

(1994) 07 BOM CK 0098

In the Bombay High Court

Case No : Criminal Appeal No's. 454 of 1992 and 5 of 1993

Vinod Lohiya

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 13-07-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 156, 165, 313

Evidence Act, 1872 — Section 101, 105, 3, 59, 60

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 29, 50

Citation : (1996) 1 BomCR 483

Hon'ble Judges : R.M. Lodha, J; M.B. Ghodeswar, J

Bench : Division Bench

Advocate : S.A. Bobde, in C.A. No. 454 of 1992 and M.R. Daga, in C.A. No. 5 of 1993, for the Appellant; Ramesh Agrawal, A.G.P. in C.A. Nos. 454 of 1992 and 5 of 1993, for the Respondent

Judgement

R.M. Lodha, J.—These two appeals shall stand disposed of by this common judgment since these appeals arise out of the judgment in Sessions Case No. 873 of 1991, State of Maharashtra v. Jaggu and Vinod, decided by the Additional Sessions Judge, Nagpur on 24-9-1992 whereby both the accused-appellants have been held guilty for the offences punishable u/s 21 read with section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, (for short, "the NDPS Act") and sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs. 1 lakh each and in default of payment of fine, both the accused-appellants have been directed to suffer further rigorous imprisonment for 18 months each.

2. The prosecution case as unfolded in complaint (Exh. 39) dated 2-10-1991 and the First Information Report of the even date (exhibit nil) is that Bapu Bhosle, Police Head Constable (P.W. 7) attached to Crime Branch and working in Narcotic Cell, on 2-10-1991 at about 11.30 a.m. along with the Assistant Sub-Inspector Shri Sakharkar and other Police Constables along with the requisite articles required for sealing the articles like papers, pen, lac, rubber stamp, chemical

analyser"s form etc. started for patrolling from their office and when they were moving within the jurisdiction of the Tahsil Police Station, an information was received at 2.00 p.m. near Meyo Hospital Square from the special informer that Jaggu " Jagdish having fair complexion, wearing blue full pant, was standing in Telipura, Bajeriya and said Jaggu was in possession of packets of Gard (brown sugar) and said Jaggu was selling the same to his customers. On receipt of the said information, the same was conveyed on phone to Shri Paraskar, Assistant Commissioner of Police who gave orders on phone itself to carry out the raid immediately. Similarly, at the same time the information which was received, was reduced into writing and the same was handed over to Police Constable, B/No. 2128 for giving it to Shri Paraskar. Two persons viz. Mangal s/o. Raghobaji Aatke, resident of Temple Bazar, Sitabuldi and Digambar s/o. Shamji Meshram, resident of Gopal Nagar who were passing by the road, were called and they were explained in details the aforesaid information and the purpose for calling them to act as panchas. Then they proceeded on foot and reached near Shukla Lodge, Telipura, Bajeriya and it was found that the above described person was standing near electric pole near the lane which is by the side of the Lodge and it was also found that one more person who was wearing full-sleeved white shirt and a light blue coloured full pant on his person, was standing near him and falling with him. On signal being given, two persons were gheraoed at 2.40 p.m. and then introduction of all the police personnel were given to the said person Jaggu and P.W. 7 Bapu Bhosle showed his identity card and also gave the introduction of panchas. Jaggu was explained and informed that his personal search was to be taken in view of the information received that he was in possession of the packets of Gard and his full name and address was asked and similarly the other person viz. Vinod was also told and informed that his search is to be taken and he was also asked to disclose his name and address completely. Thereafter Jaggu was asked to take personal search of the entire police staff and the panchas which he took and Jaggu ascertained that none of the Police staff did possess any type of Narcotic drug with them. Jaggu " Jagdish was then asked in Hindi as to whether he wanted to get his personal search conducted in the presence of Executive Magistrate or Gazetted Officer on which he answered that it was not necessary and his personal search can be taken by them. On the personal search of Jaggu which was carried out minutely, 17 packets were found from the right pocket of the full pant. Each packet was opened and examined and it was found that each of them contained dusky white coloured powder of Narcotic drug named Gard (brown sugar) and each packet was weighing 40 mg and total weight of all the packets was 680 mg. Each packet was valued at Rs. 40/-. The aforesaid Gard packets were seized and collected on a plain paper and about 50 mg. of Gard powder was taken out as a sample from it. Both these packets were wrapped separately. These packets were signed by Jaggu as well as panchas and also by Bapu Bhosle (P.W. 7). They were sealed properly as detailed out in panchanama (Exh. 38). The 17 pieces of papers in which the Gard powder was found, were given serial numbers 1 to 17. Cash amount of Rs. 100/- was also found from the person of Jaggu and that too was seized.

Another person whose name was disclosed by him to be Vinod and was accompanying Jaggu " Jagdish, in view of his suspicious activities, also was told that his personal search was to be taken. He was told that he may take personal search of the police and the panchas which he did ascertain and then Vinod was asked whether he wanted to give his personal search in the presence of the Executive Magistrate or Gazetted Officer to which he replied that it is not necessary and his personal search can be taken. On personal search of Vinod, three packets of Gard were recovered from the front pocket of his white shirt and it was found that it contained Gard (brown sugar) powder. Each packet was found to contain 40 mg. of Gard and thus, total weight of three packets found from the person of Vinod was 120 mg. and each packet was valued at Rs. 40/-. The Gard found from the person of Vinod in three packets was collected on plain paper wrapped and a square shaped packet was prepared. The trouser of Jaggu and shirt of Vinod in which the packets of Gard were found, were removed and were also taken into custody and sealed. The search of accused persons, seizure and preparation of panchanama etc. were completed at 5.30 p.m. and both the accused were arrested.

3. As aforesaid, on the basis of the complaint (Exh. 39) lodged by Bapu Bhosle, Police Head Constable on 2-10-1991, First Information Report was lodged at Police Station, Tahsil, Sub-division Kotwali, District Nagpur bearing Crime No. 448 of 1991 on 2-10-1991 at 7.10 p.m. Accordingly, a case u/s 21 read with section 29 of the NDPS Act was registered against the accused persons viz. Jaggu " Jagdish and Vinod. The First Information Report (exhibit nil) dated 2-10-1991 was registered by Shri Baliram Dakhore, Police Sub-Inspector (P.W. 6), Police Station Tahsil, Nagpur. Shri Baliram Dakhore (P.W. 6) received seven sealed packets and the original panchanama. He also received Rs. 100/- and the chemical analyser's form. P.S.I. Dakhore put one paper on the seven packets, put his signature thereon and Police Head Constable Bapu Bhosle also signed it. The said packets were then handed over to Shri Ramdas Bhangde, Police Head Constable, Tahsil Police Station who was working as Malkhana Incharge. On 3-10-1991, two sealed packets were sent to the office of the Chemical Analyser with Police Constable Ramdas Shelke (P.W. 7) with the duty car (Exh. 25). Police Constable Ramdas Shelke deposited the sample packets in the office of the Chemical Analyser and produced the receipt (Exh. 26). The said samples were received by the Receiving Clerk of the Regional Forensic Science Laboratory, Nagpur on 3-10-1991 in a sealed condition for analysis along with forwarding letter dated 2-10-1991 (Exh. 15). The seals of two parcels from the specimen seal impression on Exh. 15 were tallied and the Assistant Chemical Analyser Shri Vivek R. Dhole (P.W. 1) took notes on paper (Exh. 16) and carried out analysis on 8-10-1991 and found that heroin was present in the samples and the samples were containing 40-60% of heroin. Shri Vivek Dhole prepared original analysis sheet (Exh. 18) and on the basis of that analysis sheet (Exh. 18), gave his C.A. Report (Exh. 19) mentioning that heroin (diacetyl morphine) is detected in Exhibits 1 and 2 along with other opium alkaloids and they fall u/s 2(xvi) of the

NDPS Act, 1985.

4. The case was committed to the Court of Additional Sessions Judge, Nagpur and registered as S.T. No. 873 of 1991. The Additional Sessions Judge, Nagpur framed the following charges against the accused persons :

"1. That, you above-named accused 1 on or about 2nd day of October, 1991, at about 2.40 p.m. near Shukla Lodge, Bajeria, Telipura, found in possession of brown sugar weighing about 680 gms. valued at Rs. 680/- meant for sale, without permit, licence or authorisation and thereby you committed an offence punishable u/s 21 of the NDPS Act and within the cognizance of the Court of Sessions.

2. That, secondly, you-accused No. 2, on the aforesaid day, date, time and place, found in possession of brown sugar weighing about 120 gms. valued at Rs. 120/- meant for sale without licence permit or authorisation and thereby you committed an offence punishable u/s 21 of the NDPS Act, 1985 and within the cognizance of the Court of Sessions.

3. That, thirdly, you accused Nos. 1 and 2, on the aforesaid day, date, time and place, agreed with each other to do illegal acts to wit possess and sale brown sugar about 800 gms. which is an offence u/s 21 of the NDPS Act, 1985 and the said act to wit to sell brown sugar was done in pursuance of criminal conspiracy and thereby committed an offence punishable u/s 29 of NDPS Act and within the cognizance of the Court of Sessions".

5. The statements of accused persons were recorded u/s 313 Cr. P.C. Accused Jaggu pleaded not guilty and submitted that while at Cotton Market, he was told that there was warrant against his brother Kishori Shamlal and that he was taken to the office of Crime Branch, Nagpur. There he was required to sign 6 to 7 papers and that he has been implicated falsely. Accused No. 2 Vinod in his statement u/s 313 Cr.P.C. submitted that from Medical Chowk, he was taken to the office of Crime Branch, Nagpur and his signatures were taken by force on blank papers. He further submitted that since he was accused for similar offence in another case and was acquitted, the police have involved him again in this case.

6. The prosecution examined Shri Vivek Dhole P.W. 1, Assistant Chemical Analyser, P.W. 2 Mangal, P.W. 3 Ramdas Bhange, P.W. 4 Ramdas Shelke, P.W. 5 Digambar Meshram, P.W. 6 Baliram Dakhore and P.W. 7 Bapu Bhosle, and various documents as referred above were exhibited.

7. As stated above, the learned Additional Sessions Judge found both the accused persons guilty of the offences punishable under sections 21 and 29 of the NDPS Act, 1985 and sentenced both of them to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1 lakh each and in default of payment of fine, they were required to suffer further rigorous imprisonment for 18 months each vide judgment dated 24-9-1992.

8. Mr. S.A. Bobde, the learned Counsel for the accused Vinod in his usual persuasive manner argued that the appellant/accused Vinod has been falsely implicated in this case and conviction and sentence passed by the Additional Sessions Judge, Nagpur against accused Vinod is not sustainable. He submitted that the trial is vitiated since the investigation was conducted by the self-same person Shri Bapu Bhosle, Police Head Constable who conducted search and seizure. He submitted that law does not permit that investigation could be conducted by the person who is interested in prosecution, because the police official who conducts search and seizure is always an interested person and fair and proper investigation cannot be expected from him. Mr. Bobde further contended that pancha witnesses P.W. 2 Mangal and P.W. 5 Digambar have not supported the prosecution case and they have clearly stated before the Court that their signatures were obtained in the office of Crime Branch and they were not witness to search and seizure proceedings and in view of the testimony of these two witnesses, the prosecution case falls flat on the ground since there is no other independent evidence sufficient for holding the guilt of the accused proved. It was also argued by Mr. Bobde, the learned Counsel for appellant/accused Vinod that provisions of section 50 of the NDPS Act, 1985 which are mandatory in character, have not been complied with and on that ground also the conviction of the accused/appellant is liable to be set aside. Yet another contention of the learned Counsel is that though there were other material witnesses present according to the prosecution case, they were not examined and the testimony of the interested police personnel is not reliable and in any case not sufficient to convict the accused/appellant Vinod. Referring to section 29 of the NDPS Act, the learned Counsel submitted that there is no evidence showing abetment in criminal conspiracy and, therefore, conviction of the accused u/s 29 of the NDPS Act, 1985 is unsustainable. Lastly, Mr. Bobde argued that his client, accused Vinod was allegedly in possession of 120 mg. of brown sugar which was small quantity of a Narcotic Drug or a Psychotropic Substance and in any case was meant for personal consumption and, therefore accused Vinod's case is covered u/s 27 of the NDPS Act, 1985 and the maximum sentence for the same is one year and since he has undergone the said sentence, he now deserves to be released. The learned Counsel in support of his arguments relied on - (1) State of Punjab Vs. Balbir Singh, , Bhagwan Singh Vs. The State of Rajasthan, , (3) Usman Haidarkhan Shaikh Vs. The State of Maharashtra, , (4) Govt. of India v. P.N. Upadhaya , (5) Rajkumar Ramchandra Sahu and another v. State of Maharashtra, 1992 (2) Cri. 545 , (6) Nathiya and Another Vs. State of Rajasthan, , (7) Shaikh Munna Sh. Kadir v. The State of Maharashtra, (1992) 2 C.C.R. 1534, (8) Yusuf v. State of M.P., (1992) 2 C.C.R. 1537 and (9) Dilip Pandurang Kolekar v. The State of Maharashtra, (1992) 2 C.C.R. 1322.

9. Mr. M.R. Daga, the learned Counsel for accused Jaggu " Jagdish also strenuously urged before us that there is no legal evidence on record justifying the conviction of accused Jaggu under sections 21 and 29 of the NDPS Act, 1985. He submitted that his client Jaggu has been falsely implicated and his signatures

were obtained by the police personnel under coercion that there was warrant against his brother Kishori Shamlal. He submitted that panch witnesses P.W. 2 Mangal and P.W. 5 Digambar have also stated that their signatures were obtained at Crime Branch Office and that appears to be probable, because P.W. 2 Mangal who is running tea-stall near Crime Branch Office and P.W. 5 Digambar who also runs Pan shop near the office of the Crime Branch and there was no occasion for both of them being there near Meyo Hospital Square. Mr. Daga also submitted that the other prosecution witnesses are not reliable being police personnel and offence u/s 29 of the NDPS Act is not at all made out, because the prosecution has failed to prove abetment of criminal conspiracy. Mr. Daga in his usual frankness, submitted that he would not adopt the argument of Mr. Bobde on the point that the whole trial is vitiated because investigation was conducted by the self-same person who was a party to search of the accused persons and seizure of contraband. According to him, unless it is shown that the person investigating the crime is interested or is not impartial, by such general submission or proposition, it cannot be said that the police official who conducted the search and seizure cannot investigate into the crime.

10. The learned Public Prosecutor appearing for the State supported the findings of the learned Additional Sessions Judge and submitted before us that the conviction of both evidence and does not suffer from any infirmity warranting interference by this Court. The learned Public Prosecutor also submitted that accused/appellant Vinod has failed to discharge burden u/s 27 of the NDPS Act, 1985 that the Narcotic Drug or the Psychotropic Substance found in his possession, though in small quantity, was meant for his personal consumption and, therefore, section 27 of the Act is not applicable and the learned Additional Sessions Judge was fully justified in sentencing the accused persons to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1 lakh each and in default of payment of fine, they have been further required to suffer rigorous imprisonment for 18 months each.

11. Scan of the testimony of P.W. 7 Bapu Bhosle would show that while he was on patrol duty within the limits of Tahsil Police Station, he received the information at Meyo Hospital Chowk that accused No. 1 Jaggu was selling Gard. The said information was given to Shri Paraskar, Assistant Commissioner of Police on phone and it was also reduced into writing and was sent to the office of the Crime Branch with Police Constable Altaf. The prosecution has produced report submitted to the Assistant Commissioner of Police, Crime Branch No. I, Nagpur on 2-10-1991 vide Exh. 37. It is further apparent from the testimony of P.W. 7 Shri Bapu Bhosle that two witnesses, P.W. 2 Mangal and P.W. 5 Digambar were called to apprise of the information received and then they proceeded towards Shukla Lodge by walk and noticed both the accused persons standing on road near Shukla Lodge. They were apprehended and were apprised about their search. Both the accused persons were asked whether they were intending to take search of the members of the raiding party and panch witnesses and the accused persons took the search. From the complaint (Exh. 39) and the

panchanama (Exh. 38), it becomes apparent that before taking the search of the accused persons, they were asked whether they want the search to be taken before Executive Magistrate or Gazetted Officer. Both the accused stated that it was not necessary and their search may be taken by the police personnel and panchas. Consequently, search of accused persons and seizure of contraband were carried out. It is amply established on record that the procedure contemplated under the NDPS Act, 1985 has been fully complied with and there was no infirmity in the search, seizure and arrest of the accused persons. The testimony of P.W. 7 Bapu Bhosle does not suffer from any glaring infirmity creating any doubt in the mind of the Court about his truthfulness. It is true that section 50 of the NDPS Act, 1985 is mandatory and the Apex Court in the case of State of Punjab v. Balbir Singh (supra) held it to be mandatory in the following terms :

"17. One another important question that arises for consideration is whether failure to comply with the conditions laid down in section 50 of the NDPS Act by the empowered or authorised officer while conducting the search, affects the prosecution case. The said provision (section 50) lays down that any officer duly authorised u/s 42, who is about to search any person under the provisions of sections 41, 42 and 43, shall, if such person so requires, take him without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate and if such requisition is made by the person to be searched, the concerned authorised officer can detain him until he can produce him before such Gazetted Officer or the Magistrate. After such production, the Gazetted Officer or the Magistrate, if sees no reasonable ground for search, may discharge the person. But otherwise he shall direct that search be made. To avoid humiliation to females, it is also provided that no female shall be searched by anyone except a female. The words "if the person to be searched so desires" are important. One of the submissions is whether the person who is about to be searched should by himself make a request or whether it is obligatory on the part of the empowered or authorised officer to inform such person that if he so requires, he would be produced before a Gazetted Officer or a Magistrate and thereafter the search would be conducted. In the context in which this right has been conferred, it must naturally be presumed that it is imperative on the part of the officer to inform the person to be searched of his right that if so requires to be searched before a Gazetted Officer or a Magistrate. To us, it appears that this is a valuable right given to the person to be searched in the presence of Gazetted Officer or a Magistrate if he so requires, since such a search would impart much more authenticity and credit worthiness to the proceedings while equally providing an important safeguard to the accused. To afford such an opportunity to the person to be searched, he must be aware of his right and that can be done only by the authorised officer informing him. The language is clear and the provision implicitly makes it obligatory on the authorised officer to inform the person to be searched of his right".

.....

"22. It was further observed thus :

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in Court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the presence of persons acting solely in his interest".

When such is the importance of a right given to an accused person in custody in general, the right by way of safeguard conferred u/s 50 in the context is all the more important and valuable. Therefore, it is to be taken as an imperative requirement on the part of the officer intending to search to inform the person to be searched of his right that if he so chooses, he will be searched in the presence of a Gazetted Officer or a Magistrate. Thus, the provisions of section 50 are mandatory".

12. However, as stated above, so far as present case is concerned, there is full compliance of section 50 of the NDPS Act, 1985 and both the accused persons were clearly asked in Hindi language whether they wanted to get their personal search conducted in the presence of Executive Magistrate or Gazetted Officer to which they replied that it was not necessary and personal search can be taken. Both the accused persons were asked separately. In this view of the matter, we find that mandatory provisions of section 50 have been duly complied with and there is no force in the submission of the learned Counsel for the appellants/accused that provisions of section 50 of the NDPS Act have not been complied with.

13. Coming to one of the principal submissions of Mr. Bobde, the learned Counsel for accused Vinod that the trial is vitiated because the Investigating Office in this case was the self-same person who is said to have recovered the contraband brown sugar from the accused/appellants, it would be proper at this stage to refer to the two decisions cited by Mr. Bobde at bar at this stage.

In *Bhagwan Singh v. State of Rajasthan* (supra), the Supreme Court observed as under:

"5. Now, ordinarily this Court does not interfere with concurrent findings of fact reached by the trial Court and the High Court on an appreciation of the evidence. But, this is one of those rare and exceptional cases where we find that several important circumstances have not been taken into account by the trial Court and the High Court and that has resulted in serious miscarriage of justice calling for interference from the Court. We may first refer to a rather disturbing feature of this case. It is indeed such an unusual feature that it is quite surprising that it should have escaped the notice of the trial Court and the High Court. Head Constable Ram Singh was the person to whom the offer of bribe was alleged to

have been made by the appellant and he was the informant or complainant who lodged the first information Report for taking action against the appellant. It is difficult to understand how in these circumstances Head Constable Ram Singh, being an officer below the rank of Deputy Superintendent of Police, was not authorised to investigate the case but we do not attach any importance to that fact, as that may not affect the validity of the conviction. The infirmity which we are pointing out is not an infirmity arising from investigation by a Head Constable who was himself the person to whom the bribe was alleged to have been offered and who lodged the First Information Report as informant or complainant. This is an infirmity which is bound to reflect on the credibility of the prosecution case".

In another decision relied upon by Mr. Bobde in the case of Nathiya and another v. State of Rajasthan, (supra), the learned Single Judge of the Rajasthan High Court held as under :

"11. I have considered the rival contentions and have perused the record of the trial Court. One glaring feature of the case is that P.W. 5 Hamir Singh was the person who is said to have recovered the contraband charas from the two appellants. It is surprising that he himself investigated into the offence. Justice and fair play requires that the investigation should have been carried out by an independent officer, who was not in any way a party to the recovery proceedings. This principle is no longer res integra. In the case Radheshyam Vs. State of M.P. and Others, , it was observed :

"When S.H.O. seizes drugs and sends F.I.R. to Police Station, it expected that investigation should be by any other agency, may be of superior rank".

In the case Rana Ram v. State of Rajasthan, S.B. Cr. Appeal No. 380 of 1989, decided on August 11, 1989, it was observed :

"The learned Counsel for the appellant argued that Padamsingh, the S.H.O. was the person who caught the appellants, recovered the opium and who was the investigating officer in this case. He should not have investigated the matter, because he was a witness to the recovery. This is an infirmity in the prosecution case. Padamsingh should have handed over the investigation of this case to some other police officer".

It was held -

"The arguments of the learned Counsel has great substance. S.H.O. Padamsingh, who had recovered the opium in this case and lodged the report, should not have investigated the matter. This is an infirmity in the prosecution case."

In Bhagwan Singh Vs. The State of Rajasthan, , the Supreme Court has held (Para 5) :-

"Investigation by a Head Constable who was himself the person, to whom bribe was alleged to have been offered and who lodged the F.I.R. as informant or complainant. This was an infirmity which was bound to reflect on the credibility

of the prosecution case".

This principle was followed in *Banshi Lal v. State of Rajasthan*, S.B. Cr. Appeal No. 45 of 1990, decided on 21-2-1990 by Hon''ble Mr. Justice, S.M. Jain, as he then was. In that case the appeal of the appellant was accepted on this very short ground viz. that the case had been investigated into by the very person who had made recoveries and hence the investigation was bad in law, and the conviction and sentence of the appellant for the offence u/s 8/18 of the Act were set aside. I am, therefore, of the view that in this case, the investigation suffers from the basic infirmity, inasmuch as the officer recovering the contraband charas was the self-same person who had investigated into the case; the investigation was basically bad and reflects upon the credibility of the investigation. The Director General of Police would do well to issue proper instructions to all Investigating Officers in the State to ensure that this basic principle is not flouted while conducting investigation".

14. We may observe that the judgment of the Apex Court in *Bhagwan Singh's* case (supra) is not applicable in the facts and circumstances of the present case, because in that case the investigation was conducted by a head constable who was himself a person to whom bribe was alleged to have been offered and who lodged First Information Report as informant or complainant. Interest of the head constable to whom the bribe was alleged to have been offered, was obvious since the whole prosecution case was based on the informant who lodged First Information Report that he was bribed. In the facts and circumstances obtaining in *Bhagwan Singh's* case, it was held to be difficult to understand how there could be fair and impartial investigation because of the interest of Head Constable Ram Singh who was alleged to have been bribed. The facts and circumstances of the present case which have been referred to hereinabove and discussed hereinafter, would show that the observations made by the Apex Court in *Bhagwan Singh's* case (supra) cannot be made applicable to the facts and circumstances of the present case.

Similarly, on perusal of the facts in *Nathiya's* case (supra) decided by the Rajasthan High Court, it would appear that the facts are slightly different in the present case inasmuch as Hamir Singh who was posted as S.H.O. at Police Station, Sheo was informed by the Superintendent of Police, Barmer about contraband charas and upon that information, Hamir Singh proceeded for Sheo, apprehended the accused persons Nathiya and Saffiya in that case, conducted the search and seizure and since he was also Station House Officer at Police Station, Sheo, he conducted the investigation and submitted challan before the Additional Munsif & Judicial Magistrate who committed those two accused persons to Sessions trial to the Court of the Additional Sessions Judge, Barmer. Reverting to the facts of the present case, it would appear that P.W. 7 Bapu Bhosle was posted in the Crime Branch as Head Constable and was working in the Narcotic Cell. While on patrol duty along with the other police personnel, he received the information that a person named Jaggu " Jagdish was in possession

of Gard packets and was selling the same. On receiving the said information, the information was sent to the Assistant Commissioner of Police Shyri Paraskar and the said information was also reduced into writing. Search and seizure was conducted in accordance with the procedure prescribed under the NDPS Act and a complaint was lodged to the Police Sub-Inspector, P.S. Tahsil, Nagpur and on that basis Shri Baliram Dakhore, Police Sub-Inspector (P.W. 6) registered the case and First Information Report bearing Crime No. 448 of 1991 and the said Police Sub-Inspector sent the sealed articles for chemical analysis to the Regional Forensic Science Laboratory, Nagpur through P.W. 4 Ramdas Shelke. The report was sent by the Chemical Analyst to the Police Inspector, Crime Branch. The charge-sheet submitted to the Court also bears the signature of Shri M.P. Bhil as Investigating Officer and not that of Bapu Bhosle (P.W. 7). These facts make it clear that P.W. 7 Bapu Bhosle cannot be said to be the Investigating Officer in the strictest term and it cannot be said that investigation in the present case was not proper and fair because it was not conducted by Bapu Bhosle (P.W. 7) who was the person who carried out search and seizure. We, therefore, feel that in the present case the investigation was neither unfair nor improper nor the trial is vitiated by improper investigation, as alleged.

15. Even otherwise, keeping in view the scheme of provisions of the NDPS Act and the procedure provided under sections 41, 42, 43, 44, 49, 50, 51, 53, 53-A, 55, 56, 57, 58, 59 and 68, we feel that unless the personal interest or hostility of the Investigating Officer is shown by the accused person which has resulted in prejudice to the rights of accused person in impartial, fair and proper investigation, it cannot be said that in no case the person who was party to the search of the person of the accused and seizure of the contraband can proceed with the investigation of the crime. We, therefore, respectfully express our disagreement with the general proposition laid down in Nathiya's case (supra) by the Rajasthan High Court that the investigation is bad in law where it has been investigated into by the very person who has made recoveries and we, therefore, negative the argument of Mr. Bobde on this count.

16. It is true that the panch witnesses P.W. 2 Mangal and P.W. 5 Digambar have stated before the Court that their signatures were obtained on panchanama in the office of the Crime Branch and they had not witnessed the search and seizure. Both the witnesses viz. P.W. 2 Mangal and P.W. 5 Digambar have been declared hostile. It will be pertinent to note here that P.W. 2 Mangal has admitted in his statement that panchanama was written in his presence and he has admitted his signature on the panchanama. He further admitted that he would not sign any written paper without reading the contents though in the present case he stated that he has signed due to fear of police. P.W. 5 Digambar has also admitted his signatures on the panchanama. He also admitted that he can read and write. He, however, stated that it is not true that panchanama was drawn and then he signed on it. The panchas (P.Ws. 2 and 5) admitted their signatures on Exh. 38 and we see no reason to believe their version about being made to give their signatures to a document the contents whereof do not reflect what had

taken place in their presence. A contemporaneously drawn up Exh. 38 suffices to corroborate the sworn testimony of Head Constable Babu Bhosle (P.W. 7) whose testimony is believable, reliable and fully supported from other documents viz. report of the Chemical Analyser, panchanama, complaint and First Information Report. In view of this discussion also, the argument of the learned Counsel for the accused/appellants that panch witnesses have not supported the prosecution version and the testimony of other police personnel is not reliable, is devoid of force.

17. The submission of learned Counsel that there were other material witnesses at the time of search and seizure and they have not been produced, needs to be negated since he had failed to point out those material witnesses available at side and have not been produced. It may be stated here that in the matters relating to search and seizure of contraband like Narcotic Drugs or Psychotropic Substances, everybody does not want to be involved in the conduct of search and seizure procedure and unless the witnesses given their consent to accompany the raiding party at the time of search and seizure, they cannot be involved. In the present case since both P.W. 2 Mangal and P.W. 5 Digambar who were passing through the area at the time the information was received by P.W. 7 and they agreed to give their consent to act as panchas that they were asked to accompany the raiding party. This argument of the learned Counsel for the appellant/accused is also not sustainable. It may be observed by us here that the finding recorded by the learned Additional Sessions Judge to the effect that from the evidence of panchas and panchanama on record, prosecution failed to bring on record as to how P.W. 2 and P.W. 5 could be near Mayo Hospital on the date and time of the alleged incident, does not appear to be correct for the reasons already indicated by us above.

18. We, therefore, hold that the findings recorded by the learned trial Court that the prosecution has been able to prove that on 2-10-1991 at 02.40 p.m. near Shukla Lodge accused No. 1 Jaggu was found in possession of brown sugar weighing 680 gms. for sale and has committed an offence punishable u/s 21 of the NDPS Act, 1985 is justified. Similarly, we are of the opinion that the learned Additional Sessions Judge was justified in holding that the prosecution has proved that accused No. 2 Vinod at the aforesaid time and place was found in possession of 120 gms. of brown sugar and thereby he has committed an offence punishable u/s 21 of the NDPS Act, 1985. However, we are unable to agree with the finding recorded by the learned Additional Sessions Judge that at the aforesaid time and the place accused No. 1 Jaggu and accused No. 2 Vinod in agreement with each other were found in possession of brown sugar and selling it in pursuance of their criminal conspiracy and thereby they committed an offence punishable u/s 29 of the NDPS Act, 1985. The finding recorded by the learned Additional Sessions Judge that both the accused persons are guilty of the offence u/s 29 of the NDPS Act is based on no legal evidence. The learned Public Prosecutor appearing for the State also frankly conceded before us that the prosecution has not been able to prove that the accused/appellants have

committed an offence punishable u/s 29 of the NDPS Act, 1985 since none of the ingredients of abetment or criminal conspiracy have been proved by the prosecution. After going through the evidence of the prosecution, we are satisfied that the prosecution has failed to prove either abetment or criminal conspiracy of the accused/appellants u/s 29 of the NDPS Act, 1985 and, therefore, the conviction of the accused/appellants u/s 29 of the NDPS Act, 1985 is liable to be set aside and the same is hereby set aside. The aforesaid reasons dispose of arguments of Mr. Daga as well.

19. Adverting now to the last submission of Mr. S.A. Bobde that accused Vinod was found to be in possession of 120 mg. of brown sugar only which was small quantity and meant for his personal consumption and, therefore, accused Vinod could only be held liable for offence u/s 27 of the NDPS Act, 1985, it may be observed that accused Vinod has failed to discharge his burden that the quantity of brown sugar found in his possession was meant for his personal consumption.

20. Section 27 of the NDPS Act, 1985 reads as under :

"27. Punishment for illegal possession in small quantity for personal consumption of any Narcotic Drug or Psychotropic Substance or consumption of such drug or substance---Whoever, in contravention of any provision of this Act, or any rule or order made or permit issued thereunder, possess in small quantity any Narcotic Drug or Psychotropic Substance, which is proved to have been intended for his personal consumption and not for sale or distribution, or consumes any Narcotic drug or Psychotropic substance, shall, notwithstanding anything contained in this chapter, be punishable, -

(a) Where the Narcotic Drug or Psychotropic Substance possessed or consumed is Cocaine, Morphine, Diacetyl-morphine or any other Narcotic, Drug or any Psychotropic Substance as may be specified in this behalf by the Central Government, by notification in the Official Gazette, with imprisonment for a term which may extend to one year or with fine or with both; and

(b) Where the Narcotic Drug or Psychotropic Substance possessed or consumed is other than those specified in or under Clause (a) with imprisonment for a term which may extend to six months or with a fine or with both.

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

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

The Central Government by virtue of S.O. No. 827 (E) dated 14th November, 1985 has specified the "small quantity" for the purpose of section 27 of the NDPS Act, 1985 as given below:

"In exercise of the powers conferred by Explanation (1) to section 27 of the Narcotic Drug and Psychotropic Substances Act, 1985 (61 of 1985) and in the partial modification of the notification of the Government of India in the Ministry of Finance, Department of Revenue S.O. No. 825(E), dated the 14th November, 1985 the Central Government hereby specifies the quantity mentioned in Column (3) of the table below, in respect of the Narcotic drug mentioned in the corresponding entry in Column (2) of the table, as "small quantity" for the purpose of that Act -

TABLE

S. No. Name of Narcotic Drug Quantity (1) (2) (3) 1. Heroin or drug commonly known as Brown Sugar or Smack 250 milligrams 2. 3. 4. 5.

21. There is no dispute that accused Vinod was found in possession of 120 mg. of brown sugar and as such, the said quantity would be a "small quantity" within the meaning of section 27 of the NDPS Act. However, the burden of proving that the possession of the brown sugar was intended for personal consumption, was on accused/appellant Vinod in view of Explanation (2) appended to section 27. The accused Vinod has miserably failed to establish or discharge the burden that the quantity of brown sugar was meant for his personal consumption. The statement of accused Vinod was recorded u/s 313 Cr. P.C. and in the said statement, he did not utter a word that the brown sugar found in possession of accused Vinod was for his personal consumption. The accused-appellant has not led any evidence to discharge the burden u/s 27 of NDPS Act that the brown sugar was intended for his personal consumption. Even from the evidence which has come on record, no such inference can be drawn that the brown sugar recovered from the accused Vinod was intended for his personal consumption.

22. The accused/appellant Vinod has submitted affidavit before this Court of his father Shri Satyanarayan Lohiya stating therein that Vinod was drug addict since 4-5 years before he came to be arrested by the police in the instant case. It was also stated in the affidavit by Shri Satyanarayan Lohiya that accused Vinod had undergone treatment in the Institute of Mental Health, Nagpur and in respect thereof, has submitted some certificates. We have perused the affidavit filed by Shri Satyanarayan and the documents annexed therewith and we are satisfied that accused Vinod cannot derive any benefit from such documents which were not filed before the trial Court during the trial and, therefore, the accused Vinod has failed to discharge the burden placed on him that brown sugar recovered from him was meant for his personal consumption. It would not be out of place to mention here that the drug addiction and the illicit traffic in drugs had taken such alarming proportions that it not only affected the health of individual citizen, but had shaken the entire community. This menace needs to be curbed to save the humanity. The provisions contained under the NDPS Act are stringent enacted for the control and regulation of operation relating to Narcotic Drugs and Psychotropic Substances and like any other offence in the crime, the burden lies on the prosecution to bring the guilt of the accused to hilt, but once the

commission of crime is proved, then the minimum punishment prescribed under law has to be passed. The courts are bound to share the concern of the nation as envisaged in the provisions of the NDPS Act, 1985 by strictly complying with the provisions of the Act to combat this menace.

23. It was argued by Mr. Bobde that no amount was recovered from the person of accused Vinod and that also showed that the small quantity of brown sugar recovered from the person of accused Vinod was meant for personal consumption. In this connection, he cited two judgments of this Court in the case of Shaikh Munna Shaikh Kadir v. The State of Maharashtra and Dilip Pandurang Koleker v. The State of Maharashtra (supra).

24. None of the aforesaid cases cited by Mr. Bobde helps accused Vinod. In the case of Shaikh Munna (supra) the information was received about the accused in that case that he was standing near Regency Hotel in suspicious circumstances and the accused surrounded by some persons, was giving something to those persons from his pockets. That being the information and panchanama did not disclose any amount on the person of the accused, the Division Bench of this Court held that if the accused, as alleged by the prosecution was selling drugs, some amount ought to have been traced on the person of the accused and this by itself creates doubt about the prosecution version. In the present case, there was no information about accused Vinod nor it was the case of the prosecution that Vinod was selling the brown sugar or the accused Vinod was seen selling the brown sugar and, therefore, Sheikh Munna's case (supra) does not apply. Similarly, in the case of Dilip Pandurang (supra) the information received was to the effect that the accused was dealing in brown sugar and it was alleged by the prosecution that accused/appellant in that case was selling brown sugar. However, the drug was found in a small quantity and there was absence of money on the person of the accused and, therefore, this Court inferred that it was meant for personal consumption and benefit of section 27 of the NDPS Act was given to the accused. However, in the present case, as stated above, there was no information about Vinod nor it was the case of the prosecution that Vinod was selling the brown sugar or was seen selling brown sugar and, therefore, absence of money from the person of accused Vinod was not an important element from which it could be inferred that the recovered brown sugar from the person of accused Vinod was meant for his personal consumption. The case of Dilip Pandurang (supra) is thus clearly distinguishable and does not apply in the facts and circumstances of the case.

25. In the result, the conviction of the accused/appellants Jaggu " Jagdish and Vinod for the offence punishable u/s 29 of the NDPS Act, 1985 is set aside. However, the conviction of the accused/appellants Jaggu " Jagdish and Vinod u/s 21 of the said Act and the sentence to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1,00,000/- (Rs. One Lakh) each and in default of payment of fine, further rigorous imprisonment for 18 months each passed by the Additional Sessions Judge, Nagpur, is maintained. The appeals are decided

accordingly.