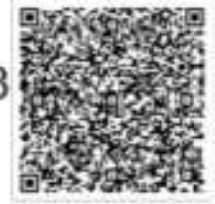


2025:PHHC:027248



CRA-S-2439-SB-2009 (O & M)

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

(203)

CRA-2439-SB-2009 (O&M)

Reserved on:-24.02.2025

Date of Decision: 25.02.2025

Santosh Kumar

... . Appellant

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present: Mr. H.S. Sidhu, Advocate, for the appellant.

Mr. Harkanwar Jeet Singh, AAG, Punjab.

JASJIT SINGH BEDI, J.

The present appeal has been filed impugning the judgment dated 10.10.2009 passed by the Special Judge, Moga whereby the accused-appellant/Santosh Kumar alongwith his co-accused came to be convicted.

2. The FIR in the present came to be registered on 07.06.2009. The judgment of conviction and order of sentence was passed on 10.10.2009 by the Special Judge, Moga. The instant appeal was filed on 14.10.2009 and has come up for final hearing now i.e. after a period of almost 16 years from the date of registration of the FIR.

3. As per the facts of the case on 07.06.2009, SI Iqbal Singh, HC Para Singh alongwith the police party were going on their government Gypsy No. PB-29H-8312 driven by constable Amarjit Singh for patrolling from Amritsar Road, Moga-Zira road and then towards grain market Moga.

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At about 11.00 a.m., when the police party turned in side from the bridge of canal minor they saw one motor cycle colour red coming from the opposite direction on which three persons were traveling. The said motor cycle was bearing No. PB-29H-7948 and it was coming from Grain Market towards Zira Road. On seeing the police party, they got confused and tried to turn back. As a result of this, their motor cycle fell down. SI Iqbal Singh stopped the vehicle and those three persons were apprehended on the basis of suspicion. The person who was driving the motor cycle disclosed his name as Piara Singh. The second person disclosed his name as Santosh Kumar and the third person disclosed his name as Anil Kumar. SI Iqbal Singh asked those persons that he suspected some intoxicant material in their possession and their search was required. They were apprised of their legal right to get the search conducted in the presence of a Gazetted Officer or a Magistrate. The three persons reposed confidence in the investigating officer for their search. Regarding this, a consent memo was prepared which was duly signed by the accused and witnesses. An effort was made to join some private witness in the police party but nobody was available. SI Iqbal Singh conducted the search of accused persons as per the rules. On the personal search of Santosh Kumar, opium wrapped in a polythene paper and tied around his abdomen with a piece of cloth/Parna under his shirt was recovered. Weights and scale were arranged. A sample of 10 grams of opium was drawn separately which was sealed in plastic container. The remaining opium came out to be 490 grams. It was also put in a plastic container alongwith the piece of cloth. Both the sample and the bulk case

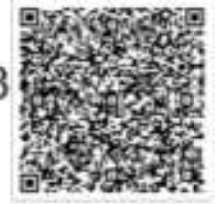
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CRA-S-2439-SB-2009 (O & M)

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property were sealed by the investigating officer with his seal bearing impressions IS. Sample seal impression was prepared on form M-29. The seal after use was handed over to HC Tara Singh. The above said case property alongwith motor cycle and its RC were taken into police possession. On personal search of accused Piara Singh cash of Rs. 120/-, on personal search of Santosh Kumar cash of Rs. 80/- and on personal search of Anil Kumar Rs. 50/- were recovered and separate personal search memos were prepared. The accused persons were arrested in this case. On the basis of this, a ruqa was written and it was sent to the police station through HC Paramjit Singh on the basis of which the formal FIR was recorded. The site plan of the place of recovery was prepared. The statements of the witnesses were recorded. All the accused were arrested in this case. On return to the police station, they were produced before SHO/SI Ram Singh. He made inquiry from the accused persons and checked the parcels of case property. The entire case property along with form M-29 was taken possession by SI Ram Singh. SI Ram Singh affixed his own seal on the sample and the case property bearing impressions 'RS' and also prepared sample seal impression. On 8.6.2009, SI Ram Singh produced the accused along with the case property before the Magistrate. The inventory proceedings were conducted. As per the directions of the court, one sample drawn by the I.O. along with form M-29 were deposited in the police Malkhana and the remaining case property was deposited in the judicial Malkhana. The sample was also sent to the Chemical Examiner Laboratory for the purpose of testing. On receipt of the report of the Chemical Examiner and



completion of the entire investigation, all the accused were challaned in this case.

4. The accused were charge sheeted under Section 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter to be referred as 'NDPS Act'). The charge sheet was read over and explained to the accused in simple language to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined (PW1) Ashok Kumar photographer, (PW2) Sandeep Kumar Clerk DTO, Moga, (PW3) Sukhjinder Singh Addl. Ahlmad, (PW4) HC Jarnail Singh, (PW5) Ekamkar Singh, (PW6) SI Ram Singh, (PW7) SI Iqbal Singh the investigating officer, (PW8) HC Tara Singh the recovery witness and closed the evidence after tendering the report of the Chemical Examiner Ex. P26.

6. The statements of the accused were recorded under Section 313 Cr.P.C. by putting to them all incriminating circumstances appearing in evidence against them to which they pleaded innocence. Accused Piara Singh took the plea that on 07.06.2009, he was doing construction work in the house of Anil Kumar. Accused Piara Singh and Anil Kumar further took the plea that he along with Anil Kumar had gone to Grain Market to bring some labourer. The police met them on the way as they were triple riding on the motor cycle. The police searched them. Nothing incriminating was recovered from them. The police took the labourer with them to the police station whose name they later on came to know as Santosh Kumar. However, later they involved them in the present case.



Accused-appellant/Santosh Kumar took the plea that he is a street hawker. He was doing the work of selling fruits. He is permanent resident of Jharkhand. No contraband was recovered from him. He could not read or write Punjabi language. He could only read and write in the Hindi language. The case against him was false.

7. Based on the evidence led, while the co-accused, namely, Piara Singh and Anil Kumar came to be acquitted, the accused-appellant/Santosh Kumar came to be convicted and sentenced vide a judgment of conviction and order of sentence dated 10.10.2009 passed by the Special Judge, Moga as under:-

Offence under Section	Sentence RI/SI	Fine	RI/SI in default of payment of fine
18 of the NDPS Act	RI 01½ year	Rs. 3,000/-	RI 01 month

8. The aforementioned judgment is under challenge in the present appeal.

9. During the pendency of the instant appeal, the sentence of the accused-appellant was suspended vide order dated 15.10.2009.

10. The learned counsel for the accused-appellant contends that as the recovery was effected from a ‘Safa’ tied to the abdomen of the accused-appellant/Santosh Kumar, Section 50 of the NDPS Act would be applicable to the search and seizure. He places reliance upon the judgment in *‘State of Himachal Pradesh versus Pawan Kumar (Crl.Appeal No.222 of 1997) with State of Rajasthan versus Bhanwar Lal (Crl. Appeal No.375 of*



2003), {2005(2) RCR(Criminal) 621}’. He further contends that there is a violation of Section 50 of the Act inasmuch as though an option was given to the appellant and his co-accused that they could be searched in the presence of a Magistrate or a Gazetted Officer, their consent was recorded to the effect that they were ready and willing to get themselves searched by the investigating officer, namely, PW-7/SI Iqbal Singh who then carried out the search and seizure. Reliance is placed on the judgments in ‘**Vijaysinh Chandubha Jadeja Vs. State of Gujarat, 2011(1) SCC 609, State of Rajasthan Vs. Parmanand & another, 2014(2) RCR (Criminal) 40, Arif Khan @ Agha Khan Vs. State of Uttarakhand, 2018(2) RCR (Criminal) 931 and Dharam Pal versus State of Punjab (CRA-S-2475-SB-2009 decided on 15.02.2025)**’.

11. The learned counsel for the State, on the other hand, contends that it was the accused-appellant/Santosh Kumar and his co-accused who themselves had reposed their faith in the investigating officer to conduct their search. Therefore, it cannot be said that there was a violation of Section 50 of the NDPS Act. He, thus, contends that the instant appeal was liable to be dismissed.

12. I have heard the learned counsel for the parties.

13. Before proceedings further in the matter, it would be apposite to refer to the provisions of Section 50 of the NDPS Act, 1985 and the same reads as under:-



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 Gazette 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. As regards the applicability of Section 50 of the NDPS Act, to a case where the search of the body or any bag, article or container kept



concealed on the body, is concerned, the Hon'ble Supreme Court in '***State of Himachal Pradesh versus Pawan Kumar with State of Rajasthan versus Bhanwar Lal, 2005(2) RCR(Criminal) 621***' has held as under:-

10. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a hold all, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act.

11. An incriminating article can be kept concealed in the body or clothings or coverings in different manner or in the footwear. While making a search of such type of articles, which have been kept so concealed, it will certainly come within the ambit of the word "search of person". One of the tests, which can be applied is, where in the process of search the human body comes into contact or shall have to be touched by the person carrying out the search, it will be search of a person. Some indication of this is provided by sub-section (4) of Section 50 of the Act, which provides that no female shall be searched by anyone excepting a female. The legislature has consciously made this provision as while conducting search of a female, her body may come in contact or may need to be touched and, therefore, it should be done only by a female. In the case of a bag, briefcase or any such article or container, etc., they would not



normally move along with the body of the human being unless some extra or special effort is made. Either they have to be carried in hand or hung on the shoulder or back or placed on the head. They can be easily and in no time placed away from the body of the carrier. In order to make a search of such type of objects, the body of the carrier will not come in contact of the person conducting the search. Such objects cannot be said to be inextricably connected with the person, namely, the body of the human being. Inextricable means incapable of being disentangled or untied or forming a maze or tangle from which it is impossible to get free.

15. As regards the validity of a search and seizure where an accused willingly agrees to be searched by a member of the Police Party who is not a Gazetted Officer or a Magistrate despite the accused being given an offer of being searched in the presence of either a Gazetted officer or a Magistrate, the Hon'ble Supreme Court and this Court have held as under:-

In **Vijaysinh Chandubha Jadeja** (supra), it was held as under:-

“22. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the Narcotic Drugs and Psychotropic Substances 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



Narcotic Drugs and Psychotropic Substances 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. As observed in Re Presidential Poll, (1974)2 SCC 33, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole." We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the Narcotic Drugs and Psychotropic Substances 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). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other



officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.”

(emphasis supplied)

In **State of Rajasthan** (supra), it was held as under:-

“2. The case of the prosecution was that on 13/10/1997 during Kota Camp at Iklera, P.N. Meena, Sub-Inspector, Office of the Narcotics Commissioner, Kota received information at 1900 hours in the evening that the respondents were to handover about 10 Kg opium on 14/10/1997 in the morning between 4.00 a.m. to 6.00 a.m. at Nangdi-Tiraha, Iklera, Chhipabaraud Road to a smuggler. This information was entered by SI Meena in the diary and he forwarded it to the Investigating Officer J.S. Negi, Superintendent. J.S. Negi sent this information through Constable B.L. Meena to Assistant Narcotic Commissioner, Kota. Thereafter, raiding party was formed. The raiding party was headed by Superintendent J.S. Negi. The raiding party reached Nangdi-Tiraha by a Government vehicle. Independent witnesses Ramgopal and Gopal Singh were called by SI Qureshi. Their consent was obtained. At about 4.25 a.m., the respondents came from the village Rajpura. On seeing the raiding party, they tried to run away but they were stopped. Enquiry was made with both the respondents in the presence of the independent witnesses by SI Qureshi. The respondents gave their names. Respondent No. 1 Parmanand had one white colour gunny bag of manure in his left hand. SI Qureshi told the respondents that he had to take their search. They were told about the provisions of section 50 of the NDPS Act. They were told that under section 50(1) of the NDPS Act, they had a right to get themselves searched in the presence of any nearest Magistrate or any gazetted officer or in the presence of Superintendent J.S. Negi of the raiding party. One written notice to that effect was given to them. On this notice, appellant



Surajmal gave consent in writing in Hindi for himself and for appellant Parmanand and stated that they are ready to get themselves searched by SI Qureshi in the presence of Superintendent J.S. Negi. He also put his thumb impression. Thereafter, bag of respondent No. 1 Parmanand was searched by SI Qureshi. Inside the bag in a polythene bag some black material was found. The respondents told him that it was opium and they had brought it from the village. The weight of the opium was 9 Kg. 600 gms. Necessary procedure of drawing samples and sealing was followed. The respondents were arrested. After completion of the investigation, respondent No. 1 Parmanand was charged for offence under Section 8 read with section 18 of the NDPS Act and respondent No. 2 Surajmal was charged for offence under Section 8 read with Section 18 and for offence under Section 8 read with section 29 of the NDPS Act. The prosecution examined 11 witnesses. The important witnesses are PW-5 J.S. Negi, the Superintendent, PW-9 SI Meena and PW-10 SI Qureshi. The respondents pleaded not guilty to the charge. They contended that the police witnesses had conspired and framed them. The case is false.

3. Learned Special Judge convicted respondent No. 1 Parmanand under Section 8 read with section 18 of the NDPS Act and respondent No. 2 Surajmal under Section 8 read with section 28 of the NDPS Act. They were sentenced for 10 years rigorous imprisonment each and a fine of L 10 lakhs each. In default of payment of fine, they were sentenced to undergo rigorous imprisonment for two years.

4. Aggrieved by the said judgment and order, the respondents preferred an appeal to the Rajasthan High Court. By the impugned order, the Rajasthan High Court acquitted the respondents. Hence, this appeal by the State.

5. Mr. Imtiaz Ahmed, learned counsel for the State of Rajasthan submitted that the High Court was wrong in coming to the



conclusion that there was no compliance with section 50 of the NDPS Act. Counsel submitted that PW-10 SI Qureshi has clearly stated that the respondents were communicated their right under section 50(1) of the NDPS Act. A written notice was also given to them and only after they consented to be searched by PW-10 SI Qureshi in the presence of PW-5 J.S. Negi, the Superintendent, that the search of their person and search of bag of respondent No. 1 Parmanand was conducted. Counsel submitted that the High Court was also wrong in disbelieving independent pancha witnesses. Counsel urged that the impugned order is perverse and deserves to be set aside.

6. Ms. Nidhi, learned counsel for the respondents, on the other hand, submitted that admittedly notice under section 50 of the NDPS Act was a joint notice. The respondents were entitled to individual notice. The search is, therefore, vitiated. In this connection, counsel relied on judgment of the Punjab and Haryana High Court in Paramjit Singh and Anr. v. State of Punjab, 1997(1) RCR (Criminal) 293 : 1997(1) CRIMES 242 and judgment of the Bombay High Court in Dharamveer Lekhram Sharma and Another v. The State of Maharashtra and Ors., 2001(2) RCR (Criminal) 788: 2001(1) CRIMES 586. Counsel submitted that search was a farce. The High Court has, therefore, rightly acquitted the respondents.

7. The question is whether section 50 of the NDPS Act was complied with or not. Before we go to the legalities, it is necessary to see what exactly the important police witnesses have stated about compliance of section 50 of the NDPS Act. The gist of the evidence of the police witnesses PW-5 J.S. Negi, the Superintendent, PW-9 SI Meena and PW-10 SI Qureshi is that the respondents were informed that they have a right to be searched in the presence of a gazetted officer or a nearest Magistrate or before J.S. Negi, the Superintendent, who was present there. They were given a written notice. On that notice, respondent No. 2 gave his consent in Hindi in his handwriting



that he and respondent No. 1 Parmanand are agreeable to be searched by PW-10 SI Qureshi in the presence of PW-5 J.S. Negi, the Superintendent. He signed on the notice in Hindi and put his thumb impression. Respondent No. 1 Parmanand did not sign. There is nothing to show that respondent No. 1 Parmanand had given independent consent. Search was conducted. PW-10 SI Qureshi did not find anything on the person of the respondents. Later on, he searched the bag which was in the left hand of respondent No. 1 - Parmanand. In the bag, he found black colour material which was tested by chemical kit. It was found to be opium.

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

13. It is now necessary to examine whether in this case, section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in Baldev Singh, it is not necessary to inform the accused person, in writing, of his right under section 50(1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which



only respondent No. 2 - Surajmal is stated to have signed for himself and for respondent No. 1 - Parmanand. Respondent No. 1 Parmanand did not sign.

14. In our opinion, a joint communication of the right available under section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval. It bears repetition to state that on the written communication of the right available under section 50(1) of the NDPS Act, respondent No. 2 Surajmal has signed for himself and for respondent No. 1 Parmanand. Respondent No. 1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorised respondent No. 2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No. 1



Parnanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.

15. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a 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 a nearest Magistrate or a 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. We have, therefore, no hesitation in concluding that breach of section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed.



Appeal dismissed.”

(Emphasis supplied)

In **Arif Khan @ Agha Khan** (supra), it was held as under:-

“7. Thereafter, the accused was asked by the police personnel of raiding party as to whether he is in possession of contraband "Charas". The accused admitted that he is in possession of "Charas". On apprehending the accused, he was informed by the police personnel that he has a legal right to be searched in the presence of a Gazetted Officer or a Magistrate to which the accused replied that he has a faith on the raiding police party and consented to be searched by them.

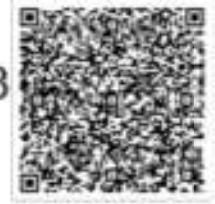
8. The raiding police party accordingly obtained his consent in writing to be searched by the raiding police party. The raiding police party then searched the accused which resulted in seizure of "Charas" weighing around 2.5 K.G. in quantity from his body.

**** **** ****

*14. Learned counsel contended that the prosecution has failed to ensure mandatory compliance of Section 50 of the NDPS Act inasmuch as the alleged recovery/search of the contraband (Charas) made by the raiding police party from the appellant's body was not done in accordance with the procedure prescribed under Section 50 of the NDPS Act which according to learned counsel is mandatory as held by this Court in the case of *Vijaysinh Chandubha Jadeja v. State of Gujarat*, 2010(4) RCR (Criminal) 911 : 2011(1) SCC 609.*

15. Learned counsel urged that the search/recovery of the alleged contraband from the appellant ought to have been made only in the presence of either a Magistrate or a Gazetted Officer only.

16. It was urged that since admittedly the prosecution did not make the search/recovery from the appellant in the presence of



a Magistrate or a Gazetted Officer and, therefore, the alleged recovery of the contraband "Charas" from the appellant is rendered illegal being in contravention of requirements of Section 50 of the NDPS Act thereby entitling the appellant for an acquittal from the charges.

18. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal and while setting aside of the impugned judgment acquit the appellant from the charges in question.

19. The short question which arises for consideration in the appeal is whether the search/recovery made by the police officials from the appellant (accused) of the alleged contraband (charas) can be held to be in accordance with the procedure prescribed under Section 50 of the NDPS Act.

20. In other words, the question that arises for consideration in this appeal is whether the prosecution was able to prove that the procedure prescribed under Section 50 of the NDPS Act was followed by the Police Officials in letter and spirit while making the search and recovery of the contraband "Charas" from the appellant (accused).

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

26. It is the case of the prosecution and which found acceptance by the two Courts below that since the appellant (accused) was apprised of his right to be searched in the presence of either a Magistrate or a Gazetted Officer but despite telling him about his legal right available to him under Section 50 in relation to the search, the appellant (accused) gave his consent in writing



to be searched by the police officials (raiding party), the two Courts below came to a conclusion that the requirements of Section 50 stood fully complied with and hence the appellant was liable to be convicted for the offence punishable under the NDPS Act.

27. We do not agree to this finding of the two Courts below as, in our opinion, a search and recovery made from the appellant of the alleged contraband "Charas" does not satisfy the mandatory requirements of Section 50 as held by this Court in the case of Vijaysinh Chandubha Jadeja (supra). This we say for the following reasons.

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

29. Though, the prosecution examined as many as five police officials (PW-1 to PW-5) of the raiding police party but none of



them deposed that the search/recovery was made in presence of any Magistrate or a Gazetted Officer.

30. For the aforementioned reasons, we are of the considered opinion that the prosecution was not able to prove that the search and recovery of the contraband (Charas) made from the appellant was in accordance with the procedure prescribed under Section 50 of the NDPS Act. Since the non-compliance of the mandatory procedure prescribed under Section 50 of the NDPS Act is fatal to the prosecution case and, in this case, we have found that the prosecution has failed to prove the compliance as required in law, the appellant is entitled to claim its benefit to seek his acquittal.”

(emphasis supplied)

In ***Dharam Pal (supra)***, this Court held as under:-

“15. A perusal of the law as laid down by the Hon’ble Supreme Court in the aforesaid judgments is that the provisions of Section 50 of the NDPS Act are mandatory and require strict compliance and failure to comply with the provisions 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. Further, in order to impart authenticity and transparency, at the first instance, it should be the endeavour of a police party to produce the suspect before the nearest Magistrate who enjoys more confidence of the common man compared to any other officer. Further, where an offer is given to an accused that he could be searched in the presence of a Gazetted Officer, Magistrate or by a member of the Police party who is not Gazetted Officer and the police party itself is not accompanied by a Gazetted Officer but the accused expresses his willingness to be searched by the raiding party reposing faith on the raiding police party and consents to be searched by them, even then, the offer



would be violative of Section 50 of the NDPS Act inasmuch as it is a legal imperative that the search is carried out in the presence of a Gazetted Officer or Magistrate only and the question of giving a third option of a search being conducted by a member of the police party does not arise. Still further, where only two options are given in the compliance of Section 50 of the NDPS Act but the accused voluntarily expresses his willingness to be searched by a member of the raiding party none of whom are Gazetted Officers and the search is carried out by such unauthorised officer, this search and seizure, if any would be in violation of Section 50 of the Act and the judgments of the Hon'ble Supreme Court (supra).

16. *Coming back to the facts of the instant case, apparently, the search could have been conducted only before a Gazetted Officer or a Magistrate. The question of a third option being given or recording of concession of the accused that he was ready for a search to be conducted by the police party which did not comprise of a Gazetted Officer or Magistrate does not arise. If such a concession of an accused was recorded and amounted to due compliance of Section 50 of the NDPS Act, then an accused in custody and under duress would easily succumb to police pressure and consent for a search to be conducted by the police party arresting him. This, most essential and vital safeguard would be rendered nugatory.*

17. *Therefore, this Court has no hesitation to hold that there must be strict compliance of Section 50 of the NDPS Act and the search of a person must be conducted in the presence of a Gazetted Officer or Magistrate only even if while exercising his option, the accused states that he wishes to be searched by a member of the police party none of whom are Gazetted Officers.*

18. *In view of the aforementioned discussion, quite apparently, there is a violation of Section 50 of the NDPS Act inasmuch as the accused/appellant consented to be searched by ASI Baljit Singh (PW1) who was not a Gazetted Officer, the search was conducted by*



PW1 and the alleged recovery of 150 gm of opium effected pursuant to the said illegal search.

19. Therefore, the impugned judgment dated 06.10.2009 passed by the Judge, Special Court, Barnala is set aside and the appellant is acquitted of the charges framed against him.”

16. In the instant case, apparently, there is a violation of Section 50 of the NDPS Act inasmuch as, though, an option was given to the accused-appellant alongwith his co-accused that they could be searched in the presence of a Gazetted Officer or a Magistrate, they consented to be searched by SI Iqbal Singh (PW-7) who was neither a Gazetted Officer nor a Magistrate.

17. In view of the apparent violation of Section 50 of the NDPS Act of the search having been conducted by PW-7/SI Iqbal Singh, a member of the Police Party, the alleged search and seizure of 500 grams of opium stands vitiated.

18. Therefore, the impugned judgment dated 10.10.2009 passed by the Special Judge, Moga, is set aside and the accused-appellant/Santosh Kumar is acquitted of the charges framed against him.

(JASJIT SINGH BEDI)
JUDGE

February 25, 2025
sukhpreet

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No