

**IN THE HIGH COURT OF MANIPUR  
AT IMPHAL**

**Criminal Revision Petition No.6 of 2014**

The State of Manipur

**..... *Petitioner***

**– Versus –**

Manoharmayum Ibotombi Sharma, aged about 38 years, s/o M.Lalmohom  
Sharma of Nagamapal Singjubung Leirak.

**.... *Respondent***

BEFORE  
**HON'BLE MR. JUSTICE M.V. MURALIDARAN**

For the Petitioner/s : Mr.H. Samarjit, PP

For the Respondent/s : Mr. M.I Sharma

Date of hearing : 18.02.2021

Date of Judgment & Order : 26.03.2021

**JUDGMENT & ORDER**  
**(CAV)**

**[1]** This Criminal Revision Petition is filed by the State against the portion of  
impugned order dated 21.05.2014 discharging the Accused/Respondent by the court

of the Special Judge (ND&PS)/Fast Track Court in its Special Trial No.543/95/26/2009 (Ref: FIR No.89(1) 94 IPS u/s 21/29 ND&PS, 25(1-B) Arms Act on the inter alia grounds that there are sufficient materials/evidence on records for framing of charges against the accused/respondents, but the Trial Court failed to appreciate the materials available on records thereby passing the impugned discharged order dated 21-05-2014.

**[2]** The brief facts of the case:

- (i) That, on 14-01-1994 a secret source information was received by the ASI, Th.Ibotombi Singh of Narcotic Cell that one jeep vehicle bearing No MNO2-1428 belonging to Manoharmayum Ibotombi Sharma S/o.M.Lalmohon Sharma of Nagamapal Singjubung Leirak used to carry No 4 heroin powder in its specially designed box made under the back seat and for which the said ASI. Th Ibotombi Singh reported/requested to the Superintendent of Police, Imphal West for authorization to search on the said Jeep belonging to M.I.Sharma.
- (ii) Following on the said report of the ASI. Th. Ibotombi Singh the SP/Imphal West communicated his authorization through Shri. G Yaima Sharma, Inspector. Officer in-charge of Narcotic Cell, Imphal District, Manipur.
- iii) Accordingly, the aforesaid Inspector G. Yaima Sharma endorsed to Th Ibotombi Singh. ASI for early action of the authorization dated 14.01.2014.
- iv) Thereafter, ASI. Th Ibotombi Singh has submitted a report to the S.P/Imphal west

stating that on 14-01-1994 at about 11.00 am, he along with his party of Narcotic Cell stopped one Jeep bearing Regd. No MN02-1428 at Nongmeibung Road in front of RDS High School, driven by the aforesaid accused/respondent No.1 with the authorization for search and conducted search on the jeep and found the following articles (i) Two plastic packets of Heroin Powder weighting 50 gms each (ii) One country made revolver 0.38 bore with 71 Nos. of live rounds and (iii) one green colour jeep bearing No. MN02/1428.

v) All the seized articles and two accused persons were handed over to the O.C., Imphal Police Station through OC Narcotic Cell with a report for necessary action.

vi) On the same day i.e., 14-01-1994, the seized articles were deposited in the GODOWN as received by the Officer-incharge of godown namely A. Latif O. C. Inspector.

vii) The said report mentioned above at (v) was treated as O.E of FIR No.89(1)94 IPS under Section 21/29 ND & PS Act and Section 25(1-b) Arms Act.

(viii) On 17-01-1994 the seized vehicle jeep was examined by expert and gave its opinion that the said vehicle has been modified by local workshop.

ix) The seized article was sent to FSL, Pangei for its expert opinion/Chemical Analysis etc.

x) On 25-06 1994, an expert opinion was received with result of examination as "The exhibits marked 55-CH/94 gave positive test for heroin"

xi) On 15-07-1994 another expert/Examination report was received with the findings that Ex.A is a country made revolver. It is in working condition, LR1 to LR71 are country made live cartridges. They can be fired through Ex.A except LR17 which is too large to be fitted in the chambers of Ex.A. Further, it is opined that Ex.A is a lethal weapon.

xii) On 20<sup>th</sup> September 2014, the prosecution sanction was granted by the District Magistrate Imphal District, Manipur to prosecute the Accused/Respondent No 1. During the course of proceeding accused/respondent No.2 has been declared as absconder by the Trial Court. That during the course of investigation of the case, the prosecution has examined as many as 14(fourteen) witnesses. The charge sheet was submitted on 14-06-2015 against the accused persons i) M. Ibotombi Sharma and ii) Mrs.Achung Tangkhul. On 14-05-2014 charge hearing was concluded and reserved for order. On 21-05-2014 an order was pronounced by the Ld Trial Court thereby discharging the accused/respondents from the liability of the charge under Section 21 and 29 of ND&PS Act on the ground that the non-compliance of mandatory provision of Sections 41, 42, 50 and 55 of the ND&PS Act vitiates not only conviction and sentence but also trial. However, the Ld. Addl. District Judge (Manipur East)/(First Track Court) found prima facie case under Section 25(1-B) of Arms Act and proceeded for framing of charge.

**[3]** Being aggrieved by the said impugned order dated 21-05-2014 passed by the Special Judge (ND&PS), Fast Track Court, Manipur East discharging the accused/Respondents, this present Criminal Revision petition is filed by the State on the following grounds;

a) There are sufficient materials/evidence on records for framing charges against the accused person, but the trial Court failed to appreciate the materials available on records and passed the impugned discharged order dated 21.05.2014 by weighing the evidence which is to be done at the time of final stage of trial. It is now a settled law that truth, veracity and effect of evidences are not to be judged meticulously at the Initial stage i.e. charge consideration and prima facie evidence is sufficient to initiate proceedings and from these reasons the impugned discharge order is liable to be quashed.

b) The Special Judge did not properly examine as to the compliance of section 41 of NDPS Act as there was endorsement to arrest the accused to one ASI. Ibotombi by the authorized Inspector Shri G. Yaima Sharma whom the authority to arrest the accused was assigned by the SP Imphal. Hence, there is no any lapse on the part of the prosecution to comply Section 41 & 42 of the NDPS Act.

c) The compliance of Section 50 of NDPS Act there was no any question

of violation by the arresting authority and such legality as to the option may only be considered after completion of the trial because without examination of the arresting authority as to the obtaining of option may only be confirmed during the examination of the prosecution witnesses and not at the stage of charge consideration. Because option may be asked to the accused as held by the Supreme Court, reported in AIR 2002 SC 564.

d) There are sufficient materials to go on for trial under Section 21 and 29 ND & PS Act.

e) The special Judge does not mention by citing the above said rulings and the above said order was passed with a malafide intention arbitrarily in order to discharge the accused persons from the liability of possessing of drugs by citing some rulings without any discussion. The mandatory formalities of searching and arrest were provided to the accused persons at the time of seizure and arrest.

**[4]** The Learned Public Prosecutor/Petitioner State has submitted the following citations for supporting his case:

*List of citations submitted by the petitioner.*

**1.) 2008 (11) SCC 363 - Para 9**

*“9. So far as Section 42(2) is concerned it is to be noted that search was made in public place and not in a building and as such what was applicable was Section 43 and not Section 42 (2) of the Act. The decision of this Court in State of Punjab vs. Baldev Singh (1999 (6) SCC 172) is clearly applicable to the facts of the present case. The view in Baldev Singh's case (supra) was re- iterated in State of Haryana v. Jarnail Singh and Ors (2004 (5) SCC 188)”.*

**2) AIR 2002 SC 3658 - Para 5**

*“5. In the instant case, according to the documents on record and the evidence of the witnesses, the search and seizure took place at the Airport which is a public place. This being so, it is the provisions of Section 43 of the NDPS Act which would be applicable. Further, as Section 42 of the NDPS Act was not applicable in the present case, the seizure having been effected in a public place, the question of non-compliance, if any, of the provisions of Section 42 of the NDPS Act is wholly irrelevant. Furthermore, in the Mahazar which was prepared, it is clearly stated that the seizure was made by PW-1. The Mahazar was no doubt drawn by one S Jayanth. But, the contention of the learned senior counsel that prosecution version is vulnerable, because Jayanth has not been examined, is of no consequence because it is PW-1 who has*

*conducted the seizure. With regard to the alleged noncompliance of Section 57 of the NDPS Act, the High Court has rightly noted that PW-3 has stated that the arrest of the accused was revealed to his immediate superior officer, namely, the Deputy Director.”*

**3) 2013 (1) GLT 968 - Para 21**

*“ 21. The learned counsel, on behalf of the accused appellant, has submitted that since the persons of the accused were searched, it was mandatory to comply the provisions of section 50 of the Act and non compliance of the same is fatal for the prosecution. The learned counsel has referred to the decision of the Hon’ble Kerala High Court in Joseph @ Pappachan Vs. State of Kerala , reported in 2002 CRI.LJ. 3203 to substantiate his contention. However, I am unable to subscribe to this argument, since the search was made in respect of the bags carried by the accused persons and not in their persons physically. Therefore, Section 50 of the Act is not applicable in the present case. ”*

**4) 2007 (11) SCC 314 - Para 8**

*“8 Section 43 of the NDPS Act provides that any officer of any of the departments mentioned in Section 42 may seize in any public place or in transit any narcotic drug or psychotropic substance etc. in respect of which he has reason to believe that an offence punishable under the Act has been committed. He is also authorized to detain and search*



*any person whom he has reason to believe to have committed an offence punishable under the Act Explanation to Section 43 lays down that for the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public "*

**5) 1996 (2) SCC 37 - Para 5**

*"5. It would be seen that the organized traffic in contraband generates deleterious effect on the national economy affecting the vitals of the economic life of the community. It is settled law that illegality committed in investigation does not render the evidence obtained during that investigation inadmissible. In spite of illegal search property seized, on the basis of said search, still would form basis for further investigation and prosecution against the accused. The manner in which the contraband is discovered may affect the factum of discovery but if the factum of discovery is otherwise proved then the manner becomes immaterial."*

**6) 2010(2) SCC 398 - Para 11, 12, 13, 14**

*"11. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of*

*ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the Court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him.*

*“12. The scope of Section 227 of the Code was considered by this Court in the case of State of Bihar vs. Ramesh Singh (1977) 4 SCC 39, wherein this Court observed as follows:*

*“..... Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved.*

*But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if*

*fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial....”*

*This Court has thus held that whereas strong suspicion may not take the place of the proof at the trial stage, yet it may be sufficient for the satisfaction of the Trial Judge in order to frame a charge against the accused.*

*“13. In a subsequent decision i.e. in Union of India vs. Prafulla Kumar Samal, (1979) 3 SCC 4, this Court after adverting to the conditions enumerated in Section 227 of the Code and other decisions of this Court, enunciated the following principles:*

*“(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.*

*(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.*

*(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.*

*(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."*

*"14. The scope and ambit of Section 227 was again considered in Niranjana Singh K.S. Punjabi vs. Jitendra Bhimraj Bijaya, (1990) 4 SCC 76, in para 6, this Court held that:*

*"Can he marshal the evidence found on the record of the case and in the documents placed before him as he would do on the conclusion of the evidence adduced by the prosecution after the charge is framed? It is*

*obvious that since he is at the stage of deciding whether or not there exists sufficient grounds for framing the charge, his enquiry must necessarily be limited to deciding if the facts emerging from the record and documents constitute the offence with which the accused is charged. At that stage he may sift the evidence for that limited purpose but he is not required to marshal the evidence with a view to separating the grain from the chaff. All that he is called upon to consider is whether there is sufficient ground to frame the charge and for this limited purpose he must weigh the material on record as well as the documents relied on by the prosecution. In the State of Bihar v. Ramesh Singh this Court observed that at the initial stage of the framing of a charge if there is a strong suspicion-evidence which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. In Union of India v. Prafulla Kumar Samal this Court after*

*considering the scope of Section 227 observed that the words 'no sufficient ground for proceeding against the accused' clearly show that the Judge is not merely a post office to frame charge at the behest of the prosecution but he has to exercise his judicial mind to the facts of the case in order to determine that a case for trial has been made out by the prosecution. In assessing this fact it is not necessary for the court to enter into the pros and cons of the matter or into weighing and balancing of evidence and probabilities but he may evaluate the material to find out if the facts emerging therefrom taken at their face value establish the ingredients constituting the said offence."*

**[5]** List of citations submitted by the respondent/party in person for supporting his case:

**1) 2000 (8) SCC 590 Roy V.D. State of Kerala**

*"17. To the same effect is the view expressed by this Court in State of Punjab Vs. Balbir Singh [1994 (3) SCC 299]. In para 13 Jayachandra Reddy, J. speaking for the Court observed thus : Therefore, if an arrest or search contemplated under Sections 41 and 42 is made under a warrant issued by any other Magistrate or is made by any officer not empowered or authorized, it would per se be illegal and would affect the prosecution case and consequently*

vitiate the trial.”

**2) 2011 (4) Supreme 319 - Narcotic Central Bureau –Vs-Sukh**

**Dev Raj Sodhi:**

*“6. From the perusal of the conclusion arrived at by this Court in Vijaysinh Chandubha Jadeja's case, it appears that the requirement under Section 50 of the NDPS Act is not complied with by merely informing the accused of his option to be searched either in the presence of a gazetted officer or before a Magistrate. The requirement continues even after that and it is required that the accused person is actually brought before the gazetted officer or the Magistrate and in Para 32, the Constitution Bench made it clear that in order to impart authenticity, transparency and creditworthiness to the entire proceedings, an endeavor should be made by the prosecuting agency to produce the suspect before the nearest Magistrate.”*

*“7. That being the law laid down by the Constitution Bench of this Court on interpretation of Section 50 of the NDPS Act, we do not think that the obligation under Section 50 of the Act has been discharged statutorily by the appellant in this case. We, therefore,*

*find no reason to interfere with the finding made by the High court. The appeal is, accordingly, dismissed.”*

**3) 2005 GLT 356 - Phalkhunei --Vs--State of Manipur**

*“10. For the reasons mentioned above, the present criminal proceedings which is initiated based on the collection of alleged three packets containing heroine powder from the possession of the Petitioner on 24.7.1990 by adopting a procedure which are per se illegal because of non-compliance of the mandatory conditions laid down in Sub-section (4) and Sub-section (5) of Section 50 of the N.D.P.S. Act, 1985 and Sub-section (5) of Section 100 of the Code of Criminal Procedure, 1973 shall vitiate not only conviction and sentence based on such material, but also the trial itself, the proceedings cannot be allowed to go on as it cannot but amount to abuse of the process of the Court. According to my considered opinion if the impugned order dated 24.8.1999 is not quashed illegality will be perpetuated resulting in great hardship to the Appellant. Thus, the present case is a fit case to exercise revisional power of the Court to quash the impugned order dated 24.8.1999.*



*“11. I hereby, quash the impugned order dated 24.8.1999. In the result the revision petition is allowed. The Petitioner is already on bail. Her bail bond is cancelled and sureties discharged.”*

[6] During the course of arguments, Mr.H. Samarjit, learned Counsel for the State submitted that as soon as information was received, the contraband articles have been seized, respondents/ accused were arrested and the contraband articles were kept and therefore, the question of giving prior information and intimation to his official superior does not arise. Since contraband were recovered in the presence of the witnesses that itself is sufficient to frame the charge. Further, it is argued that any report submitted by the NCB or the police authorities need not be looked into at the time of framing charge. The raid has been conducted and a case has been registered by the Police Inspector. Therefore, considering the fact that the Officers has not followed the mandatory provisions etc. does not arise and therefore, the trial Court has not properly appreciated the material placed on record even if any such reports received and the concerned police making some allegations against the I.O. or the complainant as well as non-registration of the case by the Police Officers on the basis of the case filed by revision petitioner and the report received if any submitted by the Enquiry Officer against the then Officer is a separate matter. There is a separate forum to enquiry into the matter by initiating departmental proceedings against erring officials who failed to discharge their duty by registering a case. Therefore, it is

submitted that at the time of framing the charge, the Court is required to see whether any prima facie case is shown to frame the charge and proceed to trial. Even if any mandatory procedures have not been complied by the I.O., law will not come to the aid of the respondents for seeking a discharge. Learned Counsel for the revision petitioner relied on the recent judgment of the Honble Apex Court reported in A.I.R. 2005 SCC 369 (State of Orissa v. Debendra Singh). Therefore, the order of discharge passed by the trial Court is liable to be set aside as incorrect.

[7] On the other hand, the respondents-accused party in person has submitted that since there is no material to frame the charge, the trial Court has rightly invoked the provisions of Section 227 Cr.P.C in discharging the respondents and the case registered at the instance of some officers who has received credible information, not lodged the complaint but only conducted the raid. There is a clear violation of Section 42(1) of NDPS Act-power to enter and search without taking any search warrant from the competent jurisdictional Magistrate. There is no special orders obtained from the State Government as such to conduct the raid and complainant had no jurisdiction to conduct raid. Further, he has argued that in order to frame the charge, whether, the revision petitioner-prosecution has placed prima facie materials to frame the charge i.e. whether they were in possession or knowledge of the contraband articles alleged to have been seized is to be determined

by the court-below. Therefore the trial Court has rightly considered all the materials in discharging respondents.

**[8]** The first question that arose for consideration of this Court is, whether there was compliance of the provisions of the NDPS Act. Keeping in view the provision being held to be mandatory by the Honble Apex Court in series of judgments.

To decide the above question, it would be appropriate to first notice to the relevant provision.

**[9]** The NDPS Act was enacted in the year 1985 with a view to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances and for matters connected therewith. Sections 1 to 3 in Chapter I deal with definitions and connected matters. The provisions in Chapter II deal with the powers of the Central Government to take measures for preventing and combating abuse of and illicit traffic in narcotic drugs and to appoint authorities and officers to exercise the powers under the Act. Under Section 41 certain classes of Magistrates are competent to issue warrants for the arrest of any person whom they have reason to believe to have

committed any offence punishable under Chapter IV or for search of any building, conveyance or place in which they have reason to believe that any narcotic drug or psychotropic substance in respect of which an offence punishable under Chapter IV has been committed, is kept or concealed. Section 42 empowers certain officers to enter, search, seize and arrest without warrant or authorisation. Such officer should be superior in rank to a peon, sepoy or constable of the Departments of Central Excise, Narcotics, Customs, Revenue, Intelligence or any other department of the Central Government or an officer of similar superior rank 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. Such officer, if he has reason to believe from personal knowledge or information taken down in writing, that any offence punishable under Chapter IV has been committed, he may enter into and search in the manner prescribed there under between sunrise and sunset. He can detain and search any person if he thinks proper and if he has reason to believe such person to have committed an offence punishable under Chapter IV. Under the proviso, such officer may also enter and search a building or conveyance at any time between sunset and sunrise also provided he has reason to believe that search warrant or authorization cannot be obtained without affording opportunity for concealment of the evidence or facility for the escape of an offender. But before doing so, he must record the grounds of his belief and send the same to

his immediate official superior. Section 43 empowers such officer as mentioned in Section 42 to seize in any public place or in transit, any narcotic drug or psychotropic substance in respect of which he has reason to believe that an offence punishable under Chapter IV has been committed and shall also confiscate any animal or Conveyance along with such substance. Such officer can also detain and search any person whom he has reason to believe to have committed such offence and can arrest him and any other person in his company. Section 44 merely lays down that provisions of Sections 41 to 43 shall also apply in relation to offences regarding coca plant, opium poppy or cannabis plant. Under Section 49 any such officer authorized under Section 42, if he has reason to suspect that any animal or conveyance is, or is about to be, used for the transport of any narcotic drug or psychotropic substance, can rummage and search the conveyance or part thereof, examine and search any goods in the conveyance or on the animal and he can stop the animal or conveyance by using all lawful means and where such means fail, the animal or the conveyance may be fired upon. Then comes Section 50. Since sufficient emphasis has been laid on this section, we shall extract the same in full. It reads as under:

*“50. Conditions under which search of persons shall be conducted - (1)*  
*When any officer duly authorized under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without*

*unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. (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 excepting a female.”*

**[10]** This provision obviously introduced to avoid any harm to the innocent persons and to avoid rising of allegation of planting or fabrication by the prosecuting authorities. It lays down that if the person to be searched so requires, the officer who is about to search him under the provisions of Sections 41 to 43, shall take such person without any unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. One of the questions raised is that what meaning to be given to the words “if the person to be searched so requires”. Do they cast a duty upon the officer about to make the search to intimate such person that if he so requires he would be taken before the nearest Gazetted Officer or the nearest Magistrate for the purpose of making search in their

presence or it is for such person to make such a request on his own without being informed by the officer.

**[11]** Section 52 lays down that any officer arresting a person under Sections 41 to 44 shall inform the arrested person all the grounds for such arrest and the person arrested and the articles seized should be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued or to the officer-in-charge of the nearest police station, as the case may be and such Magistrate or the officer to whom the articles seized or the person arrested are forwarded may take such measures necessary for disposal of the person and the articles. This section thus provides some of the safeguards within the parameters of Article 22(1) of the Constitution of India. In addition to this, Section 57 further requires that whenever any person makes arrest or seizure under the Act, he shall within forty-eight hours after such arrest or seizure make a report of the particulars of arrest or seizure to his immediate official superior. This section provides for one of the valuable safeguards and tries to check any belated fabrication of evidence after arrest or seizure.

**[12]** That, if on a prior information leading to a reasonable belief that an offence under Chapter IV of the Act has been committed, then in such a case, the Magistrate or the officer empowered have to proceed and act under the provisions of Sections 41 and 42. Under Section 42, the empowered officer even without a warrant

issued as provided under Section 41 will have the power to enter, search, seize and arrest between sunrise and sunset if he has reason to believe from personal knowledge or information given by any other person and taken down in writing that an offence under Chapter IV has been committed or any document or other article which may furnish the evidence of the commission of such offence is kept or concealed in any building any place. Under the proviso if such officer has reason to believe that search warrant or authorization cannot be obtained without affording opportunity for the concealment of the evidence or facility for the escape of the offender, he can carry out the arrest or search between sunset and sunrise also after recording the grounds of his belief Sub-section (2) of Section 42 further lays down that when such officer takes down any information in writing or records grounds for this belief under the proviso he shall forthwith send a copy thereof to his immediate official superior.

**[13]** The Magistrate or officers especially empowered under the Act can proceed under Sections 41 and 42 on the prior information and/or having reason to believe thereupon that an offence under the Act has been committed. Here mention may be worth that Section 43 which deals with the power of seizure and arrest in public places is slightly different from Section 42 in certain respects. Under this provision any empowered officer under Section 42 has the power to seize, detain, search or arrest in public place or in transit if he has reason to believe that an offence punishable under Chapter IV relating to such drug or substance has been committed



and seize any document or other article which may furnish evidence of the commission of such offence and can seize any animal or conveyance or article liable to confiscation and can detain and search any person similarly. The empowered officer while acting under Section 43 need not record any reasons of his belief. This section also does not mention anything about the empowered officer having prior information given by any person or about recording the same, as compared to Section 42.

**[14]** It is thus clear that by a combined reading of Sections 41, 42, 43 and 51 of the NDPS Act and Section 4 of Cr.P.C regarding arrest and search under Sections 41, 42 and 43, the provisions of Cr.P.C 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. 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 subsection (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]** If an arrest or search contemplated under Sections 41 and 42 is made under a warrant issued by any other Magistrate or is made by any officer not empowered or authorized, it would per se be illegal and would affect the prosecution case and consequently vitiate the trial.

**[16]** In regards to the section 52-A, there is total non-compliance as such if continue the trial would automatically vitiate as per the Central Government

Notification in regards to the narcotic drugs and psychotropic substances, as specified in Notification No. 4/89, dated the 29th May, 1989 (F. No. 664/23/89-Opium, published as S.O. 381(E)), which shall, as soon as may be, after their seizure, be disposed of, having regard to their hazardous nature, vulnerability to theft, substitution and constraints of proper storage space; as hereunder:

*“Now, therefore, in exercise of the powers conferred by sub-section (1) of Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), (hereinafter referred to as ‘the Act’), the Central Government hereby determines that the drugs specified in the aforesaid Notification shall be disposed of in the following manner...”*

**[17]** These guidelines under the Standing Order have been made under Statute and Heroin is one of the items as substances listed for disposal under Section 1 of the Standing Order. Paragraphs 3.1 and 6.1 of the Standing Order read as under Certificate of destruction containing all the relevant data like godown entry No., file No., gross and net weight of the drugs seized etc. shall be prepared and duly endorsed by the signature of one as well as Members of the Committee. This could also serve the purpose of panchnama. The original copy shall be posted in the godown register after making necessary entries to this effect, the duplicate to be retained in the seizure case file and the triplicate copy will be kept by the Disposal Committee.

**[18]** In the instance case there is no such certificate of destruction (in triplicate) (Annexure-III) containing all the relevant data like godown entry No., file No., gross and net weight of the drugs seized etc. Hence non production of the alleged seized contraband shall also vitiate the trial.

**[19]** The search, seizure and the alleged recovery of Heroin powder are all in violation of Section 42(1) being by a person who was not empowered under Sections 41 (2) of the said Act. That no officer other than an empowered officer can resort to Section 41(2) or exercise powers under Section 42(1) of the NDPS Act or make a complaint under clause (d) of sub-section (1) of Section 36A of the NDPS Act. It follows that any collection of material, detention or arrest of a person or search of a building or conveyance or seizure effected by an officer not being an empowered officer or an authorized officer under Section 41(2) of the NDPS Act, lacks sanction of law and is inherently illegal and as such the same cannot form the basis of a proceeding in respect of offences under Chapter IV of the NDPS Act and use of such a material by the prosecution vitiates the trial.

**[20]** From the facts and circumstances of the present case, the statements and material on record and in view of the case laws cited above, it stands fully established that there was non-compliance of the requirements of the provisions of the NDPS Act and accordingly it is held that failure to comply with the requirements of the same renders the recovery of contraband illegal.

[21] In my opinion, the above circumstances at the stage of discharge application considered by the learned trial Judge cannot be said to be in any manner contrary to the decisions relied upon by the learned Advocate for the applicant.

[22] In view of the above, I do not find any substance in this application.

No case is made out and the Criminal Revision stands dismissed.

**FR/NFR**

*John kom*

**MAYANG**  
**LAMBAM**  
**CHANU**  
**NANDINI**

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**JUDGE**