

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 256 of 2015

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE UMESH A. TRIVEDI

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | |
| 2 | To be referred to the Reporter or not ? | |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | |

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KALABHAI BHAVJIBHAI DAMOR

Versus

STATE OF GUJARAT

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Appearance:

MR JIGAR G GADHAVI(5613) for the Appellant(s) No. 1

MR NITIN T GANDHI(5620) for the Appellant(s) No. 1

MS MOXA THAKKER ADDL. PUBLIC PROSECUTOR(2) for the Opponent(s)/Respondent(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE UMESH A. TRIVEDI

Date : 03/02/2020

ORAL JUDGMENT

1. This is an appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as “the Act 1973”) by the appellant challenging judgment of conviction and order of sentence imposed by learned Special Judge and Additional Sessions

Judge, Dahod, dated 6.1.2015 in Special Case (N.D.P.S.) No.1 of 2013 whereby, the appellant came to be convicted for an offence under Section 20(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act, 1985") for possessing approximately 33 kilograms of 'Ganja' and ordered to undergo 10 years rigorous imprisonment and imposed a fine of Rs.1 lakh and in default of payment of fine, he is further ordered to undergo one year rigorous imprisonment.

2. As per the prosecution case, Police Constable Kadakiyabhai Damor (P.W.4) received a secret information through informer that appellant-Kalabhai Bhavjibhai Damor, who is a resident of village Jagola possessing and selling illegally 'Ganja' from his house . After the receipt of the said information, he recorded the same in the police station diary and informed to his higher officers including Mr.Vasava, who was in-charge P.S.I. of Fathepura Police Station. Pursuant to the said information, after observing all the formalities under the Act, services of two independent panch witnesses were requisitioned and a raid was arranged and lead by Mr.V.M.Jani, Circle Police Inspector along with in-charge P.S.I. Mr.Vasava and other police personnels. It is further the case of the prosecution that when they reached village Jagola, near one premises, one person was standing and on asking, he revealed his name to be Kalabhai Bhavjibhai Damor. Thereafter, he was informed about the secret information received and he was requested to have the search of his premises keeping him along with them. For the purpose, when he was asked about the ownership of the premises, he revealed that he owns the said premises. While search of the said premises was carried on, on a western side there was a declivous (storage for crops by the farmers) covered with sand wall and doors in between and after opening the door they found four plastic bags tied with a string and on suspecting containing 'Ganja', it

was opened since the officers who carried out the raid suspected it to be 'Ganja', the services of F.S.L. officer was requisitioned and on arrival of an officer, she, after examining contraband articles found in each bags, opined primarily that, it is 'Ganja'. However, she has requested the officer concerned to send the sample to Forensic Laboratory for the purpose of examination and to have another sample as a reserved sample.

3. According to the case of the prosecution, all these formalities have been performed after observing mandatory provisions of the Act. Mr.Vasava, pursuant to the search conducted, seized those articles after drawing samples from the muddamal in presence of panch witnesses after duly weighing the material which was found to be 33 kilograms in all in four different bags. They have deducted 800 grams to be of all the four different bags. From the four bags, 125 gram each is drawn and collected in a plastic jars as sample representing the muddamal, two such sample jars of 500 grams (125 grams each drawn from four bags). Pursuant to such raid, the contraband article came to be seized and receipt thereof was passed on to accused in presence of panch witnesses. Thereafter, after following due procedure, Mr.Manish Vasava, in-charge PSI of Fathepura Police Station lodged an offence against the appellant. On registration of the F.I.R., the investigating officer recorded statements of various witnesses arranged for sending the mudammal to the F.S.L. and on conclusion of investigation submitted charge-sheet against the accused in the competent court. The learned Special Judge after recording the evidence and hearing the parties convicted the appellant for an offence under section 20(b) of the Act and passed an order of sentence as aforesaid. To prove the guilt of the accused prosecution examined in all 15 witnesses including the investigating officer. Over and above that approximately 13 documents were produced and

proved by the prosecution.

4. Prosecution examined Manishkumar Gambhirbhai Vasava (P.W.1) who is the first informant of this case. According to his deposition while he was in-charge PSI of Fathepura Police Station, on 26.4.2013 at about 1:35 p.m. he received a phone call from Kadakiyabhai (P.W. 4) Asst. Sub Inspector, who received an information that the appellant possesses 'Ganja' in his house and selling it too. Therefore, the witness had informed his superior officer being Circle Police Officer, Mr.V.M.Jani and after that, two persons were called as panch witnesses to witness the search and they started for village Jagola. According to him, the information received was reduced into writing by P.W.4 Kadakiyabhai in a station diary at about 1:30 p.m. The said information was also conveyed to the superior officers orally as also in writing. Thereafter the raiding party along with the panch witnesses started for village Jagola. On reaching there, the appellant found to be standing outside one premises and he was apprised about the information and his right to be searched in presence of Executive Magistrate, to which, he denied. The appellant was also informed by the witness that Mr.V.M.Jani, Circle Police Inspector (P.W.9) is the gazetted officer in whose presence the search was to be carried out. While effecting search from the western side of declivous, four plastic bags were found containing 'Ganja' in it which came to be seized. On asking about any pass or permit for possessing such quantity of 'Ganja', the appellant could not produce anything. Since the contraband articles were to be weighed, Police Constable Jashvantsinh Somsinh (P.W.5) was sent to call some shop owner who can weigh the same with the help of battery(cell) operated weighing scale. Pursuant to the said instruction, he came with battery (cell) operated weighing scale along with Pravinbhai Mandanlal Agarwal (P.W.6). According to the witness, during that time, F.S.L. Officer Pinkyben Narve (P.W.7) also

arrived there and after examining the contraband found from each bag she opined primarily it to be 'Ganja'. Thereafter, the muddamal was weighed with the help of weighing scale through P.W.6, in all it was found to be 33 kilograms.

4.1. The said witness produced and proved the F.I.R. which is Exh.6. However, according to this witness, execution of a panchnama and further investigation therefrom was conducted by C.P.I. Mr.Jani and thereafter by P.S.I. Mr.Taviyad (P.W.15) of Fathepura Police Station. On the day of incident, he recorded statements of the police staff who was party to the raid. The witness was then shown muddamal articles and he identified to be the same which was seized. He was again shown muddamal articles No.2 and 3 which were the plastic jars in which samples were collected, which was identified to be the very same.

4.2. The witness is cross examined by the learned advocate for the appellant in detail. He was cross examined how the police party reached to the house of the appellant. However, nothing fruitful could be elicited from there. The witness was cross examined on the issue that during the raid one electricity bill in the name of Kalabhai Bhavjibhai Damor i.e. appellant was found. However, when it was shown to the witness, he had to admit that no electricity bill in the name of appellant is seized. The witness was asked that recovery panchnama of contraband articles was not drawn in presence of the panch witnesses but their signatures were obtained subsequently by calling them in police station which was denied by the witness. To a specific question put by learned advocate for the appellant, that witness had not entrusted muddamal of this case after reaching police station to anyone. However, it was denied and specifically stated that it was entrusted to crime writer. However, witness has to admit that

no receipt of the said entrustment was obtained from crime writer. It has been further brought in the cross-examination that the said fact with regard to entrusting the muddamal to crime writer is not finding place in the complaint. Witness has to however admit that after entrusting the muddamal to the police station he investigated the said case and recorded statements of certain witnesses.

5. Prosecution examined Tersing Garval (P.W.2) who is panch witness to the seizure/recovery of the muddamal article. Though said panch witness identifies his signature as panch No.1 in the original panchnama Exh.8, has denied anything is seized or recovered in his presence from the appellant. The said panch witness has identified his signature over notice given to the appellant of his right to be searched in presence of any other Magistrate or gazetted officer though Mr. Jani himself is a gazetted officer which is at Exh.9. The appellant was also offered in writing if he wanted to have search of raiding party or the panch witnesses prior to the search in his house conducted. The said notice is produced at Exh.10 and signature of P.W.2 is also identified by him. Vide Exh.11, there is a resolution recording reasonable suspicion that in the premises possessed by the applicant, there is contraband Narcotic drug and if no search is carried out urgently, appellant may dispose of the same. The said witness has also identified his signature in Exh.12 which is a seizure memo seizing 33 kilograms of 'Ganja' from the possession of the appellant signed by the accused also. All those documents Exhs.9 to 12 are also signed by the accused. The said witness was also shown Exh.13 which is a receipt demonstrating weight of each plastic bags found from the possession of the appellant signed by panch witnesses as also the person who is said to have weighed the same. The witness was further shown a xerox copy of election card issued in the name of appellant which was also seized and the witness has identified his signature

over the same. Witness was further shown one electricity bill (which is incorrectly claimed to be in the name of appellant) which is also signed by the said witness which is produced at Exh.15.

5.1. However, according to the case of the prosecution, he did not support the case, and therefore, he was declared hostile. Thereafter, he was cross examined by the learned Additional Public Prosecutor as also by learned advocate for the appellant. However, he denied to have gone along with the raiding party at village Jagola and participated in the search and seizure as claimed by the prosecution. On the contrary in examination-in-chief, witness has stated that Fathepura Police did not call him to witness the search, on the contrary he had gone to Fathepura Police Station for his personal work and at that time witness was asked to sign certain written papers. He has further deposed that at 5 to 7 places he put his signatures.

6. Prosecution examined Raman Pargi (P.W.3) who is 2nd panch witness to the panchnama Exh.8. Similar is the case of this witness which is that of the P.W.2 another panch. In the examination-in-chief itself, the witness has said that the Fathepura Police Station did not call him but he had gone for his personal work to the police station where his signature was obtained by the police in pre-written papers. This witness has claimed that he put 8 to 10 signatures in all. Though he has identified his signature as panch No.2 in documents Exhs. 8 to 15, since the said witness has also not supported the case of the prosecution, he was declared hostile and cross examined in detail but he denied to have accompanied the police and carried out the search and seizure as claimed by the prosecution.

7. Kadakiyabhai Damor, ASI (P.W.4) is the witness who is attached with Fathepura Police Station serving at Ghughas out post. While he

was on patrolling duty, he claimed to have received an information through his informer that the appellant, the resident of village Jagola is possessing the stock of 'Ganja' and selling the same. Pursuant to the said information according to the witness, he reached to the police station and had the charge of P.S.O. from Narendra Baria and he recorded the information in a station diary. He has further deposed that he has informed about the information received to his superiors also. He has also deposed to about the search and seizure carried out by the raiding party as deposed to by Manish Vasava (P.W.1). He has also deposed to with regard to find of four plastic bags containing 'Ganja' from the western side of declivous of premises of the appellant. He has also deposed to with regard to presence of (P.W.6) Pravin Agrawal as also Pinkyben Narve, F.S.L. Officer (P.W.7) at the place of offence who have weighed the muddamal article and opined with regard to muddamal article being 'Ganja' respectively. He has also deposed to about drawing of sample etc. and then find of electricity bill and the xerox copy of election card which was seized. The said witness also cross examined by the advocate for the appellant. As such nothing fruitful could be elicited from him with regard to the information received. However, in a cross-examination, he claimed to have read electricity bill which was in the name of appellant-accused. However, in the next breathe he had to admit that Exh.15 Electricity Bill is in the name of Somabhai Kalabhai. The witness had to admit in his cross-examination that no 'Ganja' was found from the house of the appellant.

8. Jashvantsinh Patel (P.W.5) is the witness who is a part of raiding party and who called the two panch witnesses of his acquaintance as also who brought the battery (cell) operated weighing scale along with Pravin Agarwal, shop keeper (P.W.6). The witness has also deposed to that F.S.L. officer Pinkyben Narve (P.W.7) had also reached the place

and who opined it primarily to be 'Ganja'. He has also deposed about drawing of samples and seizing and sealing procedure also. Though the said witness was cross examined nothing fruitful could be elicited from him by the appellant.

9. Pravin Agrawal (P.W.6) is the shop keeper whose battery (cell) operated weighing scale was used for weighing the muddamal article, according to the prosecution he was called at the place and he is said to have weighed muddamal article and passed on the receipt thereof evidencing the seizure. However, in the examination-in-chief itself the witness has said that on the date of incident, when he was present in the shop, some police officer came and asked for weighing scale and they took the same. He has further deposed to that since he required the weighing scale he had gone to Fathepura Police Station to get it back. He has deposed that when he went to the police station they have obtained his signature over one paper. Witness was shown Exh.8 document which he claims to have given to them containing his signatures and identified the same (however it appears to be panchnama which does not bear the signature of the witness). He further deposed to that four sealed plastic bags weighed by him and receipt of its weight was given to the police. The witness was shown Exh.13 receipt and he admits to have been issued by him.

9.1. However, in his cross-examination he has admitted that he was called at Fathepura Police Station. He has further admitted that in Fathepura Police Station, police said they have weighed it and asked him to write down that weight and therefore he had written it on a paper which is signed by him.

10. Pinky Narve (P.W.7) is the scientific officer who had gone to the house of appellant on a call by M.G.Vasava (P.W.1) at the house of

appellant where four plastic bags containing muddamal was shown to her and she opined it to be 'Ganja' and she issued primary report in respect of the muddamal to be 'Ganja'. The said report is at Exh.21.

10.1. In a cross-examination, she has deposed that she received a call at about 3 p.m. pursuant to which, she reached at village Jagola in a police vehicle. She has denied the suggestion that no such muddamal was found from the residential premises of appellant and no muddamal was examined by her to be 'Ganja'. She has further denied the suggestion that primary report Exh.21 was prepared at the police station and she had not gone to the place of offence.

11. Narendra Baria (P.W.8) is the Police Station Officer who was present in his office on 27.4.2013 (date appears to be incorrect), has deposed that at about 8:45 p.m., a written complaint of Mr.M.G.Vasava recorded before C.P.I., Jalod, came for registration. Pursuant thereto, he registered the same at station diary page No.12 Sr.No.13 on 27.4.2013 for an offence under Section 14 and 20(b) of the Act. The copy of the said station diary produced by the witness at Exh.28.

11.1. He has admitted in his cross-examination that for registering the said F.I.R., P.S.I., Fathepura had come to him. He has also further admitted that a written complaint had come to him for the purpose of registering it. It is further admitted that except registering the said written complaint, he has not done anything in the case. However, he stated that the muddamal acknowledgment was also issued by him. It is further stated in his cross-examination that after issuing the muddamal acknowledgment, it was handed over to the crime writer Mr.Kansinhbhai Limjibhai Palas. It is further stated that he did not obtained any signature from Mr.Kansinhbhai Limjibhai Palas after handing over muddamal of the case to him. He has further admitted

in his cross-examination that he has not made any noting for the same in any of the record. He had to admit that even in a station diary, entry Exh.28, it has not been noted that muddamal was ever produced before him.

12. Vijay Kumar Jani, C.P.I., Jalod (P.W.9) who was a part of a raiding party, as a gazetted officer and in whose presence the raid was carried out, he has deposed to with regard to onward information passed on to the superior officers in a sealed cover. Witness has arranged for services of two independent panch witnesses through Jashvantsinh (P.W.5). Thereafter, he has deposed to with regard to panchas being made aware about the information received and they have to accompany them at the spot for raid. More or less, his deposition is similar to that of the first informant, Mr.M.G.Vasava (P.W.1). On the recovery of four plastic bags tied with a string found, this witness has deposed that search was carried out from the inner room of the house. On opening the four plastic bags as deposed to by this witness, a sever smell of 'Ganja' felt by all of them and therefore, appellant was asked about any pass or permit to possess the same, to which, he denied to have pass or permit. Again, Police Constable Jashvantsinh (P.W.5) was sent to call any shop keeper who can weigh the muddamal articles. Therefore, according to this witness, Pravin Agrawal (P.W.6) was brought at the place along with weighing scale. It is further deposed to that F.S.L. Officer, Pinkyben Narve (P.W.7) had also reached at the place of offence. The F.S.L. opined the muddamal article contained in all four bags to be 'Ganja'. Therefore, the muddamal article was weighed and net 33 Kilograms of 'Ganja' in four different bags were found and it was seized. The weight of four different plastic bags was deducted from the total weight measured by Pravinbhai Agrawal. Thereafter, the witness has deposed to that drawing of sample of 125 grams each from all the four bags and placed it in one plastic jar

which was sealed with the seal of P.S.I. Fathepura Police Station containing panch slips duly signed by the panch witnesses. The four plastic bags found were also sealed in the same manner. It is further deposed to by the witness that while carrying out further search in a house, one electricity bill as also xerox copy of election card came to be seized. Over and above, identifying the documents which is executed in his presence to be Exhs. 8 to 15, the witness has deposed that the muddamal article was sent to F.S.L. by a dispatch note along with the certificate for authority given to F.S.L. which was proved through witness and given Exh.31. The report of F.S.L. received was also shown to the witness and it was produced on record at Exh.32. The muddamal article No.7, 4 bags were shown to the witness and he identified the same having seized from the house of the appellant. The witness was again shown muddamal Article Nos. 2 and 3, two plastic jars where Article No.2 plastic jar contained controlled sample whereas Article No.3 jar contained 'Ganja' which is found in a sealed condition. The witness has identified his signature over the panch slip which was signed before him by two panch witnesses in both the plastic jars. In addition, the witness has deposed that Article Nos. 2 and 3 were the same plastic jars which were send to F.S.L. He has deposed to that in-charge P.S.I. Mr.Vasava had investigated into the offence registered on that day and late night, P.S.I. Taviyad who had gone to Gujarat High Court for official work returned back and he took over the investigation.

12.1. The witness has denied the suggestion that panchnama Exh.8 was not prepared at the spot itself, but it was prepared while sitting in the police station and signatures of the panch witnesses were obtained in a prepared panchnama. Witness has admitted in his cross-examination that there is no reference on Exh.10 written notice given to the appellant making him aware about his right to be searched in

presence of gazetted officer under Section 50 of the Act. He has denied the suggestion that Exh.14, xerox copy of election card and Exh.15, electricity bill were seized from the accused subsequently. He has further denied the suggestion that the person who weighed the muddamal was not called at the place of offence nor he had weighed the muddamal. He has deposed to that complaint Exh.6 was recorded at the place of offence only. Thereafter, witness is cross examined further with regard to his visit to the police station after the raid is carried out. Witness has admitted that after finishing of the panchnama at the place of offence, he went to the Fathepura Police Station for entrusting the muddamal and acknowledgment of receipt thereof. However, he did not remember exactly on what date it was done. Again, he has stated that he does not remember exactly that he had gone to the Fathepura Police Station the day on which the panchnama was drawn. He again pleaded that he does not remember that muddamal was entrusted by him and acknowledgment was got issued by him or not. Though witness has specifically admitted that when Exh.6 was sent at the police station for registration, at that time, he did not go there. However, he has stated that he remained at the place of incident for other procedures to be followed. However, at the place what other procedure he has followed he pleaded ignorance. Witness admitted that he has taken down the complaint Exh.6 after executing the panchnama. Witness has to admit that there is no reference about original muddamal having been sent to the police station either in the complaint or the letter annexed along with it for getting it registered.

13. Chandubhai Ramabhai Solanki (P.W.10) is examined by the prosecution to depose that in the year 2013, he was working as crime writer in the Fathepura Police Station. The witness in his examination-in-chief deposed to that four bags containing muddamal 'Ganja' and

preserve samples in a plastic jars found from the residential premises of the appellant at village Jagola in connection with an offence registered at C.R. NO.II-12 of 2013 sent by C.P.I., Jani which was taken over in his possession and muddamal acknowledgment No.25/13 dated 26.4.2013 signed by him. The witness has identified the muddamal before the Court. In a cross-examination he has stated that muddamal was taken over in his possession on 27.4.2013. It is further stated that it was kept in the police station. He has further improved that the muddamal was kept in a room where generally muddamal in the police station is kept. In a cross-examination he had to admit that the muddamal was handed over to him by the investigating officer Mr. Taviyad. He had to admit that it has never happened that the said muddamal was ever entrusted to him by the police station officer of his police station. He has deposed to that after muddamal was entrusted to him, it remained with him till he remained crime writer upto 2-3 days. He had to admit that it has never happened that the said muddamal was ever obtained back by P.S.I. He had to further admit that till his transfer that is upto 31.7.2013, the said muddamal remained in the muddamal room.

14. Prosecution had further examined Lakhabhai Damor (P.W.11), Navlabhai Damor (P.W.12), Bhundabhai Damor (P.W.13) and Jagabhai Khadia (P.W.14) in support of their case. However, the aforesaid witnesses are from the village itself and some of them related to the accused. All these four witnesses have not supported the case of the prosecution and, therefore, they were declared hostile. Since they have not said anything even in examination-in-chief which may be helpful to the prosecution, their deposition is not referred to in detail.

15. Gulabsing Taviyad (P.W.15) is the investigating officer who had investigated this case. According to this witness, after investigation

was taken over by him from Mr. Vasava (P.W.1), he entrusted muddamal 'Ganja' to crime writer Chandubhai Ramabhai (P.W.10) and he arranged for sending muddamal sample to F.S.L. Gandhinagar. Since accused was arrested by P.S.I.Vasava, he was produced within permissible time before the competent Court and police custody remand of the accused was obtained. Thereafter, he has carried out investigation and recorded the statements of certain witnesses and after receipt of the report from the F.S.L., he filed the charge-sheet. The witness has identified the muddamal Article No.7 i.e. 33 Kilograms of muddamal found in four different bags. The witness has deposed to that muddamal Article No.2 plastic jar is the controlled sample and Article No.3 plastic jar containing 'Ganja' was sent in a sealed condition to the F.S.L. Thereafter the witness has been questioned by learned prosecutor to bring on record the contradictions from the statements of the witnesses who have not supported the case of the prosecution. However, in the cross-examination he has to admit that he received in his custody the muddamal of this case from Mr.M.G.Vasava, P.S.I. (P.W.1) Witness has deposed to that on that day at about 10.50 p.m. he reached the police station and till that time the said muddamal was in the chamber of Vasava, i.e. the chamber of P.S.I. Fathepura Police Station. Thereafter, the witness had obtained that muddamal and entrusted to crime writer Mr.Chandubhai Ramabhai (P.W.10).

16. After conclusion of the examination of witnesses, the learned trial Judge had heard the arguments by both the sides and thereafter convicted the appellant and imposed the punishment over him as aforesaid.

17. Challenging the judgment of conviction and order of sentence, Mr. Jigar Gadhvi, learned advocate for the appellant submitted that the

prosecution has miserably failed to prove that the house from where contraband found belongs to the appellant. It is further submitted that the place from where contraband 'Ganja' is found is an open place adjoining to the residential premises. Therefore, according to him, it cannot be said that the appellant is in possession of it. It is further submitted that there is no investigation carried out by the investigating authority that how many persons were staying in that house or any person in reality stays there or not. If at all they are staying there, whether they were aware of the raid or not. In short, it is the submission of learned advocate for the appellant that on this material point there is no investigation ever made by the police. It is further submitted that electricity bill claimed to have been found from the place of incident is in the name of Somabhai Kalabhai. It is further submitted that prosecution has not led any evidence to establish that who is Somabhai Kalabhai. It is further submitted that on the basis of the xerox copy of the election card found in the name of the appellant, it cannot be concluded that the premises is exclusively possessed by the appellant.

17.1. It is further submitted by him that there is no evidence produced by the prosecution to prove that all the 33 Kilograms of contraband is of 'Ganja' which is seized. Referring to the deposition of Pinkyben (P.W.7), it is submitted that while she examined the muddamal article in four different bags, dried green branches and dried leaves with seeds found by the witness. Referring to the definition of Cannabis (hemp) Section 2(iii)(b) of the Act, he has submitted that as defined seeds and leaves are to be excluded from the definition of 'Ganja'. Therefore, according to his submission, the total muddamal found weighed to be 33 Kilograms is never the total weight and not the weight of the 'Ganja' itself. Therefore, he has submitted that prosecution has miserably failed to prove that

appellant possesses, if at all successfully proved it, commercial quantity of 'Ganja' so as to invite punishment minimum of 10 years. According to his submission, if 'Ganja' is found to be less than even 20 Kilograms, there is no need to impose minimum punishment over the appellant and has undergone 7 years by now of actual imprisonment, if no conviction be set aside but he may be released from jail by imposing sentence already undergone, in that case.

17.2. He has further submitted that evidence of the prosecution is full of inconsistencies with regard to handling of the muddamal after seizure of it. He has further submitted that though Mr.Vasava (P.W.1) says that he entrusted the muddamal to crime writer without naming him, it does not appear to be so. As such, according to his submission, muddamal has to be entrusted to the police station officer and has to be secured in a safe custody in the muddamal room of police station officer. He has submitted that muddamal cannot be entrusted to any other person who has no safe custody or a control over the safe custody to keep it in the police station. He has submitted the prosecution has failed to show that any crime writer has safe custody to store the muddamal. He has further submitted that witness Narendra Baria (P.W.8) who is the police station officer claims that he issued muddamal acknowledgment. However, according to this witness, it was entrusted to crime writer Mr.Kansinhbhai Limjibhai Palas. He has submitted that prosecution has not examined crime writer Mr.Kansinhbhai Limjibhai Palas. It is submitted that prosecution has come out with a story that Chandubhai Ramabhai (P.W.10) was the crime writer attached with the police station. At any rate, according to him, crime writer of any police station is not to be entrusted with the muddamal and, that too, of the nature in the present case.

17.3. He has further submitted that except the police witnesses there are no independent witnesses examined by the prosecution to prove the search and seizure of the muddamal articles from the residential premises of the appellant. He has further submitted that independent witnesses i.e. P.W.11 to 14 having not supported the case of the prosecution in respect of search and seizure aspect at the house of the appellant, therefore, there remains only the evidence of police witnesses, that too, contradictory to each other so far as it relates to handling of muddamal. Only based on their evidence appellant could not have been convicted for a serious offence under the Act. Placing reliance on standing order No.1/89 dated 13.6.1989 issued by Government of India under the Ministry of Finance (Department of Revenue), he has submitted after referring Narcotic Drugs in Section-I which includes 'Ganja' has to be disposed of after samples drawn in duplicate, that means two samples to be drawn for the purpose of examination. He has further submitted that for disposal of articles seized, the prosecution has not followed the procedure prescribed under Section 52 as also Section 52A of the Act. He has further submitted that the muddamal goods as also the samples has to be stored, considering its vulnerability to the theft or otherwise storing in a safe or vaults provided with double locking system. He has further submitted that not only the muddamal article was not placed in a safe or vault, its handling is also not in accordance with the provisions made under the Act or under the standing orders. Therefore, he has submitted that the action of the investigating agency is not inspiring confidence as to the manner and method in which search is carried out and the seizure is made.

18. Therefore, Mr.Gadhvi, learned advocate for the appellant submitted that keeping in mind the oral evidence and appreciating it with the documents produced and proved, the prosecution has

miserably failed to prove the guilt of the accused and, therefore, the appellant is required to be acquitted of the charge levelled against him.

19. As against that, Ms.Moxa Thakker, learned Additional Public Prosecutor submitted that pursuant to prior information, that too, specifically with regard to name and place, after complying with the mandatory provisions of the NDPS Act, search is carried out and muddamal 'Ganja', that too, of a commercial quantity seized from the premises of the appellant which is punishable under Section 20(b) of the Act. She has further submitted that only because there is an evidence of police witnesses, it cannot be discarded. She has further submitted that there were independent witnesses from the village whose statements were recorded. However, they have not supported the case of the prosecution for the reason that either they may be related to the accused or the neighbours. Therefore, prosecution may not be doubted only on the ground that only police witnesses are examined to prove the guilt of the appellant.

19.1. She has further submitted that contraband 'Ganja' was found from the premises of the appellant, which is supported by F.S.L., primarily at the spot itself and thereafter through the report from the laboratory. She has further submitted that only because panch witnesses have turned hostile, the case of the prosecution cannot be discarded. She has further submitted that may be there is some discrepancies with regard to the drawing of muddamal samples either in one jar or two jars, it pales into insignificance as a sample jar in a sealed condition which is sealed at the spot found to be intact by the F.S.L. officer when examined and it is opined as 'Ganja' as defined under the Act. There is nothing to doubt about the seizure of 'Ganja' from the house of the appellant. She has further submitted that there

may be some inconsistencies about who weighed the contraband articles, the fact remains that it was weighed with the weighing scale provided by Pravin Agrawal (P.W.6) and it weighed in all 33 Kilograms. Therefore, she has further submitted that when the sample drawn from each plastic bags found to be 'Ganja' as defined under the Act, fact remains that 33 Kilograms 'Ganja' was found, which is much above and more than 1 ½ times more of the minimum benchmark of commercial quantity found. It can never be concluded that it falls within any intermediary quantity. Therefore, she has submitted that appellant is rightly convicted for an offence under Section 20(b), that too, for a commercial quantity and, therefore, the Court may dismiss the appeal preferred by the appellant.

20. Ms. Moxa Thakker, learned Additional Public Prosecutor has drawn the attention to this Court to Section 54 of NDPS Act and Section 4 of Evidence Act and submitted that when the seizure of the contraband article at the premises of the appellant is corroborated by Pinky Narve (P.W.7), the possession of the contraband article is proved beyond reasonable doubt and the appellant-accused has failed to rebut that presumption and, therefore, appeal may be dismissed.

21. Before proceeding with the analysis of the evidence brought on record, it is required to be mentioned that higher is the punishment, stricter is the procedure to be followed by the police officers while conducting the investigation under the Act. It is cardinal principle of criminal law and jurisprudence that the prosecution has to prove its case by leading cogent, reliable and trustworthy evidence against the accused, that too, beyond reasonable doubt. At the same time only because there is an evidence of police officers or official witnesses, in absence of any material showing that they had any animosity with the accused, it cannot be brushed aside. If evidence of the police officers

or official witnesses is found to be trustworthy, there is no impediment in law that their testimonies cannot be believed. Keeping in mind the aforesaid principle, let me consider the evidence produced before the court to prove guilt of the appellant–accused.

22. So far as information with regard to the contraband article, recording it in the station diary, informing higher officers of the said information, carrying out search and following mandatory provisions under Sections 50 and 43 of the Act, there may not be any dispute. The case against the appellant–accused rests only on evidence of police witnesses and corroborative evidence with regard to place where contraband was found. However, the panch witnesses who, prosecution claimed to, have accompanied the police authority at the time of raid, not supported the case of the prosecution. Thus, the other independent witness who was associated with the seizure, atleast, like Pravin Agarwal (P.W.6), the prosecution has not declared him hostile. Though panch witnesses, Tersingh Gerwal (P.W.2) and Raman Pargi (P.W.3) having not supported the case of the prosecution having witnessed the search, they claimed that they had never gone to the village or the house of the appellant–accused from where prosecution claims to have seized 33 Kilograms of Ganja. The prosecution has also claimed that witness Pravin Agrawal (P.W.6) who is a grocery shop owner opposite Fathepura Police Station was called at the place from where search and seizure is effected to weigh the contraband article along with battery (cell) operated weighing scale, specifically denied to have gone to the very village. Nowhere this witness said he had gone to the place of search or weighed the contraband articles there. Not only that, he has denied to have weighed any of the articles. Considering the deposition of the said witness, it is clear that what weight of each bag stated by the police, he has mentioned it in the receipt signed by him in the police station

itself. Surprisingly, the prosecution has not declared the said witness hostile. Thus, it is clear that the prosecution is also relying on the deposition of the said witness.

23. The prosecution has further claimed that the electricity bill issued by Madhya Gujarat Vij Company Limited in the name of Somabhai Kalabhai Damor, is found from nearby, where electricity meter is fixed. However, prosecution has not proved that who that Somabhai Kalabhai is. While drawing the panchnama, ISI mark of the meter, number of it and number written on the box, everything is recorded along with meter number, the said bill where due date to pay the amount found to be 12.11.2011. But at the same time, the prosecution has not recorded what was the consumption of electricity used, recorded in that meter at that time. Considering the said electricity bill, it is clear that the last date to pay the bill, present reading is also mentioned with ball pen handwritten. There are so many columns mentioned in handwritten whereas rest of the columns found to be printed. The total consumption appears to be 10 units based on average consumption for two months. Not only the prosecution has not brought on record how many persons staying there in the premises, adjoining to which, the contraband article is found, it has also failed to prove who Somabhai Kalabhai Damor mentioned in electricity bill Exh.15, is. On the contrary, the police witnesses have claimed that the electricity bill is in the name of the appellant. However, when it was shown to the witnesses, they had to admit that it is in the name of Somabhai Kalabhai. Over and above that, the said electricity bill is issued for a period from September to October, 2011, whereas the search of the premises is claimed to have been done on 26.4.2013. May be that, the recent electricity bill might not have been found from the place but at the same time in 2011 also some approximate bills are being issued on an average basis and

consumption of 10 units for two months is recorded in the bill. At the bottom of bill huge outstanding is being carried forward. All such entries are hand written which creates doubt about find of such bill from the place. Possibility cannot be ruled out that the premises is not being used. At the same time, not recording the consumption reflected from the electricity meter at the time of raid in the panchnama itself suggestive of the fact that either electricity bill Exh.15 may not be correct or the electricity meter must be reflecting no consumption at all. Over and above that prosecution has not established, about the ownership and exclusive possession of the place from where contraband found, beyond reasonable doubt. If not concluding it by such evidence, atleast a reasonable doubt is created with regard to the functioning of the police machinery acting irresponsibly in such an offence where punishments are very severe.

24. Again find of xerox copy of election card said to have been issued in the name of appellant referred to in the panchnama itself, the place exactly from where it was found is not mentioned in it but possibly with the electricity bill. Not only that when the raid is carried out pursuant to a prior information specifically by name of the accused and the village, if the raiding officer had requisitioned the services of F.S.L. officers, they should have waited for her to accompany them to lend assurance to the search and find of the muddamal article as claimed by the prosecution. Considering the evidence of Pinky Narve (P.W.7), it is clear that after search was effected and contraband was taken in possession by police, she reached there and she found it to be Ganja. It is not necessary for the police officer to take along with them at the time of search any F.S.L. officer even for primary opinion but once they have already requisitioned her services prior to proceeding for search, it would have been better that they have waited for her to be there to lend assurance

to the claim made by the prosecution witnesses. There are other short falls also in the prosecution case, to be considered along with this fact.

25. Considering the deposition of Jashvantsinh Somsinh Patel (P.W.5) who was sent for calling two independent persons to act as panch witnesses as deposed to before the Court that he had called two panchas who have acquaintance with him, however, both these panch witnesses have in their examination-in-chief claimed that they had never gone to village Jagola from where the appellant was found to be in possession of Ganja but when they had gone to the police station itself for their personal work, there 6 to 8 or 8 to 10 signatures on different papers were obtained by the police. Of course the said witnesses have not supported the case of the prosecution, therefore, their deposition may not inspire any confidence but the fact remains that though they were known to police constable Jashvantsinh Somsinh Patel and of his acquaintance they could have not so stated in their deposition that they had never gone to witness the search itself at village Jagola. Further more, almost all police witnesses claimed that Pravin Agarwal (P.W.6) was called to the spot along with battery (cell) operated weighing scale, that too, through police constable Jashvant Patel (P.W.5). All police witnesses have claimed in the deposition that Pravin Agrawal (P.W.6) had come to the spot along with his weighing scale at village Jagola. However, the deposition of Pravin Agrawal (P.W.6) is all together telling a different story. His deposition revealed that he had never gone to village Jagola. He has gone to police station only to get back his weighing scale. He has not weighed the muddamal but what police said the weight he has written in a chith and signed by him given to police. This witness was not declared hostile by the prosecution.

26. When the police personnel had prior information with regard to

any narcotic drug they would have taken along with them the weighing scale or the person along with weighing scale who can weigh the muddamal with it there only.

27. Mr.Vasava (P.W.1) who is first informant claims in his deposition that police constable Jashvantsinh Somsinh Patel has brought Pravin Agrawal with battery (cell) operated weighing scale but he failed to say anything with regard to two plastic jars in which he claimed that muddamal sample was drawn. It may have happened that they may have purchased it from the open market or provided by Pravin Agrawal. There has to be some positive evidence led by the prosecution on that count also. In absence thereof, their testimonies in respect of plastic jars in which samples have been drawn remains a mystery.

28. The present case is full of mysteries. The prosecution has not ensured safe custody of the muddamal articles including the sample jars. Mr. Manish Vasava (P.W.1), first informant, deposes that he entrusted the muddamal to crime writer. However, he has failed to name that crime writer, may be he is not attached regularly with the said police station, he may not name him but at the same time muddamal is never to be entrusted to any crime writer. The muddamal has to be entrusted to the police station officer who is also in-charge of the muddamal room keeping safe custody of it. Another witness Narendra Baria (P.W.8) who is examined to prove that at about 8.45 p.m. when he was on duty at Fathepura Police Station, he recorded in a station diary an entry of F.I.R. and registered the offence pursuant to the F.I.R. However, he appears to be the police station officer of that very police station. The said fact is also supported by deposition of Kadakiyabhai Damor (P.W.4) who received a secret information and went to the Fathepura police station, took over the

charge as P.S.O. from Narendra Baria and noted down the information in a station diary and thereafter handed over the charge to Narendra Baria. When Narendra Baria (P.W.8) was cross examined, he had to admit that in this case muddamal acknowledgment is issued by him. At the same time, after issuance of the said muddamal acknowledgment, he entrusted the said muddamal to crime writer Kansinhbhai Limjibhai Palas. However, prosecution has not examined that Kansinhbhai Limjibhai Palas to whom P.S.O. had entrusted the muddamal. Apart from it, considering the muddamal receipt No.25 of 2013, it bears date of 26.4.2013. From the record of the case, when it is seen, it is mentioned in it that article No.2, plastic jar, sample bottle containing 500 grams of Ganja was sent to Assistant Director, Narcotic Department, Gandhinagar and date therein is of 26.4.2013. Whereas CPI, V.M.Jani (P.W.9) and Mr.Taviyad (P.W.15) investigating officer claimed that muddamal Article No.2 is a controlled sample jar. If muddamal acknowledgment is issued by Narendra Baria (P.W.8), it could not have been issued by any other witness who is not at all a P.S.O. claimed by the witness himself. Whereas surprisingly, Chandubhai Ramabhai Solanki (P.W.10) who was not shown as witness in the list of witnesses in the charge-sheet, came to be examined, may be with the consent of the accused, claims to have been entrusted with four different bags of Ganja along with preserved sample of 500 grams in plastic jars which is possessed by him and muddamal acknowledgment No.25 of 2013 dated 26.4.2013 signed by him. The apparent conflict by two different prosecution witnesses with regard to possession of the muddamal and even of issuance of muddamal acknowledgment is irreconcilable. When Chandubhai Ramabhai Solanki (P.W.10) cross-examined by the accused, he has claimed that muddamal was entrusted to him on 27.4.2013 and, that too, by investigating officer Mr.Taviyad (P.W.15). He has to admit in his cross-examination that he had kept the muddamal in the police

station itself. He has further deposed in the cross-examination that he had kept that muddamal in a general muddamal room where other muddamal is kept. He had to admit in his cross-examination that it had never happened that any P.S.O. has entrusted him the muddamal. Furthermore, he had admitted in the cross-examination that the muddamal of the said case remained with him till he remained crime writer i.e. 2-3 days. However, he has never said that he was regular crime writer with police station or not. It appears that only with a view to justify assertion of Mr.Vasava, first informant, that the muddamal was entrusted to the crime writer, he claimed to be crime writer in the police station. Whereas, considering his cross-examination, it appears that he remained as crime writer for 2-3 days. He has to further admit in his cross-examination that from his possession, P.S.I. has never received back muddamal. He has to further admit that the muddamal remained in the muddamal room till he was transferred to Limdi Police Station on 31.7.2013. Gulabsing Taviyad (P.W.15) investigating officer has a different story to tell about the muddamal. In his examination-in-chief, he claimed to have taken over the investigation into this case on 26.4.2013 at about 10:45 when he returned back from Gujarat High Court to the police station. In cross-examination he deposed that when he reached the police station, muddamal was in the chamber of Vasava i.e. in the chamber of PSI, Fathepura Police Station. Thereafter in the cross-examination even without specifying the date, he claimed that he has entrusted the said muddamal to crime writer Chandubhai Ramabhai Solanki (P.W.10). Chandubhai Ramabhai Solanki (P.W.10) has never claimed in his examination-in-chief that on 26.4.2013 even at night he was entrusted with the muddamal as claimed by investigating officer Mr. Taviyad. However, he is very specific in his cross-examination that he possessed that muddamal on 27.4.2013.

29. Further, Mr.Taviyad (P.W.15) in his examination-in-chief deposed to that he had arranged to send the sample to F.S.L. for the purpose of examination. However, he has failed to name the person with whom he sent the sample muddamal to F.S.L. Not only that, the person who carried the muddamal sample to the F.S.L. is also surprisingly not examined by the prosecution. Therefore, the enthusiasm shown by the prosecution witnesses for carrying out search and seizure at the place is gradually vanished when it comes to the delivery. There is no reliable evidence produced by the prosecution with regard to the muddamal articles including sample jars, that they were kept in a safe custody of any person or in the safe or vault with double locking system. Muddamal of a case like this, can never be let loose even for a moment. Almost at every police station there is a muddamal strong room where muddamal of every offence is kept and it is under a lock and key of the police station officer himself. The muddamal sample in the present case seized on 26.4.2013 claimed to have been sent to the F.S.L. through a dispatch note dated 28.4.2013, which appears to have reached the F.S.L. on 29.4.2013. However, muddamal acknowledgment finding place in the record do exhibit at foot note that serial No.2 plastic jar was sent to Director, Narcotic Division, Gandhinagar, and date appended thereto is 26.4.2013. The prosecution has failed to produce any reliable evidence before the Court that after the search and seizure, the muddamal along with the sample were kept in a safe custody, not giving any chance of tempering to anyone, including police personnel, till it reaches the F.S.L. Whereas, different witnesses have a different story to tell about the muddamal along with the sample jar. At any rate, after the muddamal has reached the police station, it has never been kept in a safe or vault, if not having double locking system, even in a single lock. At one stage, the investigating officer claims that he has arranged for sending the muddamal to F.S.L., he has not deposed

to that with whom that muddamal was sent to F.S.L., and on what date. Not only that the person who carried the muddamal to F.S.L. is also not examined by the prosecution. Mr.M.G.Vasava (P.W.1) , In-charge PSI of the police station claims that he had entrusted muddamal to the crime writer who was never named. Mr.Narendra Baria (P.W.8), who is police station officer claims to have acknowledged the muddamal and issued receipt No.25/2013 claims that he entrusted the muddamal to crime writer Kansinhbhai Limjibhai Palas. However, prosecution has not examined the said Kansinhbhai Limjibhai Palas. At the first place, Narendra Baria (P.W.8) P.S.O. could not have entrusted the muddamal to any one and he should have kept it in a safe or vault. Even if it is entrusted to Kansinhbhai Limjibhai Palas, as claimed, he is not examined by the prosecution. As stated aforesaid above, Chandubhai Ramabhai (P.W.10) was never cited as witness in the charge-sheet, has come to be examined, though with the consent of the learned advocate on behalf of the accused, he claims to be again a crime writer, the post which he held for 2-3 days as deposed to by him in the cross-examination conducted by an accused and muddamal remained with him till he remained the crime writer. Prima facie, the deposition of Chandubhai Ramabhai Solanki does not inspire any confidence. If he is to be believed, the PSI who had entrusted him the muddamal along with sample, has never taken back the same from him as admitted by the witness in a cross-examination. If that is so, Mr.Taviyad, the PSI could not have sent the muddamal sample on 28.4.2013 as claimed in the dispatch note Exh.31. Furthermore, Mr.Taviyad has not deposed to on what date it was sent. He was contended with saying that he arranged for sending it to FSL. It appears that the prosecution has left *gaping cracks* in handling muddamal incapable of being sealed or mended. However, judicial adjudication has to be guided by the evidence brought on record. On overall analysis of the evidence brought on record, prosecution has failed to inspire confidence with

regard to handling of the muddamal as also sending to the F.S.L. for the purpose of test. The panch witnesses who were associated with the search and seizure, have not supported the case of prosecution. On the contrary in the examination-in-chief itself they have said that they had never gone to the place of offence at all. They have claimed that when they had gone to the police station for their personal work police obtained their signatures in 5 to 7 or 8 to 10 different papers. Over and above, though all the police witnesses including the CPI, Mr.Jani (P.W.9) have deposed to that Pravin Agrawal (P.W.6), the person who weighed the muddamal was brought along with weighing scale at the place, whereas, Pravin Agrawal (P.W.6) has again deposed to in examination-in-chief that police had taken his weighing scale only and he had never accompanied them at the place of offence. At the same time, he has deposed to that the so called receipt of weight mentioned in Exh.13 is as per the say of the police that they have weighed it and this much is the weight of each bag, which is recorded in that receipt. Surprisingly, prosecution had not declared the witness hostile and on the contrary chose to rely on the deposition of the said witness. As stated aforesaid, find of electricity bill Exh.15 and the xerox copy of election card from nearby the electricity meter, is also not worthy of credence, for the reasons stated herein above. Thus, not only the handling of muddamal and the sample, even the search and seizure inspires no confidence. Search and seizure itself is doubtful in view of the evidence brought on record by the prosecution as discussed herein above. Thus, prosecution has failed to prove the case against the appellant by leading cogent, reliable and believable evidence beyond reasonable doubt.

30. Thus, the appellant could not have been convicted for an offence under Section 20(b) of the NDPS Act. Hence, this appeal is allowed. The appellant is ordered to be acquitted of all the charges

levelled against him. The judgment of conviction and order of sentence imposed by learned Special Judge and Additional Sessions Judge, Dahod, dated 6.1.2015 in Special Case (N.D.P.S.) No.1 of 2013, is hereby quashed and set aside. The appellant is directed to be released, if not required in any other case. Fine, if paid, be returned to the appellant.

31. Record and proceedings be sent back to the Court concerned forthwith.

NAIR SMITA V.

(UMESH A. TRIVEDI, J)

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