

MANDATORY AND DIRECTORY PROVISIONS UNDER THE NDPS ACT



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DRUGS..... The explosive escalation of the illicit use in narcotic drugs and psychotropic substances, which account for more deaths than the most deadly diseases, has become a lethal phenomenon everywhere today, with the result that the rich and the poor alike, including students of both sexes, are falling prey in the hands of the powerful lobby of smugglers of these drugs and substances who amass wealth in a couple of days. The dangers flowing from illicit traffic in narcotic drugs have been recognised world-wide, and so aggravated in the conscious of world community that they are the subject of international conventions like the Single Convention on Narcotic Drugs, 1953, the Convention on Psychotropic Substances Act, 1971, and the Convention on Illicit Traffic in Narcotic Drugs and Psychotropic

**g abuse, drug trafficking, arms trafficking, money
dering, and narco-terrorism are some of the white-collar
es faced by the new millennium. The causes for drug abuse
are:**

**DRUG WAR: Narco-terrorism may be defined as a threat to
anity by waging a drug war with intention to influence the
ude and behaviour of the target group without any ethical
iderations or passions. Drug war is war being fought by.....**

CASA

**ORGANISED GANGS OF SMUGGLERS : By smuggling a
of heroin by the kingpin, while himself sitting at home, may
n him half a million dollars.**

**ANY GOVERNMENTS HAVE BEEN OVERTHROWN BY
GANGS OF SMUGGLERS LIKE CAMBODIA**

ACTIVITIES OF CHEMISTS AND DRUGGISTS
The young addicts start with cough syrups like phansydril, dex to proxyvon, dormant 10, diazepam tablets, iodex on head etc., and move on to a more lethal menu of ganja, paracetamol, opium, mandrax, smack, heroin. The abuse of cough syrups, painkillers and sleeping pills has risen considerably during the past few years.

CULTURAL CHANGE, LEIZURE TOURISM

JAIL CULTURE

OTHER PERSONAL OR FAMILY REASONS

We must remember drug addiction or drug abuse is not a law and order problem but is more of a psycho-social problem because the addict does not simply use drugs but develops a pathological craving for drugs and the desire is so strong that the addict must have his drug at all costs, whether in cash or in kind. The dimensions of the drugs and drug trafficking are so high that these have not only claimed millions of lives but have endangered the society as a whole by weakening national economies and shaking even the stability of some of the governments.

the symptoms of drug addicts who are addicted to hard drugs like injected heroin, on abstinence or failure to get the required doses of such drugs, can be summarized as under:—

At 8-12 hours of abstinence: The addict becomes increasingly nervous, restless and anxious and close confinement of the addict tends to intensify these symptoms.

Within 12-24 hours of abstinence: The addict begins to shiver frequently, sweats profusely and develops running of eyes and nose like that accompanying a severe bad cold.

Within 24-36 hours of abstinence: After 24 hours of abstinence pupil of the drug addict dilates, a severe twitching of muscles occur within 36 hours leading to development of

and then: All body fluids are released, vomiting and diarrah are acute with little appetite for food and the addict is unable to sleep.

and finally: The addict shall go to the grave of his own making unless he is given expert medical treatment for de-addiction and de-toxification to make him a good member of the society.

the Indian Parliament, recognising the need of the hour, enacted the Narcotic Drugs and Psychotropic Substances Act, 1985 (which came into force on 14th day of November, 1985) in which deterrent punishment of rigorous imprisonment which shall not be less than ten years; and fine which shall not be less than one lakh rupees was prescribed for those found guilty for most of the offences under the Act. By the amendment Act No. 2 of 1989, even the breath-taking punishment of death penalty has been provided for specified offences by previous convicts under section 31A of Act.

**However, after coming into force of the Narcotic
Drugs and Psychotropic Substances
Amendment) Act No. 9 of 2001, the contravention
of narcotic drugs has been categorized for the purpose of
punishment into (a) small quantity; (b) quantity lesser
than commercial quantity but greater than small
quantity; (c) commercial quantity; and while the Act has
provided stringent and severe punishment for drug
traffickers and for possession of commercial quantity of
narcotic drugs or psychotropic substances, it envisages
reformatory approach towards addicts of such drugs and
substances.**

**While providing such
deterrent punishment, the
Parliament, in its wisdom,
has also prescribed special
procedure for conducting
search, seizure and arrest in
Chapter V of the Act.**

**JUDGES HAVE TO DECIDE THE
CASES ON THE BASIS OF**

**FACTS
EVIDENCE
LAW**

FACTS —————→ **INVESTIGATION**

EVIDENCE —————→ **PROSECUTION**

LAW —————→ **AS DECLARED BY COURTS**

ARTICLE 141 OF THE CONSTITUTION

Under section 41 of the Narcotic Drugs and Psychotropic Substances Act, the empowered Magistrate or the empowered officer has power himself to arrest any person or search a building, conveyance or place or may issue warrant or authorisation for the arrest of any person, or for the search, by day or night, of any building, conveyance or place, if he has reason to believe from personal knowledge or from information given by any person and taken in the following circumstances that:—

- (a) any person has committed an offence punishable under this Act;
- (b) any narcotic drug or psychotropic substance or controlled substance has been kept or concealed in any building, conveyance or place in respect of which any offence punishable under this Act has been committed; or
- (c) any document or other article which may furnish evidence of commission of any offence punishable under the Act is kept or concealed in any building, conveyance or place; or
- (d) any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of the Narcotic Drugs and Psychotropic Substances Act is kept or concealed in any building, conveyance or place.

As we all know investigation is not an end in itself but means to find out the truth. When more stringent punishment has been provided in the Narcotic Drugs and Psychotropic Substances Act, correspondingly more safeguards have also been provided for conducting fair investigation of the cases under the Act. Chapter V of the Act lays down the procedure for conducting search and seizure under the Act. Our experience has shown that a large number of cases instituted in courts in respect of various offences under the NDPS Act have ended in acquittal not on merits but on technical grounds of non-compliance of mandatory provisions of the Act.

Now the question is what we mean by mandatory and directory provisions and what is the effect of non-compliance with the same. Generally it can be said that in case of a mandatory provision, the non-compliance of the same shall lead to acquittal of the accused in the criminal trial on that score itself; whereas in case of a directory provision, the provision cannot be ignored totally by the investigating officer, as the failure shall have bearing on appreciation of evidence regarding arrest of the accused or seizure of the contraband and the prejudice caused to the accused by non-compliance of such directory provisions. Well recognized rule of construction is that procedural prescriptions are meant for doing substantial justice.

**f violation of the procedural provision
does not result in denial of fair hearing
or causes prejudice to the parties, the
same has to be treated as directory
notwithstanding the use of word
'shall'.**

***Shivjee Singh v. Nagendra Tiwary, AIR
2010 SC 2261 (2263).***

A statute as is well-known must be read in the text and context thereof. Whether a statute is directory or mandatory would not be dependent on the use of the words “shall” or “may”. Such a question must be posed and answered having regard to the purpose and object it seeks to achieve. *P.T. Rajan v. T.P.M. Sahir*, 2003 (7) Supreme 124: AIR 2003 SC 603: 2003 AIR SCW 5396: (2003) 8 SCC 98.

Section 42 of the Narcotic Drugs and Psychotropic Substances Act lays down that any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department.

has reason to believe from personal knowledge or information given by any person and taken down in writing

-
- a) enter into and search any such building,
conveyance or place;
 - b) in case of resistance, break open any door
and remove any obstacle to such entry;
 - c) seize such drug or substance
and
 - d) detain and search, and, if he thinks proper,
arrest any person whom he has reason to believe
to have committed any offence punishable under
this Act:

PROVISO TO SECTION 42: Provided that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sun-set and sun-rise after recording the grounds of his belief.

Compliance of Section 42

For application of section 42 of the NDPS Act, it is necessary that the officer empowered thereunder, before exercise of his right, has reason to believe from personal knowledge or information received regarding the movement of narcotic drug or psychotropic substance. However, if the action is taken not upon his personal knowledge or information received, the requirements of section 42 of the Act would not be applicable.

Varnail Singh v. State of Rajasthan, 2000 (6) Supreme 414: 2000 (4) Crimes 53: (2000) 7 SCC 632: JT 2000 (10) SC 106: 2000 Cr LJ 4635: 2000 Cr LR (SC) 750.

Section 42 (2)

Under section 42(2) of the Act such empowered officer who takes down any information in writing or records the grounds under proviso to section 42(1), should send a copy thereof to his immediate official superior within 72 hours. If there is total non-compliance of this provision the same affects the prosecution's case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not will be a question of fact in each case. *State of Punjab v. Balbir Singh*, (1994) 3 SCC 299: AIR 1994 SC 1872: 1994 Cr LJ 3702: 1994 AIR SCW 1802. Also refer to *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172: AIR 1999 SC 2378: 1999 Cr LJ 3672: 1999 AIR SCW 2494; *Abdul Rashid Ibrahim Mansuri v. State of Gujarat*, (2000) 2 SCC 513: AIR 2000 SC 821: 2000 Cr LJ 1384: 2000 AIR SCW 375 and *Karnail Singh v. State of Rajasthan*, (2000) 7 SCC 632.

While total non-compliance of requirement of sub-sections (1) and (2) of section 42 of the NDPS Act is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42 of the Act. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42 of the Act. However, where the police officer does not record the information at all, or does not inform the official superior at all, then also it will be clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 of the Act or not is a question of fact to be decided in each case. The above position got strengthened with the amendment by Act 9 of 2001.

the Constitution Bench Judgement in *Sukhdev Singh* Case it has held that in view of technological advancements, it may not be possible to record information as per the requirement of section 42. That compliance by the investigating agency should not be required in an emergency situation so as to avoid misuse by wrongdoers/offenders/drug peddlers. Whether there is adequate substantial compliance is a question of fact in each case. Apart from the finding that present case is governed by section 43 of the Act, there is no ground to interfere with the concurrent finding of the courts below and there is no merit in the ground taken up by the appellants. Hence, there is not adequate compliance of section 42 of the Act.

Where search is conducted by Gazetted police officer

Where a search is conducted by a Gazetted Officer himself acting under section 41 of the NDPS Act, it was not necessary to comply with the requirement of section 42 of the Act. For this reason also, in the facts of the case, it was not necessary to comply with the requirement of the proviso to section 42 of the NDPS Act.

M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence, (2003) 8 SCC 449: AIR 2003 SC 4311: 2003 (1) 4996: 2003 AIR SCW 4975.

The gazetted rank officers enjoy special position and privileges under the Narcotic Drugs and Psychotropic Substances Act. They need not be equated to officers taking action without authorization or warrants. The requirement of sending information to superior officers under sub-section (2) of section 42 of the Act cannot be insisted upon in their case. There is no bar in the statute to functions of arrest, search and seizure being carried out by the officers of the gazetted rank themselves. When they act on their own, they do not have to report to their seniors on such things.

***Srinvas Goud v. State of A.P.*, 2005 (6) Supreme 623: AIR 2005 SC 647: 2005 Cr LJ 4367: 2005 AIR SCW 4905. Also refer to *M. Prabhalal v. Assistant Director, Directorate of Revenue Intelligence*, (2003) 8 SCC 449: AIR 2003 SC 4311: 2003 Cr LJ 4996: 2003 AIR SCW 4975 and *State of Haryana v. Jarnail Singh*, (2004) 5 SCC 188: AIR 2004 SC 2491: 2004 Cr LJ 2541: 2004 AIR SCW 2962.**

Effect of Complainant/informant and Investigating Officer being the same person

is, therefore, held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof. In the instant case as the complainant and the investigating officer is the same person the appeal succeeds and is allowed. The prosecution is held to be vitiated because of the transgression of the constitutional guarantee of a fair investigation. The appellant is directed to be set at liberty forthwith unless stated in any other case.

Three Judge Bench in *Mohan Lal v State of Punjab*,
AIR 2018 SC 3853 : J NIND 2018 SC 308 : (2018) 17

er the judgement in *Mohan Lal v State of Punjab* case (supra), the
nor was delivering lecture at Delhi Judicial Academy on 14 September
8 in the 'Conference on Integration of Knowledge, Skill and Attitude
Adjudication' when one of the Special Judge, NDPS Court, showed the
s item in 'The Indian Express' dated 13 September 2018 to the effect
t citing the judgement in the above case Hon'ble Punjab and Haryana
h Court has released the convicts in a few cases on bail in which the
plainant and the investigating officer were the same person and put
question as to whether this judgement shall operate prospectively or
rospectively. The *author explained that as new proposition of law* has
n laid down in *Mohan Lal's case*, which unsettled the settled
osition of law being followed by all the courts under the NDPS Act
t from the date of coming into force of the Act in 1985 and a number
convictions have been upheld where the complainant and the
estigating officers were the same person, therefore, *the view of the*
nor on academic side was that the proposition of law laid down in this
gement shall apply prospectively but still we have to wait for the final
dict from the Hon'ble Supreme Court of India in the years to come
never this question arise as the law declared by the Hon'ble Supreme

in the passage of time *the view of the author appears to have
d favour* with the judgement of the Hon'ble Supreme Court
India in case *Varinder Kumar v State of Himachal Pradesh* in
which it has been held as under:

Proper administration of the criminal justice delivery system,
therefore, requires balancing the rights of the accused and the
prosecution, so that the law laid down in *Mohan Lal (supra)* is
not allowed to become a spring board for acquittal in
prosecutions prior to the same, irrespective of all other
considerations. We, therefore, hold that all pending criminal
prosecutions, trials and appeals prior to the law laid down in
Mohan Lal (supra) shall continue to be governed by the
individual facts of the case. The present appeals lack merit and
therefore, dismissed.

Three Judges Bench judgement in *Varinder Kumar v State*

Varinder Kumar v State of Himachal Pradesh, 2010 (1) Cr. L.J. 100 (SC) (2010)

gain in the judgement delivered on 6 January 2020, learned counsel for the accused placed reliance on the judgment in the case of *Mohan Lal case supra*, to support his argument that informant and investigator cannot be the same person, it has been held that as in the subsequent judgment, in the case of *Varinder Kumar v State of Himachal Pradesh (supra)*, this court held that all pending criminal prosecutions, trials and appeals prior to law laid down in *Mohan Lal case* shall continue to be governed by individual facts of the case and as the case pertains to the period prior to the judgement in *Mohan Lal's case*, the judgement in *Mohan Lal's case* shall not be applicable.

Three Bench Judgement headed by Hon'ble Justice V Ramana in *Surinder Kumar v State of Punjab*,

rely because the informant is the investigator, by that itself, investigation would not suffer the vice of unfairness or bias, therefore, on the sole ground that informant is the investigator, the accused is not entitled to acquittal. The matter to be decided on a case to case basis. A contrary decision of court in the case of *Mohan Lal v State of Punjab*, (2018) 17 C 627 and any other decision taking a contrary view that informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled. The Reference is answered accordingly.

Constitution Bench judgement dated 31 August 2020 in *Rakesh Singh v State Narcotic Branch of Delhi*, Special Leave Petition (Criminal) Diary No. 39528/2018; Special Leave Petition (Criminal) No. 5648/2019; Special Leave Petition (Criminal) No. 5894/2019; Special Leave Petition (Criminal)

Under section 43 of the Narcotic Drugs and Psychotropic

Substances Act, any officer of any of the departments mentioned in section 42, has the power to seizure, detain, search and arrest in public place or in transit as under:—

(a) seize, in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, and any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or forfeiture under Chapter VA of this Act;

detain and search any person whom he has reason to believe to have committed an offence punishable under Act, and, if such person has any narcotic drug or psychotropic substance in his possession and such possession appears to him to be unlawful, arrest him and any

the next important question is whether in case of search under section 43 of the Act the compliance of section 42 of the Act is required or not?

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The answer to this question is that in case of search in public place under section 43 of the Act the compliance of section 42 of the Act is not required. Section 42 of the Act has no application when the search is conducted in the public place under section 43 of the Act. The said section applies when the contraband is recovered from a building, conveyance or closed place. Where the search was carried out in a public place, this case falls solely within the ambit of section 43 and compliance with section 42 was not necessary.

***State of Punjab v Baldev Singh* case, Dr AS**

**the material difference between the provisions of section 43
section 42 of the Act is that whereas section 42 requires
ording of reasons for belief and for taking down of
ormation received in writing with regard to the commission
n offence before conducting search and seizure, section 43
s not contain any such provision and as such while acting
er section 43 of the Act, the empowered officer has the
ver of seizure of the article etc. and arrest of a person who
found to be in possession of any narcotic drug or
chotropic substance in a public place where such
session appears to him to be unlawful.**

Learned counsel for the appellant/accused urged that Section 42 had not complied with the mandatory requirements of Section 42, as a result of which the trial stood vitiated. In rejecting the plea of Learned counsel it has been held that the appellant was walking along the Picnic Garden Road. Accused was intercepted and detained immediately by the raiding party in front of Falguni Club, which was not a building, conveyance or an enclosed place. The place where the occurrence was accessible to the public and fell within the ambit of the phrase "public place" in the explanation of Section 43 and therefore section 42 had no application.

The judgement written by Hon'ble Dr Dhananjaya Y Chandrachud, J for Three Judge Bench in *SK Raju @ Abdul Haque @ Jagga v State of West Bengal*, LNIND

Section 46 of the Act provides that it is the duty of the land-holder to give information of legal cultivation;

Section 47 of the Act, every officer of the Government and every panch, sarpanch and other village officer shall give immediate information of legal cultivation.

Section 48 empowers the Metropolitan Magistrate, Judicial Magistrate of the first class or any Magistrate specially empowered to attach crop illegally cultivated:

Section 49 of the Act empowers the authorised officer to **stop and search conveyance** in the following words:—

Any officer authorised under section 42, may, if he has reason to suspect that any animal or conveyance is, or is about to be, used for the transport of any narcotic drug or psychotropic substance or controlled substance, in respect of which he suspects that any provision of this Act, has been or is being, or is about to be, contravened, at any time, stop such animal or conveyance, or, in the case of an aircraft compel it to land and—

a) rummage and search the conveyance or part thereof;
b) examine and search any goods on the animal or in the conveyance;

c) if it becomes necessary to stop the animal or the conveyance, he may use all lawful means for stopping it, and where such means fail, the animal or the conveyance may be fired upon.”

Section 50 of the Act, provides most important safeguard wherein, it is prescribed that when any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person, so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest magistrate. If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate. The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made. Moreover, no female shall be searched by any one excepting a female. The provisions of section 50 of the Act have been interpreted by the Hon'ble Supreme Court in *State of Punjab v. Balbir Singh*, 1.(1994) 3 SCC 299: AIR 1994 SC 1872: 1994 Cr LJ 3702: 1994 AIR SCW 1802. as under:

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

State of Punjab v. Balbir Singh,

However, the matter has been finally settled by Hon'ble Supreme Court of India holding that provisions of section 50 of the Act are mandatory. *Constitution Bench Judgement in State of Punjab v Baldev Singh*, AIR 1999 SC 2378 : 1999 Cr LJ 3672 : 1999 AIR SCW 2494 : (1999) 6 SCC 172; While those of sections 52 and 57 are directory but in spite of this fact these provisions cannot be ignored completely and will have bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. *State of Punjab v Baldev Singh*, AIR 1999 SC 2378 : 1999 Cr LJ 3672 : 1999 AIR SCW 2494 : (1999) 6 SCC 172; *Gurbax Singh v State of Haryana*, AIR 2001 SC 1002 : 2001 Cr LJ 1116 : 2001

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

Compliance of Section 50 of the Act

) Failure to inform The compliance of the safeguards in section 50 of the NDPS Act is mandatory. When an empowered officer or a duly authorized officer acting on prior information is about to “search a person”, it is imperative for him to inform the person concerned of his right under sub-section (1) of section 50 of the Narcotic Drugs and Psychotropic Substances Act of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing, and section 50 of the N.D.P.S. Act would be applicable only in those cases where the search of the person is carried out. *Gurbax Singh v. State of Haryana*, 2001 (1) Supreme 625: JT 2001 (2) SC 330: 2001 (1) Crimes 235: 2001 Cr LJ 1166: (2001) 3 SCC 28:

It is imperative on the part of the officer to apprise the person intended to be searched of his right under section 10 of the NDPS Act to be searched before a gazetted officer or a Magistrate. In para 32 of the judgement, 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.

Constitution Bench Judgement in *Vijaysingh Chandubha Chaudhary v. State of Gujarat*, (2011) 1 SCC 609. Also refer to *Prakash v. State of Madhya Pradesh*, (2012) 8 Supreme 81 and *Navdeep Singh v. State of Haryana*, (2013) 1 Supreme 32.).

Where accused not taken before nearest magistrate for search after exercise of right by the suspect, it has been held that the mandatory provisions of section 50 not complied with and acquittal of accused upheld. Narcotic Control Bureau v. Sukh Dev Raj Sodhi, 2011 (4) Supreme 319).

Investigating officer nowhere stated, in his examination, that he informed the person to be searched of his right to be searched before a gazetted officer or a magistrate and in these circumstances, the judgement in Noor Aga's case followed and accused acquitted. (Nirmal Singh Pehlwan @ Nimmo v. Inspector, Customs, Punjab, (2011) 3 RCR (Cri) 831). Strict compliance of section 50 is required. Myla Venkateswarlu v. State of Andhra Pradesh, (2012) SCC 226.).

No Specific Words required

As has been highlighted in *Baldev Singh's* case (supra) it has to be seen and gauged whether the requirements of section 50 of the Act have been met. Section 50 in reality provides for additional safeguards which are not specifically provided by the statute. The stress is on the adoption of a reasonable, fair and just procedure. No specific words are necessary to be used to convey existence of the right. *Krishna Kanwar @ Thakuraeen v. State of Rajasthan*, 2004 (1) Supreme 815: AIR 2004 SC 2735: 2004 AIR SCW

Section 50 - Personal search and not search of bag

A bare reading of section 50 of the NDPS Act shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises.

Kalema Tumba v. State of Maharashtra, JT 1999

8) SC 293: AIR 2000 SC 402: 2000 Cr LJ 507:

1999 AIR SCW 4544. Also refer to *Gurbax Singh*

. State of Haryana, (2001) 3 SCC 28: AIR 2001

SC 1002: 2001 Cr LJ 1166: 2001 AIR SCW 670.

The language of section 50 of the Act is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles, and this position was settled beyond doubt by the Constitution Bench in *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172: AIR 1999 SC 2378: 1999 Cr LJ 3672: 1999 AIR SCW 2494.).

**Section 50 not applicable when
recovery from bag (thaili).
Jarnail Singh v. State of Punjab,
2011) 3 SCC 521.**

**Section 50 is not applicable when
recovery from gunny bag.
State of Rajasthan v. Tara Singh,
2011) 11 SCC 559.).**

Section 50 (4) of the Act

The provision of search of a lady by a female under section 50(4) of the NDPS Act is mandatory and in case of non-compliance of the same, the conviction and sentence of the accused cannot be sustained.

***State of Punjab v. Surinder Rani alias Chhindi*, 2002 (1) Criminal Court Cases 105 (SC): (2000) 10 SCC 429.**

Whether for non compliance of S.50 accused can be discharged – No?

However for non-compliance of the mandatory provision of section 50 of the NDPS Act the order of the discharge of the accused held to be improper. Even if search is found to be in violation of law, what weight should be given to the evidence collected is yet another question to be gone into during the trial. Under these circumstances, it has been held by Hon'ble Supreme Court that the Ld. Sessions Judge was not justified in discharging the accused, after filing of the charge-sheet holding that the mandatory requirement of section 50 of the Act has not been complied with. *State of Himachal Pradesh v. Prithi Chand*, AIR 1996 SC 977; (1996) 2 SCC 37; 1996 Cr. L.J. 1354; 1996 AIR

During my participation in the meeting with the then Hon'ble Chairman of the Law Commission of India in the year 1996 on the proposed amendments to the Narcotic Drugs and Psychotropic Substances Act, the consequences of throwing the contraband by the suspect while on transit to the Magistrate or Officer were discussed and finally sub-sections (5) and (6) have now been inserted in section 50 of the Narcotic Drugs and Psychotropic Substances Act by amendment Act No. 9 of 2001 which provide as under:—

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

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

Moreover, as per section 51

of the Narcotic Drugs and Psychotropic Substances Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall apply insofar as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under the Narcotic Drugs and Psychotropic Substances Act. Thus, the provisions of section 100 and section 165 of the Code of Criminal Procedure, 1973, shall apply to searches and seizures under this Act and these provisions of section 165 and clause (4) of section 100 of the Code of Criminal Procedure, 1973, make it clear that it is the duty of the officer or other person about to make a search to call

on a true, or more independent and respectable

inhabitants of the locality where the search is to be conducted, or of any other locality, if no such inhabitant of the said locality is available or is unwilling to be a witness to the search to attend and witness the search and may issue an order in writing to them or any of them so to do. However, if these provisions of joining two independent witnesses are not complied with, it would not affect the legality of the proceedings but would only affect the weight of evidence in support of the search and the recovery.

Where the accused/appellant Durand Didier, a French national, was found in possession of 51 grams of brown sugar (heroin), 45 grams of ganja oil and 55 grams of opium at Colva (Goa) and the counsel for the accused took the plea that the investigating officer did not deliberately join with him respectable inhabitants of the locality, the Supreme Court upheld the conviction and sentence of ten years' rigorous imprisonment and fine of rupees one lakh in case titled *Durand Didier v. Chief Secretary, Union Territory of Goa*, AIR 1989 SC 1966: (1990) 1 SCC 95.

By rejecting the plea of counsel for the accused by holding as under:—

Where witnesses to search and seizure of contraband drugs from the accused at midnight were inhabitants of the locality in which police outpost was situate and nothing brought out in cross-examination of *panch* witnesses so as to discredit their testimony, the fact that the witnesses were not residing in the vicinity of the place of seizure is immaterial and the plea that there was violation of statutory safeguards relating to search and seizure is untenable.”

Independent witness not joined

The Investigating Officer in his cross-examination has made it clear that in spite of his best persuasion, none of them were willing to become a witness. Therefore, he could not examine any independent witness. Section 114 of the Act 1872 gives rise to the presumption that every official act done by the police was regularly performed and such presumption requires rebuttal. The legal maxim '*omnia praesumuntur rite et digne probetur in contrarium sollemniter esse acta*' i.e., all the acts are presumed to have been done rightly and regularly, applies. When acts are of official nature and went through the process of scrutiny by official persons, a presumption arises that the said acts have regularly been performed. In view of the above, the submissions of the learned counsel for the appellants in regard to non-joining independent witnesses, are held to be without any substance.

It was held that though it is desirable to examine independent witness, however, in the absence of any such witness, if the statements of police officers are reliable and when there is no animosity established against them by the accused, conviction based on their statement cannot be faulted with. On the other hand, the procedure adopted by the prosecution is acceptable and permissible, particularly, in respect of the offences under the NDPS Act.

Sumit Tomar v State of Punjab, 2012 (10) Scale 507

case of the prosecution cannot be rejected solely on the ground that independent witnesses have not been examined, on the perusal of the evidence on record the court finds the case put forth by the prosecution is trustworthy. When evidence of the official witnesses is trustworthy and credible, there is no reason not to rest the conviction on the basis of their evidence. In the case at hand, the evidence is unimpeachable and beyond reproach and the witnesses cited by the prosecution can be believed and their evidence has been correctly relied upon by the trial court and the High Court to record a conviction. It is well settled in law that what is necessary for proving the prosecution case is not the quantity but the quality of the evidence. In view of the aforesaid premised reasons, we do not perceive any merit in this appeal and it is accordingly dismissed.

Swinder Singh and another v State of Punjab. AIR

Under section 52 of the Act, any officer arresting a person under sections 41, 42, 43 or 44 shall, as soon as may be, inform him of the grounds of such arrest and every person arrested and articles seized shall be forwarded to the Magistrate or the officer-in-charge of the nearest police station as the case may be;

Under section 55 of the Act, an officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.

Section 57 of the Act lays down that whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest

Section 52 and 57 not mandatory

The provisions of sections 52 and 57 of the NDPS Act which deal with the steps to be taken by the officers after making arrest or seizure under section 41 to 44 of the Act are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc., then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case. *State of Punjab v. Balbir Singh*, 1994 AIR SCW 1802: AIR 1994 SC 1872: 1994 Cr LJ 3702: 1994 (1) Crimes 753: (1994) 3 SCC 299.

The conviction and sentence of appellate has been set aside by the Hon'ble Apex Court because seized narcotic powder not deposited with the malkhana for more than two months and not producing the same in court at the time of trial in addition to all the independent witnesses in the panchnama turning hostile, and the investigating officer not coming into the witness box,.

Ashok alias Dangra Jaiswal v. State of Madhya Pradesh, 2011 (5) SCC 123.)

Section 55 - Safe custody and report of the FSL

where the trial court held that the articles seized were kept in *alkhana* in tact and section 55 of the Act were complied with, the Supreme Court of India did not interfere with the findings of conviction and sentence.

***Ajendra v. State of M.P.*, AIR 2004 SC 1103: 2003
AIR SCW 7213: (2004) 1 SCC 432.**

The safe custody of seized articles and samples has been established by cogent evidence. Forensic Laboratory report shows that the samples were received in sealed conditions with seals and tags in tact. That being so, there is no infraction as alleged.

***mt. Krishna Kanwar @ Thakuraeen v. State of
rajasthan*, AIR 2004 SC 2735: 2004 AIR SCW
203: (2004) 2 SCC 608.**

When there was doubt about sample on the basis of contradiction as to colour but the sample was found in sealed container intact fit for testing, it has been held that it cannot be doubted that material seized and examined was different.

Angdish Budhroji Purohit v. State of Maharashtra,
1998 (7) Supreme 228: (1998) 7 SCC 270: JT 1998
(5) SC 335: 1998 Cr LJ 4626: 1998 (3) Crimes
52: AIR 1998 SC 3328: 1998 (5) SCALE 173.

Variation in weighment

When the seals of sample were found intact and the variation in the weighment was very minimal and almost ignorable, the plea of the accused of tampering has been rejected.

Rajesh Jagdamba Avasthi v. State of Goa, AIR 2005 SC 1389: 2004 AIR SCW 7239: 2004 (4)

Crimes 347: (2005) 9 SCC 773. Also refer to

Madan Lal v. State of Himachal Pradesh, AIR

2003 SC 3642: 2003 Cr LJ 3868: 2003 AIR SCW

969: (2003) 7 SCC 465.

On the question of Reduction in weight of the samples sent for analysis and tampering, it has been noted by the trial court that the seals were intact and there was no tampering, which view has been endorsed by the Hon'ble High Court. On considering the reasoning indicated that there was very minimal and almost ignorable variation in weight, Hon'ble Supreme Court found no reason to interfere with the findings.

Madan Lal v. State of Himachal Pradesh, 2003 (6) Supreme 382: AIR 2003 SC 3642: 2003 Cr LJ 3868: 2003 AIR SCW 3969.

Whether content of narcotic to be considered or whole quantity recovered

When any narcotic drug or psychotropic substance is found mixed with one or more neutral substance (s), for the purpose of imposition of punishment, it is the content of the narcotic drug or psychotropic substance, which shall be taken into consideration.

E. Michael Raj v. Intelligence Officer, N.C.B., (2008) 5 SCC 161.

When 740 grams of heroine was recovered and as per the CFL report the %age of concentration was 16.93% and thus the quantity virtually comes to 125 grams i.e. intermediary quantity and not commercial quantity.

Nikku Khan @ Mohammadeen v. State of Haryana, 2011

The notification dated 18th November, 2011 has replaced the part of notification dated 09.10.2001 by laying down that in the table at the end of Note 3, the following note shall be inserted:

(4) The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content”

It has been held that this notification dated 811.2009 cannot be applied retrospectively as a penal provision providing for enhancing the sentence does not operate retrospectively. However, it has been held that the judgement in C. Michael Raj case has no application as the present case does not relate to a mixture of narcotic drug or psychotropic substance with one or more substances because material recovered in this case is opium in terms of section 2 (xv) of the NDPS Act and under entry 92 (dealing with opium) entire substance is to be opium. (Harjit Singh v. State of Punjab, 2011 (4) SCC 441

decision of this court in the case of *E. Micheal Raj (Supra)*
g the view that in the mixture of narcotic drugs or psychotropic
tance with one or more neutral substance(s), the quantity of the
al substance(s) is not to be taken into consideration while
rmining the small quantity or commercial quantity of a narcotic
or psychotropic substance and only the actual content by weight of
offending narcotic drug which is relevant for the purpose of
rmining whether it would constitute small quantity or commercial
tity, **is not a good law....In case of seizure of mixture of
otic drugs or psychotropic substances with one or more
ral substance(s), the quantity of neutral substance(s) is not to
xcluded and to be taken into consideration along with actual
ent by weight of the offending drug, while determining the
all or commercial quantity” of the narcotic drugs or
hotropic substances.**

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Three Judges Bench judgement in Hira Singh and another

Section 21 of the NDPS Act is not stand-alone provision and must be construed along with other provisions in the statute including provisions in the NDPS Act including notification S.O.2942(E) dated 18.11.2009 and notification S.O.55(E) dated 19.10.2001.....**Challenge to notification dated 18.11.2009 adding “Note 4” to the notification dated 10.2001, fails** and it is observed and held that the same is ultra vires to the scheme and the relevant provisions of NDPS Act. Consequently, writ petitions and Civil Appeal challenging the aforesaid notification stand dismissed.

Three Judges Bench judgement in Hira Singh and another v. Union of India and another, ANU/SC/0383/2020 decided on 23 April, 2020.

ast but not the least, it must be remembered that in the second-half of the 20th Century, white-collar crimes and especially the drug addiction and drug trafficking have assumed alarming proportions. Drug traffickers can be termed as “merchants of death and destruction”. A murderer kills one or two persons at a time, but a drug trafficker spoils the lives of thousands of persons and, therefore, the Parliament, in its wisdom, has enacted the Narcotic Drugs and Psychotropic Substances Act, 1985, thereby prescribing the deterrent punishment. However, when stringent punishment has been provided in the Act, the Act has also provided adequate safeguards so that innocent persons are not sentenced to imprisonment. The more serious is the offence, the more strict proof is

to conclude it is worth mentioning that judges play an important role in the implementation of the NDPS Act and Hon'ble Apex Court in case *State of Karnataka v. Krishnappa*, 1980 (4) SCC 75 has rightly pointed out that a socially sensitised Judge is a better statutory armour in cases of crime than long clauses of penal provisions, containing complex conceptions and provisos.

Thank You

Jai Hind

Any Query Most Welcome

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M. I. No. 004181/52000