HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT AT JABALPUR

Case No. **Parties Name**	**CRA. No.5610/2019** *Raju @ Surendar Nath Sonkar* *vs.* *State of Madhya Pradesh*
Date of Judgment	**08/12/2020**
Bench Constituted	**Single Bench**
Judgment delivered by	**Justice Sujoy Paul**
Whether approved for reporting	Yes
Name of counsels for parties	**For appellant:** Shri Nitin Dubey, Advocate **For respondent-State:** Shri J.S. Hora, Panel Lawyer
Law laid down	**1. Indian Evidence Act,1872**- Independent prosecution witnesses/witnesses about the search memo turned hostile. The police officer (PW/4) alone supported the Panchnama. His statement could not be demolished during cross examination. The conviction can be recorded solely on the basis of a credible statement of police officer. The evidence of official witness cannot be distrusted and disbelieved merely on account of his official status. **2. Interpretation of statute**- (i) A statute must be read as a whole in its context. (ii) The courts always presumed that Legislature inserted every part of statute for a purpose and the legislative intention is that every part of the statute should have effect (iii) The Legislature is deemed not to waste its words or to say anything in vain. (iv) The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out. (v) If language of statute is clear and unambiguous, it has to be given effect to, irrespective of its consequences.

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	3. Section 50 of NDPS Act- the expression "if such person so requires" needs to be given full meaning and effect. If accused person has been informed about his right to be searched before the Gazetted Officer or Magistrate and gives consent to be searched by the police officer, the necessary requirement of Sub-section (1) of Section 50 of NDPS Act is satisfied and no fault can be found in the search.
Significant paragraph numbers	**14, 16, 17, 18**

J U D G M E N T
(08.12.2020)

This appeal filed under Section 374 (2) of the Code of Criminal Procedure, 1973 (Cr.P.C.) assails the judgment dated 21.06.2019 passed by Special Judge, Narcotic Drugs and Psychotropic Substances, Jabalpur in Sessions Trial No.15/2017 whereby the appellant is convicted for committing the offence punishable under Section 8/21 (b) of Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and directed to undergo sentence of RI for 3 years with fine of Rs.25,000/- and default stipulation in the event of non-payment of fine.

2. Briefly stated, the story of prosecution is that on 20.01.2017, the police received an information that the appellant is standing near Pan Bazar Gurandi, Jabalpur and is carrying objectionable substance namely "smack". After recording the information in the "*rojnamcha*", the Constable Bhupendra along with two independent witnesses reached the spot where the appellant was standing. The appellant was informed that an information is received regarding possession of "smack" by him and, therefore, he has an option either to get himself searched by the Gazetted Officer or Magistrate or he may permit the Police Authority to undertake the exercise of search. As per prosecution story, Sub-Inspector Rajendra Prasad Ahirwar (PW-4) got himself checked in the presence of two witnesses and no objectionable substance was found in his possession. Thereafter, he searched the appellant and found 51 gm. of objectionable substance from the appellant. Panchnamas Ex.P/4 and Ex.P/5 were prepared at the spot.

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3. As per the prosecution case, a conjoint reading of these exhibits makes it clear that the requirements of Section 50 of NDPS Act were satisfied. The objectionable substance so seized was sent for examination to RFSL, Bhopal. As per the examination report, the substance was found to be diacety lmorphine (heroin). The appellant who was arrested was tried by the Court below. The appellant abjured the guilt. After recording the evidence of the parties, the Court below opined that the procedural formalities as per NDPS Act were fulfilled by the prosecution. The Court below opined that the prosecution has succeeded to prove its case beyond reasonable doubt and accordingly convicted and sentenced the appellant as mentioned above.

Argument of Appellant

4. Shri Nitin Dubey, learned counsel for the appellant raised two fold submissions to assail the impugned judgment. **Firstly,** it is argued that the two independent witnesses in whose presence the search was allegedly made by PW/4 turned hostile and did not support the prosecution story. In absence of any independent witness, the conviction of appellant solely based on the statement of Shri Ahirwar (PW/4) is liable to be interfered with. **Secondly,** it is submitted that Section 50 of NDPS Act is mandatory in nature. In the manner, Ex.P/4 and P/5 are prepared, if the same are read with the statement of P.W. 4 (Rajendra Prasad Ahirwar), it will be clear like noon day that the mandatory requirement of Section 50 of NDPS Act is not satisfied. In absence of complying with this provision, the entire case of the prosecution is vitiated and appellant deserves exoneration on this count alone. To elaborate, it is contended that the search and seizure of objectionable substance from the appellant was not made before the Gazetted Officer or the Magistrate. Thus, the mandatory requirement of Section 50 of NDPS Act was not fulfilled. In support of aforesaid, learned counsel for the appellant has placed reliance on three Division Bench judgments of Supreme Court reported in ***Arif Khan @ Agha Khan Vs. State of Uttarakhand (2018 AIR (SC) 2123), Ashok Kumar Sharma Vs. State of Rajasthan, (2013 (2) SCC 67) and Suresh and others Vs. State of Madhya Pradesh (Criminal Appeal No.300 of 2009)***.

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5. In alternatively, Shri Nitin Dubey, learned counsel for the appellant submits that in the event this Court is not satisfied with the argument of the appellant and is not inclined to interfere with the conviction, this Court may take into account the period already undergone in custody by the appellant between 21.01.2017 to 26.05.2017 and from the date of judgment till today and release him by reducing the period of sentence already undergone.

Argument of State

6. Countering the aforesaid argument, Shri Hora, learned P.L. for the State placed heavy reliance on Ex.P/5. It is submitted that the appellant was made aware about his valuable right flowing from Section 50 of NDPS Act, yet he has chosen to be searched by police officer. The expression "*if such persons so require*" is very important in Section 50 of NDPS Act and should be given full meaning.

7. The question of search by Magistrate or by a Gazetted Officer would arise only when such person has shown/expressed his desire for such search. Having not done so despite giving information about his right, it is no more open to the appellant to contend that the requirement of Section 50 of NDPS Act is not fulfilled. He placed reliance on the statement of PW-4 (Rajendra Prasad Ahirwar) and stated that no amount of cross-examination has demolished his case and, therefore, there is no reason to disbelieve that (i) an option was given to the appellant to get himself checked before the Magistrate or Gazetted Officer; (ii) appellant himself gave consent to get checked before PW-4 (Rajendra Prasad Ahirwar). Thus, no fault can be found in the procedure adopted by the prosecution.

8. It is further urged that the merely because two seizure witnesses namely Iqbal Ansari (PW 1) and Lakhan Choudhary (PW 2) have not supported the prosecution story, statement of PW-4 will not pale into insignificance. The law is well settled that if statement of Police Officer is trustworthy, there is no rule that the Police Authorities' statement must be discarded. He placed reliance on three Judge Bench judgment of Supreme Court reported in **2001 (9) SCC**

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571 (*P.P. Beeran Vs. State of Kerala*) in support of his aforesaid contention. He straneously contended that that this judgment makes it clear that in the manner appellant was informed about his right, it fulfills the requirement of Section 50 of NDPS Act and almost in the similar circumstances, the Apex Court did not interfere in the matter.

9. Shri Hora, learned P.L. for the State also placed reliance on a recent judgment of Supreme Court reported in **2020 SCC Online SC 730** (***Rizwan Khan Vs. State of Chhattisgarh***) to bolster the same submission that IO's statement is trustworthy and conviction is rightly recorded by Court below.

10. No other point is pressed by learned counsel for the parties.

11. I have heard learned counsel for the parties at length and perused the record.

Findings

12. In the instant case, before the Court below seven witnesses entered the witness box and deposed their statements. PW/1 Iqbal Ansari and PW/2 Lakhan Choudhari were independent witnesses of seizure. However, both of them turned hostile and did not support the prosecution story. A.S.I. Rajendra Prasad Ahirwar (PW/4) is the star witness of the prosecution. The search of the appellant was conducted by this officer. Remaining prosecution witnesses are the employees of police department, who have supported the prosecution story and proved the relevant documents.

First submission of Appellant

13. As noticed above, the impugned judgment was criticized by contending that statement of PW/4 is not worthy of credence because both the independent witnesses in whose presence objectionable substance was allegedly recovered from the appellant did not support the prosecution story and hence statement of PW/4 does not inspire confidence. It is noteworthy that PW/4 deposed with accuracy and precision regarding entire process of seizure of Heroin from the appellant. He candidly deposed that the appellant was informed about his

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constitutional/legal right to get himself searched before Gazetted Officer/Magistrate but he did not opt for a search before them. Indeed, he clearly gave consent to be searched by PW/4. This statement of PW/4 could not be demolished during his lengthy cross examination. Hence, the question arises whether the story of prosecution can be disbelieved merely because it is mainly founded upon the statement of a police officer (PW/4).

14. This point is no more *res integra*. The Apex Court in ***State (NCT of Delhi) vs. Sunil (2001) 1 SCC 652*** held as under:-

> *"It is an archaic notion that actions of the police officer should be approached with initial distrust. It is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law, the presumption should be the other way round. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature."*

Similarly, in the case of ***Surinder Kumar v. State of Punjab (2020) 2 SCC 563***, the Apex Court observed as under:-

> "*15. The judgment in* Jarnail Singh *v.* State of Punjab *(2011) 3 SCC 521, relied on by the counsel for the respondent State also supports the case of the prosecution. In the aforesaid judgment, this Court has held that merely because prosecution did not examine any independent witness, would not necessarily lead to conclusion that the accused was falsely implicated. The evidence of official witnesses cannot be distrusted and disbelieved, merely on account of their official status."*
>
> In ***Rizwan Khan*** (supra), it was opined as under:-
>
> ***"23.*** *It is settled law that the testimony of the official witnesses cannot be rejected on the ground of non-corroboration by independent witness. As observed and held by this Court in catena of decisions, examination of independent witnesses is not an indispensable requirement and such non-examination is not necessarily fatal to the prosecution case."*
>
> *(Emphasis Supplied)*

15. In view of principles laid down in the aforesaid judgments, it cannot be said as a rule of thumb that the statement of police officer to be discarded in all circumstances or such statement can be relied upon only when it is corroborated by statement of independent witness. If the statement of police

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officer is worthy of credence, the conviction can be recorded on the basis of statement of police officer even if such statement is not supported by independent witness. Thus, first submission of appellant deserves rejection.

Second submission of appellant

16. It is apposite to quote relevant portion of Section 50 of NDPS Act, which reads as under:-

> ***"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 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)."*
>
> *(Emphasis Supplied)*

17. The expression "if such person so requires" contained in Sub-section (1) of Section 50 of NDPS Act needs to be read with remaining portion of the provision and must be given full effect. This is trite that a statute must be read as a whole in its context. This rule is referred to as an 'elementary rule' by **Viscount Simonds**[1] a 'compelling rule' by **Lord Somervell** of Harrow and a 'settled rule' by **B.K. Mukherje**[2], **J. Lord Halsbury** agreed with the said preposition advanced by Mukherjee, J.

18. It is equally settled that "it is not a sound principle of construction", "to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute[3].

1 AG v. HRH Prince Ernest Augustus, (1957) 1 All ER 49, P.55 (HL)

2 Poppatlal Shah v. State of Madras AIR 1953 SC 274 P 276: 1953 SCR 677 1953Cri LJ 1105

3 Aswini Kumar Ghose v. Arabinda Bose, AIR 1952 SC 369 P 377:1953 SCR 1 [See further Union of India vs. Hansoli Devi AIR 2002 SC 3240 P 3246:(2002) 7 SCC 273, State of Orissa v. Joginder Patjoshi AIR 2004 SC 1039 P 1142:(2004) 9 SCC 278

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Jagannathdas, J. pointed out that "it is incumbent on the Court to avoid a construction, if reasonably permissible on the language, which would render a part of the statute devoid of any meaning or application[4].

Das Gupta, J. observed that "the courts always presumed that Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect[5].

The Legislature is deemed not to waste its words or to say anything in vain[6].

"The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out[7].

19. Taking into account the aforesaid principles laid down by the Supreme Court, I find substance in the argument of Shri Hora that the expression *"if such person so requires"* needs to be given due weightage and full effect. If it is held that in every case a search is required to be conducted before Magistrate or by Gazetted Officer, the expression "if such person so requires" will vanish in thin air. Putting it differently, if the aforesaid phrase is ignored then only option left with the prosecution is to take the accused to nearest Gazetted Officer or to the nearest Magistrate. This was not the legislative intent because of the phrase i.e. *"if such person so requires"* in Section 50 of NDPS Act. Thus, this phrase must be given its full meaning and effect. In ***Nelson Motis vs. Union of India (1992) 4 SCC 711***, it was held that if plain language of statute is clear and unambiguous, it has to be given effect to, irrespective of the consequences.

4 Rao Shiv Bahadur Singh vs. State of U.P. AIR 1953 SC 394 P 397:1953 SCR 1188

5 J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. State of U.P. AIR 1961 SC 1170 P 1174:(1962) 1 SCJ 417: (1961) 1 LLJ 540; Shri Mohammad Alikhan v. Commissioner of Wealth Tax, AIR 1997 SC 1165 P 1167:(1997) 3 SCC 511; Dilawar Balu Kurane v. State of Maharashtra AIR 2002 SC 564 P 566:(2002) 2 SCC 135; Ramphal Kundu v. Kamal Sharma AIR 2004 SC 1039 P 1042:(2004) 9 SCC 278

6 Quebec Railway, Light, Heat & Power Co. v. Vandry AIR 1920 PC 181 P 186:1920 AC 662 [See further Union of India vs. Hansoli Devi AIR 2002 SC 3240 P 3246:(2002) 7 SCC 273

7 Hill v. Williams Hill (Park Lane) Ltd., (1949) 2 All ER 452 (HL) P 461; referred to in Umed v. Raj. Singh AIR 1975 SC 43 P 63:(1975) 1 SCC 76

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20. In view of foregoing analysis, this Court is of the opinion that as per Section 50 of NDPS Act, the accused must be apprised by the person concerned regarding his right to get searched before Gazetted Officer or Magistrate. Despite apprising him about this said right, if the accused person has chosen to be searched by the police officer, no fault can be found in the search. Pertinently, a Constitution Bench of Supreme Court in ***Vijaysinh Chandubha Jadeja vs. State of Gujarat (2011) 1 SCC 609*** observed that "*thereafter the suspect may or may not choose to exercise the right provided to him under the said proviso*." Similarly, another Constitution Bench in ***State of Punjab vs. Baldev Singh (1999) 6 SCC 172*** held that a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial, but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of illicit article, the recovery from his person, during a search conducted in violation of provisions of Section 50 of the NDPS Act.

21. ***Baldev Singh*** (supra) contains an important finding- "in case he was apprised." Thus, as a rule of thumb, in all circumstances, the search can not vitiate merely because it was not conducted before the Gazetted Officer or Magistrate. I find support in my view by a recent judgment of Delhi High Court reported in ***2020 SCC Online Del 136 (Innocent Ozoma vs. State)***. Para 32 of this judgment reads as under:-

> *"32. In terms of Section 50(1) of the NDPS Act where an officer is about to search a person under the provisions of Sections 41, 42 or 43 of the NDPS Act, he shall,* ***if such person requires****, take such person without unnecessarily delay to the nearest Gazetted Officer or the nearest Magistrate. Whilst it is clear that the authorized officer is required to take the person concerned to the nearest Magistrate/Gazetted Officer if the person so requires;* ***it is difficult to interpret Section 50(1) of the NDPS Act to read that it is mandatory that in all cases, search must be conducted before a Gazetted Officer or a Magistrate. Clearly****, if Section 50(1) of NDPS Act is read to mean that it is necessary in all cases that a*

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> *search be conducted before a Magistrate or a Gazetted Officer, there would be no purpose in informing the suspect of his right to be searched before such officers. The entire object of informing the suspect, who is proposed to be searched, about his/her right is to enable him to exercise this right - the right to be searched before a Magistrate or a Gazette Officer. In Vijaysinh Chandubha Jadeja (supra), the Supreme Court had also observed that the obligations of the authorized officer under Section 50(1) of the NDPS Act is mandatory and requires strict compliance. Failure to comply with the said provision would render the recovery of the illicit article suspect and vitiate the conviction. However, the Court had also observed that "Thereafter, the* ***suspect may or may not choose*** *to exercise the right provided to him under the said proviso".*
>
> *(Emphasis Supplied)*

22. In the case of ***Innocent Ozoma*** (supra), Delhi High Court has considered the judgment of Supreme Court in the case of ***Arif Khan and Ashok Kumar Sharma*** (supra). The Delhi High Court considered its previous judgment delivered in Criminal Appeal No.676/17 ***(Ramgopal vs. State)*** decided on 16.10.2018. It was held that in ***Arif Khan*** (supra) on the facts of that case, the Court found that mandatory procedure under Section 50 of the Act had not been satisfied. The said case was peculiar on its facts and, therefore, is distinguishable from the facts of the present case. Since in the case in hand, the prosecution was able to establish its case through the testimony of the witnesses and documents, no benefit of ***Arif Khan*** (supra) was given. The Delhi High Court referred this previous judgment with profit in ***Innocent Ozoma*** (supra). Hence, **Innocent Ozoma** was not found to be innocent and his appeal was dismissed.

23. Relevant portion of 'Sehmati Sandehi Panchnama' (Ex.P/5) reads as under:-

> " आपकी तलाशी ली जानी है एवं आपको कानूनन संवैधानिक अधिकार है कि यदि आप चाहे तो आपकी तलाशी अधिकृत राजपत्रित अधिकारी या मजिस्ट्रेट के समक्ष ली जा सकती है यदि आप चाहे तो आप अपनी तलाशी मुझे दे सकते है जो सन्देही राजू उर्फ सुरेन्द्र नाथ सोनकर ने मुझ सहा. उप निरी. राजेन्द्र प्रसाद अहिरवार से अपनी तलाशी कराने के लिए मौखिक तथा लिखित में सहमति प्रदान किया सन्देही द्वारा अपनी तलाशी मुझ ASI राजेन्द्र प्रसाद अहिरवार से तलाशी सहमति दी जाने पर सहमति पंचनामा तैयार किया गया।"
>
> मैं अपनी तालासी अहिरवार साहब से कराना चाहता हूँ तालासी की सहमति दिया
> राजू सोनकर
>
> *(Emphasis Supplied)*

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24. A plain reading of contents of Ex.P/5, in the considered opinion of this Court, shows that the appellant was apprised by PW/4 about his legal right to be searched before the Magistrate or Gazetted Officer, yet he had chosen to give option/consent to be searched by PW/4. The Apex Court in ***P.P. Beeran*** (supra) poignantly held as under:-

> *"**4.** Learned Senior Counsel then contended that there was factually no compliance with Section 50 of the NDPS Act inasmuch as the search was not conducted in the presence of a gazetted officer or a Magistrate. That point also seems to be very fragile for the appellant as the concurrent finding shows that PW 2 in fact put it to the appellant whether he required the search to be conducted in the presence of a gazetted officer or a Magistrate and the answer was in the negative. This was communicated in the form of a written record as is evidenced by Exhibit P-2. Hence, we are not disposed to interfere with conviction of the appellant on the ground of non-compliance with Section 50 of the Act."*
>
> *(Emphasis Supplied)*

Similarly, in the case of ***T.T. Haneefa v. State of Kerala*****, (2004) 5 SCC 128**, the Apex Court held as under:-

> ***"7.*** *…… In this case the appellant was given an option to be searched in the presence of the Magistrate, he did not exercise that right……*
>
> *In the instant case, we do not think there is any violation of Section 50 of the NDPS Act, as the accused was given the right to be searched in the presence of a Magistrate and as he failed to opt for that, we do not think that there was any procedural illegality."*
>
> *(Emphasis Supplied)*

25. Pertinently, the judgments cited by learned counsel for the appellant were delivered by Division Benches whereas judgment of ***P.P. Beeran*** (supra) is decided by a three Judge Bench. If the consent given by the appellant is tested on the anvil of Sub-section (1) of Section 50 of NDPS Act, it can be safely held that the police officer has clearly informed the appellant about his legal right and with eyes open the appellant opted to be searched by the PW/4. Hence, I am unable to hold that the search was held in utter violation of Section 50 of NDPS Act. Thus, this argument of appellant also could not cut any ice.

26. This Court will be failing in its duty if the last submission of counsel for the appellant regarding quantum of sentence is not considered. In view of foregoing

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analysis, it can be safely concluded that the prosecution has established its case beyond reasonable doubt before the Court below and no fault can be found in the impugned judgment whereby the appellant has been convicted. So far sentence is concerned, the Court below has already dealt with the appellant in a very lenient manner. The Court below could have imposed a much higher punishment but has not chosen to do so. The Court below has exercised its discretion in a judicious manner which does not warrant any interference by this Court. More so, when the menace of offence of this nature cannot be taken lightly. For these cumulative reasons, I find no reason to interfere in the impugned judgment.

27. Resultantly, the appeal fails and is hereby dismissed.

(SUJOY PAUL)
JUDGE

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