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**(2000) 11 BOM CK 0031**

**Bombay High Court**

**Case No:** Criminal Appeal No. 211 of 1997

Ahmed Adenwala Kola

APPELLANT

Vs

V.M. Dosi, Intelligence  
Officer, Narcotics  
Control Bureau and  
Others

RESPONDENT

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**Date of Decision:** Nov. 30, 2000

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 100(7)
- Customs Act, 1962 - Section 103
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 21, 23, 28, 50, 57

**Citation:** (2001) ALLMR(Cri) 857 : (2001) 2 BOMLR 646 : (2001) 2 MhLj 515

**Hon'ble Judges:** S.S. Parkar, J

**Bench:** Single Bench

**Advocate:** Mr. F.E. Saldanha, Usha Kejriwal, app, for the Appellant; Mr. Prakash S. Thakur, for the Respondent

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**Judgement**

S. S. Parkar, J.

The appellant has impugned in this appeal his conviction and sentence under the provisions of the N.D.P.S. Act recorded by the Special Judge in N.D.P.S. Special Case No. 93 of 1994 by Judgment and order dated 7th January, 1997.

2. The brief facts leading to the prosecution of the appellant under the provisions of the N.D.P.S. Act are as follows :

The Customs Authorities had received information that some passengers going to leave Bombay by Ethiopian Flight scheduled at 4.45 hrs. on 8th March, 1994 were suspected to be carrying contraband with them. The Customs Officers, therefore, collected the copy of

manifest and found that names of nine suspect persons were found on the manifest. The appellant was one of those nine persons. All the nine suspect persons were intercepted by the Customs Authorities between 2 a.m. and 3 a.m. They were intercepted after they had completed their immigration and their identity was confirmed from passport, air-ticket and boarding card. Their search was taken separately in the presence of two panchas at the airport. The panchas were one Mr. Mohini and another Mr. Kotian who were Ethiopian Airlines Personnel. The search of the appellant was also taken in respect of his checked-in baggage which he himself opened so also in respect of his hand bag which he was carrying. Nothing incriminating was found either from the checked-in baggage or from the hand bag of the appellant. Accordingly panchanama was drawn. When asked whether he was carrying any narcotic drugs by swallowing inside the body or concealed in cavity or anywhere, it was denied by this appellant as well as other accused. The appellant and others were thereafter asked whether they were prepared to be examined by a doctor. As all the accused agreed, they were all brought to the office of N.C.B. at their Bombay Zonal Unit in Exchange Building at Bellard Pier by about 7 a.m. The travel documents including the passports, air tickets, boarding card, flight coupon and the copy of the manifest were attached under a common panchanama.

3. In the office again two panchas were called and the personal search of the appellant was taken and nothing was recovered from the person of this appellant. Thereafter all the suspects including the appellant were taken to J. J. Hospital in O.P.D. Thereafter the doctor in O.P.D. in J. J. Hospital was told about the purpose of bringing the suspects. The Radiologist of J. J. Hospital was asked to take X-rays of all the nine suspects. X-ray examinations of all the suspects including the appellant showed that there were certain foreign bodies present in their abdomen and, therefore, they were suspected of having swallowed the narcotic drugs in capsule forms for carrying them abroad.

4. Thereafter all the suspects including the appellant were taken to the office of N.C.B. and were shown arrested under memo of arrest which was served on them and the grounds of the arrest were communicated to them. The accused were arrested under arrest memo. Thereafter all the accused were produced before the Special Judge for remand and under the orders of the Special Judge they were then admitted to Ward No. 19 of J. J. Hospital for the purpose of purging the foreign bodies shown to be in the abdomen of the accused as per the X-ray reports. All the suspects were accordingly admitted under the charge of Dr. Algolar. The said doctor was briefed with the facts of the case and the purpose of the admission of these nine suspects.

5. The appellant is alleged to have purged 85 capsules by 18th March, 1994 during his stay in the J. J. Hospital for the said purpose. The capsules purged by the appellant were collected and seized under the panchanama dated 18th March, 1994. N.C.B. Officers took charge of the 85 capsules pertaining to the appellant in a polythene bag. One capsule was taken charge of by P.W. 3 Koppikar. The capsules were made of black insulation tape. Inside the insulation tape a small polythene bag was found which contained brown sugar in hard semi solid form. One capsule was opened and small

quantity of the powder was used by N.C.B. Officer for testing with the help of field testing kit and it tested positive for heroin. All the capsules purged by the appellant were opened and the contents thereof were collected in one polythene bag. The same weighed 800 grams. The entire powder was mixed and was divided into three separate parts and three separate sample packets of 5 grams each were collected and were put in polythene bags and then sealed. They were sealed with three separate packets. On the sample packets signatures of the panchas were obtained after the particulars about the case were written on the samples. The remaining bulk was separately packed, sealed and put in a carton. The pancha's label was affixed on it with particulars of the case and signed by the Intelligence Officer. The three sample packets and the carton were sealed with Seal No. 03. The sealing material used by the accused for capsules for wrapping and covering were separately collected in polythene bag sealed and put in a carton. The said carton also was sealed and labelled and the signatures of the panchas were obtained. This was recorded in a separate panchanama. Thereafter the staff returned to the office of the N.C.B. along with the panchanama and muddemal in a sealed condition.

6. Out of the three samples sample No. A-11T was sent to the Deputy Chemist Laboratory, New Customs House along with the triplicate test memo signed by P.W. 7 and deposited in the said laboratory for which he obtained the acknowledgment from the concerned clerk on the third copy. The sample packet was handed over in sealed condition. Sample packet bearing No. A-IV was sent to F.S.L. Kalina through another officer and the third sample bearing No. A-V was retained by the officer as reserve sample packet. The C. A. reports were received from both the laboratories. Both the reports showed that the samples contained Dyacety Morphin i.e. heroin. The reports were received along with the remnant samples in sealed condition. The C.A. report is produced as Exhibit 31 collectively while the report of the Deputy Chief Chemist from the New Customs House has been produced on record as Exhibit 30 collectively.

7. The complaint was filed in the Court of the Special Judge on 2.5.1994 against the accused. The charge was framed by the Special Judge for offence u/s 8(c) read with Section 21 as well as u/s 28 read with Section 23 of the N.D.P.S. Act for possessing 85 capsules containing narcotic drug viz. heroin hidden in the body cavity with intention to export the same. The accused denied the charge and claimed to be tried.

8. On behalf of the prosecution seven witnesses were examined. P.W. 1 is S.C. Rohatgi who was the Assistant Director of N.C.B. who had received the information pursuant to which the accused was searched and intercepted. P.W. 2 is S. P. Singh, Intelligence Officer of N.C.B. who was examined to show that when he tried to record the statement of the accused u/s 67 of the N.D.P.S. Act he refused to give any statement or sign his refusal to give statement. P.W. 3 is Dr. M. J. Algotar attached to the J. J. Hospital who was in charge of Surgical Unit i.e. Ward No. 19 of J. J. Hospital. P.W. 4 is Anil Rishiraj, the Intelligence Officer who prepared the seizure panchanama and assisted Vilas Dosi P.W. 7 in investigation. P.W. 5 is Tulsi Mackwana, a sweeper from the J. J. Hospital who acted as panch for the seizure panchanama. P.W. 6 is A. K. Thaker, an Intelligence

Officer attached to N.C-B. who deposited the muddemal articles at Customs Warehouse and lastly P.W. 7 is Vilas Dosi, the Investigating Officer who filed the complaint. He was also an Intelligence Officer attached to N.C.B.

9. After considering the entire evidence on record the learned Special Judge by his judgment and order dated 7th January, 1997 convicted the appellant u/s 8(c) read with Section 21 of the N.D.P.S. Act and sentenced him to R.I. for 13 years and to pay a fine of Rs. 1 lakh in default S.I. for six months. The appellant was also convicted u/s 28 read with Section 23 of the N.D.P.S. Act and sentenced to R.I. for ten years and to pay a fine of Rs. 1 lakh in default S.I. for six months. The substantive sentences were directed to run concurrently. It is this order of convictions and sentences which is under challenge in this appeal. -

10. Mr. Saldanha appearing on behalf of the appellant accused raised following contentions. Firstly he contended that the prosecuting agency had not complied with the provisions of law to ensure that the investigation was fair and carried on in accordance with law. Secondly he contended that the investigating agency had not taken the safeguards to ensure that the sample of contraband article sent for chemical analysis was the one which was seized from the possession of the appellant. Thirdly he contended that copy of the seizure panchanama was not given to the accused nor the seizure was made in his presence though he was available in the hospital at the relevant time. Lastly he contended that there was non-compliance with the provisions of Section 57 of the N.D.P.S. Act.-

11. So far as the first contention is concerned it was argued that neither the provisions of Section 103 of the Customs Act was complied with nor the mandatory provisions of Section 50 of the N.D.P.S. Act. The N.C.B. officers were acting on the prior information when they intercepted the accused at the Airport on 8th March, 1994 on suspicion. After the personal search and the search of the checked-in baggage no contraband was recovered from the possession of the accused. When questioned the accused denied that he had hidden narcotic drug inside his body. In spite of the denial by the accused, he was taken to the J. J. Hospital for the purpose of taking X-ray of his abdomen. When the X-ray showed the presence of foreign bodies in his abdomen the accused was taken to the Special Judge for seeking necessary orders from the Court. The learned Special Judge granted remand and directed that the accused be admitted in the J. J. Hospital for the purpose of purging foreign material in the body. There is no provision under the N.D.P.S. Act which contemplated the screening or X-raying the body of a suspect person for detecting secreted goods. However, Section 103 of the Customs Act makes provision in that behalf under which such suspect person has to be produced before the nearest Magistrate without unnecessary delay and if the Magistrate has reasonable ground for believing that such person had contraband secreted inside his body and is satisfied that for the purpose of discovery of such goods it is necessary to have the body of such person screened or X-rayed, he may make an order to that effect, instead of obtaining the orders from the Magistrate before the accused was taken for the purpose of X-raying in

the J. J. Hospital the accused was first taken to the J. J. Hospital and his X-rays were taken and thereafter an application was made to the Special Judge for further orders of remand and forgetting the accused admitted in the J. J. Hospital for the purpose of purging foreign bodies. Not only that, the provisions of Section 103 of the Customs Act were not strictly complied with on the ground that the accused had agreed for being taken to the J. J. Hospital for the purpose of X-raying but the mandatory provisions of Section 50 of the N.D.P.S. Act were also not complied with. The reliance is placed by the defence counsel on the deposition of P.W. 1 S. C. Rohatgi, the Assistant Director of N.C.B., Bombay who in para 7 of his deposition admits that no choice was given to the accused before searching his baggage or his person apprising his right to be searched before a Gazetted Officer or a Magistrate. It is well settled law that If the empowered officer is acting on the basis of prior information as in this case, the option u/s 50 of the N.D.P.S. Act has to be given to the accused in case the search of his person is to be made on the belief that he is carrying narcotic drugs. In this case according to P.W. 1 Assistant Director N.C.B. the Information was that the accused was smuggling narcotic drugs concealed in his body cavity and according to the prosecution case this accused had secreted or was carrying "heroin" in capsule form in sealed polythene bags covered with insulation tape. If pursuant to the search of a person of this accused he was found carrying In his person narcotic drug, the provisions of Section 50 are attracted. On behalf of the respondents it is argued that the provisions of Section 50 would not be applicable on the ground that Section 50 is applicable only when the narcotic drug is carried by the accused on his body and not Inside his body. The reliance is placed on the decision of the Constitution Bench of the Supreme Court In the case of State of Punjab v. Baldev Singh, and the Full Bench decision of this Court in the case of Ebanezer Adebaya v. B. S. Rawat. So far as the decision of the Apex Court in Baldev Singh"s case is concerned reliance is placed by the learned A.P.P. Mrs. Kejriwal on paragraph 38 of the Judgment which reads as follows :

"38. Let us, therefore, first examine the fact situation and the law as laid down in Pooran Mal case and the question of its applicability to cases arising out of offences under the N.D.P.S. Act, based only on proof of unlawful possession of an illicit drug or a psychotropic substance on the person of an accused, where the illicit article only was seized during the search conducted in breach of the provisions of Section 50."

Reference is also made to the observation of the Apex Court in paragraph 45 of the Judgment in Baldev Singh"s case which reads as follows :

"45. The judgment in Pooran Mal case therefore, cannot be understood to have laid down that an illicit article seized during the search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act can be used as evidence of unlawful possession of the illicit article on the person from whom that contraband had been seized during an illegal search..."

Similarly reliance was placed on paragraphs 21 and 22 of the Judgment of the Full Bench of this Court in Ebanazer's case. Para 21 only quotes the observations of the Delhi High Court In Amarjit Singh's case while in paragraph 22 the Full Bench has observed as follows :

"22. .... 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 luggage in physical possession of the person at the time of the search...,"

In my view the above argument is based on the wrong premise. The Apex Court in Baldev Singh's case and the Full Bench in Ebanazer's case were considering the argument that the search of the article on the person or body of the person or bag or luggage in physical possession of the person at the time of search as distinguished from the articles which were not either on his person or immediate physical possession of suspect at the time of search. Neither the Apex Court in the aforesaid case nor the Full Bench were considering the distinction between the narcotic drug carried on the person or body of the person or inside the body of the person. The aforesaid reasoning, therefore, cannot be cited in support of the contention that Section 50 would not be applicable in case the person is carrying illicit article or contraband concealed in abdomen or in body cavity. In my view the search of the body cavity or inside of the abdomen of a person amounts to personal search and, therefore, attracts the provisions of Section 50 of the Act. When the accused was taken for the purpose of X-ray in the J. J. Hospital to find out whether he had secreted or concealed narcotic drugs in his body cavity the search was made of the person of the accused on prior information as contemplated by Section 50 of the Act. The wording used in Section 50 is, "is about to search any person". It is this wording i.e. "search any person" which was being interpreted by the Apex Court and the Full Bench in the aforesaid decisions. Phrase "on person" was used by the Apex Court and the Full Bench not with a view to distinguish the possession inside the body of a person but to distinguish an article which was kept in the luggage which was not in his immediate physical possession like bag in hand but kept in checked-in-baggage. The distinction sought to be made with regard to the contraband concealed in the body of a person is not warranted either by the provisions of Section 50 of the Act or by interpretation of that provision by the Apex Court or the Full Bench of this Court. It is not in dispute that at no stage in this case when the accused was taken to the hospital for X-raying or at any subsequent stage before alleged purging of the contraband capsules concealed in his body cavity the choice or option under the provisions of Section 50 of the Act was given to the accused. It is settled position in law that the accused had to be made aware of his right u/s 50 and given the option to be searched in the presence of a Magistrate or a Gazetted Officer which was not done in this case. Thus there was non-compliance with the mandatory provisions of Section 50 of the Act.

12. The second contention raised by Mr. Saldanha is that the prosecuting agency had not ensured that the sample sent for the purpose of chemical analysis was the one which was recovered from the possession of the accused. The first limb of his argument is that there

is no cogent and reliable evidence to show that the capsules containing brown sugar attached under the seizure panchanama were the ones which were purged by the accused while he was in hospital. The second limb of his argument is that though according to the prosecution the capsules were taken in possession under the seizure panchanama on 18th March, 1994 at J. J. Hospital they were kept in the custody of P.W. 7 for three days upto 21st March, 1994 along with the specimen of seal which was put on the sample packets on 18th March, 1994 as admittedly the sample was sent to the office of C.A. under forwarding letter dated 21st March, 1994 along with the specimen of seal.

13. So far as the first limb of the second point raised on behalf of the defence is concerned the inventory maintained by the hospital in respect of the record of the capsules purged by this accused is not proved because Dr. Algotar who produced the said inventory at Ex. 40-E was not aware as to who had written it. A bare look at the said inventory does not indicate that it is the record of the capsules purged by this accused on the dates and timings mentioned therein. The writer of the said inventory is not examined. Moreover the said inventory cannot be said to be a complete record in respect of the capsules purged by this accused as the same shows figure of 78 being the total of the third column titled "Tab" by 14th March, 1994 whereas the capsules which were allegedly seized pertaining to this accused are shown to be 85 in number. Moreover according to the evidence of Dr. Algotar those capsules were kept in a polythene bag bearing the name of the accused but no such polythene bag with the name of the accused was produced in the Court. Admittedly there is no signature of the accused obtained on the seizure panchanama although according to the Investigating Officer Dosi P-W. 7 the accused was available in the hospital at that time. This is clearly admitted in his deposition by P.W. 7 Dosi, the Investigating Officer. It is not the case of the prosecution that the accused refused to witness the same or refused to sign the panchanama. In this case also the prosecuting agency has been careless to mention the correct number of capsules purged by this accused in the forwarding letter as the said letter which is Exhibit 31 shows that 52 capsules were purged by this accused. The evidence of Dr. Algotar examined as P.W. 3 cannot be relied on as his evidence is not based on his personal knowledge but he has clearly admitted that he was stating on the basis of the hospital record. His own statement was recorded on 19.4.1994 i.e. one month after the capsules were handed over to the N.C.B. officers by the hospital authorities. The evidence of Dr. Algotar does not mention as to who had handed over the capsules to N.C.B. officer. Even Panch P.W. 5 Tulsi Mackwana also has not named the doctor who handed over the capsules in question with the N.C.B. officer. Even the signatures of the panchas were not obtained on the polythene bag in which the capsules purged by this accused were stored or kept in the hospital. There is no evidence forthcoming as to who was in charge of those capsules in the hospital. No staff of the hospital or the sweeper who is alleged to have collected the capsules allegedly purged by the accused in the toilet has been examined. The only evidence in regard to this is ipse dixit of Dr. Algotar who had no personal knowledge about the same. It is not in dispute that the panchanama was already cyclostyled and the blanks were filled in at the relevant time, yet the panchanama does

mention in the cyclostyled form that the "heroin" was found in the capsules. Thus before even testing the capsules in question the N.C.B. authorities were knowing that the capsules were containing "heroin" or "brown sugar". It is pointed out that the statement of Dr. Algotar was recorded on 19.4.1994 i.e. one month after the seizure. That statement is produced at Exhibit I5-A collectively. It is significant to note that though in his statement Dr. Algotar has allegedly stated that nine African nationals had purged out "heroin" capsules and that the "heroin" capsules purged out by them were of size 2 1/2" x 1/2", Dr. Algotar in para 3 of his evidence denies having used the word "heroin" in his statement. He categorically states that the word "heroin" wherever referred to in his statement was written by the N.C.B. officer on his own and that he had never referred to the word "heroin" during his statement. The evidence of panch also cannot be relied on as he has categorically deposed that he did not know the contents of three written papers which he had signed in Dr. Algotar's room and the contents of those papers were not read over and explained to him by anybody. According to him he was called there to sign some papers which he signed. He also denies that any samples were drawn in his presence. Thus the contents of the panchanama are also not corroborated by independent witness.

14. In the aforesaid state of affairs it was rightly contended on behalf of the accused that there is no satisfactory and cogent evidence to show as to how many capsules were purged by this accused nor that the capsules seized under the panchanama were the ones which were purged by this accused. Thus no link is established between the accused and the capsules containing heroin seized under seizure panchanama and, therefore, it cannot be said without entertaining any reasonable doubt that the sample sent for chemical analysis was taken from the contraband seized from the accused.

15. Admittedly as per the prosecution evidence those capsules were allegedly purged by this accused not in a toilet pan on the bed but in the toilet where the accused was left alone thus giving "the accused a chance to destroy them or flush them out. According to Dr. Algotar the staff and the sweepers of the ward were asked to keep constant watch on the accused whenever they went for nature's call in the toilet, in order to collect the capsules if they were purged out. He further deposed that the accused were allowed to go to toilet for nature's call but were provided separate pan in the toilet for their nature's call. These accused were allowed to go to the toilet alone after they were provided with separate pan in the toilet itself for their nature's call. The evidence of the doctor further states that the capsules purged by the accused were deposited in individual bags with the help of the sweeper after they were cleaned and the concerned Doctor on duty used to take care with the help of N.C.B. officers to maintain the record. The N.C.B. officers do not say that they were party to keep the record of capsules purged by the accused. Apart from the possibility of accused not purging the capsules in the pan provided to him and destroying them or flushing them out. as he was allowed to go to toilet for that purpose where he was left alone, the said capsules when collected at any particular time of the day were not immediately kept in sealed condition in safe custody to ensure that the capsules in question were the same which were purged by this very accused. It cannot be

forgotten that there were nine accused persons who were admitted to the same ward in the J. J. Hospital on 8th March, 1994 and were kept there for number of days for the purpose of purging the foreign bodies hidden in their abdomen. No evidence has been led even of the persons who collected these capsules.

16. As stated earlier no sweeper or ward boy who attended the accused or collected the capsules from the toilet pan has been examined. The prosecution has not examined a single witness to prove the procedure which was followed to take the accused to answer the nature's call. The only witness examined in Dr. Algotar. Dr. Algotar has only broadly referred to the procedure without giving the details. His evidence is not based on his personal knowledge nor is supported by the documentary evidence of the hospital records like inventory produced by him which itself does not inspire confidence. Although Dr. Algotar states in his deposition that the concerned doctor on duty used to take care with the help of N.C.B. officials to maintain the record it is not borne out by the evidence of the N.C.B. officers. The prosecution also has not led evidence to show who had taken charge of the capsules after they were purged by this accused and where they were deposited or kept. The inventory does not throw light on this aspect at all which itself is not maintained properly. Even the Investigating Officer has not stated about the inventory having been maintained by the hospital authorities. The inventory was directly produced by the doctor in the Court at the time of giving his evidence and was not within the knowledge of the N.C.B. officers. In my view the prosecution has failed to establish beyond reasonable doubt the link between the sample sent to the C.A. for analysis and the possession of the accused in respect of the contraband from which sample is allegedly taken.

17. The second limb of Mr. Saldanha's argument is that though the sample was taken out of the alleged contraband on 18th March, 1994 when it was seized, the sample was sent to C.A. on 21st March, 1994 after a gap of three days. As per the panchanama of seizure (Exh. 18) the sample and the remaining articles were sealed with N.C.B. seal No. 03. The forwarding letter Exh. 31 shows at Serial/Column 7 that copy of the seal used for sealing the sample was sent by P.W. 7 on 21st March, 1994. Thus the P.W. 7 who is the Investigating Officer was having possession of the seal of N.C.B. in his possession for a period of three days thus giving him a chance of tampering the seal on the sample. It is not in dispute that the signature of the accused was not obtained on the seal which would have ensured that the sample was not tampered with. Even the copy of the seizure panchanama Exh. 18 was not handed over to the accused at the time of seizure on 18th March, 1994.

18. Mr. Saldanha relies on the decisions of the Division Benches of this Court where the accused were acquitted on the ground that the seal of seizure remained with the I.O. till the same was sent for analysis. In this connection he placed heavy reliance on the recent decision of the Division Bench of this Court in the case of Wessel Van Beelan v. State of Goa, ". That was a case where Charas was seized from the possession of the accused-After the seizure the contraband and the samples were sealed on 10-5.1996 and

the sample was sent to the office of S. P. C.I.D. on 11th May, 1996. On the intervening night between 10.5.1996 and 11.5.1996 the contraband sample as well as specimen seal used for sealing remained in the custody of the search officer when seal impression and the specimen seal was required to be forwarded along with the contraband recovered which was affixed on letter dated 11.5.1996. There was no evidence that the specimen seal had been deposited by the I.O. either with Malkhana or any other officer after seal had been affixed on the contraband which was recovered. In that context, referring to the earlier judgment of this Court at Panaji Bench, it was held that the said lacuna was serious and caused doubt whether the seal cover was not tampered with before it was sent for analysis. The reference was also made to the decision of the Division Bench of this Court in the case of Andrea Siddi v. State of Goa. where it was observed that it is of utmost importance that there must be very cogent and trustworthy evidence that the contraband seized is the same which is ultimately analysed by the C.A. and found to be contraband under N.D.P.S. Act and in order to ensure the same the specimen seal assumes importance and it is given sanctity and value. It was further observed that the prosecution had to ensure that once the specimen seal which has been used for affixing the contraband and seal impression of the same was taken by the I.O., the seal should not be available with the I.O. and there should be positive evidence on record that the said specimen seal was not within the reach of the Investigating Officer after the search and seizure formalities were completed and the impression of the specimen seal was taken.

19. The observations of the Division Bench in the aforesaid Wessel's case made in para 18 of the judgment are very pertinent where it is observed that availability and accessibility of the specimen seal with the I.O. after sealing of the contraband may create doubt about tampering with the sealed contraband. It was further observed that this doubt may be further reinforced in cases where the accused refused to sign the sealed envelope containing contraband. In the instant case the accused was not even asked to sign the sealed envelope containing contraband or the sample. Even the copy of the panchanama Exh. 18 was not tendered to the accused but was for the first time given to the accused, as conceded by Mr. Thakur, in the Court. It must have been done on the demand made by the Advocate for the accused. Thus in the absence of link having been established beyond any reasonable doubt between the contraband allegedly recovered from the accused and the sample sent for chemical analysis, it cannot be said that what was recovered from the accused was brown sugar as reported by the C.A.

20. In this case admittedly the copy of the panchanama was not given to the accused after the seizure of the alleged contraband which is the requirement of Section 100(7) of the Cr.P.C. P.W. 7 the Investigating Officer Dosi has admitted in his evidence that the capsules were not taken charge of under the seizure panchanama in the presence of the accused though he was available. This clear admission is made in the deposition of P.W. 7 Vilas Dosi, the Investigating Officer. The panchanama admittedly does not bear the signature of the accused nor it is the case of the prosecution that the copy was served on

him or tendered to him and the accused refused to take the same. First there is clear violation of Section 100(7) of the Cr.P.C. The defence counsel has, therefore, rightly placed reliance on the decision of the Division Bench of this Court in the case of Shankar Banglorkar v. State of Goa,". It was a case under the N.D.P.S. Act where the allegation was that charas was recovered from the house of the accused. The copy of the panchanama of seizure was not given to the accused. The Division Bench held that the case of discovery had failed and the accused was entitled to acquit. In this case neither the copy of the panchanama nor the copy of the inventory allegedly maintained by the hospital authorities was given to the accused. This ordinary safeguard provided by sub-section 7 of Section 100 of the Cr.P.C. to ensure the fairness in the investigation was denied to the accused. Thus the prosecution is vitiated on this ground also.

21. u/s 57 of the N.D.P.S. Act whenever any arrest or seizure is made under this Act, the officer making such arrest or seizure has to make full report of all the particulars of such arrest or seizure to his immediate official superior within 48 hours next after such arrest or seizure. When P.W. 7 Investigating Officer Dosi was asked about the compliance of Section 57 of the Act, he deposed that he had prepared the information report and seizure and put up before the Assistant Director i.e. P.W. 1 Rohatgi. The said report was not produced on record and the witness stated in his deposition that the said report was not available with him at that time. Thus the prosecution has not led evidence to show that there was compliance with Section 57 of the Act. In Balbir Singh's case the Supreme Court has held that though provisions of Section 57 are by themselves not mandatory but the failure to comply with the said provisions will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case vide paragraph 26(6) of the judgment.

22. For the reasons mentioned hereinabove I hold that the prosecution has not established beyond reasonable doubt firstly that the contraband in question was recovered from the possession of the accused and secondly; the sample sent for chemical analysis was taken from the contraband allegedly recovered from the accused. As stated earlier the discrepancies pointed out earlier in the evidence led by the prosecution and non-compliance with the provisions of Section 50 and Section 57 of the Act and under sub-sections 6 and 7 of Section 100 of the Cr.P.C. strengthens the doubt in the prosecution case and vitiates the investigation. I, therefore, hold that the prosecution has not established the charge against the appellant-accused beyond reasonable doubt and the accused is entitled to benefit of doubt.

23. Mr. Thakur stated across the bar that this case along with the other eight cases were the first cases of their kind where some part, which was the main part, had to be played by the staff attached to the J. J. Hospital and the prosecuting agency seems to have left it to the in charge Doctor of the Ward in the J. J Hospital to take care of the accused from the time they were admitted in the hospital till they were discharged from there except for visiting the hospital regularly for getting information only, without associating themselves actively or participating in the procedure adopted in the hospital. In fact Mr. Thakur,

learned Advocate appearing on behalf of the Investigating Officer, Respondent No. 1 stated that the officers of the N.C.B. were not in the picture after the accused were admitted to the hospital until the capsules were handed over to them under panchanama.

24. In the result the appeal is allowed. The convictions and sentences recorded against the appellant-accused by the Special Judge, N.D.P.S., Greater Bombay in N.D.P.S. Special Case No. 93 of 1994 are hereby quashed and set aside and the appellant-accused is acquitted. The appellant shall be set at liberty forthwith in case he is not required in any other case. The amount of fine, if paid, shall be refunded to him. The passport of the appellant which is in the custody of the Trial Court shall be returned to him after a period of two weeks from today.