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**IN THE COURT OF 8TH ADDL. SESSIONS JUDGE & JUDGE, SPECIAL
NDPS COURT, SURAT.**

NDPS Case No. 3/2014

Exh. _____

Complainant:

The State of Gujarat

VERSUS

Accused:

1. GOPAL BANARSI KESARI,

Resi. At : Haridham Society, House No. 46, Behind Noori
Media, Tal- Palsana, Dist- Surat.

Permanent Address : Rampur Thana, Revni, Dist- Baliya,
Uttar Pradesh.

2. HIMADRI CHANDANESHWAR PATRA,

Resi. At : Palsana Char-rasta, Mahendrasinh Ni Chawl, Tal-
Palsana, Dist- Surat.

Permanent Address : Nanka, Gopinathpur, Thana Kashi,
Dist- East Meghnipur, West Bengal.

Appearance:

Ld. Advocate Mr. M.A. Mastan for the accused persons.

Ld. A.P.P. Mr. V.C. Panchal for the State.

:: J U D G M E N T ::

[1] The accused persons herein are Charged for the offences punishable under Sections 8(c), 20(b) & 29 of NDPS Act *vide* charges framed at Ex. 5 against the accused persons.

[2] Brief facts of the prosecution case are as under:

2.1 That an information was received by R.I. Parekh, P.I., S.O.G. Branch Rural, Surat, which was forwarded to him by the driver of D.S.P, Bardoli Division, namely Vidhyabhushan Baliram Dubey, that the accused persons namely Gopal Banarsi Kesari and Himadri Chandaneshwar Patra have stored Ganja in their house No.46, Haridham Society, situated at Kadodara village, behind Noori Media, Surat. Thereafter, the information was verified and the entry was made by R.I. Parekh in Station Diary and the information of the same was sent to Superintendent of Police, Surat Rural telephonically as well as in sealed cover and raiding team was constituted and Panch Witnesses were called and preliminary panchnama was prepared and thereafter, raid was carried out at

the premises described above and the accused persons were found in the premises and thereafter, P.I. Sh. Parekh informed them about the information and told them that the search of the house has to be done and R.I. Parekh further revealed that he was a Gazetted Officer and despite that if they want to get them searched through any other Gazetted Officer or Magistrate then they can do so, it is their legal right. However, the accused persons reposed faith in the P.I. and accordingly a written notice under Section-50 of NDPS Act was handed-over to them and was explained to them in Hindi and a copy of the same was also given to them. Further, they were also explained about the notice under Section-42 of the NDPS Act. They were also made aware that if they want to get the raiding officer searched then they can do so.

2.2 Thereafter, during the search of the premises, Ganja was found in three white cloth bags and two Rexene bags and on opening the said bags the material smelt and appeared like Ganja. Thereafter, the Police Constable Dhiveshbhai Hasmukhbhai was called to bring the person to weigh the consignment alongwith electronic weighing scale and the accused persons were asked if they had any permit to keep Ganja to which they denied. Thereafter, personal search of the accused persons were conducted and from personal search, no objectionable objects were found. The

accused persons further revealed that one person had provided the said Ganja Consignment to them 2-3 days back which is kept with them for further retail sale. Thereafter, one Ganpatbhai Durgaji Rajpurohit was called to weigh the said Ganja and F.S.L. Officer came at the spot and during preliminary investigation, the said Ganja was weighed and in total 103.945 Kg. ganja valued around Rs. 8,31,460/- was recovered which was sealed in five different plastic bags which were marked as A to E and two samples each were drawn out of five bags, one control sample marked as A1 to E1 and reserve sample marked as A2 to E2 were drawn from each bag respectively. Thereafter, seizure memo of the seized material was prepared and was explained to the accused persons in Hindi and both were provided a copy of the said seizure memo and a complaint was lodged against the accused persons under Sections 8(c), 20(b) & 29 of NDPS Act, by one Dilipbhai Chimanbhai Chaudhari, ASI, SOG, Surat Rural, Surat.

[3] During investigation, FSL result was obtained which confirmed that samples contained ganja. After completion of investigation, the charge sheet was filed. Thereafter, after examining the accused persons, as have received the copies of the police papers, the same was registered as NDPS case No. 3/2014. The Ld. Addl. Sessions Judge, Surat, framed the charges at Exh. 5, U/s.

8(c), 20(b) & 29 of NDPS Act which were explained to the accused persons and they were asked whether they plead guilty or claim the trial. Wherein, the accused persons pleaded not guilty and insisted for trial. Thereafter, the evidence of the prosecution was recorded. After closure of the evidence from the side of the prosecution, the accused persons were examined U/s. 313 of the Cr.P.C. wherein, also the accused persons have denied the circumstances appearing in the evidence against them and stated that they are innocent and false case has been lodged against them and police has wrongly arrested them.

[4] To bring home the guilt of the accused persons to the charge, the prosecution has examined the following witnesses :

Sr. No.	PW No.	Ex. No.	Name of witnesses
1.	1	8	Kishor Punamchand Badgujar - Panch hostile.
2.	2	15	Dilipbhai Chimanbhai Chaudhary - Complainant.
3.	3	21	Ganpatbhai Durgaji Rajpurohit
4.	4	24	Vidyabhushan Baliram Dubey
5.	5	25	Vineshbhai Bhikhubhai Patel
6.	6	26	Kishorchand Chimanlal Maisuriya
7.	7	31	Bharat Ranchhod Bariya
8.	8	39	Rameshchandra Ishwar Parekh
9.	9	50	Ranjit Chhagan Vasava

10.	10	57	Ashokkumar Umedsinh Tapariya
11.	11	62	Shri Nivas Lakshmanbhai Dabekar
12.	12	63	Parthipuri Naranpuri Goswami

[5] The prosecution has produced the following documentary evidence:

Sr. No.	Particulars	Ex. No.
1.	Panchnama regarding search of house of accused persons and recovery of muddamal	9
2.	Notice under Section 50 (1) to the accused persons	10
3.	Written explanation to accused persons regarding their right to search police officers and panchas.	11
4.	Notice under Section 42 of NDPS Act.	13
5.	Seizure memo	14
6.	Complaint	16
7.	Letter to FSL Officer to giving report after examination of muddamal.	28
8.	Report regarding site visit by FSL officer.	29
9.	Letter to PSO for registration of FIR.	32
10.	Extracts of station diary.	33
11.	Panchnama regarding seized muddamal.	34
12.	Special report sent to SP Surat Rural Surat.	35
13.	Extracts of station diary regarding entry of wireless message to SP Surat Rural Surat.	36
14.	Confidential report to SP Surat Rural by PI SOG Surat.	42
15.	Request to Ganpatbhai Dargaji Rajpurohit for weighing the muddamal Ganja.	43
16.	Information regarding arrest to accused persons.	44
17.	Certificate regarding arrest of accused persons.	45

18.	Report regarding conduct of successful raid to SP Surat, Rural.	46
19.	Extracts of Entry regarding forwarding of information to SP Surat Rural.	47
20.	Letter to FSL officer regarding examination of muddamal and to file a report of the same.	51
21.	Dispatch letter.	52
22.	Acknowledgment regarding receipt of muddamal	64
23.	Final report of FSL along with forwarding letter.	60
24.	Botanical examination report of FSL.	61

[6] It is submitted by the Ld. APP for the State that 103.945 Kg of Ganja was recovered from house No. 46, Haridham Society and the accused persons were present in the premises at the time of recovery of the contraband and had not explanation for the possession of Ganja in the premises. It is further submitted that the accused persons were well aware of the presence of Ganja in the premises and were in conscious possession of the said contraband. It is further submitted that the information regarding search of Ganja in the premises was obtained through informer by one Vidhyabhushan Baliram Dubey, driver of DSP and was forwarded to PI Parekh who entered the same in writing vide entry in station diary and thereafter the said information was forwarded to the Superior officer vide outward No. 100/3 and even over telephone to the concerned SP to raid the premises. It is further submitted that the panch witnesses were called and preliminary panchnama was

prepared and thereafter, the raid was conducted on the said premises wherein the accused persons were found and on search of the premises, the contraband was recovered from the premises. It was further submitted that thereafter, notice under Section 50 was also given to the accused persons though the same was not applicable as there was no recovery of contraband from the personal search of the accused persons and the recovery was made from the premises. It is submitted that the Ganja recovered from the possession of the accused persons was of commercial quantity and the same was seized and recovered as per the provisions of law and the samples drawn out of the muddamal were sent to Lab wherein the said samples were confirmed as Ganja. It is submitted that from the evidence on record there is no confusion and doubt over the fact that the said Ganja was recovered from the conscious possession of the accused persons from premises No. 46, Haridham Society occupied by the accused persons. It was further submitted that keeping in view that a large quantity of Ganja was recovered, there is no question that the said Ganja been planted upon the accused persons and further there was no reason with the police officials to falsely implicate the accused persons and as such the prosecution has been able to discharge burden and the proved the charges against the accused persons and the evidences against the

accused persons are sufficient to convict them under Section 8(c), 20(b) and 29 of NDPS Act.

[7] Ld. Counsel appearing for the accused persons has submitted that there are material contradictions in the case of the prosecution and the prosecution has grossly failed to prove its case. It is submitted that admittedly the information was received from the private informer by driver of the DSP while the same was recorded by PI Parekh which is not permissible as the person who obtained information has to reduce the same in writing as per Section 42 of the NDPS Act. It is further submitted that there is no acknowledgment regarding the forwarding of the said information to Superior officer and as such there was no compliance of Section 42 of the NDPS Act which is sufficient to make the case fatal for the prosecution. It is further submitted that the raid was carried out after sunrise without any authorization of Magistrate and the authorization of Magistrate is mandatory. It is further submitted that even the Section 50 notice was not provided as per law and even as per the case of prosecution more than 2 options were given to the accused persons and further the joint option was given which are not permissible under law. It was further stated that notice was issued in Gujarati language, which accused persons do not understand, and the notice should have been given in the language

of the accused persons so as to enable them to understand the contents of the same. It was further submitted that even as per the case of prosecution, after the recovery of Ganja from the premises, personal search of the accused persons was carried out even prior to their arrest and as such Section 50 would come into operation at that moment when personal search was conducted. It was further stated that Muddamal was not sealed as per the norms and there was no CFSL form on record which is required in the present case. It was further stated that the panch slips were kept inside bags in the samples sent to FSL for examination as is evident from the receipt of Muddamal by FSL and the material on record, which is not permissible under law. Further, even the original muddamal was not properly sealed and panch slips were not found from the said muddamal while as per the case of prosecution panch slips were kept inside the bags while sealing the muddamal. The prosecution has no explanation as to why panch slips were not found when the muddamal was produced before this Court which itself shows that the muddamal brought before this Court was not one which was seized in terms of the present case and as such the recovery of muddamal is not proved. It was further submitted that the extract of crime writer head register were not produced on record which is major discrepancy in the prosecution case and

creates doubt over the sealing of muddamal. It was further submitted the log book of official vehicles used of raiding party and of FSL officials was not placed on record which also creates doubt over the prosecution case further no document has been produced on record to show the possessor and occupier of the house. It is submitted that in view of the evidence on record, the prosecution has grossly failed to prove the charges against the accused persons and the accused persons are entitled to be acquitted of the charges levelled against them.

[8] On the basis of the charges framed at Ex. 5, the evidence on record and the arguments of both the parties, following points arise for the determination of this matter:

1. Whether the prosecution proves beyond reasonable doubt that the accused persons were found in the conscious possession of 103.945Kg. of Ganja for further sale of the same and thus the accused persons have committed the offence under Sections 8(c), 20(b) & 29 of NDPS Act.
2. What order?

[9] Answers to the above points are as under:

1. In Negative.
2. As per final order.

:: R E A S O N S ::**Brief summary of evidence produced**

[10] PW-1 Shri Kishorbhai Poonamchand Badgujar was examined at Exh. 8 who was the panch witness of the raid conducted at the premises of the accused persons and identified his signature on recovery panchnama at Exh. 9. In his deposition, he denied going at the place of incident and any recovery of Ganja in his presence and as such was declared hostile. Nothing material came out from his cross-examination. However he admitted his signatures on Exh. 10 and 11.

[11] PW-2 Shri Dilip Chimanbhai Chaudhari was examined at Exh. 15. He filed complaint in the present case on the basis of which present FIR was filed. He deposed that one Vidya Baliram Dubey got information regarding the illegal consignment of Ganja kept by the accused persons at house No. 46, Haridham Society and forwarded the same to PI SOG Surat Rural Shri RI Parekh who was on patrolling and on verification of the said information, he further forwarded the information to Superintendent Surat Rural in a sealed cover through Police constable Tejas Tulsiram and thereafter entry in this regard was made in Kadodara police station

GIDC and left for raid. He was directed to arrange the panch witnesses and Head constable Mahendrabhai was further directed to collect the necessary material required for the purpose of raid and the seal of PSI SOG Surat. Preliminary panchnama was done and thereafter they went to House No. 46, Haridham Society as provided in the information. There PI Parekh himself introduced to the accused persons Gopal and Himadri and thereafter notice under Section 50 and 42 was given to them by PI and then explained in Hindi. Thereafter PI asked them to produce any objectionable material lying with them and they shown three plastic bags and two rexene bags in the premises, the bag were opened on examining and smelling the material kept inside bags, same was found like Ganja. The FSL official was then called. Thereafter the personal search of the accused persons were done. One weighing scale of 3 Kg capacity was also found from the premises of the accused persons. Thereafter weighing person was called and the FSL official came at the premises. FSL official also tested the material and confirmed the same as Ganja in his preliminary report. The muddamal was thereafter weighed and sealed in 5 different plastic bags and one control sample and reserve sample of each 100 gram drawn from each of the bag. Muddamal sealed in plastic bags was marked as A B C D & E and further control samples kept in plastic containers

were marked as A1 To E1 and reserve samples as A2 to E2 containing signatures of Panch witnesses and PI and were sealed with the seal of PI SOG Surat Rural, Surat. A bike was also recovered from the house and seizure memo of the muddamal seized and recovered was prepared which was produced at Exh. 14. He further deposed that he thereafter filed a complaint before PI SOG Surat Rural under Section 8(c), 20(b) and 29 of NDPS Act and admitted his signatures on same. He further identified the accused persons present in the court and further identified the Muddamal Ganja produced in the Court along with control samples and reserve samples.

In his cross-examination he admitted that the panch slips were not placed outside 5 plastic bags produced as Muddamal article No. 1 containing Ganja of 103.945 Kgs. but were kept inside the bags at the time of sealing of the said bags. He further admitted that there was crime register number with them at the time of sealing of muddamal. He further deposed that panchnama was completed at around 6 PM and seal was in English and was kept with Head constable Mahendrabhai. He further admitted that log book is kept regarding use of official vehicles and in the raid official vehicles were used. He further admitted that no photography was done of the spot. He further admitted that identification of accused

persons, seizure memo and arrest memo were prepared on the spot prior to lodging of FIR and the paper pasted on the plastic container was typed on laptop and thereafter the containers were sealed and the said paper contained name of complainant, date and sections of the case. He further admitted that the said papers were pasted on the plastic containers before filing of the complaint. He denied that the tampering was done with the muddamal and no proceeding was done at the spot.

[12] PW-3 Ganpatbhai Durgaji Rajpurohit was examined at Exh. 21. He provided certificate regarding of weighing of the muddamal. He deposed that at around 10.00 AM came to his shop and asked for electronic weighing scale and as such he provided the same. He denied having gone to any place with the said police official at any premises for weighing the material. He further denied that the Ganja was recovered from the Haridham Society in his presence and he was taken there to weigh the said Ganja. He was declared hostile.

[13] PW-4 Vidyabhushan Baliram Dubey was examined at Exh. 24. He first obtained the information through the informer regarding the presence of consignment of Ganja which he forwarded

to PI SOG Rural RI Parekh. In his cross-examination he admitted that he did not personally enter the information in the station diary.

[14] PW-5 Dineshbhai Vikhubhai Patel was examined at Exh. 25. He was also a member of raiding party and deposed on similar lines of PW-2 regarding the conduct of raid. He deposed that the panch slips containing the signature of panch witness and PI were placed inside the muddamal bags mark A to E, control samples mark A1 to E1 and reserved samples mark A2 to E2 and were sealed with the seal of PI SOG Surat rural.

In his cross-examination he admitted that muddamal was recovered from spot in 3 gunny bags and 2 bags and thereafter two samples of 100 gram each were taken from each of the bag and were kept in plastic container. He further admitted that after placing the panch slips inside containers and closing the lid, the same were sealed. He further admitted that first typed papers were pasted on the containers and thereafter, those were sealed from all sides with the help of thread. He further admitted that said papers contained CR No. and sections under which the complaint was registered and further the name of complainant and accused persons. He further admitted that they entered in the premises at around 1.00 PM and stayed till 6.00 PM. He further admitted that

the muddamal recovered from the premises were taken to Kadodara GIDC PS in Government vehicles. He denied that tampering was done with the muddamal and the same was planted upon the accused persons.

[15] PW-6 Kishorchand Trikamlal Maiysuriya who was working as scientific officer in FSL Surat was examined at Exh. 27. He deposed that he went to House No. 46, Haridham society near Kadodara Char rasta and examined the material kept in 3 gunny bags and 2 rexene bags and the said material was found Ganja on examination. He further stated that the said material was then weighed by Dargaji Rajpurohit and net weight of the total Ganja was found 103.945 Kgs. He prepared report regarding the same and identified his signature on the same at Exh. 29.

[16] PW-7 Bharatbhai Ranchhodbhai was working as PSO in PS Kadodara GIDC on 10.12.2013. He deposed that PI RI Parekh came to Kadodara GIDC and made an entry in station diary regarding the information received by him regarding consignment of Ganja at the subject premises. He registered the complaint on 10.12.2013 and entered the same vide station diary No. 11/13 and proved the extracts of station diary at Exh.33. He further deposed that PI Parekh produced the Muddamal before him and he prepared

the muddamal receipt of the same. He further proved the special report and the report regarding success of raid to SP Bardoli. He further identified the muddamal of which he prepared muddamal receipt.

In his cross-examination he admitted that crime register No. is entered only after registration of FIR. He further stated that when he received the Muddamal, there was no CR no. on the same and he wrote the CR No. on the same. He further deposed the CFSL form was handed over to him at the time of providing the complaint which was deposited with crime writer head. He further admitted that the panch slips were inside the muddamal and samples and not outside.

[17] PW-8, PI RI Parekh was examined vide Exhibit 39. He deposed that he received the information from Vidyabhushan Baliram Dubey and then entered the same in station diary and forwarded the information to SP Rural Surat and thereafter conducted a raid at the premises No. 46, Haridham society and thereafter recovered and seized the muddamal Ganja from the said premises in presence of accused persons and thereafter handed over the said muddamal material to PSO. He further deposed that he handed over notice under Section 50 and 42 of the NDPS Act. He

further deposed that the muddamal Ganja was seized and sealed by him and the accused persons were arrested by him and he also conducted the personal search of the accused persons.

In his cross-examination he admitted that muddamal receipt does not contain the entry of control samples A1 to E1 which were sent to FSL. He denied the suggestion that the said FSL samples were not given to PSO and were not entered in muddamal receipt and were planted one. He admitted that the CR number is entered only after registration of FIR and the complaint is taken only after completion of process of panchnama and sealing. He stated that he obtained CR number through telephone from PSO and on that basis the same was entered in panchnama. He further admitted that he had CR number at the time of preparing identification memo, seizure memo and arrest memo. He denied that he had no CR number at the time of conducting raid and therefore, the said number was not mentioned on identification memo, seizure memo and arrest memo. He further admitted that the panch slips containing signatures were placed inside the sealed bags A to E and therefore, bags were sealed on the outside portion. He admitted that in the panchnama Exh.9, he did not mention that the panch slips were placed on the outer parts of the bags vide Mark A to E. He further admitted that white papers seals were

pasted on the muddamal plastic containers A1 to E1 and A2 to E2 even before registration of complaint. He denied that no such information was received by him. He admitted that log book of the official vehicles is kept and was also prepared in the present case. He further admitted that the light bill recovered from the house was not in the name of accused persons. He further admitted that the neighbours residing adjoining the premises gathered on the spot at the time of raid. He further denied remembering the age of the person who weighed the muddamal. He denied that the muddamal was planted upon the accused persons.

[18] PW-9 Ranjeetbhai Chhaganbhai Vasava, PSI was the investigating officer of the case who was handed over the investigation after the registration of the FIR and obtained the statements of the raiding party and other police officials and also obtained statements from the accused persons and the muddamal was sent to FSL through constable Shri Parthipuri Naranpuri Goswami and thereafter, the further investigation of the offence was handed over to PSI A.U. Tapariya.

In his cross-examination, he admitted that he did not collect any evidence to ensure that the superior officer received the information. He further stated that the PI Shri Parekh handed over

the seal used for sealing the muddamal to him and which was kept with him for 2 days. The said seal was in English. He further stated that in his investigation, it was found that the photography was done at the spot.

[19] PW-10 Ashokkumar Umed Singh was also the investigating officer of the case and was examined at Exh. 57 who obtained the signatures of witnesses and sent the muddamal for examination to FSL Gandhinagar and also received the muddamal examination report and filed the charge-sheet. He admitted that no evidence regarding the ownership of the house was found from the accused persons.

[20] PW-11 Shri Nivas Lakshmanbhai Dabekar was crime writer head and was examined at Exh. 62. He deposed that the muddamal receipt with cash was handed over to him by the PSO Bharatbhai and was taken by him in his custody and after the report of the FSL, the said muddamal was deposited in Court. In his cross-examination, he stated that he would not remember if he had received the FSL samples in muddamal or not. He further admitted that the reserve samples of muddamal was received by him and if the FSL samples would be received by him then the entry to that effect would have been entered in the register. He denied that the

muddamal received by him do not contain the panch slips over it and maintained the panch slips were placed on the entire muddamal. He denied that the samples sent to FSL were first received from FSL and then entered by him in the muddamal register, after the same were handed over back by the FSL.

[21] PW-12 Parthipuri Naranpuri Goswami was the constable who had taken the muddamal samples to FSL, Gandhinagar and entry was also made in station diary vide Entry No. 2/2013. The said muddamal was deposited with FSL, Gandhinagar and the receipt in that regard was handed over by the FSL.

ANALYSIS OF THE EVIDENCE PRODUCED:

[22] It is the case of the prosecution that on information received through the driver of DSP Bardoli, P.I. Sh. Parekh recorded the same in station Diary and thereafter on the raid conducted pursuant thereto, accused persons were found in possession of 103.945 Kg. of Ganja. Ld. Defence counsel has submitted that the provisions of Section 42 of the Act have not been complied with.

[23] Now, first question as raised before this Court is whether in the facts of the present case, Section 42 of the NDPS Act is

applicable. Admittedly raid in question in the present case was carried out by PI. SOG Rural, Sh. R.I. Parekh, who himself was a gazetted officer.

[24] As per Section 41(2) of the NDPS Act, PI Parekh, being the gazetted officer, was empowered to conduct search and seizure of any premises or to authorize any officer subordinate to him to carry out the same. As he himself was gazette officer, he was not supposed to obtain any authorization of any superior officer or to send any report regarding the same as is provided under Section 42(2) of the NDPS Act. This legal position has been consistently held by Hon'ble Supreme Court in the catena of cases.

[25] Hon'ble Supreme Court in ***M. Prabhu Lal vs. Directorate of Revenue Intelligence, (2003) 8 SCC 449*** held that Section 42(2) is not applicable in case of Gazetted Officer contemplated under sub-section 2 of Section 41 of the Act. The said judgment of Hon'ble Supreme Court was further relied upon in ***Union of India vs. Satrughan, (2008) 8 SCC 313*** wherein similar view was adopted thereafter, in ***Yasihey Yobin and Anr. vs. Department of Custom, Shillong, 2014(13) SCC 344***, again the earlier judgment was referred and followed and it was held that if

the search is made a Gazetted Officer authorized under Section 41(2) of the Act to the compliance under Section 42 is not necessary at all. The said view was again reiterated in **Sekhhar Suman Verma Vs. Superintendent of Narcotics Control Bureau & Anr., (2016) 11 SCC 368,**

[26] Thus, in view of the settled legal position referred above the requirement of Section 42 is not required to be complied by a Gazetted Officer contemplated under Section 41(2) of the Act. Admittedly in the present case, the Seizing Officer was of the rank of P.I. who was a Gazetted Officer and as such compliance of Section 42 is not required and there was no requirement to take permission of Superior Officer at all or to obtain his authorization regarding the conduct of raid at the premises of the accused persons. So far as recording of information in writing is concerned, even the said information was recorded by P.I. himself and was entered into Station Diary and extracts of which were produced before this Court vide Exhibit 47. I am not inclined to accept the arguments of the learned Counsel that the driver of the DSP himself was required to reduce the said information in writing and if the said information was reduced in writing by P.I., that would be a violation of Section 41 and 42 of the Act. Admittedly, the

information was passed on to the police station P.I. itself and P.I. thereafter, reduced the same in writing in station diary. It was not expected from driver of DSP who was otherwise supposed to drive the vehicle of DSP to go to the police station and reduce the same in writing and in view of the facts of the present case, I do not hold that there was violation of Section 41 and 42 of the NDPS Act.

[27] Now, the next question was regarding the search and seizure of the Muddamal. As per the case of prosecution, a raiding team was constituted and as per the information received thereafter went to the premises No. 46, Haridham Society wherein the accused persons were found and Ganja weighing 103.945 Kgs. was found and recovered from the said premises. It was the case of the prosecution that before conducting search, notice under Section 50 of the NDPS Act was issued to the accused persons. It was contended by the Ld. Defense Counsel that there is violation of Section 50 of NDPS Act in as much as 3 options were provided to the accused persons and further the joint notice was given to both the accused persons. It is the contention of Ld. APP that as the Ganja was recovered from the premises and not from the personal search of the accused persons there is no application of Section 50 of the Act at all to the facts of the present case. Ld. Counsel for the

accused persons has submitted that the moment personal search of the accused persons was conducted and notice under Section 50 of the NDPS Act is issued, Section 50 becomes applicable in view of the law laid down by Hon'ble Supreme Court in *State of Rajasthan v Parmanand*, (2014) 5 SCC 345. It was further fortified by 3 Judges Bench of Hon'ble Supreme Court in *S.K. Raju @ Abdul Haq @ Jagga vs. State of West Bengal*, Crl. Appeal No. 459 of 2017 decided on 05.09.2018.

[28] In the present case, admittedly though initially the search was carried out in the premises of accused persons and Ganja was found from the same, thereafter, the personal search of the accused persons was also carried out even before the arrest of the accused persons. Thus in view of the law laid down by the Hon'ble Supreme Court referred above, Section 50 came into operation the moment personal search of the accused persons was conducted along with the search of the premises. Further, so far as notice issued under Section 50 is concerned, it appears from the notice under Section 50 at Exh. 10 that only two options were given and it was specifically stated that the search of their house was to be carried out and if they get it done in presence of any other Gazetted Officer and Magistrate then it is their legal right and that

would be arranged. It was further stated that the contents of the notice were explained to them in Hindi but they denied to the same and thereafter the search was carried out by PI Parekh in presence of two panch witnesses. However, no copy of notice was found from the personal search of the accused persons which creates doubt over the fact that in fact any notice was issued to the accused persons under Section 50 of the NDPS Act. Further, admittedly the notice was jointly given to both the accused persons.

[29] So far as the search and seizure of Muddamal Ganja is concerned, it is the case of the prosecution that after search of the muddamal from the premises, 103.945 Kgs of Ganja was recovered from the same in 5 different bags and the said Muddamal was thereafter sealed in 5 different plastic bags and two 100-100 gms samples were drawn from each out of all the 5 packets and were marked as A1 to E1 and A2 to E2, the muddamal sealed in plastic bags was marked as A to E and the samples marked as A1 to E1 were sent to FSL for examination. Further, it was the case of the prosecution that the panch slips containing the signatures of panch witnesses and seizing officer were kept in the sealed parcels marked A to E, control samples mark A1 to E1 and control samples mark A2 to E2 and were thereafter sealed with the seal of PI SOG Rural

Surat. However, when the muddamal material placed in 5 different bags marked as A to E, the panch slips were not found in the said muddamal bags. Even PW-2 has admitted in his cross-examination that the panch slips were placed inside bags while sealing the materials and were not placed outside. The prosecution has no explanation as to why the panch slips were not found when the said muddamal was produced before the Court despite the fact that the said slips were kept inside the muddamal bags. The non-finding of panch slips inside the said muddamal creates a serious doubt over the fact that the same muddamal which was sealed by the seizing officers was produced or not and the possibility of tampering with the muddamal cannot be ruled out in view of absence of panch slips in the muddamal bags even though as per the prosecution same were placed inside the bags.

[30] Hon'ble Supreme Court in a catena of judgments consistently maintained that in order to prove a case under NDPS Act regarding possession of contraband, the main muddamal contraband has to be produced before the Court for its examination and mere production of FSL report of control samples indicating the substance as narcotic substance is not sufficient. In the present case, as observed above, the panch slips were not found in the

muddamal produced before this Court which makes the identity of the muddamal itself very doubtful.

[31] In this regard, following observations of the Hon'ble Supreme Court in **Hanif Khan @ Annu Khan Versus Central Bureau of Narcotics Through Inspector L.P. Ojha, Criminal Appeal No(s). 1206 of 2013**, are very much relevant and are reproduced as under:

"There can hardly be any difference between a case of non-production of a sample and the production of a sample doubtful in its identity in being co-related to what was seized from the accused. In both the cases, it will become doubtful if the FSL Report is with regard to the very sample seized from an accused.

Unfortunately, the High Court did not advert to the evidence of PW-6 or consider the prejudice that may have been or may not been caused to the appellant by the doubtful identity of the sample stated to have been seized from him.

In view of the law laid down by this Court in Vijay Jain vs. State of Madhya Pradesh (2013) 14 SCC 527 and Ashok alias Dangra Jaiswal vs. State of Madhya Pradesh (2011) 5 SCC 123, on the single premise of a doubtful identity with regard to the sample seized from the appellant and that produced in Court, the FSL Report loses much of its significance and the appellant is held entitled to the benefit of doubt."

[32] Further, as per the material placed on record and the admission of the seizing officer, PW8 and crime writer head PW11, control samples of muddamal sent to FSL for examination were not handed over by the seizing officer to the PSO, which is corroborated with the fact that the control samples A1 to E1 were not mentioned in the Muddamal Receipt and were subsequently produced. No reason has been assigned as to why the said control samples were not deposited with the PSO alongwith the muddamal and reserve samples, which again creates doubt over the prosecution story.

[33] Further, from the evidence on record, crime register number and the sections of offences against the accused persons were written on the white papers and were pasted on the plastic containers even prior to the sealing of the muddamal. Hon'ble High Court in ***Giri Raj vs State, 2000(83) DLT 201*** held that the prosecution case becomes highly doubtful, in case the document which were prepared prior to registration of FIR, bears the FIR number. Relevant para of the judgment reads under:

“It needs to be highlighted that the rukka (Ex.PW7/A) recites that the alleged contraband was seized at 6.10 P.M. and the rukka was dispatched from the spot at 7.30 P.M. The FIR (Ex.PW2/A) shows that the same was registered at the police station at 7.40 P.M.

Surprisingly, the appellant's personal search memo (Ex.PW4/B) and the seizure memo (Ex.PW4/A) bear the number of the FIR (Ex.PW2/A). The number of the FIR (Ex.PW2/A) given on the top of the aforesaid documents is in the same ink and in the same handwriting, which clearly indicates that these documents were prepared at the same time. The prosecution has not offered any explanation whatsoever as to under what circumstances number of the FIR Ex.PW2/A had appeared on the top of the said documents, which were allegedly prepared on the spot before its registration. This gives rise to two inferences that either the FIR (Ex.PW2/A) was recorded prior to the alleged recovery of the contraband or number of the said FIR was inserted in these documents after its registration. In both the situations, it seriously reflects upon the veracity of the prosecution version and creates a good deal of doubt about recovery of the contraband in the manner alleged by the prosecution. That being so, the benefit arising out of such a situation must necessarily go to the appellant."

[34] No logbook of the official vehicles used in the raid was produced on the record. Even, the crimewriter head register was not produced regarding the entry of seized material in the same.

[35] It is well settled law that greater is the sentence, more stringent is the burden of proof. As in the present case, allegations against the accused persons regarding the possession of commercial quantity of Ganja, in view of the sentence prescribed for

the same and the fact that the offence is made out because of the possession of the Ganja, the provisions regarding search and seizure have to be followed more seriously and more cautiously manner.

[36] In **Noor Agha Vs. State of Punjab & Anr. 2008 (3) JCC (Narcotics) 135**, it was held that in a case arising out of the provisions of NDPS Act the legislature has provided very stringent punishment. Therefore, the courts have to be extremely cautious and careful in adjudicating the cases pertaining to NDPS Act. There has to be a perfect balance and fine tuning between the interest of society and protection of statutory safeguards available to the accused.

[37] In the **State of Punjab Vs. Baldev Singh (1999) 3 SCC 977**, the Hon'ble Supreme Court held that it must be borne in mind that severe the punishment, greater has to be taken care to see that the safeguard provided in statute are scrupulously followed.

[38] It is relevant to mention at this stage that it is necessary for the prosecution to prove its case beyond reasonable doubt as held by the Hon'ble Supreme Court in **Rang Bahadur Singh Vs. State of U.P. 2000 II AD(S.C.) 103**.

“That the time tested rule is that acquittal of a guilty person should be preferred to conviction of an innocent person. Unless the prosecution establishes the guilt of the accused beyond reasonable doubt a conviction can not be passed on the accused. A criminal Court cannot afford to deprive liberty of the appellants, life long liberty, without having at least a reasonable level of certainty that the appellants were the real culprits.”

[39] As discussed herein above, the prosecution has failed to prove beyond reasonable doubt the charges against the accused persons for which the accused persons are charged herein. Therefore, the above point no. 1 is answered in Negative.

POINT NO. 2:

[40] Since the prosecution has failed to prove beyond the reasonable doubt that the accused persons Gopal Banarsi Kesari and Himadri Chandaneshwar Patra are guilty of offence U/s. 8(c), 20(b) & 29 of NDPS Act, they are acquitted of the charges leveled against them and hence, following order is passed.

:: ORDER ::

[A] Accused persons **Gopal Banarsi Kesari and Himadri Chandaneshwar Patra** are held not guilty and is accordingly acquitted from all the charges leveled against him for having

committed offences punishable under sections 8(c), 20(b) & 29 of NDPS Act as per Section 235(1) of The Code of Criminal Procedure;

[B] Bail bonds of accused persons Gopal Banarsi Kesari and Himadri Chandaneshwar Patra shall stand cancelled and the accused persons are set at liberty;

[C] Accused persons Gopal Banarsi Kesari and Himadri Chandaneshwar Patra each shall furnish personal bond of Rs. 15,000/- (Rs. Fifteen Thousand only) with one surety of the like amount as per Section 437(A) of Code of Criminal Procedure;

[D] A Copy of the judgment be sent to District Collector Surat for necessary information.

[E] Muddamal Ganja shall be destroyed as per rules after expiry of the appeal period. Remaining muddamal shall be released to the accused persons after the expiry of the appeal period as per provisions of Section 452 of Cr.P.C.

Pronounced in the open Court today on this 07th day of January, 2020.

Date: 07-01-2020

Place: Surat

(PRASHANT JAIN)
8th Addl. Sessions Judge and
Judge, Special NDPS Court, Surat
UID Code GJ01507