

(2015) 12 SHI CK 0102
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 138 of 2012

Maan Chand

APPELLANT

Vs

State of H.P.

RESPONDENT

Date of Decision : 01-12-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Evidence Act, 1872 — Section 114

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 20, 41, 41(2), 42

Citation : (2015) 12 SHI CK 0102

Hon'ble Judges : Rajiv Sharma, J.

Bench : Single Bench

Advocate : B.S. Chauhan, Sr. Advocate and Vaibhav Tanwar, Advocate, for the Appellant; Parmod Thakur, Addl. Advocate General, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—This appeal is instituted against the judgment dated 25.2.2012, rendered by the learned Special Judge (Sessions Judge), Shimla, in N.D.P.S. Case No. 1-S/7 of 2010, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offences punishable under Sections 18 & 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted and sentenced to undergo rigorous imprisonment for seven years and to pay fine of Rs. 50,000/- for offence under Section 20 of the ND & PS Act. He was further sentenced to undergo rigorous imprisonment for six months and to pay fine of Rs. 1,000/- for offence under Section 18 of the ND & PS Act. The sentences were ordered to run concurrently. In default of payment of fine, the accused was further ordered to undergo simple imprisonment for one year under Section 20 and simple imprisonment for three months under Section 18 of the ND & PS Act.

2. The case of the prosecution, in a nut shell, is that on 3.11.2009, PW-8 S.I.

Sato Kumar, State Vigilance and Anti Corruption Bureau, Shimla (hereinafter referred to as SV & ACB, in short), in connection with routine patrol duty left for Inter State Bus Terminal (hereinafter referred to as ISBT, in short). At about 5:15 PM, the police party was at some distance from ISBT towards the Winter Field, when a secret information was received. It was alleged that one person carrying black bag containing psychotropic substance was on way towards ISBT. The suspect was stated to be wearing red pullover, white shirt and cream colour pant. On receipt of the information, PW-8 SI Sato Kumar reduced the information into writing vide Ext. PW-4/A under Section 42 of the ND & PS Act. It was submitted to the Dy. S.P., S.I.U., through PW-4 HC Ramesh Chand. PW-8 S.I. Sato Kumar sent for the independent and non official witnesses but none opted to associate with him. At that time, PW-1 HHG Gagan Sharma was noticed on way towards the Winter Field. PW-8 S.I. Sato Kumar associated PW-1 in the raiding party. A person matching the particulars of secret information was noticed on way from Army Training Command side who was moving towards ISBT. PW-8 S.I. Sato Kumar interrogated that person. The accused was found to be carrying black bag Ext. P-3. PW-8 S.I. Sato Kumar, in the presence of PW-1 HHG Gagan Sharma, PW-2 HHC Babu Ram and PW-3 Const. Manoj Kumar, gave an option of search to the accused to be searched before the Magistrate or Gazetted Officer vide memo Ext. PW-1/A. The accused declined the offer and consented for search before the local police party. PW-8 S.I. Sato Kumar checked bag Ext. P-3 of the accused and recovered one polythene envelope Ext. P-4 from one of the pockets of the bag. The polythene envelope Ext. P-4 was found containing charas Ext. P-5 in the shape of billets and balls. Another pocket of bag Ext. P-3 was found containing opium Ext. P-8 wrapped in polythene paper. The charas weighed 1850 grams and opium was found to be 50 grams. The sealing proceedings were completed on the spot. PW-8 S.I. Sato Kumar produced packets Ext. P-2 and P-7 before PW-9 SI/SHO Amar Singh, who resealed the same with seal impression "T". The police got the packets of charas and opium examined from the Chemical Examiner. The investigation was completed and the challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 9 witnesses. The accused was also examined under Section 313 Cr.P.C. The accused has denied the prosecution case. The learned trial Court convicted and sentenced the accused, as noticed hereinabove.

4. Mr. B.S. Chauhan, Sr. Advocate, appearing on behalf of the accused, has vehemently argued that the prosecution has failed to prove its case against the accused beyond reasonable doubt. On the other hand, Mr. Parmod Thakur, learned Addl. Advocate General for the State has supported the judgment of the learned trial Court dated 25.2.2012.

5. I have heard learned counsel for both the sides and have also gone through the judgment and records of the case carefully.

6. PW-1, HHG Gagan Sharma, deposed that he was proceeding from ISBT,

Shimla towards The Mall. S.I. Sato Kumar met him there. He was accompanied by HHC Babu Ram and Const. Manoj Kumar of SV & ACB, Shimla. One person having small beard wearing red coloured pullover, white shirt, cream coloured Cotrai pent came carrying black coloured bag on his left shoulder from Western Command side. He was stopped by SI Sato Kumar. The accused disclosed his identity. He was asked by SI Sato Kumar as to whether he wanted to give his personal search to Gazetted Officer, upon which he disclosed that he wanted to give his personal search to SI Sato Kumar. The statement is Ext. PW-1/A. The search of the bag was carried by SI Sato Kumar. On search, a polythene was found in the central pocket of bag in which charas in the shape of sticks and balls was found. SI Sato Kumar also checked other pockets of the bag upon which opium in polythene wrapper was recovered. The identification memo was prepared. The recovered charas weighed 1850 grams and opium weighed 50 grams. S.I. Sato Kumar put the recovered charas in the same polythene and recovered charas in the same bag and the bag was placed in a piece of cloth and sealed by putting eight seal impressions of seal "H". The recovered opium after putting the same in polythene wrapper was put in a piece of cloth and the cloth was sealed with by putting five seal impressions of seal "H". The seal after use was handed over to him. Both the sealed parcels were taken into possession vide memo Ext. PW-1/D. NCB forms were filled in. Seizure memo is Ext. PW-1/D. The case property was produced by the learned Public Prosecutor, while examining this witness. In his cross-examination, he deposed that SI Sato Kumar had asked few persons to stay but they did not cooperate. The police post was located nearby. In his cross-examination towards the end, he admitted that the road in question was a general road where large number of persons passes.

7. PW-2 HHC Babu Ram also deposed the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed on the spot. He deposed that they asked persons passing nearby to stop and cooperate them in the investigation, but it was 5:30 PM, hence the people were in hurry to take buses. They did not stop. In the meantime, PW-1 HHG Gagan Sharma, came on the spot. He was associated by SI Sato Kumar in the investigation. In his cross-examination, he admitted that there was rain shelter nearby the bus stop. Many pedestrians used to pass from there. They did not associate any person or witness from there. Volunteered that nobody was ready to become a witness and associate himself in the investigation. SI Sato Kumar had not asked him to call any witness. He himself asked the witnesses to participate in the investigation. There was great rush at the bus stand at that time. SI Sato Kumar had not called any witness from the bus stand. He had only asked the persons who were passing nearby the spot. No written notice was given to any of the persons to become witnesses. No case was made out against a person who had refused to become a witness. SI Sato Kumar had specifically asked the accused that he had a legal right to get himself searched either before the Gazetted Officer or a Magistrate. (Confronted with memo Ext. PW-1/A, wherein the word "right" was not mentioned). He also admitted that a police post was also located

at bus stand, at some distance from the spot.

8. PW-3 Constable Manoj Kumar also deposed the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed on the spot. He was handed over the rukka by SI Sato Kumar with direction to take the same to Police Station of SV and ACB, Khalini, Shimla. He handed over the rukka to MHC Ashok Kumar at Police Station. In his cross-examination, he admitted that the bus stand was located nearby the road. He also admitted that many persons were also walking on the road. He also admitted that many buses were parked nearby. He also admitted that there is colony of army personnels of Western Command above the road. He also admitted that no independent witness was associated by SI Sato Kumar from the bus stand. However, he tried to associate the witnesses from the spot where the accused was apprehended because nobody was ready and willing to become witness. No person from the quarters of Western Command was called. Volunteered that the Western Command is a prohibited area. SI Sato Kumar had asked many persons to become witnesses. No written notice was given to them.

9. PW-4 HC Ramesh Chand deposed that there was suspicion that the person had some narcotic substance in his possession. The grounds of belief to this effect were recorded by SI Sato Kumar which were handed over to him with the direction to hand over the same to Superior Officer at Police Station, SV & ACB (SIU), Khallini. In his cross-examination, he admitted that near bifurcation point to Winter Field, there was local bus stand from where the buses for Boileauganj, Summerhill and Totu used to ply.

10. PW-6 HC Ashok Kumar testified that on 3.11.2009 at 11:00 PM, SI Amar Singh, Police Station, SV & ACB, Khallini, deposited with him one parcel Ext. P-1 allegedly containing 1850 grams of charas, sealed with 5 seals of impression "T" and another parcel Ext. P-6 allegedly containing 50 grams of opium sealed with three seal impressions of seal "T", one sample of seal "T" having three seal impressions, one sample of seal "H", having three seal impressions, NCB forms in triplicate and asked him to deposit in the Malkhana. He entered the receipt of the case property against Sr. No. 12 in the Malkhana Register dated 3.11.2009. He handed over the case property and documents to Const. Rajesh Kumar vide RC No. 49/2009.

11. PW-7 Const. Rajesh Kumar deposed that PW-6 Ashok Kumar had handed over to him the case property to be taken to FSL, Junga. He carried the same and handed it over at FSL, Junga.

12. PW-8 SI Sato Kumar also deposed the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed on the spot. He tried to associate other persons who were passing through the road to join the investigation but none of them stopped. The accused gave his consent to be searched by him. He prepared the memo Ext. PW-1/A. In his cross-examination, he deposed that he has not associated any police officials from the

police post or the traffic duty Constable to join the raiding party. He also admitted that several persons walk through the road in question. He also admitted that many people remain present at the bus stand. He has not given any written notice to any person for joining the raiding party.

13. PW-9 Insp. Amar Singh deposed that he has handed over the case property to MHC Ashok Kumar of the Police Station after resealing the same. He filled in column No. 9 of the NCB forms vide Ext. PW8/D. He also prepared the re-sealing certificate.

14. Mr. B.S. Chauhan, Sr. Advocate, appearing for the accused has taken the Court through memo Ext. PW-1/A, whereby the consent of the accused was sought to be either searched before the Magistrate or the Gazetted officer. The accused opted to be searched by the police officer. The accused was specifically required to be told of his legal right to be searched before the nearest Magistrate or the Gazetted Officer. Section 50 of the ND & PS Act is mandatory. In the instant case, the charas and opium has been recovered from the bag but despite that the personal search of the accused was carried out, necessitating compliance of Section 50 of the ND & PS Act. PW-2 HHC Babu Ram, in his cross-examination, has deposed that SI Sato Kumar specifically asked the accused that he has legal right to get himself searched either before the Gazetted Officer or a Magistrate, but it is not so stated in Ext. PW-1/A memo.

15. Their lordships of the Hon'ble Supreme Court in the case of Saiyad Mohd. Saiyad Umar Saiyad and Others Vs. State of Gujarat, , have held that the prosecution must prove that the accused was made aware of his right that he was entitled to demand that search be carried out in the presence of a Gazetted Officer or a Magistrate but if no evidence to this effect is given, the Court must assume that the accused was not informed of the protection the law gave to him. It has been held as follows:

"7. Having regard to the object for which the provisions of Section 50 have been introduced into the NDPS Act and when the language thereof obliges the officer concerned to inform the person to be searched of his right to be searched in the presence of a Gazetted Officer or a Magistrate, there is no room for drawing a presumption under Section 114 , illustration (e) of the Indian Evidence Act, 1872. By reason of Section 114 a court "may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case." It may presume "(e) that judicial and official acts have been regularly performed." There is no room for such presumption because the possession of illicit articles under the NDPS Act has to be satisfactorily established before the court. The fact of seizure thereof after a search has to be proved. When evidence of the search is given all that transpired in its connection must be stated. Very relevant in this behalf is the testimony of the officer conducting the search that he had informed the person to be searched that he was entitled to demand that the search be carried out in the presence of

a Gazetted Officer or a Magistrate and that the person had not chosen to so demand. If no evidence to this effect is given the court must assume that the person to be searched was not informed of the protection the law gave him and must find that the possession of illicit articles under the NDPS Act was not established."

16. Their lordships of the Hon"ble Supreme Court in the case of State of Punjab Vs. Baldev Singh Khosla, , have held that it is imperative for the investigating officer to inform the suspect, orally or in writing, about his right to be searched before a gazetted officer or a Magistrate. It has been held as follows:

"32. However, the question whether the provisions of Section 50 are mandatory or directory and if mandatory to what extent and the consequences of non-compliance with it does not strictly speaking arise in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched. Therefore, without expressing any opinion as to whether the provisions of Section 50 are mandatory or not, but bearing in mind the purpose for which the safeguard has been made, we hold that the provisions of Section 50 of the Act implicitly make it imperative and obligatory and cast a duty on the Investigating Officer (empowered officer) to ensure that search of the concerned person (suspect) is conducted in the manner prescribed by Section 50 , by intimating to the concerned person about the existence of his right, that if he so requires, he shall be searched before a Gazetted Officer or a Magistrate and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, would cause prejudice to an accused and 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 during a search conducted in violation of the provisions of Section 50 of the Act. The omission may not vitiate the trial as such, but because of the inherent prejudice which would be caused to an accused by the omission to be informed of the existence of his right, it would render his conviction and sentence unsustainable. The protection provided in the section to an accused to be intimated that he has the right to have his personal search conducted before a Gazetted Officer or a Magistrate, if he so requires, is sacrosanct and indefeasible it cannot be disregarded by the prosecution except at its own peril.

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

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person 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 concerned person 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 concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under 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 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 50 have 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 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 concerned person 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's 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 Ali Mustaffa's case correctly interprets and distinguishes the judgment in Pooran Mal's case and the broad observations made in Pirthi Chand's case and Jasbir Singh's case are not in tune with the correct exposition of law as laid down in Pooran Mal's case."

17. Their lordships of the Hon''ble Supreme Court in the case of In the Matter of: Ahmed Vs. State of Gujarat, , have held that it is obligatory for the prosecution to inform the accused of his right to be searched before the nearest gazetted officer or before the nearest Magistrate in compliance with the mandatory requirement of Section 50 . It has been held as follows:

"4. The learned counsel appearing for the respondent, on the other hand contended that in the case in hand, the search itself having been made by a Gazetted Officer namely PW2, it cannot be said that there has been an infraction of Section 50 of the Act, and, therefore, the conviction cannot be held to be invalid. The question for consideration, therefore, is whether when a search is made by a gazetted officer, is it obligatory for the prosecution to inform the accused of his right to be searched before a gazetted officer or before a Magistrate, as provided under Section 50 of the Act? According to the learned counsel for the respondent, it is only when a search is made by an authorised officer under Section 41(2) of the Act, it is only then, the provisions of Section 50 can be attracted but when a search is made by an officer of gazetted rank of the department of Central Excise, who is empowered under sub-section (2) of Section 41 , then the provisions of Section 50 are not required to be complied with inasmuch the empowered officer himself is a gazetted officer. According to the learned counsel for the accused appellant, however the provisions of Section 50 are required to be complied with irrespective of the fact whether the search is being made by the empowered officer, who may be an officer of the gazetted rank or by an officer duly authorised by the empowered officer under Section 42

of the Act. To ensure fairness in the search itself and for compliance of Section 50 of the Act, no differentiation can be made whether the search is being made by the empowered officer, who obviously is an officer of a gazetted rank or the authorised officer, who may be a subordinate officer to whom the empowered officer authorises. To appreciate the point in issue, it is necessary to extract the provisions of Sections 41 , 42 and 50 of the Act:

... ..

... ..

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

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

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

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

An analysis of the aforesaid provisions, unequivocally indicate that under sub-section (2) of Section 41 , an officer of a gazetted rank of the department of Central Excise, narcotics, customs, revenue intelligence or any other department of the Central Government or the Border Security Force, can be empowered by a general or special order by the Central Government, conferring the power to arrest a person or search a building, conveyance or place, if he has reason to believe from personal knowledge or information that the person concerned has committed an offence punishable under Chapter IV or that any narcotic drug or psychotropic substance, in respect of which any offence punishable under Chapter IV, has been committed or any document or other article which may furnish evidence of the commission of such offence, has been kept or concealed in any building, conveyance or place. Sub-section (2) of Section 41 further enables the State Government to empower any officer of the gazetted rank of the revenue, drug control, excise, police or any other department by a general or special order to perform the said function. The said sub-section also confers power on such empowered gazetted officer to authorise any officer, subordinate to him but superior in rank to a peon, sepoy or a constable to perform the said function, for which the general or special order has empowered him. Section 42 is the power of entry, search, seizure and arrest without any warrant or authorisation. Section 50 , which is supposed to be the minimum safeguard

afforded to an accused, provides that when a search is about to be made of a person under Section 41 or Section 42 or Section 43 , and if the person so requires, then the said person of whom, search is about to be made has to be taken to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. The argument of the learned counsel for the respondent is based upon the expression used in Section 50 to the effect any person duly authorised under Section 42 and, therefore, a distinction is sought to be made in case of a search between an empowered officer and a search made by an authorised officer. But the said argument is devoid of any substance, since Section 42 itself also speaks of search to be made by an officer, as is empowered by a general or special order by the Central Government or as is empowered by a general or special order by the State Government. A combined reading of the provisions of Section 42 and Section 50 would make it crystal clear that whenever a search of a person is about to be made on the basis of personal knowledge or information received in that behalf, then if the person to be searched requires to be taken to a gazetted officer or the nearest Magistrate, the same must be complied with and failure to compliance of the same would constitute an infraction of the requirements of the provision of Section 50 , which would ultimately vitiate the conviction. For the purpose of complying with the provisions of Section 50 , no differentiation can be made on a plain reading of the language used in Section 50 , depending upon the officer who is going to search the person concerned. In our considered opinion, since the search is about to be effected on the basis of any prior information or personal knowledge, which the person going to search has the reasons to believe that an offence under the Act is being committed, then for the sanctity of the search itself, the person to be searched has been afforded the minimum right to be searched before another gazetted officer or the Magistrate and that right cannot be taken away, merely because the officer going to search happens to be a gazetted officer, who has been empowered either by the Central Government or by the State Government by a general or special order. In fact the legislature has enacted the safeguard contained in Section 50 to obviate any doubt of the illicit articles under the Act and this provision was engrafted having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act, namely, the shifting of the onus to the accused and the severe punishment to which he becomes liable.

In the aforesaid judgment, not only the decision of this Court in Balbir Singhs case to the effect that the provisions of Section 50 are mandatory, has been endorsed but also, it further indicates that it obliges the officer concerned to inform the person to be searched of his right to demand that the search be conducted in the presence of a Gazetted Officer or a Magistrate. In the case in hand, the evidence of PW1 indicates that even though the obligation of the officer had not been discharged by way of informing the accused of his right to demand that the search be conducted in the presence of a gazetted officer or a Magistrate but the accused himself wanted to be searched before another

gazetted officer or a Magistrate but that was not acceded to. It is not necessary to notice several decisions of this Court, holding the provisions of Section 50 to be mandatory and we would notice the recent Constitution Bench decision on the point. In the case of *State of Punjab v. Baldev Singh*, 1999(6) SCC, 172, this question was considered and answered by the Constitution Bench by holding that it is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has the right to require his search being conducted in the presence of a gazetted officer or a Magistrate and the failure to so inform the suspect of his right would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50. It was further held that if the person concerned requires, on being so informed by the empowered officer or otherwise, that his search be conducted in the presence of a gazetted officer or a Magistrate, the empowered officer is obliged to do so and failure on his part to do so would cause prejudice to the accused and also render the search illegal and the conviction and sentence of the accused based solely on recovery made during that search bad. This Court further held that bearing in mind the purpose for which the safeguard has been made, it is held that the provisions of Section 50 of the Act implicitly make it imperative and obligatory and cast a duty on the investigating officer (empowered officer) to ensure that search of the person (suspect) concerned is conducted in the manner prescribed by Section 50, by intimating to the person concerned about the existence of his right, that if he so requires, he shall be searched before a gazetted officer or a Magistrate and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate would cause prejudice to the accused and render the recovery of the illicit article suspect and vitiate the conviction and sentence of the accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered during a search conducted in violation of the provisions of Section 50 of the Act. In paragraph 57 of the judgment in *Baldev Singh's* case, the Constitution Bench held as follows:

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

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

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the

conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act."

In view of the aforesaid conclusions of the Constitution Bench, the submission of Mr. M.N. Shroff, appearing for the State-respondent, that the requirement of compliance of Section 50 will not arise, if a search is going to be made by an empowered officer, who happens to be a gazetted officer, is devoid of any substance inasmuch as this Court in no uncertain terms has held that when an empowered officer or a duly authorised officer, acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. In view of the aforesaid position of law and in view of the evidence of PW1., as indicated in the earlier part of this judgment, the accused himself having wanted to be searched before a gazetted officer or a Magistrate and the same having been denied, there cannot be any doubt that failure on the part of the prosecution in complying with the provisions of Section 50 , renders the recovery of illicit article suspect and vitiates the conviction and sentence of the accused, since the conviction in the case in hand is based solely on the alleged possession of Charas, which was recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act. In the aforesaid circumstances, the conviction and sentence is set aside and the accused be set at liberty forthwith, unless required in any other case. Fine amount, if has been paid, may be refunded to the accused."

18. Their lordships of the Hon"ble Supreme Court in the case of Vinod vrs. State of Maharashtra, reported in (2002) 8 SCC 351, have held that the police officer concerned must inform the accused of his right to be searched before an Executive Magistrate or a gazetted officer. It has been held as follows:

"[7] The law enunciated by this Court in K. Mohanan is clear as to the manner in which Section 50 of the Act has to be complied with. Before conducting the search the police officer concerned cannot merely ask the accused whether he would like to be produced before an Executive magistrate or a gazetted officer for the purpose of the search but inform him of his right in that behalf under the law. The recital in Exhibit 38 and Exhibit 39 does not indicate the same. In that view of the matter, we set aside the findings recorded by the High Court that there was compliance with Section 50 of the Act. The view of the trial court that non-compliance with Section 50 of the Act does not prejudice the accused cannot be sustained for the requirement of the section is mandatory. If Exhibit 38 and Exhibit 39 cannot be used to establish search of the person of the accused, his possession of brown sugar is not proved. Hence we set aside the order of the trial court as affirmed by the High Court. The appeal is allowed accordingly."

19. Their lordships of the Hon"ble Supreme Court in the case of State of Delhi

Vs. Ram Avtar @ Rama, , have held that while discharging the onus of Section 50 , the prosecution has to establish that the information regarding existence of such a right had been given to the suspect and if such information is incomplete and ambiguous then Section 50 is not complied with. Non-compliance with the provisions of Section 50 of the Act would cause prejudice to the accused, and, therefore, would amount to denial of a fair trial. It has been held as follows:

"27. It is a settled canon of criminal jurisprudence that when a safeguard or a right is provided, favouring the accused, compliance thereto should be strictly construed. As already held by the Constitution Bench in the case of Vijaysinh Chandubha Jadeja (supra), the theory of "substantial compliance" would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudices against the suspect. The safeguard cannot be treated as a formality, but it must be construed in its proper perspective, compliance thereof must be ensured. The law has provided a right to the accused, and makes it obligatory upon the officer concerned to make the suspect aware of such right. The officer had prior information of the raid; thus, he was expected to be prepared for carrying out his duties of investigation in accordance with the provisions of Section 50 of the Act. While discharging the onus of Section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of Section 50 of the Act. Non-compliance of the provisions of Section 50 of the Act would cause prejudice to the accused, and, therefore, amount to the denial of a fair trial."

20. Their lordships of the Hon"ble Supreme Court in the case of Nirmal Singh Pehlwan @ Nimma Vs. Inspector, Customs, Customs House, Punjab, , have held that when no information was given to the accused of his right to be searched in presence of a gazetted officer or a Magistrate and only option to be searched before one or the other, given and consent memo drawn up recording choice of appellant, Section 50 was not complied with. It has been held as follows:

"6. The Trial Court, on a consideration of the evidence, held that the case against the appellant had been proved beyond doubt more particularly as he had made a confession to PW. 4 which was admissible in evidence as PW. 4 was not a police officer. It was also found that the provisions of Section 50 of the Act had been complied with as Ex. P.A., a consent memo, had been drawn up prior to the search. The Trial Court accordingly convicted and sentenced the appellant, as already mentioned above. The conviction and sentence has been confirmed by the High Court.

7. Before us, Mr. Sanjay Jain, the learned counsel for the appellant, has raised primarily two arguments based on the judgments of this Court. The first is Vijaysinh Chandubha Jadeja Vs. State of Gujarat, . In this case it has been observed by the Constitution Bench that the provisions of Section 50 of the Act postulated that before a search was made of a person suspected of carrying a

narcotic he should be informed of his right that he had an option of being searched in the presence of a Gazetted Officer or a Magistrate and that merely because a consent memo had been drawn up whereby he had chosen to be searched before the Magistrate or a Gazetted Officer (on the option given to him by an authorized officer) would not amount to full compliance with the aforesaid provision.

10. We have examined the facts of the case in the light of the arguments raised by the learned counsel for the parties and the case law cited. Ext. P.A. is the consent memo under which the appellant had opted to be searched in the presence of a Gazetted officer. This memo is in the Gurmukhi script and has been read to us and we see that it cannot by any stretch of imagination be said to be informing the appellant of his right to be searched in the presence of a Gazetted Officer or a Magistrate as he was only given the option to be searched before one of the other.

11. In *Vijaisingh's* case (*supra*) the Constitution Bench crystalised the issue before it in para 1 as under:

"The short question arising for consideration in this batch of appeals is whether Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act") casts a duty on the empowered officer to "inform" the suspect of his right to be searched in the presence of a gazetted officer or a 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 the presence of a Magistrate or a gazetted officer can be said to be due compliance with the mandate of the said section?"

12. This was answered in paragraph 29 in the following terms: "In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision."

13. It is therefore apparent that the precise question that was before the Constitution Bench was as to whether a consent memo could be said to be information conveyed to an accused as to his right under Section 50 of the Act.

The Constitution Bench clearly stated that a consent memo could not be said to be such information as the provisions of Section 50 of the Act were mandatory and strict compliance was called for and any deviation therefrom would vitiate the prosecution. It was further held that it was not necessary that this information should be in a written form but the information had to be conveyed in some form or manner which would depend on the facts of the case.

14. We have accordingly gone through the evidence of PW. 4 Prem Singh. He did not utter a single word as to whether he had informed the appellant of his right and he merely took his option as to whether he would like to be searched before a Gazetted Officer or a Magistrate as noted in Ex. P.A. In the light of the judgment in Vijaisingh's case (supra) we find that there has been complete non-compliance with the provisions of Section 50 of the Act."

21. Their lordships of the Hon'ble Supreme Court in the case of Ashok Kumar Sharma Vs. State of Rajasthan, , have held that the fact that the accused person has a right under Section 50 of the ND & PS Act to be searched before a gazetted officer or a Magistrate was not made known to him, the non-compliance with this mandatory procedure has vitiated the entire proceedings. It has been held as follows:

"7. We are in this case concerned only with the question whether PW1, the officer who had conducted the search on the person of the appellant had followed the procedure laid down under Section 50 of the NDPS Act. On this question, there were conflicts of views by different Benches of this Court and the matter was referred to a five Judge Bench. This Court in Vijaysingh Chandubha Jadeja (supra) answered the question, stating that it is imperative on the part of the officer to apprise the person intended to be searched of his right under Section 50 of the NDPS Act, to be searched before a Gazetted Officer or a Magistrate. This Court also held that it is mandatory on the part of the authorized officer to make the accused aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this mandatory provision requires strict compliance. The suspect may or may not choose to exercise the right provided to him under the said provision, but so far as the officer concerned, an obligation is cast on him under Section 50 of the NDPS Act to apprise the person of his right to be searched before a Gazetted Officer or a Magistrate. The question, as to whether this procedure has been complied with or not, in this case the deposition of PW1 assumes importance, which reads as follows:

"He was apprised while telling the reason of being searched that he could be searched before any Magistrate or any Gazetted Officer if he wished. He gave his consent in written and said that I have faith on you, you can search me. Fard regarding apprising and consent is Ex. P-3 on which I put my signature from A to B and the accused put his signature from C to D. E to F is the endorsement of the consent of the accused and G to H is signature, which has been written by the accused."

8. The above statement of PW1 would clearly indicate that he had only informed the accused that he could be searched before any Magistrate or a Gazetted Officer if he so wished. The fact that the accused person has a right under Section 50 of the NDPS Act to be searched before a Gazetted Officer or a Magistrate was not made known to him. We are of the view that there is an obligation on the part of the empowered officer to inform the accused or the suspect of the existence of such a right to be searched before a Gazetted Officer or a Magistrate, if so required by him. Only if the suspect does not choose to exercise the right in spite of apprising him of his right, the empowered officer could conduct the search on the body of the person.

9. We are of the view that non-compliance of this mandatory procedure has vitiated the entire proceedings initiated against the accused- appellant. We are of the view that the Special Court as well as the High Court has committed an error in not properly appreciating the scope of Section 50 of the NDPS Act. The appeal is, therefore, allowed. Consequently the conviction and sentence imposed by the Sessions Court and affirmed by the High Court are set aside. The accused-appellant, who is in jail, to be released forthwith, if not required in connection with any other case."

22. Their lordships of the Hon"ble Supreme Court in the case of State of Rajasthan Vs. Parmanand and Another, , have held that if merely a bag carried by a person is searched, without there being any search of his person, S. 50 will have no application but if bag carried by him is searched and his person is also searched, S. 50 would be attracted. Their lordships have also held that it was improper for PW-10 SI "Q" to tell respondents that a third alternative was available. It has been held as follows:

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

19. 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."

23. The accused was apprehended near the bus stand on 3.11.2009 at 5:30 PM. PW-1 HHG Gagan Sharma, has admitted that SI Sato Kumar had asked few persons to stay but they did not come forward to be associated as independent witnesses. He also admitted that the police post was located at some distance. He also admitted that the road in question was a general road which is used by large number of persons. PW-2 HHC Babu Ram also admitted that they asked many people to cooperate but they did not cooperate. He also admitted that many pedestrians were passing, however, they did not associate any person from the spot. Nobody was ready to become witness in the investigation. SI Sato Kumar had not asked him to call any witness. He himself had asked the witnesses to participate in the investigation. According to him, there was great rush at the bus stand at that time and despite that SI Sato Kumar has not called any witness from the bus stand. He also admitted that the police post was also located at bus stand near the spot where the accused was apprehended. Similarly, PW-3 Constable Manoj Kumar has admitted that many pedestrians were walking on the road. The buses were also parked nearby. In his cross-examination, he has categorically deposed that no independent witness was associated by SI Sato Kumar from the bus stand, however, he tried to associate the witnesses from the spot where the accused was apprehended because nobody was ready to become witness. He also admitted that no notice in writing was given to any person to be associated as independent witness.

24. PW-8 SI Sato Kumar deposed that he tried to associate other persons who were passing through the road to join the investigation but neither anybody stopped nor agreed to be a witness. The place where the accused was apprehended was fairly busy place. It cannot be said to be secluded or isolated place. In case the persons were not ready and willing to be witnesses in the investigation, PW-8 S.I. Sato Kumar was bound to issue them notices in writing, as prescribed under the Code of Criminal Procedure, 1973. In his examination-in-chief, PW-8 SI Sato Kumar, though has stated that he asked accused to give consent in writing but he has not stated that he has told the accused that he has a legal right to be searched before the Gazetted Officer or Executive Magistrate. He has also admitted in his cross-examination that he has not associated any police officials from the police post nearby nor the traffic constable to join the raiding party. He has also admitted that several persons used the road. The bus

stand was also nearby. He has not given any written notice to anyone for joining the raiding party to the persons whom he contacted. It was necessary for the prosecution to join the independent witnesses to inspire confidence at the time of apprehending, search, seizure and sealing proceedings.

25. The case property was produced by the learned Public Prosecutor while recording the statement of PW-1 HHG Gagan Sharma. The extract of copy of the malkhana register is Ext. PW-6/A. There is entry of the deposit of the contraband on 3.11.2009 and when it was received back from the FSL Junga. There is no entry when the case property was taken out from the malkhana and produced in the Court. There is no DDR recorded when the case property was produced before the trial Court. Similarly, there is no entry when the case property after production in the trial Court was re-deposited in the malkhana register. It is necessary for the prosecution to prove that the case property was taken out from the malkhana for the production in the Court and also preparing DDR to this effect and the same process is to be undergone when the case property after its production in the Court is taken back and deposited in the malkhana. There has to be entry in the malkhana register when it is re-deposited and DDR is also prepared. The production of the case property in the Court is mandatory. There is doubt whether the case property which was produced in the Court was the same which was recovered from the accused and sent to FSL, Junga in the absence of any corresponding entries made at the time of taking it and re-deposit in the malkhana register or it was case property of some other case. It has caused serious prejudice to the accused. The nabbing of the accused, recovery and sealing proceedings in the instant case are doubtful. When the case property was produced in the Court, there is no reference as to who brought the case property to the Court from malkhana and by whom it was taken back. It is necessary to keep the case property in safe custody from the date of seizure till its production in the Court in ND & PS cases.

26. Thus, the prosecution has failed to prove the case against the accused person for the commission of offence punishable under Sections 18 & 20 of the N.D. & P.S., Act.

27. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 25.2.2012, rendered by the learned Special Judge (Sessions Judge), Shimla, H.P., in N.D.P.S. case No. 1-S/7 of 2010, is set aside. Accused is acquitted of the charges framed against him. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

28. The Registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.