

(1996) 06 BOM CK 0026

In the Bombay High Court

Case No : Criminal Appeal No's. 53 with 538 of 1994

Mohammed Phiroz Hanif Ansari and Another

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 10-06-1996

Acts Referred:

Evidence Act, 1872 — Section 3, 59, 61

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 41, 42, 50

Citation : (1996) 4 BomCR 249

Hon'ble Judges : R.P. Desai, J;N.D. Vyas, J

Bench : Division Bench

Advocate : A.P. Mundargi, in C.A. 53 of 1994 and R.S. Sayed, in C.A. 538 of 1994, for the Appellant; S.R. Borulkar, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

N.D. Vyas, J.—Both the appeals are directed against the judgement and order passed by the Special Judge appointed under Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) dated 30th September, 1993 in NDPS Special Case No. 370 of 1991. The appellant Muhamed in Appeal No. 53 of 1994 (being original accused No. 3), appellant Rashid in Criminal Appeal No. 538 of 1994 (being original accused No. 1) and one Sajjan Magan Netkar (original accused No. 2) have been convicted of the offences punishable u/s 8(c) read with section 21 of the N.D.P.S. Act and each of them is sentenced to suffer rigorous imprisonment for a period of 10 years with a fine of Rs. 1,00,000/-, in default, to suffer further rigorous imprisonment for six months. Further, the said accused are convicted u/s 8(c), section 21 read with section 29 of the N.D.P.S. Act and each of them is sentenced to rigorous imprisonment for a period of 10 years with a fine of Rs. 1,00,000/-, in default, to suffer further rigorous imprisonment for six months. The above sentences are ordered to run concurrently. One Jallaluddin Mohmed Saleya, (original accused No. 4) was discharged. Being aggrieved by the said judgment and order,

Muhamed and Rashid have filed two separate appeals. As both the appeals are directed against the same judgment, they can be conveniently disposed of by this common order.

2. It is the prosecution case that on 11th March, 1991 at about 10.30 a.m. information was received that four persons were likely to come near Naaz Hotel, L.B.S. Road, Kurla (West) at about 2.30 p.m. for the purposes of making a narcotic transaction. The information contained the name of the four accused along with their physical descriptions. This information was recorded by P.S.I. Nigade who is P.W. No. 1. Thus a raid was arranged and for that purpose two panchas were called in the office of the Narcotic Cell. The reading party offered their personal search to the panchas. They also took personal search of the panchas. A pre-trap panchanama was prepared and the Police Officers collected sealing and weighing materials, drug identification kit, and P.W. 1 along with P.I. Pawar and others left in the Police Vehicle and reached near the entrance of the gate of Mukund Wire and Steel Company situated opposite Naaz Hotel and waited for the accused to come. At about 3 p.m. accused Nos. 2 to 4 were seen standing in front of Naaz Hotel and they were talking with each other. After some time Rashid came on the spot with a polythene bag in his hand and the same was shown to the other accused who checked it and handed it back to Rashid. The Police Party, at that point of time surrounded all the four persons and detained them on the spot. It is the further case of the prosecution that P.I. Pawar disclosed his identity to the accused and told them that he wanted to take their personal search. He also told them that they had a right to have their search taken in the presence of a Gazetted Officer and that the accused declined that offer. It is also the further case of the prosecution that P.I. Pawar also told them that he himself was a Gazetted Officer. Thereafter in the presence of the panchas personal search of all the four accused was taken and contraband was found on the person of Muhamed and Rashid who are the two appellants in their respective appeals before us. All the four persons were arrested. However, before framing of the charge, Jallaluddin was discharged and charges were framed only against Rashid, Sajjan and Muhamed. The learned trial Judge found all the three accused guilty as charged and sentenced them as mentioned earlier. The present two separate appeals have been directed by Muhamed and Rashid against the said Judgment and order. At the trial, evidence of Tanaji Keshav Nigade, P.S.I. attached to the Narcotic Cell, A.P.I. Naikwadi, pre and post trap panchanama witnesses and evidence of S.R. Pawar being P.W. 4 and being P.I. attached to Nehru Nagar Police Station was recorded. No evidence was led on behalf of the defence which had taken a plea of total denial.

3. Mr. Mundargi, the learned Counsel appearing for Muhamed, the appellant in Criminal Appeal No. 53 of 1994 and Miss Syed, the learned Counsel appearing for Rashid, the appellant in Criminal Appeal No. 538 of 1994 made only one submission before us and that was to the effect that the mandatory provisions of section 50 of the N.D.P.S. Act had not been fully complied with, inasmuch as that the accused were not given an option of being searched in the presence of a

Magistrate. Thus the entire trial was vitiated.

4. The only question which requires consideration in the two appeals is: Whether asking a suspect if he wants to be searched in the presence of a Gazetted Officer and the officer conducting the search informing him that he is a Gazetted Officer, would amount to compliance with the provisions of section 50 of the N.D.P.S. Act. In other words: Whether non-mention to the suspect of his option to be searched before a Magistrate is fatal?

5. Before we embark upon this enquiry, let us first see the purpose and scheme of the N.D.P.S. Act. The Act was enacted in the year 1985 with a view to consolidate and amend the law relating to Narcotic Drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances and for matters connected therewith. Sections 1 to 3 in Chapter I deal with definitions and connected matters. The provisions in Chapter II deal with the powers of the Central Government to take measures for preventing and combating abuse of and illicit traffic in narcotic drugs and to appoint authorities and officers to exercise the powers under the Act. The provisions of Chapter III deal with prohibition, control and regulation of the prohibited items. Chapter IV deals with various offences and penalties for contravention in relation to contraband items. The provisions of Chapter V, with which we are directly concerned, deals with the procedure regarding the entry, arrest, search and seizure. Chapter V-A, deal with forfeiture of property derived from or used in illicit traffic of such drugs and substances and Chapter VI deals with miscellaneous matters. As indicated above, we are mainly concerned with the provisions contained in Chapter V of the said Act and especially sections 42, 43, 44, 50 and 54. The submission as mentioned earlier centres around the provisions of section 50 of the N.D.P.S. Act and therefore, it would be convenient to reproduce the same.

"50. Conditions under which search of persons shall be conducted.---

(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."

From the plain reading of section 50 of the said Act it is apparent that it lays down the conditions on which search of a person shall be conducted. It provides that when any officer duly authorised is "about to search" any person under the provisions of sections 41, 42 or 43 of the Act, "he shall" if such person so "requires", take such person without unnecessary delay to the nearest Gazetted Officer or to the nearest Magistrate. The Gazetted Officer indicated in the said provision is supposed to be of any of the Departments mentioned in section 42. The Supreme Court had an occasion to deal with inter alia the said provision in the matter of State of Punjab Vs. Balbir Singh, , wherein the Supreme Court inter alia held that section 50 confers a valuable right on the person to be searched in the presence of a Gazetted Officer or a Magistrate if he so requires, since such a search would impart much more authenticity and creditworthiness to the proceeding while equally providing an important safeguard to the accused; that to afford such an opportunity to the person to be searched, he must be made aware of his right and that can be done only by the authorised officer informing him; that under the Act wide powers are conferred on the officers and deterrent sentences are also provided for the offences under the Act and that the legislature while keeping in view the menace of illicit drug trafficking deemed it fit to provide for corresponding safeguards to check the misuse of power thus conferred so that any harm to innocent persons is avoided and to minimise the allegations of planting or fabricating by the prosecution and that is why section 50 has been enacted. The Supreme Court further held that therefore, it is to be taken as an imperative requirement on the part of the empowered officer or authorised officer while acting u/s 41(2) or section 42 to comply with the provisions of section 50 before the search of the person is made and such person should be therefore, informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder: that thus it is obligatory on the part of such officer to accordingly inform the person to be searched and failure to so inform the person to be searched, and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of the mandatory provisions of section 50 affecting the prosecution case and vitiating the trial. The Supreme Court relied on the Miranda Rule in U.S.A. as enunciated in *Miranda v. Arizona* 384 U.S. 436 under which rule if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has a right to remain silent. This is because for those unaware of the privilege, the warning is needed simply to make them aware of it-the threshold requirement of an intelligent decision as to its existence and further, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. Thereafter the Supreme Court in the matter of *Ali Mustaffa Abdul Rahman Moosa Vs. State of Kerala*, while dealing with a situation where the accused was not given an option as to whether he desired to be searched in the presence of a Gazetted Officer or a Magistrate reiterated that view taken by the Supreme Court in *Balbir*

Singh's case (supra) and allowed the appeal and set aside the conviction.

6. In the case of Mohinder Kumar Vs. The State, Panaji, Goa, , the Supreme Court again reiterated the above view and after scrutinizing the facts before it held that in that case the provisions of section 50 of the said Act which are mandatory, were not complied with inasmuch as the officer concerned, did not inform the person to be searched whether he would like to be taken to a Gazetted Officer or a Magistrate. Again in the matter of Saiyad Mohd. Saiyad Umar Saiyad and Others Vs. State of Gujarat, , the Supreme Court reiterated the said earlier view in Balbir Singh's case (supra) to the effect that the provisions of section 50 of the said Act are mandatory and further laid down that having regard to the grave consequences that may entail for the possession of illicit articles under the N.D.P.S. Act, namely, the shifting of the onus to the accused and the severe punishment to which he becomes liable, the Legislature has enacted the safeguard contained in the said section; that to obviate any doubt as to the possession by the accused of illicit articles under the N.D.P.S. Act, the accused is authorised to require the search for such possession to be conducted in the presence of a Gazetted Officer or a Magistrate and that the provisions in this behalf are mandatory and the language thereof 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. As regards the proof of such a mandatory procedure having been followed or not, the Supreme Court further laid down that when the evidence of search is given, all that transpired in its connection must be stated, that 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 and 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 N.D.P.S. Act was not established. The Supreme Court therein further held that it cannot be said that in cases under the N.D.P.S. Act it is the duty of the Court to raise a presumption, when the officer concerned has not deposed that he had followed the procedure mandated by section 50; that he had in fact done so; that when the officer concerned has not deposed that he had followed the procedure mandated by section 50, the Court is duty bound to conclude that the accused had not had the benefit of the protection that section 50 affords, that therefore, his possession of articles which are illicit under the N.D.P.S. Act is not established and that the precondition of his having satisfactorily accounted for such possession has not been met. The Supreme Court lastly cast duty on the Court by holding that it is necessary that courts dealing with offences under the N.D.P.S. Act should be very careful to see that it is established to their satisfaction that the accused has been informed by the officer concerned that he had a right to choose to be searched before a Gazetted Officer or a Magistrate and that the accused must be made aware of this right or protection granted by

the statute and unless cogent evidence is produced to show that he was made aware of such right or protection, there would be no question of presuming that the requirements of section 50 were complied with. Subsequent to the above decision, the Supreme Court in the case of Raghbir Singh Vs. State of Haryana, again after reiterating the above view, further held that after the officer in charge has given the option to the accused as to whether he wants to be searched in the presence of a Gazetted Officer or a Magistrate, the ultimate choice between the Gazetted Officer or a Magistrate would lie with the Police Officer and this conclusion the Supreme Court arrived at looking to the language of the said provision which contemplates taking the suspect to the "nearest" Gazetted Officer or a Magistrate "without unnecessary delay". In fact the said decision reiterated the view taken by the Supreme Court in the matter of Manohar Lal v. State of Rajasthan, reported in (1996)I AD. S.C. (CrI.) 199.

7. From the above discussion, it would be amply clear that while interpreting section 50 of the said Act, the Supreme Court has laid down the following principles viz., (a) that the provisions of section 50 of the said Act are mandatory in nature and failure to comply with the said provisions would vitiate the trial; (b) that it is the duty of the empowered or the authorised officer to inform the accused who is about to be searched as to his right and option u/s 50 of the said Act, to be searched in presence of a Gazetted Officer or a Magistrate; (c) that if the accused exercises such an option and chooses one of the two, the ultimate choice would be, always with the Officer in charge ;(d) that whether section 50 of the said Act is complied with or not has to be established by the prosecution by leading cogent evidence and no presumption of any nature can be raised by the Court in the absence of such material, that it being an official act, u/s 114(e) of the Evidence Act it would be presumed that the official act was done properly; and (e) that from the record itself it must appear whether the accused was made aware of his right u/s 50 of the Act or not. In other words, the record must itself clearly show that such a compliance had in fact taken place.

8. In the light of the above principles laid down by the Supreme Court, it was submitted on behalf of the appellants that the prosecution had failed to establish by cogent evidence that the requirements of section 50 of the Act were complied with. In order to appreciate this submission let us see whether the record of the case satisfactorily discloses full compliance with the mandatory requirements of section 50 of the Act. We wish to make it clear that we are only dealing with that part of the evidence which has a bearing on the only submission advanced before us.

"(a) The post seizure panchanama (Ex. 11), a contemporaneous document, states; "P.I. Pawar disclosed his identity and informed them that police wanted to take their personal searches. P.I. Pawar told them that they had a right to have their searches taken in presence of a Gazetted Officer u/s 50 of the N.D.P.S. Act, 1985. He further informed them that he was a Gazetted Officer."

(b) The complaint (Ex. 7), again a contemporaneous document, states: "P.I.

Pawar disclosed his identity and informed them that police wanted to take their personal searches. P.I. Pawar told them that they had a right to have their searches taken in presence of a Gazetted Officer u/s 50 of the N.D.P.S. Act. He further informed them that he was a Gazetted Officer".

(c) P.I. Nigade (the complainant) in his examination in chief deposed: "P.I Pawar disclosed his identity to them. He informed them that the police wanted to take their personal search for narcotic drug. He further informed them that they had a right to have their searches made in the presence of the Gazetted Officer. But those persons declined to be searched before the Gazetted Officer". He further deposed: "P.I. Pawar took in his charge all the packets including the packets containing cash amount. We informed all the four accused that they were arrested as "gard" was found with them. We also informed them that we would take them to a Magistrate or S.E.M. if they had any complaint. The accused declined to do so. A panchanama of all these facts was drawn on the spot". In his cross-examination he deposed: "It is true that the reply given by the accused to our query whether they wanted to be searched in the presence of a Gazetted Officer or a Magistrate is not recorded in my complaint and the panchanama". He further volunteered that the accused did not give any reply.

(d) Pancha witness D.S. Wankhede (P.W. 2) in his examination in chief deposed "Pawar told the accused whether he should take their personal search or they wanted to go before someone else for that purpose. All the four persons got frightened and did not give any reply".

(e) Inspector-in-charge S.R. Pawar in his examination in chief deposed: "The movements of the accused were found suspicious. Hence we surrounded them and detained them. I told all the four accused that we had a suspicion that they were possessing a narcotic drug and that we wanted to take their personal searches. I also told them that they had a right to have their searches made in the presence of the Gazetted Officer. However, none of them said anything. I disclosed my identity to the accused and told them that I was a Gazetted Officer". He further deposed: "Accused Nos. 1 to 3 were informed that narcotic drug was found with them. They were further explained the grounds for their detention. We told them that we would take them to a Magistrate if they had any complaint against us. But they replied in the negative". In his cross-examination he deposed: "None of the accused said anything after I told them that they had a right to have their searches made in the presence of the Gazetted Officer".

(f) Assistant Police Inspector F.A. Naikwadi in his examination-in-chief deposed: "P.I. Pawar told all the accused that he wanted to have their search. He asked them whether they wanted to have their search made before any Gazetted Officer. The accused did not give any reply. P.I. Pawar told the accused that he himself was a Gazetted Officer."

9. From the above excerpts of the evidence which we have reproduced verbatim in order to appreciate the appellants' submission, it is apparent that neither from

the evidence of P.I. Pawar, the officer in charge nor from the panchanama or the F.I.R. nor from the evidence of any other witness, it emerges that the accused before being searched were made aware of their right u/s 50 of the said Act their right to be searched before a Gazetted Officer or a Magistrate. All that emerges is that the accused were told that they can be searched before a Gazetted Officer and that P.I. Pawar was a Gazetted Officer. The reference to Magistrate is to be found only in the evidence of P.I. Nigade when in his cross-examination he agreed with the suggestion that the reply given to the query by the accused was not recorded either in his complaint or the panchanama. The other places where a mention to a Magistrate is made appear is in the evidence of P.I. Nigade and P.I. Pawar but that is after the search and arrest. The language of section 50 is very clear and as interpreted by the Supreme Court on a number of occasions, as is evident from the decisions cited hereinabove, section 50 inter alia stipulates that the officer incharge of the operation before taking personal search of the suspect must make him aware of his right that he can be searched if he so desired in the presence of a Gazetted Officer of any of the Departments mentioned in section 42 or a Magistrate. The option is given to the suspect to be searched if he so desired before a Gazetted Officer or a Magistrate. To us it appears that Mr. Pawar felt that he being a Gazetted Officer his mentioning the said fact was enough in order to comply with the provisions of section 50 of the said Act which in our view is totally wrong. The statute itself provides for the search being taken if so desired by the suspect, before a senior officer mentioned therein.

10. Mr. Borulkar the learned Counsel appearing for the respondent joined issues with Mr. Mundargi and submitted that although the provisions of section 50 were mandatory and that it was obligatory upon the officer concerned to inform the suspect about his right, there was a total compliance in the present case when the accused were asked whether they would like to be searched in the presence of a Gazetted Officer. It was his further submission that the option required is only one and that is whether the accused wishes to be searched in presence of a Gazetted Officer or a Magistrate OR by the officer conducting the search and seizure and that when the officer in charge of the operation is a Gazetted Officer, section 50 is fully complied with. Mr. Borulkar relied on a decision of a Division Bench of this Court in the matter of Shakal Abdul Gaffor v. Union of India, reported in 1991(1) Bom.C.R. 270 , wherein it was inter alia held that there was nothing in section 50(1) and (3) which required one Gazetted Officer to take the accused to another Gazetted Officer just for the search, that the rationale of section 50(1) is that the question of search of any person was a matter of responsibility and if the person so desired he was entitled to have a person of a sense of responsibility such as a Magistrate or a Gazetted Officer to direct the search and that there was no breach of the provisions of law if one of the Investigation Officers was himself the kind of Gazetted Officer having the powers referred to in section 50(1) read with section 42 of the Act. The said decision also further held that there was no duty cast on the Investigating Officer to

inform the accused of there being a right to approach the Gazetted Officer and that failure to do so would not vitiate prosecution. Mr. Borulkar also cited another Division Bench decision of this Court in the matter of Ramji Duda Makwana Vs. The State of Maharashtra, which followed the earlier decision. We are afraid that these decision cannot help Mr. Borulkar in view of the subsequent decision of the Supreme Court in Balbir Singh's case (supra) and other decisions of the Supreme Court referred to above which came in its wake. As a matter of fact in Raghbir Singh Vs. State of Haryana, the Supreme Court inter alia held that finding a person to be in possession of articles which are illicit under the provisions of the N.D.P.S. Act has the consequence of requiring him to prove that he was not in contravention of its provisions and it renders him liable to severe punishment and that therefore, that the said Act affords the person to be searched a safeguard and that he may require the search to be conducted in the presence of a "senior officer" and that the "senior officer" may be a Gazetted Officer or a Magistrate, depending upon who is conveniently available. Again in the said decision the Supreme Court further referred to search being taken in the presence of such "senior officer". There is no doubt in our mind that what is contemplated by the said provision as interpreted by the Supreme Court is taking of the search in the presence of a "senior officer" described in section 50, obviously other than the officer who is incharge of the raid. In our opinion if the legislature had intended to consider a search taken by the Investigation Officer who happens to be a Gazetted Officer as a good and valid search, the legislature would have so provided. To be searched in the presence of a senior officer, as desired by the Supreme Court in Raghubir Singh's case is to ensure that no planting of any contraband is alleged.

11. Mr. Borulkar next submitted that no foundation was laid by the defence as to non-compliance with section 50 of the Act and therefore, the appellants cannot be permitted to raise this contention. He cited a decision of the Supreme Court in the case of Surajmal Kania Lal Soni Vs. State of Gujarat, wherein it is inter alia held that there was no material on record to show that the contentions which were raised before the Supreme Court could be raised. Mr. Borulkar also relied on a decision of a Division Bench of this Court in the matter of Babulal Hiralal Sainy and another etc Vs. State of Maharashtra, which followed the decision of the Supreme Court in Surajmal's case (supra). In our view, the decision in Surajmal's case (supra) indicates that the questions raised before the Supreme Court were raised for the first time before it when the two courts below had on appreciation of evidence come to the conclusion that the contraband was found in a bag. The Supreme Court therein referring to its earlier decision in Balbir Singh's case (supra) thus held that whether there was a compliance with section 50 or not was a question of fact and in that context it observed that no foundation was laid in cross-examination. However, a larger Bench of the Supreme Court in the case of Saiyad Mohd. (supra), as discussed above, inter alia laid down that the courts dealing with offences under N.D.P.S. Act should be very careful to see that it is established to their satisfaction by the prosecution

that the accused has been informed of his right to choose to be searched before a Gazetted Officer or a Magistrate. From the above it appears to us that it is a statutory mandate that the prosecution in every case must establish by cogent evidence that the accused is made aware of this right which is a protection granted by the statute against being implicated as a result of planting of contraband. In the case before us from the evidence discussed earlier, it is apparent that the prosecution whose duty it is to establish by cogent evidence has failed to do so. From the judgment of the Division Bench in the case of Babulal Hiralal Sainy, (supra). it appears that the said subsequent decision of the Supreme Court in Saiyad Mohd's case was not cited and therefore, obviously not considered.

12. Lastly, Mr. Borulkar referred to the decision of the Supreme Court in Raghbir Singh's case (supra) in support of his contention that if the suspect is asked about being searched by the officer in charge or the presence of one of the two persons specified in section 50 of the Act, it would be a sufficient compliance. Mr. Borulkar drew our attention to the facts of that case narrated in para 3 of the said Judgment wherein it is mentioned: "The accused was found holding a bag in his hand. He was given the option of being searched by the said Police Officer or before a Gazetted Officer. The accused opted to be searched before a Gazetted Officer. He was then searched in the presence of a Gazetted Officer and the bag he was carrying was found to contain opium". From the above, it is true that it appears from this narration of fact that the accused therein was given an option as canvassed by Mr. Borulkar before us. The fact remains that when non-compliance with section 50 of the Act was contended before the Supreme Court, the Supreme Court negated the contention by reiterating the view it had taken earlier in the case of Saiyad Mohd. (supra) that the option under the said provision as it plainly reads is only of being searched in the presence of "such senior officer specified therein and that the same was complied with inasmuch as that as desired by him the accused was searched in the presence of a Gazetted Officer.

13. Lastly Mr. Mundargi cited a decision of the Delhi High Court in the matter of Mukesh v. The State, Delhi Administration, reported in 1994(3) Crime 337, where the view which we are taking has been taken by the learned Single Judge and it is held that if accused was given limited/partial option of being searched before a Gazetted Officer, there was no-compliance of a mandatory provisions of the Act contained in section 50 thereof and consequently conviction of the accused has to be set aside.

14. In our view, section 50 of the said Act has not been complied with. The accused, as it appears from the record, were asked only as to whether they would like to be searched in presence of a Gazetted Officer. Not only that but from the record it appears that the officer incharge of the raid conveyed to the accused in so many words that he was himself a Gazetted Officer, thus conveying that it was not necessary that they could be searched in the presence of any

other Gazetted Officer or a Magistrate. It is possible that if the accused were informed that he could be searched in the presence of a Gazetted Officer or a Magistrate they might have opted for a Magistrate. In short the accused had to be made aware of their right to opt to be searched either before a Gazetted Officer or a Magistrate. The salutary principle behind section 50 of the Act appears to be that the accused must be made aware of his right to be searched before a senior person viz. either a Gazetted Officer or a Magistrate. Mentioning of Gazetted Officer or a Magistrate in the said section is not an idle formality but to give a choice to the person to be searched in the presence of either of the two. Ignoring mentioning of any one of them while supposedly making the accused aware of his right can hardly be considered a compliance of the mandatory provisions of section 50 of the Act. In this view of the matter when section 50 of the N.D.P.S. Act has not been complied with, the equator would be that the trial is vitiated. In these circumstances, the convictions are set aside. Both the accused i.e. appellants in their respective appeals, are ordered to be released immediately if not required in any other case. Appeals thus allowed.