IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 566 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA
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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MAQSOOD HARUN MALANI MEMON
Versus
STATE OF GUJARAT

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Appearance :
MR RR TRIVEDI for Appellant
MR BIPIN BHATT for Appellant
MS NANDINI JOSHI APP for Respondent

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA
and
HONOURABLE MR.JUSTICE K.A.PUJ

Date : 29/04/2006

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.R.VORA)

1. The instant appeal is preferred under Section 374(2) of the Code of Criminal Procedure, 1973 and is directed against the judgment and order dated 26.04.2000 delivered by the learned Additional Sessions Judge, Gondal in N.D.P.S. Sessions Case No.92 of 1999 whereby the present appellant came to be convicted for the offence punishable under Section 21 of the Narcotic Drugs Psychotropic Substances Act, 1985 and was sentenced to undergo rigorous imprisonment of ten years and to pay a fine of Rs.1,00,000/-, in default to undergo rigorous imprisonment of one year.

2. The facts leading to the prosecution against the appellant can be depicted shortly as under:

2.1 That the incident occurred on 17.06.1999. On that day, the Police Inspector Shri Vijaybhai Jivaji Medant was in-charge of Dhoraji City Police Station, as regular Police Inspector was on leave. On that day, at

0.05 hours along with P.S.I. Shri P. D. Jadeja, Head Constable Shri Danubha, Police Constable Shri Gajrajsinh, Police Constable Shri Dharmendrasinh, Police Constable Salim and Police Constable Shri Rupendrasinh were on night round in the city of Dhoraji. When they reached near vegetable market, a person halted the jeep of the police in which they were travelling. P.I. Shri Vijaybhai Jivaji Medant exited from the jeep and the said person informed P.I. Shri Vijaybhai Jivaji Medant that a person named Maksud Harunbhai Malani (Appellant) was selling narcotics near Panchpir Dargah. Shri Vijaybhai Jivaji Medant further informed by the said person that Maksud Harunbhai Malani had two teeth of upper jaw and three teeth of lower jaw were of gold. Therefore, to arrange the raid Shri Vijaybhai Jivaji Medant sent police constable Shri Rupendrasinh to call for two panchas. On reaching panchas near vegetable market, panchas were sounded about the raid to be carried out and both the panchas named as [1] Shri Bhupatbhai Bachubhai Hirpara Patel and [2] Shri Anilkumar Indulal Hirani expressed willingness to be panch witnesses. Thereafter, the panchas searched police party and they were also searched by the police, but nothing objectionable was found. A preliminary panchnama to this effect was prepared from 00.30 hours to 00.45 hours. The panchnama was

signed by both the panchas and was also signed by the Police Inspector Shri Medant. In the meanwhile, before starting for Panchpir Dargah, Shri Vijaybhai Jivaji Medant informed Deputy Superintendent of Police, at Jetpur. Thereafter, all the police personnel as well as two panchas reached near Panchpir Dargah and kept police jeep at little distance. When police party along with panchas reached near the place of incident, the appellant stood up and, therefore, he was surrounded by the police. When his name was asked, he stated that his name was Maksud Harunbhai Malani, resident of Jetpur. Shri Vijaybhai Jivaji Medant offered his identification to the appellant and further informed the appellant that they had information that the appellant was selling narcotic drugs and, therefore, the appellant was required to be searched. The appellant was further informed by P.I. Shri Vijaybhai Jivaji Medant that if the appellant wished, he might be searched in presence of any other gazetted officer or Magistrate. The appellant was sounded in this respect, orally as well as in writing by a memo. The appellant did not choose his option to be searched in presence of any other gazetted officer. In the said memo, the appellant as well as two panchas signed. Thereafter, person of the appellant was searched by Shri Vijaybhai Jivaji Medant and from the right pocket of his pant, one white big packet was found and in that big

packet, there were 42 small plastic bags. In presence of panchas, when the appellant was inquired by Shri Vijaybhai Jivaji Medant in respect of these 42 plastic bags, he replied that those bags contained brown-sugar. Therefore, again Shri Rupendrasinh, police constable was sent to call for a goldsmith to weigh the substance found. After sometime, Shri Rupendrasinh along with one goldsmith Vinodkumar Tribhovandas Davada came at the spot. Shri Vinodkumar Tribhovandas Davada was made aware of the situation and he was requested to weigh the substance found from the person of the appellant. On weighing the substance by Shri Vinodkumar Tribhovandas Davada, it was found that brown-sugar containing of 42 small bags were weighing about 3.50 gram, in all. Thereafter, Shri Vinodkumar Tribhovandas Davada was instructed by Shri Vijaybhai Jivaji Medant to equally divide the substance in two samples. Thereafter, after dividing as aforesaid, both the divided quantity of substance was weighed and each divided part of the substance weighed about 1.25 gram. Both these samples were wrapped in a paper and were put in plastic bags separately. The said plastic bag, thereafter, was put in a cloth bag. Thereafter, the said two cloth bags containing two samples as above said were sealed vide seal of Police Inspector, Dhoraji. A slip containing signatures of both the panchas was also affixed in the

said samples. These two samples were seized. In addition to this, on search of person of the appellant from the left side shirt pocket, an amount of Rs.2,895/- was found. That also was seized and was put in an envelope. A list of articles seized was prepared and was given to the appellant. The said list was signed by panchas and the appellant also signed that list of seizure. A panchnama was drawn in second part in this respect and was signed by two panchas as well as P.I. Shri Vijaybhai Jivaji Medant. Thereafter, the police party and the appellant came to Police Station with muddamal seized from the appellant. There P.I. Shri Vijaybhai Jivaji Medant gave a complaint against the appellant along with muddamal seizure memo to concerned P.S.O. Shri Vikramsinh Govubha Zala. Shri Vikramsinh Govubha Zala, the then P.S.O. received the complaint as aforesaid along with forwarding letter, muddamal and other papers. He registered the complaint and the crime against the appellant. Thereafter through radio message superior officers were informed and copy of the F.I.R. under Section 154 of the Code of Criminal Procedure was forwarded to the Judicial Magistrate (First Class). Investigation was handed over to P.I. Shri Vijaybhai Jivaji Medant. The relatives of the appellant were informed about the arrest of the appellant in this crime registered. The muddamal in question was

handed over to Shri Ramjibhai Kanjibhai, Writer Constable by P.S.O. which he kept in treasury cupboard in lock and key in the crime branch. On 17.06.1999 at 16.00 hours, Shri Ramjibhai Khanabhai, police constable handed over the said muddamal to police constable Shri Dhanjibhai Unjabhai for taking away the said muddamal to F.S.L. At Junagadh. Two samples containing muddamal were given Mark A-1 and A-2. The police constable Shri Dhanjibhai Unjabhai took away the muddamal Mark A-1 on the same day at Junagadh F.S.L. Through L.C.B. Rajkot, but when he reached at Rajkot at 1.30 hours, L.C.B., Rajkot office was closed and hence, on that day, police constable Shri Dhanjibhai Unjabhai returned to Dhoraji and handed over the muddamal in the same condition to constable Shri Ramjibhai Khanabhai to keep it in a safe custody in crime branch. On next day on 18.06.1999, the said muddamal was again handed over to police constable Shri Dhanjibhai Unjabhai who in turn went to L.C.B. Rajkot to handover this muddamal to the F.S.L. Junagadh for necessary analysis of the substance found from the appellant. Necessary entries were made in muddamal register in this respect. During investigation, it was found that other three accused were also involved in brown-sugar dealing. They were arrested in the course of investigation. The progress of the investigation was intimated

by I.O. to his superior officer. Thereafter, the investigation was taken over by Shri Chandubhai Rupaji Kotak on 21.06.1999 and he submitted charge-sheet in all against the four accused including the present appellant for the offences punishable under Sections 8(c), 21 and 29 of the Narcotic Drugs Psychotropic Substances Act, 1985. Ultimately on receiving the charge-sheet, the said case was registered as N.D.P.S. Case No.92/1999 in the Court of Additional Sessions Judge at Gondal, District: Rajkot.

2.2 The charge against all the four accused came to be framed by the learned Additional Sessions Judge at Gondal, District: Rajkot on 25.11.1999 vide Ex.11 for the offences punishable as aforesaid. The charge was denied by all the accused including the present appellant and hence, all the four accused were tried by learned Additional Sessions Judge, Gondal at District: Rajkot.

3. To prove the case, the prosecution examined fourteen witnesses.

P.W.1	Bhupatbhai Bachubhai	Ex.19
P.W.2	Anilbhai Indubhai Hirani	Ex.20
P.W.3	Kishor Babubhai	Ex.24
P.W.4	Kishankumar Kishorchandra Shukla	Ex.26
P.W.5	Vinodkumar Tribhovandas Davada	Ex.28

P.W.6	Ramesh Budhram Patel	Ex.30
P.W.7	Head Constable Danubha Nathubha	Ex.37
P.W.8	P.S.I. Prabhatsinh Velubha Jadeja	Ex.38
P.W.9	Writer Crime Police Constable, Ramjibhai Khanabhai	Ex.49
P.W.10	P.C. Dhanjibhai Unjabhai Solanki	Ex.51
P.W.11	A.S.I. Vikramsinh Govubhai Zala	Ex.54
P.W.12	P.C. Rupendrasinh Karansinh Jadeja	Ex.59
P.W.13	P.I. Vijaybhai Jivaji Medant, Complainant and first I.O.	Ex.60
P.W.14	P.I. Chandubhai Rupaji Kotak	Ex.76

5. In addition to this, the prosecution also produced documentary evidence like panchnama of seizure of brown-sugar from the appellant at Ex.21, intimation given to the appellant under Section 50 of Narcotic Drugs Psychotropic Substances Act, 1985 at Ex.22, list of item seized from the appellant at Ex.23, receipt given by witness Shri Vinodkumar Tribhovandas Davada, goldsmith at Ex.29, muddamal register entries at Ex.50, forwarding letters to F.S.L. at Ex.52 and 53, entry in station diary registering crime at Ex.56, arrest memo at Ex.61, complaint filed by P.I.

Shri Medant at Ex.62, intimation to relatives of appellant, progress report intimated by P.I. to D.S.P. at Ex.65, opinion of F.S.L. at Ex.80, letter receiving muddamal by F.S.L. at Ex.79 and copies of the station diary entry as to registration of crime at Ex.55 and 56.

6. Having heard both the sides, learned Additional Sessions Judge, at Gondal, District: Rajkot, after considering the evidence on record, acquitted accused No.2, 3 and 4 from the charges levelled against them, while appellant being accused No.1 was found guilty, as aforesaid and hence this appeal.

7. As being the first Appellate Court, it becomes the duty of this Court to re-appreciate the evidence with reference to the contentions raised, but before re-appreciating the evidence, it is necessary to mention brief summary of the evidence recorded before the trial Court.

8. It appears that the witnesses examined before the trial Court may be divided into two groups. In one group independent witnesses be included while in second group police witnesses be included.

9. In group of independent witnesses, so far as the appellant is concerned, three witnesses are examined by the prosecution and they are P.W.1, Bhupatbhai Bachubhai, Ex.19 and P.W.2 Anilbhai Indubhai Hirani, Ex.20, both panchas of panchnama at Ex.21 by which the police seized the muddamal of brown-sugar from the appellant. Third independent witness is P.W.5 Vinodkumar Tribhovandas Davada, Ex.28, a goldsmith was called at the place of incident for weighing the substance recovered from the appellant. All the three above witnesses have turned hostile and have not supported the prosecution case.

10. Therefore, the case rests on the evidence of police witnesses forming the other group of witnesses. Out of witnesses examined, P.W.7 - Head Constable Danubha Nathubha, Ex.37, P.W.8 – P.S.I. Prabhatsinh Velubha Jadeja, Ex.38, P.W.12 - P.C. Rupendrasinh Karansinh Jadeja, Ex.59, P.W.13 - P.I. Vijaybhai Jivaji Medant, Ex.60 are the members of raiding party who actually raided near Panchpir Dargah and found brown-sugar from the person of the appellant. As per the prosecution case, while, P.W.9 - Ramjibhai Khanabhai, Ex.49 is a crime constable to whom muddamal was entrusted by P.W.11 - Vikramsinh Govubhai Zala, the then P.S.O. of the Dholaji City Police

Station for keeping muddamal in safe custody. P.W.11 - Vikramsinh Govubhai Zala recorded the complaint and registered the crime. While P.W.10 - Dhanjibhai Unjabhai Solanki, police constable is examined for the purpose that he obtained muddamal from P.W.9 - Ramjibhai Khanabhai for onward transmission to F.S.L. at Junagadh.

11. Having regard to the evidence of P.W.7 - Danubha Nathubha, P.W.12 - Rupendrasinh Karansinh Jadeja and P.W.13 - Vijaybhai Jivaji Medant, it appears that their evidence is similar and corroborating each other. It is necessary therefore to look at the evidence of Shri Vijaybhai Medant, P.I., and chief of raiding police party. Shri Vijaybhai Jivaji Medant in his deposition stated that he received information, while police party was in night patrolling. On receiving information, panchas were called and preliminary panchnama, the first part was prepared. The superior office i.e. Deputy Superintendent of Police was informed by him and police party reached in police vehicle near Panchpir Dargah and found the appellant there by them. Before searching, the appellant he was informed that the appellant could exercise his right to be searched in presence of any gazetted officer or Magistrate though raiding officer himself was gazetted officer. In the evidence of the complainant, it is

further stated by him that the appellant did not opt to exercise his right to be searched in presence of some other gazetted officer. The appellant was also informed about his right in writing and that he produced said writing at Ex.22. He further stated that on searching the person of the appellant from right hand pocket of the pant, one white bag was found which contained 42 small bags of plastic. On inquiring, the appellant stated that all the 42 small bags contained brown-sugar and, therefore, goldsmith was called for and the prosecution witness Vinodkumar Tribhovandas Davada being goldsmith weighed brown-sugar and found that substance was weighing 3.50 gram. This substance was divided in two parts equally and were seized and sealed in one cloth bag by seal of P.I. Dhoraji City Police Station placing slip signed by two panchas on such two samples of muddamal, then the samples were described at A-1 and A-2. The complainant - Vijaybhai Jivaji Medant further stated in his deposition that after sealing muddamal, a seizure memo was prepared and handed over to the appellant, who signed such seizure memo which he produced at Ex.23. The goldsmith - Vinodkumar Tribhovandas Davada gave receipt for weighing muddamal which he produced at Ex.29. The complainant - Vijaybhai Jivaji Medant identified muddamal in his deposition to be the same seized from the appellant. He further stated that

thereafter appellant – accused was brought to the Police Station and he gave complaint in respect of the incident to P.S.O. Shri Vikramsinh Govubha Zala P.S.O. registered the crime along with the complaint. He also handed over seizure memo, panchnama and muddamal to P.S.O. Shri Vikramsinh Govubha Zala vide Ex.64, which is a copy of wireless message informed superior officers about the incident and thereafter vide Ex.65 a letter, the District Superintendent of Police was also informed about the progress of the investigation.

12. All these four witnesses i.e. P.W. 7, P.W. 8, P.W. 12 and P.W. 13, who were members of the raiding party are extensively cross-examined by the learned advocate for the appellant. P.W. 13 - P.S.O. Vijaybhai Jivaji Medant, in his cross-examination, stated that he investigated the crime under Section 42 of the Narcotic Drugs Psychotropic Substances Act, 1985. He did not record the information he received. He informed Deputy Superintendent of Police orally and this fact was not recorded anywhere. On the date of incident, he reached at Vegetable Market Police Chowki at about 0.10 hours. He explained that he did not record information he received because if such information was recorded at Police Station, it was inevitable that the same would have taken some

time and during that period the accused might have absconded. He stated that he could not give any reasons for not recording the information received. His attention was drawn to panchnama at Ex.21 where space had been kept blank for the time of arrest of the appellant. He admitted that the time of presenting the complaint in the police station was not mentioned in Ex.62 complaint. He admitted that in Ex.29 a receipt given by the goldsmith, no time was mentioned. He stated that in the complaint at Ex.62 exact timing of when they went on night round and when they reached at Vegetable Market Police Chowki are not mentioned. He also stated that he did not mention time when the information received and when preliminary panchnama was drawn in Ex.62 complaint. He admitted that all the procedure of raid till sending muddamal to F.S.L. was performed by him. He stated that he could say from his memory that on muddamal bag two or three seals were impressed. He could not say how may seals in each sample were impressed. He denied that in his complaint he stated different methods of sealing the muddamal than mentioned in panchnama. He denied that after recording of the complaint, he got up panchnama thereafter. He denied that he fabricated the papers afterwards and, therefore, he did not mention time in investigation papers. In para-11, he had been asked about of Section 103

of Code of Criminal Procedure. He further stated in this paragraph that he could not remember that after returning to Police Station, whether he presented any other documents along with F.I.R., panchnama and seizure memo. He stated that mudammal seal remains in custody of Writer Head. At the time of incident the seal was in his custody and was kept in police vehicle in one box. After seal was used, it was kept in jeep. In para-12, he stated that wireless message at Ex.64 was sent by one P.S.I. Jadeja and he sent wireless message as per his instruction. He admitted that in Ex.65 a letter addressed to the Deputy Superintendent of Police by him about the progress of the investigation, he did not mention time. He stated that he could not say that when Judicial Magistrate (First Class) received the copy of F.I.R. He produced that copy on record at Ex.75. In para-13, he stated that panchas were called by Rupendrasinh, as per his instruction. He did not instruct Rupendrasinh that what type of panchas were to be called. He did not instruct Rupendrasinh that panchas were to be called for from nearby area. He did not record any statements of person residing near the place of incident. He recorded the statement of Jarinaben, the mother of the appellant. He could not say whether Jarinaben has shown as witness in the charge-sheet. In para-14 he is contradicted about the statement he made in chief that informant halted the jeep, he exited from

the jeep and informant gave him information. He admitted that he did not state those sentences in the complaint, but stated that informant gave information. He admitted that in the complaint the names of the panchas were not mentioned. In the complaint he also did not state that police personnel searched panchas vice-a-versa also. The panchas were also searched the police and nothing was found. In para-14, a contradiction in the evidence of Rupendrasinh was proved. In para-15, he denied that in investigating papers he kept blank of time with mala fide intention. He denied that he did not prepare panchnama at the scene of offence. He denied the fact that the appellant was not arrested at the place of incident with muddamal. He denied the fact that the appellant was resident of Jetpur and doing business in clothes. He denied that the appellant, in fact, had been to Dhoraji for his business and after watching movie was returning to Jetpur, and at that time, he was apprehended near bus-stand. He denied that nothing was found from the possession of the appellant and he had been falsely involved in this offence. He denied the fact that the amount which was recovered from the person of the appellant was amount of his business. This is all the evidence of P.W. 13 – Vijaybhai Jivaji Medant.

13. Likewise, other witnesses of the raiding party P.W.7, P.W.8 and P.W.10 are also extensively cross-examined. Nothing could be brought about by the defence in cross-examination of these four witnesses to raise doubt and disbelieve their version.

14. P.W.9 - Ramjibhai Khanabhai stated in his deposition that on 17.06.1999 he was on duty at Dhoraji City Police Station, as Crime Writer Police Constable. At that time A.S.I. Vikramsinh Govubha Zala was in-charge as P.S.O. in Police Station. The Prohibition C.R. No.5056/1999 was registered and muddamal of that crime registered, in two cloth bags as marked as sample A-1 and A-2 was handed over to him to keep in safe custody in crime branch in lock and key. On 17.06.1999 at 16.00 hours, he entrusted A-1 sample of muddamal to police constable Dhanjibhai Unjabhai for onward transmission to F.S.L. Junagadh. He stated that he entrusted such muddamal A-1 to police constable Dhanjibhai Unjabhai in the same condition he received. On 17.06.1999 at 21.30 hours, Dhanjibhai Unjabhai entrusted muddamal again to him to keep in safe custody because he could not reach F.S.L. Junagadh. Again on 18.06.1999 at 9.16 hours, he entrusted muddamal A-1 to constable Dhanjibhai Unjabhai for taking muddamal through L.C.B. Rajkot to

F.S.L.. The muddamal was entrusted second time to Dhanjibhai Unjabhai in same condition. He produced entries in crime branch register at Ex.50 which denotes entrusting the muddamal to Dhanjibhai Unjabhai on 17.06.1999 and 18.06.1999. The witness is extensively cross-examined and he admitted that in entries No.22 to 29 the numbers of the entries were modified. In Entry No.30, after erasing the same, 31 number was written. On the same way buckle number of the constable there were erosions. He further stated in his cross-examination that on that day he was in-charge crime writer as crime writer head constable was on leave. He stated that seal of the Police Station and all other necessary material for sealing remains in custody of writer of P.I. On that day, writer of P.I. Ganeshbhai Kanjibhai, who was having seal etc. was on leave. No register in this respect is kept. He stated that whatever muddamal produced before the Police Station was registered in the register and muddamal pavati was prepared and that register was known as muddamal pavati register. He denied that in muddamal register got up entries have been entered in respect of sending muddamal to F.S.L. as well as of receiving back the said muddamal from F.S.L. This is all he stated in his cross-examination.

Learned APP then re-examined this witness and in his re-examination he stated that entries No.22 to 30 in muddamal register which were modified and such modification was done by him. He explained that he committed a mistake in giving serial numbers and, therefore, he corrected serial numbers by such modification. There was no cross-examination by defence on this re-examination of the witness

15. P.W.10 – Dhanjibhai Unjabhai Solanki, Ex.51 stated in his deposition that on 17.06.1999 the muddamal packet of C.R.No.5056/1999 being sample A-1 in sealed condition was obtained by him from police constable Ramjibhai. He went to L.C.B. Rajkot, but at that time, L.C.B. Office was closed and, therefore, he returned to Junagadh and entrusted the said muddamal to Ramjibhai to keep it in safe custody. On 18.06.1999 again he obtained the said muddamal packet from constable Ramjibhai in sealed condition and through L.C.B. Rajkot, he entrusted the said sample of muddamal to F.S.L. Junagadh. He obtained receipt from F.S.L. He identified his signature in entries No.29 and 30 of muddamal register and also identified to be the same muddamal before the Court. The letter of F.S.L. and receipt were produced by him at Ex.52 and 53. In his cross-examination he stated that

at 16.15 hours, on 17.06.1999, he received muddamal packet along with one letter. He could not say that the letter was addressed to whom. He could not also say that whether letter was hand written and in hand written then in whose handwriting the letter was. The said letter was in envelope in sealed cover. He delivered the said letter to L.C.B. Office along with muddamal packet. Through L.C.B., Rajkot Rural, the said letter was handed over to F.S.L., Junagadh and, therefore, he returned and entrusted the muddamal to writer constable Ramjibhai and on second day, through L.C.B., he entrusted the muddamal and letter to F.S.L. He stated that when L.C.B. Office entrusted him a letter to be delivered to F.S.L., he subscribed his signature in relevant register. He denied that he deposed falsely to help the prosecution case. This is all the evidence of P.W. 10.

16. P.W.11 – Vikramsinh Govubha Zala, Ex.54 stated, in his deposition, that on 16.06.1999 from 20.00 hours to 17.08.1999 till 8.00 hours, he was in-charge P.S.O. of Dhoraji City Police Station. In the meantime, P.I. Vijaybhai Jivaji Medant came to the Police Station and presented one complaint along with forwarding letter for registering a crime. He registered a crime accordingly and informed the concerned

officers by radio message. The complaint in the form of Code of Criminal Procedure was forwarded to the Judicial Magistrate (First Class) and the investigation of the said crime was entrusted to P.I. Medant vide Ex.55. He noted this fact in station diary which he produced at Ex.56. He further stated that along with the complaint, muddamal in sealed condition was presented before him which he entrusted to Ramjibhai to keep it in safe custody. He further stated that thereafter, investigating officer of the crime informed relatives of the appellant about the arrest of the appellant. In this respect, he made entries in police station diary, which he produced at Ex.57. In his examination-in-cross by the learned advocate for the appellant, he stated that P.I. Medant recorded the complaint in Police Station. He dictated the complaint to writer constable Dharmendrasinh and accordingly Dharmendrasinh wrote the complaint. He might have taken about half an hour in recording the complaint P.I. reached at Police Station at about 2.00 a.m. When P.I. reached the Police Station, muddamal was with him. He denied the fact that to reach Police Station from the place of Panchpir Dargah to the Police Station it took about 30 to 45 minutes. He stated that it might be taken ten minutes. After recording the complaint, same was presented before him at 2.30 a.m. He admitted that in forwarding letter of

complaint at Ex.55, no time or days were mentioned. He stated that in the complaint he did not mention time when he received the said complaint. He stated that except the complaint and muddamal, no other papers were presented before him by P.I. He denied the fact that the muddamal was kept by him in his safe custody. He was confronted by his police statement about the safe keeping of muddamal in his safe custody. He further stated in his cross-examination that P.I. Medant informed the relatives of the appellant about the arrest of the appellant. He denied that he stated falsely that at 2.00 a.m., P.I. presented before him the complaint, muddamal and accused. He denied the allegations that entry of the station diary was got up afterwards by him at the instance of P.I. Medant. He denied the fact that the time of recording of registering the crime was mentioned afterwards. This is all the relevant evidence of the prosecution.

17. This Court has undertaken a complete and comprehensive appreciation of all vital feature of the case and the entire evidence on record with reference to the broad and reasonable probabilities of the case and the contentions raised by both the sides.

18. Learned advocate Mr.Bipin J. Bhatt for the appellant and learned APP Ms.Nandini Joshi for the respondent – State of Guajarat were heard extensively for almost three-four days.

19. Before each contention raised is dealt with hereinafter, the evidence as narrated briefly above is required to be appreciated on cardinal principles of appreciation of evidence. It must be borne in mind that the appreciation of evidence is a matter where the Court is required to exercise due diligence and the standard of such exercise would be of an exercise by prudent person. Therefore, in order to appreciate the evidence on record, especially in criminal trials, the Court must bear in mind the setup and the circumstances in which the crime is committed, the quality of evidence, nature and temperament of the witnesses, the level of understanding and power of perception of individual witness and probability in ordinary course of nature about the occurring of the incident as might have been witnessed by the witnesses. It must be endeavour on the part of the Court to find out the truth from the evidence recorded. It must also be borne in mind that there cannot be a prosecution case with a cast-iron perfection in all respects and it is obligatory for the

Courts to analyse, sift and assess the evidence on record, with particular reference to its trustworthiness and truthfulness, by a process of dispassionate judicial scrutiny adopting an objective and reasonable appreciation of the same, without being obsessed by an air of total suspicion of the case of the prosecution. What is to be insisted upon is not implicit proof. It has often been said that evidence of interested witnesses should be scrutinized more carefully to find out whether it has a ring of truth and if found acceptable and seems to inspire confidence, too, in the mind of the Court, the same cannot be discarded totally merely on account of certain variations on infirmities pointed or even additions and embellishments noticed, unless they are of such nature as to undermine the substratum of the evidence and found to be tainted to the core. Further if any discrepancies found in the ocular account of the witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. The corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by

reason thereof should not render the evidence of eye-witnesses unbelievable. Trivial discrepancies ought not to obliterate otherwise acceptable evidence. The approach of the Court must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of error committed by the witnesses would not ordinarily permit rejection of the evidence as a whole. If the Court before whom, the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weighty and formidable, it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ

in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. It is impossible to find out a cast-iron case of prosecution, because the normal course of the human conduct would be that while narrating a particular incident there may occur minor discrepancies, such discrepancies in law may render credential to the deposition because parrot like statement is disfavoured by Courts in order to ascertain as to whether the discrepancies pointed out was minor or not or same amounted to contradiction, regard must be had to the circumstances of the case by keeping in view the attending circumstances of the case.

20. The evidence recorded, therefore, particularly evidence of witnesses, P.W.7 – Danubhai Nathubha, P.C., P.W.8 – Prabhatsinh Velubha Jadeja, P.S.I. and member of raiding party, P.W.12 – Rupendrasinh Karansinh Jadeja, Police Constable and member of raiding party and P.W.13 – Vijaybhai Jivaji Medant, Circle Police Inspector has been re-appreciated dispassionately and it is found that the evidence of these four witnesses is unblemished, without any taint, simple and natural and without any infirmity or a major contradiction. We have carefully gone to the cross-examinations conducted by learned advocate for the

appellant of these four witnesses and we found that all these four witnesses have withstood searching, scorching and lengthy cross-examinations. Nothing could be brought about during the course of cross-examinations of these four witnesses as to how the truthfulness of these four witnesses suffered from spots of doubt. Ordinarily when a witness deposes on oath, unless by other circumstances and on account of infirmity and deficiencies elicited in examination-in-cross of such witness, the evidence of such witnesses must be accepted. All the four witnesses are Police Officers and nothing could be brought about by the defence in the cross-examinations that why the officers of police department right from Circle Inspector to Police Constables were after this particular appellant to plant brown-sugar and to frame a concocted case. Necessary it is to note here that neither any suggestion in this respect could have been asked to the witnesses nor anything is stated by the appellant in his further statement recorded under Section 313 that the officers of the raiding party were adverse against him on account of an animosity or other circumstances that it was there sole purpose to see that the appellant was framed up in planted case of narcotic drugs and psychotropic substances. On the contrary, in the further statement, it is the defence of the appellant after totally denying the evidence of the

prosecution that on the date of the incident, he had been to Dhoraji from Jetpur on account of his business of cloth selling. He had been to purchase cloth and, thereafter, he watched a movie in blue-star cinema from 6.00 p.m. to 9.00 p.m. After watching movie, he wanted to go to Jetpur and when he reached bus-stand, he was apprehended by the police and Rs.2,895/- which was kept by him purchasing cloth were seized by the police. As aforesaid, when the evidence of above four witnesses is re-appreciated the defence set out is lame and far from probability. To probabilise this defence, nothing is brought on record by the defence as to why a concocted case was got up against the appellant. The above four witnesses of raiding party are amply corroborated by contemporary documentary evidence like panchnama Ex.21, seizure memo Ex.23 which is signed by the appellant, though he denied to have signed any documents, copies of police station diary Ex.56 and 57, arrest memo Ex.61 and information given to the relatives of the appellant, complaint Ex.62 which is fully corroborated by P.W.13 – Vijaybhai Jivaji Medant, wireless message Ex.64 and other documents. It is not understood that why and how all these documents could have been got up by the prosecution witnesses to the extent of forgery as the appellant has refused that he had not signed any of the document to implicate the appellant

only in this case.

21. It must be noted that a criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. The Court should not at the same time reject the evidence which is *ex facie* trustworthy on the grounds which are fanciful or in the nature of conjectures. The hyper-technicalities or figment of imagination should not be allowed to divest the Court of its responsibility of sifting and weighing the evidence to arrive at the conclusion regarding the existence or otherwise of a particular circumstance keeping in view the peculiar facts of each case. The realities of life have to be kept in mind while appreciating the evidence for arriving at the truth. The Courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favour of the accused. The traditional dogmatic hyper technical approach has to be replaced by a rational,

realistic and genuine approach for administering justice in a criminal trial. Criminal jurisprudence cannot be considered to be a utopian thought, but have to be considered as part and parcel of the human civilization and the realities of life.

22. Therefore, we cannot accept that these officers who have deposed against the appellant dreamed on one fine day for no reason or no purpose to frame such type of a case against the appellant. All yardsticks available in law, when applied to appreciate the evidence of these witnesses and as to the defence, as well, these four witnesses appear clean in litmus test of judicial scrutiny. True it is that it is always for the prosecution to prove the case beyond any reasonable doubt. But at the same time, the evidence of witnesses will have to be examined for its intrinsic worth and unless, there are sound reasons that the evidence of witness who deposes on oath is tainted by falsehood which could be ascertain from cross-examination and attending circumstances of the case, rejection of such evidence would be against basic principles of criminal jurisdiction. There are no reasons at all nor could be shown by the defence that why the prosecution witnesses while discharging their duties as police officers and finds a crime, should not be believed when

their evidence is free from any doubt. We are unable, therefore, to reject worthy evidence of those police officers, because this would amount to doing injustice to criminal justice system of the country.

23. Likewise other witnesses out of which one is Police Sub-Inspector Vikramsinh Govubha Zala Ex.54 deposes about recording of the complaint and handing over the muddamal to P.W.9 – Ramjibhai Khanabhai for keeping in safe custody. In his support, Vikramsinh Govubha Zala has produced on record station diary entries about registration of crime as well as arrest of the appellant and intimation to the relatives of the appellant about of his arrest. The sequence starting from registering the offence to hading over the investigation to P.W. 13 – Vijaybhai Jivaji Medant, by this witness is amply and without any doubt proved. He has been cross-examined at length, but nothing could be brought about. Again, mere allegations that the station diary also were got up has no merit at all. The station diaries are public record and required to be kept and maintained as per the law and in pursuance of discharge of duties of responsible law enforcement authorities. It would not be suffice to merely allege that these entries are got up only to frame up the present appellant. Unless something serious appears from the facts

and records of the case and unless, it is shown by the defence through credible materials, the worthiness and truthfulness of this document and the fact of discharging of duty of the officers maintaining such documents must not be doubted. We find nothing in the record to discard this worthy evidence of P.W.11 – Vikramsinh Govubha Zala which is heavily corroborated by contemporary document prepared in discharge of duties.

24. Likewise, the witness P.W.9 - Ramjibhai Khanabhai, Ex.49 and P.W.10 - Dhanjibhai Unjabhai Solanki, Ex.51 establishes that muddamal sample marked A-1 as was sealed during the incident was kept in safe custody of crime branch and was safely reached to F.S.L. at Junagadh. Even there is no room for slightest doubt that during this procedure seal or muddamal could have been tampered with. When we appreciate the sequence and thread of the prosecution case right from sealing till muddamal reached to the F.S.L., we do not find any flaw in the sequence. The events have taken place in its natural course and the seal which was put on muddamal samples marked A-1 has been found intact F.S.L. which is evident by Ex.80 a letter addressed to P.I., L.C.B., Rajkot Rural by Scientific Officer. It is mentioned in the letter that on 18.06.1999 one

sealed cloth parcel marked A-1 seal as P.I. Dhoraji City (in English) seals were intact and correct, as per the spacimen copy of seal impression forwarded. It leaves no room of doubt that at any time till the mudammal reached to F.S.L., there were probabilities of tampering with the muddamal. The muddamal was forwarded to the F.S.L. on the very next day. Nothing could be shown by the defence in the cross-examination of these two witnesses to raise even pin head sized doubt in this respect. Therefore, the evidence of these two witnesses as well as evidence of P.W.11 – Vikramsinh Govubha Zala is worthy of acceptance as there is no iota of any reason as to reject this evidence. Thus, appreciating of evidence of these seven witnesses of police, we come to the conclusion that the defence was not able to make any dent in the prosecution case. However, the contention raised on behalf of the appellant shall be dealt with extensively as under:

24.1 The first contention which learned advocate Mr.Bipin J. Bhatt for the appellant raised was in respect of police witnesses whose evidence cannot be accepted as these witnesses do not find any corroboration from independent witnesses. It is submitted that three independent witnesses i.e. two panchas and a goldsmith was called to weigh brown-sugar have

not supported the prosecution case. Our attention was drawn to the evidence of prosecution witness No.8 - Prabhatsinh Velubha Jadeja, a member of raiding party wherein he stated that when the raid was conducted, the same was thoroughfare and people were coming and going down there. It is submitted that therefore, though independent witnesses were available, they were not examined by the prosecution intentionally and the case which hinges only the police witnesses cannot be believed because there are contradiction and the evidence of police witnesses. As against that learned APP Ms.Nandini Joshi for the respondent – State of Gujarat submitted that it is not necessary in all cases to examine independent witnesses and that there is no rule of law that the police witnesses always required corroboration from the independent witnesses. Only because panchas and goldsmith have not supported the prosecution case, the evidence of police witnesses otherwise is found credible, cannot be thrown overboard on the ground that firstly, no independent witnesses have supported the prosecution case and secondly, that though independent witnesses were available, they were not examined by the prosecution case.

25. Considering the rival contentions, it appears that a bare reading of

the evidence of two panch witnesses makes it clear that they are liars. Not only that but the goldsmith who is proved by the documentary evidence as well as evidence of police witnesses that he was called, is also a liar. Merely because, these three witnesses have not supported the prosecution case that by itself cannot be treated as ground to disbelieve the evidence of the police officers which is otherwise as discussed above is found to be trustworthy and reliable. In the matter of **Aher Raja Khima Vs. State of Saurashtra**, as reported in **AIR 1956 S.C. 217**, the Apex Court observed that the presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not a judicial approach to distrust and suspect him without good grounds therefor. What is laid down for the guidance of the Courts is that the attitude to distrust and suspect a police officer without good grounds, therefore, could do neither credit to the magistracy, nor good to the public and it can only run down the prestige of the police administration. Reading the evidence of police officers who are examined in the case, we are of the firm opinion that the prosecution case cannot be disbelieved merely because the so-called independent witnesses have not supported the prosecution case. We further find that the evidence of police officers

gets corroboration from the documentary evidence which are official documents. It is wrong to say that the evidence of police officers without corroboration cannot be accepted and that merely because of the panch witnesses do not support the case of the prosecution, the case of the prosecution need not to be thrown overboard as unreliable. It must be realized that the phenomenon of panch witnesses turning hostile to the prosecution is not unknown and is ever on the increase. It is also worth noticing that the recent trend of the Apex Court is to sound a note to the judiciary of this country not to allow liar witnesses to go scot free. It needs hardly to be emphasized that a decision of a case does not depend solely on the question whether the panch witnesses supported the prosecution or turn their back on it. If the decisions of the case were to depend solely on the testimony of the panch witnesses regardless of the evidence, available on record, it would be giving right of veto to the panch witnesses so far as the question of culpability of an accused is concerned. In the present case, the evidence of police officers are found unblemished and credit-worthy as aforesaid and, therefore, the judicial pragmatism requires that merely because panchas do not support the prosecution case, the same should not be made a ground to discard the credible and weighty evidence of the police officers. There are no

contradictions in their evidence. Minor variations pointed out by the defence in the evidence would lend credence to the credit-worthyness of the witnesses.

25.1 In the matter of **Karamjit Singh Vs. State (Delhi Administration)**, as reported in **(2003) 5 SCC 291**, in para-8 the Apex Court observed that the testimony of police personnel should be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. The presumption that a person acts honestly applies as much in favour of a police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good grounds. In the said case, it was observed that it was noteworthy that during the course of the cross-examination of the witness the defence did not even give any suggestion as to why they were falsely deposing against the appellant. There was absolutely no material or evidence on record to show that the prosecution witnesses had any reason to falsely implicate the appellant who was none else but a colleague of theirs being a member of the same police force. Thus, it is made clear by the Apex Court again that unless good grounds are made

out as to the false implication, it is not permissible that the credit worthy evidence of police officers should be discarded merely because such evidence not corroborated by independent witnesses.

25.2 Again in the matter of **Praveen Kumar Vs. State of Karnataka**, as reported in **(2003) 12 S.C.C. 199**, in para-21 the Apex Court observed that normally, in cases where the evidence led by the prosecution as to a fact depends solely on the police witnesses, the courts seek corroboration as a matter of caution and not as a matter of rule. Thus, it is only a rule of prudence which makes the court to seek corroboration from an independent source, in such cases while assessing the evidence of the police. But in cases where the court is satisfied that the evidence of the police can be independently relied upon then in such cases there is no prohibition in law that the same cannot be accepted without independent corroboration. Having regard to this observation of the Apex Court, it is clear that in view of what is discussed above in the present case no such corroboration is required to police witnesses. Likewise, in the matter of **Abdul Majid Abdul Hak Ansari Vs. State of Gujarat**, as reported in **(2003) 10 S.C.C. 198**, the Apex Court did not accept the argument that

the prosecution did not examine any independent witnesses and the prosecution case since was based on the evidence of police witness only, therefore, it was not safe to rely on such evidence to convict the accused under the N.D.P.S. Act. Explaining need to examine independent witnesses, in the matter, of **State of H.P. Vs. Gian Chand**, as reported in **(2001) 6 S.C.C. 71**, the Apex Court observed in para-14 that non-examination of a material witness is again not a mathematical formula for discarding the weight of the testimony available on record howsoever natural, trustworthy and convincing it may be. Examining independent material prosecution witness should be considered in the background of facts and circumstances of each case so as to find whether witnesses were available for being examined in the Court and were yet withheld by the prosecution. The Apex Court further observed in the said case that the court has first to assess the trustworthiness of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on then the testimony has to be accepted and acted upon though there may be other witnesses available who could also have been examined but were not examined. Thus, in the present case, the contentions of learned advocate for the appellant that place of incident is

of thoroughfare and independent witnesses were available and not examined by the prosecution and in consequences the prosecution case fails, has no merit at all. Likewise, in the matter of **Takhaji Hiraji Vs. Thakore Kubersing Chamansing and others**, as reported in **(2001) 6 S.C.C. 145**, in para-19 the Apex Court observed that if overwhelming evidence is available, examination of other witnesses would only be a repetition and none such non-examination would affect the prosecution case, In important decision of Hon'ble three Judges of the Apex Court in the matter of **P.P.Beeran Vs. State of Kerala**, as reported in **(2001) 9 S.C.C. 571**, in para-3 the Apex Court observed that Sub-Inspector of police searching the appellant – accused and finding him in possession of opium and when his evidence is found creditable, such evidence of Sub-Inspector, even if not corroborated by any other nonetheless can be made the sole basis for conviction.

25.3 Therefore, thus, from the above discussion, it is clear that the evidence of police officers is found credible and it requires no corroboration at all. There is no merits, therefore, in the contention that because case hinges upon only police witness and since no independent

witness is examined or supported, the prosecution case should not be believed.

26. The next contention which was urged by the learned advocate for the appellant is in respect of the contradiction in evidence of the prosecution witnesses No.7, 8, 12 and 13 about receiving information by P.W.13 C.P.I. Shri Medant. It is stated that each of these four witnesses have deposed in different manner as to how the information was received. It is, therefore, stated that this is material contradiction and the prosecution case should not be believed having considered this contradiction. While learned APP Ms.Nandini Joshi stated that an information was received by P.W.13 Shri Medant and he has sufficiently deposed in this regard and, therefore, small variation by other witnesses in respect of how P.W. 13 Shri Medant received information cannot affect the prosecution case.

26.1 Evaluating this contention, it is clear that what is material is that P.W. 13 Shri Medant received information and he was prompted by this information to detect crime. Shri Medant has stated in his deposition that he received an information, while he was in night petrolling that the appellant was selling brown-sugar and a description of the appellant was

also available to him. This evidence of P.W. 13 – Shri Medant could not be shaken by the defence and has to be accepted. While other witnesses P.W.7, P.W.8 and P.W.12 might have expressed this fact in their own language and in their expression which could not be taken to be a contradiction affecting the core of prosecution case. In fact, all the witnesses i.e. P.W.7, P.W.8 and P.W. 12 unanimously stated before the Court that Shri Medant received an information. Therefore, what is material is receiving information by P.I. Shri Medant and not how he received information. Little variation on the part of P.W.7, P.W.8 and P.W.12 about how P.W.13 received an information is not even contradiction let alone material contradiction so as to create doubt in the evidence of the prosecution witnesses.

27. The next contention raised by the learned advocate for the appellant was in respect of Section 50 of the N.D.P.S. Act. It was contended that panchnama Ex.21 cannot be believed because it has not been supported by the panchas and goldsmith and further in the said panchnama, in last para of panchnama, a gape is left blank in place of time to be mentioned about the arrest of the appellant. It is further stated that in Ex.22 which is written intimation given by P.W. 13 to the

appellant about search before any other gazetted officers does not mention time and, therefore, document Ex.22 cannot be believed. It is contended that in view of this document, the evidence of P.W.13 about compliance of Section 50 of the N.D.P.S. Act cannot be accepted. It is contended that therefore, there is a breach of non-compliance of Section 50 of the N.D.P.S. Act entitling the accused – appellant to be acquitted. Attention of the Court was drawn by the learned advocate for the appellant to the depositions of P.W.7 and P.W.8 and it was contended that P.W.7 stated in his deposition that P.I. Shri Medant first apprehended the appellant and he was searched and from his pocket of the pant, a packet of brown-sugar was found and, thereafter, he was made aware by Shri Mendant about his right to be searched before other gazetted officers. Likewise, P.W.8 Prabhatsinh at Ex.38 also stated that P.I. Shri Medant first apprehended the appellant searched him and a bag of brown-sugar was found from his pant pocket and, thereafter, Shri Medant sounded the appellant that though he himself is a gazetted officer, but the appellant could exercise his option to be searched in presence of any other gazetted officers. It was, therefore, contended that there is a clear breach of Section 50 of the N.D.P.S. Act. As against that learned APP Ms. Nandini Joshi submitted that firstly, it is not required by law that

written intimation Ex.22 requires a time to be mentioned in this document. It was contended that in this respect the evidence of P.W.12 Rupendra and P.W.13 – C.P.I. Shri Medant who conducted the search is beyond any blemish. It was contended that both these witnesses established that first on apprehending the appellant, he was given an option to exercise his right to be searched in presence of another gazetted officer. It was contended that the say of these two witnesses is corroborated by panchnama Ex.21, written intimation Ex.22 and complaint filed by Shri Mendant and, therefore, variation made by P.W.7 and P.W.8, if at all, has no effect on prosecution case.

28. Evaluating this contention raised by both the sides, it is necessary to know the principles of law and object behind enacting Section 50 of the N.D.P.S. Act. In the matter of **Krishna Kanwar (SMT) alias Thakuraeen Vs. State of Rajasthan**, as reported in **(2004) 2 S.C.C. 608**, in this respect the Apex Court observed as under in paras – 21, 22 and 23.

> **"21.** It is not disputed that there is no specific form prescribed or intended for conveying the information required to be given under Section 50. What is

necessary is that the accused (suspect) should be made aware of the existence of his right to be searched in presence of one of the officers named in the Section itself. Since no specific mode or manner is prescribed or intended, the Court has to see the substance and not the form of intimation. Whether the requirements of Section 50 have been met is a question which is to be decided on the facts of each case and there cannot be any sweeping generalization and/or strait-jacket formula.

"8. The very question that is referred to us came to be considered by a Bench of two learned Judges on 22-1-1996 in Manohar Lal v. State of Rajasthan. One of us (Verma,J.), speaking for the Bench, held:

"It is clear from Section 50 of the NDPS Act that the option given thereby to the accused is only to choose whether he would like to be searched by the officer making the search or in the presence of the nearest available gazetted officer or the nearest available Magistrate. The choice of the nearest gazetted officer

or the nearest Magistrate has to be exercised by the officer making the search and not by the accused."

9. We concur with the view taken in Manohar Lal's case.

10. Finding a person to be in possession of articles which are illicit under the provisions of the Act has the consequence of requiring him to prove that he was not in contravention of its provisions and it renders him liable to severe punishment. It is, therefore, that the Act affords the person to be searched a safeguard. He may require the search to be conducted in the presence of a senior officer. The senior officer may be a gazetted officer or a Magistrate, depending upon who is conveniently available.

11. The option under Section 50 of the Act, as it plainly reads, is only of being searched in the presence of such senior officer. There is no further option of being searched in the presence of either a gazetted officer or of being searched in the presence of a Magistrate. The use of the word 'nearest' in

Section 50 is relevant. The search has to be conducted at the earliest and, once the person to be searched opts to be searched in the presence of such senior officer, it is for the police officer who is to conduct the search to conduct it in the presence of whoever is the most conveniently available, gazetted officer or a Magistrate."

23. As has been highlighted in Baldev Singh case it has to be seen and gauged whether the requirements of Section 50 have been met. Section 50 in reality provides for additional safeguards which are not specifically provided by the statue. The stress is on the adoption of a reasonable, fair and just procedure. No specific words are necessary to be used to convey existence of the right."

29. Now appreciating the contention in light of the above observation, it is clear that what is stated by P.W.7 and P.W.8 in respect of search first conducted before informing to the appellant about his right to be searched by some other gazetted officers, it appears that the evidence of these two

witnesses is not in contradiction of what is stated by P.W.12 and P.W.13. Perhaps an attempt is made to read evidence of P.W.7 and P.W.8 in this respect that both of them have reversed sequence as stated by P.W.13 – Shri Medant, but on plain reading, it is found that it is not stated by these two witnesses in clear terms that in sequence first the search was made and, thereafter, Section 50 was complied. Only that the witnesses stated first compliance of Section 50 then deposed that the appellant was also searched. This is so because when it appears from plain reading of deposition of these two witnesses that no sequence is reversed, it was the duty of the defence to get the explanation from such witnesses and no such explanation is sought by the defence in the cross-examination from P.W.7 and P.W.8. It must be noted that in system of recording of the evidence, the witnesses reply to questions put by learned APP in chief-examination. If learned APP put question of search first and then compliance of Section 50 then witnesses likely to depose in that manner and perhaps, this is happened in this case. But in any case that sequence could not be made out from the deposition of P.W.7 and P.W.8 as suggested by the learned advocate for the appellant. On the contrary, it is amply proved by the evidence of P.W.12 and P.W.13 that on apprehending the appellant, he was made aware about his right to be

searched in presence of any other gazetted officers. All this procedure was conducted by P.W.13. He deposed in his evidence that he first informed about the appellant, his right to search before any other gazetted officers and then he was searched by him. This deposition of P.W.13 cannot be shaken by the defence. Further, evidence of P.W.13 is amply corroborated by panchnama Ex.21 and written intimation at Ex.22 only because a time of delivering an intimation to the appellant is not noted, it cannot be said that the written intimation Ex.22 is a got up document. Ex.22 is signed by the accused. Though it is denied by the appellant that Ex.22 is signed by the appellant. In these circumstances, it is far fetched inference to draw that these police officers just to involve the appellant in this crime for no reason also fabricated the signature of the appellant. There is no iota of doubt that the compliance of Section 50 is amply proved by the evidence of P.W.7, P.W.8, P.W.12 and P.W.13 and documentary evidence of panchnama Ex.21 and written intimation Ex.22, the accused was made aware of his right in natural and real manner by P.W.13. There is no reason to doubt this evidence. In the result, the contention raised by the learned advocate for the appellant is without any merits.

30. The next contention which learned advocate for the appellant raised, is in respect of non-compliance by the Investigating Agency of Section 42 of the N.D.P.S. Act. It is contended that it is an admitted fact that the information received by P.W.13 was not reduced in writing and was not forwarded to the superior officer. It was contended that secondly breach is committed of mandatory provisions of Section 42 of the N.D.P.S. Act and the accused is entitled to acquittal in this respect. Learned advocate for the appellant relied upon the decision of the Apex Court in the matter of **Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat**, as reported in **(2000) 2 S.C.C. 513**, wherein on the facts of the case, the Apex Court in paras-14 and 15 held that there was a breach of Section 42 and that case did not fall under Section 43 and the accused was entitled to acquittal. Reliance is also placed on unreported decision of the Division Bench of this Court in Criminal Appeal No.1280/1999 decided on 9th March, 2006 stating that the facts of the present case are similar to the facts of the case in Criminal Appeal No.1280/1999 wherein the accused – appellant came to be acquitted. It is contended that in Criminal Appeal No.1280/1999 of this Court, the Division Bench observed that there was a breach of Section 42. It was contended that P.I.

Shri Medant P.W.13 admitted in his cross-examination that he was acting under Section 42 of the N.D.P.S. Act. As against that learned APP stated that the facts in the case of Abdul Rashid Ibrahim Mansuri (supra) and the facts of Criminal Appeal No.1280/1999 and the facts of the present case are all different. It is contended that this is a case wherein the search is made of the person in public place and not vehicle like rickshaw as the search was made in Abdul Rashid Ibrahim Mansuri (supra) and, therefore, the present set of facts are not governed by Section 42 of the N.D.P.S. Act and that it was not necessary for P.W.13 to comply the provisions of Section 42 in the present case. It was further contended by her that even otherwise, P.W.13 was admittedly, gazetted officer as envisaged by Section 41 of the N.D.P.S. Act and, therefore also, he was not required to comply with Section 42 of the N.D.P.S. Act. Learned APP has relied upon certain decisions which will be referred hereinunder:

30.1 Evaluating and considering this contention, it is beyond reasonable doubt on admitted fact that the appellant searched in person in public place. There is no doubt in this respect. In sum and substance, the question falls for our consideration is whether it was necessary for P.W.13 to comply with the provisions of Section 42 of the N.D.P.S. Act,

when evidence admittedly shows that the appellant was found in possession of brown-sugar while he was on public road.

30.2 In the matter of **Aslam Ibrahim Memon & Anr. Vs. State of Gujarat**, as reported in **1990 Criminal Law Journal 1787**, the Division Bench of this Court dealt with this question specifically and held that whenever any search or seizure is to be made in any public place or in a vehicle in transit or any person is to be arrested or detained from a public place, it is not intended by the legislature to take down the said information in writing. What is ruled therein is that it is important to know that wordings of Sections 41 and 42 with regard to information taken in writing have been deliberately omitted by the legislature in Section 43 of the N.D.P.S. Act and that has been done advisedly inasmuch as the police officer may get information about the person in public place at the last moment and if he has to undergo the procedure of taking it in writing and recording the reasons for his belief, possibly such information may not be useful. It was ruled clearly in this decision that Section 43 speaks about the search and seizure from public place or in transit and as the wordings of Sections 41 and 42 with regard to information taken in writing have been deliberately omitted by the

legislature in Section 43. It is clear from this decision that when search and seizure is made in public place, it is not necessary to comply with the provisions of Section 42. In another decision of the Division Bench of this Court, in the matter of **Ravishankar Bhagwatiprasad Mishra Vs. State of Gujarat**, as reported in **2000 (1) GLR 137**, the same view is taken. While in the matter of Abdul Rashid Ibrahim Mansuri (supra), the observations made by the Apex Court in paras-14 and 15 cannot be treated as a binding precedent in this case, as the question which is posed for our consideration in this appeal, was never canvassed before the Supreme Court in the said matter nor the Supreme Court had addressed itself to the said question. That was a case wherein a contraband article was found in a vehicle i.e. Rickshaw and, therefore, the observations made in Abdul Rashid Ibrahim Mansuri (supra) will have no application to the facts of this case. This issue is further made clear by the Apex Court in a decision in the matter of **Krishna Kanwar (SMT) alias Thakuraeen Vs. State of Rajasthan**, as reported in **(2004) 2 S.C.C. 608.** It is made clear in para-15 by the Apex Court that Section 42 deals with search of "building, conveyance or enclosed place" whereas Section 43 deals with power of seizure and arrest in public place. Thus, when seizure

and arrest is made in public place, the case falls within the four corners of Section 43 where the mandatory requirement of Section 42 are not required to be complied with.

31. Above all it is necessary to note here that searching officer i.e. P.W.13 was admittedly a gazetted officer within the meaning of Section 41 of the N.D.P.S. Act. It is necessary, therefore, to refer to a decision of the Apex Court in the matter of **M. Prabhulal Vs. Assistant Director, Directorte of Revenue Intelligence**, as reported in **(2003) 8 S.C.C. 449**, wherein clear terms the Apex Court decided that when search and seizure etc. is conducted by gazetted officer under Section 41(2) and (3) and Section 42(2) has no application at all. In para-14 of the said decision, the Apex Court has observed as under:

> **14.** Section 41(1) which empowers a Magistrate to issue warrant for arrest of any person whom he has reason to believe to have committed any offence punishable under the NDPS Act or for search, has not much relevance for the purpose of considering the contention. Under Section 41(2) only a Gazetted Officer can be empowered by the Central Government or the State Government. Such empowered

officer can either himself make an arrest or conduct a search or authorize an officer subordinate to him to do so but that subordinate officer has to be superior in rank to a peon, a sepoy or a constable. Sub-section (3) of Section 41 vests all the powers of an officer acting under section 42 on three types of officers (i) to whom a warrant under sub-section (1) is addressed, (ii) the officer who authorized the arrest or search under sub-section (2) of Section 41, and (iii) the officer who is so authorized under sub-section (2) of Section 41. Therefore, an empowered Gazetted Officer has also all the powers of Section 42 including the power of seizure. Section 42 provides for procedure and power of entry, search, seizure and arrest without warrant or authorization. An empowered officer has the power of entry into and search of any building, conveyance or place, break open any door, remove obstruction, seize contraband, detain, search and arrest any person between sunrise and sunset in terms provide in sub-section (1) of Section 42. In case of an emergent situation, these powers can also be exercise even between sunset and sunrise without obtaining a search

warrant or authorization, in terms provided in the proviso to sub-section (1) of Section 42. Sub-Section (2) of Section 42 is a mandatory provision. In terms of this provision a copy of information taken down in writing under sub-section (1) or ground recorded for the belief under the proviso thereto, is required to be sent by the officer to his immediate superior official. It is clear from Section 41(2) that the Central Government or State Government, as the case may be, can only empower an officer of a gazetted rank who can either himself act or authorize his subordinate on the terms stated in the section. Under sub-section (1) of Section 42, however, there is no restriction on the Central a Government or the State Government to empower only a Gazetted Officer. But on an officer empowered under sub-section (1) of Section 42, there are additional checks and balances as provided in the proviso and also provided in sub-section (2) of Section 42. It is clear from the language of sub-section (2) of Section 42 that it applies to an officer contemplated by sub-section (1) thereof and not to a Gazetted Officer contemplated by sub-section (2) of Section 41, when such a

Gazetted Officer himself makes an arrest or conducts search and seizure. It would be useful to also notice Section 43 which relates to power of seizure and arrest in a public place. Any officer of any of the departments mentioned in Section 42 is empowered to seize contraband etc. and detain and search a person in any public place or in transit on existence of ingredient stated in Section 42. It can, thus, be seen that Sections 42 and 43 do not require an officer to be a Gazetted Officer whereas Section 41(2) requires an officer to be so. A Gazetted Officer has been differently dealt with and more trust has been reposed in him can also be seen from Section 50 of the NDPS Act which gives a right to a person about to be searched to ask for being searched in the presence of a Gazetted Officer. The High Court is, thus, right in coming to the conclusion that since the Gazetted Officer himself conducted the search, arrested the accused and seized the contraband, he was acting under Section 41 and, therefore, it was not necessary to comply with Section 42. The decisions in State of Punjab v. Balbir Sing, Abdul Rashid Ibrahim Mansuri v. State of Gujarat and Beckodan

Abdul Rahiman v. State of Kerala on the aspects under consideration are neither relevant nor applicable."

31.1 This decision is again approved by the Apex Court in the matter of **G. Srinivas Goud Vs. State of M.P.**, as reported in **(2005) 8 S.C.C. 183**, wherein in paras-9 and 10, the Apex Court observed that the officers of gazetted rank held are not required to comply with the requirement of Section 42(2) and the said requirement is confined to cases where the action is taken by officers below the rank of gazetted officers without authorization.

32. Thus, we are unable to accept the contentions that firstly, there is a breach of Section 42(2) and that on account of that breach the accused – appellant is entitled to acquittal. This is so because the search is made in public place and Section 43 would be attracted and that observations made in Abdul Rashid Ibrahim Mansuri (supra) will have no application to the fact of the present case. Secondly, the search is conducted by the officer of gazetted rank, the question of Section 42 would not arise at all. So far as decision cited by the learned advocate for the appellant in

Criminal Appeal No.1280/1999 is concerned, it is necessary to observe that the said decision is on facts and circumstances of that case. An attempt is made to make the facts of the said case, the precedent for the case at hand and the conclusion arrived at in the said Criminal Appeal No.1280/1999 to be precedent for the present case. In this respect, it must be observed that in criminal cases, the facts of one case cannot be precedent for the other case and likewise conclusions on such facts. The judicial pronouncements are made in the setting of the facts of the particular case. Circumstantial flexibility, one additional or different fact, may make a world of difference between conclusions in two cases. It is more so in a case where conclusions relate to appreciate the evidence in a criminal trial. In the matter of **Prakash Chandra Pathak Vs. State of Uttar Pradesh**, as reported in **AIR 1960 S.C. 195**, the Apex Court in para-8 has observed that the decisions even of the highest Court on questions which are essentially questions of fact, cannot be cited as precedents governing the decision of other cases which must rest in the ultimate analysis upon their own particular facts. The general principles governing appreciation of circumstantial evidence are well-established and beyond doubt or controversy. The more difficult question is one of

applying those principles to the facts and circumstances of a particular case coming before the court. That question has to be determined by the Court as and when it arises with reference to the particular facts and circumstances of that individual case. It is not use, therefore, appealing to precedents in such matters. No case on facts can be on all fours with those of another. Therefore, it will serve no useful purpose to decide this case with reference to the decisions of this Court in previous cases. The same view is taken by the Apex Court in respect of precedents, in the matter of **Charan Singh and others Vs. State of Punjab**, as reported in **AIR 1975 S.C. 246**.

32.1 In view of the above, the decision of the Division Bench of this Court in Criminal Appeal No.1280/1999 resting on the facts of the aforesaid case cannot be made a precedent for the facts and conclusions of the present case.

32.2 It was contended that in any of the documents prepared like seizure memo, intimation to the relatives of the accused and other documents no time is mentioned. In respect of this contention, it is observed that the

prosecution case is not affected merely Inspector concerned did not mention the time of preparing of that document. This is so because the law does not require a particular form for that document. Secondly, oral evidence is always admissible under the Evidence Act to prove when such documents were prepared. This oral evidence is led by the prosecution to the satisfaction of the Court and, therefore, the contention that only because the time has not been mentioned in certain documents like Ex.22, seizure memo etc., the prosecution case becomes doubtful has no merits at all. It was also contended that in panchnama Ex.21 the time of arrest is left blank and, therefore, the panchnama is got up one. It is amply proved that the accused was arrested at 2.15 a.m. on that day. The arrest memo Ex.61, panchnama Ex.21 and station diary as well as the complaint and the oral evidence of P.W.13 – Vijaybhai Jivaji Medant is overwhelming evidence about the arrest of the accused at 2.15 a.m. We do not accept that only because a blank is left about the time of arrest in panchnama, the prosecution case becomes doubtful. It was also contended further that though the crime was registered at 2.30 a.m. in arrest memo at Ex.61, the Crime Register number is mentioned when the accused was arrested at 2.15 a.m. It is contended that at 2.15 a.m. when the crime was not registered how arrest memo at Ex.61 indicates the

Crime Register number. In respect of this contention, it must be observed that it is not the case of the prosecution that the arrest memo was prepared at 2.15 a.m. The arrest memo at Ex.61 must have been prepared after the crime registered and, therefore, it contains registration number of the crime and the time when the accused was arrested. However, the defence did not dare to elicit any explanation from the prosecution witnesses in this respect. The arrest memo at Ex.61 appears to have been prepared by P.I. at the Police Station only. This is so because, it contents the crime register number. It must be so presumed in absence of any explanation elicited in the cross-examination by the defence and clearly proved the case of prosecution that accused was arrested at 2.15 a.m. but it is not the case of prosecution that arrest memo was prepared at 2.15 a.m. There is no force in contentions about the contradiction amongst the witnesses about the sealing of the muddamal. Nothing could be brought out about in the cross-examination in respect of any contradiction in sealing procedure. The evidence of relevant witnesses i.e. P.W.9 - Ramjibhai Khanabhai, P.W.10 - Dhanjibhai Unjabhai Solanki and P.W.11 - Vikramsinh Govubhai Zala is appreciated as aforesaid and we found nothing in the evidence of these three witnesses as to doubt either sealing procedure safe custody or tampering with it. It is necessary to

note that P.W. 7 - Danubha Nathubha, P.W.8 - Prabhatsinh Velubha Jadeja and P.W.12 - Rupendrasinh Karansinh Jadeja and P.W.13 – Vijaybhai Jivaji Medant amply deposed about sealing of muddamal on the spot. There is no reason to disbelieve to these four witnesses about the seizure and sealing of the muddamal especially nothing is brought about in the cross-examination which would render the evidence of these four witnesses untrustworthy about the seizure and sealing. The contention raised by the learned advocate for the appellant in this respect is without any merits. It is also contended that there is a contradiction in the evidence of P.W.11 and P.W.13 about reaching at the Police Station after raid by the police party. It is stated by P.W.11 - Vikramsinh Govubhai Zala that police party reached at the Police Station at 2.00 a.m., while P.W.13 – Vijaybhai Jivaji Medant stated that they are reached after 2.15 a.m. because panchnama Ex.21 was completed at 2.15 a.m. In respect of this contention, it must be observed that mathematical exactness from the witnesses as to the time or in respect of any fact, is not excepted by the courts. A witness who is deposing after some years before the Court is likely to commit error in certain respects and in this case about 15 minutes in reaching at the Police Station. This fact, therefore, by itself is not capable to throw away weighty evidence of prosecution as discussed

above. There is no merits in this contention as well.

33. The last contention for which the learned advocate for the appellant raised with regard to reduction of sentence. In this respect, it must be stated that though this is first crime for the appellant, but what is seized from him is brown-sugar, a worst class of psychotropic substance, this may be in small quantity but must be a part of big quantity. The narcotic drug and psychotropic substances are spreading all over the world devastating human race. Strict action, therefore, are always suggested by all concerned to save coming generation of human race from such vice. Therefore, there are no reasons for reduction in sentence awarded by the trial Court. Thus, in normal circumstances, though the appellate court would not be justified to view once again without justifiable reasons, the appreciation of evidence undertaken by the trial Court, but as a part of duty, we appreciated the evidence on record afresh and have considered each vital aspects of the case with reference to the contentions raised. We have taken totality of the situation in consideration including reasons given by the trial Court for convicting the appellant and we find that there are no reason to interfere in the judgment and order of conviction and sentence impugned in this appeal.

34. For the aforesaid reasons, in the result this appeal fails and is dismissed. The muddamal be disposed of as directed by the trial Judge.

[J. R. VORA,J.] **[K. A. PUJ, J.]**

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