

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

**C.R.A. 1015 of 2013
With
CRAN 3 of 2015 (Old No. CRAN 1456 of 2015)**

**Rezaul Sk. @ Razaul Sk @ Riajul Sk.
-Vs-
The State of West Bengal**

For the Appellant : Mr. Soham Banerjee
(*Amicus Curiae*)

For the State : Mr. Anand Keshari

Heard on : 29.08.2023, 04.12.2023

Judgment on : 07.03.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and orders dated 16.11.2013 passed by the Learned Special Judge, Additional Sessions Judge, 4th Court, Alipore in Sessions Trial Case No. 13(2) 2012 convicting the accused Jahangir Laskar and Rezaul Sk. @ Rajaul Sk. under Section 235(2) of the Code of Criminal Procedure being guilty of the offence punishable under Section 20(b)(ii)(b) of the NDPS Act and sentencing them to suffer rigorous imprisonment for four years each and to pay fine of Rs. 10,000/- each, in default to suffer simple imprisonment for two months.

2. On 15.11.11 S.I. Dhiman Bairagi lodged a written complaint with Jadavpur Police Station to the effect that he received source information that two persons riding on a Motor Cycle being No. WB 20L 9247 would be coming from the opposite side of main gate of Dooradarshan Kendra, Kolkata carrying Ganja for selling the same. Complainant along with force and officers went to the spot to work out the source information, after collecting two independent witnesses. Raiding party found 2 persons coming in a Motor Cycle came near the opposite side of main gate of Dooradarshan Kendra. The number of Motor Cycle matched with the source information. Police party intercepted those two persons and on interrogation they disclosed their names as Jahangir Lasker and Rajaul Sk. One Nylon bag containing some materials was kept in between the driver and pillion rider of the Motor Cycle. Then the complainant served first option to the detained persons and they opted to be searched in presence of G.O. He informed the matter to his superiors to send Government Officer. Then Additional Officer-in-Charge, Survey Park Police Station came to the spot. The accused persons handed over shopping bags containing 2 packets of Ganja weighing 3.500 kgs and 2.500 kgs respectively. The contraband articles were seized under seizure list. Samples were taken from both the packets. Thereafter all packets were packed, sealed and labeled at the spot. The complainant searched the persons of both the accused in presence of public witnesses and Government Officer after observing all the legal formalities and after search and seizure the two accused persons were arrested.

3. The police after investigation submitted charge-sheet under Section 20(b)(ii)(b)/29 of N.D.P.S Act and charge was framed against the accused persons to which they pleaded not guilty and claimed to be tried.
4. The prosecution to prove the case examined in all 4 witnesses and out of them defacto complainant as PW-1, Pabitra Bhattacharjee examined as PW-2, Government Officer, Basu Das examined as PW-3, Abdul hannan Laskar the I.O. of the case as PW-4.
5. The following documents have been admitted into evidence for the side of the prosecution:-

Exhibits 1 and 1/1 are 2 first options, Exhibits 2 and 2/1 are 2 second option, Exhibit 3 is the Seizure List containing 2 pages, Exhibit 4 series are Memo of Arrest and Inspection Memos. Exhibit 5 is Written Complaint, Exhibit 3- series are signatures of PWs. 2 and 3 in Seizure List, Exhibit 6 is the rough sketch map with index, Exhibit 7 is Chemical Examination Report and Exhibit 8 is formal F.I.R. and the following materials have been marked as Material Exhibits for the prosecution :-

Mat. Exhts. I and II are 2 sample packets, Mat. Exhts. I/1 and II/1 are signatures of the witnesses on the labels packets, Exhts. I/2 and II/2 are the signatures of PW-2 on the label of sample packets. Mat. Exht. III is the packet of Nylon bag, Mat. Exhts. III/1 and III/2 are the signature of the witnesses on Mat. Exht. III, Mat. Exht. IV is the big packet containing Ganja, Mat. Exhts. IV/1 and IV/2 are the signatures of witnesses on the label of Mat. Exht. IV, Mat. Exht. V is one Bag containing Ganja, Mat.

Exhibits. V/1 and V/2 are signatures of the witnesses on the label of Mat. Exhibit. V.

6. The Learned Advocate for the State impressed upon the distinction between the applicability of the provisions stipulated in Section 42 and Section 43 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The Learned Advocate for the State further submitted that the compliance of the provisions of Section 42 of the said Act was not required in connection with the search of the offending motorcycle. The compliance of the provisions under Section 50 of the aforesaid Act was required only for the search of the body of the person in question. In support of his contentions, the Learned Advocate for the State relied on the decisions cited in 2016 (11) Supreme Court Cases 687 and AIR 2018 Supreme Court 4255.
7. The PW-1 the complainant deposed that on 15.11.11 he received source information and went near Dooradarshan Kendra along with Officers and force and maintained watch there. These two accused persons came to the spot riding Motor Cycle. The police party detained them at the spot and after observing all legal formalities and after serving options he conducted search and recovered 1 Bag containing 2 packets of Ganja weighing 3.5 kgs. and 2.5 kgs. respectively. PW-1 further stated that they collected 2 independent witnesses and search was conducted in their presence. Ganja was seized under Seizure List and the complainant obtained signatures of independent witness, accused persons and Govt. Officer on the same and obtained samples from 2 packets of 100 grams each and packed, sealed and labeled all parts of contraband. After completion of all acts they came back to the

Police Station and lodged complaint with the Officer-in-Charge and handed over all alamats to Malkhana-in-Charge PW-2, Inspector Pabitra Bhattacharjee deposed that on 15.11.11 he was posted at Survey Park Police Station as Additional Officer-in-Charge and on that day D.C., S.S.D. informed him over Telephone that police party intercepted two persons in front of the gate of Dooradarshan Kendra having Ganja in their possession and he was directed to go to the spot. Thereafter he went to the spot and found that police detained 2 persons along with Motor Cycle and 2 bags of Ganja. He served second option to the detained persons who agreed to be searched in his presence. Officer Dhiman Banerjee searched the packet in his presence and recovered 2 bags containing 2.5 kgs and 3.5 kgs Ganja respectively. He further stated that the Officer obtained 2 samples of 100 grams each from the total quantity and thereafter those parts of Ganja were packed, sealed and labeled in his presence and seized under Seizure List and the police officer took all seized articles and the accused persons with documents and returned back to the police station. PW-3 Babu Das, the independent witness stated that on 15.11.11 he was going to his place of job and are about 3 p.m. he found gathering of people and police party in front of Dooradarshan Kendra. Then the police officer told him to assist them and told that one person would be coming at the spot having Ganja with him when he agreed to be witness of the incident and remained present at the spot and at about 3.30 p.m. 2 persons riding on a bike came at the opposite side of Dooradarshan Kendra when the police party intercepted them. One police officer informed the matter to some person over telephone and

interrogated the detained persons. Police Officer searched the contents of the Nylon bag and recovered 2 bags containing Ganja weighing 3.5 kgs and 2.5 kgs and thereafter 100 grams of Ganja was taken as samples from the said 2 bags and were packed, sealed and labeled at the spot. He put his signature on the label of the packets and documents.

8. The Learned Amicus Curiae for the appellant submitted as follows:-

- i. On 15.11.2011, Dhiman Bairagi, Sub Inspector of Jadavpur Police Station received a secret information that two persons riding a motorcycle would be arriving on the opposite side of the main gate of Dooradarshan Kendra on Uday Sankar Sarani at about 15:30 hrs and they will be carrying Ganja for selling the same. Upon the instruction of the Officer-in-Charge of Jadavpur Police Station, a raiding team was formed led by Mr. Dhiman Bairagi and the team left the Police Station at around 14:50 hrs.
- ii. At about 15:30 hrs, two persons came on the spot riding a motorcycle, and halted near the opposite side of the main gate of Dooradarshan Kendra. The raiding party surrounded the motorcycle with the driver and pillion, and detained them on spot.
- iii. Rezaul Sk. the present appellant was the driver of motorcycle. A dirty nylon bag was kept between the driver and the pillion.
- iv. Upon the instruction of pillion passenger, Jahangir, the present appellant handed over the nylon bag which was placed between the driver and the pillion passenger, containing packets of

brownish coloured material which was stated as Ganja in presence of two public witnesses and the Gazetted Officer Pabitra Bhattacharyya, Additional Officer -in-Charge of Survey Park Police Station.

- v. No incriminating material was found in search on persons as well as the dicky.

9. The Learned Amicus Curiae cited certain reasons for disbelieving the prosecution story stated as follows:-

- i) Non-Compliance of the procedures prescribed in the Act by the raiding and arresting officer:-The NDPS Act is very stringent in nature. To prevent the misuse of this Act by the State machinery, certain procedures were enacted such as Section 42 and Section 50 of the Act.
 - a) In this particular case, even after receiving a prior information, the same was not taken down on writing, nor it was intimated to the superior officer ever, which was in complete and gross violation of Section 42 of the NDPS Act. The judgment in Karnail Singh v. State of Haryana directed non-compliance of Section 42 to be impermissible.
 - b) Section 50 of the Act mandated that the officer who was about to search a person, if he wanted, should take such person to the nearest Gazetted Officer. In this case, the prosecution story narrated the stance when the appellant wanted to be searched in presence of a Gazetted Officer, the

PW-1 contacted his Officer-in-Charge of Jadavpur Police Station regarding the same, and PW-2, the additional Officer in Charge of Survey Park Police Station was sent on the spot to act as an Gazatted Officer.

However, in his cross examination, the PW-2 had admitted that Gazetted Officers may had been available at Dooradarshan Kendra, which was a government head officer in Kolkata.

There was no effort to take the appellant to the nearest Gazetted Officer, who might have been present in the Dooradarshan Kendra, which situated at the opposite foot of the Place of Occurrence. A member of same force of Calcutta Police was sent at the Place of Occurrence, from another Police Station situated at a distance of 5 kilometres, to act as a Gazetted Officer, by the Officer-in-Charge of the Jadavpur Police Station. All of these steps were taken without any documentation. Such actions completely vitiated the aim of Section 50 of the said Act.

- c) It was admitted that the two second options did not bear signature or left thumb impression of the appellant and the co-accused person. Specific date, place and time were not mentioned in the options. No written consent was obtained from the appellant intended to be searched in the presence of Gazetted Officer other than Magistrate. More over there

was no Nil Seizure List to show that the appellant got the chance to search the officers involved.

- d) The presence of the Gazetted Officer at the Place of Occurrence during the search and seizure was doubtful when he contradicted the prosecution story during his deposition and says, *"I have also found one blue coloured motorcycle and 2 bags in the dicky having Ganja..."* The story of the prosecution, as reflected in the written complaint and in the deposition of PW-1 that the contraband article was recovered from a nylon bag kept between the driver, i.e. the appellant and the pillion passenger.

ii. Reasonable Doubts :-The non-compliance of Section 42 and 50 of the Act and doubt about the presence of PW-2 at the time of search and seizure were enough to draw the inference that the case was not proved beyond reasonable doubt by the prosecution. The non-examination of a vital witness, the seizure witness Tapan Chatterjee added to such reasonable doubt.

Another seizure witness who was examined as PW-3 said that he was going to his office at about 3 pm. on 15.11.2011. In front of Dooradarshan Kendra, he found a gathering. In his cross-examination he admitted that he does not need to cross Dooradarshan Kendra to go to his office from his home. It was doubtful whether PW-3 was, actually, an independent witness.

10. The Learned Amicus Curiae further pointed out the following errors in the impugned judgment:-

- i. While disapproving the argument put forth in the trial by the Learned Advocate of the accused persons that the provisions of Section 42 and 50 of the Act have not been complied with, the Learned Judge held that the accused persons were detained at a public place, so the provisions of Section 42 and 50 of the Act were not applicable in this case.
- ii. The Learned Judge erred in not considering that the main difference between Section 42 and Section 43 was “knowledge and information received”. In this particular case, it was not the story of the prosecution that the Officer suddenly carried out a search at a public place. From the written complaint and the deposition of PW-1, it was clear that the PW-1 who conducted the raid, had received a secret information at around 14:50 hrs. However PW-1 did not record the same, and forward it to superior officer as mandated in Section 42 of the Act.
- iii. Further, the appellant and the co-accused person were detained while they were riding a motorbike bearing number WB 20 L9704 on 15.11.2011. Nothing was produced to show that the motorbike bearing number WB 20 L9704 is a ‘transport vehicle’ or ‘public service vehicle’, under the Motor Vehicle Act. At the relevant point of time, all motorbikes in West Bengal used to be personal vehicle. It was pertinent to mention that in 2016, for the first time, the Government of

West Bengal allowed the registration of two-wheelers as “contract carriage”. Hence, the motorbike could not be said to be public conveyance” within the meaning of Section 43.

- iv. Hence the provisions Section 42 and 50 of the Act are applicable in this case, and it is evident that there has been gross violation of the same.

11. Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 states as follows:-

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

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

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

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

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

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

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

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

12. Section 43 of the Narcotic Drugs and Psychotropic Substances Act, 1985 states as follows:-

"43. Power of seizure and arrest in public place.— Any officer of any of the departments mentioned in section 42 may—

(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to

believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

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

13. Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 states as follows:-

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

14. Section 20(b)(ii)(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 states as follows:-

“Punishment for contravention in relation to cannabis plant and cannabis.— *Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder,—*

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable,—

(ii) where such contravention relates to sub-clause (b),—

(A) and involves small quantity, with rigorous imprisonment for a term which may extend to 2 [one year], or with fine which may extend to ten thousand rupees, or with both;

(B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees: Provided that

the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.”

15. In **State of Rajasthan v. Jagraj Singh**¹, the Hon’ble Supreme Court observed as follows:-

“21. There is nothing to impeach the aforesaid findings. We have also perused the statement of Vira Ram in which statement he has never even stated that he has any permit for running the vehicle as transport vehicle. He has stated that “... I had given this jeep to Kartara Ram, resident of ... who is my relative to run it for transporting passengers”. Admittedly the jeep was intercepted and was seized by the police. In view of the above, the jeep cannot be said to be a public conveyance within the meaning of the Explanation to Section 43. Hence, Section 43 was clearly not attracted and the provisions of Section 42(1) proviso were required to be complied with and the aforesaid statutory mandatory provisions having not been complied with, the High Court did not commit any error in setting aside the conviction.

22. There is one more aspect which needs to be noted. The present is a case where the prosecution itself has come with case that secret information was received from the informer which information was recorded in Ext. P-14 and Ext. P-21 roznamcha and thereafter the Station House Officer along with the police party proceeded towards the scene. The present is not a case where the Station House Officer suddenly carried out search at a public place. The Station House Officer in his statement has also come up with the facts and case to prove compliance with Section 42. When search is conducted after recording information under Section 42(1), the provisions of Section 42 have to be complied with. This Court in Directorate of Revenue v. Mohd. Nisar Holia [Directorate of Revenue v. Mohd. Nisar Holia, (2008) 2 SCC 370 : (2008) 1 SCC (Cri) 415]

¹ (2016) 11 SCC 687

had occasion to consider Sections 41, 42 and 43 Explanation. The following was stated in para 14: (SCC pp. 377-78)

“14. Section 43, on plain reading of the Act, may not attract the rigours of Section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of Section 42, need not be complied with, only because the place whereat search is to be made is a public place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with. An interpretation which strikes a balance between the enforcement of law and protection of the valuable human right of an accused must be resorted to. A declaration to the effect that the minimum requirement, namely, compliance with Section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as non-compliance with the said provision would not render the search a nullity. A distinction therefore must be borne in mind between a search conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance.”

24. After referring to a large number of cases, this Court in *Balbir Singh* case [*State of Punjab v. Balbir Singh*, (1994) 3 SCC 299 : 1994 SCC (Cri) 634] recorded the conclusion in para 25 which is to the following effect: (SCC pp. 320-22)

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building, etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial....”

16. In the case of **Raju v. State of W.B.**², the Hon’ble Supreme Court observed as follows:-

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

13. The appellant was walking along the Picnic Garden Road. He was intercepted and detained immediately by the raiding party in front of Falguni Club, which was not a building, conveyance or an enclosed place. The place of occurrence was accessible to the public and fell within the ambit of the phrase “public place” in the Explanation to Section 43. Section 42 had no application.

21. As evidenced by Ext. 3, a first option was given to the appellant. PW 2 informed him that it was his legal right to be searched either in the presence of a Magistrate or in the presence of a gazetted officer. The appellant was then asked to give his option by indicating whether he wanted to be searched by a Magistrate or a gazetted officer. The appellant indicated that he wanted the search to be carried out in the presence of a gazetted officer. When PW 4 arrived, he was introduced to the detainee as a gazetted officer. As evidenced by Ext. 4, PW 4 then gave the appellant a second option. He inquired of him again, whether he wanted to be

² (2018) 9 SCC 708 : (2019) 1 SCC (Cri) 371

searched in the presence of a gazetted officer or in the presence of a Magistrate. The appellant reiterated his desire to be searched in the presence of a gazetted officer. Before the search of the appellant commenced, the gazetted officer asked the appellant whether he wanted to search PW 2 before his own search was carried out by PW 2. The appellant agreed to search PW 2 before the latter carried out his search. On conducting the search, only personal belongings of PW 2 were found by the appellant. On the search of the appellant in the presence of the gazetted officer, a biscuit-coloured jute bag was recovered from the appellant, and Rs 2400 cash in the denomination of 24 notes of Rs 100 each was found in the left pocket of the appellant's trouser. When the bag was opened, a black polythene cover containing nineteen rectangular broken sheets of a blackish/deep brown colour weighing 1.5 kg was recovered. The sheets were tested and were found to be charas.”

17. In the case of **Krishna Kanwar (Smt) Alias Thakuraeen v State of Rajasthan**³, a two judge Bench of the Hon’ble Supreme 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:

“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 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

³ (2004) 2 SCC 608; Rajendra v. State of M.P., (2004) 1 SCC 432

*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]

7 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.

8 The appellant was walking along the Picnic Garden Road. He was intercepted and detained immediately by the raiding party in front of Falguni Club, which was not a building, conveyance or an enclosed place. The place of occurrence was accessible to the public and fell within the ambit of the phrase “public place” in the explanation to Section 43. Section 42 had no application.

9 The cases relied on by the learned counsel for the appellant will also not apply in the context of the facts before us. In **Mansuri**, an auto-rickshaw driver was intercepted by police personnel. Four gunny bags of charas were recovered from the auto-rickshaw. The police officer who had prior information about transportation of some narcotic substance, had neither taken down the information before carrying out the seizure and arrest, nor apprised his superior officer. He contended that the action taken by him was under Section 43 and not Section 42. Rejecting the argument of the State, this Court held that compliance with Section 42 was required as the auto-rickshaw was a private vehicle and not a public

conveyance as contemplated under Section 43. Similarly, in **Jagraj**, contraband was recovered from a jeep which was intercepted by police personnel on a public road after receiving prior information. The police officer who had received the information, admitted to not taking it down in writing, contending that Section 43 would be applicable. Rejecting the argument of the State, this Court held that the jeep which was intercepted, was not a public conveyance within the meaning of Section 43 and compliance with Section 42(1) was therefore mandatory. In **Holia**, Mandrax tablets were recovered from the hotel room of the respondent. The information was not reduced to writing by the officer who had first received the information. The State claimed that compliance with Section 42 was not required as the hotel was a public place. Rejecting the submission of the State, this Court held that while a hotel is a public place, a hotel room inside it is not a public place. This Court held thus:

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

There is hence no substance in the first submission.

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

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

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

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

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

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

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

According to Section 50(1), an empowered officer should necessarily inform the suspect about his legal right, if he so requires, to be searched in the presence of a gazetted officer or a magistrate. In **Vijaysinh Chandubha Jadeja v State of Gujarat (“Vijaysinh”)**⁴, a Constitution Bench of this Court interpreted Section 50 thus:

“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 ... In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under Sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision ... 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 (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of Sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh’s case (supra).”

The principle which emerges from **Vijaysinh** is that the concept of “substantial compliance” with the requirement of Section 50 is neither in

⁴ (2011) 1 SCC 609

accordance with the law laid down in **Baldev Singh**, nor can it be construed from its language. [Reference may also be made to the decision of a two judge Bench of this Court in **Venkateswarlu**]. Therefore, strict compliance with Section 50(1) by the empowered officer is mandatory. Section 50, however, applies only in the case of a search of a person. In **Baldev Singh**, the Court held “on its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises, etc.” In **State of Himachal Pradesh v Pawan Kumar (“Pawan Kumar”)**⁵, 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:

“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 ...After the decision in *Baldev Singh*, this Court has consistently held that Section 50 would only apply to search of a person and not to any bag, article or container, etc. being carried by him.”

18. In **Parmanand**, on a search of the person of the respondent, no substance was found. However, subsequently, opium was recovered from the bag of the respondent. A two judge Bench of this Court considered whether compliance with Section 50(1) was required. This Court held that the empowered officer was required to comply with the requirements of Section 50(1) as the person of the respondent was also searched. [Reference may also be made to the decision of a two judge Bench of this Court in **Dilip v State of Madhya Pradesh**⁶. It was held thus:

“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.”

⁵ (2005) 4 SCC 350

⁶ (2007) 1 SCC 450

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

“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.”

The question which arises before us is whether Section 50(1) was required to be complied with when charas was recovered only from the bag of the appellant and no charas was found on his person. Further, if the first question is answered in the affirmative, whether the requirements of Section 50 were strictly complied with by PW-2 and PW-4.”

19. In the instant case, the seizure was conducted at a public place and thereafter the accused persons were arrested. Therefore, strict compliance under Section 42 of the aforesaid Act was not necessary. The complainant

served first option to the detained persons and they opted to search in presence of the Government Officer. Moreover, the search was carried in respect of the bag containing two packets of *Ganja* weighing 3.500 kgs and 2.500 kgs respectively which were seized under a seizure list and it was not concerned with the search of a person. Therefore, the mandatory provision under Section 50 of the NDPS Act was not applicable in this case.

20. The prosecution proved the seizure of the contrabanded articles from the appellants in an open air at a public place and subsequently arrested them.

21. The prosecution was able to prove its case beyond reasonable doubt.

22. In view of the above discussions, the appeal along with connected applications are dismissed.

23. There is no order as to costs.

24. I record my appreciation for the able assistance rendered by Learned Advocate, Mr. Soham Banerjee, as *Amicus Curiae* in disposing of the appeal.

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

26. 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.)