

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 14.01.2020

+ CRL.A. 139/2017 & CRL. M. (BAIL) NO.1401/2018

INNOCENT UZOMA Appellant

versus

STATE Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. J. S. Kushwaha
For the Respondent : Mr. Amit Gupta, APP for State.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The appellant has filed the present appeal impugning a judgment dated 23.12.2016 passed by the ASJ, Special Judge (NDPS), Saket Courts, whereby the appellant was convicted under Section 21(b) of the Narcotics, Drugs and Psychotropic Substances Act, 1985 (hereafter the 'NDPS Act') and Section 14(a) of the Foreigners Act, 1946. By an order dated 26.12.2016, the appellant was sentenced to undergo four years of rigorous imprisonment and a fine of ₹50,000/- for the offence under Section 21 of the NDPS Act. And, in default of payment of the said fine, to undergo simple imprisonment for a further period of three months.

He was further sentenced to undergo rigorous imprisonment for a period three years and a fine of ₹10,000/- for the offence under Section 14(a) of the Foreigners Act, 1946. And, in default of payment of the said fine, to undergo simple imprisonment for a period of one month. Both sentences were ordered to run concurrently.

2. The Trial Court had found that the appellant was guilty of being found in possession of 25 grams of cocaine. The principal controversy to be addressed in this appeal is whether the appellant's search conducted by police officials – which yielded 25 grams of cocaine – was not compliant with the provisions of Section 50 of the NDPS Act, as it was not conducted in the presence of Gazetted Officer/Magistrate.

Context

3. Briefly, the case of the prosecution is that on 04.06.2015, SI Shiv Darshan Singh, Narcotic Cell, Crime Branch, Daryaganj was informed by a secret informer that a person namely Innocent, resident of the Arjun Nagar area, is a supplier of cocaine in Delhi and would be coming to Sudarshan Marg, Gautam Nagar, Delhi between 06:30 pm and 07:00 pm to supply cocaine. A raiding party was constituted, which reached the spot at about 06:30 pm. At 06:55 pm, the informer pointed towards the accused who was wearing black t-shirt and green capris. When the accused was 5-7 steps away from the police officials, he became suspicious and started going back. At this moment, he was apprehended by the raiding team.

4. SI Shiv Darshan informed the accused that his search was going to be conducted. He also explained to the accused his legal right to be searched before a Magistrate or a Gazetted officer. However, the appellant declined the offer of being searched before a Gazetted Office/Magistrate. SI Shiv Darshan asked some passersby to join the proceedings, but none agreed. On search of the accused, a semi-transparent polythene pouch tied with a rubber band was recovered from the left pocket of the accused's capris. It contained a white coloured substance. Upon testing using the field-testing kit, the said substance, which weighed 25 grams, tested positive for cocaine.

5. Thereafter, SI Shiv Darshan prepared the *rukka* and sent HC Satyawar to PS, Crime Branch for registration of an FIR. After registration of the FIR, investigation was assigned to SI Rajveer Singh. Investigation revealed that the appellant's name was Innocent Uzoma. He was a Nigerian national and had entered India on a seminar/conference visa, which was valid up to 19.11.2014. He had overstayed the term of his visa and was thus, an illegal migrant.

6. Charges for commission of offences under Section 21(b) of the NDPS Act and Section 14(a) of the Foreigners Act, 1946 were framed against the accused, to which he claimed not guilty. Accordingly, the matter was set down for trial.

7. The Trial Court found that the prosecution had established, beyond reasonable doubt, that the appellant was found in possession of 25 gms of cocaine and thus, found him guilty of the offence under

Section 21(b) of the NDPS Act. Further, the Trial Court also found that the appellant was guilty of exceeding his stay in India beyond the term of the visa issued to him and therefore, was guilty of the offence under Section 14(a) of the Foreigners Act, 1946.

Evidence

8. The prosecution examined twelve witnesses, while the defence chose to not examine any witnesses.

9. HC Raj Kumar, PS Crime Branch deposed as PW-1. He stated that on 04.06.2015, he was working as a duty officer at Crime Branch from 08:00 pm to 08:00 am. At about 11:15 pm, HC Satyawan came along with HC Sanjeev Kumar and a *rukka*. The same was for registration of FIR sent by SI Shiv Darshan. He, thereafter, lodged DD No. 27 in this regard. On the basis of the *rukka*, he got a computerized FIR recorded. PW-1 then identified his endorsement on the same. In his cross-examination, he stated that he started recording the FIR at 11:15 pm and informed the FIR number to the SHO at the same time. He concluded recording the same at about 12:35 am.

10. HC Narender, Narcotic Cell, Daryaganj deposed as PW-2. He deposed that he had taken the sample parcels on 08.06.2015 and had deposited the same with the FSL. The acknowledgement slip issued by FSL was handed over to him by HC Jag Narayan. In his cross-examination, he denied having been authorized by the inspector in writing to collect the samples from the aforesaid MHC (M).

11. HC Jag Narayan, PS Crime Branch, Malviya Nagar deposed as PW-3. He deposed that at about 11:35 pm, Insp. Ravinder Kumar Sharma had called him along with register no. 19 to his office. He made entry in the said register at serial no. 2319 and deposited the *pullanda* in the *malkhana*. In his cross-examination, he stated that the SHO had already written the FIR number on the *pullandas* when PW-3 was called by him at about 11:35 pm. He completed recording the requisite information in register no. 19 at about 12:00 am.

12. Ct. Rajeev Kumar, Narcotics Cell, Crime Branch deposed as PW-4. He deposed that on 05.06.2015, the report under Section 57 of the NPDS Act regarding the seizure of the contraband and arrest of the accused was received in his office and he made entry in the diary register vide Ex. PW4/C and Ex. PW4/D.

13. HC Satyawan, Sector-16, Rohini deposed as PW-5. He deposed that on 04.06.2015, he was posted at Narcotic Cell, Daryaganj. He, along with other officials, constituted a raiding party and left for the spot at about 05:30 pm. At the Shantivan red light and near AIIMS Metro Station, they requested passersby to join the raiding party, however, no one agreed to do so. After apprehending the accused, PW-5 stated that the accused was made aware of his legal rights and was informed that if he so wanted, his search would be conducted before a Gazetted officer or a Magistrate. SI Shivdarshan gave a written notice under Section 50 of the NDPS Act to the accused. The accused informed the team that he was illiterate and could not read and write. Thereafter, SI Shivdarshan recorded his response to the notice on the basis of

whatever was told to him by the accused. He stated that on search of the accused, a polythene bag was recovered which contained white powder, from the left side pocket of the accused's capris. The same tested positive for cocaine using the field-testing kit. It weighed 25 gms. In his cross-examination, he stated that the secret information was given to SI Shivdarshan at about 04:30 pm on 04.06.2015. The informer informed SI Shivdarshan that Innocent Uzoma used to supply cocaine only in South Delhi. However, the informer did not give any information regarding the persons to whom the accused supplied the said contraband. In his cross-examination, he deposed that the information of the contents of the notice under Section 50 of the NDPS Act was informed to the accused in English language. The said notice was given to the accused at about 07:30 pm. The same was prepared near the street light near the transformer. PW-5 stated that a mobile phone was recovered from the left side pocket of the accused's capris. He stated that the seizure memo was not prepared in his presence, as he had taken the *tehrir* for registration of the FIR. The *rukka* was prepared while sitting on the footpath, where the accused was sitting with the police officials. PW-5 stated that he was not carrying his mobile phone that day, but SI Shivdarshan was carrying the same. SI Shivdarshan informed Inspector Vivek Pathak about the seizure and arrest at about 07:15 pm.

14. HC Laxman Prasad, AHTU, Crime Branch, Sector-16, Rohini deposed as PW-7. He stated that on 04.06.2015 at about 04:25 pm, SI Shivdarshan told him and HC Satyawan about the secret information

that the accused would come to the spot to supply cocaine. When they reached the spot, they saw one Nigerian person coming from the side of Yusuf Sarai on foot wearing green coloured capris and a black coloured t-shirt. The accused was apprehended by the raiding team at about 07:00 pm. Thereafter, SI Shivdarshan introduced himself and other members of the raiding party to the accused, who identified himself as Innocent Uzoma. SI Shivdarshan informed the accused about his legal right to be searched before a Gazetted officer or a Magistrate. A notice under Section 50 of the NDPS Act was prepared by SI Shivdarshan and a carbon copy of the same was given to the accused. Since the accused was illiterate, SI Shivdarshan read the contents of the same out to the accused. The accused's refusal was written on the said notice as was dictated to SI Shivdarshan by the accused. PW-7 stated that thereafter, the accused's search was conducted, consequent to which, a transparent polythene containing cocaine was found from the left side pocket of the capris worn by the accused. In his cross-examination, PW-7 affirmed that the IO had not asked any shopkeeper or permanent employee of the Metro Station to join the raid. He could not recollect whether a mobile phone was recovered from the possession of the accused on his search. He stated that neither the raiding team nor the IO had their mobile phones with them, as they had left the same in the office. All documents were prepared by the IO while sitting on the footpath.

15. Inspector Vivek Pathak, STF, Malviya Nagar Crime Branch deposed as PW-8. He deposed that at about 04:45, SI Shiv Darshan along with an informer came to his office and thereafter, PW-8 was

informed that the accused would be coming to the spot to deliver a consignment of Cocaine. In his cross-examination, PW-8 stated that the informer had not disclosed the complete address of the accused. He stated that during investigation, the accused was highly uncooperative and even refused to disclose his address.

16. SI Shiv Darshan, STF, Crime Branch deposed as PW-10. He deposed that on 04.06.2015, he was posted at the Narcotics Cell, Crime Branch, Daryaganj. An informer came in at about 04:30 pm and told him that the accused will deliver cocaine between 06:30 pm and 07:00 pm at Sudarshan Marg, Gautam Nagar behind AIIMS near Transformer, near Plot no. 112-A. He constituted a raiding party. On the way, he had asked four to five passersby to join the proceedings, but none agreed to do so. Thereafter, on the basis of information given by the secret informer, they apprehended the accused at about 07:00 pm. PW-10, thereafter, informed the accused of his legal rights and his right to be searched before a Gazetted Officer or a Magistrate. PW-10 stated that the accused informed him that he can read and understand English, but cannot write the same. PW-10 then prepared a notice under Section 50 of the NDPS Act. On the accused being searched, 25 gms of cocaine was found in his pocket. Thereafter, HC Satyavan and HC Sanjeev Kumar left the spot at about 11:00 pm.

17. In his cross-examination, PW-10 stated that he had inquired from the secret informer as to who the accused used to supply Cocaine to in Delhi. He affirmed that none of the members of the raiding party were carrying their phones on that day. Further, he stated that he prepared the

notice under Section 50 of the NDPS Act while sitting on the footpath and the seizure memo was prepared by him on the bonnet of the Gypsy, under the light of the electric pole. No mobile phone was recovered from the possession of the accused.

18. SI Rajveer Singh, Parliament House Security deposed as PW-12. He deposed that on the intervening night of 04.06.2015 and 05.06.2015 at about 01:15 am, HC Satyawan handed him a computerized copy of FIR No. 84/15 dated 04.06.2015 and an original *rukka*. In his cross-examination, he stated that he came to know about the case through HC Satyawan. He affirmed that no mobile phone was recovered from the accused during his search.

Submissions

19. At the outset, Mr. Kushwaha, learned counsel appearing for the appellant clarified that he does not wish to contest the appellant's conviction under Section 14(a) of the Foreigners Act, 1946. He stated that the appellant was sentenced to three years of rigorous imprisonment and a fine of ₹10,000/- for committing the offence under Section 14 of the Foreigners Act, 1946 and the appellant has served the said sentence. He limited the challenge in the present appeal to the appellant's conviction under Section 21(b) of the NDPS Act. He submitted that although the appellant had almost completed the sentence awarded for the commission of the said offence, the appellant, nonetheless, wished to contest his conviction as he was not guilty of committing any such offence.

20. The learned counsel for the appellant has assailed the appellant's conviction on, essentially, three grounds. First, that the public witnesses had not been joined in the search and seizure proceedings, despite the raiding party having sufficient time to do so. He submitted that this raised doubts as to the case set up by the prosecution. Second, there were inconsistencies in the testimonies of various witnesses. It was pointed out that whereas PW 7 deposed that cocaine was recovered from the left pocket of the accused, PW 10 testified that cocaine was recovered from the right pocket of the half trousers worn by the appellant. In addition, PW 5 had deposed that a mobile phone had been recovered from the left side pocket of the green coloured capris worn by the accused, but the same was denied by PW 10, in his cross-examination. Mr. Kushwaha also pointed out that according to PW 7, none of the members of the raiding team were carrying any mobile phones when they left the office. He submitted that it was impossible to believe that the entire raiding team would not carry any mobile phones. He submitted that investigation into the call details of the mobile phones of the raiding team would disclose that they were not present at the spot, from where the appellant was allegedly apprehended. Third, he submitted that mandatory provisions of Section 50 of the NDPS Act were not complied with, as the notice allegedly served did not state that a search before a Gazetted Officer or a Magistrate shall be arranged. Further, the search was not conducted in the presence of a Gazetted Officer or a Magistrate. He relied on the decision of the Supreme Court in *Arif Khan @ Agha Khan v. State of Uttarakhand: (2018) 18 SCC 380* in support of his contention.

Discussion and Conclusion

21. This Court is not persuaded to accept that the appellant is liable to be acquitted on account of the inconsistencies in the testimony of the witnesses. Whereas PW 7 had deposed that “*one semi-transparent polythene tied with rubber band was recovered from the left pocket of the Capri pant, containing some white powder*”; PW10 stated, in his cross-examination, that “*he had checked both the pockets of green coloured capri. Beside the contraband, there was a purse in the right side of the pocket*”. Although on first blush, it does appear that there is a contradiction as to whether the contraband was recovered from the right pocket of the capris or the left pocket of the capris, worn by the appellant at the material time. However, on a closer examination, it is apparent that there is no contradiction in the testimony of PW7 and PW10 in this regard. In his examination in chief, PW 10 had deposed that “*on the formal search the accused, on which one semi-transparent polythene was recovered from the left pocket of Capri of accused, tied with rubber band containing white powder*”. This is consistent with the testimony of PW7. The statement made in the cross-examination must be read in its context. PW10 had clarified that he had checked both the pockets and besides the contraband, a purse was recovered from the right pocket of the trousers worn by the appellant. This ought not to be read to mean that the contraband was recovered from the right pocket of the capris worn by the appellant.

22. Insofar as the recovery of mobile phone is concerned, there is inconsistency in the testimony of PW 5 and other witnesses. PW 5 had

stated that a mobile phone was recovered from the left side pocket of the capris worn by the appellant. However, PW 7 and PW 12 had denied that any mobile phone had been recovered from the appellant. PW 7, in his cross-examination, stated that he could not recall whether any mobile phone had been recovered from the appellant. Although discrepancy in this regard cannot be ignored as being irrelevant, this Court is unable to accept that it raises any doubt as to the possession of the contraband (25 grams of cocaine) by the appellant at the material time.

23. Insofar as not joining any independent witnesses is concerned, there is considerable merit in this contention. It was apposite for the raiding team to include public witnesses. The testimony that certain passersby at a red light and at the spot were asked to join the proceedings does reflect the casual approach of the concerned officials. The raiding team had sufficient time to ensure that independent witnesses are joined in the proceedings. The appellant was apprehended from a crowded spot and there were number of establishments nearby and, thus, there would be no dearth of public witnesses. Having stated the above, this Court is unable to accept that the testimonies of the police witnesses must be disregarded on account of not including of public witnesses in the proceedings. The testimonies of the raiding team – H.C. Laxman Prasad (PW 7), H.C. Satyawa (PW 5) and SI Shiv Darshan (PW 10) – are consistent with regard to recovery of cocaine from the appellant. There is also no doubt that samples drawn from the

substances recovered were not tampered with and examination of the same had revealed the substance to be cocaine.

24. The only question that remains to be addressed is whether the provisions of Section 50 of the NDPS Act were complied with. The learned counsel appearing for the appellant had contended that the notice under Section 50 of the NDPS Act served on the appellant was defective and further that the search was not conducted before a Magistrate or a Gazette Officer.

25. The notice served on the appellant, *inter alia*, stated as under:-

“.... *Before conducting your search it is your legal right that your search could be taken before a Magistrate or a Gazetted officer for which arrangement can be made....*”. Mr. Kushwaha contended that the use of the word ‘can’ in the aforementioned sentence rendered the notice defective and not compliant with Section 50 of the NDPS Act. He submitted that sub-section (1) of Section 50 of the NDPS Act used the word ‘shall’ and it was expressly indicated that the officer authorized under Section 42 of the Act ‘shall’ take the person to the nearest Gazetted Officer or to the nearest Magistrate.

26. The aforesaid contention is unmerited. It is not disputed that the provisions of Section 50 of the NDPS Act are mandatory and must be strictly complied. The Supreme Court in *The State of Punjab v. Baldev Singh: 1999 6 SCC 172* had explained that it is imperative that a person proposed to be searched be informed of his right under Sub-Section (1) of Section 50 of the NDPS Act of being taken to the nearest Gazetted

Officer or the nearest Magistrate for conducting his/her search. In the present case, the notice issued under Section 50 of the NDPS Act (Ex. PW 5/A) clearly informed the appellant of such right. The use of the word 'can' in the statement 'before conducting a search it is your legal right that a search can be conducted for which arrangement 'can be made' instead of the word 'shall' is irrelevant, because the appellant was duly communicated that he had a legal right to be searched before a Magistrate or a Gazetted Officer.

27. The next question to be addressed is whether there was non-compliance of the provisions of Section 50 of the NDPS Act as the appellant was not searched before a Magistrate or a Gazetted officer. It is contended on behalf of the appellant that notwithstanding that the appellant had not opted to be searched before a Magistrate or a Gazetted Officer, it was, nonetheless, imperative that the search be conducted before a Magistrate or a Gazetted Officer and failure in this regard rendered the appellant liable to be acquitted of the offence of possessing cocaine, since the said charge rested solely on the allegation that the search of the appellant had revealed that he was in possession of 25 grams of cocaine.

28. Before proceeding further, it would be relevant to refer to Section 50 of the NDPS Act, which is set out below:-

“50. Conditions under which search of persons shall be conducted.—(1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without

unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the gazetted officer or the Magistrate referred to in sub-section (1).

(3) The gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973.

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.”

29. In *State of Punjab v. Baldev Singh: 1999 6 SCC 172*, the Constitution Bench of the Supreme had, *inter alia*, held as under: -

“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 official concerned 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 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. 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 the 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 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.

(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 case [(1974) 1 SCC 345 : 1974 SCC (Tax) 114] 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 case [(1994) 6 SCC 569 : 1995 SCC (Cri) 32] correctly interprets and distinguishes the judgment in Pooran Mal case [(1974) 1 SCC 345 : 1974 SCC (Tax) 114] and the broad observations made in Pirithi Chand case [(1996) 2 SCC 37 : 1996 SCC (Cri) 210] and Jasbir Singh case [(1996) 1 SCC 288 : 1996 SCC (Cri) 1] are not in tune with the correct exposition of law as laid down in Pooran Mal case [(1974) 1 SCC 345 : 1974 SCC (Tax) 114].”

30. There is no dispute that it was necessary for an authorized officer to inform the person concerned, before he is searched, about his right that if he so requires, he shall be searched before a Gazetted Officer or a Magistrate. Failure to comply with the same would render the recovery of the illicit articles suspect and vitiate the conviction of the accused, if he is convicted only on the basis of possessing the contraband recovered during the search conducted without informing him of his rights.

31. In *Vijaysinh Chandubha Jadeja v. State of Gujarat: (2011) 1 SCC 609*, the Constitution Bench of the Supreme Court considered the question whether compliance of Section 50 of the NDPS Act would be

sufficient. The Court answered in the negative and held that the obligations of the authorized officer under Section 50 (1) of the NDPS Act is mandatory and requires strict compliance. The relevant extract of the said decision is set out 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.

30. As observed in Presidential Poll, In re [(1974) 2 SCC 33] : (SCC p. 49, para 13)

“13. ... 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.’”

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 [(2000) 1 SCC 707 : 2000 SCC (Cri) 300] and Prabha Shankar Dubey [(2004) 2 SCC 56 : 2004 SCC (Cri) 420] 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 [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] . 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.

33. Accordingly, we answer the reference in the manner aforesaid. The appeals shall, now, be placed before the appropriate Bench for disposal.”

32. In terms of Section 50(1) of the NDPS Act where an officer is about to search a person under the provisions of Sections 41, 42 or 43 of the NDPS Act, he shall, *if such person requires*, take such person without unnecessarily delay to the nearest Gazetted Officer or the nearest Magistrate. Whilst it is clear that the authorized officer is required to take the person concerned to the nearest

Magistrate/Gazetted Officer if the person so requires; it is difficult to interpret Section 50(1) of the NDPS Act to read that it is mandatory that in all cases, search must be conducted before a Gazetted Officer or a Magistrate. Clearly, if Section 50(1) of NDPS Act is read to mean that it is necessary in all cases that a search be conducted before a Magistrate or a Gazetted Officer, there would be no purpose in informing the suspect of his right to be searched before such officers. The entire object of informing the suspect, who is proposed to be searched, about his/her right is to enable him to exercise this right – the right to be searched before a Magistrate or a Gazette Officer. In *Vijaysinh Chandubha Jadeja* (*supra*), the Supreme Court had also observed that the obligations of the authorized officer under Section 50(1) of the NDPS Act is mandatory and requires strict compliance. Failure to comply with the said provision would render the recovery of the illicit article suspect and vitiate the conviction. However, the Court had also observed that “*Thereafter, the suspect may or may not choose to exercise the right provided to him under the said proviso*”.

33. In *Ashok Kumar Sharma v. State of Rajasthan: (2013) 2 SCC 67*, the Supreme Court considered a case where the authorized officer had merely informed the accused (appellant therein) that he can be searched before any Magistrate or Gazetted Officer, if he so wished. The Supreme Court held that the same did not comply with the mandatory procedure of Section 50 of the NDPS Act and, thus, vitiated the entire proceedings. The Court reasoned that the accused was only informed that he could be searched before a Magistrate or a Gazetted

Officer if he so wished, however, the fact that the accused had a right under Section 50 of the NDPS Act to be searched before the Gazetted Officer or a Magistrate was not made known to him. The relevant extract of the said decision, is set out below: -

“7. We are in this case concerned only with the question whether PW 1, the officer who had conducted the search on the person of the appellant had followed the procedure laid down under Section 50 of the NDPS Act. On this question, there were conflicts of views by different Benches of this Court and the matter was referred to a five-Judge Bench. This Court in *Vijaysinh Chandubha Jadeja* [(2011) 1 SCC 609 : (2011) 1 SCC (Cri) 497] answered the question, stating that it is imperative on the part of the officer to apprise the person intended to be searched of his right under Section 50 of the NDPS Act, to be searched before a gazetted officer or a Magistrate. This Court also held that it is mandatory on the part of the authorised officer to make the accused aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him and this mandatory provision requires strict compliance. The suspect may or may not choose to exercise the right provided to him under the said provision, but so far as the officer is concerned, an obligation is cast on him under Section 50 of the NDPS Act to apprise the person of his right to be searched before a gazetted officer or a Magistrate. The question, as to whether this procedure has been complied with or not, in this case the deposition of PW 1 assumes importance, which reads as follows:

“He was apprised while telling the reason of being searched that he could be searched before any Magistrate or any gazetted officer if he wished. He gave his consent in written and said that I have faith on you,

you can search me. Fard regarding apprising and consent is Ext. P-3 on which I put my signature from A to B and the accused put his signature from C to D. E to F is the endorsement of the consent of the accused and G to H is signature, which has been written by the accused.”

The above statement of PW 1 would clearly indicate that he had only informed the accused that he could be searched before any Magistrate or a gazetted officer if he so wished. The fact that the accused person has a right under Section 50 of the NDPS Act to be searched before a gazetted officer or a Magistrate was not made known to him. We are of the view that there is an obligation on the part of the empowered officer to inform the accused or the suspect of the existence of such a right to be searched before a gazetted officer or a Magistrate, if so required by him. Only if the suspect does not choose to exercise the right in spite of apprising him of his right, the empowered officer could conduct the search on the body of the person.

8. We may, in this connection, also examine the general maxim *ignorantia juris non excusat* and whether in such a situation the accused could take a defence that he was unaware of the procedure laid down in Section 50 of the NDPS Act. Ignorance does not normally afford any defence under the criminal law, since a person is presumed to know the law. Undisputedly ignorance of law often in reality exists, though as a general proposition, it is true, that knowledge of law must be imputed to every person. But it must be too much to impute knowledge in certain situations, for example, we cannot expect a rustic villager, totally illiterate, a poor man on the street, to be aware of the various laws laid down in this country, leave aside the NDPS Act. We notice that this fact is also within the knowledge of the legislature, possibly for that reason the legislature in its

wisdom imposed an obligation on the authorised officer acting under Section 50 of the NDPS Act to inform the suspect of his right under Section 50 to be searched in the presence of a gazetted officer or a Magistrate warranting strict compliance with that procedure.”

34. The above decision also makes it clear that the mandate of Section 50(1) of the NDPS Act is to ensure that the authorized officer informs the person proposed to be searched about his right to be searched before a Magistrate or a Gazetted Officer. The authorized officer is also obliged to take the concerned person (the suspect) to the nearest Gazetted Officer of any departments mentioned in Section 42 of the NDPS Act or to the nearest Magistrate, if such person so requires. In *Vijaysinh Chandubha Jadeja (supra)*, the Supreme Court had also observed that though Section 50 of the NDPS Act gives the option to the empowered officer to take the person suspect either before the nearest Gazetted Officer or to a Magistrate; in the first instance, an endeavor should be made to produce the suspect before the nearest Magistrate. This, obviously, would follow only ‘*if the person so requires*’.

35. In view of the decisions as mentioned above, it is no longer *res integra* that it is mandatory to comply with Section 50 of the NDPS Act. There is also no ambiguity as to manner in which Section 50 of the NDPC Act is required to be complied. Plainly, there is no requirement to conduct the search in the presence of a Magistrate or Gazetted Officer, if the person proposed to be searched did not so desire, after being informed of his right in this regard. The words “*if such person so*

requires” as used in Section 50(1) of the NDPS Act make it amply clear that the person to be searched would be taken before a Magistrate or a Gazetted Officer, only if he so requires.

36. In terms of Sub-section (2) of Section 50 of the NDPS Act, the Authorised Officer is empowered to detain the person proposed to be searched until he can bring him before the Gazetted Officer/Magistrate, as referred to in Sub-section (1) of Section 50 of the NDPS Act. The words “such requisition”, as mentioned in the opening sentence of Sub-section (2) of Section 50 of the NDPS Act, obviously refers to the person proposed to be searched electing to exercise his right to be searched before a Gazetted Officer / Magistrate.

37. This also is in conformity with the scheme that makes it amply clear that if the person proposed to be searched requires that search be conducted before a Gazetted Officer or a Magistrate, the authorised officer is required to take such person to the nearest Gazetted Officer/Magistrate. In terms of Sub-section (3) of Section 50 of the NDPS Act, a Gazetted Officer or a Magistrate may discharge any person brought before him/her, if he/she finds no reasonable grounds for conducting such search. Sub-section (5) and (6) were introduced in Section 50 of the NDPS Act by virtue of the Narcotics, Drugs and Psychotropic Substances (Amendment) Act, 2001 enacted on 27.09.2001 and came into effect from 02.10.2001. The said Sub-sections provided option to the authorised officer to search a person notwithstanding the said persons (suspect) requiring to be searched before a Magistrate/Gazetted Officer. However, the authorised person

could do so only if the conditions as specified under Sub-section (5) of Section 50 of the NDPS Act were met, that is, if it is not possible to take the person to be searched to the nearest Gazetted Officer/Magistrate without the possibility of the person being searched parting with the possession of any narcotic drugs, psychotropic substance or any controlled substance or article or document. In terms of Sub-section (6) of Section 50 of the NDPS Act, the authorised officer is also required to record reasons for his belief that necessitated him to search the suspect without taking him to the nearest Gazetted Officer or Magistrate. Such reasons are required to be recorded within seventy-two hours of the search being conducted and a copy of the same is required to be sent by the authorised officer to his immediate official superior. Given the scheme of Section 50 of the NDPS Act, it is difficult to accept that notwithstanding that a suspect must be searched only before a Magistrate/Gazetted Officer, even though he does not so require, after he is apprised of his rights in this regard.

38. It is contended on behalf of the appellant that the Supreme Court in *Arif Khan @ Agha (supra)* has expanded and amplified the sweep of Section 50 of the NDPS Act. In that case, the prosecution claimed that the accused had admitted that he was in possession of *Charas*. The accused was apprehended and he was informed by the police personnel that he has a legal right to be searched in presence of a gazetted officer or a Magistrate, to which the accused replied that “*he had faith in the raiding party*” and consented to be searched by them. Thereafter, the raiding party searched the accused, which yielded *Charas* weighing

around 2.5 kilograms. The accused was charged, tried and found guilty for the offence under Section 20 of the NDPS Act. He was sentenced to rigorous imprisonment for a period of ten years and a fine of ₹1,00,000/. The accused, thereafter, filed an appeal before the Uttarakhand High Court, which was dismissed. Aggrieved by the said decision of the High Court of Uttarakhand, the accused appealed to the Supreme Court. The Supreme Court allowed the appeal and acquitted the appellant of commission of an offence under Section 20 of the NDPS Act. The relevant extract of the said decision is set out below:-

“16. The short question which arises for consideration in the appeal is whether the search/recovery made by the police officials from the appellant-accused of the alleged contraband (charas) can be held to be in accordance with the procedure prescribed under Section 50 of the NDPS Act.

17. In other words, the question that arises for consideration in this appeal is whether the prosecution was able to prove that the procedure prescribed under Section 50 of the NDPS Act was followed by the police officials in letter and spirit while making the search and recovery of the contraband “charas” from the appellant-accused.

18. What is the true scope and object of Section 50 of the NDPS Act, what are the duties, obligation and the powers conferred on the authorities under Section 50 and whether the compliance of requirements of Section 50 are mandatory or directory, remain no more res integra and are now settled by the two decisions of the Constitution Bench of this Court in State of Punjab v. Baldev Singh [State of Punjab v. Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] and Vijaysinh Chandubha Jadeja [Vijaysinh

Chandubha Jadeja v. State of Gujarat, (2011) 1 SCC 609 : (2011) 1 SCC (Cri) 497].

19. Indeed, the latter Constitution Bench decision rendered in Vijaysinh Chandubha Jadeja [Vijaysinh Chandubha Jadeja v. State of Gujarat, (2011) 1 SCC 609 : (2011) 1 SCC (Cri) 497] has settled the aforementioned questions after taking into considerations all previous case law on the subject.

20. Their Lordships have held in Vijaysinh Chandubha Jadeja [Vijaysinh Chandubha Jadeja v. State of Gujarat, (2011) 1 SCC 609 : (2011) 1 SCC (Cri) 497] that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the police officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorised officer to make the suspect aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a gazetted officer or a Magistrate. (See also Ashok Kumar Sharma v. State of Rajasthan [Ashok Kumar Sharma v. State of Rajasthan, (2013) 2 SCC 67 : (2013) 1 SCC (Cri) 829] and Narcotics Control Bureau v. Sukh Dev Raj Sodhi [Narcotics Control Bureau v. Sukh Dev Raj Sodhi, (2011) 6 SCC 392 : (2011) 2 SCC (Cri) 981].)

21. Keeping in view the aforementioned principle of law laid down by this Court, we have to examine the question arising in this case as to whether the

prosecution followed the mandatory procedure prescribed under Section 50 of the NDPS Act while making search and recovery of the contraband “charas” from the appellant and, if so, whether it was done in the presence of a Magistrate or a gazetted officer so as to make the search and recovery of contraband “charas” from the appellant in conformity with the requirements of Section 50.

22. In our considered view, the evidence adduced by the prosecution neither suggested and nor proved that the search and the recovery was made from the appellant in the presence of either a Magistrate or a gazetted officer.

23. It is the case of the prosecution and which found acceptance by the two courts below that since the appellant-accused was apprised of his right to be searched in the presence of either a Magistrate or a gazetted officer but despite telling him about his legal right available to him under Section 50 in relation to the search, the appellant-accused gave his consent in writing to be searched by the police officials (raiding party), the two courts below came to a conclusion that the requirements of Section 50 stood fully complied with and hence the appellant was liable to be convicted for the offence punishable under the NDPS Act.

24. We do not agree to this finding of the two courts below as, in our opinion, a search and recovery made from the appellant of the alleged contraband “charas” does not satisfy the mandatory requirements of Section 50 as held by this Court in *Vijaysinh Chandubha Jadeja* [*Vijaysinh Chandubha Jadeja v. State of Gujarat*, (2011) 1 SCC 609 : (2011) 1 SCC (Cri) 497] . This we say for the following reasons:

24.1. First, it is an admitted fact emerging from the record of the case that the appellant was not produced before any Magistrate or gazetted officer.

24.2. Second, it is also an admitted fact that due to the aforementioned first reason, the search and recovery of

the contraband “charas” was not made from the appellant in the presence of any Magistrate or gazetted officer.

24.3. Third, it is also an admitted fact that none of the police officials of the raiding party, who recovered the contraband “charas” from him, was the gazetted officer and nor they could be and, therefore, they were not empowered to make search and recovery from the appellant of the contraband “charas” as provided under Section 50 of the NDPS Act except in the presence of either a Magistrate or a gazetted officer.

24.4. Fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the appellant in the presence of a Magistrate or a gazetted officer.

26. For the aforementioned reasons, we are of the considered opinion that the prosecution was not able to prove that the search and recovery of the contraband (charas) made from the appellant was in accordance with the procedure prescribed under Section 50 of the NDPS Act. Since the non-compliance of the mandatory procedure prescribed under Section 50 of the NDPS Act is fatal to the prosecution case and, in this case, we have found that the prosecution has failed to prove the compliance as required in law, the appellant is entitled to claim its benefit to seek his acquittal.

27. In the light of the foregoing discussion, the appeal succeeds and is allowed. The impugned judgment is set aside. As a consequence thereof, the appellant’s conviction is set aside and he is acquitted of the charges in question.”

39. The petition filed by the prosecution seeking review of the said

decision was also dismissed by the Supreme Court.

40. The question that needs to be considered is whether *Arif Khan @ Agha Khan (supra)* is an authority for the proposition that notwithstanding that the person proposed to be searched has, after being apprised of his right to be searched before a Gazetted Officer or a magistrate, declined the offer of being searched before a Gazetted Officer or a Magistrate; it is mandatory that he be searched before a Gazetted Officer/Magistrate.

41. In *Dharambir v. State: (2018) 254 DLT 354*, the Coordinate Bench of the High Court of Delhi held as under:

“44. It is undisputed, in the present case, that the search of the appellant, and his car, were conducted by the raiding party, and not by the Magistrate or a Gazetted Officer. Neither were the appellant and his car produced before any Magistrate or Gazetted Officer. The plea, of the respondent, that, as the appellant had been apprised of his right to have himself, and his car, searched by the Magistrate or a Gazetted Officer, and he had himself agreed to be searched by the raiding party, the mandate of Section 50 stood fulfilled, though attractive, cannot sustain, as an identical plea, raised in similar facts, stands negated in *Arif Khan (supra)*.”

42. In *Sikodh Mahto v. State: Crl.A. 660/2017 decided on 06.06.2019*, the co-ordinate bench of this Court of Delhi held as hereunder:

52. Insofar as the facts, essential for determination of the controversy in issue are concerned, the present case cannot be distinguished, in any manner, from *Arif Khan*

(supra). The only difference, on facts – which makes no difference to the legal position – is that, in Arif Khan (supra), the appellant Arif Khan, on being queried, confessed to carrying charas, whereas the appellants, in the present case, did not do so. In the present case, too, the alleged contraband charas was recovered from the bags of the appellants. In the present case, too, the search of the bags, and the seizure of charas therefrom, was effected by the raiding team, in the absence of any Magistrate or a Gazetted Officer. The witnesses, in the present case, have deposed that the I/O was not a Gazetted Officer, and that no Magistrate or Gazetted Officer was contacted. The ratio decidendi of Arif Khan (supra), as contained in para 28 of the said decision applies, therefore, to the present case on all fours. While it is true that Vijaysinh Chandubha Jadeja (supra) would seem to suggest that, once the accused was offered the option of having his search conducted in the presence of a Magistrate or a Gazetted Officer, and he declined the offer, Section 50 stood complied with, Arif Khan (supra), after noticing Vijaysinh Chandubha Jadeja (supra), as well as the law laid down therein, holds, nevertheless, that, even where the accused – as in that case, and as in the present case – declined the offer under Section 50 of the NDPS Act, the raiding team was, nevertheless, required to have the search of the appellant conducted in the presence of a Gazetted Officer or Magistrate. The said enunciation of the law binds me, by virtue of Article 141 of the Constitution of India.”

43. The aforesaid decisions in *Dharambir* (supra) and *Sikodh Mahto* (supra) were delivered on 13.11.2018 and 06.06.2019, respectively. However, a decision rendered by this Court prior to the said dates in *Ram Gopal v. State: Crl. A. 676/2017, decided on 16.10.2018* was not considered in the aforesaid decisions. In that case, the Court had noticed as under:-

“In *Arif Khan* (supra) on the facts of that case, the Court found that the mandatory procedure under Section 50 of the Act had not been satisfied. The said case was peculiar on its own facts and therefore, is distinguishable from the facts of the present case. In the present case, the prosecution has been able to prove its case through the testimonies of its witnesses and the documents produced on record.”

44. It is relevant to note that in *Arif Khan* (supra), the Supreme Court had referred to the decision of the Constitution Bench in *Vijaysinh Chandubha Jadeja* (supra) and observed that the search and recovery of the contraband made from the appellant in that case, did not satisfy the mandatory requirements of Section 50 of the NDPS Act, as enunciated by the Supreme Court in *Vijaysinh Chanduba Jadeja* (supra). It is, thus, apparent that the Court did not accept the prosecution’s case that the provisions of Section 50 of the NDPS Act were complied with.

45. In the facts of the present case, the prosecution has established that the appellant was apprised of his right to be searched before a Magistrate or a Gazetted officer but he did not require that his search be conducted before the said persons.

46. In view of the above, the appeal is dismissed. The pending application is also disposed of.

VIBHU BAKHRU, J

JANUARY 14, 2020

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