

Reserved

In Chamber

Case :- CRIMINAL APPEAL No. - 3162 of 2023

Appellant :- Bajjnath Prasad Sah Kanoo

Respondent :- Union Of India Thru. Intelligence Officer Directorate Revenue Intelligence Lko.

Counsel for Appellant :- Pal Singh Yadav,Ashish Kumar Singh,Prathama Singh

Counsel for Respondent :- Digvijay Nath Dubey

Connected with

Case :- CRIMINAL APPEAL No. - 2986 of 2023

Appellant :- Chandashekhar Prasad Sah

Respondent :- Union Of India Thru. Directorate Of Revenue Intelligence

Counsel for Appellant :- Ashish David Rao,Shakti Kumar Verma,Sumedha Sen

Counsel for Respondent :- Digvijay Nath Dubey

and

Case :- CRIMINAL APPEAL No. - 529 of 2024

Appellant :- Pankaj Kumar

Respondent :- Union Of India Thru. Sanjeet Singh Intelligence Officer Directorate Of Intelligence Revenue, Lko

Counsel for Appellant :- Nand Lal Pandey,Apoorva Jyoti,Ujjwal Pandey

Counsel for Respondent :- Digvijay Nath Dubey

Hon'ble Mohd. Faiz Alam Khan,J.

1. The above criminal appeals are connected with each other and for the sake of convenience and in order to avoid multiplicity and repetition of the consideration of arguments, appreciation of evidence and recording of reasoning, are being disposed of by this common order.

2. Heard Shri Pal Singh Yadav, learned counsel for the appellant - Bajjnath Prasad Sah Kanoo in Criminal Appeal No.3162 of 2023,

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Shri Shakti Kumar Verma, learned counsel for the appellant - Chandrashekhar Prasad Sah in Criminal Appeal No.2986 of 2023, Shri Apoorva Jyoti, learned counsel for the appellant - Pankaj Kumar in Criminal Appeal No.529 of 2024 as well as Shri Digvijay Nath Dubey, learned counsel appearing for the D.R.I. and perused the record.

3. Above mentioned criminal appeals have been preferred by the appellants namely Baijnath Prasad Sah Kanoo, Chandashekhar Prasad Sah and Pankaj Kumar against the judgment and order dated 25.08.2023 passed by the Additional District and Sessions Judge, Court No.11/Special Judge, N.D.P.S. Act, Lucknow in Criminal Case No.568 of 2017 (Union of India vs. Chandrashekhar Prasad Sah and 3 Others) arising out of D.R.I. Criminal Case No.01 of 2017, under Section 8(c)/20(b)(ii)(c)/25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as N.D.P.S. Act), Police Station D.R.I. Lucknow, District Lucknow, whereby the appellants were convicted for the offence under Section 8(c)/20(b)(ii)(c)/25 of the N.D.P.S. Act and were sentenced to undergo for ten years rigorous imprisonment along with fine of Rs.1,00,000/- each with default clause.

4. Brief facts necessary for disposal of the above appeals are to the tune that on 06.02.2017, a discrete information information was received by the D.R.I. Unit Lucknow from its unit at Patna in terms that a Santro car bearing registration No.PB23J4874 had gone to Kathmandu, Nepal through Raksaul for the purpose of loading illegal 'charas' on 03.02.2017 at about 05:00pm. and after loading the same this vehicle is returning to Haryana via Gorakhpur-Lucknow,Highway. On this information, Deputy Director, Directorate of Revenue Intelligence (D.R.I.), Lucknow has called Intelligence

Officer Shri Abhinav Awasthi in his chamber on 06.02.2017 at 05:45pm., where Intelligence Officers Shri Ritesh Narsinghani, Shri Sanjeet Singh were already present and thereafter a team was constituted comprising of Intelligence Officers Shri Abhinav Awasthi, Shri Ritesh Narsinghani, Shri Sanjeet Singh and Head Hawaldar, Shri Triveni Prasad Yadav. The Deputy Director has authorised the team to apprehend the contraband along with wrong doers and thereafter the team had boarded in a private 'Innova' taxi and departed from the D.R.I., Directorate, situated at Vishal Khand, Faizabad Road, Lucknow and on their way, they also took two independent witnesses namely Ram Khelawan, R/o Lane No.2, Village Kamlapur, Chihat, Lucknow and Suresh Kumar R/o Khargapur, Lucknow and the Intelligence Officer Shri Abhinav Awasthi apprised them about the facts and requested them to accompany the team as independent witnesses on which they they consented and accompanied team.

5. It is further the case of the prosecution that the whole team along with two independent witnesses had moved towards Lucknow – Faizabad highway and as no specific time was known of the arrival of the vehicle, they parked their vehicle at Lucknow – Faizabad road near Babu Banarasi Das University and at about 04:30am. in the morning one Santro car was visible bearing registration No.PB23J4874 and they started chasing the vehicle and after overtaking the same, the vehicle was stopped and it was found that four persons were boarding the vehicle. The team members have shown their identity cards on which the person sitting on the driver seat of the Santro car told his name Krishna Kumar R/o Tumariya Tola, Ward no.3 Raksaul, Police Station Raksaul, District East Champaran, Bihar and the person sitting on other side informed his name Pankaj Kumar R/o Kodariya Tola, Ward No.24 Raksaul, Police Station Raksaul, District East Champaran, Bihar and those, who were

sitting on the rear seat of the vehicle, have told their name as Baijnath Prasad Sah Kanoo R/o Ghadiyarwa Pokhari, Ward No.13, Police Station Beerganj, District Beerganj, Nepal and Chandashekhar Prasad Sah R/o Gamhariya, Ward No.4, Police Station Beerganj, Parasa, Nepal. All these persons were told about the information available with the team on which initially they were reluctant, but thereafter they confessed that some contraband is loaded in the vehicle and also that they had gone to 'Nepal' and were going to Haryana through Delhi and also that the 'charas' is concealed in the vehicle, which was intended to be transported to Haryana. The D.R.I. team thereafter prepared notice in writing under Section 50 of the N.D.P.S. Act and informed that they are having a right to be searched by a magistrate or gazetted officer on which all the four persons after receiving their notice informed that they did not want themselves to be searched by any magistrate or gazetted officer and the team may itself search them at an appropriate place. Accepting their request, the team along with all accused persons came to the Office of D.R.I. Lucknow, situated at Vishal Khand, Gomti Nagar, Lucknow and at about 06:00am in the morning they also informed Shri Manish Kulhari, Deputy Director, D.R.I. and thereafter the person of the above mentioned persons and also the vehicle was searched.

6. The personal search of the the accused persons revealed their belongings mentioned in the seizure memo and they also informed that a cavity has been created in the Santro car, wherein illegal 'charas' has been concealed. On the information given by these four persons, the cavity was opened from outside the vehicle, wherefrom 102 battis (pieces) of contraband (charas) were recovered and the some of the contraband was taken out of these battis and was tested by the drug detection kit, whereby it was found that the contraband is 'charas'. Each battis/pieces was found weighing about 500/590 grams

and they were placed in a group of 40 battis and total weight of all the battis/pieces along with packaging material was found 53.540 kilograms and net weight was found 53.200 kilograms and the market value of the same was found to be as Rs.53,20,000/- (rupees fifty three lakh twenty thousand only). Specimens were also taken from these battis and were sealed at the spot. The duplicate samples were also taken and thus in total six samples were taken and after taking these samples, the contraband was stitched in plastic bag and thereafter in 'markeen' and was also sealed. The 'Fard Baramdagi/seizure memo' was also prepared on which team members as well as two independent witnesses and four accused persons put their signatures and after finding sufficient material, a complaint was filed against all the four persons under Section 8(c)/20(b)(ii)(c)/25 of the N.D.P.S. Act.

7. The special court has framed charges against the appellants/accused persons and one other accused namely Krishna Kumar under Section 8(c)/20(b)(ii)(c)/25 of the N.D.P.S. Act to which they denied and claimed trial.

8. The prosecution in order to prove its case before the special court has produced P.W.1 Abhinav Awasthi, P.W.-2 Ritesh Narsinghani and P.W.-3 Sanjeet Singh and apart from oral evidence has also relied on following documentary evidence e.g. seizure memo as exhibit Ka-1, site plan as exhibit Ka-3, arrest memo as exhibit Ka-4, statement of accused Baijnath Prasad Sah Kanoo recorded under Section 67 of the N.D.P.S. Act as exhibit Ka-5, written notice to accused Baijnath Prasad Sah Kanoo and Chandashekhar Prasad Sah recorded under Section 50 of the N.D.P.S. Act as exhibit Ka-6 and Ka-7, search memo of accused Baijnath Prasad Sah Kanoo and Chandashekhar Prasad Sah as exhibit Ka-9 and Ka- 10, arrest memo of accused

Chandashekhar Prasad Sah and Baijnath Prasad Sah Kanoo as exhibit Ka-11 and Ka-12, arrest memo of accused Krishna Kumar and Pankaj Kumar as exhibit Ka-13 and Ka-14, notice to the accused Krishna Kumar and Pankaj Kumar as exhibit Ka-15 and Ka-16, statement of accused Krishna Kumar and Pankaj Kumar under Section 67 of the N.D.P.S. Act as exhibit Ka- 17 and Ka-18, search memo of accused Krishna Kumar and Pankaj Kumar as exhibit Ka-19 and Ka-20, inventory recovered contraband as exhibit Ka-22 and Ka-23, C.R.C.L. report of the specimen as exhibit Ka-26, inventory prepared by the Special Judge, Anti Corruption as exhibit Ka-34 and order of court as exhibit Ka-35. Apart from it, the prosecution has also produced material exhibits which consists of photographs, specimen, sample of seal etc.

9. After conclusion of the evidence of the prosecution, statement of the accused persons was recorded under Section 313 Cr.P.C., wherein they denied the evidence produced by the prosecution and in their defence have produced D.W.-1 Gyanendra Singh and D.W.-2 Ramnath Madhukar.

10. While the witnesses produced from the side of the prosecution namely P.W.1 Abhinav Awasthi, P.W.-2 Ritesh Narsinghani and P.W.-3 Sanjeet Singh have supported the case of the prosecution as stated in the seizure/arresting memo and complaint, while the two defence witnesses namely D.W.-1 Gyanendra Singh appearing from the side of accused persons has stated that the vehicle 'Innova' bearing registration No.UP32EN1902 was provided to the D.R.I. team by 'Balaji Associates' from 01.02.2017 to 28.02.2017 along with driver and thus vehicle bearing registration No.UP32EN1902 was taken on contract for a month. The other defence witness namely D.W.-2 Ramnath Madhukar has stated that he is having with him 'Innova'

vehicle bearing registration No.UP32EN1902 along with other vehicles and this vehicle was associated with Balaji Associates. It is a new vehicle and at present one Manoj is the driver on this vehicle, however, he could not recollect, who was the earlier driver of this vehicle and there was no agreement of him with Balaji Associates pertaining to the driving of this vehicle and he did not know as to whether this vehicle was with Balaji Associates from 01.02.2017 till 28.02.2017 and he did not receive Rs.44,000/- with regard to this vehicle.

11. The defence has also produced various case laws, which have been referred by the special court in paragraph no.11 of its judgement and after hearing learned counsel for the parties and keeping in view the evidence produced before it came to the conclusion that the prosecution has been successful in proving its case beyond reasonable doubt and has convicted the appellants for committing offence under Section 8(c)/20(b)(ii)(c)/25 of the N.D.P.S. Act and sentenced them in the manner shown in third paragraph of this judgement. Aggrieved by the impugned judgement and order passed by the trial/special Court the appellants preferred these appeals challenging the impugned judgement and order.

12. Learned counsels for the appellants vehemently submits that the information of the arrival of the vehicle was known to the D.R.I. officials from before the apprehension of the vehicle, however, this information has not been reduced into writing, thus mandatory provisions of Section 42 of the N.D.P.S. Act has been violated rendering arrest as well as alleged recovery as doubtful.

13. It is further submitted that during the course of trial, an application under Section 91 of the Cr.P.C. was moved by the appellants to know the details of the Innova car, which was used by

the D.R.I. team in apprehending and arresting the appellants and it was disclosed that the said vehicle was bearing registration No.UP32EN1902 and its owner was also disclosed as Ramnath Madhukar, who was testified before the trial court as D.W.-2, however, the special court has not appreciated the evidence of these witnesses as well as of D.W.-1, who was working with D.R.I. in right perspective.

14. It is also submitted that seizure/arresting memo was also not produced before the special court at the time of Remand and no explanation of non production of the same has been given. It is further submitted that there was absolutely no evidence pertaining to the entry of Santro car through Nepal border and all the witnesses, who have been produced before the trial court, were associated with the D.R.I. and two independent witnesses namely D.W.-1 Gyanendra Singh and D.W.-2 Ramnath Madhukar, who were allegedly shown by the D.R.I. team with it at the time of alleged arrest and seizure of the contraband, have not been produced before trial court as prosecution witnesses.

15. It is vehemently submitted that evidence of the D.R.I. officials being interested witness may not be deemed trustworthy and reliable in absence of non production of independent public witnesses and the confessional statement recorded by the D.R.I. officials of the appellants under Section 67 of the N.D.P.S. Act may not be used against them in view of the law laid down by Hon'ble Supreme Court in *Tofan Singh Vs. State of Tamil Nadu; (2021) 4 SCC 1*.

16. It is vehemently submitted that Section 52A of the N.D.P.S. Act and guidelines made therein, which are of mandatory nature, have also not been adhered to/followed and the samples as required to be obtained in presence of a magistrate has not been taken and keeping

in view the fact that the samples have not been taken before a magistrate would render the case of the prosecution as not proved beyond reasonable doubt and thus trial court has committed manifest illegality in assuming the case of the prosecution proved beyond reasonable doubt and in convicting the appellants for the offence, which has never been committed by them.

17. Learned counsels for the appellants in support of their submissions have relied on *Tofan Singh* (supra) and the case laws presented before the trial court.

18. Shri Digvijay Nath Dubey, learned counsel appearing for the D.R.I. vehemently opposes the submissions made by learned counsels for the appellants and submits that the trial court has not committed any illegality in convicting the appellants.

19. It is also submitted that 'charas' has been recovered from concealed compartment of Santro car bearing registration No.PB23J4874 and the appellants were also found sitting therein and thus they were in conscious possession of the same and after complying Section 50 of the N.D.P.S. Act and after obtaining their consent, the contraband has been recovered from the concealed compartment of the vehicle.

20. It is further submitted that since the appellants were travelling in a private car and the 'charas' has been recovered from the same, they would be deemed to be in conscious possession of the contraband. In this regard, law laid down by Hon'ble Surpeme Court in *Dehal Singh vs. State of Himachal Pradesh; 2010 (9) SCC 85* has been relied.

21. It is also submitted that there is no irregularity so far as the taking and preservation of the samples are concerned and forensic lab in its

report dated 20.04.2017 has found the same as 'charas'. It is further submitted that all the proceedings of search and seizure as well as of the arrest has been made in front of two independent prosecution witnesses namely Ram Khelawan and Suresh Kumar however they did not step in the witness box even after efforts made by the department and the remaining prosecution witnesses produced before the trial court have proved the factum of recovery of contraband beyond reasonable doubt, however, mere non production of the independent witnesses would not *ipso fact* be sufficient to discard the otherwise trustworthy evidence of other prosecution witnesses. In this regard, learned counsel appearing for the D.R.I. has relied on the law laid down by Hon'ble Supreme Court in ***Harpal Singh vs. Devendra Singh; AIR 1997 SC 2914*** and ***Darya Singh vs. State of Punjab; AIR 1954 SC 328***.

22. It is further submitted that all the mandatory provisions of the N.D.P.S. Act e.g. Sections 42, 52A, 57 as well as of Section 50 of the N.D.P.S. Act have been complied and thus, there is no lacunae in the case of the prosecution. It is also submitted that there is no doubt with regard to the safe custody of the samples and having regard to the fact that 53.200 kilograms of 'charas' has been recovered from the vehicle, which was being occupied by the appellants, no illegality has been committed by the trial court in convicting them.

23. Having heard learned counsel for the parties and having perused the record it is evident that in nutshell, the case of the prosecution appears to be that on an prior information received by the D.R.I., Lucknow on 06.02.2017 from D.R.I., Regional Unit, Patna pertaining to the transportation of Narcotics from Santro car bearing registration No.PB23J4874 in terms that on 03.02.2017, the above mentioned vehicle had gone to Nepal for the purpose of transporting 'charas' to

Haryana via Gorakhpur - Lucknow and is now returning from Nepal after loading the 'Charas' and in this regard a team was constituted on 06.02.2017 at 05:45pm. by the Deputy Director of D.R.I., Lucknow comprising of Intelligence Officers Shri Abhinav Awasthi, Shri Ritesh Narsinghani, Shri Sanjeet Singh and Head Hawaldar, Shri Triveni Prasad Yadav and in pursuance of the said information, two independent witnesses namely Ram Khelawan and Suresh Kumar were also procured and thereafter the vehicle was intercepted and after complying mandatory provision of section 50 of the N.D.P.S. Act the 'charas' was recovered from the concealed cavity of the said vehicle and was weighed about 53.200 kilograms.

24. So far as the contention of learned counsels for the appellants pertaining to non compliance of Section 42 of the N.D.P.S. Act is concerned, it would be evident from the record that the information, which has been received from the D.R.I. Unit, Patna, has not been duly reduced in writing and it is only thereafter a team of Intelligence Officers has been constituted and therefore, it could not be said that the information received pertaining to the transportation of the contraband has not been reduced in writing. Thus, I do not find any force in the submissions made by learned counsels for the appellants pertaining to non compliance of Section 42 of the N.D.P.S. Act and it is evident that the said section has been complied in letter and spirit.

25. Coming to the next submission of learned counsels for the appellants that Section 50 of the N.D.P.S. Act has also not been complied and arrest and recovery has become polluted.

26. 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:-

27. Hon'ble Supreme Court in ***K. Mohanan vs. State of Kerala;*** [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."

28. Hon'ble Supreme Court in ***State of Punjab vs. Baldev Singh;*** (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 infeasible — it cannot be disregarded by the prosecution except at its own peril."

29. 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."

30. Hon'ble Supreme Court in ***Vijaysinh Chandubha Jadeja v. State of Gujarat***; (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."

31. Hon'ble Supreme Court in ***Narcotics Control Bureau vs. Sukh Dev Raj Sodhi***; (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."

32. Hon'ble Supreme Court in ***Suresh and others vs. State of M.P.***; (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."

33. Hon'ble Supreme Court in ***Ashok Kumar Sharma v. State of Rajasthan***; (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."

34. Hon'ble Supreme Court in ***State of Rajasthan Vs. Parmanand & ors.***; [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."

35. Hon'ble Supreme Court in *Arif Khan vs. State of Uttarakhand*; 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."

36. Considering the factual position of the instant case, in the background of the law placed above, it would be evident that the information pertaining to the transportation of the vehicle carrying contraband was received by the D.R.I. Unit, Lucknow on 06.02.2017, wherein it was specifically mentioned that the contraband is being transported through vehicle bearing registration No.PB23J4874. It is proved by the prosecution witnesses testified before the trial court

that the appellants were made aware of their right to be searched before a magistrate or gazetted officer and on which they (appellants) opted to be searched by the team comprising of D.R.I. intelligence officers. Consent letters have also been prepared and signed by the appellants wherein also the appellants are shown to have been made aware of their legal right to be searched before a magistrate or gazetted officer as the case may be and since the recovery of contraband has been made from the cavity of the vehicle, in the considered opinion of this Court, Section 50 of the N.D.P.S. Act has been complied so far as the search of the person of the appellants is concerned and since the recovery has been affected from the concealed cavity of the vehicle, provisions of Section 50 of the N.D.P.S. Act would not be applicable to such a recovery. Thus, I do not find any force in the submissions made by learned counsels for the appellants that Section 50 of the N.D.P.S. Act has not been complied in this case.

37. So far as the submissions made by learned counsels for the appellants with regard to the drawing of samples as required by law is concerned, the prosecution evidence produced before the trial court would reveal that on the contraband being recovered from the cavity of the vehicle, various battis were found and they were weighed in the office of D.R.I. and were also checked by the Drug Detection Kit by which the contraband was found as 'charas' and complete index of the same has been prepared and recovered contraband was arranged in a group of 40 battis and from each group specimen L1, L2 and L3 were taken and were sealed at the office of the D.R.I. and they were marked with the case number and two samples have been drawn from the each group in this regard six specimen have been drawn whereon all the officers, independent witnesses and all the accused persons/appellants have made their signature and after drawing the

samples, the remaining contraband was placed in a plastic bag and was sewn in a 'markeen' cloth and was also sealed. Thus, the manner, in which the sample of the contraband has been drawn by the D.R.I., may not be doubted and in the considered opinion of this Court, appears to be in sufficient compliance of Section 57 of the N.D.P.S. Act.

38. Learned counsels for the appellants has given much emphasis on the fact that a private Innova car was taken for the purpose of intercepting the vehicle and an application was moved before the trial court to know the details of Innova car and the same was disclosed as vehicle Innova bearing registration No.UP32EN1902 and its owner namely Ramnath Madhukar was testified as D.W.-2 and the evidence of this witness would reveal that this vehicle has not been used on the relevant day by the D.R.I.

39. Perusal of the evidence, which has been produced before the trial court by the defence as well as by the prosecution would reveal that the vehicles as a routine were taken by the D.R.I. Unit, Lucknow on contractual basis for certain time, however, there is no evidence on record, which may suggest that D.W.-2 was the only person from whom vehicle has been taken nor it has been established that the vehicle bearing registration No.UP32EN1902 was used in the interception, recovery and arrest of the appellants and on the basis of hypothetical arguments the otherwise truthful testimony of the prosecution witnesses may not be doubted.

40. Another submission, which has been raised with considerable force, is that the confessional statement of the accused persons/appellants may not be used as substantive piece of evidence. There is no doubt that after passing of the law by Hon'ble Supreme Court in *Tofan Singh* (supra), the statement of the accused persons

when they are in the custody of police and recorded under Section 67 of the N.D.P.S. Act is akin to the statement recorded under Section 161 Cr.P.C. and therefore, the confessional statement made while in the custody of D.R.I. may not be proved against the maker of it, however, in this case, the appellants have been convicted by the trial court on the basis of their conscious possession of huge haul of contraband, which has been proved by reliable and trustworthy evidence of prosecution witnesses and since no reasonable explanation has been given by the appellants pertaining to the possession of illegal 'charas', the trial court has not committed any error in accepting the case of the prosecution.

41. It is further submitted by learned counsels for the appellants that non production of independent witnesses namely Ram Khelawan and Suresh Kumar has demolished the case of the prosecution.

42. Hon'ble Apex Court long back in the case of ***Bharwada Bhoginbhai Hirjibhai v State of Gujarat***; AIR 1983, 753, MANU/SC/0090/1983 laid down the following principles :-

"(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

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(4) *By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.*

(5) *In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.*

(6) *Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.*

(7) *A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him - perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."*

43. In ***Masalti vs. State of U.P.***; MANU/SC/0074/1964, Hon'ble Supreme Court has held as under :-

"14. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal Courts have to deal with evidence of

a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

44. In ***Appabhai and Ors. vs. State of Gujarat***, MANU/SC/0028/1988 Hon'ble Supreme Court has held as under :-

"Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties.

The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused."

45. Perusing the evidence of prosecution witnesses produced before the trial court, I am not in agreement with the submission of learned counsels for the appellants, as in order to put truthfulness in the story of the prosecution, it is required that efforts should be made to involve the independent public witnesses to stand as witness of search and seizure, however, in this case the two independent witnesses, who have witnessed the arrest and seizure have not appeared before the trial court despite efforts made by the D.R.I. Their absence from the trial court may not be the only ground to

doubt and discard the otherwise reliable evidence given by the prosecution witnesses. It is the ugly face of today's society that nobody wants to get himself involved in criminal matters of others and they do not want to earn bad relations with the accused persons while appearing as witnesses against them and the witnesses want to remain away from Court matters and they consider the crime as the matter between police and the victim and accused, therefore, if in this background, the independent witnesses, in this case, have not stepped into the witness box for the purpose of recording their evidence, their absence alone may not be sufficient to cast any doubt on the case of the prosecution and the case of the prosecution would be seen on the basis of the quality of evidence tendered by the witnesses of department as there is no rule of law or of prudence that the conviction could not be based on their testimony. Certainly the conviction of the accused person may safely be based on the testimony of police witnesses or witnesses of department provided their testimony inspires confidence and trust of the Court and appreciation of their evidence must be with caution. Thus it is the quality of the evidence and not the quantity which matters.

46. So far as the submissions of learned counsels for the appellants that mandatory provision of Section 52A of the N.D.S.P. Act has not been complied, is concerned, it is to recall that Hon'ble Supreme Court in *Union of India (UOI) v. Mohanlal and Ors.*; MANU/SC/0073/2016, (2016) 3 SCC 379 opined as under.

"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."

47. The trial court in its judgement at para no.71 has categorically stated that P.W.-3 Sanjeet Singh in his statement recorded before the trial court has categorically stated that the proceedings under Section 52A of the N.D.P.S. Act was facilitated by him, wherein the inventory was prepared by the department and the same was verified by the Special Judge, Anti Corruption, Lucknow and a certified copy of the inventory and the order of the court, which has certified the inventory, were produced before the trial court as exhibit Ka-34 and Ka – 35.

48. The above observation of the trial court is based on the evidence produced before it in the form of documentary evidence exhibit Ka-34 and Ka-35, which are inventory of the contraband allegedly recovered from the possession of the appellants and other accused person and also the order of the court, which has certified the inventory as exhibit ka- 34 and 35 and P.W.-3 Sanjeet Singh has proved the same. Otherwise also there is strong presumption pertaining the genuineness of the Act of the Court as recorded in its orders, thus, in the considered opinion of this Court, provisions as contained under Section 52A of the N.D.P.S. Act has also been sufficiently complied.

49. Keeping in view the above discussions, it is evident that to prove its case before the trial court, the department has produced P.W.- 1 Abhinav Awasthi, P.W.-2 Ritesh Narsinghani and P.W.-3 Sanjeet Singh and all these prosecution witnesses have proved the case of the prosecution beyond reasonable doubt right from the receipt of the discrete information from the Patna Unit and thereafter with regard to

the constitution of a team by the Deputy Director of the department and also the manner in which the appellants have been apprehended. These witnesses have also proved the recovery of contraband from the concealed portion of the vehicle, whereby the contraband was being transported. Notice under Section 50 of the N.D.P.S. Act was also signed by the appellants and there is ample evidence available on record, which suggests that the right of the appellants to be searched before the magistrate or a gazetted officer has been communicated orally as well as in writing and the appellants consented to be searched by the team of the department and in pursuance of the same, they were taken to the office of the department situated at Gomti Nagar, Lucknow, where the person of the appellants along with vehicle was searched and the contraband was recovered from the cavity of the vehicle. The information so received from the Patna Unit of the D.R.I. has been duly written. There appears no doubt pertaining to the manner in which the '*Fard Baramdagi*' (seizure Memo) and arrest memo have been written as well as the manner in which the specimens have been drawn, preserved and sent to the forensic lab. Section 52A of the N.D.P.S. Act also appears to have been sufficiently complied as the inventory was prepared in presence of a magistrate/judge and he has also certified the same and the order of the court as well as the copy of inventory was produced before the trial court and in this regard, no objection of any kind has been raised by the appellants at the level of trial Court. The evidence given by the prosecution witnesses appears to be reliable, trustworthy and in the considered opinion of this Court, no illegality appears to have been committed by the trial court in accepting the same and in convicting the appellants as the case of the prosecution was proved beyond reasonable doubt before the trial court and the defence witnesses have failed to put any dent in the trustworthy evidence of the prosecution witnesses.

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50. In result, instant criminal appeals preferred by the appellants namely **Bajnath Prasad Sah Kanoo, Chandashekhar Prasad Sah** and **Pankaj Kumar** are **dismissed** and the impugned judgment and order dated 25.08.2023 passed by the Additional District and Sessions Judge, Court No.11/Special Judge, N.D.P.S. Act, Lucknow in Criminal Case No.568 of 2017 (Union of India vs. Chandrashekhar Prasad Sah and 3 Others), arising out of D.R.I. Criminal Case No.01 of 2017, under Section 8(c)/20(b)(ii)(c)/25 of the Narcotic Drugs and Psychotropic Substances Act, 1985, Police Station D.R.I. Lucknow, District Lucknow is **affirmed**.

51. As per report of the office, the appellants appears to be in jail. They will serve out the sentence as awarded by the trial Court.

52. Let the copy of this order as well as the record of the trial court record be transmitted to the concerned trial court, forthwith for necessary compliance.

Order Date :-3.6.2024

Anupam S/-