

(1990) 08 GAU CK 0019

In the Gauhati High Court

Case No : Criminal (Jail) Appeal No. 1 of 1990 and Govt. Criminal Appeal No"s. 4 and 5 of 1990

Md. Jainulabdin alias Nahamacha and etc.

APPELLANT

Vs

State of Manipur and etc.

RESPONDENT

Date of Decision : 20-08-1990

Acts Referred:

Constitution of India, 1950 — Article 148(5)
Criminal Procedure Code, 1973 (CrPC) — Section 42
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 37, 41, 41(2), 42

Citation : (1991) CriLJ 696

Hon'ble Judges : Y. Ibotombi Singh, J;S.N. Phukan, J

Bench : Division Bench

Advocate : Nilomoni Singh and R.K. Samajaba Singh, in Cri. Jail Appeal No. 1 of 1990 and Promod Chandra Singh and Irabat Singh, Public Prosecutors in Govt. Cri. Appeal Nos. 4 and 5 of 1990, for the Appellant; Nilomoni Singh and R.K. Samajaba Singh, in Govt. Cri. Appeal Nos. 4 and 5 of 1990 and Promod Chandra Singh and Irabat Singh, Public Prosecutors in Cri. (Jail) Appeal No. 1 of 1990, for the Respondent

Final Decision : Allowed

Judgement

1. These three appeals viz. Criminal (Jail) Appeal No. 1 of 1990, Govt. Criminal Appeals Nos. 4 & 5 of 1990 were heard together as the points involved are the same. By this common judgment and order we propose to dispose of the above three appeals.

2. Facts of Criminal (Jail) Appeal No. 1 of 1990 :-- On 14-2-86 the Superintendent of Police, Boarder Affairs (P.W. 4) along with the Sub-Inspector of Police of the department (P.W. 5) were at Moreh for checking and handling of drug traffickers. They did so on getting reliable information. The party included also constable P.W. 1 and P.W. 2, an Official of Narcotic Section of Manipur Police Department and on way they came accross with the accused Jainulabdin @

Nahamacha in a suspicious manner and after getting down from their vehicle the body of the accused was searched by P.W. 5, the Sub-Inspector of Police. A plastic packet suspected to be No. 4 heroin powder was found and on measurement by P.W. 3, a local Goldsmith, the weight was found to be of 15 grams. The heroin was seized by preparing a formal seizure list Ex. P/1 and P.Ws. 1, 2 & 3 were witnesses to the seizure. Thereafter accused along with the heroin powder was taken under arrest to the Inspection Bungalow, Moreh for interrogation. On instruction from the Superintendent of Police, Boarder Affairs (P.W. 4), the Sub-Inspector of Police (P.W. 5) lodged the F.I.R. Ex. P/2 and the accused was also handed over to the Officer-in-charge of Moreh Police Station. The plastic packet containing heroin was re-seized. Thereafter, police after investigation submitted charge-sheet.

The learned Sessions Judge, Imphal accepted the prosecution story. The learned trial court also took into consideration the report of the Chemical Examiner Ex. P/6 that the packet contained heroin. The learned Sessions Judge rejected the defence plea that both the Superintendent of Police (P.W. 4) and the Sub-Inspector of Police (P.W. 5) had no power to seize the heroin under the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985, for short the Act, inasmuch as, these officers were not authorised under provisions of Sections 41, 42 & 53, holding, inter alia, that the Act is not a complete Code and when the provisions of the Act are not inconsistent to the provisions of Cr. P.C. seizure, search and arrest can be made under the provisions of Cr. P.C. The learned Sessions Judge also took into consideration Section 43 of the Act and came to the finding that these police officers had power to arrest the accused and searched him u/s 43 of the Act.

3. Facts of Govt. Criminal Appeals Nos. 4 & 5 of 1990 :-- According to prosecution the occurrence took place on the same day i.e. 14-2-86 and at the same place i.e. Moreh. Two accused; persons in the above two Sessions Cases viz Sheivam Madraji and Sirajuddin were found moving in suspicious manner at 1 p.m. and 11-10 a.m. respectively and they were arrested by the same Sub-Inspector and after search of their body 30 grams of No. 4 heroin powder and 50 grams of No. 4 heroin powder in two plastic packets were recovered from the above two persons respectively. The said; Sub-Inspector filed the FIR before the Officer-in-charge, Moreh Police Station and after investigation charge-sheet were submitted u/s 21 of the Act. Both the cases were tried separately, but by the common judgment and order, learned Additional Sessions Judge No. 1, Imphal acquitted both the accused persons on technical ground. The learned trial court held that the Sub-Inspector of Police was not a duly authorised police officer u/s 42 of the Act, as the Notification by the State Govt. was issued subsequent to the date of occurrence and such notification with retrospective effect is not tenable in law. The learned trial Court also rejected the contention that u/s 42 of the Act officers mentioned in the said Section has power to arrest, search and seized in a public place u/s 43 of the Act even if they are not duly authorised. In coming to the above conclusion the learned court also took into account, the

provisions of Section 50 of the Act. The further contention on behalf of the prosecution that under Cr. P.C. a Police Officer has power to arrest and search a person was also rejected in view of the provisions contained in the Act, which is a special law. In view of the above findings of the learned Sessions Judge on the provisions of the Act, both the accused persons were acquitted without entering into the merits of the two cases.

4. We have heard Mr. Promod Singh and Mr. Irabat Singh, learned Public Prosecutors for the State and Mr. Nilomoni Singh and Mr. Sonajobi Singh for the accused persons. We were addressed mainly regarding interpretation of the relevant provisions of the Act and learned counsels for the accused persons urged that as there was violation of the provisions of the Act which are mandatory in nature, the prosecution cannot succeed. On the other hand both the learned Public Prosecutors have urged that even if the officers were not authorised under the Act, some of the provisions which we are concerned are only directing in nature. That apart, relying on the decision of the apex court, learned counsel has urged that even if there was procedural defect in investigation, it cannot vitiate the trial, after the court has taken cognizance of the offences. Before us various decisions have been placed which we shall consider at the relevant time.

5. To appreciate the contentions of the learned counsel for the parties, it is necessary for us to quote below the relevant Sections which are contained in Chapter V of the Act. These Sections are as follows :

"41.(1) A Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV, or for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed.

(2) Any such officer of gazetted rank of the departments of central excise, narcotics, customs, revenue, intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person 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, may authorise any officer subordinate to him but superior in rank to a peon, sepoy, or a constable, to arrest such a person or search a building, conveyance, or place whether by day or by night or himself arrest a person or search a building, conveyance or place.

(3) The officer to whom a warrant under Sub-section (1) is addressed and the officer who authorised the arrest or search or the officer who is so authorised under Sub-section (2) shall have all the powers of an officer acting u/s 42.

42.(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue, intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sun rise and sun set,--

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

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

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance :

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

(2) Where an officer takes down any information in writing under Sub-section (1) or records grounds for his belief under the provision thereto, he shall forthwith send a copy thereof to his immediate official superior.

43. Any officer of any of the departments mentioned in Section 42 may --

(a) seize, in any public place or in transit, any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence punishable Under Chapter IV has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under Chapter IV relating to such drug or substance;

(d) detain and search any person whom he has reason to believe to have committed an offence punishable under Chapter IV, and, if such person has any narcotic drug or psycho-tropic substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation -- For the 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.

49. Any officer authorised u/s 42, may, if he, has reason to suspect.....

(a) to (c).....

50. (1) When any officer duly authorised u/s 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.

51. The provisions of the Code of Criminal Procedure, 1973 shall apply, in so far as they are not inconsistent with the provisions of this " Act, to all warrants issued and arrests, searches and seizures made under this Act.

52. (1) Any officer arresting a person u/s 41, Section 42, Section 43 or S, 44 shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested and article seized under warrant issued under Sub-section (1) of Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.

(3) Every person arrested and article seized under Sub-section (2) of Section 41,

Section 42, Section 43 or S, 44 shall be forwarded without unnecessary delay to

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(a) the officer-in-charge of the nearest police station, or

(b) the officer empowered u/s 53.

(4) The authority or officer to whom any person or article is forwarded under Sub-section (2) or Sub-section (3) shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article.

55. An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station."

We may add here that minimum punishment which the legislature has prescribed u/s 21 of the Act is 10 years imprisonment and a fine of Rs. 1,00,000/-. According to Section 37 of the Act every offence punishable under the Act shall be cognizable. Section 74 of the Act makes transitional provisions, inter alia, providing that every officer or other employee of the Government exercising or performing immediately before the commencement of the Act any powers or duties in respect to any matters provided for in the Act, on commencement of the Act be deemed to have been appointed under the relevant provisions of this Act the same post and with same designation.

6. The cardinal principle of criminal jurisprudence that the accused person is presumed to be innocent unless it is proved by the prosecution beyond reasonable doubt that he is guilty of the charges, has not been given a go-by by this legislation; except the provisions contained in Section 54 of the Act, which inter alia, provides that it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under Chapter IV of the Act in respect of the matters mentioned in the said section, if he fails to account satisfactorily for possession of the Narcotic drug etc.

7. By exercising powers Under Sections 41 and 42(1) of the Act, the Government of Manipur issued a notification on 24th February, 1986 authorising the officers mentioned in the said notification. But by a subsequent notification dated 18th August, 1989, the earlier notification was superseded and another notification authorising the same set of officers under the above sections was, issued and it was given retrospective effect from 14-11-85. It is settled law that a delegated legislation such as rules, by laws, notification cannot have retrospective effect unless the section under which such a notification is issued empowers the authority to give retrospective effect. In Accountant General and Another Vs. S.

Doraiswamy and Others, the apex court reiterated the above principle of law and even in respect of rules framed under Article 148(5) of the Constitution of India giving retrospective effect held that such rule can have only prospective operation. Situated thus, we have to ignore this notification dated 18th August, 1989 giving retrospective effect for the purpose of present appeals, as the occurrence took place prior to the date of issue of the above notification. In other words, we have to hold that State Government did not authorise any officers including police officers u/s 41(2) or Section 42(1) of the Act.

8. The cardinal rule of construction of a statute is that it should be construed according to the intention expressed in the Act itself and if the words of a statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. To quote the words of Lord Goddard CJ, "A certain amount of common-sense must be applied in constructing statute. The object of the Act has to be considered" (Craies on Statute Law, Seventh Edition page 64). The present Act, a penal one and Craies on Statute Law of the same edition at page 531 has observed that the distinction between a strict and liberal construction has almost disappeared with regard to all classes of statutes, so that all statutes, whether penal or not are now construed by substantially the same rule. They are construed now with reference to the true meaning and real intention of the legislature. So in analysing the above provisions of the Act, we have to ascertain the intention of the legislature.

9. In *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya*, it was pointed out by his Lordship Hon"ble Justice Subbarao (as his Lordship then was) that "for ascertaining the real intention of the legislature the court may consider, inter alia, the nature and design of the statute, and the consequences which would follow from construing it in one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that non-compliance with the provision is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all whether the object of the legislation will be defeated or furthered". If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory. We may also add here the firmly established rule for construing an obscure enactment laid down in *Heydon's case* (1584 76 ER 637), approved and followed by the apex court and other courts and the said rules are "that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered :

- (i) what was the common law before the making of the Act;
- (ii) What was the mischief and defect for which the common law did not provide;
- (iii) what remedy the parliament hath resolved and appointed to cure the disease;

(iv) the true reason of the remedy."

Court has to always make such construction as it suppresses the mischief and advances the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and pro private commodo, and to add force and life to the cure and remedy according true intent of the makers of the Act pro bono publico.

10. The menace of Narcotic drugs and Phycotropic substances has assumed alarming proportions not only in our country, but in the whole world. This has become an enemy for the mankind. Not only that trafficking in drugs meant to amass illegal wealth quickly, which is a matter no society can tolerate. From the long title of the Act, we find that to tackle this problem our legislature has enacted this law to consolidate and amend the law relating to Narcotic drugs and to make stringent provisions for the control and regulation of operations relating to Narcotic Drugs and Psychotropic substances. As the legislature was of the view that the existing law such as Opium Acts of 1857 and 1878 and Dangerous Drugs Act, 1930 and some of the local laws like Assam Opium Prohibition Act are not sufficient to deal with this problem and hence this present law has been enacted. While enacting this law the legislature has taken into consideration the recommendations of International Conventions on the subject as mentioned in Section 70 of the Act.

11. To achieve the object i.e. to curb and eradicate the evil of Narcotic drugs the legislature has made certain departure from other normal laws and these are, minimum punishment of 10 years and fine of Rupees 1,00,000/- and also separate procedure for issuance of warrant of arrest and authorisation for search, seizure and arrest of culprits. At the same time adequate safeguards have been provided keeping in view the criminal jurisprudence of our country to ensure that in no case an innocent as convicted and the officers misusing the powers are punished. These are the basic intentions as would appear from the Act.

12. Sections 41 and 42 have to be read together as u/s 41 Magistrate and Gazetted Officer of the departments mentioned in these two sections can issue warrant of arrest and authorisation to subordinate officer respectively enabling them to arrest a person or conduct a search in a building, conveyance or place. Section 42 gives power of entry, search and seizure or arrest without warrant or authorisation u/s 41. From these sections it would appear that the intentions of the legislature is to involve officers of more departments in order to make the Act effective. But these officers can act only if they are authorised to do so by the Central Government or the State Government, as the case may be, and in absence of such an authority they will have no power to arrest, search etc. and if they try to do so their action can be resisted. In our country we have adopted rule of law as our basic principle and as such the private right of an individual cannot be invaded without authority of law. We are, therefore, of the opinion that reading these two sections together, authorisation by the Central Government or the State Government is a must, and in other words these are mandatory

provisions.

13. Coming to Sub-section (2) of Section 41 an authorised Gazetted officer of the departments mentioned in the said sub-section may also authorise any officer subordinate to him but superior in rank to peon, sepoy or constable to arrest a person or conduct a search in a building, conveyance or place whether by day or night. This authorisation by the Gazetted officer similarly is also mandatory as otherwise, the subordinate officer will be acting without powers. Section 42 is not confined to gazetted officers of the department, but to other officers not being a sepoy, peon or constable who are duly authorised by the Central Government or the State Government to enter into any building etc. for the purpose of conducting search and seizure. This can be done from personal knowledge regarding any Narcotic drugs or psychotropic substances or "information given by any person and taking down in writing". Similarly, under Sub-section (2) of Section 41 a duly authorised gazetted officer it has reason to believe "from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under Chapter IV etc." may authorise any subordinate officer as mentioned in the said sub-section or himself arrest any person and conduct any search. From reading the expression "information given by any person and taken down in writing" occurring in both the! sections mentioned above, we are of the opinion that mere receiving the information is not sufficient, but it must be reduced into writing. We say so as the legislature has used the word "and" which is normally conjunctive. Of-course the word "and" can also be disjunctive if it is necessary to do so to give effect to the manifest intention of the legislature as disclosed from the context. But reading both the sections as a whole we are firmly of the opinion that the word "and" cannot be read as disjunctive as otherwise, the expression will have no meaning. If this information is not reduced into writing result may be (i) the prosecution may subsequently improve the story and (ii) officer may be exposed to vexatious prosecution u/s 58 of the Act. Section 58, inter alia, provides punishment for vexatious entry, search or arrest if it is so done without reasonable ground of suspicion or vexatiously and unnecessarily. That apart, Sub-section (2) of said Section 58 makes also a person punishable if he wilfully and maliciously gives false information which may result in arrest or search on the basis of this information.

14. The proviso to Sub-section (1) of Section 42 enables any such officer to enter and search any building, conveyance and enclosed place at any time between sun-set and sun-rise after recording ground for his belief that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of the offender. Reading this proviso with reference to the main section and Section 42, in our view, search warrant means warrent issued by a Magistrate u/s 41(1) and authorisation as is given by the authorised gazetted officer to his ubordinate officer under Sub-section (2) of Section 41 of the Act. Sub-section (2) of Section 42 provides that if an officer takes down any information in writing under Sub-section (1) of Section

42 or records grounds for his belief under the aforesaid proviso he shall forthwith send a copy to his immediate superior officer. Recording of the grounds of his belief under the above proviso to Section 42 and sending of the report, in our opinion, are also mandatory for the reasons which we have already stated above and we need not burden our judgment by repeating the same.

15. We have also taken note of the fact that in this Act no departure has been made regarding investigation etc. of cases under the provisions of Cr. P.C. Section 51 of the Act only provides that that the provisions of Cr. P.C. shall apply in-so-far as they are not inconsistent regarding issuance of warrant, arrest, search and seizure.

16. Sections 93, 94, 95 and 97, Cr. P.C. provides for searches under warrant from a Magistrate and Section 165 provides for searches by an officer in-charge of a police station or an investigating officer without warrant in course of investigation of an offence. Sections 41 & 42 of the Act empowers the officers mentioned in the said sections to conduct search etc. prior to investigation. This departure from the Cr. P.C. is a special provision and in terms of Section 51, provisions of Cr. P.C. in this respect will not be applicable.

17. u/s 43, Cr. P.C. even a private person may arrest any person who in his presence commits a non-bailable and cognisable offence. So, if the officers mentioned in Sections 41 & 42 can arrest a person, even if they are not authorised u/s 41 or 42, if the offence is committed in their presence, but for this purpose they cannot enter into any building etc. in view of our conclusion that the relevant provisions of Sections 41 & 42 are mandatory in nature.

18. Coming to Section 43, the opening words are "any officer of any of the department mentioned in the said Section 42....."

and the word "authorised" has been omitted in this section. We have to determine whether this is an intentional omission or whether it was a mistake. If we come to Section 49 we find the opening words as follows :

"any officer authorised u/s 42....."

The words authorised u/s 42 has also been used in Section 50. But in Section 58 the words are "any person empowered u/s 42 or 43 or Section 44". Thus we find that whenever legislature wanted to use the expression "authorised" it did so. Section 43 empowers any officer of any department mentioned in Section 42 to seize and arrest in public place. Public place has been defined in the explanation. In our opinion, in Section 43, legislature has intentionally omitted the word "authorised". Reading this section as a whole, we are further of the opinion that this power has been given to the officer of the departments mentioned in Section 42, as such an officer cannot be a silent spectator if in a public place Narcotic drugs etc. are found to be in possession by any person and as such the legislature did not contemplate authorisation by the Central or State Government u/s 41 or 42 of the Act for any officer of the departments mentioned in these

sections to arrest a person or makes a seizure of Narcotic drugs in public place. Of course officer will not include a peon, sepoy or a constable. We may again mention that as the offence under the Act is cognisable, even a private person can arrest u/s 42, Cr.P.C. if the offence is committed in his presence.

19. In all the three cases in hand the accused persons were arrested by the S.I. of Police in a public place and in view of our above finding, we hold that there was no illegality in the arrest and seizure in question.

20. Next question which needs our consideration is Section 50 of the Act. Reading this section, we are of the opinion that the expression "when an officer duly authorised u/s 42" shall apply only in case of officers under the said section and not to officers u/s 41 or 43. In other words, if a duly authorised officer u/s 42 or any officer u/s 42 or 43 even if not so authorised, makes an arrest, the conditions laid down in said Section 50 shall be applicable. To put it otherwise, if a person is arrested by any unauthorised officer u/s 43 he shall have to follow the conditions laid down in the said section. The words appearing in Section 50, in our opinion, makes the conditions mandatory. We are, further of the opinion that the words "if such persons so requires" also implies that the person arrested should be informed of his rights under the said Section 50. According to Section 50, the person has a right to be taken to the nearest gazetted officer of any of the department mentioned in Section 42 or to the nearest Magistrate. This is an important safeguard given to an accused person by the legislature keeping in view our criminal jurisprudence. That apart, seizure before a gazetted officer or before a Magistrate will make the recovery creditworthy and remove scope to implicate a person falsely. This intention of the legislature as stated above, makes the provision mandatory. In our opinion, after a person is arrested and before a search is conducted it is mandatory on the part of the officer to inform the accused that he has a right to be searched in presence of a gazetted officer or a Magistrate. The accused will get the benefit if there is a failure to comply with this provision.

21. Coming to the case in hand, we find that the entire operation was done in presence of a gazetted officer viz. Superintendent of Police, Border Areas and as such there were no violation of Section 50 of the Act.

22. That leads us to the last question regarding Section 55 of the Act. According to this section an officer-in-charge of the police station shall take charge for safe custody of articles seized under the Act within his jurisdiction and which may be delivered to him and shall allow the officer bringing such articles to affix his seal to such articles or to take samples and the officer-in-charge shall also seal the articles with his own seal. Reading this section, we are of the opinion that while enacting this section legislature had two intentions viz. actual articles seized are produced at the time of trial and samples of the said articles are sent for analysis by expert and secondly after the articles are produced before the officer-in-charge, these are not substituted by some other articles. These safeguards have been provided both for prosecution and the accused and have to be followed

scrupulously. In other words, these are mandatory provisions of law and unless followed, it would go in favour of the accused.

23. As stated earlier Section 51 of the Act, inter alia, provides that Cr. P.C. shall apply in-so-far as they are not inconsistent with the provisions of the Act to all warrants issued and arrest, searches and seizure made under the Act. Therefore, while conducting search and seizure in addition to the safeguards or provisions made in the Act, provisions of Cr. P.C. shall also apply, more particularly Section 100. Of course for non-compliance of this section the seizure and search may not be illegal, but the court has to scrutinise the evidence carefully and if in spite of such irregularities it is found that no advantage was taken by the authority conducting search, it may not affect the prosecution story. Otherwise, the benefit will go in favour of the accused.

24. Learned Public Prosecutor has drawn our attention to the transitional provisions contained in Section 74 of the Act in order to bring home his point that even if the notification issued by the Govt. on 18th August, 1989 may not have retrospective effect, under the above provision officers who had powers under the repealed Act shall continue to exercise these powers. We are unable to accept this contention, inasmuch as, this Act was enacted in the year 1985 and this transitional provisions cannot continue for 4 years.

25. It has been urged by the learned Public Prosecutor that illegality of investigation does not vitiate the jurisdiction of the court for trial and in support reliance has been placed in *Sailendra Nath v. State of Bihar* AIR 1968 SC 1292 : (1968 Cri LJ 1484) . It has been further urged that even if the seizure was illegal, consequent trial is not vitiated as laid down by the apex court in *State of Maharashtra Vs. Natwarlal Damodardas Soni*, In reply, learned counsel for the accused persons placed reliance in *The State of Madhya Pradesh Vs. Mubarak Ali*, Reliances have also been placed in the decisions of the apex court in *Delhi Administration Vs. Ram Singh*,

26. All these above decisions are regarding procedure for investigation and the two Acts referred to in these decisions provided that the investigation should be conducted by a superior officer or an officer specially empowered under the Act. We are not concerned in the cases before us regarding investigation, as investigation has to be done under normal procedure of Cr. P.C. after the Officer-in-charge of the police station takes charge of the matter u/s 55 of the Act. Therefore, the above decisions are not relevant for our present purpose. However, in *Natwarlal* (1980 Cri LJ 429) (SC) (supra) the question of seizure by police was not in accordance with the relevant Act and as such the apex court held that assuming that the seizure was illegal it will not affect the validity of the seizure. But the question whether a particular provision was mandatory or not was not considered in that case and as such is not relevant for our present purpose. Learned counsel for the accused persons has placed before us the landmark decision of the Privy Council in AIR 1936 253 (Privy Council) wherein the law laid down was that where a power is given to do a certain thing in a

certain way, the thing must be done in that way or not at all. This law was laid down in connection with recording of confessional statement and still holds the field. This law is not relevant for our present purpose as the question before us is regarding interpretation of some provisions of an Act which we have already done. The observation of Lord Denning, which was quoted by the apex court in *Dr. N.G. Dastane Vs. Mrs. S. Dastane*, that "degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear" has also been relied by the learned counsel for the accused persons. We are not concerned with the above observation at this stage, as this has to be taken note of by the learned trial court.

27. We may now refer to decisions of various High Courts on this Act as placed before us. In *Hakam Singh Vs. Union Territory*, it was held that transitional provision in Section 74 does not allow officer to ignore mandatory provisions of the Act. We are in respectful agreement with this law. In *Karam Singh Vs. State of Punjab*, it was laid down that provisions of Cr. P.C. shall apply only to the extent they are not inconsistent with the provisions of the Act. We have already expressed the same view. In *Pradeep Kumar v. State* 1989 Cri LJ 2438 (Delhi) it was held that trial was vitiated for non-compliance of the mandatory provisions of Sections 52(3) and 55 as the seized material and accused were not produced before the officer-in-charge of the police station as required. We are in respectful agreement with the above law as we have already held that Section 55 of the Act is mandatory. In *Rajesh Vs. The State*, the conviction of the accused was set aside mainly on the ground that provision of Section 55 of the Act was not complied with and it was also held that this is a mandatory provision. We have also expressed the same view. In *State of Himachal Pradesh v. Sudarshan Kumar*, 1989 Cri LJ 1412 (Him Pra), it was held that u/s 50(1), the officer is bound to inform the person of his right to be taken to the nearest gazetted officer or Magistrate and that Sections 52(1) and 57 are mandatory. It was also held that Section 55 is directory. We have held that Section 55 is mandatory and in view of our reasons we respectfully disagree with this law. But we agree that Section 52(1) and 57 are mandatory and that u/s 50(1) person has to be informed of his right.

28. In *Abdul Sattar v. State* 1989 Cri LJ 430 (Bombay), it was held that illegality of search u/s 41 will not vitiate conviction. With respect we are unable to agree in view of reasons given by us. Regarding *Wilfred Joseph Dawood Lema Vs. State of Maharashtra*, we are unable to agree with respect the law laid down that police officer is not duty bound u/s 50 to inform the person that he has his right for his production before a Magistrate or a gazetted officer. We have already given sufficient reasons. *Nathu Ram Vs. State*, it was held that recording of information u/s 42(2) is directory and not mandatory. But we are unable to agree with respect with this proposition of law for the reasons already stated.

29. Situated thus, we are of the opinion that the impugned judgments and orders are liable to be set aside and the cases are to be remanded back for re-

trial. The learned trial court shall give further opportunity to the prosecution to re-examine their witnesses and the accused to cross-examine and thereafter decide the matter in terms of law laid down by us.

30. In the result, all the three appeals are allowed by setting aside the impugned judgments and orders and we remand the cases for re-trial. In Criminal (Jail) Appeal No. 1 of 1990, learned counsel for the accused has stated that during trial, the accused was all along on bail. He is, therefore, released on bail of Rs. 5,000/- (Rupees five thousand) only with one surety of like amount to the satisfaction of the learned Sessions Judge.