

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRA-D-1076-DB of 2017 (O&M)

Reserved on : 09.04.2019

Date of decision : 12.04.2019

Harpreet Singh alias Gahgu

.... APPELLANT

Versus

State of Punjab

..... RESPONDENT

CORAM :- HON'BLE MR. JUSTICE RAJIV SHARMA

HON'BLE MR. JUSTICE HARINDER SINGH SIDHU

Present: Mr. B.S. Bhalla, Advocate,
for the appellant.

Mr. S.P.S. Tinna, Addl. A.G., Punjab.

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RAJIV SHARMA, J.

1. This appeal is instituted against judgment dated 25.10.2017 and order dated 26.10.2016, rendered by Judge, Special Court, Amritsar, in NDPS Case No. 880 of 2016 dated 09.08.2016, whereby appellant Harpreet Singh alias Gahgu, who was charged with and tried for the offence punishable under Section 22 read with Section 8 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act' for brevity), was convicted and sentenced to undergo rigorous imprisonment for 12 years and to pay a fine of ₹ 1,50,000/-, under Section 22 of the NDPS Act. In default of payment of fine, he was ordered to further

undergo simple imprisonment for six months.

2. The case of the prosecution, in a nutshell, is that on 22.05.2014 at about 7.10 PM, ASI Satinderpal Singh of Police Station Majitha along with ASI Gurnam Singh and other police officials was going on Government vehicle from Majitha towards village Kotla Sultan Singh via village Hamja, in connection with patrolling, and in search of bad elements. When the police party reached near village Kotla Majha Singh, then from the opposite side, a young man was seen coming on foot. After seeing the police, he got perplexed and turned towards his right hand side. The police tried to apprehend the person. The person tried to throw away a black coloured polythene envelope after taking out the same from his vest. He was apprehended by ASI Satinderpal Singh with the help of fellow police officials. He was interrogated. He disclosed his identity. The polythene bag contained intoxicant powder. One small polythene bag was also recovered which was found to be containing loose capsules of Provon Spas. Out of the recovered intoxicant powder, 10 grams was taken out as sample, and converted into parcel after putting the same into a separate plastic container. The remaining intoxicant powder weighed 240 grams. It was converted into separate bulk parcel. The recovered capsules on counting came to 50, out of which 10 capsules were separated as sample and converted into separate sample parcel after putting the same into another plastic container. The remaining 40 capsules were converted into separate bulk parcel after putting the same into another plastic container. All the samples were sealed by ASI Satinderpal Singh with his seal impression 'SPS'. Sample seal was prepared separately. One specimen seal was affixed on Form M-29. These were taken

into possession. Seal after use was handed over to ASI Gurnam Singh. FIR was registered. The accused was arrested. Rough site plan of the place of recovery was prepared. ASI Satinderpal Singh produced the parcels along with sample seals, Form M-29 and accused before SHO Inderjit Singh. He after verifying the correctness of the seals on the parcels affixed his seal 'IS'. He also completed relevant portions of Form M-29. The double lock was operated. The case property along with sample seal and Form M-29 was kept in double lock. On the next day, i.e. 23.05.2014, SHO Inderjit Singh operated the double lock. He handed over parcels, sample seals and Form M-29 along with accused to ASI Satinderpal Singh. The accused along with case property was produced before the Ilaqa Magistrate. The court after breaking the seals of both the bulk parcels took out 10 grams intoxicant powder and 10 capsules from the bulk parcels. The representative parcels were prepared and sealed by the court with its seal 'SS' and 'SS'. The remaining bulk parcels of 230 grams intoxicant powder and 30 capsules were re-sealed by the court with its seal 'SS'. On 26.05.2014, SHO Inderjit Singh again operated the double lock and handed over the aforesaid two bulk parcels and two representative parcels to ASI Satinderpal Singh. On 21.07.2014, SHO Inderjit Singh handed over sample parcels of 10 gams intoxicant powder and 10 capsules sealed with seal impressions 'SPS' and 'IS', sample seals, Form M-29 to HC Bagicha Singh vide road certificate No. 161/21, to deposit the same in the office of Chemical Examiner, Kharar. The sample of capsules was reported to be containing Tramadol Hydrochloride and sample of intoxicant powder contained Diphenoxylate Hydrochloride. Investigation was completed and challan was put up after

completing all the codal formalities.

3. The prosecution examined a number of witnesses in support of its case. The accused was also examined under Section 313 Cr.P.C. He denied the case of the prosecution. In his defence, he examined one witness.

4. The accused was convicted and sentenced, as noticed above. Hence, this appeal.

5. Learned counsel appearing on behalf of the appellant has vehemently argued that the prosecution has failed to prove its case against his client. Learned counsel appearing on behalf of the State has supported the judgment and order of the learned Court below.

6. We have heard learned counsel for the parties and gone through the judgment and record very carefully.

7. PW.1 ASI Gurnam Singh testified that on 22.05.2014, he was posted as ASI at Police Station Majitha. He along with other police officials headed by the Investigating Officer ASI Satinderpal Singh was going on government vehicle. It was being driven by HC Jagtar Singh. When the police party reached 50 yards before village Kotla Majha Singh, a person was seen coming on foot from opposite side. On seeing the police party, he got perplexed and tried to run away. The Investigating Officer with the help of police officials tried to apprehend him. He threw a black coloured polythene bag which he had taken out from his vest. He was apprehended by the Investigating Officer. He disclosed his identity. All the codal formalities were completed on the spot. The Investigating Officer sealed the case property with his seal impression 'SPS'. One specimen seal was affixed on Form M-29. In his cross-examination, he deposed that the accused was

apprehended on the basis of suspicion. He admitted that when the Investigating Officer had seen the accused, at the time the alleged contraband was in the undershirt of the accused. He further admitted that when the accused was arrested by the Investigating Officer, the alleged contraband was in the grip of right hand of the accused. No offer was given to the accused by the Investigating Officer regarding his legal right i.e. to be searched before Magistrate or any Gazetted Officer. He also admitted that the Investigating Officer had handed over seal to him. He admitted that at that time, independent witness Balwinder Singh was present. All the statements under Section 161 Cr.P.C. were recorded by the Investigating Officer in the police station after handing over the case property to the SHO. The Investigating Officer did not record any statement at the spot. No entry was made in register No. 19 by the SHO in his presence.

8. PW.2 Harpal Singh deposed that he was posted as Chemical Examiner, Kharar. The Director, FSL Mohali, vide order dated 12.08.2014 had allotted the districts from where samples were to be deposited. The Director, FSL Mohali, vide letter dated 09.09.2014 had directed the Chemical Examiner, Kharar to take samples from FSL, Mohali.

9. PW.3 HC Bagicha Singh deposed that he was posted as HC/ general duty at Police Station Majitha, on 21.07.2014. One sample parcel of 10 grams intoxicant powder and one sample parcel of 10 capsules were handed over to him by SHO. He deposited the same in the office of FSL, Mohali. In his cross-examination, he deposed that no entry was made in register No. 19 by the SHO in his presence. He admitted that whenever docket is got issued, a relevant entry is made on Form M-29.

10. PW.4 SI Satinderpal Singh deposed the manner in which the accused was seen coming from the opposite side. He tried to apprehend the accused. The accused threw a black coloured polythene bag, which he had taken out from his vest, but was apprehended by him. He disclosed his identity. Intoxicant powder and loose capsules of Provon Spas were recovered from his possession. All the codal formalities were completed at the spot, including filling up of Form M-29. He handed over parcels along with sample seals, Form M-29 and accused to SHO Inderjit Singh. On 23.05.2014, SHO Inderjit Singh of Police Station Majitha operated the double lock. The parcels, sample seal and Form M-29 along with accused were handed over to him by the SHO for producing before the Duty Magistrate. He produced the accused and the case property before the Duty Magistrate. The court after breaking the seals of both the bulk parcels had taken out 10 grams intoxicant powder and 10 capsules. The representative parcels were sealed by the court with its seal 'SS' and 'SS'. The remaining bulk parcel of 230 grams intoxicant power and 30 capsules were re-sealed by the court with its seal 'SS'. He also affixed his seal 'SPS' on the bulk parcels. On 26.05.2014, SHO Inderjit Singh again operated the double lock and handed over to him two bulk parcels and two representative parcels. He deposited the same in Judicial Malkhana, Amritsar. In his cross-examination, he admitted that the accused was apprehended on the basis of suspicion. When he saw the accused, at that time, the alleged contraband was in the undershirt of the accused. The contraband was recovered from the grip of the hands of the accused. No offer was given to the accused regarding his legal right i.e. to be searched before Magistrate or Gazetted

Officer. He also admitted that seal was not handed over to independent witness after use. Same was handed over to ASI Gurnam Singh. No seizure memo was prepared by him at the spot.

11. PW.5 Inspector Inderjit Singh deposed that the case property was produced before him. After checking correctness of the seal, he sealed all the parcels with his seal impression 'IS' and affixed one seal on Form M-29. He filled up remaining relevant columns of Form M-29. On 23.05.2014, he handed over all the parcels duly sealed with seal impressions 'SPS' and 'IS' along with the sample seals and Form M-29 after taking the same out of the double lock for authentication from the Judicial Magistrate Ist Class to ASI Satinderpal Singh. ASI Satinderpal Singh produced the same in the court. The representative parcels were drawn by the court. The court put its seal 'SS' and 'SS' on the representative parcels. The remaining bulk parcels of 230 grams intoxicant powder and 30 capsules were re-sealed by the court with its seal 'SS'. Investigating Officer affixed his seal 'SPS' on the bulk parcels. He again operated double lock on 26.05.2014. The bulk parcels and representative parcels were handed over to ASI Satinderpal Singh. He deposited the same in the Judicial Malkhana. On 21.07.2014, he handed over sample parcels of 10 grams of intoxicant powder and 10 capsules sealed with seals of 'SPS' and 'IS', sample seals, Form M-29 to HC Bagicha Singh. He deposited the same with the office of Chemical Examiner.

12. The Chemical Examiner report is Ex.PX. According to this report, on the basis of analysis, ingredients along with their quantity were found present in the samples, i.e. Tramaol Hydrochlorid and Diphenoxylate Hydrochlorid, to the extent of 48.10 mg/capsule and 2.18%, respectively.

13. PW.1 ASI Gurnam Singh has admitted in his cross-examination that when the Investigating Officer had seen the accused, at that time, contraband was in the undershirt of the accused. At the time of arrest of the accused by the Investigating Officer, the polythene bag was in the right hand of the accused. Similarly, PW.4 SI Satinderpal Singh has also deposed that the accused was arrested on the basis of suspicion. When he had seen the accused, at that time, the alleged contraband was in the undershirt of the accused. The contraband was recovered from the hands of the accused. No option was given regarding his legal right, i.e. to be searched before Magistrate or Gazetted Officer. Similarly, PW.1 ASI Gurnam Singh has also deposed that the accused was arrested on the basis of suspicion. No option was given to the accused by the Investigating Officer regarding his legal right i.e. to be searched before Magistrate or any Gazetted Officer. The seal was handed over to PW.1 ASI Gurnam Singh, instead of handing over to the independent witness.

14. The case of the prosecution is that the accused had taken the contraband from his vest and was holding polythene bag in his hand, when he was apprehended. Since the recovery is not from his body, but from the polythene bag carried by him, no option was required to be given to him to be searched in the presence of Magistrate or Gazetted Officer.

15. The Constitution Bench of the Hon'ble Supreme Court in **State of Punjab Versus Balbir Singh, (1994) 3 Supreme Court Cases 299**, has held that where a Police Officer acting under Criminal Procedure Code comes across a person and on search recovers narcotic drug, question of complying with Section 50 of the NDPS Act would not arise. Their

Lordships categorically observed that in case of chance recovery of narcotic drug, Section 50 of the NDPS Act will not attract. Their Lordships have held as under :-

“5. In most of the cases before us, the police officers did not proceed to act under the provisions of the NDPS Act after having necessary information or after having reasons to believe as contemplated under Section 42. The search, seizure or arrest carried out by them were obviously under the provisions of the Cr.P.C. The provisions of arrest, warrant, search and seizure are incorporated in Sections 41 to 60, 70 to 81, 93 to 105 and 165 Cr.P.C. It may also be noticed at this stage that NDPS Act is not a complete code incorporating all the provisions relating to search, seizure or arrest etc. The said Act after incorporating the broad principles regarding search, seizure or arrest etc. in Sections 41, 42, 43 and 49 has laid down in Section 51 that the provisions of Cr.P.C. shall apply insofar as they are not inconsistent with the provisions of the NDPS Act to all warrants issued and arrests, searches and seizures made under that Act. Therefore the provisions of Sections 100 and 165 Cr.P.C. which are not inconsistent with the provisions of the NDPS Act are applicable for effecting search, seizure or arrest under the NDPS Act also. The words "insofar as they are not inconsistent with the provisions of this Act" in Section 51 of the NDPS Act are significant. It may also be noted that Section 4 of the Cr.P.C., 1973

provides that all offences under any other law shall be investigated and inquired as mentioned therein. Section 4 of the Cr.P.C., 1973 reads thus :

"4. Trial of offences under the Indian Penal Code and other laws :-

(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of Investigating, inquiring into, trying or otherwise dealing with such offences."

Therefore under this section the provisions of the Cr.P.C. are applicable where an offence under the Indian Penal Code or under any other law is being inquired into, tried and otherwise dealt with. From the words "otherwise dealt with" it does not necessarily mean something which is not included in the investigation, inquiry or trial and the word "otherwise" points to the fact that the expression "dealt with" is all comprehensive and that investigation, inquiry and trial are some of the aspects dealing with the offence. Consequently the provisions of the Cr.P.C. shall be applicable insofar as they are not inconsistent with the NDPS Act to all warrants, searches, seizures or arrests made under the Act. But when

a police officer carrying on the investigation including search, seizure or arrest empowered under the provisions of the Cr.P.C. comes across a person being in possession of the narcotic drugs or psychotropic substances then two aspects will arise. If he happens to be one of those empowered officers under the NDPS Act also then he must follow thereafter the provisions of the NDPS Act and continue the investigation as provided thereunder. If on the other hand, he is not empowered then the obvious thing he should do is that he must inform the empowered officer under the NDPS Act who should thereafter proceed from that stage in accordance with the provisions of the NDPS Act. But at this stage the question of resorting to Section 50 and informing the accused person that if he so wants, he would be taken to a Gazetted Officer and taking to Gazetted Officer thus would not arise because by then search would have been over. As laid down in Section 50 the steps contemplated thereunder namely informing and taking him to the Gazetted Officer should be done before the search. When the search is already over in the usual course of investigation under the provisions of Cr.P.C. then the question of complying with Section 50 would not arise.

6. *x x x*

7. *It therefore emerges that non-compliance of these provisions i.e. Sections 100 and 165 Cr.P.C. would amount to an irregularity and the effect of the same on the main case depends upon the facts and circumstances of each case. Of*

*course, in such a situation, the court has to consider whether any prejudice has been caused to the accused and also examine the evidence in respect of search in the light of the fact that these provisions have not been complied with and further consider whether the weight of evidence is in any manner affected because of the non-compliance. It is well settled that the testimony of a witness is not to be doubted or discarded merely on the ground that he happens to be an official but as a rule of caution and depending upon the circumstances of the case, the courts look for independent corroboration. This again depends on question whether the official has deliberately failed to comply with these provisions or failure was due to lack of time and opportunity to associate some independent witnesses with the search and strictly comply with these provisions. In **Deepak Ghanshyam Nayak v. State of Maharashtra, 1989 Cri. L. J. 1181** a case arising under the NDPS [Act](#), a Division Bench of the Bombay High Court considered the effect of non-compliance of Section 100 (4) namely that two or more independent respectable inhabitants of the locality were not called to be present during the search and that on the other hand two Panchas of different locality were called to be present. The Division Bench considered the explanation that Parnaka was at a distance of half a kilometre from the place of occurrence and they called the Panch witnesses from that place and that they could not call somebody present on the road*

*where the incident took place and held that there was no material to hold that Panch witnesses from Parnaka were in any way motivated to falsely implicate the accused. In **Sunil Kumar v. State, 1990 Cri. L.J. 414 (Del)** again a case arising under the NDPS Act, the Delhi High Court while considering the scope of Section 42 of the NDPS Act and Section 100 (4) of Cr.P.C. observed that failure to associate independent persons in the search in a given situation would not affect the prosecution case in toto and the same cannot be thrown out or doubted on that ground alone. In this case it has also been observed that provisions of Sections 41 or 42 would not be attracted at this stage when the police had secret information that some persons would be reaching in a public place while in transit and the information was not about the specific presence of a contraband but was only about the likelihood of such articles being brought. It thus emerges that when the police, while acting under the provisions of Cr.P.C. as empowered therein and while exercising surveillance or investigating into other offences, had to carry out the arrests or searches they would be acting under the provisions of Cr.P.C. At this stage if there is any non-compliance of the provisions of Section 100 or Section 165 Cr.P.C. that by itself cannot be a ground to reject the prosecution case outright. The effect of such non-compliance will have a bearing on the appreciation of evidence of the official witness and other material depending upon the facts and*

circumstances of each case. In carrying out such searches if they come across any substance covered by the NDPS Act the question of complying with the provisions of the said Act including Section 50 at that stage would not arise. When the contraband seized during such arrests or searches attracts the provisions of NDPS Act the from that stage the remaining relevant provisions of NDPS Act would be attracted and the further steps have to be taken in accordance with the provisions of the said Act.

8. to 24. x x x

25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows :

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of Cr.P.C. and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the

provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41 (1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Sections 41 (2) and 42 (1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41 (2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42 (1) the empowered officer if has a prior

information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42 (1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42 (2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42 (1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he

happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of Cr.P.C. fails to strictly comply with the provisions of Sections 100 and 165 Cr.P.C. including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41 (2) of the Act carries out a search, he would be doing so under the provisions of Cr.P.C. namely Sections 100 and 165 Cr.P.C. and if there is no strict compliance with the provisions of Cr.P.C. then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41 (2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if

such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(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. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.”

16. In **Durgo Bai and another Versus State of Punjab, (2004) 7 Supreme Court Cases 144**, their Lordships of the Hon'ble Supreme Court have held that if there is a chance recovery of narcotic drugs or psychotropic substance during a search in exercise of the power under the provisions of the Criminal Procedure Code, the compliance of Section 50 of the NDPS Act does not arise. However, the empowered officer should, from that stage, proceed to carry out the investigation in accordance with the other provisions of the NDPS Act. Their Lordships have held as under :-

“9. It was noted in the beginning of the same paragraph that in the cases before the court, the

police officers did not proceed to act under the provisions of the NDPS Act after having necessary information or after entertaining reasonable belief as envisaged by Section 42. It was again emphasised in paragraph 25 that if there is a chance recovery of narcotic drug or psychotropic substance during a search in exercise of the power under the provisions of Cr.P.C, the compliance with Section 50 does not arise. However, the empowered officer should, from that stage, proceed to carry out the investigation in accordance with the other provisions of NDPS Act.

*10. The interpretation of Section 50 and the effect of failure to observe the safeguards enshrined in Section 50 came up for consideration before a Constitution Bench of this Court in **State of Punjab Vs. Baldev Singh [(1999) 6 SCC 172]**. The learned Judges, after referring extensively to the exposition of law in Balbir Singh's case (*supra*), remarked that none of the decisions of this Court after Balbir Singh have departed from that opinion. Though the question of applicability of Section 50 in the context of chance recovery did not directly fall for consideration in the said case, the legal position in this regard clarified in Balbir Singh's case was reiterated by A.S. Anand, C.J., speaking for the Constitution Bench. The proposition was thus laid down in paragraph 12:*

"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. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted."

11. x x x

12. *We therefore find no substance in the contention raised by the learned counsel for appellant in regard to violation of Section 50, even assuming that the search of jhola involved search of person."*

17. Their Lordships of the Hon'ble Supreme Court in **State of H.P. Versus Pawan Kumar, (2005) 4 Supreme Court Cases 350**, have held that the word "person" has not been defined in the NDPS Act. In view of the basic principles of interpretation of statutes, it becomes necessary to look to dictionaries to ascertain the correct meaning of the word "person". Having regard to the scheme of the Act and the context in which it has been used in the section it naturally means a human being or a living individual unit and not an artificial person. The word has to be understood in a broad common-sense manner and, therefore, not a naked or nude body of a human being but the manner in which a normal human being will move about in a civilised society. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. An incriminating article can be

kept concealed in the body or clothings or coverings in different manner or in the footwear. While making a search of such type of articles, which have been kept so concealed, it will certainly come within the ambit of the words “search of person”. Their Lordships have held as under :-

“7. The word "person" has not been defined in the Act. Section 2 (xxix) of the Act says that the words and expressions used herein and not defined but defined in the Code of Criminal Procedure have the meanings respectively assigned to them in that Code. The Code of Criminal Procedure, however, does not define the word "person". Section 2 (y) of the Code says that the words and expressions used therein and not defined but defined in the Indian Penal Code have the meanings respectively assigned to them in that Code. Section 11 of the Indian Penal Code says that the word "person" includes any company or association or body of persons whether incorporated or not. Similar definition of the word "person" has been given in Section 3 (42) of the General Clauses Act. Therefore, these definitions render no assistance for resolving the controversy in hand.

8. One of the basic principles of interpretation of statutes is to construe them according to plain, literal and grammatical meaning of the words. If that is contrary to, or inconsistent with, any express intention or declared purpose of the statute, or if it would involve any absurdity, repugnancy or inconsistency, the grammatical sense must then be modified, extended or abridged, so far as to

*avoid such an inconvenience, but no further. The onus of showing that the words do not mean what they say lies heavily on the party who alleges it. He must advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity (see Craies on Statute Law, 7th Edn. pp. 83-85). In the well known treatise - Principles of Statutory Interpretation by Justice G.P. Singh, the learned author has enunciated the same principle that the words of the statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context or in the object of the Statute to suggest the contrary (See the Chapter - "The Rule of Literal Construction", p. 78, 9th Edn.). This Court has also followed this principle right from the beginning. In **Jugalkishore Saraf v. Raw Cotton Co. Ltd.** AIR 1955 SC 376, S.R. Das, J. said:*

"The cardinal rule of construction of statutes is to read the statute literally, that is, by giving to the words used by the legislature their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning the Court may adopt the same. But if no such alternative construction is possible, the Court must adopt the ordinary rule of literal interpretation."

A catena of subsequent decisions have followed the same line. It, therefore, becomes necessary to look to dictionaries to ascertain the correct meaning of the word "person".

9. *x x x*

10. *We are not concerned here with the wide definition of the word "person", which in the legal world includes corporations, associations or body of individuals as factually in these type of cases search of their premises can be done and not of their person. Having regard to the scheme of the Act and the context in which it has been used in the Section it naturally means a human being or a living individual unit and not an artificial person. The word has to be understood in a broad commonsense manner and, therefore, not a naked or nude body of a human being but the manner in which a normal human being will move about in a civilized society. Therefore, the most appropriate meaning of the word "person" appears to be - "the body of a human being as presented to public view usually with its appropriate coverings and clothing". In a civilized society appropriate coverings and clothings are considered absolutely essential and no sane human being comes in the gaze of others without appropriate coverings and clothings. The appropriate coverings will include footwear also as normally it is considered an essential article to be worn while moving outside one's home. Such appropriate coverings or clothings or footwear, after being worn, move along with the human body without any appreciable or extra effort.*

Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. For interpreting the provision, rare cases of some religious monks and sages, who, according to the tenets of their religious belief do not cover their body with clothings, are not to be taken notice of. Therefore, the word "person" would mean a human being with appropriate coverings and clothings and also footwear.

11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. 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.

12. An incriminating article can be kept concealed in the body or clothings or coverings

in different manner or in the footwear. While making a search of such type of articles, which have been kept so concealed, it will certainly come within the ambit of the words "search of person". One of the tests, which can be applied is, where in the process of search the human body comes into contact or shall have to be touched by the person carrying out the search, it will be search of a person. Some indication of this is provided by Sub-section (4) of Section 50 of the Act, which provides that no female shall be searched by anyone excepting a female. The legislature has consciously made this provision as while conducting search of a female, her body may come in contact or may need to be touched and, therefore, it should be done only by a female. In the case of a bag, briefcase or any such article or container, etc., they would not normally move along with the body of the human being unless some extra or special effort is made. Either they have to be carried in hand or hung on the shoulder or back or placed on the head. They can be easily and in no time placed away from the body of the carrier. In order to make a search of such type of objects, the body of the carrier will not come in contact of the person conducting the search. Such objects cannot be said to be inextricably connected with the person, namely, the body of the human being. Inextricable means incapable of being disentangled or untied or forming a maze or tangle from which it is impossible to get free."

18. Their Lordships of the Hon'ble Supreme Court in Ajmer Singh

Versus State of Haryana, (2010) 3 Supreme Court Cases 746, have held that for search of bag, briefcase, container, etc. carried by accused person, compliance with Section 50 of the NDPS Act is not required. Their Lordships have held as under :-

*“15. The learned counsel for the appellant contended that the provision of Section 50 of the Act would also apply, while searching the bag, brief case etc., carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of the learned counsel. It requires to be noticed that the question of compliance or non-compliance of Section 50 of the NDPS. Act is relevant only where search of a person is involved and the said Section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, brief case, container, etc., does not come within the ambit of Section 50 of the NDPS Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the Section speaks of taking of the person to be searched by the Gazetted Officer or Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more res-integra in view of the observations made by this court in the case of **Madan Lal vs. State of Himachal Pradesh (2003) 7 SCC 465**. The Court has observed:*

“16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag

or premises (see Kalema Tumba vs. State of Maharashtra and Anr. (1999) 8 SCC 257, State of Punjab vs. Baldev Singh (1999) 6 SCC 172 and Gurbax Singh vs. State of Haryana (2001) 3 SCC 28). The language of section is implicitly clear that the search has to be in relation to a person as contrast to search of premises, vehicles, or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh's case. Above being the position, the contention regarding non-compliance of Section 50 of the Act is also without any substance."

16. *x x x*

17. *x x x*

18. *It appears from the evidence on record that the accused was confronted by ASI Maya Ram and other police officials on 24.1.1996 and he was informed that he has the right to either be searched before the gazetted officer or before a Magistrate and the accused chose the later (sic former). Thereafter, the accused was taken to the DSP, Pehowa, Shri Paramjit Singh Ahlawat and as directed by him, the bag carried by accused on his shoulder was searched and the charas was found in that bag. Thus, applying the interpretation of the word "search of person" as laid down by this Court in the decision mentioned above, to facts of present case, it is clear that the compliance of Section 50 of the Act is not required. Therefore, the search conducted by the investigation officer and the evidence collected*

thereby, is not illegal. Consequently, we do not find any merit in the contention of the learned counsel of the appellant as regards the non-compliance of Section 50 of the Act.”

19. In **State of Himachal Pradesh Versus Sunil Kumar, (2014) 4 Supreme Court Cases 780**, their Lordships of the Hon'ble Supreme Court have held that the expression “chance recovery” has not been defined anywhere and its plain and simple meaning seems to be a recovery made by chance or by accident or unexpectedly. Mere suspicion, even if it is “positive suspicion” or grave suspicion cannot be equated with “reason to believe”. Their Lordships have held as under :-

*“13. The expression “chance recovery” has not been defined anywhere and its plain and simple meaning seems to be a recovery made by chance or by accident or unexpectedly. In **Mohinder Kumar v. State, (1998) 8 SCC 655**, this Court considered a chance recovery as one when a police officer “stumbles on” narcotic drugs when he makes a search. In **Sorabkhan Gandhkhan Pathan v. State of Gujarat, (2004) 13 SCC 608**, the police officer, while searching for illicit liquor, accidentally found some charas. This was treated as a “chance recovery”.*

14. Applying this to the facts of the present appeal, it is clear that the police officers were looking for passengers who were travelling ticketless and nothing more. They accidentally or unexpectedly came across drugs carried by a passenger. This can only be described as a recovery by chance since they were neither looking for drugs nor expecting to find drugs

carried by anybody.

15. to 17. x x x

18. It is true that Sunil Kumar behaved in a suspicious manner which resulted in his personal search being conducted after he disembarked from the bus. However, there is no evidence to suggest that before he was asked to alight from the bus, the police officers were aware that he was carrying a narcotic drug, even though the Chamba area may be one where such drugs are easily available. At best, it could be said that the police officers suspected Sunil Kumar of carrying drugs and nothing more. Mere suspicion, even if it is “positive suspicion” or grave suspicion cannot be equated with “reason to believe. These are two completely different concepts. It is this positive suspicion, and not any reason to believe, that led to the chance recovery of charas from the person of Sunil Kumar.

19. Similarly, the positive suspicion entertained by the police officers cannot be equated with prior information. The procedure to be followed when there is prior information of the carrying of contraband drugs is laid down in the Act and it is nobody's case that that procedure was followed, let alone contemplated.

20. We are not in agreement with the view of the High Court that since the police officers had a positive suspicion that Sunil Kumar was carrying some contraband, therefore, it could be said or assumed that they had reason to believe or prior information that he was carrying charas or some other narcotic substance and so, before

his personal or body search was conducted, the provisions of Section 50 of the Act ought to have been complied with. The recovery of charas on the body or personal search of Sunil Kumar was clearly a chance recovery and, in view of Baldev Singh, it was not necessary for the police officers to comply with the provisions of Section 50 of the Act.

21. Under the circumstances, we set aside the judgment and order passed by the High Court and uphold the decision of the trial court convicting Sunil Kumar for an offence punishable under Section 20 of the Act. Necessary steps be taken to apprehend Sunil Kumar to serve out the remainder of his sentence.”

20. In **State of Rajasthan Versus Parmanand and another, (2014)** **5 Supreme Court Cases 345**, their Lordships of the Hon'ble Supreme Court have held that 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. However, if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will be applicable. Their Lordships have held as under :-

“12. 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.”

21. Their Lordships of the Hon'ble Supreme Court in **Makhan Singh Versus State of Haryana, (2015) 12 Supreme Court Cases 247**, have held that compliance of Section 50 of the NDPS Act will come into play only in case of personal search of accused and not of some baggage like a bag, article or container, etc. which accused may be carrying. Their Lordships have held as under :-

*“14. A Constitution Bench of this Court in **State of Punjab v. Baldev Singh, (1999) 6 SCC 172**, while dealing with the scope of Section 50 of the NDPS Act, had emphasized upon the aspect of availability of right of an accused to have ‘personal search’ conducted before a Gazetted Officer or a Magistrate and held as under:*

“32...The protection provided in the section to an accused to be intimated that he has the right to have his personal search conducted before a gazetted officer or a Magistrate, if he so requires, is sacrosanct and indefeasible - it cannot be disregarded by the prosecution except at its own peril.

33. The question whether or not the safeguards provided in Section 50 were observed would have, however, to be determined by the court on the basis of the evidence led at the trial and the 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 in that section were complied with, it would not be advisable to cut short a criminal trial.”

15. *Compliance with Section 50 of the NDPS Act will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which the accused may be carrying ought to be searched. In **State of H.P. v. Pawan Kumar, (2005) 4 SCC 350**, this Court in Para 11 has held as under:*

“11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. 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.”

*The same view was reiterated in **Ajmer Singh v. State of Haryana, (2010) 3 SCC 746.***

16. In the present case, since the vehicle was searched and the contraband was seized from the vehicle, compliance with Section 50 of the NDPS Act was not required. In the absence of independent evidence connecting the appellant with the fitter-rehra, mere compliance with Section 50 of the NDPS Act by itself would not be sufficient to establish the guilt of the appellant. It is a well-settled principle of the criminal jurisprudence that more stringent the punishment, the more heavy is the burden upon the prosecution to prove the offence. When the independent witnesses PW1 and DW2 have not supported the prosecution case and the recovery of the contraband has not been satisfactorily proved, the conviction of the appellant under Section 15 of the NDPS Act cannot be sustained.”

22. In the present case, the recovered contraband was a chance recovery. The patrolling party had gone in search of bad elements. The accused was seen coming on foot. He tried to run away. He was apprehended. Since recovery in this case was “chance recovery”, therefore,

Section 50 of the NDPS Act was not required to be complied with.

23. Accordingly, the prosecution has proved its case against the appellant beyond reasonable doubt. There is no reason for us to interfere with the well reasoned judgment and order of the learned trial court. The appeal is, accordingly, dismissed.

24. Before parting with the order, it would be appropriate to highlight the imposition of appropriate exemplary/deterrent sentences under the NDPS Act. The persons, who are engaged in production, manufacture, possession, transportation or transit, pose a grave threat to the health and welfare of the people. The acts of persons engaged in these activities have deleterious effect on the national economy as well. These activities are being organized at micro and macro level by the organized criminals and peddlers at the grass root level. These activities are of considerable magnitude and are organized and carried out clandestinely. Thus, appropriate sentences, should be imposed by providing deterrent/exemplary punishment . In case the deterrent sentences are not imposed, there would be chaos in the society and the lives of innocent victims would be endangered. We cannot overlook the plight of the victims and the sufferings of the people by the criminal acts of the persons involved in production, manufacture, possession and transportation of narcotic drugs and psychotropic substances. There is a need for deterrent sentences to balance the interests of the victims.

25. The law makers should analyze and consider the gravity of these offences. The paramount interests of the society must be safeguarded.

It is the duty of the State to anticipate every protection to be provided to the

citizens at large in order to maintain the rule of law. The crime committed by these persons is enormous in proportion besides being anti social. The punishment must be proportionate to the gravity of offence though primarily it is the function of the Legislature to prescribe the punishment.

26. The punishment with sufficient severity will definitely deter the persons from crime as the costs/penalties outweigh benefits though the severity of punishment should be proportionate to the crime/wickedness. Exemplary or deterrent sentence is imposed as a warning to others not to engage in criminal activities. The organized criminal activities should necessarily lead to imposition of severe sentence since such offences are planned clandestinely and present serious threat to the entire society. These cases should be treated as exceptional and extreme cases. The offences which are themselves grave require a very long sentence.

27. The persons involved in heinous crime forfeit any right to humanitarian consideration. The prevalence of an offence in a certain locality or the frequency with which it is committed generally may lead to the imposition of a deterrent sentence. In McCay (1975) NI 5, the Northern Ireland Court of Appeal upheld exemplary sentences imposed on the appellants who had been convicted of supplying dangerous drugs. Lowry L.C.J. stated that “severe sentences are of assistance in signifying the community's rejection of drug trafficking and its hostility to traffickers in drugs.”

28. Their Lordships of the Hon'ble Supreme Court in **State of H.P. vs. Pawan Kumar**, (2005) 4 Supreme Court Cases 350 have held that drug abuse is a social malady. It is, therefore, absolutely imperative that those

who indulge in these kinds of nefarious activities should not go scot-free on technical pleas which come handy to their advantage in a fraction of a second by slight movement of the baggage, being placed to any part of their body, which baggage may contain the incriminating article. Their Lordships have held as under :-

20. *As pointed out in **State of Punjab v. Baldev Singh**, drug abuse is a social malady. While drug addiction eats into the vitals of the society, drug trafficking not only eats into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. It has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. Reference in the said decision has also been made to some United Nation Conventions Against Illicit Trafficking in Narcotic Drugs, which the Government of India has ratified. It is, therefore, absolutely imperative that those who indulge in this kind of nefarious activities should not go scot-free on technical pleas which come handy to their advantage in a fraction of second by slight movement of the baggage, being placed to any part of their body, which baggage may contain the incriminating article.”*

29. Their Lordships of the Hon'ble Supreme Court in **Vikram Singh alias Vicky and another vs. Union of India and others, (2015) 9 SCC 502** have summed up the principles of punishment/sentences as under:-

“(a) Punishments must be proportionate to the nature and gravity of the offences for which the same are prescribed.

(b) Prescribing punishments is the function of the legislature and not the Courts.

(c) The legislature is presumed to be supremely wise and aware of the needs of the people and the measures that are necessary to meet those needs.

(d) Courts show deference to the legislative will and wisdom and are slow in upsetting the enacted provisions dealing with the quantum of punishment prescribed for different offences.

(e) Courts, however, have the jurisdiction to interfere when the punishment prescribed is so outrageously disproportionate to the offence or so inhuman or brutal that the same cannot be accepted by any standard of decency.

(f) Absence of objective standards for determining the legality of the prescribed sentence makes the job of the Court reviewing the punishment difficult.

(g) Courts cannot interfere with the prescribed punishment only because the punishment is perceived to be excessive.

(h) In dealing with questions of proportionality of sentences, capital punishment is considered to be different in kind and degree from sentence of imprisonment. The result is that while there are several instances when capital punishment has been considered to be disproportionate to the offence committed, there are very few and rare cases of sentences of imprisonment being held disproportionate.

30. In the Great Train Robbery case of Wilson Wilson (1965) 1 QB

102, the Court of Appeal has held as under:-

"severely deterrent sentences were necessary, not only to protect the community against these men for a very long time, but also to demonstrate as clearly as possible to others tempted to follow them into lawlessness on this vast scale that, if they are brought on trial and convicted, commensurate punishment will follow; and that being so,...minor differences in age and record between these men become ... irrelevant."

31. In the Northern Irish case of McKellar (1975) 4 N.I.J.B which involved armed robbery, McGonigal LJ stated:-

"Those who plan or take part in such offences, must do so with the knowledge that the sentences which the Courts will impose are sentences based, not on the norm, but severer sentences, longer terms of years than would fall within the norm, designed as a deterrent to stay the hands of others who may contemplate the commission of such an offence and also give to the public the protection it requires and is entitled to."

32. Accordingly, we suggest/recommend to the Union of India, through Secretary, Ministry of Finance, Department of Revenue, Government of India, to consider imposition of life imprisonment/death sentence and fine of Rs.10,00,000/- (Rs. ten lakhs) upon the persons who are engaged in production, manufacture, possession and transportation of the following Narcotic Drugs & Psychotropic Substances for prevention and eradication of the menace by terming them special category sentences:

- | | | |
|-----|----------|--------|
| (a) | Opium | 10 kgs |
| (b) | Morphine | 1 Kg |
| (c) | Heroin | 1 Kg |
| (d) | Codeine | 1 Kg |

- | | | |
|-----|--|--------------|
| (e) | Thebaine | 1 Kg |
| (f) | Cocaine | 500 grams |
| (g) | Hashish | 20 Kgs |
| (h) | Any mixture with or without any natural material of any of the above drugs. | |
| (i) | LSD, LSD - 25 (+) -N, N Diethyllysergamide (d-lysergic acid diethylamide) | 500 grams |
| (j) | THC Tetrahydrocannabinols, the following Isomers: 6a(10a), 6a(7), 7, 8, 9, 10, 9 (11) and their stereochemical variants) | 500 grams |
| (k) | Methamphetamine (+2)-2-Methylamine-I-Phenyl-propane | 1,500 grams. |
| (l) | Methaqualone: (2-Methyl-3-0-tolyl-4-(3h)-quinazolinone) | 1,500 grams |
| (m) | Amphetamine(+)-2-amino-1 phenylpropane | 1,500 grams |
| (n) | Salts and preparations of the psychotropic substances mentioned in (i) to (m) | 1,500 grams |

33. Needful be done within a period of three months from today.

The Registry is directed to send a copy of this order to the Secretary, Ministry of Finance, Department of Revenue, Government of India, New Delhi.

(**RAJIV SHARMA**)
JUDGE

April 12, 2019
ndj

(**HARINDER SINGH SIDHU**)
JUDGE

Whether speaking/reasoned	Yes
Whether Reportable	Yes