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**HIGH COURT OF JUDICATURE AT ALLAHABAD
LUCKNOW**

CRIMINAL APPEAL No. - 1937 of 2007

Munna

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s) : Avinash Srivastava,

Counsel for Respondent(s) : G.a,

Alongwith

CRIMINAL APPEAL No. - 1992 of 2007

Kamlesh

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s) : Shiv Shanker Singh,

Counsel for Respondent(s) : G.a,

Court No. - 28

HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

1. Heard, Shri Avinash Srivastava, learned counsel for the appellants and Shri Bishvanath Nishad, learned AGA for the State.

2. By means of the captioned appeals the appellants have assailed the correctness of the judgment and order dated 21.08. 2007 by which the

learned additional sessions judge, fast track court no 30 district Barabanki in criminal trial no 22/2000 State v Kamlesh Case crime no. 12/2000 convicted the appellant (Kamlesh) to undergo RI for six months and a fine of Rs 5000 and in default of fine further imprisonment of one month under section 8/18 NDPS Act and convicted Munna in criminal trial no 23/2000 State v Munna under section 8/18 NDPS Act sentencing him to undergo RI one year and also to pay fine of Rs 10000, to further undergo 2 months additional rigorous imprisonment.

CASE OF THE PROSECUTION

3. On 17.01.2000, S.O. Gauri Shankar, along with Constable Ashok Kumar Singh and Constable Anil Pratap Singh, departed from the police station in search of the wanted accused Ram Naresh related to Case Crime No. 3/2000 under Sections 457, 380, 411 IPC Police Station Kothi, and upon reaching near Usmanpur, information was received through a special informer that two individuals had gone to the place of farmer Paridin in Village Birapur on a motorcycle to purchase opium, and if acted upon quickly, they could be caught. Believing this information, Constable Shahabuddin and Constable Rudra Nath Pandey, who were deployed on road patrol, were taken along, and they reached Village Birapur. Public witnesses were asked to accompany them after being told the purpose, but due to village enmity/issues, no person was ready to go along. Therefore, along with the informer and the accompanying staff, when they reached near Paridin's house around 8:00 PM, two individuals were sitting on a motorcycle and one person was talking to them. Upon the informer's signal, they were challenged by flashing a torch. All three individuals attempted to flee but were surrounded and stopped with the help of the accompanying staff. When asked for their names and addresses, the person sitting on the motorcycle driver's seat stated his name as Kamlesh, the second person sitting behind on the motorcycle stated his name as Munna, and the third person stated his name as Paridin. On being asked the reason for attempting to flee, they stated that they possessed illicit opium, which is why they wanted to run away. Since there was information regarding the

possession of illicit opium, all three individuals were asked if they wanted to give their personal search (Jama Talashi) before any nearest Magistrate or a Gazetted Officer. On this, all three said that when the police had caught them, they may only make the search.

4. Upon conducting the personal search as per rules, approximately half a kilogram of illicit opium was recovered from inside a polythene bag kept in the gamchha (towel) tied around Kamlesh's waist. From the person sitting behind Munna, approximately one kilogram of opium was recovered from a polythene bag pressed under his right armpit, and a Hero Honda Motorcycle U.P. G.O. Number 3830 was recovered in working condition; and from the third person, Paridin, approximately 400 grams of illicit opium was recovered from a polythene bag held in his right hand. The accused persons were arrested on the spot. Recovered suspicious contraband was sealed and a recovery memo was prepared to the same effect, a copy of which was given to the accused persons. The contraband and the accused were brought to the police station and deposited, and a case was registered on the basis of the memo. The case was registered, and an investigation was conducted. Statements of witnesses were recorded under Section 161 CrPC.

5. During the course of investigation the Investigating officer visited the place of incidence and prepared a site plan (Naksha Nazri) of the crime scene and recorded the statement of the accused and sent the contraband to the Forensic Science Laboratory for examination, and upon receipt of the test report, charge sheets against the accused persons were submitted to the court.

6. The essential prosecution documents were furnished to the accused persons by the trial court, and a charge was subsequently framed. The accused persons, however, pleaded not guilty and chose to be tried by the court.

7. To establish its case, the prosecution examined seven witnesses. After completing the prosecution evidence statements of accused

persons were recorded under Section 313 Cr.P.C. At the stage of defence evidence three witnesses were examined.

8. On conclusion of the trial, the accused persons were held guilty and convicted by learned trial Court for the offence punishable under Section 8/18 of the Act in the manner already referred to *supra*.

9. Aggrieved against the judgment of conviction, instant appeal has been preferred by the appellants Kamlesh and Munna whereas the co-accused Paridin has passed away during the pendency of the appeal hence appeal in respect of Paridin has been abated.

SUBMISSIONS OF APPELLANTS

10. The counsel for the appellant submitted that the learned trial court has erred in holding that the alleged material was recovered in polythene from the possession of the appellants which does not come in personal search as such provisions of section 50 of the N.D.P.S Act are not applicable in the case.

11. The counsel also submitted that the learned trial court erred in not considering the fact that the alleged recovered material was sent for chemical examination on 20.01.2000 by the police and on the next day on 21.01.2000 charge sheet was submitted against the accused appellant without waiting the chemical examination.

12. The counsel further submitted that the trial court erred in not considering the fact that there were no independent witnesses and that prosecution has failed to prove its case beyond reasonable doubt.

SUBMISSIONS OF RESPONDENT

13. The counsel for the respondent submitted that judgment and order of the trial court is a reasoned one and that prosecution has proved its case beyond reasonable doubt.

14. I have heard the learned counsels for the parties and perused the entire material available on record with due care. The question that falls

for consideration here is, whether the trial court erred in convicting the accused persons under section 8/18 of the NDPS Act.

ANALYSIS/ DISCUSSION/ CONCLUSION

15. At the outset, it is to be noted that the conviction of the appellants rests entirely upon the alleged recovery of opium from their respective possession. The prosecution case itself makes it evident that recovery of the contraband was effected after taking a personal search of the accused persons, namely, from a polythene bag kept in the *gamchha* tied around the waist of appellant Kamlesh, from a polythene bag pressed under the armpit of appellant Munna, and from a polythene bag held in hand by co-accused Paridin. In this regard the question arises whether the provision of section 50 of the NDPS Act was attracted in the present case and if yes then whether it was complied with. While dealing with this question of compliance of section 50 of the Act the trial court observed the following:-

“On behalf of the defense, the first argument presented is that at the time of the arrest of the accused persons, Section 50 of the N.D.P.S. Act was not complied with by the police. In my opinion, there is no force in this argument of the defense. The opium stated to have been recovered from all three accused persons, Kamlesh, Munna, and Paridin, is stated to have been recovered from the polythene recovered from each accused, which does not fall under the category of personal search, and in such a situation, the provisions of Section 50 of the N.D.P.S. Act does not apply, as propounded by the Hon’ble Supreme Court in AIR 2007 SC 2018 State of Rajasthan Vs. Baburam. There is no dispute in this regard that if the recovery of the narcotic substance is from any object other than the body of the accused, then it does not fall under the category of personal search. Since it has been stated that 500 grams of opium was recovered from accused Kamlesha from a polythene kept inside the gamchha tied at his waist, one kilogram of opium from a polythene pressed in the armpit of accused Munna, and 400 grams of opium from a polythene held in the hand of accused Paridin. From which it is clear that the recovery of opium from all three accused persons has been described as being from polythene, which does not fall into the category of personal search, and accordingly, the provision of Section 50 N.D.P.S. Act does not apply in the present case. Where the recovery is not from a personal search but from any other type of plastic bag, polythene, etc., in such a situation, the provision of Section 50 N.D.P.S. Act does not apply. A similar view has been expressed by the Hon’ble Supreme Court in the case of AIR 2007 S.C. 2040 Ravindran @ John Vs. Superintendent of Customs. Therefore, keeping in view the above facts and circumstances in

the present case, the provision of Section 50 N.D.P.S. Act does not apply. Thus, I have duly perused the precedents presented by the defense: "1999 (39) Supreme Court-349 State of Punjab Vs. Baldev Singh, 2006 E.F.R. 251 (Punjab and Haryana High Court) Gurucharan Singh Vs. State of Punjab, and 2006 (1) E.F.R. 272 Allahabad High Court Lucknow Bench Liyakat Gurjar Vs. State of U.P." Accordingly, the facts and circumstances of the above precedents are completely different and do not apply to the present case. Even otherwise, if it is assumed that the provisions of Section 50 N.D.P.S. Act apply in the present case, the accused persons were given the option by the police personnel before their search that the accused are free to give their search before any nearest Magistrate or Gazetted Officer. But their search was taken only on the basis of the consent of the accused persons, whereby opium was recovered from polythene bags during the search. As far as the question of giving information regarding the consent of the accused persons under Section 50 N.D.P.S. Act is concerned that it is not necessary that this information be given in writing. As mentioned in paragraph 58 of the precedent "Baldev Singh" presented on behalf of the accused persons. Therefore, there seems to be no force in this argument of the defense that the trial of the accused persons is vitiated due to non-compliance of Section 50 N.D.P.S. Act in the present case."

Non-compliance of Section 50 NDPS Act

16. What is pertinent to note from the prosecution evidence is that it transpires that a collective option was given to all the accused persons asking whether they wished to be searched before a nearest Magistrate or a Gazetted Officer, and all of them allegedly stated in one voice that the police personnel themselves may conduct the search. There is nothing on record to show that each accused was individually apprised of his independent and valuable statutory right under Section 50 of the NDPS Act. This right was waived by the accused persons collectively. There is also nothing on record taken in written by the officers regarding the waving off of such statutory right by the accused persons.

17. In the case of **State of Rajasthan v Parmanand & Anr (2014) 5 SCC 345** the apex court while dealing with the issue of joint communication of the right under section 50 of the Act held that such communication of the right would be bad in law. The relevant observations made are reproduced below.

"14. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an

empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval.”

18. While dealing with the question whether section 50 would be attracted where personal search of the accused has been carried out but the contraband has been recovered from a polythene or bag The Supreme Court in **Paramand (supra)** observed as follows: -

“12. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of 9 (2009) 16 SCC 644 1 Page 12 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.”

19. While considering the law laid down in Parmanand the Supreme Court in the case of **Ranjan Kumar Chadha v State of Himachal Pradesh 2023 SCC OnLine SC 1262** dealt with the set of precedents and went on to clarify the position of law in this regard. The observation made the court are reproduced here: -

“126. As such, there is no direct conflict between SK. Raju (supra) and Baljinder Singh (supra). It is pertinent to note that in SK. Raju (supra) the contraband was recovered from the bag which the accused was carrying, whereas in Baljinder Singh (supra) the contraband was recovered from the vehicle. This makes a lot of difference even while applying the concept of any object being “inextricably linked to the person”. Parmanand (supra) relied upon the judgment in Dilip (supra) while taking the view that if both, the person of the accused as well as the bag is searched and the contraband is ultimately recovered from the bag, then it is as good as the search of a person and, therefore, Section 50 would be applicable. However, it is pertinent to note that Dilip (supra) has not taken into consideration Pawan Kumar (supra) which is of a larger Bench. It is also pertinent to note that although in Parmanand (supra) the Court looked into Pawan

Kumar (supra), yet ultimately it followed Dilip (supra) and took the view that if the bag carried by the accused is searched and his person is also searched, Section 50 of the NDPS Act will have application. This is something travelling beyond what has been stated by the large Bench in Pawan Kumar (supra). Baljinder Singh (supra), on the other hand, says that Dilip (supra) does not lay down a good law.

127. In the facts of the present case, there is no scope of applying the ratio of Parmanand (supra) and SK. Raju (supra). At the cost of repetition, we may state that in the case on hand, there is nothing to indicate that the search of the person of the accused was also undertaken along with the bag which he was carrying on his shoulder.

128. We do not propose to say anything further as regards SK. Raju (supra) as well as Baljinder Singh (supra). We adhere to the principles of law as explained by the Constitution Bench in Baldev Singh (supra) and the larger Bench answering the reference in Pawan Kumar (supra)."

20. From the above mentioned extract of the judgment, it can be deduced that even in the case at hand and even otherwise following the dictum of the Constitution Bench in **State of Punjab v. Baldev Singh, (1999) 6 SCC 172** and of three judge bench in **State of H.P. v. Pawan Kumar, (2005) 4 SCC 350** should be appropriate.

21. At this stage it is pertinent to look at the observations made in **Pawan Kumar (supra)**:

"11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act.

12. An incriminating article can be kept concealed in the body or clothings or coverings in different manner or in the footwear. While making a search of such type of articles, which have been kept so concealed, it will certainly come within the ambit of the word "search of person". One of the tests, which can be applied is, where in the process of search the human body comes into contact or shall have to be touched by the person carrying out the search, it will be search of a person. Some indication of this is

provided by Sub-section (4) of Section 50 of the Act, which provides that no female shall be searched by anyone excepting a female. The legislature has consciously made this provision as while conducting search of a female, her body may come in contact or may need to be touched and, therefore, it should be done only by a female. In the case of a bag, briefcase or any such article or container, etc., they would not normally move along with the body of the human being unless some extra or special effort is made. Either they have to be carried in hand or hung on the shoulder or back or placed on the head. They can be easily and in no time placed away from the body of the carrier. In order to make a search of such type of objects, the body of the carrier will not come in contact of the person conducting the search. Such objects cannot be said to be inextricably connected with the person, namely, the body of the human being. Inextricable means incapable of being disentangled or untied or forming a maze or tangle from which it is impossible to get free."

22. The further observations made by the Supreme Court in **Ranjan Kumar Chadha (Supra)**:

"129. It has been observed in Baldev Singh (supra) that drug abuse is a social malady. While drug addiction eats into the vitals of the society, drug trafficking not only eats into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. It has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. Reference in the said decision has also been made to some United Nation Conventions which the Government of India has ratified. It is, therefore, absolutely imperative that those who indulge in this kind of nefarious activities should not go scot-free on technical pleas which come handy to their advantage in a fraction of second by slight movement of the baggage, being placed to any part of their body, which baggage may contain the incriminating article."

23. In the present case the contraband was recovered from inside a polythene bag kept in the gamchha tied around Kamlesh's waist while from Munna the contraband was recovered from a polythene bag pressed under his right armpit while Paridin held it in his hand. I believe that if the contraband is seized by the empowered officer there would be some contact with the body of the accused persons but I feel that applying a straitjacket formula and this test as a sole determining factor without looking at the facts of the case would not be justified neither does the precedent at hand suggest that.

24. The manner of recovery differs significantly between the appellants. For appellant Kamlesh, the contraband was recovered from

the folds of a gamchha tied around his waist. As held by the three judge Bench in **Pawan Kumar (supra)**, a gamchha or dhoti worn by the accused is an integral part of his clothing and body. Therefore, the search of Kamlesh was a 'personal search,' mandating compliance with Section 50 of the NDPS Act.

25. Conversely, regarding accused Munna, the contraband was recovered from a polythene bag pressed under his armpit, and for co-accused Paridin, from a bag held in his hand. A bag or container even if carried under the arm does not constitute the 'person' of the accused unless it is concealed within the clothing. Consequently, I concede that Section 50 was not technically attracted for Munna and Paridin.

26. However, this distinction exposes a fatal flaw in the investigation procedure by the police. The empowered officer treated all three accused as a single unit. By offering a 'Joint Option' to a group where one person (Kamlesh) had an absolute statutory right to be searched before a Gazetted Officer and the others did not, the officer created an atmosphere of confusion. The 'Joint Option' failed to isolate and inform Kamlesh of his specific, indefeasible right, effectively diluting the mandate of Section 50 into an empty formality for him.

27. A constitution bench of the apex court in the case of **Vijaysinh Chandubha Jadeja v State of Gujarat (2011) 1 SCC 609** held that the obligation under section 50 is mandatory and the person to be searched should be specifically informed that he has a right to be searched in the presence of a Gazetted officer or Magistrate and disapproved with the concept of substantial compliance. The relevant observations made in this regard are reproduced below: -

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

under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

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31. We are of the opinion that the concept of “substantial compliance” with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in Joseph Fernandez and Prabha Shankar Dubey is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh case. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.”

28. Similarly in the case of **State of Delhi v Ram Avtar (2011) 12 SCC 207** the apex court held that merely asking the accused whether he wished to be searched before a Gazetted Officer or a Magistrate without informing him that he enjoyed a right in that behalf, is not compliance of section 50 of the NDPS Act.

29. In a similar vein in the case of **Navdeep Singh v State of Haryana (2013) 2 SCC 584** the court while dealing with notice regarding informing the suspected persons of his right held that: -

“11. In our opinion, the provisions do not prescribe any set format for such notice. The essence is to apprise the accused of his legal right of being searched either by a gazetted officer or a Magistrate. Here, when the appellant was apprised of his statutory rights under Section 50 by PW 3 and he opted to be searched by a gazetted officer, then he has, by necessary implication, consciously exercised his right. In that view of the matter, we cannot accept the submission of the learned counsel for the appellant that the mandatory provisions of Section 50 of the Act were breached.”

30. Thus it has to be seen whether the accused persons were merely informed of the option of being searched before a Gazetted Officer or a Magistrate or apprised of the statutory right to be exercised by them. An excerpt from the recovery memo is quoted below regarding this: -

"Since there is information of having illicit opium, therefore, the above-mentioned three persons were asked whether you people want to give your personal search (body search) before any Magistrate or Gazetted Officer, then the above-mentioned three people said that now that you people have stopped [us], then you yourself take our personal search, we are consenting/agreeable."

31. In the present case from the above excerpt and even the other evidence on record there is nothing to show that the officers apprised them explicitly of their right under section 50 of the act. The empowered officers while informing the accused persons of the choice available to them put it merely as an option but did not apprise them that they have a statutory right regarding the same.

32. The mandate of Section 50 is not an empty formality but a substantive safeguard provided to the accused. The law is well settled that the accused must be made aware of his right in clear and unambiguous terms, and such communication must be individual and specific, particularly when more than one accused is involved. A joint or collective consent cannot be treated as valid compliance of Section 50.

33. The majority in the case of **Tofan Singh v State of Tamil Nadu (2021) 4 SCC 1** while emphasising the on the need of compliance of safeguards provided in the NDPS act observed as follows:-

"55. Given the stringent provisions of the NDPS Act, together with the safeguards mentioned in the provisions discussed above, it is important to note that statutes like the NDPS Act have to be construed bearing in mind the fact that the severer the punishment, the greater the care taken to see that the safeguards provided in the statute are scrupulously followed. This was laid down in paragraph 28 of Baldev Singh (supra). That the NDPS Act is predominantly a penal statute is no longer res integra. In Directorate of Revenue and Anr. v. Mohammed Nisar Holia (2008) 2 SCC 370, this Court held:

"9. The NDPS Act is a penal statute. It invades the rights of an accused to a large extent. It raises a presumption of a culpable mental state. Ordinarily, even an accused may not be released on bail having regard to Section 37 of the Act. The court has the power to publish names, address and business, etc. of the offenders. Any document produced in evidence becomes admissible. A vast power of calling for information upon the authorities has been conferred by reason of Section 67 of the Act.

10. Interpretation and/or validity in regard to the power of search and seizure provided for under the said Act came up for consideration in Balbir Singh case [(1994) 3 SCC 299] wherein it was held:

“10. It is thus clear that by a combined reading of Sections 41, 42, 43 and 51 of the NDPS Act and Section 4 CrPC regarding arrest and search under Sections 41, 42 and 43, the provisions of CrPC, namely, Sections 100 and 165 would be applicable to such arrest and search. Consequently the principles laid down by various courts as discussed above regarding the irregularities and illegalities in respect of arrest and search would equally be applicable to the arrest and search under the NDPS Act also depending upon the facts and circumstances of each case.

11. But there are certain other embargoes envisaged under Sections 41 and 42 of the NDPS Act. Only a Magistrate so empowered under Section 41 can issue a warrant for arrest and search where he has reason to believe that an offence under Chapter IV has been committed so on and so forth as mentioned therein. Under sub-section (2) only a gazetted officer or other officers mentioned and empowered therein can give an authorisation to a subordinate to arrest and search if such officer has reason to believe about the commission of an offence and after reducing the information, if any, into writing. Under Section 42 only officers mentioned therein and so empowered can make the arrest or search as provided if they have reason to believe from personal knowledge or information. In both these provisions there are two important requirements. One is that the Magistrate or the officers mentioned therein firstly be empowered and they must have reason to believe that an offence under Chapter IV has been committed or that such arrest or search was necessary for other purposes mentioned in the provision. So far as the first requirement is concerned, it can be seen that the legislature intended that only certain Magistrates and certain officers of higher rank and empowered can act to effect the arrest or search. This is a safeguard provided having regard to the deterrent sentences contemplated and with a view that innocent persons are not harassed. Therefore if an arrest or search contemplated under these provisions of NDPS Act has to be carried out, the same can be done only by competent and empowered Magistrates or officers mentioned thereunder.”

11. Power to make search and seizure as also to arrest an accused is founded upon and subject to satisfaction of the officer as the term “reason to believe” has been used. Such belief may be founded upon secret information that may be orally conveyed by the informant. Draconian provision which may lead to a harsh sentence having regard to the doctrine of “due process” as adumbrated under Article 21 of the Constitution of India requires striking of balance between the need of law and enforcement thereof, on the one hand, and protection of citizen from oppression and injustice on the other.

*12. This Court in *Balbir Singh* [(1994) 3 SCC 299] referring to *Miranda v. State of Arizona* [384 US 436 (1966)] while interpreting the provisions of the Act held that not only the provisions of Section 165 of the Code of Criminal Procedure would be attracted in the matter of search and seizure but the same must comply with right of the accused to be informed about the requirement to comply with the statutory provisions. xxx xxx xxx*

16. It is not in dispute that the said Act prescribes stringent punishment. A balance, thus, must be struck in regard to the mode

and manner in which the statutory requirements are to be complied with vis-à-vis the place of search and seizure.”

33. Keeping this approach in mind, further the other evidence at hand can be analyzed.

34. It is also a glaring fact that the incident of the present case is said to happen on 17.01.2000 while chargesheet against the accused has been filed so promptly on 21.01.2000 without waiting or procuring the FSL report in regard of suspect's contraband. This conduct casts significant doubt on the prosecution's narrative. The prompt submission of the charge-sheet on 21.01.2000, merely one day after the alleged contraband was sent for chemical examination on 20.01.2000, critically undermines the prosecution's case. In NDPS Act offenses, the substance's nature is a foundational element, and filing a charge-sheet without the requisite forensic report reflects a casual and mechanical investigatory approach, thereby casting significant doubt on the entire prosecution narrative. This haste, particularly given the incident occurred on 17.01.2000, strongly suggests the investigation was conducted without properly securing or awaiting the FSL report, thereby creating clouds of suspicion over the prosecution's story. Though this fact does not alone vitiate the case of the prosecution but it portrays lack of fair investigation.

35. A three judge bench of the Supreme Court in the case of **Vinubhai Haribhai Malaviya v State of Gujarat (2019) 17 SCC 1** while emphasising the need of fair investigation and inquiry has held that: -

“Article 21 of the Constitution of India makes it clear that the procedure in criminal trials must, after the seminal decision in Mrs. Maneka Gandhi v. Union of India & Anr. (1978) 1 SCC 248, be “right, just and fair and not arbitrary, fanciful or oppressive” (see paragraph 7 therein). Equally, in Commissioner of Police, Delhi v. Registrar, Delhi High Court, New Delhi (1996) 6 SCC 323, it was stated that Article 21 enshrines and guarantees the precious right of life and personal liberty to a person which can only be deprived on following the 18 procedure established by law in a fair trial which assures the safety of the accused. The assurance of a fair trial is stated to be the first imperative of the dispensation of justice (see paragraph 16 therein). 17. It is clear that a fair trial must kick off only after an investigation is itself fair and just. The ultimate aim of all investigation and inquiry, whether by the police or by the Magistrate, is to ensure that those who have actually committed a crime are correctly booked, and those who have not are not arraigned to stand trial. That this is

the minimal procedural requirement that is the fundamental requirement of Article 21 of the Constitution of India cannot be doubted. It is the hovering omnipresence of Article 21 over the CrPC that must needs inform the interpretation of all the provisions of the CrPC, so as to ensure that Article 21 is followed both in letter and in spirit.”

36. A further lapse during the investigation that comes out is that the signatures or thumb impressions of the respective accused persons were not taken on the samples memos before sending them to the malkhana. This is a glaring lapse on the part of the prosecution as the absence of the signatures or thumb impression which are the identifying marks on the samples of the contraband, develop the possibility of misplacing and tampering. In fact in the recovery memo it has not been specifically stated that the contraband was separated and weighed on the spot rather this comes on later in the picture in the statements of the prosecution witnesses. This appears to suggest that they were only trying to fill the lapses. It is also poignant to note that the contraband allegedly recovered with possession of the accused persons is more than the small quantity but much less than the commercial quantity.

37. The act of the Investigating Officer filing the charge sheet in a predetermined manner without even awaiting the FSL report, reducing the investigation to an empty formality. More damning, however, is the failure to obtain the signatures or thumb impressions of the accused on the sealed sample packets. This omission is not merely a procedural irregularity but a substantive failure that destroys the sanctity of the seizure. Without these signatures, there is no judicial certainty that the samples tested were the same as those seized.

38. It is also evident from the record that although the alleged recovery of the contraband from the accused persons took place in a village area, no independent public witness was associated with the search and seizure. The explanation offered by the prosecution that villagers refused due to enmity is a stereotyped and routine explanation, which does not inspire confidence, particularly in a case under the NDPS Act where the standard of proof is stringent and procedural safeguards are required to be strictly followed.

39. In the case of **Gorakh Nath Prasad v State of Bihar** (2018) 2 SCC 305 the apex court had observed while stating about the testimonies of police witnesses: -

“The remaining prosecution witnesses being police officers only, it will not be safe to rely upon their testimony alone, which in any event cannot be sufficient evidence by itself either with regard to recovery or the seized material being ganja. No explanation has also been furnished by the prosecution for non-production of the ganja as an exhibit in the trial. The benefit of doubt will, therefore, have to be given to the appellant and in support of which learned Senior Counsel Shri Rai has relied upon”

40. While the testimony of police personnel cannot be discarded merely on the ground of their official status, in cases involving severe punishment and stringent provisions, the absence of independent corroboration assumes significance and weakens the prosecution case when procedural lapses are already apparent.

41. The trial court after analyzing the records has refused to accept the testimonies of the defence witnesses on grounds that they are interested persons with political connections. With the other infirmities and lapses in the investigation process I believe this was not the right approach to take.

42. Before arriving at the conclusion the observations made by the apex court in the case of **Ashok Kumar Sharma v State of Rajasthan** (2013) 2 SCC 67 squarely fit in the present case. The relevant portion of which is reproduced below: -

“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. Indisputedly 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 law laid down in this country i.e. leave aside the NDPS Act. We notice this fact is also within the knowledge of the legislature, possibly for that reason the legislature in its wisdom imposed an obligation on the authorized 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 of that procedure.”

43. The cumulative effect of the aforesaid infirmities particularly the absence of independent witnesses as well as no names of persons who refused to be the witness, the discrepancy in how the weight was measured, the filing of the charge sheet prior to the receiving of FSL report, absence of the link evidence with regard to sending the contraband to the FSL for examination since secondary evidence is adduced therefore it is lacking the transparency in carrying contraband in transit, absence of signatures of the accused on the samples of the contraband as well as other procedural lapses during investigation creates serious doubt about the prosecution version and thereby both the accused persons Kamlesh, in whose case there was non compliance of section 50 of the NDPS act and other procedural lapses during the investigation process and Munna, who also suffered due to these lapses, undoubtedly should be given the benefit of doubt as the prosecution has failed to establish its case *beyond reasonable doubt*. The learned trial court, while recording the conviction, failed to give attention to the procedural lapses apparent on the face of it and erroneously held that the accused persons were guilty of the offence under section 8/18 of the act, which finding is contrary to the evidence on record and settled legal principles.

44. Accordingly, the appeals are **allowed**.

45. The judgment and order dated 21.08.2007 passed by the learned Additional Sessions Judge, Fast Track Court No. 30, District Barabanki, in Criminal Trial No. 22/2000 (State v. Kamlesh) and Criminal Trial No. 23/2000 (State v. Munna), arising out of Case Crime No. 12/2000, Police Station- Kothi, District- Barabanki are hereby set aside.

46. The appellants Kamlesh and Munna are acquitted of the charge under Section 8/18 of the NDPS Act.

47. The appellants are on bail. Their bail bonds are cancelled and sureties are discharged. The appellants shall comply with the requirement of section 437A Cr.P.C.

(Pramod Kumar Srivastava,J.)

February 17, 2026

Haseen U.