
(2001) 12 BOM CK 0014

In the Bombay High Court

Case No : Criminal Appeal No's. 651, 685 and 733 of 1997

Mohammed Shabir Shaikh Bhikan

APPELLANT

Vs

The State of Maharashtra and Another

RESPONDENT

Date of Decision : 04-12-2001

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 22, 29, 42, 50, 57

Citation : (2002) 104 BOMLR 820

Hon'ble Judges : D.G. Deshpande, J

Bench : Single Bench

Judgement

D.G. Deshpande, J.—In all four accused were prosecuted under the N.D.P.S. Act before the Special Court, Bombay in N.D.P.S. Special Case No. 280 of 1992, one of them i.e. accused No. 4 was absconding. However, accused Nos. 1 to 3 came to be convicted by the Additional Sessions Judge, Greater Bombay, by his judgment dated 22.9.1997. Therefore, these accused have preferred and filed three separate appeals i.e. Criminal Appeal No. 733 of 1997 is filed by original accused No. 1 Mohammed Shabir Shaikh Bhikan; Criminal Appeal No. 651 of 1997 is filed by original accused No. 2 Sharifkhan Rashidkhan; and Criminal Appeal No. 685 of 1997 is filed by original accused No. 3 Sampat Tukaram Sangle. Accused No. 1 is important for the prosecution, both for his personal role as well as for leading police party to accused Nos. 2 and 3.

2.The prosecution case, in brief, is as under:

Shri S.B. Pujari (P.W. 3) - Sub-Inspector at Narcotic Cell, Bombay received information that accused No. 1 is manufacturing mandrex tablets at Shah Compound, Shastri Nagar, Kalina Village. After reducing this information in writing, completing other formalities and after taking two panchas, a raid was carried out at the aforesaid premises. This is from where the prosecution case begins. Then thereafter accused No. 1 is shown to have been involved under N.D.P.S. Act in three different manners:

(1) that in his personal search at the aforesaid place a packet containing mandrex tablets weighing about 100gms. was found;

(2) that in the factory premises he was found in possession about 376.700kgs. of methaqualone and 1.100kg. of mandrex tablets;

(3) that on 25.9.1992 accused No. 1 made a statement and pointed out a place consequently from where 200kg. methaqualone was sent by him for transport through Sai Transport Company, Janjekar Street, Mandvi, Mumbai and said quantity of methaqualone was seized by police in the presence of panchas and in presence of accused No. 1.

3. Thereafter accused No. 1 revealed the name of accused No. 2 who was financing him and supplying methaqualone which was seized from accused No. 1. P.W. 3 Pujari therefore raided the house of accused No. 1, but nothing was found in his house. However, accused No. 2 disclosed that they were running a factory at Sinnar, Plot No. 103. The police party, therefore, went to the said factory where accused No. 3 was found present. From the said factory 55 gunny bags containing brownish powder and granules, all of which tested positive for methaqualone, were seized. Accused No. 3 was also arrested.

4. So far as factory at Sinnar is concerned, it is the case of accused No. 2 that he has no concern with the said factory or with anything found therein. Further so far as his being taken into custody on 21.9.1992 by P.W. 3 Pujari and raiding party is concerned, it is his case that on 21.9.1992 and 22.9.1992 he was at Pune in connection with property Power of Attorney in the name of his brother and, therefore, the case of the police that he was taken into custody on 21.9.1992 at his residence at Antop Hill is totally false and fabricated. Consequently, accused No. 2 has denied his presence at the time of seizure at Sinnar factory or his concern with manufacturing of methaqualone powder or mandrex tablets.

5. So far accused No. 3 is concerned, it is his case that the factory at Sinnar is owned by him but at the relevant time the factory was being run by accused No. 2 as per agreement executed between them and. therefore, he is not responsible for what is found in Sinnar Factory on 21.9.1992. As against this accused No. 2 has contended that the said agreement relied upon by accused No. 3 is bogus and false and he has not executed nor signed it.

6. The Trial Court has accepted the case of the prosecution in all respects excepting running of manufacturing unit by accused No. 1 at Shah Compound, Kurla. That aspect of the prosecution case is rejected by the Trial Court on the ground that the prosecution has failed to produce any evidence that the accused No. 1 was the owner of the said factory or that the said factory was in existence. Having come to the said conclusion the Trial Court sent Commissioner to verify whether the factory premises were in existence on the date of trial and accepted the Commissioner's Report that no such premises are in existence. This particular approach of the Trial Court is wrong and consequently the acquittal of

accused No. 1 in that regard is wrong. However, there is no appeal of the State against the said acquittal and since there is specific charge against accused No. 1 for running the said factory at Shah Compound, his acquittal closes that chapter for ever and even if it is found that findings of the Trial Court are erroneous, I am not going to interfere with those findings.

7. The Trial Court has accepted the prosecution case about recovery of 110 mandrex tablets from the person of accused No. 1, recovery of 200kg. mandrex tablets from Sai Transport Company. So far as defence of alibi of accused No. 2 is concerned, the Trial Court has rejected the said defence and, the Trial Court has also rejected the case of accused No. 3 that at the relevant time he had given the factory for running to accused No. 2.

8. In this background, I heard the submissions made by three respective counsel for their respective clients and also heard Mr. Pravin Singhal, learned A.P.P. in reply thereto. Mr. Shirodkar argued for accused No. 1, Mr. Sangani argued for accused No. 2 and Mr. Lalla argued for accused No. 3.

9. Mr. Shirodkar, Advocate for accused No. 1, contended that so far as accused No. 1 is concerned, there is no compliance to Section 50 of the N.D.P.S. Act in as much as the accused was not informed of his right to get his personal search done in presence of the Magistrate or Gazetted Officer and, also there is no compliance to Section 57 of the N.D.P.S. Act. He relied upon the judgment of this Court Laxmandas Mangaldas Manikpuri Vs. State of Maharashtra, , then another judgment of this Court Shaikh Nazre AlamZahoor and Anr. v. State of Maharashtra 2001 (2) L.J. 47, and Mustakin Akbar Shaikh v. State of Maharashtra Criminal Appeal No. 214 of 1996 (U.J.), another judgment of this Court Sonu Satish Sharma v. State of Maharashtra 2001 (2) L.J. 16 and judgment of Supreme Court in Mohinder Kumar Vs. The State, Panaji, Goa, , in support of his contention regarding non compliance to the mandatory provisions of the N.D.P.S. Act.

10. On the other hand learned A.P.P. Mr. Singhal contended that there is compliance to Section 50 as well as Section 57 of the N.D.P.S. Act and at any rate it was substantial compliance and therefore no benefit could be given to the accused in this case for non compliance as alleged by them. Learned A.P.P. also relied upon a judgment of Allahabad High Court Ashim Adhikari Vs. State of U.P., , a judgment of Supreme Court in State of Himachal Pradesh Vs. Shri Pirthi Chand and another, and of Supreme Court in Munna Mohammad Hasan Ansari v. State of Maharashtra Criminal Appeal No. 1383 of 1999 (U.J.).

11. The prosecution case regarding compliance to Section 50 of the N.D.P.S. Act is brought on record by P.W. 3 Pujari, the officer attached to Narcotic Cell. He has stated that he was accompanied at the relevant time by P.I. Adhav and Adhav told accused No. 1 that they were suspecting him for manufacturing narcotic drugs and intended to search the accused No. 1 and the room i.e. the factory at Shah Compound and, P.I. Adhav also gave an offer to get the accused No. 1

searched before the Gazetted Officer or the Magistrate. He was also offered search of the members of raiding party for which accused No. 1 declined and accused No. 1 shown his willingness to get his search before the Gazetted Officer who was present in the raiding party, which consisted of P.I. Khedkar, A.C.P. More, P.I. Adhav and the witness himself. Panchanama is also pressed into service by the prosecution in respect of entire search from the person of the accused as well as from the premises. The panchanama Exhibit 31 page 266 mentions as under:

He was also informed that the search will be carried out in the presence of Gazetted Officer or a Magistrate of his choice if he so intend. P.I. Adhav told him that he himself (P.I. Adhav), A.C.P. More, P.I. Khedkar are the Gazetted Officers present on the spot. Hearing this Mohamed Shabir (accused No. 1) showed his willingness to get himself search in our presence.

P.I. Adhav is examined by the prosecution as P.W. 9. In his evidence P.I. Adhav, regarding Section 50, has stated as under:

He was also informed that search will be carried out in the presence of Magistrate or Gazetted Officer of his choice if he so intends. I told him, myself, A.C.P. More, P.I. Khedkar are the Gazetted Officers present on the spot. On hearing this, Mr. Mohd. Shabbir allowed us to take his personal search and his hut also.

It is in the background of this evidence, Mr. Shirodkar contended that neither in the panchanama nor in the deposition of P.W. 3 and P.W. 9 there is any mention of any "right" (stress added) to accused No. 1. Therefore, there is no compliance to the mandatory provisions of Section 50 of the N.D.P.S. Act and in view of the judgment relied upon by him, as stated above, Mr. Shirodkar stated that accused No. 1 is entitled for acquittal.

12. This argument has also been considered in view of the submissions made by learned A.P.P. and the case laws cited by him.

13. In the case of Shaikh Nqjare Alam Zahoor v. State of Maharashtra (referred to above) also the argument of accused was that there is non compliance to Section 50 of the N.D.P.S. Act. There the accused were apprised of their right to be searched before a Magistrate or a Gazetted Officer and they were also informed that in the raiding party, Gazetted Officers were present and accused showed their willingness for being searched before the officers in the raiding party. In that case the Division Bench came to the conclusion that Section 50 contemplates that empowered officer must inform the accused that they have a right to be searched in the presence of Gazetted Officer other than himself or a Magistrate and, this was not done and, since from the case before the D.B. where it appeared that the Investigating Officer had induced the accused to have themselves searched by the empowered officer, there was breach of law i.e. of Section 50.

14. In the unreported judgment in Criminal Appeal No. 214 of 1996, the Single Bench had not accepted the contentions of the accused that there was no compliance to Section 50 and the Court came to this conclusion after considering the evidence of Panch (P.W. 2) and also the evidence of P.W. 1 Chavan, P.W. 5 Nigade. In the case of Sonu Satish Sharma v. State of Maharashtra (referred to above), a question of compliance to Section 50 was raised by the accused. In the panchanama in that case what had written as under:

They were further informed by Sr. P.I. Dhavle that under N.D.P.S. Act that they have right to get themselves searched in the presence of Gazetted Officer or Magistrate and they so desire arrangements will be made accordingly.

However in the panchanama in that case it was also mentioned that the accused were informed that Sr. P.I. Dhavle himself was the Gazetted Officer present on the spot. In this context it was held that there was no compliance to Section 50. And as a result it was held that recovery of illicit articles was suspicious and vitiating the conviction and sentence of the accused.

15. As against this authority Mr. Singhal, A.P.P. relied upon the aforesaid judgments and contended that in the case of State of H.P. v. Pirthi Chandel the matter went before the Supreme Court when the accused were discharged from the offence under the N.D.P.S. Act. The High Court confirmed the said order and hence the State went into appeal before the Supreme Court. There also the accused were discharged on the ground of non compliance of Section 50. The Supreme Court in that background considered its own judgment in State of Punjab Vs. Balbir Singh, and in Saiyad Mohd. Saiyad Umar Saiyad and Others Vs. State of Gujarat, and held that:

It would be seen that the organized traffic in contraband generates deleterious effect on the national economy affecting the vitals of the economic life of the community. It is settled law that illegality committed in investigation does not render the evidence obtained during that investigation inadmissible. In spite of illegal search property seized, on the basis of said search, it still would form basis for further investigation and prosecution against the accused. The manner in which the contraband is discovered may affect the factum of discovery but if the factum of discovery is otherwise proved then the manner becomes immaterial.

In Radha Kishan v. State of U.P. this Court held that the evidence obtained by illegal search and seizure would not be rejected but requires to be examined carefully. In State of Maharashtra v. Natwarlal Damodardas Soni, even if the search was illegal, it will not affect the validity of the trial which followed on the complaint by the customs officials. In Shyam Lal Sharma v. State of M.P. it was held that even if the search and seizure is illegal being in contravention of Section 165, that provision does not have any effect in its application to the subsequent steps taken in the investigation. In State of Kerala v. Allasserry Mohd. this Court had held that failure to comply strictly with the statutory provisions by the Food Inspector would not vitiate the trial and conviction of the accused.

It would thus be settled law that every deviation from the details of the procedure prescribed for search does not necessarily lead to the conclusion that search by the police renders the recovery of the articles pursuant to the illegal search irrelevant evidence nor the discovery of the fact inadmissible at the trial. Weight to be attached to such evidence depends on facts and circumstances in each case. The Court is required to scan the evidence with care and to act upon it when it is proved and the Court would hold that the evidence would be relied upon.

In the case of Munna Mohammad Hasan Ansari v. State of Maharashtra, P.S.I. Vinayaka Balwant Jadhav, P.W. 4 and Ors. police people and two panch witnesses apprehended the accused in front of shop of Guljar Tailors. P.W. 4 Jadhav Informed the accused/appellant that they had the information that the accused was carrying charas in the plastic bags and he was to be searched.

16. The accused was given an offer that if he wanted to be searched by a Magistrate, then, a Magistrate could be called. The appellant declined the offer of being searched by a Magistrate and, thereafter the accused was searched. The Trial Court, therefore, convicted the accused. But the matter went to the Supreme Court at the instance of the accused and the ground of challenge the prosecution case was non compliance of Section 50 and Section 42. However, the Supreme Court held that in their opinion, it was not at all case of non compliance to the provisions of Section 50. Before being searched, the accused appellant was apprised of his right to be taken to a Magistrate and being searched in his presence. The Supreme Court further held that merely because he was not told that he could be taken to or searched in the presence of "a Gazetted Officer or a Magistrate" does not make any difference. It was further observed and held that it cannot be contended that the accused appellant, who had failed to avail the right of being searched in the presence of a Magistrate, would have availed a search being conducted in the presence of a Gazetted Officer, if only that would have been told to him. The offer given by P.W. 1 and P.W. 4 that the accused could be searched in the presence of a Magistrate if he so wished, satisfied the requirements of compliance with Section 50 of the N.D.P.S. Act. The learned A.P.P. contended that this judgment in Munna Mohammad Hasan Ansari v. State of Maharashtra is the latest judgment dated 3.5.2001 and, hence the same has to be accepted by the Court in preference to all the judgments cited by Mr. Shirodkar.

17. Mr. Singhal, the learned A.P.P., also relied upon, as stated above, the judgment of the Allahabad High Court reported in Ashim Adhikari Vs. State of U.P., in support of his contention that sudden recovery of contraband when there is no prior information to police party that accused were carrying contraband, non-observation of Section 50 cannot vitiate recovery made. In that case the prosecution story was that on 18.8.1988 at 8.30 p.m. Shri K.P. Dixit S.I.P.S. was returning to the police station along with 3 constables in their jeep when they saw one person coming from the road, on seeing the police jeep the said person

started running. The police got suspect. He was followed and arrested and on his search 3kg. illicit charas was found. In that background the accused was convicted and when the matter went to Allahabad High Court, the Allahabad High Court, on the basis of judgments of the Supreme Court in State of Punjab Vs. Balbir Singh, , in State of Himachal Pradesh Vs. Shri Pirthi Chand and another, , held that in case there is no prior information to the police party when the accused/appellant was carrying a contraband material with him. Therefore non-observation of Section 50 does not itself vitiate the recovery. It is the question of fact in each case as to whether the evidence of recovery is trustworthy or not.

18. The Division Bench of this Court, as stated above, has therefore, taken a view that firstly the accused has to be made aware of his right u/s 50 of N.D.P.S. Act and when an offer to get the accused searched before a Gazetted Officer or a Magistrate is given, the prosecution cannot be allowed to contend that the Gazetted Officers in the raiding party are contemplated by Section 50. From the evidence of P.W. 3 it is clear that when accused No. 1 was made aware of his right u/s 50, the word "right" was not used by P.W. 3 and secondly, the raiding party officers themselves introduced/included Gazetted Officers. Considering therefore the Division Bench's judgment it has to be held that so far as personal search of accused No. 1 is concerned, there is no compliance to Section 50 and, that part of the prosecution story cannot be used to be discarded.

19. However, the submission of Mr. Shirodkar cannot be accepted that if the story of personal search of the accused and recovery of mandrex tablets from him is rejected, the entire case of the prosecution about all the subsequent recoveries should also be rejected. Personal search of the accused is one offence, finding of mandrex tablets and manufacturing unit in the factory is other offence (for which the accused was acquitted). Finding of the mandrex tablets with Sai Transport Company at the instance of accused No. 1 is different incident and finding of manufacturing unit and mandrex tablets at Sinnar is also different incident. All these incidents and the prosecution case about them cannot be rejected and discarded only because of non compliance to Section 50 so far as personal search of accused No. 1 is concerned.

20. So far as recovery of 200kg. methaqualone from said Transport Company at the instance of accused No. 1 is concerned, the prosecution case is required to be accepted. So also the prosecution case against accused No. 2 is required to be accepted but that against accused No. 3 cannot be accepted for the reasons stated hereinafter.

21. It will be better at this juncture to consider the case of the accused Nos. 2 and 3 about the factory at Sinnar. According to accused No. 3 he was the owner of the factory. However, he was unable to run the factory to his maximum capacity. Therefore, he gave an advertisement in the news paper about his intention to let out his factory. Accused No. 2 approached him and entered into an agreement to run the factory and, accordingly, accused No. 2 was using the factory for manufacturing mandrex tablets. The agreement was enforced from

the date when the police raided the factory at Sinnar. Therefore, accused No. 3 is not liable at all.

22. Accused No. 3 relied upon the agreement Exhibit 50 purported to have been signed by accused No. 2. The signature of accused No. 2 on the said agreement is in Urdu. This document was referred to a handwriting expert at the instance of Accused No. 2. The handwriting expert initially was unable to give his conclusive opinion whether the signature is of Accused No. 2 or not. Therefore, while the trial was going on, again the same document was referred to the same handwriting expert. Accused No. 2 gave his specimen signature again and then the handwriting expert opined that the said document is not signed by accused No. 2.

23. As against this, accused No. 3 relied upon the circumstances for proving his defence. Those circumstances are that he gave an advertisement in the news paper for running the factory; that accused No. 2 approached him and entered into agreement and also signed it. This agreement was seized by the police immediately on the day when they raided the Sinnar factory and this fact is mentioned in the station diary entry. For providing the signature of accused No. 2 on this document, accused No. 3 relied upon the evidence of P.W. 10 Kiran Borvekar who was employed by accused No. 3 from June, 1992 to September, 1992 as a Chemist. He has stated that accused No. 3 had a sanction of 18,000 litres Alcohol quota and, therefore he could run the factory only for 15 days in a month, consequently accused No. 3 gave the factory on labour job to accused No. 2. He also identified accused No. 2 as the same person. He has further stated that he was a witness to the agreement as he has signed the same. (Exhibit 50). He has also stated that the affairs of the factory were conducted and controlled by Sherif Khan (accused No. 2), therefore, he is, however, unaware about the production carried out by accused No. 2.

24. The evidence of this witness P.W. 10 and the defence of the accused No. 3 was disputed by accused No. 2 on two grounds. Firstly, according to him, P.W. 10 does not say anything that where accused No. 2 signed the agreement in his present. Secondly, the handwriting expert's opinion is against the defence of accused No. 3.

25. Both these contentions are required to be negated because if accused No. 3 and P.W. 10 were at all not knowing about accused No. 2. They had no earthly reasons to find out a person like accused No. 2 escape from their own criminal liability. Entering into an agreement of the type of Exhibit 50 is a civil contract and when accused No. 3 and P.W. 10 specifically averred repeatedly that agreement was entered into by accused No. 2, a very heavy burden lies upon accused No. 2 to explain as to why accused No. 3 and P.W. 10 chose, from amongst millions of people in the country, accused No. 2 only as person who signed the agreement. No previous enmity is alleged. No reason whatsoever is alleged as to why such a specific plea would be raised and the evidence be given by accused No. 3 and P.W. 10 respectively.

26. Secondly, it was accused No. 2 at whose instance the police party went to Sinnar. Otherwise there is nothing on record, nor anything can be pointed out by the Advocates for the accused No. 2 as to why the police went to the factory at Sinnar. If accused No. 2 had no connection with the factory at Sinnar and, he had not even seen it, nor was concerned with it, he would not have led the police party to Sinnar Factory.

27. Thirdly, the evidence of handwriting expert in the background in which it is brought on record cannot be accepted at all. The handwriting expert was examined as D.W. 5. He is Anilkumar Mathur. Initially as stated by him in para 3 that he could not give any opinion because he had no knowledge of Urdu. He was required to get signature read out to him through other persons and it reveals that there are two different names and signatures on the disputed document as Aameerna Salim and sample signatures read as Sherif Khan. Thereafter, he again examined the signatures given by accused No. 2 as Amir Na Salim, 51 times before the Court Officer and then he came to a conclusion that the signature on the disputed document is not of accused No. 2. It is to be borne in mind that expert's opinion in any case is a opinion and the Court is not bound to accept it. When Anilkumar Mathur was even unable to read Urdu script, he had no knowledge of Urdu script and he had to seek assistance of other person to read the language, he cannot be called as expert. Every script has its own characteristics and own peculiarity. The manner in which it is written is different from other scripts and particularly Urdu is written in exactly opposite and reverse manner than any other Indian script, and therefore, even though Mr. Mathur may be otherwise competent as a hand writing expert, he certainly cannot be called as an expert in Urdu script. Therefore, his opinion cannot be accepted.

28. When for the aforesaid reasons the evidence of P.W. 5 Anilkumar Mathur, the handwriting expert for accused No. 2, cannot be accepted and the defence of accused No. 3 coupled with the evidence of P.W. 10 has to be accepted, then it has to be held that it was accused No. 2 who was directly concerned with the charges levelled against him and accused No. 3 had no concern with it. Accused No. 3 is required to be acquitted.

29. Accused No. 2 has, in addition, raised a plea of alibi as against the prosecution case that he was taken into custody on 21.9.1992 by P.W. 3 Mr. Pujari. According to him, from 21.9.1992 to 22.9.1992 he was at Pune in connection with Power of Attorney in the name of his brother. Accused No. 2 examined Advocate Chandrashekhar Patil in support of his contention as D.W. 1, so also D.W. 2 Nagnath Jamge who was working as Manager of Ajay Lodge, Pune, D.W. 3 Ramkrishna Bhokare - an Advocate and Notary practicing at Pune and also D.W. 4 Amir Khan - his own brother. All these four witnesses were examined in defence by accused No. 2 to prove that he was in Pune on 21.9.1992 to 22.9.1992. However, the Trial Court has rightly rejected the evidence of D.W. 2 the Manager of Ajay Lodge on the ground that record of the lodge produced by this witness was tampered and something new was tried to be

introduced just in order to support the accused. Even witness D.W. 2 agreed that page after Entry No. 327 and in particular where Entry No. 336 is appearing, is pasted in the register. If the register is maintained by lodge in ordinary course of business then pasting of this particular page containing Entry No. 336 supporting the defence of accused No. 2 is highly not only suspicious but it is creating false evidence. Rightly, therefore, this evidence was discarded by the Trial Court.

30. Further after the defence evidence was over, the prosecution examined the witnesses as P.W. 12 and P.W. 13. These witnesses were examined to show that person who is appearing as an attesting witness to the Power of Attorney executed examined by accused No. 2 in favour of his brother D.W. 4 was at the relevant time i.e. 21.9.1992 working at Essel World, Bombay. P.W. 12 has produced Attendance Register and stated that Issamuddin Shaikh, the same witness, reported on his duty on 21.9.1992 at Bombay in Essel World and he was there from 10.30 a.m. to 7.30 p.m. Evidence of these two witnesses and the document produced by them falsify the case of accused No. 2 that the said Issamuddin had signed the Power of Attorney as attesting witness in Pune on 21.9.1992.

31. Therefore, when two important pieces of evidence viz. the stay of accused No. 2 at Pune in Ajay Lodge and signing of Power of Attorney by Issamuddin on 21.9.1992 are falsified, the Trial Court was justified in rejecting the defence. Examination of two Advocates and Notary does not take the case anywhere in favour of accused No. 2.

32. In this background, the Trial Court was justified in rejecting the defence of accused No. 2 that on 21.9.1992 and 22.9.1992 he was in Pune. When the defence of alibi stands shattered, the prosecution case is required to be accepted so far it relates to accused No. 2.

33. Coming to the third point of recovery of 200kg. methaqualone powder at the instance of accused No. 1. It was contended by Mr. Shirodkar that the witnesses examined by the prosecution in this regard nowhere state that it was accused No. 1 who brought 200kg. methaqualone powder to Sai Transport Company.

34. P.W. 1 Vilas Ghone was examined by the prosecution in this regard. He has stated that in September, 1992 accused No. 1 came to him for booking 5 bags to be transported at Nasik (the witness pointed his finger to accused No. 1). He further stated that accused No. 2 paid him Rs. 447/- towards transport charges. The accused again came to him and expressed that they intend to engage full truck for transporting machinery. P.W. 1, therefore, told them about the charges of Rs. 1700/- in that regard. P.W. 1 also stated that he had arranged a truck bearing Reg. No. Mh-15.8.1999. He stated that hamal Sitaram Patil accompanied the vehicle and it was driven by Mubarak Pathan. He also produced document in support of his contention.

35. Mr. Shirodkar, however, relied heavily upon the cross-examination of P.W. 1, which was initially deferred and subsequently carried out, to point out that this

witness is contradicted with his statement before the police. Further cross-examination of P.W.1 is at page No. 149. This cross-examination is short and cryptic and is concluded in one page i.e. page No. 149 and the omission that is tried to be brought on record is of following effect:

I did say before the police that accused No. 1 had come to me and paid me Rs. 447/-. If it is not there in my statement, I cannot assign any reason. I now say, accused No. 1 did not come to me again for engaging a truck.

This omission is about payment of Rs. 447/- and nothing more. Substantially, the evidence of P.W. 1 cannot at all be discarded or rejected by this omission. There is absolutely no reason why P.W. 1 was tried to falsely implicate accused No. 1. Nothing is suggested nor anything brought on record.

36. For all these reasons I pass the following order:

ORDER

Criminal Appeal No. 733 of 1997 filed by Mohammed Shabir Shaikh Bhikan and Criminal Appeal No. 651 of 1997 filed by Sharifkhan Rashidkhan are partly allowed. Their conviction and substantive sentence is confirmed. However, in default sentence of two years for non-payment of fine of Rs. One lac each is reduced to six months u/s 8(c) r/w 29 and u/s 8(c) r/w 22 of the N.D.P.S. Act. It is clarified that in default sentence of accused Nos. 1 and 2 will be totally one year, if they do not pay fine of Rs. One lac each i.e. Two lacs in all.

Criminal Appeal No. 685 of 1997 filed by Sampat Tukaram Sangle is allowed. He is acquitted of all the offences for which he was convicted by the Special Judge. He should be set at liberty forthwith if not required in any other case.