

IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Cr. A. No. 141/2015

Reserved on: 01.03.2025

Decided on : 04.03.2025

State of Himachal PradeshAppellant

Versus

Vikram alias VickyRespondent

Coram:

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

The Hon'ble Mr. Justice Sushil Kukreja, Judge.

Whether approved for reporting?¹No

For the Appellant: Mr. Yashwardhan Chauhan, Senior
Additional Advocate General with
Mr. Navlesh Verma, Additional
Advocate General and Mr. Raj Negi,
Deputy Advocate General.

For the Respondent: Mr. Yudhvair Singh Thakur,
Advocate.

Justice Tarlok Singh Chauhan, Judge

Aggrieved by the acquittal of the respondent under
Section 20 of the Narcotic Drugs and Psychotropic Substances

¹ Whether reporters of the local papers may be allowed to see the judgment? Yes.

Act, 1985 (in short, “the Act”), the appellant-State has filed the instant appeal.

2 Briefly stated, the case of the prosecution is that on 31.3.2010 at about 7.30 P.M., when the police party headed by ASI Bodh Raj was present on the public road near Kainchi Mod Bhava bifurcation, they noticed the accused/respondent coming from Bagipul side and on seeing the police party, he got perplexed and tried to run away from the spot. On suspicion, the respondent was nabbed by the police party and thereafter he was informed by the Investigating Officer that police intended to carry out his personal search. The respondent was apprised about his right to be searched either before a Gazetted Officer or a Magistrate. However, the respondent consented to give his personal search to the police party. Consequently, the Investigating Officer gave his personal search. Thereafter the personal search of respondent was conducted and one white colour cloth was found tied around his waist. The police party opened the said cloth, in which 500 grams charas was alleged to have been found. The charas was weighed on the spot and thereafter it was put in the same white cloth and sealed in another cloth parcel with impression 'A'. The contraband was

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taken into possession vide separate recovery memo. The sample of seal was drawn by the Investigating Officer. The NCB form in triplicate was filled in. Rukka was prepared by the Investigating Officer and sent it to Police Station, Nirmand through HHC Diwan Chand. MHC registered the FIR and the case file was handed over to HHC Diwan Chand on the spot. Investigating Officer prepared the site plan and thereafter he along with the respondent came to the Police Station and deposited the case property along with relevant documents with the MHC who incorporated the entry of the same in his register.

3 During investigation, the case property was sent to chemical examination and Chemical Examiner's report was received. The Investigating Officer prepared special report and submitted the same to the SDPO. On the conclusion of investigation, the challan was prepared and presented in the court and the respondent was produced to face trial.

4 Upon consideration of the challan and other documents annexed therewith, the court finds prima facie case and accordingly, charges were framed against the respondent, to which he pleaded not guilty and claimed trial.

5 In order to prove its case, the prosecution examined
as many as 8 witnesses and closed its evidence.

6 On the basis of evidence adduced by the
prosecution, respondent was examined under Section 313
Cr.P.C. in which he denied all set of incriminating evidence led
by the prosecution against him and stated that he was innocent
and falsely implicated. However, the respondent despite
opportunity did not choose to lead evidence in his defence.

7 The learned Special Judge after recording the
evidence and evaluating the same acquitted the respondent as
aforesaid, constraining the State to file the instant appeal.

8 At the outset, it needs to be noticed that one of the
main grounds which weighed with the learned Special Judge
for acquitting the respondent is non-compliance of Section 50
of the Act.

8 It is not in dispute that before carrying on with the
search of the respondent, the prosecution chose to obtain the
consent of the respondent vide Ex. PW6/A which is in
vernacular and reads as under:-

फर्ड सहमति पत्र

निम्नलिखित गबाहान के सामने ईमरोज दिनांक 31.3.2010 को व मुकाम सड़क कैन्ची मोड़ बाहवा गांव सड़क रविन्दा रामपुर ता बागीपुल के पास शाम समय करीब 7.30 बजे मजकूरा विक्रम @ विकी पुत्र सोम सिंह जात सिख (मजहबी) गांव रामपुरा गली न . 6 बस्ती डा. रामपुरा तहसील फूला थाना रामपुरा जिला भटिण्डा पंजाब के पास शक मादक द्रव्य भाँग मिश्रण (चरस) होने पर मजकूरा से तलाशी लेने की सहमती के बारे पूछा गया की आपके पास अवैध बस्तु भाँग मिश्रण चरस है क्या आप अपनी जमा तलाशी किसी मजिस्ट्रेट राजपत्रित अधिकारी को या हाजरीन पुलिस को देना चाहता है फर्ड सहमति पत्र मौका पर मुराव हुई

9 It is shocking to note that the Investigating Officer admittedly even without conducting search of the person of respondent very well knew that he was carrying the contraband as is evident from the reading of the consent memo (supra).

10 Therefore, clearly it is a case of prior information and not that of chance recovery which requires strict compliance of provisions of the Act.

11 A perusal of consent memo would further go to indicate that the option has been sought from the respondent

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to be searched before the Magistrate or a Gazetted Officer or the police party and according to the prosecution, the respondent has opted to be searched before the police party present at the spot.

12 It has been held by the Hon'ble Supreme Court in ***State of Rajasthan Vs. Parmanand & another (2014) 5 SCC 345***, that Section 50 only provides an option to be searched before a Magistrate or a Gazetted Officer, and it does not provide for a third option to be searched before the police. It shall be apt to reproduce relevant observations as contained in para 19 thereof, which reads as under:

“19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate, before the nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to the nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be

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searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question of whether, if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such an option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated.”

13 The law regarding the third option given to the accused was exhaustively considered by this Court in ***Pradeep Singh alias Rocky vs State of Himachal Pradesh, 2020(1) Him. L.R. 133***, wherein it was observed as under:-

“3(iii)(c). Under the provisions of Section 50 of the Act, the accused has to be informed about his legal rights regarding search before a Magistrate or Gazetted Officer.

3(iii)(d). In the instant case, the consent memo (Ext.PW-1/A), obtained from the accused, shows that in addition to the two statutory options of search before the Magistrate or the Gazetted Officer", a 3rd option was also given to the accused for getting himself searched before any other police officer. It is in such circumstance that the accused gave his search to the police party. Giving 3rd option to the accused was clearly contrary to the mandatory provisions

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of Section 50 of the Act. In the case titled **State of Rajasthan versus Parmanand and Another, (2014) 5 SCC 345**, it has been held by the Hon'ble Apex Court that such a 3rd option could not be given when there was no provision under Section 50(1) of the Act. Relevant para of the said judgment is reproduced as under: -

"19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or, before the nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to the nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether, if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such an option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated."

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Relying upon the above judgment, in titled **SK. Raju alias Abdul Haque alias Jagga versus State of West Bengal, (2018) 9 SCC 708** Hon'ble Apex Court further observed thus: -

"18. In *Parmanand*, on a search of the person of the respondent, no substance was found. However, subsequently, opium was recovered from the bag of the respondent. A two-judge Bench of this Court considered whether compliance with Section 50(1) was required. This Court held that the empowered officer was required to comply with the requirements of Section 50(1) as the person of the respondent was also searched. [Reference may also be made to the decision of a two-judge Bench of this Court in **Dilip v State of M.P.**] It was held thus: (**Parmanand**, SCC p.351, para 15).

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

19. Moreover, in the above case, the empowered officer at the time of conducting the search informed the respondent that he could be searched before the nearest Magistrate, before the nearest gazetted officer or before the Superintendent, who was also a part of the raiding party. The Court held that the search of the respondent was not in consonance with the requirements of Section 50(1) as the empowered officer erred in giving the respondent an option of being searched before the Superintendent, who was not an independent officer."

Effect of giving the 3rd option:

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3(iii)(e). The effect of illegality committed during the course of the search of the accused has been considered by the Hon'ble Apex Court in titled **State of H.P. versus Pawan Kumar, (2005) 4 SCC 350** wherein, after considering various judgements on the question, it was observed thus:-

"26. The Constitution Bench decision in **Pooran Mal v. The Director of Inspection, (1974) 1 SCC 345** was considered in *State of Punjab v. Baldev Singh* and having regard to the scheme of the Act and especially the provisions of Section 50 thereof, it was held that it was not possible to hold that the judgment in the said case can be said to have laid down that the "recovered illicit article" can be used as "proof of unlawful possession" of the contraband seized from the suspect as a result of illegal search and seizure. Otherwise, there would be no distinction between the recovery of illicit drugs, etc., seized during a search conducted after following the provisions of Section 50 of the Act and a seizure made during a search conducted in breach of the provisions of Section 50. Having regard to the scheme and the language used, a very strict view of Section 50 of the Act was taken, and it was held that failure to inform the person concerned of his right as emanating from sub-Section (1) of Section 50 may render the recovery of the contraband suspect and sentence of an accused bad and unsustainable in law. As a corollary, there is no warrant or justification for giving an extended meaning to the word "person" occurring in the same provision so as to include even some bag, article or container or some other baggage being carried by him."

In a case titled **State of H.P. versus Rakesh 2018 LHLJ 214 (HP)**, this Court observed as under: -

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"18. Now, in view of the above, this Court has to examine whether the provisions of Section 50 of the NDPS Act are applicable to the present case and, if applicable, then whether those have been breached or not. Admittedly, as per the version of PW-3, HC Chaman Lal, he has conducted the personal search of both the accused persons and also prepared search memos, Ex. PW-3/P and Ex. PW-3/Q. If only the bag of the accused persons would have been searched, then Section 50 of the NDPS Act has no application, but as the personal search of the accused persons was also conducted, certainly Section 50 of the NDPS Act is applicable. In fact, Section 50 of the NDPS Act has a purpose and communication of the said right, which is ingrained in Section 50, to the person who is about to be searched is not an empty formality. Offences under the NDPS Act carry severe punishment, so the mandatory procedure, as laid down under the Act, has to be followed meticulously. Section 50 of the Act is just a safeguard available to an accused against the possibility of false involvement. Thus, communication of this right to the accused has to be clear, unambiguous and to the individual concerned. The purpose of this Section is to make aware the accused of his right, and the whole purpose behind creating this right is effaced if the accused is not able to exercise the same for want of knowledge about its existence. This right cannot be ignored, as the same is of utmost importance to the accused. In the present case, certainly, the provisions of Section 50 of the NDPS Act have not been complied with; therefore, the judgment (supra) is fully applicable to the facts of the present case.

19. In **State of Himachal Pradesh vs. Desh Raj & another, 2016 Supp HimLR 3088 (DB)**, this

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Court has relied upon the law laid down in Parmanand's case (*supra*). Relevant paras of the judgment of this Court are extracted hereunder:

"18. Their Lordships of the Hon'ble Supreme Court in **State of Rajasthan v. Parmanand, (2014) 5 SCC 345**, have held that there is a need for individual communication to each accused and individual consent by each accused under Section 50 of the Act. Their lordships have also held that Section 50 does not provide for the third option. Their lordships have also held that if a bag carried by the accused is searched and his personal search is also started, Section 50 would be applicable."

Again, in the present set of facts and circumstances, the judgment (*supra*) is fully applicable to the present case, as the right provided under Section 50 of the NDPS Act in no way can be diluted, and its compliance is mandatory in nature.

Therefore, the combined effect of the law laid down by the Hon'ble Apex Court, as applied to the facts of the case in hand, is that non-compliance to the mandatory provisions of Section 50 of the Act has vitiated the proceedings related to search and recovery. Point is, therefore, answered in favour of appellant."

14

The legal position was thereafter reiterated by the Hon'ble Supreme Court in **Dayalu Kashyap v. State of Chhattisgarh, (2022) 12 SCC 398**, wherein it was observed as under:

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“4. The learned counsel submits that the option given to the appellant to take a third choice other than what is prescribed as the two choices under sub-section (1) of Section 50 of the Act is something which goes contrary to the mandate of the law and in a way affects the protection provided by the said section to the accused. To support his contention, he has relied upon the judgment of **State of Rajasthan v. Parmanand** [**State of Rajasthan v. Parmanand, (2014) 5 SCC 345: (2014) 2 SCC (Cri) 563**], more specifically, SCC para 19. The judgment, in turn, relied upon a Constitution Bench judgment of this Court in **State of Punjab v. Baldev Singh** [**State of Punjab v. Baldev Singh, (1999) 6 SCC 172: 1999 SCC (Cri) 1080**] to conclude that if a search is made by an empowered officer on prior information without informing the person of his right that he has to be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to take his search accordingly would render the recovery of the illicit article suspicious and vitiate the conviction and sentence of the accused where the conviction has been recorded only on the basis of possession of illicit articles recovered from his person. The third option stated to be given to the accused to get himself searched from the Officer concerned not being part of the statute, the same could not have been offered to the appellant, and thus, the recovery from him is vitiated.”

15 Similar reiteration of law can yet again be found in a fairly recent judgment of the Hon'ble Supreme Court in **Ranjan Kumar Chadha v. State of H.P., 2023 SCC OnLine SC 1262:AIR 2023 SC 5164** wherein it was observed:

"27. We have no hesitation in recording a finding that Section 50 of the NDPS Act was not complied with as the appellant could not have been offered the third option of search to be conducted before the ASI. Section 50 of the NDPS Act only talks about a Gazetted Officer or Magistrate. What is the legal effect if an accused of the offence under the NDPS Act is being told whether he would like to be searched before a police officer or a Gazetted Officer or Magistrate?"

28. This Court in State of Rajasthan v. Parmanand, (2014) 5 SCC 345, held that it is improper for a police officer to tell the accused that a third alternative is also available, i.e. the search before any independent police officer. This Court also took the view that a joint communication of the right available under Section 50 of the NDPS Act to the accused would frustrate the very purport of Section 50.....

29. Thus, from the oral evidence on the record as discussed above, it is evident that Section 50 of the

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NDPS Act stood violated for giving a third option of being searched before a police officer.”

16 In **Ranjan Kumar Chadha’s** case (supra), the Hon’ble Supreme Court further held that the investigating officer should give an option to the accused to be searched before the Magistrate or the Gazetted Officer; the accused can decline to avail of such option, and the investigating officer can carry out the search himself. It is apt to reproduce relevant observations as contained in paras 62 to 66 thereof, which read as under:-

“62. Section 50 of the NDPS Act only goes so far as to prescribe an obligation to the police officer to inform the suspect of his right to have his search conducted either in the presence of a Gazetted Officer or Magistrate. Whether or not the search should be conducted in the presence of a Gazetted Officer or Magistrate ultimately depends on the exercise of such right as provided under Section 50. In the event the suspect declines this right, there is no further obligation to have his search conducted in the presence of a Gazetted Officer or Magistrate, and in such a situation, the empowered police officer can proceed to conduct the search of the person himself. To read Section 50 otherwise would render the very purpose of informing the suspect of his right a redundant exercise. We are of the view

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that the decision of this Court in Arif Khan (supra) cannot be said to be an authority for the proposition that notwithstanding the person proposed to be searched has, after being duly apprised of his right to be searched before a Gazetted Officer or Magistrate, but has expressly waived this right in clear and unequivocal terms; it is still mandatory that his search be conducted only before a Gazetted Officer or Magistrate.

63. A plain reading of the extracted paragraphs of Arif Khan (supra) referred to above would indicate that this Court while following the ratio of the decision of the Constitution Bench in VijaysinhChandubha Jadeja (supra) held that the same has settled the position of law in this behalf to the effect that, whilst it is imperative on the part of the empowered officer to apprise the person of his right to be searched only before a Gazetted Officer or Magistrate; and this requires strict compliance; this Court simultaneously proceeded to reiterate that in VijaysinhChandubha Jadeja (supra) “it is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act”.

64. There is no requirement to conduct the search of the person suspected to be in possession of a narcotic drug or a psychotropic substance, only in the presence of a Gazetted Officer or Magistrate if the person proposed to be searched after being

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apprised by the empowered officer of his right under Section 50 of the NDPS Act to be searched before a Gazetted Officer or Magistrate categorically waives such right by electing to be searched by the empowered officer. The words “if such person so requires”, as used in Section 50(1) of the NDPS Act, would be rendered otiose if the person proposed to be searched would still be required to be searched only before a Gazetted Officer or Magistrate despite having expressly waived “such requisition”, as mentioned in the opening sentence of sub-Section (2) of Section 50 of the NDPS Act. In other words, the person to be searched is mandatorily required to be taken by the empowered officer for the conduct of the proposed search before a Gazetted Officer or Magistrate only “if he so requires” upon being informed of the existence of his right to be searched before a Gazetted Officer or Magistrate and not if he waives his right to be so searched voluntarily, and chooses not to exercise the right provided to him under Section 50 of the NDPS Act.

65. However, we propose to put an end to all speculations and debate on this issue of the suspect being apprised by the empowered officer of his right under Section 50 of the NDPS Act to be searched before a Gazetted Officer or Magistrate. We are of the view that even in cases wherein the suspect waives such right by electing to be searched by the empowered officer, such waiver on

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the part of the suspect should be reduced into writing by the empowered officer. To put it in other words, even if the suspect says that he would not like to be searched before a Gazetted Officer or Magistrate and he would be fine if his search is undertaken by the empowered officer, the matter should not rest with just an oral statement of the suspect. The suspect should be asked to give it in writing duly signed by him in presence of the empowered officer as well as the other officials of the squad that “I was apprised of my right to be searched before a Gazetted Officer or Magistrate in accordance with Section 50 of the NDPS Act, however, I declare on my own free will and volition that I would not like to exercise my right of being searched before a Gazetted Officer or Magistrate and I may be searched by the empowered officer.” This would lend more credence to the compliance of Section 50 of the NDPS Act. In other words, it would impart authenticity, transparency and creditworthiness to the entire proceedings. We clarify that this compliance shall henceforth apply prospectively.

66. From the aforesaid discussion, the requirements envisaged by Section 50 can be summarised as follows:—

(i) Section 50 provides both a right as well as an obligation. The person about to be searched has the right to have his search conducted in the presence of a Gazetted

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Officer or Magistrate if he so desires, and it is the obligation of the police officer to inform such person of this right before proceeding to search the person of the suspect.

(ii) Where the person to be searched declines to exercise this right, the police officer shall be free to proceed with the search. However, if the suspect declines to exercise his right of being searched before a Gazetted Officer or Magistrate, the empowered officer should take it in writing from the suspect that he would not like to exercise his right of being searched before a Gazetted Officer or Magistrate and he may be searched by the empowered officer.

(iii) Before conducting a search, it must be communicated in clear terms, though it need not be in writing and is permissible to convey orally that the suspect has a right of being searched by a Gazetted Officer or Magistrate.

(iv) While informing the right, only two options of either being searched in the presence of a Gazetted Officer or Magistrate must be given, who also must be independent and in no way connected to the raiding party.

(v) In case of multiple persons to be searched, each of them has to be individually communicated of their rights, and each must exercise or waive the same in their own capacity. Any joint or common communication of this right would be in violation of Section 50.

(vi) Where the right under Section 50 has been exercised, it is the choice of the police officer to decide whether to take the suspect before a Gazetted Officer or Magistrate, but

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an endeavour should be made to take him before the nearest Magistrate.

(vii) Section 50 is applicable only in case of search of person of the suspect under the provisions of the NDPS Act and would have no application where a search was conducted under any other statute in respect of any offence.

(viii) Where during a search under any statute other than the NDPS Act, contraband under the NDPS Act also happens to be recovered, the provisions relating to the NDPS Act shall forthwith start applying, although, in such a situation, Section 50 may not be required to be complied for the reason that search had already been conducted.

(ix) The burden is on the prosecution to establish that the obligation imposed by Section 50 was duly complied with before the search was conducted.

(x) Any incriminating contraband, possession of which is punishable under the NDPS Act and recovered in violation of Section 50, would be inadmissible and cannot be relied upon in the trial by the prosecution; however, it will not vitiate the trial in respect of the same. Any other article that has been recovered may be relied upon in any other independent proceedings.

17 Adverting to the facts of the present case, the empowered officer has not taken in writing from the suspect i.e. respondent herein that he would not like to exercise his right of being searched before the Magistrate or a Gazetted

Officer and he would be searched by the empowered officer and therefore, this vitiates compliance of provisions of Section 50 of the Act.

18 It is no longer res integra that the violation of Section 50 of the Act is fatal and the police cannot rely upon the recovery so effected in violation of this Section.

19 We may with profit refer to the judgment of Constitution Bench of the Hon'ble Supreme Court in ***Vijaysinh Chandubha Jadeja vs State of Gujarat (2011) 1 SCC 609***, wherein it was observed as under:-

“29. In view of the foregoing discussion, we are of the firm opinion that the object with which right under [Section 50\(1\)](#) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation to hold that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of illicit articles suspect and vitiate the

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conviction if the same is recorded only on the basis of recovery of an illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.”

20 Similar reiteration of law can be found in **Arif Khan @ Agha Khan versus State of Uttarakhand AIR 2018 SC 2123**, wherein it was observed as under: -

“28. First, it is an admitted fact emerging from the record of the case that the appellant was not produced before any Magistrate or Gazetted Officer. Second, it is also an admitted fact that due to the aforementioned first reason, the search and recovery of the contraband “Charas” was not made from the appellant in the presence of any Magistrate or Gazetted Officer. Third, it is also an admitted fact that none of the police officials of the raiding party who recovered the contraband “Charas” from him was the Gazetted Officer, nor they could be and, therefore, they were not empowered to make search and recovery from the appellant of the contraband “Charas” as provided under Section 50 of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer; Fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the

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search and recovery was made from the appellant in the presence of a Magistrate or a Gazetted Officer.

29. Though the prosecution examined as many as five police officials (PW-1 to PW-5) of the raiding police party, none of them deposed that the search/recovery was made in the presence of any Magistrate or a Gazetted Officer.

30. For the aforementioned reasons, we are of the considered opinion that the prosecution was not able to prove that the search and recovery of the contraband (Charas) made from the appellant was in accordance with the procedure prescribed under Section 50 of the NDPS Act. Since the non-compliance of the mandatory procedure prescribed under Section 50 of the NDPS Act is fatal to the prosecution case and, in this case, we have found that the prosecution has failed to prove compliance as required in law, the appellant is entitled to claim its benefit to seek his acquittal.”

21 As observed above, the record reveals that the respondent was also told that he could be searched before the police and only then he opted to be searched by the police, which is insufficient compliance with Section 50 of the Act and the prosecution cannot rely upon the recovery effected as a result of search conducted in violation of Section 50 of the Act.

22 Apart from the above, it would be noticed that the recovery in the instant case has been effected from the person

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of the respondent because the witnesses have stated that the respondent had tied one piece of cloth around his waist from which 500 grams of charas was recovered, yet none of them has specifically stated that how the Investigating Officer came to know that the substance found in the cloth tied by the respondent around his waist was charas.

23 There is nothing in the testimony of the Investigating Officer or the other officials witnesses that he or any one of them had tested the aforesaid substance and on the basis of experience they came to the conclusion that the substance was charas.

24 Further none of the prosecution witnesses has stated that the substance recovered from the respondent was weighed and then it was found to be 500 grams.

25 Lastly and more importantly, the prosecution has failed to comply with the provisions of Section 42 (2) of the Act. As held in para-10 (*supra*) that the instant case is one of prior information and not of chance recovery as is evident from the consent memo Ex. PW6/A, therefore, provisions of Section 42(2) of the Act were scrupulously required to be followed.

26 In a similar situation, this Court in **Criminal appeal No. 260 of 2014, titled State of H.P. Vs. Rajeev Kumar @ Rinku, decided on 23.08.2024** acquitted the accused while holding that since the police had prior information regarding the respondent being in possession of charas but have not complied with the requirement of Section 42(2) of the Act, which has vitiated the trial. The relevant extract of the aforesaid judgment is reproduced as under:-

“36. In this background, the fact that the document makes a mention of only the NDPS Act can only lead to an inference that the police had prior information regarding the respondent being in possession of a contraband punishable under the NDPS Act or that this document was prepared not before the search of the respondent but after the recovery of the charas.

37. In either of the eventualities both these possibilities are fatal to the case of the prosecution. If the police had information that the respondent might be carrying or in possession of charas with him and it was a definitive information, then the police was bound to comply with the requirement of Section 42 of the NDPS Act. The police had to reduce the information into writing and send a copy thereof to his superior officer.

38. It was held by the Hon’ble Supreme Court in Smt. Najmunisha vs. The State of Gujarat (2024) 4 SCC 411, that the officer receiving the information regarding the

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narcotic is bound to record the same and send it to the superior officer and failure to do so will vitiate the trial.

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39. Thus, it would be evidently clear from the aforesaid exposition of law that the provisions of Section 42 of the NDPS Act are mandatory and its violation will vitiate the trial. 40. Here the police had prior information regarding the respondent being in possession or carrying charas but have not complied with the requirement of Section 42(2) of the NDPS Act and this has vitiated the trial and thus the respondent is entitled to be acquitted on this ground alone. Moreover, the memo Ext.PW4/A, does not even contain the number of the FIR which again makes the entire prosecution case doubtful, especially with regard to the so-called recovery alleged to have been effected from the micron bag of the respondent.

27 Since the prosecution has failed to prove mandatory compliance of sections 42(2) and 50 of the Act, which itself is fatal to the prosecution, the other grounds, on which the respondent has been acquitted by the learned Special Judge need not be gone into. The view taken by the learned Special Judge is possible and plausible one and the same warrants for no interference.

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28 In view of aforesaid discussions and for the reasons stated hereinabove, we find no merit in the instant petition and the same is accordingly dismissed so also the pending application(s), if any.

(Tarlok Singh Chauhan)
Judge

(Sushil Kukreja)
Judge

4.3.2025
(pankaj/yogesh)