

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 192 of 2005

Swapan Saha & Anr.

-Vs-

The State of West Bengal

With

C.R.A. 42 of 2006

Swapan Kumar Saha

-Vs-

The State of West Bengal

For the Appellants : Mr. Sekhar Kumar Basu,
Mr. Soubhik Mitter

For the Respondent/State : Ms. Faria Hossain
Mr. Anand Keshari

Heard on : 14.09.2023, 24.11.2023, 15.12.2023,
18.01.2024, 26.02.2024, 13.03.2024,
16.04.2024, 21.08.2024

Judgment on : 06.12.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against judgment and order dated 18.2.2005 passed by the Learned Special Judge under N.D.P.S. Act, Dakshin Dinajpur at Balurghat in Special Case No. 8 of 2003 convicting the appellant and another for commission of offence punishable under Section 21(b) of the N.D.P.S. Act and sentencing them to suffer imprisonment for a period of 6

years and to pay a fine of Rs. 25,000/- each in default to rigorous imprisonment for a further period of 6 months each and an order dated 09.08.2005 passed by the Learned Sessions Judge, Dakshin Dinajpur at Balurghat in Criminal Misc. Case No. 344 of 2005 rejecting the prayer of the appellant no. 1 to return seized alat i.e. Maruti Van and Motor Cycle to the appellant no. 1 in connection with Special Case No. 8 of 2003 under Section 21C of the N.D.P.S. Act arising out of Balurghat Police Station Case No. 322 of 2003 dated 21.09.2003 under Sections 21/22 of the N.D.P.S. Act.

2. The prosecution case precisely stated as follows:-

- i. On 21.9.2003 an information was received by the duty Officer Smt. Mumtaj Begum of Balurghat Police Station that a gang of smugglers were using a small vehicle and a motor-cycle for transporting heroin and other goods/drugs, dangerous to human life. Some heroin was being transported in Maruti Van no.WB-61-1289 and motor cycle no. WB-3674 from Malancha hat side to Laskarpur and the said vehicles left Malancha hat 10 minutes earlier.
- ii. Such information conveyed to J.C. Balurghat Police Station was diarised by the duty Officer. Pursuant to the direction of the J.C. S.I. G. Barman sprang into action.
- iii. At about 11.10 a.m. the police personnel proceeded towards Chakrrigu Simultala, collecting two independent witnesses, namely, Kamal Biswas and Nirmal Mondal from Atrayee bridge. At about 11.20 a.m., they reached Chakrrigu Simultala and kept a watch. After some time the suspected vehicles came from Malancha hat side, which were

detained to find Swapam Saha (the appellant) driving the Maturi Van and Paritosh Mondal driving the motorcycle. S.I. G. Barman conveyed to the appellant the police intended to search the appellant and their vehicles on information that the appellant was carrying heroin. The appellant agreed to be searched in presence of the I.C. Balurghat Police Station and gave written consent to that effect. Thereafter, information was sent to the I.C. Balurghat Police Station requesting him to be present at the spot.

- iv. After the arrival of the I.C. he served notices upon the appellant asking him to search him and accordingly the appellant and vehicles were searched in presence of the I.C. and the independent witnesses and from the possession of the appellant 100 grams of heroin was recovered and 150 grams of heroin was recovered from under the seat of the Maruti van. Further 100 gms. of heroin was recovered from the possession of Paritosh Mondal and 50 gms. of heroin was recovered from the motor cycle. Two separate seizure lists were prepared in presence of witnesses, the appellant and Paritosh Mondal were arrested and the vehicles were seized and were forwarded to Balurghat Police Station where St. G Barman handed over the same to the Balurghat Police Station.

3. On completion of the investigation, the investigating agency submitted its report in the formal form alleging commission of an offence punishable under section 21 (c) of the NDPS Act.

4. Charge was framed for the commission of an offence punishable under Section 21 (c) of the NDPS Act to which the appellants pleaded not guilty and claimed to be tried.
5. Prosecution, in order to prove the charges, examined 7 witnesses and exhibited certain documents.
6. Learned Advocate representing the appellants submitted as follows:-
 - i. There was confusion as to who had received the source information first. D/c (PW-1) stated in his examination-in-chief that source information was received by Duty Officer Mamtaj Begam and she registered a GDE [Ext. 1) to that effect. However, in cross-examination, PW-1 stated that the source information was received on telephone by PS and the information was not reduced into writing. PW-6 stated in his examination-in-chief that I/C of Balurghat had received the source information which was noted in PS Diary. In his cross-examination, PW-6 stated that the Duty Officer of PS had received the source information, but he could not name the Duty Officer. IO (PW-7) stated in his cross-examination that the secret information was received by the Duty Officer SI Mamtaj Begam but the I.O admittedly did not examine her. I.O. (PW-7) further admitted in his cross-examination that Mamtaj Begam was not cited as CSW and I.O also did not seize any GD.
 - ii. FIR did not indicate as to at what time the FIR was registered. FIR merely indicates that the alleged incident had occurred on 21.09.2003 before 11:45 hours and the information was received by PS on 21.09.2023 at 10:55 Hours.

- iii. As per FIR, the raiding team was constituted pursuant to I/C's order. As per the examination-in-chief of D/c (PW-1), upon I/C's direction, PW-1 had gone to work on the information along with the other members of the raiding team. PW-6 also stated in his examination-in-chief that I/C had directed PW-1 to work on the information and thereupon PW-1 constituted the raiding team. Further, the prosecution case indicates that PW-1 requisitioned I/C to come to the spot as GO for the purpose of search and seizure. GO in this case was not any independent being I/C appeared to be an interested party. Hence, search could not be said to have been conducted impartially.
- iv. Prosecution evidence did not indicate that the officer who had taken down the source information in writing had sent it to the superior officer within 72 hours. Hence, Section 42(2) of NDPS Act was violated.
- v. The chemical examiner's report [Ext. 19] indicated that sample marked as A/1 (seized from Swapan Saha/appellant No. 1) and sample marked as C/1 (seized from Paritosh Mondal/appellant No. 2) did not contain heroin.
- vi. Mamtaj Begum (who purportedly received the source information and registered a GDE) was not examined. No explanation was furnished for not examining her.
- vii. IO (PW-7) admitted in his cross-examination that he had not examined the complainant under Section 161 Cr.P.C., therefore, PW-1 (being the D/c herein) was deposing for the first time in Court, hence, his testimony could not be relied on.

- viii. D/c (PW-1) stated in his cross-examination that he had no note in his GDE or in the notice served upon the appellants that he had reason to believe that an offence under Chapter 4 of the NDPS Act was going to be committed.
- ix. D/c (PW-1) admitted in his cross-examination that in the notice served upon the appellants, he had not mentioned that they could opt for search and seizure in the presence of GO or Magistrate. Appellants were not informed of their right under Section 50 of NDPS that they could be searched in the presence of GO or Magistrate. Section 50 of NDPS was violated.
- x. D/c (PW-1) admitted in his cross-examination that he had submitted a written information to I/C with all the seized articles. I/C made entries in the Stock Register and kept the articles in his custody. There was no evidence that I/C had indeed received the seized articles from PW-1. Section 52(4) and Section 55 of NDPS Act had been violated.
- xi. Investigation was conducted in perfunctory manner. I.O (PW-7) admitted in his cross-examination that he did not physically verify the seized alamats which were in the custody of I/C. I.O (PW-7) deposed in his cross-examination that the I/C maintained separate personal Stock Register, but I.O neither seized the Register nor verified the same. I/C was also not examined to clarify as to where and in what condition the contraband was kept. No explanation was furnished for not examining the I/C.

- xii. D/c (PW-1) admitted in his cross-examination that I/C did not prepare any inventory after taking charge of the seized articles from him. PW-6 also stated in his cross-examination that he could not state as to whether I/C had prepared any inventory on receiving the seized contraband. Section 52A of NDPS Act was violated.
- xiii. FIR did not mention about the presence of goldsmith (PW-4) at the PO. D/c (PW-1) admitted in his cross-examination that the scale which was recovered from the accused persons was used for weighing the contraband. PW-6 stated in his examination-in-chief that a goldsmith had come to the PO with I/C, but PW-6 did not name the goldsmith. PW-4 stated in his examination-in-chief that he had gone to Simultala and weighed 2 packets by a weighing scale, but he could not state the exact weight of the articles. In cross-examination, PW-4 stated that he could not remember if he had gone to Simultala and weighed any article. PW-1 admitted in his cross-examination that FIR did not indicate that PW-4 had gone to the PO with I/C. Hence, the presence of PW-4 at the PO is doubtful.
- xiv. In his examination-in-chief, goldsmith (PW-4) further stated that he could not recall if there was a Maruti Van and a motor cycle at the PO. PW-4 also failed to identify the appellants in Court. PW-4 appeared to be a stock witness, because he admitted in his cross-examination that he had deposed in another case before this Court earlier and as per the direction of the police he was required to attend the police party as and

when he was so required. This made his presence at the PO all the more doubtful.

- xv. Independent witness (PW-5) also appeared to be a stock witness, because he admitted in his cross-examination that he was deposing as per the direction of police. PW-5 further admitted in his cross-examination that he had signed on the papers at the PS and he could not state about the contents of the papers he had signed on. PW-5 admitted in his cross-examination that he could not state wherefrom the articles were recovered. PW-5 further disclosed in his cross-examination that prior to this incident, he used to be a police driver. PW-5 also did not mention the quantum of contraband seized from the spot. He merely stated that some packets were recovered from the car and motor cycle. He also could not remember if the seized articles were weighed. This cast a shadow of doubt on the presence of this independent witness at the PO during search and seizure.
- xvi. D/c (PW-1) stated in his examination-in-chief that two independent witnesses, being Kamal Biswas and Nirmal Mondal (PW-5) were brought in. However, as per the prosecution case, apart from PW-5, the other independent witness was Paban Biswas. Out of the 2 independent witnesses, only one (being PW-5) was examined. No explanation was furnished for not examining the other independent witness. Uday Sankar Mondal (PW-6) also stated in his examination-in-chief that 2 local witnesses were picked up, but he did not name them. This also made the presence of the other independent witness at the PO doubtful.

- xvii. PW-6 stated in his cross-examination that all the documents were prepared on the spot. Appellants stated in their statements under Section 313 Cr.P.C that their signatures were obtained forcibly on a blank paper in the P.S.
- xviii. Statements of appellants recorded under Section 313 Cr.P.C indicated that they were arrested on 20.09.2003 from their residence and their signatures were obtained on blank papers. As per the prosecution case, alleged incident occurred on 21.09.2003. Appellants were already in custody of police when this case was foisted upon them.
- xix. As per the prosecution case, representative samples were drawn at the spot. I.O (PW-7) admitted in his cross-examination that the representative samples were not collected in the presence of any Magistrate or Judicial Officer.
- xx. D/c (PW-1) stated in his examination-in-chief that the raiding party was comprised of SI Uday Sankar Mondal (PW-6), ASI Narayan Sarkar, Constable Gopi Ballav Roy, Constable Khiten Bhattacharya, NVF Nilmon Roy, NVF Rabindra Nath Lakra, and others. PW-6 also stated that in his examination-in-chief that PW-1 constituted a raiding team, comprising of PW-6 himself, one ASI, two constables, and two NVF personnel. PW-6, however, did not name any of the members of the raiding team. Moreover, except for PW-6, none of the other members of the raiding party were examined and no explanation was furnished for not examining them.

- xxi. PW-2 stated in his cross-examination that he had collected the samples of the contraband from Balurghat PS on 22.09.2003 and started for the Drug Controller's Office in Calcutta on 23.09.2003 at night. No indication as to where and in what condition the contraband was kept in the interregnum.
- xxii. FSL Report [Ext. 19] was not placed before AI under Section 313 Cr.P.C.
- xxiii. D/c (PW-1) stated in his cross-examination that he did not keep the impression of the seal which had been used on the SL and that the seal which was used in the PO was still in his custody. I.O (PW-7) admitted in his cross-examination that he had not seized the seals used by the seizing officer and he could not state in whose custody the seals were lying.
- xxiv. As admitted by I.O (PW-7) in cross-examination, Malkhana Register was not produced in Court during trial.
- xxv. PW-6 (member of the raiding team) stated that the raiding team found Van-I of Balurghat PS at the bus stand and asked the police party to accompany them. That did not find any mention in the FIR.
- xxvi. As per the I.O (PW-7), the formal part of the FIR was filled up by ASI Shib Sankar, but he was not examined. No explanation has been furnished for not examining him.

7. Learned Advocate for the State submitted as follows:-

- i. The appellants were in police custody at the time of the alleged incident; Section 42 of NDPS Act was not complied with.
- ii. Section 42(1) of NDPS Act was complied with by the police officer.
- iii. The accused persons were not informed of their right to be searched in the presence of GO or Magistrate, but depositions of PW-1 and PW-6 indicated that the accused persons were informed [Ext. 4, 5] that PW-1 wanted to search the persons of the appellants and vehicles in the presence of a superior officer or GO. In response to such notice, the accused persons gave their consent in writing that they were ready to be searched in the presence of a police officer.
- iv. There was no independent witness in this case. However, PW-5 is an independent witness and his deposition indicated his presence at the time of search and seizure.
- v. The depositions of PW-4 and PW-5 were credible. Nothing transpired from their testimony to disbelieve their presence at the time of search and seizure.
- vi. No document was filed by prosecution to indicate that PW-1 was empowered to conduct the search and seizure. Section 53 of NDPS Act provided for power of search and seizure and included O/C of a PS. These police personnel were empowered by the general law to conduct search and seizure under NDPS Act. Search and seizure was conducted in the presence of I/C who was was a GO. I/C signed on the SLs and sample packets.

- vii. The seal used by the seizing officer was not properly kept, but deposition of PW-1 indicated that the seal which was used at the PO was still in his custody. Failing to hand over the seal would not vitiate the prosecution case.
 - viii. No inventory list was prepared by D/c (PW-1) of I/C, but failing to prepare the inventory list would not be prejudicial to the prosecution case and would not be hit by Section 52A (2) of NDPS Act.
 - ix. The chemical examination report was not a complete one. Chemical examination report [Ext. 19] was proved in Court and can be taken as evidence under Section 45 of Evidence Act.
 - x. In the chemical examination report [Ext. 19] the samples A/1 and C/1 did not contain heroin. A/1 and B/1 were seized from Swapan Saha (Appellant No. 1). C1 and D1 were seized from Paritosh Mondal (Appellant No. 2). Contraband seized from their possession was lesser than commercial quantity but greater than small quantity.
 - xi. The accused persons were convicted under Section 21(b) of NDPS Act.
 - xii. The accused persons were sentenced to rigorous imprisonment for 6 years and to pay fine of Rs. 25,000/- each, in default, rigorous imprisonment for a further 6 months.
8. A circumspection of evidence of the prosecution witnesses revealed as follows:-
- i. PW-1 stated in his examination-in-chief that on 21.09.2003, the source information was received by Duty Officer Mamtaj Begum (NE) and she registered a GD to that effect. In the GD it was written that

an information was received over phone that a gang using a small vehicle and a motor cycle for transporting heroin and some other goods/drugs; Heroin was being transported by Maruti Van (bearing No. WB-61-1289) and motor cycle (bearing No. WB-3674) from Malancha hat to Laskarpur, The vehicles had left Malancha hat with the said articles about 10 minutes ago; The information was passed on to I/C of Balurghat PS. I/C asked PW-1 to look into the matter. This GDE was written by SI Mamtaj Begam [Ext. 1].

- ii. PW-1 further stated that upon I/C's direction, PW-1 went to work on the information along with SI Uday Sankar Mondal (PW-6), ASI Narayan Sarkar (NE), Constable Gopi Ballav Roy (NE), Constable Khiten Bhattacharya (NE), NVF Nilmon Roy (NE), NVF Rabindra Nath Lakra (NE), and others. PW-1 registered this GD, being GDE No. 1199 dt.21.09.2003 [Ext. 2]. They proceeded towards Chakvrigu, Simultala. They brought in two independent witnesses, namely, Kamal Biswas (NE) and Nirmal Mondal (PW-5). ASI Kaliram Barman (NE) was on duty as Van Officer and he accompanied them. At 11:35 AM, they found the Maruti Van (WB-61-1289) and a motor cycle (WB-61-3474) were proceeding from Balurghat towards Laskarhat. they detained both the vehicles at Simultala, Chakvrigu. A1 was the driver of the Maruti Van and A2 was the rider of the motor cycle. PW-1 served notices on the appellants [Ext. 4, 5]. Both of them were ready to be searched in the presence of I/C and they submitted their consent to that effect in writing [Ext. 6, 7]. PW-1 wrote a letter to I/C

[Ext. 3] requesting to be present at the spot for searching the accused persons in his presence.

- iii. PW-1 stated that at 12:15 PM, I/C arrived with Bimal Karmakar (PW-4) at the PO. Accused persons searched them and a NIL SL was prepared [Ext. 8, 9]. In the presence of I/C and other witnesses, PW-1 searched the body of A-1 and found 100 gm of heroin [MAT Ext. I] in plastic cover and was wrapped to his waist by a cloth [MAT Ext. II]. Beneath the driver's seat of A1, PW-1 recovered 115 gm of heroin [MAT Ext. III] kept in plastic cover and a small weighing machine [MAT Ext. VII]. PW-1 seized the articles and the Maruti Van under one SL [Ext. 10]. PW-1 signed on the SL. Accused and witnesses also signed on the SL. PW-1 searched the body of A2 and seized 50 gm of heroin [MAT Ext. IV] kept in a polythene packet attached to his waist by a cloth (MAT Ext. V) and another packet of 100 gm of heroin (MAT Ext. VI) from his motor cycle. PW-1 seized the contraband and the motor cycle (MAT Ext. IX) under one SL [Ext. 11]. PW-1 signed on the SL. Accused persons failed to produce any document for possessing the contraband. PW-1 arrested the accused persons.
- iv. PW-1 identified the label on 100 gm of heroin [MAT Ext. 1/1] recovered from around A1's waist, cloth [MAT Ext. 11/1] with which the contraband was attached to A1's waist, 115 gm heroin [MAT Ext. III/1] recovered from A1's seat, 50 gm of heroin [MAT Ext. IV/1] recovered from around A2's waist and the cloth [MAT Ext. V/1] with which it was attached to his body, 100 gm of heroin [MAT Ext. VI/1]

recovered from the motor cycle, and the weighing machine [MAT Ext. VII/1]. PW- 1 took 5 gm of heroin separately and prepared 4 small packets [MAT Ext. VIII collectively) for chemical examination and affixed labels on them [MAT Ext. VIII/1 collectively].

- v. PW-1 stated that all the sample packets bear the signature of the accused persons and witnesses. PW-1 affixed the labels on all the four sample packets. PW-1 arrested the accused persons and returned to the PS at 2:55 PM. On returning to PS, PW-1 registered GDE No. 1208 dated 21.09.2003 [Ext. 12]. PW-1 submitted a written information to I/C with all the seized articles. I/C made entries in the Stock Register and kept the articles in his custody. PW-1 lodged a written complaint [Ext. 13]. PW-1 identified the appellants in Court. Bimal Karmakar (PW4) weighed the contraband seized from the appellants. PW-1 pasted a label [Ext. 14] on the Maruti Van.
- vi. During cross-examination PW-1 stated that the message which was received on telephone by the PS was not reduced into writing. PW-1 have no note in my GDE to the extent that he had believed that an offence under Chapter 4 of the NDPS Act was going to be committed.
- vii. PW-1 further stated that in the GDE written by Mamtaj Begam, the names of the accused persons were not mentioned. In the message received on telephone, the specific route followed by the accused persons was not mentioned, but it was mentioned that they would proceed from Laskarhat to Malancha. The accused persons had to

cross Balurghat PS on their way. The PO was in front of Chakvrigu Anchal Office. The SLWs are from different localities.

- viii. PW-1 did not mention in the notice served on the accused persons that they could opt for search and seizure in the presence of GO or Magistrate. In the notice it was not mentioned that there was reason to believe that the accused persons had violated the provisions under Chapter 4 of the NDPS Act. In the NIL SLs and FIR, it was not mentioned as to whose body was searched. The consent Letters signed by the accused were not written by them. PW-1 have not kept the impression of the seal which I used on the SL. PW-1 did not take the fax of the seal separately. The seal which PW-1 used at the PO was still in his custody. PW-1 prepared the FIR at the PS. In the requisition, PW-1 did not ask the I/C to accompany the goldsmith.
- ix. FIR did not indicate that Bimal Karmakar (PW-4) went to the PO with the I/C. I/C did not prepare any inventory after taking charge of the seized articles from PW-1. In the enclosures it was not mentioned about the mother packets and sample packets accused persons was used for weighing the heroin.
- x. PW2 in his examination-in-chief stated that on 16.09.2004 that on 22.09.2003, as per the order of I/C, Balurghat PS, PW-1 carried 4 packets for depositing the same with the Drug Controller. On the next date, he deposited the alampats. Then stated that he deposited the packets on 24.09.2003. PW-2 identified the forwarding letter under which the packets were sent to Drug Controller. On receiving

the packets, the office of the State Drug Controller & Research Laboratory made an endorsement under the official seal in his presence [Ext. 15].

- xi. During cross-examination PW-2 stated that on 22.09.2003, he took the samples from I/C of Balurghat PS and started for Calcutta on 23.09.2003 at night.
- xii. PW-3 stated in his examination-in-chief that on 03.11.2003, he went to Calcutta on "Dak Duty". PW-3 was directed to bring one report from the Director of Drug Controller. He submitted the original letter issued by I/C of Balurghat PS to office of the Director of Drug Controller [Ext. 16].
- xiii. During cross-examination PW-3 stated that within 4-5 days he submitted the report to I/C.
- xiv. PW-4 stated in his examination-in-chief that 1½ years ago, PW-4 went to Simultali with I/C of Balurghat PS. As per the direction of I/C, he weighed 2 packets by weighing scale. PW-4 could not state the exact weight of the articles. PW-4 could not remember if there was a Maruti Van and a motor cycle at the spot. He failed to identify the appellants in Court. 2-3 police personnel were also present.
- xv. During cross-examination PW-4 stated that he was a goldsmith. He deposed in another case before this Court earlier. As per the direction of police, PW-4 was required to attend the police party as and when required. He could not remember whether I weighed any article at Simultals on that date.

- xvi. PW-5 stated in his examination-in-chief that 1 ½ years ago at noon he went to Simultala. PW-5 found a Maruti Van and a motor cycle at the spot. He found 2 accused persons there. PW-5 identified the appellants in Court. Police personnel were also present there. From the car and motor cycle, some packets were recovered. I/C of Balurghat PS was present. SL was prepared at the spot. He signed on 4 SLs [Ext. 8/1, 9/1, 10/1, 11/1]. Other witnesses also signed on the SLs in his presence. He could not remember whether the seized articles were weighed.
- xvii. During cross-examination PW-5 deposed that he signed on the papers at the PS. He could not state about the contents of the papers he signed on. He could not state wherefrom the articles were recovered. He was deposing as per the direction of police. Prior to this incident, he used to be a police driver. He was deposing as per the direction of police.
- xviii. PW – 6 during his examination-in-chief stated that on 21.09.2003, I/C of Balurghat received source information, which was noted in PS Diary. I/C directed SI Gobinda Barman (PW-1) to work on the information. Thereafter, PW-1 constituted a team comprising of one ASI, two constables, two NVF personnel, and myself. Thereafter, they proceeded towards Simultala, Chakvrigu. From the source information, I/C learnt that the smugglers were carrying heroin in Maruti Van and motor cycle and they were proceeding towards Tapan. They picked up 2 local witnesses. They found Van-I of

Balurghat PS at the bus stand and asked the police party to accompany them. At 11:45 AM, they found a Maruti Van and a motor cycle proceeding towards Tapan.

- xix. PW-6 further stated that they intercepted the vehicles. PW-1 served a notice upon the accused persons and asked whether they wanted to be searched before a police GO or Magistrate to which they said they were willing to be searched before a police officer. PW-1 sent a message to I/C and SP of Dakshin Dinajpur. I/C and a goldsmith reached the spot. PW-1 searched the accused persons and the vehicles. PW-1 recovered 1 packet of heroin of 100 gm covered polythene and cloth from A1's waist. A1 was driving the Maruti Van. PW-1 recovered one polythene packet containing 150 gm of heroin under the seat where A1 was sitting. PW-1 recovered 50 gm of heroin covered in polythene and cloth from A2's waist. PW-1 recovered 100 gm of heroin from the saddle box of the motor cycle. PW-4 weighed the seized articles in my presence. 5 gm of representative samples were taken from each packet. The contraband was packed, labelled, and sealed.
- xx. PW-6 further stated that labelling was done at the spot. SLs were prepared at the spot. A total of 400 gm of heroin was recovered and seized. PW-6 identified the appellants in Court and identified MAT Ext. in Court.
- xxi. During cross-examination PW-6 stated that the contemporaneously prepared documents did not bear his signature. All the documents

were prepared on the spot. Complaint was prepared at the PS. On returning to PS, the seized contraband was handed over to I/C. He could not state whether I/C prepared any inventory on receiving the seized contraband. The Duty Officer of PS received the source information that some smugglers were carrying heroin, but he could not state the name of the Duty Officer. Chakvrigu Anchal Panchayat Office was situated near the PO. Chakvrigu was a populated area. Simultala was a residential area.

- xxii. PW-7 in his examination-in-chief stated that the formal part of the FIR [Ext. 17] was filled up by ASI Shib Sankar [NE] on the instruction of the I/C. I/C endorsed [Ext. 13/1] the case to him for investigation. He examined the witnesses and recorded their statements under Section 161 Cr.P.C. PW-7 recorded the statements of the accused persons. He prepared the rough sketch map [Ext. 18] and index of the PO.
- xxiii. PW-7 further stated that samples were sent to the State Drug Controller and Research Laboratory, Kolkata for chemical examination after obtaining permission from Special Judge. He collected the chemical report [Ext. 19] during investigation. On 22.09.2003 PW-7 forwarded the accused persons to Learned Special Judge. PW-7 identified the appellants in Court. On 23.11.2003 he submitted charge-sheet against the two accused persons.
- xxiv. During cross-examination PW-7 stated that secret information was received by the Duty Officer SI Mamtaj Begum [NE]. PW-7 did not

examine her. She was not cited as a witness in this case. He did not seize any GD in this case, He examined 5 public witnesses. Nirmal Mondal, Bimal Karmakar, and Paban Kumar Biswas resided in different localities. On examining the Motor Vehicles Department, it came to be known that both the vehicles belonged to A1.

- xxv. PW-7 further stated that he did not physically verify the seized alamats which were in the custody of I/C. I/C maintained a separate personal Stock Register. He did not seize the Register. He did not verify the Register. He verified the Register kept in the Malkhana. PW-7 had not produced the Malkhana Register in Court, No sample was drawn in the presence of any Magistrate or Judicial Officer. He did not seize the seals used by the seizing officer. He did not collect the fax of the seals. PW-7 could not in whose custody the seals were lying. He did not examine the complainant under Section 161 Cr.P.C.
- xxvi. The appellant no.1 in his examination under Section 313 Cr.P.C deposed that he was compelled to sign on blank paper at Balurghat PS. On 20.09.2003 at midnight, police caught hold of him and arrested him from his house and obtained his signature forcibly on blank paper. Thereafter, they arraigned him as an accused in a false case.
- xxvii. The appellant no.2 in his examination under Section 313 CrPC deposed that his signature was forcibly obtained on a blank paper in the PS. On 20.09.2003 at midnight, police caught hold of him and

arrested him from his house and obtained his signature forcibly on blank paper. Thereafter, they arraigned him as an accused in a false case.

9. In ***Mangilal v. State of M.P.***¹, the Hon'ble Supreme Court held the following:-

“... ”

92. Omission on the part of the prosecution to produce evidence in this behalf must be linked with a second important piece of physical evidence that the bulk quantity of heroin allegedly recovered indisputably has also not been produced in court. The respondents contended that the same had been destroyed. However, on what authority it was done is not clear. Law requires that such an authority must flow from an order passed by the Magistrate. Such an order whereupon reliance has been placed is Exhibit PJ; on a bare perusal whereof, it is apparent that at no point of time had any prayer been made for destruction of the said goods or disposal thereof otherwise. What was necessary was a certificate envisaged under Section 110(1-B) of the 1962 Act. An order was required to be passed under the aforementioned provision providing for authentication, inventory, etc. The same does not contain within its mandate any direction as regards destruction.

XXXXXXXXXX

95. The High Court proceeded on the basis that non-production of physical evidence is not fatal to the prosecution case but the fact remains that a cumulative view with respect to the discrepancies in physical evidence creates an overarching inference which dents the credibility of the prosecution. Even for the said purpose the retracted

¹ 2023 SCC OnLine SC 862

confession on the part of the accused could not have been taken recourse to.

96. Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act.

XXXXXXXXXX

*100. Physical evidence of a case of this nature being the property of the court should have been treated to be sacrosanct. Non-production thereof would warrant drawing of a negative inference within the meaning of Section 114(g) of the Evidence Act. While there are such a large number of discrepancies, if a cumulative effect thereto is taken into consideration on the basis whereof the permissive inference would be that serious doubts are created with respect to the prosecution's endeavour to prove the fact of possession of contraband by the appellant. This aspect of the matter has been considered by this Court in *Jitendra v. State of M.P.* [(2004) 10 SCC 562 : 2004 SCC (Cri) 2028] in the following terms : (SCC p. 565, para 6)*

“6. ... In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the

offence is punishable with a stringent sentence as under the NDPS Act.””

9. On the issue of seizure in the presence of Magistrate, we wish to place reliance upon the decision of this Court in Union of India v. Mohanlal, (2016) 3 SCC 379:...”

10. The Supreme Court held the following in **State (NCT of Delhi) v. Mohd. Jabir**²:-

“5. It is obvious that the intent behind the provision is to ensure that the person about to be searched is made aware of the option to be taken before a third person other than the one who is conducting the search. Use of the expression “nearest” refers to the convenience as the suspect is to be searched. Delay should be avoided, as is reflected from the use of the word “unnecessary delay” and the exception carved in sub-section (5) to Section 50 of the NDPS Act. Nothing more is articulated and meant by the words used, or the intent behind the provision.”

11. In **Raju v. State of W.B.**³, the following was held by the Hon’ble Supreme Court:-

“9. We are unable to accept the submission made by the learned counsel for the appellant that Section 42 is attracted to the facts of the present case. In State of Punjab v. Baldev Singh [State of Punjab v. Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] (“Baldev Singh”), Dr A.S. Anand, C.J. speaking for a Constitution Bench of this Court, held : (SCC p. 189, para 10)

“10. ...The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such

² 2024 SCC OnLine SC 4374

³ (2018) 9 SCC 708

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 substance in a public place where such possession appears to him to be unlawful.”

(emphasis supplied)

10. *In Narayanaswamy Ravishankar v. Directorate of Revenue Intelligence [Narayanaswamy Ravishankar v. Directorate of Revenue Intelligence, (2002) 8 SCC 7 : 2002 SCC (Cri) 1865] , a three-Judge Bench of this Court considered whether the empowered officer was bound to comply with the mandatory provisions of Section 42 before recovering heroin from the suitcase of the appellant at the airport and subsequently arresting him. Answering the above question in the negative, the Court held : (SCC pp. 8-9, para 5)*

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

11. *In Krishna Kanwar v. State of Rajasthan [Krishna Kanwar v. State of Rajasthan, (2004) 2 SCC 608 : 2004 SCC (Cri) 607; Rajendra v. State of M.P., (2004) 1 SCC 432 : 2004 SCC (Cri) 314] , a two-Judge Bench of this Court considered whether a police officer who had prior information was required to comply with the provisions of Section 42 before seizing contraband and arresting the appellant who was travelling on a motorcycle on the highway. Answering the above question in the negative, the Court held : (SCC pp. 615-16, para 16)*

“16. ... Section 42 comprises of two components. One relates to the basis of information i.e. : (i) from personal knowledge, and (ii) information given by person and taken down in writing. The second is that the information must relate to commission of offence punishable under Chapter IV and/or keeping or concealment of document or article in any building, conveyance or enclosed place which may furnish evidence of commission of such offence. Unless both the components exist Section 42 has no application. Sub-section (2) mandates, as was noted in Baldev Singh case [State of Punjab v. Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior. Therefore, sub-section (2) only comes into operation where the officer concerned does the enumerated acts, in case any offence under Chapter IV has been committed or documents, etc. are concealed in any building, conveyance or enclosed place. Therefore, the commission of the act or concealment of document, etc. must be in any building, conveyance or enclosed place.”

(emphasis supplied)

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

place, which includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

xxx

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

“50. Conditions under which search of persons shall be conducted.—(1) *When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to 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.”

According to Section 50(1), an empowered officer should necessarily inform the suspect about his legal right, if he so requires, to be searched in the presence of a gazetted officer or a Magistrate.

16. *In Vijaysinh Chandubha Jadeja v. State of Gujarat [Vijaysinh Chandubha Jadeja v. State of Gujarat, (2011) 1 SCC 609 : (2011) 1 SCC (Cri) 497] (“Vijaysinh”), a Constitution Bench of this Court interpreted Section 50 thus : (SCC pp. 617-18 & 622, paras 20, 29 & 31)*

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

29. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law-enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that 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.

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* [*Joseph Fernandez v. State of Goa*, (2000) 1 SCC 707 : 2000 SCC (Cri) 300] and *Prabha Shankar Dubey* [*Prabha Shankar Dubey v. State of M.P.*, (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 [*State of Punjab v. Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080].”

17. The principle which emerges from *Vijaysinh* [*Vijaysinh Chandubha Jadeja v. State of Gujarat*, (2011) 1 SCC 609 : (2011) 1 SCC (Cri) 497] is that the concept of “substantial compliance” with the requirement of Section 50 is neither in accordance with the law laid down in *Baldev Singh* [*State of Punjab v. Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080], nor can it be construed from its language. [Reference may also be made to the decision of a two-Judge Bench of this Court in *Venkateswarlu* [*Myla Venkateswarlu v. State of A.P.*, (2012) 5 SCC 226 : (2012) 2 SCC (Cri) 686].] Therefore, strict compliance with Section 50(1) by the empowered officer is mandatory. Section 50, however, applies only in the case of a search of a person. In *Baldev Singh* [*State of Punjab v. Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080], the Court held : (SCC p. 190, para 12)

“12. On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises, etc.”

In State of H.P. v. Pawan Kumar [State of H.P. v. Pawan Kumar, (2005) 4 SCC 350 : 2005 SCC (Cri) 943] (“Pawan Kumar”), a three-Judge Bench of this Court held that the search of an article which was being carried by a person in his hand, or on his shoulder or head, etc., would not attract Section 50. It was held thus : (SCC pp. 360 & 363, paras 11 & 16)

“11. ... In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word “person” occurring in Section 50 of the Act.

16. ...After the decision in Baldev Singh [State of Punjab v. Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] , this Court has consistently held that Section 50 would only apply to search of a person and not to any bag, article or container, etc. being carried by him.”

18. *In Parmanand [State of Rajasthan v. Parmanand, (2014) 5 SCC 345 : (2014) 2 SCC (Cri) 563] , on a search of the person of the respondent, no substance was found. However, subsequently, opium was recovered from the bag of the respondent. A two-Judge Bench of this Court considered whether compliance with Section 50(1) was required. This Court held that the empowered officer was required to comply with the requirements of Section 50(1) as the person of the respondent was also searched. [Reference may also be made to the decision of a two-Judge Bench of this Court in Dilip v. State of M.P. [Dilip v. State of M.P., (2007) 1 SCC 450 : (2007) 1 SCC (Cri) 377]] It was held thus : (Parmanand [State of Rajasthan v. Parmanand, (2014) 5 SCC 345 : (2014) 2 SCC (Cri) 563] , SCC p. 351, para 15)*

“15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application.”

19. *Moreover, in the above case, the empowered officer at the time of conducting the search informed the respondent that he could be searched before the nearest Magistrate or before the nearest gazetted officer or before the Superintendent, who was also a part of the raiding party. The Court held that the search of the respondent was not in consonance with the requirements of Section 50(1) as the empowered officer erred in giving the respondent an option of being searched before the Superintendent, who was not an independent officer. It was held thus : (Parmanand case [State of Rajasthan v. Parmanand, (2014) 5 SCC 345 : (2014) 2 SCC (Cri) 563] , SCC pp. 352-53, para 19)*

“19. We also notice that PW 10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before the nearest gazetted officer or before PW 5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW 5 J.S. Negi by PW 10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to the nearest Magistrate or the nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW 10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW 5 J.S. Negi, the Superintendent, who was part of the raiding party. PW 5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the

question whether if the respondents had voluntarily expressed that they wanted to be searched before PW 5 J.S. Negi, the search would have been vitiated or not. But PW 10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW 10 SI Qureshi is vitiated.”

12. In **Boota Singh v. State of Haryana**⁴, the following was observed by the Hon’ble Supreme Court:-

“12. In Karnail Singh [Karnail Singh v. State of Haryana, (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887] , the Constitution Bench of this Court concluded : (SCC pp. 554-55, para 35)

*“35. In conclusion, what is to be noticed is that Abdul Rashid [Abdul Rashid Ibrahim Mansuri v. State of Gujarat, (2000) 2 SCC 513 : 2000 SCC (Cri) 496] did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham [Sajan Abraham v. State of Kerala, (2001) 6 SCC 692 : 2001 SCC (Cri) 1217] [**Ed.** : This word between two asterisks has been emphasised in original as well.] hold [**Ed.** : This word between two asterisks has been emphasised in original as well.] that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:*

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

⁴ (2021) 19 SCC 606

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally [Ed. : This word between two asterisks has been emphasised in original as well.] precede [Ed. : This word between two asterisks has been emphasised in original as well.] the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the

police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.”
(emphasis in original and supplied)

13. *In Jagraj Singh [State of Rajasthan v. Jagraj Singh, (2016) 11 SCC 687 : (2017) 1 SCC (Cri) 348] , the facts were more or less identical. In that case, the vehicle (as observed in para 5.3 of the decision) was not a public transport vehicle. After considering the relevant provisions and some of the decisions of this Court including the decision in Karnail Singh [Karnail Singh v. State of Haryana, (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887] , it was observed : (Jagraj Singh case [State of Rajasthan v. Jagraj Singh, (2016) 11 SCC 687 : (2017) 1 SCC (Cri) 348] , SCC pp. 694-95 & 702, paras 14, 16 & 29)*

“14. What Section 42(2) requires is that where an officer takes down an information in writing under sub-section (1) he shall send a copy thereof to his immediate officer senior. The communication Ext. P-15 which was sent to the Circle Officer, Nohar was not as per the information recorded in Ext. P-14 and Ext. P-21. Thus, no error was committed by the High Court in coming to the conclusion that there was breach of Section 42(2).

16. In this context, it is relevant to note that before the Special Judge also the breach of Sections 42(1) and 42(2) was contended on behalf of the defence. In para 12 of the judgment the Special Judge noted

the above arguments of defence. However, the arguments based on non-compliance with Section 42(2) were brushed aside by observing that discrepancy in Ext. P-14 and Ext. P-15 is totally due to clerical mistake and there was compliance with Section 42(2). The Special Judge coming to compliance with the proviso to Section 42(1) held that the vehicle searched was being used to transport passengers as has been clearly stated by its owner Vira Ram, hence, as per the Explanation to Section 43 of the Act, the vehicle was a public transport vehicle and there was no need of any warrant or authority to search such a vehicle. The High Court has reversed the above findings of the Special Judge. We thus, proceed to examine as to whether Section 43 was attracted in the present case which obviated the requirement of Section 42(1) proviso.

29. After referring to the earlier judgments, the Constitution Bench came to the conclusion that non-compliance with requirement of Sections 42 and 50 is impermissible whereas delayed compliance with satisfactory explanation will be acceptable compliance with Section 42. The Constitution Bench noted the effect of the aforesaid two decisions in para 5. The present is not a case where insofar as compliance with Section 42(1) proviso even an argument based on substantial compliance is raised there is total non-compliance with Section 42(1) proviso. As observed above, Section 43 being not attracted, search was to be conducted after complying with the provisions of Section 42. We thus, conclude that the High Court has rightly held that non-compliance with Section 42(1) and Section 42(2) were proved on the record and the High Court has not committed any error in setting aside the conviction order.”

(emphasis supplied)

14. *The evidence in the present case clearly shows that the vehicle was not a public conveyance but was a vehicle belonging to accused*

Gurdeep Singh. The registration certificate of the vehicle, which has been placed on record also does not indicate it to be a public transport vehicle. The Explanation to Section 43 shows that a private vehicle would not come within the expression “public place” as explained in Section 43 of the NDPS Act. On the strength of the decision of this Court in Jagraj Singh [State of Rajasthan v. Jagraj Singh, (2016) 11 SCC 687 : (2017) 1 SCC (Cri) 348] , the relevant provision would not be Section 43 of the NDPS Act but the case would come under Section 42 of the NDPS Act.

15. *It is an admitted position that there was total non-compliance of the requirements of Section 42 of the NDPS Act.*

16. *The decision of this Court in Karnail Singh [Karnail Singh v. State of Haryana, (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887] as followed in Jagraj Singh [State of Rajasthan v. Jagraj Singh, (2016) 11 SCC 687 : (2017) 1 SCC (Cri) 348] , is absolutely clear. Total non-compliance of Section 42 is impermissible. The rigor of Section 42 may get lessened in situations dealt with in the conclusion drawn by this Court in Karnail Singh [Karnail Singh v. State of Haryana, (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887] but in no case, total non-compliance of Section 42 can be accepted.”*

13. In **Sanjeet Kumar Singh v. State of Chhattisgarh**⁵, the following was held:-

“17.4. *That once it is established that the contraband was recovered from the accused's possession, a presumption arises under Section 54.*

34. *It is true that Section 54 of the Act raises a presumption and the burden shifts on the accused to explain as to how he came into possession of the contraband. But to raise the presumption under*

⁵ (2022) 16 SCC 58

Section 54 of the Act, it must first be established that a recovery was made from the accused. The moment a doubt is cast upon the most fundamental aspect, namely, the search and seizure, the appellant, in our considered opinion will also be entitled to the same benefit as given by the Special Court to the co-accused.”

14. The following was observed by the Hon’ble Supreme Court in **Union of India**

v. Mohd. Nawaz Khan⁶:-

“11.4. A presumption under Section 54 of the NDPS Act would arise in respect of the possession of a narcotic drug which is found to be in the conscious possession of the accused.

xxx

25. We shall deal with each of these circumstances in turn. The respondent has been accused of an offence under Section 8 of the NDPS Act, which is punishable under Sections 21, 27-A, 29, 60(3) of the said Act. Section 8 of the Act prohibits a person from possessing any narcotic drug or psychotropic substance. The concept of possession recurs in Sections 20 to 22, which provide for punishment for offences under the Act. In Madan Lal v. State of H.P. [Madan Lal v. State of H.P., (2003) 7 SCC 465 : 2003 SCC (Cri) 1664] this Court held that : (SCC p. 472, paras 19-23 & 26)

“19. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record are that all the accused persons were travelling in a vehicle and as noted by the trial court they were known to each other and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.

20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to

⁶ (2021) 10 SCC 100

offences for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

21. It is highlighted that unless the possession was coupled with the requisite mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

22. The expression “possession” is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Supt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja [Supt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja, (1979) 4 SCC 274 : 1979 SCC (Cri) 1038] to work out a completely logical and precise definition of “possession” uniform[ly] applicable to all situations in the context of all statutes.

23. The word “conscious” means awareness about a particular fact. It is a state of mind which is deliberate or intended.

26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.”

15. To maintain a balance between the rigorous of law and the rules of equality and fairness it must be ensured that all procedural protections and safeguards as required and provided by the Act are strictly and unfailingly observed before a Court proceeds to draw any presumption against an accused. A court before drawing any presumption must satisfy itself about

the compliance of all mandatory requirements by the prosecution. Any breach of such mandatory compliance leads to rejection of the prosecution case.

16. Violation of legislative mandate casts a grave shadow of doubt on the prosecution case itself. In the instant case, mandatory provisions of Section 50 of the Act has been blatantly violated by the members of the raiding party.
17. Neutrality is the essence of Section 50 of the NDPS Act, legislative intent as it appears from Section 50 of the Act was not only to search an apprehended accused but to conduct such search only after it has been explained to him that he has an invaluable right to be searched in presence of a Gazetted Officer or Magistrate of his choice. Failure to explain this right to an accused denudes Section 50 of NDPS Act of its basic neutrality and it has been often held by the Apex Court that failure to inform an accused of his right was not only fatal but renders the resultant search and seizure suspect. In the instant case, the appellants at no point of time were informed about their valuable right.
18. The oral evidence of PWs-1 and 7 on this score revealed at no point of time the appellants were intimated about their right. Contemporaneous documents like the FIR and the written notices (Exbts. 4 and 5) issued upon the appellants did not in any way establish the factum of apprising the appellants of their right under Section 50 of the said Act. Mere offer to search was not a compliance of Section 50 unless it was proceeded by an intimation to the appellants about their valuable right.

19. In the instant case a secret information was received at Balurghat Police Station. This secret information was conveyed to the I/C Balurghat Police Station by PW-1 and, in turn, the I/C Balurghat P.S. directed PW-1 to constitute a raiding party and work out the said information. Thereafter, PW-1 allegedly apprehended the appellants and requisitioned the I/C Balurghat Police Station to come to the spot and witness the search as the Gazetted Officer. Such course of action could not be termed as an impartial search. The I/C Balurghat P.S. himself had directed PW-1 to undertake the raid and, thus, the I/C was officiating as the superior officer of PW-1 who was in fact interested in the arrest of the appellants.
20. Section 50 has three district compartments. The first one, i.e. Sub-Section 1 procedurally suspends the search when the required requisition was made, the second one indicts the officer concerned to take the person apprehended before the designated authority of his choice and permits the officer to detain the person apprehended for the period required to produce the designated authority concerned. This was what Sub-Section 2 provides. The last and the third compartment was the strongest limb of the law in the Section. Sub-Section 3 provides for taking a decision by the designated authority to (i) find out whether there was any reasonable ground for search, (ii) on such finding to either discharge the apprehended person forthwith or direct the search to be made. Participation in the decision making process is the substantive right of the person. Speaking in conformity with the letters of law after to be made would include informing the person of his right to take part in the decision making process and not the right to be searched automatically as at

the stage of Sub-Section 1 search was not a certainty. The suspension of the right of search by the officer revives only on the decision of the designated authority under Sub-Section 2. Therefore, where the designated authority himself officiates the raid on the basis of source information the basic neutrality of Section 50(3) was lost.

21. PW-1 the searching and seizing officer for reasons best known to him did not preserve the seals. PW-1 even did not hand over the seals to the I/C Balurghat P.S. or to PW-2 (the constable who purportedly carried the contraband only to the office of the Drug Controller for chemical analysis). The chemical expert in the instant case was not examined in Court by the prosecution and his report (Exbt.-1 has been exhibited through PW-7, the I.O. of this case). Thus prosecution at no stage could prove that the goods which were allegedly seized were the ones which were sent for chemical analysis. There was also no evidence about the seals being intact of that they (the allegedly seized contraband) had marks of the seal inasmuch as the facsimile of the seal was not sent to the chemical examiner.
22. Discrepancies were writ large on the fact of the prosecution case. PW-1 stated in his evidence that after he came back to Balurghat Police Station, he handed over the contraband articles to the I/C who kept the same in the malkhana for safe keeping. However, from the evidence of PW-7 (the I.O.) it appeared that he took no steps to verify about the place where the articles were kept. PW-7 even did not seize the register and during the course of the trial, the malkhana register was not produced in Court. Such a course of action created a reasonable suspicion that the contraband allegedly seized

from the appellants was not deposited in the manner as claimed by PW-1 prosecution even did not examine the I/C in Court to clarify the position as to where the articles were kept after seizure.

23. The evidence of PW-2 recounted on 22.09.03 as per the order of the I/C, he (PW-2) carried the contraband to the office of the Chemical Analyst at Kolkata. PW-2 further stated that he started for Kolkata, i.e. the Office of the Chemical Analyst on 23.09.03 and handed over the allegedly seized contraband to the office of the chemical analyst on 24.09.03. Thus, where were the articles lying from 22.09.03 to 23.09.03 had remained unanswered. No contemporaneous document had been produced by the prosecution in this regard. This being the actual state of affairs, there was every possibility that the articles which were allegedly seized were not the ones which were sent for chemical examination.

24. PW-4 was a goldsmith who accompanied the I/C to the place of occurrence and as per the prosecution version he (PW-4) weighed the allegedly seized contraband. However, in Court, PW-4 could not state about the weight of the articles and even could not remember if he had weighed anything on that date at the spot. PW-4 could not even identify the appellants in Court. In his cross-examination PW-4 admitted that he attended the police party as and when required and had deposed in a previous case before the Court. Thus, it was crystal clear that PW-4 was nothing but a stock witness and by no means it could be stated that PW-4 was an independent witness to the search and seizure.

25. The evidence of PW-5 much like PW-4 indicated that PW-5 was another stock witness of the police party. It was claimed by the prosecution that PW-5 had been collected before hand from Atrayee Bridge to witness the search as an independent person. But such claims of the prosecution had been squarely negated by PW-5 himself during his examination in Court. PW-5 stated during his evidence that when he reached the place of occurrence the contraband had been allegedly recovered and the I/C Balurghat Police Station was already present there. So by no stretch of imagination it could be said that PW-5 at all witnessed the search. Furthermore PW-5 admitted in Court that he signed the seizure lists at the Police Station. This being the nature of evidence it was crystal clear that there was no independent witness at the spot when the offer was advanced to the appellants or when the purported search took place. Furthermore, from the evidence on record it was borne out that PW-5 was an ex Police driver. This fact compiled with the circumstances enumerated hereinabove leaves no room for doubt that the evidence of PW-5 was unreliable.

26. PW-6 himself claimed to be a member of the raiding party but in his evidence in Court he admitted that none of the contemporaneous document purportedly prepared at the time of seizure at the spot prove his presence. If PW-6 was indeed present with the raiding party then it was hard to explain as to why he (PW-5) did not sign the seizure lists or the written notices. Thus from the bald statements of PW-6 prosecution could not lead any evidence to prove that indeed PW-6 was present at the spot. Furthermore, PW-5 submitted his ignorance about who was the duty officer who had received

the secret information. It can be inferred that PW-6 was never present at the spot and his testimony was unworthy of any credit.

27. No effort was made by the investigating agency to examine S.I. Mamtaj Begum (the duty officer who had received the information) in Court. Even PW-7 (the I.O.) admitted that he did not examine S.I. Mamtaj Begum during the investigation although she was still then posted at Balurghat Police Station.
28. Prosecution at no stage could prove that the offer to such an apprehended person as contemplated under Section 50 of the Act was at all advanced to the appellants. The two purported independent witnesses on whom prosecution has relied on this score had failed miserably. PW-4 appeared at the scene with the I/C and PW-4 admitted that he appeared after the I/C had come and the contraband had been recovered. Thus apart from the ipse dixit of the Police Officers there was practically nothing on record to show that any offer to search was at all extended to the appellants.
29. It had been held by this Hon'ble Court that Section 52A was a mandatory provision of law and it should be complied with in the true letter and spirit. In the instant case no inventory was prepared by PW-1 at the spot or at any subsequent time. This tantamounts to a clear violation of the law.
30. The provisions of Section 52, 55 and 57 of the Act have not been complied with. It had been held by the Hon'ble Apex Court, on a number of occasions, that failure to comply with the aforesaid Sections casts, a grave shadow of doubt on the prosecution case itself and conviction should not be recorded in a trial where such failure has occasioned.

31. In the instant trial prosecution has miserably failed to comply with the provision of Section 42 (2) of the Act. Section 42 (2) categorically laid down that where an officer taken down in writing any information as per provision in Section 42 (1) he shall immediately send a copy of such information to his immediate Superior. In the instant case no copy such information was ever forwarded by PW-1 to anybody. Section 42 (2) has been given a mandatory character by Courts of all state in India and flagrant violation of this mandatory provision renders the prosecution case doubtful.
32. PW-1 claimed that from the allegedly seized heroin 4 sample packets of 6 gram each marked as A1, B1, C1 and D1 were collected and later on purportedly these 4 sample packets were sent to the office of the chemical examiner. From the report of the chemical examiner (Ext.-19) it was found that the packets A1 and C1 did not contain any heroin while the packets B1 and D1 reacted positive to the test of heroin. From the evidence on record it was not clear as to who was in possession of the heroin. From the evidence on record was not clear as to who was in possession of the heroin allegedly recovered as at no stage prosecution could clarify this position.
33. If a fact in issue, or a relevant fact, was not supported by the evidence adduced by the parties, it was not open to the Court to hold that fact to have been proved on its own surmises and fanciful reasons.
34. In view of the above discussions, the instant criminal appeals being CRA 192 of 2005 and CRA 42 of 2006 are allowed.
35. Under such facts and circumstances, the judgment and order dated 18.2.2005 passed by the Learned Special Judge under N.D.P.S. Act, Dakshin

Dinajpur at Balurghat in Special Case No. 8 of 2003 and the order dated 09.08.2005 passed by the Learned Sessions Judge, Dakshin Dinajpur at Balurghat in Criminal Misc. Case No. 344 of 2005 are set aside.

36. Accordingly, the criminal appeals being CRA 192 of 2005 and CRA 42 of 2006 stand disposed of.

37. There is no order as to costs.

38. The Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

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

(Ananya Bandyopadhyay, J.)