

**HIGH COURT OF ALLAHABAD****Bench : Hon'ble Mohd. Faiz Alam Khan, J.****Date of Decision: 22nd May 2024**

CRIMINAL APPEAL No. 2455 of 2019

**Khagendra Acharaya .....Appellant****Versus****State of U.P. ....Respondents****Legislation:**

Sections 8, 18, 23, 50, 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act)

Section 374(2) of the Code of Criminal Procedure (Cr.P.C.)

**Subject:** Criminal appeal challenging conviction and sentence for offences under NDPS Act; focusing on procedural lapses including non-compliance with Sections 50 and 52A NDPS Act, safe custody of the sample, and discrepancies in forensic examination.

**Headnotes:**

Criminal Law – Conviction under NDPS Act – Appeal against trial court's judgment convicting appellant for possession of 7 kg of 'charas' later identified as 'opium' – Alleged procedural lapses in compliance with mandatory provisions of Sections 50 and 52A NDPS Act – Safe custody of seized contraband not established – Discrepancies in forensic examination results – Appeal allowed, conviction and sentence set aside – Appellant acquitted due to non-compliance with mandatory legal requirements and reasonable doubt in prosecution's case. [Paras 1-50]

Compliance with Section 50 NDPS Act – Held – Non-compliance with Section 50 – Accused not properly informed of his right to be searched before a magistrate or gazetted officer – Seizure memo/arresting memo did not mention communication of this right – Evident improvement in witnesses' statements before trial court regarding communication of right – Conviction vitiated due to non-compliance with mandatory procedure under Section 50 NDPS Act. [Paras 21-34]

Compliance with Section 52A NDPS Act – Held – Violation of Section 52A – Samples not drawn before a magistrate as required – No link evidence for safe custody of samples – Sample found to be 'opium' rather than 'charas' –

Reasonable doubt on prosecution's case due to discrepancies and procedural lapses – Conviction not sustainable. [Paras 35-45]

Decision – Acquittal of Appellant – Appeal allowed – Conviction and sentence by trial court quashed – Appellant ordered to be released unless wanted in any other case – Appellant to furnish bond and sureties as per Section 437-A Cr.P.C. [Paras 46-49]

### **Referred Cases:**

- K. Mohanan vs. State of Kerala, [2001 (2) EFR 219 (S.C.)]
- State of Punjab vs. Baldev Singh, [(1999) 6 SCC 172]
- Dilip and another vs. State of M.P., [(2007) 1 SCC 450]
- Vijaysinh Chandubha Jadeja vs. State of Gujarat, [(2011) 1 SCC 609]
- Narcotics Control Bureau vs. Sukh Dev Raj Sodhi, [(2011) 6 SCC 392]
- Suresh and others vs. State of M.P., [(2013) 1 SCC 550]
- Ashok Kumar Sharma vs. State of Rajasthan, [(2013) 2 SCC 67]
- State of Rajasthan vs. Parmanand & ors., [2014 (2) JIC 136 (SC)]
- Arif Khan vs. State of Uttarakhand, [2018 SCC OnLine SC 459]
- Yusuf @ Asif vs. State, [MANU/SC/1142/2023]

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Hon'ble Mohd. Faiz Alam Khan, J.

1. Heard Shri Piyush Kumar Singh, learned counsel for the appellant as well as learned A.G.A. for the State and perused the record.

2. The instant criminal appeal under Section 374(2) Cr.P.C. has been preferred by the appellant- Khagendra Acharaya against the judgment and order of the trial court dated 31.07.2019 passed by Additional Sessions Judge, Court No.1, Balrampur in Special Criminal Case No. 07 of 2016 "State of U.P. vs. Khagendra Acharaya", arising out of Case Crime No. 247 of 2015, under Section 8/18/23 of N.D.P.S. Act, Police Station Kotwali Jarwa, District Balrampur, whereby the appellant has been convicted for committing offences under Section 8/18/23 of N.D.P.S. Act and has been sentenced for 10 years' imprisonment and Rs. 1,00,000/- fine and in default to further undergo imprisonment of one year.

3. The necessary facts required for disposal of the instant appeal appears to be that, an F.I.R. was lodged by the informant HC/GD Nipendra Deori on 04.11.2015 at 14:45 hours at Police Station Jarwa, District Balrampur alleging

therein that when they were on patrolling and were going from Janakpur to Balapur with other members of the force, they saw a person coming from the front and who after seeing them started running back and on became suspicious, he was apprehended and was asked about the reason for running away, whereon he informed that he is possessing 'charas' and revealed his name, on which he was told that as you are possessing 'charas' you are required to be searched before a Magistrate or gazetted officer who are being called, on which, the accused person stated that since he has been arrested, he may be searched by the informant and his associates, on which, the S.S.B. personnels' searched each other and did not find any objectionable thing in their possession and thereafter the consent letter was prepared and the accused person was searched and thereafter a bag which he was carrying on his back was also searched from which 7 kg. of 'charas' in five separate packets was recovered and when weighed with the use of a traditional scale was found as of 07 kg. The accused person was arrested and 50 grams of 'charas' was taken as specimen and the specimen as well as the remaining 'charas' was sealed on the spot and thereafter the recovered 'charas' and accused was taken to the police station concerned.

4. On the basis of this information a Case Crime No. 247 of 2015 was registered under Section 8/20 of the N.D.P.S. Act and the investigation commenced.

5. The specimen of 'charas' collected from the spot was also sent for forensic examination and on forensic examination, the contraband was found to be 'opium' and the investigating officer after completing the formalities of investigation e.g. recording of the statement of the informant and other members of the force, which at that point of time were allegedly accompanying the informant and also after preparing the site plan submitted charge-sheet against the appellant under Section 8/18/23 of N.D.P.S. Act.

6. The charges were framed against the appellant by the trial court under Section 8/18/23 of N.D.P.S. Act, however, the appellant denied the charges and claimed trial.

7. The prosecution in order to prove its case before the trial court has produced in oral evidence P.W.-1/Nipendra Deori, P.W.-2/Yatendra Kumar, P.W.-3/Santram, P.W.-4/Sub Inspector Manoj Kumar Singh, P.W.-5/H.C.P. Shri Jeev Lal and apart from it, the prosecution has also relied on documentary evidence e.g. Seizure Memo, Exhibit-ka-1, Consent letter, Exhibit-ka-2, apprehension detail, Exhibit-ka-3, Seizure Memo, Exhibit-ka-4,

Site Plan, Exhibit-ka-5, Letter of forensic lab bearing letter no. 2742 of 2015, Exhibit-ka-6, forensic lab report, Exhibit-ka-7, Charge-sheet, Exhibit-ka-8, G.D. Kayami, Exhibit-ka-9, Chik F.I.R., Exhibit-ka-10, Letter by which the contraband was sent for examination to the forensic lab, Exhibit-ka-11.

8. After completion of the evidence of prosecution, the statement of the appellant/accused person was recorded under Section 313 Cr.P.C., wherein he denied the evidence produced against him by the prosecution and stated that he has not been arrested from the place from where he is shown to have been arrested and no illegal material has been recovered from his possession, as also that no investigation in this case has been done and the charge-sheet has been filed without making any investigation at all and in fact he had gone to Jarwa market to purchase household material and was taking tea at a tea stall where the S.S.B. personnels were also taking tea and he was apprehended from there and has been wrongly shown to have been arrested from some other place.

9. The trial court after analyzing and appreciating all the evidence available on record has convicted the appellant in the manner, as stated in the second paragraph of this judgment and aggrieved by the same, the appellant has preferred instant appeal.

10. Shri Shri Piyush Kumar Singh, learned counsel appearing for the appellant while drawing the attention of this Court towards the impugned judgment and order passed by the trial court, vehemently submits that the trial court has committed manifest illegality in appreciating the evidence available on record. The story, as cooked up by the S.S.B. personnels may not be believed having regard to its improbability and inherent weaknesses.

11. It is further submitted that Section 42 of the N.D.P.S. Act has been violated, as the search has been made admittedly made by constables in sheer violation of Section 42 of the N.D.P.S. Act and, therefore, the recovery as well as the arrest is vitiated.

12. It is further submitted that the seizure memo, a copy of which has been placed on record, is bearing the seal of the concerned police station where the F.I.R. was lodged and it clearly suggests that this document has been prepared in the police station and has not been written as claimed at the place where the appellant is shown to have been arrested.

13. It is further submitted that Section 50 of the N.D.P.S. Act has not been complied in letter and spirit and though, the recovery of contraband is shown

to be from the bag which the appellant was carrying on his back but along with the bag the person of the appellant was also searched and, therefore, Section 50 of the N.D.P.S. Act would be applicable and since the appellant has not been made aware of his right to be searched in presence of a gazetted officer or the magistrate, Section 50 of the N.D.P.S. Act has been evidently violated and the arrest and recovery of any contraband, in violation of Section 50 of the N.D.P.S. Act, is vitiated.

14. It is further submitted that out of the recovery of 07 kg. of 'contraband', sample of only 50 grams has been taken and significantly the forensic lab has found the substance of 'opium' while the same has been termed as 'charas' by the informant and his associates.

15. It is further submitted that samples were not drawn before any magistrate as required under Section 52-A of the N.D.P.S. Act and further for two complete days the samples was admittedly in the possession of P.W.-5/H.C.P. Shri Jeev Lal and no explanation of the same has been given and, therefore, the sample was not kept in proper custody, moreover, no 'maalkhana register' has been prepared. The alleged incident is of 04.11.2015 and the sample has been sent for forensic lab on 16.11.2015 through P.W.-5/H.C.P. Shri Jeev Lal and has been delivered to the forensic lab on 18.11.2015. Thus, Section 52-A and 57 of the N.D.P.S. Act have also been violated as at first no sample has been collected in presence of the magistrate as required under Section 52-A of the N.D.P.S. Act and secondly there is no link evidence which may show that after deduction of the sample, the same was kept in safe custody.

16. It is next submitted that the trial court has committed patent illegality in recording conviction of the appellant, as the story as cooked by the prosecution was not proved before the trial court, beyond reasonable doubt and, thus, the appeal filed by the applicant be allowed and he be acquitted of all the charges framed against him.

17. Learned A.G.A. on the other hand submits that the factum of recovery of 'contraband' from the possession of the appellant has been proved by three witnesses of fact, namely, P.W.-1/Nipendra Deori and P.W.-2/Yatendra Kumar. The safe custody of the sample has been proved by P.W.-5/H.C.P. Shri Jeev Lal, who has also delivered the sample to the forensic lab, which has been ultimately found as 'opium' and there appears no illegality so far as the conviction and sentencing done by the trial court is concerned. Therefore, no interference is required in the judgment and order passed by the trial court.

18. Having heard counsel for the parties and having perused the record, it is reflected that the case of the prosecution is in terms that on 04.11.2015 when the informant and his other associates who are all members of the S.S.B. were patrolling the area, they found the appellant in suspicious circumstances and when he attempted to run away, they apprehended him and when he informed them that he is possessing 'charas' they informed him that he may be searched before the magistrate or gazetted officer, on which, the appellant stated that he may be searched by the informant and his associates on which the person of the appellant as well as the bag which he was carrying on his back was searched from where five packets of contraband was recovered, which according to the police party, at that point of time the contraband allegedly recovered was assessed as 'charas' and later on as per the forensic lab report the same was found as 'opium' and it was weighed by procuring a scale and the specimen of only 50 grams was taken from it and the sample is also shown to have been sealed at the spot. Thereafter, the appellant and recovered material was taken to the police station concerned where the F.I.R. was lodged and the material was given in the custody of the police and kept at 'Malkhana', from where it was sent for forensic examination.

19. The prosecution has produced two witnesses of fact in this case, namely, P.W.-1/Nipendra Deori and P.W.-2/Yatendra Kumar, who have stated that after the suspicious behaviour of appellant he was apprehended and on being informed that the appellant is possessing 'charas', the appellant was informed of his legal right to be searched before a magistrate or gazetted officer and also that the magistrate as well as the gazetted officer may be called at the spot whereon the appellant/convict stated that when he has been apprehended, he is having faith on the S.S.B. personnel, consent letters were prepared and thereafter his person was searched and from the bag which he was carrying on his back the 'contraband' was recovered.

20. It is evident from the statements of these two witnesses of fact that the person of the appellant was also searched along with the bag which he was carrying on his back. The trial court in the impugned judgment at Page No.9 considered the submissions made by the accused person pertaining to the non-compliance of Section 50 of the N.D.P.S. Act and was of the view that the appellant was informed of his right to be searched before the magistrate or gazetted officer, on which, he consented to be searched by the S.S.B. personnels and thereafter his search was made and contraband was recovered from the bag, which he was carrying on his back. Thus, in the opinion of the trial court, there is no violation of Section 50 of the N.D.P.S. Act.

21. The law with regard to Section 50 of the N.D.P.S. Act is now no more res integra and the same has been set at rest by 'Catena of Judgments' passed by the Hon'ble Supreme Court, which are being placed below:-

22. Hon'ble Supreme Court in K. Mohanan vs. State of Kerala reported in [2001 (2) EFR 219 (S.C.)] has held as under:-

"6. If the accused, who was subjected to search was merely asked whether he required to be searched in the presence of a gazetted officer or a Magistrate it cannot be treated as communicating to him that he had a right under law to be searched so. What PW1 has done in This case was to seek the opinion of the accused whether he wanted it or not. If he was told that he had a right under law to have it (sic himself) searched what would have been the answer given by the accused cannot be gauged by us at this distance of time. This is particularly so when the main defence adopted by the appellant at all stages was that Section 50 of the Act was not complied with.

7. We, therefore, hold that there was non-compliance with Section, 50 of the Act and consequently the evidence of search spoken to by PW1 cannot be acted upon in the absence of any other independent evidence to show that the appellant was in possession of the contraband article."

23. Hon'ble Supreme Court in State of Punjab vs. Baldev Singh reported in (1999) 6 SCC 172 has held as under:-

"32. However, the question whether the provisions of Section 50 are mandatory or directory and, if mandatory, to what extent and the consequences of non-compliance with it does not strictly speaking arise in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched. Therefore, without expressing any opinion as to whether the provisions of Section 50 are mandatory or not, but bearing in mind the purpose for which the safeguard has been made, we hold that the provisions of Section 50 of the Act implicitly make it imperative and obligatory and cast a duty of the investigating officer (empowered officer) to ensure that search of the person (suspect) concerned is conducted in the manner prescribed by Section 50, by intimating to the person concerned about the existence of his right, that if he so requires, he shall be searched before a gazetted officer or a Magistrate and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate would cause prejudice to the accused and render the recovery of the illicit article suspect and vitiate the conviction and sentence of the accused, where the conviction has been recorded only on the basis of the possession of the

illicit article, recovered during a search conducted in violation of the provisions of Section 50 of the Act. The omission may not vitiate the trial as such, but because of the inherent prejudice which would be caused to an accused by the omission to be informed of the existence of his right, it would render his conviction and sentence unsustainable. The protection provided in the section to an accused to be intimated that he has the right to have his personal search conducted before a gazetted officer or a Magistrate, if he so requires, is sacrosanct and indefeasible — it cannot be disregarded by the prosecution except at its own peril."

24. Hon'ble Supreme Court in *Dilip and another v. State of M.P.*, (2007) 1 SCC 450 has held as under:-

"12. Before seizure of the contraband from the scooter, personal search of the appellants had been carried out and, admittedly, even at that time the provisions of Section 50 of the Act, although required in law, had not been complied with.

16. In this case, the provisions of Section 50 might not have been required to be complied with so far as the search of scooter is concerned, but, keeping in view the fact that the person of the appellants was also searched, it was obligatory on the part of PW 10 to comply with the said provisions. It was not done."

25. Hon'ble Supreme Court in *Vijaysinh Chandubha Jadeja v. State of Gujarat* reported in (2011) 1 SCC 609 has held as under:-

"24. Although the Constitution Bench in *Baldev Singh* case [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] 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.

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 Fernand [(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."

26. Hon'ble Supreme Court in Narcotics Control Bureau vs. Sukh Dev Raj Sodhi reported in (2011) 6 SCC 392 has held as under:-

"5. From the perusal of the conclusion arrived at by this Court in Vijaysinh Chandubha Jadeja case[(2011) 1 SCC 609 : (2011) 1 SCC (Cri) 497] , it appears that the requirement under Section 50 of the NDPS Act is not complied with by merely informing the accused of his option to be searched either in the presence of a gazetted officer or before a Magistrate. The requirement continues even after that and it is required that the accused person is actually brought before the gazetted officer or the Magistrate and in para 32, the Constitution Bench made it clear that in order to impart authenticity, transparency and creditworthiness to the entire proceedings, an endeavour should be made by the prosecuting agency to produce the suspect before the nearest Magistrate."

27. Hon'ble Supreme Court in Suresh and others vs. State of M.P. reported in (2013) 1 SCC 550 has held as under:-

"18. We reiterate that sub-section (1) of Section 50 makes it imperative for the empowered officer to "inform" the person concerned about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate, failure to do so vitiate the conviction and sentence of an accused where the conviction has been recorded only on the basis of possession of the contraband. We also reiterate that the said provision is mandatory and requires strict compliance."

28. Hon'ble Supreme Court in Ashok Kumar Sharma v. State of Rajasthan, reported in (2013) 2 SCC 67 has held as under:-

"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."

29. Hon'ble Supreme Court in State of Rajasthan Vs. Parmanand & ors. reported in [2014(2) JIC 136 (SC)] has held as under:-

"12. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application."

30. Hon'ble Supreme Court in Arif Khan vs. State of Uttarakhand, reported in 2018 SCC OnLine SC 459 has held as under:-

"23. Their Lordships have held in Vijaysinh Chandubha Jadeja (supra) 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 authorized 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 MANU/SC/0019/2013 : 2013 (2) SCC 67 and Narcotics Control Bureau v. Sukh Dev Raj Sodhi, MANU/SC/0650/2011 : 2011 (6) SCC 392)

28. 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; 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; 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; 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.

29. Though, the prosecution examined as many as five police officials (PW-1 to PW-5) of the raiding police party but none of them deposed that the

search/recovery was made in presence of any Magistrate or a Gazetted Officer.

30. 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."

31. Considering the factual position of the instant case, in the back ground of the law placed above, it would be evident that in the seizure memo/arresting memo which is claimed to have been prepared at the spot, there is no mention that the accused person was informed of his right to be searched before a magistrate or gazetted officer. The phraseology by which the accused person(s) is shown to have been made aware of his right to be searched before the magistrate or a gazetted officer is of utmost importance, in the given facts and circumstances of each case, as the same could only project as to whether the right of an accused person to be searched before a magistrate or gazetted officer has been properly communicated having regard to the spirit of Section 50 of the N.D.P.S. Act or simply his advice has been sought. An accused may never opt search before a magistrate or gazetted officer, unless he is informed that he is having a right to be searched before a magistrate or gazetted officer. It appears that there was no such phraseology used by the informant or his associates in the 'fard baramadgi' pertaining to the communication of any 'right' possessed by the accused person (s) to be searched before the magistrate or gazetted officer as only this much has been communicated that his search is required to be taken before a magistrate or gazetted officer, on which the accused person is shown to have consented for being searched by the S.S.B. personnels, themselves.

32. The evidence of the two prosecution witnesses of fact, namely, P.W.-1/Nipendra Deori and P.W.-2/Yatendra Kumar would sufficiently demonstrate that they have improved their story so far as the communication of the right of the appellant to be searched before a magistrate or gazetted officer, as enshrined under Section 50 of the N.D.P.S. Act, is concerned in their statement recorded before the trial court. They in their in-chief-examination have stated that appellant was informed of his legal right to be searched

before a gazetted officer or magistrate while no such right has been communicated to the appellant/accused, as is evident from the seizure memo/arresting memo, which has been placed on record. Thus, the evidence of these two witnesses of fact that the appellant was communicated about his right to be searched before a magistrate or gazetted officer is not reliable and trustworthy and should not have been accepted. In this regard, the consent letter alleged to have been prepared with the consent of the appellant is also significant wherein also there is no mention of any right of the appellant to be searched before magistrate or gazetted officer, which was allegedly communicated to the appellant.

33. It is to be recalled that the communication of this legal right vested in the accused person of being searched before a magistrate or gazetted officer is a valuable right and since the conviction of the accused person of an offence under N.D.P.S. Act may entail harsh punishment, the same is required to be complied in letter and spirit and in its real sense and any laxity in communication of the same would result in favour of the accused person.

34. Thus, in the considered opinion of this Court, the trial court has committed manifest illegality in not appreciating the evidence of the prosecution in right perspective with regard to the compliance of Section 50 of the N.D.P.S. Act and, thus, this Court is of the considered view that no right, as required under Section 50 of the N.D.P.S. Act for being search before the magistrate or a gazetted officer has been communicated to the appellant and the arrest and alleged seizure of contraband is vitiated for want of compliance of Section 50 of the N.D.P.S. Act.

35. Perusal of the record would also reveal that the appellant is shown to have been arrested on 04.11.2015 and from 04.11.2015 till 16.11.2015 the specimen as well as the remaining contraband is shown to be in the 'maalkhana' of the concerned police station, as is also evident from the evidence of P.W.-3/Santram (Investigating Officer) and it was only on 16.11.2015 the specimen was sent to the forensic lab through P.W.-5/HCP Jeev Lal. There is no link evidence produced pertaining to the safe custody of this sample in the maalkhana, as no 'maalkhana register' or constable clerk/incharge of 'maalkhana' of P.S. concerned appears to have been produced before the trial court, which may even prima facie prove the safe custody of the sample in 'maalkhana' of the P.S. concerned.

36. It is also evident that as per the evidence of P.W.-3/Santram, on 16.11.2015 the specimen was taken out of 'maalkhana' of the concerned

police station and was given in the custody of P.W.-5/HCP Jeev Lal for the purpose of taking it to forensic lab. Significantly, Prosecution witness no.5/HCP Jeev Lal, in his evidence, has stated that he had deposited this sample in the forensic lab on 18.11.2015 and the report of the forensic lab, which is available on record of the trial court of date 15.12.2015 would also reveal that the specimen, which was sent for forensic examination was found to be 'opium' and not charas. In-ordinary circumstances, the non-production of link evidence with regard to the safe custody of the sample in the 'maalkhana' of the concerned police station as well as keeping the sample by the P.W.-5/HCP Jeev Lal with him for two days may not be of utmost importance and significance but since the recovered contraband, which was earlier identified as 'charas' in the F.I.R., recovery-memo, seizure memo, consenting letter as well as in the statement of the witnesses recorded by the investigating officer and the revelation of this contraband by the forensic lab as opium throws a dark cloud of suspicion over the whole prosecution story pertaining to the safe custody of the sample.

37. At this juncture, it is worth mentioning that Section 52A of the N.D.P.S. Act was introduced by way of an amendment by the Central Government in the year 1989 and the matter relating to sampling is governed by the said Section of the law and various instructions issued by the Govt. of India from time to time.

38. Section 52-A of the Narcotic Drugs and Psychotropic Substances Act reads as hereunder:

[52A. Disposal of seized narcotic drugs and psychotropic substances. - (1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence].

39. A plain reading of the aforesaid Section shows that the manner and procedure of sampling is not specifically provided in it and rather by Sub Section (1), the Central Government has been empowered to prescribe by

notifications the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government has in exercise of that power issued Standing Order No. 1 of 1989 which prescribes the procedure to be followed while conducting seizure of the contraband. The said Order of 1989 succeeds the previous Standing Order No. 1 of 1988.

40. The Standing Order No. 1/89 dated 13.06.1989 issued under Sub-section (1) of Section 52A of NDPS Act by the Department of Revenue, Ministry of Finance, Government of India. Section (II) of the said Order of 1989 provides for the general procedure for sampling, storage and reads as under:-

**STANDING ORDER No. 1/89 SECTION II-GENERAL PROCEDURE FOR SAMPLING, STORAGE, ETC.**

"2.1. All drugs shall be properly classified, carefully weighed and sampled on the spot of seizure.

2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchanama drawn on the spot.

2.3. The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn.

2.4. In the case of seizure of a single package/container, one sample in duplicate shall be drawn. Normally, it is advisable to draw one sample (in



duplicate) from each package/container in case of seizure of more than one package/container.

2.5. However, when the packages/containers seized together are of identical size and weight, bearing identical markings, and the contents of each package given identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects, the packages/containers may be carefully bunched in lots of ten packages/containers except in the case of ganja and hashish (charas), where it may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample (in duplicate) may be drawn.

2.6. Where after making such lots, in the case of hashish and ganja, less than 20 packages/containers remain and, in the case of other drugs, less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

2.7. If such remainder is 5 or more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such remainder package/container.

2.8. While drawing one sample (in duplicate) from a particular lot, it must be ensured that representative samples in equal quantity are taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

2.9. The sample in duplicate should be kept in heat-sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelopes should also bear the No. of the package(s)/container(s) from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope along with test memos should be kept in another envelope which should also be sealed and

marked "Secret-Drug sample/Test memo", to be sent to the chemical laboratory concerned.

3. The seizing officers of the Central Government Departments, viz., Customs, Central Excise, Central Bureau of Narcotics, Narcotics Control Bureau, Directorate of Revenue Intelligence, etc. should despatch samples of the seized drugs to one of the laboratories of the Central Revenues Control Laboratory nearest to their offices depending upon the availability of test facilities. The other central agencies like BSF, CBI and other central police organizations may send such samples to the Director, Central Forensic Laboratory, New Delhi. All State enforcement agencies may send samples of seized drugs to the Director/Deputy Director/Assistant Director of their respective State Forensic Science Laboratory.

3.1. After sampling, a detailed inventory of such packages/containers shall be prepared for enclosure with the panchnama. Original wrappers shall also be preserved for evidentiary purposes."

41. In *State of Kerala and Ors. v. Kurian Abraham (P) Ltd.* MANU/SC/0801/2008 : 2008:INSC:158 : (2008) 3 SCC 582, wherein following the earlier decision rendered in *Union of India v. Azadi Bachao Andolan* MANU/SC/1219/2003 : (2004) 10 SCC 1, it was held that the aforesaid statutory instructions are mandatory in nature.

42. The sanctity of the Standing Order 1/89 came for consideration before the Supreme Court in *Noor Aga v. State of Punjab* MANU/SC/2913/2008 : 2008:INSC:785 : (2008) 16 SCC 417, wherein it was held as under:-

"91. Logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such

evidence been produced, the same would have gone against the prosecution."

43. Noticing an apparent conflict between the standing order of 1988 and 1989 as the former provides for sampling at the spot of seizure and sending the same to laboratory within 72 hours whereas the latter provides for sampling before a Magistrate, the same was dealt with by the Hon'ble Supreme Court in Union of India (UOI) v. Mohanlal and Ors., MANU/SC/0073/2016 : 2015:INSC:808 : (2016) 3 SCC 379. The relevant paragraphs of the said Judgment of the Hon'ble Apex Court are reproduced hereunder:

"Seizure and sampling

12. Section 52-A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government has in exercise of that power issued Standing Order No. 1 of 1989 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10-5-2007 and the other dated 16-1-2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures.

"Para 2.2 of Standing Order No. 1 of 1989 states that samples must be taken from the seized contraband on the spot at the time of recovery itself. It reads: "2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot."

15. It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the

nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purpose of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct."

44. Hon'ble Supreme Court in Yusuf @ Asif vs. State, reported in MANU/SC/1142/2023 has held as under:-

"12. A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or to the officer so mentioned Under Section 53, the officer so referred to in Sub-section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.

13. Notwithstanding the defence set up from the side of the Respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed Under Sub-sections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample

such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of Sub-section (2) of Section 52A of the NDPS Act.

14. It is an admitted position on record that the samples from the seized substance were drawn by the police in the presence of the gazetted officer and not in the presence of the Magistrate. There is no material on record to prove that the Magistrate had certified the inventory of the substance seized or of the list of samples so drawn.

15. In Mohanlal's case, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered Under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.

16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated."

45. Thus, it is revealed that Section 52-A of the N.D.P.S. Act has also not been complied in letter and spirit and at the cost of repetition, it is to be highlighted that the absence of link evidence with regard to safe custody of the sample as well as the detention of the sample for many days by the P.W.-5/HCP Jeev Lal before depositing it in the forensic lab and ultimate revelation of the forensic lab that the contraband recovered from the appellant is 'opium' and

not 'charas', a reasonable doubt is emerging in the case of the prosecution and in the considered opinion of this Court when the trial court has not considered it expedient to forward another sample of the contraband shown to have been recovered for forensic lab examination, the benefit of reasonable doubt may be accorded to the accused person/appellant.

46. Thus, having considered all the facts and circumstances of the case, evidence produced before the trial court by the prosecution and other attending facts and circumstances of the case, in the considered opinion of this Court, the prosecution has miserably failed to prove its case beyond reasonable doubt before the trial court and, thus, appears to have committed illegality in convicting the appellant and the interference in the impugned judgment and order of the trial court is required to be made by this Court.

47. In result, the instant appeal filed by the appellant- Khagendra Acharaya is, hereby, allowed and the appellant is acquitted of all the charges framed against him and impugned judgment and order of the trial court dated 31.07.2019 passed by Additional Sessions Judge, Court No.1, Balrampur in Special Criminal Case No. 07 of 2016 "State of U.P. vs. Khagendra Acharaya", Case Crime No. 247 of 2015, under Section 8/18/23 of N.D.P.S. Act, Police Station Kotwali Jarwa, District Balrampur, whereby the appellant has been convicted for committing offences under Section 8/18/23 of N.D.P.S. Act and has been sentenced for 10 years' imprisonment and Rs. 1,00,000/- fine and in default to further undergo imprisonment of one year is, hereby, quashed/set-aside.

48. The appellant is in jail. He shall be released from prison forthwith unless wanted in any other Court.

49. However, having regard to the provisions contained under Section 437-A of the Cr.P.C., the appellant shall file his personal bond with two sureties of Rs. 50,000/- before the trial court within 30 days from his actual release from the prison to secure his presence before the Hon'ble Supreme Court if any S.L.P. or to say any criminal appeal is filed against the judgment of this Court.

50. A copy of this order be immediately sent to the trial court through the Sessions Judge concerned for information, along with the record of the trial court.

\*Disclaimer: Always compare with the original copy of judgment from the official website.