

(2002) 04 GUJ CK 0053
In the Gujarat High Court
Case No : Criminal Appeal No. 146 of 1998

Akilkhan Mehboobkhan Pathan and Another	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 18-04-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 100(4), 102, 156, 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2, 21, 41(2), 42(1), 43

Citation : (2002) 3 GLR 838

Hon'ble Judges : R.R. Tripathi, J;K.R. Vyas, J

Bench : Division Bench

Advocate : B.G. Jani, Nos. 1 and 2, for the Appellant; K.T. Dave, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

R.R. Tripathi, J.—This appeal is filed u/s 374(2) of the Code of Criminal Procedure against the judgment and order dated 24th December, 1997 rendered by the learned Special Judge, Surat, in Sessions Case No. 289 of 1996, by which the appellants are convicted under Sections 8, 9, 10, 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("N.D.P.S. Act" for short) and punished with R.I. for 10 years and a fine of Rs. 1 lac (Rupees One lac only), in default to undergo R.I. for one year.

2. On 13th August, 1996, Shri H. S. Ninama was serving as a Police Inspector at Salabatpura Police Station; when he was present in the Police Station, at about 3-30 p.m., he received an information that at "Akbar Sayeed-Na-Tekra", a person named Akilkhan Mehboobkhan Pathan and Merazbibí Jalil Khan Rehman Khan Pathan are possessing contraband substance, brown sugar, and are selling the same. Akilkhan procures the supply of brown sugar and Merazbibí assists in getting customers for the same. At present, they have received supply of brown sugar and that they have gone out and after coming back, they are

likely to dispose of the same. Therefore, it was decided to take immediate steps. The said information was taken down in writing and an entry was made in the Station Diary, being Entry No. 20 of 1996, at 3-35 p.m. An intimation of this information was sent in a sealed cover to the Deputy Commissioner of Police (North Division). Thereafter, two police personnel, namely, Shantaram Baburao and Vasant Eknath, were sent for verification of the said information, who, on return, informed that the information was correct and that the accused are to return to "Akbar-Sayeed-Na-Tekra", and therefore, immediate action is required. Therefore, Police Sub-Inspector-Shri Jhabha, Police Sub-Inspector Shri N. N. Chaudhary, Police Jamadar-Shri Vasantbhai, Shantarambhai, Babubhai, Laxmanlal, etc., were called. Jamadar-Babubhai was asked to call the panch witnesses. He called two persons, namely, Abdul Usman Gani and Jaswantbhai Lalawala, as panch witnesses. After having obtained consent of the panchas, requisite material for sealing, packing, batteries for light, etc. and showing the same to the panchas was taken and the same was kept in a tin box, the same was handed over to Shri Chaudhary. The panchas and the police personnel searched each other and did not find any objectionable. Thereafter, an entry was made in the Station Diary about starting for the raid, being Entry No. 21 of 1996. Copies of the said entry and the statements of constable Vasant Eknath and Shantaram Baburao were also sent to the Deputy Commissioner of Police for information. A preliminary panchnama was drawn and signatures of both the panchas were obtained. Thereafter, in the Government Jeep and two rickshaws, which were also searched by the panchas and nothing objectionable was found, parties started for raid via Bardoli Pitha, Reshamvad. The jeep was stopped near Rustampura Chowky, under a banyan tree. The jeep was sent to Rustampura Chowky. Thereafter, the panchas and the police personnel were explained that Akil Khan Pathan is wearing a white-lining shirt and a black colour pant, while Merazbibí is wearing yellow colour punjabi with a pink colour "odhani". The police personnel were positioned in the surrounding area. They were told that no sooner a signal is given, persons with the aforesaid description of clothes be surrounded. The signal was also explained to the police personnel.

The two panchas with the Police Inspector had remained near the banyan tree. After about 45 minutes, a rickshaw came from "Delia Mohalla" and the persons answering the aforesaid description alighted from the rickshaw; they were identified as accused; a signal was given; both the persons were stopped at a little distance. On enquiring their name, the man disclosed his name to be Akil Khan Mehboob Khan Pathan and the woman disclosed her name to be Merazbibí Jalil Khan Rehman Khan Pathan. They were told about the information received by the police party and that their search is to be carried out. It was also explained that Shri Ninama is the Police Inspector of Salabatpura Police Station and that if they want their search to be carried out in presence of any Magistrate or any Class-I Officer, the same can be arranged. They declined for the same and in the meantime, Merazbibí, tried to run away, but fell down. She was assisted by the lady Police Constable, Ashaben. At this juncture, in a Government vehicle,

Assistant Commissioner of Police, Shri Christian, reached the place. He enquired as to whether anything is found. He was informed about the information. He was shown the two suspects and was informed about their search. Introduction of Shri Christian was given. It was conveyed that he is a Class-I Officer - Assistant Commissioner of Police, and whether the accused are having any objection if their search is carried out in his presence. The accused having expressed no objection, consent of Shri Christian to remain present during the search was obtained.

The accused were told that if they have any substance like brown sugar, the same be handed over to the police party. Merazbibí gave her hand pouch of coffee colour with a flower print. In that hand pouch, a paper packet, rectangular in shape, with a pink colour rubber bend was found. On opening the same, a transparent plastic bag admeasuring 10 x 14 was found, containing light yellow colour powder. On weighing, it was found to be 7.700 gms. Merazbibí told that it was brown sugar. On enquiry as to whether the accused have any pass or permit for possessing the said brown sugar, they denied to have any. On personal search of Shri Akilkhan, from the pocket of his shirt, four small packets were found in a plastic bag, which contained small quantity of light yellow colour powder. It was not possible to weigh that powder. Thereafter, Akilkhan was also enquired as to whether he has any licence or permit to possess this narcotic drug like brown sugar, to which he replied in negative. Thereafter, keeping the paper and rubber bend in the hand pouch, the same was kept in a cloth bag. A slip containing the signatures of the police officers and panchas was placed in the cloth bag and the same was stitched. Thereafter, a slip containing the signatures of the panchas and police officers was affixed on the cloth bag, and was sealed, and it was given mark as Mark-A. Light yellow colour powder in the plastic bag was allowed to remain as it is and the same was kept in a transparent plastic box having blue colour cover, and in that, a slip containing signatures of the panchas and police officers was kept. The plastic box was closed with blue colour cover. Thereafter, the same was kept in a cloth bag. The cloth bag was stitched and sealed after placing a slip containing signatures of the police officers and panchas. It was given mark as Mark-B. Thereafter, four packets found from Akilkhan were allowed to remain in transparent plastic bags as it is. It was kept in a transparent plastic box and after placing a slip containing signatures of the police officers and panchas, the said plastic box was closed with a blue colour cover. It was then placed in a cloth bag. The cloth bag was stitched and sealed after placing the slip containing signatures of the police officers and panchas. The same was given mark as Mark-C. Thereafter, a personal search of Merazbibí was to be carried out, she was taken to Rustampura Police Chowky and on her search of person, nothing objectionable was found. The said search of person was carried out by a woman Police Constable-Ashaben, On further search of Akilkhan, Rs. 170-00 were found from his pocket consisting of currency notes of different denomination of 100, 50 and 20. These currency notes were kept in a brown paper cover and were marked as Mark-D. Merazbibí was also told as to whether

she would like to get the brown sugar weighed before any other person, to which she declined. Thereafter, the accused were arrested and were supplied reasons for their arrest. Merazbibi put her thumb impression. Merazbibi was also given a copy of seizure memo for the muddamal recovered from her, on which also the accused put her thumb impression. Whereas, Akilkhan was given a separate seizure memo for recovery of four packets of brown sugar and Rs. 170-00, a copy of the seizure memo was signed as a token of acknowledgement. He was also given grounds of arrest, an office copy of which was signed by him. After reading the panchnama before the panchas, it was signed by both the panchas, Police Inspector and Deputy Commissioner of Police, Shri Christian. The panchnama was over by about 9-45 p.m.

Mr. Jhabha, Police Sub-Inspector, filed an F.I.R. in the presence of Shri H. S. Ninama, Police inspector, and Shri Christian, Deputy Commissioner of Police, at Rustampura Police Chowky and Shri Christian and Shri Ninama also signed the same. Thereafter, both the accused, muddamal and all papers pertaining to the case were taken to Salabatpura Police Station. The same were handed over to the Police Station Officer, who in turn registered an offence, and a yadi was given to the Police Station Officer, which is produced at Exh. 28. The investigation was handed over to P.S.I., Shri Jhabha. Shri Jhabha forwarded the muddamal to the Forensic Science Laboratory ("the F.S.L." for short), Ahmedabad. On receipt of the F.S.L. report and on completion of the investigation, a charge-sheet was filed.

3. The learned Judge explained to the accused the charge framed against them, and the accused, having denied the offence, were tried.

4. The prosecution, therefore, examined (i) Usmanbhai Rehmanbhai Dudhwala, P.W. 1, Exh. 13, a Panch Witness; (ii) Shantaram Baburao, unarmed Head Constable, P.W. 2, Exh. 24, who was sent for verification of the information; (iii) Hasmukhbhai Sartanbhai Ninama, Police Inspector, P.W. 3, Exh. 26; (iv) Pursottambhai Shivabhai Rathod, Head Constable, P.W. 4, Exh. 39; (v) Bijalbhai Nathabhai, Crime Writer Head, P.W. 5, Exh. 44, who was handed over the muddamal by the Police Station Officer for safe custody; (vi) Bhimsinh Gulabbhai, Head Constable, P.W. 6, Exh. 47, who had taken the muddamal to F.S.L., Ahmedabad; (vii) Prahladrao Ramshanker Joshi, Assistant Director, F.S.L., Ahmedabad, P.W. 7, Exh. 51; and, (viii) Siraj Abdul Mazid Jhabha, Police Sub-Inspector, Salabatpura Police Station, P.W.-8, Exh. 57, who filed the complaint and carried out investigation, and on completion of the same, having found prima facie case, filed a charge-sheet.

5. The prosecution has also relied upon the documentary evidence, namely, (i) panchnama at Exh. 14; (ii) receipt at Exh. 15 (seizure memo for recovery of the contraband narcotic drug from Merazbibi); (iii) receipt at Exh. 16, (seizure memo for recovery of contraband narcotic drug and Rs. 170 from Akilkhan); (iv) statement of unarmed Head Constable, Shantaram Baburao Patil at Exh. 25, the one who was sent for verification of the information; (v) F.I.R. at Exh. 27; (vi) forwarding letter at Exh. 28 written by the Police Inspector, Shri H. S. Ninama, to

the Police Station Officer, Salabatpura Police Station for registering an offence on the basis of the complaint filed by the Police Sub-Inspector, Shri S. A. Jhabha; (vii) intimation at Exh. 29 sent to the Deputy Commissioner of Police (North Division), Surat City by Police Inspector informing about the arrest of the accused, recovery of the muddamal with Form F and a copy of the complaint; (viii) Form-F at Exh. 30, Form F, seizure report of opium and other dangerous drugs; (ix) Exh. 31, a copy of the information received by the Police Inspector, Shri H. S. Ninama, on 13-8-1996 at 3-30 p.m.; (x) Exh. 32, an intimation sent to the Deputy Commissioner of Police (North Division), Surat City sending the information in a sealed cover at 3-45 p.m.; (xi) Exh. 33, a statement of Vasant Eknath, Police Jamadar, the one who was sent for verification of the information; (xii) Exh. 34, an intimation sent to the Deputy Commissioner of Police (North Division), Surat City, by H. S. Ninama, Police Inspector, about the raid, wherein it is recorded that at present, it is already 4-50 p.m. and if a search warrant or an authorisation is to be obtained from the Court, the same is likely to consume time; that the raid is to be carried out immediately; (xiii) Exh. 35, an intimation given to the female accused Merazbibibi, intimating about the information received, a search being carried out for the contraband narcotic drug and intimation given to the said accused about the search to be carried out in presence of Class-I Officer, informing about that the accused can get the substance weighed by any other person with a receipt (seizure memo) is already given about the muddamal recovered from the accused that an offence is registered against her under Sections 8, 9, 10, 20 and 21 of the N.D.P.S. Act and that she is arrested at 9-45 p.m.; (xiv) Exh. 36, similar intimation to accused No. 1, Akil Khan Mehboob Khan Pathan; (xv) Exh. 40, a copy of the entry made in Police Station Diary, being Entry No. 32 of 1996 dated 13-8-1996 at 11-35 a.m.; (xvi) Exh. 31, a copy of the entry made in the Crime Register at 3-35 p.m. by the Police Inspector, Shri H. S. Ninama, Salabatpura Police Station; (xvii) Exh. 42, a copy of the Salabatpura Police Station Diary, being Entry No. 21 of 1996 dated 13-8-1996 at 5-50 p.m.; (xviii) Exh. 45, a copy of the extracts of the muddamal register; (xix) Exh. 48, a note by Police Sub-Inspector, Salabatpura Police Station to an Unarmed Head Constable, Bhimsinh Gulabsingh, for taking muddamal to the F.S.L., Ahmedabad; (xx) Exh. 49, a copy of the intimation of Exh. 48 to the concerned Head Constable routed muddamal to F.S.L.; (xxi) Exh. 52, a forwarding letter from F.S.L. to the Police Inspector Salabatpura Police Station along with F.S.L. report; (xxii) Exh. 53, a letter from the Police Sub-Inspector, Salabatpura Police Station to the Director, F.S.L., Ahmedabad for analysing the sample sent; (xxiii) Exh. 54, a forwarding note; and, (xxiv) Exh. 55, a receipt issued by F.S.L. for having received the muddamal, etc.

6. The learned Judge, after recording the evidence, explained the same to the accused and recorded their statements u/s 313 of the Code of Criminal Procedure, wherein, both the accused have not stated anything except denying the case of the prosecution. They have also not shown their willingness to depose on oath and they have only said that a raise case is registered against

them and that they are innocent.

7. The learned Judge, on appreciation of evidence, recorded the conviction for the offence under Sections 8, 9, 10, 21 and 29 of the N.D.P.S. Act and sentenced, as aforesaid, against which the present appeal is preferred.

8. Mr. B. G. Jani, learned Advocate for the appellants, submitted that the conviction recorded u/s 21 of the N.D.P.S. Act is not correct and that it could have been only u/s 22 of the N.D.P.S. Act, but as no charge u/s 22 was framed, the conviction of the appellant is required to be quashed and set aside by this Court.

9. Section 21 provides for punishment for offence/s in relation to manufactured drugs and preparations, while Section 22 of the Act provides for punishment for offence in relation to psychotropic substances. We examined the provisions of the Act and the definition of the term, "manufactured drug", in Clause (xvi) of Section 2 of the N.D.P.S. Act, definition of "narcotic drug" in Clause (xiv) of Section 2, definition of psychotropic substance in Clause (xxiii) of the N.D.P.S. Act. The definition of the word, "manufactured drug", is "all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate; (b) any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug; but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufactured drug".

In the present case, Schedule-1 attached to the Narcotic Drugs and Psychotropic Substances Rules, 1985 has provided in the First Part titled as "Narcotic Drugs",

In the said part, there are three items, namely, (1) Coca Leaf; (2) Cannabis (hemp); (3)(a) Acetorphine; (b) Diacetyl Morphine (heroin); (c) Dihydrodesoxymorphine (desmorphine); (d) Etorphine; (e) Ketobemidone.

The item mentioned at Clause (b) is Diacetyl Morphine (heroin). In the present case, from the F.S.L. report, it is clear that what was found from Mark-B and Mark-C, was Morphine, Codain, Acetylene, Monoacetylene, Morphine, Diacetyl Morphine (heroin), Thiline, Pepelarine and Narcotin. Thus, it is clear that the contraband substance found from the accused did contain Diacetyl Morphine (heroin), which definitely falls within the definition of Narcotic drugs as mentioned in Schedule-1 to the aforesaid Rules. In view of that, the charge u/s 21 and conviction thereunder is not defective in any manner and the submission of the learned Advocate regarding the conviction being faulty on the ground that the conviction ought to have been u/s 22 of the N.D.P.S. Act is found without any merit and the same is rejected.

10. Mr. Joshi, learned Advocate, submitted that from the deposition of the raiding officer, Mr. Ninama, it is clear that he had received an information at 3-30 p.m., a copy of which is produced at Exh. 31, wherein it is recorded that -

"A person residing near Gopi Talav at "Akbar-Sayeed-Na-Tekra", in a hutment, named Akil Khan Mehboob Khan Pathan and Meraz Bibi, wife of Jalil Khan Rehman Khan Pathan, residing at Gopi Talav, "Akbar-Sayeed-Na-Tekra", in a hutment, in assistance of each other, are dealing in Narcotic drugs like brown sugar. Of the two, Akil Khan gets supply of brown sugar and Meraz Bibi gets customers for the same. Recently, they have received supply of brown sugar. Right now, they have gone out and after returning, they are likely to dispose of the same, and therefore, immediate steps be taken."

This information, as deposed by the Police Inspector, Shri Ninama, was recorded in the register and an entry was made in the Station Diary at Entry No. 20 of 1996 at 15-35 (3-35 p.m.). Thereafter, the said officer sent this information in a sealed cover to the Deputy Commissioner of Police (Northern Division). Thereafter, he sent two police personnel, namely, Shantarambhai Baburao and Vasant Eknath, for verification of the said information, who on return informed that the information is correct. Thereafter, the said officer has narrated the steps taken by him of calling the police personnel. One of the police personnel was asked to call the panch witnesses. After the panch witnesses came, they were explained about the raid. He has also deposed that as immediate steps were required to be taken, it was not possible to obtain warrant from the Magistrate or an authorisation from Class-I Officer. They took necessary material required for sealing the contraband substance, found if any. They had taken search inter se search, and thereafter, they started in a police vehicle after making an entry in the Station Diary about the same bearing No. 21 of 1996. He has also deposed that he had sent a copy of the statements of Vasant Eknath and Shantaram Baburao, which were taken on their return after verifying the information to the Deputy Commissioner of Police for information. They had prepared a preliminary panchnama which was signed by both the panchas and he had also signed the same. After reaching under a banyan tree near Rustampura Chowky, the jeep was sent back to Rustampura Chowky. Thereafter, he explained to the panchas and the police personnel about the dress in which the accused persons are to be identified. He stated that Akil Khan Pathan is wearing white colour lining shirt and black colour pant, while Meraz Bibi is in yellow colour punjabi dress and a pink colour Odhani.

Mr. Jani submitted that this description has come for the first time in the deposition and it is not said to have been given by the informant as it is not reflected in the Station Diary Entry, a copy of which is produced at Exh. 31. He also submitted that this information is not found either in the panchnama or in the complaint. He submitted that, therefore, the raid and the implication of the accused persons in such a serious offence, is very much doubtful. On perusing the panchnama on record, it is clear that the preliminary panchnama was

completed at 5-55 p.m. There is no mention of this information. In absence of such information, it would have been difficult for the police party to identify the accused, and therefore, prima facie, the contention raised by Mr. Jani does require consideration.

11. On perusal of the evidence of the Police Inspector, Shri H. S. Ninama, in his cross-examination, he has stated that information regarding the clothes in which the accused were to be found was given by the informant at a later stage. He has further clarified that "later stage" means at the time of coming out of the Police Station. From this evidence of the Police Inspector, it is explained how the information regarding the clothes, in which the accused were to be found, was received by the officer who was to conduct the raid. Not only that, the officer has deposed that he had stated to the panch witnesses and the members of the police party that only after getting a signal from him, the police party personnel shall come into action. He has also deposed that while they were waiting at the place after about 45 minutes, a rickshaw came from Delia Mohalla and from that, one person with a female passenger got down. They were found answering the description. The Police Inspector then gave a signal, and thereafter, both these accused were surrounded at a little distance. Then, on enquiry, they disclosed their name to be Akil Khan Mehboob Khan Pathan and Meraz Bibi, wife of Jalil Khan Rehman Khan Pathan. In view of this discussion, the point raised by Mr. Jani is explained. The Police Officer, who carried out the raid, did have that information and he had received this information from the informant at the time of coming out of the police station, and therefore, it was rightly not recorded in the preliminary panchnama. However, in view of the aforesaid discussion, it cannot be said that the officer did not have that information and in absence of such an information, he has falsely implicated the present accused in such a serious offence.

12. Mr. Jani, learned Advocate, submitted that it is recorded by the learned Special Judge in all the depositions that, as the accused are not able to understand or speak Gujarati, charge, questions and deposition were read and explained to them in Hindi, and thereafter, the same recorded. Mr. Jani submitted that the Police Inspector, Mr. Ninama, in his cross-examination, has stated that, they reached under the banyan tree. After about an hour or so, Assistant Commissioner of Police, Shri Christian, had reached there. After about 45 minutes of their reaching under the banyan tree, a rickshaw had come. Mr. Jani submitted that, he has not taken note of the registration number of that rickshaw. The accompanying police personnel of the deponent did not try to stop the rickshaw while it was returning. It was only when both the accused, after getting down from the rickshaw started going, they were stopped and interrogated in presence of all. A noting made to that effect is in Exh. 14. The deponent has further stated that the deponent interrogated them in Gujarati. Mr. Jani submitted that, thus, it is clear that interrogation was in Gujarati and, therefore, a breach of mandatory provisions of Section 50 is committed.

Mr. Jani submitted that Sub-section (1) of Section 50 lays down the conditions under which a search of a person shall be carried out. It is provided that when any officer duly authorised u/s 42 is about to search any person under the provisions of Sections 41, 42 or 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

Mr. Jani submitted that as is laid down by various decisions of the Apex Court, under Sub-section (1) of Section 50, the accused is to be told by the raiding officer about his right of being searched in presence of a Gazetted Officer of any of the departments or in presence of the Magistrate. Mr. Jani submitted that this is to be conveyed to the accused in an effective manner. If a person does not know Gujarati and if he is conveyed of his right of being examined in presence of a Gazetted Officer or a Magistrate, in Gujarati, it is no communication, and therefore, there is a breach of a mandatory requirement u/s 50.

The submission of Mr. Jani, prima facie seems to be not only attractive but also convincing. Mr. Jani relied upon a judgment of Madhya Pradesh High Court reported in 1995 (1) CLJ 2939 (UP) and also a judgment of the Delhi High Court reported at John Bamidele Vs. State, . Mr. Jani submitted that it is held that the accused should have been explained his right in the language known to him.

We have examined the evidence on record of the case. It has come on record that accused No. 1, Akilkhan Mehboobkhan Pathan, is residing in Surat and is driving a rickshaw. Not only that he has signed all the papers in Gujarati while Merazbibibi has put her thumb impression being illiterate. We have perused the panchnama, Exh. 14, wherein it is recorded that, "on accused having got down from the rickshaw, on a signal being given by the police inspector, keeping the panchas in front of them, these accused were gheraoed and on enquiry, in presence of the panchas, the male accused disclosed his name to be Akilkhan Mehboobkhan Pathan, aged 31 years, residing at Gopi Talav, "Akbar-Sayeed-Na-Tekra", in a hutment, and the female accused disclosed her name to be Merazbibibi, wife of Jalilkhan Rehman Khan Pathan, aged 30 years, residing at Gopi Talav, "Akbar-Sayeed-Na-Tekra", in a hutment. The Police Inspector explained to them about the information received by him that, "they have brown sugar, and therefore, he wants to search them under the N.D.P.S. Act. He also explained to them that under this Act, both of you have full right to get yourself searched in presence of a Magistrate. If they so desire, then we will take you to a Magistrate or if you want any Class-I Officer to be called, we will arrange for the same".

Both these persons declined for the same and said in Gujarati that, "Saheb amne Java do", meaning thereby, "Sir, please let us go". After saying this, the female Merazbibibi tried to run away, but fell down.

It is further recorded in the panchnama that in the meantime, a police jeep came on the scene and from it, a police officer in the uniform got down and asked the raiding police officer, "whether caught", to which officer replied in the affirmative.

The officer was introduced to panchas as Shri H. N. Christian, Assistant Commissioner of Police, "C* Division, Surat. The officer also introduced the Assistant Commissioner of Police to the accused. The officer informed Mr. Christian about the information and requested that as search is to be carried out, he may remain present. Mr. Christian consented for the same, and therefore, the raiding officer again explained to both the accused that Shri Christian is a Class-I Officer and whether they have any objection in being searched in his presence, in reply to which, the accused No. 2, Merazbibi, and accused No. 1, Akilkhan, declined and stated in Gujarati that, "Amane Koi Vandho Nathi; Amari Bhool Thai Gai Chhe; Saheb, Amne Java Do", meaning thereby, "we have no objection; a mistake is committed by us; Sir, please let us go." Thereafter, it is recorded in the panchnama that a woman police constable, Ashaben Devajit, was kept present and in her presence, the accused was asked to surrender the narcotic drug, if any. The accused, Merazbibi, handed over her hand pouch made of rekjin of brown colour having a flower print newspaper, and on opening the said pouch, a packet with a pink colour rubber band, rectangular in shape, was found and on opening the packet, a transparent plastic bag was found from that packet.

13. From the aforesaid two quotes, which are stated by the panchas, in the words spoken by the accused, it is more than clear that the accused knew Gujarati. Besides this, from the fact that Akilkhan, who is stated to have been plying rickshaw in the city of Surat, a judicial notice can be taken that he is having knowledge of Gujarati and it cannot be said that when the raiding officer interrogated him and conveyed the information and his right under the N.D.P.S. Act, he did not understand the same, and therefore, there being no any effective communication of the same, there is a breach of mandatory provisions of Section 50(1) of the N.D.P.S. Act.

Besides this, we have taken care to examine the statements recorded of these two accused u/s 313 of the Code. Had it been a fact that the accused did not understand Gujarati, the first averment before the learned Special Judge would have been that we do not understand Gujarati at all and that we do not know as to under what offence we are arrested and brought here. No where in the statement u/s 313, either of these accused have stated that they do not know Gujarati. In any case, in reply to the last question as to whether they have anything special to submit, the accused could have definitely stated that they do not understand Gujarati, and therefore, they do not know anything about proceedings, which have taken place against them at the time of raid.

In view of this convincing evidence, we are of the opinion that the plea raised by Mr. Jani has no substance. Not only that, we are of the opinion that this stand was taken by the accused during trial only with a view to see that such a plea can be taken at an appropriate stage. In fact, from the aforesaid evidence, we are of the opinion that the accused have deliberately tried to mislead the learned Special Judge by stating that they do not understand Gujarati and are not able to speak Gujarati on account of that, proceedings were required to be translated

and explained to them in Hindi.

14. So far as the two decisions relied upon by Mr. Jani are concerned, the same have no application to the facts of the present case. In the decision of Madhya Pradesh High Court, it was a case where the accused was a South Indian (Madrasi) and he did not understand any other language than Tamil and Kannada and this fact was verified by the Court by putting several questions so as to find out as to whether the accused really did not understand Hindi. The Court had given further opportunity to the learned Government Advocate to put questions to the accused and to find out as to whether the accused was able to understand Hindi or not. In such circumstances, on the ground that the accused did not understand English in which the proceedings were conducted, the Court had held that the case of the prosecution must fail.

15. In the matter before the Delhi High Court, it was a case of Nigerian Citizen. In that case, he was explained in English, but then, he had a little knowledge of English. Having held that he was able to understand little English, the Court did not hold on this point in favour of the accused. Therefore, the authority on the face of it is not supporting the case of the appellants herein .

16. Mr. B. G. Jani, learned Advocate, next submitted that there being a female accused, the prosecution ought to have taken care to keep a female panch present while conducting the raid. Mr. Jani submitted that in a judgment of Bombay High Court, reported in 1993 MLJ 1073, in the matter between Amina Abdul Sheikh v. State of Maharashtra, the Court had held that a female panch ought to have been kept present while taking search of a female accused.

On perusal of the facts of the case, it is found that the Bombay High Court while dealing with the question of the search of "person" of a female accused, it was held that, in case when a female accused is to be searched for her person, as it is provided under the relevant provisions of law, such search can only be taken by a lady police officer. In the case on hand, the raiding officer had taken care to take a lady constable, Ashaben Devajit, with him and the accused, Merazbibi, was searched by the lady police constable. The submission of Mr. Jani that search should have been carried out in presence of a lady panch, would have certainly clinched the issue provided it was the case of the prosecution that the contraband narcotic drug was found from "the person" of the accused. In the present case, in the presence of panchas, the accused, Merazbibi, handed over the hand pouch and on opening that hand pouch, a packet consisting of contraband narcotic drug was found. When it came to search "the person" of accused, Merazbibi, she was taken to Rustampura Police Chowky, situated close to the place of raid, so that her "search of person" can be carried out in a secluded place. If it would have been a case of the prosecution that from the person of the accused, Merazbibi, contraband narcotic drug was found, the case would have definitely failed on the ground of absence of lady panch, but in the present case, when nothing is found from the person of the accused, the case of the prosecution is not vitiated at all. Therefore, the aforesaid decisions of the

Bombay High Court that when a lady accused is to be searched of her person, the same should be done by a lady police officer in presence of a lady panch, does not come to the rescue of the accused. This contention of Mr. Jani is also rejected.

17. Mr. Jani, learned Advocate appearing for the appellants, next contended that in the present case, investigation is carried out by the Police Sub-Inspector, Mr. Jhabha, who was also a member of the raiding party. He relied upon two judgments of the Supreme Court reported at Bhagwan Singh Vs. The State of Rajasthan, and Megha Singh Vs. State of Haryana, , two decisions of the Rajasthan High Court reported at 1992 (5) Crimes 537 and Gyan Chand Vs. The State of Rajasthan, , and one decision of this High Court reported "at Gopalla Ghisulal Chhipa (Since Decd.) through his heirs and LRs. Vs. State of Gujarat, . Mr. Jani submitted that the case of the prosecution should fail on the ground that the investigation is carried out by an officer who was a member of the raiding party. He submitted that the theme of these decisions is that the complainant himself should not be the Investigating Officer. He submitted that as in the present case, that principle is not adhered to, the prosecution case must fail.

18. On perusal of these decisions, we are of the opinion that none of these decisions apply to the facts of the present case. The judgment reported in Megha Singh Vs. State of Haryana, is under the Arms Act. The judgment reported in Bhagwan Singh Vs. The State of Rajasthan, is under the Corruption Act, while the judgments of the Rajasthan High Court are indeed under the N.D.P.S. Act, but the judgment of this Court is under the Corruption Act.

19. Mr. K. T. Dave, learned Additional Public Prosecutor, submitted that the facts of all these cases are different than the facts of the case on hand. It is always a desirable thing that the complainant should not be the Investigating Officer, but merely because a raiding party member happens to be the Investigating Officer, the case of the prosecution is not vitiated. He submitted that in the present case, when a panch - an independent witness has supported the case of the prosecution, it speaks about the trustworthiness of the case of the prosecution. He further submitted that in the cases under the N.D.P.S. Act, normally, nothing remains for the Investigating Officer to investigate. It is the evidence of the raiding officer and supporting evidence of panch witnesses and documentary evidence in the form of F.S.L. report, which is material. He submitted that success of the prosecution case mainly depends upon the credibility of the raiding officer's evidence. In case, evidence of the raiding officer is not found to be trustworthy or reliable, the case of the prosecution fails. In such circumstances, merely because the Investigating Officer happens to be a member of the raiding party, cannot be allowed to vitiate the case of the prosecution because in cases under the N.D.P.S. Act, in reality, there is hardly any important role played by an Investigating Officer. In fact, Investigating Officer undertakes the work of recording the statements of the police personnel, who were present at the time of raid, statement of Police Station Officer, and that

of Constable or any other Police personnel, who carried the muddamal to the F.S.L. Beyond that, nothing substantial is required to be done by him.

20. In our considered opinion, we find substance in the submissions of Mr. Dave and we are of the opinion that merely because the Investigating Officer happened to be a member of the raiding party, the case of the prosecution is not vitiated. More particularly, when the accused have neither pleaded nor proved that any prejudice was caused to them on account of raiding party member acting as an Investigating Officer. Mr. Jani is not able to point out any prejudice caused to the accused, and therefore, this contention also fails. The same is rejected.

21. Mr. Jani lastly submitted that in the present case, panch was not an independent panch, and therefore, the case of the prosecution cannot be said to have been supported by an independent witness, and therefore, the prosecution case should fail.

In the present case, it is not alleged by the defence that this panch had any enmity with the present accused or that this panch had any special reason to falsely corroborate the case of the prosecution and to support the panchnama, which was drawn by a police officer in his presence. In this case, the presence of an officer of the rank of Deputy Commissioner of Police gives an extra credibility to the procedure undertaken by the raiding officer. In the present case, all papers including the panchnama, seizure memo and arrest intimation are signed by the Deputy Commissioner of Police, who was present on the scene of occurrence.

Mr. Jani is not able to explain the concept of "the independent panch". Merely because a person happens to be residing in the vicinity of a Police Station or in a particular area, he does not lose his independence. In the present case, panch witness was cross-examined in detail, but the defence Counsel is not able to bring out any material on which it can be said that the panch was not an independent witness. Merely because the panch is selected, who happened to be residing in a nearby locality of the police station, we are of the opinion that he cannot be held to be non-independent witness. It is required to be noted that in a case under the N.D.P.S. Act, a preliminary panchnama is to be drawn and that is to be drawn by an officer before he starts for raid at the police station. In that situation, it is natural that a panch will be called at the police station, then he cannot be called from a place where raid is to be carried out nor it will be feasible to call a person from a far away place from the police station. Similarly, there cannot be two separate panch witnesses, one for the , preliminary panchnama and the other for subsequent panchnama. The contention of Mr. Jani, is therefore, rejected having found no substance.

22. For the foregoing reasons, the present appeal fails and the same is dismissed. The conviction and sentence awarded by the learned Special Judge, Surat is maintained. Muddamal be disposed of in terms of the directions given by the learned Special Judge, Surat.