

(2015) 06 CAL CK 0044
In the Calcutta High Court
Case No : C.R.A. No. 82 of 2014

Biswajit Das and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 25-06-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 215, 313, 464
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 20(a)(b)
(c)(ii), 41, 42, 42(2)

Citation : (2015) 3 CALLT 359

Hon'ble Judges : Debasish Kar Gupta, J;Md. Mumtaz Khan, J

Bench : Division Bench

Advocate : Rabi Sankar Chattopadhyay, Anindo Sundar Das, Imteaz Ahmed and Santanu Maji, for the Appellant; Manjit Singh and Pawan Kumar Gupta, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Md. Mumtaz Khan, J—This appeal is preferred by the appellants assailing the judgment and order of conviction and sentence dated 30.08.2013 and 02.09.2013 respectively passed by the Learned Judge, Special Court (under NDPS Act)-cum-Additional Sessions Judge, 3rd Court, Malda, in Special Trial No. 02 of 2012 arising out of Special Case No. 57 of 2011. By virtue of the impugned judgment the appellants were found guilty of the offence punishable under section 20(C) of the Narcotic Drugs and Psychotropic Substance Act, 1985 (hereinafter referred to as the NDPS Act) and accordingly convicted and sentenced to undergo rigorous imprisonment for 10 years each and to pay fine of Rs. one lakh each and in default to undergo simple imprisonment for two years each. The prosecution case, in brief, is as follows:--

2. On 18.07.2011 at 22.45 hrs. P.W. 1 by producing the appellants at English Bazar P.S. along with 27 kgs and 400 gms. of "ganja" and a Matiz vehicle being No. WB74C/9888 lodged a written complaint there to the effect that on that date

at 19.30 hours he had received a telephonic information from source that two persons were proceeding towards Lalgola, Dist. Murshidabad from Cooch Behar carrying Ganja in vehicle No. WB74C/9888 and would arrive at Rathbari, P.S. English Bazar at about 20.00 hours. Accordingly, he directed the source to wait at Rathbari More and informed the duty officer to diarise the information and to inform his superior officer. He himself also tried to contact S.D.O., Sadar Malda for the presence of an Executive Magistrate but could not contact him. He then left for Rathbari More along with P.W. Nos. 2, 3, 4 & 5 to work out the information and also contacted two local persons namely Chitta Hazra and P.W. 8 and told them about the source information and requested them to remain present with them as witnesses and thereafter they ambushed at Rathbari More. At about 20.10 hours they found the vehicle coming towards Rathbari More on NH-34 and accordingly on being identified by the source he detained that vehicle near Traffic Office on NH-34 and found the appellants inside the vehicle. He, thereafter, contacted P.W. 7, Dy. SP (D&T), Malda and also sent a written requisition through constable No. 610 Jakir Hossain requesting him to come to Rathbari More and accordingly at 20.50 hours P.W. 7 came there. On interrogation appellants disclosed their identity. Thereafter observing legal formalities search was made and three bags containing Ganja measuring 11 Kg 600 gms., 10 Kg 600 gms. and 5 Kg 200 gms. respectively were found in the vehicle. On demand appellants could not produce any valid documents in support of possessing/carrying such huge quantity of ganja and also failed to produce any valid documents in respect of use of the said vehicle. Accordingly, after observing all formalities ganja along with the bags and the vehicle were seized by a seizure list and appellants were arrested. Two samples were also taken from each of the bags and thereafter seized ganja and the samples were properly packed, sealed and labeled in presence of the appellants and the witnesses.

3. On the basis of the above written complaint of P.W. 1, S.I. Riajul Islam started the English Bazar P.S. Case No. 441 of 2011 dated 18.07.2011 under section 20(a)(b)(c)(ii) of the N.D.P.S. Act against the appellants and endorsed the case to P.W. 9 for investigation who thereafter investigated the case and after completion of investigation submitted charge sheet No. 582/2011 dated 31.10.2011 under section 20(a)(b)(c)(ii) of the N.D.P.S. Act against the appellants.

4. On the basis of the above allegations of the prosecution and after hearing both parties a charge under section 20(C) of the N.D.P.S. Act was framed on 27.01.2012 against the appellants and after the appellants pleaded not guilty to the charge trial proceeded. To prove the case prosecution examined 09 witnesses including the de facto complainant, A.S.I. Ranjit Das, constables, Jakir Hossain, Asit Saha, Rejaul Karim, one Bhola Mandal, a shopkeeper, Saikat Ghosh, Dy. SP (D&T) Malda, Paban Singh and the I.O. and also produced and proved the FIR, seizure list, labels, extract of GDE, rough sketch map, chemical analysis report etc. which have been marked from Exhibits 1 to 12 and packets and the bags marked Mat. Exhibits I and II (Collectively). Thereafter on completion of trial and

after examining the appellants under section 313 Cr.P.C. learned Court below found the appellants guilty of the offence punishable under section 20(C) of the N.D.P.S. Act and accordingly by the impugned judgment convicted and sentenced them to suffer rigorous imprisonment for 10 years each and also to pay fine of rupees one lakh each in default to undergo simple imprisonment for two years each.

5. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence the appellants have preferred the instant appeal and the grounds raised in the instant appeal is that the Ld. Court below did not consider the facts and circumstances of this case and the evidence on record in its proper perspective and failed to consider that provisions of section 42(2) as well as section 50 of the NDPS Act have not been complied with and the independent witnesses were declared hostile while remaining witnesses are police personnel and made a wrong approach to the whole case and has arrived at a wrong decision that the prosecution has been able to prove guilt of the appellants and convicted them. They have, therefore, prayed for setting aside the impugned judgment and order of conviction and sentence passed by the Ld. Court below.

6. It is submitted by Mr. Rabi Sankar Chattopadhyay, Ld. Advocate appearing on behalf of the appellants, that the impugned judgment and order of conviction and sentence cannot be sustained in law for the following reasons:--

"1. There was a defect in framing of charge against the appellants as seizure of three bags containing 11 kg 600 gm, 10kg 600 gm and 5 kg 200 gm of ganja respectively have not been not mentioned there but simply total quantity had been mentioned.

2. The provisions of section 42(2) as well as section 50 of the Narcotic Drugs and Psychotropic Substance Act had not been complied with in the instant case. No information taken down in writing was sent to superior officer nor the search was made in presence of an independent Gazetted officer as required under the law. The P.W. 7 could not be said to be an independent officer as he was himself in the raiding party.

3. Prosecution examined nine witnesses but out of them only two were independent witnesses who did not supported the prosecution case while the other independent witness Chitta Hazra had not been examined by the prosecution and the remaining seven witnesses examined were police personnels.

4. In the seizure list and also in the evidence it has been mentioned that 100 gms. each of samples were taken and sent for examination but in the report of the expert, Exhibit 12, the samples sent for chemical examination has been described as 123 gms., 124 gms. and 121 gms."

7. According to Mr. Chattopadhyay, the Ld. Court below did not take into consideration the aforesaid aspects of the matter while passing the impugned judgment and order of conviction and sentence.

8. Reliance is placed by Mr. Chattopadhyay on the decisions of State of Punjab Vs. Baldev Singh, etc. etc., AIR 1999 SC 2378 : (1999) CriLJ 3672 : (1999) 157 CTR 3 : (1999) 65 ECC 695 : (1999) ECR 545 : (1999) 81 FLR 303 : (1999) 4 JT 595 : (1999) 1 LLJ 254 : (1994) 4 SCALE 144 : (1999) AIRSCW 2494 : (1999) 6 Supreme 159 , Dilip and Another Vs. State of M.P., AIR 2007 SC 369 : (2007) CLT 534 Supp : (2007) CriLJ 880 : (2006) 12 SCALE 331 : (2007) 1 SCC 450 : (2006) 9 SCR 390 Supp , Union of India (UOI) Vs. Shah Alam and Another, AIR 2010 SC 1785 : (2009) 8 JT 1 : (2009) 16 SCC 644 : (2009) 10 SCR 1118 : (2009) 7 UJ 3427 , Sukhdev Singh Vs. State of Haryana, (2013) 1 AD 29 : AIR 2013 SC 953 : (2013) CriLJ 841 : (2013) 2 JCC 41 : (2013) 1 JT 212 : (2013) 2 RCR(Criminal) 232 : (2012) 12 SCALE 699 : (2013) 2 SCC 212 : (2013) AIRSCW 312 , Kishan Chand Vs. State of Haryana, (2013) 1 AD 39 : AIR 2013 SC 357 : (2013) 116 CLT 476 : (2013) CriLJ 723 : (2013) 1 JT 222 : (2013) 2 RCR(Criminal) 67 : (2012) 12 SCALE 429 : (2013) 2 SCC 502 : (2013) AIRSCW 210 and State of Rajasthan Vs. Parmanand and Another, AIR 2014 SC 1384 : (2014) AIRSCW 1578 : (2014) CriLJ 1756 : (2014) 5 JT 271 : (2014) 3 SCALE 303 : (2014) 5 SCC 345 in support of his submissions.

9. Mr. Manjit Singh, learned Public Prosecutor, High Court, Calcutta submitted that there was no irregularity and/or defect in the framing of charge against the appellants as the total quantity of ganja seized from the appellants have been specifically mentioned in the Charge Form and the appellants who had signed on the seizure list were well aware of the details of recovery and seizure of ganja from them and further that it is a procedural matter and there was also no defence by the appellants that the error has caused any miscarriage of justice or any prejudice to them. He also drawn our attention to the provisions of section 215 and section 464 of the Criminal Procedure Code.

10. Mr. Manjit Singh also submitted that ganja seized from the possession of the appellants was raw material and samples of 100 gms of raw material from each packet was taken and the difference of weight of samples as shown in Exhibit 12 is due to the standard of weighing scale and the weight kept in the shop and also due to the weight of the envelopes which were also included.

11. According to Mr. Manjit Singh, ganja was seized not from the person but from the vehicle and accordingly search was conducted under the provisions of section 43 of the N.D.P.S. Act and not under section 42 of the said Act. He also submitted that section 50 of the N.D.P.S. Act has no application in the case of search and seizure from any vehicle in a public place. Reliance is placed by Mr. Manjit Singh on the decisions of State of Rajasthan Vs. Ram Chandra, AIR 2005 SC 2221 : (2005) CriLJ 2201 : (2005) 100 ECC 83 : (2005) 4 JT 390 : (2005) 5 SCC 151 : (2005) 1 SCR 496 : (2005) 2 UJ 848 : (2005) AIRSCW 2123 : (2005) 3 Supreme 302 , State of Himachal Pradesh Vs. Pawan Kumar, AIR 2005 SC 2265 : (2005) CriLJ 2208 : (2005) 99 ECC 737 : (2005) 4 JT 373 : (2005) 4 SCC 350 : (2005) 1 SCR 417 : (2005) AIRSCW 2154 : (2005) 3 Supreme 321 , State of Haryana Vs. Ranbir @ Rana, AIR 2006 SC 1796 : (2006) 102 CLT 215 : (2006)

CriLJ 2142 : (2006) 3 CTC 48 : (2006) 4 JT 350 : (2006) 4 SCALE 113 : (2006) 5 SCC 167 : (2006) SCC(L&S) 1012 : (2006) 1 UJ 515 : (2006) AIRSCW 2022 : (2006) 3 Supreme 358 , Babubhai Odhavji Patel, Vs. State of Gujarat, AIR 2006 SC 102 : (2005) 103 ECC 85 : (2005) 9 JT 410 : (2005) 8 SCC 725 : (2006) 1 UJ 20 : (2005) AIRSCW 5647 : (2005) 7 Supreme 691 , Kanaiya Lal v. State of M.P., reported in (2000) 10 SCC 380, Jamail Singh v. State of Punjab, reported in (2011)3 SCC 521 and Madan Lal and Another Vs. State of Himachal Pradesh, AIR 2003 SC 3642 : (2003) CriLJ 3868 : (2004) 1 CTC 381 : (2003) 89 ECC 241 : (2003) 6 SCALE 483 : (2003) 7 SCC 465 : (2003) 2 SCR 716 Supp in support of his above submissions.

12. Mr. Manjit Singh further submitted that since the gazetted officer was in the raiding party so compliance of section 42 of the N.D.P.S. Act was not required. In support of his above submission he relied on the decisions of M. Prabhulal Vs. The Assistant Director, Directorate of Revenue Intelligence, AIR 2003 SC 4311 : (2003) CriLJ 4996 : (2003) 89 ECC 697 : (2003) 2 JT 459 Supp : (2003) 7 SCALE 649 : (2003) 8 SCC 449 : (2003) 3 SCR 958 Supp : (2003) AIRSCW 4975 : (2003) 7 Supreme 61 , State of Haryana Vs. Jarnail Singh and Others, (2004) CriLJ 2541 : (2004) 93 ECC 694 : (2004) 5 SCALE 245 : (2004) 5 SCC 188 : (2004) 1 SCR 864 Supp , Union of India (UOI) Vs. Satrohan, (2008) CLT 1080 : (2008) 8 JT 148 : (2008) 10 SCALE 138 : (2008) 8 SCC 313 : (2008) 2 UJ 936 : (2008) AIRSCW 619 .

13. Mr. Singh also submitted that attempt was made to bring other independent witness by issuing summon but he did not turn up. He further submitted that PW6, was though declared hostile but he had admitted his signature on the seizure list and the labels and he had even not denied that he had no business at the relevant time. He also submitted that absence of independent witnesses was not fatal for the prosecution case and there is no reason to disbelieve the evidence of the police personnels. Reliance is placed by Mr. Singh on the decisions of Surjit Singh v. State of Punjab, reported in (2011)15 SCC 187 , Sumit Tomar Vs. The State of Punjab, (2013) 115 CLT 783 : (2013) 1 JCC 6 : (2012) 4 RCR(Criminal) 948 : (2012) 10 SCALE 507 : (2013) 1 SCC 395 , Ram Swaroop Vs. State (Govt. NCT) of Delhi, (2013) 6 AD 228 : AIR 2013 SC 2068 : (2013) CriLJ 2997 : (2013) 3 JCC 129 : (2013) 3 RCR(Criminal) 946 : (2013) 7 SCALE 407 : (2013) 14 SCC 235 in support of his above submission.

14. We have heard the learned Counsels appearing for the respective parties. We have given our thoughtful consideration to the evidence of the prosecution witnesses, the materials on record including the F.I.R., G.D.E., seizure lists, chemical analysis report, rough sketch map with regard to the place of occurrence, charge sheet, charge framed amongst other materials for examining propriety of the impugned judgment and order of conviction and sentence.

15. The Id. Court below took into consideration the evidences of P.W. Nos. 1, 2, 3, 4, 5, and 7 who had proved the search, recovery and seizure of "ganja" kept in three bags in the vehicle in which the appellants were travelling and also took

into consideration Ext. 12, the chemical analysis report where the expert had opined the sample sent for analysis to contained "ganja".

16. It is evident from the evidence of P.W. 1 that he has fully corroborated the F.I.R. and the prosecution case and his statements-in-chief remained unshaken during cross-examination. During cross-examination he even affirmed his statements made in his examination-in-chief relating to the search, recovery and seizure of "ganja" from the vehicle in which the appellants were travelling. P.W. 7, D.S.P.(DNT), Malda also corroborated the above statements of P.W. 1. He specifically stated on oath that on getting requisition from P.W. 1 he went to the P.O. and saw the car and the appellants sitting inside the car. He then disclosed them his identity and expressed his intention to search their person as well as the vehicle and gave them option of being searched either in his presence or in presence of Magistrate and on agreeing by the accused persons to be searched in his presence, search was made in his presence and three bags containing total quantity of 27 Kg 400 gms of "ganja", were recovered from the back seat of the said vehicle while nothing was found from the body of the accused persons. Interestingly he was not challenged by the defence on this score. The above statements of P.W. 1 and P.W. 7 also found corroboration from P.W. Nos. 2, 3, 4 and 5. Thus it is apparent from the above that search was made at a public place in presence of a gazetted officer and "ganja" was recovered and seized from the vehicle. So provisions of section 43 of the Narcotic Drugs and Psychotropic Substance Act will apply and not section 42 of the said Act and as such there was no requirement of the officer conducting search to record the grounds of his belief as contemplated by the proviso to section 42. Reference may be made to the decision of State of Haryana Vs. Jarnail Singh and Others, (2004) CriLJ 2541 : (2004) 93 ECC 694 : (2004) 5 SCALE 245 : (2004) 5 SCC 188 : (2004) 1 SCR 864 Supp and the relevant portion of the above decision is quoted below:--

"7. section 43 of the Narcotic Drugs and Psychotropic Substance Act provides that any officer of any of the departments mentioned in section 42 may seize in any public place or in transit any narcotic drug or psychotropic substance etc. in respect of which he has reason to believe that an offence punishable under the Act has been committed. He is also authorised to detain and search any person whom he has reason to believe to have committed an offence punishable under the Act. Explanation to section 43 lays down that 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.

8. section 42 and 43, therefore, contemplate two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while section 43 contemplates a seizure made in any public place or in transit. If seizure is made under section 42 between sunset and sunrise, the requirement of the proviso thereto has to be complied with. There is no such proviso in section 43 of the Act and, therefore, it is obvious that if a public conveyance is searched in a public place, the officer making the search is not

required to record his satisfaction as contemplated by the proviso to section 42 of the Narcotic Drugs and Psychotropic Substance Act for searching the vehicle between sunset and the sunrise.

9. In the instant case there is no dispute that the tanker was moving on the public highway when it was stopped and searched. Section 43 therefore clearly applied to the facts of this case. Such being the factual position there was no requirement of the officer conducting the search to record the grounds of his belief as contemplated by the proviso to section 42. Moreover it cannot be lost sight of that the Superintendent of Police was also a member of the searching party. It has been held by this Court in *M. Prabhulal Vs. The Assistant Director, Directorate of Revenue Intelligence*, AIR 2003 SC 4311 : (2003) CriLJ 4996 : (2003) 89 ECC 697 : (2003) 2 JT 459 Supp : (2003) 7 SCALE 649 : (2003) 8 SCC 449 : (2003) 3 SCR 958 Supp : (2003) AIRSCW 4975 : (2003) 7 Supreme 61 that where a search is conducted by a gazetted officer himself acting under 41 of the Narcotic Drugs and Psychotropic Substances Act, it was not necessary to comply with the requirement of the proviso to section 42 of the Narcotic Drugs and Psychotropic Substance Act.

10. We, therefore, hold that in the facts of this case section 50 of the Narcotic Drugs and Psychotropic Substance Act was not applicable since the contraband was recovered on search of a vehicle and there was no personal search involved. The requirement of the proviso to section 42 was also not required to be complied with since the recovery was made at a public place and was, therefore, governed by section 43 of the Act which did not lay down any such requirement. Additionally, since the Superintendent of Police was a member of the search party and was exercising his authority under section 41 of the Narcotic Drugs and Psychotropic Substances Act, the proviso to section 42 were not attracted."

17. Similarly section 50 of Narcotic Drugs and Psychotropic Substance Act applies in case of a personal search of a person and it does not extend to search of a vehicle. Reference may be made to the decisions of *Madan Lal and Another Vs. State of Himachal Pradesh*, AIR 2003 SC 3642 : (2003) CriLJ 3868 : (2004) 1 CTC 381 : (2003) 89 ECC 241 : (2003) 6 SCALE 483 : (2003) 7 SCC 465 : (2003) 2 SCR 716 Supp and the relevant portion of the above decision is quoted below:--

"17. A bare reading of section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises. (See *Kalema Tumba Vs. State of Maharashtra and Another*, AIR 2000 SC 402 : (2000) CriLJ 507 : (1999) 4 Crimes 352 : (2000) 67 ECC 6 : (2000) ECR 766 : (2000) 115 ELT 38 : (1999) 8 JT 293 : (1999) 6 SCALE 529 : (1999) 8 SCC 257 : (1999) 2 SCR 670 Supp : (2000) 1 UJ 22 : (1999) AIRSCW 4544 : (1999) 9 Supreme 179 , *State of Punjab Vs. Baldev Singh, etc. etc.*, AIR 1999 SC 2378 : (1999) CriLJ 3672 : (1999) 157 CTR 3 : (1999) 65 ECC 695 : (1999) ECR 545 : (1999) 81 FLR 303 : (1999) 4 JT 595 : (1999) 1 LLJ 254 : (1994) 4 SCALE 144 : (1999) AIRSCW 2494 : (1999) 6 Supreme 159 , *Gurbax*

Singh Vs. State of Haryana, AIR 2001 SC 1002 : (2001) CriLJ 1166 : (2001) 74 ECC 277 : (2001) 2 JT 330 : (2001) 1 SCALE 662 : (2001) 1 SCR 882 : (2001) 1 UJ 703 : (2001) AIRSCW 670 : (2001) 1 Supreme 625 . The language of section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh's case (supra). Above being the position, the contention regarding non-compliance of section 50 of the Act is also without any substance."

18. The above proposition of law was repeated and reiterated by the Hon'ble three Judges Bench of Supreme Court in the case of State of Himachal Pradesh Vs. Pawan Kumar, AIR 2005 SC 2265 : (2005) CriLJ 2208 : (2005) 99 ECC 737 : (2005) 4 JT 373 : (2005) 4 SCC 350 : (2005) 1 SCR 417 : (2005) AIRSCW 2154 : (2005) 3 Supreme 321 and the relevant portion of the above decision is quoted below:--

"9. We are not concerned here with the wide definition of the word "person", which in the legal world includes corporation, associations or body of individuals as factually in these type of cases search of their premises can be done and not of their person. Having regard to the scheme of the Act and the context in which it has been used in the section it naturally means a human being or a living individual unit and not an artificial person The word has to be understood in a broad commonsense manner and, therefore, not a naked or nude body of a human being but the manner in which a normal human being will move about in a civilized society. Therefore, the most appropriate meaning of the word "person" appears to be - "the body of a human being as presented to public view usually with its appropriate coverings and clothings". In a civilized society appropriate coverings and clothings are considered absolutely essential and no sane human being comes in the gaze of others without appropriate coverings and clothings. The appropriate coverings will include footwear also as normally it is considered an essential article to be worn while moving outside one's home. Such appropriate coverings or clothings or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. For interpreting the provision, rare cases of some religious monks and sages, who, according to the tenets of their religious belief do not cover their body with clothings, are not to be taken notice of. Therefore, the word "person" would mean a human being with appropriate coverings and clothings and also footwear.

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.

.....

12. The scope and ambit of section 50 of the Act was examined in considerable detail by a Constitution Bench in *State of Punjab Vs. Baldev Singh, etc.* etc., AIR 1999 SC 2378 : (1999) CriLJ 3672 : (1999) 157 CTR 3 : (1999) 65 ECC 695 : (1999) ECR 545 : (1999) 81 FLR 303 : (1999) 4 JT 595 : (1999) 1 LLJ 254 : (1994) 4 SCALE 144 : (1999) AIRSCW 2494 : (1999) 6 Supreme 159 and para 12 of the reports is being reproduced below:

"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. However, if the empowered officer, without any prior information as contemplated by section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the Narcotic Drugs and Psychotropic Substances Act is also recovered, the requirement of section 50 of the Act are not attracted.

19. The Bench recorded its conclusion in para 57 of the reports and sub-paras (1), (2), (3) and (6) are being reproduced below:

"57. On the basis of the reasoning and discussion above, the following conclusions arise:

(1) That when an empowered officer or a duly authorized officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from him person, during a search conducted in violation of the provisions of State

Government 50 of the Act.

.....

.....

(6) That in the context in which the protection has been incorporated in section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

13. The above quoted dictum of the Constitution Bench shows that the provisions of section 50 will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which he may be carrying."

20. The above proposition of law was also repeated and reiterated by the Hon"ble Supreme Court in the case of Jamail Singh v. State of Punjab reported in (2011)3 SCC 521 and the relevant portion of the above decision is quoted below:--

"12. The next submission made by Mr. Ujjal Singh is that there has been non compliance of section 50 of the Narcotic Drugs And Psychotropic Substances Act, in that requisite option was not given to the appellant, as to, whether he wanted to be searched in the presence of a Gazetted Officer or a Magistrate. We are unable to accept the aforesaid submission. Inspector Ram Pal (PW4) has clearly stated that the option was duly given to the appellant. The appellant had, in fact, signed on the consent statement expressing his confidence to be searched in presence of the aforesaid witness. Similarly, Satpal Singh PW5 has also stated that before affecting the search, the accused/appellant was given the necessary option as to whether he wanted to be searched before a Gazetted Officer or a Magistrate. This witness also stated that the appellant reposed his confidence in Inspector Rampal. In such circumstances, it cannot be held that there was non compliance with section 50 of the Narcotic Drugs And Psychotropic Substances Act.

12.1. This apart, it is accepted that the narcotic/opium, i.e., 1 kg. and 750 grams was recovered from the bag (thaili) which was being carried by the appellant. In such circumstances, section 50 would not be applicable. The aforesaid section can be invoked only in cases where the drug/narcotic/NDPS substance is recovered as a consequence of the body search of the accused. In case, the recovery of the narcotic is made from a container being carried by the individual, the provisions of section 50 would not be attracted. This Court in the case of Kalema Tumba Vs. State of Maharashtra and Another, AIR 2000 SC 402 : (2000) CriLJ 507 : (1999) 4 Crimes 352 : (2000) 67 ECC 6 : (2000) ECR 766 : (2000) 115 ELT 38 : (1999) 8 JT 293 : (1999) 6 SCALE 529 : (1999) 8 SCC 257 :

(1999) 2 SCR 670 Supp : (2000) 1 UJ 22 : (1999) AIRSCW 4544 : (1999) 9 Supreme 179 discussed the provisions pertaining to "personal search" under section 50 of the Narcotic Drugs and Psychotropic Substances Act and held as follows;

".....if a person is carrying a bag or some other article with him and narcotic drug or psychotropic substance is found from it, it cannot be said that it was found from his person."

Similarly, in the case of Megh Singh Vs. State of Punjab, AIR 2003 SC 3184 : (2003) CriLJ 4329 : (2003) 89 ECC 709 : (2003) 1 JT 257 Supp : (2003) 7 SCALE 483 : (2003) 8 SCC 666 : (2003) 3 SCR 720 Supp : (2003) 2 UJ 1532 : (2003) AIRSCW 4536 : (2003) 6 Supreme 832 this Court observed that;

"A bare reading of section 50 shows that it applies in case of personal search of a person. It does not extend to a search of a vehicle or container or a bag or premises."

The scope and ambit of section 50 was also examined by this Court in the case of State of Himachal Pradesh Vs. Pawan Kumar, AIR 2005 SC 2265 : (2005) CriLJ 2208 : (2005) 99 ECC 737 : (2005) 4 JT 373 : (2005) 4 SCC 350 : (2005) 1 SCR 417 : (2005) AIRSCW 2154 : (2005) 3 Supreme 321 ."

21. However in the present case before us it is evident from the evidence of the P.Ws. on record that P.W. 7, gazetted officer, after arrival at the P.O. disclosed his identity to the accused persons and also informed them that he is a gazetted officer and expressed his intention to search their person as well as the vehicle and gave them option of being searched either in his presence or in presence of Magistrate and on being agreeing by the accused persons to be searched in his presence search was made and "ganja" was recovered from the vehicle while nothing was found from the person of the accused persons. Interestingly no plea was taken nor any suggestion was put from the side of the defence to any of the prosecution witnesses nor even to P.W. 7 that accused persons were not made aware about their right to be searched in presence of any one of the officers named in section 50 of the NDPS Act. In such circumstances there is no reason to disbelieve the oral testimony of P.W. 7. It is not in dispute that there is no specific form prescribed or intended for conveying the information required to be given under section 50. So from the above it is clear that accused persons were duly informed of their right to be searched before the specified officer and only after they agreed search was made before the gazetted officer, P.W. 7.

22. Now with regard to the non examination of one of the public witness and veracity of the statements of the independent witnesses declared hostile and putting reliance on the evidence of official witnesses it is evident from the LCR that steps was taken to examine him by issuing summon but he did not appear. The process lying in the LCR supports the claim of the prosecution. Thus we find that necessary steps had been taken by the prosecution to examine the said witness. Now from the evidence of P.W. 6 it is evident that though he has

admitted his signatures on the seizure list and the labels but denied that on the relevant date and time he was taken to the P.O. by the police with his weighing scale and he weighed three bags containing "ganja" which were seized and he put his signatures thereon. Interestingly during cross-examination by the defence he even admitted about weighing of three packets at the instruction of police but claimed that he was taken to the P.S. Whereas the investigating officer, P.W. 9 has specifically stated that P.W. 6 told him during investigation that on the relevant date and time he was taken to the P.O. by the police with his weighing scale and he weighed three bags containing "ganja" which were seized and he put his signatures thereon. P.W. 1, P.W. 2 and P.W. 3 have also specifically stated that P.W. 6 came at the spot with his weighing tools and weighed the packets in presence of the appellants and the witnesses. They also affirmed the same during cross-examination. In view of the above such claim of P.W. 6 does not appear to be believable. P.W. 8, another public witness though admitted his signatures on the seizure list and the labels but when he did not support the prosecution case so he was declared hostile and was cross-examined by the prosecution and was challenged that during investigation he stated to the I.O. that on the relevant date both he and one Chitta Hazra were called at the P.O. where P.W. 1 along with force detained one vehicle which came there and thereafter one D.S.P. came who disclosed his identity to the persons present in the vehicle and on interrogation those persons disclosed their names as Mithun Das and Biswajit Das and thereafter on search of the vehicle three bags containing "ganja" was recovered which was seized in their presence by a seizure list and they signed thereon but now in order to save the accused persons he has deposed falsely to which he denied. But according P.W. 9, he stated all these to him during investigation. Even during cross-examination also he has specifically stated that on the relevant date he examined P.W. 8 and recorded his statement under section 161 Cr.P.C.. No suggestion was put to him from the side of the defence that P.W. 8 did not state anything to him. So there is no reason to disbelieve P.W. 9. In such circumstances the evidence of P.W. 8 does not appear to be believable. Furthermore there is no absolute rule that police officials cannot be cited as witnesses and their depositions should be treated with suspect. In the absence of any animosity between the accused and the official witnesses there is nothing wrong in relying on their testimonies. Reference may be made to the decision of Sumit Tomar Vs. The State of Punjab, (2013) 115 CLT 783 : (2013) 1 JCC 6 : (2012) 4 RCR(Criminal) 948 : (2012) 10 SCALE 507 : (2013) 1 SCC 395 . In the instant case no animosity has been established against the official witnesses by the accused persons nor there is anything to show by which their evidence could be treated to be untrustworthy. Under the circumstances there appears no reason to disbelieve their testimonies.

23. With regard to the submission of the learned advocate for the appellants that there is a defect in framing of charge as details of weight of 11 kg 600 gm, 10 kg 600 gm and 5 kg 200 gm of ganja respectively contained in three bags has not been mentioned therein and only total weight has been given we find that charge

against the appellants was framed on 27.01.2012 under section 20(C) of the N.D.P.S. Act. It is evident from the Charge that total quantity of ganja contained in three bags recovered from the appellants has been specifically mentioned therein. Charge is an accusation made against a person in respect of an offence alleged to have been committed by him and the basic requirement is that it must be so framed as to give the accused person a fairly reasonable idea of the case which he has to face. The mere irregularity in framing the charge against the accused, does not vitiate the trial, unless some prejudice is caused to the accused.

"Section 215 of the Code of Criminal Procedure clearly states that- "No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice".

Section 464 of the Code of Criminal Procedure also provides that no finding sentence or order by a competent Court shall be deemed to be invalid merely on the ground that no charge has been framed or that there are some errors, omission or irregularity in the charge unless some failure of justice has occurred on that ground."

24. In order to take the benefit of the same the accused must establish that failure of justice has been occasioned by an error or defect in stating the particulars in the charge. No such plea of any prejudice and/or any defect in framing of charge was taken by the appellants before the learned court below and even no evidence was adduced by them suggesting failure of justice due to defect in framing of charge. There is also nothing on record to show that any prejudice has been caused to the appellants due to such omission in mentioning details of weight of each bag separately. On the other hand Ext. 1, the seizure list, in which signatures of the appellants appear clearly shows the details of recovery and seizure of "ganja" which means appellants were quite aware about the accusation made against them. Under such circumstances omission to mention details of weight of each bag separately in the charge does not vitiate the trial.

25. Now with regard to the submission of the learned council for the appellants that in the evidence it has been mentioned that 100 gm each of samples were taken and sent for examination whereas in the report of the expert, Exhibit 12, the samples sent for chemical examination has been described as 123 gms.(124 gms and 121 gms. we find that learned court below took into consideration the difference of weight due to standard of weighing scale and the weight kept in shops and further that such small difference in weight as not much of any significance. Learned advocate representing the state also submitted that the said difference of weight due standard of weighing scale and also due to the weight of the envelope. According to him ganja seized from the possession of the appellants was a raw material and samples of 100 gms each of raw material from

each packet was taken and the difference of weight of samples as shown in Exhibit 12 is due to the weight of the envelopes which were also included. We do agree with the observation of the learned court below and are of the view that such discrepancy will not affect the merit of the case.

26. Having considered the entire materials on record the trial court found the appellants guilty. We are unable to find any perversity or any miscarriage of justice in the findings so recorded. We are, therefore, not inclined to interfere with the impugned judgment and order of conviction and sentence passed by the learned court below.

27. Accordingly we dismiss the appeal.

Debasish Kar Gupta, J.

28. While concurring with the judgment of Hon'ble Justice Md. Mumtaz Khan, I would like to add a few words to the same as follows:

29. The main question which emerges for consideration in this appeal is the propriety of the Procedure followed in connection with the search and seizure involved in this appeal in the light of the relevant provisions of the NDPS Act.

30. The provisions of section 42 of the NDPS Act, deal with the entry into and search of any building, conveyance or enclosed place. The provisions of section 43 of the NDPS Act deal with seizure and arrest in public place or in transit. The expression "public place" used in section 43 of the NDPS Act, includes the places explained as follows:--

"Explanation.--For the purpose 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."

31. In our case, bodies of the appellants as also a conveyance had been searched though there was no recovery of illicit article from their bodies.

32. The proposition of law relating to adherence of the safeguard or protection provided in section 50 of the NDPS Act, has already been settled by a Constitution Bench of the Hon'ble Supreme Court in subparagraphs 57 of its celebrated judgment of State of Punjab v. Baldev Singh. (supra). Those are as follows:

"(1) That when an empowered officer or a duly authorized officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of section 50 of the Act.

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the officer concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain about board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by section 50 at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in the context in which the protection has been incorporated in section 50 for the benefit of the person intended to be searched we do not express any opinion whether the provisions of section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied

upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search,

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

(9) That the judgment in Pooran Mal case cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal. Search.

(10) That the judgment in AH Mustaffa case correctly interprets and distinguishes the judgment in Pooran Mal Case and the broad observations made in Pirthi Chand case and Jasbir Singh case are not in tune with the correct exposition of law as laid down in Pooran Mal case."

(Emphasis supplied)

33. According to the above decision, inter alia, empowered officer or duly authorized officer acting on prior information is about to search a person, it is imperative for him to inform the person concern of his right under sub-section (1) of section 50 of NDPS Act. A search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a Gazetted Officer of Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person, during a search conduct in violation of the provisions of section 50 of the NDPS Act. Whether the provisions of section 50 are mandatory or directory, no opinion is expressed in the above judgment as to whether the provisions of section 50 are mandatory or directory but failure to inform the person concerned of his right as emanating from sub-section (1) of section 50 may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law. However, the prior information as mentioned herein above may not necessarily be in writing. Whether or not the safeguards provided in section 50 of the NDPS Act have been duly observed would have to be determined by the Court on the basis of the evidence laid at trial.

34. The word "person" in the above context is clarified by the Hon"ble Supreme Court in its judgment delivered by a Bench of three Hon"ble Judges in the matter of State of Himachal Pradesh Vs. Pawan Kumar, AIR 2005 SC 2265 : (2005) CriLJ 2208 : (2005) 99 ECC 737 : (2005) 4 JT 373 : (2005) 4 SCC 350 : (2005) 1 SCR

417 : (2005) AIRSCW 2154 : (2005) 3 Supreme 321 . According to the above judgment the word "person" would mean a human being with appropriate coverings and clothing as also footwear.

35. The question of inclusion of a bag, briefcase or any such article or container etc. within the term "person" is answered in the above case considering the facts and circumstances of that case as follows:--

"29. According to the case of the prosecution, Ram Niwas, SHO, Police Station Pilibanga received information that the accused who was including in smuggling of opium was standing at the bus-stand. A police party reached the main bus-stand at about 7.10 p.m. and found the accused standing with an attache in his hand. A written notice was then given to the accused that his attache case will be searched as information has been received that the same contains opium. He was also asked whether he would like the search to be conducted before a Magistrate or a gazetted officer. This fact was also mentioned in the notice. The accused said that he did not want to be searched before any Magistrate or gazetted officer and the SHO could carry on the search This statement of the accused was signed by him. The search of the attache revealed 5 Kg of opium. After conducting other formalities and investigation of the case, the accused was put up for trial. The learned Sessions Judge convicted the accused under sections 8/18 of the NDPS Act and sentenced him to 10 years" RI and a fine of Rs. 1 lakh The High Court by a very cryptic judgment held that the provisions of section 50 of the NDPS Act were not complied with as the accused was not informed of his right to be searched in the presence of a Magistrate or a gazetted officer and accordingly allowed the appeal and set aside the conviction and sentence of the accused.

30. For the reasons discussed earlier, the view taken by the High Court cannot be sustained as it was a case of search of an attache which was carried by the accused. The appeal is accordingly allowed and the judgment and order dated 5-10-2001 of the High Court is set aside. The matter is remitted back to the High Court for a fresh consideration of the appeal on merits and in accordance with law."

(Emphasis supplied)

36. While deciding the short question as to whether the provisions of section 50 of the NDPS Act cast a duty on the empowered officer to "inform" the suspect of his right to be searched in presence of a Gazetted Officer or Magistrate, if he so desires or whether a mere enquiry by the said officer as to whether the suspect would like to be searched in presence of a Magistrate or a Gazetted Officer can be said to be duly complied with the mandate of the said section, a Constitution Bench of the Hon"ble Supreme Court arrived at a conclusion in the matter of Vijaysinh Chandubha Jadeja Vs. State of Gujarat, AIR 2011 SC 77 : (2011) CriLJ 680 : (2010) 12 JT 255 : (2010) 11 SCALE 509 : (2011) 1 SCC 609 : (2011) 1 SCC(Cri) 497 : (2010) AIRSCW 6800 . The relevant portions of the above

judgment is quoted below:--

"24. Although the Constitution Bench in Baldev Singh case did not decide in absolute terms the question whether or not section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of section 50 make it imperative for the empowered officer to "inform"" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce."

37. It is the settled proposition of law that when an empowered officer or a duly authorized officer acting on prior information is about to search a person, he must inform the person concern of his right under subsection (1) of section 50 of the NDPS Act, however, such may not necessarily be in writing.

38. Taking into consideration the admitted fact of this case that there was no recovery of illicit article from the bodies of the appellants and the impugned judgment, order of conviction and sentence were based on recovery of illicit article (Ganja) from a private conveyance, the trial or the impugned judgment or order of conviction, or sentence were not vitiated in view of the settled principles of law relating to the adherence of the safeguard provided in section 50 of the NDPS Act.

39. Further, it will not be out of context to take note of the conclusion arrived at sub-paragraph (1) of paragraph 57 of the judgment of State of Punjab Vs. Baldev Singh, etc. etc., AIR 1999 SC 2378 : (1999) CriLJ 3672 : (1999) 157 CTR 3 : (1999) 65 ECC 695 : (1999) ECR 545 : (1999) 81 FLR 303 : (1999) 4 JT 595 : (1999) 1 LLJ 254 : (1994) 4 SCALE 144 : (1999) AIRSCW 2494 : (1999) 6 Supreme 159 , that furnishing of information to a person of exercising his right under the provision of sub-section (1) of section 50 of the NDPS Act, prior to search of his/her body under the provisions of sections 41, 42 and 43 of the above Act, may not necessarily be in writing even in case of application of the above provision in our case. Copy of this judgment along with the lower court records be sent down to the court below immediately.

Urgent photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.