

(2001) 04 BOM CK 0034

In the Bombay High Court

Case No : Criminal Appeal No's. 142 and 262 of 1996

Shahid Abdulla Siddiqui

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 27-04-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 223
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2, 20, 21, 25, 29

Citation : (2001) ALLMR(Cri) 1549 : (2001) 3 BOMLR 479

Hon'ble Judges : Pratibha Upasani, J

Bench : Single Bench

Advocate : Mr. Sachindra B. Shetye, Ms. Sunita Gaidhani and Mrs. Manjula Rao, for the Appellant; Ms. Purnima H. Kantharia/Khokawala and Ms. Usha Kejriwal, Assistant Public Prosecutors, for the Respondent

Final Decision : Dismissed

Judgement

Dr. Pratibha Upasani, J.—Both these criminal appeals are filed by the appellants, Shahid Abdulla Siddiqui and Abujafar Abubakar Bakshi, original accused Nos. 1 and 3 respectively, being aggrieved by the judgment and order dated 1.2.1996, passed by the Special Judge (N.D.P.S.), in N.D.P.S. Special Case No. 371/91.

2. By the impugned judgment and order, accused No. 1 Shahid Abdulla Siddiqui was convicted of the offence punishable u/s 8(c) r/w section 21 of the Narcotic Drugs & Psychotropic Substances Act. 1985 (for short, "the N.D.P.S. Act") and was sentenced to suffer R.I. for ten years and to pay a fine of Rs. 1,00,000/-, in default to undergo R.I. for two months.

3. Accused No. 3 Abujafar Abubakar Bakshi was convinced of the offence punishable u/s 8(c) r/w section 20(b)(ii) of the N.D.P.S. Act and was sentenced to suffer R.I. for ten years and to pay a fine of Rs. 1,00,000/-, in default to undergo R.I. for two months.

This conviction and sentence was awarded by the Special Judge as he came to the conclusion, after recording evidence of the 8 prosecution witnesses and after hearing both the sides, that the prosecution had established beyond reasonable doubt, the recovery and seizure of 1 kg. of heroin, as defined u/s 2(xvi)(e) of the N.D.P.S. Act, from the possession of accused No. 1 on 20.2.1991, and 535 kg. of charas, as defined u/s 2(iii) of the N.D.P.S. Act, from the possession of accused No. 3 on 18.3.1991.

4. The prosecution story can be briefly narrated as follows : Complaint came to be lodged by P.S.I. Tanaji Nigade (P.W. 3), who at the relevant time was attached to the Narcotics Cell, C.B.-C.I.D.. Ghatkopar Unit, Bombay, that while he was on duty on 20.2.1991, at about 12.30 p.m., he received information from one of his informants that one person by name Shahid Siddiqui (accused no. 1.) was indulging in narcotic activities and was likely to make a narcotic deal on the same day i.e., on 20.2.1991, at about 3.30 p.m. in front of Claire Building, Byculla Station Road, Bombay. The description of the said Shahid Siddiqui was given in the complaint. As per the information, the said Shahid Siddiqui was a person aged about 26 years, that his height was about 5' 7", he was of medium built and was having a fair complexion. This information was passed on by P.W.-3 P.S.I. Nigade to P.W. 6 P.I. Suresh Pawar and P.S.I. Kachare (not examined), who in turn passed on this information to the Deputy Commissioner of Police (Narcotics) Mr. Rahul Sur, who ordered to arrange for the trap.

It is further stated in the complaint by P.S.I. Nigade that the information was recorded in the information book and P.C. 9571 was instructed to fetch two panchas, who were brought at about 1.00 p.m. These panchas were introduced to the officers and staff who were also informed by P.I. Pawar and P.S.I. Kachare that a narcotic trap was being arranged and they were requested to act as panchas. It was also stated in the said complaint that these two persons showed their willingness to act as panchas and thereafter they were explained about the procedure of a narcotic trap. It was also explained to them that they had received information that one person by name Shahid Siddiqui was likely to make a narcotic transaction on the same day i.e., 20.2.1991, at about 3.30 p.m. in front of Claire Building, Mominpura, Byculla, Bombay. The panchas were also explained the description of the said Shahid Siddiqui.

It is further stated in the said complaint that the officers and staff then offered themselves for their personal search to the panchas. The personal search of the panchas also was taken by the complainant P.S.I. Nigade and P.S.I. Kachare but no drug of any kind was found. The police jeep, which was intended to be used in the raid, bearing registration No. MH-01-4425 was also taken and the materials required for the raid, such as sealing and weighing materials, drug identification kit and a portable typewriter were also collected and a panchanama (pre-trap panchanama) to that effect was drawn in the office.

It is further stated in the said complaint that after conclusion of the said pre-trap panchanama, the complainant P.S.I. Nigade himself with other officers, staff and

the two panchas left the office at about 1.30 p.m. in the police jeep, and at about 3.00 p.m. they reached at Byculla Station Road where the jeep was halted in a lane. The parties then walked down toward Mominpura. Further it is stated in the complaint that on reaching Claire Building at about 3.05 p.m.. the officers and the staff took different positions and kept a watch, when at 3.15 p.m. a person, answering the description given by the informant, was noticed and it was seen that he was coming from the west side who then stood in front of shop No. 113 in Claire Building, Mominpura, Byculla. It was also stated in the said complaint that the said person appeared to be waiting for somebody and was carrying a white coloured polythene bag. The said person was immediately surrounded and detained on the spot by the officers and the staff.

Further it is stated in the said complaint that P.I. Pawar disclosed his identify and informed the said person that the police wanted to take his search. P.I. Pawar also told him that he had the right to have his search taken by a Gazetted Officer u/s 50 of the N.D.P.S. Act. P.I. Pawar further informed him that he was such a Gazetted Officer.

Further it is stated in the said complaint that a search of the polythene bag was taken, which accused No. 1 was holding in his left hand, and the same was found containing one white colour cloth bag. The said bag was taken out and then it was noticed that it was having a marking as 555/5, in English and 7 markings at different places as "A and F Laboratory Limited". One more Urdu script marking was also seen on the bag.

It was further stated in the said complaint that this bag, which was in the left hand of accused No. 1, was marked by letter "A and when it was cut open, a polythene bag came out and it was again cut open when it was found to contain a brownish powdery substance, giving a strong odour, a small quantity of which was taken out and on being tested on the drug identification kit, it tested positive for heroin and when it was weighed, it was found that its weight was 1 kg. Two samples of 5 grams each were taken out and kept in two separate polythene bags, marked A-1 and A-2. The personal search of accused No. 1 was taken and he was then found to possess cash amount of Rs. 41 /-in his shirt pocket, which was marked B.

It was also stated in the complaint that the cloth which was marked by letter A, was stitched and the sample packets marked A-1 and A-2 were scaled and labelled and all the articles were originally containing the signatures of the panchas. The articles were then taken charge of by P.S.I. Kachare in his personal custody. Accused No. 1 was arrested and was explained the grounds of his arrest. He was also asked whether he wanted to approach any S.E.M. (Special Executive Magistrate) or other Magistrate, to which he declined.

It is also stated in the complaint that a copy of the panchanama was given to accused No. 1 and his signature was taken on the original panchanama. He was brought to the office of the N.C.B. along with the seized contraband, the sample

packets and the cash which was found on his person. On the basis of this complaint, offence u/s 8(c) r/w section 21 of the N.D.P.S. Act was registered against accused No. 1 vide C.R. No. 20/91 by the Narcotics Cell, C.B.-C.I.D., Bombay.

5. The prosecution case further is that the seized contraband was deposited in a sealed condition in the safe custody of the headquarter of the Narcotics Cell along with the cash amount of Rs. 41/-. It is the prosecution case that on 20.2.1991, at about 8.00 p.m., a motor van bearing registration No. MP-O-9046 was seized from Belasis Road, lying unclaimed. The prosecution case further is that on 21.2.1991 a detailed report in respect of the arrest and seizure of the contraband from accused No. 1 and the registration of crime against him was sent to the Senior Inspector of Police. It is also the prosecution case that after receiving the information on 20.2.1991, at the office, it was recorded in the information book and a copy thereof was sent to the higher officer. It is also the prosecution case that vide report dated 21.2.1991 the sample packet of the seized contraband marked A-1 was sent to the Chemical Analyser on 22.1.1991.

The prosecution case further is that on 25.2.1991, while accused No. 1 was in police custody and when he was being interrogated by the police in the presence of panchas, he volunteered to point out the place where the contraband was kept. Therefore, after recording the memorandum of interrogation in the presence of the panchas, accused No. 1 led the police party and the panchas to Katamb, Raigad, where, from a heap of cement bags, two gunny bags were taken out and were brought to the ground shed which were found to contain 20 cloth bags having the same marks, as contained on the cloth bag seized from his possession on 20.2.1991. Each of these 20 bags was found to contain heroin, the total weight of each bag was 1 kg. The prosecution case is that as all the marks and characters were identical, they were divided into two packets and wherefrom each packets, two samples, each weighing 5 grams were drawn as representative samples. They were accordingly marked 1-A, 1-B, 11-A and 11-B. The prosecution case further is that when the second gunny bag was checked, it was also found to contain 10 cloth bags with identical marks and writings, which contained heroin and where from two samples, each weighing 5 grams were drawn and marked 21-A and 21-B. The second gunny bag was also found to contain 10 polythene bags containing some substance in a rectangular shape and on being tested, it was found to be hashish, from which two sample packets were collected, each weighing 24 grams and accordingly were marked XI, AH, H10B and H10. The prosecution case is that all these sample packets containing the signatures of the panchas were packed and they were seized. In all, 66 packets were prepared and seized under panchanama. It is the prosecution case that at that time some labourers were working at the poultry farm. It is the prosecution case that on 14.2.1991 one person by name Tawakkal Khan (absconding original accused No. 2) was arrested by the Narcotics Cell, Ghatkopar Unit, in connection with C. R. No. 16/91. The investigation revealed that the said Tawakkal Khan had supplied the contraband seized in the instant case and, therefore, he was also

arrested in this crime and on being interrogated on 25.2.1991, in the presence of panchas, the said Tawakkal Khan volunteered to state that he could point out the residence of accused No. 3 Abujafar Abubakar Bakshi. After recording the memorandum of interrogation, the said Tawakkal Khan led the police and the panchas to the residence of accused No. 3 i.e., Flat No. 208, 2nd Floor, Kailash Apartment. Belasis Road. Bombay-400 008. Thus, at the instance of the absconding accused No. 2, the police along with the panchas entered the said flat. The door of the said flat which was found to be closed, was opened by one Rafiya Bakshi, to whom P.S.I. Kachare disclosed his identity and told her that search of the house was to be taken. The prosecution case is that P.S.I. Kachare explained that search of the house could be taken by a Magistrate or a Gazetted Officer, if so desired, and that I.P. Pawar (P.W.- 6) was introduced as the Gazetted Officer. In the search at the place above the bathroom door, there was a loft where the police noticed one rexine bag containing some heavy material. It was found to contain 5 cloth bags bearing the mark 555/5 and 7 markings at different places as "A & F Laboratory Limited" and similar identical markings as the ones contained on the cloth bags seized from the possession of accused No. 1 on 20.2.1991, and at the instance of Tawakkal Khan on 25.2.1991. The contents were tested, which gave positive result of heroin and after weighing each of the 5 bags, the weight was found to be 1 kg. each. They were all marked by letters A to F. from which two samples, each weighing 5 grains, were separated and marked A-1. A-2 to E-1, B-2. All the contraband recovered was packed, labelled and sealed on the spot. The labels contained the signatures of the panchas and the officers. The prosecution case is that some telephone bills and electric bills also were recovered from the said flat.

6. It is the prosecution case that on 18.3.1991. at about 1.00 p.m., P.S.I. Kachare informed P.I. Pawar that he had received an information that the wanted accused Abujafar Abubakar Bakshi (accused No. 3) was likely to come near the Maharashtra Weighing Bridge. L.B.S. Road, Mulund, Bombay, in a motor car bearing No. CII-4516. It was further stated by P.S.I. Kachare to him that the said wanted accused was trying to shift huge quantity of hashish from one place to another. Accordingly, this information was passed to the Senior Inspector of Police, Shriniwas, who joined the raid. At about 4.00 p.m. two panchas were fetched and after performing all the formalities i.e., the search of the officers, staff and panchas, collection of materials which are required for effecting the raid, the raiding party left for the spot by two vehicles at about 4.30 p.m. and reached near the weighing bridge and kept a watch. At about 5.00 p.m. one white Ambassador car bearing No. CII-4516 came from Sion and which was surrounded by the officers and the staff. The driver of the Ambassador car gave his name as Abujafar Bakshi. He was told by P.I. Pawar and P.S.I. Kachare that they wanted to take his personal search and search of his car. The said driver Bakshi was also informed that he had a right to be searched by a Gazetted Officer u/s 50 of the N.D.P.S. Act and P.I. Pawar also informed him that he was a Gazetted Officer. When search of the accused and his car was taken, two gunny

bags from the front seat and seven gunny bags from the rear seat, so also four gunny bags from the dicky were recovered. They were accordingly marked by letters A to M. When search of the gunny bags was taken by opening them, all the bags were found to contain polythene packets of rectangular shape, which in turn contained greenish-blackish colour slabs of malleable substance which was covered with red cellophane paper. On testing the said substance it gave positive result for hashish. Thus a total of 535 slabs of hashish were recovered, each weighing t kg. and from each gunny bag 2 slabs weighing 24 grams each were accordingly marked 1-A and 1-B as representative samples. All the gunny bags, so also the contents thereof were marked and slabs were prepared and seized under panchanama after affixing them with labels and sealing each of them. The personal search of accused No. 3 Bakshi was taken and he was found in possession of cash amount of Rs. 110/-. The sample packets, duly sealed, and the cash amount of Rs. 110/- were seized under panchanama. A copy of the panchanama was given to accused No. 3 and his signature was obtained on the original on the same day.

7. The prosecution case further is that all the seized contraband was deposited in the Narcotics Cell. Ghatkopar Unit and the sample packets were sent to the office of the Chemical Analyser with the analysis report. Further the prosecution case is that the C.A. report of the samples drawn from the contraband seized from accused No. 1 on 20.2.1991 and at his instance discovered, recovered and seized from the Advance Poultry & Eggs Farm on 25.2.1991 were heroin and hashish, as defined u/s 2(xvi) of the N.D.P.S. Act. So also, the contraband recovered from the house of accused No. 3 and the contraband recovered at the instance of the absconding accused No. 2 Tawakkal Khan on 25.2.1991 was heroin, as defined u/s 2(xvi) of the N.D.P.S. Act. So also the contraband seized from the Ambassador car driven by accused No. 3 Bakshi bearing No. CII-4516 on 18.3.1991 contained hashish, as defined u/s 2(xvi)(e) of the N.D.P.S. Act.

8. After completing the investigation, chargesheet was filed in the Court against all the three accused u/s 8(c) r/w sections 21 and 29 of the N.D.P.S. Act. The accused Tawakkal Khan, who happened to be a Pakistani National, however, was granted bail and now he has jumped bail and is declared a proclaimed offender. His chargesheet, therefore, came to be separated and accused Nos. 1 and 3 faced the trial. When charge came to be framed, read over and explained to the original accused Nos. 1 and 3, they pleaded not guilty and claimed to be tried. Their defence was that of denial.

9. To bring home the charges against the appellants/original accused Nos. 1 and 3, the prosecution examined 8 witnesses namely P.W.-1 Idris Barkatali and P.W.-2. Dadasaheb Mane, who were the panchas. P.W. 3 P.S.I. Tanaji Nigade, the complainant, P.W. 4. Baban Varekar, who acted as a panch in the trap of 18.3.1991. P.W.-5 P.C. Nana Ahire, P.W.-6. P.I. Pawar, who along with P.S.I. Kachare investigated into the entire matter. P.W.-7, Sudani Ghogale, who at the relevant time was working as the Branch Manager of Dena Bank, Kalamb, District

Raigad, where accused No. 3 had a joint account and P.W.-8 Hajimuddin Rehman, who was working as a casual labourer at the Advance Poultry & Eggs Farm. Kalamb, from where, at the instance of accused No. 1 a huge quantity of contraband was recovered.

P.W.-1 Idris and P.W.-2 Dadasaheb were examined by the prosecution to prove possession of the contraband by accused No. 1 on 20.2.1991 and the recovery at his instance from the Advance Poultry & Eggs Farm on 25.2.1991. In order to prove the allegation of possession of contraband by accused No. 3 Bakshi, the prosecution adduced the evidence of P.W. 1 Baban Vearekar, who was another panch witness and P.W.-6, again, i.e., P.I. Pawar. In order to bring home the allegation of conspiracy, the prosecution adduced the evidence of P.W.-7 Sudam Qhogale, Branch Manager. Dena Bank. Kalamb. and P. W.-8 Hajimuddin, who was working as a casual labourer at the Advance Poultry & Eggs Farm apart from claiming that the contraband seized on 20.2.1991 from the personal possession of accused No. 1 on 25.2.1991 from the house of accused No. 3 Bakshi and the poultry farm at Kalamb at the instance of accused No. 1 were all similar, and this is part of the evidence of P.W.s-1, 2, 3, 4 and 6. To prove that the contraband samples were carried to the office of the C.A. and delivered the evidence of P.W.-5 Nana Ahire was adduced.

10. Thus, after recording the evidence of the 8 prosecution witnesses, the Special Judge came to the conclusion that he prosecution did not succeed in establishing beyond reasonable doubt that accused No. 1 Shahid Siddiqui and accused No. 3 Abujafar Abubakar Bakshi along with the absconding accused No. 2 Tawakkal Khan on or about 20.2.1991 and 18.3.1991 entered into a criminal conspiracy to possess, transfer, store and purchase huge quantity of heroin and hashish ranging from 31 kg. of heroin and 535 Kg. of hashish, in contravention of the provisions contained u/s 8(c) of the N.D.P.S. Act, and that they were jointly found in possession of the above mentioned huge quantity of heroin and hashish on 20.2.1991 and 25.2.1991 and 18.3.1991 and that thereby they committed offence punishable under sections 21, 20(b)(ii) r/w sections 25 and 29 of the N.D.P.S. Act.

The Special Judge, however, came to the conclusion that the prosecution had succeeded in establishing beyond reasonable doubt that on 20.2.1991 the accused No. 1 was found in unlawful possession of 1 kg. of heroin and thus committed an offence punishable u/s 8(c) r/w section 21 of the N.D.P.S. Act.

The Special Judge also came to the conclusion that the prosecution had failed to establish that on 25.2.1991 accused No. 1 was found in possession of 30 Kg. of heroin and 10 kg. of hashish which were recovered from the Advance Poultry & Eggs Farm, situated at Kalamb, District Raigad and thereby committed offence punishable under sections 21, 20(b)(ii) and 25 of the N.D.P.S. Act.

The Special Judge also came to the conclusion that the prosecution had failed to establish beyond reasonable doubt that accused No. 3 Bakshi was found in

possession of 5 Kg. of heroin, kept by him in his residence, which was also owned by him and, therefore, was liable to be punished u/s 8(c) r/w Section 21 of the N.D.P.S. Act.

The Special Judge, however, held that the prosecution had succeeded in establishing beyond reasonable doubt that on 18.3.1991 accused No. 3 Bakshi was found in possession of 535 kg. of hashish while illegally transporting the same in Ambassador car No. CII-4516, which was seized at L.B.S. Road. Sion, and which was in contravention of the provisions contained u/s 8(c) r/w sections 20(b)(ii) and 25 of the N.D.P.S. Act.

Thus, giving these findings, he convicted and sentenced accused Nos. 1 and 3, as stated above. Being aggrieved by the said order of conviction and sentence, the presence criminal appeals are filed by accused Nos. 1 and 3, which are being disposed of by this common judgment.

11. I have heard Mr. S. B. Shetye, appearing for the appellant/original accused No. 1 Shahid Abdulla Siddiqui in Criminal Appeal No. 263 of 1996, so also Mrs. Manjula Rao, appearing for the appellant/original accused No. 3 Abujafar Abubakar Bakshi Criminal Appeal No. 142 of 1996, at length. I have also heard Ms P.M. Kantharia/Khokawala, so also Mrs. Usha Kejriwal, the learned Addl. Public Prosecutors, appearing for the State and I have also gone through the entire evidence on record, which is very heavy and bulky. Both the sides referred to various judgments of this Court as well as of the Apex Court to substantiate their arguments. Written arguments also were tendered and after giving my thoughtful consideration to the entire material on record, in my opinion, the Special Judge had rightly arrived at the finding of guilt and had rightly recorded the conviction and sentence against both the appellants by his judgment and order dated 1.2.1996.

12. The contention of Mrs. Manjula Rao, appearing for the appellant/ original accused No. 3 was that as far as original accused No. 3 was concerned, there was total non-compliance by the prosecution of section 42(1) and (2), so also sections 50, 52 and 57 of the N.D.P.S. Act. According to her, since compliance with the provisions of these sections is mandatory and since there is failure to comply with these provisions by the police, the appellant has to be acquitted. She also submitted that there was a misjoinder of the charges and that there was no nexus between the alleged incidents of 20.2.1991, 25.2.1991 and 18.3.1991 and the charge of conspiracy having not been proved and also taking into consideration that there was tampering with the seized contraband, the entire seizure becomes suspicious and, therefore, the appellant deserves to be acquitted.

13. To appreciate the submissions made by Mrs. Rao, the provisions laid down in sections 42, 50, 52 and 57 have to be understood in a proper perspective.

Section 42 of the N.D.P.S. Act speaks about the power of entry, search, seizure and arrest without warrant or authorisation. It states that (1) any such officer

(being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset.

(a) enter into and search any such building, conveyance or place;

(b)

(c)

(d)

There is a proviso to section 42 which says as follows :

"Provided that, if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief."

Sub-section (2) of section 42 states that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereto to his immediate official superior. This what section 42 states is that an empowered officer, if he has any appropriate information about a narcotic transaction, then he has to take down the information in writing and then he has to forthwith send a copy thereof to his immediate official superior.

14. Now, in the present case at hand, one has to see whether there is proper compliance of section 42(1) and (2) of the N.D.P.S. Act, For that, one has to refer mainly to the deposition of P.W.-6 P.I. Pawar, who was at the relevant time attached to the Narcotics Cell, Ghatkopar Unit. He has stated in his deposition that on 20.2.1991, at about 12.30 p.m. while he was on duty at the Ghatkopar Unit of the Narcotics Cell. P.S.I. Tanaji Nagade, who was working with him, had received an information that one person by name Shahid Siddiqui (accused No. 1 and the appellant in Criminal Appeal No. 263 of 1996) was dealing in narcotics and on that day he was likely to make a narcotic transaction near Claire Building, Byculla Station Road, Mominpura, P.S.I. Nigade passed on this information to P.W.-6 P.I. Pawar, who was superior to P.S.I. Nigade. P.I. Pawar, in his turn,

passed on the said information to the Deputy Commissioner of Police, Mr. Rahul Sur, on telephone, around the same time i.e. 12.30 p.m. This information came to be recorded by P.S.I. Nigade in the information book. Copies of the information were prepared and those copies were sent to D.C.P. Sur and the Sr. Inspector of Police, Narcotics Cell, Head-Office. This information which was recorded in the information book, was at serial No. 16. This was in the handwriting of P.S.I. Nigade, which was identified by P.I. Pawar. The signature on the said information book at serial No. 16 was that of P.I. Pawar himself. This, it can be seen that there was due compliance of section 42(1) as well as section 42(2) of the N.D.P.S. Act. There is also corroborative evidence to this effect by P.W.-3 P.S.I. Tanaji Nigade, which concludes the issue. The defence's contention, casting doubt on the maintenance of the information book and the contents of the entry etc., just because the words, "Information Book 1991" appearing on the cover was handwritten and the contention that several columns meant for recording caste, religion etc., were not filled, are without any substance and were rightly rejected by the Special Judge. The only question which is relevant is whether the information was received, whether it was recorded and whether the same was sent forthwith to the senior officer or not. In the present case at hand, the information which was received was duly recorded and thereafter it was also forthwith communicated to the superior officer, as required by section 42(2) of the N.D.P.S. Act, as revealed by the evidence of P.W.-6 P.I. Pawar and P.W.-3 P.S.I. Tanaji. As far as the information received with respect to original accused No. 3 Bakshi, who is appellant in Criminal Appeal No. 142 of 1996, is concerned, it can be said that it is the evidence of P.W.-6 P.I. Pawar that on 18.3.1991 P.S.I. Kachare received an information that the wanted accused No. 3 Abujafar Abubakar Bakshi was likely to come near the Maharashtra Weighing Bridge on the L.B.S.. Road, Sion, Bombay, in a motor car bearing registration No. CII-4516 and who was trying to shift huge quantity of hashish from one place to another. This information was also passed on to the Senior Inspector of Police, Headquarter, on telephone. It has come in his evidence that panchas were called in the office of the Senior Inspector of Police. It has also come in the evidence of P.W.-4 Baban Varekar (Panch) that a pre-trap panchanama was prepared at the office, P.W.-6 P.I. Pawar stated that the entry at Sr. No. 14 was made at 4.35 p.m. at the time of leaving the Ghatkopar Unit on 18.3.1991 by P.S.I. Kachare. It is pertinent to note as to what that entry is. The entry was as follows." Sr. P.I. Shriniwas and P.S.I. Nigade left for enquiries in Kurla, Sion, L.B.S., Road, Bombay, in C. R. No. 20/91" It is significant and very important to remember and highlight that C. R. No. 20/91 was with respect to the earlier incident of 20.2.1991 when Shahid Siddiqui, the original accused No. 1 /appellant in Criminal Appeal No. 263 of 1996, was nabbed. Under these circumstances, the contention of Mrs. Rao that there was no nexus between these two incidents -the one which took place on 20.2.1991, namely the nabbing of accused No. 1 and the incident which took place on 18.3.1991 i.e., the nabbing of accused No. 3 has to be rejected. A reference to the "wanted accused" was to accused No. 3 and the station diary makes it clear that the said wanted accused, namely accused

No. 3 Bakshi was a wanted accused in C.R. No. 20/91. Thus there was station diary entry made with respect to accused No. 3. which was reduced into writing and passed on to the superior officers. Thus there was due compliance of section 42 of the N.D.P.S. Act. The evidence of P.Ws.-3 and 6 on this point that before leaving the office for conducting the raid, entry in the station diary was made by P.S.I. Kachare at serial No. 4 at 1.35 p.m. on 20.2.1991 was an entry running into two pages, wherein all the details were noted. The record reveals that there is lengthy cross-examination by the defence's Advocate on this issue and numerous questions were put to the prosecution witnesses but nothing of substance has been brought on record, which would go to show that there was non-compliance of section 42(1) or (2) of the N.D.P.S. Act.

One relevant observation which can be made at this stage is that the cross-examination in fact is very lengthy and has been very vigorously and strenuously undertaken on all the points. This has to be highlighted with respect to the contention of the defence that there is a misjoinder of charges. The record reveals that a prosecution witnesses have been examined and the cross-examination shows that all the defence available under the sun were taken and the cross-examination runs into almost hundred pages. The purpose of framing of charge is that the accused should know and understand as to what allegation he has to meet in defence and while preparing himself for the defence he is given full opportunity to defend himself and that no prejudice is caused to him in defending the case. The bulky cross-examination on all the points only goes to show that no prejudice of any nature has been caused to the accused even if there is a faint suggestion that there is a misjoinder of charges. Of course, there is no question of any misjoinder of charges, as already pointed out. The station diary entry (Exhibit-125) makes it clear that the seizure of 20.2.1991, 25.2.1991 and 18.3.1991 had nexus with each other. Though the prosecution did not succeed in establishing beyond reasonable doubt the charge with respect to conspiracy, it was successfully brought home the charges u/s 8(c) r/w sections 20(b)(ii) and 25 of the N.D.P.S. Act with respect to the incident which took place on 18.3.1991 involving accused No. 3 who was found in possession of 535 Kg. of hashish while illegally transporting the said huge quantity in a motor car bearing No. CII-4516, seized on the L.B.S. Road. Sion.

15. The Supreme Court in its Constitutional Bench Judgment *State of Punjab v. Baldev Singh*, while mainly examining the provisions of section 50, has also discussed the nature of section 42(1) and (2) of the N.D.P.S. Act. No doubt compliance of section 42(1) and (2) is mandatory. However, the Supreme Court in the case of *Koluttumottil Razak v. State of Kerala*, has laid down that non-compliance of the provisions of section 42 would render the resultant search and seizure suspect and in such a situation the evidence of the police officer is required to be corroborated by independent evidence and if that is not done and if the evidence regarding compliance with section 50 of the N.D.P.S. Act is also based on mere ipse dixit of the police officer who had conducted the search and seizure, the conviction of the accused u/s 21 (as was the case) cannot be

sustained. In the present case at hand, there is corroboration by independent witnesses, namely the panchas who have vouched about the pre-trap panchanama, etc. The contention of the defence that the panchas are stock witnesses and, therefore, their evidence has to be rejected, is obviously not correct. In fact, in *Pon Adithan v. Deputy Director, Narcotics Control Bureau, Madras*, the Supreme Court had rejected to lay down as a proposition of law that in the absence of independent evidence or any other supporting documentary evidence, oral evidence of a witness conducting the search cannot be regarded as sufficient for establishing compliance with the requirement of section 50(1). In the present case at hand, the prosecution is on a higher footing.

16. As far as the provisions of sections 52 and 57 are concerned, they, by themselves are not mandatory and this has been rightly emphasised and highlighted by Mrs. Usha Kejriwal, the A.P.P., appearing for the State.

Section 52 states that any officer arresting a person u/s 41 of the N.D.P.S. Act or sections 42, 43 and 44 of the Act shall, as soon as may be, inform him of the grounds for such arrest. Sub-clause (3) of section 52, which is relevant here, states 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.

Section 57 states that whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior. The prosecution has rightly relied upon the case of *Rangi Ram v. State of Haryana*, to counter the argument of Mrs. Rao, learned counsel appearing for the appellant/original accused No. 3, that there was no compliance of sections 52(3)(a) and 57 of the N.D.P.S. Act. In *Rangi Ram v. State Haryana* (supra), similar submission was made by the defence, as far as non-compliance of section 52 was concerned, and this is what the Supreme Court observed in paragraph 4 of its judgment. The relevant paragraph, which is paragraph 4, can be reproduced below :

"4. The High Court after re-appreciating the evidence agreed with the findings recorded by the Trial Court and confirmed the conviction and sentence of the appellant. It was submitted by the learned counsel appearing for the appellant that in this case requirement of Section 52 was not complied with inasmuch as the accused and the seized articles were not forwarded to the Officer empowered u/s 53 of the Act. We find no substance in this submission because the person who had arrested the appellant and seized the articles was himself an Officer-in-Charge of the nearest police station. It was also contended that the requirement of Section 57 was not complied with inasmuch as no full report of the particulars of arrest and seizure was made by the Sub-Inspector Ram-Krishan to his superior officer. It is true that there is no positive evidence on record to show that such a report was made. But it is also true that in cross-examination of the

witness not a single question was put to find out whether he had made any report to his superior officer or not. There is no material on record which would indicate that this provision was not complied with. Moreover, as pointed out by the High Court, this provision is not mandatory. Hence, its non-compliance by itself cannot vitiate the conviction or the appellant."

I have gone through the evidence on record in the present case at hand, which shows that on 18.3.1991 when D.C.P. Sur visited the Ghatkopar Unit, accused No. 3 was produced before him. It has come in the evidence of P.W.-6 P.I, Pawar that when D.C.P. Sur visited the Ghatkopar Unit of the Narcotics cell, he saw the contraband and the accused. It has also come in the evidence of P.W.-6 P.I. Pawar that the contraband was kept in a separate room at the Ghatkopar Unit of the Narcotics Cell and that the sample packets were in his personal custody. He has further deposed that the said room was locked and the keys were with him and that there was also adequate security maintained in the room. Thus it is clear from the deposition of P.W.-6 that there was due compliance of section 52(3) (a) r/w section 53 as well as section 57 of the N.D.P.S. Act. This also refutes the contention of the defence that there was tampering with the seals of the contraband.

Ms. P.H. Kantharia/Khokawala, the A.P.P., appearing for the State in Criminal Appeal No. 263 of 1996 submitted very forcefully that in the present case the evidence of the police personnel is corroborated by independent witnesses and assuming that there is a discrepancy here and a discrepancy there in the evidence of these independent witnesses, it does not mean that the evidence of the police personnel has to be thrown out of the Court. She submitted that the Supreme Court has gone to the extent of saying that even if there are no independent witnesses, the evidence of the I.O. and the other witnesses, on any point, if remains unshaken despite cross-examination, has to be accepted. She relied upon the judgment of the Supreme Court in the case of *Jal Singh v. State of Haryana*, to substantiate her argument that even though independent witnesses are not available, their non-availability does not vitiate the evidence regarding search. She argued that in *Jal Singh's* case (*supra*) the bedding of the accused was searched and it was found to contain 10 Kilos of opium. The evidence of the I.O. and the other witnesses disclosed that many independent witnesses were requested to witness the search but all of them refused. Under these circumstances, the evidence of the I.O. and the other witnesses, on this point, which had remained unshaken, was accepted, the finding of guilt recorded by the Special Judge was upheld and the appeal by the accused against his conviction was dismissed.

Thus, from the above discussion, after hearing both the sides and after going through the voluminous record and the judgment of the Special Judge, in my opinion, there was due compliance of section 42(1) and (2), section 52 and section 57 of the N.D.P.S. Act and the contention of the defence that there was no such compliance, fails.

17. The next contention of Mrs. Rao, appearing for the appellant/original accused No. 3 Bakshi and Mr. Shetye, appearing for the appellant /original accused No. 1 Siddiqui is that there was total non-compliance of the provisions of section 50 of the N.D.P.S. Act and hence the entire search, seizure and operation is vitiated and both the accused, therefore, are entitled for acquittal.

Mr. Shetye fairly conceded that as far as accused No. 1 is concerned, he is assailing the non-compliance of section 50 only. According to him, when accused No. 1 was allegedly nabbed on the date in question, neither the evidence of the panch witnesses nor the panchanama itself says that the accused was given a choice, that if he so desired, he would be taken without unnecessary delay to the nearest Gazetted Officer or to any nearest Magistrate. Mr. Shetye drew my attention to the evidence of P.W.-1 Barkatali, who acted as a panch to the panchanama (Exhibit 22-A), dated 20.2.1991. Mr. Shetye drew my attention to the line in the panchanama which reads as follows. "P.I. Pawar also told him that he had a right to have his personal search taken by the Gazetted Officer u/s 50 of the N.D.P.S. Act, 1985. Pawar further informed him that he was a Gazetted Officer." Mr. Shetye, pointing out this sentence, argued that in the said sentence there is no mention of the word "Magistrate". He argued that though in the deposition the very same panch has deposed that accused No. 1 was given a choice by P.I. Pawar whether he would like to be searched by a Gazetted Officer (wrongly mentioned as graduate) or a Magistrate, there is clear non-compliance of section 50. Relying upon various judgments of the Supreme Court as well as judgments of this Court. Mr. Shetye and Mrs. Rao, both, vehemently argued that compliance of section 50 was mandatory and non-compliance of the provisions of section 50 entitled the accused to be acquitted. To substantiate their argument, both the learned Advocates mainly relied upon the decisions in *State of Punjab v. Balbir Singh*, *Ali Mustaffa v. State of Kerala*,: *Maher Mohd. Rafiq v. State*, and *Saiyed Mohd. Saiyad Umar Saiyed v. State of Gujarat*.

In *Balbir Singh's* case (supra), the Supreme Court has held that "it is obligatory for the authorised officer to inform the person to the searched of his right that compliance with provisions of section 50 are mandatory."

In *Ali Musttaffa's* case (supra), the Supreme Court has held that "it is the duty of the police officer to give an option to the person as to whether he desires to be searched in the presence of a Gazetted Officer or a Magistrate, as envisaged u/s 50 of the N.D.P.S. Act and failure on this count vitiates the conviction.

In *Maher Mohd. Rafiq's* case (supra), the Delhi High Court has held that there must be total compliance and not partial compliance of section 50.

In *Saiyad Mohd. Saiyad Umar Saiyad's* case (supra) the Supreme Court has held that the prosecution must prove that the accused was made aware of this right but he did not choose to be searched before a Gazetted Officer or a Magistrate. If no evidence to this effect is given, the Court must assume that the accused was not informed of his right and must find that the possession of the illicit articles

was not established.

18. There is no quarrel with this proposition. It is a settled position of law that compliance with provisions of section 50 of the N.D.P.S. Act is mandatory and this view has been reiterated by the Supreme Court in all the cases. In *Kalema, Tumba v. State of Maharashtra*, and in *State of Punjab v. Baldev Singh*, (which is a judgment of the Constitutional Bench), the Supreme Court has laid down that it is imperative for the investigating officer to inform the suspect, orally or in writing, about his right to be searched before a Gazetted Officer or a Magistrate and that failure to give such information would not vitiate the trial but render the recovery of the illicit article illegal and vitiate the conviction and sentence, if recorded only on the basis of possession of such illicit article and that the Court must be satisfied about the due compliance of section 50 requirements and the prosecution should get an opportunity to establish such compliance. It is further held by the Apex Court that section 50 embodies a reasonable, fair and just procedure that must be honoured. While further analysing section 50, the Supreme Court has observed the necessity of such a safeguard which is envisaged by section 50. This is what the Supreme Court has stated:

"The safeguard or protection to be searched in the presence of a Gazetted Officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. Severe punishments have been provided under the Act for mere possession of illicit drugs and narcotic substances. Personal search, more particularly for offences under the N.D.P.S. Act, are critical means of obtaining evidence of possession and it is, therefore, necessary that the safeguards provided in Section 50 of the Act are observed scrupulously. The duty to inform the suspect of his right to be searched in the presence of a Gazetted Officer or a Magistrate is a necessary sequence for enabling the person concerned to exercise that right u/s 50."

19. While conceding to the position that section 50 of the N.D.P.S. Act contains mandatory provisions which act as a safeguards against the planting of the contraband on the suspect by the police, Ms. Kantharia as well as Mrs. Kejriwal, the A.P.Ps., appearing for the State, argued that as far as original accused No. 1 Shahid Siddiqui was concerned, there was due compliance of section 50 inasmuch as after he was nabbed. P.I. Pawar, who was himself a Gazetted Officer, asked him whether he would like to be searched by a Magistrate or a Gazetted Officer and that this fact has been duly proved by the deposition of the panch witness Barkatali (P.W.1). It is submitted by them that even in the cross-examination there is no dent to his deposition on this point.

As far as compliance with provisions of section 50 with respect to original accused No. 3 was concerned, it was argued by the A.P.Ps. that since Bakshi was caught in a conveyance which he himself was driving and since 535 Kg. of contraband was found in the said conveyance, compliance of section 50 was not at all necessary. It is submitted that even in the case of *State of Punjab v. Baldev*

Singh (supra), the Supreme Court has held that requirement of informing the person about his right u/s 50 of the N.D.P.S. Act comes into existence only when a person of the accused is to be searched. They further argued that if a person is carrying a bag or some other article with him and narcotic drug is found from it, it cannot be said that it was found from his person. They further argued that search of a baggage of a person is not the same thing as the search of a person himself. To substantiate this argument, both the learned A.P.Ps. relied upon the Full Bench judgment of this Court in Ebanezer Adebaya v. B.S. Rauat. While concluding, the Full Bench has observed as follows :

"..... In our view, the Legislature has made distinction between a personal search and search of a conveyance, building or place, whether private or public. In our view, the provisions of section 50 would be attracted only if it is confined to search of article on the person or body of the person or bag or luggage in physical possession of the person at the time of the search. Therefore, personal search" would be confined to Clauses (a) and (b) of paragraph 5 u/s 50, but it would not include and cannot be extended to Clauses (c) and (d) of paragraph 5 as mentioned above."

Clause (a) and (b) of paragraph 5 referred to in the concluding paragraph of the Full Bench Judgment of this Court, were the clauses referred to in Mohinder Kumar v. The State of Goa. The question for consideration in this case was, what meaning could be assigned to the phrase "to search any person" used in section 50 of the N.D.P.S. Act and whether "to search any person" means;

(a) search of articles on the persons or body of the person;

(b) would include search of articles in immediate possession such as bag and other luggage carried by him or in physical possession of the person to be searched :

or

(c) would include search of bag or luggage which are presumed to be in possession of the person even though it may be lying in a house, or railway compartment or at the airport:

and

(d) whether application of section 50 can be extended to a case of search of a place, a conveyance or a house if the accused is physically present at the time of the search.

It is in this context that the Full Bench of this Court in Ebanezer Adebaya's case (supra) concluded that "personal search" would be confined to clauses (a) and (b) referred above, but would not include and cannot be extended to clauses (c) and (d), as mentioned above.

The facts of the present case at hand are obviously covered by clause (d), as accused No. 3 was moving in a car (conveyance) in which the contraband was

found at the time of search. Obviously, in view of the aforesaid Full Bench judgment of this Court, the term, "personal search", would not include and cannot be extended to this situation and, therefore, section 50 of the N.D.P.S. Act will not be attracted.

Ms. Kantharia and Mrs. Usha Kejriwal, the A.P.Ps., also relied upon the decision in Kalema Tumba's case (supra) wherein it is laid down by the Supreme Court that requirement of informing the accused about his right u/s 50 need not be complied with when baggage of the accused is to be searched inasmuch as the search of a baggage of a person is not the same thing as search of the person himself.

20. Having heard both the A.P.Ps. I find force in the submissions made by them. Suffice it to say that the provisions of section 50 are not applicable, as far as accused No. 3 was concerned, and as far as accused No. 1, was concerned, the said provisions were duly complied with, as I find no infirmity in the evidence of P.W.-I Barkatali and P.W.-6 P.I. Pawar, who has investigated the entire matter, shoulder to shoulder, with P.S.I. Kachare.

21. In view of the foregoing discussion, I find no merit in these criminal appeals and, in my opinion, the learned Special Judge rightly recorded the conviction and sentence against both the accused. Hence following order:

ORDER

Criminal Appeal No. 263 of 1996 and Criminal Appeal No. 142 of 1996 are both dismissed.