Before Rajiv Sharma and Harinder Singh Sidhu, JJ.

SUKHPAL SINGH AND ANOTHER—*Appellants*

versus

STATE OF PUNJAB—*Respondent*

CRA-D No.712-DB of 2009

May 22, 2019

Narcotic Drug & Psychotropic Substances Act, 1985—Appellants charged and tried for offences punishable under S. 21(c) and S. 8(c) of the Narcotic Drug & Psychotropic Substances Act, 1985—Convict directed to undergo 14 years imprisonment and to pay fine of Rs.2 lakhs each under Section 21(c) and 8(c) of the Act—Twenty five packets of heroin found in bag on intercepting motorcycle of the appellant—Challenge on ground of violation of Section 42 of the NDPS Act—No illegality if no prejudice caused—Recovery from bag—Section 50 not attracted.

Held that relying upon the decision of *Karnail Singh vs. State of Haryana, (2009) 8 Supreme Court Cases 539* has held that in special circumstances and emergent situations when the officer is on the move, and recording of information is not practical prior to search and seizure, and would be detrimental to effectiveness of the search and seizure concerned, the requirement of writing down and conveying information to superior officer may be postponed by a reasonable period which may even be after the search, entry and seizure. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. Non-compliance with Section 42 may not vitiate the trial if it does not cause any prejudice to the accused.

(Para 18)

Held that where the contraband is recovered from the bag, Section 50 of the NDPS Act was not required to be complied with. Section 50 of the NDPS Act is to be enforced when the contraband is recovered from the person.

(Para 21)

Held that the Division Bench relied upon SC decision in *Ajmer Singh versus State of Haryana, (2010) 3 Supreme Court Cases 746*, have held that for search of bag, briefcase, container, etc. carried by accused person, compliance with Section 50 of the NDPS Act is not required. (Para 22)

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for *appellant* No.1.

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for appellant No.2

S.P.S Tinna, Addl. A.G. Punjab

RAJIV SHARMA, J.

(1) This appeal is instituted against judgment and order dated 4.08.2009, rendered by Special Judge, Ferozepur, in Sessions Trial No. 97 of 2009. Appellants Sukhpal Singh and Sukhdev Singh were charged with and tried for the offences punishable under Sections 21 (c) and 8 (c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act' for brevity). They were convicted and sentenced to undergo imprisonment for 14 years and to pay a fine of Rs.2,00,000/- each, under Section 21 (c) of the NDPS Act. In default of payment of fine, they were ordered to further undergo imprisonment for four years. The motor cycle was ordered to be confiscated to the State under Section 8 (c) of the NDPS Act.

(2) The case of the prosecution, in a nutshell, is that on 28.02.2008, SI Major Singh of CIA Staff, Ferozepur, received a secret information that Sukhpal Singh alias Sukha son of Darshan Singh and Sukhdev Singh alias Sukha son of Joginder Singh were the smugglers of heroin. On the intervening night of 26/27.02.02.2018, they had received a consignment of heroin from Pakistan. Same was kept concealed by them near border. On that night, they were to deliver the same to the party. If a naka was held near the crossing of river of Palla Megha, they could be apprehended. On the basis of this secret information, SI Major Singh on the directions of higher officers and under the supervision of Rajinder Singh, DSP, Ferozepur, laid nakas at the boundaries of villages Kamalewala, Palla Megha and Akkuwala. At about 11.00 PM, one motor cycle without head-light was noticed coming from the side of Peer Berian. The motor cycle was intercepted. The person, who was sitting as a pillion rider, had placed a bag on his thighs. On enquiry, he disclosed his name as Sukhpal Singh alias Sukha. Accused Sukhdev Singh was driving the motor cycle. SI Major Singh and DSP Rajinder Singh disclosed their identity to both the accused. SI Major Singh told the accused that he had suspicion that the bag was containing some intoxicant material. He asked both the accused if they wanted to get the search of the bag conducted in his

presence or in the presence of some Gazetted Officer or Magistrate as per their right. Both the accused wanted to get the search of the bag to be conducted in the presence of DSP Rajinder Singh. The consent memos Ex.P2 and Ex.P3 of both the accused were prepared. These consent memos were attested by SI Jaswant Rai, ASI Rachhpal Singh and DSP Rajinder Singh. On the directions of DSP, SI Major Singh conducted the search of the bag. It contained 25 packets of heroin. On weighment, each packet was found to be one kilogram. Two samples of 10 grams each of heroin were separated from each packet and their parcels were prepared. These parcels were numbered as 1 to 25 and 1A to 25A. The remaining bulk was found to be 980 grams in each packet. Parcels were prepared and numbered as 1 to 25. SI Major Singh affixed his seal bearing impressions 'MS' on all the parcels. DSP Rajinder Singh also affixed his seal bearing impression 'RS' on all the parcels. The Investigating Officer handed over his seal to SI Jaswant Rai. The case property along with motor cycle was taken into possession. The Investigating Officer sent ruqa Ex.PW.4/1 to police station. FIR Ex.PW.4/2 was registered. Rough site plan Ex.PW.4/3 was also prepared. Case property as well as the accused were produced before Inspector Sarabjit Singh. He took the entire case property in his possession vide memo Ex.PW.4/4. The samples were sent to the office of Chemical Examiner, Amritsar. The investigation was completed and challan was put up after receiving report of the Chemical Examiner Ex.PW.5/7.

(3) The prosecution examined a number of witnesses in support of its case. The accused were also examined under Section 313 Cr.P.C. They denied the case of the prosecution. According to them, they were falsely implicated. In their defence, they examined five witnesses. They were convicted and sentenced, as noticed above. Hence, this appeal.

(4) Learned counsel appearing on behalf of the appellants have vehemently argued that the prosecution has failed to prove its case against their clients. Learned counsel appearing on behalf of the State has supported the judgment and order of the learned Court below.

(5) We have heard learned counsel for the parties and gone through the judgment and record very carefully.

(6) PW.1 HC Dinesh Kumar led his evidence by filing affidavit Ex.P1. According to the averments contained in his affidavit, on 06.03.2008, Inspector Sarabjit Singh had taken out 25 parcels of heroin of this case, weighing 10 grams each, duly sealed with the seals `MS', `RS' and `SS' along with docket from the Malkhana. He handed over

the same to him in an intact condition for delivering the same to the office of Chemical Examiner, Amritsar. Inspector Sarabjit Singh directed him firstly to get the docket forwarded and numbered from the office of SSP, Ferozepur. On the same day, he got forwarded and numbered the docket from the office of SSP, Ferozepur. He deposited the sample parcels of heroin along with docket in the office of Chemical Examiner, Amritsar, on 07.03.2008.

(7) PW.2 SI Jaswant Rai testified that he was posted at Narcotics Cell, Ferozepur. He along with SI Major Singh, Incharge CIA Ferozepur, ASI Rachhpal Singh and other police officials of Narcotic Cell and CIA Staff was present at bridge of river at Bann in the area of village Palla Megha, on 28.02.2008, under the supervision of Rajinder Singh, DSP (D). They were in four groups. At about 11.00 PM, a motor cycle without head-lights was noticed coming from the side of Basti Peer Berian. SI Major Singh directed all the groups to be alert. The motor cycle was intercepted.The person, who was sitting as pillion rider on the motor cycle, was carrying a bag on his thighs. SI Major Singh enquired about his antecedents. The person who was driving the motor cycle revealed his name as Sukhdev Singh alias Sukha. The person who was sitting as pillion rider disclosed his identity as Sukhpal Singh. The Investigating Officer introduced himself to the accused. DSP also introduced himself to the accused. The Investigating Officer told the accused that he had suspicion that they were carrying some intoxicant substance. Search of the bag was to be carried out. The Investigating Officer also told them that they had a legal right to get the search of the bag to be conducted in the presence of a Gazetted Officer or Magistrate. Both the accused reposed faith in DSP Rajinder Singh. Their consent memos Ex.P2 and Ex.P3 were prepared. He and ASI Rachhpal Singh were witnesses to these memos. These were attested by DSP Rajinder Singh. The gunny bag was tied. It was opened and searched. It contained 25 packets of hereoin. The Investigating Officer weighed each packet, which was found to be containing 1 kilogram of heroin in each packet. Two samples of 10 grams each of heroin were separated from each packet. These were sealed with the seal of the Investigating Officer, bearing impressions `MS' and were also sealed by DSP with his seal bearing impressions `RS'. Each sample parcel was marked as 1 to 25 and 1A to 25A. The remaining bulk was found to be 980 grams in each packet. All the packets were also converted into bulk parcels. These were also sealed. The bulk parcels and sample parcels and sample seal chit were taken into possession. In his cross-examination, he deposed that they reached the place of nakabandi at

about 9.00 PM, which was at a distance of about 9-10 Kms. from CIA Staff, Ferozepur. The motor cycle reached at the place of naka at about 11.00 PM. It was dark. Three different nakas were laid. He denied the suggestion that the accused were already in illegal custody of PS Sadar Ferozepur and CIA Staff, Ferozepur, since 26.02.2008. He denied the suggestion that the packets were already in the custody of the police being recovered as unclaimed articles.

(8) PW.3 Rajinder Singh DSP deposed the manner in which the accused were apprehended. They were apprised of their legal right. The search and seizure formalities were completed on the spot. He was the supervisory officer of Narcotic Cell and all CIA Staffs of District Ferozepur. SP (D) had deputed him to accompany the police officials for nakabandi. He was deputed at about 6.30/7.00 PM for this purpose. They left at about 8.00 PM for the nakabandi. They were about 25/30 officials.

(9) PW.4 SI Major Singh testified that on 28.02.2008, he was posted as Incharge, CIA Staff, Ferozepur. He received secret information that the accused were smugglers. On the intervening night of 26/27.02.2008, they had received a huge consignment from Pakistan. They had kept concealed heroin near the border. On the basis of this information and on the directions of higher officers and under the supervision of Rajinder Singh, DSP (D), Ferozepur, separate parties were constituted. Motor cycle was intercepted. Contraband was recovered. All the codal formalities were completed on the spot. The case property was produced before Inspector Sarabjit Singh. Neither he nor any body else had tampered with the case property. In his cross-examination, he deposed that he received secret information at about 6.00 PM, while he was present at CIA Staff, Ferozepur. He did not record that secret information nor he sent any ruqa on the basis of that secret information for registering case under the NDPS Act. He organised large force to lay naka at different places. He discussed the secret information with SP (D). On this, SP (D) deputed DSP (D) to supervise the nakabandi. He denied the suggestion that Sukhpal Singh accused was kept in illegal custody by the police of PS Sadar Ferozepur, since 26.02.2008, and was falsely implicated. He also denied the suggestion that accused Sukhdev Singh was falsely implicated.

(10) PW.5 Inspector Sarabjit Singh deposed that SI Major Singh, Incharge CIA Staff, Ferozepur, along with other police officials, produced before him 50 sample parcels, each containing 10 grams

heroin, and 25 bulk parcels each containing 980 grams of heroin, on 29.02.2008. The motor cycle and the accused were also produced before him. He produced the entire case property along with the accused before the Ilaqa Magistrate. Till the period, the case property remained in his custody, neither he tampered with it nor allowed any person to tamper with it. After preparing CFSL Form Ex.P2, on 06.03.2008, he handed over 25 sample parcels to HC Dinesh Kumar, to deposit the same with the office of Chemical Examiner.

(11) DW.1 Sukhdev Mittar testified that he was working in the Telegraph Officer, BSNL, Ferozepur, since 1982. He proved the certified copies of telegrams Ex.D1 to Ex.D3, which were got booked on 27.02.2008 at 11.00 AM. The telegrams were sent by Darshan Singh. In his cross-examination, he deposed that he did not know the facts of the present case. He did not know whether the contents of telegrams were true or false. He did not know the parties personally.

(12) DW.2 Darshan Singh deposed that accused Sukhpal Singh was his son. On 26.02.2008, he along with his son Sukhpal Singh and other family members was present at their house. It was about 10.00 AM. Sarabjit Singh SHO, PS Sadar, Ferozepur, along with other police officials came to their house. Baj Singh son of Bishan Singh and Mohan Singh, Ex-Sarpanch of their village came to their house. SHO Sarabjit Singh took his son Sukhpal Singh with him. When accused Sukhpal Singh was not released by the police, he along with Baj Singh, Mohan Singh and 2/3 other persons went to Police Station Sadar, Ferozepur, on 27.02.2008. They approached SHO Sarabjit Singh. When his son was not released, they sent telegrams to the higher officers. After 2/3 days, he came to know that his son was falsely implicated in a case under the NDPS Act.

(13) DW.3 Baj Singh testified that on 26.02.2008, Mohan Singh Ex-Sarpanch of his village was present in his house. At about 10.00 AM, police party headed by Sarabjit Singh SHO, Ferozepur, came to the house of Sukhpal Singh. SHO Sarabjit Singh took Sukhpal Singh accused with him. When Sukhpal Singh was not released by the police, he along with Darshan Singh – father of Sukhpal Singh, Mohan Singh and 2/3 other persons went to Police Station Sadar Ferozepur on 27.02.2008. They approached SHO Sarabjit Singh. Sukhpal Singh was not released. Later on, after 2/3 days, they came to know that a false case under the NDPS Act was planted against Sukhpal Singh. Sukhpal Singh's father also sent telegrams to the higher authorities in this regard.

(14) DW.4 Sahib Singh deposed that he knew Sukhdev Singh alias Sukha. On 26.02.2008, police party headed by Sarabjit Singh SHO, Police Station Sadar Ferozepur, came to their village at about 11.00 AM. They went to the house of Sukhdev Singh. The police party took Sukhdev Singh with them on the pretext that some application was pending against him. But he was not released. On 27.02.2008, he along with Mehal Singh and some other persons went to Police Station Sadar Ferozepur. Sukhdev Singh was not released. After two or three days, they came to know that Sukhdev Singh was falsely implicated in the case of NDPS Act.

(15) DW.5 Mehal Singh deposed that he knew Sukhdev Singh. On 26.02.2008, the police party headed by Sarabjit Singh SHO, PS Sadar Ferozepur, came at about 11.00 AM. They went to the house of Sukhdev Singh. He along with Sahib Singh Sarpanch also went to the house of Sukhdev Singh. The police party took Sukhdev Singh with them. When Sukhdev Singh was not released by the police, then on 27.02.2008, he along with Sahib Singh Sarpanch and some other persons went to PS Sadar Ferozepur. They asked SI Sarabjit Singh to release Sukhdev Singh, but he did not release. After 2 or 3 days, they came to know that Sukhdev Singh was falsely implicated. He along with Sahib Singh Sarpanch went to SSP Office and gave application to SSP, Ferozepur, regarding false implication of Sukhdev Singh.

(16) PW.4 SI Major Singh deposed in his cross-examination that he had discussed the secret information with SP (D), who deputed the DSP (D) to supervise the nakabandi. The information was received, as per the statement of PW.4 SI Major Singh, that on the intervening night of 26/27.02.2008 smugglers of heroin had received a huge consignment of heroin from Pakistan. The consignment was concealed near the border. PW.4 SI Major Singh, on the basis of this information and on the specific directions of the higher officers and under the supervision of DSP (D), Ferozepur, had laid the naka. The appellants were apprehended. Sukhdev Singh was driving the motor cycle and Sukhpal Singh was sitting as a pillion rider. He was carrying the contraband in his lap. The quantity of heroin was 25 Kgs. All the codal formalities were completed on the spot. The statement of PW.4 SI Major Singh is duly corroborated by PW.2 SI Jaswant Rai and PW.3 Rajinder Singh, DSP, with regard to the manner in which the appellants were apprehended and the contraband was seized. PW.3 Rajinder Singh DSP also deposed that he was the supervisory officer of Narcotic Cell and all CIA Staffs of District Ferozepur. SP (D) had deputed him to

accompany the police officials for nakabandi. He was deputed at about 6.30/7.00 PM for this purpose. He left at about 8.00 PM.

(17) The police party left the police station at 8.00 PM and reached the spot at 9.00 PM. The motor cycle was intercepted at 11.00 PM. It was an emergent situation. In case of delay, the contraband and the accused would have disappeared. It was for the appellants to prove prejudice caused to them in case Section 42 of the NDPS Act was not complied with.

(18) A Constitution Bench of the Supreme Court in ***Karnail Singh*** versus ***State of Haryana***[1] has held that in special circumstances and emergent situations when the officer is on the move, and recording of information is not practical prior to search and seizure, and would be detrimental to effectiveness of the search and seizure concerned, the requirement of writing down and conveying information to superior officer may be postponed by a reasonable period which may even be after the search, entry and seizure. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. Non-compliance with Section 42 may not vitiate the trial if it does not cause any prejudice to the accused. Their Lordships of the Supreme Court have held as under :-

> "35. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42 (1) and 42(2) nor did Sajan Abraham hold that the requirements of Section 42 (1) and 42 (2) need not be fulfilled at all. The effect of the two decisions was as follows :
>
> (a) The officer on receiving the information (of the nature referred to in Sub-section (1) of section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42 (1).
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> (b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be

[1] (2009) 8 SCC 539

feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior .

(c) In other words, the compliance with the requirements of Sections 42 (1) and 42 (2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001.

36. We answer the reference in the manner aforesaid. Let the appeals be now placed for disposal before the appropriate Bench."

(19) Their Lordships of the Supreme Court in ***Bahadur Singh*** versus ***State of Haryana***[2] have held that with advancement of technology and availability of high-speed exchange of information, some of the provisions of NDPS Act, including Section 42, have to be read in the changed context. Delay caused in complying with provisions of Section 42 could result in escape of offender or even removal of the contraband. Hence, substantial compliance is sufficient, if the information received was subsequently sent to the superior office. Their Lordships have held as under:-

> "17. It cannot but be noticed that with the advancement of technology and the availability of high speed exchange of information, some of the provisions of the NDPS Act, including Section 42, have to be read in the changed context. Apart from the views expressed in Sajan Abraham's case (supra) that the delay caused in complying with the provisions of Section 42 could result in the escape of the offender or even removal of the contraband, there would be substantial compliance, if the information received were subsequently sent to the superior officer.
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> 18. In the instant case, as soon as the investigating officer reached the spot, he sent a wireless message to the Deputy Superintendent of Police, Kurukshetra, who was his immediate higher officer and subsequent to recovery of the contraband, a Ruqa containing all the facts and circumstances of the case was also sent to the Police Station from the spot from where the recovery was made on the basis whereof the First Information Report was registered and copies thereof were sent to the Ilaqa Magistrate and also to the higher police officers. As was held by the High Court, there was, therefore, substantial compliance with the provisions of Section 42 of the NDPS Act and no prejudice was shown to have been caused to the accused on account of non reduction of secret information into writing and non sending of the same to the higher officer immediately thereafter.
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> 18. Apart from the decision in Sajan Abraham's case (supra), the decision of the Constitution Bench in Karnail Singh's case (supra), has also made it clear that non-

[2] (2010) 4 SCC 445

> compliance with the provisions of Section 42 may not vitiate the trial if it did not cause any prejudice to the accused. Furthermore, whether there is adequate compliance of Section 42 or not is a question of fact to be decided in each case.
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> 20. As far as compliance with the provisions of Section 57 of NDPS Act is concerned, as has been indicated earlier, it has been held by this Court that the same was not mandatory, and, in any event, information of the arrest of the petitioner and seizure of the contraband had been duly reported to the local police station on the basis of which the First Information Report had been drawn up."

(20) Their Lordships of the Supreme Court in ***Dalel Singh*** versus ***State of Haryana***[3] have held that when the officer was on patrol duty and received secret information and conveyed the same to the senior officer through wireless it would amount to substantial compliance of Section 42 in emergent situations. In case he had not moved quickly in right earnest, appellant-accused would have had opportunity to remove contraband charas and escape from arms of police. Their Lordships have held as under:-

> "8. Learned counsel for the appellant very vehemently urged that there was total non-compliance of Section 42 of the NDPS Act. We do not think that the accused can succeed even on this point in view of the judgment of Constitution Bench of this court rendered in ***Karnail Singh*** versus ***State of Haryana*** 2009 (10) SCALE 255 wherein, in paragraph 10, it was held as under:
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> "35. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42 (1) and 42 (2) nor did Sajan Abraham hold that the requirements of Section 42 (1) and 42 (2) need not be fulfilled at all. The effect of the two decisions was as follows:
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> (a) The officer on receiving the information (of the nature referred to in Sub-section (1) of Section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediately

[3] (2010) 1 SCC 149

official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42 (1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42 (1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Section 42 (1) and 42 (2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the officer superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non- sending a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the

> Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."
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> 9. In this backdrop when we see the prosecution case here, it is apparent that the information was received by PW6 Inspector Mahabir Singh when he was not in the police station but was on patrol duty in the town. He immediately, after receipt of the information, informed his superior officer on wireless. There is no doubt that he did not record it in writing but passed on it to his superior ASP Kala Ramachandran by wireless. The fact that the superior officer was informed is deposed to by ASP Kala Ramachandran who appeared as PW5. We have seen her cross-examination which really is totally irrelevant. Similarly, we have gone through the evidence of PW6 Inspector Mahabir Singh. Again, his cross examination is also redundant cross-examination. Both the witnesses have deposed about the information having been transmitted through wireless and in our opinion would be a substantial compliance of Section 42 of the NDPS Act since the situation was of emergency. Had the police officer not moved right in the earnest, the appellant-accused would have had an opportunity to remove the contraband charas and escaped from the arms of police."

(21) Since the contraband was recovered from the bag, Section 50 of the NDPS Act was not required to be complied with. Section 50 of the NDPS Act is to be enforced when the contraband is recovered from the person.

(22) Their Lordships of the Hon'ble Supreme Court in ***Ajmer Singh*** versus ***State of Haryana***[4] have held that for search of bag, briefcase, container, etc. carried by accused person, compliance with Section 50 of the NDPS Act is not required. Their Lordships have held as under :-

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[4] (2010) 3 SCC 746

"15. The learned counsel for the appellant contended that the provision of Section 50 of the Act would also apply, while searching the bag, brief case etc., carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of the learned counsel. It requires to be noticed that the question of compliance or non-compliance of Section 50 of the NDPS. Act is relevant only where search of a person is involved and the said Section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, brief case, container, etc., does not come within the ambit of Section 50 of the NDPS Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the Section speaks of taking of the person to be searched by the Gazetted Officer or Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more res-integra in view of the observations made by this court in the case of ***Madan Lal*** versus ***State of Himachal Pradesh*** **(2003) 7 SCC 465**. The Court has observed:

"16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises (see ***Kalema Tumba*** versus ***State of Maharashtra and Anr.*** (1999) 8 SCC 257, ***State of Punjab*** versus ***Baldev Singh*** (1999) 6 SCC 172 and ***Gurbax Singh*** versus ***State of Haryana*** (2001) 3 SCC 28). The language of section is implicitly clear that the search has to be in relation to a person as contrast to search of premises, vehicles, or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh's case. Above being the position, the contention regarding non-complice of Section 50 of the Act is also without any substance"

16. x x x

17. x x x

18. It appears from the evidence on record that the accused was confronted by ASI Maya Ram and other police officials on 24.1.1996 and he was informed that he has the right to either be searched before the gazetted officer or before a Magistrate and the accused chose the later (sic former). Thereafter, the accused was taken to the DSP, Pehowa, Shri

> Paramjit Singh Ahalawat and as directed by him, the bag carried by accused on his shoulder was searched and the charas was found in that bag. Thus, applying the interpretation of the word "search of person" as laid down by this Court in the decision mentioned above, to facts of present case, it is clear that the compliance of Section 50 of the Act is not required. Therefore, the search conducted by the investigation officer and the evidence collected thereby, is not illegal. Consequently, we do not find any merit in the contention of the learned counsel of the appellant as regards the non-compliance of Section 50 of the Act."

(23) In ***State of Rajasthan*** versus ***Parmanand and another***[5] their Lordships of the Hon'ble Supreme Court have held that 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. However, if the bag carried by him is searched and his person also searched, Section 50 of the NDPS Act will be applicable. Their Lordships have held as under :-

> "12. 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 application. In this case, respondent No. 1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application."

(24) Their Lordships of the Supreme Court in ***Gulsher Mohammed*** versus ***State of Himachal Pradesh***[6] have held that mandatory requirement prescribed under Section 50 of the NDPS Act is required to be complied with only when search is carried out on body of person. Their Lordships have held as under:-

> "13. We do not find such a legal consequence getting attracted simply because under sub-section (5) of Section 50

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[5] (2014) 5 SCC 345

[6] (2015) 17 SCC 682

a reference has been made to an officer duly authorized under Section 42 in the said sub-section. The said reference has been made to identify such of those officers who were all noted as empowered officers under Section 42(1) solely for the purpose of Section 50 when a search on a person is made and for which purpose due compliance of all other stipulations contained in Section 50 will have to be carried out. In the alternative, the requirement of compliance under Section 42 for effecting a search of the premises are entirely different from the requirements when a search is to be made on the body of a person under Section 50, though the search to be carried out are to be made by the officers duly authorized and specified in Section 42.

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15. In the light of our above conclusion, we do not find any scope even to invoke Section 100 Cr.P.C. as was canvassed by the learned counsel by the learned counsel on behalf of the appellant by relying upon Section 50 which has no application relating to a search of a premises.

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18. The above statements in the evidence of PW2 were more than sufficient to support the case of the prosecution in having made the recoveries from the premises of the appellant, inasmuch as PW2 was not only an independent witness but he was also very close friend of the appellant but yet he came forward with a very fair statement about the contraband materials found in the premises of the appellant which were recovered in his presence and his statement was also truly recorded, which he signed after going through the same and understanding its correctness. However, when he was cross-examined on behalf of the appellant, he made a contradictory version and thereby virtually withdrawing whatever categoric admission he made in the earlier part of his testimony.

19. Having noted the manner in which PW2 deposed before the Court and the subsequent expressions contained in the document having been admitted to have been made by him without any hesitation including the correctness of those contents, the documents as well as his attestation on the

parcels which contain the samples, the contraband which were duly admitted by him, the contrary statements contained in the latter part of his evidence are all liable to be rejected as containing no truth in it. In fact, when the contents of the documents have been accepted to be true after ascertaining it before the Court, the said part of his evidence alone should carry weight and the latter part of his statement which are made by simply adopting the suggestions put to him at the instance of the appellant will be of no consequence."

(25) Their Lordships of the Hon'ble Supreme Court in ***Makhan Singh*** versus ***State of Haryana***[7] have held that compliance of Section 50 of the NDPS Act will come into play only in case of personal search of accused and not of some baggage like a bag, article or container, etc. which accused may be carrying. Their Lordships have held as under :-

"14. A Constitution Bench of this Court in ***State of Punjab*** versus ***Baldev Singh,*** (1999) 6 SCC 172, while dealing with the scope of Section 50 of the NDPS Act, had emphasized upon the aspect of availability of right of an accused to have 'personal search' conducted before a Gazetted Officer or a Magistrate and held as under:

"32…The protection provided in the section to an accused to be intimated that he has the right to have his personal search conducted before a gazetted officer or a Magistrate, if he so requires, is sacrosanct and indefeasible - it cannot be disregarded by the prosecution except at its own peril.

33. The question whether or not the safeguards provided in Section 50 were observed would have, however, to be determined by the court on the basis of the evidence led at the trial and the finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish at the trial that the provisions of Section 50, and particularly, the safeguards provided in that section were complied with, it would not be advisable to cut short a criminal trial."

[7] (2015) 12 SCC 247

15. Compliance with Section 50 of the NDPS Act will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which the accused may be carrying ought to be searched. In ***State of H.P.*** versus ***Pawan Kumar,*** (2005) 4 SCC 350, this Court in Para 11 has held as under:

> "11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act."

The same view was reiterated in ***Ajmer Singh*** versus ***State of Haryana,*** **(2010) 3 SCC 746**.

16. In the present case, since the vehicle was searched and the contraband was seized from the vehicle, compliance with Section 50 of the NDPS Act was not required. In the absence of independent evidence connecting the appellant with the fitter-rehra, mere compliance with Section 50 of the NDPS Act by itself would not be sufficient to establish the guilt of the appellant. It is a well-settled principle of the criminal jurisprudence that more stringent the punishment, the more heavy is the burden upon the prosecution to prove the offence. When the independent witnesses PW1 and DW2 have not supported the prosecution case and the recovery of the contraband has not been satisfactorily proved, the conviction of the appellant under Section 15 of the NDPS Act cannot be sustained."

(26) Their Lordships of the Supreme Court in ***SK. Raju alias Abdul Haque alias Jagga*** versus ***State of West Bengal***[8] have held that when the contraband was recovered from the bag carried by the accused, compliance of Section 50 is not mandatory in such circumstances. Their Lordships have held as under:-

> "7. Section 42 of the Act deals with the power of entry, search, seizure and arrest without warrant or authorization. It reads thus:
>
> **"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 including para-military forces or armed forces 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, drugs 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, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,—
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> (a) enter into and search any such building, conveyance or place;
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> (b) in case of resistance, break open any door and remove any obstacle to such entry;

[8] (2018) 9 SCC 708

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to 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 this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; 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 this Act:

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further 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 sunset and sunrise 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 within seventy-two hours send a copy thereof to his immediate official superior."

8. Section 43 of the Act confers powers on the empowered officer to seize a substance and arrest a suspect in a public place. It provides thus:

"43. Power of seizure and arrest in public place — Any officer of any of the departments mentioned in section 42 may –

(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable

under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation.— For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public."

[Emphasis supplied]

9. We are unable to accept the submission made by the learned counsel for the appellant that Section 42 is attracted to the facts of the present case. In State of Punjab v Baldev Singh ("Baldev Singh"), Dr A S Anand, C.J. speaking for a Constitution Bench of this Court, held:

"10.....The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any Narcotic Drug or Psychotropic Substances in a public place where such possession appears to him to be unlawful."

[Emphasis supplied]

10. In Narayanaswamy Ravishankar versus Assistant Director of Revenue Intelligence, a three judge Bench of this Court

considered whether the empowered officer was bound to comply with the mandatory provisions of Section 42 before recovering heroin from the suitcase of the appellant at the airport and subsequently arresting him. Answering the above question in the negative, the Court held:

> "5. In the instant case, according to the documents on record and the evidence of the witnesses, the search and seizure took place at the airport which is a public place. This being so, it is the provisions of Section 43 of the NDPS Act which would be applicable. Further, as Section 42 of the NDPS Act was not applicable in the present case, the seizure having been effected in a public place, the question of non-compliance, if any, of the provisions of Section 42 of the NDPS Act is wholly irrelevant."

11. In Krishna Kanwar (Smt) Alias Thakuraeen v State of Rajasthan, a two judge Bench of this Court considered whether a police officer who had prior information was required to comply with the provisions of Section 42 before seizing contraband and arresting the appellant who was travelling on a motorcycle on the highway. Answering the above question in the negative, the Court held:

> "16.....Section 42 comprises of two components. One relates to the basis of information i.e.: (i) from personal knowledge, and (ii) information given by person and taken down in writing. The second is that the information must relate to commission of offence punishable under Chapter IV and/or keeping or concealment of document or article in any building, conveyance or enclosed place which may furnish evidence of commission of such offence. Unless both the components exist Section 42 has no application. Subsection (2) mandates, as was noted in Baldev Singh case 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. Therefore, sub-section (2) only comes into operation where the officer concerned does the enumerated acts, in case any offence under Chapter IV has been committed or documents etc. are concealed in any building, conveyance or enclosed place. Therefore, the

commission of the act or concealment of document etc. must be in any building, conveyance or enclosed place."

[Emphasis supplied]

12. An empowered officer under Section 42 (1) is obligated to reduce to writing the information received by him, only when an offence punishable under the Act has been committed in any building, conveyance or an enclosed place, or when a document or an article is concealed in a building, conveyance or an enclosed place.

Compliance with Section 42, including recording of information received by the empowered officer, is not mandatory, when an offence punishable under the Act was not committed in a building, conveyance or an enclosed place. Section 43 is attracted in situations where the seizure and arrest are conducted in a public place, which includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

13. The appellant was walking along the Picnic Garden Road. He was intercepted and detained immediately by the raiding party in front of Falguni Club, which was not a building, conveyance or an enclosed place. The place of occurrence was accessible to the public and fell within the ambit of the phrase "public place" in the explanation to Section 43. Section 42 had no application.

14. The cases relied on by the learned counsel for the appellant will also not apply in the context of the facts before us. In Mansuri, an auto-rickshaw driver was intercepted by police personnel. Four gunny bags of charas were recovered from the auto-rickshaw. The police officer who had prior information about transportation of some narcotic substance, had neither taken down the information before carrying out the seizure and arrest, nor apprised his superior officer. He contended that the action taken by him was under Section 43 and not Section 42. Rejecting the argument of the State, this Court held that compliance with Section 42 was required as the auto-rickshaw was a private vehicle and not a public conveyance as contemplated under Section 43. Similarly, in Jagraj, contraband was recovered from a jeep which was intercepted by police personnel on a public road after receiving prior information. The police

officer who had received the information, admitted to not taking it down in writing, contending that Section 43 would be applicable. Rejecting the argument of the State, this Court held that the jeep which was intercepted, was not a public conveyance within the meaning of Section 43 and compliance with Section 42(1) was therefore mandatory. In Holia, Mandrax tablets were recovered from the hotel room of the respondent. The information was not reduced to writing by the officer who had first received the information. The State claimed that compliance with Section 42 was not required as the hotel was a public place. Rejecting the submission of the State, this Court held that while a hotel is a public place, a hotel room inside it is not a public place. This Court held thus:

"14. Section 43, on plain reading of the Act, may not attract the rigours of Section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of Section 42, need not be complied with, only because the place whereat search is to be made is a public place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with … It is also possible to contend that where a search is required to be made at a public place which is open to the general public, Section 42 would have no application but it may be another thing to contend that search is being made on prior information and there would be enough time for compliance of reducing the information to writing, informing the same to the superior officer and obtain his permission as also recording the reasons therefore coupled with the fact that the place which is required to be searched is not open to public although situated in a public place as, for example, room of a hotel, whereas hotel is a public place, a room occupied by a guest may not be. He is entitled to his right of privacy. Nobody, even the staff of the hotel, can walk into his room without his permission. Subject to the ordinary activities in regard to maintenance and/or housekeeping of the room, the guest is entitled to maintain his privacy."

[Emphasis supplied]

15. There is hence no substance in the first submission. 15. Section 50 of the Act deals with conditions under which search of persons shall be conducted. It states:

"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 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 authorised 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."

According to Section 50(1), an empowered officer should necessarily inform the suspect about his legal right, if he so requires, to be searched in the presence of a gazetted officer or a magistrate.

16. In Vijaysinh Chandubha Jadeja v State of Gujarat ("Vijaysinh"), a Constitution Bench of this Court interpreted Section 50 thus:

"20. The mandate of Section 50 is precise and clear, viz. if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so

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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 minimize the allegation 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 Subsection (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

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31. 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 and Prabha Shankar Dubey 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."

17. The principle which emerges from Vijaysinh is that the concept of "substantial compliance" with the requirement of

Section 50 is neither in accordance with the law laid down in Baldev Singh, nor can it be construed from its language. [Reference may also be made to the decision of a two judge Bench of this Court in Venkateswarlu]. Therefore, strict compliance with Section 50(1) by the empowered officer is mandatory. Section 50, however, applies only in the case of a search of a person. In Baldev Singh, the Court held

> "12. On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises, etc."

In State of Himachal Pradesh v Pawan Kumar ("Pawan Kumar"), a three judge Bench of this Court held that the search of an article which was being carried by a person in his hand, or on his shoulder or head, etc., would not attract Section 50. It was held thus:

> "11....In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act
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> *** *** ***
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> 16.…After the decision in Baldev Singh, this Court has consistently held that Section 50 would only apply to search of a person and not to any bag, article or container, etc. being carried by him."

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 Madhya Pradesh]. It was held thus:

> "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 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 or 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 search before the Superintendent, who was not an independent officer. It was held thus:

"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 the nearest gazette 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."

20. The question which arises before us is whether Section 50 (1) was required to be complied with when charas was recovered only from the bag of the appellant and no charas was found on his person. Further, if the first question is answered in the affirmative, whether the requirements of Section 50 were strictly complied with by PW-2 and PW-4.

21. As evidenced by Exhibit-3, a first option was given to the appellant. PW2 informed him that it was his legal right to be searched either in the presence of a magistrate or in the presence of a gazetted officer. The appellant was then asked to give his option by indicating whether he wanted to be searched by a magistrate or a gazetted officer. The appellant indicated that he wanted the search to be carried out in the presence of a gazetted officer. When PW-4 arrived, he was introduced to the detainee as a gazetted officer. As evidenced by Exhibit-4, PW-4 then gave the appellant a second option. He inquired of him again, whether he wanted to be searched in the presence of a gazetted officer or in the presence of a magistrate. The appellant reiterated his desire to be 16 searched in the presence of a gazetted officer. Before the search of the appellant commenced, the gazetted officer asked the appellant whether he wanted to search PW-2 before his own search was carried out by PW-2. The appellant agreed to search PW-2 before the latter carried out his search. On conducting the search, only personal belongings of PW-2 were found by the appellant. On the search of the appellant in the presence of the gazetted officer, a biscuit colour jute bag was recovered from the appellant, and Rs. 2,400/- cash in the denomination of 24 notes of Rs. 100/- each was found in the left pocket of the appellant's trouser. When the bag was opened, a black polythene cover containing nineteen rectangular broken sheets of a blackish / deep brown colour weighing 1.5 kilograms was recovered. The sheets were tested and were found to be charas.

22. PW-2 conducted search of the bag of the appellant as well as of the appellant's trousers. Therefore, the search conducted by PW-2 was not only of the bag which the appellant was carrying, but also of the appellant's person. Since the search of the person of the appellant was also

involved, Section 50 would be attracted in this case. Accordingly, PW-2 was required to comply with the requirements of Section 50(1). As soon as the search of a person takes place, the requirement of mandatory compliance with Section 50 is attracted, irrespective of whether contraband is recovered from the person of the detainee or not. It was, therefore, imperative for PW-2 to inform the appellant of his legal right to be searched in the presence of either a gazetted officer or a magistrate. 17 From Exhibit-3, it can be discerned that the appellant was informed of his legal right to be searched in the presence of a magistrate or a gazetted officer. The appellant opted for the latter alternative. Exhibit-4 is a record of the events after the arrival of PW-4 on the scene. After the arrival of PW-4, the appellant was once again asked by him, whether he wished to be searched in the presence of a gazetted officer or a magistrate. This was the second option which was presented to him. When he reiterated his desire to be searched before a gazetted officer, PW-4 inquired of the appellant whether he wished to search PW-2 before his own search was conducted by PW-2. The appellant agreed to search PW2. Only the personal belongings of PW-2 were found by the appellant. It was only after this that a search of the appellant was conducted and charas recovered. Before the appellant's search was conducted, both PW2 and PW-4 on different occasions apprised the appellant of his legal right to be searched either in the presence of a gazetted officer or a magistrate. The options given by both PW-2 and PW-4 were unambiguous. Merely because the appellant was given an option of searching PW-2 before the latter conducted his search, would not vitiate the search. In Parmanand, in addition to the option of being searched by the gazetted officer or the magistrate, the detainee was given a 'third' alternative by the empowered officer which was to be searched by an officer who was a part of the raiding team. This was found to be contrary to the intent of Section 50 (1). The option given to the appellant of searching PW-2 in the case at hand, before the latter searched the appellant, did not vitiate the process in which a search of the appellant was conducted. The search of 18 the appellant was as a matter of fact conducted in the presence of PW4, a gazetted

officer, in consonance with the voluntary communication made by the appellant to both PW-2 and PW-4. There was strict compliance with the requirements of Section 50(1) as stipulated by this Court in Vijaysinh.

23. As we have already held that Section 50 was attracted in the present case, we do not need to decide on the applicability of Namdi to the facts of the present case. We have held that Section 50 was complied with. Having regard to the above position, we do not find any merit in the appeal."

(27) Learned counsel appearing on behalf of the appellants have also argued that their clients were falsely implicated. According to them, they were taken into custody on 26.02.2008. They have relied the statement of DW.1 Sukhdev Mittar to prove the telegrams sent by Darshan Singh, father of appellant Sukhpal Singh. Statement of DW.2 Darshan Singh was relied upon to prove that the police had come to arrest appellant Sukhpal Singh on 26.02.2008. DW.3 Baj Singh also deposed that the policy party headed by SHO Sarabjit Singh, had come to the house of appellant Sukhpal Singh on 26.02.2008. Sukhpal Singh was taken away by the police. DW.4 Sahib Singh and DW.5 Mehal Singh were examined to prove that appellant Sukhdev Singh was taken away by the police on 26.02.2008. DW.5 Mehal Singh submitted application to the office of SSP regarding false implication of Sukhdev Singh.

(28) We do not find any merit in the contention of the appellants that they were falsely implicated. The police officials had no previous enmity with the appellants. They were apprehended with huge quantity of heroin, weighing 25 Kgs. PW.2 SI Jaswant Rai has denied the suggestion that the appellants were already in illegal custody of PS Sadar Ferozepur and CIA Staff, Ferozepur, since 26.02.2008. PW.4 SI Major Singh also denied the suggestion that Sukhpal Singh accused was kept in illegal custody by the police of PS Sadar Ferozepur, since 26.02.2008. He also denied the suggestion that accused Sukhdev Singh was in illegal custody of the police earlier to 28.02.2008. He also denied the suggestion that unclaimed packets of heroin recovered from near Indo Pak border were foisted on the appellants.

(29) The case property was produced before PW.5 Inspector Sarabjit Singh. Same was taken to FSL, Amritsar, by PW.1 HC Dinesh Kumar. He also denied the suggestion that the appellants were falsely implicated. The statements of the official witnesses inspire confidence.

All the DWs, except DW.1 Sukhdev Mittar, are from the same village. Since the recoveries were made at 11.00 PM, it was not possible to join independent witnesses. The special report was received by the learned Ilaqa Magistrate on 29.02.2008 at 8.45 AM. Delay of six days in sending the sample to the office of Chemical Examiner was not fatal to the case of the prosecution. It has come on record that samples reached the FSL in intact condition.

(30) The FSL report is Ex.PW.5/7. According to this report, analysis indicated that contents of exhibits No. 104 to 128 were of diacetylmorphine, also known as smack/heroin. In the ruqa itself, Ex.PW.4/1, it is mentioned that the police parties were constituted to intercept the appellants, after receiving instructions from higher officers and under the supervision of DSP (D).

(31) Accordingly, the prosecution has proved its case against the appellants beyond reasonable doubt. There is no reason for us to interfere with the well reasoned judgment and order of the learned trial court. The appeal is, accordingly, dismissed.

I.P.S Doabia