (Bulletin on Narcotics, Volume LVIII. Nos. 1 and 2, 2006, Review of the world cannabis situation), even today there is direct disagreement about whether cannabis is a genus with only one species or several and in the words of Peter Stafford quoting Schultes and Hoffman notwithstanding the great economic value of the plant for uses other than as an intoxicant, cannabis is still characterized more by what we do not know botanically about it than what we know (See Psychedelics Encyclopedia, page 180, supra). Species mentioned above, if they can at all be called as species, are distinguished by different growth habits, character of the akenes and specially by major differences in structure of the wood. According to Peter Stafford (supra), of the three species of cannabis, sativa type was the first to be spread widely around the globe, probably because of its having strong fibers and lots of edible seeds and that is also the opinion shared by Schultes and Hofmann when they say that since plant users normally proceed from the simpler to the more complex, one may presume that its useful fibers first attracted man's attention. According to Peter Stafford, quoting William Daniel Drake, Jr., cannabis is ... icon for the faithful, a windfall for the glib, a bonus for under-employed experts, a thrill for the nave, a whipping-boy for the ambitious, a tool for mystic explorers, a tantalizing mystery for scientists, a cash crop for peasants; hassles, joy, shouting, tranquility, apoplexy, fear, rebellion all wash over Western man in the presence of the little green weed.

17. Section 2(iii) of the Act define cannabis (hemp) to mean:

- (a) charas, that is, the separated resin, in whatever form whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish;
- (b) ganja, that is, the flowering of fruiting tops of the cannabis plant (excluding the seed and leaves when not accompanied by the tops), by whatever, name they may be known or designated; and
- (c) any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared there from.

18. Several drug products can be produced from the cannabis plant, falling into three main categories namely: (1) Herbal cannabis: the leaves and flowers of the plant; (2) Cannabis resin: the pressed secretions of the plant, commonly referred

to as hashish in the West or charas in India, and (3) Cannabis oil. (See Bulletin on Narcotics, page 7, supra). Within the above three categories, a number of different grades and strains are also available in most major market areas. While there are shadings, the primary product division on the herbal side is between high-grade cannabis produced without seeds and the more mundane product known as sinsemilla (from the Spanish sin semilla: without seeds), and this product is composed entirely of the unfertilized flowers of the female plant and is far more potent than other forms of cannabis herb. India has traditionally produced at least three standard cannabis products: bhang which is chopped cannabis leaves, usually consumed as a drink often with other psychoactive ingredients added; ganja which is herbal cannabis and charas which is hand rubbed cannabis resin. Charas from Nepal is considered to be of an even higher quality than charas from India although lower grades are also produced. It is often smoothened into temple balls or fingers. There are persistent claims that temple balls are treated with opium or some by product of opium refining process (first water) but these claims are difficult to substantiate. (Bulletin on Narcotics, page 9, supra). According to Peter Stafford, in India three different strengths of cannabis are usually distinguished bhang, ganja and charas. These correspond to leaves, flowering tops and leaves, and the best of the resin from flowers.

19. Since we are concerned with charas or hashish, it is but a resin exuded from the leaves and stems of the plant cannabis sativa or cannabis indica (the latter is stated to be most potent and more resinous). Historically, the term hashish was used to describe all sorts of cannabis concoctions, but today the term is primarily used to refer to cannabis resin. As the plants flower, glands called trichomes produce a sappy, resinous substance in which much of the cannabinoid content of the plant is concentrated. The purpose of this resin is unclear, but it has been hypothesized that it plays a role in protecting the buds from harsh environmental conditions (for example, ultra violet light, insect pests and water loss due to wind) or as a means of collecting wind borne pollen, as it is in the unfertilized female flowers that the resin is most plentiful and most potent (See Bulletin on Narcotics, page 8, supra). The resin is collected wet or after it has dried. Dried resin must be heated or pressed to make it malleable. Sale-ready cannabis resin differs in colour from sandy to reddish to black. It differs in consistency from putty-like to brittle and dusty. These differences may be attributed to the type of cannabis plant used and the way it was cultivated and cured; the presence of non-resinous plant matter; the extent to which the resin has been pressed, heated or otherwise handled; age; and adulterants introduced by manufacturers. Historically there have been two means of collecting cannabis resin i.e. hand rubbing and sieving. (See Bulletin on Narcotics, page 9, supra). In hand-rubbing, workers remove the gummy resin from the living plants by running their hands over the flowering tops. The resin adheres to the skin and has to be removed by forcefully peeling it away and rubbing it into little balls, which are combined and moulded into shapes for marketing. Hand-rubbed cannabis resin may have been

the first way cannabis was consumed and it represents a rather inefficient and labour-intensive means of gathering the drug. Hand-rubbing today is concentrated in India and Nepal. Hand-rubbing is not to be confused with hand-pressing. The dust-like produce produced by sieving becomes malleable when heat and pressure are applied and this can be done by hand or by machine in order to prepare it for storage and shipping. According to Peter Stafford (page 217, *supra*) traditionally hash was collected by workers passing bare skinned through cannabis fields, embracing the plants and then having the adhering resin scrapped of their bodies. Nowadays, the practice generally is to clothe a worker in leather and then scrape the resin off the leather or to simply rub the plant's buds with one's hands and then scrape the oily residue off one's hands.

20. The second method of sieving requires the plant to be dried first, which means an arid climate is essential. The resin and trichomes become powdery and brittle and can be removed from the bulk of the plant matter by use of a screen and some percussive force. Traditionally, fabric is used as a screen and a basin or pot as a collection device. Light tapping produces the purest cannabis resin, but greater quantities (including quite a lot of relatively inert plant matter) can be gathered by the application of more force. The powdery resin that is produced is either gently heated or manually or mechanically pressed to make it malleable. Lower grades may be adulterated with a range of oils and inert or active bulking agents. As with cannabis herb, there are grades to cannabis resin, which vary depending on the country of origin. Much like olive oil, cannabis resin made from the first sifting is rated highest, as it contains the maximal amount of resin with minimal impurities. Manual preparation processes are highly labour intensive and somewhat wasteful, so it is not surprising that modern consumers of cannabis resin have devised more efficient technologies. Many of these were piloted in Netherlands. The potency of the cannabis resin they produce (*nederhasj*) is much higher than the resin produced through traditional methods, although the yield is not as great. *Sinsemilla* cannabis plants are generally used for *nederhasj* further enhancing potency.

21. A third sort of cannabis resin (*jelly hash*) has also emerged in the recent years. This appears to be a combination of *nederhasj* and cannabis oil, with a soft consistency and very high THC levels. Cannabis oil itself may be making a comeback, as new processes are developed that reduce the risk of solvent impurities. (See Bulletin on Narcotics, page 10, *supra*).

22. One of the most comprehensive studies carried out by the European Monitoring Centre on Drugs and Drug Addiction (EMCDDA) in the year 2004 has concluded that a modest increase in aggregate cannabis potency had occurred, possibly related to the use of intensive indoor cultivation methods. (Page 97 UNODC's world Drug Report, 2009). It is stated that there can be little doubt that cannabis has changed, and that it is possible to mass produce cannabis today of a potency level that would have been unimaginable just 25 years ago. (See Bulletin on Narcotics, page 95, *supra*).

23. Then we come to potency. Cannabis is not an alkaloid; it contains over four hundred chemicals or identified compounds of which more than sixty are chemically unique and are collectively referred to as cannabinoids. The Director, CFSL, has referred to them as derivative forms of benzofurans known as cannabinoids. According to Peter Stafford, more than sixty cannabinoids generally referred to as cannabinoids in scientific papers are produced in a typical flower (which contains yet another four hundred identified compounds). The most psychoactive of these substances is Δ^9 tetrahydrocannabinol (THC) which is believed to be responsible for most of the psychoactive effects of cannabis, although related chemicals are also believed to play a role. The precise way in which the various components of cannabis interact and influence the physiological and subjective effects of cannabis is a topic of ongoing research, (as per the Bulletin on Narcotics, page 11). The amount of THC, that is to say, Δ^9 tetrahydrocannabinol in a cannabis sample is generally used as a measure of cannabis potency. Much of the THC in a plant is in acid form or in a less potent variant and the application of heat is essential to make all the THC accessible. Chemically synthesized Δ^9 is known as dronabinol (marketed as Marinol) and this is shown under item No. 166 of the table prescribing quantities by Notification dated 19.10.2001. According to Peter Stafford, chemists have now produced more than eighty cannabinoids synthetically, many of which exhibit no psychoactivity but have some of the medically beneficial effects of THC.

24. The secretion of THC is most abundant in the flowering heads and surrounding leaves. The amount of resin secreted is influenced by environmental conditions during growth (light, temperature and humidity), sex of the plant, and time of harvest. The THC content varies between parts of the plant: from 10-12% in flowers, 1-2% in leaves, 0.1-0.3% in stalks, to less than 0.03% in the roots. The cannabis herbs (ganja in our case) comprises the dried and crushed flower-heads and surrounding leaves containing up to 5% THC. Sinsemilla derived from unfertilized female plant can be much more potent. Cannabis resin (charas in our case) can contain up to 20% THC, but the most potent form of cannabis, however, is cannabis oil, derived from the concentrated resin extract. It may contain more than 60% THC. (See World Drug Report, 2009, page 97, *supra*). Cannabis resin has retained popularity because cannabis resin is much less bulky than cannabis herb, lacks the overwhelming odour of the herbal plant and is highly malleable and this makes it easier to transport and this may be one reason why cannabis resin is popular where consumer markets are in different countries from production sites, as is the case in Europe, but is less common in areas where cannabis is grown locally, such as North America. In other words, the production of cannabis resin requires considerable additional processing of a plant that is, essentially, ready to use. Yields are only about 4% of herbal yields and prices per gram are nowhere near 25 times higher. Indeed, while cannabis resin is more potent than the herbal product from which it is made, it is not 25 times more potent, thus, making cannabis resin results in a net loss of consumable THC. (See Bulletin on Narcotics, page 30). It is also stated that

though cannabis resin is a concentrated product, it is remarkable that in major markets such as Germany and U.K. the cannabis herb available locally is actually more potent than the cannabis resin that is consumed. (Page 12, Bulletin on Narcotics, Supra) and possibly due to these reasons that the Legislature in its wisdom has thought it fit to have uniform weight for the purpose of punishment under serial No. 23 of the Notification dated 19.10.01 whether the substance is cannabis, or resin or extracts from it.

25. Then there are tinctures made. A tincture is a medicinal extract in an alcohol solution. Alcohol is used to extract and preserve resins and other soluble material from the plant. Cannabis tinctures are an excellent way to utilize the plant's medicinal ingredients, and a perfect alternative for those who do not wish to smoke it. Cannabis tinctures and extracts commonly serve as analgesics, sedatives and narcotics. The advantage of tincture and extract preparation is their ease of dispensing, consumption and rapid absorption. They are very potent when concentrated. They can be diluted in a glass of water (Americans for safe access, <http://www.honoluluasa.org/Recipes/tincture.htm>).

26. The Bulletin on Narcotics (supra) concludes:

Despite the widely held notion that cannabis has been exhaustively researched, large gaps in our understanding remain. Given that an estimated 4 percent of the world's population consumes the drug each year and that in several countries the majority of young people have tried it, cannabis remains a topic about which we cannot afford to be ignorant.

27. Reverting to the facts of the case, in principle, in a given case there can be no difficulty in following the principle laid down by the Apex Court in the case of E. Micheal Raj (supra). No doubt, the Apex Court was not dealing in that case with charas but with heroin and the Apex Court stated, in para 16 of the Judgment that we are of the view that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance/s, for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration (emphasis supplied). For the purpose of imposition of punishment, it may be noted here that it is nobody's case that the seized article in this case was mixed with one or more neutral substances and in any event, evidence in that regard is absolutely lacking and no effort was made on behalf of the defence to show that the seized article had contained any other substance or a neutral substance, other than charas. It must be observed that any Judgment has got to be appreciated in the facts of a given case and the issues raised, before it can be considered as a binding precedent.

28. In the case at hand, the evidence of Pw1/Mahesh Kaisare shows that he had found the substance weighing 1.765 kgs out of which the weight of bean shaped pieces was 0.880 kgs and the weight of spherical pieces clustered together was 0.395 kgs. He took twenty samples as representative samples out of which twelve were from the bean shaped pieces and four were taken from the two

bundles of spherical shaped pieces and after microscopic examination as well as the three tests conducted by him, he came to the conclusion that the substance analyzed by him contained charas. He specifically denied the suggestion that there was also ganja in it. The entire argument of the defence is based on the words used by the said Kaisare that he did not describe the seized article as charas but only stated that it contained charas. There is not even a question put to the said C.A. to find out whether quantitative analysis of the seized article was carried out by him to find out the percentage of charas or any other question or suggestion put to him that the seized article opined by the C.A. as containing charas also contained any other neutral substance other than charas and in such a situation there was no other option for the Court to conclude that the seized substance tested by him was containing charas alone. Whether crude or purified since the entire weight of charas was more than 1 kg., which is commercial quantity in terms of the said Notification dated 19.10.2001, there was no other option for the Court to have convicted him for having found in possession of over 1 kg. of charas. As far as the said Notification is concerned, 100 grams is considered as small quantity. In case no quantitative analysis was done, nothing prevented the accused from getting the same done through the Court and therefore it is but obvious that the principle laid down elsewhere in some other cases cannot be invoked and applied to the facts of the case as deposed by the C.A. i.e. Pw1/Shri Kaisare who was not at all cross examined on the aspects which might have helped the accused.

29. Be that as it may, the Notification dated 19.10.01 prescribing small quantities and commercial quantities to the extent it is relevant for the our purpose is as follows:

* Lesser of the Small quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture.

** Lesser of the Commercial quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part o the mixture.

30. Learned Counsel on behalf of the accused submits that it would be necessary to take into account the impact of the added terms in the Notification such as extracts and tinctures which are obviously stronger versions of the same drug and which have been given equivalent quantities of 100 grams and 1 kg. for small and commercial quantity respectively and ignoring such terms, would, besides other thing, be tent amount to being arbitrarily and that would violate Article 21 of the Constitution of India. This submission is not relevant in this case and need not be considered though I have made a passing reference to it in para 24, as under the Act potency of the drug does not matter at all and what matters is weight alone. One cannot rule out the possibility that in a given case, the herb may be more potent than the tincture unless THC content is established, but that is not required to be done under the Act.

31. Various cases cited on behalf of the accused show that they stood on facts of their own which are not even similar or identical with the facts of the case at hand.

32. In *Toral Minguel Blanco v. The State* (unreported Judgment of this Court dated 23.10.1991 in Criminal Appeal No. 19 of 1991), the C.A. had clearly stated that the accused was found with 6.693 kgs. of charas and the C.A. who was examined in that case had also stated that it was possible to analyze the substance quantitatively but she had not carried out quantitative analysis of the substance. The C.A. had further stated that the C.A. could not rule out the presence of impurities in the charas which was analyzed. The fact that the raiding officer himself had stated that the charas recovered from the accused might have meant for his personal consumption that the Learned Division Bench accepted the submission that the substance found with the accused would fall under small quantity, and, ultimately acquitted the accused.

33. In the case of *Yaniv Cohen v. State of Goa* (unreported Judgment of this Court dated 5.12.2003 in Criminal Appeal No. 16 of 2003, the accused was tried for having found in possession of 691 tablets and on examination they were found to contain N-Methyl methylenedioxyamphetamine. However, the C.A., in his cross examination had admitted that he had not carried out quantitative analysis of the seized article as he was not required to do so and had further admitted that normally the tablets has bulk of binders such as starch or some other neutral ingredients and entire tablet is not a drug and had further admitted that he had not carried out any tests to find out what is the extent of drug contents in it, and neutral content of it. Further, he had admitted that he could not say anything to the suggestion that over 90% of the substance was neutral substance and not amphetamine. He had also admitted that the result related only to the Exhibits tested i.e. 50 tablets from the second envelope and two tablets from the first envelope and had further admitted that he was not 100% certain whether all the balance tablets would test positive for amphetamine. It is in that context that the conviction of the accused was brought down from Section 20(ii)(C) to Section 20(ii)(A). It may be reiterated that there is almost no cross examination in our case on the aspects which were brought to light in the cross examination of the C.A. in the said case.

34. In the case of *Anthony D'Costa @ Thorn v. State of Goa* (unreported Judgment of this Court dated 29/30-1-1992 in Criminal Appeal No. 24 of 1991, the accused was found with six packets stated to have contained 930 milligrams and the C.A. had opined that it contained only 34.4% of morphine and the Court concluded that the quantity of morphine found in the said substance was about 319.9 m. grams which was a small quantity and also noted that the case of the prosecution was that the accused was a drug addict and therefore the conviction of the accused was reduced from Section 21 to Section 27 of the Act.

35. In the case of *Dharam Pal and Ors. v. State of H.P. and Anr.* (supra), the report of the C.A. showed that it contained charas and it was further clearly

stated that the percentage of resin in the stuff was 28.92% and the report was totally silent as regards the contents of the rest of the stuff and the Court concluded that it meant that the entire quantity of the recovered stuff was not charas and considering that, the conviction of the accused was maintained and the sentence was reduced to five years R.I. and fine of Rs. 20,000/- as the quantity was found not to be commercial.

36. In the case of *Salim Ibrahim Chouhan v. State of Maharashtra* (supra), each of the accused were found in possession of 6 kgs. of charas and the C.A. report had specifically opined that the percentage of charas was 321.6 grams as far as the accused Salim Ibrahim Chouhan is concerned and this Court relying upon *E. Micheal Raj* (supra) reduced the conviction and sentence from Section 20(ii)(C) to Section 20(ii)(B) read with Section 80(c) of the Act.

37. Coming back to the case of *E. Micheal Raj* (supra), the allegation was that the accused was carrying 4.07 kgs. of heroin and the submission made was that the purity of heroin was only 1.4% and 1.6% respectively, in the two samples examined and thus the quantity of heroin was only 60 grams and thus it was below commercial quantity and it was contended that its percentage content of heroin translated into weight that is relevant and that is the contention which was ultimately accepted by the Court. Relying on its earlier decision in the case of *Ouseph alias Thankachan v. State of Kerala* : (2004) 4 SCC 446, it was held that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance/s, for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration.

38. As already stated, the accused made no effort in cross examination to find out whether the seized article contained any other substance, for it to be called a mixture or any other neutral substance and therefore in the absence of any cross examination, reading the evidence of Pw3/Kaisare as a whole, one has to presume and conclude that the whole of the substance analyzed by him was charas without any other substance, neutral or narcotic-ganja. In the absence of any cross examination it not permissible to mince words and conclude that because he did not use the word is but used the word contains, the whole substance cannot be termed as charas.

39. In the case of *Joseph Fernandez Vs. State of Goa*, , the analyst who had tested the contraband in the laboratory, to a question in cross examination, has stated that he could not answer whether the contraband contained cow dung also and the Apex Court came to the conclusion that the isolated answer was hardly sufficient to destroy the evidence of that witness.

40. Considering the facts of the case and the discussion supra, in my view, the conviction as well as sentence imposed upon the accused cannot be faulted. I find there is no merit in this appeal and consequently the same is hereby dismissed.