

(1993) 09 BOM CK 0041

In the Bombay High Court

Case No : Criminal Appeal No. 152 of 1992

Kalpanaben Chandan Chatarji

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 17-09-1993

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2, 21, 27, 41, 42

Citation : (1994) 2 BomCR 256 : (1994) CriLJ 2000 : (1994) 1 MhLj 140

Hon'ble Judges : S.H. Kapadia, J;H.H. Kantharia, J

Bench : Division Bench

Advocate : G.S. Vetal and P.D. Dalvi, for the Appellant; S.S. Bhojane, Assistant Public Prosecutor, for the Respondent

Judgement

S.H. Kapadia, J.—This is an appeal by the appellant-accused (hereinafter referred to, for the sake of brevity, as "the accused") challenging her conviction for being found in possession of narcotic drug, namely, heroin, u/s 8(c) read with Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act") and against sentence of 10 years rigorous imprisonment and a fine of Rs. 1,00,000/-, in default to undergo further rigorous imprisonment for one year awarded by the learned Additional Sessions Judge, Greater Bombay, Bombay, vide judgment and order dated 26th March 1991 in NDPS Special Case No. 916 of 1989. The relevant facts giving rise to the appeal are as follows.

2. On 31st August 1989, PSI Arun Chavan was on station house duty at Goregaon Police Station. He received secret information that accused No. 1 (the appellant herein) possessed brown sugar at her residence situate at 268/2127, Motilal Nagar No. 1, Goregaon (West), Bombay. Thereupon PSI Arun Chavan (PW 1) took PSI Raikar, 3 Constables and 2 panchas and proceeded to the residence of the appellant. PW 1 knocked on the door of the flat which was opened by the accused. The police along with the panchas entered her flat and upon search,

found a lady's purse lying on a stool. On opening that purse 21 packets containing brown sugar were found. The contraband was in three parts. The first part consisted of 18 packets, which weighed 25 grams each and on which the figure "25" was written and the second part comprised of 2 packets which weighed 5 grams each and on which the figure "300" was written. The third part, comprised of one packet which had figure "6" written on it in English. The above mentioned two packets of part two in turn contained five packets each. The one packet, in part three, had 6 packets. Therefore, in all there were 34 packets. A small quantity was drawn by the Police from each packet as a sample. The sample as well as the packets were then separately packed, labelled, sealed and seized under a panchanama. The muddemal, the sample and the accused were brought to the police station.

3. In this appeal, we are only concerned with the conviction of accused No. 1 i.e. the present appellant-accused as the original accused No. 2 was acquitted of all the charges framed against him by the impugned judgment and order and, therefore, we shall confine discussion to the evidence appearing only against the original accused No. 1 i.e. the present appellant.

4. In order to prove its case, the prosecution examined in all five witnesses, namely, PSI Arun Chavan (PW 1), Rameshkumar Roy, Panch Witness (PW 2), another panch witness Vijay Shetye (PW 3), Police Inspector Pramod Rane (PW 4) and lastly Jibbau Aher (PW 5), the handwriting expert. According to PW 1, Arun Chavan, in August 1989, he was attached to the Goregaon Police Station as a Police Sub-Inspector. On 31st August 1989, he was on station house duty. At about 9.30 a.m. he received information that a lady by name Kalpanaben Chatterjee residing at the abovementioned address was possessing brown sugar. On receipt of this information he along with the police party and two panchas went to the reported spot. On reaching there, he knocked at the door of the flat and called out the name of Kalpanaben Chandan Chaterjee. Then a lady came out and gave her name as Kalpanaben Chandan Chaterjee i.e. the accused. He told Kalpanaben that the police party together with the panchas intended to search her house. He offered the search of the members of the raiding party. As Kalpanaben was a lady, PW 1 also took out pant pockets as well as shirt pockets of the members of the raiding and showed to her that none of the members of the raiding party had anything incriminating with them. On the accused being satisfied about it, the police party entered the flat. According to PW 1, the personal search of the lady was not taken but on entering the flat, in one of the rooms, a purse was found lying on a stool and on opening the same, 21 packets of brown powder were found. Each Packet had inside it a plastic bag. Out of the 21 packets, 18 packets were found having the figure "25" written on them in English. Two packets out of the 21 packets had the figure "300" in English written on them. The last packet out of 21, had the figure "6" written in English on it. Each of the above two packets which bore the figure "300" on them were opened and out of them came one packet of 5 each. There was a paper cover having a mark of rose flower the words "Best Wishes"/"With Best Compliments"

were written. The last packet, in part there, on which figure "6" was written was also opened out of which 6 polythene bags came out. These bags were also wrapped in a brown colour paper on which the word "sample" was written. From the purse, a railway pass, a railway identity card with a photo on it, a diary with the word Pravin on it and a photo of a male were found. Each of the 34 packets were weighed separately, PW 1 then asked a Constable to bring small clean bottles for sealing the samples recovered. A small quantity from each packet was drawn and put in the bottles separately. Each bottle was then wrapped with a paper containing the signatures of the panchas. Each packet was then sealed with wax. The remaining muddemal was then repacked, labelled and sealed. All the abovementioned sealed packets were then put back into the same purse from which they were recovered. The purse is marked as Article No. 1. A seizure panchanama was drawn by PW 1. All the packets were sealed and signed by the panchas as indicated by Article 4 (Colly.) The statement of PW 1 was recorded and treated as an F.I.R. Accused No. 1 was then arrested and charged for offences punishable u/s 8(c) read with Section 21 of the NDPS Act, 1985.

5. In his cross-examination, PW 1 testified that before he left along with the police party for raiding the premises of the accused, he made an entry to that effect in the Station Diary wherein the above details were recorded. He further deposed that he did not take any women Constable with him for the raid because of non-availability of a women Constable at his Police Station. He also testified in the cross-examination that no lady was taken to act as a panch because no one was available for the purpose. He has further deposed that the panch witness Rajesh Kumar (PW 2) and another were first called to the police station and were taken thereafter to the residence of the accused. According to him, PW 2 was in the business of supplying cloth upon receiving orders. He categorically denied that both the panchas were brought to the police station earlier and charged with offence. The above evidence of PW 1 is fully supported by the panchanama of seizure (Exh. 12) and the complaint (Exh. 9 colly.).

6. To the same effect is the testimony of PW 2, the panch witness Rajeshkumar Roy, who has also deposed that on 31st August, 1989 at 10.15 a.m. he was called by the Goregaon Police Station to act as one of the panchas; that when he reached the police station there was another panch, two officers and 3 constables; that PW 1 was one of the officers; that on reaching the spot, PW 1 called out the name of Kalpanaben which was answered by the accused who came out and told the police party that she was Kalpanaben; that when the panchas entered the room, they found a lady's purse lying on a stool and on opening the purse they found 21 packets which were khaki coloured, a railway identity card and a railway pass were also found in the purse; that out of 21 packets, figure "25" was written on 18 packets, on the other 2 packets figure "300" was written and on the last one packet some figure was written which he could not recollect; that when the first lot of 18 packets was opened inside each packet a plastic bag was found containing brown powder; that Arun Chavan (PW 1) then asked a Constable to bring a scale, weight, police seal and small glass

bottles which were brought by the Constable. The brown powder was then weighed and 18 packets referred to above contained approximately 25 grams of brown powder in each packet. It contained gard (heroin). The packets found from the 2 packs in the second lot bore the figure "300" and when weighed they were found to contain 5 grams each of gard. A sample was drawn from each lot and they were put in glass bottles. The said glass bottles and all other packets were then packed and sealed. Labels with the signatures of the panchas were pasted on packets and bottles. In his cross-examination, PW 2 testified that he did not conduct business on the road; he took orders for ready-made garments and supplied them. He has categorically deposed that the never acted as a police panch prior to or after the above case. He has categorically deposed that it was PW 1 who had knocked on the door of the house of the accused and that she opened the door within half a minute. He has further deposed that there were 2 to 4 rooms in the flat. He has also deposed that the accused was inside the flat when the police party and the panchas entered the flat. He has further deposed that all the persons of the raiding party entered the flat of the accused together and also came out together.

7. Now, reading the evidence of PW 1 and PW 2 together, we find that the evidence substantiates the prosecution case. The said evidence clearly establishes the recovery and seizure of the brown powder from the accused. It also indicates that the search was proper and that correct procedure of seizure was followed. In this connection, the testimony of PW 4, the investigating officer, Pramod Rane, may also be seen. PW 4 in his testimony has deposed that he was a Police Inspector attached to the Goregaon Police Station; that on 31st August 1989 C.R. N. 227 of 1989 came to be registered; that initial investigation in the case was carried out by PW 1; that on 12th September 1989 he had sent the sealed sample bottles to the Chemical Analyser vide letter dated 11th September 1989; that on 3rd October 1989 he had obtained the specimen handwriting (Exh. 21 colly) of the accused under a panchanama and that on the next day another set of specimen handwriting (Exh. 22 colly.) of the accused was obtained under a panchanama. All the specimens of the handwritings (Exh. 21 colly, and Exh. 22 colly.) of the accused were sent to the handwriting expert (PW 5) through the Joint Commissioner of Police under a forwarding letter dated 25th October 1989. PW 4 also identified (Exh. 13 colly.) the original wrappers on which figures in English were written and from which the contents of Art. 4 colly, were removed and repacked into Art. 4A and 4B by him.

8. The case of the prosecution is further strengthened by the evidence of the handwriting expert (PW 5) Jibbau Aher who has deposed that he was Assistant State Examiner of Documents who was appointed in 1981 by the State of Maharashtra; that he was B.Sc. (Hons.) of the Pune University and had taken 2 years training from the department of handwriting science. On 6th November 1989, he had received the above specimen handwritings vide letter dated 25th October 1989 from the Joint Commissioner of Police, Gr. Bombay. According to him, amongst the documents sent to him were Exhs. 13, 21 and 22 of the Court.

For the purposes of analysing the specimens, he marked Court Ex. 13 (colly.) (which were bearing the figure "25") coloured packet Court Ex. 21 (colly.) and Ex. 22 (colly.) marked as S-7 to S-9 (specimen handwritings of the accused as stated above.) PW 5 in his testimony has clearly opined that the figures in English marked in Court Ex. 13 (colly.) which indicates figure "25" on the packet when compared with the above Court Ex. 21 and Ex. 22 (colly.) indicated similarities of common authorship. In the above circumstances, taking into account the testimony of the complainant (PW 1) Arun Chavan, as also the testimony of the investigating officer PW 4, along with the testimony of the handwriting expert (PW 5), it is clear that the articles seized during the raid were well connected with the accused. The above evidence clearly proves that the accused was in possession of the seized articles. She was in possession of the purse from which the contraband drug came to be recovered and seized. This evidence also proves the conscious possession of the contraband drug by the accused. The evidence clearly shows that the accused was all alone in her flat when the raid took place. The purse was lying on the stool from which the above contraband drug came to be recovered. The purse also contained a railway pass and the identity card. The railway pass had a photograph of the accused. The railway pass also indicates her name and taking into consideration the above evidence, it is clear that the accused was connected with the seized articles and that she was found to be in possession of the contraband drug. There is nothing on the record to indicate that the accused was taking her bath when the police knocked on the door as is sought to be suggested in the cross-examination. On the other hand, the evidence of PW 2, the panch, clearly indicates that the door came to be opened within half a minute and the accused herself stated that her name was Kalpanaben Chaterjee. Therefore, the above evidence clearly indicates that the prosecution has proved that the accused was directly connected with the seized articles and that she was in conscious possession of the narcotic drug.

9. However, one more question still remains to be answered whether the seized article was narcotic drug. In this connection it may be mentioned that the Chemical Analyser's report (Exh. 19) dated 16th December, 1989 has given the result of the analysis. The report indicates that Chemical Analyser analysed contents of 34 bottles. According to the result of the analysis, heroin (Di-Acetyl morphine) along with other opium alkaloids was detected in Exhs. 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, and 34, which were randomly selected out of the 34 above exhibits and examined. The report clearly indicates that the said exhibits attracted Section 2(xvi)(e) of the NDPS Act. In view of the above report of the Chemical Analyser, it is clear that the seized articles was narcotic drug. It was argued that a very small quantity was sent for chemical analysis and, in the circumstances, the report of the Chemical Analyser stating that the seized article was a narcotic drug (heroin) was not reliable. We do not find any merit in the said contention. The Report of the Chemical Analyser in the present case shows that he received 34 sealed bottles with seals intact. The said report also indicates that the Chemical Analyser selected exhibits randomly out

of 34 exhibits. In the circumstances, there is no merit in the above contention of learned Counsel appearing on behalf of the accused. A similar situation arose in the case of *Durand Didier Vs. Chief Secretary, Union Territory of Goa*, . In that case it was argued that sending of small quantity of seized substance for analysis was insufficient to come to the conclusion that it was narcotic drug. While dealing with this argument, the Apex Court came to the conclusion that from the record in that case it was found that PW 7, the Assistant Sub-Inspector of Police, had divided the contraband into 3 categories and had sent the samples from each of the 3 categories for analysis. The Supreme Court observed (vide paragraph 11) that "no doubt it would have been appreciable, had PW 7 sent sufficient representative quantity from each of the packets but however this omission in the case did not affect the intrinsic veracity of the prosecution case." This judgment applies on all fours to the facts of our case. In our case PW 1, the complainant, divided the contraband into 3 categories as stated hereinabove and forwarded the samples from each of the categories for analysis. In the circumstances, there is no merit in the contention of the learned Counsel for the accused that because insufficient quantity was sent to the Chemical Analyser, the article could not be said to be narcotic drug.

10. At this stage our attention is also invited to the judgment of the Division Bench of this Court (M. L. Dudhat and M. F. Saldanha, JJ.) (unreported) in the case of *Ashok Asumal Bajaj v. The State of Maharashtra*, in Criminal Appeal No. 504 of 1991, decided on 8th February 1993. In that case, a similar argument was advanced on behalf of the accused that the Chemical Analyser's report did not indicate the quantity by weight that was sent for analysis. In that case the Chemical Analyser had stated in the report that the whole quantity of the powder in all the 8 cases had been fully used in the course of the analysis. While dealing with the said contention of the accused, the Division Bench stated that they were aware of the fact that for the purpose of carrying out laboratory analysis a certain minimum quantity of the same was required. It was further observed that even in cases where the quantities are reasonably small, it was advisable to follow the procedure as otherwise difficulties would rise in cases where the accused may challenge the nature of the material seized. It was observed that in such cases where the quantity is extremely small and where all of it is sent for chemical analysis, it would be necessary for the Chemical Analyser to specifically indicate the quantity of the material sent to him so that the Court could be satisfied in the face of a challenge that there was a valid justification for none of it being produced before the Court. The case of *Ashok Asumal Bajaj* (supra) was a case u/s 27 of the said NDPS Act which is not the point in the present matter. Paragraph 4 of the judgment, contains observations to the effect that in that case there was nothing to indicate in the C.A. report about the exact quantity by weight that was sent for analysis. It was in the light of those facts that the observations were made by the Division Bench and, therefore, the said observations must be read in the facts and circumstances of that case and as a rule of law. On the other hand, as stated herein above, the well settled principle

of law on the point is that although it is desirable to send sufficient quantity for analysis to the Chemical Analyser merely because a small quantity is sent will not weaken the prosecution case. In the circumstances, reliance cannot be placed on the judgment of the Division Bench in the case of Ashok Asumal Bajaj (supra).

11. Hence, we are in full agreement with the judgment and order passed by the learned trial Judge. Having perused the above evidence on record, we are satisfied that the seized article was narcotic drug and that the accused was directly connected with the seized articles. In the present case, the evidence clearly proves that the accused was in possession of the narcotic drug as she was found to be in possession of the purse from which the said drug was seized and recovered. The comparison of the handwritings is also indicative of the fact that the accused was in conscious possession of the said narcotic drug. In the circumstances, the conviction and the sentence recorded by the learned trial Judge stand confirmed.

12. However, the learned Counsel for the accused invited our attention to certain breaches/violations of Sections 50(4) and 57 of the NDPS Act. It was submitted that in view of the said violations, the trial and the conviction of the accused were vitiated. In support of his argument, the learned Counsel submitted that in our case Section 50(4) of the NDPS Act was violated in as much as it lays down that no female shall be searched by anyone except a female and the present accused who is a female was searched by male officers. But it is important to note that no personal search of the accused was undertaken by the investigating officer and, therefore, there was no breach of Section 50(4) of the NDPS Act. It was also submitted that in the present case there was also a breach of Section 57 of the NDPS Act because no report of the seizure was forwarded by the investigating officer within 48 hours giving all particulars of the seizure to his immediate official superior. It was urged that in view of the violation of Section 50(4) and Section 57, the conviction of the accused was not proper. In support of the above argument, the learned Counsel for the accused placed heavy reliance on the judgment of the Division Bench of this Court in the case of Usman Haidarkhan Shaikh Vs. The State of Maharashtra, passed by V. P. Tipnis and I. G. Shah, JJ.

13. In that case one of the points which arose for consideration was the consequence of violation of Sections 50 and 57 of the NDPS Act. In that case, it was observed that it was implicitly obligatory on the part of the police officer in-charge of the raid to inform the accused of his right to be searched in the presence of the nearest gazetted officer or the Magistrate and if the accused declined to resort to such search only then he could be searched by the Police Officer in charge of the raid. The Division Bench came to the conclusion that since the accused was not informed about his right u/s 50 of the NDPS Act, there was a breach of the said provision. Similarly, there was non-compliance of Section 57 of the Act in that case as found by the Division Bench. It may be

mentioned at this stage that in the case of Usman Haidarkhan Shaikh Vs. The State of Maharashtra, , the trial Court had come to the conclusion that though the provision of Sections 50 and 57 were breached since they were no mandatory, it did not affect the case of the prosecution. The Division Bench did not go into the question whether the said provisions were mandatory or not but it came to the conclusion that in view of the breach of the provisions of Section 50 and 57 of the NDPS Act, the case of the prosecution stood vitiated because the said provisions were not duly complied with and accordingly the Division Bench set aside the conviction. It may be mentioned here that the said Division Bench in the above case of Usman Shaikh has made the above observations which are, in our opinion, per incuriam, speaking with respect to our learned brothers. The question in the present case which is required to be decided has to be gone into in detail for the simple reason that the above judgment in Usman Shaikh's case is repeatedly cited before this Court.

14. Now, we would like to formulate the question to be answered as under :

"Whether the factum of violation of the procedure laid down under Sections 42 to 58 of the NDPS Act, 1985 by itself and per se could be said to be causing any sort of prejudice to the accused so as to vitiate the trial and the subsequent conviction ?"

In order to answer this question and in order to find out whether the ratio of the judgment in Usman Haidarkhan Shaikh Vs. The State of Maharashtra, was per incuriam, we would like to say that, it appears, that the earlier judgments of the Division Bench of this Court were not brought to the notice of the Bench of Tipnis and Shah, JJ. and as such were not considered by the said Division Bench in Usman Shaikh's case (supra). In this regard, the first judgment in point of time of the Division Bench in the case of Abdul Sattar v. State of Maharashtra, reported in 1989 Cri LJ 430 . In that case the Division Bench of this Court (Panaji Bench, Goa, consisting of Dr. G. F. Couto and G. D. Kamat, JJ.) had laid down that the invalidity of a preceding investigation or illegality of a search or seizure does not vitiate the conviction of an accused prejudice to the accused. It was further held that even if the provisions of Sections 41 to 58 of the NDPS Act were held to be mandatory and even if the said provisions were not complied with, it was a procedural infirmity which by itself will not vitiate the conviction of the accused when the recovery of narcotics from him is proved to be genuine and no prejudice could be said to have been caused to the accused by such infirmity. In laying down the above law, the said Division Bench relied upon the judgment of the Supreme Court in the case of Radhakishan Vs. State of U.P., , in which it has been laid down that no criminal case is free from discrepancy and that minor variations do not vitiate the trial. Reliance was also placed on the judgment of the Supreme Court in Khandu Sonu Dhobi and Another Vs. State of Maharashtra, in which it has been laid down that where cognizance of a case has in fact been taken by the Court on a police report following investigations conducted in breach of Section 5(a), the result of the trial cannot be set aside unless the

illegality in the investigation can be shown to have brought about miscarriage of justice. The underlying reason of the above dictum is that an illegality committed in the course of investigation does not affect the competence and jurisdiction of the Court to try the accused and where trial of the Court to try the accused and where trial the case has proceeded to termination, the invalidity of the preceding investigation would not vitiate the conviction of the accused unless the illegality in the investigation has caused prejudice to the accused. Relying on the ratio of the judgment of the Supreme Court in Khandu Sonu's case (supra), the Division Bench of this Court, with respect, rightly came to the conclusion in Abdul Sattar's case (supra) that breach of Sections 50 and 57 of the NDPS Act are procedural infirmities and such infirmities in the preceding investigation or in search or seizure do not vitiated the conviction of the accused unless invalidity or illegality has caused prejudice to him and the procedural infirmity would not by itself vitiate the conviction of the accused when the recovery of narcotics from him proved to be genuine and no prejudice could be said to have been caused to the accused by such infirmity.

15. The above question once again came up in the case of Wilfred Joseph Dawood Lema Vs. State of Maharashtra, , before the Division Bench of this Court of which one of us. (H. H. Kantharia, J.) was a party. The said Division Bench was presided over by Mr. Justice D. N. Mehta (as he then was). In that case one of the questions which arose for determination was whether the police followed the proper procedure laid down in Section 50 of the NDPS Act, in as much as the police did not inform the accused therein that he had a right to be searched in the presence of a gazetted officer or a Magistrate and that the accused should have been searched in the presence of a gazetted officer or a Magistrate Similarly, in the said case as in the present case, a question also arose whether there was a breach of the mandatory provisions of the Section 57 of the NDPS Act, inasmuch as the accused was not informed about the grounds of his arrest and that the police who arrested him did not make a full report of the particulars of such arrest of seizure to his immediate official superior within 48 hours. There was a difference of opinion between the two Judges in the said case of Wilfred Joseph Dawood Lema. Kantharia J. laid down, inter alia, that there was no substance in the argument advanced on behalf of the accused that there was a breach of Section 50 of the NDPS Act in as much as the police did not inform the accused that he had a right to be searched in the presence of the Gazetted Officer or a Magistrate and that the accused should have been searched as such. It was held by Kantharia, J. that the accused would have been searched in the presence of the nearest Gazetted Officer or the Magistrate only if he had requested the police in that behalf. That was on a bare reading of Section 50 of the NDPS Act which clearly envisages that where any officer duly authorised u/s 42 is about to search any person under the provisions of Sections 41, 42 or 43, he shall, if such person so requires, take him to the nearest Gazetted Officer or Magistrate before whom the search is to be carried out. Kantharia, J. also held that even assuming for the sake of argument that he was wrong incoming to the

conclusion that the investigating officer did not comply with the provisions of Sections 52 and 57 of the NDPS Act, even then procedural irregularity will not vitiate by itself and the trial and the consequent conviction of the accused unless it is shown that prejudice was caused to the accused in his defence. In coming to the above conclusion, Kantharia, J. placed reliance on the judgment of the Supreme Court in *Khandu Sonu Dhobi and Another Vs. State of Maharashtra*, as well as the Division Bench Judgment of this Court (Goa Bench) in *Abdul Sattar's* case 1989 Cri LJ 430 (supra) and accordingly the conviction of the accused was confirmed by Kantharia, J. However, as stated hereinabove speaking with respect Mehta, J. (as he then was) did not agree with the view taken by Kantharia, J. and he came to a contrary conclusion. He held that looking to the object and looking to the punishment contemplated by the provisions of the NDPS Act, the said Sections 50 and 57 must be read as mandatory and the investigating agency was duty bound to follow and obey each of the obligations under the relevant sections; that the legislature had viewed the above impositions with certain amount of seriousness as enacted by Section 59 of the NDPS Act which laid down that any wilful failure or contravention on the part of the Investigating Officer was made punishable with penal liability. In the light of the said Section 59 and the object of the Act Mehta, J. (as he then was) came to the conclusion that an investigation in all criminal matters must be fair and above board and that fairness in investigation is fundamental to the administration of criminal justice and therefore, violation of Section 50 of the Act by the Investigating Officer in not taking accused to the nearest Gazetted Officer or Magistrate for carrying out the search would vitiate the conviction and sentence and so also the non-compliance of provisions of Section 57 of the NDPS Act inasmuch as if no report is made by the investigating officer to the Inspector of Police or the Assistant Commissioner of Police or his immediate official superiors, then the entire trial, conviction and sentence would stand vitiated. Mehta, J. did not agree with the ratio of the Division Bench in *Abdul Sattar's* case (supra) to the effect that if there is breach of Sections 41 to 58 of the NDPS Act, then it was merely as procedural infirmity which by itself would not vitiated the trial or the conviction of the accused unless the accused was able to show that the same had caused prejudice to him Mehta, J. thus came to the conclusion that in view of the lapses committed by the police in the investigation the accused deserved to be acquitted.

16. Since the view taken by Mehta, J. (as he then was) differed from the view taken by Kantharia, J. in the case of *Wilfred Joseph Dawood Lema Vs. State of Maharashtra*, the matter came to be referred to the third Judge, Kurdukar, J. By his judgment dated 11th September 1989, Kurdukar, J. came to the conclusion on the above aspects of law that he was in complete agreement with the view taken by Kantharia, J. In coming to the above conclusion, Kurdukar, J. opined that in that case the accused had never suggested to the investigating officer to have him searched before the nearest gazetted officer of the Magistrate, that Section 50 did not warrant the conclusion that it was obligatory upon the Police

Officer to take search by taking the person to the nearest gazetted officer or to the nearest Magistrate and as no such request was ever made by the accused, there was no breach of Section 50(2) of the Act; that although Section 57 was mandatory its breach ipso facto will not vitiate the entire investigation. Accordingly, it was held that any irregularity or illegality during the investigation cannot ipso facto vitiate the entire investigation, conviction and sentence based thereon if such irregularity in the the investigation has not caused any prejudice to the accused. In view of the judgment of Kurdukar, J. upholding the view taken by Kantharia, J. the appeal preferred by Wilfred Joseph Dawood Lema came to be dismissed.

17. In this view of the legal position, therefore, what emerges is that the observations made by the Division Bench of this Court in the case of Usman Haidarkhan Shaikh Vs. The State of Maharashtra, , vide paragraph 9 were per incuriam because the judgments of the earlier Division Bench of this Court were not brought to the notice of the learned Judges (Tipnis and Shah, JJ.) and the said earlier judgments were not considered in the case of Usman Shaikh (supra).

18. Now, on reading the provisions of Section 42 to 57 of the NDPS Act, we are, in agreement with the view taken by the Division Bench of this Court in the case of Abdul Sattar 1989 Cri LJ 430 (supra) as well as the ratio of the Division Bench of this Court in the case of Wilfred Joseph Dawood Lema Vs. State of Maharashtra, . A similar view was taken by the Kerala High Court in a recent case of Haneefa Vs. State, . In that case, it has been held by the Kerala High Court that every breach of the condition cannot result in vitiating the conviction and trial; the plain language of Sections 50, 52, 53, 55, 56 and 57 of the Act leave no manner of doubt that they are mandatory provisions but in violation of these provisions per se will not vitiate the conviction unless prejudice thereby is caused to the accused and whether prejudice has been caused to the accused has to be ascertained from the circumstances of each case. This view of the Kerala High Court, with respect, is in conformity with the view expressed hereinabove by us and we are in agreement with the test propounded in the above judgment of Haneefa v. State (supra) by the Kerala High Court. Similarly, in the case of Rekha Parameswari alias Gnanambigal Muthiah Vs. Assistant Collector of Customs, , the Madras High Court has expressed the same view. In the said judgment, the facts were that the accused, a Srilankan national, falsely styled herself as Gnanambikai Mukhaiya on a forged passport and was a passenger bound for Colombo by Indian Airlines flight. This was on 21st February, 1989. She proceeded for security check after the Customs clearance at Madras International Airport. The lady Security Officer, while frisking her felt something concealed on her person. The lady Security Officer took her to a toilet when her person was searched in the presence of two lady witnesses, her undergarment jetty was found bulging and on being questioned a polythene bag came to be detected, containing narcotic substance. One of the contentions raised by the accused in that case was that Section 50 prescribes search of persons to be conducted, if the accused person so requires, in the presence of the nearest Gazetted Officer

or the nearest Magistrate. It was contended that she was not searched in the presence of the nearest Gazetted Officer or a Magistrate and, therefore, Section 50 came to be violated. Repelling the said contention, the Madras High Court took the view that the fact of possession of the narcotic substance was brought to the notice of the Security Officer only after the search and seizure of the contraband from the petitioner and in the very nature of things, the only plausible feat to be performed by the Security Officer was to detect the contraband on the person of the accused on being searched at the security counter. It was further held that in such a situation the question which a Court has to ask itself is whether the search and seizure were true and whether the evidence adduced by the prosecution through the security officer during the course of trial inspired confidence in commanding acceptance at the hands of the Court. This safeguard, if once established, then the factum of violation of procedure by itself can by no stretch of imagination be stated to be causing any sort of prejudice to the case of the petitioner so as to vitiate the entire prosecution.

19. Now, applying the ratio of all the above judgments to the facts of the present case, it is clear that the seizure was followed by weighing, packing and sealing of the contraband drug. The evidence also indicated the authenticity of the seized material duly analysed by the Chemical Analyser to be a narcotic drug (heroin). The facts clearly indicated that the search and seizure carried out were genuine and the evidence of the police, the panchas and the handwriting expert inspire confidence and deserve acceptance at the hands of this Court and we do not see any prejudice to the defence and/or failure of justice on account of the so called non-compliance of procedural laws.

20. In the light of the above judgments, we shall here examine the judgment of this Court cited by the learned Counsel for the accused in the case of Shankar Raju Banglorkar Vs. State Of Goa, . The submissions of the learned counsel is that this judgment laid down that when the provisions of Sections 52 and 55 were not complied with, the entire prosecutions case stood vitiated. In this connection, the learned Counsel relied upon paragraph 20 of the said judgment and submitted that the Division Bench of this Court (M. L. Dudhat and Dr. E. D. D. S. Da'Silva, JJ.) also came to the conclusion that where the violation of the above sections took place, the entire prosecution case stood vitiated. We do not see any merit in the contention for two reasons. The ratio of the said judgment is required to be read in the context of the facts of that case. On facts, the Division Bench came to the conclusion that there was no explanation given by the prosecution for non-compliance of provisions of Section 52 and 55 of the NDPS Act coupled with the fact that there were large number of inconsistencies in the evidence of the prosecution witnesses on vital aspects and, therefore, the Division Bench ruled that in the circumstances there was no choice but to set aside the conviction. On the facts of our case the judgment cited at the Bar is not relevant. Inconsistency in the evidence of the prosecution on vital aspect would certainly vitiate the trial. But merely because a procedural irregularity has taken

place, per se it will not vitiate the trial and the consequent conviction.

21. The learned Counsel of the accused then invited our attention to the judgment of the Division Bench of this Court (M. L. Dudhat and M. F. Saldanha, JJ.) in the case of *Manohar Peeraji v. State of Maharashtra*, reported in 1993 Mah LJ 782 . In that case, the accused stood convicted u/s 8(c) read with Section 21 of the NDPS Act. The prosecution examined only one of the two witnesses who saw the seizure. The person examined was held not to be an independent witness and, therefore, benefit of doubt was given to the accused and the conviction was set aside. The learned Counsel appearing on behalf of the accused in our case submitted that in the present case also the co-panch was not examined and only PW 2, the panch witness Rajesh Kumar Roy, was only examined by the prosecution and hence the trial stood vitiated. He also submitted that in the present case the site plan was not prepared and in view of the above irregularities the accused herein was entitled to the benefit of doubt. He also submitted that even in the case of *Manohar Peeraji* (supra) the Division Bench has ruled that since the accused was never asked as to whether he desired to be searched in keeping with the requirement of Section 50, there was a breach of the provisions of the said Section. According to the Division Bench, reading between the lines, as far as the record of that case is concerned, they had no hesitation in holding that the accused was never asked as to whether he desired to be searched in keeping with the requirement of Section 50. The learned Counsel, therefore, submitted that the above ratio of the Division Bench judgment in *Manohar Peeraji*'s case (supra) was not per incuriam because the judgment of this Court in *Wilfred Joseph Dawood Lema Vs. State of Maharashtra*, was cited before the Division Bench. We do not find any merit in these contentions. Firstly, as stated hereinabove, in the case of *Manohar Peeraji*, the prosecution had claimed that two independent witnesses had witnessed the seizure and out of the two panchas only one was examined and the Court was of the opinion that the examined witness was not an independent person. In the circumstances, benefit of reasonable doubt was given to the accused. In the present case, there is nothing to indicate that PW 2 was a got up witness or that he could not be termed as independent witness for whatever reason. There is also nothing to indicate that he was an interested witness. In the circumstances, the facts of the present case are not covered by the ratio of the judgment in *Manohar Peeraji*'s case (supra). And what turns on preparation of a site plan is not understandable in our case. As stated hereinabove, and as held by us, the seizure in our case was genuine, the samples were properly drawn and the evidence indicates that the accused was directly linked to the article seized and the seized article was a narcotic drug and, therefore, on the facts of the present case, merely because one of the panchas was not examined, will not vitiate the prosecution. It is the quality and not the quantity of the evidence that matters. Secondly, regarding violation of Section 50, the Division Bench in the case of *Manohar Peeraji* (supra) did refer to the case of *Wilfred Joseph Dawood Lema* (supra) and in paragraph 9 of the judgment, did observe that the accused was

never asked as to whether he desired to be searched in keeping with the requirements of Section 50. However, it does not appear that before making such observations the learned Judges, speaking with respect, considered the law made clear by the earlier Division Bench in the case of Wilfred Joseph Dawood Lema that unless the accused asked for it, the investigating officer is not obliged to tell the accused whether he would like to be searched in the presence of a Gazetted Officer or a Magistrate. A bare reading of the judgment in the case of Manohar Peeraji (*supra*) shows, with respect, that the above question of law as to whether it was obligatory on the part of the Police Officer in charge of the raid to inform the accused of his right to be searched in the presence of the nearest Gazetted Officer or the Magistrate was not perceived and present in the mind of the Court and, therefore, the said decision was rendered sub-silentio and cannot operate as a binding precedent. In this connection the judgment of this Court in the case of Kahibai v. State of Maharashtra, reported in 1993 Mah LJ 1168 , may be usefully referred to regarding the doctrine of per incuriam.

"..... a decision rendered in ignorance of a statute or a binding authority is described as per incuriam and does not lay down a binding precedent for which the question of law involved must be perceived and must be present in the mind of the Court. A decision rendered sub-silentio cannot operate as a binding precedent."

Therefore, the view thus expressed by the later Division Bench without considering the view taken by the earlier Division Bench is per incuriam. In the circumstances, there is no merit in the contentions raised by the learned Counsel appearing on behalf of the accused in the present case.

22. Before concluding, we would like to observe that looking to the preamble of the NDPS Act and the scheme of the various provisions, it is not possible to take a technical view that every procedural infirmity leads to vitiation of the trial, conviction and sentence imposed on the accused. We cannot lose sight of the fact that drug traffickers who are mass murderers, anti-social and anti-national and are enemies of humanity who destroy not only the existing generation but also the future generations and they cannot be permitted to carry on clandestine and illegal activities with impunity and thereafter take shelter under the specious plea that because of non-compliance of procedural law, injustice has been done to them if the recovery and seizure of narcotic drug from them is proved genuine and real and truthful on appreciation of evidence on record. We wish to make it clear that we should not be understood to say that we are giving a blanket licence to the investigating agency not to follow the procedural law but we only reiterate the well settled principles of law that merely because procedural law is not properly and strictly followed, the trial and the subsequent conviction of the accused do not get vitiated. We reiterate with all the emphasis at our command that if technical views on such matters are taken by the Court, it would result in undeserved acquittals, would be unfair to the prosecution and justice would be miscarried resulting into disastrous consequences. To the same effect, our

Supreme Court was constrained to observe in the case of Durand Didier Vs. Chief Secretary, Union Territory of Goa, that :

"With deep concern, we may point that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addition among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, the Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine."

23. In the premises aforesaid, the appeal fails and the same is dismissed. The conviction and sentence recorded against the accused-appellant stand confirmed.

24. Appeal dismissed.