

HIGH COURT OF TRIPURA
AGARTALA

CRLA(J) 3 OF 2022

1.Shri Mithu Kumar, son of Sri Sashi Mandal, aged about 26 years,
Resident of Madrauni, Pachhiantal, P.S. Rangachauk,
District-Bhgarlpur, Bihar;

2.Shri Amar Kumar Singh, son of Sri Lucho Singh, aged about 28 years,
Resident of Ward No.11, Mohanpur, P.O.Raipur, P.S. Narayanpur,
District-Bhaghalpur, Bihar.

....Appellants.

Vrs.

The State of Tripura.

....Respondent.

Present:

For the appellants : Mr. Sankar Lodh, Advocate.
Mr. Asis Bhadra, Advocate.

For the respondents : Mr. R. Datta, Public Prosecutor
Mr. S. Debnath, Addl. Public Prosecutor.

Date of hearing : 28.03.2023

Date of delivery of judgment : 28.04.2023

Whether fit for reporting : Yes

HON'BLE MR.JUSTICE T. AMARNATH GOUD
HON'BLE MR.JUSTICE ARINDAM LODH

JUDGMENT & ORDER

[T. Amarnath Goud, J]

This is a criminal appeal, under Section 36B of the Narcotic
Drugs & Psychotropic Substances (for short, NDPS) Act,1985, read with
Section 374(2) of the Code of Criminal Procedure (for short, Cr.P.C.) 1973

against the judgment and order of conviction and sentence, dated 15.01.2022, passed by learned Sepcial Judge(NDPS), West Tripura, Agartala in Case No. Special (NDPS) 30 of 2021 whereby and whereunder the appellants have been convicted for committing offence punishable under Section 20(b)(ii)(c) of the NDPS Act, and sentenced them to suffer Rigorous Imprisonment for 10(ten) years and to pay fine of Rs.1,00,000/- (Rupees One Lakh) in default of payment of fine, they will suffer Simple Imprisonment for further 6(six) months.

2. Brief facts of the prosecution case is that on 13.02.2021, at about 22:45 hours, the complainant, namely, Kapil Das, Inspector of Police being the O.C., Agartala GRPS along with his staff was on special combined checking/screening duty of passengers of Deogarh Express train at the entrance of Agartala Railway Station. During their duty at about 23:55 hours they noticed two persons with two trolley bags had been trying to enter into the station through the main gate in suspicious movement carrying contraband items with them. They were detained and on being asked by the complainant and his staff, they identified themselves as Mithu Kumar and Amar Kumar Singh from Bihar. The complainant in compliance with the procedure searched their body and luggage and in course of search, they recovered 04 (four) packets of ganja each i.e. 8 packets, from their two luggage and after opening those packets, 20 Kg. of

ganja was found from one trolley bag and another 13 Kg. of ganja from the other trolley bag, in total 33 Kg. of ganja was recovered. Both of them had been arrested and the alleged contraband items (ganja) along with other articles i.e. one touch screen MI mobile, two Adhaar card, some cash amount, one silver chain have been seized from their possession at the spot. Thereafter, the complainant submitted a *suo motu* complaint against both the accused persons which was registered as Agartala GRPS Case No.2021-GRP-004 dated 14.02.2021, under Section 20(b)(ii)(c)29 of the NDPS Act and O.C., Agartala GRPS endorsed the case to S.I., Mantu Ranjan Das for investigation.

3. After completion of investigation, the I.O. submitted charge-sheet against both the accused persons under the aforesaid section before learned Special Judge, West Tripura, Agartala for taking cognizance. Accordingly, learned Special Judge took cognizance and framed Charges against the two accused persons under Section 21(b)(ii)(c) of NDPS Act to which they pleaded not guilty and claimed to be tried.

4. To prove the charge, prosecution examined as many as 8 (eight) witnesses and produced some material documents and objects as exhibits.

5. After closure of the prosecution evidence, accused persons were examined individually under Section 313 CrPC to which they denied that the prosecution case is false and claimed themselves as innocent. They also declined to adduce any defence witness.

6. Finally, learned Addl. Special Judge after hearing the learned counsel of both the parties and considering the evidence on record found the accused appellants guilty of committing offence punishable under Section 20(b)(ii)(c) of the NDPS Act and convicted and sentenced them as stated here-in-before.

7. Being aggrieved by and dissatisfied with the said judgment and order of conviction and sentence, the accused-appellants have filed the instant appeal.

8. Heard Mr. Sankar Lodh, learned counsel appearing for the appellants and Mr. Ratan Datta, learned Public Prosecutor appearing for the State-respondents.

Mr. Lodh, learned counsel for the appellants has contended that the respondent-officials have not followed Sections 41, 42, 43, 51 and 52 of the NDPS Act. The officials did not comply the provision of Section 50 of the NDPS Act as Section 50 of the NDPS Act requires that the accused has the right to be searched in presence of gazetted officer or a Magistrate and for such purpose, the police officer must give notice under

Section 50 of the NDPS Act informing that accused has the right to be searched in presence of a gazetted officer or a Magistrate but, in the present case, there was no such compliance. Even, they did not comply the provision of sub-section (6) of Section 50, since they have made the alleged seizure of contraband items as depicted in the complaint. The entire search, seizure and recovery were made in presence of the police personnel and no independent witness was cited during the said process. He has drawn the attention of this court on the deposition of PW-6, i.e. the complainant stating that PW-6 never stated that I am a gazetted officer and there is no such statement made by PW-6 that he was the leader of the raiding party, if he was a member of the raiding party in that situation whether he should be considered as a gazetted officer or Magistrate as contemplated under section 50 of the Act. He pointed out that in the notice issued under Section 50 of the Act to the appellants, the answer was not clear regarding personal search as the words—“*I require/do not require that my personal search may be conducted...*” were not scored out. During his argument, he reiterated that the two trolley bags from where the alleged ganja were recovered and seized were not produced before the court and therefore, he claims that the recovery and seizure of ganja from the possession of the appellants is become doubtful.

In support of his arguments, he relied upon the following judgments:

- (i) *(2011) 1 SCC 609 [Bijaysinh Chandubha Jadeja Vrs. State of Gujrat];*
- (ii) *(2014) 5 SCC 345 [State of Rajasthan Vrs. Parmananda & Anr.];*
- (iii) *(2016) 3 SCC 379 [Union of India Vrs. Mohanlal & Anr.];*
- (iv) *(2018) 9 SCC 708 [SK.Raju alias Abdul Haque alias Jagga Vrs. State of West Bengal]*

In support of the aforesaid contention, Mr. Lodh, learned counsel for the appellants has prayed to allow the appeal and set aside the judgment and order of conviction and sentence passed by the learned Special Judge.

9. Mr. R. Datta, learned Public Prosecutor for the State-respondent contended that there are no legal infirmities and all the provisions have been followed by the police officials with regard to the procedure, search and seizing the contraband items. He submitted that there is ample corroboration in the testimonies given by the prosecution witnesses that the accused-appellants were illegally carrying 33 kg. of ganja and their motive was to leave Tripura along with ganja but, both were detained at the Agartala Railway Station and in course of search, ganja was recovered. The accused persons have violated the provision of Section 8 of the NDPS Act and since the alleged ganja as recovered are of commercial quantity. The accused persons will have to face the punishment U/S 21(b)(ii)(c) of NDPS Act. He contended that in the examination of the

accused persons under Section 313, CrPC the accused persons have not spoken anything against the police personnel and even the notices issued under Section 50 of the NDPS to the accused-appellants are in conformity with the provisions of the NDPS Act. Accordingly, Mr. Datta, learned Public Prosecutor prayed for dismissal of the appeal and uphold the judgment and order of conviction and sentence passed by the learned Special Judge.

10. To appreciate the case from various angles, it becomes necessary for us to examine some Provisions of the NDPS Act which are reproduced here-in-below:

10.1 Section 8 of the NDPS Act reads as follows:

“8. Prohibition of certain operations.--No person shall---

(a) cultivate any coca plant or gather any portion of coca plant; or
(b) cultivate the opium poppy or any cannabis plant; or
(c) produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance,
except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation:

Provided that, and subject to the other provisions of this Act and the rules made thereunder, the prohibition against

the cultivation of the cannabis plant for the production of ganja or the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter-State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the Official Gazette, specify in this behalf:

[Provided further that nothing in this section shall apply to the export of poppy straw for decorative purposes.]

10.2

Section 20 of the NDPS Act, reads as follows:

“20. Punishment for contravention in relation to cannabis plant and cannabis.---Whoever, in contravention of any provisions of this Act or any rule or order made or condition of licence granted thereunder,—

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable—

(i) where such contravention relates to clause (a) with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees; and

(ii) where such contravention relates to sub-clause (b),—

(A) and involves small quantity, with rigorous imprisonment for a term which may extend to one year, or with fine, which may extend to ten thousand rupees, or with both;

(B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;

(C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also

be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.”

10.3

Section 41 of the NDPS Act reads thus:

“41. Power to issue warrant and authorisation.(1) *A Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under this Act, or for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed.*

(2) Any such officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including the para-military forces or the armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under this Act or that any narcotic drug or psychotropic substance or controlled substance in respect of which any offence under this Act has

been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or place, may authorise any officer subordinate to him but superior in rank to a peon, sepoy or a constable to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest such a person or search a building, conveyance or place.

(3) The officer to whom a warrant under sub-section (1) is addressed and the officer who authorised the arrest or search or the officer who is so authorised under sub-section (2) shall have all the powers of an officer acting under section 42.”

10.4 Section 42 of the NDPS Act, reads thus:

“42. Power of entry, search, seizure and arrest without warrant or authorisation.—

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been

committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,—

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

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances, granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

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

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior”

10.5 Section 43 of the NDPS Act, reads thus

“43. Power of seizure and arrest in public place.--Any officer of any of the departments mentioned in section 42 may—

(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.”

10.6 Section 50 of the NDPS Act reads as follows:

“50. Conditions under which search of persons shall be conducted.--(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so 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.

(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).

(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.

(4) No female shall be searched by anyone excepting a female. 1[(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).

(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.”

10.7

Section 51 of the NDPS Act reads as follows:

“51. Provisions of the Code of Criminal Procedure, 1973 to apply to warrants, arrests, searches and seizures.-- The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, in so far as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act.”

11. Let us now evaluate the evidence on record which were appreciated by the learned Special Judge in recording the conviction and sentence of the appellants.

11.1 PW-6, the Officer-in-Charge of Agartala GRPS, being the complainant, in his deposition stated that on 13.02.2021, he along with other staff of GRPS and RPF was performing checking duty at the main gate of Agartala Railway Station at about 10:45 pm. During their duty at about 11:55 pm, they detained the accused-appellants due to suspicious movement. The accused-appellants were asked by the complainant to check themselves after issuing notice under Section 50 of the NDPS Act. He also issued pre-search memo prior to conducting search. Thereafter, following the procedure PW-6 along with other staff searched those two persons and their belongings. During search they found four packets of ganja in each of the two trolley bags, i.e. total 8 (eight packets) containing 33 kgs. During deposition he stated that he prepared seizure list on the place of occurrence and seized those two trolley bags along with ganja and other articles and cash amount. Thereafter he took the seized articles along with both the accused-appellants to GRPS and lodged a *suo motu* complaint against them. He identified his signature in the complaint which has been marked as Exbt.6/1 and the *suo moto* complaint has been marked as Exbt.6.

11.2 The defence has tried to make out their case that during cross-examination of PW-6, he deposed that he came to know that the accused persons are Hindi speaking people and they do not have any knowledge of English. The pre-search memo and the notice under Section 50 of the NDPS Act were written in English and nowhere on the body of the memo and notice he wrote that he explained the contents of the memo and notice to them in Hindi language. Again, PW-6 during cross-examination stated that he did not draw any sample from the seized ganja at the spot and he did not mention the reason in the *suo motu* complaint as well as in his statement recorded under Section 161, CrPC by the I.O. why the seizure was not done in presence of any independent witnesses. The witness then voluntarily stated that the seizure was done at late night on the day of occurrence and no independent witness was available there.

11.3 PW-1, PW-2, PW-3, PW-4 and PW-5 being the accompanying police officials of O.C. Agartala GRPS specifically corroborated the deposition of PW-6, stating on the alleged date, time and place they were performing luggage checking duty at the main gate of Agartala Railway Station. During their duty they detained the accused-appellants on their suspicious movement. After observing legal formalities they searched the accused persons and on search they found 33kg. of ganja containing 8 packets in two trolley bags carried by the accused. The aforesaid PWs in

their depositions stated that the complainant seized the alleged ganja by preparing seizure list. PW-1 and PW-3 stated that they signed on the alleged seizure list.

In cross-examination of their depositions, the defence could not collect any material contradiction.

11.4 PW-7, being the Forensic Expert examined the exhibited materials those were sent to their authority by the learned J.M. 1st Class, Agartala and S.I. Mantu Ranjan Das, the I.O. of the present case. On examination, he found the exhibits as ganja. Accordingly, he submitted report. He identified his report and his signature which were marked as Exbt. 7 and 7/1.

11.5 P.W.8 is the I.O. of the case. He deposed that on being endorsed, he investigated the case. During investigation he visited the place of occurrence, prepared hand sketch map with separate index, examined available witnesses and recorded their statements under Section 161 of CrPC. He further deposed that he took the seized 33Kg. of suspected ganja in his custody, arranged for forensic examination of the inventories prepared by him, collected the SFSL report and finally after complying all the formalities, submitted charge-sheet against the accused-appellants.

12. After going through the entire prosecution evidence, it has come to light that the complainant i.e. PW-6 on the alleged date, time and

place along with his accompanying staff detained the accused-appellants as the accused-appellants movement was suspicious. The complainant issued notices upon the appellants under Section 50 of the NDPS Act to search them bodily and accordingly, they were searched in person. On being searched the police personnel detected 33Kg. of Ganja carrying in two trolley bags with them. These were seized instantly after observing all formalities and after that a *suo motu* complaint was lodged against the accused-appellants.

13. In the instant case, we find that the complainant who detained the accused-appellants and immediately conducted search upon them on being informed about the personal search after issuing notice under Section 50 of the NDPS Act is himself holding the post of Inspector of Police i.e. in the capacity of a gazetted officer. In section 50 of the Act, it clearly says that an authorization is required in respect to an officer who is not a gazetted officer, but when the officer himself is a gazetted officer, no such authorization is required to arrest and recovery of any contraband items.

14. In *Vijaysinh Chandubha Jadeja Vrs. Sate of Gujarat*, reported in (2011) 1 SCC 609 at para 29 & 31 Hon'ble Apex Court held thus:

“29. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to

minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

“31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra)[(2001) 1 SCC 707 and Prabha Shankar Dubey (supra)[(2004) 2 SCC 56] is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra)[(1999) 6 SCC 172]. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.”

14.1 In ***State of Rajasthan Vrs. Parmanand & Anr.***, reported in **(2014) 5 SCC 345**, at para **15 & 19** Hon’ble Apex Court held thus:

“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 application. In this case, respondent No.1 Parmanand’s bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.”

“19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a 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 a 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 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.”

14.2 **In *Union of India Vrs. Mohanlal & Anr.*, reported in (2016) 3 SCC 379**, Hon’ble Supreme Court at para 14, 15 and 16 observed thus:

“14. Section 52A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

“52A : Disposal of seized narcotic drugs and psychotropic substances.

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin

and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

- (a) certifying the correctness of the inventory so prepared; or*
- (b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or*
- (c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.*

(3) When an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.

15. It is manifest from Section 52A (2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. ”

14.3 In *SK.Raju alias Abdul Haque alias Jagga Vrs. State of West Bengal*, reported in (2018) 9 SCC 708, Hon'ble Supreme Court at para 18, 20 and 22 observed thus:

"18. In Parmanand, (2014) 5 SCC 226 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 Madhya Pradesh (2007) 1 scc 450. It was held thus: Parmanand, [(2014) 5 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 application."

"20. The question which arises before us is whether Section 50(1) was required to be complied with when charas was recovered only from the bag of the appellant and no charas was found on his person. Further, if the first question is answered in the affirmative, whether the requirements of Section 50 were strictly complied with by PW-2 and PW-4."

"22. PW-2 conducted a search of the bag of the appellant as well as of the appellant's trousers. Therefore, the search conducted by PW-2 was not only of the bag which the appellant was carrying, but also of the appellant's person. Since the search of the person of the appellant was also involved, Section 50 would be attracted in this case. Accordingly, PW-2 was required to comply with the requirements of Section 50(1). As soon as the search of a person takes place, the requirement of mandatory compliance with Section 50 is attracted, irrespective of whether contraband is recovered from the person of the detainee or not. It was, therefore, imperative for PW-2 to inform the appellant of his legal right to be searched in the presence of either a gazetted officer or a magistrate. From Exhibit-3, it can be discerned that the appellant was informed of his legal right to be searched in the presence of a magistrate or a gazetted officer. The appellant opted for the latter alternative."

Exhibit-4 is a record of the events after the arrival of PW-4 on the scene. After the arrival of PW-4, the appellant was once again asked by him, whether he wished to be searched in the presence of a gazetted officer or a magistrate. This was the second option which was presented to him. When he reiterated his desire to be searched before a gazetted officer, PW-4 inquired of the appellant whether he wished to search PW-2 before his own search was conducted by PW-2. The appellant agreed to search PW-2. Only the personal belongings of PW-2 were found by the appellant. It was only after this that a search of the appellant was conducted and charas recovered. Before the appellant's search was conducted, both PW- 2 and PW-4 on different occasions apprised the appellant of his legal right to be searched either in the presence of a gazetted officer or a magistrate. The options given by both PW-2 and PW-4 were unambiguous. Merely because the appellant was given an option of searching PW-2 before the latter conducted his search, would not vitiate the search. In Parmanand, in addition to the option of being searched by the gazetted officer or the magistrate, the detainee was given a 'third' alternative by the empowered officer which was to be searched by an officer who was a part of the raiding team. This was found to be contrary to the intent of Section 50(1). The option given to the appellant of searching PW-2 in the case at hand, before the latter searched the appellant, did not vitiate the process in which a search of the appellant was conducted. The search of the appellant was as a matter of fact conducted in the presence of PW-4, a gazetted officer, in consonance with the voluntary communication made by the appellant to both PW-2 and PW-4. There was strict compliance with the requirements of Section 50(1) as stipulated by this Court in Vijaysinh (2011) 1 SCC 609."

15. Having gone through the above citations, it reveals that Hon'ble Supreme Court in **SK.Raju alias Abdul Haque alias Jagga** (*supra*) in deciding the case clearly observed that –*'Before the appellant's search was conducted, both PW- 2 and PW-4 on different occasions apprised the appellant of his legal right to be searched either in the presence of a gazetted officer or a magistrate. The options given by both PW-2 and PW-4 were unambiguous. Merely because the appellant was given an option of searching PW-2 before the latter conducted his search, would not vitiate the search. In Parmanand, in addition to the*

option of being searched by the gazetted officer or the magistrate, the detainee was given a 'third' alternative by the empowered officer which was to be searched by an officer who was a part of the raiding team. This was found to be contrary to the intent of Section 50(1). The option given to the appellant of searching PW-2 in the case at hand, before the latter searched the appellant, did not vitiate the process in which a search of the appellant was conducted. The search of the appellant was as a matter of fact conducted in the presence of PW-4, a gazetted officer, in consonance with the voluntary communication made by the appellant to both PW-2 and PW-4. There was strict compliance with the requirements of Section 50(1) as stipulated by this Court in Vijaysinh (2011) 1 SCC 609."

16. Here, we may refer the notice issued under Section 50 of the NDPS Act to the accused-appellants which is reproduced here-in-below:

**"GOVERNMENT OF TRIPURA
OFFICE OF THE OFFICER-IN-CHARGE
AGARTALA GRPS**

Notice to 50 of NDPS Act

To,
Mithu Kumar,
S/o Sri Sasi Mandal of Madrauni, Pachhiantal,
Bhgarlpur, Bihar.

Amar Kumar Singh,
S/o Sri Lucho Singh of Ward No.11, Manoharpur,
P.O. Raipur, P.S. Narayanpur, Dist. Bhagalpur, Bihar.

Sub: Notice U/S 50 of NDPS Act 1985.

Sir/Madam,

Whereas, there is reason to believe that Narcotic Drugs/psychotropic substance/control substances or documents, articles, things which may furnish evidences of Commission of offence under NDPS Act 1985 are in your possession. Therefore, your personal search

is to be conducted by the undersigned. If you so require, such search will be conducted in presence of the Gazetted officer of Magistrate.

Date

*(Insp./SI Kapil Das (Sd/-)
Of O/C Agt. GRPS
Date 14.02.21*

*Statement of Sri/Smt. Mithu Kumar/Amar Kumar Singh I have been informed and have understood the notice of personal search U/S 50 of NDPS Act 1985 I “**require/do not require**” that my personal search may be conducted in presence of any nearest gazetted officer or Magistrate.*

*Mithu Kumar/Amar Kumar Singh (sd/-)
Full signature/name of the person with
date*

Particulars of witnesses

Signature of Witnesses

- 1. ASI, Bishnu Pada Das of AGTL RPF (Sd/-)*
- 2. C/0067 Balaram Nama (Sd/-)”*

17. Since it is a printed form and the sentence—“*I have been informed and have understood the notice of personal search U/S 50 of NDPS Act, 1985 **I require/do not require** that my personal search may be conducted in presence of any nearest gazetted officer or Magistrate*” do not specifically indicate scoring out the words “***I require/do not require***”.

Here the question lies whether absence of scoring out of any of the options expressed in the words “***I require/do not require***” amounts to substantial compliance of Section 50 of the NDPS Act. On mere perusal of the Notice(s) [Exhibits 2 and 3] under Section 50 of the NDPS Act, it

does not reflect that which of the either option or choice was preferred by the accused-appellants before their personal search was undertaken. It raises reasonable suspicion in the minds of the Court as regards the integrity of search of the accused-appellants. The law in this regard requires strict compliance and the accused must be made aware of his right to be searched before a Gazetted Officer or a Magistrate and it must be in expressed terms and must be clearly reflected in the notices.

18. The object of Section 50 of the NDPS Act is to proceed additional safeguards to a suspect of being involved in the trade of narcotic. The stress is on the adoption of reasonable, fair and just procedure. In our opinion, it is not clear from the Notices whether the accused-appellants were made aware of their right to be searched before a Gazetted Officer or a Magistrate as per the mandatory requirements of Section 50 of the NDPS Act. The Arresting Officer had acted in casual manner and such approach would render the recovery of the illicit articles suspect and vitiate the conviction. Furthermore, in our considered view, the record/notices must manifest that the suspect has been made aware of his right and the exercise of his right in choosing the option must be in expressed terms in writing i.e. in the notice itself.

19. Before we part with this judgment, we feel it necessary to urge that though Section 50 of the NDPS Act gives an option to the empowered officer to take such person (suspect) either before the nearest Gazetted Officer or the Magistrate, but, in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate who enjoys more confidence of the common man compared to any other officer, it would not only add first legitimacy to the search proceeding, but, it may verily strengthen the prosecution as well.

20. In the present case, the exercise of such right of choosing option whether the accused appellants required or does not require to be searched by a Gazetted Officer or a Magistrate having found manifestly absent, and in our considered view, Section 50 of the NDPS Act has not been substantially complied with and vitiates the conviction and sentence thereof in consonance with the observation made by the Hon'ble Supreme Court.

21. Accordingly, the appeal is allowed. The judgment and order of conviction and sentence dated 15.01.2022, passed by learned Special Judge(NDPS), West Tripura, Agartala in Case No. Special (NDPS) 30 of 2021 stands set aside and quashed.

The appellants shall be released forthwith if not wanted in connection with any other case.

Send down the LCRs.

JUDGE

JUDGE

