
(2001) 08 GUJ CK 0093
In the Gujarat High Court
Case No : Criminal Appeal No. 769 of 1996

Abdul Kader Jusab Sandhi and Another APPELLANT
Vs
State of Gujarat RESPONDENT

Date of Decision : 13-08-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 102, 102(3), 30
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 52A
Penal Code, 1860 (IPC) — Section 64, 65

Citation : (2002) 2 GLR 1212

Hon'ble Judges : B.C. Patel, J;A.L. Dave, J

Bench : Division Bench

Advocate : Budhbhatti and A.R. Saikh, for the Appellant; K.T. Dave, Assistant Public Prosecutor, for the Respondent

Final Decision : Partly Allowed

Judgement

B.C. Patel, J.—Original accused Nos. 1 and 2 have preferred this appeal against the order of conviction recorded by the learned Additional Sessions Judge, Jarnagar, on 5-8-1996, in Sessions Case No. 9 of 1995. By the said order, accused No. 1 was held guilty for an offence punishable u/s 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("N.D.P.S. Act" for short) and for an offence punishable u/s 22 of the N.D.P.S. Act. Accused No. 2 was held guilty for an offence punishable u/s 20(b)(ii) of the N.D.P.S. Act. The trial Court sentenced accused No. 1 to undergo R. I. for a period of 10 years and to pay a fine of Rs. 1 lakh (in default of payment of fine, to undergo simple imprisonment for five years) for the offence punishable u/s 20(b)(ii) of the N.D.P.S. Act and rigorous imprisonment for 10 years and a fine of Rs. 1 lakh (in default of payment of fine, to undergo simple imprisonment for five years) for the offence punishable u/s 22 of the N.D.P.S. Act. The trial Court directed that both the sentences shall run concurrently. So far as accused No. 2 is concerned, the trial Court sentenced him to undergo 10 years rigorous imprisonment and to pay a fine of Rs. 1 lakh (in default of payment of fine, to undergo simple imprisonment

for five years) for the offence punishable u/s 20(b)(ii) of the N.D.P.S. Act.

2. The facts of the case, in a nutshell, are as follows :-

2.1 Vide Exh. 40, Vikramsinh Jadeja, Police Sub-Inspector, Task Force, Jamnagar (P.W. 10), lodged a First Information Report, inter alia, indicating that, at about 13-13 hours on 6-11-1994, when he along with his staff members was in office, Constable Sarayusinh Chauhan (P.W. 1) received an information from his informant that in the building known as Mujahid Manzil, on Abdul Rahim Street, near Landhawad Slope, Abdul Kader Jusub Sandhi @ Kadar Kati (original accused No. 1) and his associate Jafarbin Kasam Arab (original accused No. 2) are dealing in contraband substances which are punishable under the N.D.P.S. Act. The Police Constable also received an information that certain quantity of charas and ganja are lying in the house mentioned hereinabove. The Police Constable-Sarayusinh (P.W. 1) recorded the information in writing and submitted a written report. The Police Inspector-B. K. Charan, Superior Officer was also informed and report was made in this behalf. Dy. Superintendent of Police and District Superintendent of Police, Jamnagar. were also informed on telephone as well as in writing. Thereafter, in the Police Station Diary, at about 14-00 hours, entry was also made. Services of two Panchas, namely, Kirtikumar M. Pandya (P.W. 3) and Anirudhsinh P. Bhatt (P.W.4) were solicited. They were informed about the illegal sale of contraband articles carried on by the accused and the preliminary panchnama to this effect was drawn in detail vide Exh. 20. Thereafter, in the Government vehicle, members of the raiding party and Panchas moved towards the site. Over and above Police Inspector, there were other officers. When they came near Abdul Rahim Street, the vehicle was stopped and on foot they reached Mujahid Manzil. In one room of the house, two persons were carrying on some activities. Near them, there was one tin and some plastic bags and both the persons were busy in their activities. On giving a shout in the name of Abdul Kader Jusub, both the persons got up, and on questioning, they disclosed their names, which we have referred and gave their addresses. The Police Officer gave introduction and the Police Inspector stated that he is Inspector of Police and a Gazetted Officer. He inquired of the accused whether they want to be searched in presence of any other Gazetted Officer or Magistrate, to which the accused stated that they would be satisfied, if they are searched by the Police. In a room, there was one tin. It contained ganja. The Police and the Panchas were satisfied that it was contraband-ganja. Nearabout the tin, there were plastic bags. The accused had no pass or permit to possess. Police Constable-Anopsinh (P.W. 2) was asked to summon Lalitkumar Soni (P.W. 5) for a weighing scale. Ganja was found in three polyethene bags weighing about 1050 grams. There were about 33 small polyethene bags containing ganja, weighing about 318 grams. Thus, in all 1368 grams of ganja was found. In all 835 small polyethene bags found near two bundles were found. On search of person of Abdul Kader Jusub-original accused No. 1, from one of the pockets of his pant, charas weighing about 103.5 grams was seized and from the other pocket a sum of Rs. 1105/- was found, which was nothing but the sale proceeds. Ganja and charas were effectively

sealed by applying seal of Police Inspector, Jamnagar. In the cloth bag as well as on the mouth of the cloth bag, slips bearing signatures of the Panchas were also affixed and were sealed. Thereafter, the police commenced investigation and filed charge-sheet in the Court of learned Chief Judicial Magistrate, Jamnagar, who committed the accused to the Court of Sessions. The charge (Exh. 4) was framed on 22-6-1995 giving details, to which the accused pleaded not guilty and contended that they are innocent. The trial Court, on appreciation of evidence - oral as well as documentary, considering the statements recorded u/s 313 of the Code of Criminal Procedure, and after hearing the submissions made by the learned Advocates, held the accused guilty for the offences as aforesaid. It is against this order of conviction that the present appeal is filed.

3. At the outset, Mr. Budhbhatti submitted that, so far as accused No. 2 is concerned, he was tried for contravention which relates to ganja. He submitted that reading Clause (i) of Sub-section (b) of Section 20, it is clear that, if the contravention relates to ganja, then in that case, the accused can be sentenced to rigorous imprisonment for a term which may extend to 5 years and can also be held liable to pay a fine which may extend to fifty thousand rupees. He submitted that, so far as accused No. 2 is concerned, even if it is not argued on merits, then also he is required to be released forthwith as he has already undergone the aforesaid period. Mr. Budhbhatti submitted that the learned Additional Sessions Judge, while recording the conviction, has misread the provision. It is not the case of the prosecution that both were acting in criminal conspiracy. He submitted that there is negative finding u/s 29 of the N.D.P.S. Act.

4. Mr. Budhbhatti, learned Advocate for the appellants, also drew attention to the provisions contained under Sections 64 and 65 of the Indian Penal Code. He submitted that, in view of Section 65 of the Indian Penal Code, there is a limit to imprisonment for non-payment of fine. Section 65 of the Indian Penal Code reads as under :-

"65. Limit to imprisonment for non-payment of fine, when imprisonment and fine awardable.

The term for which the Court directs the offender to be imprisoned in default of payment of fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine."

4.1 Mr. Budhbhatti submitted that, in view of the aforesaid provision, the accused when directed to undergo imprisonment in default of payment of fine, then in such case, the term of imprisonment cannot exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence. In the instant case, so far as Section 20(b)(i) is concerned, the maximum term of imprisonment prescribed is five years and the accused can be ordered to undergo only one-fourth of the aforesaid term of five years.

4.2 Section 30 of the Code of Criminal Procedure, similarly, refers to award of

imprisonment in default of payment of fine as it is authorised by law. The said Section reads as under :-

"30. Sentence of imprisonment in default of fine :- (1) The Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law :

Provided that the term -

(a) is not in excess of the powers of the Magistrate u/s 29;

(b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of fine.

(2) The imprisonment awarded under this Section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate u/s 29."

4.3 Of course, it refers to exercise of powers by the Magistrate and not the Court of Sessions, etc. In absence of specific provision for awarding sentence in default of payment of fine in N.D.P.S. Act, one is required to look to the general provision in the Code of Criminal Procedure or similar provision in other Acts to find out the intention of the Legislature in general. If there was clear provision for awarding a particular term of imprisonment in default of payment of fine, the Court would require to impose the term of imprisonment as specified. In absence of such provision, substantive sentence in default of payment of fine cannot exceed one-fourth of the term of imprisonment which could be inflicted.

5. As against this, Mr. Dave submitted that, from the facts, both were found selling the contraband articles, then, irrespective of the fact that from the person of accused No. 2 charas was not found, accused No. 2 could be convicted with the aid of Section 29 for possessing charas as well as ganja. It is clear that number of plastic bags were found. Ganja was stored in small polyethene bags. It may be that before they could fill the Charas in small polyethene bags, the police arrived. Mr. Dave submitted that, in view of the facts and circumstances of the case, it is clear that both were acting in conspiracy.

6. In the instant case, regarding the issues framed as per Paragraph 10 of the impugned judgment and the finding recorded by the trial Court, it is clear that both the accused were tried for possession of ganja and were convicted for the same. Reading issue No. 2 and finding recorded by the trial Court, it is clear that accused No. 1 was tried and convicted for keeping charas in his possession. From the search of the pocket of the pant put on by accused No. 1, charas was found without pass or permit. Accused No. 2 cannot be convicted for an offence punishable u/s 20(b)(ii) of the N.D.P.S. Act as he was tried for possession of ganja and not charas. He is required to be held guilty of having committed an offence punishable u/s 20(b)(i) of the N.D.P.S. Act. At this stage, submission

made by the learned Additional Public Prosecutor, in absence of an appeal by the State, making a grievance that with the aid of Section 29, accused No. 2 ought to have been convicted cannot be considered.

7. In view of what is stated hereinabove, it is clear that, accused No. 2 is required to be held guilty for contravening the provisions which relate to ganja, in view of clause (i) of sub-sec, (b) of Section 20 and accused No. 2 can be ordered to undergo rigorous imprisonment for a term of five years and to pay a fine of Rs. 50.000/-.

8. Mr. Budhbhatti has not challenged the conviction of accused No. 2, but has concentrated only on the legality of the order. The contention is well-founded and the order of sentence, so far as accused No. 2 is concerned, is modified as under :-

8.1 Accused No. 2 is ordered to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs. 50000/- (in default of payment of fine, he shall undergo rigorous imprisonment for a period of 15 months).

9. Mr. Budhbhatti, learned Advocate for the appellants, submitted that, in the instant case, there is discrepancy in the evidence. Insofar as the seals applied to the samples forwarded to the laboratory are concerned, he further submitted that in view of the discrepancy, benefit of doubt must be given to the accused. For this purpose, he placed reliance on a decision of a Division Bench of this Court in the case of State of Gitjamt v. Mohmad Yunus @ Munim in Criminal Appeal No. 821 of 1988, decided on 19-4-2001.

10. Mr. Budhbhatti further submitted that, insofar as search of accused No. 1 is concerned, there is non-compliance of Section 50 of the N.D.P.S. Act. He further submitted that, no question was put to him whether he would like to be searched in presence of a Gazetted Officer or a Magistrate. He submitted that, in view of this breach, accused No. 1 should be acquitted.

11. Mr. Budhbhatti further submitted that, there is non-compliance of Section 57 of the N.D.P.S. Act. He submitted that provisions contained in Section 57 being mandatory, it was the duty of the officer to inform about the arrest and seizure within 48 hours next after such arrest and seizure to immediate superior officer. He further submitted that there is no full report of all particulars to immediate superior officer, and therefore, the order of conviction must be set aside.

12. Mr. Budhbhatti further submitted that, Section 52(3) of the N.D.P.S. Act read with Section 102(3) of the Code of Criminal Procedure, having been not - complied with, the conviction must be set aside. For this purpose, he relied on a decision of the Division Bench of this Court in the case of Shivabhai Gajmalbhai Vs. State of Gujarat, .

13. Sarayusinh (P.W. 1), while discharging his duties on 6-11-1994, received an information from his informant about the accused persons are dealing in ganja and charas. He submitted a report to his immediate superior officer, namely,

P.S.I.-Jadeja, at about 14-35 hours. The said report is at Exh. 17. We have perused Exh. 17, which is a report signed by Police Head Constable-Sarayusinh. He has forwarded the report to his superior officer, i.e. Police Sub-Inspector. From Exh. 17, it transpires that Police Sub-Inspector forwarded his report by making endorsement below the report made by Sarayusinh (P.W. 1). This report was made to the Inspector of Police, "B" Division Police Station, Jamnagar City. Request was made that he should lead the party for the raid. This report was submitted to Vikramsinh Jadeja (P.W. 10), who also lodged the First Information Report. P.I.-Charan (P.W. 11) stated that on 6-11-1994, when he was serving as P.I. at City "B" Division Police Station, at about 2-00 p.m., P.S.I.-Jadeja (P.W. 10) submitted a report conveying that the report is received from Head Constable-Sarayusinh (P.W. 1). He pointed out in the evidence about an entry made in the Police Station Diary being entry No. 20 of 1994, vide Exh. 44. He also stated that, thereafter, on telephone as well in writing superior officer was also informed. The said report is at Exh. 45.

14. Mr. Budhbhatii invited our attention to the evidence of Paneh-Kirti kumar Pandya (P.W. 3). He drew our attention to paragraph 3 and pointed out that the seals applied on the container was that of "Panchkoshi "B" Division" and not of Police Inspector, Jamnagar City. He submitted that, as an independent Panch has given this version, there is no reason to disbelieve that the seal applied was of Panchkoshi "B" Division. He drew our attention to evidence of P.W. 1-Sarayusinh, who was working with the Task Force, He stated in his evidence in Paragraph 4 that the muddamal containers were sealed by means of affixing the seal in the name of P.S.I., Task Force. It is required to be noted that this constable was working with the Task Force, at the relevant time.

15. Panchnama (Exh. 20), if perused, it becomes clear that the seal that was applied was of Police Inspector, Jamnagar City. That is the first documentary evidence which has come in existence before any action is taken after the raid. Over and above, from the F.I.R. Exh. 40, lodged by Vikramsinh Jadeja (P.W. 10), it is also clear that the seal that was applied was of Police Inspector, Jamnagar City. There is evidence of Vikramsinh Jadeja (P.W. 10), P.I.-Charan (P.W. 11) and other officers. Over and above this, there is independent evidence which cannot be doubted, i.e. the report of Forensic Science Laboratory (Exh. 57). Reading the same, it appears that the seal applied on the containers was that of Police Inspector, Jamnagar City. Thus, considering the evidence of Police Officers, Panchnama and the report, it is very clear that the seal applied was of Police Inspector, Jamnagar City. In the instant case, it is also clear that the specimen seal was forwarded and that the seal affixed on the sample tallied with the specimen seal forwarded, and thus, there is no doubt about die effective seal affixed on the container and it cannot be said that there was no effective seal on the container and we find no substance in the contention so far as the seal is concerned.

15.1 Mr. Budhbhatti invited our attention to the decision of this Court in the case

of State of Gujarat v. Mohmad Yunus (Criminal Appeal No. 821 of 1988) (supra). Reading Paragraphs 10 and 11 of the judgment, it becomes clear that the seal was applied at the time of seizure was in the name of P.I., N.D.P.S., C.I.D. Crime, Ahmedabad. However, it did not tally with the documents. The report submitted by the F.S.L. was indicating that the seal was in the name of "N.D.P.S. C.I.D. Crime G.S. & C.I.T. Over and above, the Division Bench found that about the quantity, there was also some difference, and therefore, the judgment relied on is on the facts of that case and no reliance can be placed in the facts and circumstances of the present case, as the seals affixed on the containers at the time of seizure and the seals found by F.S.L., were same and there was no tampering with the seals affixed on the containers.

16. Insofar as the breach of Section 50 of the N.D.P.S. Act is concerned, Mr. Budhbhatti invited our attention to the evidence of Anopsinh (P.W. 2). He pointed out that, in the cross-examination, the witness has stated that P. I.-Charan questioned both the accused that whether they would like to be searched before a Gazetted Officer or a Magistrate? Mr. Budhbhatti submitted that even P.I.-Charan (P.W. 11) and P.S.L-Jadeja (P.W. 10) have stated similarly. In his submission, both the accused were required to put questions separately, i.e., one after the other. In his submission, as both the accused were searched at different timings, it was absolutely necessary to question accused No. 1 before the search was conducted. It is required to be noted that the information received by the police was that accused Nos. 1 and 2 both were dealing in contraband articles. The information was specific that accused No. 1 was dealing in ganja and charas. From the record, it is clear that small packets were being prepared for the purpose of sale. The sale proceeds also have been recovered. From the contemporaneous record, it is clear that both were found preparing small containers of contraband article. When the officer has asked both of them, it is clear that there is sufficient compliance with Section 50. It is required to be noted that, at the same place, in the same room, at the same time the raid has been carried out. Therefore, in the facts of this case, it is difficult to say that there is no compliance of Section 50, and therefore, we find no merits in this contention.

17. Mr. Budhbhatti submitted that in view of Section 52-A of the N.D.P.S. Act, it was absolutely necessary for the police to forward the substance to the Magistrate, as contemplated under Sub-section (2) of Section 52-A of the N.D.P.S. Act. Section 52-A reads as under :-

"52-A. Disposal of seized narcotic drugs and psychotropic substances : (1) The, Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by

such officer and in such manner as the Government may from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered u/s 53, the officer referred to in Sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing 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 or psychotropic substances 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 or substances 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 any thing contained in the Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (II of 1974), every Court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-sec. (2) and certified by the Magistrate, as primary evidence in respect of such offence."

17.1 Mr. Budhbhatti also submitted that Section 102 of the Code of Criminal Procedure mandates the police officer not only to report about the seizure, but to produce the contraband material before the Magistrate. Section 102 of the Code of Criminal Procedure reads as under :-

"102. Power of police officer to seize certain property :- (1) Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

(2) Such police officer, if subordinate to the officer-in-charge of a police station, shall forthwith report the seizure to that officer.

(3) Every police officer acting under Sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court, he may give

custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same."

It is required to be noted that Section 102 of the Code of Criminal Procedure will come into picture only if the police officer has seized the property which is alleged or suspected to have stolen or is found under circumstance which creates suspicion of the commission of any offence. If the property is seized only under these circumstances, then the provision of Sub-section (3) of Section 102 is required to be followed. In the instant case, there was no question of finding a person with a property under circumstances creating suspicion of commission of any offence. But, in fact, persons were found with contraband articles in their possession and they were arrested in view of the provisions contained in the N.D.P.S. Act. So far as Section 52-A is concerned, in view of Sub-section (4), the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-sec. (2) and certified by the Magistrate can be treated as primary evidence in respect of such offence. Section 52-A refers to disposal of seized narcotic drugs and psychotropic substances having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, after their seizure, in the manner as the Government may direct from time to time, after following the procedure specified in Sub-section (2). Sub-section (2) provides for preparing the inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred in Sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application to any Magistrate for the purpose of certifying the correctness of the inventory so prepared or taking, in the presence of such Magistrate, photographs of such substances and certifying such photographs as true or 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 drawn. Reading Section 52-A, it is very clear that before the trial, in view of the situation referred to in Section 52-A(1), if the narcotic drugs or psychotropic substances are to be disposed of, then the procedure as laid down in Sub-section (2) has to be followed, and thereafter, the material can be disposed of. However, before that, the Magistrate has to certify and the same is to be considered as primary evidence. In the instant case, when the charas and ganja seized have been produced before me Court and in absence of disposal of seized narcotic drugs or psychotropic substances, there is no question of invoking Section 52-A of the N.D.P.S. Act. In our view, the submission has no merit.

17.2 In view of disposal of narcotic drugs or psychotropic substances in

accordance with Section 52-A, for want of seized material before the trial Court, the prosecution will not suffer. For the circumstances narrated in Sub-section (1) of Section 52-A, if the Government is satisfied, may permit the disposal of narcotic drugs or psychotropic substances in the manner prescribed in Sub-sections (2) and (3) of Section 52-A of the N.D.P.S. Act. It is not necessary that in all cases such contrabands should be disposed of. We find no merits in the submission that as contrabands were not forwarded to Magistrate, the accused should be acquitted. In our opinion, there was no need to follow the provisions contained in Sub-section (2) of Section 52-A of the N.D.P.S. Act in absence of any order issued by the Government for disposal u/s 52-A(1) of the N.D.P.S. Act.

17.3 The case of Shivabhai GajmaMai v. State of Gujarat 1996 (2) GTR 64, which is heavily relied on by Mr. Budhbhatti for non-compliance of Section 102(3) of Code of Criminal Procedure. In that case, in Paragraph 5, the Division Bench, from the record, has found as under :-

"5. In the present case, on search of the person of the appellant some eight pills of charas were found from a match-box in his possession. The obnoxious article was seized by the police. It appears that the person arrested and the article seized were forwarded to the Salabatpura Police Station in Surat. The officer-in-charge of the said Police Station was required to report the matter to the Magistrate as provided in Section 102(3) of the Cr.P.C. The record shows that no such report was made by or on behalf of the officer-in-charge of the Salabatpura Police Station to the Magistrate having jurisdiction in that regard."

Thus, it is clear that no report whatsoever was submitted in that case by or on behalf of the officer-in-charge of the Police Station to the Magistrate having jurisdiction in that regard. In the instant case, there is sufficient evidence on record that mere is compliance of the provisions. Exh. 44 is a Station Diary. That clearly reveals that the Divisional Police Officer and the D.S.P. were informed by telephone and arrangement was made to submit report in writing. This happened before the raid. There is document on record (Exh. 48) from which it is clear that report was forwarded to learned Judicial Magistrate, First Class, at Jamnagar, conveying me information that the accused were arrested for possessing contraband articles, namely, charas and ganja and the learned Judicial Magistrate granted sanction, as prayed for, on the report submitted by Police Inspector-Charan. Thus, there is compliance of the provisions contained in the provisions of law. There is document-Exh. 49, for keeping contraband in the Police Station. It is also clear that the report with regard to arrest, place and time of arrest was forwarded directly. Thus, it is very clear that, in the instant case, the provisions have been complied with and the arguments advanced before us are without any merit.

18. Mr. Budhbhatti submitted that there is non-compliance of Section 57 of the N.D.P.S. Act. We have discussed the aforesaid aspect and we have indicated that there is compliance. However, Mr. Budhbhatti submitted that, in Paragraph 8 of the evidence of P.I.-Charan (P.W. 11), he stated that before the raid, he had

informed the D.S.P. and the Dy. S. P. on telephone and he had noted down in the Police Station Diary and there is no evidence in writing with him to show that before making entry No. 20, he telephoned to the D.S.P. and the Dy. S, P. It may be noted that the Police Inspector himself need not make the entry. However, entry No. 20 is made by the Police Inspector-Charan and he has also stated that he is arranging for making a report. In view of this clear entry, it leaves no doubt that necessary precautions have been taken.

19. Thus, from what is stated hereinabove," it is clear that there is no substance in the contentions raised by Mr. Budhbhatti. We make it clear that Mr. Budhbhatti has made submissions as aforesaid and we have dealt with each of the submissions. We also think it proper to refer to, at this stage, the decision of the Apex Court in the case of State of Punjab Vs. Balbir Singh, . In that case, Their Lordships have held that "However, a mere non-compliance or failure to strictly comply by itself will not vitiate the prosecution" In Paragraph 24, Their Lordships have pointed out the aforesaid aspect. Therefore, in our opinion, we find no merits in the submission.

20. Lastly, Mr. Budhbhatti submitted that the trial Court has misread the provisions contained in Section 22 insofar as accused No. 1 is concerned and he could not have been convicted for an offence u/s 22 of the N.D.P.S. Act. He submitted that, so far as the finding of charas is concerned. Section 20(b)(ii) would be attracted. However, he submitted that, so far as ganja is concerned, he could be convicted for an offence punishable u/s 20(b)(i) of the N.D.P.S. Act. Section 22 of the N.D.P.S. Act deals with psychotropic substances. In the instant case, there is no question of possessing psychotropic substances. Accused No. 1 was found in possession of charas and ganja, and therefore, must be convicted u/s 20(b)(ii) and u/s 20(b)(i) of the N.D.P.S. Act. In fact, in Paragraph 60 of the impugned judgment, the trial Court has recorded a finding that the prosecution has successfully proved that both the accused were in possession of contraband ganja. In this behalf, Paragraphs 10 and 11 of the impugned judgment are also required to be referred. Issue No. 1 is with regard to joint possession of ganja while issue No. 2 refers to possession of charas by accused No. 2. The trial Court has answered both in affirmative. In paragraph 61 of the judgment, the trial Court has referred the same. Under the circumstances, the conviction recorded u/s 20(b)(ii) of the N.D.P.S. Act is hereby confirmed. However, so far as the conviction recorded u/s 22 of the N.D.P.S. Act is concerned, in view of the facts that he was found in possession of ganja, the same is required to be modified by convicting accused No. 1 for the offence punishable u/s 20(b)(i) of the N.D.P.S. Act and is sentenced to undergo rigorous imprisonment for five years and is ordered to pay a fine of Rs. 50,000/- (in default of payment of fine, to undergo rigorous imprisonment for a period of 15 months). Though, conviction u/s 20(b)(ii) of the Act and order of sentence is confirmed, we intend to modify the sentence imposed, in default of payment of fine. u/s 20(b)(ii), the punishment provided is 10 years rigorous imprisonment and payment of fine is Rs. 1 lakh, but the Court is empowered to impose sentence in default of payment of fine, as

discussed hereinabove. Therefore, over and above the sentence awarded u/s 20(b)(ii), we sentence accused No. 1 to undergo two and a half years rigorous imprisonment, in default of payment of fine. It is ordered that the sentences shall run concurrently.

21. Appeal allowed accordingly.