



2025 INSC 1090

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal Nos.5179-5181/2024

MANOJ TEJRAJ JAIN

Appellant(s)

VERSUS

STATE OF GUJARAT

Respondent(s)

WITH

Criminal Appeal No. 5184-5185/2024, Criminal Appeal Nos. 5182-5183/2024 & Criminal Appeal Nos. 1492-1493/2025

O R D E R

1. Since the issues raised in all the captioned appeals are the same and the challenge is also to the self-same Judgment and Order passed by the High Court, those were taken up for hearing analogously and are being disposed of by this common Judgment and Order.

2. These appeals are at the instance of four convicts and are directed against the self-same Judgment and Order passed by the High Court of Gujarat dated 8-9-2023 in Criminal Appeal Nos.2328/2019, 2349/2019, 5184-5185/2024 and 2298/2019 respectively, by which the High Court dismissed all the appeals preferred by the convicts and thereby affirmed the Judgment and Order of conviction dated 7-10-2019 passed by the Additional Sessions Judge, Ahmedabad (Rural) Mirzapur at Ahmedabad in the

NDPS Case No.4/2016, NDPS Case No.6/2016 and NDPS Case No.2/2017 respectively.

3. It appears from the materials on record that in all six persons including the four appellants herein before us were put to trial in the Court of Additional Sessions Judge, Ahmedabad (Rural), Mirzapur at Ahmedabad in connection with the NDPS Case Nos. 6 of 2016, 2 of 2017 and 4 of 2016 respectively for the offence punishable under Sections 25A and 29 respectively of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "the NDPS Act").

4. The trial court held all the accused persons put to trial, guilty of the offences they were charged with as enumerated above and sentenced them to undergo ten years of rigorous imprisonment with fine of Rs. 1,00,000/- each.

5. It all started with a First Information Report dated 14.04.2016 lodged by one Shri. V. R. Malhotra Inspector of Police ATS Ahmedabad. The same came to be registered as FIR No. 2 of 2016.

6. It appears that the first person to be arrested was Narendra Dhirajlal Kacha, the appellant in Criminal Appeal Nos.1492-1493 of 2025.

7. It is the case of the prosecution that on the basis of a secret information, the officials of the ATS raided a godown situated in Village Vahelal, Taluka Daskroi, District Ahmedabad. This godown was found to have been taken on lease by Narendra Kacha, from a person named Jayeshbhai Patel owner of M/s. MD Steel.

8. The search of the godown led to recovery of 55 boxes containing Ephedrine powder weighing 1364 Kgs. This ephedrine powder is a controlled substance used for manufacturing decongestant syrup.

9. According to the case of the prosecution, Narendra Kacha, at the time of search and seizure, is said to have made a confessional statement before the officials of the ATS implicating himself and other co-accused in so far as the seizure of Ephedrine powder is concerned. It is on the strength of such statement that the ATS got some clues and was able to reach up to the other accused persons including the appellants herein.

10. Upon completion of investigation, charge-sheets came to be filed in the Court of 10th Additional Sessions Judge, Ahmedabad (Rural) at Mirzapur, Ahmedabad.

11. The filing of the charge-sheets culminated in the NDPS Case No.4/2016, NDPS Case No.6/2016 and NDPS Case No.2/2017 respectively.

12. The Trial Court thereafter proceeded to frame charge against the accused persons vide order dated 23-2-2018. Although separate charges were framed yet substantially, they read as under:

"1. That the accused persons had organised a meeting on 9.1.2016 in Hotel Blizz at Mombasa in Kenya;

2. Manoj Jain, who owns a company named Avon Life situated at Solhapur in Maharashtra would export the "Ephedrine" to Kenya @ Rs. 60,000/- KG;

3. Export would be done with the help of accused viz. Kishore Rathod;

4. The receiver Vikky Goswamy sent Rs. 91,90,000/- towards the part payment through angadiyas which was

received by the co-accused in different proportions;

5. To make Ephedrine colourless, the same was transported from Solhapur, without any permit, to accused Narendra Kacha to his Chemical Factory which he was operating in a shed of a company called MD Steels. The transportation was done through truck No. GJ-12-AT-8544 and its driver was one Rajendrasingh Parmar PW-2;

6. At the premises of Narendra Kacha, a raid was carried out based on secret information."

13. In the course of the trial, the prosecution examined the following witnesses:-

<i>"PW no.</i>	<i>Name Position</i>	<i>Particulars/ Designation of the PW</i>	<i>EXH No.</i>
<i>PW 1</i>	<i>Hemang Dineshbhai Sheth</i>	<i>Witness examined to prove that he went to Kenya with co-accused persons including Kishorsinh Rathod and Jay Mukhi</i>	<i>19</i>
<i>PW 2</i>	<i>Rajendrasingh Pravinsinh Parmar</i>	<i>Driver of truck used to deliver consignment of Ephedrine</i>	<i>20</i>
<i>PW 3</i>	<i>Ajitsinh Ranchodbhai Kathiya</i>	<i>Owner of truck used by accused to deliver consignment of Ephedrine</i>	<i>21</i>
<i>PW 4</i>	<i>Yogi Bhadreshbhai Vyas</i>	<i>Travel Agent who allegedly booked tickets to Kenya</i>	<i>26</i>
<i>PW 5</i>	<i>Firozbhai Mommadbhai Mansuri</i>	<i>Driver of Truck hired by ATS which picked up Ephedrine from shed in Ahmedabad</i>	<i>27</i>
<i>PW 6</i>	<i>Pareshbhai Sureshbhai Patel</i>	<i>Employee of Accused</i>	<i>29</i>

		<i>Narendrabhai Dhirajal Kacha (or Narendra Kacha in short) working in shed rented from MD Steel Factory</i>	
<i>PW 7</i>	<i>Jayeshbhai Maganbhai Patel</i>	<i>Owner of MD Steel which let out its shed to accused Narendra Kacha</i>	<i>30</i>
<i>PW 8</i>	<i>Dineshbhai Somabhai Prajapati</i>	<i>Employee of MD Steel</i>	<i>36</i>
<i>PW 9</i>	<i>Bhagabhai Fuiabhai Solanki</i>	<i>Employee of MD Steel</i>	<i>37</i>
<i>PW 10</i>	<i>Mukeshbhai Nanubhai Patel</i>	<i>Person who introduced accused Narendra Kacha to the owner of the Shed (PW 7)</i>	<i>38</i>
<i>PW 11</i>	<i>Baseshwar Shantiling Khandal</i>	<i>Production Manager of Avon Life Sciences Ltd (in Short "Avon") , Solapur Maharashtra [where Ephedrine was manufactured]</i>	<i>40</i>
<i>PW 12</i>	<i>Umeshbhai Prataprao Bhosle</i>	<i>HR Manager (Avon)</i>	<i>41</i>
<i>PW 13</i>	<i>Prabhakar Gundopant Hajare</i>	<i>Store Assistant (Avon)</i>	<i>42</i>
<i>PW 14</i>	<i>Rakeshbhai Gordhanbhai Gajjar</i>	<i>Panch witness of Search and Seizure of Ephedrine</i>	<i>45</i>
<i>PW 15</i>	<i>Brijen Dilipkumar Mehta</i>	<i>Panch witness of Search and Seizure of Ephedrine</i>	<i>47</i>
<i>PW 16</i>	<i>Kirtibhai Arvindbhai Shah</i>	<i>Owner of SIM card alleged to be used by accused persons during conspiracy</i>	<i>49</i>
<i>PW 17</i>	<i>Jayesh Bakabhai</i>	<i>Owner of SIM card</i>	<i>50</i>

	<i>Panchal</i>	<i>alleged to be used by accused persons during conspiracy</i>	
<i>PW 18</i>	<i>Dhruvin Ashokbhai Patel</i>	<i>Owner of SIM card alleged to be used by accused persons during conspiracy</i>	<i>51</i>
<i>PW 19</i>	<i>Ajit Annu Kaamat</i>	<i>One of the Directors of Avon</i>	<i>52</i>
<i>PW 20</i>	<i>Rajendra Padbhanabhan Kemal</i>	<i>One of the Directors of Avon</i>	<i>53</i>
<i>PW 21</i>	<i>Harishbhai Chhajuram Dhanka</i>	<i>Owner of SIM card alleged to be used by accused person during conspiracy</i>	<i>54</i>
<i>PW 22</i>	<i>Dinesh Harishbhai Dhanka</i>	<i>Owner of SIM card alleged to be used by accused person during conspiracy</i>	<i>55</i>
<i>PW 23</i>	<i>Harshadbhai Flaribhai Sohiliya</i>	<i>Owner of SIM card alleged to be used by accused person during conspiracy</i>	<i>56</i>
<i>PW 24</i>	<i>Mahendrakumar Manilal Morakhiya</i>	<i>Partner of Angadiya firm (vijay Vikram & Co.)</i>	<i>58</i>
<i>PW 25</i>	<i>Babubhai Shankarlal Patel</i>	<i>Partner of Angadiya firm (vijay Vikram & Co.)</i>	<i>59</i>
<i>PW 26</i>	<i>Jaysinh Dipaksinh Chauhan</i>	<i>Panch-witness of Truck GJ12AT 8544 used to transport Ephedrine by Accused Narendra Kacha</i>	<i>60</i>
<i>PW 27</i>	<i>Magendra Baliram Aagvane</i>	<i>Security Person at Avon's premises</i>	<i>61</i>
<i>PW 28</i>	<i>Baweshwar Ghyanoba Venapure</i>	<i>Security Person at Avon's premises</i>	<i>62</i>

PW 29	Sandeep Sureshbhai Modi	PSO at ATS Police Station, received complaint from (PW 39 (informant) and recovered Mudammal	63
PW 30	Jayantii Babuial Dhodhara	PSO at ATS Police Station	65
PW 31	Ranjitsinh Shivubha Rathod	Police constable - received samples and FSL Report	69
PW 32	Pradipsinh Dilipsinh Vaghela	Gave samples to FSL	70
PW 33	Amraji Harchandji	Crime writer - received samples and kept in locker	71
PW 34	Mohmmad Sajid Abdul Khalid Sumra	Crime writer and recovered Mudammal	72
PW 35	Pravinsinh Ghanshyamsinh Parmar	Driver of Police vehicle used by raiding team	73
PW 36	Nitinkumar Chandulal Thakkar	Person known to accused Bharatsinh and Kishoresinh and alleged to have visited Mumbai with them	75
PW 37	Kishor Kameshwar Jha	Owner of Hotel Sunshine at Mumbai	76
PW 38	Rashminkumar Khemchandbhai Solanki	Police Inspector, First Informant & Member of Raiding Team	77
PW 39	Vijaykumar Rameshbhai Malhotra	Police Inspector, First Informant & Member of Raiding Team	79
PW 40	Amrutlal Vashrambhai Hingrajiya	Asst. Director, FSL Gandhinagar	96
PW 41	Manishkumar Hasmukhrai Thakar	Investigating Officer	111

PW 42	Maheshbhai Chaturbhai Nayak	Asst. Investigating Officer	137"
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14. The prosecution also relied upon few pieces of documentary evidence.

15. Upon closure of recording of evidence by the prosecution, the further statements of the accused persons were recorded under Section 313 of the Code of Criminal Procedure, 1973 (CrPC).

16. All the accused persons in their individual statements stated that they were innocent and had been falsely roped in the alleged crime.

17. The Trial Court, upon appreciation of oral evidence as well as the documentary evidence on record, held all the accused persons guilty of the alleged offence.

18. The operative part of the Trial Court's judgment reads thus:-

"Hence, considering all the above factors this Court is of the opinion that imposing a sentence lesser than the maximum prescribed for the offence will not be just and proper; to the contrary it will be too inadequate to serve the purpose with which the legislation has been enacted. Accordingly, in my opinion the maximum sentence is required to be imposed on each of the convict to serve the ends of justice in this case. I, therefore, sentence the convicts herein as under: -

The convicts Narendrabhai Dhirajlal Kacha, Punit Ramesh Shringi, Manoj Tejraj Jain, Jay @ Jay Mukhi, Kishoresinh, Bhavsinh Rathod and Bharatsinh Ranjitsinh Kathiya are, hereby, sentenced for offence under section 25-A of the Narcotics Drugs & Psychotropic Substances Act, 1985 with rigorous imprisonment for a term of Ten (10) years and a fine of Rupees One Lack (Rs. 1,00,000/-) each.

The convicts Narendrabhai Dhirajlal Kacha, Punit Ramesh Shringi, Manoj Tejraj Jain, Jay @ Jay Mukhi, Kishoresinh Bhavsinh Rathod and Bharatsinh Ranjitsinh Kathiya are sentenced for offence under section 29

of the Narcotics Drugs & Psychotropic Substances Act, 1985 with Rigorous Imprisonment for a term of Ten (10) years and a fine of Rupees One Lack (Rs. 1,00,000/-) each.

Both the sentences shall run concurrently.

In default of payment of fine the accused shall have to undergo rigorous imprisonment of six months in addition to the sentence awarded above.

The accused are in jail since the inception of the case, they shall be given the benefit of Section 428 of the Code of Criminal Procedure, 1973 in computing the period of sentence.

Accused Narendrabhai Dhirajlal Kacha, Punit Ramesh Shringi, Manoj Tejraj Jain, Kishoresinh Bhavsinh Rathod and Bharatsinh Ranjitsinh Kathiya are present from Sabarmati Central Prison; they be sent back to the Central Prison along with the jail warrants for serving the sentence as awarded above.

Accused Jay @ Jaymukhi is confined in Taloja Central Prison, Maharashtra; he remained present through Video Conferencing and made aware of the judgment as well as sentence. His legal aid-counsel Mr. J. M. Pathan is present in person; his jail warrant and a true copy of this judgment be sent to that Jail forthwith.

The order is pronounced in the open court on this 07th day of October, 2019 in the presence of all the convicts (accused Jay @ Jaymukhi remained present through video conferencing) their Learned Advocates and Learned Assistant Public Prosecutor."

19. The appellants - herein being dissatisfied with the judgment and order of conviction passed by the Trial Court went in appeal before the High Court.

20. As noted above, all the appeals were taken up for hearing together and those came to be dismissed by the High Court vide the common impugned Judgment and Order dated 8-9-2023.

21. In such circumstances, referred to above, the appellants are here before this Court with their respective appeals.

22. We heard Mr. Prasannan Namboodiri, the learned counsel appearing for the appellant - Manoj Tejraj Jain in Criminal Appeal Nos.5179-5181/2024 respectively Mr. Nikhil Goel, the learned Senior counsel appearing for the appellant - Mr. Kishorsinh Bhavsinh Rathor in Criminal Appeal Nos.5184-5185/2024 respectively and Mr. R.Krishnamoorthi, the learned counsel appearing for the appellants - Mr. Bharatsinh Ranjitsinh Kathiya and Narendrabhbai Dhirajlal Kacha in Criminal Appeals Nos.5182-5183/2024 and Criminal Appeal Nos.1492-1493/2025 respectively.

23. We are at pains to observe that although the High Court has laboured to dictate a judgment running into more than 141 pages yet all that has been observed by the High Court was not at all necessary as the High Court failed to address itself on the core issues.

24. The High Court from pages 1 to 15 respectively of its impugned judgment has recorded the case of the prosecution and has included the list of prosecution witnesses examined during the trial and the list of documents exhibited by the prosecution.

25. From para 9, the High Court starts recording the submissions canvassed on behalf of the appellants in their respective appeals which continue till para 13.

26. From para 14, the arguments of prosecution/State have been recorded till Para 16.

27. From paras 17 to 21 respectively, the High Court has noted the

findings of the Trial Court as regards the compliance of Sections 42, 50, 52 and 57 of the NDPS Act respectively. The High Court has not returned any findings of its own but agreed with the findings of the trial court and without any further discussion concluded in para 21 as under:

"Considering the evidence available on record and the decision cited at the bar, I am of the considered opinion that the present appeals filed by the respective appellants deserve to be dismissed."

28. Till the aforesaid, no evidence of conspiracy or violation of Section 9A has been discussed or analysed nor any finding has been given.

29. From paras 22 to 23.9 respectively, the High Court has discussed the judgment of this Court in Mukesh Singh v. State reported in (2020) 10 SCC 120 to hold that merely because the informant police officer himself investigated the case, would not by itself vitiate the investigation. The High Court holds that though the panch witnesses in the case had turned hostile yet their evidence deserved to be scrutinised closely and notes that prosecution has examined police witnesses PW 29 to PW 35, PW 38 and PW 41 in support of its case.

30. In para 23.10, the High Court records as under:

"23.10. The witnesses have been cross-examined at length by all the defence counsel but the merits and demerits of these cross examinations shall be discussed in the later part of the judgment while appreciating the entire evidence of the case."

31. We looked into the entire oral evidence on record.

ANALYSIS

32. Section 9A of the NDPS Act provides for the power to control and regulate controlled substances. Section 9A reads thus:

"9A. Power to control and regulate controlled substances.—(1) If the Central Government is of the opinion that, having regard to the use of any controlled substance in the production or manufacture of any narcotic drug or psychotropic substance, it is necessary or expedient so to do in the public interest, it may, by order, provide for regulating or prohibiting the production, manufacture, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the power conferred by sub-section (1), an order made thereunder may provide for regulating by licences, permits or otherwise, the production, manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption, use, storage, distribution, disposal or acquisition of any controlled substance."

33. Section 25A of the NDPS Act provides for the punishment for contravention of orders made under Section 9A. Section 25A reads thus:

"25A. Punishment for contravention of orders made under section 9A.—If any person contravenes an order made under section 9A, he shall be punishable with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding one lakh rupees.]"

34. Section 29 of the NDPS Act provides for the punishment for abetment and criminal conspiracy. Section 29 reads thus:

"29. Punishment for abetment and criminal conspiracy.-(1) Whoever abets, or is a party to a criminal conspiracy to commit, an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in section 116 of the Indian Penal Code (45 of 1860), be punishable with the punishment provided for the offence.

(2) A person abets, or is a party to a criminal conspiracy to commit, an offence, within the meaning of this section, who, in India, abets or is a party to the criminal conspiracy to the commission of any act in a place without and beyond India which-

(a) would constitute an offence if committed within India; or

(b) under the laws of such place, is an offence relating to narcotic drugs or psychotropic substances having all the legal conditions required to constitute it such an offence the same as or analogous to the legal conditions required to constitute it an offence punishable under this Chapter, if committed within India."

35. Section 35 of the NDPS Act provides for the presumption of culpable mental state. Section 35 reads thus:

"35. Presumption of culpable mental state.-(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.-In this section "culpable mental state" includes intention motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist

beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."

36. Section 54 of the NDPS Act provides for presumption from possession of illicit articles. Section 54 reads thus:

*"54. Presumption from possession of illicit articles.
-In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of -*

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily."

37. From the above it is clear that the essential requisite for the constitution of offence under Section 9A is the use of any controlled substance in the production or manufacture of any narcotic drug or psychotropic substance. If the Central Government deems it expedient in the public interest, it may by order provide for regulating or prohibiting the production, manufacture, supply and distribution thereof and trade and commerce of the controlled substance.

38. The Schedule to the Narcotic Drugs and Psychotropic Substances (Regulation of Controlled Substances) Order 2013 (for short, "Order 2013") under clause 2(d) includes ephedrine and its salts.

39. Thus, ephedrine is a controlled substance and its manufacture, distribution, sale, purchase, possession, storage and consumption are subject to control as specified in the Order 2013. The contravention of orders is made punishable under Section 25A of the Act 1985. The punishment provided under Section 25A is rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to Rs. 1,00,000/-.

40. Likewise, to fasten the liability under Section 29 of the NDPS Act, the prosecution must prove that (i) there was abetment, (ii) there was conspiracy denoting that there was meeting of mind; between the owner and the other accused and common object and in pursuance of that common object an agreement took place to commit an offence (iii) some overt act was done in furtherance of such agreement.

41. When the above elements are present in the form of evidence, the liability under Section 25A and/or Section 29 of the NDPS Act can be fastened on any person. The evidence means, the evidence in shape of police papers, as well as evidence recorded by the court during trial.

42. We first take up the appeal of the convict Narendra Kacha.

43. Narendra Kacha is the person who had taken the godown on lease from the Company M/s. MD Steel. When the raid was carried out, Narendra Kacha was found to be present at the place where the

godown is situated. He was found to be in possession and control of the godown. The search was carried out in the presence of the independent witnesses. However, all those independent witnesses (panchas) turned hostile.

44. In such circumstances referred to above, we were left with no other option but to look into the oral evidence of the ATS officials, i.e., the members of the raiding party:

<i>"1. Witnesses to prove conspiracy/Meeting in Kenya /Transfer of Money through Angadiyas</i>	
<i>PW-1 Hemang Sheth (Pg. 31) (Hostile)</i>	<i>Witness alleged to have visited Kenya with accused persons namely Kishore Rathod, Narendra Kumar and Jaymukhi. He has turned hostile and has not supported prosecution case and has disowned his S.161 Cr.P.C. statement.</i>
<i>PW-4/Yogi Vyas (Pg. 54) (Hostile)</i>	<i>As per prosecution he arranged tickets to and from Kenya online. Admits booking some ticket generally. Declared hostile. In prosecution cross examination, says that he booked tickets for accused persons to and from Kenya, however, again denies the same in cross examination by accused persons. Does not produce any ticket(s) as alleged.</i>
<i>PW- 24/ Mahendrakumar Morkhiya (does not support prosecution case though not formally declared Hostile)</i>	<i>Partner of Angadiya firm (Vijay Vikram & Co.) - witness to show transfer of money through hawala. Despite not having supported prosecution case on any of the alleged aspect, he has</i>

	not been declared hostile. In cross examination by accused persons, denies prosecution case.
PW -25 /Babu Patel (does not support prosecution case though not formally Hostile)	Other partner of Angadiya firm (Vijay Vikram & Co.) - witness to show transfer of money through hawala. Despite not having supported prosecution case on any of the alleged aspect, he has not been declared hostile. In cross examination by accused persons, denies prosecution case.
PW-36/Nitinkumar Thakkar (Hostile)	Person alleged to have visited Mumbai with accused Bharatsinh Kathiya and Kishoresinh Rathod. Does not support prosecution case and declared hostile. Even in cross examination by prosecution, denies prosecution case.
2. Panch Witness of Search and Seizure of controlled substance/ Ephedrine from the possession of Accused - Narendra Dhirajlal Kacha from the shed in Ahmedabad (rented from MD Steel Factory)	
PW-14/ Rakeshbhai Gajjar PW-15/ Brijen Mehta (Hostile)	Denied procedure of Search and Seizure. Have deposed that police obtained signatures on 7-8 papers. Have deposed that they had not witnessed anything.
3. Witnesses concerning transport of Ephedrine	
PW-2/Rajendrasinh Parmar (Hostile)	Driver of truck used by accused to deliver consignment of Ephedrine. Supported the fact pertaining to transport in his S. 164 Cr.P.C. statement. However, he turned hostile before the court.

<p>4. Witnesses produced by prosecution to prove that the accused persons had used Identity documents/ SIM Card of these witnesses.</p> <p>(a) No phone recovered from Kishoresinh Rathod;</p> <p>(b) No Nodal Officer examined;</p>	
<p>PW-16/ Kirtibhai Shah PW-17/Jayesh Panchal PW-18/ Dhruvin Patel PW-21/Harish Dhanka PW- 22/Dinesh Dhanka PW -23/ Harshad Sohiliya</p>	<p>All these witnesses have turned hostile and have denied informing the police that their documents/ID Cards were used/taken by accused to get SIM card.</p>
<p>5. Expert Witness</p>	
<p>PW-40/ Amrutlal Hingrajya</p>	<p>Asst. Director FSL Gandhinagar confirming seized substance as Ephedrine</p>
<p>6. Police Witness</p>	
<p>PW- 29/ Sandeep Modi</p>	<p>PSO at ATS Police Station, received complaint from (PW 39 (complainant) and recovered Mudammal</p>
<p>PW-30/Jayantilal Ghoghra</p>	<p>PSO at ATS Police Station regarding procedure</p>
<p>PW-31/Ranjitsinh Rathod PW-32/Pradipsinh Vaghela PW-33/ Amraji and PW 34</p>	<p>Police Officials - they proved giving and receiving samples to the FSL Gandhinagar</p>
<p>PW-35/Pravingsinh Parmar</p>	<p>Driver of Police vehicles used by raiding team</p>
<p>7. Members of Raiding Team</p>	
<p>PW- 38 /Rashminkumar Solanki and PW-39 /Vijay Kumar Malhotra</p>	<p>This witness proved the raid and recovery of the controlled substance from Narendra Kacha</p>
<p>8. Investigating Officers</p>	
<p>PW-41/Manishkumar Thakkar</p>	<p>The IO proved the procedure under NDPS Act, the raid and recovery. However, he does not prove the conspiracy. Even the CDR's are statedly not prepared before him.</p>

PW-42/MC Nayak	<i>He came into picture after the investigation and proves facts from the point of filing of the charge sheet."</i>
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45. It is difficult for us to take the view that the entire recovery suffers from some basic infirmities and is unbelievable or rather the entire search could be termed as illegal or contrary to the provisions of NDPS Act.

46. The search undertaken ultimately resulted in recovery of 55 boxes of ephedrine powder weighing 1364 Kgs.

47. It could be said on the basis of some evidence on record that Narendra Kacha was found to be in conscious possession of the contraband.

48. We called upon the learned counsel appearing for Narendra Kacha to show us as to what explanation his client had offered in his Section 313 statement.

49. Except total denial, there is no explanation worth the name.

50. In such circumstances, it is difficult for us to accept the argument of the learned counsel that since the independent witnesses, i.e., the panchas in whose presence the search was undertaken failed to support the case of the prosecution and were declared hostile, the entire recovery should be disbelieved.

51. In such circumstances, referred to above, we can invoke Section 54 of the NDPS Act so far as the convict - Narendra Kacha is concerned.

52. We now proceed to look into the evidence so far as the other convicts are concerned, i.e., the other appellants before us.

53. Mr. Nikhil Goel and Mr. Prasannan Namboodiri, the learned counsel appearing for their respective clients submitted that there is no legal evidence or any cogent material connecting their clients with the seizure of ephedrine powder. In such circumstances, both the Courts below, i.e., the Trial Court and the High Court could be said to have committed an egregious error in straightway raising the presumption under Section 35 of the NDPS Act. They would submit that nothing incriminating was recovered or seized from the possession of their clients. In such circumstances, the presumption under Section 54 of the NDPS Act would also not come into operation.

54. In Noor Aga v. State of Punjab reported in (2008) 16 SCC 417, this Court in the context of NDPS Act stated that the presumption can be invoked only if the foundational facts are established by prosecution.

55. Paras 58 and 59 respectively of the said Judgment read thus:-

"58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt."

(emphasis supplied)

56. This Court for the first time in State of Punjab v. Baldev Singh reported in (1999) 6 SCC 172 sowed the seeds for a test to ascertain as to when such presumption can be safely attracted which was later more fully evolved in Noor Aga (supra) wherein a brightline test was laid down in the form of the 'Rule or Principle of Foundational Facts'.

57. This 'Rule or Principle of Foundational Facts' simpliciter lays down that before the statutory presumption of culpable mental state could be validly invoked, the prosecution must first establish certain foundational facts. These foundational facts typically involve or correspond to proving those facts or elements that cogently establish the *actus reus* required for the offence alleged by the prosecution. It is only after such foundational facts have been proved beyond a reasonable doubt that the prosecution may take recourse of the statutory presumption provided by the legislature. The rationale behind the same is two-fold. First, in the absence of any *actus reus* there is no possible way to ascertain the corresponding *mens rea* that is required to be established. This is because it is the *actus reus* which demarcates or delineates the *mens rea* which is to be looked for and

established. Without an *actus reus* of any form there arises no question of establishing and consequently presuming the *mens rea*, in view of the fundamental principle of criminal jurisprudence, that no one should be punished for their thoughts or intention alone unless accompanied by some form of act. Secondly, and more importantly it ensures that the statutory presumption does not overreach or take the place of proof of guilt under the guise of 'presumption of culpable mental state'.

58. It would be too much to shift the entire onus onto the accused and to then ask him to prove a negative fact. Thus, any statutory presumption would operate only after the prosecution first lays the foundational facts necessary for the offences that have been alleged beyond a reasonable doubt. This is because a negative cannot be proved in the initial threshold, in order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. Thus, in law it is trite that the initial burden always lies on the prosecution. This is why, the establishment of foundational facts by the prosecution is a prerequisite for triggering the statutory presumption for shifting the onus on the accused to prove the contrary. It is a delicate balance struck between the practical need for such presumption in law and the cardinal principles of criminal jurisprudence to ensure that the presumption does not cross or transgress the fine line that demarcates presumption of 'culpable mental state' from the 'presumption of guilt' itself.

59. Since a negative cannot be proved, an accused cannot be asked to disprove his guilt even before the foundational allegations with

supporting material thereof are placed and duly established by the prosecution before the court. Unless the prosecution is able to prove foundational facts in the context of the allegations made against the accused under any specific provision of the NDPS Act as the case may be, the statutory presumption of culpable mental state under Section 35 of the NDPS Act will not come into play.

60. Even if the prosecution establishes such foundational facts and the presumption is raised against the accused, he can rebut the same either by discrediting prosecution's case as improbable or absurd or the accused could lead evidence to prove his defence, in order to rebut the presumption, however the said presumption under Section 35 of the NDPS Act will be said to have been rebutted only where the accused by way of his defence establishes a fact contrary to the presumption and proves the same beyond a reasonable doubt.

61. It is equally well-settled that the mere alleged confessional statement of co-accused, namely, Narender Kacha at the time of his arrest can also not be made the basis of conviction.

62. In the case in hand, the Courts below have relied upon Section 30 of the Indian Evidence Act.

63. The learned counsel appearing for the ATS would submit that it is the confessional statement of Narendra Kacha that led the officials reach upto the other accused persons and unearth the larger conspiracy. He would submit that the statement made by Narendra Kacha has been rightly relied upon by the courts below for the purpose of inferring the conspiracy hatched by the accused persons.

64. The record reveals that the statement of Narendra Kacha sought to be relied upon is not one recorded under the provisions of Section 67 of the NDPS Act. It appears that when the raid was carried out at the godown and Narendra Kacha was apprehended, at that point of time they recorded the statement of Narendra Kacha. This statement said to have been made by Narendra Kacha has no evidentiary value.

65. Even otherwise, the Court should not start with the confession of an accused. The Court should first marshal the facts on record and look into the other legal evidence if any. It is only if the Court finds some legal evidence on record that it can bring the confession or use the confession of an accused in aid of such legal evidence.

66. In Kashmira Singh v. State of M.P. reported in (1952) 1 SCC 275, this Court observed as under:

"The confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

(emphasis supplied)

67. In Chandrakant Chimanlal Desai v. State of Gujarat reported in (1992) 1 SCC 473 while referring to and relying upon *Kashmira Singh* (supra) this Court observed as under:

"The High Court has on the other hand made this confessional statement as the basis and has then gone in search for corroboration. It concluded that the confessional statement is corroborated in material particulars by prosecution witnesses without first considering and marshalling the evidence against the accused excluding the confession altogether from consideration. As held in the decision cited above only if on such consideration on the evidence available, other than the confession a conviction can safely be based then only the confession could be used to support that belief or conclusion. ..."

(emphasis supplied)

68. In Haricharan Kurmi v. State of Bihar reported in (AIR) 1964 SC 1184, this Court has stated that confession of an accused can be looked into only if there is some other legal evidence *prima facie* connecting the accused with the crime.

69. Some of the broad principles governing the law of conspiracy has been explained and summarised by this Court in State of Tamil Nadu v. Nalini reported in (1999) 5 SCC 253. This Court while summarizing the broad principles stated that the summary cannot be exhaustive of the principles.

"1. Under Section 120-A IPC offence of criminal conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. When it is a legal act by illegal means overt act is necessary. Offence of criminal conspiracy is an exception to the general law where intent alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence. The question for consideration in a case is did all the

accused have the intention and did they agree that the crime be committed. It would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever horrendous it may be, that offence be committed.

2. Acts subsequent to the achieving of the object of conspiracy may tend to prove that a particular accused was party to the conspiracy. Once the object of conspiracy has been achieved, any subsequent act, which may be unlawful, would not make the accused a part of the conspiracy like giving shelter to an absconder.

3. Conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused.

4. Conspirators may for example, be enrolled in a chain - A enrolling B, B enrolling C, and so on; and all will be members of a single conspiracy if they so intend and agree, even though each member knows only the person who enrolled him and the person whom he enrolls. There may be a kind of umbrella-spoke enrolment, where a single person at the centre does the enrolling and all the other members are unknown to each other, though they know that there are to be other members. These are theories and in practice it may be difficult to tell which conspiracy in a particular case falls into which category. It may however, even overlap. But then there has to be present mutual interest. Persons may be members of single conspiracy even though each is ignorant of the identity of many others who may have diverse roles to play. It is not a part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role.

5. When two or more persons agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement. There has thus to be two conspirators and there may be more than that. To prove the charge of conspiracy it is not necessary that intended crime was committed or not. If committed it may further help prosecution to prove the charge of conspiracy.

6. It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended objective, and all are equally responsible. What part each conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left.

7. A charge of conspiracy may prejudice the accused because it forces them into a joint trial and the court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of the object of conspiracy but also of the agreement. In the charge of conspiracy the court has to guard itself against the danger of unfairness to the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence in conspiracy, which is otherwise inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy. As observed by Judge Learned Hand "this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders".

8. As stated above it is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement which is the gravamen of the crime of conspiracy. The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive actions evidencing their joining of the conspiracy.

9. It has been said that a criminal conspiracy is a partnership in crime, and that there is in each

conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incidental to and growing out of the original purpose. A conspirator is not responsible, however, for acts done by a co-conspirator after termination of the conspiracy. The joinder of a conspiracy by a new member does not create a new conspiracy nor does it change the status of the other conspirators, and the mere fact that conspirators individually or in groups perform different tasks to a common end does not split up a conspiracy into several different conspiracies.

10. A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime."

(emphasis supplied)

70. In the overall view of the matter, we have reached the conclusion that the High Court committed no error in affirming the Judgment and Order of conviction passed by the Trial Court so far as Narendra Kacha is concerned.

71. While affirming the Judgment and Order of conviction, we reduce the sentence so far as Narendra Kacha is concerned to the period already undergone. In the result, the Criminal Appeal Nos.1492-1493/2025 respectively stand partly allowed.

72. We are informed that the Trial Court imposed sentence of 10 years of rigorous imprisonment. Out of 10 years, the convict Narendra Kacha has already undergone 8 years and 10 months. He is on bail. His bail bonds now stand discharged.

73. So far as the other connected Criminal Appeals are concerned, they stand allowed. The appellants are acquitted of all the charges framed against them. Their bail bonds also stand discharged.

74. Pending applications, if any, also stand disposed of.

.....J
(J.B. PARDIWALA)

.....J
(K.V. VISWANATHAN)

NEW DELHI
28TH AUGUST, 2025.