

(2009) 12 GUJ CK 0019
In the Gujarat High Court
Case No : Criminal Appeal No. 436 of 2007

Zakirhussain Shakurbhai Shaikh

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 23-12-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 102(3), 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2, 21, 29, 35, 42

Citation : (2010) CriLJ 1558

Hon'ble Judges : Ravi R. Tripathi, J; J.C. Upadhyaya, J

Bench : Division Bench

Advocate : Rajesh M. Agrawal, for the Appellant; D.C. Sejpal, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

J.C. Upadhyaya, J.—The appellant-Zakirhussain Shakurbhai Shaikh, who was original accused in NDPS Case No. 1 of 2005 came to be convicted by Additional Sessions Judge and Fast Track Court No. 3, Gandhinagar on 19-10-2006 for the commission of offences punishable u/s 21 r/w Section 8(c) and Section 29 r/w Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1981 ("the NDPS Act", for short) and was sentenced to undergo R.I for ten years and fine of Rs. 1 lac and in default of payment of fine, imprisonment for one year for the offences punishable u/s 21 read with Section 8(c) of the NDPS Act. He was acquitted from the charges of the offences punishable u/s 29 of the NDPS Act.

2. The prosecution case in nutshell is that PI, Prohibition Department, Ahmedabad Mr. K.S. Vaghela was in his office at 10.30 am on 2.8.2005 and he received a secret information that the present appellant accused Zakirhussain Shakurbhai Shaikh is to pass at Naroda to Mota Chiloda Road and he would be carrying Brown Sugar in one cotton bag to be delivered to someone else and he would be found near ST bus stand opposite to Pancheswar Mahadev Temple. The

informant also provided the description of the appellant i.e. his age and native place. PI Mr. Vaghela reduced the information into writing and forwarded to his immediate superior, Dy. S.P. Mr. K.C. Chudasama. After receipt of the information by Dy. S.P. Mr. Chudasama, Mr. Chudasama thought it fit to conduct the raid involving himself in the raid along with PI Mr. Vaghela. Two Panchas, namely, Gulammohamed Abdul Hamid Shaikh and Jagdishbhai Kalidas Leuva were called. Panchas were apprised about the secret information and preliminary panchnama was drawn. Thereafter, in two different vehicles Dy. S.P. Mr. Chudasama. PI Mr. Vaghela, two Panchas and other members of the raiding party left the police station to go to the place of information. After reaching to the place of information, a surveillance was arranged. At about 1 pm, the appellant carrying a cotton bag in his hand came near the ST bus stand. The members of the raiding party, including Dy. S.P. Mr. Chudasama and PI Mr. Vaghela along with Panchas went near the appellant. Upon inquiry, appellant introduced himself as Zakirhussain Shakurbhai Shaikh and the Officer of the raiding party informed him that the appellant was required to be searched. The appellant was also informed that if the appellant wanted the search to be carried out in presence of any other Gazetted Officer other than the Dy. S.P. Mr. Chudasama or before any Magistrate, he can opt for the same, to which the appellant stated that he had no objection if the search was to be conducted by the Officers of the raiding party. When the cotton bag held by the appellant was searched, one polythene bag was found. When said polythene bag was opened, one another polythene bag was found and when that second bag was opened, it contained contraband substance described as Brown Sugar. Along with the polythene bag, the substance weighed 354 gms. and the net weight of the substance came to be 352 gms. Two samples were prepared, each containing 5 gms. of those contraband substances, which were marked as A1 and A2. A1 was original sample and A2 was duplicate. The remaining contraband substance was packed and sealed and was marked as A. The samples were packed and sealed, panchas slips containing signatures of the Panchas and Dy.S.P. Mr. Chudasama were pasted on the packets and seal was affixed on the packets. Final part of the panchnama was drawn on the spot, necessary papers like Ravangi Nondh etc. were prepared on the spot. Thereafter, the Officers of the raiding party along with accused and muddamal came to Prohibition police station. Dy.S.P. Mr. Chudasama lodged the FIR against the appellant and offence was investigated, statements of material witnesses were recorded, FSL reports were kept with the investigation papers. After collecting required material for the purpose of lodgment of charge-sheet, charge-sheet came to be filed, which came to be registered as NDPS Case No. 1 of 2005.

3. The trial Judge framed charge at Exh.4, to which the appellant did not plead guilty. Thereupon the prosecution adduced its oral and documentary evidence. The prosecution examined the witnesses and produced required documentary evidence. After the prosecution concluded its evidence, the learned trial Judge recorded further statement of the appellant u/s 313 of the Cr.P.C. and the appellant in his further statement denied generally all the incriminating

circumstances put to him by the trial Court and stated that he was serving in Memco Johnson & Johnson Company and he was passing near the place for the purpose of taking tea and he was apprehended by police and he was falsely implicated in this case. After appreciating the evidence on record and considering the submissions made on behalf of both the sides, learned trial Judge came to the conclusion that the prosecution successfully proved its case beyond any reasonable doubt, and ultimately recorded the conviction of the appellant for the offence punishable u/s 21 r/w Section 8(c) of the NDPS Act and awarded the sentence as hereinabove referred to in this judgment.

4. We have heard arguments made by learned advocate Mr. R.M. Agrawal for the appellant and learned A.P.P., Mr. Sejpal, for the State.

5. Learned advocate Mr. Agrawal for the appellant submitted that the appellant is falsely implicated in this case. The evidence adduced by the prosecution is concocted and got-up evidence, which does not inspire any confidence. The prosecution has suppressed material evidence and only the evidence of interested witnesses is adduced.

5.1 Learned advocate Mr. Agrawal for the appellant submitted that the mandatory requirements laid down under Sections 42, 50, 55, 57 etc. of the NDPS Act have not been duly and fully complied with. It is vehemently submitted that PI Mr. Vaghela who allegedly received the information, as per the prosecution case, is not examined as witness and thus, the prosecution has suppressed the best evidence.

5.2 It is further submitted that the muddamal was weighed not by any independent person, but by the Police Officer himself. The weight cannot be said to have been proved. Considering the evidence on record, it further transpires that no satisfactory evidence is adduced regarding the custody of the seal allegedly affixed on the muddamal packets. Thus, the possibility of tampering of the muddamal cannot be ruled out. That Malkhana register is not produced on record. That in Ravangi Nondh, Exh.34, the column of crime register number is blank. That, therefore, there is no convincing evidence to come to the conclusion that the said muddamal, which was seized by the police, came to be analysed by the FSL. That out of the two Panchas of seizure panchnama, only one Gulammohamed Abdul Hamid Shaikh is examined. His evidence cannot be relied upon. That arrest register is not produced. The relevant provisions including Section 102(3) of the Cr.P.C. have been violated. Case diary is not produced. No document is proved as it should have been proved under the Evidence Act. Station diaries are not proved and they are concocted one.

5.3 Learned advocate Mr. Agrawal for the appellant submitted that the charge framed by the trial Court is defective and misleading, which has caused prejudice in the defence of the appellant. That the appellant does not know Gujarati and his mother-tongue is Hindi. Nothing emerges that any document was translated to him in Hindi. That, thus, his defence is gravely prejudiced. That the

prosecution story as it stands tells unnatural facts. Further statement recorded by the trial Court u/s 313 of the Cr. P.C. is defective. That the presumption cannot be drawn against the appellant automatically. It is submitted that the prosecution has to prove basic facts beyond any reasonable doubt and if basic facts are proved, then only the presumption contained u/s 35 and Section 54 of the NDPS Act can be drawn. That the prosecution in the instant case failed to prove that the alleged contraband substance was recovered from the possession of the appellant.

5.4 Learned advocate Mr. Agrawal submitted that for the sake of arguments, if it is assumed that contraband article was seized from the possession of the appellant, then it can only be said that it was only 2 gms. and 355 miligrams diacetylmorphine or heroin. It is submitted that considering the FSL evidence on record, as adduced by the prosecution itself and especially considering the report, Exh.51, it is established that the percentage of diacetylmorphine is 0.669%. Considering the total weight of contraband substance being 352 gms. and considering the percentage of purity, the percentage of diacetylmorphine comes to 2 gms and 355 miligrams and considering Sr. No. 56 and especially column No. 5 of notification dated 19.10.2001, up to 5 gms, the contraband substance can be said to be of small quantity. In the instant case, taking into consideration the purity of substance as analysed by the FSL, it comes to less than 5 gms. The penal provision contained under Sub-clause (a) of Section 21 of the NDPS Act would apply and the maximum punishment prescribed is R.I for six months or with fine which may extend to Rs. 10000/- or with both. It is submitted that in the instant case, the appellant is in jail since last about five years. That, thus, if at all it is held that the prosecution proved its case relating to the recovery of contraband substance from the appellant, yet, the maximum penalty which could have been awarded was R.I for six months. Since the appellant has undergone more than the maximum penalty prescribed under the provisions, the appeal accordingly deserves to be allowed.

5.5 Learned advocate Mr. Agrawal for the appellant tendered written arguments and the learned advocate Mr. Agrawal read-over the contentions raised in the written arguments and we find that many contentions are overlapping to each other. This judgment is dictated in presence of learned advocate Mr. Agrawal and the main contentions which are not overlapping are incorporated herein-above. Nothing more is submitted. Ultimately, it is submitted that the appeal may be allowed.

6. Learned A.P.P., Mr. Sejpal, for the State vehemently opposed this appeal and submitted that considering the other submissions, other than the submission regarding the purity of the substance, those contentions outright do not require any consideration for the simple reason that, considering the oral and documentary evidence adduced by the prosecution, the prosecution has successfully proved the basic fact about seizure of the contraband substance from the possession of the appellant and that the mandatory requirements laid

down under the NDPS Act have been duly and fully complied with. It is further submitted that considering the original record of the case, copy of the case diary in sealed cover is produced. It is submitted that there is no dispute that PI Mr. Vaghela, is not examined as witness in this case, but, considering the evidence of his superior Officer, namely, Dy. S.P. Mr. Chudasama, examined at Exh.24, the prosecution did not think it fit to repeat the evidence by examining PI Mr. Vaghela, who was Jr. Officer to PW-1 Dy. S.P. Mr. Chudasama. That the prosecution has examined independent panch witness PW-2 Gulammohamed Abdul Hamid Shaikh and his evidence is cogent, convincing, reliable and trustworthy. Panch witness fully supports the contents of the panchnama, Exh.31 and the prosecution case.

6.1 Learned A.P.P., Mr. Sejpal. for the State submitted that it is true that the evidence reveals that the percentage of diacetylmorphine assessed by the FSL comes to 0.669%. Our attention was drawn to FSL report, Exh.49 wherein in the column of opinion, the FSL has opined that the sample of the contraband substance contained diacetyl-morphine, morphine (heroin), 6 monoacetyl morphine, codeine, acetyl codein, thebaine, papavarin, narcotine, and it is clearly opined that all these substances form part of "opium derivative" as defined u/s 2(xvi) of the NDPS Act. That, thus, in the instant case there is nothing that any neutral substance was mixed with the contraband substance diacetylmorphine. Other substances blended with the diacetylmorphine were also contraband substances defined as "opium derivative" . Our attention was also drawn to the definition of "manufactured drug" defined u/s 2(xi) of the NDPS Act wherein all opium derivatives are defined as manufactured drug. Section 21 of the NDPS Act prescribes punishment for contravention in relation to manufactured drugs and preparations. Under such circumstances, it is submitted that mere fact that in terms of the percentage of diacetylmorphine found by the FSL, diacetylmorphine may be 2 gms. and 355 miligrams, but over and above diacetylmorphine, there were other contraband substances narrated by the FSL in the FSL report, Exh.49 and, therefore, it cannot be said that here is a case wherein the appellant was required to be punished for possessing small quantity of contraband article.

6.2 Learned A.P.P., Mr. Sejpal, for the State submitted that in the impugned judgment the learned trial Judge has assigned cogent and convincing reasons to come to the conclusion that the prosecution successfully proved its case beyond any reasonable doubt. That, there is no reason whatsoever to interfere with the findings arrived at by the trial Court and the appeal deserves dismissal.

7. We have examined the record and proceedings in context with the submissions made by the rival sides.

8. Considering the evidence of PW-1 Mr. K.C. Chudasama, examined at Exh.24, in brief he stated that he himself along with Prohibition PI Mr. Vaghela were present at about 10.30 am on 2.8.2005 in Prohibition police station, Ahmedabad and PI Vaghela received the secret information. In the evidence, PW-1 Mr. Chudasama stated the contents of the information. It is further submitted that

the contents were reduced in writing by PI Mr. Vaghela. The information contained the name and description of the appellant and the nature of contraband substance he would be carrying and the place where he would be found and the time. In this connection considering the documentary evidence and especially, Exh.38. it clearly transpires that PI Mr. Vaghela reduced the secret information into writing and forwarded the same to his immediate superior, namely, PW-1 Mr. Chudasama. Relevant entries with regard to the information were made in the station diary. Thus, we are of the considered opinion that in the instant case, mandatory requirements laid down u/s 42 of the NDPS Act have been duly and fully complied with.

9. On behalf of the appellant it was vehemently submitted that the prosecution has suppressed the best evidence, namely, the prosecution has not examined PI Mr. Vaghela, who allegedly received the secret information. It is true that PI Mr. Vaghela is not examined in this case as prosecution witness, however, in the instant case, considering the evidence of PW-1 Mr. Chudasama, who was superior officer to PI Mr. Vaghela, it has come on record that as soon as PW-1 Mr. Chudasama was informed about the secret information received by PI Mr. Vaghela, PW-1 Dy.S.P. Mr. Chudasama thought it fit to conduct the raid and to go to the place of information along with the Officers of the raiding party. Mr. Chudasama actually went to the place of information along with the members of the raiding party, including PI Mr. Vaghela. He witnessed the entire episode. When such is the situation, mere fact that the prosecution did not examine PI Mr. Vaghela in this case would not go to the root of the prosecution case and would not shake the very spectrum of the prosecution case. As submitted by learned A.P.P., Mr. Sejpal, for the State, when the evidence of superior officer PW-1 Dy.S.P. Mr. Chudasama is adduced by the prosecution, the examination of PI Mr. Vaghela would have been mere repetition and duplication of the evidence. Considering the evidence of PW-1 Mr. Chudasama. as stated above, Mr. Chudasama thought it fit to go to the place of the information along with the officers of the raiding party. According to his evidence, after completing preliminary panchnama, in presence of the Panchas in the police station, he himself, PI Mr. Vaghela and other officers of the raiding party along with two Panchas went to the place of the information, a search was arranged and the appellant carrying cotton bag in his hand, came near bus stop, opposite to Pancheshwar Mahadev Temple and he was intercepted. The evidence of PW-1 Mr. Chudasama further reveals that upon inquiry, the appellant told his name to be Zakirhussain Shakurbhai Shaikh. It further becomes clear that the appellant was informed about his right to be searched in presence of any Magistrate or any Gazetted Officer, to which the appellant stated that he had no objection, if his search was conducted by the officers of the raiding party. It further transpires that a written resolution under Sections 42 and 50 of the NDPS Act came to be passed, the copies of which are produced at Exhs.27 and 28 and both these documents are in Hindi language. The fact that the appellant was going to be searched and the fact that he was informed about his right to be searched in

presence of any Magistrate or any Gazetted Officer have been reduced into writing in those resolutions Exhs.27 and 28 in Hindi language and as per the evidence of PW-1 Mr. Chudasama, the same were explained to the appellant in Hindi. Both these documents bear endorsements made by the appellant about receipt of the copies of the documents and his signature. At the time when both these documents were tendered in evidence during the course of deposition of PW-1 Mr. Chudasama on behalf of the defence, an objection was raised against the exhibition of the documents on the ground that the copies were not supplied to the defence, but, if the endorsements below the documents, Exhs.27 and 28 are considered, the copies were supplied to the appellant. Under such circumstances, the contention raised on behalf of the appellant that the appellant knows only Hindi language and, therefore, his defence is gravely prejudiced, does not require any consideration. Considering the evidence of PW-1 Mr. Chudasama, even the contents of the panchnama. Exh.31 were translated in Hindi to the appellant. On behalf of the appellant it is submitted that when the trial Court recorded further statement of the appellant u/s 313 of the Cr. PC, the questions were framed in Gujarati language. In this connection, if the further statement recorded u/s 313 of the Cr. P.C. of the appellant is considered, it clearly transpires that below the further statement, the learned trial Judge has made specific endorsement to the effect that since the appellant did not know Gujarati, the questions framed for further statement were interpreted and translated into Hindi language and were put to the appellant in Hindi language and the appellant replied in Hindi language, which was reduced into writing in the further statement and translated the same in Gujarati language. We are, therefore, of the considered opinion that the contention raised on behalf of the appellant that as appellant did not know Gujarati language, his defence was gravely jeopardised, is baseless.

10. Further, considering the evidence of PW-1 Mr. Chudasama, as stated above, the appellant was apprised about his right to be searched in presence of any Magistrate or Gazetted Officer. The same was also reduced into writing. Under such circumstances, we are of the considered opinion that the mandatory requirements laid down u/s 50 of the NDPS Act have been duly and fully complied with. Learned A.P.P., Mr. Sejpai, relied upon the case of State of Himachal Pradesh Vs. Pawan Kumar, wherein Hon''ble Apex Court interpreting the word person as referred in Section 50 of the NDPS Act held that search of a bag, briefcase or any such article or container etc. which is being carried by accused is not a search of the person and, hence, Section 50 would not apply in such case.

10.1 Therefore, though as held by the Hon''ble Apex Court in Pawan Kumar''s case (supra), in the instant case, the prosecution was not required to follow the mandatory requirements laid down u/s 50 of the NDPS Act for the simple reason that the contraband substance was found from the cotton bag held by the appellant. However, despite this the evidence adduced by the prosecution reveals that the mandatory requirements laid down u/s 50 of the NDPS Act were duly and fully complied with.

11. Considering the evidence of PW-1 Mr. Chudasama, it further transpires that from the cotton bag held by the appellant, upon conducting a search, one polythene bag was found and opening said polythene bag, one more polythene bag came to be found which contained the contraband substance. It is true that the substance was weighed by Dy.S.P. Mr. Chudasama. On behalf of the appellant it was submitted that the contraband should have been weighed by some independent person other than the officer of the raiding party. We do not find any justification in the submissions raised on behalf of the appellant. PW-1 Mr. Chudasama is responsible and Gazetted Police Officer. Nothing emerges that there was any animosity between any of the officers of the raiding party, including PW-1 Mr. Chudasama with the appellant, so that the appellant could be falsely implicated in this case. Further considering the evidence of PW-1 Mr. Chudasama, it further transpires that two samples were prepared, namely, A1 and A2. A1 was original sample and A2 was duplicate sample. Both the samples were packed and duly sealed and the slips containing signatures of the Panchas and the Police Officer came to be pasted on the bags. Detailed panchnama was drawn on the spot. Necessary documents were prepared on the spot including Ravangi Nondh, Exh.34. On behalf of the appellant it was vehemently submitted that Ravangi Nondh, Exh.34 by which the sample was forwarded to the FSL, does not contain crime register number. In this connection, considering the evidence of PW-1 Mr. Chudasama at internal page No. 6 and running page No. 189 of the paper-book, Mr. Chudasama categorically stated that the Ravangi form, Exh.34 was prepared on the spot and, thereafter, the offence was registered. The offence was thereafter registered as Crime Register No. 813/2005. Under such circumstances, the non-mention of crime register number in the Ravangi Nondh, Exh.34 has been duly explained by PW-1 Mr. Chudasama, in his evidence. The FSL receipt, Exh.48 and the FSL report, Exh.49 duly describe the name of the appellant and other details which are mentioned in Ravangi Nondh, Exh.34. Under such circumstances, we do not find any substance in the submissions made on behalf of the appellant that the prosecution failed to prove beyond reasonable doubt that the same contraband which came to be seized from the possession of the appellant came to be analysed by the FSL. We are of the considered opinion that the prosecution successfully proved that the contraband substance seized from the possession of the appellant came to be analysed by the FSL.

12. Further, considering the evidence of PW-1 Mr. Chudasama, it transpires that after completing the procedure for seizure, recovery and drawing of samples etc., along with the appellant, the officers of the raiding party came to police station and PW-1 Mr. Chudasama lodged the FIR against the appellant which is produced at Exh.33. We have examined FIR, Exh.33 along with the deposition of PW-1 Mr. Chudasama and we do not find any material contradictions or inconsistency in the evidence of PW-1 Mr. Chudasama in light of the contents of the FIR, Exh.33.

13. Furthermore, in the instant case, the prosecution has examined Panch No. 1, PW-2 Gulammohamed Abdul Hamid Shaikh at Exh.41. We have examined the

evidence of Panch PW-2 Gulammohamed Abdul Hamid Shaikh and we are of the considered opinion that the Panch fully supports not only the contents of the panchnama, Exh.31, but the case of the prosecution as well as the evidence adduced by Dy.S.P. PW-1 Mr. Chudasama. Panch PW-2 Gulammohamed Abdul Hamid Shaikh clearly deposed in his evidence all the necessary details regarding interception of the appellant, apprising the appellant about his right to be searched in presence of Gazetted Officer or Magistrate, about search of the cotton bag held by the appellant, about the contraband substance found from the bag, weighment of the contraband substance, drawing of samples and packing and sealing the samples etc. It appears that on behalf of the appellant Panch PW-2 Gulammohamed Abdul Hamid Shaikh was succinctly cross-examined. We have minutely perused the cross-examination of the panch witness and nothing is revealed which would make his evidence either doubtful one or untrustworthy. In his cross-examination, he categorically stated that for the first time in his life, he was taken up as Panch in this case. Thus, there is nothing that the Panch was repeater and police used to take his services frequently. Thus, the evidence of independent Panch witness fully corroborates not only the contents of the panchnama, but, even the evidence of PW-1 Mr. Chudasama. Moreover, considering the evidence of other police officers, who were members of the raiding party, examined by the prosecution in this case, we find that they support the prosecution case and the evidence of PW-1 Mr. Chudasama.

14. It is submitted that non-production of Malkhana register is fatal to the prosecution case. On behalf of the appellant reliance was placed on the case of State of Rajasthan Vs. Gurmail Singh, In said case, Malkhana register was not produced to prove that seized articles were kept in Malkhana. In the instant case, if the evidence of PW-1 Mr. Chudasama is examined, he categorically stated that after completing the raid, he himself along with appellant, carrying the muddamal came to the police station. Muddamal along with other relevant papers were handed over to PSO of the police station. In this case, considering the evidence of police officer Kanubhai Revabhai PW-4, examined at Exh.45, he categorically stated that on 2.8.2005 while he was in the police station, the muddamal was entrusted to him and he kept it in his safe custody in a locker and the key of the locker was kept by him. Considering his evidence, the movement of the samples from the police station to the office of the FSL has also been duly proved. Considering the FSL report, Exh.49, it is duly stated that the sample in packed and sealed condition was received by the FSL containing the seal of Superintendent, P & E.D.S.F. Ahmedabad in Gujarati language. Thus, the sample was received by the FSL in packed and sealed condition. Under such circumstances, in the instant case, the prosecution has duly proved the fact that the seized article was properly kept in the police station and we do not find any material on record to come to the conclusion that there was any possibility of tampering with the muddamal. Under such circumstances, the facts of our case are clearly different than the facts and circumstances and evidence on record in Gurmail Singh's case (supra) relied upon by the appellant.

15. Considering the evidence on record, we are of the considered opinion that at the time of the arrest of the appellant in connection with this offence, due procedure and formality were undertaken by the concerned Police Officer. The case diary is produced by the prosecution on record before the trial Court. We are, therefore, of the considered opinion that the documentary evidence is duly proved by the prosecution. We do not find any material on record to come to the conclusion that the seal was ever misused in this case. Even the custody of the seal has been duly proved. When the evidence of Panch No. 1 PW-2 Gulammohamed Abdul Hamid Shaikh is cogent and convincing, then mere fact that the prosecution did not examine the 2nd Panch would not come in way of the prosecution in proving the case beyond any reasonable doubt against the appellant. We do not find any inconsistency or any contradictory version in the evidence adduced by the prosecution, which would go to the root of the prosecution case and would shake the credibility of the prosecution case.

16. Assailing the charge framed by the trial Court, the learned advocate Mr. Agrawal for the appellant stated that in the charge, the trial Court almost reproduced the contents of the FIR and, therefore, the charge is defective. We have examined the charge and we are of the considered opinion that we do not find any material defect or irregularity in the charge which would vitiate the prosecution case. We do not find that the prosecution case can be termed as containing unnatural story. We find that the prosecution proved beyond reasonable doubt the possession of contraband substance of the appellant and the recovery of the same from his possession. When such is the situation, we are of the considered opinion that the presumption contained u/s 54 of the NDPS Act is squarely applied in this case. Learned advocate Mr. Agrawal for the appellant relied upon the cases of Samir Ghosh v. State of West Bengal (2001) 1 Crimes 505 , Shivabhai Gajmalbhai Vs. State of Gujarat, Narcotics Control Bureau, Mumbai Vs. Abdullah Hussain Juma and Another, and Babubhai Dalaji Mali v. State of Gujarat decided by this Court in Criminal Appeal No. 387 of 1999 with Criminal Appeal No. 819 of 2000 on 31.7.2003. We have gone through the judgments relied upon by the appellant. Considering those judgments, it transpires that on the basis of the peculiar facts and circumstances of those cases and the evidence on record in those cases, it was observed that the mandatory requirements laid down in the NDPS Act were not duly and fully complied with. However, in the instant case, as elaborately discussed above, we do not find any breach of any mandatory requirement laid down in the NDPS Act and thus, we are of the considered opinion that the facts and circumstances and evidence on record in the instant case are totally different than the facts and evidence in record in the above cases relied upon on behalf of the appellant.

17. Learned advocate Mr. Agrawal for the appellant pressed into service the case of E. Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau, and relied upon the case of State (Govt. of N.C.T. of Delhi) v. Ashif Khan @ Kalu reported in (2009) 2 EFR 55 and the judgments delivered by other High Courts, namely, in the case of Chandrakant Khare v. State of Maharashtra and Ors. reported in 2004

(2) EFR 746 decided by Bombay High Court and case of Anup Gupta v. State of Punjab reported in 2009(1) EFR 124 and submitted that considering the evidence on record in this case and principles established by Hon'ble Apex Court and other High Courts, the conviction recorded by the trial Court of the appellant in connection with the commercial quantity is outright illegal and improper. Our attention was drawn to the evidence of FSL Officer PW-3 Mr. Sharma, examined at Exh.42 and the spot inspection report of the FSL, Exh.43 wherein it is stated that upon spot examination, the Brown Sugar was found to be blended with some other substance. It further transpires that the prosecution examined the Scientific Officer of FSL PW-6, Shashikant Maganbhai Darji at Exh.47 and as per the report, Exh.51, the diacetylmorphine percentage is found to be 0.669%. PW-6 Mr. Darji in his evidence admits that considering the percentage of diacetylmorphine and the total weightage of the contraband substance, the diacetylmorphine in the substance can be said to be weighing 2 gms. and 355 miligrams. Therefore, learned advocate Mr. Agrawal for the appellant submitted that the purity test suggests that the purity in the substance was 2 gms. and 355 miligrams and as per Sr. No. 56 and column No. 5 in the table dated 19.10.2001 attached to the NDPS Act, the small quantity is 5 gms. and the commercial quantity is 250 gms. It is, therefore, submitted that in the instant case, since the quantity, is less than 5 gms., the punishment prescribed in Clause(a) of Section 21 of the NDPS Act would apply and accordingly, the maximum sentence prescribed is R.I for a term which may extend to six months or with fine, which may extend to Rs. 10000/- or with both. Therefore, it is submitted that accordingly the appeal may be partly allowed as the appellant had served out more sentence than, what is prescribed in Clause(a) of Section 21 of the NDPS Act.

18. We have given our thoughtful consideration to the submissions made by learned advocate Mr. Agrawal for the appellant. We have also given our thoughtful consideration to the judgments relied upon by learned advocate Mr. Agrawal for the appellant on this point. In the instant case, there is no dispute that FSL Officer PW-6 Mr. Darji conducted purity test. According to his evidence and the Certificate, Exh.51, diacetylmorphine was found to be 0.669% w/w. in the substance. Thus, the total weight of diacetylmorphine can be assessed as 2 gms. and 355 miligrams. However, in this connection, it is necessary to consider the FSL report, Exh.49. It may be noted that the report, Exh.49 is also prepared by PW-6 Mr. Darji, the Scientific Officer of the FSL. According to his evidence and considering the opinion arrived at by him in his report, Exh.49, it appears that the sample contained "opium derivative", namely, morphin, diacetylmorphine (heroin), 6 monoacetyl morphine, codeine, acetyl co-dein, thebaine, papavarin, and narcotine. It is, therefore, opined that all these substances together form part of "opium derivative". In this connection considering the definition of "opium derivative", defined u/s 2 (xvi) NDPS Act, it transpires that all the above substances form part of the definition of "opium derivative". Furthermore, considering the definition of "manufactured drug" defined u/s 2 (xi) of the NDPS

Act, it transpires that all "opium derivatives" form part of "manufactured drug".

19. In this background, considering the case of E. Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau, it transpires that the mixture of narcotic drug found in said case contained neutral substance. Hon"ble the Apex Court held that the quantity of neutral substance(s) is not to be taken into consideration while determining the small or commercial quantity of the narcotic drug or psychotropic substance. Accordingly, in said case it was held that considering the purity test of the substance other than the neutral substance, the quantity would fall within the purview of the quantity higher than the small quantity, but lesser than commercial quantity and accordingly it was held that the appellant was required to be convicted for the offence punishable under Clause(b) of Section 21 and not under Clause(c) of Section 21 of the NDPS Act. In State of NCT of Delhi Vs. Ashif Khan @ Kalu, almost identical was the situation and Hon"ble Apex Court held that for determination of percentage of heroin contained, translated into weight is relevant and the weight of heroin came to be 2.945 gms. In other cases decided by Delhi High Court, Bombay High Court and Punjab & Haryana High Court, almost identical was the situation. To put it differently, in the case before Hon"ble the Apex Court and other High Courts, relied upon on behalf of the appellant, the contraband substance was blended with neutral substance(s). Now in the case on hand, the situation is different. As stated above, in the instant case, the diacetylmorphine is not mixed with any neutral substance(s). It is true that the percentage of diacetylmorphine is found to be 0.669%, but, it is further pertinent to note that the diacetylmorphine was blended with other substance which form part of definition of "opium derivative". In short, in the case on hand, diacetylmorphine was not mixed with any neutral substance. When such is the situation, we are of the considered opinion that the facts and circumstances and evidence on record in the instant case are totally different than the facts and circumstances and evidence on record in the cases relied upon on behalf of the appellant. ,

20. When such is the situation, in the instant case, we are therefore of the opinion that the trial Court rightly recorded the conviction of the appellant for the offence punishable under Clause(c) of Section 21 of the NDPS Act. As stated above, "opium derivative" forms part of the definition of "manufactured drug" and Section 21 of the NDPS Act pertains to contravention in relation to manufactured drug and preparations. When such is the situation, the weight of the manufactured drug found to be 352 gms., which is exceeding 250 gms., it can safely be said that the contraband substance (manufactured drug) seized from the possession of the appellant was of commercial quantity. Under such circumstances, we do not find any merits in the submissions made on behalf of the appellant that the case falls within the purview of small quantity, and, therefore, in the instant case, the punishment was required to be awarded under Clause(a) of Section 21 of the NDPS Act and not under Clause(c) of Section 21 of the NDPS Act.

21. The trial Court in the impugned judgment, appreciating the evidence on record, rightly came to the conclusion that the prosecution proved its case against the appellant beyond any reasonable doubt. In the impugned judgment, the trial Court elaborately dealt with the contention regarding the purity test raised on behalf of the appellant accused and considering the FSL report and appreciating the overall evidence on record, rightly came to the conclusion that diacetyl-morphine was not the only substance found from the possession of the appellant, but, the same was found mixed with other substances which form part of definition of "opium derivative". We do not find any ground to interfere with the reasonings assigned by the trial Court and the ultimate conclusion arrived at by the trial Court in the impugned judgment. We, therefore, do not find any merits in the appeal and the appeal deserves dismissal.

22. For the foregoing reasons, the appeal stands dismissed.