

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.2183 of 2018**

Arising Out of PS. Case No.-8 Year-2015 Thana- KATIHAR GRP CASE District- Katihar

Yogesh Kumar, S/o Ramesh Chand, R/o Vill.- Nai Ki Sarai, P.S.- Khandauli,
District- Agra Uttar Pradesh.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Aditya Abhishek-Advocate Mr. Sanjeev Kumar Singh-Advocate Mr. Indrajeet Kumar-Advocate
For the Respondent/s	:	Mr. Zeyaul Hoda-Advocate

**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT**

17-08-2019

Vide judgement of conviction dated 31.05.2018

and order of sentence dated 05.06.2018 in connection with Katihar Rail P. S. Case No.08 of 2015, G. R. No.22 of 2015 passed by the Special Judge, Katihar, whereby and whereunder appellant Yogesh Kumar has been found guilty for an offence punishable under Section 20 of the N.D.P.S. Act and sentenced to undergo R.I. for six years, under Section 22 of the N.D.P.S. Act and sentenced to undergo R.I. for six years with a further direction to run the sentences concurrently. He has further been directed to pay fine appertaining to Rs.20,000/- and in default thereof, to undergo S.I. for six months, additionally. It has also been directed that the period of custody during course of trial would be subject to set off in accordance with Section 428 of



the Cr.P.C.

2. Vijay Kumar Singh (PW-4), O/c of G.R.P. Katihar recorded his self-statement on 28.03.2015 at about 5.00 P.M. over Platform No.1 of Katihar Railway Junction disclosing therein that he has been informed by Incharge Police Inspector, R.P.F. Sri Indrasan Singh (PW-7) that he has been informed by R.P.F. Escort Party that the attendant of Coach No.A/2 of Dibrugarh-New Delhi Rajdhani Express (12423 Up) is carrying one bag in bedroll box wherein ganja is suspected. Immediately this information was conveyed to S. P. Railway, Katihar, who constituted a team under his leadership consisting that of S.I. Praveen Kumar, A.S.I. Krishna Kumar Singh, A.S.I. Dinesh Ram, Hawaldar Vijay Kumar Singh (II), DPC/507 Ajay Kumar, Constable/377 Kaushelendra Kumar. Furthermore, on account of absence of Dy. S.P., Police Inspector Rail, Katihar, the S.P. has instructed him to search and seizure including other ancillary activity connected therewith. In the background of aforesaid direction, he made Sanha Entry and then, reached at Platform No.1, expecting arrival of Rajdhani Express. After arrival of Rajdhani Express over Platform No.1, all of them gone to Coach No.A/2, located the attendant and inquired about his identity, who disclosed his name as Yogesh Kumar, aged



about 19 years, son of Ramesh Chandra of village-Nai Ki Sarai, P.S. Khandauli, District-Agra (U.P.). Seeing the police, so many persons assembled there and in whose presence, it was disclosed that they have got confidential information with regard to presence of Ganja in the bag of coach attendant. The Coach Attendant was informed regarding his option, whether he intends to be searched in presence of Magistrate or Gazetted Officer, whereupon Yogesh Kumar confessed that he is carrying Ganja in the bag and so, he is ready to be searched by the police officials. Then thereafter, Yogesh Kumar was taken out from the train along with bag and in presence of two persons namely Raju Kumar and Md. Sahnawaz, firstly the notice under Section 50 of the Act was served upon him and then, bag as well as physical search of Yogesh Kumar was done. During said course, from a bag having over his back, Ganja was found while from his physical possession, one mobile set, attendant card bearing ID No.-N000498 along with Rs.8130/- was recovered. He was also asked for to produce relevant documents with regard to possession of the Ganja, but he failed. He volunteered that this Ganja has been handed over him by one Surendra having mobile no.09983916095 with a request to carry the same to Delhi and for that, he was paid Rs.5,000/-. Accordingly, seizure list was



prepared, a copy thereof, has been handed over to Yogesh Kumar, who put his signature and then, all of them came to parcel office where seized Ganja was weighed being 18 k.g. Then two samples have been prepared each containing 25g.m. and then, all have been sealed over which, the witnesses have put their signature.

3. After registration of Katihar Rail P. S. Case No.08 of 2015, investigation commenced and concluded by way of submission of chargesheet followed with trial, meeting with ultimate result, subject matter of instant appeal.

4. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. It has further been submitted that nothing has been recovered from the possession of the appellant. Because of the fact that being an attendant of Rajdhani Express, appellant did not oblige the prosecution party in having free access of Rajdhani Express and in the aforesaid background, been victimized. However, nothing has been adduced in defence.

5. In order to substantiate its case, prosecution has examined altogether ten PWs, who are PW-1, Vijay Kumar Singh, son of Late Moti Lal Singh, PW-2, Dinesh Ram, PW-3,



Praveen Kumar, PW-4, Vijay Kumar Singh, son of Satya Narayan Singh, PW-5, Kaushelendra Kumar, PW-6, Ajay Kumar, PW-7, Indrasan Singh, PW-8, Raju Kumar Sahani, PW-9, Krishna Kumar Singh and PW-10, Naushad Iqbal. In likewise manner, prosecution has exhibited following documents as Exhibit-1, notice, Exhibit-2, seizure list, Exhibit-3, self written application, Exhibit-4, formal F.I.R., Exhibit-5, endorsement over written report, signature of witness over seizure list marked as Exhibit-1/1 and Exhibit-2/1, Exhibit-6, chargesheet, Exhibit-7 F.S.L. Report and material exhibit marked Samsung Mobile as Exhibit-1, Purse as Exhibit-II, out of three packets, two red packet and one Fatar packet marked as Exhibit-111, III/1, 111/2 respectively. As stated above, nothing has been adduced on behalf of defence.

6. The learned counsel for the appellant while assailing the judgment of conviction and sentence has submitted that the finding so recorded by the learned lower Court happens to be against the settled principle of law on account thereof, is fit to be set aside. In order to buttress such plea, it has been submitted that mere asking for whether an accused intends to be searched by police officials or before Magistrate, Gazetted Officials is not the proper mode of compliance of Section 50 of



the Act and in likewise manner, whenever there happens to be physical search along with search of the bags etc. Even having recovery from the bag is not going to spare the raiding party from following the mandate of Section 50 of the Act. From the evidence available on the record, it is evident that in order to comply the mandate of Section 50 of the Act, the prosecution party indulged in such kind of activity, which could not be recognized as a compliance in pursuance of Section 50 of the Act, whereupon the whole trial vitiates including the judgment impugned. To substantiate such plea, the learned counsel for the appellant has referred *State of Rajasthan vs. Parmanand and another reported in(2014)5 SCC 345*.

7. It has further been submitted that reliability of the search and seizure is found doubtful from own conduct of the prosecution as there happens to be specific disclosure at the end of the prosecution that in the bogie itself, there was presence of some persons, who assembled on account of presence of police and before whom, the police officials disclosed that they have come to search out the attendant as they have got confidential information regarding transportation of Ganja by the appellant/ attendant of Coach No.A/2, but before that neither the prosecution party informed the Train



Superintendent, the T.T.E., the R.P.F. Escort Party, the Station Superintendent. None of the passengers has been picked up for being a seizure list witness. How these two seizure list witnesses that too, being of local inhabitants have their presence over Platform No.1 without any Platform ticket or ticket for any destination, is indicative of the fact that recovery has been planted and that being so, the story of search and seizure became futile. Stressing upon this point, it has further been urged that there happens to be specific disclosure that from platform no.1, the Ganja was taken to the parcel office where it was weighed and then thereafter, it was found to be 18 k.g. From the seizure list, it is evident that there happens to be disclosure at Column no.5 showing weight of seized Ganja as 18 k.g. and from column no.2, it is evident that the place of seizure has been shown to be from Coach no.A/2 of Rajdhani Express at platform no.1.

8. It has also been submitted that this happens to be reason behind that in spite of disclosure having at the end of the prosecution party that sample was prepared at the spot, it was sealed at the spot, but the same was not produced before the learned Sessions Judge at the time of remand of the appellant rather it was produced on 31.03.2015 and then, after



procurement of the order, it was sent to F.S.L. Bihar on 31.03.2015 itself through Special Messenger P.S.I. Naushad Iqbal, but the same was received at the F.S.L. Office on 24.04.2015 and for that, prosecution has got no explanation.

9. It has also been submitted that from perusal of the order dated 31.03.2015 of the learned Sessions Judge, it is evident that no seal of learned Sessions Judge was procured and that was due to non-production of the bulk of Ganja from which, allegedly sample was prepared and that happens to be reason behind while the Ganja has been produced before the Court as material exhibit, it did not bear the seal of the Sessions Judge/ Special Judge as well as the Officer-in-Charge (PW-4). That means to say, whether the Ganja, which has been produced in Court during course of evidence as material exhibit remained to be the seized property of instant case? If the evidence of the witnesses are taken together in the background of the infirmity as indicated herein above, the judgment impugned did not find favour.

10. On the other hand, learned Additional Public Prosecutor while supporting the finding recorded by the learned lower Court has submitted that the learned lower Court came to the finding after meticulous consideration of the materials



available on the record. It has also been argued that from the evidence, it is apparent that the prosecution party indulged in proper adherence of Section 50 of the Act. Side by side, also indulged in preparation of sample in accordance with principle laid down by the Apex Court in ***Union of India v. Mohanlal and another reported (2016) 3 SCC 379*** wherein the Circular No.1/88, 1/89 has properly been considered.

11. It has also been submitted that there happens to be no infirmity during course of search and seizure and in likewise manner, there happens to be ample material in order to establish the Ganja to be the case property and that being so, the case of the prosecution is found duly substantiated, whereupon the judgment impugned did not attract interference.

12. PW-1 has stated that on the alleged date and time of occurrence, he was posted as Hawaldar at G.R.P., Katihar Station. On that day, they have gone to conduct raid at platform no.1 under the leadership of O/c Vijay Kumar Singh along with other police personnel (so named). When Rajdhani Express arrived, they have conducted raid at Coach No.A/2 and during course thereof, attendant of that coach was interrogated. From the bag, which the attendant was carrying, Ganja was found. On weigh, it was 18 k.g. Ganja has been seized and for



that, seizure list was prepared. Ganja has been deposited in Malkhana under proper seal, identified. During cross-examination, he has stated that during course of conduction of raid, article was kept in a bag having over back of accused/ attendant. Bag, pocket, purse was checked and recovery of Rs.8130/-. He has seen the Ganja. At the time of deposition, same is not before him.

13. PW-2, an A.S.I. has deposed that as per instruction of the O/c Vijay Kumar Singh, he was nominated as one of the members of the raiding party consisting others (named). They have gone at platform no.1 to conduct raid. When Rajdhani Express No.12423 Up came, they have gone to Coach No.A/2, attendant was interrogated. He was also asked to disclose what was in his bag, which he was carrying over his back. He confessed that it happens to be Ganja. He also offered to be checked by them, though was informed that if he so wants, may get searched in presence of Gazetted Officer or Magistrate. During course of search, from the bag, Ganja was found weighing 18 k.g. for which, seizure list was prepared. A copy thereof, was handed over to the attendant and in token thereof, put his signature. Bag was seized, they took the accused to Thana Hazat and in likewise manner, seized ganja was also kept



in Malkhana. Identified the accused. During course of cross-examination, he has stated at Para-2 that at the time of raid, accused was carrying bag over his back. Accused was apprehended by the O/c. They were all along with him. Accused was alone. In Para-3, he has stated that on search, purse, ID as well as cash appertaining to Rs.8130/- was recovered and for that, seizure list was prepared. Only one seizure list was prepared. Then denied the suggestion that Ganja was not recovered from the possession of the accused.

14. PW-3, during his examination-in-chief, has stated that as per instruction of the O/c, he also became one of the member of the raiding party. They have gone to platform no.1 where Dibrugarh Rajdhani Express came. They have gone to Coach No.A-2 and during course thereof, they have identified one person, who was carrying a bag over his back. During course of interrogation, he disclosed that ganja is kept in this bag. Then he was de-boarded. In presence of two seizure list witness, he was searched out. From the bag, ganja was recovered for which, seizure list was prepared. A copy thereof, was handed over to the accused, who put his signature over the same. Before search and seizure, it was disclosed before the accused that if he so wants, search could be effected in presence



of Gazetted Officer/ Magistrate, but he shown inclination to be searched by them. They have come to parcel office, where ganja was weighed having 18 k.g. Ganja was sealed at that very place. Then they brought the accused as well as seized ganja to police station where ganja was kept in G.R.P. Malkhana. Identified the accused. In Para-5, he has stated that he was informed by the O/c with regard to conduction of raid. At Para-6, he has stated that he had not stated before the I.O. that accused had disclosed that police may search him. At Para-7, has said that weight of ganja was taken in presence of the accused, member of the raiding party as well as seizure list witnesses. In Para-8, he has stated that Ganja was not kept in abandoned condition rather it was recovered from a bag having over the back of the accused. Then has denied the suggestion that ganja was kept in abandoned condition, which they have seized and then got the accused implicated on false, wrong allegation. In Para-9, he has stated that name of none others came during course of recovery of the ganja. He denied the suggestion that name of Surendra Singh cropped up. In Para-10, he has stated that Surendra was not present. Then has denied the suggestion that in collusion with Surendra, accused has been implicated in this case in place of aforesaid Surendra Singh.



15. PW-4 is the O/c, who has deposed that on the alleged date and time of occurrence, he was O/c of Katihar Rail P.S. On that day, he received information that attendant of A/C Coach No.A/2 of Rajdhani Express is carrying ganja, whereupon after informing the S.P., Katihar and as directed by him, constituted a raiding party (named) and then, they have come to platform no.1 and began to wait arrival of Rajdhani Express. After arrival of Rajdhani Express at 3.50 P.M., they have gone to AC Coach No.A/2 and interrogated the attendant, who disclosed his identity as Yogesh Kumar. One bag was over his back regarding which query was made. He confessed that ganja is in the bag. At that very time, he was acknowledged with the fact that if he so desires, search could be in presence of Gazetted Officer/ Magistrate, whereupon he said that he is ready to be searched out by them. Accordingly, he was searched out in presence of two seizure list witnesses. Ganja was recovered there from weighing 18 k.g. A purse was also found carrying his ID Card as well as cash appertaining to Rs.8130/-. After weighing of the ganja at parcel office, sample was prepared each weighing 25 gm and then, sealed. Having his seal, he also put his signature. Then they have taken to G.R.P. P. S. The seized ganja was kept in G.R.P. Malkhana. On the following day,



seized ganja as well as accused were produced before the Court. He has recorded his self-statement at the platform no.1 itself. After recording of his self-statement (exhibited), entrusted investigation to Naushad. Identified the accused, exhibited all the documents. In Para-9, he has stated that notice was served upon the accused under Section 50 of the Act, before search. He denied the suggestion that such formality was never taken. In Para-11, he denied the suggestion that the ganja was seized while was in abandoned condition, but on wrong notion, they have apprehended the accused. Then has denied the suggestion that they have not informed the superior police officials. He has further admitted that with regard to recovery of all the articles, he had prepared only one seizure list. Then has denied the suggestion that they falsely implicated the accused.

16. PW-5, during course of examination-in-chief has reiterated the prosecution version and further, stated that for the recovery of 18 k.g. ganja, seizure list was prepared and then, they brought the accused and ganja to the police station. Ganja was kept at the Malkhana. Identified the accused. During cross-examination at Para-4, he has stated that Praveen Kumar is the informant. Search was made by the O/c Vijay Kumar Singh. Search was not conducted before the Gazetted Officer. Then has



denied the suggestion that no recovery has been made from the possession of the accused.

17. PW-6, during course of examination-in-chief has narrated the same story being a member of the raiding party. Also submitted that after recovery of the ganja, its weight was taken at parcel office weighing 18 k.g. and for that, seizure list was prepared and then, the seized ganja along with accused has been taken to police station. Ganja was kept in Malkhana. Identified the accused. During cross-examination at Para-4, he has stated that ganja was deposited in Malkhana in his presence as well as presence of the accused. At Para-5, he has denied the suggestion that ganja was found in abandoned condition and got the accused apprehended on wrong notion. In Para-6, he has stated that F.I.R. was registered against only one person. He is not knowing whether two persons have been made an accused. In Para-7, he has stated that accused Yogesh Kumar has informed that this ganja belongs to Surendra Singh, but he is not knowing whether investigation against Surendra Singh was done or not. In Para-8, he has stated that notice was given in his presence, but controverted immediately thereafter. In Para-10, he has stated that search and seizure was not made in presence of Gazetted Officer.



18. PW-7 is the R.P.F. Personnel, who has disclosed that on the alleged date and time of occurrence, R.P.F. Escort Party have informed him that attendant of Coach No.A-2 possesses a bag containing ganja, which he has passed to the Officer-in-Charge, G.R.P. During cross-examination, he has stated that he is not knowing the accused of this case.

19. PW-8 is the seizure list witnesses, who during his examination-in-chief has stated that he had put his signature over the seizure list and identified the same, but declined to identify the accused in dock on the ground of elapse of time. During cross-examination at Para-2, he has stated that seizure list was not prepared in his presence.

20. PW-9 also happens to be one of the member of the raiding party and on account thereof, he has substantiated the prosecution version regarding search, recovery, preparation of seizure list and carrying of ganja along with the accused to the police station. During cross-examination at Para-4, he has stated that search was made by the O/c Vijay Kumar Singh while weight of ganja was taken at parcel office. Then had denied the suggestion that no recovery was made from the possession of the accused. In Para-6, he has stated that seizure list was prepared at the platform itself.



21. PW-10 is the I.O., who has stated that after registration of the case, he was entrusted by the O/c (exhibited the relevant documents) to investigate. After taking up investigation, he recorded further statement of the informant, recorded statement of members of the raiding party, seizure list witnesses. He recorded statement of the accused. Handed over the seized article to the Incharge Malkhana, which was the ganja along with bag (18 k.g.), mobile. Cash appertaining to Rs.8130/- and I.D. Card was also recovered. Then after taking permission from the Court, he got the sample examined at Kolkata in sealed condition. Then had exhibited the material exhibit, purse, Aadhar Card, ID Card, cash appertaining to Rs.8130/-. Also produced Ganja. Bag has become rotten. He had inspected the P.O. which happens to be the platform no.1, superior police officials have supervised the case and then, after completing investigation, submitted chargesheet. During cross-examination, he has stated that this case has been registered against Surendra Singh and Yogesh Kumar. In Para-4, he has stated that he had not produced the accused before any Gazetted Officer. At Para-5, he has stated that at the time of sealing of the seized articles, he was present. 4-5 persons were also present. At Para-6, he has stated that at the time of sealing, accused was under custody.



Then has denied the suggestion that his investigation happens to be faulty.

22. From the evidence, it is apparent that although (PW-4) informant has contended that after getting confidential information from R.P.F. Personnel, which PW-7 has corroborated, he passed the same to the S.P. and as per his direction, raiding party was constituted and after recording the Sanha, they proceeded for conduction of raid. The aforesaid Sanha has not been brought up on record nor the aforesaid Sanha number has got reference in the self-statement of the informant. PW-10, who happens to be the I.O. did not talk about before the constitution of raiding party, matter was informed to the S.P., raiding party was constituted at the instance of S.P. The raiding party proceeded after having Sanha Entry ought to have been seen, during course of investigation. That means to say, when the information has been reduced in writing, then in that circumstances, information regarding search and seizure has to be given to two superior officers as per Section 42(2) of the Act. From the evidence of the PW-8, it is crystal clear that aforesaid mandatory provision has not been complied with.

23. Then thereafter, the other circumstances have to be seen. As per Section 57 of the Act, the Officer-in-Charge has



to inform his superior officials within 72 hours of recovery. There happens to be failure of the prosecution on that very score. In likewise manner, as is evident from the evidence of PW-4, it is evident that on the following day, accused as well as seized ganja was placed before the Sessions Judge, but from the order sheet of the learned lower Court, the same is not at all found duly substantiated (relating to Ganja). Furthermore, it is also evident from the evidence of PW-4 that sample was prepared at the spot after taking out 25 gm in viol-sealed, but I.O. (PW-10) has not substantiated the same. Not only this, after going through the Exhibit-7, it is evident that vide memo no.187 dated 31.03.2015, the same was transmitted to the F.S.L. Patna, Bihar through Special Messenger P.S.I. Naushad Iqbal, which was received at his office on 24.04.2015 without having any explanation with regard to custody of the so alleged sample during the intervening period. The most interesting feature is that I.O. (PW-10) during his examination-in-chief has stated that it was sent to F.S.L. Patna as well as Custom House, Kolkata, however, there happens to be missing link over preparation of sample/ or was prepared since before, in sealed condition, kept at Malkhana in sealed condition, failed to substantiate the same by Malkhana Register. On the other hand, he has deposed that



the ganja, which was to be sent to test, has been sent after having been sealed, that means to say, ganja was not sealed since before, that means to say, the claim of the PW-4, informant that sample was prepared at the spot is found duly falsified. No Malkhana Register has been produced to substantiate that seized ganja was deposited in the Malkhana. Although material exhibit ganja weighing 18 k.g. has been produced in Court, but from the evidence, it is apparent that none of the packet is found sealed though with regard to bag an explanation has been that it has been destroyed by the rat, did not have reference of P. S. Case Number.

24. When the evidence of other witnesses are taken into consideration, it is evident that none have claimed that sample was prepared at the spot itself by the Officer-in-Charge (PW-4). Some of them have stated that packet was sealed, some have not even suggested so. Had there been sealing of the ganja at the spot, then in that circumstance, packets which have been produced in Court would have contained the seal in reference of P. S. Case Number as was deposited in Thana Malkhana with regard thereto.

25. In *Union of India v. Mohanlal and another reported (2016) 3 SCC 379*, the Hon'ble Apex Court has taken



into consideration the mode of sealing and sampling of the narcotic substance and for that, taken into consideration the Circular No.1/88, 1/89 issued by the Central Government and after scrutinizing the same, laid down the following guidelines:-

“12. Section 52-A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government have in exercise of that power issued Standing Order No. 1/89 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10.05.2007 and the other dated 16.01.2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of the Standing Order 1/89 states that samples must be taken from the seized contrabands on the spot at the time of recovery itself. It reads:

“2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession



the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.”

13. Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the States or the Central agencies in the matter of drawing of samples. This is, therefore, an area that needs to be suitably addressed in the light of the statutory provisions which ought to be strictly observed given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regarding the true position as regards drawing of samples.

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

“Section 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.



17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.”

26. In ***State of Punjab vs. Balbir Singh reported (1994)3 SCC 299***, the provisions of the Sections 52 and 57 of the Act has been held to be mandatory in nature is found diluted to some extent in ***Sajan Abraham vs. State of Kerala reported in (2001) 6 SCC 692***, wherein it has been observed that compliance of Section 57 of the Act was not at all mandatory in nature to such extent that if substantial compliance thereof, is made, it would not vitiate the trial. For better appreciation, the relevant Para is quoted below:-

“12. The last submission for the appellant is, there is non- compliance of Section 57 of the Act. He submits under it, an obligation is cast on the prosecution while making an arrest or seizure, the



officer should make full report of all particulars of such arrest or seizure and send it to his immediate superior officer within 48 hours of such arrest or seizure. The submission is, this has not been done. Hence the entire case vitiates. It is true that the communication to the immediate superior has not been made in the form of a report, but we find, which is also recorded by the High Court that PW5 has sent copies of FIR and other documents to his superior officer which is not in dispute. Ex.P9 shows that the copies of the FIR along with other records regarding the arrest of appellant and seizure of the contraband articles were sent by PW5 to his superior officer immediately after registering the said case. So, all the necessary information to be submitted in a report was sent. This constitutes substantial compliance and mere absence of any such report cannot be said it has prejudiced the accused. This section is not mandatory in nature. When substantial compliance has been made, as in the present case it would not vitiate the prosecution case. In the present case, we find PW5 has sent all the relevant material to his superior officer immediately. Thus we do not find any violation of [Section 57](#) of the Act.

13. [In State of Punjab vs. Balbir Singh](#) (1994) 3 SCC 299,



this Court held:

"(6) The provisions of [Sections 52](#) and [57](#) which deal with the steps to be taken by the officers after making arrest or seizure under [Sections 41](#) to [44](#) are by themselves not mandatory."

27. In *Vijaysinh Chandubha Jadeja vs. State of Gujarat* reported in (2011)1 SCC 609, the Constitution Bench held after considering earlier Constitution Bench relating to *State of Punjab v Baldev Singh* ("Baldev Singh"), (1999) 6 SCC 172, *Karnail Singh vs. State of Haryana* reported in (2009)8 SCC 539, observed as follows:-

"29. In view of the foregoing discussion, we are of the firm opinion that the object with which 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.

30. As observed in Presidential Poll, In re (1974) 2 SCC 33:

"13....It is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole."

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 (2000) 1 SCC 707 and Prabha Shankar Dubey (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 (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.”

32. We also feel that though [Section 50](#) 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 (1974) 2 SCC 33 the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.”

28. From the evidence as discussed herein above, it is evident that there happens to be inconsistency amongst the evidence of the PWs with regard to sealing, sampling as well as there also happens to be deficiency over proper compliance of mandatory provisions of law. Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower Court is set aside. Appeal is allowed. Appellant is under



custody, hence is directed to be released forthwith if not wanted
in any other case.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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