

(2015) 09 SHI CK 0059

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal Nos. 352, 353 and 354 of 2014

Padam Singh and Others

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 10-09-2015

Acts Referred:

Constitution of India, 1950 — Article 21

Criminal Procedure Code, 1973 (CrPC) — Section 100, 165, 313

Evidence Act, 1872 — Section 27, 29

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 20(b)(ii)(C), 29, 31, 31(a)

Penal Code, 1860 (IPC) — Section 120A, 120B, 43

Citation : (2015) 09 SHI CK 0059

Hon'ble Judges : Rajiv Sharma, J; Sureshwar Thakur, J

Bench : Division Bench

Advocate : Bhupinder Ahuja and Suneel Awasthi, for the Appellant; M.A. Khan, Additional Advocate General, Advocates for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sharma, J—Since all the appeals arise from a common judgment, the same are being taken up together for disposal vide this common judgment.

2. These appeals are instituted against Judgment dated 18.10.2014, rendered by learned Special Judge-II, Mandi, District Mandi, Himachal Pradesh in Sessions Trial No. 11 of 2013, whereby appellants-accused in Cr. Appeal No. 352/2014, (hereinafter referred to as "accused" for convenience sake), who were charged with and tried for offence under Section 20(b)(ii)(C) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as "Act" for convenience sake), have been convicted and sentenced to rigorous imprisonment for a period of fourteen years and to pay a fine of Rs. 1.00 Lakh each, in default of payment of fine, to further undergo simple imprisonment for a period of one year, for the commission of offence under Section 20(b)(ii)(C) of the Act. Accused in Cr. Appeals No. 353 and 354/2014, who were charged with and tried

for offence punishable under Section 29 of the Act, have been convicted and sentenced to undergo rigorous imprisonment for a period of fourteen years and to pay a fine of Rs. 1.00 Lakh each, in default of payment of fine, to further undergo simple imprisonment for one year, for commission of said offence.

3. Case of the prosecution, in a nutshell, is that on 5.12.2012 Inspector Deep Ram In charge Police Station Bharari, Shimla has sent one Rukka through ASI Subhash Kumar addressed to MHC State CID Bharari, Shimla, as per which Inspector SHO Deep Ram on 4.12.2012 alongwith ASI Mahesh Inder Singh, ASI Pratap Singh, Lady ASI Veena Pal, HHC Liak Ram, HHG Surender Thakur, HHG Narinder Singh was collecting information at places Mandi, Aut and Banjar in vehicle No. HP07B-0324. Raiding Party associated ASI Subhash Kumar from Mandi. On 5.12.2012 at 3.00 am, when police party was present 3 km ahead of Larji towards Banjar road, it received a secret information that from Gadagusai side Roshan Lal r/o Ghaliyar, Padam Singh r/o Faryari, Jai Singh r/o Tinder, Deepak Kumar servant of Roshan Lal, Nikka Ram r/o Palach, Sanjay Kumar r/o Gurgaon and Ravi Kumar r/o Gurgaon are transporting charas in their vehicles bearing No. HP01K-2191 Alto Car, HP34A-0634 Alto Car and HP33-9255 Indigo car. They received information that all the three vehicles had left Jhibi half an hour before. This information was recorded in writing under Section 42(2) of the Act, which was sent through ASI Subhash Kumar to Dy. SP, who had already come to Banjar. In the meantime, Police party saw the lights of the vehicles and laid a naka after crossing Burah bridge. It was night, no independent witness was available. Three vehicles came from Banjar side at 3.30 am. Indigo car was in front of Alto Car bearing No. HP01K-2191, which were signalled to stop. Accused were nabbed. Search of the Alto car bearing No. HP34A-0634 was conducted and one gunny bag was recovered, which was kept on the foot-mat of back seat of vehicle affixed with two patches of green colour. On checking the gunny bag a packet wrapped with plastic tape containing black coloured substance in the shape of balls, sticks and pancake was recovered. It was found to be charas. It weighed 15.450 kgs. The recovered gunny bag was sealed in a parcel of cloth. The parcel was sealed with seal "H" at 9 places. The sample seal was taken on a separate piece of cloth. The seal was also embossed on NCB form-I in triplicate and seal after use was handed over to ASI Pratap Singh. Charas alongwith vehicle was taken into possession. FIR Ext. PW-3/D was registered. Vehicle bearing No. HP16K-4971 i.e. Santro Car was also taken into possession at Swarghat. A sum of Rs. 3.50 Lakh was recovered alongwith passbook of Sanjay Kumar from the vehicle. Accused Nika Ram had absconded. His proceedings were filed and after declaring him proclaimed offender. Case property was deposited in the Malkhana. Same was sent to FSL.

4. Prosecution has examined as many as 12 witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. They denied the case of prosecution. Trial Court convicted and sentenced the accused as noticed herein above. Hence, this appeal.

5. Mr. Bhupinder Ahuja and Mr. Suneel Awasthi, Advocates, has vehemently argued that the prosecution has failed to prove its case against the accused.

6. Mr. M.A. Khan, Additional Advocate General, has supported the judgment of conviction.

7. We have heard the learned counsel for the parties and also gone through the record carefully.

8. PW-1 Mahesh Inder Singh has deposed that Alto Car bearing No. HP01K-2191 were signalled to stop by SHO. The driver tried to run away. He was nabbed. SHO has taken search of the vehicle. One gunny bag of plastic was kept behind the driver seat, which was recovered. It contained charas. It weighed 15.450 kgs. It was repacked in the same manner and thereafter put in cloth parcel and affixed 9 seals of seal impression "H". Sample of seal was taken on a separate piece of cloth and seal was embossed on NCB form-I in triplicate. Seal was handed over to Pratap Singh after use. Case property was taken into possession vide memo Ext. PW-1/A. He has scribed Ruka Ext. PW-1/B on the dictation of SHO Deep Ram. It was sent to Police Station Bharari through ASI Subhash Kumar for registration of case. In his cross-examination, he has categorically deposed that secret information was received at about 3.00 am when they were about 3 kms ahead of Larji. They were 1 km away from the spot. Secret information was written by him on the dictation of SHO Deep Ram. ASI Subhash Kumar had gone on foot with the information to handover the same to DSP towards Bali Chowki.

9. PW-2 ASI Subhash Kumar also deposed the manner in which accused were apprehended on the spot and search, sealing and seizure process was completed at the spot. According to him, Inspector SHO Deep Ram received secret information that from Gadagusain side accused were transporting charas in their vehicles. SHO Deep Ram reduced into writing the information and reasons of belief and handed over the same to him to be handed over to DSP, through Vijay Sharma. In his cross-examination, he admitted that information was written in his presence.

10. PW-3 ASI Rajesh Kumar deposed that on 5.12.2012 at 1.30 pm, ASI Subhash Kumar brought Ruka Ext. PW-1/B alongwith case property i.e. parcel, Ext P1, NCB Form-I in triplicate, seizure memo, sample seal of H and handed over it to him. Parcel was sealed with seal "H" at 9 places. He resealed the same and put seal "P" at 6 places vide Ext. PW-3/A. He completed column No. 9 to 11 of the NCB form vide Ext. PW-3/C and embossed seal "P" at three places. Thereafter, he recorded FIR Ext. PW-3/D. He handed over case property alongwith documents to the MHC to enter the same in Malkhana register. At about 3.15 pm, SHO Deep Ram told him that one of the accused was coming in his vehicle No. HR-16-K-4971 from Chandigarh to Kullu via Swarghat. SHO asked to him to nab the vehicle. On this information, Constable Dhani Ram and he reached Swarghat at about 9.00 pm. They stopped the vehicle. Two persons

Sandeep and Rangila were sitting in the vehicle. He has taken into possession mobile phone of accused Sandeep vide Ext. PW-3/F. Vehicle was searched. A sum of Rs. 3.50 Lakh was recovered.

11. Constable Raman Kumar (PW-4) deposed that SHO Ram Dass PS Swarghat telephonically informed, when he was on patrolling, that one white Santro car bearing No. HR16K-4971 was to be stopped. He stopped the vehicle. Two persons Sandeep Kumar and Rangila Ram were in the vehicle. Vehicle was searched. A sum of Rs. 3.50 Lakh was recovered from dash-board of the car.

12. PW-5 Prakash Chand deposed that ASI Rajesh Kumar had handed to him Rukka Ext. PW-1/B. He recorded FIR Ext. PW-3/D. FIR was sent by ASI Rajesh Kumar to be handed over the same to ASI Subhash Kumar and further directed to hand over the same to SHO Deep Ram. ASI Rajesh Kumar had deposited case property with him i.e. Parcel Ext. P1 containing charas sealed with seal "H" at 9 places and reseal "P" at 6 places alongwith sample seals, H and P, NCB form-I in triplicate. He entered the same in Malkhana Register. Case property was sent to SFSL Junga vide RC No. 96/12.

13. PW-10 Vijay Sharma, Dy. SP, CID deposed that on 5.12.2012, ASI Subhash Kumar presented written information under Section 42(2) of the Act, Ext. PW-7/A. He made endorsement on the same vide Ext. PW-10/A at 4.15 am. He handed over the copy to ASI at place near Bali Chowki. He had gone to Bali Chowki to record forest offences where he stayed for 10-15 minutes and returned towards Mandi. He was cross-examined. He did not remember the places where he had undertaken patrolling. He has not recorded the information in writing about forest offences.

14. PW-12 Deep Ram was the Investigating Officer. He deposed the manner in which accused was apprehended and codal formalities of seizure and sampling were completed at the spot. In his cross-examination, he deposed that memo Ext. PW-7/A under Section 42(2) of the Act was scribed by ASI Subhash Kumar on his dictation. He had received secret information telephonically. He has not mentioned in memo Ext. PW-7/A that information was received telephonically. He also admitted that personal search of the accused was also undertaken but no incriminating material was taken into possession. Volunteered that it was taken after arrest. Though he again stated that personal search of the accused was conducted before search of the vehicle.

15. It is evident from the evidence discussed herein above that it was a case of prior information. Section 42(2) was required to be complied with. PW-1 has deposed that secret information was written by him on the dictation of SHO Deep Ram. However, PW-2 ASI Subhash Kumar deposed that SHO Deep Ram received secret information. SHO reduced it into writing and handed over to him to be handed over to DSP Vijay Sharma. PW-12 IO (Deep Ram) deposed that memo Ext. PW-7/A under Section 42(2) of the Act was scribed by ASI Subhash Kumar on his dictation. Thus there is variance in the statements of PW-1 Mahesh Inder

Singh, PW-2 Subhash Kumar and PW-12 Deep Ram that who has written Ext. PW-7/A. PW-1 Mahesh Inder Singh says that he has written the information on the dictation of SHO Deep Ram. PW-2 Subhash Kumar has deposed, as noticed herein above, the PW-12 has reduced it into writing. PW-12 says that he has dictated the same to Subhash Kumar PW-2. According to PW-12 Deep Ram, he has received secret information telephonically. Information was required to be reduced into writing by the person who has received it. PW-12 Inspector Deep Ram sent the information to DSP Vijay Sharma (PW-10). Vijay Sharma, PW-10 has deposed that he was gathering information about forest offences but, in his cross-examination, he has admitted that he has not recorded information in writing regarding forest offences. Section 42(2) of the Act has not been complied with. All the accused were traveling in different cars. Contraband was recovered from Alto Car bearing No. HP34A-0634 where accused Padam Singh and Jai Singh were sitting. However, fact of the matter is that personal search of all the accused was undertaken as per statement of PW-12 Deep Ram, without complying with Section 50 of the Act. However, prosecution has not placed any tangible evidence on record that accused were apprised of their legal right to be searched before a gazetted officer or a Magistrate. Thus, there is non-compliance of section 50 of the Act also. It was not necessary for the police to personally search the accused since Charas was recovered from vehicle but despite that personal search of the accused was undertaken without complying Section 50 of the Act. Thus, in the present case, police has neither complied with Section 42(2) of the Act nor with Section 50 of the Act. Non-compliance of these mandatory sections has vitiated the entire case of the prosecution.

16. PW-1 SI Mahesh Inder Singh deposed that during interrogation, Sanjay Kumar got recorded his statement under Section 27 of the Indian Evidence Act, in which he has disclosed that he has a talk with Padam Singh and Roshan Lal to purchase 20 kg Charas. On 4.12.2012 he alongwith Ravi came to Banjar and they paid Rs. 3.50 Lakh for 15 kg Charas at the rate of Rs. 35,000/- per kg to Padam Singh. Remaining amount was to be paid after crossing Himachal boundary at Swarghat. They have asked accused to transport them to Swarghat and from there they were to be shifted in vehicle No. HR-16K-4971 being driven by Sandeep Kumar. Thereafter, information was given to Police Station Bharari. ASI Rajesh was directed to visit Swarghat to check vehicle, from where Rs. 3.50 Lakh and passbook of Sanjay Kumar was recovered. On the demarcation of Sanjay Kumar vide memo Ext. PW-1/G, accused had disclosed the house of accused Roshan Lal. Spot map was prepared by Deep Ram vide Ext. PW-1/H. Sanjay Kumar also disclosed that Charas was loaded in vehicle bearing No. HP34A-0634 from the vehicle No. HP-01K-2191. He has admitted in his cross-examination that they tried to associate independent witness but none was present. No official was sent to bring the witness. PW-3 Rajesh Kumar deposed that he went to Swarghat. One constable from Swarghat police station had stopped the vehicle coming from Chandigarh towards Kullu at Swarghat. Two persons Sandeep Kumar and Rangila were sitting in the vehicle. PW-4 Raman

Kumar deposed that he stopped the vehicle at Swarghat. Vehicle was searched. A sum of Rs. 3.50 Lakh was recovered from the dash-board of the car. However, he did not identify Sandeep Kumar in the Court. PW-12 Inspector Deep Ram also deposed that during interrogation, statement of Sanjay Kumar under Section 27 of the Indian Evidence Act was recorded vide Ext. PW-1/F. He disclosed that he had made a deal with Padam Singh and Roshan Lal for the purchase of 15 kg Charas. He further disclosed that he made payment of Rs. 3.50 Lakh to Padam Singh and Roshan Lal and remaining amount of Rs. 1,75,000/- was to be paid at Swarghat. Accused Sanjay Kumar had asked Padam Singh and Roshan Lal to transport them to Swarghat from Banjar. From there they had to be shifted in another vehicle. Statement is Ext. PW-1/F. Information was given to police station Bharari. ASI Rajesh Kumar was directed to visit Swarghat. On the disclosure statement of accused Sanjay Kumar Police visited place at Banjar. On the demarcation of Sanjay Kumar vide Ext. P-1/G, accused disclosed house of Roshan Lal. Spot map was prepared vide Ext. PW-1/H. Sanjay Kumar disclosed that Charas was loaded in vehicle No. HP34A-0634 from the vehicle bearing No. HP01K-2191. He prepared spot map Ext. PW-12/C and Ext. PW-12/D, from where deal was settled and contraband was loaded in the vehicle. However, in his cross-examination, he admitted that after his statement, accused Sanjay Kumar, he has not conducted the search of the house of Roshan Lal on 7.12.2012 and 8.12.2012 to recover cash. He has not even obtained revenue record of house of Roshan Lal. He has not even prepared road certificate regarding carrying case property to police station Bharari. He did not remember when accused Sandeep Kumar was arrested and put in lock-up. He has not obtained copy of Rapat regarding his detention in lock-up. He did not ascertain the ownership of the Alto car. It was necessary for PW-12 to make efforts to recover money from Roshan Lal to complete the chain.

17. Their Lordships of the Hon'ble Supreme Court in V.C. Shukla and Others Vs. State (Delhi Administration), AIR 1980 SC 1382 : (1980) CriLJ 965 : (1980) 2 SCC 665 : (1980) SCC(Cri) 561 have held that in order to prove criminal conspiracy, there must be direct or circumstantial evidence to show that there was an agreement between two or more persons to commit an offence. Thus, there must be a meeting of minds resulting in an ultimate decision taken by the conspirators regarding the commission of an offence..Their Lordships have held as under:

"8. Before we proceed further, we might indicate that it is well settled that in order to prove a criminal conspiracy which is punishable under s. 120B of the Indian Penal Code, there must be direct or circumstantial evidence to show that there was an agreement between two or more persons to commit an offence. This clearly envisages that there must be a meeting of minds resulting in an ultimate decision taken by the conspirators regarding the commission of an offence. It is true that in most case it will be difficult to get direct evidence of an agreement to conspire but a conspiracy can be inferred even from circumstances giving rise to a conclusive or irresistible inference of an agreement between two

or more persons to commit an offence. After having gone through the entire evidence, with the able assistance of Mr. Rajinder Singh, learned counsel for A-1 and of learned counsel for the State, we are unable to find any acceptable evidence connecting either of the appellants with the existence of any conspiracy. We are further of the opinion that even taking the main parts of the prosecution case at their face value, no connection has been proved with the destruction of the film and the two appellants. The prosecution has, of course, produced some witnesses to show the existence of the alleged conspiracy or some sort of connection of the appellants with the destruction, of the film but that evidence, as we shall show, falls short of the standard of proof required in a criminal case. We realise that the prosecution was seriously handicapped because the investigation started only after the Janata Government came into power in March 1977, that is to say, about a year and a half after the offences in question were allegedly committed, by when naturally much of the evidence would have been lost and even some of the important witnesses examined by the prosecution had turned hostile and refused to support its case. Despite these difficulties, the prosecution has to discharge its onus of providing the case against the accused beyond reasonable doubt. We, therefore, propose to deal only with that part of the evidence led by the prosecution which has been relied upon to prove some sort of a connection of the appellants with the alleged destruction of the film"

18. In the instance case, there is no evidence placed on record by the prosecution except statement of accused Ext. PW-1/F, of one of the accused recorded under Section 27 of Evidence Act. House of Roshan Lal was not searched to recover the money. Revenue record to establish that house belonged to Roshan Lal was not obtained. Version of the prosecution that some amount was paid to Roshan Lal and rest of amount was to be paid at Swarghat, has not been linked since one of the witnesses PW-4 Raman Kumar who has stopped the car at Swarghat, has failed to identify Sandeep Kumar in the Court. PW-12 has not made any efforts to even visit the house of Roshan Lal to recover the money to complete the chain. Thus, prosecution has miserably failed to prove that remaining accused have committed offence under Section 29 of the Act.

19. Their Lordships of the Hon'ble Supreme Court in *State of Punjab Vs. Balbir Singh*, AIR 1994 SC 1872 : (1994) CriLJ 3702 : (1994) 1 Crimes 753 : (1994) 70 ELT 481 : (1994) 2 JT 108 : (1994) 1 SCALE 793 : (1994) 3 SCC 299 : (1994) 2 SCR 208 have held that under Section 42(1) the empowered officer who take down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this Section, same affects the prosecution case. To this extent, it is mandatory. Their Lordships have held as under:

"15. In *K.L. Subbayya Vs. State of Karnataka*, AIR 1979 SC 711 : (1979) CENCUS 316 : (1979) CriLJ 651 : (1979) 2 SCC 115 : (1979) SCC(Cri) 367 : (1979) 2 SCR 1131 this Court considering the scope of S. 54 in the Mysore Excise Act whereunder the Officer was required to "record the grounds of his

belief" and the failure to do so was held to be rendering the entire search without jurisdiction and thus vitiated the conviction. Commenting on the failure to do so, it was observed as under (para 4):

"This, therefore, renders the entire search without jurisdiction and as a logical corollary vitiates the conviction. We feel that both Ss. 53 and 54 contain valuable safeguards for the liberty of the citizen in order to protect them from ill-founded or frivolous prosecution or harassment."

The very fact that sub-section (2) of S. 42 requires that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior, itself is a strong indication of the mandate that the officer should record his reasons for his belief as required under the proviso and also that the information received should be reduced to writing so that it can be verified whether there were sufficient reasons for belief. In *Re: Presidential Poll*, AIR 1974 SC 1682 : (1974) 2 SCC 33 : (1975) 1 SCR 504 this Court observed as under (para 13):

"In determining the question whether a provision is mandatory or directory, the subject matter, the importance of the provision, the relation of that provision to the general object intended to be secured by the Act will decide whether the provision is directory or mandatory. It is the duty of the courts to get at the real intention of the legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole." (See *Brett v. Brett*, (1826) 3 Addams 210 at p. 216)."

In *Govindlal Chhaganlal Patel Vs. The Agricultural Produce Market Committee, Godhra and Others*, AIR 1976 SC 263 : (1975) 2 SCC 482 : (1976) 1 SCR 451 it was observed thus (Para 13):

"Thus, the governing factor is the meaning and intent of the legislature, which should be gathered not merely from the words used by the legislature but from a variety of other circumstances and considerations. In other words, the use of the word "shall" or "may" is not conclusive on the question whether the particular requirement of law is mandatory or directory. But the circumstances that the legislature has used a language of compulsive force is always of great relevance and in the absence of anything contrary in the context indicating that a permissive interpretation is permissible, the statute ought to be construed as peremptory. One of the fundamental rules of interpretation is that if the words of a statute are themselves precise and unambiguous, no more is necessary than to expound these words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature."

The object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid

harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to S. 42(1). To that extent they are mandatory. Consequently the failure to comply with these requirements thus affects the prosecution case and therefore vitiates. the trial.

25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:

(1) If a police officer without any prior information as contemplated under the Provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offence as provided under the provisions of Cr.P.C. and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance (of) recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc., when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal.

Likewise only empowered officers or duly authorised officers as enumerated in Ss. 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by any one other than such officers, the same would be illegal.

(2B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention that would affect the prosecution case and vitiate the conviction.

(2C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not

mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of Cr.P.C. fails to strictly comply with the provisions of Sections 100 and 165, Cr.P.C. including the requirement to record reasons, such failure would only amount to an irregularity.

(4B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of Cr.P.C. namely Sections 100 and 165, Cr.P.C. and if there is no strict compliance with the provisions of Cr.P.C. then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information, the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a gazetted officer or a magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to 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 Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc., then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case."

20. Their Lordships of the Hon"ble Supreme Court in Koluttumottil Razak Vs.

State of Kerala, (2000) 4 SCC 465 have held that non-compliance with the provisions of Section 42(1) and (2) would render the resultant search and seizure suspect, though that by itself may not vitiate the proceedings. Their Lordships have held as under:

"1. A request was made on behalf of the appellant to adjourn this matter as the advocates have called for a strike today. But when we considered the stark reality that this appellant has been languishing in jail for a very long time we felt it our duty to look into the matter by ourselves and if there is no scope for interference with the conviction and sentence there would be necessity to hear an advocate appointed as amicus curiae to argue for the appellant. Having gone into the matter we found that the conviction and sentence imposed can be interfered with and, therefore, we feel further delay in disposing of the matter would be a violation of Article 21 of the Constitution. Hence, we proceed to dispose of this matter.

10. We are of the considered view that in the light of his non-compliance with, the provisions of Section 42(1) and (2) of the Act besides noncompliance with the requirement in Section 50 of the Act it is difficult to sustain the conviction and sentence of the appellant. The graver the consequences the greater must be the circumspection to be adopted. We take into account that the appellant otherwise will have to be subjected to a longer period of sentence as Section 31 of the Act was also invoked in the present situation for adopting such greater circumspection for scrutinising the evidence."

21. Their Lordships of the Hon"ble Supreme Court in Saju Vs. State of Kerala, (2001) CriLJ 102 : (2000) 2 JT 602 Supp : (2000) 7 SCALE 424 : (2000) 4 SCR 621 Supp have held that to prove criminal conspiracy, prosecution is required to establish that two or more persons agreed to do or caused to be done an illegal act or an act which is not legal by illegal means. Their lordships have further held that besides fact of agreement, the necessary mens rea of crime is to be proved. Their Lordships have held as under:

"7. To prove the charge of criminal conspiracy the prosecution is required to establish that two or more persons had agreed to do or caused to be done, an illegal act or an act which is not illegal, by illegal means. It is immaterial whether the illegal act is the ultimate object of such crime or is merely incidental to that object. To attract the applicability of Section 120B it has to be proved that all the accused had the intention and they had agreed to commit the crime. There is no doubt that conspiracy is hatched in private and in secretly for which direct evidence would rarely be available. It is also not necessary that each member to a conspiracy must know all the details of the conspiracy. This Court in Yash Pal Mittal Vs. State of Punjab, AIR 1977 SC 2433 : (1978) CriLJ 189 : (1977) 4 SCC 540 : (1978) SCC(Cri) 5 : (1978) 1 SCR 781 held:

"The offence of criminal conspiracy under S. 120A is a distinct offence introduced for the first time in 1913 in Chapt. V-A of the Penal Code. The very agreement,

concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-conspirators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes mis-fire or over-shooting by some of the conspirators. Even if some steps are resorted to by one or two of the conspirators without the knowledge of the others it will not affect the culpability of those others when they are associated with the object of the conspiracy. The significance of criminal conspiracy under S. 120A is brought out pitthily by this Court in *Major E.G. Barsay Vs. The State of Bombay*, AIR 1961 SC 1762 : (1961) CriLJ 828 : (1962) 2 SCR 195 thus:

"The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Under S. 43 of the Indian Penal Code, an act would be illegal if it is an offence or if it is prohibited by law. Under the first charge the accused are charged with having conspired to do three categories of illegal acts, and the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the offence of conspiracy has been committed. They are all guilty of the offence of conspiracy to do illegal acts, though for individual offences all of them may be liable".

We are in respectful agreement with the above observations with regard to the offence of criminal conspiracy."

10. It has thus to be established that the accused charged with criminal conspiracy had agreed to pursue a course of conduct which he knew leading to the commission of a crime by one or more persons to the agreement, of that offence. Besides the fact of agreement the necessary mens rea of the crime is also required to be established."

22. Incriminating circumstances must be established on reliable evidence. They must clearly fill the chain whereby conclusion of guilt of accused can safely be drawn.

23. Their Lordships of the Hon"ble Supreme Court in *Beckodan Abdul Rahiman*

Vs. State of Kerala, AIR 2002 SC 1810 : (2002) CriLJ 2529 : (2002) 2 Crimes 375 : (2002) 81 ECC 8 : (2002) 4 JT 68 : (2002) 3 SCALE 564 : (2002) 4 SCC 229 : (2002) 3 SCR 53 : (2002) 1 UJ 706 : (2002) AIRSCW 1780 : (2002) 3 Supreme 597 have explained the objects of Sections 42(2) and 50, as under:

"3. According to the prosecution, the Sub-Inspector of Police received a telephonic message on 6-10-1990 at about 8.30 a.m. that narcotic drugs were being sold at T.C. Junction. He recorded the information in the general diary and proceeded to the scene of occurrence in a jeep. On reaching T.C. Junction at about 8.45 a.m. he saw the accused carelessly walking from the bus shelter towards Kathu Parambu side. Allegedly seeing him in suspicious condition, the Sub-Inspector along with his party approached him and after disclosing his identity searched the person of the accused in presence of witnesses. It was found that inside the fold of Dhoti, which the appellant was wearing, opium had been concealed in a polythene bag. As he was found unauthorisedly possessing the opium, he was arrested and the opium seized was weighed to be 11 gms. Out of that 2 gms. each were separated and two samples were roped in plastic paper. On enquiry from the accused whether he would like to meet any higher official or Gazetted officer, he allegedly replied in negative. Section 42 of the Act provides :

"42. Power of entry, search, seizure and arrest without warrant or authorisation.--

(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, drug 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 sunrise and sunset-

(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 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 proviso thereto he shall forthwith send a copy thereof to his immediate official superior."

Section 50 of the Act prescribes :

"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 or 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 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) female shall be searched by anyone excepting a female."

Keeping in mind the grave consequences which are likely to follow on proof of possession of illicit articles under the Act, namely, the shifting of the onus to the accused and severe punishment to which he becomes liable, the Legislature has enacted and provided certain safeguards in various provisions of the Act including Sections 42 and 50 of the Act. A Constitution Bench of this Court in *State of Punjab Vs. Baldev Singh, etc. etc.*, AIR 1999 SC 2378 : (1999) CriLJ 3672 : (1999) 157 CTR 3 : (1999) 65 ECC 695 : (1999) ECR 545 : (1999) 81 FLR 303 : (1999) 4 JT 595 : (1999) 1 LLJ 254 : (1994) 4 SCALE 144 : (1999) AIRSCW 2494 : (1999) 6 Supreme 159 has held that while conducting search and seizure in addition to the safeguards provided under the Code of Criminal Procedure, the safeguards provided under the Act are also required to be followed. The harsh provisions of the Act cast a duty upon the prosecution to strictly follow the procedure and compliance of the safeguards. In that case the Court observed :

"Prior to the passing of the NDPS Act, 1985 control over narcotic drugs was being

generally exercised through certain Central enactments though some of the States also had enacted certain statutes with a view to deal with illicit traffic in drugs. The Opium Act, 1857 related mainly to preventing illicit cultivation of poppy, regulating cultivation of poppy and manufacture of opium. The Opium Act, 1878 supplemented the Opium Act, 1857 and made possession, transportation, import, export, sale, etc., of opium also an offence. The Dangerous Drugs Act, 1930, was enacted with a view to suppress traffic in contraband and abuse of dangerous drugs, particularly derived from opium, Indian hemp and coca leaf etc. The Act prescribed maximum punishment of imprisonment for three years with or without fine, in so far as the first offence is concerned and for the second or the subsequent offence the punishment could go up to four years" R.I. These Acts, however, failed to control illicit drug traffic and drug abuse on the other hand exhibited an upward trend. New Drugs of addiction known as psychotropic substances also appeared on the scene posing serious problems. It was noticed that there was an absence of comprehensive law to enable effective control over psychotropic substances in the manner envisaged by the International Convention on Psychotropic Substances, 1971. The need for the enactment of some comprehensive legislation on narcotic drugs and psychotropic substances was, therefore, felt. Parliament with a view to meet a social challenge of great dimensions, enacted the NDPS Act, 1985 to consolidate and amend existing provisions relating to control over drug abuse etc. and to provide for enhanced penalties particularly for trafficking and various other offences. The NDPS Act, 1985 provides stringent penalties for various offences. Enhanced penalties are prescribed for the second and subsequent offences. The NDPS Act, 1985 was amended in 1988 w.e.f. 29-5-1989. Minimum punishment of 10 years imprisonment which may extend up to 20 and a minimum fine of Rs. 1 lakh which may extend up to Rs. 2 lakhs have been provided for most of the offences under the NDPS Act, 1985. For the second and subsequent offences, minimum punishment of imprisonment is 15 years which may extend to 30 years while minimum fine is Rs. 1.5 lakhs which may extend to Rs. 3 lakhs. Section 31(a) of the Act, which was inserted by the Amendment Act of 1988, has even provided that for certain offences, after previous convictions, death penalty shall be imposed, without leaving any discretion in the court to award imprisonment for life in appropriate cases. Another amendment of considerable importance introduced by the Amendment Act, 1988 was that all the offences under the Act were made triable by a Special Court. Section 36 of the Act provides for constitution of Special Courts manned by a person who is a Sessions Judge or an Additional Sessions Judge. Appeals from the orders of the Special Courts lie to the High Court. Section 37 makes all the offences under the Act to be cognizable and non-bailable and also lays down stringent conditions for grant of bail. However, despite the stringent provisions of the NDPS Act, 1985 as amended in 1988 drug business is booming; addicts are rapidly rising; crime with its role in narcotics is galloping and drug trafficking network is evergrowing. While interpreting various provisions of the statute, the object of the legislation has to be kept in view but at the same time the interpretation has to be

reasonable and fair."

After referring to host of judgments, the Constitution Bench of the Court held that the provisions of Sections 42 and 50 are mandatory and their non compliance would render the investigation illegal. It was reiterated that severer the punishment, greater the care to be taken to see that all the safeguards provided in the statute are scrupulously followed. The safeguards mentioned in Section 50 are intended to serve a dual purpose to protect the person against false accusation and frivolous charges as also to lend credibility to the search and seizure conducted by the empowered officer. If the empowered officer fails to comply with the requirements of the Section, the prosecution is to suffer for the consequences. The legitimacy of the judicial process may come under the cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice.

In *State of Punjab Vs. Balbir Singh*, AIR 1994 SC 1872 : (1994) CriLJ 3702 : (1994) 1 Crimes 753 : (1994) 70 ELT 481 : (1994) 2 JT 108 : (1994) 1 SCALE 793 : (1994) 3 SCC 299 : (1994) 2 SCR 208 it was held that under Section 42(2) the empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is a total non-compliance of the provisions the same affects the prosecution case. To that extent it is mandatory. To the same effect is the judgment in *Saiyad Mohd. Saiyad Umar Saiyad and Others Vs. State of Gujarat*, (1995) CriLJ 2662 : (1995) 2 Crimes 182 : (1995) 50 ECC 117 : (1995) 78 ELT 649 : (1995) 3 JT 489 : (1995) 2 SCALE 576 : (1995) 3 SCC 610 : (1995) 3 SCR 117 : (1992) 85 STC 1 .

5. In this case the violation of the mandatory provisions is writ large as is evident from the statement of K.R. Premchandran (P.W. 1). After recording the information, the witnesses is not shown to have complied with the mandate of sub-section (2) of Section 42 of the Act. Similarly the provisions of Section 50 have not been complied with as the accused has not been given any option as to whether he wanted to be searched in presence of a Gazetted Officer or Magistrate. The compliance of Section 50 is held to have been fulfilled on his (P.W. 1) asking the accused "whether I should search him in the presence of senior officers or Gazetted Officer". The accused was required to be apprised of his right conferred under Section 50 giving him the option to search being made in presence of gazetted officer or the Magistrate. The accused is not shown to have been apprised of his right nor any option offered to him for search being conducted in the presence of the Magistrate.

6. We are of the firm opinion that the provisions of sub-section (2) of Section 42 and the mandate of Section 50 were not complied with by the prosecution which rendered the case as not established. In view of the violation of the mandatory provisions of the Act, the appellant was entitled to be acquitted. Both the trial

court as well as the High Court have failed to consider this aspect of the matter which warrants the setting aside of the impugned judgment."

24. Their Lordships of the Hon"ble Supreme Court in *Dilip and Another Vs. State of M.P.*, AIR 2007 SC 369 : (2007) CLT 534 Supp : (2007) CriLJ 880 : (2006) 12 SCALE 331 : (2007) 1 SCC 450 : (2006) 9 SCR 390 Supp have held that provisions of Section 50 of the Act, might not have been required to be complied with so far as the search of scooter is concerned, but, keeping in view the fact that the person of the appellants was also searched, it was obligatory to comply with the said provisions It was not done. Their Lordships have held as under:

""6. It is now well settled that the offence committed under the Act is a grave one. Procedural safeguards provided therefor in terms of Sections 41, 42 and 50 of the NDPS Act should be complied with.

12. Before seizure of the contraband from the scooter, personal search of Appellants had been carried out and, admittedly, even at that time the provisions of Section 50 of the Act, although required in law, had not been complied with.

16. In this case, the provisions of Section 50 might not have been required to be complied with so far as the search of scooter is concerned, but, keeping in view the fact that the persons of the appellants were also searched, it was obligatory on the part of P.W.10 to comply with the said provisions. It was not done."

25. Their Lordships of the Hon"ble Supreme Court in *Directorate of Revenue and Another Vs. Mohammed Nisar Holia*, (2008) CLT 352 : (2007) 13 JT 408 : (2008) 2 SCC 370 : (2007) 12 SCR 906 , have explained the duty of the officer receiving the information. Their lordships have further held that though the officer in the Directorate of Revenue Intelligence received an information as to the offence, said information was not reduced into writing by the officer who received it but by PW 1 who was later on conveyed the message by the said office. It was held to be non-compliance of the statutory requirements of Section 42 of the Act. Their lordships have further held that if no evidence of compliance of section 50 has been led by the prosecution, Court can presume that procedure has not been complied with. Their Lordships have held as under:

"17. This Court times without number has laid great emphasis on recording of reasons before search is conducted on the premise that the same would be the earliest version which would be available to a court of law and the accused while defending his prosecution. The provisions contained in Chapter IV of the Act are a group of sections providing for certain checks on exercise of the powers of the concerned authority which otherwise would have been arbitrarily or indiscriminately exercised. The statute mandates that the prosecution must prove compliance of the said provisions. If no evidence is led by the prosecution, the Court will be entitled to draw the presumption that the procedure had not been complied with. For the said purpose, we are of the opinion that there may not be any distinction between a person's place of ordinary residence and a room of a hotel.

19. In the instant case, the statutory requirements had not been complied with as the person who had received the first information did not reduce the same in writing. An officer who received such information was bound to reduce the same in writing and not for the person who hears thereabout. Furthermore, in this case, apart from proving the fax and the copy of a challan nothing else has been proved. The fax was illegible. It allegedly was received in the PCO run by PW 17. He could not prove the contents of the fax. He also could not show when the same was received and from whom. It has not been shown that the accused was the person who obtained the said fax from PW 17. Furthermore, contents of the said documents had not been proved. In absence of the aforementioned details, the fax being illegible and its contents being not known, the question of the same being admissible in evidence in terms of Section 65 (sic. 66) of the Act would not arise. The Xeroxed copy of said fax had not been proved in the strict sense of the term. No secondary evidence could have been led to prove another secondary evidence. Contents of document are required to be proved. The contents of a document could be held to have been proved in terms of Section 66 only, when the contents are decipherable and not otherwise.

25. For the foregoing reasons, we are of the opinion that the impugned judgment does not suffer from any legal infirmity. There is no merit in the appeal. It is dismissed accordingly."

26. In view of the discussion and analysis made hereinabove, all the three appeals are allowed. Judgment dated 18.10.2014, rendered by learned Special Judge-II, Mandi, District Mandi, Himachal Pradesh in Sessions Trial No. 11 of 2013 is set aside. Accused are acquitted of the offence under Section 20 and 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 Act. They are ordered to be released forthwith, if not required by the police in any other case. Fine amount, if any paid by the accused, be refunded to them. Registry is directed to prepare the release warrants of the accused and send the same forthwith to the Superintendent of Jail concerned.