IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.4311 of 2018

Arising Out of PS. Case No.-172 Year-2017 Thana- SIKTA District- West Champaran

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Laddu Baitha, S/o Khublal Baitha, R/O Village-Shikarpur, P.S. Sikta, District-West Champaran.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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Appearance :
For the Appellant : Mr. Ajeet Kumar Bhardwaj, Advocate
For the State : Mr. S. Ashfaque Ahmad, APP

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CORAM: HONOURABLE MR. JUSTICE JITENDRA KUMAR
ORAL JUDGMENT

Date : 25-07-2025

Introduction

The present Appeal has been preferred by the Appellant against the impugned judgment of conviction dated. 04.10.2018 and order of sentence dated 06.10.2018, passed by learned District and Sessions Judge-cum-Special Judge, N.D.P.S. Act, West Champaran, Bettiah in connection with Sikta P.S. Case No. 172 of 2017, Trial No. 19 of 2018 and C.I.S. No-N.D.P.S.- 22/18, whereby learned Special Judge, N.D.P.S. has found the Appellant guilty under Section 20(b)(ii)(c) of the N.D.P.S. Act and sentenced him to undergo R.I. for ten years and to pay fine of Rs.1,00,000/- under Section 20(b)(ii)(c) of the N.D.P.S. Act and in default to pay the fine, additional imprisonment for two years.

Prosecution Case

2. The prosecution case as per the FIR is that the informant/police officer got information that the Appellant is traveling with *charas* from Nepal. The information was communicated by the informant to his superior officers and constituted a police team. The informant and the police team reached the house of the Appellant, but seeing the police, the Appellant fled away from the house. Search of the house of the Appellant was made and a bag from below of the bed of the Appellant was recovered, containing 18 packets of *charas* weighing eight kilogram. The Circle Officer was also present on the spot and participated in search and seizure of the contraband.

Factual Background

3. During the Trial following four prosecution witnesses were examined: (i) **P.W.1-** Anil Kumar Singh, who was the informant/police officer, (ii) **P.W.2-** Jairam Tiwari, who was a member of the raiding party, (iii) **P.W.3-** Chandrama Rai, who was also a member of the raiding party and (iv) **P.W.4-** Rajendra Sandil, who was the I.O of the case.

4. The following documentary evidence were also brought on record: (i) **Ext.1-** Seizure list, (ii) **Ext.2-** Written Report, (iii) **Ext.3-** Endorsement on the written petition, (iv)

Ext.4- Formal FIR and **Ext.5-** FSL Report.

5. The Appellant has not examined any witness in his defense.

6. I heard learned counsel for the Appellant and learned APP for the State.

Submission on behalf of the Appellant

7. Learned counsel for the appellant submits that the impugned judgment of conviction and the order of sentence passed by learned Trial Court are not sustainable in the eye of law or on facts. The Trial Court has not applied his judicial mind and has failed to properly appreciate the evidence on record. He has claimed that the prosecution has failed to prove its case against the appellant beyond all reasonable doubts.

8. He further submits that even statutory provisions of Sections 35 and 54 of the NDPS Act do not help the prosecution. For raising presumption under Sections 35 and 54 of the Act, the prosecution is first required to prove the foundational facts of the alleged offence beyond all reasonable doubts against the accused. But the prosecution has badly failed to prove its case against the appellant as per legally admissible evidence on record.

9. To substantiate his claim, learned counsel for the appellant submits that the NDPS Act is an stringent penal statute

providing severe punishment. Hence, the legislature has also provided safeguards against false implications of any person. Sections 42 and 50 of the NDPS Act provide for mandatory procedure in regard to search and seizure, but the same has not been complied with by the prosecution in this case. He also refers to Standing Instruction No. 1/1988 and Standing Order No. 2/1988, issued under the NDPS Act by the Central Government providing procedure for search, seizure and sampling and for chemical examination of the contraband. But even the rules provided in these standing orders are not complied with by the prosecution. Hence, the Prosecution case against the accused/Appellant is rendered doubtful and unreliable.

10. He further submits that no independent witnesses in regard to the search and seizure have been examined during the trial by the Prosecution.

11. He also submits that the seized goods are required to be deposited in specially designated godown within 48 hours of the seizure in packed and sealed condition with proper identification particulars of the case. But it is not clear when the seized goods were deposited and where.

12. Moreover, the sampling was not drawn on the place of occurrence, nor a Magistrate was associated in drawing the

sample. It is also not clear how the sample was drawn from the seized 18 packets of the contraband. Moreover, the sample is required to be dispatched to laboratory within 72 hours of the seizure, whereas there is no evidence to show when the sample was drawn and when it was sent to FSL for report.

13. Learned counsel for the appellant further submits that in view of the aforesaid facts and circumstances, the prosecution has failed to prove beyond all reasonable doubts that contraband was recovered from the possession of the appellant.

Submission on behalf of the State

14. However, learned APP for the State vehemently defends the impugned judgment of conviction and order of sentence, submitting that there is no illegality or infirmity in them. 8 Kg. *charas* has been recovered from the conscious possession of the appellant and hence, culpable mental state of the appellant is presumed under Section 35 of the NDPS Act and presumption of commission of the offence of illegal possession of the contraband stands raised under Section 54 of the NDPS Act and it was for the appellant to rebut the presumption of legally admissible evidence. But no evidence has been adduced by the appellant to rebut the presumption of his *mens rea* and the illegal possession of the contraband.

15. He also submits that search, seizure and sampling of the contraband has been done as per law and there is no illegality involved in it.

The meaning and import of Sections 35 and 54 of the NDPS Act.

16. As such, the first and foremost question which arises for consideration of this Court is what is the effect of Sections 35 and 54 of the NDPS Act, which provide for presumptions. Do these provisions absolve the prosecution to prove its case against the accused beyond all reasonable doubts? Can the accused be fastened with the burden to prove his innocence without the prosecution proving even the foundational facts of the alleged offence by legally admissible evidence?

17. This question is not *res integra*. Hon'ble Supreme Court has, on several occasions, explained the meaning and import of the presumptions as provided under Sections 35 and 54 of the NDPS Act and their effect on the criminal trial.

18. However, before I refer to relevant judicial precedents, it would be pertinent to advert to the statutory provisions of Sections 35 and 54 of the NDPS Act, which read as follows:-

"**Section 35. Presumption of culpable mental state.**

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the

court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.-- In this section "culpable mental state" includes intention motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section , a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

54. Presumption from possession of illicit articles.-- In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of--
(a) any narcotic drug or psychotropic substance or controlled substance;
(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;
(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or
(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily."

19. In **Babu Vs. State of Kerala, (2010) 9 SCC 189, Hon'ble Supreme Court** has held that presumption of innocence is a human right, though the exception may be created by statutory provisions. But even such statutory presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution.

20. In Noor Aga v. State of Punjab, (2008) 16 SCC 417, Hon'ble Supreme Court has held as follows:

> **"58.** Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established."
>
> (Emphasis supplied)

21. In **Dharampal Singh v. State of Punjab, (2010) 9 SCC 608, Hon'ble Supreme Court** has held as follows:

> "**15.** From a plain reading of the aforesaid it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the appellants have not been able to satisfactorily account for the possession of opium.
>
> **16.** Once possession is established the court can presume that the accused had culpable mental state and have committed the offence……...
>
> (Emphasis supplied)

22. In **Bhola Singh v. State of Punjab, (2011) 11 SCC**

653, Hon'ble Supreme Court has held as follows:

> "**10.** While dealing with the question of possession in terms of Section 54 of the Act and the presumption raised under Section 35, this Court in *Noor Aga* v. *State of Punjab* [(2008) 16 SCC 417 while upholding the constitutional validity of Section 35 observed that as this section imposed a heavy reverse burden on an accused, the condition for the applicability of this and other related sections would have to be spelt out on facts and it was only after the prosecution had discharged the initial burden to prove the foundational facts that Section 35 would come into play."
>
> (Emphasis supplied)

23. In **Gangadhar v. State of M.P., (2020) 9 SCC 202, Hon'ble Supreme Court** has held as follows:

> "**8.** The presumption against the accused of culpability under Section 35, and under Section 54 of the Act to explain possession satisfactorily, are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond all reasonable doubt. The presumptive provision with reverse burden of proof, does not sanction conviction on basis of preponderance of probability. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability."
>
> (Emphasis supplied)

24. As such, it emerges that despite Sections 35 and 54 of the NDPS Act, the prosecution is not absolved of its obligation to prove the foundational facts of the alleged offence against the accused beyond all reasonable doubts and only after discharge of such obligation by the prosecution, the onus of proof shifts to the accused to rebut the presumption by preponderance of probability and not beyond all reasonable doubts.

What is proof beyond reasonable doubts

25. Now the question is what is proof beyond reasonable doubts? Even this question is not *res integra*. It has been explained by Hon'ble Supreme Court on several occasions and it has been held that the proof beyond reasonable doubts is not necessarily a perfect proof to mathematical precision. All that is required is the establishment of such a degree of probability that a prudent man may on its basis believe in the existence of the facts in issue. The accused are entitled to get benefit not of all doubts, but only of reasonable doubts. Every hesitancy, hunch and doubt are not reasonable doubts. One may refer to the following authorities in this regard:-

(i) **Kali Ram Vs State of HP**; (1973) 2 SCC 808.
(ii) **Dharm Das Wadhwani Vs. State of U.P.**
(1974) 4 SCC 267.
(iii) **Collector of Customs Vs. D. Bhoormal,**
(1972) 2 SCC 544.
(iv) **Narender Kumar Vs. State (NCT of Delhi)**,
(2012) 7 SCC 171.
(v) **Shivaji Sahabrao Bobade Vs. State of Maharashtra**,
(1973) 2 SCC 793.
(vi) **Dilavar Hussain Vs. State of Gujarat**,
(1991) 1 SCC 253.

Procedure as prescribed under Sections 42 and 52A of the NDPS Act and standing orders.

26. As the parties have made rival submissions regarding breach of the provisions of Sections 42 and 52A of the NDPS Act and standing orders issued under it by the Central

Government, it is relevant to advert to these provisions and the judicial precedents thereon.

27. Section 42 of the NDPS Act reads as follows:

"**Section 42. Power of entry, search, seizure and arrest without warrant or authorisation.**-- (l) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intellegence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances

or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."

(Emphasis Supplied)

28. Section 52A of the NDPS Act reads as follows:

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

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

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

(b) taking, in the presence of such magistrate, photographs of

[such drugs, substancesor conveyances] and certifying such photographs as true; or

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

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

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the innventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances]and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.

(Emphasis supplied)

29. Relevant para of **Standing Instruction 1/1988** issued by Narcotic Control Bureau reads as follows:-

"**Subject :** Drawal, Storage, Testing and disposal of samples from seized Narcotic Drugs and Psychotropic Substances Procedure -regarding

…….

1.4 If the drugs seized are found in packages/containers the same should be serially numbered for purposes of identification. In case the drugs are found in loose form the same should be arranged to be packed in unit containers of uniform size and serial numbers should be assigned to each package/container. Besides the serial number, the gross and net weight, particular of the drug and the date of seizure should invariably be indicated on the packages. In case sufficient space is not available for recording the above information on the package, a Card Board label, should be affixed with a seal of the seizing officer and on this Card Board label, the above details should be recorded.

1.5 **Place and time of drawal of sample:**

Samples from the Narcotic Drugs and Psychotropic Substances seized, must be drawn on the spot of recovery, in duplicate, in the presence of search (Panch witnesses and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchanama drawn on the spot.

1.6 **Quantity of different drugs required in the sample:**

The quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the cases of Opium, Ganja and Charas/Hashish where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken

for the duplicate sample also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.

1.7 **Number of samples to be drawn in each seizure case**

a) In the case of seizure of a single package/container one sample in duplicate is to be drawn.

Normally it is advisable to draw one sample in duplicate from each package/ container in case of seizure of more than one package/container.

b) However, when the package/containers seized together are of identical size and weight, bearing identical markings and the contents of each package give identical results on colour test by U.N. kit, conclusively indicating that the packages are identical in all respect/the packages/container may be carefully bunched in lots of 10 packages/containers. In case of seizure of Ganja and Hashish, the packages/containers may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample in duplicate may be drawn.

c) Whereafter making such lots, in the case of Hashish and Ganja, less than 20 packages/containers remain, and in case of other drugs less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

d) If it is 5 or more in case of other drugs and substances and 20 or more in case of Ganja and Hashish, one more sample in duplicate may be drawn for such remainder package/containers.

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

……..

1.8 Numbering of packages/containers

Subject to the detailed procedure of identification of packages/containers, as indicated in para 1,4 each package/container should be securely sealed and in identification slip pasted/attached on each one of them at such place and in such manner as will avoid easy obliteration of the marks and numbers on the slip. Where more than one sample is drawn, each sample should also be serially numbered and marked as S-L, S-2, S-3 and so on, both original and duplicate sample. It should carry the serial number of the packages and marked as P-1,2,3,4 and so on.

1.9 It needs no emphasis that all samples must be drawn

and sealed in the presence of the accused, Panchnama witnesses and seizing officer and all of them shall be required to put their signatures on each sample. The official seal of the seizing officer should also be affixed. If the person from whose custody the drugs have been recovered, wants to put his own seal on the sample, the same may be allowed on both the original and the; duplicate of each of the samples.

1.10 Packing and sealing of samples :

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

……...

1.12. Test Memo

The Samples of seized drugs or substances should be despatched to the respective laboratories under the cover of a Test Memo which shall be prepared in triplicate in proforma NCB-I. This test memo will be serially numbered for each unit effecting the seizure. The seizing officer will carefully fill-up column 1 to 8 of the Test Memo and put his signature with official seal. The original and duplicate of the Test Memo should be sent to the Laboratory concerned alongwith the samples. The tripli- cate shall be retained in the case file of the seizing officer.

1.13. Mode and Time limit for despatch of sample to Laboratory.

The samples should be sent either by insured post or through special messenger duly authorised for the purpose. Despatch of samples by registered 'post or ordinary mail should not be resorted to. Samples must be despatched to the Laboratory within 72 hours of seizure to avoid any legal objection.”

(Emphasis supplied)

30. Relevant para of **Standing Order No. 2/1988** issued by Narcotics Control Bureau reads as follows:-

“ Subject : Receipt, custody, storage and disposal of seized/confiscated narcotic drugs and psychotropic substances.

…….

2. Recognising the importance of despatch, transit, receipt, safe custody, storage, proper accounting and disposal destruction of the seized/confiscated drugs, and the Deed for evolving a uniform procedure for regulating the above mentioned operations, both by the Central and State drug law enforcement agencies in the country, the Narcotics Control Bureau has formulated the following procedure to be complied with in this behalf.

3.1 All drugs should be properly classified, carefully weighed and sampled on the spot of seizure.

3.2 All the packages/containers should be serially numbered and kept in lots for sampling. The procedure set out in Standing Order No.1/88 referred to above should be scrupulously followed.

3.3 After sampling, detailed inventory of such packages/containers should be prepared for being enclosed to the panchanama. Original, wrappers must also be preserved for evidentiary purposes.

3.4 After completion of panchanama, the drugs should be packed, in heat scaled plastic bags. For bulk quantities of ganja, instead of plastic bags, gunny bags may also be utilized wherever those are not readily available.

3.5 Agencies of the Central and State Government, who have been vested with the powers of investigation under the new law must specifically designate their godowns for storage purposes. The godowns should be selected keeping in view their security, angle, juxtaposition to courts, etc.

3.6 All drugs must invariably be stored in safes and vaults provided with double-locking system.

3.7 Such godowns, as a matter of rule, be placed under the over-all supervision and charge of a Gazetted Officer of the respective enforcement agency, who should exercise utmost care, circumspection and personal supervision, as far as possible. Such officers should not be below the rank of Superintendent in the Departments of Customs, Central Excise, Directorate of Revenue Intelligence, Central Bureau of Narcotics, Narcotics Control Bureau, C.B.I., B.S.F., etc., central agencies and station house officer/officer incharge of a - Police station Superintendent of State Excise, Naib Tehsildar of Revenue, Drug Inspector of Drug Control Department, etc. in the States and U.T. enforcement agencies. They will personally be held accountable for safely and security of the drugs.

3.8 Each seizing officer should deposit the drugs fully packed

and sealed with his seal in the godown within 48 hours of seizure of such drugs, with a forwarding memo indicating.

(1) NDPS Crime No, as per crime and, prosecution register under the new law (LONDPS Act)
(2) Name(s) of accused
(3) Scanned by CamScan
(4) Description of drugs in the sealed packages/containers and other goods, if any
(5) Drug-wise quantity in each package/container
(6) Drug-wise number of packages/containers
(7) Total number of all packages/containers

(Emphasis supplied)

Substantive compliance of Section 52 A of the NDPS Act and the Standing Orders

31. Time and again, the Hon'ble Apex Court has held that substantive compliance of Section 52 A of the NDPS Act and the Standing Orders or instructions issued under the NDPS Act are mandatory for fair investigation and trial.

32. Hon'ble Supreme Court in the case of **Union of India Vs. Mohanlal, (2016) 3 SCC 379,** has held as follows:

"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 purposes 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.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

.....

31. To sum up we direct as under:

31.1. No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A, as discussed by us in the body of this judgment under the heading "seizure and sampling". The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order."

(Emphasis supplied)

33. In the recent judgment of **Bharat Aambale Vs. State of Chhattisgarh (2025 SCC OnLine SC 110),** Hon'ble Supreme Court has comprehensively dealt with Section 52A of the N.D.P.S. Act and the standing orders and the rules made thereunder, including the effect of non-compliance of the same, scanning almost all the judicial precedents, and concluded as

follows:

"50. **We summarize our final conclusion as under:—**

(I) Although Section 52A is primarily for the disposal and destruction of seized contraband in a safe manner yet it extends beyond the immediate context of drug disposal, as it serves a broader purpose of also introducing procedural safeguards in the treatment of narcotics substance after seizure inasmuch as it provides for the preparation of inventories, taking of photographs of the seized substances and drawing samples therefrom in the presence and with the certification of a magistrate. Mere drawing of samples in presence of a gazetted officer would not constitute sufficient compliance of the mandate under Section 52A sub-section (2) of the NDPS Act.

(II) Although, there is no mandate that the drawing of samples from the seized substance must take place at the time of seizure as held in Mohanlal (supra), yet we are of the opinion that the process of inventorying, photographing and drawing samples of the seized substance shall as far as possible, take place in the presence of the accused, though the same may not be done at the very spot of seizure.

(III) Any inventory, photographs or samples of seized substance prepared in substantial compliance of the procedure prescribed under Section 52A of the NDPS Act and the Rules/Standing Order(s) thereunder would have to be mandatorily treated as primary evidence as per Section 52A subsection (4) of the NDPS Act, irrespective of whether the substance in original is actually produced before the court or not.

(IV) The procedure prescribed by the Standing Order(s)/Rules in terms of Section 52A of the NDPS Act is only intended to guide the officers and to see that a fair procedure is adopted by the officer in-charge of the investigation, and as such what is required is substantial compliance of the procedure laid therein.

(V) Mere non-compliance of the procedure under Section 52A or the Standing Order(s)/Rules thereunder will not be fatal to the trial unless there are discrepancies in the physical evidence rendering the prosecution's case doubtful, which may not have been there had such

compliance been done. Courts should take a holistic and cumulative view of the discrepancies that may exist in the evidence adduced by the prosecution and appreciate the same more carefully keeping in mind the procedural lapses.

(VI) If the other material on record adduced by the prosecution, oral or documentary inspires confidence and satisfies the court as regards the recovery as-well as conscious possession of the contraband from the accused persons, then even in such cases, the courts can without hesitation proceed to hold the accused guilty notwithstanding any procedural defect in terms of Section 52A of the NDPS Act.

(VII) Non-compliance or delayed compliance of the said provision or rules thereunder may lead the court to drawing an adverse inference against the prosecution, however no hard and fast rule can be laid down as to when such inference may be drawn, and it would all depend on the peculiar facts and circumstances of each case.

(VIII) Where there has been lapse on the part of the police in either following the procedure laid down in Section 52A of the NDPS Act or the prosecution in proving the same, it will not be appropriate for the court to resort to the statutory presumption of commission of an offence from the possession of illicit material under Section 54 of the NDPS Act, unless the court is otherwise satisfied as regards the seizure or recovery of such material from the accused persons from the other material on record.

(IX) The initial burden will lie on the accused to first lay the foundational facts to show that there was non-compliance of Section 52A, either by leading evidence of its own or by relying upon the evidence of the prosecution, and the standard required would only be preponderance of probabilities.

(X) Once the foundational facts laid indicate non-compliance of Section 52A of the NDPS Act, the onus would thereafter be on the prosecution to prove by cogent evidence that either (i) there was substantial compliance with the mandate of Section 52A of the NDPS Act OR (ii) satisfy the court that such non-compliance does not affect its case against the accused, and the standard of proof required would be beyond a reasonable doubt."

(Emphasis supplied)

Relevant Judicial Precedents regarding search and seizure.

34. In **State of Punjab v. Balbir Singh, (1994) 3 SCC 299,** Hon'ble Supreme Court has held as follows:-

> **"**10**.** It is thus clear that by a combined reading of Sections 41, 42, 43 and 51 of the NDPS Act and Section 4 CrPC regarding arrest and search under Sections 41, 42 and 43, the provisions of CrPC namely Sections 100 and 165 would be applicable to such arrest and search. Consequently the principles laid down by various courts as discussed above regarding the irregularities and illegalities in respect of arrest and search would equally be applicable to the arrest and search under the NDPS Act also depending upon the facts and circumstances of each case.
>
> 11. But there are certain other embargoes envisaged under Sections 41 and 42 of the NDPS Act. Only a Magistrate so empowered under Section 41 can issue a warrant for arrest and search where he has reason to believe that an offence under Chapter IV has been committed so on and so forth as mentioned therein. Under sub-section (2) only a Gazetted Officer or other officers mentioned and empowered therein can give an authorization to a subordinate to arrest and search if such officer has reason to believe about the commission of an offence and after reducing the information, if any, into writing. Under Section 42 only officers mentioned therein and so empowered can make the arrest or search as provided if they have reason to believe from personal knowledge or information. In both these provisions there are two important requirements. One is that the Magistrate or the officers mentioned therein firstly be empowered and they must have reason to believe that an offence under Chapter IV has been committed or that such arrest or search was necessary for other purposes mentioned in the provision. So far as the first requirement is concerned, it can be seen that the Legislature intended that only certain Magistrates and certain officers of higher rank and empowered can act to effect the arrest or search. This is a safeguard provided having regard to the deterrent sentences contemplated and with a view that innocent persons are not harassed. Therefore if an arrest or search contemplated under these provisions of NDPS Act has to be carried out, the same can be done only by competent and empowered Magistrates or officers mentioned thereunder.

.....

15. ..... The object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1). To that extent they are mandatory. Consequently the failure to comply with these requirements thus affects the prosecution case and therefore vitiates the trial.

.....

25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:

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

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If

such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

(Emphasis supplied)

35. In **Karnail Singh Vs. State of Haryana, (2009) 8 SCC 539,** Hon'ble Constitution Bench of Supreme Court has held as follows:-

"5. Section 42 with which we are concerned relates to power of entry, search, seizure and arrest without warrant or authorisation. Section 43 relates to power of seizure and arrest in public place. Section 50 refers to conditions under which search of persons shall be conducted.

.....

29. It is to be noted that *Baldev Singh case* [(1999) 6 SCC 172 :] has dealt with Section 50 of the Act and the effect of non-compliance with the same. It was held that the same provisions of Section 50 containing certain protection and safeguards implicitly make it imperative and obligatory and cast a duty on the investigating officer to ensure that search and seizure of the person concerned is conducted in a manner prescribed by Section 50.

.....

31. The safeguard or protection to be searched in the presence of a gazetted officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only

searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. But this strict procedural requirement has been diluted by the insertion of sub-sections (5) and (6) to the section by Act 9 of 2001, by which the following sub-sections were inserted accordingly:

"50. (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."

Through this amendment the strict procedural requirement as mandated by *Baldev Singh case* [(1999) 6 SCC 172 :] was avoided as relaxation and fixing of the reasonable time to send the record to the superior official as well as exercise of Section 100 CrPC was included by the legislature. The effect conferred upon the previously mandated strict compliance with Section 50 by *Baldev Singh case* [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] was that the procedural requirements which may have handicapped an emergency requirement of search and seizure and give the suspect a chance to escape were made directory based on the reasonableness of such emergency situation. Though it cannot be said that the protection or safeguard given to the suspects have been taken away completely but certain flexibility in the procedural norms were adopted only to balance an urgent situation. As a consequence the mandate given in *Baldev Singh case* [(1999) 6 SCC 172] is diluted.

……..

33. *Abdul Rashid* [(2000) 2 SCC 513] had been decided on 1-2-2000 but thereafter Section 42 has been amended with effect from 2-10-2001 and the time of sending such report of the required information has been specified to be within 72 hours of writing down the same. The relaxation by the legislature is evidently only to uphold the object of the Act. The question of mandatory application

of the provision can be answered in the light of the said amendment. The non-compliance with the said provision may not vitiate the trial if it does not cause any prejudice to the accused.

.....

35. In **conclusion**, what is to be noticed is that *Abdul Rashid* [(2000) 2 SCC 513 : 2000 SCC (Cri) 496] did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did *Sajan Abraham* [(2001) 6 SCC 692 : 2001 SCC (Cri) 1217] *hold* that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(*a*) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (*a*) to (*d*) of Section 42(1).

(*b*) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (*a*) to (*d*) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(*c*) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally *precede* the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(*d*) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not

recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."

(Emphasis supplied)

36. Hon'ble Supreme Court in the case of **Najmunisha v. Abdul Hamid Chandmiya @ Ladoo Bapu, 2024 SCC Online SC 520** has held as follows:-

"**31.** From the perusal of provision of Section 42(1) of the NDPS Act 1985, it is evident that the provision obligates an officer empowered by virtue of Section 41(2) of the NDPS Act 1985 to record the information received from any person regarding an alleged offence under Chapter IV of the NDPS Act 1985 or record the grounds of his belief as per the Proviso to Section 42(1) of the NDPS Act 1985 in case an empowered officer proceeds on his personal knowledge. While the same is to be conveyed to the immediate official superior prior to the said search or raid, in case of any inability to do so, the Section 42(2) of the NDPS Act provides that a copy of the same shall be sent to the concerned immediate official superior along with grounds of his belief as per the proviso hereto. This relaxation contemplated by virtue of Section 42(2) of the NDPS Act 1985 was brought about through the Amendment Act of 2001 to the NDPS Act of 1985 wherein prior to this position, the Section 42(2) mandated the copy of the said writing to be sent to the immediate official superior "forthwith".

32. The decision in *Karnail Singh* (supra) has been extensively referred by the learned Counsel for the

> Appellants and at the cost of repetition, it is observed that absolute non-compliance of the statutory requirements under the Section 42(1) and (2) of the NDPS Act 1985 is verboten. However, any delay in the said compliance may be allowed considering the same is supported by well-reasoned explanations for such delay. This position adopted by the instant 5-Judges' Bench of this Court is derived from the ratio in the decision in *Balbir Singh* (supra) which is a decision by a 3-Judges' Bench of this Court.
>
> **33.** Another 3-Judges' Bench while dealing with compliance of Section 42 of the NDPS Act 1985 in *Chhunna alias Mehtab* v. *State of Madhya Pradesh*, (2002) 9 SCC 363 dealt with criminal trial wherein there was an explicit non-compliance of the statutory requirements under the NDPS Act 1985. It was held that the trial of the Petitioner-Appellant therein stood vitiated…….
>
> **34.** In *Dharamveer Parsad* v. *State of Bihar*, (2020) 12 SCC 492, there was non-examination of the independent witness without any explanation provided by the prosecution and even the *panchnama* or the seizure memo were not prepared on the spot but after having had reached police station only. Since the vehicle was apprehended and contraband was seized in non-compliance of the Section 42 of the NDPS Act 1985 - conviction and sentence of the appellant therein was set aside. Apart from the said reasons there were various suspicious circumstances that inspired the confidence of the Court to set aside the conviction affirmed by the High Court therein……."
>
> (Emphasis supplied)

Present Case

37. Coming to the case on hand, I find that there is no evidence that the information received by the informant was reduced to writing, let alone sending a copy of the same to the superior officer. I further find that the seizure of the contraband could not be proved by the independent witnesses. As per the seizure list, there were two independent witnesses, but neither of them has been examined by the prosecution. Only the informant

and members of the raiding party have deposed regarding seizure. None of the prosecution witnesses are private or independent persons. All the prosecution witnesses are police officers connected with the seizure of the contraband. There is also no evidence to show that where the seized and sealed contraband was deposited and within what time. Moreover, there is no evidence at all regarding how the sample was prepared. There is no statement of the prosecution witnesses that any Magistrate was associated with drawing of the sample. There is also no evidence to show how the sample was prepared out of eighteen packets of the contraband.

38. In view of such evidence on record, I find that the foundational facts of the alleged offence could not be proved by the prosecution beyond reasonable doubts against the Appellant. Hence, Sections 35 and 54 of the N.D.P.S. Act, do not come into play, and hence, there is no question of shifting the onus on the Appellant to prove his innocence.

39. Resultantly, the prosecution case against the Appellant badly fails. The impugned judgment and order of sentence are not sustainable.

40. The Appeal is, accordingly, allowed, setting aside the impugned judgment of conviction dated 04.10.2018 and order of

sentence dated 06.10.2018, passed by learned District and Sessions Judge-cum- Special Judge, NDPS Act, West Champaran at Bettiah in Trial No. 19 of 2018/C.I.S. No. N.D.P.S. 22/18, arising out of Sikta P.S. Case No. 172 of 2017.

41. The appellant is acquitted of all the charges and directed to be released forthwith, if not required in any other case. A copy of the judgment be sent to the Superintendent of the Jail where the appellant is lodged forthwith for his information and needful.

42. Interim applications, if any, stand disposed of.

43. The Lower Court Records be returned to the Trial Court forthwith along with a copy of this judgment.

(Jitendra Kumar, J.)

ravishankar/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	26.07.2025
Transmission Date	26 07.2025