
(2001) 02 BOM CK 0093

In the Bombay High Court

Case No : Criminal Appeal No. 577 of 1997 with Criminal Appeal No's. 379, 883 of 1998

Anwar Hussain Mohd. Idris Ansari

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 13-02-2001

Acts Referred:

Evidence Act, 1872 — Section 114, 27

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 29, 42, 42(1), 42(2)

Citation : (2001) ALLMR(Cri) 609 : (2001) ALLMR(Cri) 331 : (2001) BomCR(Cri) 694 : (2001) 3 BOMLR 338

Hon'ble Judges : N.V. Dabholkar, J

Bench : Single Bench

Advocate : Shri L.K. Chari, Mr. A.R. Khan and Mr. K.M. Sangani, for the Appellant; Shri D.T. Patil, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

V. Dabholkar, J.—These appeals, appellants - original accused Nos. 3, 2 and 1 respectively, impugn the conviction and sentence imposed upon them by the common judgment delivered in N.D.P.S. Special Case No. 61 of 1994 with 220 of 1994, by the Special Judge (N.D.P.S.) for Greater Bombay.

The prosecution arises out of Crime No. 4 of 1994 registered with Narcotic Cell of C.B.C.I.D. Seven accused where charge sheeted by the case registered as Special Case No. 61 of 1994 and eight by Special Case No. 220 of 1994.

By the impugned judgment delivered on 26.8.1997, the learned trial Judge was pleased to acquit accused Nos. 4 to 8 and convict the three appellants. In fact, all the accused are acquitted as far as charge u/s 29 of the N.D.P.S. Act, 1985 i.e. criminal conspiracy to commit an offence punishable under Chapter IX of the said Act. All the three appellants are held guilty for the offence punishable u/s 21 read with Section 8(c) of the N.D.P.S. Act, 1985 i.e. possession of heroine and

accused Nos. 1 and 2 are sentenced to suffer rigorous imprisonment for ten years and pay a fine of Rs. 2,00,000, in default, further rigorous imprisonment for two years. Accused No. 3 is sentenced to suffer rigorous imprisonment for 15 years and fine of Rs. 5,00,000, in default, further rigorous imprisonment for three years.

2. The prosecution has a long story, which includes a chain of three events. Since couple of months prior to alleged incident, D.C.P. Narcotic Cell, Bombay was getting information of heroine, being imported in the city of Bombay from Pakistan and Afghanistan. The officers of the Department were directed to keep vigilance about the same. Complainant, P.S.I. Nigade, therefore, alerted his informants and instructed them to work accordingly. In the first week of December, 1993, P.S.I. Nigade was informed by the informant of having learnt of a gang, which stored huge quantity of heroine imported from Pakistan. It was, further informed that the heroine was being distributed to various parties by three wheeler rickshaw. The informant was instructed to obtain further detailed information.

On 6.1.1994, at 1800 Hours, Shri Nigade was informed by his informant that the gang consisting of one Mohd. Idris and his sons, Anwar. Akhtar and Asgar are linked with two Pathans, operating from Ahmedabad in the State of Gujarat and Rickshaw, MH-02/P-4872 driven by one Salim was being used for distribution of heroine.

Description of Salim, Anwar and one Gulam was also obtained. It was specifically informed that Salim, Anwar and Gulam would be on delivery trip between 2300 Hrs. of 6.1.1994 and 0300 Hrs. of 7.1.1994 by the said rickshaw. The informant suggested to lay a trap at LBS Road, Link Road, Near Traffic Booth, Bhandup, Bombay.

P.S.I. Nigade, passed the information to P.I. Surya, who informed it to Shri Rahul Rai Sur, D.C.P. Narcotics. Couple of panchas were thereafter procured and raiding party, inclusive of D.C.P. Sur, P.S.I. Nigade. P.I. Wadile. P.I. S. Surya and other police paraphernalia proceeded to the spot and took positions, by about 2230 Hrs.

At 0100 Hrs. of 7.1.1994, the rickshaw was spotted. Raiding party members signaled to each others and rickshaw was intercepted by the Police vehicles. Accused No. 1 was in the driver's seat and accused Nos. 2 and 3 the passengers. In the search, cash of Rs. 100/- and polythene bag containing about 100 gms. heroine were recovered from the shirt and pant pockets of accused No. 1 Salim. Accused No. 2 Gulam had cash of Rs. 1,000/- in his pant pocket and 1.02 kgs. of heroine in the plastic bag carried in his right hand. Accused No. 3 Anwar had cash of Rs. 2,000 in his pant pocket, apart from the white plastic bag carried in his right hand, which contained 1.025 kgs. of heroine. A key was also recovered from his shirt pocket and accused informed that it was the key of cupboard in his house. Search of the rickshaw did not yield any objectionable articles. The documents regarding vehicle such as taxation, insurance and fitness certificates,

road permit, battery guarantee etc. and a bunch of 8 keys was recovered from the same.

Usual procedure of testing the contraband by field identification kit, withdrawing couple of samples from each stock, sealing and labelling of all the articles etc. was carried out and the panchanama, first phase of which was recorded in the office, was completed by supplementary second phase, regarding occurrence on the spot. The raiding party returned to the office of Unit No. 3 at Ghatkopar with the three accused persons and seized the articles, where P.S.I. Nigade registered the complaint.

During the course of interrogation immediately after registration of the complaint, accused No. 3 Anwar volunteered to make a statement, which was recorded in presence of another set of panchas. He showed willingness to show stocks of 18 Kgs. and 30 Kgs. of Gird (heroin) powder kept respectively at Mumbra and Madanpura. He claimed that the same was kept by him and his father Mohd. Idris.

As guided by accused, raiding party visited Mumbra premises and recovered around 18 Kgs. heroin and cash of Rs. 2,00,000 from the cupboard in his house. The cupboard was opened with the key that was seized from him in the earlier incident. The contraband was in 18 packets. Accused Nos. 4 and 5 were present in the house. This proceeding took place between 0510 to 0615 Hrs. of 7.1.1994.

The party, thereafter, proceeded to Madanpura, Ghelabhai Street, Bombay. Accused guided police to room No. 26 of Adam Siddiqui's Baithi Chawl. On the mezzanine floor in the said room, accused No. 7 was present in the outer part. In the inner part, accused No. 6, his wife and a child were present. At the direction of accused No. 3 Anwar, accused No. 6 Akhtar produced a large bag from the bathroom. 30 packets, containing about 30 and odd kilograms of heroin, were recovered from the bag.

While going out, person of Rashid, who was in the outer compartment of the mezzanine floor, was searched and a polythene packet containing 150 gms. of heroin was recovered from his right pant pocket. Cash of Rs. 150/- was also recovered from the left pocket.

At Mumbra, 18 packets were in two groups of 10 and 8. At Madanpura 30 packets were in 5 groups of 7, 9, 6, 5 and 3 bags respectively. The groups were identified due to the marking on the covering cloth. Specimen from each group as also packet recovered from accused No. 7, tested positive for the heroin on the field identification kit and therefore, couple of samples were taken from each stock, followed by the procedure of sealing and labelling etc. The prosecution claims to have complied with all statutory requirements under the N.D.P.S. Act, 1985 as also Code of Criminal Procedure, 1973, during all three phases of the raid.

Eleven samples were carried to Chemical Analyser by Police Naik V. V. Tapre on

10.1.1994. On receipt of Analyser's report dated 8.4.1994, confirming detection of heroine in all eleven packets, along with other Opium alkaloids and on completion of investigation, charge-sheet was filed on 30.3.1994 against accused Nos. 1 to 7. Supplementary charge-sheet against accused No. 8, who was that time absconding; was filed on 30.11.1994 after he was found apprehended in another crime No. 45 of 1994.

After considering the evidence of seven prosecution witnesses (although infact eight witnesses were examined, P.W. 5 Paresb Pujara expired even before his Chief Examination could be completed), which included, Chemical Analyser, two panchas, one carrier, three raiding party members, including complainant and Investigating Officer, three defence witnesses and the Court witness, the learned Judge recorded finding of guilt against three appellants and not guilty against rest of accused persons.

3. In the impugned judgment, taking into consideration Exhibit 86; entry in the information book and Exhibit 87; copy of the information sent to A.C.P./D.C.P. Narcotics, the learned Judge observed that there is compliance of requirements of Section 42(1) and (2). The learned Judge went to observe further that since search and seizure has taken place at Bhandup Link Road Junction (public place), the same is governed by the provisions of Section 43 of the N.D.P.S. Act, 1985.

The argument, that since contemporary documents i.e. the complaint and panchanama did not indicate that during the search at Bhandup, three accused were apprised of their right to be searched before a Gazetted Officer or a Magistrate, because the word "Magistrate" is absent in the reference regarding such intimation, there is no compliance of Section 50; is turned down by the learned Judge, in view of the oral evidence of prosecution witnesses Nos. 1, 2, 3 and 8.

Non-production of log book of rickshaw or non-examination of owner, according to the learned Judge; were not sufficient to disbelieve the interception and search of rickshaw and persons travelling there. The explanation of panch witnesses that due to fear they have given fictitious addresses in the panchanama was found acceptable and the learned Judge refused to disbelieve them on that count, as argued by the learned counsel for the Defence. The argument, it is improbable that the accused Nos. 2 and 3 sitting in the passenger's space of rickshaw would hold the parcel of contraband weighing about 1 Kg. in their hand, did not find favour with the learned Judge.

As far as key is concerned, referring to panchanama Exhibit 68, learned Judge rejected the evidence of panch witnesses P.W. 2 and P.W. 3 to the effect that key was sealed at Bhandup itself and therefore, also rejected the argument that, it was not possible to open the cupboard at the residence of accused No. 3 by the same key.

Merely because, there was no train for Calcutta at 3.00 a.m. from Ghatkopar, the Judge was not inclined to disbelieve the version of P.W. 7 Sunil, that he was

called by the police, while he and his friend had come to Ghatkopar to see off father of his friend from Ghatkopar for the purpose of boarding a Calcutta train. This is because, the panch had never said that the train for Calcutta was to be boarded at Ghatkopar and from Ghatkopar father could have travelled to Victoria Terminus, for the purpose.

The learned Judge also refused to disbelieve that accused No. 3 made a statement showing willingness to point out contraband at Mumbra and Madanpur, inspite of the fact that the Station Diary entry Exhibit 91 was effected while raiding party departed for discovery at the instance of accused No. 3, did not bear any such recital.

Except their names in the secret information and presence when the police visited there being no other material against accused Nos. 4 and 5, they are acquitted. About accused No. 6 the learned Judge felt that possibly he did not know what were the contents of said case. Benefit of doubt was given to him as well as accused No. 7 because panch witness Sunil gave confused evidence as to which of the accused have out the suitcase at the direction of the accused No. 3, and which of the two was searched to recover polythene bag of 150 gms. of heroine. Father of accused Nos. 3 to 5, i.e. accused No. 8 is also exonerated, because except disclosure of his name in the information the learned Judge did not find any other material against him. However, we are not concerned with the reasons for acquittal of accused Nos. 4 and 8, for the purpose of present appeals. Therefore, those are dealt with very briefly.

Statement of accused No. 3, according to the learned Judge was strictly a statement u/s 27 of the Indian Evidence Act and not an information received u/s 42(1) of the Act of 1985 and therefore, argument that upon recording of this statement, copy of the same ought to have been sent to immediate superior official in compliance of Section 42(2) of the Act of 1985 was unacceptable.

As far as defence is concerned, learned Judge considered the evidence of Asma. mother of accused Nos. 3 to 5 in the light of the station diary entry at Sr. No. 33. dated 6.1.1994, produced at Exhibit 139. The learned Judge has read the station diary entry in evidence, although P.S.I. Tayade, who was summoned for proving the contents of station diary entry was discharged by the learned Additional Public Prosecutor. The learned Judge has taken into consideration all the circumstances, surrounding the manner in which the said station diary entry has come on record and read the contents in view of the fact that genuineness of the same was not disputed by the prosecution. However, it is observed that D.W. 2 has given substantive evidence only to the extent of accused Nos. 3 to 5 and 7 being taken away from the house on 6.1.1994 at about 5 a.m. She has not narrated many more facts, which are incorporated in the said station diary, i.e. the allegations such as police personnel having visited the house again in afternoon of 6.1.1994, having planted some contraband and having photographed accused No. 3 near the cupboard. Since, considerable contents of the station diary entry were not reiterated by D.W. 2 Asma, the learned Judge

felt that there is no evidence regarding truthfulness of the contents of the said station diary entry and therefore, the evidence of D.W. 2 together with the said station diary entry was incapable of proving the fact that accused Nos. 3 to 5 and 7 were picked up on 6.1.1994 at early dawn hours.

Theory of Asma that she had despatched the telegram addressed to the Commissioner of Police, as well as the Chief Justice of Bombay High Court, was found unacceptable because of admissions of D.W. 1 in his cross-examination that the date on the receipt was not legible, as also some writing on the receipt, which according to learned Judge, could lead to a possible inference that it was the receipt regarding telegram despatched from Bombay to Thane. Learned Judge felt that unavailability of the text of the telegram was further handicap for the defence.

Thus, learned-trial Judge disbelieved the theory that accused Nos. 3 to 5 and 7 were picked up by the police from the residence on 6.1.1994 at early hours and that Asma mother of accused Nos. 3 to 5 had either approached lawyers or sent telegrams to highest authorities, complaining about the same.

4. Learned Advocate Shri Chart contended that there is no compliance of Section 50 of the Act of 1985 inasmuch as the accused were not appraised of their option of being searched in the presence of "a Magistrate" and such appraisal was by collective communication to all the three accused, which is improper.

So far as discovery of contraband at Mumbra and Madanpura, according to the learned counsel there are indications on record speaking against accused No. 3 having made any statement, which is tried to be pressed into service as the statement u/s 27 of the Indian Evidence Act. He pointed out that the key recovered from the shirt pocket of accused No. 3 at Bhandup was sealed and yet the prosecution claims that cupboard at the residence was opened with the same key. Likewise, the number of currency notes of each denomination has changed, although amount was preserved in an envelopes sealed immediately after recovery. According to Advocate Chart, there is material on record to explain this. It was urged that in view of such mysteries on record, the prosecution evidence loses its probative value.

Shri Chart has also pointed out all the details surrounding the non-production and late production of station diary entry dt. 6.1.1994 effected on the basis of the intimation given by mother of accused Nos. 3 to 5. He has pointed out how witness P.I. Tayade was withheld by A.P.P. although he was summoned on the application of prosecution for the purpose of giving evidence regarding the said station diary entry. It was urged that the contents in the station diary entry, which is written at Police Station in the ordinary course of business and being account of acts of public servants, should be read in evidence and if the version of Asma, supported by that station diary entry is acceptable, it totally blasts the prosecution story.

Advocates S/Shri A.R. Khan and Sangani represent accused persons, who were

allegedly apprehended at midnight hours and have no concern with the recovery at Mumbra and Madanpura. They have subscribed to all the arguments by learned Advocate Shri Chari, so far as that part of the prosecution story is concerned, and added couple of minor points concerning their respective clients.

5. While replying, learned A.P.P. Shri Patil contended that accused were appraised of their option to be searched in presence of a Magistrate, as deposed by the witnesses. However, in case, Court arrives at a conclusion that there was no such appraisal because the word "Magistrate" is missing in the complaint and panchanama, since accused had waived their right u/s 50, neither omission to appraise regarding option to be searched in presence of a Magistrate nor irregularity if any in making such appraisal jointly to all the three accused can be said to be infraction of Section 50.

So far as the key is concerned, the contemporary documents do not claim that key was packed and sealed and therefore, the key was available for accused No. 3 for opening the cupboard at Mumbra residence. Relying upon various station diary entries, learned A.P.P. submitted the prosecution has specifically discovery of contraband at Mumbra and Madanpura at the instance of accused. According to him, defence evidence was rightly rejected by learned trial Judge. He prayed for upholding the conviction and sentence of appellant, although he conceded that he cannot explain the mystery regarding change in number of currency notes of each denominations.

6. REGARDING NON-COMPLIANCE OP SECTION 50.

Objection regarding non-compliance of Section 50, so far as to Bhandup incident is concerned, is two fold. Firstly, it is pointed out that all the three accused were jointly informed of their right to be searched in the presence of the Gazetted Officer. Secondly, they were never informed of their right to be searched in presence of "a Magistrate". An exception is taken also to the action on the part of the raiding party members in informing the accused persons that there were three Gazetted Officers in the raiding party. According to the learned counsel, the intimation was in such a manner as to give an impression to the accused that he has no choice, but to allow the search by raiding party members. That accused had an option of being searched in the presence of "a Magistrate" was not at all communicated to them.

In order to substantiate this proposition, the learned counsel pointed out that, although, P.S.I. Nigade, Panch Dinesh and Police Inspectors Vatkar and Surya (P.Ws. 1, 2, 3 and 8 respectively) all deposed about accused having been appraised of their right to be searched in presence of a Gazetted Officer or Magistrate, contemporary documents i.e. complaint Exhibit 64 and panchanama of the occurrence Exhibit 68 indicate that accused were appraised only of their right to be searched in presence of a Gazetted Officer. The depositions incorporating the intimation regarding the right of being searched in presence of "a Magistrate" therefore, will have to be ignored as unreliable improvement.

The prosecution witnesses Nos. 1, 2, 3 and 8 i.e. P.S.I. Nigade, Panch Dinesh, P. I. Vatkari and P. I. Surya all are the witnesses to the incident of search and seizure after laying a trap at Bhandup. As rightly pointed out by learned Advocate Shri Chari. S/Shri Nigade, Hatkar and Dinesh, although deposed in their chief examination that three accused were appraised of their right and also option to be searched in presence of either "a Gazetted Officer", or "a Magistrate", were forced to admit during the course of their cross-examination that contemporary documents i.e. panchanama and complaint of S/Shri Nigade, do not refer to the appraisal regarding second choice i.e. to be searched in presence of the Magistrate. The learned counsel Shri Chari was, therefore, justified in submitting that this being an improvement must be ignored and it should be held that, on the spot, three accused were informed only regarding their choice of being taken before a Gazetted Officer for their personal searches.

Shri Chari, placed reliance on the judgment of a Division Bench of this Court in *Sadrudin Mohd. Hussein v. D.C.B., C.I.D.C. Narcotic Cell Bombay*, and especially contents in para No. 6 of the same. In this matter, Narcotic Cell had received information regarding a Tanzanian national transacting in the Narcotics at Ballard Peer. On apprehension, accused Sadrudin Mohd. Hussain was informed that he was suspected to be in possession of narcotic drugs on the basis of information received. Although oral evidence claimed that accused was informed whether he desired to be searched in presence of "a Gazetted Officer or a Magistrate", recovery panchanama indicate, that accused was only asked, whether he wanted to be searched by any Special Executive Magistrate or any Magistrate. P.I. Ali Mulla Khan admitted during his cross-examination that the appellant was appraised of his right to be searched in presence of a Gazetted Officer, was not reflected in the panchanama. On these facts, relying upon the observations of the "Honourable Supreme Court in *Baldevsingh's case* 1999 SCC 1980, the Division Bench observed :

".... it has not been mentioned that appellant was appraised of his right to be searched before a Gazetted Officer and the public panch of recovery Mr. Vijay Rao is also silent on the appellant being informed whether he wanted his search to be taken in presence of a Gazetted Officer or a Magistrate. In our view, it would be unsafe to accept the substantive evidence of P.W. Ali Mulla Khan (P.W. 3) to the effect that he had asked the appellant whether he wanted to be searched not only before a Magistrate but also before a Gazetted Officer."

It was held by relying upon the decision of Constitution Bench in *Baldevsingh's case* that Section 50(1) gives a dual right to the accused, namely of his being informed whether he wanted to be searched before a Gazetted Officer or a Magistrate and as it was not proved beyond reasonable doubt, that the appellant was appraised of his right to be searched before a Gazetted Officer, there is non compliance of Section 50(1) of the Act of 1985. Needless to say that the appeal was allowed and conviction and sentence was set aside.

In *Mohanlal v. State*, similar point was considered since accused were asked

whether they wanted to be searched by a Gazetted Officer. The appraisal that accused had an option to be searched in presence of a Gazetted Officer and further intimation that raiding party contained couple of Gazetted Officers was, in the opinion of the Division Bench, hardly a compliance with the provisions of Section 50 of the Act of 1985.

In this matter, argument of learned A.P.P. that, since the prosecution had established about the accused being made aware of their right of being searched before a Gazetted Officer and accused having declined to be searched before a Gazetted Officer, there was substantial compliance of Section 50 because, said section did not confer an absolute choice between a Gazetted Officer or a Magistrate, was also rejected.

In the facts and circumstances of the case at hand, when the contemporary documents do not contain a recital that accused Nos. 1 to 3 were apprised of their dual choice to be searched in presence of either a Gazetted Officer or a Magistrate, the improved version of all four witnesses to the incident will have to be discarded and consequently, it must be said that the prosecution has not established strict compliance of Section 50(1) of the Act 1985, so far as the incident of interception at Bhandup on the night between i.e. 6th and 7th January, 1994 is concerned.

Learned A.P.P. Shri Patil submits that if Section 50 confers upon accused a right to be searched in presence of a Gazetted Officer or Magistrate, it also gives liberty to waive the right. It is incumbent upon the authorised officer to take accused before a nearest Magistrate or a nearest Gazetted Officer, if so desired by accused, but in case accused declines to exercise his right, in that case. Irregularity if any, in intimating about the right u/s 50 of the Act of 1985 should stand condoned and in such case non-compliance of Section 50 should have no adverse effect upon the merits of the prosecution evidence.

Shri A.R. Khan, pleading for accused No. 2/appellant in Criminal Appeal No. 379 of 1998, relied upon unreported judgment in Criminal Appeal No. 673 of 1996 dated 13.9.2000. In this matter also, accused were apprised that the raiding party include couple of Gazetted Officers. After considering the observations of Division Bench of this Court at Mohanlal's case (supra), it was observed that mentioning of the fact that raiding party included Gazetted Officers, while appraising accused regarding their right u/s 50 of the Act of 1985 was an act to discourage accused in opting for search by an independent authority. The possibility of accused being misled also cannot be ruled out. In that case intimation that raiding party contained Gazetted Officers was followed by information regarding u/s 50 of the Act 1985. There does not appear to be refusal on the part of accused person to exercise right before intimation of inclusion of Gazetted Officers in the raiding party. In the case at hands, it was only after accused declined the offer, they were apprised of Gazetted Officers being members of raiding party. In absence of appraisal of right to be searched in presence of a Magistrate, this was the worst possible situation. Accused were

appraised that they had a right to be taken before a nearest Gazetted Officer for personal search, if they so desired. They declined and thereafter, they were informed inclusion of Gazetted Officers in the raiding party and were searched by them. The resultant effect is a search of accused persons by a Gazetted Officer, although accused had specifically refused that option. There appears clear infraction of Section 50 of the Act of 1985 in the matter.

The argument of learned A.P.P., although attractive, is required to be rejected. If Section 50 confers a right upon accused, his waiver of right will exonerate the prosecution from blame of non-compliance of Section 50, only if all the options were fully appraised to accused and not when some of the options were suppressed from accused. In other words, there is no escape from total compliance of Section 50 in letter and spirit.

In the oral evidence, as well as contemporary documents, prosecution claims that all accused were informed of their right to be taken to nearest Gazetted Officer for personal search. The emphasis of learned counsel for appellants was the joint appraisal. In case of *Dharamveer v. State of Maharashtra*, referred above, four accused persons were jointly appraised of their right u/s 50 of the Act. Following the view in *Paramjeetsingh and another v. State of Punjab*, the Division Bench of this Court observed that, it was necessary for the officers of the raiding party to appraise the accused persons individually regarding their right contemplated u/s 50 of the Act of 1985 and in the absence of such evidence, there was no proper compliance of Section 50 of the Act of 1985. The case at hand also suffers from similar infirmity regarding compliance of Section 50.

In view of the guidelines laid down by the Constitution Bench of the Apex Court in *State of Punjab v. Baldevsingh*, non-compliance of Section 50 may not vitiate the trial but would render the recovery of illicit article suspect and vitiate the conviction and sentence of accused, where the conviction has been recorded only on the basis of possession of illicit articles, recovered from his person during a search conducted in violation of Section 50 of the Act. Apart from the claim that narcotic cell had prior intimation, there is no other evidence, except recovery from the person of these accused persons during the search. On the contrary, there are few other circumstances, which speak against the prosecution and make recovery more unreliable.

On reference to information that was received on 6.1.1994 at 1800 Hrs. which was the basis for laying the trap, accused Salim was named only as driver. Accused Nos. 3 to 5 and 8 were reported to be members of the Gang alongwith 2 Pathans from Ahmedabad.

As far as accused Nos. 2 and 3 are concerned, they are said to be holding the plastic bags containing about 1.025 kgs. of heroine in their hand. If accused were gangsters and on the trip for supply of drugs to their customers/conspirators, natural course of human conduct demands that even the rickshaw

could have a concealed location for keeping the contraband. The story of possession in the bags held in hand does not stand to the test of probability.

Admittedly, there was no interrogation for obtaining information of the destination or place of delivery. This circumstance, although very trifling is capable of hitting at the base of theory that accused were intercepted while in transit. For all these reasons, accused Nos. 1, 2 and 3 are entitled to acquittal for the charge of possession of heroine, so far as the incident at Bhandup is concerned.

7. Learned Counsel Shri Chari for original accused No. 3 has placed heavy reliance on the defence evidence and especially deposition of Asma - mother of accused Nos. 3 to 5. He has urged to read her oral evidence coupled with the station diary entry No. 33, effected by Mumbra Police Station on 6.1.1994 at 1925 Hrs. According to Advocate Shri Chari, these two pieces of evidence considered together are sufficient to establish that accused No. 3 along with his brothers - accused Nos. 4, 5 and brother-in-law accused No. 7 were taken away by Police on 6.1.1994 at early dawn hours and if this is probabalised by the defence the same makes total prosecution story unreliable. Shri Chari, did not fail to criticise prosecution for delaying production of the said station diary entry and conduct surrounding the production. This was on the basis of observations by the Trial Court in the impugned judgment paragraphs 40 and 42. Shri Chari submitted that conclusion of the Trial Court that the defence has failed to establish arrest of accused Nos. 3 to 5 and 7 at early hours of 6.1.1994 is therefore, erroneous.

On reference to Exhibit 126, evidence of Asma, she has narrated that on 6.1.1994 at about 5.30 or 6 a.m. the door bell rang, she opened the door and found three persons present there. One of them asked about Anwar, she informed that he was sleeping. She was asked to wake him up and simultaneously three persons rushed inside the house. According to her all three sons, who were sleeping in the entrance hall along with her son-in-law Rashid, woke up due to noise and those three persons took away all of them. On her enquiry, nothing was disclosed, but she was replied that she will come to know where they were being taken. On asking about the identity of those persons, they informed that they were police persons. According to Asma, they left in a jeep. Her evidence was recorded on 11.7.1997.

The station diary was got produced through D.W. 4 V. D. Gorhe, Police Constable attached to Mumbra Police Station by recording his evidence on 14.8.1997 for that purpose.

As can be seen from the record, a xerox of the station diary register pertaining to 6.1.1994 which contains as many as 44 entries numbered as 1 to 44 was obtained. Forty Four station diary entries dt. 6.1.1994 are marked as Exhibit 139 and xerox copy of the same is retained on record as Exhibit 139/A. The Judge desired to obtain a copy of all 44 entries because the station diary entry contained duplicate pages bearing each page number. Eventually whatever

doubts the Judge had because of duplication of page numbers are got clarified by examining P. I. Garje of Mumbra Police Station as Court witness at Exhibit 133. Shri Garje has clarified that the Station Diary has each page in duplicate and the Police Station is expected to effect entry in duplicate and send copy to superiors for information. However, he also added that, as a routine, all pages are now being used continuously, without preparing the duplicate or tendering it to superiors. Shri Garje was bold enough to concede that in his entire service he has not observed any police station following the practice of effecting entry in duplicate and submitting carbon copy to the seniors. The learned Judge has admitted station diary, read it in the evidence for reasons expressed in judgment para No. 40. The learned Judge observed that the prosecution has no evidence to suggest fabrication of the said entry and Special P. P. has not raised any doubt as to the genuineness of entry Sr. No. 33.

Section 114 of the Indian Evidence Act enables the Court to presume existence of certain facts, which it thinks likely to have happened, regard being had to common course of natural events, human conduct and public and private business. In relation to the facts of a particular case. The prosecution has produced some entries from the Station Diary of N.C.B. at Exhibits 89 to 92 and it will not be in a position to dispute that every Police Station maintains a Station Diary and records of all the occurrences within Police Station in the same. It may not be incorrect to say that maintenance of station diary is a part and parcel of functioning of the Police Station. Having regard to the common course of natural events, the Court would be justified in presuming that the event recorded in the station diary at a particular hour on a particular day has occurred at the Police Station, which maintains the diary. The learned Judge, therefore, appears to be justified in reading the contents of the station diary which is maintained by Police Station in its usual course of business.

The circumstances in which the station diary has come on record, registered by the Judge in his judgment ought to be taken cognizance of. Admittedly, at the initial stage of the trial, accused No. 3 applied for directions to Senior Police Inspector of Mumbra Police Station to produce the station diary entry dt. 6.1.1994 and especially entry at Sr. No. 33. Mumbra Police Station reported that the station diary was not available. Learned Advocate for accused Nos. 3 and 8 again prayed for production of the document during course of his arguments. This application Exhibit 138 was granted by the Court and it was only on 14.8.1997, said station diary was produced before the Court. The Court witness P.I. Garje of Mumbra Police Station has tried to explain that the station diary was not available earlier because the same was submitted in Sessions Court Thane, in connection with Sessions Case No. 729 of 1994 and hence it was available. Admittedly, the Station Diary and especially entry Sr. No. 39 dt. 10.1.1994, which was relevant for the said sessions case, does not bear any endorsement of the Sessions Court Thane, indicating that diary was tendered in the evidence before that Court. The matter does not end here. As observed by the learned Judge in para No. 40 of the judgment, at the request of Special Public Prosecutor

witness summons was issued to P.S.I. Shri Tayade, who was the scribe of relevant station diary entry No. 33 dt. 6.1.1994. On 20.8.1997. P.S.I. Tayade was present in the Court and the Special P.P. declined to examine him and therefore, witness was discharged. As rightly argued by learned Counsel Shri Chari, if the defence was insisting for production of station diary entry No. 33 right from the beginning of the trial, even after refusal by the Special P.P. to examine Shri Tayade, the Court ought to have examined P.S.I. Tayade or any other Police Officer who had effected the relevant entry. The learned Judge seems to have made amends of error in not examining the scribe of the entry by reading the whole entry in evidence. None of the parties objected to it.

On perusal of Exhibit 139/A, which is xerox copy of all station diary entries, Sr. Nos. 1 to 44, dated 6.1.1994 as effected by Mumbra Police Station, it is ascertained that the entry No. 33 is not interpolation nor addition of paper etc. The entry appears to have been effected in the usual course, in its sequence in the entries progressively effected during the day.

No doubt. Asma in her deposition has omitted many things. The Station Diary entry records five police men having visited the house along with one arrested person (not accused No. 3) at about 4 a.m. It has further details regarding visit of police men in the afternoon, along with accused No. 3 and having photographed accused No. 3 by spreading certain packets on the cot and by the side of a cupboard also. Certainly, many details in the Station Diary entry No. 33, said to have been effected on the basis of her narration are omitted by Smt. Asma during her deposition. The learned Judge, therefore, refused to believe Asma and the entry.

Asma had deposed after three and half years since the occurrence. In the eagerness of making self serving statements, witnesses tend to exaggerate and add spice. The omissions can hardly be the reason to disbelieve Asma, which on the contrary are assurance regarding absence of manipulation. Except suggesting that the incident occurred on the 7th morning and not on the 6th and that accused under arrest brought by the police was her son (accused No. 3), which suggestions were promptly denied by Asma: learned Special P.P. has not been able to obtain any admissions which may discredit and make her a witness unworthy of belief. The date on which station diary entry No. 33 was effected is the guarantee that denial of Asma is reliable and not the suggestions by Special P.P.

The learned Judge while arriving at a conclusion that defence raised that accused Nos. 3, 4, 5 and 7 were picked up by police on 6.1.1994 is not proved, has observed that the contents in the station diary entry cannot be the evidence as to the truthfulness of the contents therein. No doubt, the entry by itself, will not establish fact of three sons and son-in-law of D.W. 1 Asma being taken away by police on 6.1.1994 early morning. But the entry is corroborative piece of evidence, being record of subsequent conduct of witness Asma as influenced by the incident. The substantive or direct evidence of four persons being taken away

by police on 6.1.1994 is provided by deposition of Asma, who was a witness to the occurrence.

It must be borne in mind that burden of proof upon the defence is never as stringent as upon the prosecution. In case, defence can establish preponderance of probability, the same serves the defence. In the case at hands. Asma has given direct evidence and the same is supported by station diary of Mumbra Police Station. The probability of accused Nos. 3 to 5 and 7 being picked up on 6th morning, therefore cannot be ruled out.

The station diary entry is not the only corroboration. Evidence of Asma and Shri Pasbola, Advocate shows that she had been attempting to approach the Police Station and the Advocate and she has also sent telegrams to highest authorities, such as Commissioner of Police and the Chief Justice of Bombay High Court. Although defence has not been able to bring on record original of the telegram from either of the authorities or xerox certified copy from the postal authorities, it has produced registration receipt of the telegram. Although the learned Judge has relied upon the admission of D.W. 1 that date stamp on the said receipt is not clear, witness has produced at Exhibit D/2, entry under which the amount of telegram charges are credited to accounts on 7.1.1994. On perusal of receipt, handwritten date 6.1.1994 is legible. Charges of this telegram being Rs. 213/- it can be seen that this was not a routine telegram.

Thus, there is every reason to believe that Asma had sent telegrams as advised by Advocate Shri Pasbola to the highest authorities, as a result of her sons and son-in-law being taken away by police.

Version of Asma, supported by Station Diary entry and to some extent claim of having sent telegrams can be rejected, only, if, we can say that she had predicted arrest of accused No. 3 on the night between 6.1.1994 and 7.1.1994 and had planned a scheme of defence. But there is no evidence to inform such scheming on her part. In order to scheme such a planned defence, if Asma had predicted arrest of accused No. 3, as a natural course of human conduct, trip during which arrest was expected, could be cancelled or arrest could have been avoided by changing the route of journey or time of the trip. In view of this, it can neither be said that Asma had predicted the arrest nor the story can be said to be pre-planned scheme for the sake of defence.

Considering the evidence in its totality i.e., deposition of Asma, station diary entry No. 33 dated 6.1.1994 and the receipt of charges for the telegram, the defence has created a probability that accused Nos. 3 to 5 and 7 were taken by Police on 6th January, 1994, and if this story is probable the prosecution story loses its fulcrum, the incident of interception at Bhandup being lever to claim regarding further recovery of contraband at Mumbra and Madanpura, at the instance of information given by accused No. 3. It must be taken into consideration that if accused No. 3 was picked up on 6th morning, prosecution story that accused Nos. 1 to 3 were intercepted at Bhandup on 7.1.1994 at 0001

hours while in the transit by rickshaw, cannot stand and contents in the complaint Exhibit 64 as also panchanama Exhibit 68 to that extent become utmost suspect.

The prosecution has claimed discovery of two big hauls of contraband at Mumbra and Madanpura, at the instance of information by accused No. 3, recorded in the form of his statement in panchanama Exhibit 74 on 7.1.1994.

It is pointed out by the learned Counsel for the appellant that panch Sunil in his deposition para No. 4 has stated that contents of panchanama Exhibit 74 are correct, except the bracketed portion and this bracketed portion is precisely the statement attributed to accused No. 3 Anwar, which is relied upon by the prosecution as his statement u/s 27 of the Indian Evidence Act. Sunil, also does not admit accused No. 3 having made a statement inculcating himself. In para No. 2 of his deposition, he states that accused No. 3 Anwar only said ".. he will show the place and the articles .." P.W. 1 Shri Nigade, (complainant) although deposed about the recovery of contraband and cash at Mumbra and Madanpura, has simply said that during the course of investigation, police party visited the house and recovered the contraband. Shri Nigade, does not refer to the accused No. 3 having made any statement. P.I. Vatkari in his examination para No. 3, states that accused No. 3 during his statement agreed to show the places, where contraband was kept. He does not say that accused No. 3 claimed to have kept it himself as recorded in Exhibit 74.

The aspect, whether accused confessed the contraband to have been kept by himself or he only claimed knowledge that contraband was kept at those places, is of vital importance for the purpose of determining conscious possession. This is because, about Mumbra house there is ample prosecution evidence indicating that accused No. 3 was not the only adult male occupant of the said house.

Thus, none of the prosecution witnesses lend support to the story that accused No. 3 made a statement attributing responsibility of conscious possession to himself, so far as contraband at Mumbra and Madanpura. Certainly, if this was to be treated as a statement u/s 27 of the Indian Evidence Act, the contents in the statement to the extent those amount to confession would not be admissible but only so much of information as related to the discovery may come into evidence. Considering the evidence of material prosecution witnesses on this point, it is difficult to believe that accused No. 3 rendered statement as recorded in Exhibit 74 and accordingly he led the police and assisted the discovery.

Initial information was only regarding transit through Bhandup. The statement by accused No. 3 did amount to further information regarding much bigger haul concealed in the enclosed place. Whether it was information attracting Section 42 of the Act of 1985 and therefore, requiring compliance of Section 42(2) of the Act of 1985, is an aspect not considered by either side. In the light of observations of Supreme Court in Mohinderkumar v. State of Goa, such compliance appears to be necessary. It is not the claim of P.I. Surya that

intimation regarding information received by the statement of accused No. 3 was communicated to immediate higher official. The statement was recorded at the office of unit and there was no hindrance in despatching the copy for information to immediate superior official. Non-compliance of Section 42(2), therefore, makes subsequent recovery suspect.

9. The prosecution claimed that accused No. 3 opened the cupboard at Mumbra with the key that was recovered from his shirt pocket during midnight interception. The defence has attacked this theory by arguing that the prosecution is not certain whether this key was sealed during the course of panchanama Exhibit 68, drawn at midnight hours. Panch Dinesh deposed that all packets were sealed and labelled. In his cross-examination he categorically admitted that the key packet was also sealed in his presence. P. I. Vatkar also deposed that key was kept in brown paper packet and sealed.

From the deposition of P.I. Nigade, it appears that the sealed packet containing the key was opened in the Court, but in his examination-in-chief, he has only said that key was wrapped in brown paper packet and label bearing signatures of panchas and P.I. Surya was affixed. P.W. Surya categorically states that key was labelled but not sealed. He was totally confused in the cross-examination and admitted that he does not remember if the packet was pasted. Later on, he also admitted that the key was kept in the brown paper packet and sealed during panchanama Exhibit 68.

The prosecution witnesses thus appear totally confused as to whether key was sealed tonight and thus not available for opening the cupboard at Mumbra, or otherwise.

On reference to contemporary documents i.e. complaint Exhibit 65 and panchanama Exhibit 68, it can be seen that the key was kept in brown paper packet and the packet was labelled but not sealed. The contemporary documents do not form the substantive evidence, but render assistance to separate grain from the chaff.

Upon referring the depositions of complainant Nigade, panch Dinesh, P.I. Vatkar and P.I. Surya, Advocate Shri Chari argued that there is reason to believe that key was sealed, while drawing panchanama Exhibit 68 and was not available for opening the cupboard at Mumbra. Accused No. 3 opening the cupboard with the key recovered from his possession was a circumstance sufficient to establish conscious possession of the contraband by accused No. 3. There cannot be denial that witnesses are confused whether the key was sealed or sample kept in brown envelope which was labelled with the signatures of panchas. But admittedly, documents, complaint and panchanama, recorded that the key was kept in a brown packet, which was labelled. If I were to record a finding, evidence of prosecution witnesses, who claim that key was kept in brown packet and packet was labelled could have been accepted as reliable evidence. However, the defence theory having been held probable such an exercise is not necessary.

Number of currency notes of each denomination, seized at Mumbra has changed when those were counted in the Court and learned Additional Public Prosecutor had no explanation to offer for the same.

The confusion of the key had a vital role to play and the change of currency notes further reduces the credibility of investigation and prosecution story.

10. The story regarding midnight recovery suffers from non-compliance of Section 50 of the Act of 1985. There being no other material except the recovery as against accused Nos. 1 and 2, they are entitled to acquittal on this count alone.

The night trap so far as accused Nos. 2 and 3 is concerned, is also unworthy of belief due to intrinsic improbabilities.

The defence having created a probability of accused No. 3 being picked up on 6.1.1994 morning itself, whole the prosecution story loses its credibility, since arrest of accused No. 3 on the night between 6.1.1994 and 7.1.1994 is the starting point as well as foundation of the prosecution story as presented in the Court.

The evidence regarding statement u/s 27 and discovery at his instance is also suspect and the premises from which the contraband is recovered are not established to be in exclusive possession of accused No. 3. The subsequent recoveries are suspect, also due to non-compliance of Section 42(2) of the Act of 1985. Therefore, conviction and sentence of accused No. 3 also cannot be sustained.

11. In the result, all three appeals are allowed. Conviction and sentence imposed upon all the three appellants is set aside. They be set to liberty forthwith, if not required in any other case. Fine, if paid, be refunded to respective accused persons.

Since the accused have disclaimed any recovery from them, orders regarding disposal of muddamal including forfeiture of cash to the State do not call for interference.