

IN THE HIGH COURT AT CALCUTTA

Criminal Application

Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 155 of 2021

Jahangir Sk. alias Taki

Versus

The State of West Bengal

For the appellants : Mr. Sobhendu Sekhar Roy, Adv.
: Mr. Amarendra Chakraborty, Adv.
: Ms. Argha Banerjee, Adv.

For the State : Mr. Madhusudan Sur Ld. APP.
: Mr. Monoranjan Mahata, Adv.

Hearing
concluded on : 20th February, 2023

Judgment on : 15th March, 2023

Md. Shabbar Rashidi, J.

1. The appeal is directed against the judgement of conviction dated September 19, 2020 and order of

sentence dated September 21, 2020 passed by the learned 1st Additional Sessions Judge, Special Court, Suri, Birbhum in Complaint Case No. 25 of 2017.

2. By the impugned judgement of conviction and order of sentence, the appellant was convicted for the offences punishable under Sections 21/22/29 of the Narcotic Drugs and Psychotropic Substance Act, 1985 and was sentenced to suffer Rigorous Imprisonment for 10 years and a fine of ₹ 1 lakh and in default of payment of the fine to suffer rigorous imprisonment for a further period of two years.

3. The facts giving rise to the instant case are that the Inspector of Police, DDI, Birbhum DD, CID West Bengal received a secret source information to the effect that a person was going to hand over huge quantity of crude Heroin near Tilpara More, under Suri Police Station and was going to dispatch the same to other customers for wrongful business purpose. Upon receipt of such information, the informant communicated the same to

his superior officers of CID West Bengal. However, he had no time to obtain permission. Thereafter, the complainant accompanied by police force proceeded for Suri Police Station by a vehicle carrying all necessary equipments like electronic weighing machine, a papers and carbon paper, pen, scale, stamp pad, sealing works, metal specimen seal, candle matchbox and other articles. Reaching Suri PS, the complainant submitted a written requisition to the Inspector-in-charge for providing necessary police assistance. A GDE in this regard was lodged and, thereafter, the complainant along with force and the police assistance from Suri Police Station, proceeded to the place where the transaction was reported to be performed at 11.55 hours, as per the source information. They arrived near the Jatri Pratikashalaya over Panagarh – Moregram High Road, NH -60, 200 meters away from Sree Rama Krishna Shilpa Vidyapith under Suri Police Station and waited for the dealers to come.

4. The complainant also stated that he requested some passers-by to remain present during the proceeding but none came forward. However, two local persons agreed. After waiting for some time, the source pointed out the person coming towards the said place having a nylon bag in his hand from Morgram side on foot. The said person at first tried to flee away but was apprehended. The police team disclosed their identity and desired to conduct search on his person for reasonable suspicion. Upon interrogation, the said person disclosed his identity as the appellant.

5. A notice under Section 50 of the NDPS Act was served upon him whereupon the appellant refused to search the person of the police personnel. He also replied that no magistrate or a gazetted officer was required for his personal search. However, a search was conducted upon the body of the police personnel in presence of the independent witnesses. Nothing

objectionable could be recovered from the person and accordingly, a nil seizure list was prepared.

- 6.** Thereafter, a search was conducted on the person and one nylon bag by the complainant in presence of the witnesses. During such search, one pink – blue Brown striped nylon bag approximately 1 foot in length and 14 inches in width with handle was found. A plastic carry bag was recovered from such bag containing 313 grams of heroin. The recovered articles were tested with the help of testing kit and found to be positive for narcotic drug. On interrogation, the detainee failed to produce any valid papers for the possession of crude heroin. The search and seizure process was completed between 13.15 hours and 14.25 hours. The recovered articles were seized under proper seizure list and the detainee was arrested.

- 7.** On the basis of such written complaint lodged by the Inspector of Police DDI, Birbhum, Suri Police Station Case No. 322/17 dated August 23, 2017 under Sections

21/22 of the NDPS Act was started against the appellant. The police took up investigation and on completion of investigation submitted the charge-sheet against the two accused persons.

- 8.** Accordingly, on the basis of materials in the case diary, charges under Sections 21/22/29 of the NDPS Act were framed on September 19, 2018. The accused persons pleaded not guilty of the charges and claimed to be tried. They were put on trial.
- 9.** On conclusion of the trial, one of the accused persons, namely Ebrahim Sk. alias Ibrahim was found not guilty and was acquitted of the charges. The appellant, however, was convicted by the Trial Court for the charges under Sections 21/22/29 of the NDPS Act, 1985.
- 10.** At the time of advancing argument, learned advocate for the appellants contends that the impugned judgement of conviction and order of sentence passed by learned Trial Court is bad for non-compliance of Section

50 of the Act of 1985. It has also been contended that the appellant was not apprised of the existence of his right to be searched in presence of a magistrate or a gazetted officer. In support of his contention for such proposition, learned advocate for the appellant has relied upon the authorities of **(2007) 1 SCC 450, (Dilip & anr. V state of MP); (2009) 16 SCC 644, (Union of India V.Shah Alam & anr); and (2014) 5 SCC 345, (State of Rajasthan V. Parmannand & Anr).**

11. Learned advocate for the appellant has also submitted that although, notice under Section 50 of the NDPS Act was served upon the appellant providing him the intimation with regard to the option of being searched in presence of a magistrate or a gazetted officer, it is submitted, that the very existence of the right of the appellant to be searched in presence of a magistrate or a gazetted, officer was not notified in the said notice in so many words. For this reason, the aforesaid notice cannot be said to be a complete

compliance of the provisions of Section 50 of NDPS Act in letter and spirit.

12. Learned advocate for the appellant has also assailed the impugned judgement of conviction and order of sentence on the ground that the seized contraband articles were never produced in Court at the time of trial. It was submitted on behalf of learned advocate for the appellant that non-production of the seized articles at the trial, is not a procedural irregularity but it causes serious prejudice to the accused and, therefore, it is fatal for the prosecution case. For such proposition, learned advocate for the appellant has relied upon the decision reported in **(2004) 10 SCC 562 (Jitendra and anr. V. State of MP).**

13. On the other hand, learned advocate for the State has contended that, before conducting the search, the appellant was served with notice giving him the option to be searched in presence of a Magistrate or a Gazetted

Officer and the appellant agreed to be searched without the presence of such authorities. Therefore, according to the submissions made on behalf of learned advocate for the State, there was sufficient compliance of the provisions under Section 50 of the NDPS Act. It is contended that the impugned judgement and order cannot vitiate on this score.

14. Learned advocate for the State also submits that in terms of the ratio laid down by the Hon'ble Supreme Court in the case of **Union of India V. Mohanalal & Ors.** reported in **(2016) 3 SCC 379**, the production of the seized contraband at the trial is not mandatory. No prejudice is shown to have been caused to the appellant for non-production of the seized articles, and as such, non-production of such articles cannot vitiate the impugned judgement of conviction and order of sentence.

15. At the trial, in order to prove the charges levelled against the accused, the prosecution examined nine

witnesses in all. In addition, the prosecution also relied upon some documentary as well as material evidences.

- 16.** One sub- inspector of police deposed as PW 1. He stated that on August 23, 2017, he accompanied inspector Simul Sarkar to Suri Tilpara bridge near yatri Niwas on NH – 60. He further stated that on the said date, SI Simul Sarkar received a source information and PW1 along with force accompanied Inspector Simul Sarkar to work out the information. At about 1. 00 p.m. as indicated by the source, one person was found coming from the side of Ramkrishna Shilpa Vidyapith towards Suri having a pink blue Brown coloured nylon bag in his possession. DDI Simul Sarkar apprehended the said person and informed him that he suspected him carrying narcotic substance and as such he wanted to search him. PW1 also stated that a notice, intimating him that if he wanted to be searched his person by a Magistrate or other competent authority, was served upon such person. The said person agreed to be

searched in presence of DDI Simul Sarkar. Thereafter DDI Simul Sarkar started searching the person as well as belongings of the detained person and on such search, one polythene bag was found from inside the pink blue Brown coloured nylon bag. The polythene bag was found to contain some suspected substance. Upon testing the suspected substance with the help of testing kit, it was found to be positive for heroin. The said substance was weighed with the help of a weighing machine and found to be 313 grams in weight.

- 17.** PW1 also stated that two samples of 50 grams each were taken out of the recovered heroin and the mother packet along with the samples were seized by DDI Simul Sarkar under proper seizure list. One Brown coloured money bag containing ₹ 230 was also seized. The mother packet and the sample packets were sealed and labelled separately in presence of two independent witnesses. PW1 signed on the labels attached to such packets. Besides himself, the labels were also signed by

ASI Sanjib Saha and the independent witnesses. He also identified the appellant in court.

18. He further stated that the appellant was arrested after observing all formalities by DDI Simul Sarkar and thereafter the raiding team along with the appellant and the seized articles returned to Suri Police Station. DDI Simul Sarkar lodged a written complaint with Suri PS. PW1 identified his signature on the seizure list which was marked as Exhibit 1 and that on the labels were marked as Exhibit 2 series. He also identified the money bag recovered from the possession of the appellant which was marked as Mat. Exhibit I. The seized samples of heroin were marked as Mat. Exhibit. II & III.

19. In his cross-examination, PW1 proved the notice served upon the appellant which was marked as Exhibit- A.

20. The de facto complainant, DDI Simul Sarkar deposed as PW 2. In his deposition, he stated that on August 23, 2017 at about 12.00 noon, he received

source information that a carrier was coming with heroine at Tilpara passenger's waiting room at Suri. Receiving such information PW 2 informed the matter to his official superior and thereafter, along with his team went to Suri police station. There, he submitted a requisition seeking police help. On the basis of such requisition, the inspector in charge of Suri Police Station provided an officer and force. Thereafter PW2 proceeded to the spot along with the source. They also carried electric weighing machine, drug testing kit et cetera. He also arranged two independent witnesses at the spot.

- 21.** PW2 also stated that on the spot, the source identified the suspected person namely the present appellant, whereupon, the appellant was apprehended. PW2 also proposed the appellant to search the person of the police party if he wanted. He was also informed that he might be searched in presence of a Gazetted Officer or Magistrate. The appellant informed PW2 that he did not required to be searched in presence of Gazetted

Officer or Magistrate. He further stated that after obtaining consent, the appellant was searched and cash money of ₹. 230 was recovered.

22. He further stated that the appellant was carrying a multicoloured nylon bag and on search of such nylon bag, Brown coloured dust in a packet inside the bag was found which weighed 313 gms. Upon testing, with the help of testing kit, the aforesaid materials tested positive for heroine. Accordingly, the recovered articles together with the cash money, and the bag were seized in presence of the witnesses. PW2 also stated that he took two samples from the seized articles. The appellant could not produce any valid document for the possession of the aforesaid articles.

23. The appellant along with the seized articles were brought back to Suri Police Station and were handed over to the inspector-in-charge. PW 2 also lodged a written complaint with Suri Police Station. PW 2 tendered the written complaint lodged by him which was

marked as Exhibit 3. He also proved the seizure list prepared in his pen and signature (Exhibit 1/1) and the notice served upon the appellant bearing his signature and that of the appellant as well as the witnesses (Exhibit 4). He also identified the labels attached to the seized contraband bearing signatures of the witnesses (Exhibit 2/3, 2/4 and 2/5). He also proved the labels attached to the mother articles, weighing machine and seized money (Exhibit 5 series). The written requisition before Suri police station was tendered and marked as Exhibit 6.

24. PW 2 also stated that upon completion of the entire process, he informed the matter to his official superior through an email message which was tendered in evidence and marked as Exhibit 8. He was examined by the investigating officer.

25. PW2 was cross-examined on behalf of the appellant and in his cross-examination, he admitted that upon service of notice upon the appellant, he did not make

any attempt for taking the accused to any nearby Magistrate or a Gazetted Officer.

26. An assistant sub- inspector of DD Birbhum was examined as PW 3. He stated that on August 23, 2017, he accompanied PW 2 to Panagarh–Moregram highway near Ramkrishna Shilpa Vidyapith.

27. Upon information of transaction of heroin, DDI Simul Sarkar accompanied by PW3 and other force went first to Suri PS seeking police assistance. Being provided with the police force, the raiding party went to the place of occurrence at about 1 p.m. One person was identified by the source and accordingly, he was detained. PW3 also stated that the raiding party offered the said person to search the Police personnel. He was also informed that if he needed the presence of a Magistrate for conducting search upon him as the raiding party had information that he was in possession of narcotics. The said person is said to have intimated the raiding party that he did not require the presence of a Magistrate.

Two local persons were requested to be a witness of the search and seizure. Thereafter, a search was conducted upon the person of the detainee as well as on his belongings. Some brown coloured powder was recovered from the bag he was carrying. The said article was tested with the help of a testing kit and was found to be positive for heroin. He further stated that the said articles were weighed, sealed and seized under proper seizure list. Thereafter, the detained person and the seized articles were brought back to Suri Police Station. PW3 identified the appellant in Court. He proved his signature on the seizure list (Exbt. 1/1). He also proved his signature on the labels attached to the packets of the seized contrabands (MAT Exbt. II/VI, II/VII and II/VIII). PW3 also signed on the notice served upon the appellant (Exbt. 4/1).

- 28.** A police constable of the Detective Department was examined as PW4. He also testified the statement of PW2 and 3. He has stated that on the basis of the source

information, he accompanied the DDI Simul Sarkar to Suri PS. After taking police assistance from Suri Police Station, the raiding team reached in front of the waiting room beside Suri Shilpa Vidyapith. At that place as per the identification of the source, the appellant and another accused Sk Ibrahim were detained. On search of the nylon bag, heroin like materials of brown colour, kept in a plastic bag inside the nylon bag was found from their possession. The articles were tested and found positive for heroin. PW4 also stated that the heroin like material was recovered from the appellant. The search was conducted in presence of the independent witnesses who were going on cycles. PW4 identified the appellant and the other accused in Court.

- 29.** One ASI of Police was examined as PW5. He stated that on August 27, 2017 at about 1.30 p.m., he accompanied the officers of Detective Department at high Road under the direction of the Inspector-in-charge of Suri PS. He further stated that one person with a bag

containing brown sugar was apprehended which was seized by the officer. PW5 did not identify the appellant in Court.

30. A Civic Volunteer deposed as PW6. He photographed the proceeding of the sampling and certification of the seized contrabands by learned Magistrate on August 23, 2017. He tendered the photographs of the said photography and the compact disc which were marked as MAT. Exbt. IV series and V.

31. PW7 is an independent witness. He has stated that on August 23, 2017 at about 1.30 pm, he was returning on a cycle. When he reached near Ramkrishna Silpo Vidyapith, he found some Police persons in civil dress who disclosed themselves to be CID officers and that they were waiting to nab a person who dealt in contraband articles. PW7 also stated that he was also requested by an officer to be a witness. The other witness Radhamadhav Bhattacharjee was also present there. It was also stated by PW7 that after some times, he found a

person going with a nylon bag. He was detained by the CID officers who disclosed his name as Jahangir Sk. The CID officers served a notice asking him whether he was interested to be searched in presence of a gazetted officer or of a magistrate whereupon he replied that he wanted to be searched by a gazetted officer and not by a magistrate. PW7 also stated that subsequently, Simul Sarkar, inspector of CID reached there , he has also stated that prior to searching the accused, he searched the CID officers and found nothing. Thereafter, CID Inspector Simul Sarkar searched the nylon bag carried by the detainee and found brown coloured powder suspected to be brown sugar. On measurement, the said article was found to be weighing 313 grams, which was seized. PW7 also stated that the person of the detainee was also searched and a brown coloured money bag was recovered from the bag of his pant. PW7 signed on the seizure list which he proved (Exbt. 1/2 and 4/2). He also identified the seized money bag (MAT Exbt. I) and his

signatures on the label attached to it (Exbt. 2/7). He identified the appellant in Court.

32. In his cross-examination, PW7 stated that after two days of the incident, he was called at Suri officer and at that time, his signatures on the papers which he signed at the place of occurrence was shown to him.

33. Another independent witness deposed as PW8. He stated that on August 23, 2017 at about 1/1.30 p.m., he was returning from Rampurhat by a motor-cycle. When he reached near the waiting shade beside L.C. College, he found some police personnel in civil dress. They disclosed before PW8 that they were CID officers and waiting to nab one person who dealt in contraband articles. PW8 was requested to be a witness for search and seizure. He has also stated that the other witness Hasibul Haque was also present there. He further stated that after some times, a person with a nylon bag was found going. He was detained by the CID officers and on interrogation, he disclosed his name as Jahangir Sk. PW8 also stated that

the CID officers asked the detainee, by serving a notice upon him as to whether he wanted to be searched in presence of a gazetted officer or of a magistrate and the detainee opted to be searched by a gazetted officer and not by a magistrate. Thereafter, the CID Officers conducted search of the person and bag of the detainee and found a money bag from his pocket. Brown sugar was also recovered from the nylon bag and on measurement it was found to be 250 to 300 grams in weight. PW8 signed on the seizure list and the notice (Exbt. 1/3 and 4/3). PW8 identified the appellant as well as the money bag in Court.

- 34.** The Investigating Officer of his case deposed as PW9. He has stated that one Simul Sarkar was posted as inspector of Detective Department, Suri. He has tendered the formal FIR filled up in the pen and signature of the inspector Simul Sarkar, which was marked as Exbt. 9. He further stated that being endorsed with the investigation of the case, he visited the place of

occurrence and prepared rough sketch map with index thereto which he tendered (Exbt. 10 and 10/1). PW9 also examined the available witnesses and recorded their statements under Section 161 of the Code of Criminal Procedure. He also examined the appellant and forwarded him to Court. He also applied for making inventory of the seized contraband. He took samples from the seized articles in presence of the learned magistrate and sent the samples for chemical examination. He collected the report received from the director of the Drugs Control and Research Laboratory. He tendered the report which was marked as Exbt. 11. On completion of investigation, he submitted the charge sheet under Sections 21/22/29 of the NDPS Act on March 26, 2018. PW9 was examined on behalf of the accused persons.

- 35.** Upon completion of the evidence on behalf of the prosecution, the appellant and another accused were examined under Section 313 of the Code of Criminal Procedure. The appellant pleaded innocence in such

examination. He, however, declined to adduce any defence witness.

- 36.** According to the case made out by the prosecution, PW2 received a source information regarding certain details in respect of the narcotic drugs near Tilparamor under Suri P.S. PW2 brought the information into the notice of his superior officers of CID, West Bengal. In order to work out the information, PW2 accompanied by a team of CID officials namely PW1, PW3 and PW4 went to Suri Police Station seeking police assistance, as the transaction was informed to take place within the jurisdiction of such Police Station. Being provided with police assistance from Suri Police Station, the raiding team arrived near Tilpara bridge, Jatr nibas on NH-60. At that place, as per the identification of the source, the appellant was detained. His person and belongings were searched by the due to service of notice and in course of such search, a polythene bag was recovered from multi coloured nylon bag carried by the appellant. The

polythene bag was found to contain suspected articles which were tested with testing kit and found to be positive for heroin. The appellant is said to have fail to produce any valid documents for the possession of such heroin. Accordingly, the suspected articles were weighed, samples were taken and sealed and labelled. Thereafter, the seized articles and the appellant were brought to the Police Station where the appellant and the seized articles were handed over to the officer-in-charge of Suri P.S.

- 37.** PW2 has stated in his deposition about the recovery of a brown coloured dust in a packet inside the bag carried by the appellant. The suspected articles were weighed and found to be 313 grams. PW2 has proved the seizure list which was marked as Exbt. 1/1. It was also stated that the search and seizure was conducted in presence of the independent witnesses PW7 and PW8. PW1, PW3, PW4, PW7 and PW8 have supported the statements made by PW2 with regard to the search and seizure of contraband narcotic drugs from the possession

of the appellant. Exhibit 1/1 is the seizure list dated August, 23 2017 which gives to show that 313 grams of contraband narcotic drugs were seized from the possession of the appellant. The witnesses including the independent witnesses PW7 and PW8 have admitted to have signed on such seizure list and their signatures were separately identified by the aforesaid witnesses. Exhibit 1/1 also goes to show that the appellant also put his signature on such seizure list with regard to his signature on the seizure list dated August 23, 2017. In fact, from the trend of cross examination of the prosecution witnesses on behalf of the appellant, it transpires that the recovery of the alleged contraband articles from the possession of the appellant at the place of occurrence, where it is said to have been recovered, has not been challenged on behalf of the appellant.

- 38.** Moreover, the labels attached to the seized articles i.e. seized contrabands and its samples and the money bag of the appellant were also proved by PW2. The

witnesses putting their signature on such labels also identify their signatures thereon. In respect of the case of the prosecution as made out, PW2 has also proved his written requisition submitted to the Inspector-in-charge of Suri Police Station seeking police assistance to work out the source of information. Exhibit 6 goes to show that such requisition was submitted and received by Suri Police Station vide G.D. entry No. 1484 dated August 23, 2017 on August 23, 2017.

- 39.** PW2 has also stated that after completion of the entire process of search and seizure, the requisition along with the appellant were brought to Suri Police Station. He handed over the appellant and the seized articles to the Suri Police Station. He also submitted a written complaint. PW2 has proved the written complaint. Exhibit 3 goes to show that the written complaint was submitted and it was received by Suri Police Station on August 23, 2017 at 15.45 hrs. The investigating officer in the case of PW9 has stated that he made a prayer before

the Learned Magistrate for making an inventory of the seized articles and it was done in presence of the learned Magistrate. PW9 took samples from the seized articles in presence of the learned Magistrate. He also sent the samples for chemical examination. PW9 has also proved the chemical examination report and the seized articles collected by him. Exhibit 11 goes to show that the condition of the seal on the parcel of the seized articles which were received by the office of the State Drugs Control and Research Laboratory was found intact and tallied with the specimen seal forwarded to the said office. Upon examination, the seized samples were found to contain heroin which are narcotic drugs falling within the purview of NDPS Act, 1985. The evidence on record also goes to show that on completion of the process of search and seizure and initiation of case under the provision of NDPS Act, 1985 was duly informed by PW2 to his official superiors in place of the provisions under Section 42 of the NDPS Act, 1985.

40. On the basis of the aforesaid evidence, it can be safely held that the appellant was apprehended near Tilpara bridge, Jatr nibas on NH-60 by the raiding team led by PW2. Search of the person and belongings of the appellant was conducted and on such search, 313 grams of contraband narcotic drugs were recovered from a polythene bag kept in the nylon bag. The said contraband narcotic drugs, upon chemical examination, was found to be heroin, a contraband narcotic drugs within the purview of the NDPS Act.

41. As noted hereinbefore, the appellant has not challenged the recovery of contraband articles from his possession at the relevant date and place of occurrence. The point of contention that has been raised on behalf of the appellant that the recovery was made in contravention of the provisions contained under Section 50 of the NDPS Act, 1985. From the evidence adduced on behalf of the prosecution, it transpires that when the appellant was detained at the place of occurrence stated

by the prosecution, a notice under Section 50 of the said Act was duly served upon the appellant. PW 2 has categorically stated in his deposition that he told the appellant that he might search the body of the police personnel if he wanted. PW2 also intimated to him that he might be searched in presence of the Gazetted Officer or a Magistrate. The appellant communicated PW2 that he did not require to be searched in presence of the Gazetted officer or of a magistrate. The factum of such a notice by PW2 to the appellant was supported by PW1, PW3 and the independent witnesses PW7 and PW8. All the aforesaid witnesses have stated in one rhythm that the seizing officer PW2 intimated the appellant for an option to be searched in presence of the Gazetted officer or of a magistrate. PW2 has also stated that he served a notice under Section 50 of the NDPS Act, 1985 upon the appellant. The notice has been proved by PW2 as exhibit-4. Upon perusal of the Exhibit 4, it transpires that a written notice intimating the appellant that PW2 himself

was a Gazetted Officer and that if the appellant so desired, he could be searched in presence of another Gazetted Officer or a Magistrate.

42. The evidence on record, although goes to show that no contraband was recovered from the person for the appellant upon search, rather the contraband was recovered from the nylon bag carried by the appellant. The compliance of the provisions under Section 50 of the NDPS Act, as such, was not required so far as the narcotics were recovered from the bag carried by the appellant. Nevertheless, since PW2 went on to search the body of the appellant, he thought it prudent to serve a notice under Section 50 of the Act of 1959 upon the appellant.

43. In the case of **Dilip and anr. (supra)**, it was laid down by the Hon'ble Supreme Court that,

“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.

44. It was also laid down in the said case:

“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 party of PW 10 to comply with the said provisions. It was not done.”

45. The facts of the present case seem to be more or less similar to that in the case of **Dilip and anr (supra)**. In the present case as a whole, personal search as well as search on the belongings of the appellant was conducted and nothing was recovered from the persons of the appellant. However, contraband narcotic drugs were found upon search of the nylon bag of the appellant. Nevertheless, in the instant case, a notice under Section

50 of the said Act was served upon the appellant prior to such search. In that view of the facts, we do not find much force in the contention on behalf of the appellant to the effect that the provisions of Section 50 of the NDPS Act, was not complied with. In the case of **Shah Alam (supra)**, the Hon'ble Supreme Court relying upon the ratio laid down in the case of **Dilip and anr. (supra)**, was pleased to hold that the recovery of 'heroin' from the respondent was made in complete violation of the provisions of Section 50 of the said Act.

46. We have already held hereinbefore that in the instant case, a notice under Section 50 of the said Act was duly served upon the appellant and as such the contention of the appellant that the recovery of the contraband was made in violation of Section 50 of the NDPS Act, has no legs to stand.

47. The appellant has also relied upon the case of **Parmanand (supra)**, wherein it has been held by Hon'ble Supreme Court that,

“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 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.”

48. In the aforesaid case also, it was held by Hon’ble Supreme Court that,

“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 search, 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."

49. As we have noted, in the instant case, the personal search was conducted on the body of the appellant. By dint of Exhibit 4, the appellant was amply intimating that the officer proceeding to conduct search on the person of the appellant was himself a Gazetted Officer. He was also invited that he could express his option in writing, if the appellant wanted the presence of another gazetted Officer or a magistrate. The evidence on record also goes to show that the appellant is said to have expressed that he did not want the presence of a magistrate or a Gazetted

Officer or the presence of any other Gazetted Officer or a Magistrate. The contents of Exhibit 4, goes to establish that the appellant in his own handwriting and signature gave out that he did not want the presence of another Gazetted Officer. He himself has written on Exhibit 4 “Darkar nei” (not required). The contents of Exhibit 4 and the answer of the appellant noted upon Exhibit 4 sufficiently proves that the appellant was afforded with the offer to be searched in presence of a magistrate or a Gazetted Officer, though the officer who served the notice was himself a Gazetted Officer. Exhibit 4 also sanctifies that the appellant understood the purport of Exhibit 4 and refused the presence of another Gazetted Officer or a Magistrate.

50. In consideration of the aforesaid facts and circumstances and in view of the ratio laid down in the authorities, relied upon by the appellant, we are of the opinion that although no contraband article was recovered upon personal search of the appellant,

nevertheless the provisions of Section 50 of the NDPS Act was duly complied by PW1, prior to the search conducted by the appellant.

51. The appellant has also taken a stand that the seized articles were not produced before the Court at the trial causing serious prejudice, vitiating the trial.

52. In the case of **Jitendra and anr. (supra)**, it was noted by the Hon'ble Supreme Court that the independent witnesses to the seizure of contraband turns hostile at the trial and therefore, production of the seized articles at the trial was held to be indispensable. However, in instant case, both the independent witnesses PW7 and PW8 have supported the case of the prosecution so far as search and seizure of contraband article from the possession of the appellant is concerned. We have come to a conclusion on the basis of Exhibit 1 that contraband articles were seized from a nylon bag carried by the appellant. All the witnesses to such search and seizure including the independent

witnesses PW7 and PW8 have supported the search conducted upon the appellant and recovery of contraband from the bag he was carrying. We have also noted hereinbefore that the appellant also put his signature on such seizure list and no explanation has been advanced on behalf of the appellant for his signature on the seizure list. Besides that, on perusal of the original trial court record of the case, it transpires that the Investigating Officer of the case had moved an application before the Learned Trial Court for preparation of an inventory and certification of the seized contraband articles by a Magistrate in terms of the provisions under Section 52A of the NDPS Act. The testimony of PW6, together with MAT Exbt. IV series and MAT Exbt. V goes to establish that the inventory and sampling of the seized contraband were conducted in presence of a judicial Magistrate in terms of the provisions of Section 52A of the NDPS Act.

53. In the case of Mohanlal(supra) (2016) 3 SCC 379, the Hon'ble Supreme Court in consideration of the provisions contained under Section 52A of the Narcotic Drugs and Psychotropic Substances Act, laid down certain guidelines for the destruction of the seized contraband narcotics. The Hon'ble Supreme Court also noted the provisions contained under Section 52A (4) of the said Act providing for the proof of the seized contraband by treating the inventory, photographs of narcotic drugs, psychotropic substances, controlled substances or conveyance and any list of samples drawn under Sub-section (2) and certified by the magistrate, as primary evidence in respect of such offences. In the instant case, PW6 has testified that he photographed the proceedings of sampling and certification of the seized contraband by the learned magistrate and tendered the photographs thereof with a compact disc, which were marked as MAT Exbt. IV series and V.

54. Therefore, under the facts and circumstances of the present case and in view of the provisions contained under Section 52A of the NDPS Act, and the ratio laid down in the case of Mohanlal(supra),the non-production of the seized contraband narcotic at the trial may not have much bearing upon the veracity of search and seizure especially when the independent witnesses have testified such search and seizure.

55. Therefore, in the light of discussions made hereinabove, we find no reason to interfere with the impugned judgment dated September 19, 2020 passed by the learned 1st Additional Sessions Judge, Special Court, Suri, Birbhum in Complaint Case No. 25 of 2017. The same is consequently affirmed.

56. Accordingly, the instant appeal being **CRA No. 155 of 2021** hereby stands dismissed.

57. Trial Court records along with a copy of this judgment; be sent down at once to the learned Trial Court for necessary action.

58. Photostat certified copy of this order, if applied for, be given to the parties on priority basis upon compliance of all formalities.

[MD. SHABBAR RASHIDI, J.]

59. I agree.

[DEBANGSU BASAK, J.]