

## IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 658 of 2002

WITH

CRIMINAL APPEAL No. 1005 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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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, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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AMBALAL MADHAVLAL PATEL - Appellant

Versus

STATE OF GUJARAT - Opponent

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Appearance :

**CRIMINAL APPEAL No. 658 of 2002**

MR.SUBHASH G BAROT for Appellants.  
MR KT DAVE, A.P.P for Opponent.

**CRIMINAL APPEAL No.1005 of 2002**

MR KT DAVE, A.P.P for Appellant.  
MR.MUKESH VAIDHY with JR DAVE for Opponent.  
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CORAM : HONOURABLE MR.JUSTICE  
A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 30/11/2006

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K. A. PUJ)

1. Since both these appeals are filed against the same judgment and order dated 15.7.2002 passed by the learned Special Judge and Additional Sessions Judge, Panchmahal at Godhra in Sessions Case No.5 of 2002 (NDPS) and since both these appeals are heard together, the same are being disposed of by this common judgment.

2. Criminal Appeal No.658 of 2002 is filed by the appellants - original accused Nos.1 and 2, who are convicted under Section-8(c) read with Section-18 of the Narcotic Drugs Psychotropic Substance Act, 1985 (hereinafter referred to as 'the Act' and ordered to suffer R.I for a period of 10 years and fine of Rs.1 lac and default thereof to undergo R.I for 1 year to each one of these two appellants - original accused.
3. Criminal Appeal No.1005 of 2002 is filed by the State of Gujarat against the respondent - original accused No.3, who was acquitted from the charge of offence punishable under Section-8(c) read with Section-18 of the NDPS Act, by the very same judgment and order dated 15.7.2002.
4. The case of the prosecution as revealed in the complaint and as unfolded during the course of trial is briefly stated as under :-
5. It is the case of the prosecution that Mr.J.J.Desai,

Police Inspector of Halol Police Station lodged FIR against the present appellants in Criminal Appeal No.658 of 2002 and the respondent in Criminal Appeal No.1005 of 2002 for the offence punishable under Sections-8(c), 17, 18 and 49 of the Act. The FIR lodged by the first informant, Police Inspector of Halol Police Station is registered as III CR No.74 of 2002. The first informant has alleged that when the first informant and other staff members were on the night petrolling, the first informant received an information that three persons were coming on motor-cycle from the side of Kalol with opium and they would go towards Baska, from the by-pass situated after Navjeevan Hotel. The first informant has alleged that after receiving the said information, the first informant with other members of the staff and two panch witnesses blockade the place from where the appellants and other accused were going to pass as per the information received by the first informant. The first informant alleged that when the first informant with other staff members and panch witnesses was on the place of blockade, one motor-

cycle came from the side of Kalol and passed the Hotel Navjeevan and when the motor-cycle turned on the by-pass the first informant and the staff members of the first informant tried to intercept the motor-cycle but, motor-cyclist did not stop the motor-cycle and, therefore, the first informant and other staff members of the first informant chased the motor-cycle with the help of Jeep. The first informant has alleged that after few distance, the first informant and other staff members of the first informant caught the motor-cycle with three accused. The first informant has alleged that when he asked the name of driver of the motor-cycle in the presence of witnesses, the driver of motor-cycle gave his name as Ambalal Madhavlal Patel, resident of Derol Station. The first informant has alleged that the person who was sitting in between has named himself as Kishanlal Thakurmal Khatik, resident of Hotel Bhiravnath, Taluka - Kalol, and the person who was sitting at last named himself as Kishan Maginram Patel, resident of Rajasthan. The first informant has alleged that from the person, who was sitting

between two other persons, was having one plastic bag. The first informant has alleged that when the said plastic bag was opened in the presence of panch witnesses, there was another plastic bag and in the said another plastic bag, there was thick black liquid in one plastic bag. The first informant has alleged that after verifying the said thick black liquid, he came to know that it was opium. The first informant has further alleged that as he came to know that the thick black liquid is opium, he sent one Police Constable, namely, Manabhai Rupabhai for bringing a person who can weigh the opium. The first informant has alleged that the said Manabhai Rupabhai came with Jayantilal Viththaldas Mod, resident of Parshwanath Society with instrument of weighing. The first informant has alleged that the weight of the opium with plastic bag was 2kg. and 200 grams. The first informant has alleged that the price of the said opium can be computed at Rs.33,000/-. The first informant has alleged that he could not find anything from the person of another two persons after search. The first informant has

further alleged that the motor-cycle was of the Yamaha Company and of black colour. The back number plate of the motor cycle was having No.GJ-1-M-5266. The first informant has further alleged that the said three persons could not produce any pass/permit to keep opium in possessions and, therefore, he took 500 gram of opium in plastic bag for sample. The first informant has further alleged that after taking the sample and completing the requirement of sealing the sample and remaining opium, he seized the goods and motor-cycle. The first informant, Police Inspector thereafter lodged the FIR against all the three original accused for the offences punishable under Sections-8(c), 17, 18 and 49 of the Act.

6. Pursuant to the registration of the offence, the investigation was put into motion. During the course of investigation, statements of the witnesses were recorded, panchnama of scene of offence was prepared, muddamal articles were recovered by drawing panchnama which were sent to F.S.L. for

chemical analysis. After obtaining F.S.L. Report, since sufficient incriminating evidence was found against the accused, they were charge-sheeted in the Court of learned Special Judge and Additional Sessions Judge, Panchmahal at Godhra. The learned Additional Sessions Judge, Panchmahal at Godhra framed charge against the accused for commission of the offence punishable under Sections-8(c), 17, 18 and 49 of the Act.

7. The charge was read over and explained to the accused. As the accused have not pleaded guilty to the said charge, they were put to trial and tried by the learned Special Judge and Additional Sessions Judge, Panchmahal at Godhra in Sessions Case No. 5 of 2002 (NDPS Act).
8. To prove the culpability of the accused, prosecution has in all examined as many as 7 witnesses, details of which are as under :-



Sr. No.	Exh.	Description	Page No.
1	9	Deposition of P.W. No.1 Manabhai Rupabhai	89 to 106
2	10	Deposition of P.W. No.2 Jitendrakumar Maganlal Bhagt	107 to 114
3	12	Deposition of P.W. No.3 Manojkumar Kanaiyalal Soni	123 to 128
4	14	Deposition of P.W. No.4 Jayantilal Viththaldas	129 to 136
5	15	Deposition of P.W. No.5 Ramabhai Lakhabhai	137 to 140
6	16	Deposition of P.W. No.6 Chandrasinh Somsinh	141 to 158
7	24	Deposition of P.W. No.7 Jayraj Jivrajbhai Desai	189 to 198

9. Prosecution has also produced several documents and relied upon the contents of the same, details of which are as under :-

Sr. No.	Exh.	Type of Evidence	Page No.
1	1	Charge-sheet	27 to 30
2	4	Charge	31 to 36
3	11	Panchnama	115 to 122
4	17	Letter addressed to Police Officer	159 to 160
5	18	Letter addressed to FSL, Ahmedabad	161 to 164
6	19	Letter addressed to P.I. Halol	165 to 168
7	20	Letter addressed to P.I. Halol	169 to 172
8	21	FSL Report	173 to 184
9	22	Serological Report	185 to 188
10	25	Original Complaint	199 to 206

10. After recording of the evidence of the prosecution

witnesses was over, the learned Special and Additional Sessions Judge, Panchmahal at Godhra explained the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement, as required under Section 313 of the Code. In their further statement, the accused denied the case of the prosecution by reiterating that they have been falsely implicated.

11. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned Special Judge and Additional Sessions Judge, Panchmahal at Godhra has held that the prosecution has established beyond reasonable doubt that the charge levelled against the accused Nos. 1 & 2 was proved and, therefore, the accused Nos. 1 & 2 were held guilty of the offence punishable under Sections-8(c) read with Section 18 of the Act. The learned Special Judge and Additional Sessions Judge, Panchmahal at Godhra has, however, acquitted the accused No. 3 from the charge levelled

against him. Thereafter, the learned Special Judge and Additional Sessions Judge, Panchmahal at Godhra heard the accused and their advocate on sentence and looking to the gravity of the offence committed by the accused and looking to the circumstances, original accused Nos. 1 & 2 were sentenced to suffer rigorous imprisonment of 10 years and fine of Rs. 1 Lac and in default thereof, R.I of one year.

12.Mr. Subhash G. Barot, learned advocate appearing for the appellants - original accused Nos.1 and 2 in Criminal Appeal No.658 of 2002 has submitted that the learned Special Judge and Additional Sessions Judge, Panchmahal at Godhra has committed error apparent on the case of record by convicting the appellants - original accused Nos.1 and 2 for the offence punishable under Section-8(c) read with Section-18 of the Act. He has further submitted that the learned Judge has misdirected himself in appreciating the evidence placed on record. He has further submitted that the learned Judge has

recorded the findings which are not based on the evidences placed on record. The learned Judge should have appreciated the evidences and should have also held that the prosecution has failed to prove the offences alleged against the appellants beyond reasonable doubt and, therefore, the learned Judge ought to have acquitted the appellants. He has further submitted that the appellants were unknown about the incident as alleged in the FIR by the Police Inspector of Halol Police Station. The appellant No.2 has deposed in his statement under Section 313 of the Criminal Procedure Code that they are falsely implicated by the police and at night when the alleged incident took place, they went to see movie in the show of 9:00 to 12:00 p.m at Halol and when they were taking tea and snack at Navjeevan Hotel, they were arrested by the police. He has submitted that this aspect of false implication was not considered by the learned Judge while convicting the appellants. He has further submitted that the search as alleged in the FIR was search of person (body of a person) and when all the witnesses

have admitted in their respective evidence that the accused No.2 was holding plastic bag containing contraband goods in his hand and, therefore, the mandatory requirements of Section-50 of the Act was required to be followed by the first informant. The prosecution could not lead any evidence regarding the compliance of Section-50 of the Act during the trial though it was incumbent upon the prosecution to show compliance of mandatory Section-50 of the Act. On the contrary, the learned Judge has observed in para-25 of the judgment that there is no evidence regarding compliance of Section-50 of the NDPS Act. Since the detention and conviction of the appellants are in violation of mandatory requirements of Section-57 of the Act by which the officer who has arrested or seized the goods is duty bound to make a full report of all the particulars of such arrest or seizer to his immediate official superior within forty eight hours. Shri J. J. Desai, Police Inspector has made arrest and seizer but he has deposed in his cross-examination that he has not informed his official superior regarding the arrest of

accused and seizer of contraband articles. He has further submitted that the letters at Ex.17 and 18 were written by the ASI - Chandrasinh to the Dy. Superintendent of Police for requisite certificate and they were not written by the Police Inspector who has conducted the search and seizer of contraband articles. Mr.Barot has further submitted that there is violation of Section-52(i) by which legislature has caste duty upon the Investigating Officer to inform the grounds of arrest to the accused. There was no evidence on record that the Investigating Officer has informed the grounds of arrest to the accused person, which has caused prejudice to the accused in defence. He has further submitted that there is violation of Section-55 of the Act by which the SHO / Officer in Charge of NDPS Act has to affix his seal on the contraband goods and sample taken from the contraband goods. The search and seizer was made by the Police-Sub-Inspector, Halol but the seal of the Police Inspector Halol is used. Thus, the authenticity of the recovery of contraband goods from the accused are very much in doubt.

13.Mr. Barot has further submitted that no witnesses in their statements taken by the Police have deposed that the cloth was used at the time of sealing contraband goods, but in the chief before the learned Judge all the witnesses have stated that the cloth was used at the time of sealing the contraband goods. Thus, contradiction is very much apparent and that creates doubt about the authenticity of recovery of contraband goods. He has further submitted that there is infirmity in the investigation as after the arrest and seizer of goods by the Police Inspector, the further investigation was handed over to one Shri Chandrasinh Somsinh, who was discharging his duty as ASI in Halol Police Station and he was the party present at the time of search and seizer of the goods. This infirmity in the investigation has not been considered by the learned Judge. He has further submitted that no reliance can be placed on the evidence of panch witnesses as they are not independent witnesses. They deposed in their deposition that the police are calling them

many times as panch witnesses. The panch witness – Jitendrakumar Maganlal had deposed in cross-examination that in last one and half year, he has signed more than forty panchnamas. Thus, the panch witnesses are not independent witnesses and they were selected by the Police and signed the panchnama on dotted lines.

14.Mr. Barot has further submitted that as per the evidence of the first informant – Police Inspector, Halol, the seized goods were handed over to the PSO Halol Police Station, but no statement of PSO of the Halol Police Station was recorded nor he was examined as prosecution witness. The prosecution has not produced any evidence with regard to the entry of sample in custody register and, therefore, the version made by the first informant – Police Inspector, Halol is very much doubtful. Mr. Barot has further submitted that the prosecution has failed to lead any evidence regarding the receipt of any information from any unknown person to first informant as the first informant, Police Inspector,



Halol has not produced entry in daily diary to the effect that he has received information from any unknown person regarding commission of offence. He has further submitted that there is no wishper about at what time, the accused were arrested and contraband goods were seized in FIR. As per the Suchi Patra produced by the prosecution, the time of the commission of offence is shown at 4:00 p.m and time declaration of offence is shown as 4:30 p.m. The person who has weighed the contraband article was called at 2:15 p.m. Therefore, the time of commission of offence must be before 2:15 p.m. This aspect was not considered by the learned Judge.

15.Mr. Barot has further submitted that the prosecution has mainly relied upon the three police witnesses and person who has weighed the contraband. Both the panch witnesses were declared as hostile and their version was not relied upon by the learned Sessions Judge. Shri Jayantilal Viththaldas, who has weighed the contraband was not an independent witness to the search. The

evidence of the police is not considered to be the evidence of independent witnesses. When the requirements of Section-50 of the Act are not followed in search, the two independent witnesses have been declared hostile, then only after relying upon the police witnesses accused could not have been convicted. Mr.Barot has further submitted that there is contradiction in bringing empty tins from the Police Station to the place of offence. In deposition of ASI - Chandrasinh on one hand he has stated that after leaving the Police Station, PSI - Shri Desai had informed him regarding the information received from the unknown person and on the other hand in cross-examination he has stated that the empty tins in which they have seized the contraband goods were taken by them at the time of leaving the Police Station. Such contradiction has not been considered by the learned Judge. He has further submitted that the prosecution has failed to prove beyond reasonable doubt that the accused No.1 was in conscious possession of contraband goods.

16.Mr. Barot has lastly submitted that the sealing procedure is also defective and slip duly signed by the panchas as well as P.I were not affixed as required under law and in accordance with the judgment delivered by this Court.

17.In support of this last submission, Mr. Barot relied on the decision of this Court in the case of **Navinkumar @ Shambhuprasad @ Bapji Chimanlal Vyas V/s. State of Gujarat, 2006 (1) G.L.H. 409** wherein after considering earlier three decisions of this Court, namely, (1) Chandrakant Nagindas Modi V/s. State of Gujarat, 1989 (I) FAC 153, (2) unreported decision dated 17.08.2001 rendered in Criminal Appeal No. 323 of 1996 filed by Jitendra @ Sanjaykumar Suryakant Desai against State of Gujarat and (3) decision dated 07.05.2002 rendered in Criminal Appeal No. 287 of 1999 filed by Ganpatram Punmaram Vishnoi against State of Gujarat, the Court held that as per the law laid down by this Court, the slips bearing signatures of the

panch-witnesses should be affixed on samples and thereafter seals should be applied so that if any attempt is made to tamper with sample, the slips affixed would get torn. On re-appreciation of evidence, the Court was satisfied that correct and fool-proof procedure of sealing was not resorted to by the Investigating Officer and possibility of tampering with muddamals was not ruled out at all. The Court has evaluated such deficiency in light of other discrepancies brought on record of the case and held that it was difficult to sustain conviction of the appellant - accused. The appeal was accordingly allowed and the appellant - accused was ordered to be released from jail forthwith unless his presence in jail was needed with reference to any other case.

18.Mr. K. T. Dave, learned Additional Public Prosecutor appearing for State of Gujarat, on the other hand, supported the order and judgment of the learned Special Judge and Additional Sessions Judge, Panchmahal at Godhra and submitted that there was no violation of any statutory provision and all

necessary compliances were made by the raiding parties and/or investigating agency and there was no substance in the argument that the provisions contained in Sections-50, 55 and 57 of the Act were violated. So far as sealing procedure is concerned, he has submitted that the learned Special Judge and Additional Sessions Judge, Panchmahal at Godhra has discussed at length this issue in the impugned judgment and order and he has come to the right conclusion that there was no violation of the sealing procedure. He has also considered evidence led by the prosecution before him and after considering the same, he has correctly recorded the conviction of the accused Nos.1 and 2.

19.While arguing the appeal filed by the State of Gujarat against original accused No. 3, Mr. Dave has submitted that the learned Special Judge and Additional Sessions Judge, Panchmahal at Godhra has not properly appreciated the oral as well as documentary evidence in its true perspective. He has erred in coming to the conclusion that prosecution

has failed to prove the case against the accused No. 3. He has further erred in coming to the conclusion that the accused No. 3 was not found in conscious possession of the contraband article and, therefore, he was entitled to acquittal. He has further submitted that the accused No.3 was also travelling with the accused Nos.1 and 2 on one motor-cycle and, therefore, there was no reason to acquit the accused No.3 when the original accused Nos.1 and 2 were convicted and sentenced. He has, therefore, submitted that the acquittal order passed by the learned Judge deserves to be reversed and the accused No.3 is required to be convicted in the same manner as accused Nos.1 and 2 were convicted.

20.We have considered the submissions advanced by Mr. Subhash Barot, learned advocate appearing for the appellants – original accused Nos. 1 & 2 and Mr. K.T. Dave, learned Additional Public Prosecutor appearing for State of Gujarat at length. We have also considered the submissions made by Mr.Dave, in Criminal Appeal No.1005 of 2002 and Mr. Vaidya,

learned advocate appearing on behalf of Mr. J.R. Dave. We have also undertaken a complete and comprehensive exercise of appreciating all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. We have also gone through the entire testimonial collections. We have applied our mind to the impugned judgment and order passed by the learned Special Judge and Additional Sessions Judge, Panchmahal at Godhra convicting the accused Nos. 1 & 2 and acquitting the accused No. 3.

21. Though several contentions were raised before the Trial Court and before this Court, we confine ourselves to deal with the strong protest lodged against sealing procedure adopted by the prosecution as well as conscious possession of the contraband articles so far as accused No.1 is concerned. Even otherwise, we are not impressed by the other contentions raised by Mr. Barot. The main grievance was that the identity of the muddamal and

the samples sent to the F.S.L. is not established. There was a possibility of tampering with the contents of the samples. The samples were not kept in safe and proper custody and the sealing procedure was absolutely defective. There is contradiction in the evidence of the prosecution witnesses with regard to the sealing procedure and the possibility of tampering the contents of the sample cannot be ruled out.

22.To examine and appreciate this contention, relevant provisions in the Act or Rules made thereunder touching this subject matter are required to be looked into. Section 55 of the Act deals with Police to take charge of articles seized and delivered. It provides that Officer in charge of police station shall allow any officer depositing the seized articles to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station. Except this, no provision seems to have been made in the present Act and Rules framed



thereunder regarding mode of taking and sealing of the sample, mode of assigning the same to chemical examiner and their chemical examination or even touching the above matters. However, the Central Government issued Standing Instruction / Orders under Section 55 of the Act. Standing Order No. 1/88 dated 15.03.1988, Standing Order No. 2/88 dated 11.04.1988 and Standing Order No. 1/89 dated 13.06.1989 are required to be looked into. Standing Instruction 1/88 speaks about procedure regarding drawl, storage, testing and disposal of samples from seized narcotic drugs and psychotropic substances. Standing Order No. 2/88 deals with receipt, custody, storage and disposal of seized/confiscated narcotic drugs and psychotropic substances. Standing Order No. 1/89 relates to general procedure for sampling, storage etc. Standing Instruction / Order No. 1/88 inter alia provides as under:-

- (i) If the drugs seized are found in packages/containers, the same should be serially numbered for purpose of identification etc.

(ii) Samples must be drawn on the spot of recovery in duplicate, in the presence of search (panch) witnesses and the person from whose possession the drug is recovered.

(iii) The quantity to be drawn in each sample should be 5 gms in respect of all narcotic drugs and psychotropic substances except in the cases of opium, ganja and charas, hashish where a quantity of 24 gms in each case is required. The same quantity should be taken for the duplicate samples also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.

(iv) In the case of seizure of a single package/container one sample in duplicate is to be drawn. In case of seizure of more than one packages/container one sample in duplicate from each package/container should be drawn.

(v) All samples must be drawn and sealed in the presence of the accused, panchnama witnesses and seizing officer and all of them shall be required to put their signatures on each sample. The official seal of the seizing officer should also be affixed. If the person from whose possession the drugs have been recovered, wants to put his own seal on the sample, the same may be allowed on both the original and duplicate of each sample.

(vi) The sample in duplicate should be kept in heat sealed plastic bags. The plastic bags should be kept in a paper envelope and properly sealed. Such sealed envelope should be marked as original and duplicate.

(vii) The samples should be dispatched to the

respective laboratories under the cover of a Test Memo which shall be prepared in triplicate in proforma NCB-1.

23.Despite the aforesaid Standing Orders/Instructions, the proper procedures are not being followed by the Investigating Agency and cases have come up before the Court. In the case of **Chandrakant Nagindas Modi V/s. State of Gujarat, 1989 (I) FAC 153,** this Court has taken the view that the muddamal was not properly sealed and there was all possibility of substituting the substance. Coupled with this, the fact that the muddamal remained with the police for more than two months raises a doubt. The prosecution has, therefore, failed to establish the offence beyond reasonable doubt against the appellant. The Court further held that this aspect has escaped the notice of the Learned Trial Judge and in view thereof, the Court allowed the appeal and acquitted the appellants.

24.In **Criminal Appeal No. 323 of 1996, in the case of Jitendra @ Sanjaykumar Suryakant Desai V/s.**

**State of Gujarat** decided on 17.08.2001, the Court has taken the view that the contention regarding laxity in following the procedure relating to sealing of the seized contraband articles has some substance. After considering the evidence of the Investigating Officer and Panch witnesses, the Court has observed that after drawing the samples, at the time of sealing the samples as well as the remainder of the contraband seized, the slips containing signatures of the Panch witnesses and the Police Officer were placed inside the bags, thereafter the bags were stitched and wax seals were applied. There is no dispute that the Seal remains in custody of the police. The possibility of tampering with the muddamal at a later stage and then again resealing the same by the Investigating Agency cannot be ruled out. The very purpose behind carrying out the search, taking of sample and sealing in presence of Panch witnesses is to ensure that there is no scope for any mischief in procedure required to be followed. At the time of sealing, slips containing

signatures of Panch witnesses as well as the Investigating Officer are affixed on the articles seized and a seal is applied over it, so that, in case of any attempt for tampering with the article seized, the seal would be broken or the slip would be torn which would immediately reveal such an attempt. If the slip is put inside as was done in that case, the possibility of tampering cannot be ruled out. Under the circumstances, the Court held that the procedure followed for sealing in that case cannot be said to be proper and free from any possibility of tampering. The procedure, therefore, cannot be said to be beyond the scope of any reasonable doubt and in that event, benefit must go to the accused.

25. This Court has again considered this issue in **Criminal Appeal No. 287 of 1999 in the case of Ganpatram Punmaram Vishnoi V/s. State of Gujarat** decided on 07.05.2002. Additional Public Prosecutor, as an officer of the Court, has pointed out in the case that no proper sealing has been done

by the PSO and, therefore, possibility of tampering with the muddamal cannot be ruled out. The Court took the view in that case that the slip signed by the panchas as well as the PSO, which was kept along with the polyethylene bag is required to be affixed at the outer portion below the wax seal of the police station. If the police keeps the slip signed by the panchas and the PSO along with the sample muddamal and affix the seal of the police station at the outer portion of the bag, possibility of tampering the muddamal cannot be ruled out as the official seal always remains with the concerned police station. The Court, therefore, held that it is obligatory on the part of the police to see to it that the slip signed by the panchas as well as the concerned Officer is affixed at the outer portion of the sample bag below the official seal of the police station. This procedure will totally rule out the possibility of any tampering with the sample muddamal. This has not been done in that case and hence, the Court held that the procedure adopted by the PSO cannot be said to be free from

any doubt and the possibility of the tampering also cannot be ruled out. The Court held that in any case, the benefit must go to the accused.

26.All the aforesaid three judgments have been referred to and relied upon by this Court in its later decision in the case of Navinkumar @ Shambhuprasad @ Bapji Chimanlal Vyas V/s. State of Gujarat, 2006 (1) G.L.H. 409 and held that the slips bearing signatures of the panch-witnesses should be affixed on samples and thereafter seals should be applied so that if any attempt is made to tamper with sample, the slips affixed would get torn.

27.This very Bench has considered this issue regarding sealing procedure in Criminal Appeal No. 1366 of 1999 with Criminal Appeal No. 34 of 2000 decided on 21.09.2006, wherein all the previous judgments were referred to and relied upon and the appellant-accused was acquitted on the ground that the

sealing procedure was not properly followed by the prosecution.

28.If we consider the order as well as ratio of the above referred judgments of this Court, in light of the facts found from the deposition of the panch witnesses, police witnesses and FSL report as well as from the documents produced on record, we come to the conclusion that in the present case also proper procedure has not been followed by the prosecution. P.W. No.1 - Manabhai - Ex.9 in his deposition has stated that out of the contraband article, 500 gram opium was separately taken and it was kept in a steel tin and, thereafter, it was wrapped with cloth and on that steel tin slip duly signed by panch witnesses as well as by Mr.Desai was kept and tied with a cotton thread. On that slip a seal of PSI Halol was affixed. The remaining contraband article was kept in separate bag and that bag was kept in a steel tin and the same procedure was adopted with regard to that tin also. P.W. No.2 - Jitendrakumar Ex.10 is a



panch witness and he turned hostile. Panchnama at Ex.11 indicates that 500 gram of contraband articles were placed in plastic bag and it was tied with cotton thread. Thereafter, it was put into a steel tin and the remaining contraband articles were also placed in plastic bag and, thereafter, the same were put into a steel tin. On both these tins the slips duly signed by panch witnesses as well as PI, were affixed on each of these two tins. This panchnama is, however, not proved by the panch witnesses. P.W. No.3 - Manojkumar Soni Ex.12 is also panch witness and he turned hostile. P.W No.4 - Jayantilal Ex.14 is a person who weighed the muddamal article. He merely deposed that 500 gram of contraband articles were placed into a steel tin and it was sealed. No further description is given by him. Nor there is any reference with regard to the slip duly signed by the panch witnesses as well as Police Inspector. P.W. No.6 - Chandrasinh Ex.16 is ASI at Halol Police Station. He has deposed that 500 gram contraband articles were kept in plastic bag and the bag was kept in a steel tin. The steel tin was wrapped with

the cloth and on that tin the slip duly signed by panch and P.I was affixed. As against the evidence of these witnesses it is found from the FSL report that while opening parcel Mark-A slip was found from that parcel. Report does not refer to the fact that the slip was affixed on the steel tin. The slip was loosely kept in the tin and it was not affixed on the tin duly wrapped by the cloth. Thus, there is major contradiction in the FSL report as well as the prosecution witnesses.

29. Because of the material contradictions between the deposition of prosecution witnesses regarding the sealing procedure and FSL report this Court is of the view that there is possibility of tampering with the contents of the samples before they were sent to F.S.L. for analysis. When there is possibility of tampering with the contents of the samples, then no reliance can be placed on the expert opinion and the report of the F.S.L. and it cannot be said that the contraband articles were seized from the possession

of the accused and that the sample therefrom was taken and that the sample was sent for analysis and that the report of the expert is regarding the same. When it is so, then the report deserves to be discarded in toto.

30. Over and above this, there is another major infirmity in the prosecution case. The incident was taken place on 25.2.2002 whereas the samples were sent to Forensic Science Laboratory for chemical analysis on 2.4.2002 and it was received by Forensic Science Laboratory on 3.4.2002. This is made clear from the letter written by P.I Halol Police Station on 2.4.2002 to the Director, Forensic Science Laboratory, Ahmedabad. The same was acknowledged by the Forensic Science Laboratory vide its letter dated 3.4.2002 at Ex.19. No explanation has come forward with regard to this inordinate delay in sending the sample of contraband articles to Forensic Science Laboratory. This being very major infirmity in the prosecution case, the conviction based on the report of FSL cannot be

sustained.

31. In light of these discrepancies, it is very unsafe to sustain the conviction order. Both the accused are arrested on 25.2.2002 and since then they are in jail. More than four and half years have passed. It is very unfortunate that the appeal could not be heard earlier.

32. There is one more reason for reversing the conviction of accused No.1. Admittedly, nothing was found from the accused No.1. He was driving the vehicle. The learned Judge has presumed that the accused No.1 knew that the accused No. 2 was having contraband articles and on that ground he was convicted. This is not justified and contrary to the settled legal position.

33. In the case of **Sorabkhan Gandhkhan Pathan and another Vs. State of Gujarat, reported in (2004) 12 Supreme Court Cases 608**, it is held that no

material was produced to establish that the accused No.2 in that case has knowledge that accused No.1 was carrying contraband articles or was conniving with the said accused in carrying the contraband articles and hence conviction of accused No.2 in absence of any such material, only on the basis of his being in the auto rickshaw was not sustainable. Likewise, in the present case simply because the accused No.1 was driving the motor-cycle and it was night time and he did not stop the motor-cycle it could not be presumed that the accused No.1 was having the knowledge that the accused No.2 was carrying the contraband article or that he was conniving with the accused No.2 in carrying the contraband article.

34. In the case of **Narcotics Control Bureau, Jodhpur V/s. Murlidhar Soni and others, (2004) 5 S.C.C. 151**, the Hon'ble Supreme Court was concerned with a case where accused's father (since died) was carrying a cloth bundle containing contraband, and

the role of the accused was only to take his father on his scooter to the place where they were allegedly arrested. There was no evidence showing that accused had knowledge that the bundle contained any contraband articles. In absence of any material showing conscious possession of the contraband by the accused and the accused's father being dead, it was held that accused cannot be said to be in possession of any contraband articles and hence, his conviction under Section 21 was rightly set aside by the High Court. The Court was also in agreement with the finding of the High Court that the statements of the accused persons have been obtained by the Prosecuting Agency under duress. In the present case also, such statement of accused No. 1 was simply driving the motor-cycle, no evidence has come on record to show that the accused No.1 was having the knowledge that the accused No.2 was carrying contraband article with him. Even in the case of father and son, the Court has not presumed, in absence of any evidence, knowledge, the Court cannot presume as it was presumed by the learned

Sessions Judge in the present case.

35. In the case of **State of Punjab V/s. Balkar Singh and another, (2004) 3 S.C.C. 582,** the accused were alleged to have been found present at the place where about 100 bags of poppy were recovered. They were sitting on such bags and they have failed to give any satisfactory explanation for being present at that place. The Hon'ble Supreme Court in that case has considered the question as to whether mere presence of the accused is enough to take the view that the accused was in conscious possession of prohibited substance. The Hon'ble Supreme Court held that mere being found to be present at the place where the poppy husk bags were found and the failure to give any satisfactory explanation for being so present did not prove that the accused persons were in possession of the said poppy husk bags. Similarly, in the present case, simply because the accused No. 1 was driving the motor-cycle and simply because his name was found in the

information so received by the P.I., it cannot be proved beyond reasonable doubt that the accused No. 1 was aware about the fact that the accused No.2 was carrying Muddamal contraband articles with him and that he has abetted the accused No.2 in commission of the alleged offence.

36.The learned Judge has acquitted accused No.3 on the ground that he was not found to be in conscious possession of the contraband articles. The same reasoning is equally applicable to the accused No.1.

37.In peculiar facts of the present case and in light of the decisions referred to herein above and the principles laid down therein, this Court is of the view that the conviction order passed against the accused Nos. 1 & 2 cannot be sustained. The Appeal, therefore, succeeds. The order of the learned Special Judge and Additional Sessions Judge, Panchmahal at Godhra dated 15.7.2002 passed in Sessions Case No.5 of 2002 (NDPS) convicting accused Nos.1 and 2 for the offence punishable



under Section-8(c) read with Section-18 of the Act and sentencing them to rigorous imprisonment of 10 years and fine of Rs. 1 Lacs and in default thereof, R.I for one year for commission of such offence is hereby quashed and set aside. The appellants - original accused Nos. 1 & 2 are hereby acquitted from the charges levelled against them. The respondent - State of Gujarat and the jail authority is hereby directed to release the appellants - original accused Nos. 1 & 2 from jail forthwith unless their presence is required in connection with any other case. Amount of fine, if paid shall be refunded to them.

38.Criminal Appeal No.1005 of 2002 filed by the State of Gujarat against the original accused No.3 is hereby dismissed in view of the fact that no case was made out against any of the accused including the original accused Nos.1 and 2 due to the infirmities and defects found in the sealing procedure as a result of which possibility of tempering with samples could not be ruled out. This finding equally holds

good with regard to this appeal and hence, the appeal filed by the State of Gujarat against the order acquitting the accused No. 3 i.e. Kishan Magniram Patel is hereby dismissed. Bailable Warrant issued against him earlier stands cancelled.

(A. M. KAPADIA, J.)

(K. A. PUJ, J.)

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