

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.310 of 2016

Arising Out of PS.Case No. -86 Year- 2009 Thana -GOVERNMENT OFFICIAL COMP. District -
EASTCHAMPARAN(MOTIHARI)

=====

Md. Samsul S/o Md. Mufiz, Village- Kharihaniya, P.O-Malahi, P.S- Paro, Distt-
Muzaffarpur

.... Appellant/s

Versus

The Union of India Through The Commissioner, Land Customs Station, Raxaul, District
East Champaran

.... Respondent/s

with

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Criminal Appeal (DB) No. 292 of 2016

Arising Out of N.D.P.S PS.Case No. -86 Year- 2009 Thana -GOVERNMENT
OFFICIAL COMP. District- EASTCHAMPARAN(MOTIHARI)

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1. Md. Firoz S/o Late Abdul Habib, Village - Gauri Gaonaa P.O. - Mahadev Raipura, P.S. - Saraiya,
District - Muzaffarpur permanent Address - 2, A.L. Daw Road, Budge Budge, District - 24 Parganas
(South), West Bengal.

.... Appellant/s

Versus

1. The Union of India Through The Commissioner, Land Customs Station, Raxaul, District East
Champaran

.... Respondent/s

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Appearance :

(In CR. APP (DB) No.310 of 2016)

For the Appellant/s : Mr.Sri. Prakash Tiwari

For the Respondent/s : Mr. Mr. Manoj Kumar Singh, CGC

(In CR. APP (DB) No.292 of 2016)

For the Appellant/s : Mr. Mukund Mohan Jha

For the Respondent/s : Mr. Manoj Kumar Singh, CGC

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date: 01-05-2018

These two criminal appeals have arisen out of the
judgment dated 27th January, 2016 passed by the learned 1st
Additional Sessions Judge, East Champaran, Motihari, (hereinafter
referred to as the learned “Trial Court”) in N.D.P.S. Case No.86 of
2009 punishable under Sections 20(b) (ii) (c), 23(c) of the Narcotic
Drugs and Psychotropic Substance Act, 1985 (in short
“N.D.P.S.Act”).



2. The learned Trial Court having recorded a finding of guilt against the two accused persons namely, Md. Firoz and Md. Samsul for the offences punishable under the aforesaid provisions of the N.D.P.S Act convicted them and they have been sentenced to undergo rigorous imprisonment for a term of 15 years with a fine of Rs.1,50,000/- each for the offences punishable under Section 20 (b) (ii) (c) of the N.D.P.S Act. Default in payment of fine will result in further rigorous imprisonment for one year. They have also been sentenced to undergo rigorous imprisonment for a term of 10 years with a fine of Rs.1,50,000/- for the offence punishable under Section 23 (c) of the N.D.P.S Act and for default in payment of fine they have to serve rigorous imprisonment for one year. The Trial Court has ordered that both the sentences shall run concurrently.

3. The prosecution case stated in brief are as under:-

That acting on an information that a Tanker lorry of West Bengal registration number is expected to come into India through the Border post of Raxaul from Birganj, Nepal, between 07.09.2009 and 09.09.2009 with contraband Ganja concealed in its chambers, one Tanker lorry bearing Registration No.WB39-7736 was signaled by the customs officers of Land Customs Station, Raxaul, to stop on 09.09.2009 at 6.15 hours just after crossing the Border check post at Raxaul. It is alleged that on stopping of the vehicle the driver who introduced himself as Md. Firoz was asked to get his vehicle searched. Although the driver of the Tanker lorry is said to have said that the



lorry is empty but on suspicion the vehicle was searched. The Khalasi was identified as Md. Samsul.

4. According to the informant, before initiating the search the two independent witnesses were also requested to be present and to witness the search operation for which they agreed. Upon search it was found that a large number of rectangular packets are kept in four chambers of the said vehicle. It is alleged that when few packets were taken out and opened in presence of the two independent witnesses, the packets so opened appeared to contain Ganja with characteristic pungent smell. Thereafter, the Tanker lorry was thoroughly searched in presence of Superintendent (Preventive) and other witnesses, as listed above and all the packets kept in the four chambers were unloaded before the driver and Khalasi and the two independent witnesses. As per the allegations, during the search of the cabin of the said Tanker some documents were also recovered namely certificate of Registration of the said Tanker bearing Registration No.WB39-7736 (in original), certificate of Insurance, National/Tourist permit for public carrier. A total of 475 numbers of rectangular packets of different sizes and weight of contraband Ganja (in moist condition, wrapped with paper, plastic sheets and tied with sutli) were recovered from the said Tanker lorry. The same were quantified and weighted before the said driver, Khalasi and the two independent witnesses. The gross weight of the Ganja was found to be 5181 Kgs and the net weight as 4468 Kgs. The value of the said Ganja was ascertained at



the rate of 200 per kg as Rs.89,36,000/-. The said lorry was also valued at Rs.7,50,000/-. It is further stated that in presence of the Superintendent (Preventive) and other witnesses the above recovered Ganja and the vehicle totally valued at Rs.96,86,000/- were seized on 09.09.2009 at 16 hours under the provisions of Section 43 of the N.D.P.S Act, 1985, for the violation of Section 8 of the N.D.P.S Act on reasonable belief that the same is liable for confiscation under the provisions of Section 60 of the Act.

5. It is further stated that the driver and Khalasi of the vehicle made a voluntary and interrogatory statements which were recorded under the provisions of N.D.P.S Act, 1985, wherein, the involvement of both the accused persons in the act of smuggling of said recovered Ganja has been established. The informant has briefly stated the statements of the driver and Khalasi recorded before the Superintendent (Preventive) namely Sri Sone Toppo and Sri. P.C.D Singh, respectively under the provisions of Section 67 of the N.D.P.S Act, 1985. The informant further states that after the completion of the formalities the seized Ganja and the seized Tanker lorry were taken into possession for further action and the two arrested persons namely Md. Firoz and Md. Samsul were forwarded on 09.09.2009 to the District and Sessions Judge, Motihari, for their judicial custody.

6. The samples of the seized Ganja (N.D.P.S) were sent for chemical analysis to the chemical examiner, Customs House, Kolkata-1, vide office letter C No.VIII



(10)151/CUS/Seiz/RXL/2009/6693 dated 10.09.2009. In the test report received from the office of the Joint Director, Chemical Laboratory, Customs House, Kolkata-1, vide their letter Reg.No.1945/SZD (N)173 dated 11.11.2009, it has been confirmed that the said sample under reference answers positive test for Ganja which reads as under:-

“The sample is in the form of flowering top consisting of stalk leaves and seed. On the basis of macroscopic chemical and chromatographic examination it is concluded that the sample under reference answers positive test for Ganja.”

7. From the Letter dated 09.09.2009 written by the Inspector, Land Customs Station, Raxaul, to the District and Sessions Judge, Motihari, it would appear that the two accused persons were forwarded for judicial custody with an allegation that they were apprehended by the officials of Land Customs Station, Raxaul, for their act of commission of offences punishable under Sections 20, 23 and 24 of the N.D.P.S Act. The copies of the Panchanama, seizure memo, voluntary statement and interrogatory statements of the two accused persons and D.R.I-3, were enclosed with the forwarding memo of the accused.

8. After submission of the charge-sheet cognizance was taken in the case on 06.01.2010 and the records of the case was transferred for trial and disposal. After framing of charge, the prosecution has examined altogether 11 witnesses, thereafter, the case



has been closed. The statement of the accused persons under Section 313 Cr.P.C have been recorded in which they pleaded innocence and denied the allegations leveled against them.

9. Before the learned Trial Court, prosecution examined 11 witnesses out of whom, P.W.1 Hare Krishan Prasad, P.W.2 Ashok Kumar, P.W.3 Sone Toppo, P.W.4 Premchand Dwar Singh, P.W.5 Anil Kumar Jha, P.W.6 Sanjay Kumar, P.W.7 Arvind Kumar Mishra, P.W.8 Shambhu Nath Singh, P.W.9 Sanjay Kumar, P.W.10 Tarakant Prasad Karan and P.W.11 Naveen Chandra, have supported the prosecution case.

10. The prosecution has exhibited the following documents which are as follows:-

“1.Seizure memo no.151/2009 has been marked

Ext.1.

2. Ext.2 is Panchanama.

3. Ext.3 is chemical examination report.

4. Ext.4 is statement of accused Md. Firoz.

5. Ext.5 is statement of accused Md. Samsul.

6. Ext.6 is interrogatory statement of accused Samsul.

7. Ext.6/a is interrogatory statement of accused Md.Firoz.

8. Ext.7 is signature of Sone Toppo on the report regarding verification of address.



9. Ext.8 is complaint petition.

10. Ext.9 is supplementary complaint petition.

11. Ext.10 is signature of Sone Toppo on the letter of address verification.

12. Ext.10/a is signature of Sone Toppo on the photocopy of certificate of Sarpanch.

13. Ext.10/b is signature of Sone Toppo on the photocopy of certificate of Mukhiya.

14. Ext.10/C is signature of Sone Toppo on the photocopy of News paper regarding seized Ganja.

15. Ext.11 is date for destruction of Narcotic Drugs.

16. Ext.2/1 is signature of Navinchandra on the panchnama.”

11. P.W.1 Hare Krishna Prasad and P.W.2 Ashok Kumar are Inspectors in the Customs Department and they were posted at Raxaul on 09.09.2009. They have stated about having received an information that illegal Ganja is being carried from the Tanker and on that information he along with other police officials were deputed for search. He has proved Panchanama as Ext.2. The sample of 25 Grams from each packet, three packets had been sealed with the signature of Seizing Officer and signature of both the accused persons and the witnesses which had been sent for the chemical examination, Kolkata, has been marked as Ext.3. The witnesses are also on the



point that in their presence the confessional statement of the accused Md. Firoz and Md. Samsul has been recorded. Those statements have been marked as Ext.6 and 6/8.

12. P.W.3 Sone Toppo, was the Superintendent of Customs Department at Raxaul on the date of occurrence. He has stated that on search of the chamber of the tanker the contraband articles were found in the plastic packets which were tied with sutli. He has stated that in presence of two different witnesses, Amarnath and Suresh Gupta, the packets were opened and 475 packets were recovered containing 5181 Kgs of Ganja and net weight was 4468 Kgs of Ganja. He has stated that Ashok Kumar had prepared the Panchanama and seizure list and sample of Ganja in few quantity had been taken. This witness had recorded interrogatory statement of Md. Firoz (Ext.6) and it is stated that Md. Firoz had confessed his guilt in course of his statement. The address verifications were done from the Mukhiya and Sarpanch which were marked as Ext.10/A and Ext.10/B respectively.

13. P.W.4 Premchand Dwar Singh, is the Superintendent in the Customs Department and has narrated the same story.

14. P.W.5, P.W.6, P.W.7 and P.W.8 are the Inspectors in the Customs Department posted at Raxaul, who have repeated the prosecution version of the story.

15. P.W.9 Sanjay Kumar, has stated in his examination-in-chief that he had come with the paper relating to destruction of



Ganja in connection with this case which is in one page on which back side there is signature. Sri. J.P.Singh, Inspector, has typed it in computer and according to this witness at Serial No.1 description is mentioned and signature of J.P.Singh, Go-down In-charge is also there on the main page on which Sri. J.P.Yadav, Assistant Commissioner, Patna, has also signed. It is stated that the other officers named in his statement had signed Ext.11. Sri. R.K.Tiwary, Judicial Magistrate, Motihari, had verified the Ganja before burning the same and after getting permission, the Ganja was destroyed. In course of his cross-examination he has stated that on 17.01.2013 he was posted at Patna Division, Patna. Ext.11 has been prepared in his presence and he was not transferred. No name is mentioned on the Serial No.1. He denied the suggestion of the defence that Ext.11, Serial No.1, is not related to this case.

16. P.W.10, Tarakant Prasad Karan, has stated that on the alleged date of seizure he was posted as a Constable at Raxaul Customs Department and had been present when the officers checked the vehicle in question. In his cross-examination this witness has stated that he had not checked the vehicle.

17. P.W.11, Naveen Chandra, has stated in his examination-in-chief that on 09.09.2009 he was posted as Superintendent of Customs Department, Raxaul, and on the secret information at about 6:55 A.M in the morning he stopped the vehicle and asked the driver and Khalasi to get down from the vehicle. He



has also reiterated the prosecution story.

18. It appears that on behalf of the defence it was submitted that in this case no any prosecution witness had claimed in his respective evidence about crossing of the tanker of the accused persons from Nepal Border to India. A plea was taken there that before search of the accused persons they were not taken to the nearest Gazetted Officer of any of the department mentioned in Section 42 or to the nearest Magistrate. The defence also took a plea that the informant had not followed the provisions contained in Section 50 of the N.D.P.S Act. The learned Trial Court rejected the submission of the learned defence counsel stating that the submission of the counsel is not correct. The learned Trial Court took note of the fact that in the present case the accused persons agreed for search of the Tanker lorry bearing Registration No.WB39-7736 in presence of two independent witnesses along with both the accused persons and the search was effected accordingly. The Trial Court observed that the safeguard mentioned in Section 50 of the N.D.P.S Act are intended against false accusation and also to lend credibility to the search and seizure conducted by the empowered officers but in this case the accused persons were taken to the police station without unnecessary delay in compliance of provision of Section 52 contained in N.D.P.S Act.

19. It further appears from the judgment of the learned Trial Court that the learned defence counsel argued that in this case



there is no compliance of Section 42 (1) (ii) of the N.D.P.S Act. It was submitted that Section 50 to 57, 58, 50 and 51 of the N.D.P.S Act require that the sample of the seized articles are to be dealt in a particular manner. Several provisions of N.D.P.S Act were cited on behalf of the defence with a submission before the learned Trial Court that under Section 47 of the N.D.P.S Act it is irrelevant to say whether the search is voluntarily or not and that in order to convict the accused for the offence punishable under the provisions of the N.D.P.S Act, there must be independent corroboration of the statements made by the accused. Learned Trial Court was however not convinced and rejected the plea of the defence about the violation of the statutory provisions under the N.D.P.S Act.

20. In appeal before us, learned counsel representing the appellants in both the appeals has taken us through various provisions of the N.D.P.S Act. With reference to Section 42 of the N.D.P.S Act (also called 'Act'), learned Advocate submits that in order to secure justice to the accused the Act has got some inbuilt safeguards and Section 42 which deals with the power of entry, search, seizure and arrest without warrant of authorization provides one of those safeguards. It is submitted that if the Inspector or the Superintendent of the Customs Department had a reason to believe on receipt of information given by any person that any offence under the provisions of N.D.P.S Act has been committed, the same was required to be taken note of in writing and such written document was required to be



produced in course of evidence. According to sub-section 2 of Section 42 of the N.D.P.S Act where an officer takes down any information in writing under sub-section (1) or records grounds for his beliefs under the proviso thereto, he shall forthwith send a copy thereof to his immediate superior. It is submitted that in the present case the procedure prescribed under Section 42 has not at all been followed.

21. Learned counsel has also referred to Section 50 of the N.D.P.S Act which prescribes conditions under which search of a person is conducted. According to sub-section 1 of Section 50 when any officer duly authorized 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.

22. According to Section 52 and Section 52 (A) of the N.D.P.S Act certain procedures have been prescribed for forwarding of persons arrested and disposal of articles seized. According to sub-section 2 of Section 52 every person arrested and articles seized under warrant issued under sub-section (1) of Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued. Under sub-section 3 of Section 52 every person arrested and article seized under sub-section (2) of Section 41, Section 42, Section 43 or Section 44 shall be forwarded without unnecessary delay to-



- (a) the officer-in-charge of the nearest police station, or
- (b) the officer empowered under Section 53.

23. Under Section 52 (A) procedures required to be followed before disposal of seized narcotic drugs or psychotropic substances, have been prescribed and according to it the Central Government may, having regard to the hazardous nature vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect 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. In sub-section 2 of Section 52 (A) it is provided that (where any narcotic drugs, psychotropic substance, controlled substances or conveyances) has been 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, psychotropic substance, controlled substances or conveyances) containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars



of the (narcotic drugs, psychotropic substance, controlled substances or conveyances) or the packing in which they are packed, country or origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the (narcotic drugs, psychotropic substance, controlled substances or conveyances) 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 presence of such Magistrate, photographs of (such drugs substances or conveyances) 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.

24. According to sub-section 3 of Section 52 (A) where an application is made under sub-section 2, the Magistrate shall, as soon as may be, allow the application.

25. Further sub section 4 of Section 52 (A) provides that notwithstanding anything contained in the Indian Evidence Act, 1872 or the Code of Criminal Procedure, 1973, every Court



trying an offence under this Act, shall treat the inventory, the photographs of (narcotic drugs, psychotropic substance, 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.

26. Relying upon the judgment of the **Hon'ble Supreme Court in the case of Gorak Nath Prasad vs. The State of Bihar decided on 5th December, 2017 vide Criminal Appeal No.2104 of 2017 (arising out of SLP (Crl) No.7588 of 2016)** learned counsel for the appellants submits that a bare perusal of the said judgment would show that the Hon'ble Apex Court held that the N.D.P.S Act provides for a reverse burden of proof upon the accused, contrary to the normal Rule for criminal jurisprudence for presumption of innocence unless proved guilty. This shall not dispense with the requirement of the prosecution to having first established a prima-facie case, only whereafter the burden will shift to the accused. The mere registration of a case under the N.D.P.S Act will not *ipso facto* shift the burden on the accused from the very inception. The Hon'ble Apex Court found compliance with statutory requirements and procedures shall have to be strict and the scrutiny stringent. It has also been held that if there is any *iota of doubt* the benefit shall have to be given to the accused. The Hon'ble Apex Court found that the independent witnesses in the said case with regard to the search and seizure had turned hostile deposing that their signatures were obtained on blank



paper at the police station, therefore, the mere fact of the FSL report (Ext.8), being available is no confirmation either of the seizure or that what was seized was Ganja, in absence of the production of the seized item in Court as an exhibit. The non-production of the seized material is, therefore, considered fatal to the prosecution case. The Hon'ble Apex Court also took note of the fact that the remaining prosecution witnesses were the police officers only, therefore, it will not be safe to rely on their testimony alone, which cannot be in any event be sufficient evidence by itself either with regard to the recovery or the seized material being Ganja. In this connection reliance was also placed on the judgment of the Hon'ble Apex Court in the case of **Jitendra and Another vs. State of M.P., (2004) 10 SCC 562**, which have been reiterated in **Ashok alias Dangra Jaiswal vs. State of Madhya Pradesh, (2011) 5 SCC 123**, paragraph 12 and 13 of the said judgment have been taken note of by the Hon'ble Apex Court which we quote hereunder:-

“12. Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused.

13. It may be noted here that in Jitendra v. State of M.P., (2004) 10 SCC 562, on similar facts this Court held that the material placed on record by the prosecution did not bring home the charge against the



accused beyond reasonable doubt and it would be unsafe to maintain their conviction on that basis. In Jitendra (supra), The Court observed and held as under:-SCC pp. 564-65, paras 5-6) ‘‘5. The evidence to prove that charas and ganja were recovered from the possession of the accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW7), Angad Singh (PW8) and Sub-Inspector D.J Rai (PW6), there is no independent witness as to the recovery of the drugs from the possession of the accused. The charas and ganja alleged to have been seized from the possession of the accused were not even produced before the trial court, so as to connect them with the samples sent to the Forensic Science Laboratory. There is not material produced in the trial, apart from the interested testimony of the police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the Forensic Science Laboratory were taken from the drugs seized from the possession of the accused..’’

27. Learned counsel for the appellants has, therefore, vehemently submitted in course of hearing that in this case the learned Trial Court has committed a grave error in rejecting the plea of the defence that at every stage there has been violation of the statutory provisions which are in the nature of safeguards provided under the N.D.P.S Act. It is his submission that the learned Trial Court could not appreciate that in this case neither the Ganja in question was produced in course of evidence nor the destruction list (Ext.11) contains the full particulars and details showing that the Ganja in question which was the subject matter of destruction was the same



Ganja which were allegedly recovered from the vehicle in question. It has also been submitted that no photograph of the Ganja was taken and there was no certificate by the learned Magistrate, therefore on the face of the glaring violation of the statutory provisions the conviction of the appellant is liable to be set-aside.

28. On the other hand, the Central Government counsel representing the Department of Customs has opposed the submissions of learned counsel representing the appellants. Learned counsel submits that in the present case the F.S.L report (Ext.3) duly proves that the seized article was Ganja. It is also submitted the seizure memo and the Panchanama have been duly proved and exhibited in course of trial as Exts.1 and 2 respectively, moreover, in the interrogatory statement the accused persons namely, Md. Firoz and Md. Samsul both have confessed their guilt.

CONSIDERATION

29. Having heard learned counsel for the appellants and learned Central Government counsel representing the Department of Customs and upon going through the relevant statutory provisions and the materials which are available on the record, we find that in this case at every stage there has been a violation of the statutory provisions. According to the informant search of the vehicle was carried out after stopping it when an information was received in the morning regarding a vehicle coming from the Nepal border with contraband articles but this information has not been recorded in



writing and no evidence to this effect has been brought in course of trial. The seizure Memo No.151 of 2009 has been prepared taking two persons as independent witnesses who are namely Ganesh Kumar Gupta and Amar Lal Srivastava but in course of evidence, the prosecution has failed to bring them in dock and as such they have not been examined. The Panchanama has also been signed by these two witnesses who have not been examined in course of trial, therefore, both Ext.1 and Ext.2/1 are not supported/corroborated by any independent witnesses.

30. All other witnesses in the case are the Inspectors, Superintendents and Constables of the Department of Customs. It further appears that the inventory of the seized Ganja could not be proved and the entry register of the Malkhana/Go-down where the seized Ganja was kept and from where it is said to have been taken out for destruction has not been proved. The Ext.11 which is said to be the data showing destruction of seized/confiscated narcotic drugs on 17.01.2013 at M/s Smirti Paper Mills (Pvt.) Limited, Mehuli Road, Chitma, Patna City, has not been prepared in presence of the Magistrate. No photograph has been taken nor any evidence has been brought on record to show that prior to destruction of Ganja any step was taken for certification of correctness of the inventory. According to sub section 2 of Section 52 (A) the inventory was required to be prepared giving all details such as the description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars



of the narcotic drugs, psychotropic substance controlled substances and conveyances or the packing in which they are packed, country or origin and other particulars which may be required to identify the narcotic drugs, psychotropic substance controlled substances and conveyances. An application was required to be made to a Magistrate for the purpose of certifying the correctness of the inventory so prepared and then it was incumbent upon the department to take in the presence of such Magistrate, photographs of such drugs substances or conveyances and certifying such photographs as true was required to be made.

31. We also find that there has been violation in the matter of taking samples of the Ganja. According to Clause (c) of sub section 2 of Section 52 (A) a representative sample of such drugs or substance was required to be drawn in presence of Magistrate and the Magistrate was required to certify the correctness of the list of samples so drawn. These provisions have been violated with impunity by the department and no step in this regard was taken to comply the provisions of N.D.P.S Act.

32. As regards search and seizures procedure also there has been a catena of decisions of the Hon'ble Apex Court that the conditions prescribed under Section 50 of the N.D.P.S Act are mandatory. It is a safeguard provided to an accused. Merely asking an accused as to whether he would offer their personal search to the police officer or to Gazetted officer would not satisfy the protection



accorded to an accused under Section 50 of the N.D.P.S Act. It has also been held that if the safeguard provided by Section 50 is dispensed with merely on a bald submission of a police officer that offer was declined by the accused, it would render the provisions of Section 50 negatory, therefore, in this regard cogent and reliable evidence should be produced to show compliance of Section 50 of the N.D.P.S Act.

33. We have taken note of the judgment of the Hon'ble Supreme Court rendered in the case of **Gorakh Nath Prasad** hereinabove. Recently in the case of **Arif Khan alias Agha Khan vs. State of Uttrakhand in Criminal Appeal No.273 of 2007 decided on April 27, 2018**, the Hon'ble Apex Court has once again dealt with a similar kind of situation and found that there must be a mandatory compliance of Section 50 of the N.D.P.S Act and when it was found that in absence of compliance of Section 50 of the N.D.P.S Act the alleged recovery/search of contraband (Charas) made by the raiding party from the appellants body was not in accordance with the procedure prescribed under Section 50 of the N.D.P.S Act, the Hon'ble Apex court held the appellant entitled for acquittal. While dealing with the scope and ambit of Section 50 of the N.D.P.S Act, the Hon'ble Apex Court dealt with the previous case lodged on the subject in Paragraphs 20, 21, 22 and 23 of the judgment which are quoted hereunder for ready reference:-

"20. In other words, the question that arises



for consideration in this appeal is whether the prosecution was able to prove that the procedure prescribed under Section 50 of the N.D.P.S Act was followed by the Police Officials in letter and spirit while making the search and recovery of the contraband “Charas” from the appellant (accused).

*21. What is the true scope and object of Section 50 of the N.D.P.S Act, what are the duties, obligation and the powers conferred on the authorities under Section 50 and whether the compliance of requirements of Section 50 are mandatory or directory, remains no more res integra and are now settled by the two decisions of the Constitution Bench of this Court in **State of Punjab vs. Baldev Singh (1999) 6 SCC 172** and **Vijaysinh Chandubha Jadeja (supra)**.*

*22. Indeed, the latter Constitution Bench decision rendered in the case of **Vijaysinh Chandubha Jadeja (supra)** has settled the aforementioned questions after taking into consideration all previous case law on the subject.*

*23. Their Lordships have held in **Vijaysinh Chandubha Jadeja (supra)** that the requirements of Section 50 of the N.D.P.S Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the Police Officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a Gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorized officer to make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this requires a strict compliance. 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 but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a Gazetted Officer or a Magistrate. (See also **Ashok Kumar Sharma vs. State of Rajasthan**,*



2013 (2) SCC 67 and Narcotics Control Bureau vs. Sukh Dev Raj Sodhi, 2011 (6) SCC 392).”

34. In the aforesaid case also it was the plea of the prosecution that the accused was deprived of his right to be searched in presence of either a Magistrate or a Gazetted Officer but despite telling him about the legal right under Section 50 in relation to search, the appellant (accused) gave his consent in writing to be searched by the police officers (raiding party) and because of this, the two Courts below had come to a conclusion that the requirement of Section 50 stood fully complied with. The Hon’ble Apex Court rejected the plea of the prosecution, stating that the Hon’ble Apex Court in Paragraphs 28, 29 and 30 held as under:-

“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 but none of them deposed that the search/recovery was made in 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 the compliance as required in law, the appellant is entitled to claim its benefit to seek his acquittal.”

35. In the given facts of the case and the evidences available on record, we have no option but to hold that in this case none of the statutory provisions as regards, search, seizure, preparation of inventory, destruction of the contraband articles, certifications etc. which are in the nature of mandatory requirements to be followed have been complied with by and on behalf of the prosecution. The learned Trial Court has not correctly appreciated the law on the subject and the mandatory provisions of the N.D.P.S Act which provides for severe punishment only after proof of compliance with the statutory safe-guards could not be properly appreciated by the learned Trial Court.

36. The conviction of the accused persons are, therefore,



liable to be set-aside and is, accordingly, set-aside. The appellants are directed to be released forthwith.

37. Both the appeals are allowed.

(Rajendra Menon, CJ)

(Rajeev Ranjan Prasad, J)

Arvind/R.R.Ojha

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