

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 222 of 2014**

- Avinash Singh Rajput S/o Rajesh Kumar Aged About 19 Years R/o Q. No. -J.248, Janta Colony, Tilak Nagar, Gudyari, Raipur Thana Gudyari Pahadi, Ps, Raipur C.G. Civil And Rev. Distt. Raipur C.G. , Chhattisgarh

---- Appellant**Versus**

- State Of Chhattisgarh Through Ps Mahasamund, Distt. Mahasamund C.G. , Chhattisgarh

---- Respondent**CRA No. 1214 of 2014**

- Nandkumar Kosare S/o Kaluchand Kosare Aged About 24 Years R/o Village Farhad, P.S. Somani, Distt. Rajnandgaon, Presetnly Residing At In The House Of Horilal Satnami, Devpuri Bhathapara, P.S. Mana, Distt. Raipur C.G. , Chhattisgarh

---- Appellant**Versus**

- State Of Chhattisgarh S/o Through P.S. Mahasamund, Distt. Mahasamund C.G., Chhattisgarh

---- Respondent**Present:-**

Shri Manoj Paranjpe with Shri Vaibhav A. Goverdhan and Shri S.K.Guha, Advocates for appellants.

Shri Anand Verma, Deputy Government Advocate for the State.

**D.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava &
Hon'ble Smt. Justice Rajani Dubey**

CAV Judgment**Per Manindra Mohan Shrivastava, J.****30/09/2019**

1. The aforesaid two appeals are directed against the impugned judgment of conviction and order of sentence dated 20-12-2013 passed by the Special

Judge, (NDPS) Act, 1985, Mahasamund, Chhattisgarh in Special Criminal Case No.06/2013, whereby and whereunder, each of the appellants have been held guilty for commission of offence under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (For short "the Act") and sentenced, as described below-

Section-20(b)(ii)(C) of NDPS Act	R.I. for twenty years and fine of Rs.2 Lakh, in default of payment of fine, additional R.I. for five years.
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2. The prosecution story, as revealed from the impugned judgment and records of the case is that upon receipt of information by the informant regarding illegal trafficking of contraband (ganja) on 13-12-2012, the police arranged trap of the informed vehicle and it is said that when vehicle was intercepted and searched, total quantity of 182 KG of ganja was found in the vehicle, which was being driven by the appellant-Nand Kumar Kosre and other appellant-Avinash Singh Rajput was found in the said vehicle. According to the prosecution case, notice under Section 50 of the Act was given to both the appellants and after they having accorded their consent to get searched by the intercepting police officers, search was carried out and in the vehicle, ganja was found. Further case of the prosecution is that thereafter, a panchnama of identification was prepared, weighment machine was brought and weighment was conducted and after mixing the entire quantity, four samples were taken out and the quantity as well as samples were sealed and thereafter, taken to the police station, FIR was registered and the appellants were arrested. Further case of the prosecution was that the seized quantity of ganja and the samples drawn therefrom at the spot, were duly deposited in the safe custody of the Police Station and later on, two out of four samples were taken to the Forensic

Science Laboratory by one Police Officer. Upon analysis being carried out, the Forensic Science Laboratory gave report that the sample was ganja. On that basis, upon completion of usual investigation, charge sheet was filed and the appellants were charged for commission of offence under Section 20(b)(ii)(C) of the Act on the allegation that they were found carrying 182 KG of ganja and illegal possession of the same. The appellants having abjured guilt, they were put to trial. In order to prove its case, the prosecution examined witnesses of seizure, Police Officer, Investigating Officer as well as the witnesses of weighment. The appellants were examined under Section 313 of Cr.P.C. in respect of incriminating evidence and circumstances appearing against them in the evidence led by the prosecution. Defence was taken by the appellant-Nand Kumar Kosre that he was driver of the vehicle and while returning from college, he went to watch strike of Shiksha Karmi along with Avinash, Co-accused, as the vehicle contained black glasses, the police took action, prepared challan and demanded money. As they were not having sufficient amount, dispute arose and false case was registered against them.

Other appellant-Avinash took similar defence. The appellants also examined two defence witnesses.

3. Learned trial Court, however, relying upon the evidence led by the prosecution, particularly the evidence of seizure of contraband, evidence of spot inspection, weighment, safe custody, drawl of sample, sanction and the positive report of Forensic Science Laboratory and disbelieving defence version, held the appellants guilty of commission of offence. As the appellants were held guilty of being found in illegal possession of commercial quantity of ganja, jail sentence of 20 years was imposed upon the appellants.

4. Assailing correctness and validity of the impugned judgment of conviction and order of sentence, learned counsel for the appellant argued that the entire

procedure, right from the interception is vitiated on account of utter violation of mandatory provisions contained in Section 50 of the Act, which renders the entire case of the prosecution highly doubtful and render plausible the defence of the appellants that dispute arose on account of non-payment of challan amount of Rs.2,000/-, the police acting vindictively, prepared a false case. Learned counsel for the appellant argued that according to the prosecution case, the appellants were given joint notice under Section 50 of the Act, which itself is illegal and impermissible under the law, only on that ground, entire procedure is vitiated. He would further argue that according to the evidence and the document of search, each of the appellants were personally searched. In such a situation, it is contended, compliance of Section 50 is mandatory and contravention of the mandatory provision with regard to personal search as mandated under Section 50 of the Act, will completely vitiate the proceedings. The appellants were not informed about their legal rights. They were not examined by the Magistrate or Gazetted Officer. Ram Kumar Tode, PW-9, Sub Inspector, without having any authority, search was carried out. It is argued that no other option was available with Ram Kumar Toade, PW-9, hence, he could not have searched as he does not stand in the capacity of an independent person. Learned counsel for the appellant placed reliance on several authorities i.e. ***State of Punjab vs. Baldev Singh***¹, ***Dilip and another vs. State of M.P.***², ***State of Rajasthan vs. Parmanand and another***³ and ***SK. Raju alias Abdul Haque alias Jagga vs. State of West Bengal***⁴.

Next submission of learned counsel for the appellant is regarding non-compliance of Section 55 of the Act that the Officer Incharge of the Police Station did not prepare his own seal for sealing the seized articles and even no

1 (1999) 6 SCC 172

2 (2007) 1 SCC 450

3 (2014) 5 SCC 345

4 (2018) 9 SCC 708

panchnama of preparation of specific seal of the Officer Incharge of the Police Station was prepared. It is further contended that the samples were drawn without any specimen seal impression at the time of sealing of contraband. Impression of seal was not marked at the time when the samples were allegedly sealed, neither samples nor the seals were produced before the Magistrate. Malkhana Register does not mention that the samples were deposited in the sealed condition. It is also argued that Dolamani, PW-3, Malkhana Moharir has also not stated that the seal was deposited in the malkhana along with the contraband of samples. It is further submitted that there is no mention in the Ex.P-20, as to who had taken samples to the Forensic Science Laboratory. Learned counsel for the appellant would further argue that there was no impression of specimen seal available on memorandum Ex.P-20 and even in the records, it is not shown, which seal was sent to the Forensic Science Laboratory for comparison. Even though, Forensic Science Laboratory report, Ex.P-6 states that from samples, it does not reveal that the seal found on the samples were tallied with the specimen impression of the seal, both were found one and the same. Learned counsel for the appellant has placed reliance on several authorities i.e. ***Shavnath Shah vs. State of Chhattisgarh***⁵, ***Amol Ratre vs. State of Chhattisgarh***⁶, ***Pardeshi Ram vs. State of M.P. (Now State of C.G.)***⁷, ***Itwari Ram vs. State of M.P. (Now CG)***⁸, ***Shakuntla Rao vs. State of M.P.***⁹ and ***Narendra Bhushan Dubey vs. State of MP (Now CG)***¹⁰.

Learned counsel for the appellant submits that the proceedings were also vitiated, because the prosecution has failed to prove that the sample and the ganja allegedly seized from the possession of the appellants were kept in safe

5 2006 (3) CGLJ 515

6 2011 (2) CGLJ 68

7 2011 (1) Crimes (HC) 329

8 2011 (4) CGLJ 614

9 2013(1) CGLJ 126

10 2011 (1) CGLJ 259

custody. Though, prosecution case is that the contraband in samples were sealed and sent to malkhana on 13-12-2012 and thereafter, as per memo Ex.P-20, sent to Forensic Science Laboratory on 15-12-2012, which is said to be received in the Forensic Science Laboratory on 17-12-2012 vide Ex.P-21, the oral evidence led by PW-7, Police Personnel is at variance, because according to him, it was sent to Forensic Science Laboratory on 27-12-2012. Dolamani, Malkhana Moharir, PW-3, has deposed that samples were sent to Forensic Science Laboratory Ex.P-18(C), which records that the samples were sent to Forensic Science Laboratory on 27-12-2012 and an entry to that effect was made in the Rojnamchasanha No.1412. From the aforesaid evidence led by the prosecution itself, the prosecution case becomes highly doubtful, because it cannot be said that the samples which were taken by Megha Rani Chandrakar, PW-7 to the Forensic Science Laboratory on 27-12-2012. It thus, renders highly doubtful that the samples which were allegedly recovered from the appellant was sent to malkhana. Therefore, even if the evidence of the prosecution witnesses is accepted, the samples were collected from malkhana of the Police Station on 15-12-2012, but it reached Forensic Science Laboratory on 17-12-2012, i.e. after 2 days. There is, however, no evidence as to where these samples were kept during these two days.

Further submission is that there is another discrepancy in the prosecution case that it is not clear as to how samples were marked as A, B, C & D and there is no specific mention made in the malkhana register as to which of the samples were taken out and sent to Forensic Science Laboratory. Learned counsel for the appellant would further argue that in this manner, the prosecution has failed to prove mandatory requirement under Section 55 of the Act with regard to safe custody as neither proper seal was prepared nor samples were sealed with the own seal of Officer In-charge. There is serious

doubt with regard to safe custody and the identity of the sample taken to Forensic Science Laboratory. It has also been argued to assail the impugned judgment of conviction and order of sentence that as per the deposition of Ram Kumar Tode, PW-9, entire contraband were first made homogeneous and then four samples of 100 grams were taken out which is illegal and impermissible in law. In support of his submission, learned counsel for the appellant has placed reliance in the judgment in ***Union of India vs. Bal Mukund and others***¹¹ and decision of High Court of Chhattisgarh in the case of ***Kripasindhu Sahu vs. State of Chhattisgarh***¹².

Lastly, it is argued that the prosecution has failed to prove that the contraband and samples were actually produced before the Magistrate nor has the prosecution come out with any reliable and trustworthy evidence to prove compliance of the provisions under Section 52-A of the Act in the matter of destruction of contraband, as Ex.P-22 does not disclose as to how huge quantity of ganja was destroyed. There is no description or signatures of persons, before whom or in whose presence, contraband was destroyed, none of the persons have been examined by the prosecution. It is also argued that as per the inventory, Ex.P-22, before destroying contraband, three samples of 100 grams, were drawn from the entire quantity, but these samples were also not produced before the Malkhana Moharir to identify the contraband alleged to be seized from the possession of the appellants. In support of his submission, learned counsel for the appellant has placed reliance on several authorities i.e. ***Noor Aga vs. State of Punjab and another***¹³, ***Mohinder Singh vs. State of Punjab***¹⁴ and ***Gorakh Nath Prasad vs. State of Bihar***¹⁵.

5. On the other hand, learned State counsel, while supporting the impugned

11 (2009) 12 SCC 161

12 Decided on 28-04-2014 in Cr.A.Nos.462 & 540 of 2009

13 (2008) 16 SCC 417

14 AIR 2018 SC 3798

15 (2018) 2 SCC 305

judgment of conviction and order of sentence, would argue that the prosecution has succeeded in bringing home the guilt of the appellant by leading cogent evidence of the prosecution witnesses, particularly the official witnesses and the Police Officers that upon receipt of Mukhbir information, reached the spot and after sending necessary information to the higher police authorities, as required under Section 42(2) of the Act and only after getting them searched by the police and giving notice under Section 50 of the Act, informing the appellants of their right to be searched by a Magistrate or Gazetted Officer and upon consent given for being searched by the Police Officer, search was carried out. Learned State counsel would submit that in the present case, the prosecution has not come out with the allegations that the contraband was seized from the possession of the appellants during their bodily search. Prosecution case is that the ganja was found in the vehicle. Therefore, in such a case, compliance of Section 50 of the Act is not mandatory, though the Police Officer is actually complied with the said legal requirement. Learned State counsel would emphasize upon the fact that the appellants having given consent for their personal search by the Police Officer, cannot make any grievance. Learned State counsel would further argue that as far as drawl of samples and sealing of those samples as also entire quantity of contraband is concerned, provisions of Section 55 of the Act have been substantially complied with, as the memo of seizure clearly contains impression of the specimen seal of the concerned police station. It has also come in evidence that proper seal was prepared at the time of sealing of samples and the quantity of ganja packed in the bags. Learned State counsel would further argue that the prosecution has proved by leading cogent evidence both oral as well as documentary that after samples were drawn and sealed with specimen seal as also the quantity of ganja, the police officer carried them to the Police Station and upon registration of FIR,

four sample packets with bags of ganja were entrusted in the safe custody of the police station and necessary entry to that effect was made in the Malkhana Register by the Malkhana Moharir, who has also deposed to prove aforesaid fact. The samples were found in sealed condition and Forensic Science Laboratory report also state that the seal were not found tampered with. Moreover, there is clear evidence that the samples were duly taken from the police station to Forensic Science Laboratory and receipt of the same was also issued to that effect. Therefore, minor discrepancies, would not impeach credibility of the prosecution witnesses with regard to sealing and safe custody of the contraband in the police station and subsequently sending of the same to the safe hands of Forensic Science Laboratory. He would rely upon the decision of the Supreme Court in the case of **State of Rajasthan vs. Daul alias Daulat Giri**¹⁶.

Learned State counsel would further argue that in the matter of destruction of contraband, provisions contained in Section 52-A of the Act were complied with in its true spirit. List of inventory has been proved by the prosecution and the same has not been challenged by the defence. Therefore, non-production of sample in the Court, does not vitiate the case of the prosecution, particularly when it was not challenged in the Court. Learned State counsel submits that the mixing of entire quantity of ganja and the drawn samples only after making it homogeneous is not such irregularity, as it would make quantity or nature of articles seized from the possession of the appellants doubtful. There is no suggestion that other articles were also kept in the bags and not the contraband. Learned State counsel also argued that uncontroverted evidence of Parmeshwar Singh Rajput, PW-6, regarding contraband taken from the police station to the Forensic Science Laboratory, certain discrepancies, if

16 (2009) 14 SCC 387

any, with regard to time and date of carrying sample from the police station to Forensic Science Laboratory, as the Forensic Science Laboratory report is dated 26-12-2012 Ex.P-26, which has not been disputed, the oral evidence of Dolamani, PW-3 may be ignored, particularly when the police officer stated that the sample was taken to the Forensic Science Laboratory on 17-12-2012.

6. We have heard learned counsel for the parties and minutely examined the records of the case.

7. As far as challenge to the order of conviction on the ground of non compliance of mandatory provision under Section 50 of the Act is concerned, two fold submissions have been made. First relates to applicability of Section 50 of the Act and second with regard to compliance of the same. According to the learned State counsel, as no recovery was made from the bodily search and the person of the accused, but according to the prosecution, contraband was found kept in the vehicle, Section 50 of the Act will have no application and the proceedings of seizure are not vitiated on the ground of non-compliance of the provisions contained under Section 50 of the Act. Learned counsel for the appellant, however, relying upon the various judgments, has submitted that in the facts and circumstances of the case, provisions of Section 50 of the Act are attracted and therefore, non-compliance will vitiate the entire proceedings of seizure and the conviction.

8. Provisions contained under Section 50 of the Act came under scrutiny and interpretation of the Supreme Court in plethora of decisions. One of the most authoritative pronouncement on the interpretation of the provisions contained under Section 50 of the Act has been made by the Constitution Bench of the Supreme Court in the case of ***State of Punjab vs. Baldev Singh***¹⁷. Upon survey of large number of decisions and close scrutiny of the

¹⁷ (1999) 6 SCC 172

provisions contained under Section 50 of the Act, it was concluded as below:-

57. “On the basis of the reasoning and discussion above, the following conclusions arise : -

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing;

(2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;

(3) That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act;

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards 50 have by Section 50 at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut-short a criminal trial;

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;

(7) That an illicit article seized from the person of an accused during

search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search;

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act

(9) That the judgment in Pooran Mal's case cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search;

(10) That the judgment in Ali Mustaffa's case correctly interprets and distinguishes the judgment in Pooran Mal's case and the broad observations made in Pirthi Chand's case and Jasbir Singh's case are not in tune with the correct exposition of law as laid down in Pooran Mal's case.”

9. In a subsequent decision in the case of ***Dilip and another vs. State of M.P.***¹⁸, an issue arose as to whether compliance of Section 50 of the Act was necessary, if the person of the accused was also searched, though the contraband was not recovered from the person, but from the vehicle. In para 16 of the judgment, it was observed that the provisions of Section 50 of the Act might not have been required to comply with orders of search of scooter is concerned, but keeping in view the fact that the person of the appellant was also searched, it was obligatory on the part of the police officer to comply with the said provisions. In coming to this conclusion, reliance was placed on the observations made in the Constitution Bench of the Supreme Court in the case of ***Baldev Singh*** (supra), where Constitution Bench opined (SCC PP 190-191) :

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“Thus, while conducting search and seizure, in addition to the

18 (2007) 1 SCC 450

safeguards provided under the Code of Criminal Procedure, the safeguards provided under the NDPS Act are also required to be followed. Section 50(4) of the NDPS Act lays down that no female shall be searched by anyone excepting a female. This provision is similar to the one contained in Section 52 of the Code of Criminal Procedure, 1898 and Section 51(2) of the Code of Criminal Procedure, 1973 relating to search of females. Section 51(2) of the Code of Criminal Procedure, 1973 lays down that whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency. The empowered officer must, therefore, act in the manner provided by Section 50(4) of the NDPS Act read with Section 51(2) of the Code of Criminal Procedure, 1973 whenever it is found necessary to cause a female to be searched. The document prepared by the Investigating Officer at the spot must invariably disclose that the search was conducted in the aforesaid manner and the name of the female official who carried out the personal search of the concerned female should also be disclosed. The personal search memo of the female concerned should indicate compliance with the aforesaid provisions. Failure to do so may not only affect the credibility of the prosecution case but may also be found as violative of the basic right of a female to be treated with decency and proper dignity.”

10. In a subsequent decision in the case of ***State of Rajasthan vs. Parmanand and another***¹⁹, Their Lordships in the Supreme Court revisited its earlier Constitutional Bench decisions in the case of ***Baldev Singh and Dilip*** (supra) as also in the case of ***Union of India vs. Shah Alam and another***²⁰.

11. In the case of ***Union of India vs. Shah Alam*** (supra), heroine was first recovered from the bag carried by the accused, their personal search was taken and nothing recovered from that person. It was urged that since personal search did not led to any recovery, there was no need to comply with Section 50 of the Act.

19 (2014) 5 SCC 345

20 (2009) 16 SCC 644

12. Relying upon the verdict in the case of **Dilip** (supra), it was held that since provision of Section 50 of the Act was not complied with, acquittal was justified in law on that ground.

Relying upon the aforesaid three verdicts, it was 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”

13. In a recent decision of three Judge Bench of the Supreme Court in the case of **SK Raju @ Abdul Haque vs. State of West Bengal**²¹, the aforesaid legal position was re-affirmed that irrespective of whether contraband is recovered from the person of the detainee or not, as soon as, search of person takes place, requirement of mandatory compliance under Section 50 of the Act is attracted. It was observed thus: -

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.”

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However, learned State counsel has relied upon another recent decision of the Supreme Court in the case of ***Varinder Kumar vs. State of Himachal Pradesh***²² and submitted that in that case, on facts, it was found that contraband kept in two gunny bags was recovered from the scooter and not recovered from the person, Section 50 of the Act was held not applicable.

14. In the case of ***Varinder Kumar vs. State of Himachal Pradesh*** (supra), Their Lordships in the Supreme Court, having found that the gunny bags containing contraband were recovered from the scooter and not from the person of the accused, held that Section 50 of the Act would have no application. In that decision, it was neither argued nor the Court had an occasion to examine the applicability of Section 50 of the Act, upon consideration of the factual aspect that the person of the accused was searched. The aforesaid decision is not an authority for the proposition that Section 50 of the Act will have no application, where though person is searched, but recovery of contraband is not made from the personal search, but from the vehicle or any other place. There was no occasion for the Supreme Court to examine the legal position in the backdrop of any factual position as was considered in its earlier decisions in the cases which have been referred to hereinabove. In the decisions, which have been considered hereinabove, it has been consistently held that where recovery is made not from the person, but from any other place, compliance of Section 50 of the Act would not be necessary. However, where personal search is carried out, Section 50 of the Act would be attracted. Therefore, the decision in the case of ***Varinder Kumar*** (supra) does not come to the aid of the State.

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15. Accordingly, it has to be held that settled legal position that as soon as search of person takes place, requirement of mandatory compliance under Section 50 of the Act is attracted, irrespective of whether contraband is recovered from the person of the detainee or not.

16. Looking to the facts of the present case, it is clear that the appellants were bodily searched. The document of personal search, Ex.P-5 clearly records that the two appellants namely Nand Kumar Kosare and Avinash Singh Rajput as also the vehicle, in which, they were travelling i.e. Indica Car, was searched. It contains clear recital that search was carried out not only of the vehicle, but from the accused also. Ganja was allegedly recovered from the backseat and dickey of the vehicle. Ram Kumar Tode, Investigating Officer, PW-9 has also proved Talashi Panchnama, Ex.P-5 prepared at the spot. From the prosecution case, it is also borne out that the contraband was allegedly recovered from the vehicle and not from the person of the accused. Therefore, the factual premise, on which, the prosecution rests, is that the accused-appellants were bodily searched and the vehicle was also searched and contraband was recovered from the vehicle, but not from the person of the accused. Therefore, in view of the legal positions, as discussed hereinabove and law laid down by the Supreme Court, the requirement of mandatory compliance under Section 50 of the Act is attracted.

17. It has now to be seen whether the prosecution has succeeded in proving compliance of Section 50 of the Act.

18. The Constitution Bench of the Supreme Court in the case of **Baldev Singh** (supra) and subsequent decisions referred to hereinabove, clearly laid down that before search is carried out, it is imperative that the Officer, inform the person concerned of his right of being taken to the nearest Gazetted Officer or nearest Magistrate to take search, though it may not be necessary to be

reduced in writing.

19. Ram Kumar Tode, Investigating Officer, PW-9 has deposed in para 3 & 4 of his evidence that after the vehicle was intercepted and the appellants were found in the vehicle, which was driven by Nand Kumar Kosre, they were informed that if they desire, they may get search carried out by the Magistrate or the Gazetted Officer. He further deposed that the appellants had given their consent to get their vehicle and their personal search by the Investigating Officer, where after the Investigating Officer gave his own search, that of the Staff and the witnesses and thereafter, upon search was carried out in the vehicle, ganja was recovered. Suggestion has been given in the cross-examination that the entire proceedings drawn by the Investigating Officer is fabricated which has been denied. There is no specific suggestion given to the Investigating Officer that the accused were not informed of their right to be searched by the Magistrate or by the Gazetted Officer nor that the accused had not given their consent to be searched by the Investigating Officer. In this regard, it has been elicited in the cross-examination that no consent in writing was given. In view of the Constitution Bench decision in the case of **Baldev Singh** (supra), consent was not required to be given in writing. According to prosecution, Ex.P-4 contain consent given in writing by both the appellants and signed by them.

20. It is, however, found that both the appellants were given joint communication regarding their right to get searched from the Magistrate or Gazetted Officer. On this aspect, observation made by the Supreme Court in para 16 of its decision in the case of **Parmanand** (supra) have been brought to the notice of the Court to submit that if individual information is not given to the accused, it vitiates the search proceedings as it would be against the spirit of the provisions contained under Section 50 of the Act.

In the case of **Parmanand** (supra), on facts, it was found that on joint written notice, given to the accused, only one of the accused had given his consent in his handwriting that he and other accused Parmanand are agreeable to search by the Investigating Officer. Only one of them had signed the notice and put his thumb impression and other accused-Parmanand did not sign. In this factual background that a joint written notice of a right to be searched by the Magistrate or Gazetted Officer was given to both the accused, in which, only one of the accused had given consent in writing on his behalf and on behalf of the other accused, their Lordships had an occasion to state the consequences of joint communication on the right available under Section 50(1) of the Act to the accused, by observing thus:-

17. “The principle which emerges from Vijaysinh is that the concept of “substantial compliance” with the requirement of [Section 50](#) is neither in accordance with the law laid down in Baldev Singh, nor can it be construed from its language. [Reference may also be made to the decision of a two judge Bench of this Court in Venkateswarlu]. Therefore, strict compliance with [Section 50\(1\)](#) by the empowered officer is mandatory. [Section 50](#), however, applies only in the case of a search of a person. In Baldev Singh, the Court held:

“12. On its plain reading, [Section 50](#) would come into play only in the case of a search of a person as distinguished from search of any premises, etc.”

In State of Himachal Pradesh v Pawan Kumar (“Pawan Kumar”),¹¹ a three judge Bench of this Court held that the search of an article which was being carried by a person in his hand, or on his shoulder or head, etc., would not attract [Section 50](#). It was held thus:

“11. ..In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word “person” occurring in [Section 50](#) of the Act.

16. ...After the decision in Baldev Singh, this Court has consistently held that [Section 50](#) would only apply to search of a person and not to any bag, article or container, etc. being

carried by him.”

21. Though, learned State counsel would submit that the aforesaid observations made by the Supreme Court have to be confined only in those cases, where one of the accused alone gives his consent in writing on his behalf and on behalf of the other accused and the other accused does not state his own consent, we are not impressed with this submission.

22. True it is that the factual background of that case was that in response to joint communication, only one of the accused had given consent and the other co-accused had not given his consent and the document stated that one accused had given consent on behalf of other accused also, but the observations made by the Supreme Court are not confined to only such contingencies, but are, sweeping in nature. It has been held that the joint communication may not be clear and unequivocal and may create confusion and resulting in violation of the right. On such consideration, it has been held that the accused must be individually informed under Section 50 (1) of the Act, that he has right to be searched before the nearest Gazetted Officer or before the Magistrate. Reliance was placed on the decision of the Punjab and Haryana High Court in ***Paramjit Singh vs. State of Punjab***²³ and the Bombay High Court in ***Dharamveer Lekhram Sharma vs. State of Maharashtra***²⁴

23. Therefore, on considerations of the entire evidence, oral and documentary, with regard to compliance of Section 50(1) of the Act, in the light of the various decisions, it has to be held that while conducting personal search, provision of Section 50 of the Act was not duly complied with and thus it vitiates the proceedings of search and seizure of contraband.

24. The judgment of conviction and order of sentence has also been assailed

23 (1997) 1 Crimes 242 (P&H)

24 (2001) 1 Crimes 586 (Bom)

on the grounds that the mandate of law under Section 55 of the Act, which is intended to ensure safe custody and avoid possibility of tampering with the seized article as well as sample has been violated.

The punishment for unlawful possession of commercial quantity of contraband is very stringent where minimum 10 years of R.I. has been prescribed under the law, and further, keeping in view that in the matter of commission of offence under the Act, it carries reverse burden of proof, the prosecution is required to come out with full proof case that while effecting seizure, preparation of sample, sealing, safe custody, sending of sample to the Forensic Science Laboratory, the legal requirements are strictly complied with.

25. Section 55 of the Act reads as below:-

55. “Police to take charge of articles seized and delivered. --An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the Officer-in-charge of the police station.”

26. In the case of ***Shivnath Shah vs. State of Chhattisgarh***²⁵, this Court examined the statutory scheme of Section 55, as below:-

8. “A cumulative reading of these two provisions makes it clear that what is strictly required is that when any police officer, below the rank of the Officer-in-charge of police station apprehends a person, suspected to be in possession of narcotic drug or other psychotropic substance, he has to take charge of that person, detain him, conduct his search and in case such a person is found to be in possession of any drug or substance of prohibited category, then place him under arrest. Thereafter the mandate of law is that he has to forthwith produce such a person, as well as the

articles seized from him, before the Officer-in-charge of the police station.

9. A bare reading of Section 55 makes it clear that it is the Officer-in-charge of the concerned Police Station who is to take charge of the articles seized and to keep them in safe custody, and allow any person, who accompanies such seized articles to the Police Station, to affix his seal on the articles or samples thereof, and has necessarily to affix the seal of the officer-in-charge of the Police Station on such parcels.

10. The Legislative intention is clear, that samples to be sent to the Forensic Science Laboratory in an offence which can visit a person with such grave minimum penal consequences like R.I. for ten years and fine of Rs.1 Lakh and further imprisonment in lieu thereof, as a matter of legislative policy, ought to be handled by a senior officer, i.e. the Officer-in-charge of the police station. It is this officer who has to take charge of the seized commodity, have it sampled and sealed and then get it deposited in the Police Station for safe custody pending orders of the Magistrate, and affix his seal on the samples prepared out of the seized commodity and it is only in the event of his permitting some Junior officer accompanying the seized articles to the police station for depositing the same in the police station, such officer may affix his seal on those parcels.

11. Thus the only construction possible from a reading of Section 55 of the Act, in conjunction with Section 52(3), is that it is the officer-in-charge of the police station, who is to take charge of the person arrested, as well as the articles seized and to allow such other officer accompanying those articles to put his seal on the parcels and to have the samples taken in his presence and sealed with his own seal, and then get them deposited at the police station for safe custody.

12. The sentencing policy, as incorporated under the Act is so stringent and rightly so because it is ought to be really deterrent, so as to curb the activities of people who indulge in trafficking of narcotic drugs who are proving a menace to the health of the society. The legislature, aware of the heavy minimum sentence of 10 years of R.I. and fine of Rs.1 Lakh introduced inbuilt safeguards in the scheme contained in chapter-V of the act so that the investigation is conducted in such a manner that there is no scope for any type of suspicion or doubt either about the authenticity of the recovery or of tampering of the samples which are sent to the Forensic Science Laboratory. The provision contained in Section 55 of the Act is

carved out with that end in view. The words “seal of the Officer-in-charge of the Police Station” reflect the intention of the legislature. Once, the S.H.O. of the concerned police station takes charge of the contraband article, affixes his seal on the samples taken there from and entrusts the sealed articles at the malkhana, it would ensure against tampering with the samples. Non compliance of the provision of Section 55 of the Act would have a definite bearing on appreciation of evidence in the facts and circumstances of each case.

13. In order to maintain transparency in the investigation conducted in such offences, at the time of sealing of the samples as required by Section 55 of the Act, a specimen impression of the seal should also be prepared and deposited along with the sample packets in the malkhana and is also sent to the Forensic Science Laboratory which can verify whether the seal affixed on the sample packets tallied with the specimen impression of the seal sent with the sample packets. If this is done, it would, depending on the facts and circumstances of each case, remove any doubt about the authenticity of the sealing of the samples.”

27. In yet another decision in the case of **Narendra Bhushan Dubey vs. State of Madhya Pradesh (now CG)**²⁶, violation of Section 55 of the Act was noticed, as below:-

18. “The Investigating Officer, who was the officer in charge of the police station and who seized the contraband has been examined by the prosecution as PW-4. In his cross-examination, he has stated that seized ganja was sealed with the seal of the police station. In his cross-examination, he admits that he has seal in his own name. The mandate of Section 55 requires the officer in-charge of the police station to seal the sample with his own seal. However, no explanation has come forth from the prosecution even in the cross-examination of R.K. Rai (PW-4) as to why the officer in-charge did not affix his seal as required under Section 55 of the Act. This aspect assumes importance as in the cross-examination, a suggestion has been given that the incident happened in the night at some other place and the accused was sent to the police station along with the constable and the Investigating Officer had gone to Sakari where signatures of the witnesses were taken on all the

documents. Section 55 of the Act of 1985 requires the officer-in-charge of police station to take charge of and keep in safe custody all seized articles. The statutory scheme of the Act engrafted under Section 55 requires the officer-in-charge of the police station to seal all the samples with his own seal. The legislative intention is that there should be fair investigation for keeping the seized article in safe custody of the highest officer of the concerned police station so as to eliminate the possibility of the sample being tampered with till the same reaches the hands of the chemical examiner. Under provision contained in Section 55 such a duty has been enjoined upon the officer in-charge of the police station with the manifest object that the senior officers can be trusted to be fair in investigation and not indulging in dubious practices. When the prescribed procedure is abandoned, it gives rise to gnawing suspicion particularly when in the present case, the officer in-charge/S.H.O. himself had seized the articles.

19. The purpose and object of the provision contained in Section 55 of the N.D.P.S. Act is to rule out any possibility of tampering the sample as stringent provisions with regard to punishment for offence under the Act have been made. The sanctity of the sample therefore has to be proved by the prosecution by leading thorough evidence.”

28. In the present case, even according to the case of the prosecution, the contraband was seized by R. K. Tode, Sub Inspector, PW-9. In para 7, he has stated that four packets of samples were prepared in Ex.P-4 and seized quantity of ganja along with sample packets was sealed and the seal is marked as “E to E” in Ex.P-11. Annexure P-13 is the seizure memo of seizure of the vehicle and 181.600 KG of ganja. It bears two seals of Police Station Mahasamund. This has been prepared by R. K. Tode, PW-9, who was Sub Inspector in the Police Station. Ex.P-14 is separate Sample Panchnama, which states that four packets of sample, each of 100 grams, was taken out of the wholesome quantity of ganja and sealed. This Ex.P-14 does not bear any specimen seal of the Officer effecting seizure. As to what specimen seal was used for sealing the samples is not affixed on the Sample Panchnama Ex.P-14. Ex.P-13 is not the seizure

memo of seizure of sample but only of the vehicle, 181.600 KG of ganja.

Moreover, Ram Kumar Tode, Sub Inspector, PW-9 has nowhere stated that he was the Officer In-charge of the Police Station. If he was not the Officer In-charge of the Police Station, only Officer of the Police Station, who had effected the seizure, Section 55 of the Act required him to handover the entire quantity of ganja allegedly seized by him along with sample as also the vehicle to the Officer In-charge of the Police Station and it was the duty of the Officer In-charge of the Police Station, as mandated under Section 55 of the Act to take charge and keep all the articles in the safe custody. Section 55 of the Act further oblige him to put his seal as Officer In-charge of the Police Station and keep the articles in safe custody. There is no material placed by the prosecution before the Court that Ram Kumar Tode, PW-9, after return to the Police Station, entrusted allegedly seized ganja in the hands of the Officer In-charge of the Police Station and thereafter the Officer In-charge of the Police Station affixed his seal on the quantity of ganja as well as on the packets of samples and then it was deposited in the malkhana of the police station. Even in the FIR or in the Malkhana Register, no such mention has been made. It would thus appear that Ram Kumar Tode, PW-9, who was carrying a [common](#) seal of the Police Station, affixed seal on the quantity of ganja, as reflected from Ex.P-13, memo of seizure and that was brought along with samples to the Police Station and it is nowhere shown as to what specimen seal was affixed on the samples. In the Police Station, without the same having been entrusted to the Officer In-charge of the Police Station and the Officer In-charge of the Police Station not taking charge nor affixing his own seal as Officer In-charge, the seized quantity of samples were allegedly deposited in the Malkhana. No document of sample seal, with which samples were affixed, was deposited in the Malkhana. The evidence of Ram Kumar Tode, PW-9, Sub Inspector, who effected seizure and

who claims to have effected seizure and copies of Malkhana Register, Ex.P-18(C) did not reflect that while depositing seized articles, any document bearing imprint of sample seals was also deposited.

Though, it is true that only on this ground that the conviction may not be vitiated, violation of Section 55 of the Act in the matter of proper sealing and safe custody weakens the case of the prosecution.

There is yet another discrepancy in the matter of keeping and transmitting samples from the Police Station to the Forensic Science Laboratory. According to Ram Kumar Tode, PW-9, Sub Inspector of the Police Station, who effected seizure, samples were sent to Forensic Science Laboratory, Raipur on 17-12-2012, through the office of the Superintendent of Police, Mahasamund.

Megha Rani Chandrakar, PW-7, Constable, states that she had taken two sealed packets along with FIR, copy of memo of seizure, sample panchnama and specimen seal to the Forensic Science Laboratory on 17-12-2012 and obtained acknowledgment of receipt.

However, according to Dolamani, PW-3, Head Constable, In-charge of the Malkhana, sample packets were sent to the Forensic Science Laboratory on 27-12-2012 and entries to that effect have been made at S.No.39, dated 13-12-2012. The entries in Ex.P-18(C) made on 13-12-2012 and said to be in respect of the quantity of seized article from the appellants is not at S.No.39, but at S.No.91.

29. Curiously enough, in the corresponding column, firstly under Rojnamchasanha No.245, dated 05-05-2013, it has been recorded that as per the order of the Special Judge, vehicle was given on supurdnama to Rajesh Rajput below that, another Rojnamchasanha No.1412 dated 27-12-2012 has been noted to the effect that through Mahila Police Constable, Megha Rani Chandrakar, sample of ganja was deposited in the Forensic Science

Laboratory, Raipur.

30. Therefore, the prosecution evidence with regard to the date, on which, samples were taken out of Malkhana is contradictory, suffers from inherent contradiction. While according to Megha Rani Chandrakar, PW-9, Constable, samples were taken from the police station on 17-12-2012, according to the In-charge of Malkhana namely Dolamani, PW-3, entries made in Malkhana Register, Ex.P-18(C), samples were removed on 27-12-2012.

Memo of the police of the Superintendent of Police, District Mahasamund addressed to Director, Forensic Science Laboratory, Raipur, forwarding sample, bears date 15-12-2012. Receipt of sample by the Forensic Science Laboratory vide Ex.P-21 shows receipt on 17-12-2012. The Forensic Science Laboratory report, Ex.P-26, bears signature of the Forensic Science Laboratory Scientists, which bears 26-12-2012 as the date, on which, the report was signed. It would thus be seen that the entire case of the prosecution is extremely doubtful as to when the sample was removed from the custody of the Police Station, when it was deposited in the Forensic Science Laboratory and when the report was prepared. If according to the Malkhana In-charge and the entries made in the Malkhana register, samples were removed on 27-12-2012, how could report be prepared prior to the date when it was removed i.e. 26-12-2012 ?

If it is to be noted that if according to prosecution, samples were sent along with the memo of Superintendent of Police, Mahasamund on 15-12-2012, then where the samples were kept for two days before it was deposited in the Forensic Science Laboratory on 17-12-2012 is not known. If the evidence of Megha Rani Chandrakar, PW-7 and Ram kumar Tode, PW-9 is to be believed, the sample was taken out on 17-12-2012, then how it could be sent two days prior to that along with memo dated 15-12-2012 of the Superintendent of Police, Mahasamund?

31. The samples have not been proved to be bearing any particular seal of the Officer In-charge of the Police Station or even of the Officer, who effected seizure and drawn samples. The Forensic Science Laboratory report does not mention as to which was that sample seal, which was sent along with the sample. In the report of Forensic Science Laboratory also, there is no mention that the seal affixed on the sample sent for test was tallied with the sample seal and was found matched.

The offence of unlawful possession of commercial quantity of narcotics is punishable with stringent punishment of not less than 10 years and as it carries reverse burden of proof, conviction cannot be sustained and when there are such serious doubts with regard to sealing, safe custody and testing of the sample.

32. Learned State counsel has relied upon the case of ***Daul alias Daulat Giri, (supra)***, to submit that where samples reached Forensic Science Laboratory with seals intact and remained in custody of an employee of office of the Superintendent of Police, that would not may render prosecution and conviction fatal. The facts of the aforesaid case are completely distinguishable. That was a case where some delay was found in sending the samples and further that it remained in the hands of an employee. As the seals were found intact, possibility of sample having been tampered with, was not accepted. The discrepancies, which have been noticed in the present case, were not found in the aforesaid case.

33. This is a case, where not a single independent witness has supported the case of the prosecution. Though, Ramesh Kumar Yadav, PW-2 and Chetan Mannade, PW-5 were examined by the prosecution as independent witnesses of seizure of contraband, both have not supported the case of the prosecution and according to them, they were asked to sign certain papers in the police

station, no proceedings were drawn in their presence nor they had gone to the place, where proceedings of search was made by the police.

34. Afroz, PW-4, who is said to be called in the police station for the purpose of weighment, has also not supported the case of the prosecution nor he had supported preparation of samples. According to him, he was called in the police station and his signatures were obtained, but he did not know as to for what purpose, his signatures were obtained.

Though, it has been held by the Supreme Court as also by this Court, in number of decisions, that in a case where independent witnesses of seizure and various proceedings have not supported the prosecution case, yet reliable testimony of the Investigating Officer can be made a basis to prove seizure and preparation of sample and various proceedings, in the present case, when all other proceedings drawn by the Investigating Officer are tainted with various irregularity and illegalities committed by the Police Officers including violation of Section 50 & 55 of the Act, it would not be safe to convict the appellants when the proceedings are not corroborated by the independent witnesses particularly with regard to seizure of contraband. The accused, in our considered opinion, are entitled to be given benefit of doubt, because the prosecution in the present case, has failed to prove its case, beyond reasonable doubt.

Though, some other grounds were urged, we do not consider it necessary to dwell into other aspects.

35. In view of above, conviction of the appellants is held unsustainable in law. The impugned judgment of conviction and order of sentence is accordingly set aside.

36. In the result, the aforesaid two appeals are accordingly allowed. The appellants shall be released forthwith, if not required in any other case.

SD/-
(Manindra Mohan Shrivastava)
Judge

SD/-
(Rajani Dubey)
Judge