

**HIGH COURT OF MADHYA PRADESH**  
**BENCH AT INDORE**

**(SINGLE BENCH: HON. MR. JUSTICE RAJENDRA KUMAR**  
**(VERMA))**

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| Case No.                         | : | <b>Criminal Appeal No.673/1998</b>  |
| Parties name                     | : | <b>Guddu @ Sadique<br/>vs. The State of M. P.</b>   |
| Date of Judgement                | : | <b>07/12/21</b>   |
| Bench constituted of             | : | Hon'ble Justice <b><u>RAJENDRA KUMAR</u></b><br><b><u>(VERMA)</u></b>   |
| Judgement delivered by           | : | Hon'ble Justice <b><u>RAJENDRA KUMAR</u></b><br><b><u>(VERMA)</u></b>   |
| Whether approved for reporting   | : | <b>Yes</b>  |
| Name of counsels for the parties | : | Shri Yogesh Purohit, learned counsel for the appellant.<br>Ms. Archana Maheshwari, learned Penal Lawyer for the respondent– State.  |
| Law laid down                    |   | <b>1.</b> Theory of 'substantial compliance would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudices against the suspect. The Safeguard cannot be treated as formality, but it must be construed in its proper perspective, compliance thereof must be ensured. The law has provided a right to the accused, and makes it obligatory upon the officers concerned to make the suspect aware of such right.<br><b>2.</b> While discharging the onus of Section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of Section 50 of the Act. |

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|                               | Non-compliance of the provisions of Section 50 of the Act would cause prejudice to the accused, and , therefore, amount to the denial of a fair trial. To secure a conviction under<br><b>3.</b> Whether the provisions of Section 50 of the Act wer <sup>34</sup> complied with or not, would normally be a matter to be determined on the basis of the evidence produced by the prosecution. An illegal search cannot entitle the prosecution to raise a presumption of validity of evidence under Section 50 of the Act. |
| Significant paragraph numbers | 16, 17, 18, 19 & 20   |

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**J U D G E M E N T**

**(Passed on 7<sup>th</sup> day of December, 2021)**

1. This criminal appeal is preferred by the appellant being aggrieved by the judgment dated 20.03.1998 passed by Special Judge, NDPS Act, Indore in Special Case No.147/1996 whereby the appellant is convicted for the offence punishable under Section 8/20 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (hereinafter referred as to “The Act”) and sentenced for 10 years R.I. With fine of Rs.1,00,000/- and in default of payment of fine amount further to undergo for 3 years R.I.
2. The prosecution story in short is that, on 17.12.1996, at about 3:45 PM, Mrigendra Tripathi (PW-4) Sub Inspector of Police Station Pandhrinath, Indore has received a secret information that the appellant is standing at Nagar Seva bus stand Machhi Bazar, Indore and is in possession of psychotropic substance (brown sugar) and is going somewhere. On the basis of this Information, PW-4 prepared a memo vide Ex.P/11 and also the information is recorded in the Rojnamcha vide Ex.P/12 and thereafter, witnesses were called, the intimation was given to the CSP, Pandhrinath. Since it was an urgent matter therefore, search warrant

could not be obtained by PW-4. Thereafter, PW-4 alongwith witness Santosh Kumar (PW-1) and Bheru Lal (PW-3) went on the spot where the appellant was given intimation vide Ex.P/2 that he could be searched either by Mrigendra Tripathi (PW-4) or by a Magistrate or Gazetted Officer. After following due process, searched and recovered a small packet of paper from right pocket of pant of the appellant contained in a plastic/polythene bag having the substance/powder of brown sugar vide Ex.P/4.

3. As per prosecution, on being weight, the contraband was found in quantity of 20grams. Sub-Inspector has taken two samples of five gram each and thereafter, the sample alongwith the entire contraband was sealed properly, various memos were prepared about the procedure adopted by PW-4. The appellant was taken in custody and the FIR was registered. The contraband was taken to the Malkhana of police station Pandthiranth on the same date and FIR was registered. The sample was sent to the forensic science laboratory. The FSL vide its letter dated 18.12.1996 opined that in sample of contraband, Dy-acetyl morphine (heroin) was confirmed. After due investigation, charge-sheet was filed before the Special Judge, NDPS Act, Indore.
4. The appellant was charged under Sections 8/20 of the NDPS Act. The appellant/accused abjured his guilt and he took a plea that he is innocent. The prosecution has examined total 9 witnesses namely, Santosh Kumar (PW-1), Rajlallan Mishra (PW-2), Bherulal (PW-3), Mrigendra Tripathi (PW-4), Vikram Singh (PW-5), Jitendra Kumar (PW-6), Suresh (PW-7), Bhartendra Sanlunke (PW-8) and Pratap Bhanu Awashi (PW-9).
5. No witness in his defence was examined. The Special Judge, after considering the evidence adduced by the parties, has convicted the appellant as mentioned above in para no.1.
6. The appellant has preferred the present appeal mainly on the following grounds:-

- (i) there is non-compliance of the mandatory provisions of Section 42 and 50 of the Act;
- (ii) there is total non-compliance of provisions of Sections 52, 55 and 57 of the Act which is serious prejudice to the appellant;
- (iii) no FSL form is prepared, nor sent to the laboratory, therefore, the possibility of plantation and tampering with the samples can not be ruled out;
- (iv) the procedure adopted for testing the samples is also not stated in the report so FLS report is not reliable;
- (v) the learned trial Court committed error in not considering the material contradictions and omissions appeared in the statements of prosecution witnesses and also in discarding defence version;
- (vi) the impugned order is contrary to law and facts available on record;
- (vii) the learned trial court has read and mis-appreciated the evidence available on record and erred in ignoring the material contradictions, discrepancies and infirmities in the evidence of the prosecution

Therefore, learned counsel for the appellant prays that on the aforesaid grounds, the appeal is liable to be allowed and the appellant may be acquitted.

7. Learned Public Prosecutor has opposed the prayer. Inviting my attention towards the conclusive paragraphs of the impugned judgement, learned public prosecutor has submitted that that contraband was recovered from possession of the appellant and which was very well confirmed by the Forensic Science Laboratory as Dy-acetyl morphine (heroin). The prosecution has complied with the provisions of The Act during the

search of the appellant after prior intimation to the Superior officer. He supported the judgment and order by submitting that there is clear evidence against the appellant, therefore, according to the learned Public Prosecutor, the appeal deserves to be dismissed.

8. I have considered rival contentions of the parties and have perused the record.
9. It is seen that Ex.P/11 contains secret information that was received by CSP, Pandhrinath vide Ex.P/21. Constable Suresh (PW-7) had categorically stated that he had taken the intimation to the CSP, the envelope was handed over to the CSP, Pandhrinath and receipt of CSP is Ex.P/21.
10. The learned trial Court has considered the statement of Suresh (PW-7) and Bhartendu Salunke, Inspector (PW-9) regarding intimation given to the CSP and compliance of Section 42 of the Act and after discussing the evidence in detail in para no.12 and 13 of the impugned judgment, has rightly held that there is compliance of Section 42 of the Act. Ex.P/21 clearly shows that there was a receipt of information dispatched by Mrigendra Tripathi (PW-4) Sub Inspector that being so merely because of dispatch number was not mentioned that would not corrode credibility of the evidence of witnesses examined to establish that the information was conveyed to the higher officials. [See; **Smt, Krishna Kanwar @ Thakuraeen vs. state of Rajasthan AIR 2004 SC 2735 and Madanlal vs. State of Himachal Pradesh AIR 2003 Sc 3642.**]
11. In support of the appeal, learned counsel for the appellant/accused has mainly focused at alleged non-compliance of the requirements of Section 50 of the Act. It is submitted that Section 50(1) and 50(3) of the Act in its common grammatical connotation make it abundantly clear that the procedure safeguards envisaged under section 50 of the Act are to be implied effectively and honestly while informing, apprising and

advising the suspect of his vested right to be searched only by a Gazetted Officer or a Magistrate. Hon'ble Apex Court in **Beckodan Abdul Rahiman vs. State of Kerala (2002) 4 SCC 229** has held that the harsh provisions of the Act cast a heavier duty upon the prosecution to strictly follow and comply the safeguards.

12.Learned counsel for the State, on the other hand, submits that the purpose of information to the accused is to ensure that there is transparency and has aimed at ruling out allegations and failure of false implication. There is no specific manner in which the information/intimation, is required to be given. The appellant/accused did not opt to be searched by the Gazetted Officer or by the Magistrate even though it was pointed out to him that he had the choice. It was not as if he had the limited option. Learned counsel for the State has placed heavy reliance on para no.11, 12 and 13 of the judgment of **Prabha Shankar Dubey vs. State of Madhya Pradesh (2004) 2 SCC 56**, which reads as under:-

“11. Though there cannot be any quarrel with the general principle highlighted by learned counsel for the appellants that if a thing is required to be done in a particular way it should be done in that way, the position here is different in view of our conclusions that the requirements of Section 50 of the Act were sufficiently complied with. The general principle as noted has been stated illuminatingly in *Nazir Ahmad v. King-Emperor* (AIR 1936 P.C. 253), and later by this Court in *State of Uttar Pradesh v. Singhara Singh and Ors.* (1964 (4) SCR 485). What the concerned officer is required to do is to convey about the choice the accused had. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the concerned officer, even though there is no specific form. The use of the word 'right' at relevant places in the decision of Baldev Singh's case (supra) seems to be to lay effective emphasis that it is not by the grace of the officer

the choice has to be given but more by way of a right in the 'suspect' at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it.

**12.** The use of the expression 'substantial compliance' was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in Baldev Singh's case (supra). A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations.

**13.** Above being the position, we find no substance in the plea that there was non-compliance with the requirements of Section 50 of the Act.”

13. Section 50 of the NDPS Act prescribes the conditions under which personal search of a person is required to be conducted. Being the pivotal provision, the Section, (as amended by Act 9 of 2001 - inserting sub-sections (5) and (6) with effect from 2nd October 2001) is extracted in full. It reads as under;

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

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

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

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

(5) When an officer duly authorized under section 42 has reason to believe that it is not possible to take the person

to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

14. In **Vijaysingh Chandubha Jadeja vs. State of Gujarat (2011) (1) SCC 609** a Constitutional Bench of Hon'ble Apex Court has been over ruled the law laid down in Prabha Shankar Dubey (supra) and hon'ble the apex Court in para No.22 has held as under:-

22. 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 in holding 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 a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision. As observed in *Re Presidential Poll*<sup>14</sup>, 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 component is, the intention of the law maker expressed in the law itself, taken as a whole." **We are of the opinion that the concept of "substantial**



**compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra)."** Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of (1974) 2 SCC 33 the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."

15. Learned counsel for the appellant has placed heavy reliance on para no.14 and 15 of the judgement of Hon'ble apex Court passed in case of *State of Rajasthan vs. Permanand & Anr. In Criminal Appeal No.78/2005 decided on 28.02.2014*. Relevant paragraphs are reads as under:

In our opinion, a joint communication of the right available under [Section 50\(1\)](#) of the NDPS Act to the accused would frustrate the very purport of [Section 50](#). Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the [NDPS Act](#) carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of

the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under [Section 50\(1\)](#) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in *Paramjit Singh* and the Bombay High Court in *Dharamveer Lekhram Sharma* meets with our approval. It bears repetition to state that on the written communication of the right available under [Section 50\(1\)](#) of the NDPS Act, respondent No.2 Surajmal has signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorized respondent No.2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 Parmanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.

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

50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed.

16. It is a settled cannon of criminal jurisprudence that when a safeguard or a right is provided, favouring the accused, compliance thereto should be strictly construed. The Theory of 'substantial compliance would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudices against the suspect. The Safeguard cannot be treated as formality, but it must be construed in its proper perspective, compliance thereof must be ensured. The law has provided a right to the accused, and makes it obligatory upon the officers concerned to make the suspect aware of such right. The officer had prior information of the raid, thus, he was expected to be prepared for carrying out his duties of investigation in accordance with the provisions of Section 50 of the Act. While discharging the onus of Section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of Section 50 of the Act. Non-compliance of the provisions of Section 50 of the Act would cause prejudice to the accused, and , therefore, amount to the denial of a fair trial. To secure a conviction under Section 21 of the Act, the possession of the illicit article is a sine qua non. Such contraband article should be recovered in accordance with the provisions

of Section 50 of the Act, otherwise, the recovery itself shall stand vitiated in law. Whether the provisions of Section 50 of the Act are complied with or not, would normally be a matter to be determined on the basis of the evidence produced by the prosecution. An illegal search cannot entitle the prosecution to raise a presumption of validity of evidence under Section 50 of the Act.

17. In the case in hand, Mrigendra Tripathi (PW-4) Sub Inspector informed the appellant that he could be searched by PW-4 himself, or Gazetted officer or by the Magistrate. Mrigendra Tripathi (PW-4) Sub Inspector was head of the raiding party and in his statements recorded before the learned trial Court in para no.4, he has stated as under:-

“मैने अभियुक्त गुड्डु को यह अवगत कराया कि मुझे यह सूचना मिली है कि उसके पास ब्राउन शुगर है जिसकी तलाशी ली जाना है यदि वह अपनी तलाशी मजिस्ट्रेट अथवा राजपत्रित अधिकारी के समक्ष देना चाहे तो उनके समक्ष तलाशी दी जा सकती है और यदि वह मुझे तलाशी देना चाहे तो मुझे तलाशी दे सकता है। इस संबंध में पंचनामा बनाया गया। अभियुक्त गुड्डु ने अपनी तलाशी मुझे देने की सहमति दी। उक्त पंचनामा पंच साक्षियों के समक्ष तैयार किया गया जो प्र.पी. -2 है, इस पर डी से डी मेरे हस्ताक्षर है। अभियुक्त ने बी से बी भाग में लिखकर मुझे तलाशी की सहमति दी है।”

18. In this case, the option given to the accused has been proved as Ex.P/2, which reads as under:-

“हम पंचान उपरोक्त समक्ष मृगेन्द्र त्रिपाठी S.I. ने गुड्डू उर्फ सादिक को सूचना दी कि “मुझ S.I. मृगेन्द्र त्रिपाठी को सूचना प्राप्त हुई है कि आपके पास अवैध ब्राउन सुगर है जिस हेतु तुम्हारी तलाशी ली जाना है आप मुझे या राजपत्रित अधिकारी या मजिस्ट्रेट को अपनी तलाशी देंगे।”

19. As it is clear from the language of Ex.P/2, the accused was not made aware of his right that he could be searched in the present of gazetted officer of the Magistrate and that he could exercise such chance, the writing does not reflect this important initial requirement of

Section 50 of the Act.

20. The appellant was informed that he would like to be searched by Mrigendra Tripathi (PW-4) Sub Inspector himself also. As held by Apex Court in the case of **Parmanand case (supra)**, it is breach of Section 50(1) of the Act. The idea behind taking the accused/appellant to the nearest Magistrate or Gazetted Officer, if how requires, is to give him a chance of being searched in the presence of an independent officer. Thereafter, it was improper for Mrigendra Tripathi (PW-4) Sub Inspector to tell the accused about the 3<sup>rd</sup> alternative was available and that he could be searched by Mrigendra Tripathi (PW-4) Sub Inspector, who was the head of the raiding party. Mrigendra Tripathi (PW-4) Sub Inspector could not have given a third option to the appellant when Section 50(1) of the Act does not provide for it and such option would defeat the provisions of Section 50(1) of the Act. On this ground, search conducted by Mrigendra Tripathi (PW-4) Sub Inspector, is vitiated.

21. It is correct that the independent witnesses PW-1 Santosh has not been supported the case of the prosecution and he has been declared hostile, but he has not denied his signature on the documents prepared during search and seizure. Other independent witness PW-3 (Bherulal) has supported the prosecution story. The learned Trial Court has considered the contradictions and omissions appeared in the evidence of prosecution witnesses regarding the information given to the CSP in compliance of Section 42 and 57 of the Act and also the contradictions regarding to sealing of seized articles and further, sending of the samples to the FSL for chemical examination in para nos.15, 16, 19, 20, 21 and 22 of the impugned judgment and after discussing the evidence in detail, has rightly held that these contradictions does not affect the case of the prosecution adversely. Ex.P.24 shows that this FSL report was given in pursuance to the memo of S.P. Indore and seal of sample was found

intact according to the prosecution. Therefore, there is nothing to disbelieve the FSL Report.

22. In the aforesaid elaborate discussion, I found that the compliance of Section 50 of the Act could not be complied with by PW-4, however, there should be strict compliance of Section 50 of the NDPS Act and the accused be informed of his right to search before the Gazetted Officer or Magistrate, hence, in my considered opinion, there are reasons for non-compliance of the mandatory provision of the Act by the prosecution during raid. The appellant is entitled for benefit of such lapse committed by the prosecution for not complying the mandatory provisions of Section 50 of the Act, the appeal deserved to be and is hereby allowed and the judgement and order dated 20.03.1998 passed by Special Judge, NDPS Act, Indore in Special Case No.147/1996, is hereby quashed. The appellant is acquitted from the charges Section 8/20 of the Narcotic Drugs and Psychotropic Substance Act, 1985. Fine amount, if deposited, be refunded to him. He be set at liberty forthwith, if not required in any other case.

23. Order of the learned trial Court regarding disposal of property is hereby confirmed.

24. Consequently, other pending applications, if any, shall stand stands closed.

**(Rajendra Kumar (Verma))**  
**Judge**

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