

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

335

CRA-S-208-SB-2004 (O&M)

Reserved on:01.12.2022

Date of Decision: 06.01.2023

Ashwani Kumar @ Parontha

...Appellant

Versus

State of Punjab

... Respondent

CORAM : HON'BLE MR. JUSTICE N.S.SHEKHAWAT

Present : Mr. Veneet Sharma, Advocate
for the appellant.

Mr. M.S. Bajwa, DAG, Punjab.

N.S.SHEKHAWAT, J.

The present appeal challenges the impugned judgment of conviction and order of sentence dated 03.12.2003 passed by the learned Special Judge, Amritsar, whereby, the present appellant was convicted under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as '**the NDPS Act**') and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1,00,000/- alongwith default stipulation.

The prosecution story, as it emerges from the report under Section 173 Cr.P.C., is that on 11.03.1996, SI Kulwinder Singh alongwith other police officials was present on canal bridge in the area of village Thathgarh in connection with patrolling on a Government gypsy, he received a secret information that the accused Ashwani Kumar @ Parontha son of Badri Nath was indulged in selling smack in the area of Police Station Jhabal and on that day he

was coming to that area of Thathgarh to sell smack. SI/SHO Kulwinder Singh had set up a *naka* and directed his companions to remain alert and after some time one person was seen coming on foot on the bank of canal and he was asked to stop by him by using the light of the torch. The person stopped and the police team encircled him and asked about his name and address and the accused disclosed his name to be Ashwani Kumar @ Parontha son of Badri Nath resident of Nevi Abadi Mohalla Ghumiaran Chotta Haripura. On this, the complainant raised the suspicion that he was in possession of some intoxicant article and his personal search was to be effected. He gave him an offer that he could get his personal search conducted through him or through a gazetted police officer. The accused told that he wanted to get his search conducted through a gazetted police officer and on this Sukhbir Singh, the Deputy Superintendent of Police, Police Lines, Tarn Taran was informed to reach at the spot on a wireless message. The complainant tried to join independent witnesses, but no one was prepared to join. After some time, Sukhbir Singh, the Deputy Superintendent of Police, Police Lines Tarn Taran reached at the spot at a Government vehicle alongwith his staff. The Deputy Superintendent of Police disclosed his identity to that person and asked as to whether he wanted to get his personal search conducted in his presence. The personal search of Ashwani Kumar @ Parontha, accused was made by the complainant. During this process, smack wrapped in a glazed paper was recovered from the bag held by

the accused in his right hand and the accused was asked about the licence for carrying the smack. Ashwani Kumar @ Parontha accused could not produce any licence regarding his possession of smack and out of the recovered smack, 20 gms of smack was put in a small plastic box as sample and the remaining smack weighed as 500 grams and was put into a plastic box with a glazed paper. The bag containing sample and the remainder of the quantity were kept in separate sealed parcel with the seal of the Deputy Superintendent of Police bearing initials 'SS'. The separate parcels were prepared and the seals after its use were handed over to SI Shamsheer Singh. Consequently, by keeping in his possession 520 grams of smack without any licence or permit, the accused had committed the offence under Section 22 of the NDPS Act.

After registration of the FIR, the necessary investigation was conducted and the challan was presented against the accused in the competent Court. Finding prima-facie case against the accused, the accused was ordered to be charge-sheeted under Section 22 of the NDPS Act, to which, he pleaded not guilty and claimed trial.

In order to bring home the guilt of the accused, the prosecution examined four witnesses.

HC Makhan Singh was examined as PW1 and his evidence was formal in nature. The Deputy Superintendent of Police, Sukhbir Singh, was examined as PW2, who stated that he reached the spot on getting the information with regard to the presence of the

accused and he asked the accused as to whether he wanted to get his search conducted by him in his presence or through some gazetted officer or the Magistrate. On this, the accused reposed confidence in him and in his presence, the Investigating Officer effected the search of the accused, which yielded the recovery of smack wrapped in glazed paper from a cloth bag (Jhola), held by the accused in his right hand. The samples were prepared and were sealed in his presence. He admitted in his cross-examination that he had received information at his residence and he had immediately left for the spot. However, he did not prepare any consent memo at the spot nor the SHO prepared the consent memo in his presence nor he verified any consent memo. No consent memo was prepared at all in his presence. The *ruka* was recorded and sent to the police station by the SHO in his presence. The SHO had sent some police officials to arrange some independent witnesses but he was told that no one was willing to join the police party. The prosecution further examined PW3 SI Kulwinder Singh, who was the complainant and was posted as SHO Police Station Jhabal on 11.03.1996. After the accused was intercepted, he asked the accused as to whether he wanted his search conducted by him (SI/SHO Kulwinder Singh) or by some gazetted officer. The accused stated that he wanted to get his search conducted by a gazetted police officer and, thereafter, he called Sukhbir Singh, the Deputy Superintendent of Police, through a wireless message. He also tried to join independent witnesses, but without any result. Thereafter, the

personal search of the accused was conducted and the smack was recovered from the cloth bag hanging in the right hand of the accused. He further stated that on return to the police station, he kept the case property in his safe custody and on the next day, he produced the accused alongwith the case property before the learned Illaqa Magistrate. Even, on return to the police station, the case property was again kept in his own safe custody. On 11.04.1996, he sent sample to the office of chemical examiner through constable Makhan Singh who deposited the same there and handed over the receipt to him. He further stated that the consent memo of the accused was not reduced into writing and he could not tell the names of the persons, who were asked to join the police party. No action was taken against any such persons, who had refused to join the police party. The prosecution further examined Constable Lakhwinder Singh as PW4 who tendered his evidence by way of affidavit and his statement was formal in nature.

After the closure of the evidence, the statement of the accused under Section 313 Cr.P.C., was recorded, who pleaded false implication and did not assign any reason for his false implication by the police. In his defence, he examined Constable Balwinder Singh as DW1, who brought the register No. 19 from Police Station Jhabal and as per entry No. 61, the case property was deposited on 12.03.1996 and the photocopy of the entry was Ex.D1. He further admitted that no parcel seal was deposited in the Malkhana. According to entry

No. 61, the sample was sent to F.S.L., Punjab and Chandigarh on 11.04.1996 through HC Makhan Singh and it was not mentioned therein as to who sent the sample. He did not bring the DDR dated 11.03.1996, as it had destroyed.

I have heard learned counsel for the parties and perused the trial Court record with their able assistance.

Learned counsel for the appellant has vehemently argued that the mandatory provisions of Section 50 of the NDPS Act had not been complied with by the police, which render the entire search and seizure to be illegal and inadmissible in evidence. In the FIR Ex.PC/1, it has been recorded that the appellant was informed that his personal search was to be carried out and he could get his search conducted by SI Kulwinder Singh (complainant) or through gazetted police officer. Even, while appearing as PW3, SI/SHO, Kulwinder Singh stated that he had asked the accused as to whether he wanted to get his search conducted by him or by some gazetted police officer. Even, PW2 the Deputy Superintendent of Police, Sukhbir Singh stated in his cross-examination that he had asked the accused as to whether he wanted to get his search conducted from him or in the presence of any other police officer or a Magistrate. Still further, no written consent memo was prepared at the spot admittedly and the search was carried out in complete disregard to the mandatory provisions of Section 50 of the NDPS Act and the appellant was liable to be acquitted by this Court. In support of his contention, the learned counsel places reliance on the

judgment passed by the Hon'ble Supreme Court in the matter of *State of Rajasthan Vs. Paramanand and another, 2014 (2) RCR (Criminal) 40* and submitted that in the instant case, the personal search of the accused as well as of the bag were carried out and from the bag, smack was recovered. However, his personal search was also carried out and the provisions of Section 50 of the NDPS Act will have the application to the facts of the instant case. The aforesaid contention of the learned counsel for the appellant has been vehemently opposed by the learned State counsel by contending that the provisions of Section 50 of the NDPS Act would not apply to the facts of the instant case as the recovery has been effected from a cloth bag held by the accused in his right hand.

Before recording the findings on the contentions raised by the learned counsel for the parties, it would be necessary to reproduce the provisions of Section 50 of the NDPS Act:-

Section 50 of the NDPS Act

“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”.

Section 50 of the NDPS Act prescribes the conditions under which the search of a person was to be conducted. Sub-Section (1) provides that when the empowered officer is about to search any suspected person, he shall, if the person, to be searched so requires, take him to nearest Gazetted Officer or the Magistrate for the purpose. Under sub-Section (2), it is laid down if such request is made by the suspected person, officer who is to take search, may detain the suspected until he can be brought before such Gazetted Officer or the Magistrate. Sub-Section (3) lays down that when the person to be searched is brought before such a Gazetted Officer or a Magistrate and such Gazetted Officer or Magistrate finds that there are no reasonable grounds for search, he shall forthwith discharge the person to be searched, otherwise, he shall direct that search be made.

On a plain reading of Section 50 of the NDPS Act, it is apparent that mandatory provisions of Section 50 would come into play only in the case where the personal search of a person is to be

conducted, which can be distinguished from search from any premises, bag etc.

The Hon'ble Supreme Court in a recent judgment held that the mandate of Section 50 of the NDPS Act is confined to the personal search only and non-compliance would not invalidate the effect of recovery from a vehicle, a container or a premises. It has been held by the Hon'ble Supreme Court in the matter of **State of Punjab Vs. Baljinder Singh AIR 2019 SC 5298 and (2020 (1) SCC (Crl) 22)** as follows:-

12. Section 50 of the Act affords protection to a person in matters concerning "personal search" and stipulates various safeguards. It is only upon fulfilment of and strict adherence to said requirements that the contraband recovered pursuant to "personal search" of a person can be relied upon as a circumstance against the person.

13. The law which has developed on the point in some of the judgments of this Court may now be considered.

*In **State of Punjab v. Baldev Singh, [1999(3) RCR (Criminal) 533 : (1999) 6 SCC 172]** a Constitution Bench of this Court considered, inter alia, questions as to what would be the resultant effect, in case the requirements of Section 50 were not complied with. The conclusions arrived at in para 57 of the decision were as under:*

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 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. (Underlying by us)

(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 official concerned 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 the judicial process may come under a 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 the 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 the 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 person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law. (7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.

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

*(9) That the judgment in **Pooran Mal case [(1974) 1 SCC 345]** 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 case [(1994)(3) RCR (Criminal) 595 : 1994) 6 SCC 569]** correctly interprets and distinguishes the judgment in **Pooran Mal***

*case [(1974) 1 SCC 345] and the broad observations made in **Pirthi Chand case [1996(2) RCR (Criminal) 759 : (1996) 2 SCC 37]** and **Jasbir Singh case [(1996) 1 SCC 288]** are not in tune with the correct exposition of law as laid down in **Pooran Mal case[(1974) 1 SCC 345].**"*

*Subsequently, another Constitution Bench of this Court in **Vijaysinh Chandubha Jadeja v. State of Gujarat, [2010(4) RCR (Criminal) 911 : (2011) 1 SCC 609]** 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)

14. 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.

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.

*15. At this stage we may also consider following observations from the decision of this Court in **Ajmer Singh v. State of Haryana [2010(2) RCR (Criminal) 132 : (2010) 3 SCC 746]** :-*

"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 noncompliance 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(4) RCR (Criminal) 100 : (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(4) RCR (Criminal) 575 : (1999) 8 SCC 257]**, **State of Punjab v. Baldev Singh [(1999) 6 SCC 172]** and **Gurbax Singh v. State of Haryana [2001(1) RCR (Criminal) 702 : (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** case. Above being the position, the contention regarding non-compliance with Section 50 of the Act is also without any substance."*

16. 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.

*17. 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.

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.

18. 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.

19. 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.

In view of the above discussion and the law laid down by the Hon'ble Supreme Court, it is held that since the recovery of smack has been effected from the cloth bag held by the accused in his right hand, he would not be entitled to the protection of the provisions of Section 50 of the NDPS Act and the argument raised by the learned counsel for the appellant is without any substance.

Learned counsel for the appellant vehemently argued that the present case was based on secret information allegedly received by PW3 SI Kulwinder Singh, but the same was not reduced into writing and it amounts to non-compliance of Section 42 of the NDPS Act. It was further argued that the provisions of Section 42 of the NDPS Act are mandatory in nature and its non-compliance would vitiate the entire trial and the appellant was entitled to acquittal. The said submission has been vehemently opposed by the learned State counsel by contending that the search and seizure in this case had taken place on a canal bridge of village Thathgarh, which is apparently a public place. Consequently, in this case, the provisions of Section 42 of the NDPS would not be applicable and the arguments raised by the learned counsel for the appellant is without any substance. I have considered the said submission in the light of the law laid down by the Hon'ble Supreme Court in this regard and find no force in the arguments raised by the learned counsel for the appellant. It has been held by a Co-ordinate Bench in CRM M-22004

of 2020 (O&M) decided on 05.01.2021 titled as **Pushpinder Singh @**

Bhindi Vs. State of Punjab as follows:-

8. The material question would be as to whether it is the procedure mandated under Section 42 of the Act which would be applicable or as to whether Section 43 of the Act alone will apply in such cases of recovery from a vehicle in public place. A Constitution Bench of Hon'ble Supreme Court in 1994(3) SCC 299 State of Punjab v. Baldev Singh marked the distinction between the provisions of Sections 42 and 43 of NDPS Act, 1985 in the following words:

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

9. In **State of Haryana v. Jarnail Singh and others, 2004(5) SCC 188**, the Hon'ble Supreme Court held as follows :

"Section 42 and 43, therefore, contemplate two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. If seizure is made under Section 42 between sunset and sunrise, the requirement

of the proviso thereto has to be complied with. There is no such proviso in Section 43 of the Act and, therefore, it is obvious that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 of the Narcotic Drugs and Psychotropic Substances Act for searching the vehicle between sunset and the sunrise."

10. The aforesaid position of law was reiterated by Supreme Court in **State, NCT of Delhi v. Malvinder Singh 2007(11) SCC 314**, in a case of recovery of opium from dicky of a private scooter, which has been followed by a Division Bench of our High Court in **2012(2) RCR (Criminal) 600 Davinder Kumar v. State of Punjab**, in a case of recovery of four bags of poppy husk from a private car, wherein it was held as under:

*"17. The reasoning propounded in Jarnail Singh's case (supra) was further relied upon in **State, NCT of Delhi v. Malvinder Singh 2007(3) RCR (Criminal) 602 : 2007(3) R.A.J. 677 : (2007) 11 SCC 314**. In the present case, the accused were traveling in a Cielo car coming from the side of Phillaur when the same was apprehended at Adda Lasara. Therefore, the recovery was effected when the vehicle was in transit, and hence, Section 43 of the Act is attracted. Thus, we have no hesitation to hold that non-compliance of Section 42 of the Act is not fatal to the prosecution."*

Keeping in view the above said ratio, it is a case of recovery of contraband from a public place and Section 43 of the NDPS Act would be applicable in the matter of procedure and not

Section 42 of the NDPS Act. Consequently, the contentions raised by the learned counsel regarding the non-compliance of Section 42 of the Act cannot be accepted.

Learned counsel for the appellant further argued that in spite of ample opportunity, no public witness was joined at the time of search and seizure and the appellant was entitled to benefit of doubt. The said submission has been opposed by learned State counsel by submitting that every offer was made to join the public witnesses, however, they refused to join the said proceedings. It is a matter of common experience that in cases of arrest of smugglers, no public witness is willing to join the police proceedings and the learned counsel for the appellant had failed to point out any prejudice due to non-joining of the independent witnesses.

I have heard learned counsel for the parties and find no substance in the argument raised by the learned counsel for the appellant. Under Section 100 of the Code of Criminal Procedure, the officer conducting search should call upon two or more independent and respectables inhabitants of the locality, in which, the place to be searched is situated or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search. The non-compliance of the provisions of Section 100 of the Code of Criminal Procedure amounts to an irregularity and the effect of the same on the main case depends upon the facts and the circumstances of each case. In any situation,

the Court has to consider whether any prejudice has been caused to the accused and also has to examine the evidence in respect of search in the light of the fact that this provision has not been complied with and also should further consider whether weight of the evidence is in any manner affected because of the non-compliance. It is well settled that the testimony of a witness is not to be doubted or discarded merely on the ground that he happens to be an official, but for a rule of caution and depending upon the circumstances of the case, the Courts always look for independent corroboration. This again depends upon question whether the official has deliberately failed to comply with these provisions or failure was due to lack of time and opportunity to apprehend some independent witnesses for the search and strictly complied with these provisions.

In the instant case, from a perusal of the testimonies of the official witnesses, it is evident that efforts were made to join the public witnesses, but they refused to join the police proceedings. Even otherwise, in the facts of the case, the testimonies of the official witnesses also inspire confidence and are liable to be believed by this Court.

In view of above, I find no illegality or infirmity in the impugned judgment of conviction and order of sentence dated 03.12.2003 passed by the learned Special Judge, Amritsar and the same are liable to be upheld.

Consequently, the instant appeal is ordered to be dismissed.

All pending applications, if any, are disposed of, accordingly.

The case property, if any, may be dealt with as per the rules after expiry of period of limitation for filing the appeal.

Records of the Court below be sent back.

The appellant is directed to surrender within a period of fifteen days, failing which, the Chief Judicial Magistrate, concerned is directed to issue non-bailable warrants against him and he shall be taken into custody forthwith.

06.01.2023
amit rana

(N.S.SHEKHAWAT)
JUDGE

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