Criminal Appeal

Present :The Hon'ble Mr. Justice Ashim Kumar Banerjee
And
The Hon'ble Mr. Justice Kalidas Mukherjee

Judgment on : June 18, 2010.

C.R.A. No.184 of 1997

Subhas Chandra Jana
-VS-
Ajibar Mirdha

POINTS

METHOD OF PROOF – Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable whether it can form the basis of conviction in the absence of some independent witness-NCB Officials raided the house of the accused not on any specific information but on a vague, uncertain and probable information- Whether it requires to reduce it into writing-The accused, himself voluntarily made confessional statement stating that he dealt in Heroin for the livelihood of his family- Whether there is any scope to acquit the Accused on the ground of mere irregularity of procedural compliance by the prosecution- The accused was fleeing with a foam hand-bag in his hand – Whether the mandatory provision of law under sec 50 of the NDPS Act required to be complied with- Narcotic Drugs and Psychotropic Substances Act, 1985 Ss .42 , 50 – Code of Criminal Procedure 1973 S 100.

FACTS

Narcotic Control Bureau (hereinafter referred to as N.C.B.) raided the house of Ajibar Mirdha at Hatatganju Bazar under the police station Swarupnagar in the district of 24-Parrganas. The raiding party including a lady officer of the N.C.B. as required under provisions of the Narcotic Drugs and

Psychotropic Substances Act, 1985 (hereinafter referred to as N.D.P.S. Act) knocked the door of the house of Ajibar. Seeing them, Ajibar tried to flee away from the place. The officers caught him. He was carrying a foam hand bag in his hand. He confessed that the bag contained heroin. The officers searched the bag in his presence wherefrom a polythene packet containing brown powdered substance was found. A small quantity of the substance was tested by the officers when it responded positive to the test of heroin. Ajibar confessed his guilt, however, prayed for mercy on the ground that he was trafficking it to maintain his livelihood. The substance was weighed and found to be weighing 315 grams. 2.The bag was seized along with the polythene packet under Section 42 of the N.D.P.S. Act. The seizure was made in presence of Ajibar as well as two independent witnesses namely Sintu Mondal and Muzibar Rahaman belonging to the same locality. The officers drew two samples of 5 grams each and sealed the samples in two different packets, one was sent for chemical examination and other was kept along with another sealed packet containing the remaining substance. Proceeding was drawn under Section 21 under the N.D.P.S. Act against Ajibar after arresting him under Section 42 at about 7.30 p.m. on the same day. Ajibar was produced on the next day before the Learned Sub-divisional Judicial Magistrate and was remanded to jail custody. PW-1, being an officer of the N.C.B. filed a written complaint in the Court of learned 2nd Additional District Judge (Special Court), Barasat. The learned Additional District Judge framed the charges against Ajibar under Section 21 of the N.D.P.S. Act. Azibar pleaded not guilty and faced trial.

The learned Judge, Special Court, after examining the evidence held the accused not guilty of the offence and acquitted him of all the charges. The learned Judge was of the view that the provisions of Section 42 and 50 of the N.D.P.S. Act were treated in breach by the raiding party. The learned Judge drew adverse inference under Section 114 g of the Evidence Act in view of non-

production of the independent seizure witnesses. According to the learned Judge, the provisions of Section 42(1) was mandatory and not directory and the raiding team failed to comply with the requirements of the stringent provisions of the said Act. The Learned Judge also observed that provisions of Section 50 was mandatory and non-compliance of such provision was fatal for the prosecution. According to the learned Judge, the accused was deprived of exercising his right to be searched in presence of a Gazetted Officer. The learned Judge also found discrepancy in the evidence of PW-2, 4 and 5.

Being aggrieved by the judgment and order of acquittal passed by the learned special Judge the appellant being an officer of the N.C.B. preferred the instant appeal.

HELD

The rule of prudence, however, requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form the basis of conviction. The absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the credit worthiness of the prosecution case. Para 17

As per Sec 100 of Cr.P.C before making any search, the concerned officer should call two independent and respectable witnesses before whom he can conduct the search. But in the light of the above mentioned leading judgments it becomes very clear that the presence of the witnesses is totally circumstantial and varies from case to case. The intention of the legislature behind this section is to ensure that the search and seizure is being conducted fairly so that during the course of investigation no evidence is fabricated. But it no way says that the evidence given by the officials,

who are interested in the outcome of the case, are not trustworthy. If during the cross examination any doubt gets created in the evidence given by the officials then only in the absence of the corroborative evidence by the witnesses the accused can get the benefit of doubt. Weight to be attached to such evidence depends upon the facts and circumstances of each case. The court is required to scan the evidence with care to act upon it when it is proved and the court would hold that the evidence would be relied upon. Para 18

In the present case from the evidence of all the witnesses it is clear that they called two independent witnesses before search and seizure but if they later refused to be present in the court of law and give evidence, then no way that is going to harm the merit of the prosecution case and thus in the interest of justice the prosecution case cannot be vitiated solely on this ground. Para 19

Where the information received by the Police Officer was that, some persons had arrived at a particular place with large quantity of brown sugar and they were in search of customers, the information so received was not specific which required the police to reduce it to writing. This was not an information as contemplated under section 41 and 42 of the NDPS Act 1985. Para 21

The NCB Officials raided the house of the accused not on any specific information but on a vague, uncertain and probable information. The term “Secret” nowhere indicates that the information was reliable. So on the basis of the above mentioned judgment there was no requirement to reduce it into writing as there was no formal or definite complaint as such. Para 23

The accused, himself voluntarily made confessional statement stating that he dealt in Heroin for the livelihood of his family. So after the voluntary admission by the Accused there remains no scope to acquit the Accused on the ground of mere irregularity of procedural compliance by the prosecution in the interest of justice. It was held in the case In Re:Md. Farid Ali v State[1]that, Recovery of Narcotics from an accused cannot impede the course of justice merely on the ground

of procedural lapses when the contraband goods on ultimate analysis are found to be Narcotic by the expert. It therefore, excludes the plea of technicality which cannot make any triumph over the social legislation. Para 25

The accused was fleeing with a foam hand-bag in his hand seeing the NCB Officials. From the above mentioned judgments, it becomes clear that the bag did not form part of the "PERSON" of the accused, so to search that no information regarding his right to be searched before a Gazatted Officer or Magistrate, was required to be supplied by the NCB officers to the accused. So there had been no violation of mandatory provision of law under sec 50 of the NDPS Act and no violation of the protective right of the accused had taken place. Para 28

i)Podda Narayana & Others –VS- State of Andhra Pradesh[2]
ii) The State of Maharashtra –VS-Madhukar Keshav Waity[3]
iii) State of Maharashtra –VS- Natwarlal Damodardas Soni[4]
iv) Md. Farid Ali & Others –VS- State & Another[5]
v) State of Punjab –VS- Balbir Singh[6]
vi) Kalema Tumba –VS- State of Maharashtra & Another[7]
vii) Khet Singh –VS- Union of India[8]
viii) Devi Singh –VS- State of Rajasthan[9]
ix) State of Haryana –VS- Suresh[10]
x) Kanhaiyalal –VS- Union of India[11]
xi)Vijay Kumar v State[12],
xii)Megha Singh v State of Haryana[13]
xiii)Tahir v State(Delhi)[14]

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[1] ***ibid***
[2] AIR 1975 SC 1252
[3] AIR 1980 SC 1224
[4] AIR 1980 SC 593
[5] 1994 Cri. LR(Cal) 189
[6] 1994 C Cr. LR (SC) 121
[7] AIR 2000 SC 402
[8] JT 2002 Vol-III SC 208
[9] 2005 Vol.X SCC 453
[10] AIR 2007 SC2245
[11] 2008 Vol.IV SCC 668
[12] 1995 Cri. LJ 2599(Del)
[13] (1996) 11SCC 709

xiv)St. of HP v Prithi Chand & Ans. 1996(2) SCC 37.
xv)Babulal v State[15]
xvi)Punjab –VS- Balbir Singh[16].
xvii)H.N. Rishbud v Satet of Del. AIR 1955 SC196
xviii)Farid Ali V State, 1994 C Cr LR (Cal) 189.
xix)State of Haryana v Suresh[17]
xx)S. Rajan v State ASSTT. Collector Customs (Intelligence) Madurai, 1995 Cri Lj 1594.
xxi)Kalema Tumba V State of Maharashtra[18]
xxii)Babubhai Odhubji Patel v Satate of Gujarat[19].

For the Appellant (N.C.B.) : Mr. Bishwaranjan Ghosal (Senior Advocate)
Mrs. Sashwati Ghosal (Sinha)
Mr. Ujjal Datta

For the State : Mr. Arup Chatterjee
Mr. Satyabrata Chakrabarty

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[14] (1996) 3 SCC 338
[15] 1995 Cri LJ 4105(Bom)
[16] 1994 Cal.CLR (SC) 121
[17] AIR 2007 SC 2245
[18] AIR 2000 SC 402.
[19] AIR 2006 SC 402.

ASHIM KUMAR BANERJEE.J:

1. FACTS OF THE CASE :-

1.Based on an information, the officers of the Narcotic Control Bureau (hereinafter referred to as N.C.B.) raided the house of Ajibar Mirdha at Hatatganju Bazar under the police station Swarupnagar in the district of 24-Parrganas. The raiding party including a lady officer of the N.C.B. as required under provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as N.D.P.S. Act) knocked the door of the house of Ajibar. Seeing them, Ajibar tried to flee away from the place. The officers caught him. He was carrying a foam hand bag in his hand. He confessed that the bag contained heroin. The officers searched the bag in his presence wherefrom a polythene packet containing brown powdered substance was found. A small quantity of the substance was tested by the officers when it responded positive to the test of heroin. Ajibar confessed his guilt, however, prayed for mercy on the ground that he was trafficking it to maintain his livelihood. The substance was weighed and found to be weighing 315 grams. 2.The bag was seized along with the polythene packet under Section 42 of the N.D.P.S. Act. The seizure was made in presence of Ajibar as well as two independent witnesses namely Sintu Mondal and Muzibar Rahaman belonging to the same locality. The officers drew two samples of 5 grams each and sealed the samples in two different packets, one was sent for chemical examination and other was kept along with another sealed packet containing the remaining substance. Proceeding was

drawn under Section 21 under the N.D.P.S. Act against Ajibar after arresting him under Section 42 at about 7.30 p.m. on the same day. Ajibar was produced on the next day before the Learned Sub-divisional Judicial Magistrate and was remanded to jail custody. PW-1, being an officer of the N.C.B. filed a written complaint in the Court of learned 2nd Additional District Judge (Special Court), Barasat. The learned Additional District Judge framed the charges against Ajibar under Section 21 of the N.D.P.S. Act. Azibar pleaded not guilty and faced trial.

2. PROSECUTION EVIDENCE :-

PW-1 (Monotosh Sarkar) :-

3.The witness filed the complaint on behalf of the N.C.B. under Section 21 of the N.D.P.S. Act. He was however not a member of the raiding party.

PW-2 (Nemai Chandra Patra) :-

4.The witness was the Superintendent (Eastern Zone). He led the raiding party. The raiding party called two local witnesses. They raided the house. Ajibar attempted to flee away along with a foam hand bag in his hand. When challenged by the team the accused voluntarily disclosed heroin as a content of the said bag. The witnesses narrated the incident in detail as briefly stated hereinbefore.

PW-3 (A.K. Bandapadhyay) :-

5.This witness was the Chemical Examiner belonging to Customs Department. He tested the sample. The packet contained 5.6 grams substance. 1 gram was consumed for chemical examination, the test was positive.

PW-4 (Biswajit Roy) ;-

6.Being a member of the raiding party, this witness observed the incident from a distance. In cross-examination he could not give detailed description of the house belonging to the accused. He merely helped PW-5 for obtaining signature of the accused and witnesses on the sample packets.

PW-5 (Gouri Shankar Mukherjee) :-

7.He was an active member of the raiding party. He knocked the house of the accused, called him by his name. When the accused was trying to flee away the team detained him when he handed over the bag to the witness and confessed that the bag was containing heroin. He gave details of the incident which found corroboration from PW-2.

3. DEFENCE EVIDENCE :-

8.The accused did not adduce any evidence. He was examined under Section 313 of the Criminal Procedure Code. In reply to the queries, he claimed to be innocent and denied each and every allegation made against him. With regard to the confessional statement, the accused complained that he was beaten up and was compelled to write the confessional statement.

4. JUDGMENT :-

9.The learned Judge, Special Court, after examining the evidence held the accused not guilty of the offence and acquitted him of all the charges. The learned Judge was of the view that the provisions of Section 42 and 50 of the N.D.P.S. Act were treated in breach by the raiding party. The learned Judge drew adverse inference under Section 114 g of the Evidence Act in view of non-production

of the independent seizure witnesses. According to the learned Judge, the provisions of Section 42(1) was mandatory and not directory and the raiding team failed to comply with the requirements of the stringent provisions of the said Act. The Learned Judge also observed that provisions of Section 50 was mandatory and non-compliance of such provision was fatal for the prosecution. According to the learned Judge, the accused was deprived of exercising his right to be searched in presence of a Gazetted Officer. The learned Judge also found discrepancy in the evidence of PW-2, 4 and 5.

5. THIS APPEAL :-

10.Being aggrieved by the judgment and order of acquittal passed by the learned special Judge the appellant being an officer of the N.C.B. preferred the instant appeal which was heard by us on the above mentioned dates.

6. CONTENTIONS OF THE PARTIES :-

i) PROSECUTION :-

11.Mr. Biswaranjan Ghosal, learned senior advocate appearing for the appellant contended that the learned Judge misconstrued the provisions of Section 50 as the said provision gave right to an accused to be searched in presence of a Gazetted Officer only when he was searched in person. Luggage of a person could not be included within the definition of “person” within the meaning of Section 50. Mr. Ghosal further contended that Section 42, if read as a whole, would make it clear that such provision was directory and not mandatory. In any event, even if there was some irregularity on that score, such irregularity would not vitiate the trial when the crime was otherwise

proved. Even if the search was held to be illegal, it would not, per se, vitiate the investigation and/or the trial.

ii) DEFENCE :-

12.Mr. Arup Chatterjee, learned counsel appearing for appellant Ajibar on the other hand contended that when the independent witnesses were not produced the Court was duty bound to be more cautious while scanning the evidence of the interested witnesses being the members of the raiding party. In the instant case, PW-2, 4 and 5 being the members of the raiding party contradicted each other while deposing at the trial. Such contradiction would automatically raise doubt in the mind of the Court and the accused was entitled to benefit of such doubt. Hence, the learned Judge was right in passing an order of acquittal.

7. CASES CITED :-

13.Mr. Chatterjee did not cite any decision. Mr. Ghosal cited the following decisions :-

i) Podda Narayana & Others –VS- State of Andhra Pradesh[20]

ii) The State of Maharashtra –VS-Madhukar Keshav Waity[21]

iii) State of Maharashtra –VS- Natwarlal Damodardas Soni[22]

iv) Md. Farid Ali & Others –VS- State & Another[23]

[20] AIR 1975 SC 1252
[21] AIR 1980 SC 1224
[22] AIR 1980 SC 593
[23] 1994 Cri. LR(Cal) 189

v) State of Punjab –VS- Balbir Singh[24]

vi) Kalema Tumba –VS- State of Maharashtra & Another[25]

vii) Khet Singh –VS- Union of India [26]

viii) Devi Singh –VS- State of Rajasthan[27]

ix) State of Haryana –VS- Suresh[28]

x) Kanhaiyalal –VS- Union of India[29]

8. OUR VIEW :-

14.On a close analysis, we find three major points discussed by the learned Judge in his judgment and reiterated by Shree Chatterjee before us in support of the defence.

i) Non-production of the independent witnesses – adverse inference.

ii) Compliance of Section 42(1) - whether mandatory.

iii) Non-compliance of Sect 50 – fatal to prosecution.

We have considered the evidence. We have considered the law on the subject as well as the precedents on the issue. Our view on the three issues are as follows :-

ISSUE I:

[24] 1994 C Cr. LR (SC) 121
[25] AIR 2000 SC 402
[26] JT 2002 Vol-III SC 208
[27] 2005 Vol.X SCC 453
[28] AIR 2007 SC2245
[29] 2008 Vol.IV SCC 668

15. Adverse presumption was drawn against the prosecution under ***section 114 g of the Evidence Act.*** *The settled proposition of law is that, statement of the official witness should be corroborated at least by one independent witness. The Prosecution submitted that during search and seizure two local witnesses were called and in their presence only PW-5, Gouri Shankar Mukherjee, an intelligence Officer of NCB, drew out a packet containing Heroin from the foam hand bag of the Accused in his hand. During the Trial those witnesses were not produced in the court to corroborate the evidence adduced by PW1, 4 and 5- Intelligence Officers of NCB, PW 2- Superintendent of NCB Eastern Zonal Unit Calcutta and PW3– the Asstt. Chemical Examiner at Customs House.*

16.In the case ***Vijay Kumar v State***[30], it was held that, if the investigating officer fails to procure independent and respectable person to witness the search such search would not per se be illegal and would not vitiate the trial. Such failure should be kept in mind while appreciating the evidence in the fact and circumstances of each case. Normally whenever any recovery is effected by the police, the police should join public witnesses to ensure that investigation being done by the police is fair. It cannot be laid down as a broader proposition of law that if two public witnesses are not joined for any reason whatsoever the recovery effected by the police should be held to be doubtful. It is well settled that the testimony of a witness is not to be doubted or discarded merely on the ground that he happens to be an official but as a rule of caution and depending upon the circumstances of the case, the court should look for independent corroboration.

[30] 1995 Cri. LJ 2599(Del)

17.In the case ***Megha Singh v State of Haryana***[31] and ***Tahir v State(Delhi)***[32]**,** it was held that, no infirmity attaches to the testimony of police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The rule of prudence, however, requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form the basis of conviction. The absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the credit worthiness of the prosecution case.

18.As per Sec 100 of Cr.P.C[33] before making any search, the concerned officer should call two independent and respectable witnesses before whom he can conduct the search. But in the light of the above mentioned leading judgments it becomes very clear that the presence of the witnesses is totally circumstantial and varies from case to case. The intention of the legislature behind this section is to ensure that the search and seizure is being conducted fairly so that during the course of investigation no evidence is fabricated. But it no way says that the evidence given by the officials, who are interested in the outcome of the case, are not trustworthy. If during the cross examination any doubt gets created in the evidence given by the officials then only in the absence

[31] (1996) 11SCC 709
[32] *(*1996) 3 SCC 338

[33] Sec 100(4) of Cr.PC: *Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.*

of the corroborative evidence by the witnesses the accused can get the benefit of doubt. Weight to be attached to such evidence depends upon the facts and circumstances of each case. The court is required to scan the evidence with care to act upon it when it is proved and the court would hold that the evidence would be relied upon[34].

19.In the present case from the evidence of all the witnesses it is clear that they called two independent witnesses before search and seizure but if they later refused to be present in the court of law and give evidence, then no way that is going to harm the merit of the prosecution case and thus in the interest of justice the prosecution case cannot be vitiated solely on this ground.

ISSUE II:

20. ***The compliance of Section 42(1) of the NDPS Act 1985 is mandatory.*** *From the fact of the present case it is very clear that the NCB Officers raided the house of the accused receiving prior information. But as per the above-mentioned section Officers receiving prior information should reduce the same in writing and also record the reasons for the belief. According to Prosecution they did not go on the basis of any information but only to work out an intelligence whereas PW 2 during cross- examination said that they raided on the basis of a secret information. So according to defence non- compliance of the mandatory provision of Section 42(1) vitiated the trial.*

21.In the case ***Babulal v State***[35] Bombay High Court observed that, no vague information is required to be reduced to writing. Thus, where the information received by the Police Officer was that, some persons had arrived at a particular place with large quantity of brown sugar and they were in search of customers, the information so received was not specific which required the police

[34] ***St. of HP v Prithi Chand & Ans***. 1996(2) SCC 37.

to reduce it to writing. This was not an information as contemplated under section 41 and 42 of the NDPS Act 1985.

22. This view was approved by the Apex Court in the case of ***State of Punjab –VS- Balbir Singh***[36]. Paragraph 22 of the said decision is quoted below :-

"We have also already noted that the searches under the NDPS Act by virtue of section 51 have to be carried under the provisions of Cr.P.C. particularly sections 100 and 165. The irregularities, if any, committed like independent witnesses not being associated or the witnesses not from the locality, while carrying out the searches etc. under sections 100 and 165, Cr.P.C. would not, as discussed above, vitiate the trial. But a question may still arise that when an empowered officer acting under sections 41 and 42 of the Act, carries out a search under section 165, Cr.P.C. without recording the grounds of his belief as provided under section 165, whether such failure also would vitiate the trial particularly in view of the fact that such a search is connected with offences under the NDPS Act. Neither section 41(2) nor section 42(1) mandates such empowered officer to record the grounds of his belief. It is only proviso to section 42(1) read with section 42(2) which makes it obligatory to record grounds for his belief. To that extent we have already held the provisions being mandatory. A fortiori, the empowered officer though is expected to record reasons of belief as required under section 165, failure to do so cannot vitiate the trial particularly when section 41 or 42 do not mandate to record reasons while making a search. Section 165 in the context has to be read along with sections 41(2) and 42(1) whereunder he is not required to record his reasons."

23. In the present case, the NCB Officials raided the house of the accused not on any specific information but on a vague, uncertain and probable information. The term "Secret" nowhere indicates that the information was reliable. So on the basis of the above mentioned judgment there was no requirement to reduce it into writing as there was no formal or definite complaint as such.

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[35] 1995 Cri LJ 4105(Bom)
[36] 1994 Cal.CLR (SC) 121

24. Assuming that the NCB Officials had definite information about the Accused then also the trial cannot be vitiated on this ground. The Appex court[37] held that, a defect or illegality in investigation however serious, has no bearing on the competence of the procedure relating to cognizance or trial.

25. Drug trafficking is equally, if not more, dangerous, as it allures and has allured, a generation of young Indians from Manipur to Gujarat, from Kashmir to Kanya kumari who are crippled by these drugs and psychotropic substances, whose senses are atrophied, to whom illusion has become reality, who are beating their marches slowly and painfully[38]. In the present case the accused, himself voluntarily made confessional statement stating that he dealt in Heroin for the livelihood of his family. So after the voluntary admission by the Accused there remains no scope to acquit the Accused on the ground of mere irregularity of procedural compliance by the prosecution in the interest of justice. It was held in the case ***In Re:Md. Farid Ali v State***[39] that, Recovery of Narcotics from an accused cannot impede the course of justice merely on the ground of procedural lapses when the contraband goods on ultimate analysis are found to be Narcotic by the expert. It therefore, excludes the plea of technicality which cannot make any triumph over the social legislation.

ISSUE III:

26. ***Section 50 of the NDPS Act 1985*** *lays down the condition under which the search of a person will be conducted. As per this section the "person" of the accused should be searched before a Gazatted Officer or a Magistrate after informing him about his right and giving him an opportunity*

[37] ***H.N. Rishbud v Satet of Del.*** AIR 1955 SC196
[38] ***Farid Ali V State***, 1994 C Cr LR (Cal) 189.
[39] ***ibid***

to chose the option. This is a protective right given to the accused under this Act but in the present case the evidence of the witnesses nowhere speaks that any such offer was given to the accused before his personal search. So according to defence this section has not been complied with. So the accused is entitled to be acquitted.

27. As per the leading judgment of the Supreme Court in ***State of Haryana v Suresh***[40] A bag, briefcase or any such article or container etc can under no circumstances, be treated as a body of a human being. They are given a separate name and identify as such. They cannot even remotely be treated to be part of the body of a human being[41]. A person can carry any number of such articles depending upon his physical capacity. But to carry these he has to employ some extra effort. These are called luggage of such person. Thus where the luggage of the accused is the subject matter of search, the provisions of Sec 50 of the act is not applicable. Therefore it was not legally required to make an offer to the accused for search in presence of a Gazatted Officer or a Magistrate[42]. This proposition was upheld by the Supreme Court in the case ***Kalema Tumba V State of Maharashtra***[43] and confirmed in ***Babubhai Odhubji Patel v Satate of Gujarat***[44].

28. In the present case, it is clear from the fact that, the accused was fleeing with a foam hand-bag in his hand seeing the NCB Officials. From the above mentioned judgments, it becomes clear that the bag did not form part of the "PERSON" of the accused, so to search that no information regarding his right to be searched before a Gazatted Officer or Magistrate, was required to be supplied by the NCB officers to the accused. So there had been no violation of mandatory provision

[40] AIR 2007 SC 2245
[41] S. Rajan v State ASSTT. Collector Customs (Intelligence) Madurai, 1995 Cri Lj 1594.
[42] State of HP v Edward Samuel Chareton, 2001 Cri LJ 1856.
[43] AIR 2000 SC 402.

of law under sec 50 of the NDPS Act and no violation of the protective right of the accused had taken place.

9. SUMMING UP :-

29. To sum up we come to the following conclusion :-

i) Non-production of the independent witnesses is not fatal, per se, it would depend upon the fact and circumstance. The raiding party got hold of two independent witnesses. However, their presence at the trial could not be ensured despite attempts being made. Even if we consider the mandate of Section 100 we find that the officials did comply with the requirement. It was not in the hands of the N.C.B. Officials to compel the seizure witnesses to adduce before the Court at the trial. What is required is to see whether there was bona fide intention on the part of the investigating agency and/or the prosecution to have subjective compliance of the provision. Such test is positive in the instant. Hence, learned Judge was wrong in drawing an adverse inference merely because of non-production of the seizure witnesses when the case was otherwise proved through evidence.

ii) Section 42 Sub-section 1 inter alia provides for noting down the knowledge or information received by the official with regard to any narcotic drug or psychotropic substance. Sub-section 2 inter alia provides that in case any officer takes down any information in writing under Sub-section (1) and records reason for his belief he must forward the information to his superior without seventy two hours. In the instant case, the officials deposed that they got a secret information and they wanted to work out an intelligence and as such they raided the house of Ajibar. If we read both the Sub-sections together we would find that when it is

[44] AIR 2006 SC 402.

decided to raid for recovery of narcotic drugs etc. based on definite information the official must note down the information and the reason to believe the same and pass on such information to his superior within seventy-two hours. If he does not note down, the question of informing his superior would not arise. It would mean that there was some element of discretion left to the official. An information was received. To believe the same the officers wanted to act upon it and proceeded to the spot. They knocked the door of the accused when the accused tried to flee away with a foam hand-bag. On being chased, he confessed that the bag contained herein and handed over the bag to the raiding party. In our view, the logic so advanced by the prosecution cannot be brushed aside. It is not the requirement of law that each and every information with regard to narcotic drug must be noted down. It is only when such information is believed to be true it is to be noted along with reason for belief and to be forwarded to the superior within seventy-two hours. If the officer wanted to examine the veracity of the information and becomes successful in the process in recovering the substance, merely because the information was not noted down previously, would not vitiate the proceeding per se. The learned Judge was not correct on that score.

iii) The provision of Section 50 was clearly construed by the Apex Court in the judgments referred to above. The evidence in our case, would depict that the accused was not searched on his “person”. Hence, the provision of Section 50 did not and could not have any application. Learned Judge was wrong also on this score.

30. We are, therefore, of the considered view that the learned Trial Judge misconstrued the relevant provisions of law and proceeded on a wrong legal approach which suffers from perversity and as a result, occasioned failure of justice. The evidence on record is sufficient to warrant conviction.

10.RESULT :-

31. The appeal succeeds. The impugned judgment of acquittal dated January 10, 1996 is set aside.

11. SENTENCE :-

32. The accused Ajibar is held guilty of the offence committed by him under Section 21 of the N.D.P.S. Act. He is convicted and sentenced to rigorous imprisonment for ten years coupled with a fine of rupees one lakh and in default to suffer further rigorous imprisonment for one year.

12. DIRECTIONS :-

33. Accused is directed to surrender himself before the Court below for serving out the sentence. In case of default, the Court below must take appropriate steps for arresting the accused and sending him to judicial custody for serving out the sentence. The period when the accused was in custody during trial must be set off as against the sentence imposed upon him in the foregoing judgment.

34.Lower Court Records be sent down along with a copy of this judgment.

35. Urgent xerox certified copy will be given to the parties, if applied for.

Kalidas Mukherjee, J:

I agree.

[ASHIM KUMAR BANERJEE,J.]

[KALIDAS MUKHERJEE,J.]