

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/CRIMINAL APPEAL (AGAINST ACQUITTAL) NO. 122 of 2009****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE HEMANT M. PRACHCHHAK**

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Approved for Reporting	Yes	No
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STATE OF GUJARAT

Versus

PRABHUBHAI PUJABHAI NAT & ORS.

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Appearance:

MS JYOTI BHATT APP for the Appellant(s) No. 1

ABATED for the Opponent(s)/Respondent(s) No. 1

BAILABLE WARRANT UNSERVED for the Opponent(s)/Respondent(s)
No. 2,3,4

RULE UNSERVED for the Opponent(s)/Respondent(s) No. 2,3,4

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CORAM: HONOURABLE MR. JUSTICE HEMANT M. PRACHCHHAK**Date : 19/08/2026****ORAL JUDGMENT**

1. The appellant - State of Gujarat has preferred this appeal under Section 378(1)(3) of the Code of Criminal Procedure, 1973 against the judgment and order dated 08.10.2008 passed by the learned Special Judge (N.D.P.S.) Himmatnagar, Camp at Idar (hereinafter be referred to as "the Special Judge") in Special (NDPS) Case No. 1 of 2006, whereby the trial Court has acquitted the original accused

(respondents herein) from the offences punishable under Sections 8(c), 20(B) and 29 etc of the Narcotic Drugs and Psychotropic Substances Act, 1985 [hereinafter be referred to as “the Act”].

2. The facts of the present case are that on 30.10.2005, one Virchandbhai Kanjibhai was carrying out checking in luxury bus coming from Rajasthan bearing registration No. RJ 14-1-P-5758 from which one passenger tried to hide his bag and on scrutiny of the bag, contraband article i.e. Ganja weighed about 2 kilo 600 gram for the purpose of selling without any pass or permit, came to be seized and other accused made support in carrying the said article and therefore they have committed an offence punishable under Sections 8(c), 20(B) and 29 of the Act. Pursuant thereto, complaint being C.R.No.II – 90/2005 came to be registered at Shamlaji Police Station. After completion of the investigation, a chargesheet was filed against the accused.

2.1 The charge against the accused came to be framed by the trial Court vide Exhibit 7 for the aforesaid offences against the accused. On being explained it to them, the accused have denied having committed any offence. The accused pleaded not guilty to the charge and pleaded for trial and hence, the case was tried by the learned Special Judge.

3. It appears from the records that to prove the case, the prosecution has examined the witnesses in addition to this, the prosecution has also produced the documentary evidence.

4. After closure of the evidence, the statements of the accused under section 313 of the Criminal Procedure Code, 1973 have been

recorded wherein they denied of having committed any offence and have stated that they are innocent.

5. After hearing both sides and considering the evidence on records, the trial Court by impugned judgment and order has acquitted the accused from all the charges levelled against them.

6. Being aggrieved by and dissatisfied with the aforesaid judgment and order of acquittal the appellant – State of Gujarat has preferred this appeal.

7. Heard Ms.Jyoti Bhatt, learned Additional Public Prosecutor for the appellant – State of Gujarat at length. Though served, the accused have chosen not to appear before the Court.

8. Ms.Bhatt, learned Additional Public Prosecutor for the appellant has submitted that the impugned judgment and order of acquittal passed by the Trial Court is contrary to law and the evidence available on record. She has submitted that the Trial Court erred in holding that the prosecution had failed to prove its case beyond reasonable doubt. She has submitted that the contraband articles were found in the custody of respondent No.1, whereas, respondents No.2, 3 and 4 were driver and cleaner of the bus bearing registration No. RJ 14-1-P-5758 and the bus was intercepted at the check post near Ratanpur at that time respondent No.1 was suspected and during the course of examination by the complainant – police constable, the contraband article namely ganja was found from the bag which was carried by respondent No.1. She has submitted that the complainant – Pramodchandra along with one unarmed constable Virchand have taken the accused to nearby police station i.e. Shamlaji Police Station.

The complainant has registered the complaint and in presence of the PSI, the complainant informed the concerned C.P.I. of Bhiloda who was the Incharge of the Police Station but since he was on leave therefore the Dy.S.P., Khedbrahma was informed and he was reached to the place and in his presence, all the formalities were carried out by the Investigating Officer and, therefore, the evidence was collected and after found sufficient material, the prosecution has filed the charge-sheet against the accused.

8.1 Ms.Bhatt, learned Additional Public Prosecutor for the appellant has submitted that the prosecution examined several witnesses including two panchas and also produced the documentary evidence, except panchas, the prosecution witnesses have supported the case and through the documentary evidence, the prosecution has led the evidence to prove the charge against the accused, however, without proper appreciation oral as well as documentary evidence, the trial Court erroneously passed the impugned judgment and order of acquittal.

8.2 Ms.Bhatt, learned Additional Public Prosecutor for the appellant has submitted that the Trial Court erred in holding that the prosecution had failed to prove the charge beyond reasonable doubt against the accused and, therefore, the impugned judgment and order of acquittal recorded by the Trial Court, which deserves to be quashed and set aside and the appeal deserves to be allowed.

8.3 Ms.Bhatt, learned Additional Public Prosecutor for the appellant has submitted that the prosecution has led the evidence which supports the case of the prosecution and thereby the case was proved beyond reasonable doubt against the accused, however, the Trial

Court has not considered the same in its true and proper perspective. She has further submitted that the prosecution has led the evidence to the effect that the respondent, who was culprit and from whose possession the contraband articles namely ganja weighing 2-kilogram 600 gram found from the different bags carried by accused No.1. However, Ms.Bhatt, learned Additional Public Prosecutor fairly admitted that so far as respondents No.2, 3 and 4 are concerned, neither there was material found from their possession nor from the vehicle, however, the Trial Court has committed serious error of facts and law in passing the impugned judgment and order of acquittal.

8.4 Ms.Bhatt, learned Additional Public Prosecutor has submitted that the Trial Court has committed an error in holding that the accused cannot be charged for the alleged offences of the Act, despite sufficient evidence establishing the conscious and illegal possession of the contraband articles of the accused. She has submitted that P.W.1 - Pramodchandra Sukhdevprasad Pandya and P.W.2 Virchandbhai Kavjibhai i.e. complainant and accompanied witnesses, from whose evidence, it was established that accused No.1 was found with contraband articles during inspection and it was seized from accused No.1 and their evidence were duly corroborated by the other oral as well as documentary evidence, however, the Trial Court has, without appreciating the said evidence in its true and proper perspective, discarded the evidence of those witnesses on the ground that since panchas have not supported the recovery of muddamal from the possession of accused No.1, it was supported by the evidence of the police witnesses and, therefore, it cannot be ignored and discarded by the Trial Court.

8.5 In view of the cogent and reliable oral and documentary evidence, Ms.Bhatt, learned Additional Public Prosecutor has submitted that the Trial Court ought not to have acquitted the accused. The findings recorded in the impugned judgment are contrary to the evidence on record and suffer from serious errors of appreciation. It is, therefore, submitted that the judgment and order of acquittal deserves to be quashed and set aside by this Court.

9. Though served, the respondents have chosen not to appear before the Court and in absence of the submissions on the part of the respondents, this Court has to look the judgment and order of acquittal and on perusal of the same and the submissions advanced by the learned Additional Public Prosecutor and on examining the oral as well as documentary evidence, this Court has examined the issues that arises for consideration before this Court for determination are as under:-

Whether the learned Trial Court committed any error in passing the impugned judgment and order of acquittal?

Whether the learned Trial Court, while appreciating the evidence of the prosecution witnesses, has committed any error of law or fact?

Whether the impugned judgment and order of acquittal suffers from any illegality or perversity?

10. In light of the aforesaid submissions made by the learned Additional Public Prosecutor and on perusal of the impugned judgment and order of acquittal as well as the evidence recorded by the Trial Court and the issues framed by the Court for determination are required to be examined in light of the facts and circumstances of

the present case. If this Court peruses the facts of the present appeal, it appears that on 30.10.2005, while complainant - P.W.1 and police constable - P.W.2 serving at Shamlaji Police Station were posted at Ratanpur Check Post and they were on duty at that time one luxury bus bearing registration No.RJ-14-1-P-5758 was standing in a queue at the Check Post, P.W.1 and P.W.2 have checked the said post at that time passenger sitting on seat No.27 was found in suspicion condition and he was trying to hide the bag contained contraband article and, therefore, upon search, it was found that the bag containing contraband articles was of accused No.1 and, therefore, P.W.1 and P.W.2 asked the accused that whether he was having any pass or permit to carry this contraband article upon which he stated that he had no pass and permit, for which, the complainant asked accused No.2 and 3 being drivers and accused No.4 being cleaner / conductor of the bus and all four along with other passengers taken to Ratanpur Check Post where the complainant immediately informed the PSI, Shamlaji Police Station and also informed the C.P.I., Bhiloda and since C.P.I. was not available and hence, the message sent to Dy.S.P., Khedbrahma i.e. P.W.6 - Saitansinh Magansinh Chavda about seizure of contraband article from accused No.1 then panchas were called i.e. P.W.3 - Rajubhai Kadavabhai Parghi and P.W.4 - Kantibhai Somabhai Parghi, in whose presence, contraband article was weighing and weight of the contraband article was approximately 2 kilo 600 gram and after drawing sample from the said contraband articles, P.W.1 and P.W.2 have completed formalities of the seizure of the muddamal and, thereafter, the complaint came to be lodged against the accused.

11. On perusal of the evidence of P.W.1, who was an armed police

constable, and P.W.2, who was an unarmed police constable, it appears that they intercepted the bus and, during the course of checking, suspected accused No.1. Though they were aware that they were not authorised officers under the Act, they proceeded to search accused No.1 and thereafter informed the concerned PSI, who was also not an authorised officer under the Act. Thereafter, P.W.1 and P.W.2 informed the Dy. S.P., Khedbrahma, who reached the spot after about one hour, as stated by the witnesses. During the said period, all the activities relating to weighing, seizing and searching were carried out by the police constables in the presence of the PSI, i.e. P.W.7. On perusal of the depositions of P.W.5 - Arjunsinh Javansinh Chauhan, P.W.6 - Amaraji Bahecharji Desai, and P.W.7 - Saitansinh Magansinh Chavda, it clearly emerges that, while searching accused No.1, the police did not follow the procedure prescribed under the Act, which is mandatory in nature. From the evidence of P.W.5, it emerges that he specifically admitted that, though he registered the FIR at the behest of P.W.1 and P.W.7, he did not forward the FIR within 24 hours to the nearest learned Magistrate. He also did not forward the report to the higher officer as required under Section 42(2) of the Act, nor did he intimate the concerned Dy. S.P. regarding the seizure of the muddamal article and the arrest of the accused. Though the C.P.I. was present and was in charge of Bhiloda, when a question was put to P.W.6, he admitted that no charge had been handed over to him by the Dy. S.P. However, he stated that he had been informed through a telephonic message and thereafter reached the place of the incident.

12. On perusal of the record and the evidence, it reveals that the prosecution has not produced any evidence regarding the place where the muddamal article was weighed or the person by whom it

was weighed. The prosecution has also not examined the person who weighed the contraband article or brought on record the place where it was weighed. Surprisingly, the weight of the contraband article had already been mentioned in the seizure panchnama at Exhibit 49, even though no evidence has been produced to establish by whom, at which place, and in whose presence the contraband article was weighed. This creates a serious doubt regarding the manner in which the weight of the contraband article was determined. No evidence whatsoever has been brought on record regarding the person who weighed the contraband article, the place where it was weighed, or the persons who were present at that time.

13. It is admitted by P.W.6 that, when he reached Shamlaji Police Station, the procedure of drawing the panchnama had already been completed by P.W.7, P.W.1 and P.W.2. Surprisingly, from the evidence of P.W.6 and P.W.7, it emerges that it is not brought on record as to how or by whom P.W.6 was informed about the incident. There is also no register recording any wireless message or any details of the telephonic communication. The prosecution has not examined the FSL expert and has merely produced the FSL report. Thus, the documents were exhibited without examining their author, which constitutes a serious lacuna in the prosecution case. It is also a serious lacuna in the prosecution case that the Investigating Officer, who was not authorised to investigate the offence, carried out the investigation. It is admitted by P.W.7 that, initially, the investigation was carried out by him and, subsequently, by another PSI. However, the said PSI was not examined by the prosecution to prove its case, for reasons best known to the prosecution. There are, therefore, serious lacuna in the investigation. Consequently, after considering the evidence at length,

the Trial Court recorded cogent reasons as to why the prosecution case could not be believed. In paragraph 17, the Trial Court recorded reasons demonstrating how the prosecution had failed to establish the charge against the accused due to serious lacunae in the investigation and non-compliance with the mandatory provisions of Sections 42(2), 50, 55 and 57 of the Act. After referring to the decisions of the Hon'ble Apex Court, the Trial Court rightly passed the impugned judgment and order of acquittal.

14. This Court in similar set of facts in Criminal Appeal No. 645 of 2008 filed by the appellant – State of Gujarat decided on 05.08.2026 and dealt with similar provisions of Sections 42, 50, 55 and 57 of the Act.

15. At this stage, it is appropriate to refer the decision of the Honourable Apex Court in the case of **State of Punjab vs. Balbir Singh reported in AIR 1994 SC 1872**, whereby Hon'ble Apex Court has held as under:-

“Head Note (D) Narcotic Drugs and Psychotropic Substance Act (61 of 1985), Ss. 50, 41, 42 - Search and Seizure - On prior information empowered officer acting under S.41(2) of S.42-Should comply with provisions of S.50-Provisions of S.50 are mandatory.

17. One another important question that arises for consideration is whether failure to comply with the conditions laid down in Section 50 of the NDPS Act by the empowered or authorised officer while conducting the search, affects the prosecution case. The said provision (Section 50) lays down that any officer duly authorised under Section 42, who is about to search any person under the provisions of Sections 41, 42 and 43, shall, if such person so requires, take him without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate and if such requisition is made by the person to be searched, the authorised officer concerned can detain him until he can produce him before such Gazetted Officer or the

Magistrate. After such production, the Gazetted Officer or the Magistrate, if sees no reasonable ground for search, may discharge the person. But otherwise he shall direct that the search be made. To avoid humiliation to females, it is also provided that no female shall be searched by anyone except a female. The words "if the person to be searched so desires" are important. One of the submissions is whether the person who is about to be searched should by himself make a request or whether it is obligatory on the part of the empowered or the authorised officer to inform such person that if he so requires, he would be produced before a Gazetted Officer or a Magistrate and thereafter the search would be conducted. In the context in which this right has been conferred, it must naturally be presumed that it is imperative on the part of the officer to inform the person to be searched of his right that if he so requires to be searched before a Gazetted Officer or a Magistrate. To us, it appears that this is a valuable right given to the person to be searched in the presence of a Gazetted Officer or a Magistrate if he so requires, since such a search would impart much more authenticity and creditworthiness to the proceedings while equally providing an important safeguard to the accused. To afford such an opportunity to the person to be searched, he must be aware of his right and that can be done only by the authorised officer informing him. The language is clear and the provision implicitly makes it obligatory on the authorised officer to inform the person to be searched of his right.

21. In Miranda v. Arizona¹⁷ the Court, considering the question whether the accused be apprised of his right not to answer and keep silent while being interrogated by the police, observed thus :

"At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere."

It was further observed thus :

"The warning of the right to remain silent must be

accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system that he is not in the presence of persons acting solely in his interest."

When such is the importance of a right given to an accused person in custody in general, the right by way of safeguard conferred under Section 50 in the context is all the more important and valuable. Therefore it is to be, taken as an imperative requirement on the part of the officer intending to search to inform the person to be searched of his right that if he so chooses, he will be searched in the presence of a Gazetted Officer or a Magistrate. Thus the provisions of Section 50 are mandatory.

25. The question considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows :

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed

in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal.

Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the

provisions of Cr. PC fails to strictly comply with the provisions of Sections 100 and 165 Cr. PC including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of Cr. PC namely Sections 100 and 165 Cr. PC and if there is no strict compliance with the provisions of Cr. PC then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case

16. In the decision in case of **Karnail Singh v. State of Haryana, (2009) 8 SCC 539**, the Hon'ble Apex Court has held as under:-

"(6) In the light of the above decisions and the principles enunciated therein, it would be appropriate to refer to

Section 42 of the NDPS Act which is relevant for the present purpose as it stood before its amendment by Act 9 of 2001. It reads as under:-

"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 or of the Border Security Force 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, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset,--

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(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 Chapter IV relating to such drug or substance; 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 Chapter IV relating to such drug or substance:

Provided 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 forthwith send a copy thereof to his immediate official superior."

Sub-section (2) as replaced by Act 9 of 2001 is extracted below:

"(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."

15) Under Section 42(2) as it stood prior to amendment such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same would adversely affect the prosecution case and to that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case, it is to be concluded that the mandatory enforcement of the provisions of Section 42 of the Act non-compliance of which may vitiate a trial has been restricted only to the provision of sending a copy of the information written down by the empowered officer to immediate official superior and not to any other condition of the Section. Abdul Rashid (supra) has been decided on 01.02.2000 but thereafter Section 42 has been amended with effect from 02.10.2001 and the time of sending such report of the required information has been specified to be within 72 hours of writing down the same. The relaxation by the legislature is evidently only to uphold the object of the Act. The question of mandatory application of the provision can be answered in the light of the said amendment. The non-compliance of the said provision may not vitiate the trial if it does not cause any prejudice to the accused.

17. 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).

(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 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”.

17. In the decision in case of ***Vijaysinh Chandubha Jadeja vs. State of Gujarat reported in 2011(1) SCC 609***, the Hon’ble Apex Court has held as under:-

“18.Although the Constitution Bench did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, 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 the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.

19.As noted above, sub-sections (5) and (6) were inserted

in Section 50 by Act 9 of 2001. It is pertinent to note that although by the insertion of the said two sub-sections, the rigour of strict procedural requirement is sought to be diluted under the circumstances mentioned in the sub-sections, viz. when the authorised officer has reason to believe that any delay in search of the person is fraught with the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance etc., or article or document, he may proceed to search the person instead of taking him to the nearest gazetted officer or Magistrate. However, even in such cases a safeguard against any arbitrary use of power has been provided under sub-section (6). Under the said sub-section, the empowered officer is obliged to send a copy of the reasons, so recorded, to his immediate official superior within seventy two hours of the search. In our opinion, the insertion of these two sub-sections does not obliterate the mandate of sub-section (1) of Section 50 to inform the person, to be searched, of his right to be taken before a gazetted officer or a Magistrate. The object and the effect of insertion of sub-sections (5) and (6) were considered by a Constitution Bench of this Court, of which one of us (D.K. Jain, J.) was a member, in Karnail Singh Vs. State of Haryana¹³. Although in the said decision the Court did observe that by virtue of insertion of sub-sections (5) and (6), the mandate given in Baldev Singh's case (supra) is diluted but the Court also opined that it cannot be said that by the said insertion, the protection or safeguards given to the suspect have been taken away completely. The Court observed :-

"Through this amendment the strict procedural requirement as mandated by Baldev Singh case was avoided as relaxation and fixing of the reasonable time to send the record to the superior official as well as exercise of Section 100 CrPC was included by the legislature. The effect conferred upon the previously mandated strict compliance with Section 50 by Baldev Singh case was that the procedural requirements which may have handicapped an emergency requirement of search and seizure and give the suspect a chance to escape were made directory based on the reasonableness of such emergency situation. Though it cannot be said that the protection or safeguard given to the suspects have been taken away completely but certain flexibility in the procedural norms were adopted only (2009) 8 SCC 539 to balance an urgent situation. As a consequence the mandate given in Baldev Singh case is

diluted."

22. *In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision. As observed in Re Presidential Poll¹⁴, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole." We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of (1974) 2 SCC 33 the common*

man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."

18. In the decision in case of **State of Himachal Pradesh vs. Surat Singh reported in 2026 (0) AIJEL SC 76708** the Hon'ble Apex Court has held as under:-

"18. Their lordships of the Hon'ble Supreme Court in the case of Suresh and others versus State of Madhya Pradesh, reported in (2013) 1 SCC 550, have held that in a case where the accused were merely asked whether they would offer their personal search to police officer concerned or to gazetted officer and the appellants gave their consent for their personal search by police officer concerned, it will amount to non-compliance of Section 50(1) of the ND & PS Act. Their lordships have held as follows:

"16) The above Panchnama indicates that the appellants were merely asked to give their consent for search by the police party and not apprised of their legal right provided under Section 50 of the NDPS Act to refuse/to allow the police party to take their search and opt for being searched before the Gazetted officer or by the Magistrate. In other words, a reading of the Panchnama makes it clear that the appellants were not apprised about their right to be searched before a gazetted officer or a Magistrate but consent was sought for their personal search. Merely asking them as to whether they would offer their personal search to him, i.e. the police officer or to gazetted officer may not satisfy the protection afforded under Section 50 of the NDPS Act as interpreted in Baldev Singh's case.

17. Further a reading of the judgments of the trial Court and the High Court also show that in the presence of Panchas, the SHO merely asked all the three appellants for their search by him and they simply agreed. This is reflected in the Panchnama. Though in Baldev Singh's case, this Court has not expressed any opinion as to whether the provisions of Section 50 are mandatory or directory but "failure to inform" the person concerned 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. In Vijaysinh Chan Jadeja's case (supra), recently the Constitution Bench has explained the mandate provided under sub-section (1) of Section 50 and concluded that it is mandatory and requires strict compliance. The Bench also held that 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. The concept of substantial compliance as noted in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) were not acceptable by the Constitution Bench in Vijaysinh Chandubha Jadeja, accordingly, in view of the language as evident from the panchnama which we have quoted earlier, we hold that, in the case on hand, the search and seizure of the suspect from the person of the appellants is bad and conviction is unsustainable in law."

18. Their lordships of the Hon'ble Supreme Court in case of State of Rajasthan versus Parmanand and another, reported in (2014) 5 SCC 345, have held that if merely a bag is carried by person is searched without there being any search of his person, S. 50 will have no application but if bag carried by him is searched and his person is also searched, S. 50 would be attracted. Their lordships have also held that it was improper for PW-10 S.I. "Q" to tell respondents that a third alternative was available. It has been held as follows:

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. 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."

19. It is also worthwhile to refer the decision of the Hon'ble Apex Court in case of **State of Rajasthan vs. Jag Raj Singh reported in 2016 (11) SCC 687 and in the case of Boota Singh vs. State of Haryana reported in 2021 (19) SCC 606** whereby in similar set of facts the Hon'ble Apex Court has deal with Sections 42, 43 and 50 of the NDPS Act.

20. Thus, the basic requirement under Section 42(2) as laid down under the Act r/w. Sections 55 and 57 of the Act was also not complied with in the present case at the time of conducting the search of the present respondent No.1 in the presence of the panch

witnesses. There is no evidence on record to establish that the respondent was informed of his right to have his search conducted in the presence of a Gazetted Officer or a Magistrate, as required under the said provision. From the evidence of none of the witnesses does it emerge that the mandatory requirement under Section 50 of the NDPS Act was duly complied with. Mere denial by the present respondent cannot dispense with the statutory requirement. The concerned authority was required to inform the respondent of his legal right and, if he so desired, to produce him before the nearest Gazetted Officer or Magistrate, as observed by the Hon'ble Apex Court in the decisions referred to hereinabove.

21. Even prima facie on perusal of the panchnama of the seizure of Mudammal and the report of the chemical analyzer also creates a doubt that whether the actually it was a ganja or not as it is provided under the provision of Section 2 (iii)(b) of the NDPS Act, which reads as under:-

"2. (iii) "cannabis (hemp)" means—

(a) xxx xxx xxx

(b) ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated"

22. Now, upon perusal of the provisions of Section 2(b) of the NDPS Act and considering the evidence of the witnesses vis-à-vis the panchnama, it is not established with certainty as to whether the actual muddamal seized from the possession of the respondent was ganja or hemp. There is no specific opinion of the Chemical Analyser on record establishing that the seized substance was ganja. In fact, it

was mentioned that it was a leaf, fruits and therefore after considering all this fact, it is not proved by the prosecution in its true and proper perspective.

23. In view of the aforesaid circumstances, the Trial Court recorded a finding that the prosecution had failed to establish the basic ingredients of the offence against the present respondent. After considering the evidence on record and relying upon the decisions referred to in the impugned judgment, the Trial Court recorded cogent reasons and ultimately passed the impugned judgment and order of acquittal. Even, the Trial Court has observed that the prosecution has not complied with the mandatory provisions namely Sections 42(1)(2), 50, 55 and 57 of the NDPS Act and after referring the decisions of the Hon'ble Apex Court has rightly passed the impugned judgment and order of acquittal.

24. Further, on perusal of the record of the appeal, it transpires that the respondent-accused has established his innocence before the Trial Court and that, after due appreciation of the oral as well as documentary evidence and other material placed on record, the Trial Court has rightly passed the impugned judgment and order of acquittal. The findings recorded by the Trial Court are just, proper and in accordance with the settled principles of law and, therefore, no interference is warranted by this Court.

25. It is well settled by catena of decisions that the Appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded. However, Appellate Court must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of

innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of their innocence is further reinforced, reaffirmed and strengthened by the trial Court.

26. Further, if two reasonable conclusions are possible on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal recorded by the trial Court. Further, while exercising the powers in appeal against the order of acquittal, the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the Appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the Appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether the accused are connected with the commission of the crime with which he is charged.

27. The scope and principles are enunciated by the Hon'ble Apex Court in case of ***Chandrappa and others Vs. State of Karnataka*** reported in **(2007) 4 SCC 415**, more particularly **paragraph Nos.**

42 and 43, which was subsequently re-affirmed by the Hon'ble Apex Court **Rajesh Prasad Vs. State of Bihar and another**, reported in **[2022] 3 SCC 471**, wherein, the Hon'ble Apex Court has enunciated the general principles in case of acquittal, more particularly in **paragraph No. 26** the general principles are set out by the Hon'ble Apex Court based upon various decisions of the Hon'ble Apex Court. Then in case of **Babu Sahebagouda Rudragoudar Vs. State of Karnataka**, reported in **AIR 2024 SC 2252 = (2024) 8 SCC 149**, the Hon'ble Apex Court has dealt with the similar issue, more particularly, in **paragraph Nos. 37 to 40**. Hence, I am in complete agreement with the findings recorded by the trial Court.

28. It is also worthwhile to refer to the recent decision of the Hon'ble Supreme Court in the case of **Ramesh vs. State of Karnataka**, reported in **[2024] 9 SCC 169**, wherein the Hon'ble Supreme Court has held and observed in paras-20 and 21 as under:-

"20. At this stage, it would be relevant to refer to the general principles culled out by this Court in Chandrappa and others vs. State of Karnataka , regarding the power of the appellate Court while dealing with an appeal against a judgment of acquittal. The principles read thus:

"42. (1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive

powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasize the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

21. In Rajendra Prasad v. State of Bihar, a three-Judge Bench of this Court pointed out that it would be essential for the High Court, in an appeal against acquittal, to clearly indicate firm and weighty grounds from the record for discarding the reasons of the Trial Court in order to be able to reach a contrary conclusion of guilt of the accused. It was further observed that, in an appeal against acquittal, it would not be legally sufficient for the High Court to take a contrary view about the credibility of witnesses and it is absolutely imperative that the High Court convincingly finds it well-nigh impossible for the Trial Court to reject their testimony. This was identified as the quintessence of the jurisprudential aspect of criminal justice. Viewed in this light, the brusque approach of the High Court in dealing with the appeal, resulting in the conviction of Appellant Nos. 1 and 2, reversing the cogent and well-considered judgment of acquittal by the Trial Court giving them the benefit of doubt, cannot be sustained."

29. Considering the entire evidence on record, it clearly appears that there is no credible evidence to connect the present accused with the alleged crime and the evidence on record is not so convincing to prove beyond reasonable doubt that the accused has committed the

alleged crime. Therefore, the accused cannot be convicted on the evidence on record.

30. On perusal of the impugned judgment and order, it clearly transpires that the trial Court has not committed any error of fact and law in appreciating the evidence on record and in acquitting the accused from the charges levelled against them. Even on re-appreciation of the evidence, it clearly transpires that the prosecution has miserably failed to prove the charge levelled against the accused beyond reasonable doubt. Therefore, the impugned judgment and order of the trial Court is sustainable and the present appeal is liable to be dismissed.

31. In view of the above, the present appeal is devoid of merits and it deserves to be dismissed. Resultantly, it is dismissed. The impugned judgment and order of acquittal passed by the Trial Court is hereby confirmed. Bail bond stands cancelled. Record and proceedings be sent back to the concerned Trial Court forthwith.

(HEMANT M. PRACHCHAK,J)

V.R. PANCHAL