2025 INSC 1117

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. OF 2025
(Arising out of SLP (Criminal) No.4646 of 2025)

KAILAS S/O BAJIRAO PAWAR ... APPELLANT(S)

VERSUS

THE STATE OF MAHARASHTRA ... RESPONDENT(S)

J U D G M E N T

MANOJ MISRA, J.

1. Leave granted.

2. This appeal arises from a judgment and order of the High Court[1], dated 25.10.2024, in Criminal Appeal Nos. 449 of 2023 and 457 of 2024, whereby the appeals filed by the appellant and another, against the order of conviction and sentence dated 29.04.2023 of the Trial Court[2] in Special Sessions Trial No. 34 of 2020, were partly allowed, the order of conviction was set aside and the case was

[1] The High Court of Judicature at Bombay, Nagpur Bench, Nagpur
[2] Additional Sessions Judge Akot, District Akola

remanded to the Trial Court for a re-trial coupled with a direction that the accused shall stand remanded to judicial custody.

Facts

3. Appellant and three others were tried for offences punishable under Section 8(c) read with Section 20(b)(ii)(C) of Narcotic Drugs and Psychotropic Substances Act, 1985[3]. Prosecution case is based on a search and seizure operation leading to recovery of contraband (i.e., Ganja). It is alleged that on receipt of information that accused No. 1 - Kailas (the appellant) and accused No. 2 – Raju Motiram Solanke have stocked Ganja for sale in a hut, after entering the information in the Diary, sending information to senior officer vide written letter (Exh. No.69) and seeking permission (Exh. No.70), a raid was organized after arranging two panch witnesses, a photographer, a gazetted officer and a weighing scale. The hut was located. Two persons, namely, accused nos.1 and 2, were found sitting there. After necessary formalities, the hut was searched. Upon search, in the presence of panchas, 18

[3] NDPS Act

plastic packets, kept in a sack, containing Ganja, weighing 39 kilograms, were recovered; from which samples were drawn and sealed. On disclosure by the aforesaid two accused, complicity of accused No.3 came to light. Thereafter, raid was conducted at the residence of accused No. 3, who was not found present. However, during house search, five sacks with packets containing Ganja, weighing 107.90 kilogram, were recovered. When accused No. 3 was arrested, complicity of accused No. 4 came to light as the person who transported the contraband.

4. After investigation all four were charge-sheeted and tried. During trial, prosecution examined seven witnesses, namely, S.W. No. 1 – Vinayak Rajabhau Shinde i.e., witness of spot and seizure panchnama; S.W. No. 2 – Santosh Ashok Solanke i.e., photographer who took video as well as photographs of the raid proceedings; S.W. No. 3 – Sajid Khan Rajulla Khan i.e., person who weighed the contraband; S.W. No. 4 – Gopal Ukhardu Patil i.e., one of the members of the raiding party; S.W. No. 5 – Mohammed Umar Anisoddin i.e., panch witness of seizure panchnama of accused no.4's vehicle, who was declared hostile; S.W.

No. 6 – Gopalsingh Narsingh Daberao i.e., driver-cum-Police Constable, who took Ganja samples to forensic laboratory, Amravati for chemical analysis; and S.W. No. 7 – Sagar Ashokrao Hatwar i.e., Chief of the raiding party.

5. Trial Court convicted accused Nos.1 and 2 and acquitted the other two accused.

6. In its judgment, the Trial Court, inter alia, relied on the video recording of the raid to corroborate the substantive evidence led during trial. Relevant observations *qua* appreciation of evidence including the video recording are found in paragraphs 40 to 48 of the judgment, which are reproduced below:

> "40. Santosh (SW No.2) has stated in his examination in chief that, he himself videographed the entire procedure and he himself made the compact disc of the said video film. He also personally gave the necessary certificate to the police in that behalf. He has included all the technical details in the said certificate. It is the same certificate as Exh. No.32.
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> 41. The certificate on Exh. No.32 is given by Santosh (SW No.2). That is, of course as per section 65 B (4) of the Indian Evidence Act, 1872. In the said certificate Santosh (SW No.2) has mentioned the entire details such as the business of photography the witness is involved in, the camera he uses for that purpose, its particulars such as Sony company camera model number 450 H.D. camera etc and he has proven the certificate that he has issued

personally (Exh. 32) on all the legal and technical criteria.

42. The video film of the proceedings of the raid conducted by the police and its compact disc made by Santosh (S.W. No. 2) is produced in the court and it was seen in the court on the laptop by the court (myself), the concerned clerk, the learned counsels for the accused, the learned counsels for the prosecution and all the accused. The said compact disc is assigned property No.27. There is no dispute regarding the video film in the said compact disc raised by the defense. This important fact is to be taken into consideration and kept in our collective conscious (sic).

43. All of us saw when the said CD was played in this court that the panch witnesses, police officers, staff members, the weighing scale operator, sub-divisional officer, both the accused No.1, Kailas, No. 2 Raju could be seen in the video film (i.e., in the video shooting in the CD) in the compact disc marked as property No.27.

44. There is no reason whatsoever to take any doubt regarding the veracity of the video film in the said property No.27. There is no place whatsoever to raise any doubt regarding the reliability of Santosh No.2 doing the video shooting. There is also no reason whatsoever to raise any doubts regarding this certificate exhibit No.32 issued as per section 65-B (4) of the Indian Evidence Act 1872. No one has raised any dispute whatsoever in the recognition or identification of the panch witnesses, police officials, staff members, accused seen in the said video hence all these facts stand proven.

45. In this way the originally reliable contentions made in the oral statements and examination in chief by all the witnesses such as Vinayak (SW No.1), Santosh (SW No.2), Sajid Khan (SW No.3), Gopal (SW No.4) and Shri Hatkar (SW No.7) that, on the date, time and place of occurrence the accused

No.1, Kailas, and accused No.2, Raju, were found in possession of Ganja weighing 39 kilograms are strongly and undisputedly supported by the video film and photographs in the compact disc of property No.27 on record of the court. There is no reason whatsoever to refute the said proofs. As mentioned earlier the said video film in the said CD has also not been contested on behalf of the accused No.1 and 2.

46. In the said video film and in some still photographs (i.e., in the photographs in exhibit No.36, 37, 38 on record of this court) an unknown person in yellow T-shirt and who has dyed his color can be seen. The learned counsel Shri Sharma for the accused No.1 and 2 attempted to create a big controversy during the cross examination of the witnesses in that behalf.

47. All the witnesses have clearly dismissed the suggestions made by the learned counsel for the accused number 1 and 2 to the witnesses in their cross examination that the Hut behind the Mari Mata temple at Adgaon is owned by the unknown person in those photographs and the Ganja also belongs to him. Shri Hatwar (S.W. No.7) has clearly stated in his cross examination (Exh. No.61), page No.14, Para No.67) that the person wearing the yellow T-shirt is the associate of the weighing scale operator Sajid Khan (SW No.3).

48. It is quite possible that some bystanders, overzealous persons then enter as intruders while any such proceedings are in progress. Just because he was seen in one of such photographs and in some part of the video film, the cogent, reliable and undisputed proof of all the remaining witnesses, public prosecution does not and should not get nullified. The identification of the unknown person seen in the said photograph and the video film is not the point of contention in this case. It is unnecessary and irrelevant, and it is not sufficient

> at all to nullify all the other reliable evidence produced by the prosecution."
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> (Emphasis supplied)

7. Aggrieved by Trial Court's judgment and order, the two convicts filed criminal appeals before the High Court. Criminal Appeal No. 449 of 2023 was by the appellant whereas the other i.e., Criminal Appeal No. 457 of 2024, was by Raju Motiram Solanke.

8. The High Court partly allowed the appeals, set aside the conviction and sentence, however, remanded the matter for a re-trial with a direction that the accused shall stand remanded to judicial custody. Aggrieved by the direction for a re-trial with judicial remand, this appeal has been filed.

High Court's observations

9. The reasons for which High Court directed a re-trial can be found in paragraphs 12 to 19 of its judgment, reproduced below:

> **"12.** It is to be noted that the entire process of raid at the hut as well as at the house of Shatrughna was video recorded with the help of the photographer. The photographer has been examined. Panch witness has supported the case of the prosecution. PW-1 Vinayak Shinde, the panch witness, has deposed in great detail about the raid, search, seizure and sampling. He has stated that, in his

presence, the entire process was video recorded by the photographer. PW-2 Santosh Solanke is the photographer. He has deposed about the video recording of the entire process of search, seizure, sampling and apprehension of the appellant. PW-7 Sagar Hatwar, the investigating officer, has deposed in his evidence that the entire process of the raid was video-graphed. The CD of the video recording is at Exh. 27. In this context, it would be necessary to consider the evidence of the photographer (PW-2). At Para No. 7, he has stated that on last date the CD was played on the computer of the Court by the clerk. The APP and the Advocates for the appellants had seen the recording. Perusal of the evidence of all the witnesses does not show that the learned Judge, while recording their evidence, had played the CD in the Court and personally saw it."

13. In this background, it is necessary to consider the observations made by the learned Judge in his judgment. Para No. 42 would be relevant. Learned Judge has noted that he had personally seen the video recording. Similarly, it was seen by the concerned clerk, APP and the advocates for the appellants. Learned Judge has noted that the advocates for the appellants had no dispute about the contents of the CD. In my view, this observation is against the appellants. It is to be noted that the CD has been admitted in the evidence. It is marked as Exh. 27. The question is whether the evidence adduced before the Court is sufficient to prove the contents of the CD or not. If the Court comes to the conclusion that this evidence is not sufficient to prove the contents, then the question is as to how the same could be used against the appellant."

14. It is to be noted that we are in the era of technology. The technology is now being used for the purpose of investigation. This is a good sign for the criminal justice administration. Electronic evidence collected with the assistance of the technology, which may be audio recording, video recording, photography or the data from the memory card,

cannot be admitted in the evidence as it is. Before such material is admitted as an evidence, proper care and procedure is required to be followed. Such material has to be converted into a legally admissible evidence. The law prescribes the procedure. The prosecutor, the presiding officer and the advocates must be well versed with the procedure, while recording the evidence of the witness with regard to the contents of the video recording or CCTV footage. If there is a lack of procedural knowledge to convert such material into legally admissible evidence collected during the course of investigation, then the very purpose of the video recording or collection of the CCTV footage capturing the incident will be frustrated. The video recording or CCTV footage without proper evidence to prove the contents of the video recording cannot be made use of against the accused. It needs to be stated that with the advent of technology and use of the technology during the investigation, all concerned are required to keep themselves abreast with the law and procedure. A great care is required to be taken while recording the evidence when such electronic evidence is produced before the court. It is the duty of the court and other stakeholders to see that it is converted into legally admissible evidence. If there is a failure on the part of the prosecutor and the presiding officer, on account of some misconception related to the subject, then it can cause miscarriage of justice. It needs to be stated that in this case on account of procedural error, apparent lacuna has crept in, and which has resulted in miscarriage of justice. It has caused prejudice not only to the appellant but to the prosecution as well. It needs to be mentioned that in this case, on this count, there is an imminent flaw, which has caused prejudice not only to the appellants but to the prosecution as well.

15. It is to be noted that the video recording of the entire process was the best evidence in the possession of the prosecution. The question that was required to be addressed by the learned Judge

while recording such evidence was as to how it has to be converted into legally admissible evidence. The learned Judge and the learned prosecutor have committed a procedural error. The proper procedure has not been followed. In this case, the main witnesses are the panch witnesses, the photographer, other members of the raiding party and the investigating officer. If the evidence consists of a video recording of the particular incident or part of the incident, the recorded incident must be proved through the concerned witness. As far as the video recording or recorded CCTV footage is concerned, the witness who is an eyewitness to the incident or acted as a panch witness or in the other capacity, must describe the incident on oath before the Court. In such a case, at the time of recording the evidence of the concerned witness, the video recording, either recorded in the CD or pen drive or any other electronic gadget, must be played on the screen. The witness, after playing the CD, must describe or translate the video recording or the contents of the recording in his own words on oath before the Court. If it is an audio recording, then the part of the audible conversation must be transcribed and placed on record under the signature of the investigating officer. Unless and until the recorded video or CCTV footage is played at the stage of evidence of the witness, the witness would not be able to describe or narrate the incident in his or her own words on oath before the Court. In this way, at the stage of recording of evidence, each and every witness concerned with the video recording of the incident or any part of the incident must describe or narrate the incident in his or her own words on oath before the Court. If it is not so done, then it would be very difficult to understand or read that video recording by the presiding officer, prosecutor or Advocate. This procedure has to be scrupulously followed. This has not happened in this case. The CD was not played while recording the evidence of the panch witnesses, the photographer, the other members of the raiding party and the investigating officer. It is therefore apparent that the legally

admissible evidence as to the contents of the recording/CD has not at all been recorded.

16. The CD is a part of the record. At the stage of the arguments in these appeals, the CD was played in the Court. It is evident that the video recording commenced with the apprehension of the appellant. The CD contains the recording of the inspection of hut, recovery of the substance, the description of the substance and further part of the proceedings. The CD further contains the recording of the raid and recovery at the house of Shatrughna. The learned Judge was required to play the CD at the time of recording evidence of each witness and record the contents appearing on the screen with the help of the concerned witness. If this procedure had been followed, then the contents of the CD would have become legally admissible evidence. This procedure had not been followed. This has caused prejudice to the appellants as well as to the prosecution. The important evidence collected in the form of the video recording has not been converted into legally admissible evidence. In order to verify the correct factual position, at the stage of the argument of the appeals, the video recording was played. It was very difficult to understand the contents of the CD. If the evidence of the witnesses had been recorded on playing the video recording at the time of the evidence, then the oral testimony of the witnesses on oath, as to the contents of the CD would have been part of the record.

17. It is evident that in this case the detailed description of the Ganja has not been recorded in the panchnama. Similarly, the detailed description of the Ganja has not been stated by the witnesses. The substance seized from the possession of the appellant can be seen from the video recording. It was necessary to show this part of the recording to the witnesses and record the description of the substance in detail through each and every witness. In my view, this is a fundamental flaw in this case. The appellants could not be held responsible for this

mistake or rather a mess. It was the responsibility of the learned prosecutor to insist before the learned Judge to play the CD when the witnesses were in the witness box. It was not done by the learned Prosecutor/In-charge of the case. Similarly, the learned Judge did not follow this procedure scrupulously. It seems that the learned Judge did not act diligently while recording the evidence of the witnesses with regard to the incident or a part of the incident video-graphed by the investigating officer. Learned Judge has observed in his judgment that there was no objection as such on the part of the appellants to this CD. In my view, this observation is totally perverse. This observation is not only against the appellants, but it is also against the prosecution. In this case, the required evidence as to the contents of the video recording or CD has not been properly recorded. There is a procedural error. It was the duty of the Court to give justice to the hard work put in by the police officer, while conducting the raid and ensuring the video recording of the entire proceedings. The video recording is the most important and vital evidence in this case. It can reflect upon the credibility and authenticity of the raid. Similarly, the description of the substance, which can be seen from the video recording, would be of immense importance. It cannot be excluded from consideration, if it is proved properly. This is one flaw in this case. It has caused prejudice to the appellants as well as to the prosecution.

18. The next important flaw which can be seen is the failure of the prosecution to examine the CA. It is noticed that in the Vidarbha region, in the trials under the NDPS Act, the CA is not examined. In my view, this is a serious mistake on the part of the prosecution. It needs to be placed on record that in Greater Mumbai, in every case under the NDPS Act, the CA is examined. In Vidarbha region, while deciding the appeals against the conviction and sentence in NDPS cases, it is noticed that this aspect is taken for granted by the prosecution. It needs to

be stated that in Vidarbha region, the majority of the cases under the NDPS Act are with regard to the seizure of the Ganja. The examination of the CA, in the case of the analysis of Ganja, is very important because, in the report of the CA the description of the substance in detail is recorded invariably. The description of the substance, seized as Ganja, is required to be proved to bring it within the ambit of the definition of Ganja under Section 2(iii)(b) of the NDPS Act. In this case, the prosecution has failed to examine the CA. In this case, the learned prosecutor did not produce remnant samples received from the office of CA. Similarly, the prosecutor did not produce the representative samples drawn at the time of the seizure on the spot as well as drawn in presence of the learned Magistrate at the time of the inventory. The remnant samples are required to be shown to the CA to bring on record the nature of the narcotic drug and the description of the drugs. Similarly, the representative samples are required to be opened before the Court at the time of the evidence of the concerned witness. The presiding officer is required to note down the description of the narcotic drug/substance found in the sample packets. It is further pertinent to mention that if the seized drug is not destroyed, then the same shall also be produced before the Court while recording the evidence of the witness. The description of the substance found in the packets/sacks shall also be recorded. The learned presiding officer is required to record this part of the evidence very meticulously and note down the description of substance.

19. I am conscious of the fact that under Section 293 of the Code of Criminal Procedure, the reports of certain Government scientific experts may be used as evidence in an inquiry, trial or other proceedings. The record shows that no specific order was passed by the learned Judge, while admitting the CA report. It is to be noted that, in cases under the NDPS Act, as and when a CA report is tendered, the Court shall insist the prosecutor to examine the CA. If the CA is available, then the learned Judge

> shall not exhibit the report without examining the CA. The trial of the offences under the NDPS Act cannot be taken lightly. The trial for the offences under the NDPS Act has to be conducted very carefully. It needs to be mentioned that in such a trial, the Court has to deal with so many technical aspects and issues. The NDPS Act provides for checks and balances while conducting the investigation in the crime so as to avoid false implication of innocent persons. The act provides for stringent punishment for a proved offence. Therefore, the Court has to be very careful while recording the evidence. In this case, the required care was not taken."

10. After the above discussion, the High Court proceeded to consider whether a re-trial of the case would be necessary and, in Paragraph 26, the High Court opined that re-trial is necessary. Paragraph 26 of the impugned judgment is extracted below:

> **"26**. It is to be noted that in this case, for the purpose of proving the contents of the CD, the recall of all the witnesses would be necessary. The witnesses were the members of the raiding party. Each and every witness would be required to describe /translate the contents of the CD/video recording. Similarly, the prosecution would be required to examine the CA. Therefore, in this case, the option of recording additional evidence may not be appropriate. Even after recording the additional evidence, the further procedure with regard to the recording of 313 statement of the accused would be required to be gone into. In this case, in my view, the re-trial would be the best option in the interest of the appellants as well as the prosecution. In the facts and circumstances, in this case, I am opting to order a re-trial."

11. Having held that re-trial is necessary the High Court set aside the Trial Court judgment and ordered re-trial of accused nos.1 and 2. However, since there was no appeal against acquittal of accused nos.3 and 4, the High Court observed that accused nos. 3 and 4 shall not have to face re-trial.

12. Aggrieved by the direction for holding a re-trial, one of the accused, namely, Kailas, is in appeal before us.

Submissions on behalf of the Appellant

13. On behalf of the appellant, it is submitted that a re-trial can be directed in exceptional circumstances as laid down by a Constitution Bench of this Court in ***Ukha Kolhe versus State of Maharashtra***[4]***,*** which has been consistently followed, and recently followed by a three Judge Bench of this Court in ***Nasib Singh versus State of Punjab and Another***[5]. Relying on the aforesaid decisions, it was urged that re-trial is not to be ordered just to enable the prosecution to lead evidence which it could but did not care to lead either on account of insufficient appreciation of the nature of the case or for

[4] AIR 1963 SC 1531
[5] (2022) 2 SCC 89

other reasons. It was urged that if the High Court was not satisfied with the prosecution's evidence on record, the appropriate course for the High Court was to order acquittal of the appellant. Accordingly, it is urged that the order of the High Court directing for a re-trial be set aside and the appellant be acquitted.

Submissions on behalf of Respondent-State

14. *Per contra*, on behalf of the State, it was urged that the High Court erred in holding that the video was not admissible. The same was admissible as a document under Section 65B of the Indian Evidence Act, 1872[6] in view of there being a certificate under sub-section (4) of Section 65B from its creator (SW No.2). Moreover, there was substantive oral evidence of the members of the raiding party who witnessed the recovery. Additionally, there were documents in the form of seizure memo, inventory of the consignment of Ganja prepared by Magistrate, produced as Exh. No.84, evidencing the recovery. Besides above, during trial, the video was played in Court in the presence of the presiding officer of the

[6] Evidence Act

Court, the accused persons and their respective counsels. No dispute as regards the identity of accused and members of raiding party as seen in the video was raised before the trial court. Therefore, the view of the High Court that video was not admissible, because it was not played while recording statement of each witness and its transcript was not prepared, is misconceived. Moreover, it was urged, transcript of a visual input cannot be prepared. As regards non-examination of Chemical Examiner, it was urged, it would not have a material bearing on the admissibility of its report because, under Section 293 of the Code of Criminal Procedure, 1973[7], Chemical Examiner is a scientific expert, and its report is *ipso facto* admissible. In such circumstances, it was urged, there was no necessity to direct for a re-trial; and if the High Court found it difficult to understand the video, it had power to accept additional evidence on record under Section 391 CrPC but in no case a re-trial was required. It was thus prayed on behalf of the State that the order of

[7] CrPC

the High Court be set aside, and the appeal be restored on the file of the High Court for fresh consideration.

Discussion

15. Having considered the rival submissions, the principal question that falls for our consideration is whether the High Court was justified in ordering a re-trial? If not, then what would be the appropriate order that may be passed in this appeal?

16. Before we proceed further, it would be useful to survey the judicial precedents as to in what circumstances a re-trial is to be directed and what are the consequences of such a direction. In ***Ukha Kolhe Versus State of Maharashtra (supra)***, this Court observed that:

> "An order for the re-trial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interest of justice the appellate court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial

again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could, but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons."

17. Following the aforesaid decision, in ***Nasib Singh versus State of Punjab and Another (supra),*** this Court summarized the principles governing re-trial as follows:

"33. The principles that emerge from the decisions of this Court on re-trial can be formulated as under:

33.1 The appellate court may direct a re-trial only in "exceptional" circumstances to avert a miscarriage of justice.

33.2 Mere lapses in the investigation are not sufficient to warrant a direction for retrial. Only if the lapses are so grave so as to prejudice the rights of the parties, can a re-trial be directed.

33.3 A determination of whether "shoddy" investigation /trial has prejudiced the party, must be based on the facts of each case pursuant to a thorough reading of the evidence.

33.4 It is not sufficient if the accused/prosecution makes a facial argument that there has been a miscarriage of justice warranting a re-trial. It is incumbent on the appellate court directing a re-trial to provide a reasoned order on the nature of the miscarriage of justice caused with reference to the evidence and investigatory process.

33.5 If a matter is directed for re-trial, the evidence and record of the previous trial is completely wiped out.

33.6 The following are some instances, not intended to be exhaustive, of when the Court could

order a re-trial on the ground of miscarriage of justice:

(a) The trial court has proceeded with the trial in the absence of jurisdiction;

(b) The trial has been vitiated by an illegality or irregularity based on a misconception of the nature of the proceedings; and

(c) The prosecutor has been disabled or prevented from adducing evidence as regards the nature of the charge, resulting in the trial being rendered a farce, sham or charade."

18. In the instant case, the High Court ordered a re-trial citing following reasons:

(a) Video-recording of search and seizure operation was the best evidence, but the same was not converted into admissible evidence inasmuch as, (i) video was not played while recording statement of each witness so as to enable the witness to explain the video in his own words in his deposition; (ii) no transcript of video was prepared; and (iii) when it was played in Court, in absence of explanatory statement of witnesses *qua* the video, its content could not be understood.

(b) The Chemical Examiner / Analyst (for short CA) was not produced as a witness.

(c) The prosecutor did not produce remnant samples received from the office of CA.

(d) The prosecutor did not produce the representative samples drawn at the time of the seizure from the spot as well as drawn in presence of the learned Magistrate at the time of making the inventory.

19. As far as admissibility of video recording i.e., Compact Disc (CD) is concerned, the author of the video i.e., SW No.2 not only deposed that he recorded the video, but he also gave a certificate, as contemplated under sub-section (4) of Section 65B of the Evidence Act, to make the CD admissible in evidence. Interestingly, the High Court did not dispute that the electronic record was duly exhibited as there existed a certificate envisaged under sub-section (4) of Section 65B. However, strangely, the High Court opined that the video would become relevant only if it is played during deposition of each witness so that the witness could explain its contents in his own words resulting in a transcript of the video. In our view, this is a strange and unacceptable reasoning for the simple reason that the CD

is an electronic record and once the requirement of Section 65B is fulfilled it becomes an admissible piece of evidence, like a document, and the video recorded therein is akin to contents of a document which can be seen and heard to enable the Court to draw appropriate inference(s). No doubt, there may be an occasion where to appreciate contents of a video an explanatory statement may be needed, but that would depend on the facts of a case. However, it is not the requirement of law that the contents of the video would become admissible only if it is reduced to a transcript in the words of a witness who created the video or is noticed in the video. Besides that, in the instant case, the search and seizure operation was sought to be proved by oral evidence of witnesses. The video, therefore, was perhaps to corroborate the oral testimony. Even the judgment of the trial court makes it clear that the video was played in court in the presence of all accused as well as both sides counsels and the presiding officer, upon seeing the video, could spot and confirm the presence of witnesses as well as the accused at the time of search and seizure. In

such circumstances, in our view, a re-trial is not required only to explain the video.

20. We are conscious of the law that while exercising appellate power the record must be perused[8] and, therefore, if the High Court, as an appellate court, had difficulty in understanding the contents of the video, which was part of the record, it could have called for the presence of the accused as well as the witnesses or their respective lawyers to explain to the Court the significance of what appears in that video. Besides, the power to take additional evidence is there under Section 391 of CrPC. However, to merely understand the video, in our view, there is no justification to order a re-trial and fresh recording of evidence. For the reasons above, reason (a) supra assigned by the High Court for ordering a re-trial is totally misconceived and baseless.

21. As far as non-production of Chemical Examiner as a witness is concerned, under Section 293[9] of CrPC, report

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[8] See: Section 386 CrPC

[9] **Section 293. Reports of certain Government scientific experts. ---** (1) Any document purporting to be a report under the hand of a government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.
(2). The court may, if it thinks fit, summon and examine any such expert as to the subject matter of his report.
(3). Where any such expert is summoned by a court and he is unable to attend personally, he may, unless the court has expressly directed him to appear personally, depute any responsible officer

of a Chemical Examiner is admissible even if he is not produced as a witness though, the Court may summon and examine him as to the subject matter of the report. Nothing is there in High Court's judgment to show that before the trial court any application was moved to summon the Chemical Examiner but the same was rejected. In paragraph 19 of its judgment, the High Court records that no specific order was passed by the trial judge while admitting the CA (Chemical Analyst) report. The High Court thereafter goes on to observe that in cases under NDPS Act as and when a CA report is tendered, the Court must insist the prosecutor to examine the CA. In our view, there is no such requirement of law that Chemical Examiner would have to be called in each NDPS case to prove the report when it is otherwise admissible under sub-section (1) of

working with him to attend the court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.
(4). This section applies to the following Government scientific experts, namely:-
(a) any Chemical Examiner or Assistant Chemical Examiner to Government;
(b) the Chief Controller of Explosives;
(c) the Director of the Finger Print Bureau;
(d) the Director, Haffkeine Institute, Bombay;
(e) the Director, Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;
(f) the Serologist to the Government.
(g) any other Government scientific experts specified, by notification, by the Central Government for this purpose.

Section 293 of CrPC. Moreover, from the judgment of the trial court it appears that the Chemical Examiner's report was admitted in evidence as Exh Nos.81 and 82. Nothing is there in High Court's judgment that any objection was raised in respect of exhibiting the Chemical Examiner's report. In such circumstances, reason (b) supra assigned by the High Court for ordering re-trial is not sustainable.

22. As far as reasons (c) and (d) (supra) assigned for ordering a re-trial are concerned, they are linked to each other and shall, therefore, be discussed simultaneously. Before we discuss the same, it would be useful to survey judicial pronouncements as to why production of the seized contraband may be important and in what manner recovery of contraband may be proved.

23. In ***Jitendra and Another v. State of M. P.***[10] the *Charas* and *Ganja* alleged to have been seized from the possession of the accused were not produced before the trial court to connect them with the sample sent to the forensic science laboratory (FSL). The High Court noticed the lacuna but brushed it aside by observing that non-production of

[10] (2004) 10 SCC 562

those articles before the court is not fatal to the prosecution when the defense had not insisted during trial that those be produced. While observing so, the High Court relied on Section 465 CrPC to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused. Rejecting the aforesaid reasoning, this Court held:

> "6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of *charas* and *ganja* were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial when marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offense is punishable with a stringent sentence as under the NDPS Act. …"

24. The aforesaid view was followed by this Court in ***Ashok v. State of M.P.***[11]**,** wherein this Court, *inter alia*, emphasized upon the necessity of maintaining proper custody of the seized contraband from the date of its seizure till obtaining of FSL report including production in Court because for the prosecution to succeed it is imperative that

[11] (2011) 5 SCC 123

there must be evidence to connect the forensic report with the substance that was seized from the possession of the accused. Similar was the view taken by this Court in ***Vijay Jain v. State of M.P.***[12]

25. In ***Noor Aga v. State of Punjab***[13], the accused, an Afghan national, was apprehended with 1.4 kg heroin concealed in layered wall of a carton carrying grapes. The contraband articles were produced before the Magistrate. Evidence, however, was not clear regarding the purpose of such production and there was no evidence that order was passed in respect of its destruction. Moreover, no application for destruction was filed. During trial, the seized contraband was not produced. Submission, on behalf of accused, *inter alia*, was that prosecution having not produced the physical evidence of the seizure before the court, particularly the sample of the purported contraband material, no conviction could have been based thereupon. On behalf of the prosecution, submission was that the contraband was destroyed under orders of the Magistrate. This Court found that there was no cogent evidence that

[12] (2013) 14 SCC 527
[13] (2008) 16 SCC 417

guidelines in respect of destruction of contraband articles were followed. Relevant observations are extracted below:

> "96. Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act."

25.1. After observing as above, this Court proceeded to notice several discrepancies in the evidence produced and held:

> "100. Physical evidence of a case of this nature being the property of the court should have been treated to be sacrosanct. Non-production thereof would warrant drawing of a negative inference within the meaning of section 114 (g) of the Evidence Act. While there are such a large number of discrepancies, if a cumulative effect thereto is taken into consideration on the basis whereof the permissive inference would be that serious doubts are created with respect to the prosecution's endeavor to prove the fact of possession of contraband by the appellant."

26. Following the decision in ***Noor Aga (supra)***, this Court, in ***Union of India v. Jaroopram***[14], laid emphasis on the production of the bulk quantity of seized contraband in

[14] (2018) 4 SCC 334

absence of there being evidence of its disposal. The relevant observations are extracted below:

> "10. Omission on the part of the prosecution to produce the bulk quantity of seized opium would create a doubt in the mind of the court on the genuineness of the samples drawn and marked as A, B, C, D, E, F from the allegedly seized contraband. However, the simple argument that the same had been destroyed, cannot be accepted as it is not clear that on what authority it was done. Law requires that such an authority must flow from an order passed by the Magistrate. On a bare perusal of the record, it is apparent that at no point of time any prayer had been made by the prosecution for destruction of the said opium or disposal thereof otherwise. The only course of action the prosecution should have resorted to is for its disposal is to obtain an order from the competent court of Magistrate as envisaged under section 52A of the Act. It is explicitly made under the Act that as and when such an application is made, the Magistrate may, as soon as may be, allow the application.
>
> 11. There is no denial of the fact that the prosecution has not filed any such application for disposal /destruction of the allegedly seized bulk quantity of contraband material nor was any such order passed by the Magistrate. Even no notice has been given to the accused before such alleged destruction /disposal. It is also pertinent here to mention that the trial court appears to have believed the prosecution's story in a haste and awarded conviction to the respondent without warranting the production of bulk quantity of contraband. But, the High Court committed no error in dealing with this aspect of the case and disbelieving the prosecution story by arriving at the conclusion that at the trial, the bulk quantities of contraband were not exhibited to the witnesses at the time of adducing evidence."

27. In ***Baldev Singh v. State of Haryana***[15], a three-Judge Bench of this Court, following the decisions in ***Jitendra*** (supra), ***Vijay Jain*** (supra) ***Ashok*** (supra) and ***Noor Aga*** (supra), allowed the appeal of a convict on the ground that the seized contraband was not produced and there was no satisfactory evidence regarding proper custody of the contraband.

28. In ***Vijay Pandey v. State of U.P.***[16], this Court laid emphasis on the existence of evidence to correlate the seized sample with the one that was tested. The relevant observations are reproduced below:

> "8. The failure of the prosecution in the present case to relate the seized sample with that seized from the appellant makes the case no different from failure to produce the seized sample itself. In the circumstances the mere production of a laboratory report that the sample tested was narcotics cannot be conclusive proof by itself. The sample seized and that tested have to be correlated."

29. In ***State of Rajasthan v. Sahi Ram***[17], the High Court acquitted the accused on the ground that *muddamal* (i.e., case property or seized goods) were not produced. The High Court held that in absence of production of seized

[15] (2021) 18 SCC 523
[16] (2019) 18 SCC 215
[17] (2019) 10 SCC 649

goods the prosecution failed to lead primary evidence of the seizure and thus, the entire evidence of the prosecution leading to recovery had to be discarded. This Court did not accept the verdict of the High Court and, while allowing the appeal and restoring conviction recorded by the trial court, after discussing earlier decisions in ***Jitendra*** (supra), ***Noor Aga*** (supra), ***Ashok*** (supra), ***Vijay Jain*** (supra) and ***Vijay Pandey*** (supra), held that in none of the decisions of this Court non-production of the contraband material before the court has singularly been found to be sufficient to grant the benefit of acquittal. After holding so, the law on the point was summarized in the following terms:

> "18. If the seizure of the material is otherwise proved on record and is not even doubted or disputed, the entire contraband material need not be placed before the court. If the seizure is otherwise not in doubt, there is no requirement that the entire material ought to be produced before the court. At times, material could be so bulky, for instance as in the present material when those 7 bags weighed 223 Kg that it may not be possible and feasible to produce the entire bulk before the Court. If the seizure is otherwise proved, what is required to be proved is the fact that the samples taken from and out of the contraband material were kept intact, that when the samples was submitted for forensic examination the seals were intact, that the report of the forensic experts shows the potency, nature and quality of the contraband material and that based

on such material the essential ingredients constituting an offense are made out."

30. At this stage, we may refer to the provisions of Section 52-A[18] of NDPS Act. This section, inter alia, enables preparation of inventory of seized contraband, drawing of samples therefrom, taking of photographs, etc., as well as its disposal. Sub-section (4) of Section 52-A is important. It provides that every court shall treat the inventory, the photographs of the contraband and any list of samples

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[18] **Section 52-A. Disposal of seized narcotic drugs and psychotropic substances. –** (1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances or the tracking in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any magistrate for the purpose of --

(a) certifying the correctness of the inventory so prepared; or

(b) taking in the presence of such Magistrate, photographs of such drugs, substances or conveyances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offense under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.

drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.

31. In the light of the discussion above, in our view, mere non-production of the seized contraband during trial may not be fatal if there is reliable evidence in respect of its seizure, drawing of samples therefrom, and FSL report relating to the sample drawn from the seized material. However, to ensure that no adverse inference is drawn against the prosecution for non-production of the seized contraband, documents prepared in terms of the provisions of Section 52-A, *inter alia*, evidencing preparation of inventory of seized contraband and drawing of samples therefrom, would have to be brought on record. Likewise, evidence should be there that the sample drawn from the inventory was sent to FSL in a sealed container/ envelop, as per guidelines, and that the seal was found intact at the end of FSL. This is to obviate any doubt regarding sample being tampered in transit. Similarly, FSL's report along with the sample tested by it is to be placed on record so that there remains no doubt regarding the sample tested.

32. In the instant case, trial court in its judgment has observed as follows:

> "55. Shri Hatwar (SW No.7) has also stated in his examination in chief that, I sent a letter (Exh No.83) to the First Class Judicial Magistrate, Akota for getting the inventory of the consignment of Ganja that was found in possession of the accused no.1 and 2 made and, accordingly, the said court prepared the inventory as per Exh. No.84.
>
> 56. Going through the inventory at Exh. No.84, it appears that, it was made by the First Class Judicial Magistrate, Court No.2, Akot on dated 25.9.2020 i.e., immediately on the day following the date of occurrence i.e., dated 23.9.2020. Basically, the hearing proceedings appear to be going on till the midnight of dated 23.9.2020 i.e., from 00.26 till 1.09 hours on dated 24.9.2020. Therefore, one day after 24th i.e., immediately on the following day i.e., on dated 25.9.2020 the court appears to have made the inventory of Exh. No.84.
>
> 57. Accordingly, the said court has mentioned in Exh. No.84 that the entire consignment was found properly sealed, samples were sealed and were sealed again, its weight of 39.180 kilos was noted correctly and in detail. It was also mentioned in it that the entire consignment was properly sealed and the seal was intact and it has been resealed. Later it was also mentioned in it that the First Class Judicial Magistrate of the said court and the panchas and the witnesses have signed the said inventory.
>
> 58. The driver Gopal Singh (SW No.6) has stated in his examination in chief that, he had taken such properly sealed samples to the Forensic Laboratory, Amravati for chemical analysis and for examination. The chemical analysis report of the said substance given by the said laboratory after examining it are on record at Exh. No.81 and 82. It is clearly mentioned in the said report that the sample of the

> said substance is nothing but Ganja. It is mentioned in the report that the said samples were brought to the said laboratory through Gopal Singh (SW No.6) the police constable, batch number 2140. The seal of the wrapping on the samples were intact and it is mentioned in Exh. No.81.
>
> 59. From the above it stands indisputably proven beyond all possible doubts that, the accused no.1 Kailas and accused no.2 Raju were found in possession of Ganja weighing 39 kilograms in the hut that is located behind the Mari Mata Temple at Adgaon on dated 23.9.2020. There is not even a word of clarification except denial in the statement recorded under section 313 of CrPC of the accused in this behalf."

33. From above, prima facie, there existed material to indicate that the seized contraband was sent in a sealed condition for preparation of inventory. Thereafter, inventory was prepared, samples were drawn and sealed; and the samples were sent to FSL in a sealed condition, which found the seal intact. The High Court, however, observed that the representative sample was not opened before the Court at the time of recording of statement of the concerned witness. Be that as it may, this was not a ground to direct for a re-trial when the appellate court has power to take additional evidence under Section 391 of CrPC, which, *inter alia*, can be exercised to exhibit a document or material already on the record of the Court. And if those defects are fatal to the

prosecution, the appellate court is free to take its decision as may be warranted in the facts of the case. But, in any event, it cannot be a ground to direct a re-trial.

34. We are therefore of the view that even for reasons (c) and (d) (supra), direction for a re-trial cannot be countenanced. We shall now consider as to what would be the appropriate relief to the appellant, that is, should he be acquitted or the appeals be restored for a fresh consideration by the High Court in accordance with law.

35. In our view, a direction for restoration of appeals before the High Court for a fresh decision would be more appropriate, reasons being: (a) neither the High Court nor the Trial Court has enlisted the entire evidence available on record therefore it is difficult for us to take a decision with precision as to whether the prosecution has been successful in bringing home the charge against the accused; (b) the High Court's judgment does not address the entire evidence on record, rather it is swayed by an erroneous view that the video-record was the best evidence available which was not converted into legally admissible evidence; and (c) the parties would lose the right of appeal if we take a decision

on the merits more so when the High Court has not taken a final call on merits. In our view, therefore, ends of justice would be served if the appeal(s) are restored on the file of the High Court for a fresh decision in accordance with law.

36. Consequently, the appeal is allowed. The impugned order of the High Court is set aside. Both the appeals (i.e., one filed by the appellant, being Criminal Appeal No.449 of 2023, and the other by the co-accused Raju Motiram Solanke, being Criminal Appeal No.457 of 2024), are restored on the file of the High Court for a fresh decision in accordance with law, preferably, within six months from the date this order is communicated to the High Court.

37. We also direct that the appellant, who was released on bail by an order of this Court dated 05.05.2025, shall continue to remain on bail during the pendency of the appeal subject to the condition that he shall cooperate in the hearing of the appeal(s) by the High Court. The other accused Raju Motiram Solanke who had not filed appeal against the order of the High Court would be at liberty to apply to the High Court for suspension of sentence and bail, which shall be considered on its own merit.

38. At this stage, we would like to clarify that we have not expressed opinion on the merit of the appeals filed by the appellant and the other co-accused before the High Court. Our discussion in this judgment was with a view to assess whether in the facts and law a re-trial is necessitated or not.

39. Pending application(s), if any, shall stand disposed of.

.....J.
(MANOJ MISRA)

.....J.
(UJJAL BHUYAN)

NEW DELHI;
SEPTEMBER 15, 2025