



Reserved on 5th August, 2019

Delivered on 28th August, 2019

A.F.R.

Court No. - 88

Case :- CRIMINAL APPEAL No. - 5200 of 2009

Appellant :- Jog Raj

Respondent :- State Of U.P.

Counsel for Appellant :- Harikesh Kumar Gupta, Ajay Kumar Kashyap

Counsel for Respondent :- Govt. Advocate

Hon'ble Mrs. Manju Rani Chauhan, J.

1. The present criminal appeal has been preferred by the accused appellant Jograj challenging the order dated 05.06.2009 passed by Additional Sessions Judge, Court No.1, Pilibhit, in Special Trial No.63 of 2007 (State vs. Jograj) arising out of Case Crime No.1080 of 2007 u/s 8/18 Narcotics Drugs & Psychotropic Substances Act, 1985, Police Station Neuria, District Pilibhit, whereby the appellant has been convicted u/s 8/18 Narcotics Drugs & Psychotropic Substances Act, 1985 and has been sentenced for four years rigorous imprisonment and a fine of Rs.10,000/- and in default of payment of fine, for six months further imprisonment.

2. Heard Mr. R.B. Pal, Advocate holding brief of Mr. Ajay Kumar Kashyap, learned counsel for the appellant and Mr. Om Prakash Mishra, learned Additional Government Advocate as well as perused the record.

3. The prosecution case as narrated in the F.I.R. lodged by P.W.1 Sub-Inspector Gajram Singh is that on 22.08.2007, Sub-Inspector Gajram Singh along with Constable Ran Singh & Constable Kanhai Lal was busy in making enquiry about an application and was also on patrolling duty, during which when they reached Pilibhit road near village Gulhadiyan Dulhan, they received an input from police informer that one person sitting near the triangle of village Dhankuna is possessed with opium. Relying on this information, the

police personnel made a search of each other to ensure that none of them were having any illegal substance and thereafter, proceeded towards triangle of village Dhankuna. They also tried to get independent witnesses, but no one came forward to become witness of search. When they reached near the triangle of village Dhankuna, the police informer pointed out the person who was having opium. As soon as the police personnel reached close to that person, he tried to run towards village Dhankuna, however the police personnel chased and apprehended him near the triangle of village Dhankuna at about 07:30 P.M. and upon being asked to disclose reason for his running away from the police, he confessed that he has opium in the polythene bag kept in his hand and that is why he ran on account of fear of his arrest. The P.W.1 informed him about his right to be searched in presence of a Gazetted Officer or before a Magistrate. But the arrested person reposed faith in police personnel and consented for being searched by them. On being asked, he disclosed his name to be Jograj and upon being searched, one green colored polythene, having therein another white polythene, was found in his right hand, wherein a black colored sticky substance smelling like opium was recovered. After weighing, the quantity of substance was found to be about 200 gms. Thereafter accused Jograj was arrested and was informed about the grounds for his arrest and the mandate of law regarding arrest and the instructions issued by Hon'ble Supreme Court and National Human Rights Commission regarding arrest and search were followed. The recovered substance was duly sealed and a memo was prepared and copy thereof was given to the accused after obtaining his thumb impression and thereafter, the arrested accused along with recovered substance was brought and detained in police station and on the basis of recovery memo and arrest memo, an F.I.R. was registered on 22.07.2007 at about 9:10 A.M. The entries of relevant facts were also made in the general diary of the police station. Thereafter during investigation, the

sample of recovered substance was sent to forensic laboratory at Lucknow for its forensic examination and subsequently forensic report was received, wherein presence of opium was mentioned and percentage of morphine in the sample was found to be 2.8%. After completing investigation, a charge-sheet was submitted against the appellant u/s 8/18 Narcotics Drugs & Psychotropic Substances Act, 1985 (*referred in short as NDPS Act hereinafter*).

4. The learned trial court, vide order dated 01.12.2007, framed charge against the accused appellant u/s 8/20 NDPS Act and the trial proceeded.

5. The prosecution in order to prove its case, examined five prosecution witnesses, out of them, P.W.1 Sub-Inspector Gaj Ram Singh is first informant of the case and is a witness of arrest of accused appellant Jograj and the recovery of 200gms. of opium from his possession. P.W.2 Constable Ran Singh is also witness of arrest of accused appellant Jograj and recovery of 200gms. opium from his possession. P.W.3 Constable Clerk Naveen Kumar Saxena had registered the F.I.R. and has proved the registration of a criminal case. P.W.4 Sub-Inspector, Bhuwaneshwar Singh, Investigating Officer, had conducted the investigation and had submitted charge-sheet. P.W.5 Constable Satyapal has given the evidence about collection of sample of recovered opium and send it to forensic lab and has proved the link evidence.

6. Thereafter, the accused appellant Jograj was examined u/s 313 Cr.P.C., who denied his involvement in the offence and stated that some stolen property was recovered from one person, whose wife had kept two pants which were stolen from his house and hence, the police had challaned him in the false case of Narcotics Drugs & Psychotropic Substance. He further stated that he will adduce evidence in his defense but no evidence was adduced by the defense.

7. The learned trial court relied the prosecution witness and

convicted the accused appellant under section 8/18 NDPS Act and sentenced him to four years R.I. and a fine of Rs.10,000/- and in default of payment of fine, six months further imprisonment. Feeling aggrieved by this order of conviction and sentence, the accused appellant Jograj preferred the present criminal appeal.

8. The learned counsel for the appellant has assailed the impugned order of conviction and sentence and has submitted that:-

(i) The prosecution case is not supported by any independent public witness and it would not be safe to rely upon the evidence of police personnel only.

(ii) There is anomaly in sending the substance recovered to forensic lab and although it is alleged that 40gms. of sample was prepared and sent for testing in forensic lab, but the substance alleged to have been received in forensic lab has been shown to be 37gms. only and hence, the entire exercise done by the prosecution appears to be doubtful and the prosecution case has to be disbelieved.

(iii) The charge framed against the accused appellant is defective for the reason that the substance alleged to have been recovered from the possession of the appellant is "opium", as such charge u/s 8/18 NDPS Act should have been framed, but the learned trial court has framed charge u/s 8/20 NDPS Act which relates to substance "charas" and thus, there is ambiguity and illegality in framing of charge, which goes to the root of the matter and causes prejudice to the appellant and hence, the trial of the accused appellant is vitiated in law.

(iv) The mandatory provisions of NDPS Act and rules regarding search, arrest and recovery, particularly sections 42 & 50, have not been complied with by the police party in the present case, which vitiates entire proceeding and the accused appellant is liable to be

acquitted.

9. On the other hand, the learned Additional Government Advocate has supported the order of conviction and sentence and has contended that the prosecution witness are wholly reliable and the prosecution has proved its case beyond reasonable doubts and the accused appellant has miserably failed to show any prejudice caused to him on account of the alleged defect in framing the charge.

10. In the light of rival submissions, this court proceeds to examine the evidence available on record, which reflects that the P.W.1 Sub-Inspector Gajram Singh, the first informant has stated that on 22.08.2007 he was posted at police outpost Dhankuna, police station Neuria and on that day he along with constable Ran Singh and constable Kanhai Lal left for outpost Dhankuna after making an entry in the general diary to conduct an enquiry on some application received by him. When they reached near triangle of village Gulhadiyan Dulhan, an input was received from police informer that one person who is sitting at Dhankuna triangle is having opium in his possession and he may be arrested. Believing this information, the police party after ensuring non-availability of any illegal substance with them proceeded to village Dhankuna triangle along with police informer. P.W.1 Sub-Inspector Gajram Singh, the first informant has further stated that while proceeding, the police personnel tried to procure independent public witness but none from public was ready to accompany them for that purpose. After reaching near Dhankuna tiraha, the police informer pointed out towards one person said to have opium in his possession and while reaching towards that person, he tried to run away but was chased and over powered and was arrested. Upon being asked, he disclosed that he is having opium in a polythene bag. Upon this, the P.W.1 apprised him about his right to be searched in front of any Gazetted Officer or Magistrate. The said person reposed trust in police

personnel and stated that he is not willing to be searched before any Gazetted Officer or Magistrate. Thereafter again, P.W.1 tried to procure independent public witness but none became ready for that purpose and thereafter the aforesaid person was interrogated who disclosed his identity as Jograj Singh S/o Tika Ram, resident of village Dhankuna, police station Neuria, District Pilibhit. The P.W.1 Sub-Inspector Gajram Singh has also identified the accused in the court and has stated before the court that he is the same person who was found to be in possession of Opium and when he was searched, a black coloured sticky substance was recovered from a white polythene which was kept in a green coloured polythene laying in the right hand of the accused appellant. Upon being sniffed, the substance smelled like opium. P.W.1 Sub-Inspector Gajram Singh has stated that he asked the constable Kanhai Lal to procure Taraju Baat and after weighing, the weight of the substance was found to be 200 grams. The accused Jograj was asked to produce the license of keeping opium but he failed to show it. Then again he was explained about the offence committed by him and the recovered substance was taken into possession by the police. Meanwhile the endorsement of accused regarding his consent to be searched by police personnel was also obtained. The substance was sealed on the spot and a recovery memo was prepared upon which the accused put his thumb impression and the accompanying police personnel also signed it. A copy of the recovery memo was also given to accused Jograj and thereafter he along with accused Jograj went to police station and the criminal case was registered against accused Jograj and the recovered substance i.e. opium was also kept in malkhana in a sealed cover. The aforesaid witness was cross examined by the defense in detail but nothing material could be elicited from the cross examination. A suggestion has also been made to this witness that accused appellant was arrested from the house as he was a suspect of theft of a engine in the village but he

did not confess regarding the theft so he has been falsely implicated in this case. This suggestion was readily denied by P.W.1.

11. Similar statements have been given by P.W.2 Ran Singh, who has supported the statement of P.W.1 in every material aspect. Apart from other things, he has also identified the bundle in which substance, alleged to have been recovered from the possession of the accused, was kept and sealed by Sub-Inspector Gajram Singh. He has further identified the signature of Gajram Singh as well as his own signature on the bundle and has also identified the thumb impression of accused Jograj. After opening the seal of the bundle before trial court, the substance kept therein in white polythene has also been identified by P.W.2 as the substance recovered from the possession of accused Jograj.

12. P.W.3 Constable Naveen Kumar Saxena has given his statement regarding registration of first information report and has proved the Chik first information report and other general diary entries regarding admission of arrested accused at police station and also about preservation of substance recovered from accused Jograj in a sealed packet.

13. The P.W.4, Sub-Inspector, Bhuvneshwar Singh who was the Investigating Officer of the case has proved the steps taken by him during investigation and he has also proved further investigation done by Sub-Inspector, Dharam Singh and has also given statement regarding sending of sample of recovered substance to forensic lab and receiving of forensic report from concerned lab.

14. The P.W.5, Constable, Satyapal has given link evidence regarding preparation of sample and sending it to forensic lab. He has also stated that a sample of substance measuring about 40gms. was taken from the bundle and was forwarded to forensic lab, Lucknow on 13.09.2007 in a sealed cover and was deposited in the forensic lab on 14.09.2007.

15. With regard to the submissions made by learned counsel for

the appellant that there is discrepancy regarding the weight of the sample of the substance recovered from the possession of the appellant. In this regard, while the prosecution case is that 40 gms. of substance was sent to forensic lab, the report of forensic lab shows that only 37 gms. of substance was received in the lab. Although Exhibit Ka-9 by which the sample was sent shows the quantity of the sample as "about 40gms.", though a judicial notice can be taken of the fact that such a minor difference in the weight of substance in question may occur on account of difference of weighing machines and its accuracy on both the ends, i.e. at the end of local police and at the end of forensic laboratory, especially in view of the fact that because of stickiness of the substance in question, it may not be completely taken out from the bundle wherein it was kept and it may also lose some weight on account of time gap and may get affected on account of change of humidity due to change in weather conditions in between the time of taking sample and its examination at forensic lab. Furthermore, the difference of weight, as suggested by learned counsel for appellant, is too trivial and is in fact inconsequential and cannot be treated as discrepancy in prosecution evidence and hence, it does not create any doubt in the mind of the court.

16. With respect to defect in framing of charge and consequential prejudice to accused appellant, this court has gone through the language of charge framed by the trial court and bare perusal of charge reveals that the accused/appellant has been specifically informed to the effect that on 22.08.2007 at about 07:30 A.M., 200 gms. of Opium have been recovered from the green polythene held by accused/appellant in his right hand. A copy of the charge framed against the appellant is mentioned below:-

"आरोप

मै, आर०के० जैन अपर सत्र न्यायाधीश/न्यायालय सं० 1,
पीलीभीत आप, जोगराज पर निम्नलिखित आरोप लगाता हूं:-

यह कि दिनांक 22.8.2007 को समय 7:30 बजे प्रातः वाहद ग्राम धनकुनी में तिराहा के पास थाना न्यूरिया जिला पीलीभीत के क्षेत्र में आप पुलिस पार्टी द्वारा गिरफ्तार किये गये और आपके कब्जे से आपकी जमा तलासी से आपके दाहिने हाथ में पकड़े हरे रंग की पॉलीथीन के अन्दर से 200 ग्राम अफीम बरामद हुई जिसको रखने का आपके पास कोई लाइसेंस नहीं था। इस प्रकार आपने धारा 8/20, स्वापक औषधी एवं मनःप्रभावी पदार्थ अधिनियम के अंतर्गत दण्डनीय अपराध किया जो इस न्यायालय के प्रसंज्ञान में है।

मैं, एतद्वारा आपको निर्देश देता हूँ कि आपका विचारण उक्त आरोप पर इस न्यायालय द्वारा किया जायेगा।

दिनांक: 01.12.2007

आर०के० जैन

अपर सत्र न्यायाधीश/न्यायालय सं० 1
पीलीभीत

आरोप अभियुक्त को पढ़कर सुनाया व समझाया गया। उसने आरोप अस्वीकार करते हुए विचारण चाहा।

दिनांक: 01.12.2007

आर०के० जैन

अपर सत्र न्यायाधीश/न्यायालय सं० 1
पीलीभीत

17. Thus it is crystal clear that accused appellant was fully aware that he is being charged for keeping 200 gms. of Opium without there being any license to keep the same. The error appears to have occurred in mentioning the section of the offence and in place of "section 18", "section 20" has been mentioned. The law is well settled in this regard that **mere defect in the charge will not vitiate the trial automatically** but such eventuality gives an occasion to the accused to prove or to show that serious prejudice has been caused to him on account of the error/defect in framing of charge. Chapter XVII of the Code of Criminal Procedure deals with the framing of charge. The relevant provisions in this regard find place in sections 211, 212, 213 & 215 of Cr.P.C. which are being

quoted below:-

“211. Contents of charge- (1) Every charge under this Code shall state the offence with which the accused is charged.

(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

(3) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) The charge shall be written in the language of the Court.

(7) If the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact date and place of the previous, conviction shall be stated in the charge, and if such statement has been omitted, the Court may add it at any time before sentence is passed.

212-Particulars as to time, place and person- (1) The charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which. it was committed , as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) When the accused is charged with criminal breach of

trust or dishonest misappropriation of money or other moveable property, it shall be sufficient to specify the gross sum or, as the case may be, described the movable property in respect of which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 219.

Provided that the time included between the first and last of such dates shall not exceed one year.

213. When manner of committing offence must be stated- *When the nature of the case is such that the particulars mentioned in section 211 and 212 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.*

215. Effect of errors- *No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.”*

18. Like-wise, section 464 of Cr.P.C. deals with the effect of omission to frame, or absence of, or error in charge. It states as under:-

“464. Effect of omission to frame, or absence of, or error in, charge- (1) *No finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charge, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.*

(2) *If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-*

(a) *in the case of an omission to frame a charge, order*

that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge.

(b) In the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provide that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction."

19. The Hon'ble Apex Court, while deciding the reference in the case of ***Willie (William) Slaney vs. State of Madhya Pradesh*** reported in AIR 1956 SC 116, has elaborately discussed the purpose and scope of framing of charge in a criminal trial and has observed in following manner:-

"Before we proceed to set out our answer and examine the provisions of the Code, we will pause to observe that the Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well established and well understood lines that accord with our notions of natural justice.

If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is "substantial" compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based".

20. In the present matter, the record shows that at the time of framing of charge, the accused was heard and after framing of

charge, it was read over and explained to the accused appellant, but at that point of time he did not raise any grievance or objection regarding any type of error or irregularity in framing of charge.

21. Similarly, the prosecution witnesses were examined in presence of accused and his counsel, who clearly stated that 200 gms. of opium was recovered from the possession of the accused appellant and hence, there was no occasion to have doubt in the mind of the accused appellant that he was charged and was being tried for illegal possession of 200 gms. of any substance other than opium regarding which he was not having license. This fact was again put to accused appellant by the Trial Court while putting question no.2 at the time of his examination U/s 313 Cr.P.C. and his answer to question no.2 goes to show that he was fully aware of the accusation made against him. Furthermore, when the learned Trial Court asked the accused appellant as to whether he wants to say anything further, the accused appellant replied that no such opium has been recovered from his possession. For ready reference, the relevant question nos. 2 & 7 put by the learned Trial Court to the accused and its reply by the accused appellant are being quoted below:-

"प्रश्न संख्या 2— पी०डब्लू० 1 एस०आई० गजराम सिंह का कथन है कि पकड़े गये व्यक्ति का नाम पता पूछा और भागने का कारण पूछा तो उसने बताया कि उसके पास पॉलीथीन में अफीम है। इस पर उससे कहा कि तुम्हारा विधिक अधिकार है कि तुम अपनी जमा तलाशी किसी राजपत्रित अधिकारी या मजिस्ट्रेट के समक्ष चलकर दे सकते हो तो आपकी स्वीकृति पर आपकी जमा तलाशी ली गई तो आपके दाहिने हाथ में पकड़े हरे रंग की पॉलीथीन में काले रंग का चिपचिपा पदार्थ बरामद हुआ। जिसे उसने सूखा व अन्य कर्मचारियों को सुंघाया जो उसमें से अफीम की गंध आ रही थी तथा बरामद अफीम को तराजू बांट से तोला तो अफीम का वजन 200 ग्राम निकला। मौके पर फर्द प्रदर्श क-1 अंकित की

गई तथा माल अफीम को सील मोहर किया और माल व अभियुक्त को थाने में दाखिल करके मुकदमा पंजीकृत कराया। आपको इसके संबंध में क्या कहना है?

उत्तर— जी नहीं गलत है।

प्रश्न संख्या 7— क्या आपको कुछ और कहना है?

उत्तर— चोरी का माल जिसके यहां बरामद हुआ था उसकी औरत ने मेरे घर पर दो पैन्टें चोरी की मेरे यहां पहुंचा दी थी। पुलिस ने फर्जी अफीम एन0डी0पी0एस0 में मेरा चालान कर दिया मेरे पास में कोई अफीम बरामद नहीं हुई थी। ”

22. This statement of accused appellant makes it amply clear that the accused appellant was fully aware of the prosecution allegations at every stage of the trial and the error in mentioning the provision number of offence, while framing of charge, was not significant even according to the accused himself. Thus the submission made by learned counsel with regard to the error in framing charge is liable to be rejected.

23. For next submission regarding non-compliance of mandatory provision of section 42 & 50 of NDPS Act and illegality in the arrest and the recovery from appellant, the record shows that P.W.1 & P.W.2 have categorically stated to the effect that the accused was informed, orally as well in writing on the form prescribed for that purpose, about his right to be searched before a Gazetted Officer or Magistrate and moreover, P.W.1 Gajram Singh has proved the aforesaid documents as Exhibit Ka-1 which contains thumb impression of accused Jograj. The memo of arrest and the document regarding intimation of arrest of accused to the District Legal Aid Committee has also been proved as Exhibit Ka-2. Like-wise the P.W.1 Sub-Inspector, Gaj Ram Singh had received information, when he was on the patrol duty and he might not have chance to reduce the same into writing and to dispatch it to the Superintendent of Police.

24. The position of law in this aspect of the matter as laid down

by Hon'ble Apex Court in the case of ***State of Orissa vs. Rajendra Tripathi*** reported in 2004 SCC (Crl.) 1586, enlightens this court, wherein under similar set of facts, conclusion was drawn in following manner: -

“8. It has to be noticed that before the trial Court and the High Court the stand was taken by the accused persons alleging non-compliance of Sections 42 and 50 of the Act. The same was given up by the respondents in this appeal and in our view rightly. Considering the time when search and seizure was done, and the undisputed position that the detection was made while the officers were on patrolling duty, Section 42 has no application. Additionally the evidence of P.W.s. 1 & 5 clearly shows that the accused persons were given the liberty to be searched in the presence of the prescribed officer and they did not choose to be searched by any person other than P.W.5. Therefore, the plea related to non-compliance of Section 50 as raised during trial and before the High Court in addition to the concession, plea regarding non-applicability of Sections 42 and 50 of the Act is also without any substance. The residual question is regarding custody of the contraband articles and corrections in seizure memo. The evidence on record clearly shows that the forwarding report clearly indicated that the articles were being produced before the Magistrate. The order sheet of the Magistrate shows that because he was busy he directed that the articles should be produced on 10.8.1992 for the purpose of collecting samples.”

25. In one another judgment in the case of ***Girdhari vs. State of Rajasthan*** reported in (2010) 15 SCC 576, the Hon'ble Apex Court dealt with the objection raised by the accused regarding non-compliance of section 50 of NDPS Act and rejected such objection, the relevant portion whereof may be usefully quoted herein below:-

“4. The learned counsel then argued that the mandatory requirement of section 50 has also not been complied with inasmuch as there was an error in the memo issued to the appellants as to their right of being searched by a gazetted

officer or magistrate. He pointed out that in the said memo given to the appellants instead of word “magistrate”, the word “Judicial Magistrate” is used which is not the requirement of section 50 of the Act. We do notice that P.W.7 while issuing the memo to the appellants has used this word “judicial magistrate” instead of the word “Magistrate” found in section 50 of the Act. But then the learned counsel is unable to point out to us what prejudice is caused to the appellant by the usage of the word “judicial magistrate” instead of the word “Magistrate”. In the absence of any such prejudice being caused to the appellants, we think this argument of learned counsel for the appellants must also fail.”

26. Recapitulating facts of the case, it is found that apart from above noted circumstances on the issue of compliance of section 42 and 50 as well as arrest of appellant and recovery of contraband, the P.W.1 was not cross-examined on these factual aspects of the matter and as such, this court is satisfied that the provision of section 42 and 50 of NDPS Act has been duly complied with by the arresting police party and there is also no illegality in the arrest and the recovery from appellant.

27. With regard to the submission of non-compliance of section 52 of Narcotics Drugs & Psychotropic Substance Act, the record of the case demonstrates that there is sufficient material on record to satisfy this court about due compliance of the provision of section 52 of NDPS Act. The averment regarding compliance of section 52 of NDPS Act is available in the recovery memo and first information report itself. The P.W.1 Sub-Inspector, Gaj Ram Singh and P.W.2 Constable Ran Singh have stated in their deposition before the court that the accused appellant was informed about his right to be searched in presence of a Gazetted Officer or Magistrate and in this regard, his written consent was also taken and produced in the court and was proved by P.W.1 as Exhibit Ka-1.

28. Similarly, the submission with regard to the non-presence of

independent witness is also not acceptable in as much as the presence of independent witness during search is not mandatory. Moreover in the present case, it has been stated by the prosecution witnesses that they had tried to procure public witnesses but no one came forward to become the witness of search and arrest. This statement is not improbable, in view of the fact that the accused is resident of the same vicinity, from where he was arrested. It is a matter of common knowledge that the co-villagers normally don't get ready to give evidence against another co-villager in criminal matters. Furthermore, there is no such circumstance or material available on record, which may discredit the evidence of the searching officer who is responsible government servant. In this regard, the relevant part of the judgment of Hon'ble Apex Court in the case of ***Pon Adithan vs. Deputy Director, Narcotics Control Bureau, Madras*** reported in (1999) 6 SCC 1, may be referred, which reads thus:-

"6. It was next contended by Mr. Lalit that oral testimony of a witness alone cannot be regarded as sufficient for establishing that the requirement of Section 50(1) was complied with. To support this contention he relied upon the decision of this Court in T. P. Razak v. State of Kerala, 1995 Supp (4) SCC 256. In that case the Sub-Inspector of Police had searched the accused and recovered brown sugar from him. He deposed before the Court that before the accused was searched he had asked the appellant whether he wanted to be taken before a Gazetted Officer or a Magistrate for the purposes of search and that the accused had replied that it was not necessary. As this fact was not reflected either in the F.I.R. or in the seizure mahazar and the independent witness to the mahazar had not supported the version of the Sub-Inspector this Court held that the prosecution had failed to establish that there was compliance with the provision of Section 50(1) of the Act. As it appears from the judgment the trial Court in that case had not considered it necessary to assess the evidence of Sub-Inspector of Police since it was

of the view that it was not necessary to comply with the provisions of Section 50(1). The High Court had also proceeded on the basis that the said requirement of Section 50(1) is directory and, therefore, its non-compliance was not fatal to the prosecution case. It was in the context of these facts and circumstances that this Court held:

"Having regard to the fact that the FIR and Seizure Mahazar do not mention about the appellant having been asked before the search was conducted as to whether he would like to be produced before a Gazetted Officer or a Magistrate and the further fact that P.W.1, the other independent witness, also does not state about this we are of the view that the prosecution has failed to establish that there was compliance with the provisions of Section 50 of the Act before conducting the search of the appellant."

In that case no clear finding was recorded regarding credibility of the Sub-Inspector of Police who was the only witness on the point. It was upon appreciation of the evidence led in that case that it was held that the prosecution had failed to establish that there was compliance with the provisions of Section 50(1) while conducting the search of the accused. We, therefore, cannot agree with the submission of Mr. Lalit that this Court in that case has laid down as a proposition of law that in absence of independent evidence or any other supporting documentary evidence, oral evidence of a witness conducting the search cannot be regarded as sufficient for establishing compliance with the requirement of Section 50(1)."

29. In view of totality of facts and circumstances detailed herein above, there is no merit in the submissions made by learned counsel for the appellant and this court finds that the prosecution has been able to successfully prove its case beyond reasonable doubt. Hence, the conviction of the appellant is liable to be upheld. On the question of sentence, this court is of the view that the learned Trial Court has considered the aspect of sentence in detail and has

already taken a lenient view and as such, under facts and circumstances of the case, there comes no occasion to alter or reduce the sentence.

30. The present criminal appeal is devoid of merit and is dismissed accordingly.

(Manju Rani Chauhan, J.)

Order Date :- 28.8.2019

Sushil/-