

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ BAIL.APPL. No.973/2019

Judgment reserved on :18.11.2019

Date of decision :20.01.2020

SH. AKHILESH BHARTI

..... Applicant

Through: Mr. Arvind Kumar Gupta,
Advocate.

versus

STATE

..... Respondent

Through: Mr. Kewal Singh Ahuja, APP
for State with Simple
Imprisonment Abdul Barkat,
Narcotics Cell, Crime Branch.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. The applicant Akhilesh Bharti in judicial custody since 12.02.2017 seeks the grant of bail under Section 439 r/w Section 482 of the Cr.P.C., 1973 in relation to FIR No.18/2017, PS Crime Branch under Sections 20/29 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act, 1985).

2. The charge sheet in the instant case under Section 173 of the Cr.P.C., 1973 has been filed before the learned Trial Court and till the hearing of the application as on 18.11.2019 out of the cited 16 prosecution witnesses, 9 prosecution witnesses had been examined.

3. The status report dated 01.07.2019 under the signatures of the ACP, Narcotic Cell, Crime Branch, Delhi put forth the facts alleged against the applicant to the effect that on 11.02.2017 at about 9.00 PM, the secret information was received by ASI Sudhir Kumar at the Office of the Narcotics Cell, Crime Branch, Old Kotwali Daryaganj, Delhi that a lady Ajmeri, who resides at Kasim Vihar, Loni, Uttar Pradesh with her associates Shamsheer Shah and Akhilesh Bharti (i.e. the applicant herein) deal in the supply of Ganja in wholesale and retail in Delhi and in the area of NCR after procuring the same from Jagdalpur and Raipur and that Shamsheer Shah and Akhilesh Bharti (i.e. the applicant herein) would come that day for supply of Ganja to someone between 10:45 PM to 11:15 PM near Khajoori Khas Chowk, Pusta Road, Delhi and that if the raid was conducted in time, then they could be caught along with the consignment of Ganja.

4. As per the prosecution version, ASI Sudhir Kumar produced the informer before Insp. Manoj Kumar in his office at about 9:15 PM after apprising him of the information received and after satisfying himself on making enquiries from the secret informer, Insp. Manoj Kumar informed Shri Sanjeev Kumar Tyagi, ACP/ N&CP telephonically who directed the taking of immediate appropriate legal action for conducting of a raid. This information is stated to have been reduced into writing vide DD No.10 at about 9:30 PM and the same was produced to Inspector Manoj Kumar in compliance of Section 42 of the NDPS Act, 1985. The raiding party along with its equipment is stated to have reached the spot at about 11:00 PM and two persons are stated to have come from the side of Khajoori Khas Chowk on foot

whilst holding two trolley bags and whereas the co-accused Shamsher Shah was found holding two trolley suit cases, the applicant herein namely Akhilesh Bharti was found in possession of one Magenta coloured trolley bag in his right hand.

5. As per the status report submitted, the compliance of provisions of the NDPS Act, 1985 was made and the trolley bags were checked and were found to contain four bags in each of the bags, which were packed with the help of tape and on checking after cutting tapes of all the packets, greenish seeds and leaves type smelly substance was found in all packets which was found to be Ganja. The said four parcels in each of the trolley bags were found to weigh 21 Kgs of Ganja and two samples of 250 gms each were drawn from the recovered contraband from each of the parcels and was separately marked and the remaining contraband and all four wrappers were kept in the white plastic katta and was converted into apulanda with the help of white cloth strip and the trolley bags were also converted into pulandas and were all seized and a signatory is stated to have been sent to FSL.

6. As per the status report, the contraband containing Ganja recovered from the applicant weighing 21 Kgs being a commercial quantity, the rigours of Section 37 of the NDPS Act, 1985 would apply in the instant case.

7. The contentions raised through the present petition are to the effect that the charge sheet having been filed, no useful purpose would be served by further incarceration of the applicant in judicial custody; that the trial in the case would take time and that the applicant/

petitioner is of a very young age and has been falsely implicated in the case and nothing has been recovered from him and that the alleged recovery of 21 Kgs of Ganja has only been planted upon him. The petitioner/ applicant submits that there is no public witness who was joined in the investigation despite the recovery having been effected in a public place.

8. Another contention raised on behalf of the petitioner /applicant is to the effect that PW-9 ASI Sudhir Kumar examined by the prosecution on 07.09.2018, has stated that all the four packets had been found in possession of the petitioner weighing total of 21 Kgs and on that date his examination in chief was deferred to 11.10.2018 for want of case property and on 11.10.2018, learned counsel for the petitioner requested the learned Trial Court that the material/ Ganja contained in Ex.P-6, P-14 and P-22 be weighed and the matter was re-notified for the date 30.11.2018 so that the arrangement for weighing the case property would be made and on 30.11.2018 when Ex.P-22 containing Ganja recovered was weighed including the weight of two plastic bags which weighed around 85 gms each and it was found that Ex.P-22 the Ganja recovered including the weight of two plastic bags which weighed around 85 gms each was found to be 19 Kgs and thus, the petitioner submits that the total weight as per the testimony of PW-9, ASI Sudhir Kumar would itself show that the alleged contraband recovered from the petitioner weighed less than the commercial quantity and thus, the embargo of Section 37 of the NDPS Act, 1985 would not apply in the instant case, in as much as the contraband recovered as produced during the trial weighed less than 20 Kgs,

which is the commercial quantity prescribed in terms of the Table (Section 2 sub clause (vii)(a) and xxiii (a) in Column 6 at serial no. 55 i.e. Ganja).

9. The learned Trial Court vide order dated 28.08.2019 has observed to the effect that as per the FSL result, the two samples of 250 gms each which had been sent to the FSL, on being weighed were found to be 244.2 gms and 246.1 gms at the time when they were de-sealed on their examination on 26.05.2017 but observed to the effect that the examination of those samples had taken place after a gap of about 3 ½ months from the date of the alleged seizure by the police and that the thread bare analysis of the testimonies of the prosecution witnesses cannot be made at the stage of trial.

10. However, it cannot be overlooked that the chief contention raised by the applicant herein is to the effect that the requisite compliance of Section 50 of the NDPS Act, 1985 was not made in the instant case and that the compliance thereof is mandatory. Section 50 of the NDPS Act, 1985 prescribes as follows:-

“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.]”,

11. It has thus been submitted on behalf of the petitioner that the non-compliance of the mandatory procedure prescribed under Section 50 of the NDPS Act, 1985 is fatal to the case of the prosecution and the petitioner is entitled to claim the benefit for the same.

12. The verdicts on the aspect of compliance of Section 50 of the NDPS Act, 1985 as per the law laid down, are referred to hereinbelow.

Vide the verdict of the Hon'ble Supreme Court of the Constitution Bench dated 21.07.1999 in the case titled as ***“State of Punjab Vs. Baldev Singh” (1999) 6 SCC 172***, it was laid down vide paragraph 57 of the said verdict to the effect:-

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

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a

person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing;

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

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

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

administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.

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

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

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

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of

Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act.

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

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

thus, the necessity of informing the person about the existence of his right to be searched before the Gazetted Officer or a Magistrate was held imperative vide verdict in “***State Vs. Baldev Singh***” (supra).

13. Vide verdict of the **two** judge Bench of the Hon’ble Supreme Court dated 24.11.2006 in “***Dilip and another Vs. State of M.P.***” (2007) 1 SCC 450 observed in a case in which on the search of the scooter on which the accused was found, the said scooter was found to contain six big plastic bags and one small plastic bag containing opium, though, nothing was recovered on the personal search of the accused persons in that case. The Hon’ble Supreme Court in the said case observed vide paragraphs 12 & 16 to the effect:-

“12. Before seizure of the contraband from the scooter, personal search of the appellants had been carried out and, admittedly, even at that time the provisions of Section 50 of the Act, although required in law, had not been complied with.

....
....

16. In this case, the provisions of Section 50 might not have been required to be complied with so far as the search of scooter is concerned, but, keeping in view the fact that the person of the appellants was also searched, it was obligatory on the part of PW 10 to comply with the said provisions. It was not done.”

14. The verdict of the Constitution Bench of the Hon'ble Supreme Court in ***“Vijaysinh Chandubha Jadeja Vs. State of Gujarat” (2011) 1 SCC 609***, a verdict dated 29.10.2010 observed vide paragraph 24 to the effect:-

“24. Although the Constitution Bench in Baldev Singh case [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to “inform” the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to “inform” the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a

gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.”,

and laid down vide paragraph 29 of the said verdict to the effect:-

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

and it was also observed vide paragraph 31 of the verdict in “*Vijaysinh Chandubha Jadeja Vs. State of Gujarat*” (supra) to the effect:-

“31. We are of the opinion that the concept of “substantial compliance” with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in Joseph Fernandez [(2000) 1 SCC 707 : 2000 SCC (Cri) 300] and Prabha Shankar Dubey [(2004) 2 SCC 56 : 2004 SCC (Cri) 420] 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 case [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] . Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.”

15. The verdict of the two judge Bench of the Hon’ble Supreme Court in “*State of Rajasthan Vs. Parmanand and another*” (2014) 5 SCC 345 dated 28.02.2014 vide paragraph 15 thereof after making referrals to the conclusions drawn by the Hon’ble Constitution Bench of the Hon’ble Supreme Court in *Baldev Singh’s* case, *State of H.P. Vs. PawanKumar* (2005) 4 SCC 350, *Dilip Vs. State of M.P.* (supra), *Union of India Vs. Shah Alam* (2009) 16 SCC 644, observed vide paragraphs 10 to 15 to the effect:-

“10. The conclusions drawn by the Constitution Bench, which are relevant for this case could be quoted: (Baldev Singh case [State of Punjab v. Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080], SCC pp. 208-09, para 57)

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

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

(3) That a search made by an empowered officer, on prior information, without informing the person of his

right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.”

(emphasis in original)

11. In the present case, the conviction is solely based on recovery of opium from the bag of Respondent 1 Parmanand. No opium was found on his person. In Kalema Tumba v. State of Maharashtra [(1999) 8 SCC 257 : 1999 SCC (Cri) 1422] this Court held that if a person is carrying a bag or some other article with him and narcotic drug is recovered from it, it cannot be said that it was found from his person and, therefore, it is not necessary to make an offer for search in the presence of a gazetted officer or a Magistrate in compliance with Section 50 of the NDPS Act.

12. In State of H.P. v. Pawan Kumar [(2005) 4 SCC 350 : 2005 SCC (Cri) 943] , a three-Judge Bench of this Court held that a person would mean a human being with appropriate coverings and clothing and also footwear. A bag, briefcase or any such article or container, etc. can under no circumstances be treated as a body of a human being. Therefore, it is not possible to include these articles within the ambit of the word “person” occurring in Section 50 of the NDPS Act. The question is, therefore, whether Section 50 would be applicable to this case because opium was recovered only from the bag carried by Respondent 1 Parmanand.

13. In Dilip v. State of M.P. [(2007) 1 SCC 450 : (2007) 1 SCC (Cri) 377] , on the basis of information, search of the

person of the accused was conducted. Nothing was found on their person. But on search of the scooter they were riding, opium contained in plastic bag was recovered. This Court held that: (SCC p. 456, para 16)

“16. ... provisions of Section 50 might not have been required to be complied with so far as the search of scooter is concerned, but keeping in view the fact that the person of [the accused] was also searched, it was obligatory on the part of [the officers] to comply with the said provisions.” which was not done. This Court confirmed the acquittal of the accused.

14. In Union of India v. Shah Alam [(2009) 16 SCC 644 : (2010) 3 SCC (Cri) 377] , heroin was first recovered from the bags carried by the respondents therein. Thereafter, their personal search was taken but nothing was recovered from their person. It was urged that since personal search did not lead to any recovery, there was no need to comply with the provisions of Section 50 of the NDPS Act. Following Dilip [(2007) 1 SCC 450 : (2007) 1 SCC (Cri) 377] , it was held that since the provisions of Section 50 of the NDPS Act were not complied with, the High Court was right in acquitting the respondents on that ground.

15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, Respondent 1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of Respondent 2 Surajmal was also conducted. Therefore, in the light of the judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.”

and thus, in that case where the recovery of the contraband opium from a bag carried by the accused was effected, it was held that the bag of the accused was searched and from the bag opium was recovered but that his personal search was also carried out and thus, Section 50 of the NDPS Act, 1985 would have application and in as much, there had been no compliance of Section 50 of the NDPS Act, 1985, the breach thereof vitiated the search and the accused in that case were thus,- acquitted.

16. Reliance was also placed on behalf of the petitioner on the verdict dated 27.04.2018 of the two judge Bench of the Hon'ble Supreme Court in ***"Arif Khan @ Agha Khan Vs. State of Uttarakhand"*** AIR2018SC2123, to contend that compliance of Section 50 of the NDPS Act, 1985 of the accused being searched in the presence of either a Magistrate or a Gazetted Officer, is mandatory and that the consent given by an accused that he may be searched by the member of the raiding party is irrelevant. It was observed vide paragraphs 23 to 29 of the said verdict to the effect:-

"23. Their Lordships have held in VijaysinhChandubha Jadeja (supra) that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the Police Officer to apprise the person intended to be searched of his right Under Section 50 to be searched only before a Gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorized officer to make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided

to him Under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him Under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a Gazetted Officer or a Magistrate. (See also Ashok Kumar Sharma v. State of Rajasthan MANU/SC/0019/2013 : 2013 (2) SCC 67 and Narcotics Control Bureau v. Sukh Dev Raj Sodhi, MANU/SC/0650/2011 : 2011 (6) SCC 392)

24. Keeping in view the aforementioned principle of law laid down by this Court, we have to examine the question arising in this case as to whether the prosecution followed the mandatory procedure prescribed Under Section 50 of the NDPS Act while making search and recovery of the contraband "Charas" from the Appellant and, if so, whether it was done in the presence of a Magistrate or a Gazetted Officer so as to make the search and recovery of contraband "Charas" from the Appellant in conformity with the requirements of Section 50.

25. In our considered view, the evidence adduced by the prosecution neither suggested and nor proved that the search and the recovery was made from the Appellant in the presence of either a Magistrate or a Gazetted Officer.

26. It is the case of the prosecution and which found acceptance by the two Courts below that since the Appellant (accused) was apprised of his right to be searched in the presence of either a Magistrate or a Gazetted Officer but despite telling him about his legal right available to him Under Section 50 in relation to the search, the Appellant (accused) gave his consent in writing to be searched by the police officials (raiding party), the two Courts below came to a conclusion that the requirements of Section 50 stood fully complied with and hence the Appellant was liable to be convicted for the offence punishable under the NDPS Act.

27. We do not agree to this finding of the two Courts below as, in our opinion, a search and recovery made from the Appellant of the alleged contraband "Charas" does not satisfy the mandatory requirements of Section 50 as held by

this Court in the case of VijaysinhChandubha Jadeja (supra). This we say for the following reasons.

28. First, it is an admitted fact emerging from the record of the case that the Appellant was not produced before any Magistrate or Gazetted Officer; Second, it is also an admitted fact that due to the aforementioned first reason, the search and recovery of the contraband "Charas" was not made from the Appellant in the presence of any Magistrate or Gazetted Officer; Third, it is also an admitted fact that none of the police officials of the raiding party, who recovered the contraband "Charas" from him, was the Gazetted Officer and nor they could be and, therefore, they were not empowered to make search and recovery from the Appellant of the contraband "Charas" as provided Under Section 50 of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer; Fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the Appellant in the presence of a Magistrate or a Gazetted Officer.

29. Though, the prosecution examined as many as five police officials (PW-1 to PW-5) of the raiding police party but none of them deposed that the search/recovery was made in presence of any Magistrate or a Gazetted Officer.”,

and thereupon, holds vide paragraph 30 of the said verdict to the effect:-

“30. For the aforementioned reasons, we are of the considered opinion that the prosecution was not able to prove that the search and recovery of the contraband (Charas) made from the Appellant was in accordance with the procedure prescribed Under Section 50 of the NDPS Act. Since the non-compliance of the mandatory procedure prescribed Under Section 50 of the NDPS Act is

fatal to the prosecution case and, in this case, we have found that the prosecution has failed to prove the compliance as required in law, the Appellant is entitled to claim its benefit to seek his acquittal.”

and reliance was also placed on behalf of the petitioner on the verdict dated 13.11.2018 of this Court in ***“Dharambir Vs. State” (2018) 254DLT354*** to contend to similar effect.

17. Reliance was also placed on behalf of the petitioner on the verdict of this Court in ***“Sunny Khanna Vs. State (Govt. of NCT of Delhi)”*** in Bail Appln. No.218/2019 dated 25.04.2019, in which the accused in that case for non compliance of Section 50 of the NDPS Act, 1985, in as much as, he was not taken to a Magistrate or a Gazetted Officer before his search was conducted, was released on bail. Reliance was also placed on behalf of the petitioner on the verdict of this Court in ***“Vijay Verma Vs. State”*** in Bail Appln. No.2653/2018 dated 14.03.2019, in which case the contraband was recovered on the personal search of the accused who was thus, for non compliance of Section 50 of the NDPS Act, 1985 granted bail.

18. Reliance was also placed on the verdict of this Court in ***“Deepak Singh Vs. State”*** in Bail Appln. No.1854/2017 dated 31.10.2018, in which case too, the accused was granted bail with it having been submitted on behalf of the accused therein that there had been no compliance of the provisions of Section 50 of the NDPS Act, 1985 and in as much as the search of the accused was not conducted before the Magistrate or Gazetted Officer.

19. Reliance was also placed on behalf of the petitioner on the verdict of this Court in ***“Dharambir Vs. State”*** in CRL.A. No.658/2017 dated 13.11.2018, in which case 30 Kgs of opium was recovered from the rear seat of the Maruti Car in two containers and the accused in that case was apprised by the raiding party of his right to be searched in the presence of a Magistrate or a Gazetted Officer and a notice under Section 50 of the NDPS Act, 1985 was issued to him, which the accused declined to avail of. It was observed vide paragraph 29 of the said verdict to the effect:-

“29. It is undisputed, in the present case, that the search of the appellant, and his car, were conducted by the raiding party, and not by the Magistrate or a Gazetted Officer. Neither were the appellant and his car produced before any Magistrate or Gazetted Officer. The plea, of the respondent, that, as the appellant had been apprised of his right to have himself, and his car, searched by the Magistrate or a Gazetted Officer, and he had himself agreed to be searched by the raiding party, the mandate of Section 50 stood fulfilled, though attractive, cannot sustain, as an identical plea, raised in similar facts, stands negated in Arif Khan (supra).”

and it was concluded vide paragraph 30 of the said verdict to the effect:-

“30. For non-compliance with the provision of Section 50 of the NDPS Act, therefore, the search and seizure of the appellant, and the car in which he was travelling, and the alleged recovery of opium, therefrom, as well as all the proceedings consequent thereupon, stand vitiated in toto. The appellant would, therefore, be entitled to be acquitted of the charges against him, and the impugned judgment, dated 21st March, 2017, as well as order on sentence dated

27th March, 2017, are therefore required to be quashed and set aside.”,

and reliance was also placed on behalf of the petitioner on the verdict of this Court in ***“Sumit Rai @ Subodh Rai Vs. State”*** in CRL.A. No.578/2017 dated 29.07.2019, which verdict relates to the recovery of 100 Kgs of Ganja and in that case the Ganja was recovered from four plastic bags tied with a plastic rope and it has been observed vide paragraphs 10 to 24 of the said verdict to the effect:-

“10. It is clear, from a reading of the above report under Section 57 of the NDPS Act, that simultaneous search of the appellant, and the bags in his possession, was conducted. This immediately calls into application of the judgments of the Supreme Court in Dilip (supra) and Parmanand (supra), in which the Supreme Court held that, if the recovery of contraband took place from the bag carried by the accused, and the accused as well as his bags were simultaneously searched, Section 50 of the NDPS Act would apply, and compliance therewith would be mandatory.

11. In the circumstances, the applicability of Section 50 of the NDPS Act, to the facts of the present case, cannot be gainsaid. Indeed, the raiding team was also, apparently, of the view that Section 50 of the NDPS Act would apply, as they offered, to the appellant, the opportunity of having his search, and the search of the bags found in his possession, being conducted in the presence of a Magistrate or a Gazetted Officer, and proceeded to search the appellant, and his bags only after the appellant had refused the said offer.

12. The question that arises, then, is whether, once the appellant had refused the offer of having his search, and the search of the bags in his possession, conducted by a

Magistrate or a Gazetted Officer, the I/O was justified in proceeding to conduct the search of the appellant and his bags himself.

13. On this aspect, Arif Khan (supra) marks a radical change, in the jurisprudence relating to Section 50 of the NDPS Act. The facts of the said case strikingly mirror those of the present, and may, therefore, be briefly adverted to. Pursuant to receipt of secret information, a raiding party was constituted, which spotted the appellant Arif Khan approaching, and intercepted him. On being questioned, he admitted being in possession of charas. He was informed of his right to have his search conducted by a Gazetted Officer or a Magistrate, to which he responded that he had faith on the raiding police party and consented to be searched by them. After having obtained the said consent, in writing, the raiding police party searched the accused, resulting in seizure of charas, weighing 2.5 kg, from his body. Arif Khan was, accordingly, prosecuted for commission of the offence punishable under Section 20 of the NDPS Act. The prosecution resulted in conviction, by order dated 9th November, 2004, of the learned ASJ. An appeal, preferred thereagainst, was dismissed by the High Court of Uttarakhand. Arif Khan appeal further, to the Supreme Court.

14. The principal contention advanced, by learned counsel appearing for Arif Khan before the Supreme Court, was that there had been violation of Section 50 of the NDPS Act, inasmuch as the search of Arif Khan had not been conducted in accordance with the said provision. Reliance was placed, for the said purpose, on the judgment of the Supreme Court in Vijaysinh Chandubha Jadeja v. State of Gujarat, MANU/SC/0913/2010 : (2011) 1 SCC 609. It was contended that the search/recovery of the alleged contraband from Arif Khan ought to have been made only in the presence of either a Magistrate or a Gazetted Officer. The response of the prosecution has been

recorded, in para 26 of the judgment, in the following words:

"It is the case of the prosecution and which found acceptance by the two Courts below that since the appellant (accused) was apprised of his right to be searched in the presence of either a Magistrate or a Gazetted Officer but despite telling him about his legal right available to him under Section 50 in relation to the search, the appellant (accused) gave his consent in writing to be searched by the police officials (raiding party), the two Courts below came to a conclusion that the requirements of Section 50 stood fully fully complied with and hence the appellant was liable to be convicted for the offence punishable under the NDPS Act."

(Italics and underlining supplied)

and it was concluded thus, vide paragraphs 16, 20, 22, 23 & 25 to the effect:-

"16. Insofar as the facts, essential for determination of the controversy in issue are concerned, the present case cannot be distinguished, in any manner, from Arif Khan (supra). The only difference, on facts-which makes no difference to the legal position-is that, in Arif Khan (supra), the appellant Arif Khan, on being queried, confessed to carrying charas, whereas the appellant, in the present case, did not do so. In the present case, too, the alleged contraband ganja was recovered from the bags of the appellants. In the present case, too, the search of the bags, and the seizure of ganja therefrom, was effected by the raiding team, in the absence of any Magistrate or a Gazetted Officer.

....

20. In view of this position, it would neither be necessary, nor appropriate, for this Court to venture into the allegations, or the findings, regarding the nature and identity of the substance found in the bags carried by the appellants, as the failure, on the part of the raiding team, to proceed in accordance with Section 50 of the NDPS Act, vitiates the very search and seizure of the said material. All subsequent efforts at identifying the nature of the material, allegedly seized from the bags of the appellants, whether by using the Drug Field Testing Kit carried by the raiding team, or by way of the report of the FSL, would pale into insignificance.

.....

22. There can be no manner of doubt, therefore, that failure to comply with Section 50 of the NDPS Act is fatal to the case of the prosecution, which stands vitiated, in its entirety, thereby.

23. Notably, in Arif Khan (supra) too, once the Supreme Court found the seizure of the alleged charas to have been effected in violation of Section 50 of the NDPS Act, it did not proceed to discuss any other aspect of the matter, and acquitted the appellant/accused, in that case, on that sole ground.

.....

25. As the result of the above discussion, the appeal succeeds. The appellant is acquitted of the charge against him. The impugned judgment dated 4th March, 2015, and order on sentence, dated 10th March, 2015, of the learned ASJ, are quashed and set aside. The appellant shall be released forthwith, unless his incarceration is required in any other case.”

20. The verdict of the Hon’ble **three** Judge Bench of the Hon’ble Supreme Court dated 05.09.2018 in case titled as “**SK. Raju**

alias Abdul Haque alias Jagga Vs. State of West Bengal” (2018) 9 SCC 708 relates to a case in which though no contraband was recovered on the personal search of the accused but charas was recovered from the rectangular sheets from a black polythene packet which was inside a biscuit coloured jute bag, which the accused was carrying in his right hand and the recovery of cash amounting to Rs.2400/- was also stated to have been recovered from the left pocket of the trouser of the accused. In the circumstances, it was observed by the Hon’ble **three** Judge Bench of the Hon’ble Supreme Court advertent to the provisions of Section 50 of the NDPS Act, 1985 and relying on *“Vijaysinh Chandubha Jadeja Vs. State of Gujarat”* (supra), *“State of Rajasthan Vs. Parmanand and another”* (supra) and it was then, concluded on observing vide paragraphs 20, 21 & 22 to the effect:-

“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 Ext. 3, a first option was given to the appellant. PW 2 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 Ext. 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 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-coloured jute bag was recovered from the appellant, and Rs 2400 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 kg 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 Ext. 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. Ext. 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 [State of Rajasthan v. Parmanand, (2014) 5 SCC 345 : (2014) 2 SCC (Cri) 563] , 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 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 [Vijaysinh Chandubha Jadeja v. State of Gujarat, (2011) 1 SCC 609 : (2011) 1 SCC (Cri) 497].”,

thus, holding to the effect that where the search of the person of an accused was also involved even though the recovery of the contraband was effected from the bag which the accused was carrying, the requirement of mandatory compliance of the provisions of Section 50 of the NDPS Act, 1985 is attracted irrespective of whether the contraband is recovered from the person of the detainee or not.

21. On behalf of the State, it was however contended that there had been substantial compliance of the provisions of Section 50 of the NDPS Act, 1985 and that the recovery of the alleged contraband was not effected from the personal search of the accused/ petitioner but was effected from the trolley that he was carrying and that thus, the requirement of the mandatory presence of a Gazetted Officer or a Magistrate at the time of the conducting of the search of the trolley bag was not required when the petitioner had declined to avail of such opportunity on being offered to him by the Investigating Agency.

22. It is essential to observe that the verdict dated 15.02.2010 of the two judge Bench of the Hon'ble Supreme Court in ***"Ajmer Singh Vs. State of Haryana"*** (2010) 3 SCC 746 relates to a recovery of 500 gms of Charas which was effected from the bag carried by an accused on his shoulder and it was observed vide paragraphs 15, 16 & 17 of the said verdict to the effect:-

"15. The learned counsel for the appellant contended that the provision of Section 50 of the Act would also apply, while searching the bag, briefcase, 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 with 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, briefcase, 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 a 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 Madan Lal v. State of H.P. [(2003) 7 SCC 465 : 2003 SCC (Cri) 1664 : 2003 Cri LJ 3868] The Court has observed: (SCC p. 471, para 16)

“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 v. State of Maharashtra [(1999) 8 SCC 257 : 1999 SCC (Cri) 1422] , State of Punjab v. Baldev Singh [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] and Gurbax Singh v. State of Haryana [(2001) 3 SCC 28 : 2001 SCC (Cri) 426]). The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh case [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] . Above being the position, the contention regarding non-compliance with Section 50 of the Act is also without any substance.”

16. In State of H.P. v. Pawan Kumar [(2005) 4 SCC 350 : 2005 SCC (Cri) 943] this Court has stated: (SCC p. 360, para 11)

“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."

(emphasis in original)

17. After discussion on the interpretation of the word "person", this Court concluded: (Pawan Kumar case [(2005) 4 SCC 350 : 2005 SCC (Cri) 943], SCC p. 361, para 14)

"14. ... that the provisions of Section 50 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."

The Court further observed: (SCC p. 369, para 27)

"27. ... In view of the discussion made earlier, Section 50 of the Act can have no application on the facts and circumstances of the present case as opium was allegedly recovered from the bag which was being carried by the accused."

23. Reliance was placed on behalf of the State on the verdict of the Hon'ble three Judge Bench of the Hon'ble Supreme Court dated 15.10.2019 in **"State of Punjab Vs. Baljinder Singh and Another"** 2019 SCC OnLine SC 1408 which relates to a case in which the driver of the vehicle and the person accompanying the driver were found to be in possession of seven bags containing poppy husk with each bag weighing 34 Kgs, though, nothing was recovered from the personal search of the accused persons and it was observed vide paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 to the effect:-

"15. Subsequently, another Constitution Bench of this Court in Vijaysinh Chandubha Jadeja v. State of Gujarat had an occasion to consider the case from the stand-point whether the person who is about to be searched ought to be informed of his right that he could be searched in the presence of a Gazetted Officer or a Magistrate. While considering said

question, this Court also dealt with the judgment rendered in Baldev Singh's case and the discussion in paragraphs 24 and 29 was as under:

24. Although the Constitution Bench in Baldev Singh case [(1999) 6 SCC 172] did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to “inform” the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to “inform” the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.

.....
29. In view of the foregoing discussion, we are of the firm opinion that the object with which the 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 insofar as the obligation of the authorised officer under subsection (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires 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.”

(Underlying by us)

16. The law is thus well settled that an illicit article seized from the person during personal search conducted in violation of the safe-guards provided in Section 50 of the Act cannot by itself be used as admissible evidence of proof of unlawful possession of contra-band.

17. But the question is, if there be any other material or article recovered during the investigation, would the infraction with respect to personal search also affect the qualitative value of the other material circumstance.

18. At this stage we may also consider following observations from the decision of this Court in Ajmer Singh v. State of Haryana:—

“15. The learned counsel for the appellant contended that the provision of Section 50 of the Act would also apply, while searching the bag, briefcase, 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 with 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, briefcase, 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 a 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 Madan Lal v. State of H.P. [(2003) 7 SCC 465]. The Court has observed: (SCC p. 471, para 16)

“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 v. State of Maharashtra [(1999) 8 SCC 257], State of Punjab v. Baldev Singh [(1999) 6 SCC 172] and Gurbax Singh v. State of Haryana [(2001) 3 SCC 28]). The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh case¹. Above being the position, the contention regarding non-compliance with Section 50 of the Act is also without any substance.”

19. As regards applicability of the requirements under Section 50 of the Act are concerned, it is well settled that the mandate of Section 50 of the Act is confined to “personal search” and not to search of a vehicle or a container or premises.

20. The conclusion (3) as recorded by the Constitution Bench in Para 57 of its judgment in Baldev Singh clearly states that the conviction may not be based “only” on the basis of possession of an illicit article recovered from personal search

in violation of the requirements under Section 50 of the Act but if there be other evidence on record, such material can certainly be looked into.

21. In the instant case, the personal search of the accused did not result in recovery of any contraband. Even if there was any such recovery, the same could not be relied upon for want of compliance of the requirements of Section 50 of the Act. But the search of the vehicle and recovery of contraband pursuant thereto having stood proved, merely because there was non-compliance of Section 50 of the Act as far as "personal search" was concerned, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle. Any such idea would be directly in the teeth of conclusion (3) as aforesaid.

22. The decision of this Court in Dilip's case, however, has not adverted to the distinction as discussed hereinabove and proceeded to confer advantage upon the accused even in respect of recovery from the vehicle, on the ground that the requirements of Section 50 relating to personal search were not complied with. In our view, the decision of this Court in said judgment in Dilip's case is not correct and is opposed to the law laid down by this Court in Baldev Singh and other judgments.

23. Since in the present matter, seven bags of poppy husk each weighing 34 kgs. were found from the vehicle which was being driven by accused-Baljinder Singh with the other accused accompanying him, their presence and possession of the contraband material stood completely established.

24. In the circumstances, the acquittal recorded by the High Court, in our considered view, was not correct. We, therefore, set aside the view taken by the High Court."

24. The verdict of this Court in Bail Appln. No.127/2019 in case titled as *"Anil Sharma Vs. The State"* dated 08.11.2019 in which

Ganja is stated to have been recovered in plastic bags and was effected from the search of the vehicle and it was observed vide paragraphs 26 & 27 thereof to the effect:-

“26. Even otherwise, it has been held by the Supreme Court in the matter of State of Punjab v. Baljinder Singh &Anr., in Criminal Appeal No.1565-66/2019, decided on 15.10.2019 that non-compliance of Section 50 during „personal search” cannot invalidate recovery from vehicle. The mandate of Section 50 of the Act is confined to “personal search” and not to search of a vehicle or a container or premises. Hence, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle.

27. The contraband in this case was recovered from the vehicle, hence, no benefit, if any, regarding non-compliance of Section 50 of the NDPS Act can be extended to the petitioner in view of the facts of the present case, in any manner. Even otherwise, in view of the decision in Vijaysinh Chandubha Jadeja v. State of Gujarat (supra), the question as to whether or not the procedure prescribed has been followed and the requirements of Section 50 of the NDPS has been met, is a matter of trial.”

25. It is essential to observe that vide the verdict of the Hon’ble **three** Judge Bench of the Hon’ble Supreme Court dated 05.09.2018 in ***“SK. Raju alias Abdul Haque alias Jagga Vs. State of West Bengal” (2018) 9 SCC 708***, it has specifically been observed to the effect that where merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act, 1985 will have no application but if the personal search of the accused is also conducted, the provisions of Section 50 of the NDPS Act, 1985 would

wholly apply. The verdict of the Hon'ble Supreme Court dated 15.10.2019 in ***“State of Punjab Vs. Baljinder Singh and Another”*** 2019 SCC OnLine SC 1408 is also a verdict of the Hon'ble **three** Judge Bench of the Hon'ble Supreme Court in which the personal search of the accused did not result into recovery of any contraband but there was a recovery of contraband effected from the vehicle in which the accused persons were seated with one of them being the driver. Though, the Hon'ble Supreme Court in ***“State of Punjab Vs. Baljinder Singh and Another”*** (supra) has observed to the effect that the judgment of the Hon'ble Supreme Court in ***Dilip***'s case is not correct and is opposed to the decision to the law laid down by the Hon'ble Supreme Court in ***Baldev Singh's*** and other judgments, the observations in the verdict of the Hon'ble Supreme Court in ***“SK. Raju alia Abdul Haque alias Jagga Vs. State of West Bengal”*** (supra) dated 05.09.2018 (which are **not adverted to** in ***“State of Punjab Vs. Baljinder Singh and Another”*** (supra) dated 15.10.2019) lay down a fine distinction and in these circumstances thus, where the contraband is recovered from an object which is held by an accused in his hand and the search of the person of such an accused is also conducted which lead to no recovery of any contraband, though, there are recoveries of other personal assets of a person from his personal search, in view of the judgments of the Hon'ble Supreme Court in ***“SK. Raju alia Abdul Haque alias Jagga Vs. State of West Bengal”*** (supra), the non compliance of Section 50 of the NDPS Act, 1985 would *prima facie* vitiate the recovery.

26. Furthermore, in the instant case, the alleged contraband on being weighed during trial is found to weigh 18 kgs and 490.3 gms and thus, less than the commercial quantity prescribed in terms of the Schedule to the NDPS Act, 1985. The trial of the case would apparently take time and in the instant case, the mandatory provisions of Section 50 of the NDPS Act, 1985 by the presence of a Gazetted Officer or a Magistrate at the time of the personal search conducted of the accused having not been complied with, in the facts and circumstances of the instant case, the applicant is allowed to be released on bail on filing a bail bond in the sum of Rs.2,00,000/- with two sureties of the like amount to the satisfaction of the learned Trial Court with directions that he shall not leave the city/country, shall not tamper with the evidence in any manner, shall appear before the Trial Court on each and every date of hearing and shall not involve in the commission of any other offence whatsoever and in the event of there being any FIR registered against the applicant, the State shall bring it to the notice of this Court forthwith.

27. Nothing stated hereinabove shall however amount to any expression on the merits or demerits of the trial in progress.

28. The application stands disposed of.

ANU MALHOTRA, J.

JANUARY 20th, 2020

'Neha Chopra'