



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No. 321 of 2011

Reserved on: 17.09.2026

Date of Decision: 28.09.2026.

Khimi Ram

...Appellant

Versus

State of H.P.

...Respondent

Coram

Hon'ble Mr Justice Rakesh Kainthla, Judge.

Whether approved for reporting?¹ No.

For the Appellant : Mr Ajay Chandel, Senior Advocate, with Mr Sidhant Jamwal, Advocate.

For the Respondent/State : Mr Jitender Sharma, Additional Advocate General.

Rakesh Kainthla, Judge

The present appeal is directed against the judgment of conviction dated 10.08.2011 and order of sentence dated 12.08.2011, passed by the learned Special Judge, Kullu, H.P. (learned Trial Court), vide which the appellant (accused before the learned Trial Court) was convicted of the commission of an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') and was

¹ Whether reporters of Local Papers may be allowed to see the judgment? Yes.

sentenced to undergo rigorous imprisonment for two years, pay a fine of ₹20,000/-, and in default of payment of fine, to further undergo imprisonment for four months for the commission of the aforesaid offence. *(The parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court for convenience).*

2. Briefly stated, the facts giving rise to the present appeal are that the police presented a challan before the learned Trial Court against the accused for the commission of an offence punishable under Section 20 of the NDPS Act. It was asserted that ASI Nirmal Singh (PW-10), HC Hari Singh (PW-9), HC Paras Ram, HC Moti Ram, and other police officials were checking the vehicles on 06.02.2009 at about 7:40 PM. An HRTC bus bearing registration No. HP-34A-7823 came from Kullu, which was going from Manali to Delhi. The police signalled the bus to stop. The driver identified himself as Leela Vilas, and the conductor identified himself as Nagesh Kumar (PW-8). The police checked the luggage of the passengers. The accused was occupying seat No. 44. He started fidgeting after seeing the police. He identified himself as Khimi Ram. The police became suspicious of the conduct of the accused and informed him that the police

suspected the possession of some contraband and that his search was to be conducted; he should exercise his option. The accused chose to be searched by the police vide memo (Ext. PW-8/A).

3. ASI Nirmal Singh gave his personal search to the accused, and nothing incriminating was found in his possession; memo (Ext. PW-8/B) was prepared. He searched the accused and found a khaki-coloured cello tape packet (Ext.P-4) concealed under the left armpit by the accused beneath his jacket. ASI Nirmal Singh took out the packet from the armpit of the accused. He took the accused, contraband, independent witnesses, and police officials to the office room of the Police Check Post, Bajaura, where the packet was opened. It was found to contain a transparent polythene envelope (Ext.P-6) having rectangular-and spherical-shaped black substance. ASI Nirmal Singh checked the substance and found it to be charas. It was weighed, and its weight was found to be 500 grams. Two samples of 25 grams each were separated on the spot, which were packed in separate cloth parcels. The remaining charas were put in the polythene envelope (Ext. P-6), and the envelope was put in the packet (Ext.P-4). The packet was put in a cloth parcel (Ext.P-1). The bulk parcel and the sample parcels were sealed with three impressions of seal 'N'

each. The seal impression (Ext.P-3) was taken on a separate piece of cloth. NCB-I form (Ext.PW-10/A) was filled in triplicate, and the seal impression was put on the form. The contraband was seized vide memo (Ext.PW-8/C). The seal was handed over to the witness Leela Vilas after use. ASI Nirmal Singh prepared a *rukka* (Ext.PW-10/B) and sent it to the Police Station, where FIR (Ext.PW-11/A) was registered.

4. ASI Nirmal Singh (PW-10) investigated the matter. He prepared the spot map (Ext.PW-10/C) and recorded the statements of witnesses as per their version. He apprised the accused of the grounds of arrest and arrested him vide memo (Ext.PW-10/D). He produced the accused and the case property before SI Krishan Chand (PW-11), who checked the parcels and resealed each parcel with three impressions of seal 'S'. He obtained the specimen impression of seal 'S' (Ext.PW-11/D1), filled the relevant columns of the NCB-I form, and deposited the case property with HC Kartar Singh (PW-3), who made an entry at Serial No. 77 of the Register No. 19 (Ext.PW-3/A) and deposited the case property in the Malkhana. He handed over one sealed parcel of the sample sealed with seal 'N' and seal 'S', sample seals of 'N' and 'S', form NCB-I in triplicate, copy of seizure memo, FIR, and docket to Constable

Deep Chand (PW-6) with a direction to carry them to FSL, Junga for analysis vide R.C. No. 31 of 2009 (Ext. PW-3/B). Constable Deep Chand deposited all the articles at FSL, Junga and handed over the receipt to the MHC on his return. ASI Nirmal Singh (PW-10) prepared the special report (Ext.PW-5/B) and submitted it to Additional SP, Ahmed Sayeed on 07.02.2009 at 2:20 PM. Ahmed Sayeed made an endorsement on the special report and handed it over to his reader, HC Nirat Ram (PW-5), who made an entry in the register of special reports (Ext.PW-5/B) and retained the special report on record. C.L. Sharma, Assistant Chemical Examiner (PW-4), analysed the sample and found that it was a mixture of cannabis and a sample of charas. He issued the report (Ext.PW-4/A). ASI Nirmal Singh (PW-10) seized the papers of the vehicle bearing registration No. HP-34A-7823 from the office of HRTC, Kullu vide memo (Ext.PW-1/C). The statements of witnesses were recorded as per their version, and after the completion of the investigation, the challan was prepared and presented before the learned Trial Court.

5. The learned Trial Court found sufficient reasons to frame charges against the accused for the commission of an

offence punishable under Section 20 of the NDPS Act, to which he pleaded not guilty and claimed to be tried.

6. The prosecution examined 11 witnesses to prove its case. Khajan Singh (PW-1) produced the documents of the bus. Constable Ram Lal (PW-2) proved the entry in the daily diary. HC Kartar Singh (PW-3) was working as MHC, with whom the case property was deposited. C.L. Sharma (PW-4) analysed the sample. HC Nirat Ram (PW-5) was working as a reader to the Additional SP, to whom the special report was handed over. Constable Deep Chand (PW-6) carried the case property to FSL. SI Narayan Singh (PW-7) prepared the challan. Nagesh Kumar (PW-8) is an independent witness who did not support the prosecution case. ASI Hari Singh (PW-9) is the witness to the recovery. ASI Nirmal Singh (PW-10) effected the recovery and investigated the matter. SI Krishan Chand (PW-11) was working as SHO, who had resealed the case property.

7. The accused, in his statement recorded under Section 313 of the Code of Criminal Procedure, denied the prosecution case in its entirety. He claimed that he was travelling in the bus and the police found an unclaimed bag in the bus. Nobody owned the bag,

and the police made a false case against him. He did not produce any evidence in his defence.

8. The learned Trial Court held that the statements of official witnesses corroborated each other. Nagesh Kumar had not supported the prosecution version, but it was not sufficient to discard it. There was nothing in the cross-examination of the witnesses to show that they were making false statements. The minor contradictions in the statements of the witnesses were not sufficient to discard them. The chain of custody of the case property was duly established, and the sample was found to be that of charas after the analysis. The prosecution version that the accused was in possession of the charas was duly proved. The report of analysis showed that the charas contained 42.05% resin (w/w) in it, which was to be used for determining the quantity of charas. 210.25 grams of charas was recovered from the possession of the accused. Hence, the learned Trial Court convicted and sentenced the accused as aforesaid.

9. Being aggrieved by the judgment and order passed by the learned Courts below, the accused has filed the present appeal asserting that the learned Trial Court had failed to properly

appreciate the material on record. There were major contradictions in the statements of witnesses which affected the core of the prosecution case. The learned Trial Court erred in relying upon the statements of the prosecution witnesses. The prosecution had failed to comply with the provisions of Section 50 of the NDPS Act, and no reliance could have been placed upon the recovery effected from the accused. The percentage of tetrahydrocannabinol was not given, and the sample was not proved to be that of charas. Therefore, it was prayed that the present appeal be allowed and the judgment and order passed by the learned Trial Court be set aside.

10. I have heard Mr Ajay Chandel, learned Senior Advocate assisted by Mr Sidhant Jamwal, learned counsel for the appellant/accused, and Mr Jitender Sharma, learned Additional Advocate General for the respondent-State.

11. Mr Ajay Chandel, learned Senior Advocate for the appellant/accused, submitted that the recovery was effected from the armpit of the accused. The prosecution was required to comply with the provisions of Section 50 of the NDPS Act. However, there is no proper compliance with the provisions of Section 50 of the

NDPS Act, and no reliance could have been placed upon the recovery so effected by the police. Therefore, he prayed that the present appeal be allowed and the judgment passed by the learned Trial Court be set aside.

12. Mr Jitender Sharma, learned Additional Advocate General for the respondent-State, submitted that the statements of prosecution witnesses corroborated each other on material aspects. The accused was apprised of his right to be searched before a Magistrate or a Gazetted Officer, and the provisions of Section 50 of the NDPS Act were complied with. Hence, he prayed that the present appeal be dismissed.

13. I have given considerable thought to the submissions made at the bar and have gone through the records carefully.

14. It is undisputed that, as per the prosecution, the accused had concealed the packet beneath his left armpit under the jacket. This fact was mentioned in the *rukka* (Ext.PW-10/B), memo of recovery (Ext.PW-8/C), and on oath by ASI Hari Singh (PW-9) and ASI Nirmal Singh (PW-10). It was laid down by the Hon'ble Supreme Court in *State of H.P. v. Pawan Kumar*, (2005) 4 SCC 350: 2005 SCC (Cri) 943: 2005 SCC OnLine SC 714 that where a

human body is to be touched for carrying out the search, provisions of section 50 of the NDPS Act would apply. It was observed at page 360: -

“12. An incriminating article can be kept concealed in the body or clothing or coverings in different manner or in the footwear. While making a search of such type of articles, which have been kept so concealed, it will certainly come within the ambit of the words “search of person”. One of the tests, which can be applied, is, where in the process of search the human body comes into contact or shall have to be touched by the person carrying out the search, it will be search of a person. Some indication of this is provided by sub-section (4) of Section 50 of the Act, which provides that no female shall be searched by anyone excepting a female. The legislature has consciously made this provision as, while conducting a search of a female, her body may come in contact or may need to be touched and, therefore, it should be done only by a female. In the case of a bag, briefcase or any such article or container, etc., they would not normally move along with the body of the human being unless some extra or special effort is made. Either they have to be carried in hand or hung on the shoulder or back or placed on the head. They can be easily and in no time placed away from the body of the carrier. In order to make a search of such type of objects, the body of the carrier will not come in contact of the person conducting the search. Such objects cannot be said to be inextricably connected with the person, namely, the body of the human being. Inextricable means incapable of being disentangled or untied or forming a maze or tangle from which it is impossible to get free.”

15. The packet was kept beneath the armpit, and the body of the accused would come in contact with the person searching the accused to recover it. Therefore, the prosecution was required

to comply with the provisions of Section 50 of the NDPS Act which reads as under: -

“50. Conditions under which the search of persons shall be conducted.

(1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 42 or Section 43, he shall, if such person as requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

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

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

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

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

16. Thus, the police were required to inform the accused of

his right to be searched before a Magistrate or Gazetted Officer.

17. The consent memo (Ext.PW-8/A) mentions that the accused should express his consent in writing or orally that he could also be searched before a Magistrate or a competent Gazetted Officer. The accused consented to be searched by the police. The use of the term "also" shows that the option to be searched before a Magistrate or Gazetted Officer was an additional option. This is apparent from the statement of ASI Nirmal Singh (PW-10), in which the Court had observed that the witness had deposed before reading the memo that he had given the option to the accused regarding his search conducted by the police or the competent officer. Therefore, the record shows that in addition to the option to be searched before a Magistrate or a Gazetted Officer, an option to be searched before the police was also given to the accused. This is also apparent from the fact that the accused had opted to be searched by the police. If no option to be searched by the police was given to the accused, he could not have opted to be searched by the police. He could have declined to be searched by the Magistrate or the Gazetted Officer, but without being informed that he could be searched before the Police, he could not have mentioned specifically that he wanted to be searched before the

police. This shows that the accused was given an option to be searched by the police as well, and that is why he opted to be searched by the police. It was laid down by the Hon'ble Supreme Court in the *State of Rajasthan Vs. Parmanand & another* (2014) 5 SCC 345, that section 50 only provides an option to be searched before a Magistrate or a Gazetted Officer, and it does not provide for a third option to be searched before the police. It was observed:

“19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate, before the nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution's case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to the nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question of whether, if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it, and when such an option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground

also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated.”

18. The law regarding the third option given to the accused was exhaustively considered by this Court in *Pradeep Singh alias Rocky vs State of Himachal Pradesh, 2020(1) Him. L.R. 133*, and it was held that giving the third option to the accused is fatal. It was observed:

“3(iii)(c). Under the provisions of Section 50 of the Act, the accused has to be informed about his legal rights regarding search before a Magistrate or Gazetted Officer.

3(iii)(d). In the instant case, the consent memo (Ext.PW-1/A), obtained from the accused, shows that in addition to the two statutory options of search before the Magistrate or the Gazetted Officer, a 3rd option was also given to the accused for getting himself searched before any other police officer. It is in such circumstances that the accused gave his consent to be searched by the police party. Giving the 3rd option to the accused was clearly contrary to the mandatory provisions of Section 50 of the Act. In the case titled *State of Rajasthan versus Parmanand and Another, (2014) 5 SCC 345*, it has been held by the Hon'ble Apex Court that such a 3rd option could not be given when there was no provision under Section 50(1) of the Act. Relevant para of the said judgment is reproduced as under: -

"19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate, or before the nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution's case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the

NDPS Act. The idea behind taking an accused to the nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether, if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it, and when such an option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated."

Relying upon the above judgment, in a case titled *SK. Raju alias Abdul Haque alias Jagga versus State of West Bengal*, (2018) 9 SCC 708, the Hon'ble Apex Court further observed thus: -

"18. In *Parmanand*, on a search of the person of the respondent, no substance was found. However, subsequently, opium was recovered from the bag of the respondent. A two-judge Bench of this Court considered whether compliance with Section 50(1) was required. This Court held that the empowered officer was required to comply with the requirements of Section 50(1) as the person of the respondent was also searched. [Reference may also be made to the decision of a two-judge Bench of this Court in *Dilip v. State of M.P.*] It was held thus: (*Parmanand*, SCC p.351, para 15).

"15. 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 an application.

19. Moreover, in the above case, the empowered officer at the time of conducting the search informed the respondent that he could be searched before the nearest Magistrate, before the nearest gazetted officer or before the Superintendent, who was also a part of the raiding party. The Court held that the search of the respondent was not in consonance with the requirements of Section 50(1) as the empowered officer erred in giving the respondent an option of being searched before the Superintendent, who was not an independent officer."

Effect of giving the 3rd option:

3(iii)(e). The effect of illegality committed during the course of the search of the accused has been considered by the Hon'ble Apex Court in *State of H.P. versus Pawan Kumar*, (2005) 4 SCC 350, wherein, after considering various judgments on the question, it was observed thus: -

"26. The Constitution Bench decision in *Pooran Mal v. The Director of Inspection*, (1974) 1 SCC 345 was considered in *State of Punjab v. Baldev Singh* and having regard to the scheme of the Act and especially the provisions of Section 50 thereof, it was held that it was not possible to hold that the judgment in the said case can be said to have laid down that the "recovered illicit article" can be used as "proof of unlawful possession" of the contraband seized from the suspect as a result of illegal search and seizure. Otherwise, there would be no distinction between the recovery of illicit drugs, etc., seized during a search conducted after following the provisions of Section 50 of the Act and a seizure made during a search conducted in breach of the provisions of Section 50.

Having regard to the scheme and the language used, a very strict view of Section 50 of the Act was taken, and it was held that failure to inform the person concerned of his right as emanating from sub-Section (1) of Section 50 may render the recovery of the contraband suspect and sentence of an accused bad and unsustainable in law. As a corollary, there is no warrant or justification for giving an extended meaning to the word "person" occurring in the same provision so as to include even some bag, article or container or some other baggage being carried by him."

In a case titled *State of H.P. versus Rakesh 2018 LHLJ 214 (HP)*, this Court observed as under: -

"18.

Now, in view of the above, this Court has to examine whether the provisions of Section 50 of the NDPS Act are applicable to the present case and, if applicable, then whether those have been breached or not. Admittedly, as per the version of PW-3, HC Chaman Lal, he has conducted the personal search of both the accused persons and also prepared search memos, Ex. PW-3/P and Ex. PW-3/Q. If only the bags of the accused persons would have been searched, then Section 50 of the NDPS Act has no application, but as the personal search of the accused persons was also conducted, certainly Section 50 of the NDPS Act is applicable. In fact, Section 50 of the NDPS Act has a purpose and communication of the said right, which is ingrained in Section 50, to the person who is about to be searched, is not an empty formality. Offences under the NDPS Act carry severe punishment, so the mandatory procedure, as laid down under the Act, has to be followed meticulously. Section 50 of the Act is just a safeguard available to an accused against the possibility of false involvement. Thus, communication of this right to the accused has to be clear, unambiguous and to the individual concerned.

The purpose of this Section is to make aware the accused of his right, and the whole purpose behind creating this right is effaced if the accused is not able to exercise the same for want of knowledge about its existence. This right cannot be ignored, as the same is of utmost importance to the accused. In the present case, certainly, the provisions of Section 50 of the NDPS Act have not been complied with; therefore, the judgment (supra) is fully applicable to the facts of the present case.

19. In *State of Himachal Pradesh vs. Desh Raj & another*, 2016 Supp HimLR 3088 (DB), this Court has relied upon the law laid down in Parmanand's case (supra). Relevant paras of the judgment of this Court are extracted hereunder:

"18. Their Lordships of the Hon'ble Supreme Court in *State of Rajasthan v. Parmanand*, (2014) 5 SCC 345, have held that there is a need for individual communication to each accused and individual consent by each accused under Section 50 of the Act. Their Lordships have also held that Section 50 does not provide for the third option. Their Lordships have also held that if a bag carried by the accused is searched and his personal search is also started, Section 50 would be applicable."

Again, in the present set of facts and circumstances, the judgment (supra) is fully applicable to the present case, as the right provided under Section 50 of the NDPS Act in no way can be diluted, and its compliance is mandatory in nature."

Therefore, the combined effect of the law laid down by the Hon'ble Apex Court, as applied to the facts of the case in hand, is that non-compliance to the mandatory provisions of Section 50 of the Act has vitiated the proceedings related to search and recovery. The point is, therefore, answered in favour of the appellant."

19. This position was reiterated in *Dayalu Kashyap v. State of Chhattisgarh*, (2022) 12 SCC 398: 2022 SCC OnLine SC 334, wherein it was observed at page 400:

“4. The learned counsel submits that the option given to the appellant to take a third choice other than what is prescribed as the two choices under sub-section (1) of Section 50 of the Act is something which goes contrary to the mandate of the law and in a way affects the protection provided by the said section to the accused. To support his contention, he has relied upon the judgment of *State of Rajasthan v. Parmanand* [*State of Rajasthan v. Parmanand*, (2014) 5 SCC 345: (2014) 2 SCC (Cri) 563], more specifically, SCC para 19. The judgment, in turn, relied upon a Constitution Bench judgment of this Court in *State of Punjab v. Baldev Singh* [*State of Punjab v. Baldev Singh*, (1999) 6 SCC 172: 1999 SCC (Cri) 1080] to conclude that if a search is made by an empowered officer on prior information without informing the person of his right that he has to be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to take his search accordingly would render the recovery of the illicit article suspicious and vitiate the conviction and sentence of the accused where the conviction has been recorded only on the basis of possession of illicit articles recovered from his person. The third option stated to be given to the accused to get himself searched from the Officer concerned, not being part of the statute, the same could not have been offered to the appellant, and thus, the recovery from him is vitiated.”

20. A similar view was taken in *Ranjan Kumar Chadha v. State of H.P.*, 2023 SCC OnLine SC 1262: AIR 2023 SC 5164, wherein it was observed:

“27. We have no hesitation in recording a finding that Section 50 of the NDPS Act was not complied with, as the appellant could not have been offered the third option of a search to be conducted before the ASI. Section 50 of the NDPS Act only talks about a Gazetted Officer or a Magistrate. What is the legal effect if an accused of the offence under the NDPS Act is being asked whether he would like to be searched before a police officer, a Gazetted Officer, or a Magistrate?

28. This Court in *State of Rajasthan v. Parmanand*, (2014) 5 SCC 345, held that it is improper for a police officer to tell the accused that a third alternative is also available, i.e. the search before any independent police officer. This Court also took the view that a joint communication of the right available under Section 50 of the NDPS Act to the accused would frustrate the very purport of Section 50.....

29. Thus, from the oral evidence on the record as discussed above, it is evident that Section 50 of the NDPS Act stood violated for giving a third option of being searched before a police officer.”

21. It was further held in *Ranjan Kumar Chadha* (supra) that the investigating officer should give an option to the accused to be searched before the magistrate or the gazetted officer; the accused can decline to avail of such option, and the investigating officer can search the accused himself. It was observed:

“62. Section 50 of the NDPS Act only goes so far as to prescribe an obligation to the police officer to inform the suspect of his right to have his search conducted either in the presence of a Gazetted Officer or Magistrate. Whether or not the search should be conducted in the presence of a Gazetted Officer or Magistrate ultimately depends on the exercise of such right as provided under Section 50. *In the event the suspect declines this right, there is no further*

*obligation to have his search conducted in the presence of a Gazetted Officer or Magistrate, and in such a situation, the empowered police officer can proceed to conduct the search of the person himself. To read Section 50 otherwise would render the very purpose of informing the suspect of his right a redundant exercise. We are of the view that the decision of this Court in **Arif Khan** (supra) cannot be said to be an authority for the proposition that notwithstanding the person proposed to be searched has, after being duly apprised of his right to be searched before a Gazetted Officer or Magistrate, but has expressly waived this right in clear and unequivocal terms, it is still mandatory that his search be conducted only before a Gazetted Officer or Magistrate.*

63. A plain reading of the extracted paragraphs of **Arif Khan** (supra) referred to above would indicate that this Court while following the ratio of the decision of the Constitution Bench in **Vijaysinh Chandubha Jadeja** (supra) held that the same has settled the position of law in this behalf to the effect that, whilst it is imperative on the part of the empowered officer to apprise the person of his right to be searched only before a Gazetted Officer or Magistrate; and this requires strict compliance; this Court simultaneously proceeded to reiterate that in **Vijaysinh Chandubha Jadeja** (supra) “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”.

64. There is no requirement to conduct the search of the person suspected to be in possession of a narcotic drug or a psychotropic substance, only in the presence of a Gazetted Officer or Magistrate if the person proposed to be searched, after being apprised by the empowered officer of his right under Section 50 of the NDPS Act to be searched before a Gazetted Officer or Magistrate, categorically waives such right by electing to be searched by the empowered officer. The words “if such person so requires”, as used in Section 50(1) of the NDPS Act, would be rendered otiose if the person proposed to be searched would still be required to be

searched only before a Gazetted Officer or Magistrate despite having expressly waived “such requisition”, as mentioned in the opening sentence of sub-Section (2) of Section 50 of the NDPS Act. In other words, the person to be searched is mandatorily required to be taken by the empowered officer for the conduct of the proposed search before a Gazetted Officer or Magistrate only “*if he so requires*” upon being informed of the existence of his right to be searched before a Gazetted Officer or Magistrate and not if he waives his right to be so searched voluntarily, and chooses not to exercise the right provided to him under Section 50 of the NDPS Act.

65. However, we propose to put an end to all speculations and debate on this issue of the suspect being apprised by the empowered officer of his right under Section 50 of the NDPS Act to be searched before a Gazetted Officer or Magistrate. We are of the view that even in cases wherein the suspect waives such right by electing to be searched by the empowered officer, such waiver on the part of the suspect should be reduced to writing by the empowered officer. To put it in other words, even if the suspect says that he would not like to be searched before a Gazetted Officer or Magistrate, and he would be fine if his search is undertaken by the empowered officer, the matter should not rest with just an oral statement of the suspect. The suspect should be asked to give it in writing, duly signed by him in the presence of the empowered officer as well as the other officials of the squad, that “*I was apprised of my right to be searched before a Gazetted Officer or Magistrate in accordance with Section 50 of the NDPS Act; however, I declare of my own free will and volition that I would not like to exercise my right of being searched before a Gazetted Officer or Magistrate, and I may be searched by the empowered officer.*” This would lend more credence to the compliance with Section 50 of the NDPS Act. In other words, it would impart authenticity, transparency and creditworthiness to the entire proceedings. We clarify that this compliance shall henceforth apply prospectively.

66. From the aforesaid discussion, the requirements envisaged by Section 50 can be summarised as follows:—

(i) Section 50 provides both a right as well as an obligation. The person about to be searched has the right to have his search conducted in the presence of a Gazetted Officer or Magistrate if he so desires, and it is the obligation of the police officer to inform such person of this right before proceeding to search the person of the suspect.

(ii) Where the person to be searched declines to exercise this right, the police officer shall be free to proceed with the search. However, if the suspect declines to exercise his right of being searched before a Gazetted Officer or Magistrate, the empowered officer should take it in writing from the suspect that he would not like to exercise his right of being searched before a Gazetted Officer or Magistrate, and he may be searched by the empowered officer.

(iii) Before conducting a search, it must be communicated in clear terms, though it need not be in writing, and it is permissible to convey orally that the suspect has a right to be searched by a Gazetted Officer or Magistrate.

(iv) While informing of the right, only two options of either being searched in the presence of a Gazetted Officer or Magistrate must be given, who also must be independent and in no way connected to the raiding party.

(v) In case of multiple persons to be searched, each of them has to be individually communicated of their rights, and each must exercise or waive the same in their own capacity. Any joint or common communication of this right would be in violation of Section 50.

(vi) Where the right under Section 50 has been exercised, it is the choice of the police officer to decide whether to take the suspect before a Gazetted

Officer or Magistrate, but an endeavour should be made to take him before the nearest Magistrate.

(vii) Section 50 is applicable only in case of search of the person of the suspect under the provisions of the NDPS Act and would have no application where a search was conducted under any other statute in respect of any offence.

(viii) Where during a search under any statute other than the NDPS Act, contraband under the NDPS Act also happens to be recovered, the provisions relating to the NDPS Act shall forthwith start applying, although, in such a situation, Section 50 may not be required to be complied with for the reason that search had already been conducted.

(ix) The burden is on the prosecution to establish that the obligation imposed by Section 50 was duly complied with before the search was conducted.

(x) Any incriminating contraband, possession of which is punishable under the NDPS Act and recovered in violation of Section 50, would be inadmissible and cannot be relied upon in the trial by the prosecution; however, it will not vitiate the trial in respect of the same. Any other article that has been recovered may be relied upon in any other independent proceedings.”

22. Therefore, there was non-compliance with the provision of section 50 of the NDPS Act. It was laid down by the Hon'ble Supreme Court in *Vijaysinh Chandubha Jadeja vs State of Gujarat (2011) 1 SCC 609* that violation of Section 50 of the NDPS Act is fatal, and the police cannot rely upon the recovery effected in violation of Section 50 of the NDPS Act. It was observed: –

“29. We have no hesitation to hold that in, so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of illicit articles suspect and vitiate the conviction if the same is recorded only on the basis of recovery of an illicit article from the person of the accused during such search.”

23. This position was reiterated in *Arif Khan @ Agha Khan versus State of Uttarakhand AIR 2018 SC 2123*, wherein it was observed: -

“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, 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, none of them deposed that the search/recovery was made in the 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 compliance as required in law, the appellant is entitled to claim its benefit to seek his acquittal.”

24. Thus, the conclusion of the learned Trial Court that there was sufficient compliance with Section 50 of the NDPS Act is not correct. The prosecution has failed to prove compliance with Section 50 of the NDPS Act, and it cannot rely upon the recovery effected as a result of a search conducted in violation of Section 50 of the NDPS Act.

25. The consent memo (Ext. PW-10/A) specifically mentions Section 20 of the NDPS Act. The Investigating Officer could have no reason to know that the accused would be found in possession of the charas and could not have mentioned Section 20 of the NDPS Act. It was laid down by the Division Bench of this Court in the *State of H.P. Vs. Vikram @Vicky*, 2025: HHC:4601, that when the Investigating Officer had mentioned the possession of the narcotic by the accused, it was a case of prior information

which required compliance with the various provisions of the NDPS Act. It was observed: -

“9. It is shocking to note that the Investigating Officer, admittedly, even without conducting a search of the person of the respondent, very well knew that he was carrying the contraband, as is evident from the reading of the consent memo (supra).

10. Therefore, clearly it is a case of prior information and not that of chance recovery, which requires strict compliance with the provisions of the Act.”

26. Learned Trial Court did not advert to these infirmities and relied upon the statements of police officials. Therefore, the judgment and order passed by the learned Trial Court are not sustainable.

27. In view of the above, the present appeal is allowed, and the judgment and order passed by the learned Trial Court are set aside, and the accused is acquitted of the charged offence. The accused be released from custody if not required in any other case. The fine amount, if deposited by the accused/appellant, be refunded to him after the expiry of the statutory period of limitation in case no appeal is preferred, and in case of appeal, the same be dealt with as per orders of the Hon’ble Apex Court.

28. In view of the provisions of Section 437-A of the Code of Criminal Procedure [Section 481 of Bharatiya Nagarik Suraksha

Sanhita, 2023 (BNSS)], the appellant/accused is directed to furnish his personal bond in the sum of ₹25,000/- with one surety in the like amount to the satisfaction of the learned Registrar (Judicial) of this Court/learned Trial Court, within four weeks, which shall be effective for six months with stipulation that in the event of Special Leave Petition being filed against this judgment, or on grant of the leave, the appellant/accused, on receipt of notice(s) thereof, shall appear before the Hon'ble Supreme Court.

29. A copy of this judgment, along with the records of the learned Trial Court, be sent back forthwith. Pending miscellaneous application(s), if any, also stand(s) disposed of.

(Rakesh Kainthla)
Judge

28th September, 2026
(Chander)