

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

CRA-D-807-DB-2016

Reserved on : 23.05.2019

Date of decision : 28.05.2019

Jugal Kishore

... Appellant

Versus

State of Punjab

... Respondent

CORAM: HON'BLE MR. JUSTICE RAJIV SHARMA
HON'BLE MR. JUSTICE HARINDER SINGH SIDHU

Present: Mr. Salil Bali, Advocate
for the appellant.

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

RAJIV SHARMA, J.

This appeal is instituted against judgment and order dated 19.08.2016 rendered by Special Judge, Sri Muktsar Sahib, in Sessions Case No.62 of 2015 whereby the appellant, who was charged with and tried for offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act'), has been convicted and sentenced to undergo rigorous imprisonment for a period of 12 years and to pay a fine of Rs.1 lac and in default of payment of fine, to further undergo rigorous imprisonment for a period of 2 years, for offence punishable under Section 18(b) of the NDPS Act.

3. The case of the prosecution, in a nutshell, is that on 24.12.2014 Inspector Om Parkash, Incharge, Narcotic Cell, Sri Muktsar Sahib, along with other police officials, reached near Dera Radha Swami. One Balwant Singh son of Mukhtiar Singh met the police party. When the police party

reached near bus stand of village Barkandi, then accused carrying a black colour bag on his right shoulder was seen standing. He got perplexed. He immediately entered into the bus stop. He was apprehended. He disclosed his identity. Accused was apprised about his legal right of search in the presence of a Magistrate or a gazetted officer. Accused shown his willingness to be searched in the presence of a gazetted officer. Thereafter DSP Kanwalpreet Singh Chahal was called. He also apprised about his legal right of search. Accused reposed faith in him. Consent memo was prepared. Bag was searched. The bag contained opium. It was weighed on computer scale. 10 grams was separated as sample. Remaining bulk weighing 3.490 kgs. was converted into bulk parcel. Form M29 was filled on the spot. Case property was taken into possession. Case property was produced before the SHO SI Iqbal Singh. He verified the facts. He put his seal. The case property was sent for chemical examination. Challan was put up after receipt of chemical examiner's report and completion of all the codal formalities.

4. The prosecution examined a number of witnesses in support of its case. Statement of accused was recorded under Section 313 Cr.P.C. He denied the case of prosecution. The accused also examined two witnesses in his defence. The appellant was convicted and sentenced, as noticed hereinabove. Hence the appeal.

5. Learned counsel appearing on behalf of the appellant has vehemently argued that the prosecution has failed to prove the case against the appellants.

6. Learned counsel appearing on behalf of the State has supported the prosecution case.

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

8. PW-1 SI Iqbal Singh testified that he received ruqa Ex.PA written by Inspector Om Parkash. He registered FIR Ex.PB. He sent special report to the higher officers. Accused Jugal Kishore as well as case property were produced before him. Bulk parcel and sample parcel were duly sealed with seal bearing impression 'OP' and 'KS'. He interrogated the accused. He verified the facts of the case. He put his seal bearing impression 'IS' on the parcels. Case property was taken into possession vide memo Ex.PE. He directed ASI Surinder Singh to produce the accused along with entire case property in the Court of Illaqa Magistrate vide DDR No.4 dated 25.12.2014 Ex.PJ.

9. PW-2 HC Jarnail Singh led his evidence by filing affidavit Ex.PW2/A. According to his affidavit, on 01.01.2015, MHC Sukhwinderpal Singh handed over to him one sample parcel of opium. He obtained the docket from the office of SSP, Sri Muktsar Sahib. He deposited the case property in the Forensic Science Laboratory, Phase-4, Mohali.

10. PW-3 HC Sukhwinderpal Singh also led his evidence by filing affidavit Ex.PW3/A. According to the contents of affidavit, ASI Surinder Singh had deposited the case property, one sample parcel of small plastic box of 10 grams opium sealed with seal OP+KS+IS, one additional sample parcel of opium of 10 grams duly sealed with seal MK and one parcel of case property plastic box weighing 3.480 kgs. duly sealed with seal MK marked as seen by learned Judge along with sample seal Form M29. 10 grams opium sealed with seal OP+KS+IS along with specimen seal, Form M29 were taken out from the Malkhana and handed over to HC Jarnail

Singh vide road No.1 dated 01.01.2015 for depositing in Forensic Science Laboratory, Phase 4, Mohali. HC Jarnail Singh deposited the same at Forensic Science Laboratory, Phase 4, Mohali after getting docket from SSP, Sri Muktsar Sahib.

11. PW-5 ASI Sukhjit Singh deposed the manner in which accused was spotted. He was apprehended. He was apprised of his legal right. He gave his consent to be searched by a gazetted officer. DSP Kanwalpreet Singh Chahal was informed. He reached the spot. Bag was searched. It contained opium. A sample of 10 grams opium was taken out. Remaining bulk of opium weighed 3.490 kgs. The seals 'OP' and 'KS' were put on the case property. Form M29 was filled. Rough site plan was prepared.

12. PW-6 ASI Surinder Singh testified that on 25.12.2014, SHO/Inspector Iqbal Singh was on urgent official duty. He assigned him the duty to produce the accused along with case property before the CJM, Sri Muktsar Sahib. He produced the case property along with accused before the CJM, Sri Muktsar Sahib. Ms.Manjinder Kaur, the Chief Judicial Magistrate took out a sample of 10 grams from the bulk parcel in the open court and further sealed the case property, bulk parcel and sample with seal bearing impressions 'MK'. The order of the Court is Ex.PT.

13. PW-7 DSP Kanwalpreet Singh Chahal has deposed that he received information. He reached the spot at 3.20 P.M. He told the accused that he wanted to conduct search of bag. He apprised the accused of his legal right of search before a Magistrate or a gazetted officer. Accused reposed faith in him. He disclosed his identity. Bag was searched. Contraband was recovered. All the codal formalities were completed on the spot.

14. PW-8 Inspector Om Parkash was heading policy party. He apprehended the accused. Accused gave option to be searched before a gazetted officer. DSP Kanwalpreet Singh was informed. He reached the spot at 3.20 P.M. DSP Kanwalpreet Singh disclosed his identity. All the codal formalities of seizure were completed on the spot. Case property was taken into possession vide Ex.PP. The same was produced before the officiating SHO. It was checked and case property was found intact.

15. DW-1 Balwant Singh testified that he was not member of police party headed by Inspector Om Parkash on 24.12.2014. He did not know the person present in the Court as accused. He had seen him first time. Nothing was recovered from him. However, the fact of the matter is that in his cross-examination he identified his signatures Ex.PN, Ex.PO, Ex.PP, Ex.PR and Ex.PQ. According to him, his signatures were obtained on blank papers. He also admitted that he had not filed any complaint to any higher officer regarding obtaining his signatures on blank papers.

16. DW-2 Constable Mukesh Kumar has produced on record Ex.D1 the report of SHO regarding antecedents of accused Jugal Kishore. He has admitted that Ex.D1 and Ex.D2 did not bear any signature. He did not know the occupation of Jugal Kishore. He was not aware whether any criminal case was registered against Jugal Kishore in any police station or not.

17. Learned counsel for the appellant has vehemently argued that there is violation of Section 50 of the NDPS Act.

18. The fact of the matter is that recovery had been effected from the bag carried by the accused. Section 50 of the NDPS Act is required to be complied with if the search is made from the person.

19. Their Lordships of the Supreme Court in ***Gulsher Mohammed vs. State of Himachal Pradesh, (2015) 17 Supreme Court Cases 682*** have held that mandatory requirement prescribed under Section 50 is required to be complied with only when search is carried out on body of person. Their Lordships have held as under:-

“13. We do not find such a legal consequence getting attracted simply because under sub-section (5) of Section 50 a reference has been made to an officer duly authorized under Section 42 in the said sub-section. The said reference has been made to identify such of those officers who were all noted as empowered officers under Section 42(1) solely for the purpose of Section 50 when a search on a person is made and for which purpose due compliance of all other stipulations contained in Section 50 will have to be carried out. In the alternative, the requirement of compliance under Section 42 for effecting a search of the premises are entirely different from the requirements when a search is to be made on the body of a person under Section 50, though the search to be carried out are to be made by the officers duly authorized and specified in Section 42.

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15. In the light of our above conclusion, we do not find any scope even to invoke Section 100 Cr.P.C. as was canvassed by the learned counsel by the learned counsel on behalf of the appellant by relying upon Section 50 which has no application relating to a search of a premises.

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18. The above statements in the evidence of PW2 were more than sufficient to support the case of the prosecution in having made the recoveries from the premises of the appellant, inasmuch as PW2 was not

only an independent witness but he was also very close friend of the appellant but yet he came forward with a very fair statement about the contraband materials found in the premises of the appellant which were recovered in his presence and his statement was also truly recorded, which he signed after going through the same and understanding its correctness. However, when he was cross-examined on behalf of the appellant, he made a contradictory version and thereby virtually withdrawing whatever categorical admission he made in the earlier part of his testimony.

19. *Having noted the manner in which PW2 deposed before the Court and the subsequent expressions contained in the document having been admitted to have been made by him without any hesitation including the correctness of those contents, the documents as well as his attestation on the parcels which contain the samples, the contraband which were duly admitted by him, the contrary statements contained in the latter part of his evidence are all liable to be rejected as containing no truth in it. In fact, when the contents of the documents have been accepted to be true after ascertaining it before the Court, the said part of his evidence alone should carry weight and the latter part of his statement which are made by simply adopting the suggestions put to him at the instance of the appellant will be of no consequence.”*

20. Their Lordships of the Supreme Court in ***Dilbagh Singh vs. State of Punjab, (2017) 11 Supreme Court Cases 290*** have held that Section 50 is not applicable when the recovery of contraband is from the car. Their Lordships have held as under:-

“11. As the essence of the impeachment is the non-compliance of the enjoinder of Sections 50 and 57 of

the Act, for ready reference, these provisions are extracted herein below:

“50. Conditions under which search of persons shall be conducted -

(1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

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

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.

* * *

57. Report of arrest and seizure - *Whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior.”*

12. *Whereas the conditions under which, the search as contemplated in Section 50 are limited only to the contingency of search of any person, Section 57 prescribes that whenever any person makes any arrest or seizure under the Act, he would within 48 hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior. As it is no longer res integra that the application of Section 50 of the Act is comprehended and called for only in the case of search of a person as distinguished from search of any premises etc. having been authoritatively propounded by the two Constitution Bench rulings of this Court in State of Punjab vs. Baldev Singh – (1999) 6 SCC 172 and Vijaysinh Chandubha Jadeja vs. State of Gujarat – (2011) 1 SCC 609, further dilation in this regard, in the attendant facts and circumstances of the case, is considered inessential. This is more so as the contraband in the case in hand had been recovered from inside the car in which the petitioner and the co-accused were travelling at the relevant point of time and not in course of the search of their person. Noticeably, it had also not been the plea of the defence ever that the alleged seizure according to the*

accused persons had been from their person. In the contextual facts therefore, Section 50 has no application to espouse the cause of the defence.

21. Their Lordships of the Supreme Court in ***SK.Raju alias Abdul Haque alias Jagga vs. State of West Bengal, (2018) 9 Supreme Court Cases 708*** have held that when the contraband was recovered from the bag carried by the accused, compliance of Section 50 is not mandatory in such circumstances. Their Lordships have held as under:-

“7. Section 42 of the Act deals with the power of entry, search, seizure and arrest without warrant or authorization. It reads thus:

“42. Power of entry, search, seizure and arrest without warrant or authorisation.— (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such

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

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

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

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

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

Provided further that if such officer has

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

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

8. *Section 43 of the Act confers powers on the empowered officer to seize a substance and arrest a suspect in a public place. It provides thus:*

“43. Power of seizure and arrest in public place.

— Any officer of any of the departments mentioned in section 42 may—

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

(b) detain and search any person whom he has reason to believe to have committed an offence

punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation.— For the purposes of this section, the expression “public place” includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.”

[Emphasis supplied]

9. We are unable to accept the submission made by the learned counsel for the appellant that Section 42 is attracted to the facts of the present case. In *State of Punjab v Baldev Singh* (“Baldev Singh”), Dr A S Anand, C.J. speaking for a Constitution Bench of this Court, held:

“10.....The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any Narcotic Drug or Psychotropic Substances in a public place where such possession appears to him to be unlawful.”

[Emphasis supplied]

10. In *Narayanaswamy Ravishankar v Assistant Director of Revenue Intelligence*, a three judge Bench of this Court considered whether the empowered officer was bound to comply with the mandatory provisions of

Section 42 before recovering heroin from the suitcase of the appellant at the airport and subsequently arresting him. Answering the above question in the negative, the Court held:

“5. In the instant case, according to the documents on record and the evidence of the witnesses, the search and seizure took place at the airport which is a public place. This being so, it is the provisions of Section 43 of the NDPS Act which would be applicable. Further, as Section 42 of the NDPS Act was not applicable in the present case, the seizure having been effected in a public place, the question of non-compliance, if any, of the provisions of Section 42 of the NDPS Act is wholly irrelevant.”

11. In Krishna Kanwar (Smt) Alias Thakuraeen v State of Rajasthan, a two judge Bench of this Court considered whether a police officer who had prior information was required to comply with the provisions of Section 42 before seizing contraband and arresting the appellant who was travelling on a motorcycle on the highway. Answering the above question in the negative, the Court held:

“16.....Section 42 comprises of two components. One relates to the basis of information i.e.: (i) from personal knowledge, and (ii) information given by person and taken down in writing. The second is that the information must relate to commission of offence punishable under Chapter IV and/or keeping or concealment of document or article in any building, conveyance or enclosed place which may furnish evidence of commission of such offence. Unless both the components exist Section 42 has no application. Subsection (2) mandates, as was noted in Baldev Singh case that

where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior. Therefore, sub-section (2) only comes into operation where the officer concerned does the enumerated acts, in case any offence under Chapter IV has been committed or documents etc. are concealed in any building, conveyance or enclosed place. Therefore, the commission of the act or concealment of document etc. must be in any building, conveyance or enclosed place.”

[Emphasis supplied]

12. An empowered officer under Section 42(1) is obligated to reduce to writing the information received by him, only when an offence punishable under the Act has been committed in any building, conveyance or an enclosed place, or when a document or an article is concealed in a building, conveyance or an enclosed place. Compliance with Section 42, including recording of information received by the empowered officer, is not mandatory, when an offence punishable under the Act was not committed in a building, conveyance or an enclosed place. Section 43 is attracted in situations where the seizure and arrest are conducted in a public place, which includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

13. The appellant was walking along the Picnic Garden Road. He was intercepted and detained immediately by the raiding party in front of Falguni Club, which was not a building, conveyance or an enclosed place. The place of occurrence was accessible to the public and fell within the ambit of the phrase

“public place” in the explanation to Section 43. Section 42 had no application.

14. The cases relied on by the learned counsel for the appellant will also not apply in the context of the facts before us. In Mansuri, an auto-rickshaw driver was intercepted by police personnel. Four gunny bags of charas were recovered from the auto-rickshaw. The police officer who had prior information about transportation of some narcotic substance, had neither taken down the information before carrying out the seizure and arrest, nor apprised his superior officer. He contended that the action taken by him was under Section 43 and not Section 42. Rejecting the argument of the State, this Court held that compliance with Section 42 was required as the auto-rickshaw was a private vehicle and not a public conveyance as contemplated under Section 43. Similarly, in Jagraj, contraband was recovered from a jeep which was intercepted by police personnel on a public road after receiving prior information. The police officer who had received the information, admitted to not taking it down in writing, contending that Section 43 would be applicable. Rejecting the argument of the State, this Court held that the jeep which was intercepted, was not a public conveyance within the meaning of Section 43 and compliance with Section 42(1) was therefore mandatory. In Holia, Mandrax tablets were recovered from the hotel room of the respondent. The information was not reduced to writing by the officer who had first received the information. The State claimed that compliance with Section 42 was not required as the hotel was a public place. Rejecting the submission of the State, this Court held that while a hotel is a public place, a hotel room inside it is not a public place. This Court held thus:

“14. Section 43, on plain reading of the Act, may

not attract the rigours of Section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of Section 42, need not be complied with, only because the place whereat search is to be made is a public place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with ... It is also possible to contend that where a search is required to be made at a public place which is open to the general public, Section 42 would have no application but it may be another thing to contend that search is being made on prior information and there would be enough time for compliance of reducing the information to writing, informing the same to the superior officer and obtain his permission as also recording the reasons therefore coupled with the fact that the place which is required to be searched is not open to public although situated in a public place as, for example, room of a hotel, whereas hotel is a public place, a room occupied by a guest may not be. He is entitled to his right of privacy. Nobody, even the staff of the hotel, can walk into his room without his permission. Subject to the ordinary activities in regard to maintenance and/or housekeeping of the room, the guest is entitled to maintain his privacy.”

[Emphasis supplied]

There is hence no substance in the first submission.

15. *Section 50 of the Act deals with conditions under which search of persons shall be conducted. It states:*

“50. Conditions under which search of persons shall be conducted.— (1) When any officer duly authorised under section 42 is about to search any

person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

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

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.”

According to Section 50(1), an empowered officer

should necessarily inform the suspect about his legal right, if he so requires, to be searched in the presence of a gazetted officer or a magistrate.

16. *In Vijaysinh Chandubha Jadeja v State of Gujarat (“Vijaysinh”), a Constitution Bench of this Court interpreted Section 50 thus:*

“20. The mandate of Section 50 is precise and clear, viz. if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so

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29. *In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under Sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or*

may not choose to exercise the right provided to him under the said provision

31. *We are of the opinion that the concept of “substantial compliance” with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez and Prabha Shankar Dubey is neither borne out from the language of Sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case.”*

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”), 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

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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.”

18. In Parmanand, on a search of the person of the respondent, no substance was found. However, subsequently, opium was recovered from the bag of the respondent. A two judge Bench of this Court considered whether compliance with Section 50(1) was required. This Court held that the empowered officer was required to comply with the requirements of Section 50(1) as the person of the respondent was also searched. [Reference may also be made to the decision of a two judge Bench of this Court in Dilip v State of Madhya Pradesh]. 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.”

19. Moreover, in the above case, the empowered officer at the time of conducting the search informed the respondent that he could be searched before the nearest Magistrate or before the nearest gazetted officer or before the Superintendent, who was also a part of the raiding party. The Court held that the search of the respondent was not in consonance with the requirements of Section 50(1) as the empowered officer erred in giving the respondent an option of being search before the Superintendent, who was not an independent officer. It was held thus:

“19. We also notice that PW 10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before the nearest gazetted officer or before PW 5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW 5 J.S. Negi by PW 10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to the nearest Magistrate or the nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW 10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW 5 J.S. Negi, the Superintendent, who was part of the raiding party. PW 5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW 5 J.S. Negi, the search would have been vitiated or not. But PW 10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW 10 SI Qureshi is vitiated.”

20. The question which arises before us is whether Section 50(1) was required to be complied with when charas was recovered only from the bag of the appellant and no charas was found on his person. Further, if the

first question is answered in the affirmative, whether the requirements of Section 50 were strictly complied with by PW-2 and PW-4.

21. *As evidenced by Exhibit-3, a first option was given to the appellant. PW2 informed him that it was his legal right to be searched either in the presence of a magistrate or in the presence of a gazetted officer. The appellant was then asked to give his option by indicating whether he wanted to be searched by a magistrate or a gazetted officer. The appellant indicated that he wanted the search to be carried out in the presence of a gazetted officer. When PW-4 arrived, he was introduced to the detainee as a gazetted officer. As evidenced by Exhibit-4, PW-4 then gave the appellant a second option. He inquired of him again, whether he wanted to be searched in the presence of a gazetted officer or in the presence of a magistrate. The appellant reiterated his desire to be 16 searched in the presence of a gazetted officer. Before the search of the appellant commenced, the gazetted officer asked the appellant whether he wanted to search PW-2 before his own search was carried out by PW-2. The appellant agreed to search PW-2 before the latter carried out his search. On conducting the search, only personal belongings of PW-2 were found by the appellant. On the search of the appellant in the presence of the gazetted officer, a biscuit colour jute bag was recovered from the appellant, and Rs. 2,400/- cash in the denomination of 24 notes of Rs. 100/- each was found in the left pocket of the appellant's trouser. When the bag was opened, a black polythene cover containing nineteen rectangular broken sheets of a blackish / deep brown colour weighing 1.5 kilograms was recovered. The sheets were tested and were found to be charas.*

22. *PW-2 conducted search of the bag of the appellant as well as of the appellant's trousers. Therefore, the*

search conducted by PW-2 was not only of the bag which the appellant was carrying, but also of the appellant's person. Since the search of the person of the appellant was also involved, Section 50 would be attracted in this case. Accordingly, PW-2 was required to comply with the requirements of Section 50(1). As soon as the search of a person takes place, the requirement of mandatory compliance with Section 50 is attracted, irrespective of whether contraband is recovered from the person of the detainee or not. It was, therefore, imperative for PW-2 to inform the appellant of his legal right to be searched in the presence of either a gazetted officer or a magistrate. From Exhibit-3, it can be discerned that the appellant was informed of his legal right to be searched in the presence of a magistrate or a gazetted officer. The appellant opted for the latter alternative. Exhibit-4 is a record of the events after the arrival of PW-4 on the scene. After the arrival of PW-4, the appellant was once again asked by him, whether he wished to be searched in the presence of a gazetted officer or a magistrate. This was the second option which was presented to him. When he reiterated his desire to be searched before a gazetted officer, PW-4 inquired of the appellant whether he wished to search PW-2 before his own search was conducted by PW-2. The appellant agreed to search PW-2. Only the personal belongings of PW-2 were found by the appellant. It was only after this that a search of the appellant was conducted and charas recovered. Before the appellant's search was conducted, both PW-2 and PW-4 on different occasions apprised the appellant of his legal right to be searched either in the presence of a gazetted officer or a magistrate. The options given by both PW-2 and PW-4 were unambiguous. Merely because the appellant was given an option of searching PW-2 before the latter conducted his search, would not

vitiate the search. In Parmanand, in addition to the option of being searched by the gazetted officer or the magistrate, the detainee was given a 'third' alternative by the empowered officer which was to be searched by an officer who was a part of the raiding team. This was found to be contrary to the intent of Section 50(1). The option given to the appellant of searching PW-2 in the case at hand, before the latter searched the appellant, did not vitiate the process in which a search of the appellant was conducted. The search of 18 the appellant was as a matter of fact conducted in the presence of PW-4, a gazetted officer, in consonance with the voluntary communication made by the appellant to both PW-2 and PW-4. There was strict compliance with the requirements of Section 50(1) as stipulated by this Court in Vijaysinh.

23. As we have already held that Section 50 was attracted in the present case, we do not need to decide on the applicability of Namdi to the facts of the present case. We have held that Section 50 was complied with. Having regard to the above position, we do not find any merit in the appeal."

22. All the codal formalities were completed on the spot in the presence of accused. Form M-29 was filled. Samples as well as bulk were converted into parcels. The case property was produced before the officiating SHO. He sealed the same. The case property was produced before the CJM, Sri Muktsar Sahib. She had also completed all the codal formalities in the open Court. Thereafter, sample was sent for FSL examination. It has come in the FSL report Ex.PW4/A that the sample was sealed with three seals of one each of 'IS', 'KS' and 'OP'. On the basis of analysis the contents were identified as Opium having 2.98% morphine.

Statements of DW-1 Balwant Singh and DW-2 Constable Mukesh Kumar

do not inspire any confidence. DW-1 Balwant Singh in his examination-in-chief has deposed that he had seen the accused first time in Court. However, the fact of the matter is that he identified his signatures Ex.PN, Ex.PO, Ex.PP, Ex.PR and Ex.PQ. It was not necessary for the prosecution to cite Balwant Singh as witness. Statement of official witnesses inspire confidence. There was no occasion with police official to falsely implicate the accused. The quantity recovered from the accused is more than commercial quantity.

23. There is no merit in the appeal and the same is dismissed.

(RAJIV SHARMA)
JUDGE

(HARINDER SINGH SIDHU)
JUDGE

May 28, 2019.
Davinder Kumar

Whether speaking / reasoned	Yes/No
Whether reportable	Yes/No