

IN THE HIGH COURT OF HIMACHAL PRADESH AT
SHIMLACr. Appeal No. 167 of 2012
Reserved on: 15.12.2025
Decided on : 5.1.2026

Kalu Ram @ Chandey Ram

... Appellant
Versus

State of H.P.

...Respondent

Coram

Hon'ble Mr. Justice Virender Singh, Judge

Whether approved for reporting? yes

For the Appellant : **Mr. Lakshay Thakur, Advocate.**

For the Respondents : **Mr. Tejasvi Sharma and Mr. H.S. Rawat, Addl. AGs with Mr. Rohit Sharma, Dy.A.G.**

Virender Singh, Judge

Appellant Kalu Ram @ Chandey Ram has preferred the present appeal, under Section 374 of the Code of Criminal Procedure (hereinafter referred to as 'the Cr. P.C.'), read with Section 36-B of the Narcotic Drugs & Psychotropic Substances Act (hereinafter referred to as 'the NDPS Act') against the judgment of conviction and order of sentence dated 3.5.2012, passed by the Court of learned Special Judge (II), Mandi, H.P., (hereinafter referred to as 'the Trial Court'), in

Sessions Trial No. 50 of 2010, titled as, 'State versus Kalu Ram @ Chandey Ram'.

2. Vide judgment of conviction and order of sentence, as referred to above, the appellant was convicted for the offence, punishable under Section 20(b) (ii)(B) of the NDPS Act and he has been sentenced to undergo rigorous imprisonment, for a period of one year and to pay a fine of Rs. 10,000/-. In default, he has been sentenced further to undergo simple imprisonment, for a period of three months.

3. For the sake of convenience, appellant herein is referred to, in the same manner, in which, he was referred to, by the learned trial Court.

4. Brief facts leading to filing the present petition, as borne out from the record of the case, may be summed up, as under:

Police of Police Station Sadar Mandi has filed the charge sheet, before the learned Special Judge, Mandi, arising out of case FIR No. 119 of 2010, dated 20.4.2010, under Section 20 of the NDPS Act, on the ground that on 20.4.2010, ASI Ram Lal alongwith LHC

Narpat Ram No. 460 and other police officials, was on patrolling duty and was present at a place known as 'Sukki-Bai' on National Highway-21. At about 5:30 p.m., they noticed a private bus, bearing registration No. HP-65-2244, being driven by its driver, coming from Kullu-Pandoh towards Mandi, which was stopped for checking by the I.O. Thereafter, the I.O., alongwith police officials, entered the bus and started checking the same. The person, who was sitting on seat No. 22, on seeing the Police had started doing weird activities, upon which, the I.O. developed a suspicion in his mind that he might be having some stolen articles or illegal articles, in his possession. Thereafter, the said person was taken down from the bus. The bus driver, conductor and other passengers were requested to be the witnesses, but no one was ready to be the witness.

4.1 Thereafter, the I.O. made efforts to associate the drivers of the vehicles, crossing from there, but no one was ready to be the witness, upon which, LHC Narpat Ram and Const. Ram Lal were associated as independent witnesses and the name and address of the

person, sitting on seat No. 22, was inquired. The said person disclosed his name as Kalu Ram, S/o Nehru Ram, R/o Village Kasadha, Tehsil and District Kullu.

4.2 Thereafter, I.O., as well as, the police officials had given their personal search to the accused, but nothing incriminating was found from their possession. This fact was documented by the I.O. Thereafter, search of Kalu Ram was conducted. During search, it was found that Kalu Ram, with the help of a tape has concealed something wrapped with brown plastic tape, on his calf muscles. When, the said plastic tape was removed, it was found containing two black coloured packets. On tearing the same, the stick shaped substance was found, which, on the basis of experience was found to be cannabis.

4.3 On weighment, the Charas was found to be 450 grams. The cannabis was thereafter, taken into possession and other codal formalities were completed. After registration of the FIR, the accused was arrested. After completion of investigation, police filed the charge-

sheet, under Section 20 of the NDPS Act, against the accused.

5. From the report under Section 173(2) of the Cr. P.C., the learned trial Court, after complying with the provisions of Section 207 Cr. P.C., found a *prima-facie* case, against the accused, for the commission of offence, punishable under Section 20 of the NDPS Act. As such, the learned trial Court framed the charge against the accused. The accused has pleaded not guilty and claimed to be tried. Consequently, the prosecution was directed to adduce evidence, in order to substantiate the charge, framed against the accused. Consequently, the prosecution has examined, as many as, 9 witnesses, in this case.

6. After closure of evidence of the prosecution, the entire incriminating evidence was put to the accused, in his statement, recorded under Section 313 Cr. P.C. Accused has denied the entire case of the prosecution and taken the defence that he is innocent. However, he has not led any evidence in defence.

7. The learned trial Court, after hearing learned APP, as well as, learned counsel for the accused, convicted the accused, for the commission of offence, punishable under Section 20 of the NDPS Act, vide the aforesaid judgment.

8. Against the said judgment of conviction, present appeal has been preferred, on the ground that the learned trial Court has not considered the fact that there is complete non-compliance of Section 50 of the NDPS Act, as the I.O., before conducting the personal search of the accused has not given option to the accused to be searched before the Magistrate or Gazetted Officer, as mandated by Section 50 of the NDPS Act.

9. Apart from this, violation of Section 55 of the NDPS Act has also been highlighted. It has also been pleaded that link evidence is not there, in the present case.

10. On the basis of above facts, Mr. Lakshay Thakur, Advocate, appearing for the appellant has prayed that the appeal may kindly be allowed.

11. Per contra, Mr. Tejasvi Sharma, learned Addl. A.G. appearing for the respondent-State has supported the judgment of conviction and order of sentence, passed by the learned trial Court and submitted that the learned trial Court has rightly appreciated the evidence of the prosecution and rightly convicted the accused.

12. In this case, judgment of conviction and order of sentence have been assailed, mainly on the ground of non-compliance of Section 50 of the NDPS Act. As such, evidence of only those witnesses is to be discussed, who were present on the spot.

13. PW-9 is the I.O. According to him, on 20.4.2010, he, alongwith LHC Narpat, C. Ram Lal, C. Roshan Lal and C. Krishan Kumar was present at Sukki Bai, where they had gone for patrolling duty in their private vehicle number HP-33B-3100. At that place, they noticed a bus, bearing registration No. HP-65-2244, coming from Kullu side. The I.O signalled to stop the same. Driver of the bus stopped the same. Thereafter, the bus was checked. The accused, who was sitting on seat No. 22, got perplexed on seeing the police party. On noticing the

Police, he got frightened and his face became pale. Due to this, the I.O. developed suspicion in his mind that he might be having some stolen articles or some illegal articles, in his possession.

13.1 Thereafter, the accused was taken out from the bus. Efforts were made to associate the bus driver, conductor and other passengers to be the witnesses, but all of them refused to be the witness. Consequently, LHC Narpat Ram and C. Ram Lal were associated as witnesses.

13.2 On inquiry, the accused has disclosed his name as Kalu Ram, S/o Mehru Ram. Thereafter, the I.O., as well as, other police officials had given their personal search to the accused, but nothing incriminating was found in their possession. This fact was documented vide memo, Ext. PW4/A. Thereafter, search of accused was conducted. From his personal search, something was found tied on his calf muscles with the brown coloured tape. When, the tape was removed, it was found containing two black coloured envelopes, which, on opening were found containing black coloured stick

shaped substance. On opening the same, it was found to be charas, which, on weighment, was found to be 450 grams.

13.3 The contraband, so recovered, was put in a parcel of cloth and the same was sealed with 9 seal impressions. One such impression is Ext. PW4/B. Thereafter, the I.O. filled NCB I form, Ext. PW7/C, in triplicate. The cannabis was seized, vide seizure memo Ext. PW4/C, which was signed by Narpat and C. Ram Lal. Copy of Seizure Memo was given to the accused. The accused was also found to be in possession of one ticket, which was seized, vide memo Ext. PW4/D.

13.4 Thereafter, Ruqua Ext. PW9/A was prepared, which was sent to Police Station, through C. Roshan Lal. The I.O. has prepared the site plan, Ext. PW9/B. The accused was thereafter arrested, vide memo Ext. PW4/E. Apart from this, he has deposed about the manner, in which, remaining investigation was conducted.

13.5 In the cross-examination, this witness has admitted that number of vehicles were parked near the

water source. He has admitted that there is a hut of hermit near the place of occurrence. He has further admitted that at the place of occurrence, a number of persons were there. He has feigned his ignorance as to whether all the police officials entered the bus or not. This witness has conducted the search of the passengers himself. However, he could not tell about the number of persons, who were checked by him, prior to the search of the accused.

13.6 This witness also could not disclose as to who were occupying the seats No. 21 and 23, nor their names and addresses were noted. No action was taken against the passengers, who refused to be the witnesses. The I.O. took about 10 minutes to conduct the search of passengers prior to occupant of seat No. 22. No one was deputed to bring the independent witnesses, as according to this witness, there were no houses in the vicinity. No efforts were made to produce the accused before the Magistrate or Gazetted Officer. According to this witness, it took 45 minutes to prepare the documents prior to NCB-1 form.

14. PW-4 is LHC Narpat Ram. He has also deposed on the similar lines. His evidence is totally silent about the fact whether any efforts were made by the I.O. to comply with the provisions of Section 50 of the NDPS Act.

15. PW-5 is C. Roshan Lal. He has also deposed on the similar lines.

16. Admittedly, in this case, the I.O. has not complied with Section 50 of the NDPS Act, as recovery of alleged contraband was made from personal search of the accused. According to the prosecution witnesses, the contraband was tied with calf muscles of the accused, by putting the contraband, in plastic envelopes. Those envelopes were tied with calf muscles with brown coloured plastic tape. Prior to the search, this witness has allegedly given his personal search, as well as, search of other police officials, vide memo Ext. PW4/A.

17. A bare perusal of memo Ext. PW4/A shows that the I.O. has mentioned the following particulars in heading of the document:

*“Case FIR No. 119/2010, dated 20.4.2010, u/s 20-61-85
NDPS Act P.S. Sadar, District Mandi, H.P.”*

Although, FIR No. 119 has been mentioned in red ink, but, learned Additional Advocate General could not satisfy the judicial conscience of this Court as to how the I.O. anticipated about the recovery of charas, from the alleged possession of the accused. Admittedly, he was not having any prior information and according to the I.O., it is a case of chance recovery. When, the I.O., prior to the search of the accused, has mentioned Section 20 of the NDPS Act, it creates doubt not only in the prosecution story, but, about the casual approach, adopted by the I.O. to conduct the investigation of the case, in which, stringent punishment has been provided by law.

18. Hon’ble Supreme Court in a case titled as **‘Noor Aga versus State of Punjab & Anr.’**, reported in (2008) 16 Supreme Court Cases 417, has held that higher decree of assurance would be necessary to convict an accused, in such type of cases. Paras 56 and 57 of the judgment are reproduced as under:

"56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the Court to impose fine of more than maximum punishment of Rs.2,00,000/- as also the presumption of guilt emerging from possession of Narcotic Drugs and Psychotropic substances, the extent of burden to prove the foundational facts on the prosecution, i.e., 'proof beyond all reasonable doubt' would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance of the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of 'wider civilization'. The courts must always remind itself that it is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In State of Punjab v.

Baldev Singh, (1999) 3 SCC 977, it was stated:

"It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed."

[See also Ritesh Chakravarty v. State of Madhya Pradesh, JT 2006 (12) SC 416]

*57. It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, *prima facie*, shaking the conscience of any court but it is well settled that suspicion, however high may be, can under no circumstances, be held to be a substitute for legal evidence."*

19. If the facts and circumstances of the present case are seen in the light of above decision of Hon'ble Supreme Court, the act of the I.O. to prepare the memo regarding search of the I.O., as well as, police officials, by mentioning Section 20 of the NDPS Act, takes away, the proceedings, which were conducted by the I.O., allegedly on the spot, out of the purview of the proceedings, which were purportedly conducted, on the spot. These documents cannot be said to be prepared, on the spot, as per the deposition, made by the I.O. Not only in this document, but in the memo, by virtue of which, the alleged contraband was recovered, Ext. PW4/C, the FIR number in red ink, as well as, Section 20 of the NDPS Act, have also been mentioned.

20. According to the I.O., ruqua was prepared by him, after handing over NCB form to HC Anil. Meaning thereby, the FIR was registered thereafter. In NCB-1 form, Ext. PW7/C, column Nos. 1 to 8, were supposed to be filled in by the I.O., on the spot, but he has also mentioned the FIR in this document. Not only this, the FIR was be registered later on. The I.O. has not deposed anywhere about the fact that after receipt of the file from the Police Station, he has mentioned the FIR number in the document, which was prepared, allegedly by him, on the spot. How the I.O. came to know about the FIR number, prior to its registration, which was registered after the receipt of the ruqua in the Police Station.

21. At the cost of repetition, the document Ext. PW4/A, which contains the number of the FIR, which was later on, registered makes the entire case doubtful.

22. As highlighted above, even in the specimen of seal impression 'R', the I.O. has not only mentioned the FIR, but also the Section, under which, the same was registered, and the said document seems to be prepared

in one go, as the words “FIR 20 of 2019” have been mentioned in blue ink, in one go.

23. Learned counsel appearing for the accused has assailed the judgment of conviction, mainly on the ground of non-compliance of Section 50 of the NDPS Act. The Hon'ble Supreme Court in a case titled as, **Ranjan Kumar Chadha versus State of Himachal Pradesh**, 2023 INSC 878, has elaborately discussed the provisions of Section 50 of the NDPS Act and after discussing the entire law, on this point, has concluded that obligation under Section 50 of the NDPS Act is mandatory and failure to comply with the same would render the recovery of the illicit article suspicious and vitiate the conviction. Relevant paragraphs 45 to 56, 63 and 64 of the judgment are reproduced as under:

“45. This Court in Baldev Singh (supra) further observed that the conditions prescribed in Section 50 are an obligation imposed upon the empowered officer and the same must be duly complied with before conducting any search of a person. The relevant observations are reproduced hereunder:-

“24. ... There is, thus, unanimity of judicial pronouncements to the effect that it is an obligation of the empowered officer and his duty before

conducting the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has a right to require his search being conducted in the presence of a gazetted officer or a Magistrate and that the failure to inform the suspect of his right, would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50. Similarly, if the person concerned requires, on being so informed by the empowered officer or otherwise, that his search be conducted in the presence of a gazetted officer or a Magistrate, the empowered officer is obliged to do so and failure on his part to do so would also render the search illegal and the conviction and sentence of the accused bad.” (Emphasis supplied)

46. This Court in *Baldev Singh (supra)* also explained the purpose behind the safeguards engraved under Section 50 and the reason as to why the right of the suspect to have his search conducted before a Gazetted Officer or Magistrate ought to be zealously guarded by the courts. It was held as under:-

“25. To be searched before a gazetted officer or a Magistrate, if the suspect so requires, is an extremely valuable right which the legislature has given to the person concerned having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act. It appears to have been incorporated in the Act keeping in view the severity of the punishment. The rationale behind the provision is even otherwise manifest. The search before a gazetted officer or a Magistrate

would impart much more authenticity and creditworthiness to the search and seizure proceeding. It would also verily strengthen the prosecution case. There is, thus, no justification for the empowered officer, who goes to search the person, on prior information, to effect the search, of not informing the person concerned of the existence of his right to have his search conducted before a gazetted officer or a Magistrate, so as to enable him to avail of that right. It is, however, not necessary to give the information to the person to be searched about his right in writing. It is sufficient if such information is communicated to the person concerned orally and as far as possible in the presence of some independent and respectable persons witnessing the arrest and search. The prosecution must, however, at the trial, establish that the empowered officer had conveyed the information to the person concerned of his right of being searched in the presence of a Magistrate or a gazetted officer, at the time of the intended search. Courts have to be satisfied at the trial of the case about due compliance with the requirements provided in Section 50. No presumption under Section 54 of the Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the court, that the requirements of Section 50 were duly complied with.

26. The safeguard or protection to be searched in the presence of a gazetted officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only searched with a good cause and

*also with a view to maintain the veracity of evidence derived from such search. We have already noticed that severe punishments have been provided under the Act for mere possession of illicit drugs and narcotic substances. Personal search, more particularly for offences under the NDPS Act, are critical means of obtaining evidence of possession and it is, therefore, necessary that the safeguards provided in Section 50 of the Act are observed scrupulously. The duty to inform the suspect of his right to be searched in the presence of a gazetted officer or a Magistrate is a necessary sequence for enabling the person concerned to exercise that right under Section 50 because after *Maneka Gandhi v. Union of India* it is no longer permissible to contend that the right to personal liberty can be curtailed even temporarily, by a procedure which is not “reasonable, fair and just” and when a statute itself provides for a “just” procedure, it must be honoured. Conducting a search under Section 50, without intimating to the suspect that he has a right to be searched before a gazetted officer or a Magistrate, would be violative of the “reasonable, fair and just procedure” and the safeguard contained in Section 50 would be rendered illusory, otiose and meaningless. Procedure based on systematic and unconscionable violation of law by the officials responsible for the enforcement of law, cannot be considered to be a “fair”, just or reasonable procedure. We are not persuaded to agree that reading into Section 50, the existence of a duty on the part of the empowered officer, to intimate to the suspect, about the existence of his*

right to be searched in the presence of a gazetted officer or a Magistrate, if he so requires, would place any premium on ignorance of the law. The argument loses sight of a clear distinction between ignorance of the law and ignorance of the right to a “reasonable, fair and just procedure”.

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28. This Court cannot overlook the context in which the NDPS Act operates and particularly the factor of widespread illiteracy among persons subject to investigation for drug offences. It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed. We are not able to find any reason as to why the empowered officer should shirk from affording a real opportunity to the suspect, by intimating to him that he has a right “that if he requires” to be searched in the presence of a gazetted officer or a Magistrate, he shall be searched only in that manner. As already observed the compliance with the procedural safeguards contained in Section 50 are intended to serve a dual purpose — to protect a person against false accusation and frivolous charges as also to lend creditability to the search and seizure conducted by the empowered officer. The argument that keeping in view the growing drug menace, an insistence on compliance with all the safeguards contained in Section 50 may result in more acquittals does not appeal to us. If the empowered officer fails to comply with the requirements of Section 50 and an

order or acquittal is recorded on that ground, the prosecution must thank itself for its lapses. Indeed in every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted.”

47. *As to what would be the consequences of a recovery made in violation of Section 50, it was observed in Baldev Singh (supra) that it would have the effect of rendering such incriminating material inadmissible in evidence and hence, cannot be relied upon to hold the accused guilty for being found to be in unlawful possession of any contraband. The Court further held that it would not impede the prosecution from relying upon recovery of any other incriminating article in any other independent proceedings. It was further held that the burden of proving that the conditions of Section 50 were complied with, would lie upon the prosecution to establish. The relevant observations are being reproduced hereunder:-*

“32. *However, the question whether the provisions of Section 50 are mandatory or directory and, if mandatory, to what extent and the consequences of non-compliance with it does not strictly speaking arise in the context in which the protection has been incorporated in Section 50 for the benefit of*

the person intended to be searched. Therefore, without expressing any opinion as to whether the provisions of Section 50 are mandatory or not, but bearing in mind the purpose for which the safeguard has been made, we hold that the provisions of Section 50 of the Act implicitly make it imperative and obligatory and cast a duty of the investigating officer (empowered officer) to ensure that search of the person (suspect) concerned is conducted in the manner prescribed by Section 50, by intimating to the person concerned about the existence of his right, that if he so requires, he shall be searched before a gazetted officer or a Magistrate and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate would cause prejudice to the accused and render the recovery of the illicit article suspect and vitiate the conviction and sentence of the accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered during a search conducted in violation of the provisions of Section 50 of the Act. The omission may not vitiate the trial as such, but because of the inherent prejudice which would be caused to an accused by the omission to be informed of the existence of his right, it would render his conviction and sentence unsustainable. 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.

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45. ... Prosecution cannot be permitted to take advantage of its own wrong. Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. Conducting a fair trial is both for the benefit of the society as well as for an accused and cannot be abandoned. While considering the aspect of fair trial, the nature of the evidence obtained and the nature of the safeguard violated are both relevant factors. Courts cannot allow admission of evidence against an accused, where the court is satisfied that the evidence had been obtained by a conduct of which the prosecution ought not to take advantage

particularly when that conduct had caused prejudice to the accused.

*If after careful consideration of the material on record it is found by the court that the admission of evidence collected in search conducted in violation of Section 50 would render the trial unfair then that evidence must be excluded. In *R. v. Collins*, (1987) 1 SCR 265 (Canada), the Supreme Court of Canada speaking through Lamer, J. (as his Lordship, Chief Justice of the Supreme Court of Canada then was) opined that the use of evidence collected in violation of the Charter rights of an accused would render a trial unfair and the evidence inadmissible. ... x x x x*

55. *We, therefore, hold that an illicit article seized from the person of an accused, during search conducted in violation of the safeguards provided in Section 50 of the Act, cannot by itself be used as admissible evidence of proof of unlawful possession of the contraband on the accused. Any other material/article recovered during that search may, however, be relied upon by the prosecution in other/independent proceedings against an accused notwithstanding the recovery of that material during an illegal search and its admissibility would depend upon the relevancy of that material and the facts and circumstances of that case.”*

48. *This Court ultimately summed up its findings with the following ten conclusions reproduced below:-*

“57. On the basis of the reasoning and discussion above, the following conclusions arise:

(1) *That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing;*

(2) *That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused;*

(3) *That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act;*

(4) *That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the*

investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. 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

therein were duly complied with, it would not be permissible to cut- short a criminal trial;

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the concerned person of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search;

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act.

*(9) That the judgment in *Pooran Mal v. Director of Inspection (Investigation)*, (1974) 1 SCC 345,*

cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search; (10) That the judgment in Ali Mustaffa's case correctly interprets and distinguishes the judgment in Pooran Mal's case and the broad observations made in State of H.P. v. Pirthi Chand, (1996) 2 SCC 37, and State of Punjab v. Jasbir Singh, (1996) 1 SCC 288, case are not in tune with the correct exposition of law as laid down in Pooran Mal's case."

49. Thus, the Constitutional Bench in express terms laid down that although the non-compliance of Section 50 may not vitiate the trial yet would render the recovery of the contraband doubtful and may vitiate the conviction of the accused. The emphasis laid by the Court is on illicit articles seized from the "person of an accused" during the search conducted in violation of safeguards provided in Section 50 of the NDPS Act. In other words, according to Baldev Singh (*supra*), the provisions of Section 50 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 he may be carrying.

When Section 50 could be said to be complied with?

50. This Court in a number of cases has dealt with this very aspect and laid down the principles with respect to when Section 50 be said to be complied with. This Court

in Manohar Lal v. State of Rajasthan reported in (1996) 11 SCC 391, held that Section 50 only requires the option to be given to the accused to say whether he would like to be searched in the presence of a Gazetted Officer or Magistrate. The relevant observations made therein are reproduced below:-

“2. ... The provision only requires the option to be given to the accused to say whether he would like to be searched in the presence of a Gazetted Officer or a Magistrate; and on exercise of that option by the accused, it is for the officer concerned to have the search made in the presence of the nearest Gazetted Officer or the nearest Magistrate whosoever is conveniently available for the purpose in order to avoid undue delay in completion of that exercise. It is clear from Section 50 of the NDPS Act that the option given thereby to the accused is only to choose whether he would like to be searched by the officer making the search or in the presence of the nearest available Gazetted Officer or the nearest available Magistrate. The choice of the nearest Gazetted Officer or the nearest Magistrate has to be exercised by the officer making the search and not by the accused.” (Emphasis supplied)

51. In Joseph Fernandez v. State of Goa reported in (2001) 1 SCC 707, this Court held that only substantial compliance of Section 50 is required, and informing the suspect that if he wishes he may be searched in presence of a Gazetted Officer or Magistrate without the use of the word “right” would not amount to breach of Section 50. The relevant observations made therein are reproduced below:-

"2. Learned counsel tried to highlight a point that Section 50 of the Narcotic Drugs and Psychotropic Substances Act has not strictly been complied with by PW 8, the officer who conducted the search. According to the learned counsel for the appellant the searching officer should have told the person who was subjected to search that he had a right to be searched in the presence of a gazetted officer or a Magistrate. In this case PW 8 has deposed that she told the appellant that if he wished he could be searched in the presence of the gazetted officer or a Magistrate to which the appellant had not favourably reciprocated. According to us the said offer is a communication about the information that the appellant has a right to be searched so. It must be remembered that the searching officer had only Section 50 of the Act then in mind unaided by the interpretation placed on it by the Constitution Bench. Even then the searching officer informed him that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate". This according to us is in substantial compliance with the requirement of Section 50. We do not agree with the contention that there was non-

compliance with the mandatory provision contained in Section 50 of the Act."

52. In *Prabha Shankar Dubey v. State of M.P.* reported in (2004) 2 SCC 56, this Court held that for the purpose of due compliance of Section 50 there is no specific word or form in which the communication is to be made and it is not necessary to use the word "right", as the person to

be searched is only required to be made aware that he has a choice of having his search conducted before a Gazetted Officer or Magistrate. The relevant observations made in it are reproduced hereunder:-

“11. ... What the officer concerned is required to do is to convey about the choice the accused has. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the officer concerned, even though there is no specific form. The use of the word “right” at relevant places in the decision of Baldev Singh case seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given but more by way of a right in the “suspect” at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it.”

53. However, a five-Judge Bench of this Court in *Vijaysinh Chandubha Jadeja v. State of Gujarat* reported in (2011) 1 SCC 609, overruled the decisions in *Prabha Shankar Dubey (supra)* and *Joseph Fernandez (supra)* and disapproved the concept of “substantial compliance” and held that the obligation under Section 50 is mandatory and the failure to comply with the same would render the recovery of illicit article suspicious and vitiate the conviction, more particularly if the basis of conviction is the recovery of illicit article from the accused during search. The person to be searched is to be specifically informed that he has a right to be searched in presence of a Gazetted Officer or Magistrate. The Court also held that while it is the choice of police to take the suspect either before a

Gazetted Officer or Magistrate, an endeavour should be made to take him before Magistrate. The relevant observations made therein are reproduced below:-

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

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 case. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.

32. *We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.” (Emphasis supplied)*

54. *In Parmanand (supra) this Court held that Section 50 confers a right upon the accused to be searched either by a Gazetted Officer or Magistrate, and as such while informing the suspect of its right, only the aforesaid two options can be provided. Section 50 could be said to be violated where a third option is also offered, be it that of being searched by the superintendent of police or by the police officer himself.*

55. *Although a superintendent of police is a Gazetted Officer, yet the reason why this court in Parmanand (supra) held the third option to be bad in law is because, first, in that case the Superintendent of*

Police was a part of the raiding party and as such was not an independent witness and secondly, as discussed, Section 50 provides for only two options, either a Magistrate or Gazetted Officer.

56. *Thus, the person intended to be searched under Section 50 must be told in clear and unambiguous words that he has a right to have the search conducted in presence of either a Gazetted Officer or Magistrate. The person concerned must be made aware of his right and must be given only two options that have been provided under the section.*

63. *However, we propose to put an end to all speculations and debate on this issue of the suspect being apprised by the empowered officer of his right under Section 50 of the NDPS Act to be searched before a Gazetted Officer or Magistrate. We are of the view that even in cases wherein the suspect waives such right by electing to be searched by the empowered officer, such waiver on the part of the suspect should be reduced into writing by the empowered officer. To put it in other words, even if the suspect says that he would not like to be searched before a Gazetted Officer or Magistrate and he would be fine if his search is undertaken by the empowered officer, the matter should not rest with just an oral statement of the suspect. The suspect should be asked to give it in writing duly signed by him in presence of the empowered officer as well as the other officials of the squad that "I was apprised of my right to be searched before a Gazetted Officer or Magistrate in accordance with Section 50 of the NDPS Act, however, I declare on my own free will and volition that I would not like to exercise my right of being searched before a Gazetted*

Officer or Magistrate and I may be searched by the empowered officer." This would lend more credence to the compliance of Section 50 of the NDPS Act. In other words, it would impart authenticity, transparency and credit worthiness to the entire proceedings. We clarify that this compliance shall henceforth apply prospectively.

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

(i) Section 50 provides both a right as well as an obligation.

The person about to be searched has the right to have his search conducted in the presence of a Gazetted Officer or Magistrate if he so desires, and it is the obligation of the police officer to inform such person of this right before proceeding to search the person of the suspect.

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

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

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

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

(vi) Where the right under Section 50 has been exercised, it is the choice of the police officer to decide whether to take the suspect before a Gazetted Officer or Magistrate but an endeavour should be made to take him before the nearest Magistrate.

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

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

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

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

24. Judging the facts and circumstances of the present case, in the light of aforesaid decisions of Hon'ble Supreme Court, when, there is non-compliance of Section 50 of the NDPS Act, then, alleged recovery of cannabis, from the possession of the accused, becomes suspicious.

25. Hence, it can be said that the learned trial Court has fallen into an error by not considering the admitted factual position, i.e. non-compliance of Section 50 of the NDPS Act, by the I.O.. As such, judgment of conviction does not sustain in the judicial scrutiny by this Court.

25 In view of the aforesaid discussion, the present appeal is allowed, by setting aside the judgment of the

learned trial Court and the accused is acquitted from the offence, punishable under Section 20 of the NDPS Act.

26. The bail bond and surety bond furnished by the accused are discharged. He is directed to furnish the bail bond in the sum of Rs. 50,000/- with one surety of the like amount, under the provisions of Section 437-A Cr. P.C. to the satisfaction of the learned Registrar (Judicial) of this Court, within a period of seven days, by giving an undertaking to appear before the Hon'ble Apex Court, in case, this judgment is being assailed before the Apex Court.

27. Record be sent back.

(Virender Singh)
Judge

January 5, 2026
(kalpana)

