

Dinesh Palyekar Vs. State of Goa

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Court : Mumbai

Decided On : Aug-31-2006

Reported in : 2007CriLJ106

Judge : N.A. Britto, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20, 41, 42, 42(1), 43, 50, 50(1) and 57

Appeal No. : Cri. Appeal No. 6 of 2005

Appellant : Dinesh Palyekar

Respondent : State of Goa

Advocate for Def. : Winnie Coutinho, PP

Advocate for Pet/Ap. : Lalit Chari, Sr. Counsel and ;J.P. D'Souza, Adv.

Disposition : Appeal allowed

Judgement :

N.A. Britto, J.

1. This appeal is by the accused, who has been convicted and sentenced under Section 20(b)(ii) (B) of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#), ('Act' for short), for having been found in illegal possession of 505 gms of charas.

2. The accused was charged and tried under the said Section on the allegation that he was found in possession of the said charas near Primary Health Centre, Candolim, on 22-12-2001 between 20.00 hours to 23.45 hours. The case of the accused was that he was falsely implicated. The prosecution examined eight witnesses to support the charge. The learned Special Judge, upon consideration of the evidence led by the prosecution, noted that there were some discrepancies in the evidence of the Investigating Officer/P. W. 4 and also in the evidence of Police Inspector Shri Paes /P.W. 7 but they were such as not to create any doubt and that from the evidence produced, the prosecution had established that the accused was found in illegal possession of the said charas and, therefore, proceeded to convict and sentence the accused as aforesaid.

3. The case of the prosecution as set out by the Investigation Officer PSI Shri Mardolkar/P.W. 4, was that on 22-12-2001, at about 17.00 hours, he had received specific and reliable information through his sources that one local person of about 26 years of age, medium built, wheatish complexion, wearing a gold stud in his left ear and driving a white colour Trax bearing registration No. GA-01 V-3801, would come to deliver the consignment of charas near Primary Health Centre, Candolim, between 7.30 to 8.30 p.m., which information he reduced into writing and copy of the same was handed over to Dy. SP D' Souza/P. W. 6, along with the letter which information was acknowledged by him, and thereafter, he secured the presence of the panchas through Constable Paes, Buckle No. 3916, and who returned with two panchas at about 6.00 p.m., namely, Nilesh Talwadkar/P. W. 3 and Santosh Mandrekar, to whom he explained about the reliable information received by him, etc., and thereafter they left the Police Station along with the said two panchas in police jeeps along with Dy. SP D'Souza /P. W. 6, PI Paes/P. W. 7, PSI Menezes /P. W. 5 and other constables and while proceeding, they carried with them the seal of ANC (Anti Narcotic Cell), Police Station, Panji, Goa-3, with Ashoka Emblem, kit box containing weighing, packing and sealing materials and a typewriter and reached near Primary Health Centre, Candolim, at about 7.05 p.m., and after parking the vehicle by the side of the said Primary Health Centre, they alighted and concealed their presence in four groups and at about 7.45 p.m., they saw a white colour Trax bearing said number, coming from the beach side towards the Primary Health Centre, and accordingly, they stopped the said vehicle and the

description of the driver tallied with the information received by him and thereafter he identified himself to the person who was driving the said jeep and upon asking his name, he gave it as Dinesh S/o. Pandurang Palyekar and his address, and thereafter, he introduced both the panchas and the members of the raiding party to the accused and told the accused about the receipt of the reliable information and that he wanted to take his personal search as well as that of the Jeep and told the accused that he had a right to be searched in the presence of a Gazetted Officer or a Magistrate of his choice but he declined the offer. He further stated that he told the accused that he had a right to search the members of the raiding party including the panchas and he declined the offer and the accused was made to get down from the jeep and after the accused got down, he took the personal search of the accused and from his right side pocket, he found a packet wrapped in light yellowish colour tape and after the said tape was opened at one end, he saw black colour substance in cylindrical shape wrapped in transparent polythene bag and after he smelt the same, he suspected it to be charas, which substance he weighed along with the polythene bag and found it to be 505 grams, which Substance, he then put in an envelope, packed and sealed, and he took down the signatures of both the panchas and he also signed it but the accused refused to sign. He stated that he also found a leather purse having an emblem in the left hand side pant pocket and upon opening the same, he found cash of Rs. 250/- in different denominations, a driving licence and the same was put in an envelope and duly packed and sealed and signed as before and the accused refused to sign the same. He stated that he also conducted the search of the jeep but nothing incriminating was found and that he did not attach the clothes of the accused because the accused had no other clothes to wear and that he informed the accused that possession of charas was an offence and asked him to produce whatever legal documents he had to support his possession but the accused could not produce any such document and since the accused did not produce any documents, the accused was taken in custody. He stated that the panchanama of seizure was completed at 23.45 hours and then he drew a seizure report which he and the panchas signed but the accused refused to sign. He stated that he then prepared a letter addressed to the Police Inspector, ANC Police Station, regarding handing over the muddemal property and also the seal of the said Police Station

for safe custody. He stated that the letter to the laboratory (Exhibits 10/14) was prepared by him at the Police Station and submitted to the said Police Inspector of ANC Police Station and after the return to the Police Station, along with the seized property, he filed, the complaint (Exhibit 26) and registered the offence under Crime No. 19/01 and then handed over the muddemal property along with the seal to Police Inspector of ANC Police Station for safe custody. He also stated that he had prepared the letter to the Laboratory (Exhibit 10), before handing over the seal to the Police Inspector vide his letter exhibit 25 and, thereafter, he signed the intimation under Section 57 of the Act and then, he prepared a forwarding letter to the Superintendent of Police (Exhibit 13), which he prepared on the spot. He clarified himself that his earlier statement that the said letter to the Laboratory, (The Director, Food and Drugs Administration, Panaji, Goa-Exhibit 10), was prepared at the Police Station, was not correct and that only the outward number to the same was given at the Police Station.

4. Shri Chart, the learned Senior Counsel appearing on behalf of the accused has made four broad submissions. I will deal with them seriatim.

5. Firstly, learned Senior Counsel Shri Chart has submitted that the seized article and the seal used for sealing the same had remained with PSI Mardolkar/P. W. 4, and therefore, the seizure itself is vitiated. In this regard, learned Counsel has brought to my notice different statements made by different witnesses which contradict each other, and, in the light of the said contradictions, which I will immediately point out, learned Counsel submits that it is safe to assume that the seized article as well as the seal had remained with PSI Mardolkar /P. W. 4, from the time of seizure i.e. 23.45 hours of 22-12-2001 till the seized article was sent and received in the Directorate of Food & Drugs, Panaji, on 24-12-2001, as stated by the Jr. Scientific Officer, Shri Kaissarre/P. W. 1.

There is force in the said submission. PSI Shri Mardolkar /P. W. 4, prepared the letter dated 22-12-2001 (Exhibit 25). The said letter was addressed to Police Inspector Shri PI Paes /P. W. 7. The said letter purports to hand over to him the seized article and the seal with a request to send the seized article to the Directorate of Food & Drugs Administration, for chemical analysis. The said letter

dated 22-12-2001, Exhibit 25, as can be seen from address written on it, shows that it was written at the scene i.e. Primary Health Centre, Candolim, Goa. PSI Mardolkar /P. W. 4 on 13-11-2003, when he deposed before the trial Court, stated that by the said letter he handed over the seal for safe custody. However, in cross-examination, PSI Mardolkar/P. w. 4, stated that he had handed over the said letter, exhibit 25, to the Police Inspector Paes/P. W. 7 but he was unable to recall if he had handed over the sealed envelope to him at the spot. The contents of the said letter were brought to his notice namely that by virtue of the said letter, he was handing over the said two envelopes to PI Paes/P. W. 1 and he stated that the said two envelopes were not handed over to PI Paes/P. W. 7 at the spot but at the Police Station. PSI Menezes /P. W. 5, was also a member of the raiding party, but he stated that he was not too sure whether the seal was handed over to P1 Paes/P. W. 7 or to Dy SP D'Souza /P. W. 6 or at which place it was handed over. He further stated that he did not have personal knowledge as to how and when the seal was handed over by PSI Mardolkar/P. W. 4 or to whom it was handed over and further stated that he did not know what happened to the seized property as he did not know as to who had carried it to the Police Station and after it was taken to the Police Station, he had not played any role in dealing with the seized property. He was certainly not a bystander and ought to have known whether the seized article was at all handed over as per letter, Exhibit 25, Dy SP D'Souza /P. W. 6 has remained silent as regards the handing over the seal by PSI Mardolkar /P. W. 4, either to him or to PI Paes /P.W.7, but PI Paes/P. W. 7, has stated that PSI Mardolkar /P.W. 4, had given him a letter handing over the muddemal property and also the seal and the same was given to him at the spot along with the seal. In this context, the evidence of PSI Mardolkar/P. W. 4, may again be referred to, wherein he stated that the two sealed envelopes as well as the seal continued to be in his possession from the spot of the raid till he reached the Police Station and the said statement of PSI Mardolkar /P. W. 4 clearly shows that the said letter, Exhibit 25, was prepared as a farce and neither the seized article nor the seal were handed over to P. I. Paes/P. W. 7 apart from the fact that the said letter, Exhibit 25, was also not typed at the spot for, as stated by the only independent witness namely, Talwadkar /P. W. 3, no typing was at all done at the spot and the said letter, Exhibit 25, is a typewritten letter. As per Talwadkar /P. W.

3, at the spot PSI Mardolkar/P. W. 4, had written a letter in hand on which he had affixed a seal. In the cross-examination, he was asked about the said handwritten letter but he stated that he had not read the contents of the same. He further stated that he asked PSI Mardolkar/P. W. 4, whether he was required to sign the said handwritten letter and PSI Mardolkar /P. W. 4, told him that his signature was not required as it was a letter which was required to be submitted to the Department. The said handwritten letter has not been produced by the prosecution, nor the other police witnesses have referred to the same, and, on the contrary, Talwadkar/P.W. 3 has categorically stated that no typing was done at the spot. It is therefore obvious that the statement of P. I. Paes/P. W. 7 that the letter, Exhibit 25, was given to him along with seized article and the seal at the spot is a lie and the seized article as well as the seal had continued in the custody of PSI Mardolkar, till they returned at the Police Station.

The prosecution produced the extract of the muddemal register at Exhibit 39, which against Entry No. 20/2001, shows that two sealed envelopes containing 505 gms of charas and a black leather purse containing cash of Rs. 250/-, etc., were received, as attached by PSI Mardolkar/P. W. 4. As against column of disposal, the said register shows that one sealed envelope was handed over to lady Constable Buckle No. 1989, along with forwarding letter to the Directorate of Food & Drugs Administration, Panaji, bearing No. 2972, dated 23-12-2001. It has been stated by PI Paes/P. W. 7, that 23-12-2001 was a Holiday. If that is so, one fails to understand as to why the seized article was given to Constable Buckle No. 1989 on a Holiday when it could not be delivered to the Directorate of Food & Drugs. Against the column of final disposal on the said register, lady Constable Buckle No. 1989, is supposed to have initialled, but without mention of any date. The said lady Constable Buckle No. 1989 has not been examined by the prosecution either to say that she had received the seized article on 23-12-2001 or 24-12-2001. PSI Shetgaonkar/P. W. 2, was examined by the prosecution to say that on 24-12-2001, he had received the seized article from lady Head Constable Buckle No. 1989 and he stated that he kept the said sealed envelope in his steel cupboard and inwards the copy of the letter addressed to the Superintendent of Police, CID, Crime branch, and forwarded the letter addressed to the Director of Food & Drugs Administration vide a forwarded note, (Exhibit 15). The extract of muddemal

register does not at all show that the seized article was handed over to Lady Head Constable 1989 on 23-12-2001. If the balance quantity of the seized article after analysis was received on 17-1-2002 as stated by PSI Shetgaonkar /P. W. 2 and PI Paes /P. W.7, the same ought to have been reflected on the muddemal register. In fact, PI Paes/P. W. 7, has admitted in cross-examination that the signature of lady Head Constable Buckle No. 1989 is undated and there is no record in the muddemal registers to show that the seized article (M. O. 1) was sent to the office of CID, Crime Branch, for onward dispatch to the laboratory. Like-Wise, PI Paes/P. W. 7 also admitted that there was also no record to show that the said lady Head Constable Buckle No. 1989 had carried the letter to the S. P., (Exhibit 13), and to the Directorate of Food & Drugs Administration, (Exhibit 14), along with the sealed parcel. P. I. Paes/P. W. 7 also admitted that he had made no record in the muddemal register on the receipt of the sealed parcel after analysis from the office of the Directorate of Food & Drugs Administration. PI Paes/P. W. 7 has stated that he returned the seal to PSI Mardolkar/P. W. 4 after about three to four days of the raid, a fact which was not deposed to by PSI Mardolkar /P. W. 4 himself. The evidence as regards the custody of the seized property and the seal soon after the raid, is in direct conflict as stated by PSI Mardolkar / P.W. 4 and Shri Paes/P. W. 7 and, as already stated, PSI Mardolkar/P. W. 4 has categorically stated that the said sealed envelopes and the seal continued in his possession till he had reached the Police Station and in the absence of any written record to the contrary including that of the muddemal register, it is safe to assume that the sealed article and the seal had continued to remain in the custody of PSI Mardolkar /P. W. 4, till they were handed over to PSI Shetgaonkar /P. W. 2 on 24-12-2001 and forwarded by the letter to the Directorate of Food & Drugs Administration. In this context, Shri Chari, the learned Senior Counsel on behalf of the accused, has placed reliance on two decisions of this Court. In the first case of K.A. Koya v. A.S. Menon , this Court referred to Section 50 of the Act and observed that the intention behind making a provision that the sample to be sent for examination and the remaining packets should be handed over to the custody of the Officer-in-charge of the nearest Police Station by the members of the raiding party is that there should be a separation between the members of the raiding party and such an officer and the purpose of ensuring such separateness is for the purpose of avoiding the

possibility of tampering with the samples and other packets by partisan person who happen to be members of the raiding party. The Court further observed that:

The good purpose, the safeguards created, assurance rendered gets frustrated by allowing such an officer to have the seals in his possession or custody, which were used by the members of the raiding party by effecting the raid, search and panchanama.

This Court in the case of Gopal Bahadur v. State of Goa 2005 Drugs Cases (Narcotics) 449 observed that 'the Courts have always frowned upon with the practice of Police Officers keeping the custody of the seal as well as of the seized articles for long in the hands of the same Officer. In other words, a person who has the custody of the seized articles and the seal used to seal the same, should not continue to have both for long because such practices can lead to tampering with the seized article. The Act has taken special care that in normal course after the seizure, the seized drug should be handed over in the custody of the Officer in charge of the nearest Police Station. No such provision is made in case of the seal'. This Court further held that 'when the sentence provided is severe, the procedures followed should be beyond suspicion and above-board. The Officer having the custody of the seized article and the custody of the seals, should not be the same. All these procedures are required to be followed in order to avoid the possibility of tampering with the sample and to lend assurance to the Court that in a given case there was no such tampering this Court referred to the case of Rajesh J. Avashti v. State of Goa 2004 DC 322, in which the Apex Court had noted that the question was not how much was seized but whether there was actual seizure and whether what was seized was really sent for chemical analysis and since prosecution was unable to explain the discrepancy, it rendered the case of the prosecution doubtful and that, what could be least said was that, a serious doubt was created about the truthfulness of the prosecution case. In the case at hand, PSI Mardolkar /P. W. 4, has falsified his own letter dated 23-12-2001, Exhibit 25, and PI Paes/P. W. 7 and has categorically stated that he had carried the seized article as well as the seal till he reached the Police Station. The muddemal register, the extract of which, was produced at Exhibit 39, does not show as to when the seized article was taken out of the muddemal room to be

sent to the Directorate of Food & Drugs Administration or when it was received back therefrom. The prosecution also did not produce the Station diary which might have shown the relevant entries as to when the seized article was taken out from the muddemal room of the Police Station to be sent for analysis. In the absence of any such evidence, the only conclusion which can be drawn is that the seized article as well as the seal had remained with PSI Mardolkar/P. W. 4 till 24-12-2001 when it was taken by Shetgaonkar/P. W. 2 for analysis to the Directorate of Foods & Drugs Administration. As observed by the Supreme Court in the case of *Rajesh J. Avashti v. State of Goa* (supra), the question was not how much was seized but whether there was actual seizure and whether what was actually seized was sent for chemical analysis and since what was seized had remained with PSI Mardolkar/P. W. 4 till it was sent for analysis, a serious doubt was created as to whether what was seized was actually sent for analysis. It also may be noted that PSI Mardolkar P. W. 4 even went to the extent of stating that the seals identified by him on the envelopes were not the seals affixed by him at the spot thereby leading to an inference that the sample was not sealed at the spot, as otherwise stated by him earlier.

6. Secondly, Shri Chari, the learned Senior Counsel has submitted that the incident of seizure, as deposed to by various witnesses, is discrepant so much so that the witnesses examined by the prosecution contradict one another to such an extent that the case of the prosecution could not have been accepted beyond reasonable doubt. In this context, learned Senior Counsel has pointed out to various discrepancies in the evidence of the prosecution witnesses, Firstly, PSI Mardolkar/P. W. 4 produced a letter bearing No. 2972/2001 dated 23-12-2001, (Exhibits 10/14). This letter, PSI Mardolkar/P. W. 4 stated, was prepared by him at the Police Station and submitted through P. I. Paes /P. W. 7. Next, he stated that he had prepared the letter, Exhibit 10, before handing over the seal to the police Inspector. If the seals were handed over to the Police Inspector vide letter, Exhibit 25, it only meant that the said letter, Exhibit 10, was prepared at the spot and was not prepared at the Police Station. This was on 13-11-2003. When PSI Mardolkar/P. W. 4 was examined on 29-11-2003, he stated that his earlier statement that the said letter Exhibit 10, was prepared at the Police Station, was not correct and only the outward number was given at the Police Station. The

letter dated 23-12-2001 Exhibit 10 clearly mentions that it is on the subject of Examination of Narcotic Drugs i.e. charas concerned in ANC Ps CR. No. 19/2001 Under Section 20(b)(ii) of NDPS Act, 1985. In other words, it carries the crime number. PSI Mardolkar/P. W. 4 had clearly stated that he had no knowledge as to what would be the crime number to be assigned to the case at the spot. Therefore, a letter which carried a typewritten crime number as Cr. No. 19/2001, could not certainly be typed at the spot but had to be typed at the Police Station. On this aspect, Dy. S.P. D'Souza/ P. W. 6 had also stated that the crime number could be allotted only upon registration of the offence at the Police Station. As per PSI Menezes /P. W. 5, the said letter to the Scientific Officer, Exhibit 10, was prepared at the spot and that letter along with letter to the S. P. forwarding the drugs, were typed by Constable Gawas in his presence. He stated that he did not know what was done to the said letters after they were removed from the typewriter so much so that he also stated that he also did not see whether the said letters were signed and came to know that they were signed (i.e. Exhibits 10 and 13), only after the investigations were handed over to him. As per P. I. Paes/P. W. 7, the said letter to the Directorate, Exhibit 10, was prepared on the spot, and last but not the least, we have Talwadkar/P. W. 3, who is claimed to be independent witness, who stated that no typing was at all done at the spot though a typewriter was carried to the spot. If the crime number could have been known, only upon the arrival at the Police Station, as stated by PSI Mardolkar/P. W. 4 and Dy. S.P. D'Souza /P. W. 6, the said letter which contains typewritten crime number could not have been typed at the spot as falsely stated by OSI Menezes /P. W. 5, Dy. S. P. D'Souza/ P. W. 6 and PI Paes/P. W. 7, and for that reason, PSI Mardolkar/P. W. 4, was confused whether to say the said letter, Exhibit 10, was prepared at the Police Station or at the spot and came with an explanation that only the outward number was given at the Police Station. The evidence of the aforesaid witnesses that the said letter, Exhibit 10/14, was prepared at the spot was nothing but falsehood. The aforesaid Police Officers have supported with unanimity a case which is contrary to the document itself i.e. Exhibit 10/14. These inherent contradictions in the case of the prosecution could not have certainly been glossed over as done by the learned Special Judge.

There is also a controversy raised as regards the Trax jeep, which is alleged to have been used by the accused to transport the charas and it is submitted on behalf of the accused, that the story that the accused came in a jeep appears to be fictitious. Referring to intimation given under Section 57 of the Act. Exhibit 27, learned Senior Counsel submits that in terms of Section 57, PSI Mardolkar/P.W. 4 had to give a full report of all the particulars of arrest or seizure as contemplated therein but there is no mention whatsoever to the said jeep in the said intimation, Exhibit 27. There is merit in this submission. In this context, it may be noted that PSI Mardolkar/P. W. 4, when his evidence was recorded on 13-11-2003 and 29-11-2003, made no reference to the said jeep and, as a result an application was filed before the trial Court dated 21-10-2004, stating that PSI Mardolkar /P. W. 4, was required to be re-examined on the aspect of taking the said jeep to the Police Station and, thereafter, releasing the same in favour of Deepak Palekar. The said application was granted by the trial Court by Order dated 21-10-2004, and in the course of his re-examination, PSI Mardolkar/P. W. 4 stated that on the conclusion of the raid, the Trax Jeep was brought to the Police Station by Shri Ravi Dessai, P. C. No. 3208, for investigation. PSI Mardolkar/P. W. 4 stated that the jeep was not attached under the panchanama as no incriminating articles were found in it and on 23-12-2001, he released the jeep in favour of the cousin brother of the accused by name Deepak Palekar and obtained the necessary receipt from him. He also stated that he also made an entry in the Station diary to that effect vide No. 24 dated 23-12-2001 and produced a copy of Station diary at Exhibit 45. Although PSI Mardolkar/P. W. 4 was re-examined on 8-11-2004, his further cross-examination was adjourned to 17-11-2004 and, in the course of the cross-examination, PSI Mardolkar/P. W. 4 stated that he had taken possession of the Trax jeep at the very spot and it was driven by PSI Ravindra/P. W. 8 to the Police Station. He stated that he had not made any record in any register that the Trax jeep was brought to the Police Station as the said jeep was not attached under a panchanama. He further stated he had not made any specific entry that Trax jeep was brought to the Police Station from the spot of raid at Candolim. He denied the suggestion that he had falsely stated that PSI Ravindra /P. W. 8 and not PC 3208 had driven the said jeep from the spot of raid to the Police Station. As regards this aspect of the jeep, Talwadkar/P. W. 3 stated that one Constable had driven the

Trax jeep to the Police Station. PSI Ravindra /P. W. 8 was examined subsequently on 12-1-2005 and he stated that PSI Mardolkar /P. W. 4 had given him instruction to take the jeep of the accused to ANC Police Station along with PSI Bras Menezes and he drove the said jeep to the Police Station, and thereafter, reported to PSI Mardolkar/P. W. 4 and handed over the keys of the jeep to him. He stated that he did not know what was done to the jeep thereafter. In cross-examination, he stated that to his knowledge, no receipt of the seizure of the jeep was given to the accused by PSI Mardolkar / P. W. 4 though normally a receipt is issued to a person from whom an article is seized during seizure. In further cross-examination he submitted that he did not know if any entry was made in the Station diary of the Trax jeep being handed over by him to PSI Mardolkar/P.W. 4. He also admitted that in his statement recorded by PSI Mardolkar/P.W. 4 on 25-12-2001, he had not stated that PSI Mardolkar/P. W.4 had directed him to take the jeep from the spot to the Police Station or that he handed over the keys to him after taking the jeep to the Police Station. As already noted, as per the statement of Talwadkar/P.W. 3 as well as the statement of PSI Mardolkar/P. W. 4 made on 8-11-2004, the Trax jeep was driven to the Police Station by a Constable and, which according to PSI Mardolkar/P.W. 4, is Constable with Buckle No. 3208 by name Ravindra. If PSI Dessai/P.W. 8 had not stated anything, as regards PSI Mardolkar/P.W. 4 having told him to take the jeep to the Police Station in his statement earlier recorded, it is but obvious that he was making the said statement for the first time before the Court. Neither the complaint lodged by PSI Mardolkar/P.W. 4, Exhibit 26, nor the evidence of PSI Mardolkar/P.W. 4 recorded on 13-11-2003, makes a mention of PSI Ravindra/P. W. 8 as being part of the raiding party but a reference is made to Constable Ravindra, Buckle No. 3208. PSI Menezes/P.W. 5, in his evidence makes no mention that he along with PSI Ravindra/P.W. 8, had brought the jeep to the Police Station and it is but obvious that PSI Ravindra Dessai/P.W. 8 was examined subsequently to fill in the loopholes as regards the said Jeep. The learned Public Prosecutor has tried to explain the P.C. Ravi Dessai, Buckle No. 3208, is none other than PSI Ravindra Dessai/P.W. 8. There is nothing in the evidence either of PSI Mardolkar/P.W. 4 or Ravindra/P.W. 8 to accept the said explanation. It is difficult to accept that a person who was a Constable on 23-12-2001, became a PSI on 17-12-2004. Learned Public Prosecutor undertook to

produce the promotion Order but did not produce any. If the Jeep was brought from the spot to the Police Station, then necessarily, an entry to that effect ought to have been made on the Station diary which was not made and if no entry was made when it was brought, one fails to understand any reason behind making an entry only on 24-12-2001 at the time of his handing over to the said Deepak S. Palekar. In the absence of any entry having been made when the Jeep was brought to the Police Station, an entry made at the time of his release would not be free from suspicion. The entry on the Station diary, Exhibit 45, therefore cannot carry much conviction and so also the evidence of PSI Ravindra Dessai/P.W. 8 in the light of earlier statements made by Talwadkar/P.W. 3 and PSI Mardolkar/P.W. 4 himself, that the jeep was brought by a Constable and not by PSI Ravindra Dessai/P.W. 8. If the Jeep of the accused was brought to Police Station by PSI Menezes/P.W. 5 and PSI Dessai/P.W. 8. how is it that Dy. S. P. D'Souza/P.W. 6 did not know as to what was done to the jeep? What sort of Supervisory Officer was he Manipulations are writ large in the case of prosecution. In this context, reference could be made to a decision of this Court in the case of Vikram Reddy v. State of Goa 2002 Bom CR (Cri) 499. wherein it was observed that where a witness who is shown to have stated a falsehood to prove part of prosecution case cannot be relied upon. He not only renders his testimony unworthy of acceptance and casts shadow of doubt on the entire prosecution case. That is precisely the case at hand. PSI Mardolkar/P.W. 4, as well as Ravindra Dessai/P.W. 8 cannot at all be believed when they stated that the Trax jeep was taken to the Police Station by the latter and the evidence of both has got to be discarded as a whole, moreso in the light of other contradictions pointed out in the evidence of PSI Mardolkar/P.W. 4. It is obvious that both the said witnesses have indulged in suppression of truth and suggestion of falsehood.

7. Thirdly, Shri Lalit Chatur has submitted that there has been breach of Section 50 of the Act, in that Talwadkar/P.W. 3, did not support the statement of PSI Mardolkar/P.W. 4 that he had made an offer to the accused that he had a right to be searched in the presence of a Gazetted Officer or a Magistrate of his choice which offer the accused had declined. On behalf of the accused, reliance is placed on the case of K. Mohanan v. State of Kerala 2000 SCC 1228, wherein the Apex Court had referred to the case of State of Punjab v. Baldev Singh :

(1999)6SCC172 wherein it was observed thus:

57.(1) That when an empowered officer or a duly authorized officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused.

The Supreme Court therefore held that if the accused who was subjected to search was merely asked whether he required to be searched in the presence of a Gazetted Officer or the Magistrate, it cannot be treated as communicating to him that he had a right under law to be searched for and what P.W. 1 had done in that case was to seek the opinion of the accused whether he wanted it or not. If he was told that he had a right under law to have himself searched, what would have been the answer given by the accused cannot be gauged by them at this distance of time and particularly because the main defence adopted by the accused at all stages was that Section 50 of the Act was not complied with. The Supreme Court, therefore, held that there was non-compliance of Section 50 of the Act and, therefore, the evidence of search spoken to by P.W. 1 could not be acted upon in the absence of any other independent evidence to show that the appellant/accused was in possession of the contraband article.

In reply, it has been submitted by the learned Public Prosecutor that there cannot be any particular form in which art offer contemplated by Section 50 of the Act is required to be made and, in this context, the learned Public Prosecutor has placed reliance on the case of *Prabha Shankar Dubey v. State of M.P.* : 2004(91)ECC194 wherein the Apex Court stated that there is no specific form prescribed or intended for conveying the information required to be given under Section 50. What is necessary was that the accused (suspect) should be made aware of the existence of his right to be searched in the presence of one of the officers named in the section itself and since no specific mode or manner is prescribed or intended, the

Court has to see the substance and not the form of intimation. Referring to Section 50, the Apex Court held that it provides for additional safeguards which are not specifically provided by the statute and the stress is on the adoption of a reasonable, fair and just procedure. Whether the requirements of Section 50 have been met is a question which is to be decided on the facts of each case and there cannot be any sweeping generalization and/or straitjacket formula. As far as the facts of this case go, I do not see any reason why any reliance should be placed on the statement of PSI Mardolkar/P.W. 4 when he stated that he had made an offer to the accused that he had a right to be searched in the presence of a Gazetted Officer or a Magistrate, when on most of the aspects of the case, his evidence has been found unreliable. Although Talwadkar/P.W. 3 initially stated in his examination-in-chief that PSI Mardolkar/P.W. 4 had made an offer to the accused that he could be searched before a Gazetted Officer or a Magistrate, which offer the accused declined, Talwadkar/P.W. 3 in his cross-examination stated, which when translated would be as follows : 'Your search we are taking in the presence of Gazetted Officer and Magistrate. (Tujhi search ami Gazetted Officer and Magistrate haje mukhar gheta)'. That was only a statement of fact. By no stretch of imagination it could be said that it was an offer which was in compliance with Section 50 of the Act and, therefore, it must be stated as far as the facts go, there was also no compliance with Section 50 of the Act and, therefore, prejudice was caused to the accused vitiating the trial.

8. Lastly, Shri Chari, the learned Senior Counsel has submitted that the proviso to Section 42(1) was not complied with since there was ample time to secure a warrant or an authorization. It is submitted that the search could be carried out only in case of emergency and that too after recording the grounds of his belief. Shri Chari has placed reliance on a decision of this Court in the case of Sanjay v; State of Maharashtra 2004 All MR (Cri) 3393, wherein this Court held that since the process of raid including search and seizure was carried out after sunset, the proviso of Section 42(1) was mandatory and contravention of the same would affect the prosecution case and vitiate the trial. That case stood on its own facts. The submission of learned Counsel as regards non-compliance of the proviso to Section 42(1) of the Act need not detain us for long. As far as this aspect is concerned, the learned Special Judge held that the receipt of information was that

charas was being carried by the accused not in the vehicle but on the person of the accused and, as such, the proviso to Section 42(1) was Inapplicable. In my view, the matter could be looked at from another angle. Firstly, there was no cross-examination whatsoever of PSI Mardolkar/P.W. 4 as regards recording the grounds of his belief that there was no time to obtain a search warrant or authorization, as contemplated by the said proviso. Moreover, the search and seizure in this case took place in the presence of a Gazetted Officer namely, Dy, S. P. D'Souza/P.W. 6 and in a public place. In almost identical situation, the Apex Court in the case of State of Haryana v. Jarnail Singh : 2004 CriLJ2541 observed as follows : 'In the instant case, there is no dispute that the tanker was moving on the public highway when It was stopped and searched. Section 43 therefore clearly applied to the facts of this case. Such being the factual position, there was no requirement of the Officer conducting the search to record the grounds of his belief as contemplated by the proviso to Section 42. Moreover, it cannot be lost sight of that the Superintendent of Police was also a member of the searching party. It has been held by this Court in M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence : 2003 CriLJ4996 that where a search is conducted by a Gazetted Officer himself acting under Section 41 of the NDPS Act, it was necessary to comply with the requirement of Section 42.'

The Act makes a clear distinction between a search which is conducted in any public place or in transit under Section 43 of the Act and a search which is conducted in a building, conveyance or enclosed place under Section 42 of the Act. Recording of reasons would be required only under Section 42 and not under Section 43. In the circumstances, the last submission of the learned Senior Counsel has got to be rejected.

9. Shri Chari succeeds in his first three submissions but not the fourth. The case of the prosecution was nothing but a bundle of contradictions and manipulations. PSI Menezes/P.W. 5, Dy. S. P. D'Souza/P.W. 6 and PI Paes/P.W. 7, have indulged in falsehood to support the manipulation of PSI Mardolkar/P.W. 4. Such a case could not have been accepted as proved beyond reasonable doubt against the accused. Considering the conflicting versions of the prosecution witnesses touching the essential aspects of the case, the accused certainly deserved to be given benefit

of doubt.

10. The appeal is, therefore, allowed. The judgment dated 23-2-2005 and 2-3-2005 of the learned Special Judge, NDPS Court, Mapusa, is hereby set aside and, consequently, the accused is acquitted under Section 20(b)(ii)(B) of the Act. The accused shall be released forthwith In case he is not required in any other case. The seized article shall be disposed of as ordered by the learned Special Judge, Mapusa, in her Order dated 2-3-2005.

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