

(2002) 05 GUJ CK 0018
In the Gujarat High Court

Case No : Criminal Appeal No's. 1043 and 1060 of 1998

Gulam Nurmamad Theim

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 02-05-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 102, 102(3), 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 41(2), 42, 43, 44, 52

Citation : (2003) CriLJ 356 : (2002) 3 GLR 794

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

Bench : Division Bench

Advocate : Banna S. Dutta, in Criminal Appeal No. 1043 of 1998 and Saurin A. Shah, in Criminal Appeal No. 1060 of 1998, for the Appellant; K.T. Dave, Assistant Public Prosecutor in Criminal Appeal No. 1043 of 1998 and K.T. Dave, Assistant Public Prosecutor for Respondent No. 1 and D.N. Patel, in Criminal Appeal No. 1060 of 1998, for the Respondent

Final Decision : Dismissed

Judgement

R.R. Tripathi, J.—These appeals are filed u/s 374 of the Code of Criminal Procedure, 1973 against the judgment and order passed by the learned Special Judge, Bhuj (Kutch) in Special Case No. 44 of 1996 dated 30-9-1998, whereby the learned Judge was pleased to convict the appellant in each of these appeals under Sections 22, 23 with 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as "N.D.P.S. Act") and u/s 120B of Indian Penal Code (hereinafter referred to as "I.P.C.") and awarded sentence of rigorous imprisonment for 10 years and fine of Rs. 1 lakh, in default simple imprisonment for 2 years for the offences u/s 22 of the N.D.P.S. Act and Section 120B of the I.P.C. While for the offences under Sections 23 and 28 of N.D.P.S. Act and u/s 120B of the I.P.C. rigorous imprisonment for 10 years and fine of Rs. 1 lakh, in default simple imprisonment for 2 years. The learned Judge was pleased to order the sentences to run concurrently and the accused be given benefit of set off.

2. The case of the prosecution is that on 20-3-1996 the vessel named Safina Noor Madina bearing registration No. BDI-13/9 arrived at Tuna Port from Jam Salaya. It was to leave for Sharjah after loading livestock. During the course of routine rummaging of the aforesaid vessel on 22-3-1996, the officers of the Customs Shore Guard, Tuna (Kutch) and the officers of Kandla Customs recovered 22,400 tablets of Diazepam (Volume 10) which is a psychotropic substance as defined under Clause XXIII of Section 22 of the N.D.P.S. Act which is also shown at serial No. 43 of the Schedule of the said Act. The Customs staff consisting of one Mr. B. G. Jhala, Custom Supdt., Mr. B. M. Vyas, another Custom Supdt., Mr. C. B. Meena, Customs Inspector, Mr. M. L. Chauhan, another Customs Inspector along with sepoys of the Customs Department went for routine rummaging of the vessel at Tuna Port at about 3-30 p.m. They found tandel, Abu Amad Ker and other 15 seamen on Board. They inquired the name of each of them and also inquired as to whether they have any goods which is in a prohibited category. The tandel and the staff informed that they do not have any such goods. But while inquiring from the appellant, original accused No. 1, his conduct was found little suspicious. Therefore, he was inquired as to where he has kept his luggage. He informed that he has kept his luggage in "Fanna" of the vessel, i.e. the front portion of the vessel. The officers went to that part of the vessel and saw his luggage. He was asked to bring that luggage on the deck. His luggage consisted of a trunk (iron) and a bedding. On inspection of the trunk which contained only clothings, nothing objectionable was found. On opening the bedding, a cream coloured "thaila", i.e. cotton bag having design of strips -- red, green, yellow, black and violet colours, stitched with a thread was found. On opening a part of the thread stitches, it was found that it contained Diazepam tablets I.P. As "Diazepam tablets" fall in the category of prohibited drug, it was decided to carry out further procedure in presence of Panchas.

2.1 Customs Inspector Meena was sent to call for Panchas. He came with two Panchas, one Jaychandbhai Bechardas Thakkar, another Asif Hanif Mamad Momin. The Panchas were informed about the presence of Diazepam tablets in the bedding of "khalasi" (seamen), Gulam Nurmamad Theim. The Panchas expressed their willingness to be Panch witness. In presence of Panchas, appellant-accused were informed that if he wants to have the inspection of his luggage and search of his person in presence of any Gazetted Officer or the Magistrate, he may opt for the same. The appellant denied for the same and agreed for inspection/search by the party. The luggage of the appellant which was kept back on "Fanna" was brought on the deck. Thereafter, the bedding was opened from which a "thaila" was taken out. On opening that "thaila", it was found that it contained 90 packets of Diazepam I.P. tablets. On opening each packet it was found that it contained Diazepam, the prohibited tablets. In 88 packets, there were 250 tablets in strips of 10 tablets each. In the remaining two packets there were only 200 tablets. The appellant was inquired about the bill, voucher or any other document pertaining to the said drug. He denied to have any such document with him. He also told that he will not be able to produce any

bill or voucher even in future. Therefore, the prohibited drug-tablets were seized. The boxes containing these tablets were numbered as 1/90 to 90/90. Thereafter, three strips containing 10 tablets each were taken out from packet number 89/90. Each strip was kept in a plastic bag. It was then stapled and kept in a brown cover. The brown cover was then closed by applying gum and on each of these covers, Customs Inspector Mr. Meena wrote in his hand-writing, "Samples of seized tablets at Tuna on 22-3-1996". These three covers were given marks, "A", "B", "C". Three slips of white paper containing the signatures of Panchas; tandel Abu Ahmed Ker and Customs Inspector Meena and thumb impression of appellant, accused No. 1-Gulam Nurmamad Theim were affixed on the aforesaid covers and wax seal was applied on these covers. The seal bore the inscription, "Assistant Collector of Customs, Bhuj".

3. The remaining 22,370 Diazepam tablets were kept in the respective boxes in the same position as they were. The same were placed back in the "thaila". The opened portion of the thaila was stitched back with a thread. Thereafter, a paper seal was applied on that thaila on all the four sides and on that paper seal the signature of Panchas, tandel Abu Ahmed Ker, Customs Inspector, Meena and left hand thumb impression of Gulam Nurmamad Theim was obtained. Paper seal was applied with the help of gum, with due care to see that nobody can take out any tablet without breaking open the said seal. Thereafter, a thread was tied on the said thaila and on the knot of that thread, a wax seal bearing the aforesaid inscription was applied. Thereafter, appellant - accused No. 1 -Gulam Nurmamad Theim and tandel of the vessel were served with summons to remain present at Customs Office, Tuna. In the office copy of the said summons, signature of the tandel and thumb impression of the appellant was obtained. After serving with summons, the muddamal which was recovered was brought to the office of the Shore Guard. It was kept in the cupboard. The cupboard was locked and key was kept with Mr. B. G. Jhala, Supdt. of Customs. The Customs Inspector, Mr. Meena made a seizure report u/s 57 of N.D.P.S. Act to the Assistant Customs Collector, Bhuj. The appellant was allowed to remain on the vessel under surveillance. On 23-3-1996 the statements of the appellant and the tandel of the vessel u/s 67 of the N.D.P.S. Act and u/s 108 of the Customs Act were recorded. They were also informed that if they give any false information in the statements, action will be taken under the relevant provisions of I.P.C. After recording the statements of the appellant and the tandel of the vessel they were served with the summons to remain present on 24-3-1996 at the Customs Divisional Officer, Bhuj, for recording further statement. The office copy of the said summons bears thumb impression of the appellant, accused No. 1 and the signature of the tandel of the vessel. On 24-3-1996 u/s 67 of the N.D.P.S. Act and Section 108 of the Customs Act. Further statements were recorded. The authorities on being convinced from the statements that an offence is committed under the N.D.P.S. Act, the Customs Inspector, Mr. Chauhan was directed to arrest the appellant, accused No. 1. Mr. Chauhan, Customs Inspector after preparing arrest memo, arrested appellant, accused No. 1 on 24-3-1996 at 6.15 p.m. Thereafter, the appellant was produced

before the learned Chief Judicial Magistrate, Bhuj with a production report. After the arrest, Customs Inspector, Mr. Chauhan made a report to his immediate superior (Supdt. of Customs) on 24-3-1996 itself, who in turn made a report to the Assistant Commissioner of Customs.

4. From the statement of the appellant, it was found that the contraband Diazepam tablets were supplied to him by one Jarnailsingh Pritamsingh Bahara @ Bholabhai, accused No. 2, appellant in Criminal Appeal No. 1060 of 1998, at the residence of one Talab Sale @ Subhania. Accused No. 2 was served with summons through Jamnagar Customs Division on 23-3-1996 and he was intimated to remain present before Bhuj Customs Divisional Office on 24-3-1996. In response to the summons, accused No. 2 remained present before Mr. B. G. Jhala, Supdt. of Customs at the Customs Divisional Office at Bhuj. He was explained the provisions of Section 67 of N.D.P.S. Act and Section 108 of the Customs Act. Thereafter, accused No. 2 gave his statement in his own handwriting and along with that statement he also produced documents like licence issued by the Assistant Commissioner of Food and Drugs Control dated 5-2-1996, the licence for doing business, the bills of muddamal tablets. These documents were duly signed by accused No. 2 in token of being produced by him. While making statement, on 24-3-1996 accused No. 2 requested that as he is exhausted, he is not in a position to give further statement and therefore, he may be given some other date. Accepting his aforesaid request, accused No. 2 was given summons to remain present on 25-3-1996. On 25-3-1996 accused No. 2 remained present. Again, he was explained the legal position about the statement he was making. He gave his further statement. Accused No. 2 informed that he met accused No. 1 at the residence of Talab Sale @ Subhania at Jamnagar and he had given 22,400 Diazepam tablets to accused No. 1, i.e. Gulam Nurmamad Theim. The tablets were to be delivered to Talab Sale @ Subhania at Dubai. Accused No. 2 was shown photograph of accused No. 1, he identified him as Gulam Nurmamad Theim. On the basis of the statement of accused No. 2, being convinced of the fact that accused No. 2 has committed an offence under N.D.P.S. Act, Customs Inspector Mr. Chauhan arrested accused No. 2 on 25-3-1996 at 6-15 p.m. He was then produced before the learned Chief Judicial Magistrate, Bhuj. He was also served with the arrest memo. A report of arrest of accused No. 2 u/s 57 of the N.D.P.S. Act was made by the Customs Inspector to his immediate superior, namely, Supdt. of Customs, who in turn made a report to the Assistant Commissioner, Bhuj on 26-3-1996.

5. On 23-3-1996 after the statement of Abu Ahmed Kher, tandel of the vessel was recorded, he was served with summons to remain present at the Customs Divisional Office on 25-3-1996. He remained present at the Customs Divisional Office at Bhuj where he was explained the provisions of Section 67 of N.D.P.S. Act and Section 108 of the Customs Act. Thereafter, his further statement was recorded. Besides this, the statements of fourteen other "Khalasis" (seamen) were recorded u/s 67 of the N.D.P.S. Act and Section 108 of the Customs Act. After recording of the statements of all other persons, having found no offence

being made out against them, the tandel and Khalasis were allowed to go.

6. The muddamal was sent to Forensic Science Laboratory, Ahmedabad on 24-3-1996 for analysis with forwarding letter. On receipt of the report of the analysis which indicated that the sample, mark "A-1" to "A-10" contained Diazepam, a psychotropic substance, under N.D.P.S. Act and on completion of the investigation, a criminal complaint was filed for the offences under Sections 21, 22, 23, 24, 27, 28 & 29 of the N.D.P.S. Act, in the Court of the Honourable Special Judge and the Honourable Sessions Judge, Bhuj (Kutch).

7. The learned Judge framed charge at Exh. 6 for the offences punishable under various sections of the N.D.P.S. Act as set out therein and Section 120B of I.P.C. The charge was read over and explained to the appellants, who pleaded not guilty to the same, and hence, came to be tried. The prosecution examined Jaychand Bechardas Thakkar, P.W.-I, Exh. 11, a Panch witness; Hitesh Jitendra Thakkar, P.W.-I, Exh. 14, a Panch witness of Panchnama carried out at medical shop of Jalaram Agency; Hitesh Bharatbhai Daliya, P.W.-3, Exh. 21, who was second Panch to the aforesaid Panchnama of medical shop of Jalaram Agency; Chaturbhuj Badrilal Mana, P.W.-4, Exh. 23; Customs Superintendent Bhupatsinh Ghanshyamsinh Jhala (B. G. Jhala), P.W.-5, Exh. 26. Besides this, the prosecution also produced documentary evidences which are set out in detail in Para 4 of the judgment. The evidence starts from Exh. 12, i.e. seizure Panchnama and continues upto Exh. 101, Forensic Science Laboratory report. The learned Advocates appearing for the appellants, the learned Advocate appearing for respondent No. 2, i.e. Union of India and the learned Additional Public Prosecutor appearing for respondent No. 1, State of Gujarat have relied upon some of those documentary evidence during their submissions. We have referred the same at the time of dealing with the submissions of the learned Advocates. After recording of the evidence of the prosecution witnesses was over, the learned Judge explained to the appellants the circumstances appearing against them in the evidence of the prosecution and recorded their statements as required u/s 313 of the Code of Criminal Procedure, 1973. In their statements, the appellants denied the case of the prosecution but have not led any evidence in support of their defence that the case of the prosecution is false.

8. On appreciation of the evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond doubt that accused No. 1, appellant in Criminal Appeal No. 1043 of 1998 was found in possession of 22,400 Diazepam tablets and that accused No. 2, appellant in Criminal Appeal No. 1060 of 1998 had supplied the said tablets to him. Thus, they committed offences under Sections 22, 23 & 28 of the N.D.P.S. Act and Section 120B of I.P.C. They were acquitted of the offence under Sections 24, 27A, 29 & 30 of the N.D.P.S. Act. The learned Judge concluded that it was proved by the prosecution that the mandatory provisions of N.D.P.S. Act were complied with, that the appellants could not satisfy the Court of the breach of any of the mandatory provisions of N.D.P.S. Act by the prosecution. The appellants were heard

regarding the punishment as required u/s 235(2) of the Code of Criminal Procedure. Appellant, accused No. 1 submitted that he is innocent and he is falsely implicated, that he does not want to say anything in this regard and he has nothing else to submit. Accused No. 2 stated that he is the only earning member in his family. He has an aged mother at his residence and two young children. Therefore, taking into consideration the circumstances appropriate punishment be awarded. The learned Judge punished the appellants by his judgment and order dated 30-9-1998 as mentioned earlier, which has given rise to the present appeal.

9. We have considered the submissions advanced by the learned Advocates appearing for the appellants in both the appeals, the learned Counsel appearing for the Union of India, and the learned Additional Public Prosecutor appearing for the State of Gujarat. We have also appreciated the entire evidence on record.

10. (i) Mr. Shah, the learned Advocate appearing for the appellant, original accused No. 1 started his submissions by submitting that the officer concerned had not made a report to the learned Magistrate as required u/s 102 of the Code of Criminal Procedure. According to him Section 102(3) of the Code of Criminal Procedure casts a duty on every Police officer to, forthwith report the seizure, to the Magistrate having jurisdiction. He submitted that in the present case Diazepam tablets were seized on 22-3-1996, but the officer concerned has not made any report of this seizure to the Magistrate.

(ii) He next submitted that by leading necessary evidence before the Court, the possibility of tampering with the muddamal-sample was illustrated and once there is a possibility of tampering, the accused cannot be convicted of the offence with which they are charged.

(iii) He also submitted that the sample drawn by the officer concerned was not in accordance with the procedure laid down under the notification in this regard. Mr. Shah made available a copy of the notification dated 29-5-1989 and placing reliance on the same submitted that not only the method of drawing a sample was defective, even the quantity which was drawn as a sample was not sufficient as prescribed under the said Notification, and therefore, on this count the prosecution must fail.

11. Learned Counsel Mr. D. N. Patel appearing for the Union of India submitted that the prosecution has followed all requirements of law; that there was sufficient compliance of various provisions of N.D.P.S. Act. He also submitted that it is clear from the evidence of the officers, namely, Mr. B. G. Jhala and Mr. C. B. Meena that there was no possibility of any kind of tampering with muddamal even the Court below has recorded a finding to the effect that no tampering has taken place.

Mr. Patel submitted that so far as the notification, laying down the procedure for drawing a sample is concerned, it is more in the nature of "guidelines", and therefore, even if it is assumed without admitting for the sake of argument that

there was some lapse on the part of the officer in following the said procedure, it cannot be fatal to the case of the prosecution. The prosecution has proved beyond doubt that no tampering had taken place. The sample was drawn in a legal manner and that the same was found to be sufficient for being analysed by the Forensic Science Laboratory. There is no evidence on record to the effect that the Forensic Science Laboratory found the sample to be insufficient for being analysed. Mr. Patel submitted that in light of these facts all the contentions raised by Mr. Shah as well as on behalf of accused No. 2 are required to be rejected and the judgment and order of the learned Special Judge, Bhuj (Kutch) is required to be confirmed by this Court.

12. Mr. K. T. Dave, learned Additional Public Prosecutor adopted the arguments of Mr. Patel. In addition to the submissions made by Mr. Patel, Mr. K. T. Dave submitted that the statements recorded u/s 67 of N.D.P.S. Act and Section 108 of the Customs Act are admissible in evidence and there are decisions of the Honourable the Apex Court to that effect. He submitted that provisions of Section 25 of the Evidence Act are not applicable to the statements recorded u/s 67 of the N.D.P.S. Act. He emphatically urged that the prosecution has successfully proved the case against the accused and therefore, the judgment and order impugned before this Court is not required to be disturbed by this Court.

13. In this matter, it is clear from the deposition of Mr. C. B. Meena, Customs Inspector who is examined as P.W. 4 at Exh. 23 that on 22-3-1996 during the course of routine rummaging, the vessel named, "Safina Noor Madina" was inspected by the officers of the "Shore Guard" from Customs Department as the vessel had come from Jam Salaya and was to go to Sharjah after loading livestock. The inspecting party consisted of the officers of the rank of Superintendent, Mr. B. G. Jhala, Abu Amad Ker, the other Supdt. Mr. B. M. Vyas, Customs Inspectors Mr. C. B. Meena and Mr. N. L. Chauhan and Customs Sepoys. One Abu Amad Ker was the tandel of the vessel along with 15 khalasis (seamen). The Customs party interrogated all these persons. It inquired as to whether they have any contraband goods or substance with them. It is the case of the prosecution as narrated by the prosecution witnesses that during the interrogation, the conduct of one of the crew members, named, Gulam Nurmamad Theim who subsequently came to be charged as accused No. 1 was found to be suspicious. Therefore, they interrogated him further and also searched his belongings. He had kept his belongings at "Fanna" (a front portion of the vessel). The same were brought on the deck. The belongings consisted of an iron trunk and a bedding. On search of the iron trunk nothing objectionable was found. It contained only the clothings. On opening of the bedding a cream coloured thaila was found having design of red, black, yellow and violet coloured strips. It was inquired as to what that thaila contains, to which he replied that there is medicine inside. Thaila was closed by stitching and therefore, a part of the stitched portion was opened. The boxes containing Diazepam tablets were seen. As there was no prior intimation, it was chance recovery, and therefore, the officers stayed further investigation. The deponent (Mr. C. B. Meena,

Customs Inspector, P.W. 4) was sent to call the Panch witnesses. The deponent went to the port area and called one Jaychand Bechardas Thakkar and another, Hanif Mamad Momin as Panchas. Thereafter, the party proceeded with further search in presence of Panchas. Before that the situation was explained to them and they conveyed that their presence was required as Panch in view of Diazepam tablets were found from the custody of accused No. 1, Gulam Nurmamad Theim-- one of the Khalasis of the vessel and a Panchnama was to be drawn. The Panchas expressed their willingness. Thereafter, the party proceeded further.

13.1 Superintendent Mr. Jhala informed appellant-accused No. 1, Gulam Nurmamad Theim that he (Mr. Jhala) and Mr. Vyas are Gazetted Officers, still if he wishes to have his inspection in presence of a Magistrate, he can opt for the same. He replied that he has faith in them and that they can proceed further with the inspection of the goods in presence of Panchas. Thereafter, he (Gulam Nurmamad Theim) took the inspection party and Panchas to the place where his goods were kept. The same were brought back on the deck as while the Customs Inspector was sent to call for Panchas, the goods were kept in their place, i.e. "Fanna", In presence of Panchas the "thaila" belonging to Gulam Nurmamad Theim was opened and 90 boxes containing "Diazepam", Volume 10 tablets were taken out. These boxes contained a writing, "Diazepam I.P. Tablets, Volume 10 -- 250 tablets". On the other side of the boxes the name of the company -- manufactured by Peramal Health Care, etc. was written. On opening the boxes 88 boxes contained in the stirps of ten tablets. Remaining two boxes contained 200 tablets. Thus, totalling to 22,400 tablets.

13.2 The witness, P.W. 4 has deposed that three strips which were taken out as samples were packed in three plastic bags separately. The plastic bags were then placed in separate brown paper envelopes which were sealed with paper seal. On paper seal it was written by the deponent, "Sample of tablet seized on 22-3-1996 at Tuna". Envelopes were given mark, "A", "B", "C" and "D". Signatures of two Panchas, tandel of the vessel, thumb impression of Gulam Nurmamad Theim were obtained. The deponent had also signed on those envelopes. It is stated by this witness that though the thumb impression of Gulam Nurmamad was taken in presence of Panchas, the tandel of the vessel and the deponent himself, due to inadvertence the same was not identified. The packets were then sealed with a round seal with wax having inscription, "Assistant Collector of Customs, Bhuj". The deponent has also deposed that the office of the Supdt. of Customs, Shore Guard, Tuna does not have its own separate seal, but they use the seal of Assistant Collector, Customs, Bhuj for official purpose.

13.3 After these tables were found the Customs Inspector, Mr. C. B. Meena inquired from Gulam Nurmamad Theim as to whether he has any bill for these tablets, to which he replied in negative. Possessing these tablets in such a large quantity is an offence under the N.D.P.S. Act. The boxes found were given serial

number in presence of Panchas as 1/90 to 90/90. It was also recorded that all these tablets were of the same batch, and were manufactured by the same company. From box No. 89, three strips of 10 tablets each were taken out for analysis in a Government Laboratory. First sample was taken for being sent to Forensic Science Laboratory for analysis. Second was taken for being deposited in the Court and the third was taken for being kept for office record.

13.4 After the sample tablets were taken out, the remaining 22,370 tablets were kept in the boxes as it is. All 90 boxes which were found from "thaila" were kept in the same "thaila". It was stitched with needle and thread. It is required to be noted specifically that this witness has deposed that, "This "thaila" was applied a paper seal on all the four sides in such a manner that until the paper seal is broken, tablet cannot be taken out of "thaila"". The deponent proceeded to depose that thereafter he wrote on the "thaila", "Diazepam 22,370 I.P. tablets seized on 22-3-1996 at Tuna." He also wrote below that, "out of "22,400 tablets seized 30 tablets drawn as representative sample". The deponent has then deposed that on the paper seal which was applied on the "thaila", the signatures of both the Panchas and of the tandel of the vessel and the thumb impression of Gulam Nurmamad Theim were obtained, but due to inadvertence the deponent did not identify the said thumb impression.

13.5 After the aforesaid procedure was completed the "thaila" was tied with a string crossing the same on all four sides. Thereafter, same seal was affixed on the knot which was affixed on samples. The deponent has deposed that when "thaila" was recovered it had a portion which was stitched with a black thread on account of a cut. At this juncture, it is important to consider Para 14 of his deposition. It pertains to muddamal article 3, i.e. "thaila". He has deposed that, "this is the same "thaila" which was recovered by his department, and "the muddamal is the same", and that, "the thaila" is packed in the manner stated hereinabove". He has also deposed that he has signed along with a stamp of his designation. It is required to be noted that this witness was cross-examined on behalf of accused No. 1, but no question was put at the initial stage. It is only at a later stage that the learned Advocate appearing for accused No. 1 has tried to confuse the witness. That is why in Para 28 he deposed as under :

"Muddamal article No. 3 is having paper seal on the top, on the bottom and on sides, but it does not have brass seal as well as it does not have wax seal."

13.6 It is true that there is no wax seal on outer cover and the paper seal on muddamal article No. 3. Muddamal article No. 3 tied with a white string in a cross and there is a wax seal on the knot of that string. The learned Advocate Shri Lodhia for accused No. 1 illustrated in the open Court at the time of trial that white string which is tied in a cross on which a wax seal is affixed can be shifted without the wax seal being broken and it can be brought back to the same condition.

13.7 Mr. Shah strenuously submitted that from this exercise of his counterpart

before the Court during trial, this Court should come to the conclusion that it was possible to tamper with the muddamal. We are not in a position to uphold the contention of Mr. Shah for the simple reason that P.W.-4 and P.W.-5 both have deposed in no uncertain terms that, "the paper seal was applied on the "thaila" on all four sides in such a way that until paper seal is broken no tablet can be taken out from "thaila"". The counterpart of Mr. Shah has rightly not contended before the Court below that the paper seal applied on the "thaila" was found to be broken. Because if that would have been so, it would have been a conclusive proof of muddamal being tampered with. Deliberately, the matter was left at that stage. In fact an additional precaution was taken by the officer by tying the "thaila" with a string and applying wax seal on the knot. Merely because the string could be moved to a side and could be brought back to the original position without wax seal being broken, cannot furnish a ground for the failure of the prosecution. The contention of Mr. Shah that possibility of tampering is not ruled out has no substance and hence rejected.

13.8 P.W.-5 has deposed in Para 7 of his deposition that the remaining 22,370 Diazepam tablets were kept in the box as they were and the boxes were kept in "thaila". Thereafter, the "thaila" was stitched with needle and thread and on this "thaila" on all four sides paper seal was applied on which both the Panchas, the tandel Abu Ahmed Kher and the Customs Inspector Mr. Meena had signed and Gulam Nunnamad Theim had put his thumb impression.

13.9 He has also stated in Para 10 of his deposition that, "On seeing the muddamal, article 3, I say that the same is in intact condition in which it was recovered at the time of Panchnama. It was sealed by affixing the paper seal on all four sides of the said "thaila". He has further deposed that, "this packet is in the same condition as it was". If this packet is to be opened, seal is required to be broken, and thereafter, the stitches below the paper seal are to be opened. Thereafter only the muddamal can be taken out and not otherwise.

13.10 It will be proper at this juncture to discuss the contents of para 29 of the cross-examination of P.W.-4 wherein it is stated that on one side article 3-outer cover --- "thaila" is found to have cut of 4 inches in length. That portion is having rough stitches with black thread. The deponent has deposed before the Court that when this "thaila" was recovered from the accused at that time also this was the position, meaning thereby there was a "cut" and that portion was stitched with black thread when "thaila" was recovered. The deponent has denied the suggestion that the Customs Department had cut "thaila" and then stitched the same with black thread. He has also denied the suggestion that the muddamal tablets were taken out from the "thaila" and in place of that some other tablets were placed in the same type of strips of 10 tablets each. He has also denied that it is not true that article 3 did not have any Diazepam tablets. In view of this clear position and bearing in mind the most important factor of this matter which is peculiar of its kind that Diazepam tablets were found in possession of accused No. 1; to possess Diazepam tablets in such a large

quantity is an offence as it falls under Clause XXIII of Section 21 of N.D.P.S. Act and also Item 43 of Schedule of the Act. We are conscious of the fact that it is not the case that a psychotropic substance was packed in a packing of some other drug of innocuous nature, then in that case the contention of tampering would have different significance. To clarify further, if Diazepam tablets were alleged to have been packed in the guise of some vitamin tablets, the contention raised by Mr. Shah would have different dimension than what it has just now. It is not the case of the accused that he did not possess Diazepam tablets or that he was carrying some other tablets and that he is falsely implicated. In fact at one stage it was the submission of Mr. Shah that just a few months prior to the incident (the incident took place in March, 1996), Diazepam tablets were not included in the list of contraband psychotropic substance. From this submission, it is clear that the accused was pleading ignorance and it was only on account of change in law that an offence is committed. But then ignorance of law is no excuse. On one hand, the Court has to be cautious on account of gravity of the offence under the N.D.P.S. Act, on the other hand the Court has to be alive to the possibility of a person being wrongly implicated in such a serious offence. It being so, even at the cost of repetition, it may be stated that, "had it been the case of the prosecution that in the guise of vitamin tablets, Diazepam tablets were transacted; the contention of possibility of tampering and substitution of Diazepam tablets in place of vitamin tablets would have required serious consideration. But in view of the aforesaid discussion, the said contention is without any merit. Besides that on threadbare scrutiny of the evidence, we have come to the conclusion that there was no possibility of any tampering with the muddamal contained in article 3.

13.11 So far as the sample article is concerned the same was forwarded to the Forensic Science Laboratory, Ahmedabad and the same was received by the said Laboratory in sealed condition. This is clear from the report of the Forensic Science Laboratory, which is exhibited at Exh. 101 which was forwarded to the Inspector of Customs, Shore Guard, Tuna by forwarding letter dated 13th June, 1996. It is clearly mentioned in that report that, "one sealed brown paper parcel bearing mark "A" was received". It was bearing seal having inscription, "Assistant Collector, Customs, Bhuj" in English and it tallied with the sample sent therewith. It is further mentioned in that report that the brown paper parcel bearing mark "A" had a white paper slip which contained signatures which could be read as J, V. Thakkar, 22-3-1996; Asif Hanif Mamad Momin, 22-3-1996; thumb impression; Abu Nurmamad Theim, 22-3-1996; and illegible signature dated 22-3-1996 having stamp of Inspector of Customs (S.G.), Tuna (K) in English. It is to be noted at this stage that P.W.-4, Customs Inspector has deposed that he signed the papers slips with stamp of his designation which stands corroborated.

13.12 Mr. Shah, learned Advocate appearing for accused No. 1 contended that the report of the Forensic Science Laboratory could not have been taken into consideration because the original is not produced. What is produced is only the

xerox copy, which is certified as true copy. Mr. Shah contended that under various provisions of the Evidence Act, in absence of a person being examined from Forensic Science Laboratory, this true copy could not have been accepted and relied upon by the learned Judge. It is not proper on the part of Mr. Shah to make this submission without verifying the original record of the case which is available for his perusal. We have perused the original papers. On perusal, we found that even the original Forensic Science Laboratory report is on record. Exh. 100 is the forwarding letter which is dated 13-6-1996. The original report is produced and it is at page 76 of the original record. It is in torn condition. The lower portion of report is torn. We have compared the xerox copy which is produced after being certified as true copy by a responsible officer of the rank of Assistant Director of Forensic Science Laboratory. On perusal of that document we have no doubt in our mind that the same is a xerox copy of the same document which is at page 76. There are more pages as annexure to that page which are at pages 77 & 78 of the record. It is clear from the perusal of Exh. 101 that the same must have been kept by the office of Forensic Science Laboratory for its own record. This is apparent because it bears all the marks which are found on the first half of the original record. We are constrained to make the aforesaid remark to the effect that, "It is not proper on the part of Mr, Shah to make this submission.", because even from the perusal of Exh. 101, true copy, the column in which it is mentioned that in what condition the parcel(s) were received, the important information is available. From the original report is possible to read the contents of the column without missing any word of it. As is mentioned in xerox copy, so is mentioned in the original that, "one sealed brown paper parcel bearing mark "A" was received in intact condition". The seal was bearing inscription, "Assistant Collector, Customs, Bhuj" in English and that the seal was found to be tallying with the sample of the seal sent". Further, Mr. D. N. Patel, learned Advocate appearing for the Central Government pointed out that P.W.-5, Mr: B. G. Jhala during his cross-examination in Para 45 has stated as under :

"45. It is true that the portion stating the important details in the Forensic Science Laboratory analysis report is torn."

The fact that he deposed as aforesaid means that the deponent was shown page 76, the original report of the Forensic Science Laboratory. If Mr. Shah had taken little trouble to locate page 76 and compare the same with Exh. 101, he would not have made such a submission because he could have appreciated that Exh. 101 is a xerox copy of the original and here is no question of the same being concocted or fabricated one.

14. Learned Advocate Mr. Dodia appearing for accused No. 1 in the trial Court has cross-examined P.W. 5, at length, but no material contradictions have come on record by the said cross-examination. We are not able to refrain ourselves from making an observation that in this case a deliberate attempt is made to tire out witnesses. For an illustration even after the witness deposed that a portion of

the Forensic Science Laboratory report containing material details was torn, a certified true copy was produced. This copy was not certified as true copy by the Customs Officers. It was certified as true copy by the Forensic Science Laboratory officers of the rank of "Assistant Director" and still the cross-examination was made on the line that the Forensic Science Laboratory report at Exh. 101 is a concocted one. This question was repeated. It was then repeated for third time. Thereafter, it was suggested to the witness that he was not giving out the true facts. The last part of Para 45 is suggestive of the fact that the witness is exhausted and tired out. The witness stated that.

" If you are asking for the reason of tallying this information before the Court, then the answer is that I cannot have any such information or any proof of that."

It will also be appropriate to note that the xerox copy which was sent by the Forensic Science Laboratory after certifying to be true copy has come from the official record of the Forensic Science Laboratory and this Court has no reasons to believe that an officer of Forensic Science Laboratory had any interest in concocting the report against the accused. At no stage, it is the defence of the accused that he had an enmity with X, Y or Z of the prosecution agency or that of the Forensic Science Laboratory, and therefore, he is wrongly booked.

15. While answering the contention of Mr. Shah regarding "non-- making of report to the Magistrate", learned Advocate Mr. Patel invited our attention to the deposition of P.W. 5 -- Mr. B. G. Jhala, Superintendent of Customs, Para 23, wherein he has deposed that "on recording the statement of Gulam Nurmamad Theim, he felt that the offence attracts the provisions of N.D.P.S. Act", therefore, he had asked the Customs Inspector Mr. Chauhan to arrest Gulam Nurmamad Theim. He has further deposed that said Customs Inspector Mr. Chauhan prepared arrest memo and arrested Gulam Nurmamad Theim on 24-3-1996 at 6-15 p.m., and thereafter he was produced before the learned Chief Judicial Magistrate, Bhuj. A copy of the arrest memo and production report are produced at Exhs. 37 and 38.

15.1 Section 52 of the N.D.P.S. Act pertains to "disposal of persons arrested and articles seized". Sub-section (1) reads as under :

"Any officer arresting a persons u/s 41, Section 42, Section 43, or Section 44 shall, as soon as may be, inform him of the grounds for such arrest."

Sub-section (2) of the said Section provides that,

"Every person arrested and article seized under warrant issued under Sub-section (1) of Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued."

Sub-section (3) of the said Section provides that,

"Every person arrested and article seized under Sub-section (2) of Section 41.

Section 42, Section 43, or Section 44 shall be forwarded without unnecessary delay to, --

(a) the officer-in-charge of the nearest police station, or

(b) the officer empowered u/s 53." Sub-section (4) of the said Section provides that, "The authority or officer to whom any person or article is forwarded under Sub-section (2) or Sub-section (3) shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article,"

15.2 In the present case, raid was not carried out on information received by the Police officers. In this case, while on routine rummaging the party of the Customs officer had a chance recovery of the contraband psychotropic substance. u/s 53 of the N.D.P.S. Act there is power with the Central Govt. to invest any officer of the Department of the Central Excise, Narcotic, Customs, Revenue Intelligence or Border Security Force or any other department of the Central Gov with the powers of an officer in charge of a police station for the investigation of the offences under the Act. The learned Judge has referred to the notifications produced by the prosecution at the time when the objections were taken by the Counsel appearing for the accused. In light of these notifications, the officers who have recovered contraband substance was invested with the powers of "the officer-in-charge of a police station". This Court is of the opinion that there was compliance of Section 102 of the Code of Criminal Procedure, Besides that as a precautionary measure the officers had produced the accused No. 1 before the learned Chief Judicial Magistrate, Bhuj and the arrest memo along with production report are produced on record which are accepted. The Court is alive to the provisions of Section 51 of the N.D.P.S. Act wherein it is provided that provisions of the Code of Criminal Procedure, 1973 (II of 1974) shall apply insofar as they are not inconsistent with the provisions of the N.D.P.S. Act, to all warrants issued and arrests, searches and seizures made under this Act. In the present case, it was a chance recovery, during a routine rummaging by the Customs officer and the officers were of the rank of Supdt. of Customs and Customs Inspectors, who were also invested with, "the powers of officer-in-charge of a police station" and that being so, the contention of Mr. Shah that there is no compliance of Section 102 of the Code of Criminal Procedure in this case has no merit. This contention of Mr. Shah is also rejected because in the present case there is compliance of Sub-section (3) of Section 52 of the N.D.P.S. Act whereunder a person arrested and article seized under warrant issued under Sub-section (2) of Section 41, Section 42, Section 43 or Section 44 shall be forwarded without unnecessary delay to -- (a) the officer-in-charge of the nearest police station, or (b) the officer empowered u/s 53. In the present case, the Supdt. of Customs being an officer empowered u/s 53 there is no question of any breach of the provisions of Section 102 of the Code of Criminal Procedure.

15.3 Mr. Shah, in support of his contention, relied upon a judgment of this Court in the matter of Shivabhai Gajmalbhai Vs. State of Gujarat, . He contended that

there being no report to the Magistrate u/s 102 of the Code of Criminal Procedure the case of the prosecution must fail. We have perused the aforesaid decision. It does not have any application to the facts of the present case inasmuch as in the case before the Division Bench, the police officers were acting under the N.D.P.S. Act and there was no vesting of powers of Section 53 of the N.D.P.S. Act in them as required under Clause (b) of Sub-section (3) of Section 52 of the N.D.P.S. Act.

16. The contention raised by Mr. Shah regarding the method/manner of drawing sample and sufficiency of the quantity drawn as sample relying on the notification dated 29-5-1989, a copy of which is produced by Mr. Shah, it is found that neither it is provided nor any authority is cited by Mr. Shah in support of his contention that these notifications are mandatory in character, and therefore, any breach of any of the clauses of this notification will be fatal to the case of the prosecution. In reply, Mr. D. N. Patel submitted that the contents of this notification are in the nature of guidelines for the officers acting under N.D.P.S. Act. That these guidelines are to be followed as far as practicable. In case of non observance or breach of any of the guidelines, it will amount to an irregularity. Mr. Patel further submitted that there are decision of the Honourable the Apex Court to the effect that, "whenever an irregularity is alleged the next thing which is required to be shown by the accused is, "the prejudice" caused to him on account of that irregularity. In this case, as discussed hereinabove it is on record that all 22,400 tablets were bearing the same batch number and expiry date. They were manufactured by the same company. Therefore, drawing samples by taking out three strips of 10 tablets each cannot be said to be an unreasonable method or manner of drawing sample. At one stage, Mr. Shah submitted that for proving that these tables were manufactured by a particular company, a person from the company ought to have been examined, but then he did not press this contention having realised the worth of the same.

16.1 The notification which is relied upon by Mr. Shah is Standing Order No. 1 of 1989 dated 13th June 1989. Clause 2.1 is in Part II of the Notification. It provides for sampling, classification, etc. of drugs. Clause 2.2 for drawal of samples. Clause 2.3 provides for quantity, to be drawn for the sampling, which reads as under :

"The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drug and psychotropic substances save in the case of opium, ganja and charas (hashish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages/ containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn."

This particular clause is to be appreciated in light of the following facts. The psychotropic substances are mentioned in Notification No. S.O. 527(E) dated 16th July, 1996. Said Notification is issued in exercise of powers conferred by

Explanation (1) of Section 27 of N.D.P.S. Act, 1985 and in suppression of the Notification of Govt. of India, Ministry of Finance, Department of Revenue No. S.O. 825 (E) dated 14-11-1985 and S.O. No. 827 (E) dated 14-11-1985. By this notification the Central Govt. has specified the quantity mentioned in column (3) of the table below in relation to narcotic drugs or psychotropic substance mentioned in the corresponding entry in column 2 of the table. A small quantity for the purpose of Clause (b) of that section is prescribed. It will be appropriate here to refer to Clause (b), Section 27, which reads as under :

" where narcotic drugs or psychotropic substance consumed is other than those specified in or under Clause (a), with imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees or with both."

The explanation below this clause is also relevant, which reads as under :

"Explanation (1) -- For the purposes of this section "small quantity" means such quantity as may be specified by the Central Govt. by notification in the Official Gazette.

(2) Where a person is shown to have been in possession of a small quantity of a narcotic drug or psychotropic substance, the burden of proving that it was intended for the personal consumption of such person and not for the sale or distribution, shall lie on such person."

This is required to be referred, to point out that the notification which is sought to be relied upon by Mr. Shah, cannot be applied without appreciating the name of the psychotropic substance, the quantity prescribed as a small quantity, which is 0.2 grams (item 32 of the notification) 0.005 grams in case of Items 81, 92, 95, 96, 97, 98, 99, 100, 104, 105, 110, 112 and in case of Item at 116, the small quantity is 0.002 grams. The Court perused the notification. Said Notification does not provide any exception while providing quantity to be drawn for sampling. If a quantity weighing 0.002 grams is the small quantity while any quantity more than that is a quantity attracting application of all the provisions in their full swing. In such circumstances, if the case of the prosecution is to fail on the ground that the prosecution did not draw a sample in the quantity prescribed in the notification sounds absurd. This Court is not in a position to accept the contention of Mr. Shah in view of the aforesaid discussion.

16.2 We would have found favour with the submissions/contentions of Mr. Shah had it been the case that the Forensic Science Laboratory had found the quantity drawn as sample insufficient for being analysed. If that was so, the case of the prosecution must fail on that ground. But, in the present case, the quantity was not found insufficient by the Forensic Science Laboratory. Not only that, after analysing, whatever left was also sent by the Forensic Science Laboratory to the officers concerned. This will go to show that the substance (sample) was not only insufficient quantity for analysis but even after a part of the sample was used for analysing there was a left over. In light of that the contention of Mr. Shah

regarding "insufficiency of the sample", is rejected as there is no merit in the same. As the Notification relied upon by Mr. Shah is dated 13th June, 1989 and the notification whereby small quantity is prescribed is dated 1-9-1996, it may be argued that the later notification has no application to the earlier notification. We have examined the earlier notification of 1985 which was superseded by the present notification of 1996, wherein also the small quantity prescribed is 250 mg. In case of "heroin" or drug commonly known as "brown sugar" or "smack" and in case of "cocaine" 125 mg. Meaning thereby the notification of the year 1989 has not taken due care while providing the quantity to be drawn as sample. When a notification provides for 250 mg. to be a small quantity, meaning thereby any substance found more than that attracts all the provisions of N.D.P.S. Act. Therefore, to provide 5 grams as a quantity to be drawn as sample is not in consonance with the provisions of the Act. In such circumstances to uphold the contention of Mr. Shah, learned Advocate that the notification is mandatory in nature and violation of any of the clauses, in the matter of drawing of sample, quantity of sample must vitiate the case of the prosecution and the prosecution must fail, cannot be accepted. The same is rejected.

17. Mr. Shah, learned Advocate also argued that the statements recorded u/s 313 of the Code of Criminal Procedure is recorded as joint statement of both accused Nos. 1 and 2, is not permissible under law and on that ground the appellant must succeed in this appeal.

17.1 The aforesaid contention is not born out from the record of the case. We have examined the statement u/s 313 and we found that the statements recorded u/s 313 of the Code of Criminal Procedure which Mr. Shah attempted to brand as "joint statement" of the accused are not the "joint statement". In fact, the questions put to both the accused are typed only once, but then the answers of both the accused are separately recorded. This is done by the typing clerk only with a view to avoid typing the questions once again. We have examined the reply to each question and found that answers given by both the accused were separately recorded in the statement. Therefore, it cannot be said to be a joint statement. Mr. Shah also submitted that in response to two important questions which pertain to the evidence of Mr. Jhala, Customs Superintendent, the answer column is blank. Similarly, in reply to the next question also the answer column is blank. On perusal of the original papers, this Court has no doubt that the same is nothing but an inadvertent mistake on the part of the recording clerk. However, this Court inquired from Mr. Shah as to whether he would like this Court to undertake an exercise of calling accused Nos. 1 and 2 and putting these questions to them. Mr. Shah replied in negative and did not express his willingness to avail of the opportunity offered to him. We have also examined that in the latter part of these statements, wherein it is recorded that the accused was asked as to whether the accused wants to give deposition on oath -- the answer recorded is, "no". Whether the accused wants to examine any of the witnesses in support of his defence. The answer is, "no". The last question is as to whether he has to say anything in particular to which accused No. 1 has

replied that, "I have not sold Diazepam tablets to anybody and that I am falsely implicated and I was sent to Jail after beating. The other 14 Khalasis, who were with me are allowed to go after taking money and that as I did not pay any money, I am implicated." If what Mr. Shah is contending is right that the accused were not confronted with two important questions, the answer column is blank with regard to these questions, because there was nothing which could have prevented the accused from stating so while making the last submission or through his Advocate as he was very much represented by a senior Advocate at the trial. Therefore, we are of the view that even this contention of Mr. Shah has no substance and the same is rejected.

18. Mr. Shah lastly contended that the statements recorded of the other seamen who were on the vessel and that of the tandel of the vessel u/s 67 of the N.D.P.S, Act and u/s 108 of the Customs Act could not have been relied upon in absence of the prosecution examining these persons which would have rendered an opportunity of cross-examination to the defence.

19. We have examined the record and found that, in the present case, the prosecution has not relied upon the statements of other Khalasis or that of the tandel of the vessel. The prosecution has proved the guilt of the accused independent of those statements as discussed hereinabove. We also found sufficient material to hold these two accused guilty. Therefore, we do not find any substance in the contention of Mr. Shah and the same is rejected. We are not detaining ourselves on the point as to whether the statements recorded u/s 67 of the N.D.P.S. Act and Section 108 of the Customs Act could have been accepted or not in absence of prosecution examining those persons. To our mind, the statements of two accused, the evidence of the witnesses examined by the prosecution and the documentary evidence is more than sufficient to prove the guilt of the accused beyond reasonable doubt. It is true that the statements of the other seamen and the tandel of the vessel do render corroboration to the case of the prosecution, but then the prosecution has not based its case on this evidence nor the conviction is recorded by the learned Judge relying on this evidence, therefore, "rejection" is the only fate of Mr. Shah's contention.

20. In view of the aforesaid discussion, we find no substance in any of the submissions of Mr. Shah and they stand rejected.

21. Mr. Shah has not raised any other contention except which are discussed hereinabove. After having dealt with all the submissions of Mr. Shah, and Mr. D. N. Patel for the Union of India and the learned Additional Public Prosecutor Mr. K. T. Dave for the State of Gujarat and after having perused the entire record in detail, including the depositions of witnesses examined, we find that the learned Judge is right in recording the conviction and awarding the punishment to both the accused.

22. For the foregoing reasons, both the Criminal Appeals fail. Conviction of the appellants recorded u/s 22 with Section 120B of Indian Penal Code and under

Sections 23 and 28 of the N.D.P.S. Act and Section 120B of I.P.C. as well as punishment imposed for the commission of the said offences is hereby confirmed. Muddamal to be disposed of in terms of the directions given by the learned Sessions Judge in the impugned judgment.