IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No. 220 of 2013
Reserved on: 19.11.2024
Date of Decision: 29.11.2024

State of H.P. ...Appellant.

Versus

Bablu Deen ...Respondent.

Coram

Hon'ble Mr Justice Vivek Singh Thakur, Judge.

Hon'ble Mr Justice Rakesh Kainthla, Judge.

Whether approved for reporting?[1] Yes.

For the Appellant/State : M/s J.S. Guleria and Sanjay Dutt Vasudeva, Deputy Advocates General.

For the Respondent : M/s Mohd. Aamir and Sumit Bains, Advocates.

Rakesh Kainthla, Judge

The present appeal is directed against the judgment dated 22.12.2012, passed by learned Special Judge (Fast Track Court), Chamba, District Chamba, H.P. (learned Trial Court), vide which the respondent (accused before the learned Trial Court) was acquitted of the commission of an offence punishable under Section 20 of ND&PS Act.

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[1] Whether reporters of Local Papers may be allowed to see the judgment? Yes.

2. Briefly stated, the facts giving rise to the present appeal are that ASI Avtar Singh (PW13), HC Bhagwan Chand (PW5), HC Rajinder Kumar, Constable Subhash Chand (PW11) and Constable Sanjay Kumar (PW6) left the Police Station for traffic checking in the official and private motorcycles. An entry (Ex.PW1/A) was recorded in the Police Station. The Police party was checking the vehicles near Petrol Pump, Banikhet. A motorcycle bearing registration No. HP38-1272 came from Banikhet, at about 4.30 PM. Two persons were riding the motorcycle. The police signalled the rider to stop the motorcycle for traffic checking. The pillion rider ran away. HC Rajinder Kumar and Constable Subhash Chand ran after him. The driver revealed his name as Bablu Deen. He started saying that he had nothing and he should be let off. ASI Avtar Singh (PW13) became suspicious that the accused might be carrying some contraband (charas). Hence, he directed Constable Sanjay Kumar and HC Bhagwan Chand to keep an eye on Bablu Deen. ASI Avtar Singh (PW13) called Suneel Kumar (PW4) telephonically and informed him about the circumstances leading to the apprehension of Bablu Deen. He also informed SHO and asked him to bring a video camera and still camera. Suneel Kumar (PW4) and Constable

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Rajesh Kumar (PW3) reached the spot. Rajesh Kumar (PW3) brought a video camera and a still camera. ASI Avtar Singh (PW13) told accused Bablu Deen that he had a legal right to be searched before a Magistrate or a Gazetted Officer. He consented to be searched by the Police. Consent memo (Ex.PW5/A) was prepared. Police officials gave their persnal search to accused Bablu Deen. Nothing incriminating was found in their possession. Memo (Ex.PW4/B) was prepared. Search of accused Bablu Deen was conducted and police recovered one polythene packet (Ex.P2) concealed in his socks. The police opened the packet and found that it contained cannabis (Ex.P3). The police checked the cannabis by smelling and burning it and confirmed it to be charas. A memo of identification (Ex.PW5/C) was prepared. ASI Avtar Singh (PW13) weighed the charas and found its weight to be 400 grams. The charas was put in the polythene packet in the same manner in which it was recovered. Polythene packet was put in a cloth parcel and the parcel was sealed with three seal impressions of seal 'A'. The specimen seal (Ex.PW5/B) was taken on a separate piece of cloth. The NCB-1 Form (Ex.PW13/A) was filled in triplicate. The seal impression was put on the NCB-1 form and the seal was handed over to HC Bhagwan Chand (PW5)

after its use. Charas was seized vide memo (Ex.PW4/C). Constable Rajesh Kumar (PW3) took the photographs (Ex.PW3/A1 to Ex.PW3/A17). He also video-recorded the proceedings and the video recording was transferred to the CD (Ex.PW3/B). ASI Avtar Singh (PW13) prepared a rukka (Ex.PW12/A) and handed it over to Constable Sanjay Kumar with a direction to carry it to the Police Station. Constable Sanjay Kumar carried the rukka to the Police Station and handed it over to Inspector/SHO Govind Ram (PW12). FIR (Ex.PW12/C) was registered in the Police Station. ASI Avtar Singh (PW13) conducted the investigation. He prepared the site plan (Ex.PW13/B) and arrested the accused vide memo (Ex.PW5/E). He produced the case property and the accused before Inspector/SHO Govind Ram (PW12). He (PW12) resealed the parcel with two impressions of seal 'T'. He filled the relevant columns of the NCB-1 Form and put the seal impression on the form. He prepared a resealing memo (Ex.PW8/A), and obtained sample seal 'T' (Ex.PW8/B) on a separate piece of cloth. A seal impression was also taken on the NCB-1 Form and the seal was handed over to Constable Vinod Kumar (PW8) after its use. Inspector/SHO Govind Ram (PW12) handed over the case property and the documents to HC Arun Kumar (PW9) who made

an entry in the Malkhana register (Ex.PW9/A) and deposited the case property in the Malkhana. HC Arun Kumar (PW9) handed over the parcel (Ex.P1), specimen seal impressions, NCB-1 form and documents to HHC Yugal Kishore with a direction to carry them to FSL, Junga vide RC No. 19/12. HHC Yugal Kishore deposited all the articles in FSL, Junga and handed over a receipt to MHC on his return. A special report (Ex.PW11/A) was prepared and handed over to the Superintendent of Police, Chamba, who made an endorsement on the special report and handed it over to HC Subhash Chand (PW11). The result of analysis (Ex. PX) was issued in which it was shown that the exhibit was an extract of cannabis and a sample of charas. Statements of remaining witnesses were recorded as per their version and after completion of the investigation, a challan was prepared and presented before learned Special Judge, Chamba.

3. The learned Trial Court charged the accused with the commission of an offence punishable under Section 20 of the ND&PS Act, to which the accused pleaded not guilty and claimed to be tried.

4. The prosecution examined 13 witnesses to prove its case. LC Kusum Lata (PW1) and LC Sulekha Kumari (PW2) proved

the entries in the daily diary. Constable Rajesh Kumar (PW3) took the photographs. Suneel Kumar (PW4) is an independent witness, who has not supported the prosecution case. HC Bhagwan Chand (PW5) is the official witness to the recovery. Constable Sanjay Kumar (PW6) carried the rukka to Police Station. ASI Ami Chand (PW7) transferred the video recording to the CD. Constable Vinod Kumar (PW8) is the witness to resealing, to whom the seal was handed over by SHO Govind Ram. HC Arun Kumar (PW9) was working as MHC, with whom the case property was deposited. Constable Yugal Kishore (PW10) carried case property to FSL, Junga. HC Subhash Chand (PW11) is the Reader to the Superintendent of Police, Chamba, to whom the special report was handed over. Inspector Govind Ram (PW12) resealed the case property. ASI Avtar Singh (PW13) effected the recovery and conducted an initial investigation.

5. The accused in his statement recorded under Section 313 of Cr.P.C. denied the prosecution case in its entirety. He stated that witnesses testified against him falsely. He is innocent and was falsely implicated. No defence was sought to be adduced by the accused.

6. Learned Trial Court held that the report of analysis is not as per the judgment of this Court in ***Sunil vs. State (2010) 1 Shim. L.C. 192***. Hence, the prosecution case, even if accepted to be correct, does not lead to an inference that the accused was found in possession of charas.

7. Being aggrieved from the judgment passed by the learned Trial Court, the State has filed the present appeal asserting that the learned Trial Court erred in acquitting the accused. Learned Trial Court appreciated the evidence in a perfunctory and slipshod manner. Learned Trial Court set up unrealistic standards to evaluate the prosecution evidence. The reasoning of the learned Trial Court is manifestly unreasonable and the learned Trial Court should not have discarded the testimonies of the official witnesses without any cogent reasons. Learned Trial Court discarded the prosecution case without assigning any reason. It was duly proved by the prosecution evidence that the accused was found in possession of a carry bag containing the charas. Learned Trial Court only relied upon the report of the analysis to acquit the accused and did not even discuss the evidence of the prosecution. Being a fact-finding Court, learned Trial Court was supposed to appreciate the

evidence and record findings regarding the facts; however, learned Trial Court failed to do so. The reports specifically mentioned that charas was a resinous mass. The quantity of resin was found to be 31.60% w/w in it. It was wrongly held that the prosecution case did not prove that the accused was transporting the charas. Therefore, it was prayed that the present appeal be allowed and the judgment passed by the learned Trial Court be set aside.

8. The Division Bench of this Court dismissed the appeal on 8.7.2013 after relying upon the judgment of ***Sunil*** (supra) and other judgments. The State carried the matter in an appeal. The appeal was accepted by the Hon'ble Supreme Court of India and it was held that the judgment of ***Sunil Kumar*** (supra) was overruled by the judgment in ***Hira Singh Vs. Union of India (2020) SCC Online SC 382***. Since this Court had also relied upon the judgment of ***Sunil Kumar*** (supra) while deciding the earlier matter; therefore, the matter was remitted to this Court for a fresh decision.

9. We have heard M/s J.S. Guleria and Sanjay Dutt Vasudeva, learned Deputy Advocates General for the appellant-State and M/s Mohd. Aamir and Sumit Bains, Advocates, for the respondent/accused.

10. Mr J.S. Guleria, learned Deputy Advocate General, for the appellant-State submitted that the learned Trial Court had exclusively relied upon the judgment of ***Sunil Kumar*** (supra) which judgment has been overruled by the judgment of Hon'ble Supreme Court in ***Hira Singh*** (supra). The prosecution case was proved beyond reasonable doubt and learned Trial Court erred in acquitting the accused. Therefore, he prayed that the present appeal be allowed and the judgment passed by the learned Trial Court be set aside.

11. Mr. Mohd. Aamir, learned counsel for the respondent/accused submitted that there are various contradictions in the testimonies of the prosecution case. Independent witness did not support the prosecution case and he was declared hostile. There is no corroboration to the testimonies of the police officials. Even Constable Sanjay Kumar (PW6), who carried the rukka and Constable Rajesh Kumar (PW4), who took photographs have not deposed anything about the recovery. There are major contradictions in the testimonies of police officials, which would make them unreliable. Learned Trial Court had rightly acquitted the accused and this Court

should not interfere with the judgment of the learned Trial Court, even if the alternative view is possible.

12. We have given considerable thought to the submissions made at the bar and have gone through the records carefully.

13. The present appeal has been filed against a judgment of acquittal. It was laid down by the Hon'ble Supreme Court in ***Mallappa v. State of Karnataka, (2024) 3 SCC 544: 2024 SCC OnLine SC 130*** that while deciding an appeal against acquittal, the High Court should see whether the evidence was properly appreciated on record or not; second whether the finding of the Court is illegal or affected by the error of law or fact and thirdly; whether the view taken by the Trial Court was a possible view, which could have been taken based on the material on record. The Court will not lightly interfere with the judgment of acquittal. It was observed:

> "**25.** We may first discuss the position of law regarding the scope of intervention in a criminal appeal. For, that is the foundation of this challenge. It is the cardinal principle of criminal jurisprudence that there is a presumption of innocence in favour of the accused unless proven guilty. The presumption continues at all stages of the trial and finally culminates into a fact when the case ends in acquittal. The presumption of innocence gets concretised when the case ends in acquittal. It is so because once the

trial court, on appreciation of the evidence on record, finds that the accused was not guilty, the presumption gets strengthened and a higher threshold is expected to rebut the same in appeal.

26. No doubt, an order of acquittal is open to appeal and there is no quarrel about that. It is also beyond doubt that in the exercise of appellate powers, there is no inhibition on the High Court to reappreciate or re-visit the evidence on record. However, the power of the High Court to reappreciate the evidence is a qualified power, especially when the order under challenge is of acquittal. The first and foremost question to be asked is whether the trial court thoroughly appreciated the evidence on record and gave due consideration to all material pieces of evidence. The second point for consideration is whether the finding of the trial court is illegal or affected by an error of law or fact. If not, the third consideration is whether the view taken by the trial court is a fairly possible view. A decision of acquittal is not meant to be reversed on a mere difference of opinion. What is required is an illegality or perversity.

27. It may be noted that the possibility of two views in a criminal case is not an extraordinary phenomenon. The "*two-views theory*" has been judicially recognised by the courts and it comes into play when the appreciation of evidence results in two equally plausible views. However, the controversy is to be resolved in favour of the accused. For, the very existence of an equally plausible view in favour of the innocence of the accused is in itself a reasonable doubt in the case of the prosecution. Moreover, it reinforces the presumption of innocence. Therefore, when two views are possible, following the one in favour of the innocence of the accused is the safest course of action. Furthermore, it is also settled that if the view of the trial court, in a case of acquittal, is a plausible view, it is not open for the High Court to convict the accused by reappreciating the evidence. If such a course is permissible, it would make it practically impossible to settle the rights and liabilities in the eye of the law.

28. In ***Selvaraj* v. *State of Karnataka*** **[*Selvaraj* v. *State of Karnataka*, *(2015) 10 SCC 230: (2016) 1 SCC (Cri) 19]***: (SCC pp. 236-37, para 13)

> "*13.* Considering the reasons given by the trial court and on an appraisal of the evidence, in our considered view, the view taken by the trial court was a possible one. Thus, the High Court should not have interfered with the judgment of acquittal. This Court in ***Jagan M. Seshadri v. State of T.N. [Jagan M. Seshadri v. State of T.N., (2002) 9 SCC 639: 2003 SCC (L&S) 1494]*** has laid down that as the appreciation of evidence made by the trial court while recording the acquittal is a reasonable view, it is not permissible to interfere in appeal. The duty of the High Court while reversing the acquittal has been dealt with by this Court, thus: (SCC p. 643, para 9)
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> > '*9.* ... We are constrained to observe that the High Court was dealing with an appeal against acquittal. It was required to deal with various grounds on which acquittal had been based and to dispel those grounds. It has not done so. Salutary principles while dealing with appeal against acquittal have been overlooked by the High Court. If the appreciation of evidence by the trial court did not suffer from any flaw, as indeed none has been pointed out in the impugned judgment, the order of acquittal could not have been set aside. The view taken by the learned trial court was a reasonable view and even if by any stretch of imagination, it could be said that another view was possible, that was not a ground sound enough to set aside an order of acquittal.'"

29. In ***Sanjeev v. State of H.P. [Sanjeev v. State of H.P., (2022) 6 SCC 294: (2022) 2 SCC (Cri) 522]***, the Hon'ble Supreme Court analysed the relevant decisions and summarised the approach of the appellate court while deciding an appeal from the order of acquittal. It observed thus: (SCC p. 297, para 7)

> "*7.* It is well settled that:

> 7.1. While dealing with an appeal against acquittal, the reasons which had weighed with the trial court in acquitting the accused must be dealt with, in case the appellate court is of the view that the acquittal rendered by the trial court deserves to be upturned (see ***Vijay Mohan Singh v. State of Karnataka [Vijay Mohan Singh v. State of Karnataka, (2019) 5 SCC 436 : (2019) 2 SCC (Cri) 586***] and ***Anwar Ali v. State of H.P. [Anwar Ali v. State of H.P., (2020) 10 SCC 166 : (2021) 1 SCC (Cri) 395]***).
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> 7.2. With an order of acquittal by the trial court, the normal presumption of innocence in a criminal matter gets reinforced (see ***Atley v. State of U.P. [Atley v. State of U.P., 1955 SCC OnLine SC 51: AIR 1955 SC 807]***).
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> 7.3. If two views are possible from the evidence on record, the appellate court must be extremely slow in interfering with the appeal against acquittal (see ***Sambasivan v. State of Kerala [Sambasivan v. State of Kerala, (1998) 5 SCC 412: 1998 SCC (Cri) 1320]***)."

14. The present appeal has to be decided as per the parameters laid down by the Hon'ble Supreme Court.

15. Sanjay Kumar (PW4) was associated as an independent person. He did not support the prosecution case. He stated that he was called by the police near the Petrol Pump at Banikhet where the police was checking the vehicles. Photographs were shown to him but he did not know whether the person present in the Court was the same, who was shown in the photograph. He was permitted to be cross-examined. He denied

that police had intercepted a motorcycle. He denied that police had given an option to the accused to be searched before the Magistrate or a Gazetted Officer. He denied that the accused denied to be consented to be searched by the police. He denied that he gave his search and nothing incriminating was found in his possession. He denied that the search of the accused was conducted during which the 400 grams of cannabis was recovered. He denied his previous statement recorded by the police.

16. This witness has contradicted his previous statement recorded by the police. He specifically denied that any recovery was effected in his presence; therefore, no advantage can be derived from his testimony by the prosecution.

17. As per the prosecution, Constable Sanjay Kumar (PW6) was also present with the police party and he had carried the rukka to the Police Station; however, he has not deposed anything about the interception of the motorcycle, giving of option, a search of the police official, search of the accused and recovery of contraband. Similarly, Constable Rajesh Kumar (PW3) took photographs and was present throughout the proceedings. He has also not deposed anything about the option

having been given to the accused, a search of the police officials, a search of the accused and recovery of the contraband. It was submitted that the fact that these witnesses even though present, as per the prosecution, have not deposed anything about the various steps of the investigation and recovery. This would make the prosecution case doubtful. This submission is not acceptable. A similar situation arose before this Court in ***Chet Ram Vs. State of H.P., Cr. Appeal No. 151 of 2006, decided on 25.7.2007*** and it was held that where the police official had participated in more than one proceeding during the investigation and they deposed about only one proceeding it cannot be inferred that other proceedings had not taken place in his presence. It was observed:-

> "21. It was argued that even though according to the testimony of PW-6 LHC Narpat Ram and PW-8 HC Ram Lal, Constable Dhan Dev (PW7) was with them when the appellant was intercepted and Charas was recovered from his bag, but he did not make even a whisper of his being present on the spot and witnessing the search and recovery of Charas. It was argued that his silence was enough to hold that he was not there and hence, the testimony of PW-8 HC Ram Lal and PW-6 LHC Narpat Ram that recovery was effected in Dhan Dev's presence cannot be believed and consequently, their entire version regarding search and seizure becomes unbelievable.
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> 22. PW-7 Dhan Dev was examined by the prosecution to prove another fact, viz. he carried one of the two sample parcels from Malkhana to the laboratory of Chemical

> Examiner. So, he confined his statement only to this fact. It was known to the defence side that PW-7 Dhan Dev was cited as a witness of search and recovery because copies of the challan and other papers filed therewith had been supplied to the appellant before the start of the trial. Memo. Ext.PW6/C not only records that Dhan Dev was one of the two witnesses of the search and seizure, but it also bears his signature as one of the witnesses. Now when it was known to the defence that Dhan Dev was a witness of search and seizure and the prosecution examined him to prove some other fact and not the fact of search and seizure, because one witness, namely PW-6 LHC Narpat Ram had already been examined and Investigating Officer PW-8 HC Ram Lal was also going to be examined to prove the fact, defence could have cross-examined PW-7 Dhan Dev with regard to the search and recovery. No suggestion was put either to PW-6 LHC Narpat Ram or PW-8 HC Ram Lal that Dhan Dev (PW7) was not on the spot nor was any such suggestion put even to PW-7 Dhan Dev, in the cross-examination.
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> 23. In view of the above-stated position, no inference or presumption is required to be drawn against the prosecution for PW-7 Constable Dhan Dev not testifying about the search and seizure, even though he was a witness thereto and had even signed the search and seizure memo. as a witness."

18. Thus, in view of this precedent, the prosecution is free to examine the witness regarding one fact, even if he is a witness for more than one fact and the prosecution case cannot be doubted simply because he has not deposed about the other fact; however, it has to be taken into consideration that the prosecution had not sought corroboration of the testimonies of

ASI Avtar Singh (PW13) and HC Bhagwan Chand (PW5) from them.

19. It was specifically mentioned in the rukka that when the motorcycle was stopped, the pillion rider ran away from the spot and Constable Rajesh Kumar and Constable Subhash Chand ran after him. It was also mentioned that accused Bablu Deen remained present on the spot and he revealed his name as Bablu Deen on inquiry, however, ASI Avtar Singh stated in his examination in chief that the pillion rider/accused, who was present in the Court, started walking briskly towards Nanikhad, he and other police officials ran away after the accused and nabbed him after 10-15 mtrs. away from the spot. The accused revealed his name as Bablu Deen. He stated in his cross-examination that the accused had run away for about half a kilometre and he was on foot. This makes the prosecution case highly suspect because it substitutes the person who was apprehended on the spot and from whom the recovery was effected.

20. It was specifically mentioned in the rukka (Ex.PW12/A), the seizure memo (Ex.PW4/C) and the statement on oath that a polythene packet was found in the socks. It was laid

down by the Hon'ble Supreme Court in ***State of H.P Versus Pawan Kumar (2005) 4 SCC 350***, that the word person includes the body of a human being as presented to public view usually with its appropriate coverings and clothing. It was observed:-

> "10. We are not concerned here with the wide definition of the word "person", which in the legal world includes corporations, associations or bodies of individuals as factually in these types of cases search of their premises can be done and not of their person. Having regard to the scheme of the Act and the context in which it has been used in the section it naturally means a human being or a living individual unit and not an artificial person. The word has to be understood in a broad common-sense manner and, therefore, not the naked or nude body of a human being but the manner in which a normal human being will move about in a civilised society. Therefore, the most appropriate meaning of the word "person" appears to be - "the body of a human being as presented to public view usually with its appropriate coverings and clothing". In a civilised society appropriate coverings and clothing are considered absolutely essential and no sane human being comes into the gaze of others without appropriate coverings and clothing. The appropriate coverings will include footwear also as normally it is considered an essential article to be worn while moving outside one's home. Such appropriate coverings or clothing or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. For interpreting the provision, rare cases of some religious monks and sages, who, according to the tenets of their religious belief do not cover their body with clothing, are not to be taken notice of. Therefore, the word "person" would mean a human being with appropriate coverings and clothing and also footwear.

21. In the present case, the charas was recovered from the socks which are part of the clothing covering the body; thus, the recovery was effected from the person of the accused.

22. Section 50 of the ND&PS Act deals with the search of the person. It reads as under: -

> "**50. Conditions under which search of persons shall be conducted.**
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> (1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 42 or Section 43, he shall, if such person as requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.
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> (2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).
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> (3) The Gazetted Officer or the Magistrate before whom any such person is brought shall if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.
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> (4) No female shall be searched by anyone except a female.
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> (5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974)
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> (6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which

> necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

23. Thus, the police were to search the accused as per Section 50 of the NDPS Act and had to inform the accused of his right to be searched before the Magistrate or Gazetted Officer.

24. ASI Avtar Singh (PW13) informed the accused that he had a right to be searched before the Magistrate or the Gazetted Officer. He prepared a consent memo (Ex.PW5/A) in which the accused wrote that he wanted to give his search to the police. ASI Avtar Singh (PW13) or HC Bhagwan Singh (PW5) have nowhere stated that as to how the accused could have opted to be searched by the police when he was told of his right to be searched before a Magistrate or the Gazetted Officer. Any reasonable person provided with an option to be searched before a Magistrate or a Gazetted Officer will choose either and cannot choose an option to be searched by the police unless such an option was given to him. The fact that the accused opted to be searched by the police can only lead to an inference that an option to be searched before the police was also given to him and that is why the accused had opted to be searched before the police. In the absence of any explanation from the official witnesses, this is the only inference, which can be drawn in the circumstances of the case. It was laid down by the

Hon'ble Supreme Court in ***State of Rajasthan Vs. Parmanand & another (2014) 5 SCC 345,*** that section 50 only provides an option to be searched before a Magistrate or a Gazetted Officer and it does not provide for a third option to be searched before the police. It was observed:

> "19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate, before the nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to the nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such an option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated."

25. The law regarding the third option given to the accused was exhaustively considered by this Court in ***Pradeep***

Singh alias Rocky vs. State of Himachal Pradesh, 2020(1) Him. L.R. 133 and it was held that giving the third option to the accused is fatal. It was observed:

> "3(iii)(c). Under the provisions of Section 50 of the Act, the accused has to be informed about his legal rights regarding search before a Magistrate or Gazetted Officer.
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> 3(iii)(d). In the instant case, the consent memo (Ext.PW-1/A), obtained from the accused, shows that in addition to the two statutory options of search before the Magistrate or the Gazetted Officer", a 3rd option was also given to the accused for getting himself searched before any other police officer. It is in such circumstance that the accused gave his search to the police party. Giving 3rd option to the accused was clearly contrary to the mandatory provisions of Section 50 of the Act. In the case titled ***State of Rajasthan versus Parmanand and Another, (2014) 5 SCC 345***, it has been held by the Hon'ble Apex Court that such a 3rd option could not be given when there was no provision under Section 50(1) of the Act. Relevant para of the said judgment is reproduced as under: -
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> > "19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before the nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to the nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be

searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such an option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated."

Relying upon the above judgment, in titled ***SK. Raju alias Abdul Haque alias Jagga versus State of West Bengal, (2018) 9 SCC 708*** Hon'ble Apex Court further observed thus: -

"18. In Parmanand, on a search of the person of the respondent, no substance was found. However, subsequently, opium was recovered from the bag of the respondent. A two-judge Bench of this Court considered whether compliance with Section 50(1) was required. This Court held that the empowered officer was required to comply with the requirements of Section 50(1) as the person of the respondent was also searched. [Reference may also be made to the decision of a two-judge Bench of this Court in ***Dilip v State of M.P.***] It was held thus: (***Parmanand***, SCC p.351, para 15).

> "15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have an application.

19. Moreover, in the above case, the empowered officer at the time of conducting the search informed the respondent that he could be searched before the nearest Magistrate before the nearest

gazetted officer or before the Superintendent, who was also a part of the raiding party. The Court held that the search of the respondent was not in consonance with the requirements of Section 50(1) as the empowered officer erred in giving the respondent an option of being searched before the Superintendent, who was not an independent officer."

Effect of giving the 3rd option:

3(iii)(e). The effect of illegality committed during the course of the search of the accused has been considered by the Hon'ble Apex Court in titled ***State of H.P. versus Pawan Kumar, (2005) 4 SCC 350*** wherein, after considering various judgements on the question, it was observed thus:-

"26. The Constitution Bench decision in ***Pooran Mal v. The Director of Inspection, (1974) 1 SCC 345*** was considered in State of Punjab v. Baldev Singh and having regard to the scheme of the Act and especially the provisions of Section 50 thereof, it was held that it was not possible to hold that the judgment in the said case can be said to have laid down that the "recovered illicit article" can be used as "proof of unlawful possession" of the contraband seized from the suspect as a result of illegal search and seizure. Otherwise, there would be no distinction between recovery of illicit drugs, etc. seized during a search conducted after following the provisions of Section 50 of the Act and a seizure made during a search conducted in breach of the provisions of Section 50. Having regard to the scheme and the language used, a very strict view of Section 50 of the Act was taken and it was held that failure to inform the person concerned of his right as emanating from sub-Section (1) of Section 50 may render the recovery of the contraband suspect and sentence of an accused bad and unsustainable in law. As a corollary, there is no warrant or justification for giving an extended meaning to the

word "person" occurring in the same provision so as to include even some bag, article or container or some other baggage being carried by him."

In a case titled ***State of H.P. versus Rakesh 2018 LHLJ 214 (HP)***, this Court observed as under: -

"18. .....

Now, in view of the above, this Court has to examine whether the provisions of Section 50 of the NDPS Act are applicable to the present case and if applicable, then whether those have been breached or not. Admittedly, as per the version of PW-3, HC Chaman Lal, he has conducted the personal search of both the accused persons and also prepared search memos, Ex. PW-3/P and Ex. PW-3/Q. If only the bag of the accused persons would have been searched, then Section 50 of the NDPS Act has no application, but as the personal search of the accused persons was also conducted, certainly Section 50 of the NDPS Act is applicable. In fact, Section 50 of the NDPS Act has a purpose and communication of the said right, which is ingrained in Section 50, to the person who is about to be searched is not an empty formality. Offences under the NDPS Act carry severe punishment, so the mandatory procedure, as laid down under the Act, has to be followed meticulously. Section 50 of the Act is just a safeguard available to an accused against the possibility of false involvement. Thus, communication of this right to the accused has to be clear, unambiguous and to the individual concerned. The purpose of this Section is to make aware the accused of his right and the whole purpose behind creating this right is effaced if the accused is not able to exercise the same for want of knowledge about its existence. This right cannot be ignored, as the same is of utmost importance to the accused. In the present case, certainly, the provisions of Section 50 of the NDPS Act have not been complied with,

> therefore, the judgment (supra) is fully applicable to the facts of the present case.

19. In ***State of Himachal Pradesh vs. Desh Raj & another,2016 Supp HimLR 3088 (DB)***, this Court has relied upon the law laid down in Parmanand's case (supra). Relevant paras of the judgment of this Court are extracted hereunder:

> "18. Their Lordships of the Hon'ble Supreme Court in ***State of Rajasthan v. Parmanand, (2014) 5 SCC 345***, have held that there is a need for individual communication to each accused and individual consent by each accused under Section 50 of the Act. Their lordships have also held that Section 50 does not provide for the third option. Their lordships have also held that if a bag carried by the accused is searched and his personal search is also started, Section 50 would be applicable. ....."

Again, in the present set of facts and circumstances, the judgment (supra) is fully applicable to the present case, as the right provided under Section 50 of the NDPS Act in no way can be diluted and its compliance is mandatory in nature."

> Therefore, the combined effect of the law laid down by the Hon'ble Apex Court, as applied to the facts of the case in hand, is that non-compliance to the mandatory provisions of Section 50 of the Act has vitiated the proceedings related to search and recovery. Point is, therefore, answered in favour of appellant."

26. This position was reiterated in ***Dayalu Kashyap v. State of Chhattisgarh, (2022) 12 SCC 398: 2022 SCC OnLine SC 334*** wherein it was observed at page 400:

> **4.** The learned counsel submits that the option given to the appellant to take a third choice other than what is prescribed as the two choices under sub-section (1) of Section 50 of the Act is something which goes contrary to

> the mandate of the law and in a way affects the protection provided by the said section to the accused. To support his contention, he has relied upon the judgment of ***State of Rajasthan v. Parmanand [State of Rajasthan v. Parmanand, (2014) 5 SCC 345 : (2014) 2 SCC (Cri) 563]***, more specifically, SCC para 19. The judgment in turn, relied upon a Constitution Bench judgment of this Court in ***State of Punjab v. Baldev Singh [State of Punjab v. Baldev Singh, (1999) 6 SCC 172: 1999 SCC (Cri) 1080]*** to conclude that if a search is made by an empowered officer on prior information without informing the person of his right that he has to be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to take his search accordingly would render the recovery of the illicit article suspicious and vitiate the conviction and sentence of the accused where the conviction has been recorded only on the basis of possession of illicit articles recovered from his person. The third option stated to be given to the accused to get himself searched from the Officer concerned not being part of the statute, the same could not have been offered to the appellant and thus, the recovery from him is vitiated.

27. A similar view was taken in ***Ranjan Kumar Chadha v. State of H.P., 2023 SCC OnLine SC 1262: AIR 2023 SC 5164*** wherein it was observed:

> **27.** We have no hesitation in recording a finding that Section 50 of the NDPS Act was not complied with as the appellant could not have been offered the third option of search to be conducted before the ASI. Section 50 of the NDPS Act only talks about a Gazetted Officer or Magistrate. What is the legal effect if an accused of the offence under the NDPS Act is being told, whether he would like to be searched before a police officer or a Gazetted Officer or Magistrate?
>
> **28.** This Court in ***State of Rajasthan v. Parmanand, (2014) 5 SCC 345***, held that it is improper for a police officer to tell

> the accused that a third alternative is also available i.e. the search before any independent police officer. This Court also took the view that a joint communication of the right available under Section 50 of the NDPS Act to the accused would frustrate the very purport of Section 50.....
>
> 29. Thus, from the oral evidence on the record as discussed above it is evident that Section 50 of the NDPS Act stood violated for giving a third option of being searched before a police officer."

28. It was further held in ***Ranjan Kumar Chadha*** (supra) that the investigating officer should give an option to the accused to be searched before the magistrate or the gazetted officer, the accused can decline to avail of such option and the investigating officer can carry out the search himself. It was observed:

> "**62.** Section 50 of the NDPS Act only goes so far as to prescribe an obligation to the police officer to inform the suspect of his right to have his search conducted either in the presence of a Gazetted Officer or Magistrate. Whether or not the search should be conducted in the presence of a Gazetted Officer or Magistrate ultimately depends on the exercise of such right as provided under Section 50. *In the event the suspect declines this right, there is no further obligation to have his search conducted in the presence of a Gazetted Officer or Magistrate, and in such a situation the empowered police officer can proceed to conduct the search of the person himself.* To read Section 50 otherwise would render the very purpose of informing the suspect of his right a redundant exercise. We are of the view that the decision of this Court in ***Arif Khan*** (supra) cannot be said to be an authority for the proposition that notwithstanding the person proposed to be searched has, after being duly apprised of his right to be searched before a Gazetted Officer or Magistrate, but has expressly waived this right in clear and unequivocal terms; it is still mandatory that

his search be conducted only before a Gazetted Officer or Magistrate.

63. A plain reading of the extracted paragraphs of ***Arif Khan*** (supra) referred to above would indicate that this Court while following the ratio of the decision of the Constitution Bench in ***Vijaysinh Chandubha Jadeja*** (supra) held that the same has settled the position of law in this behalf to the effect that, whilst it is imperative on the part of the empowered officer to apprise the person of his right to be searched only before a Gazetted Officer or Magistrate; and this requires strict compliance; this Court simultaneously proceeded to reiterate that in ***Vijaysinh Chandubha Jadeja*** (supra) "*it is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act".*

64. There is no requirement to conduct the search of the person, suspected to be in possession of a narcotic drug or a psychotropic substance, only in the presence of a Gazetted Officer or Magistrate, if the person proposed to be searched, after being apprised by the empowered officer of his right under Section 50 of the NDPS Act to be searched before a Gazetted Officer or Magistrate categorically waives such right by electing to be searched by the empowered officer. The words "if such person so requires", as used in Section 50(1) of the NDPS Act would be rendered otiose, if the person proposed to be searched would still be required to be searched only before a Gazetted Officer or Magistrate, despite having expressly waived "such requisition", as mentioned in the opening sentence of sub-Section (2) of Section 50 of the NDPS Act. In other words, the person to be searched is mandatorily required to be taken by the empowered officer, for the conduct of the proposed search before a Gazetted Officer or Magistrate, only "***if he so requires***", upon being informed of the existence of his right to be searched before a Gazetted Officer or Magistrate and not if he waives his right to be so searched voluntarily, and chooses not to exercise the right provided to him under Section 50 of the NDPS Act.

65. However, we propose to put an end to all speculations and debate on this issue of the suspect being apprised by the empowered officer of his right under Section 50 of the NDPS Act to be searched before a Gazetted Officer or Magistrate. We are of the view that even in cases wherein the suspect waives such right by electing to be searched by the empowered officer, such waiver on the part of the suspect should be reduced into writing by the empowered officer. To put it in other words, even if the suspect says that he would not like to be searched before a Gazetted Officer or Magistrate and he would be fine if his search is undertaken by the empowered officer, the matter should not rest with just an oral statement of the suspect. The suspect should be asked to give it in writing duly signed by him in presence of the empowered officer as well as the other officials of the squad that "*I was apprised of my right to be searched before a Gazetted Officer or Magistrate in accordance with Section 50 of the NDPS Act, however, I declare on my own free will and volition that I would not like to exercise my right of being searched before a Gazetted Officer or Magistrate and I may be searched by the empowered officer*." This would lend more credence to the compliance of Section 50 of the NDPS Act. In other words, it would impart authenticity, transparency and creditworthiness to the entire proceedings. We clarify that this compliance shall henceforth apply prospectively.

66. From the aforesaid discussion, the requirements envisaged by Section 50 can be summarised as follows:—

(i) Section 50 provides both a right as well as an obligation. The person about to be searched has the right to have his search conducted in the presence of a Gazetted Officer or Magistrate if he so desires, and it is the obligation of the police officer to inform such person of this right before proceeding to search the person of the suspect.

(ii) Where the person to be searched declines to exercise this right, the police officer shall be free to proceed with the search. However, if the suspect declines to exercise his right of being searched

before a Gazetted Officer or Magistrate, the empowered officer should take it in writing from the suspect that he would not like to exercise his right of being searched before a Gazetted Officer or Magistrate and he may be searched by the empowered officer.

(iii) Before conducting a search, it must be communicated in clear terms though it need not be in writing and is permissible to convey orally, that the suspect has a right of being searched by a Gazetted Officer or Magistrate.

(iv) While informing the right, only two options of either being searched in the presence of a Gazetted Officer or Magistrate must be given, who also must be independent and in no way connected to the raiding party.

(v) In case of multiple persons to be searched, each of them has to be individually communicated of their rights, and each must exercise or waive the same in their own capacity. Any joint or common communication of this right would be in violation of Section 50.

(vi) Where the right under Section 50 has been exercised, it is the choice of the police officer to decide whether to take the suspect before a Gazetted Officer or Magistrate but an endeavour should be made to take him before the nearest Magistrate.

(vii) Section 50 is applicable only in case of search of person of the suspect under the provisions of the NDPS Act, and would have no application where a search was conducted under any other statute in respect of any offence.

(viii) Where during a search under any statute other than the NDPS Act, a contraband under the NDPS Act also happens to be recovered, the provisions relating to the NDPS Act shall forthwith start applying, although in such a situation Section 50

> may not be required to be complied for the reason that search had already been conducted.
>
> (ix) The burden is on the prosecution to establish that the obligation imposed by Section 50 was duly complied with before the search was conducted.
>
> (x) Any incriminating contraband, possession of which is punishable under the NDPS Act and recovered in violation of Section 50 would be inadmissible and cannot be relied upon in the trial by the prosecution, however, it will not vitiate the trial in respect of the same. Any other article that has been recovered may be relied upon in any other independent proceedings.

29. In the present case, the memo (Ex.PW5/A) contains the writing of the accused that he wanted to be searched by the police. This writing does not mention that the accused after having been apprised of the right to be searched before the Magistrate or Gazetted Officer had elected to waive the right. Hence, the submission that the police had not complied with the provisions of Section 50 of the NDPS Act has to be accepted as correct.

30. It was laid down by the Hon'ble Supreme Court in ***Vijaysinh Chandubha Jadeja vs. State of Gujarat (2011) 1 SCC 609***, that violation of Section 50 of NDPS Act is fatal and the police cannot rely upon the recovery effected in violation of Section 50 of NDPS Act. It was observed:–

> "29. ..... We have no hesitation to hold that in so far as the

obligation of the authorized officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of illicit articles suspect and vitiate the conviction if the same is recorded only on the basis of recovery of an illicit article from the person of the accused during such search."

31. This position was reiterated in ***Arif Khan @ Agha Khan versus State of Uttarakhand AIR 2018 SC 2123***, wherein it was observed:-

"28. First, it is an admitted fact emerging from the record of the case that the appellant was not produced before any Magistrate or Gazetted Officer; Second, it is also an admitted fact that due to the aforementioned first reason, the search and recovery of the contraband "Charas" was not made from the appellant in the presence of any Magistrate or Gazetted Officer; Third, it is also an admitted fact that none of the police officials of the raiding party, who recovered the contraband "Charas" from him, was the Gazetted Officer and nor they could be and, therefore, they were not empowered to make search and recovery from the appellant of the contraband "Charas" as provided under Section 50 of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer; Fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the appellant in the presence of a Magistrate or a Gazetted Officer.

29. Though the prosecution examined as many as five police officials (PW-1 to PW-5) of the raiding police party none of them deposed that the search/recovery was made in the presence of any Magistrate or a Gazetted Officer.

30. For the aforementioned reasons, we are of the

> considered opinion that the prosecution was not able to prove that the search and recovery of the contraband (Charas) made from the appellant was in accordance with the procedure prescribed under Section 50 of the NDPS Act. Since the non-compliance of the mandatory procedure prescribed under Section 50 of the NDPS Act is fatal to the prosecution case and, in this case, we have found that the prosecution has failed to prove compliance as required in law, the appellant is entitled to claim its benefit to seek his acquittal."

32. The consent memo (Ex.PW5/A) and rukka (Ex.PW12/A) mention that ASI Avtar Singh suspected that the accused might be in possession of narcotics (charas). There is no evidence on the record as to how ASI Avtar Singh (PW13) could have known before searching the accused that the accused was carrying charas. This shows that either ASI had prior information regarding the transportation of charas or he prepared the consent memo after searching the accused. Both of these possibilities is fatal to the prosecution case because if ASI Avtar Singh had prior information regarding the transportation of charas, he was required to comply with the requirements of Section 42 of the ND&PS Act since the search of a private vehicle was conducted at a public place. It was laid down by the Hon'ble Supreme Court in ***Boota Singh v. State of Haryana, (2021) 19 SCC 606: 2021 SCC OnLine SC 324*** that where the search of a private vehicle was conducted at a public place, it is necessary to comply

with the requirements of Section 42 of NDPS Act. It was observed at page 612:

> "**14.** The evidence in the present case clearly shows that the vehicle was not a public conveyance but was a vehicle belonging to accused Gurdeep Singh. The registration certificate of the vehicle, which has been placed on record also does not indicate it to be a public transport vehicle. The *Explanation* to Section 43 shows that a private vehicle would not come within the expression "public place" as explained in Section 43 of the NDPS Act. On the strength of the decision of this Court ***in Jagraj Singh [State of Rajasthan v. Jagraj Singh, (2016) 11 SCC 687 : (2017) 1 SCC (Cri) 348]***, the relevant provision would not be Section 43 of the NDPS Act but the case would come under Section 42 of the NDPS Act.
>
> **15.** It is an admitted position that there was total non-compliance of the requirements of Section 42 of the NDPS Act.
>
> **16.** The decision of this Court in ***Karnail Singh [Karnail Singh v. State of Haryana, (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887]*** as followed in ***Jagraj Singh [State of Rajasthan v. Jagraj Singh, (2016) 11 SCC 687 : (2017) 1 SCC (Cri) 348]***, is absolutely clear. Total non-compliance of Section 42 is impermissible. The rigour of Section 42 may get lessened in situations dealt with in the conclusion drawn by this Court in ***Karnail Singh [Karnail Singh v. State of Haryana, (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887]*** but in no case, total non-compliance of Section 42 can be accepted."

33. It was laid down by the Hon'ble Supreme Court in ***Najmunisha v. State of Gujarat, 2024 SCC OnLine SC 520*** that the officer receiving the information regarding the narcotics is bound to record the same and send it to the superior officer and failure to do so will vitiate the trial. It was observed:

"**31.** From the perusal of provision of Section 42(1) of the NDPS Act 1985, it is evident that the provision obligates an officer empowered by virtue of Section 41(2) of the NDPS Act 1985 to record the information received from any person regarding an alleged offence under Chapter IV of the NDPS Act 1985 or record the grounds of his belief as per the Proviso to Section 42(1) of the NDPS Act 1985 in case an empowered officer proceeds on his personal knowledge. While the same is to be conveyed to the immediate official superior prior to the said search or raid, in case of any inability to do so, Section 42(2) of the NDPS Act provides that a copy of the same shall be sent to the concerned immediate official superior along with grounds of his belief as per the proviso hereto. This relaxation contemplated by virtue of Section 42(2) of the NDPS Act 1985 was brought about through the Amendment Act of 2001 to the NDPS Act of 1985 wherein prior to this position, Section 42(2) mandated the copy of the said writing to be sent to the immediate official superior "forthwith".

32. The decision in ***Karnail Singh v. State of Haryana, (2009) 8 SCC 539: (2009) 3 SCC (Cri) 887*** has been extensively referred by the learned Counsel for the Appellants and at the cost of repetition, it is observed that absolute non-compliance of the statutory requirements under the Section 42(1) and (2) of the NDPS Act 1985 is verboten. However, any delay in the said compliance may be allowed considering the same is supported by well-reasoned explanations for such delay. This position adopted by the instant 5-Judges' Bench of this Court is derived from the ratio in the decision in ***State of Punjab v. Balbir Singh, (1994) 3 SCC 299*** which is a decision by a 3-Judges' Bench of this Court.

33. Another 3-Judges' Bench while dealing with compliance of Section 42 of the NDPS Act 1985 in ***Chhunna alias Mehtab v. State of Madhya Pradesh, (2002) 9 SCC 363*** dealt with criminal trial wherein there was an explicit non-compliance of the statutory requirements under the NDPS Act 1985. It was held that the trial of the

Petitioner-Appellant therein stood vitiated. For a better reference, the judgment is quoted below as:

> "**1.** The case of the prosecution was that at 3.00 a.m. a police party saw opium being prepared inside a room and they entered the premises and apprehended the accused who was stated to be making opium and mixing it with chocolate.
>
> 2. It is not in dispute that the entry in search of the premises in question took place between sunset and sunrise at 3.00 a.m. This being the position, the proviso to Section 42 of the Narcotic Drugs and Psychotropic Substances Act was applicable. It is admitted that before the entry for effecting search of the building neither any search warrant nor authorisation was obtained nor were the grounds for a possible plea that if an opportunity for obtaining a search warrant or authorisation is accorded the evidence will escape indicated. In other words, there has been non-compliance with the provisions of the proviso to Section 42 and therefore, the trial stood vitiated.
>
> 3. The appeals are, accordingly, allowed."

34. In ***Dharamveer Parsad v. State of Bihar, (2020) 12 SCC 492***, there was non-examination of the independent witness without any explanation provided by the prosecution and even the *panchnama* or the seizure memo was not prepared on the spot but after having had reached police station only. Since the vehicle was apprehended and contraband was seized in non-compliance of Section 42 of the NDPS Act 1985 - the conviction and sentence of the appellant therein was set aside. Apart from the said reasons there were various suspicious circumstances that inspired the confidence of the Court to set aside the conviction affirmed by the High Court therein. Paragraph numbers 05 and 06 are reiterated below for reference:

"**5.** In the present case PW 1, who is the investigating officer, in his deposition has stated that the information i.e. the contraband was being carried from the Indo-Nepal

> border identified in a vehicle, details of which had also been provided, had been received in the evening of 2-7-2007. PW 1 has further stated that on receipt of this information, he had formed a team and had moved to Raxaul from Patna, which place they had reached by 2.00 a.m. in the morning of 3-7-2007. The vehicle in question had been apprehended and the contraband seized at about 6.00 a.m. of 3-7-2007. No explanation has been offered as to why the statement had not been recorded at any anterior point of time and the same was so done after the seizure was made.
>
> 6. Even if we were to assume that the anxiety of the investigating officer was to reach Raxaul which is on the international border and therefore, he did not have the time to record said information as per requirement of Section 42 of the Act, the matter does not rest there. There are other suspicious circumstances affecting the credibility of the prosecution case. Though the investigating officer stated that he had moved to Raxaul along with a team and two independent witnesses, the said independent witnesses were not examined. No explanation is forthcoming on this count also. That apart from the materials on record it appears that no memos including the seizure memo were prepared at the spot and all the papers were prepared on reaching the police station at Patna on 4-7-2007."

34. Therefore, the possibility that police had prior information regarding the transportation of charas by the accused and they had not complied with the requirement of Section 42(2) of the ND&PS Act will vitiate the trial.

35. In case the document was prepared after the search, the police were required to comply with the requirement of Section 50 of the ND&PS Act because recovery was effected from

the socks of the accused which is part of the body and a violation to comply with the requirement of Section 80 of ND&PS Act will be fatal to the prosecution case.

36. In ***State of H.P. v. Gyasho Ram, 2024 SCC OnLine HP 4192*** the police had recorded the section in the consent memo. It was laid down by this Court that this suggested that police had prior information. It was observed:

> "**20.** Now in case, Ext. PW-1/A to Ext. PW-1/C are perused, it would be noticed that the number of the FIR on these documents is conspicuously missing and the heading thereof reads as "*Fard Sahmati Patar Adhin Dhara 50 NDPS Act i.e Consent Memo Under Section 50 of the NDPS Act.*" This memo as per the prosecution was written on the spot and prepared prior to the recovery of the contraband.
>
> **21.** Once the police party had gone for patrolling duty, we really wonder as to how prior to the recovery of the contraband, the provisions of Section 50 of the NDPS Act could have been invoked. Even if some suspicion had arisen, how could it was only for the charas and for anything illegal like liquor, gold, forest produce, wild animal body parts, etc. etc.
>
> **22.** In this background, the fact that the document makes a mention of only the NDPS Act can only lead to an inference that the police had prior information regarding the respondents being in possession of contraband punishable under the NDPS Act or that this document was prepared not only before the search of the respondents but after the recovery of the charas."

37. A similar view was taken in ***State of H.P. v. Manoj Bahadur, 2024 SCC OnLine HP 3442*** wherein it was observed:

> **"16.** Apart from the above, the manner in which the prosecution claims to have prepared the document is also not free from doubt. As per the prosecution, search memos Ext.PW-1/A and Ext.PW-1/B were prepared prior to the signing of the rukka, however, it is not understandable as to how these documents bear FIR number and the provisions of law, under which, the respondent was stated to have committed the crime."

38. Once, it is held that the prosecution cannot rely upon the recovery of the charas, the subsequent steps like depositing the case property with malkhana moharrir and sending it to FSL will become meaningless as the charas analysed cannot be connected to the accused. Therefore, no advantage can be derived by the prosecution from the evidence led to this effect.

39. Therefore, the accused could not have been convicted of the commission of an offence punishable under Section 20 of the ND&PS Act based on the recovery effected in violation of Sections 42 and 50 of the ND&PS Act and no interference is required with the judgment passed by learned Trial Court.

40. No other point was urged.

41. In view of the above, there is no reason to interfere with the judgment of the learned Trial Court. Consequently, the present appeal fails and the same is dismissed.

42. In view of the provisions of Section 437-A of the Code of Criminal Procedure (Section 481 of Bhartiya Nagarik Suraksha Sanhita, 2023) the respondent/accused is directed to furnish bail bonds in the sum of ₹25,000/- with one surety in the like amount to the satisfaction of the learned Trial Court within four weeks, which shall be effective for six months with stipulation that in the event of Special Leave Petition being filed against this judgment, or on grant of the leave, the respondent/accused on receipt of notice thereof, shall appear before the Hon'ble Supreme Court.

43. A copy of this judgment along with the record of the learned Trial Court be sent back forthwith. Pending applications, if any, also stand disposed of.

(Vivek Singh Thakur)
Judge

(Rakesh Kainthla)
Judge

29th November, 2024
(Chander)