

CRIMINAL APPEAL NO. 83 OF 2000.

1. Mr. Syed Mudassir,
r/o Makdoo Colony,
Bandar Road, Bhatkal,
Karnataka State.
2. Mr. Najeeb Damuda,
r/o Kalifa Street,
Bhatkal, Karnataka
State.
3. Mr. Mohammed Saadulla
Amar, Takiya Street,
Bhatkal, Karnataka State. ... Appellants.

Versus

Union of India through
Assistant Collector of
Customs and Excise,
Anti-Smuggling Unit, Goa. ... Respondent.

Mr. Amin Solker, Advocate for the Appellants.

Mr. M.S. Joshi, Central Govt. Standing Counsel for the
Respondent.

Coram: P.V. HARDAS, J.

Date: 26th July 2002.

ORAL JUDGMENT.

The appellants have filed the present appeal challenging their conviction under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and the sentence of 10 years rigorous imprisonment and fine of Rs. 1 lakh in default simple imprisonment for one year passed against each of the appellants by the Special Judge, N.D.P.S. Court, Mapusa, by Judgment dated 5th October 2000, in Special Criminal Case No. 5 of 1999.

2. The facts necessary for the decision of the appeal are set out hereunder:-

P.W.6 John Cruz, Inspector of Central Excise, who is the seizing officer, received specific and reliable information on 11th November 1998 that three persons had checked in room no. 101 of Sanrit Hotel in Margao and were in possession of drugs. He recorded the said information into writing and gave it to the Superintendent. The said information was put in an envelope and sealed and sent to the Superintendent A. D'Costa. Exhibit P.W.4/A is the said information. The DRI 1 is at Exhibit P.W.6/A. P.W.4 A. D'Costa, Superintendent of Central Excise, states that in the year 1998 he was attached to Margao Office as Superintendent of Customs and Central Excise. On 11th November 1998, at about 4.00 p.m., P.W.6 John Cruz, an Inspector of Central Excise, brought information in an envelope that in room 101 in Sanrit Hotel there were drugs. P.W.4 D'Costa immediately contacted his superior Assistant Commissioner of Customs at Panaji and told him that more officers would be required for search of the said room and had also asked for a search warrant from him. At 5.30 they proceeded to the hotel for conducting the raid and one Albert Alvarez was taken as a pancha. The second pancha was P.W.3 Dinanath N. Asolnekar, a receptionist of the hotel. On reaching the hotel P.W.3

was asked whether there were customers in room no. 101 of Sanrit Hotel. P.W.3 replied that there were three persons in the said room. Alongwith P.W.3 the raiding party proceeded to room no. 101. Search warrant was shown to both the panchas before entering the room and their signatures were obtained on the search warrant, Exhibit P.W.3/A. P.W.5 Ulhas Pandey Inspector of Anti Smuggling Unit knocked on the door. The door was opened by accused no. 1 Syed Mudassir. P.W.4 D'Costa introduced himself to accused no. 1 and the other two persons, who were sitting on the cot. The other two persons gave their names as Najeeb Damuda and Mohammed Saadulla Amar, who are original accused nos. 2 and 3. P.W.4 D'Costa informed the accused that he had received information that these persons were having narcotic drugs in their possession and showed them the search warrant. P.W.4 D'Costa obtained the signatures of the accused on the search warrant. He offered the personal search of the members of the raiding party and the panchas to the accused but the accused declined. P.W.6 Cruz informed the accused that they had an option to be searched in the presence of a Judicial Magistrate or a Gazetted Officer and the accused replied that they do not like to be searched in the presence of a Gazetted Officer or a Judicial Magistrate. P.W.6 Cruz then informed the accused that P.W.4 D'Costa was a Gazetted Officer and asked them whether they could be searched in

the presence of a Gazetted Officer. The accused agreed for a search in the presence of P.W.4 D'Costa. P.W.4 D'Costa states that this offer was given to the accused simultaneously. On searching accused no. 1, nothing incriminating was found. On searching accused no. 2, Rs. 15/- were found in the right hand pocket and on personal search of accused no. 3, nothing incriminating was found. The raiding party was searching for narcotics and on searching underneath the first cot, the Officer found a black colour travelling bag with green straps and handles. Inside the bag there were clothes, tooth brush and one colgate tooth paste. In the bag one packet wrapped in newspaper and cellotape was found. On opening the said packet, it was noticed that there was a transparent polythene packet with red strips with autopen opening. The said packet contained white powder. P.W.6 Cruz took a pinch of the white powder and tested the same with the field testing kit and the test showed positive for heroin. The quantity of the white powder was weighed and it was found to weigh 1.160 kgs.. Thereafter two samples were taken and put in a plastic bag and heat sealed and thereafter put in an envelope and marked as S-1 and S-2. The balance quantity of 1.160 kgs. was emptied into another cellophane bag, heat sealed and packed in a corrugated box. The seal that was put was a seal with the inscription "South Goa Anti Smuggling Unit, Margao". The accused and the

property were then taken to the office. The panchanama Exhibit P.W.3/B was drawn. Summons were issued to the accused, which are collectively marked as Exhibit P.W.4/B. P.W.5 Pandey recorded the statements of the accused. The statements are at Exhibit P.W.4/C Colly. P.W.4 D'Costa states that one sample was sent to the Food and Drugs Administration and the other property was deposited in the warehouse. The copy of the letter sent to the Food and Drugs Administration is at Exhibit P.W.1/B. Exhibit P.W.2/A is a copy of the letter sent to the warehouse. Intimation under Section 57 of the N.D.P.S. Act was sent to the Assistant Commissioner, which is at Exhibit P.W.4/E.

3. The samples were deposited with the warehouse Officer P.W.2 Fatima Noronha on 12th November 1998 at 2.45 p.m.. She had executed the receipt, which is at Exhibit P.W.2/B. The samples were analysed by P.W.1 Mahesh Kaissare and his report is at Exhibit P.W.1/A. He has opined that the substance analysed by him was Methyl Morphine. After completion of the investigation, a complaint through P.W.5 Pandey was filed before the Special Judge, N.D.P.S. Court, Mapusa. The learned Special Judge, N.D.P.S. Court, Mapusa, vide Exhibit 7 framed a charge against the appellants. The appellants abjured their guilt and claimed to be tried. The prosecution, in support of its case, examined 7

witnesses. The learned trial Court accepted the evidence of the prosecution and convicted and sentenced the accused as aforestated. Hence, the present appeal.

4. P.W.4 D'Costa states that after obtaining the warrant from P.W.7 M.A.F. Monteiro Assistant Commissioner of Customs, he alongwith the raiding party proceeded to Sanrit Hotel. P.W.6 Cruz knocked on the door of room no. 101, which was opened by the original accused no. 1. P.W.4 D'Costa introduced himself to the accused no. 1 and to the other accused, who were sitting on the cot. The signatures of the accused were obtained on the search warrant and after apprising the accused of their right under Section 50, the personal search of the accused were undertaken and nothing incriminating was found on their persons. P.W.4 states that beneath the cot a bag was found which contained 1.160 kgs. of heroin. Two samples of 10 gms. each were taken and packed and sealed. The samples were marked as S-1 and S-2. The seal with the inscription "South Goa Anti Smuggling Unit, Margao" was affixed. In the cross-examination P.W.4 has admitted that his statement was not recorded by the complainant. He has admitted that he has not signed the panchanama. He admitted that, though he was the Investigating Officer, he had verbally directed P.W.5 Pandey to file the complaint. He has further admitted that he had not

shown warrant no. 3, dated 1st November 1998, issued by Shri Monteiro to the panchas and Pandey (P.W.5). He states that they had not taken warrant no. 3 while coming to the raid. He does not know whether there is warrant no. 3, dated 11th November 1998, issued by the Assistant Commissioner. He denied the suggestion that warrant no. 3 was dated 11th November 1998 issued by Assistant Commissioner and that he had suppressed the said warrant. He has admitted that in the intimation under Section 57, Exhibit P.W.4/E, the place where the drugs were found was not mentioned. He also admitted that it was not mentioned in the said intimation that P.W.4 was supervising the raid and that the raid was conducted in the presence of the two panchas. He admitted that he personally had not recovered the bag containing the drugs. He does not remember whether in any document the name of the person who had recovered the drugs was mentioned. He could not give any reason as to why the name of the person who had recovered the drugs was not mentioned in the intimation Exhibit P.W.4/E. He also admitted that the name of the person who had weighed and who had sealed the samples was not mentioned in the intimation Exhibit P.W.4/E. He states that the property was in his custody during the night at Margao and no record was made that he had kept the custody of the drugs. He admitted that, after the raid, the seal was kept in the cupboard where the attached

drugs were kept. He has admitted that the keys of the cupboard were with him. He has further admitted that there was no need for using the seal after it was kept in the cupboard.

5. In response to the question by the Court, he admitted that he returned to his office at 8.00 p.m. and had kept the sealed packet and the seal in the cupboard, which was locked. He has further stated in response to the question by the Court that on the next day morning at about 9.30 to 10.00 a.m. he had deposited the sealed packet at the warehouse at Panaji, however, the seal continued to remain with him in his office at Margao. He has further admitted that he does not remember whether he had an occasion to use the seal till the sealed packet was sent to the Chemical Analyser. He states that he had sent one officer to carry the said sealed packet to the Chemical Analyser. He further admits that he did not keep any record as to which Officer had taken the sealed packet to the Chemical Analyser. He denied the suggestion that he had suppressed warrant no. 3, dated 11th November 1998, issued by the Assistant Commissioner of Customs. In cross-examination on behalf of accused nos. 2 and 3, P.W.4 D'Costa admitted that the date and time of arrest of the accused have not been mentioned in Exhibit P.W.4/E. He admitted that there was a toilet attached

to room no. 101. He further admitted that the panchanama was scribed by P.W.5 Pandey.

6. P.W.6 Cruz had stated that after he had received the specific and reliable information on 11th November 1998 regarding the three accused, he had recorded the said information into writing and gave it to the Superintendent and had also recorded the said information in Form DRI 1. P.W.4/A is the said information which is signed by P.W.6. He further states that he had identified P.W.4 D'Costa as a Gazetted Officer to the accused and in his presence the search of the accused was taken. He states that he had recovered the bag from under the cot and on opening the same, found drugs in the packet wrapped with newspaper and cellotape. He admitted that on receipt of the information a case under the N.D.P.S. Act was registered even before the recovery of any drug. He has stated that the case number was given by the Superintendent D'Costa. He has also admitted in the cross-examination that his statement was not recorded. He has admitted that he does not know whether he had mentioned any where that the bag was found by him. Similarly he has also admitted that he does not know whether he has stated any where that the bag was under the cot.

7. P.W.5 Pandey has stated that he had accompanied P.W.4 D'Costa for the raid on 11th November 1998. He has admitted that the contents of the search warrant Exhibit P.W.3/A was explained to the accused. He has also stated that the signatures of the accused alongwith that of the panchas was obtained on the search warrant at Exhibit P.W.3/A. He has further stated that the accused were jointly told that they had a right to be searched before a Gazetted Officer or a Magistrate and the accused did not say anything to the offer. He has admitted that P.W.4 D'Costa then told the accused that he himself was a Gazetted Officer and the search would be taken in his presence and for that the accused agreed. He has also stated that one of the Officers found a bag on the table at the corner. He could not say who the particular officer was who had found the bag. He states that P.W.6 Cruz opened the bag and found one packet of 11 x 11 inches approximately. Inside there was a polythene bag and inside the polythene bag there was white powder. He has stated that P.W.6 Cruz tested the said powder with the field testing kit and Cruz found that it was heroin. He has stated that it was weighing about 1,160 kgs. and two samples of 10 gms. each were taken. He has stated that he had written the panchanama and had signed the panchanama. He states that he had recorded the statement of accused no. 1. In further examination-in-chief on behalf of

the Public Prosecutor, P.W.5 Pandey has admitted that the search warrant was bearing no. 4 but, while writing the panchanama it was wrongly written as '3'. He further states that warrant no. 3 was in fact used in another case. He states that warrant no. 3 was executed on 10th November 1998. The learned trial Court allowed this witness to produce the statement of the accused recorded by him under Section 57 of the N.D.P.S. Act, which was marked as Exhibit P.W.5/A. The Statement of Najeeb Damuda is at Exhibit P.W.5/B.

8. In cross-examination on behalf of accused no. 1, P.W.5 has admitted that as soon as they entered the room of the hotel, the scribing of the panchanama commenced and the scribing continued simultaneously as the events took place. He admitted that it was mentioned in the panchanama Exhibit P.W.3/B that the search warrant was bearing no. '3' and this number '3' is mentioned at four places in the said panchanama. This witness has again admitted in the cross-examination that warrant no. 3 was issued on 10th November 1998 and was executed on the same day. He admits that he was a member of the raiding party. He has admitted that the said warrant no. 3 was not dated 11th November 1998 or was executed on 11th November 1998. He also admitted that it was not mentioned in the panchanama that the warrant no. 3 was dated 10th November 1998. He has

also admitted that there was no warrant no. 3 dated 11th November 1998. He could not say anything to the suggestion that warrant no. 3, dated 10th November 1998 is not produced in Special Criminal Case No. 4 of 1999 pertaining to one Kaskar in whose case P.W.5 had claimed that the said warrant had been issued. He denied the suggestion that they were suppressing the warrant no. 3 as it would be adverse to the prosecution case. P.W.5 further admitted in the cross-examination that in the panchanama it is not mentioned that P.W.6 Cruz opened the bag and he also admitted that it was similarly not mentioned in the complaint filed in the Court. He has admitted that he had not cautioned the accused no. 1, before recording his statement, that he has a right to remain silent. He has admitted that he did not inform any family members or friends of accused no. 1 regarding his arrest. Similarly, he has admitted that he did not inform accused no. 1 if he confesses, it would be used against him in the Court of law. He has admitted that he did not record the exact words of accused no. 1 while recording his statement. He denied the suggestion that accused no. 1 was forced to sign on the statement. P.W.5 further admitted that in the complaint it was not mentioned that a copy of the statement was furnished to accused no. 1. He also admitted that no acknowledgement of accused no. 1 was taken in token of having received a copy of his

statement. He has also admitted that he had read the retraction statement of accused no. 1 at Exhibit 4 wherein the accused no. 1 had alleged that he was threatened by the Officers to sign the papers without the accused no. 1 reading the contents nor was accused no. 1 given a copy of the statement he was forced to sign. He admitted in the cross-examination that in his reply to Exhibit 4 it was not mentioned that a copy of the statement had been furnished to the accused.

9. P.W.5 has admitted in cross-examination on behalf of accused nos. 2 and 3 that when the statement of accused nos. 2 and 3 were recorded, P.W.4 D'Costa and P.W.6 Cruz were present. He has also admitted that he had not cautioned accused nos. 2 and 3 before recording their statements that they had right to remain silent. He states that he, P.W.4 and P.W.6 were questioning the accused. He also admitted that there was no acknowledgement that copy of the statement had been furnished to the accused. Incidentally, it may be mentioned that in respect of the recording of the statements of the accused by P.W.5, when he states that he and P.W.6 were questioning the accused, P.W.6 Cruz does not corroborate the version of P.W.5 at all. In fact, the evidence of P.W.6 Cruz does not make any reference to the recording of the statements of the accused, which, according to P.W.5, was done in the

presence of both P.W.4 D'Costa and P.W.6 Cruz.

10. P.W.3 Dinanath Asolnekar states that on 11th November 1998 he was working as a receptionist in Hotel Sanrit, Margao, Goa. At about 5.30 p.m. about 8 persons came to the reception counter of the hotel and one of them introduced himself as A. D'Costa, Superintendent of Central Excise. He also introduced P.W.6 Cruz and P.W.5 Pandey. P.W.4 D'Costa informed him that he was armed with a search warrant issued by Assistant Commissioner of Customs and Excise and had shown him the warrant. P.W.3 states that he had signed on the said warrant. He further states that P.W.4 D'Costa requested him to accompany them to search the room. He states that P.W.5 Pandey knocked on the door and the door was opened by one person, who was dark in complexion and there were two other persons sitting on the bed. He further states that on entering the said room P.W.4 D'Costa identified himself to the said persons. He also states that the raiding party offered their search to the accused. He states that the warrant was shown to the accused and the three accused signed the same. He has identified the said warrant, which is at Exhibit P.W.3/A. The said warrant is dated 11th November 1998 and bears the number '04 of 1998'. He also states that P.W.4 D'Costa apprised them of their right of being searched in the presence of a Magistrate

or a Gazetted Officer but, they declined the said offer and since D'Costa was a Gazetted Officer, the accused were informed that their search would be taken in the presence of P.W.4 D'Costa. He has also stated that during the personal search of the accused nothing incriminating was found. He further states that the Officers found a black colour air-bag under the bed and on opening the said bag the Officers recovered one packet wrapped in newspaper and inside the wrapping one transparent polythene bag was found. He states that the white powder in the bag was tested with the field testing kit and it tested as Heroin. The contents of the bag was weighed and it was found to weigh 1.160 kgs.. Two samples of which were drawn, packed and sealed. The samples were marked as S-1 and S-2. He has also stated that he was on duty that day from 9.00 a.m. to 6.00 p.m.. At about 12.00 to 12.30 p.m. he had checked in the accused. He states that accused no. 1 had given him an advance of Rs. 200/- and he had issued the receipt on the next day. The receipt is at Exhibit P.W.3/D. The xerox copy of the hotel register is at Exhibit P.W.3/C. He states that after payment he had allotted to the accused room no. 101 on the first floor.

11. In the cross-examination on behalf of accused no. 1, P.W.3 has admitted that he is working in the

said hotel for the last 16 years. He admits that in the register the last entry is dated 14th November 1998. He states that he had allotted room no. 101 to a single person and the other room no. 209 to two persons. He states that he had not given the xerox copy to the Customs Officers but the Proprietor had given the xerox copy to the Customs Officers. He states that on the next day the register had been seized. He admits that he has not signed on the register nor does the register bear the signatures of the panchas. He has admitted that his statement was recorded on 16th November 1998. He has also admitted that on the day his statement was recorded, he had not produced the original nor a xerox copy of the hotel register Exhibit P.W.3/C. He admitted that it was incorrectly recorded in his statement that he is producing a xerox copy of the old register. He has also stated that the panchanama was correctly recorded. He has admitted that it was not written in the panchanama that the bag was found under the cot. He also admitted that it is not mentioned in the panchanama as to who had exactly found the said bag. He admitted in the panchanama it is mentioned that the panchas were shown the warrant no. 3 of 1998, that is, P.W.3/A. He also admitted that in the panchanama it was mentioned that warrant no. 3, dated 11th November 1998 is mentioned at four different places. He has admitted in the cross-examination that no warrant other than the

warrant bearing no. 3 was shown to him. He has stated that while signing the panchanama and the search warrant, he had seen the number on the search warrant and had seen the number '3'. He has admitted that Exhibit P.W.3/A, the search warrant, is having number '4' and not number '3'. He has admitted that the discrepancy in the warrant number was brought to his notice two days before his deposition in the Court by the Customs Officials. He has admitted that before his deposition was recorded he was told by the Customs Officials that if he was questioned in the Court, he should say that it was warrant number 4 of 1998. He has also admitted that the person who found the bag was not known to him previously. He has clarified by saying that he had not been introduced to him.

12. This witness has given a very startling admission in the evidence that the panchanama Exhibit P.W.3/B was written on 12th December 1998. He has admitted that he has seen the bag under the bed for the first time at the time of raid. In response to the question, he has admitted that he could not tell to whom the said bag belonged but volunteered that the said bag was carried by accused no. 3 Mohammed Amar. In cross-examination on behalf of accused nos. 2 and 3, he has stated that he has not stated to the Customs Officials that the accused no. 3 was carrying the bag

during the checking in. He admitted in the cross-examination that there was an omission in his statement that two more persons were sitting on the bed when P.W.4 D'Costa entered the room.

13. A perusal of the panchanama Exhibit P.W.3/B reveals that there is a reference to search warrant no. 3, dated 11th November 1998 issued by the Assistant Commissioner of Customs and Excise. The reference to warrant no. 3 is to be found at four places in the said panchanama. In the entire panchanama there is no mention as to who had recovered the black colour bag and from where it was recovered. There is only a bald statement in the panchanama that the officers then commenced the search of the room and during the search the officers recovered a black colour air-bag. The panchanama Exhibit P.W.3/B is conspicuously silent about the place from where the bag was recovered and the person who had recovered the bag. P.W.5 Pandey, the person who had filed the complaint in the Special Court states that one Officer had found the bag on the table at the corner. In the complaint which was filed before the N.D.P.S. Court, Mapusa, and which was registered as Criminal Case No. 5 of 1989, in paragraph 14, there is no reference to the place where the bag was found and the person who had found the bag.

14. The trial Court had permitted the prosecution to place on record the letter of Superintendent of Customs, dated 11th November 1998 and the test memo with seals of the Customs which were marked as Exhibit P.W.1/C Colly. Though the prosecution claims to have seized 1.160 kgs. of white powder, only 10 gms. were sent for analysis. The balance quantity was deposited in the warehouse on the next day. P.W.4 D'Costa has stated that he had sent one Officer to carry the sealed packets to the Chemical Analyser and he had not personally gone. In response to the questions by the Court, he has stated that on the next day, that is, on 12th November 1998, at about 9.30 to 10.30 a.m. he had deposited the sealed packets at the warehouse at Panaji.

15. A perusal of the evidence of P.W.2 Fatima Noronha would show that on 12th November 1998 at 2.45 p.m. she had received four sealed packets from the Superintendent of Customs Shri D'Costa and, accordingly, had given an acknowledgement. The acknowledgement is at Exhibit P.W.2/B. P.W.2/B makes a reference of having received four sealed packets on 12th November 1998 at 2.45 p.m.. In the cross-examination Fatima Noronha has given a startling admission in which she states that the seals at Exhibit P.W.2/B had been put by P.W.4 D'Costa in her presence. She has also stated that if directions are issued by the Superintendent she keeps the godown

open even after 6.00 p.m.. She has admitted that there had been occasions when she had kept the godown open after the office hours. She has also stated that the seal affixed over P.W.2/B had not been deposited with her. According to D'Costa, he had not used the seal after he had sealed the narcotics. Apparently the seal was in the possession of D'Costa from the evening of 11th November 1998 till the afternoon of 12th November 1998. The sealed property was also in the possession of D'Costa from the time it was sealed till it was deposited in the warehouse. During that period also the seal was in his possession. Coupled with this D'Costa had given a vague answer that he had sent an officer to carry the samples. The carrier has not been examined. His name is not mentioned in any of the documents. P.W.4 D'Costa also does not know who that Officer is. Thus, the prosecution has failed to establish at the very threshold that the sample which was analysed by P.W.1 Kaissare was the sample which was seized by P.W.4 D'Costa. There is no satisfactory explanation as to how the sealed narcotic continued to remain in the possession of P.W.4 D'Costa from the evening of 11th November 1998 till the afternoon of 12th November 1998. There is no explanation as to why the said property was not immediately deposited in the warehouse, though P.W.2 Fatima Noronha has admitted that the godown is kept open on instructions of the Superintendent. In this case the

godown could have been kept open and the property could have been deposited alongwith the seal. There is no explanation as to why the property came to be deposited on the next day at 2.45 p.m.. Thus, the seized drugs and the seal continued to remain in the possession of P.W.4 D'Costa for more than 18 hours and for which there is no satisfactory explanation at all.

16. Mr. Solker, the learned counsel appearing on behalf of the appellants, has very rightly urged before me that the prosecution has suppressed warrant no. 3, which is said to have been issued by P.W.7 Monteiro. In the panchanama the search warrant is referred to as search warrant no. 3 of 1998. P.W.5 Pandey has himself scribed the panchanama. A very lame excuse is offered by P.W.5 Pandey that inadvertently instead of mentioning the search warrant as number 4 of 1998 it was mentioned as number 3 of 1998. The evidence of P.W.3, the panch witness, completely demolishes this version of P.W.5. The pancha has admitted that he had read the panchanama and he had read the warrant. There is absolutely no justification as to why the warrant no. 3 was not produced. The contention of the prosecution that warrant no. 3 relates to another case has not been substantiated by the prosecution at all. No efforts were made to call for the said warrant or a copy thereof from the file of the Court. These are all suspicious

circumstances which cast a doubt on the prosecution.

17. Apart from this, the fact that the bag was recovered from the room itself becomes doubtful. In the panchanama there was no mention about the person who had found the bag or the place from where the bag was found. P.W.6 Cruz states to have found and searched the bag. It is not corroborated either by the panchanama or by the evidence of P.W.3. In fact, P.W.3 states that he does not know the name of the Officer who had found the bag. This mystery deepens further in view of the prosecution evidence and the version of finding the bag is rendered highly doubtful in view of the deposition of P.W.3 that the panchanama was scribed on 12th November 1998 whereas the case of the prosecution is that the panchanama was scribed on 11th November 1998. There is, therefore, no convincing evidence to justify the conviction of the accused. The only piece of evidence is the confessional statements of the accused recorded under Section 57 of the Act. The confessional statements have been retracted by the accused and the recording of the confessional statements itself is doubtful. No efforts have been made by the prosecution to establish that the confessions had been voluntarily recorded after informing the accused of their rights. P.W.5 Pandey claims to have recorded the confessional statements in the presence of P.W.4 D'Costa and P.W.6

Cruz, neither P.W.4 nor P.W.6 depose about the recording of the statements. In any event, the confessional statements which have been retracted cannot be made the foundation for conviction. Apart from this, the prosecution at the very threshold has failed to prove in whose possession the said bag was. Though the room is alleged to have been booked by accused no. 1, accused nos. 2 and 3 were also found in the room. The prosecution has not been able to establish, in order to sustain the conviction of the three accused, that the bag was in the possession and belonged to either all the accused or to one of the accused. Thus, there is no convincing evidence to sustain the conviction of the appellants.

18. In the result the Criminal Appeal is allowed. The conviction and sentence passed against the appellants by the Special Judge, N.D.P.S. Court, Mapusa, dated 5th October 2000, in Special Criminal Case No. 5 of 1999, convicting the appellants for an offence punishable under Section 21 of the N.D.P.S. Act and sentencing the appellants to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1 lakh, in default to undergo simple imprisonment for one year, are, hereby, quashed and set aside and the appellants are acquitted of the aforesaid offence. The appellants be released forthwith, if not wanted in any

other case. Fine, if paid, be refunded to the appellants.

ed's.

(P.V. HARDAS)
JUDGE.