

**HIGH COURT OF TRIPURA
AGARTALA**

Crl.A(J) No.02 of 2023

Sri Sanjit Rudra Paul alias Sanju, son of Sri Rabindra Rudra Paul, resident of
Betbagan, Dolubari, P.S. Ambassa, District- Dhalai Tripura

.....Appellant(s)

Versus

The State of Tripura

.....Respondent(s)

and

Crl.A(J) No.03 of 2023

Sri Krishna Ch. Debroy alias Maran, S/O- Lt. Mohanlal Debroy, of Dolubari,
P.S- Ambassa, Dist.- Dhalai Tripura

.....Appellant(s)

Versus

The State of Tripura

.....Respondent(s)

Crl.A(J) No.04 of 2023

Sri Prasanta Deb alias Jiban, S/O- Lt. Parimal Deb, of Dolubari, P.S.- Ambassa,
Dist.- Dhalai Tripura

.....Appellant(s)

Versus

The State of Tripura

.....Respondent(s)

For Appellant(s) : Mr. P.K. Biswas, Sr. Advocate,
Mr. B. Deb, Advocate,
Mr. R. Nath, Advocate,
Mr. Victor Ghosh, Advocate,
Ms. Rumpa Dey, Advocate.

For Respondent(s) : Mr. Ratan Datta, Public Prosecutor.

HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH

Dates of hearing: **21.08.2023 & 31.08.2023**

Date of Pronouncement of Judgment & Order: **29.09.2023**

Whether Fit for Reporting: **YES**

JUDGMENT & ORDER

All these three appeals arise out of the common impugned judgment and order of conviction and sentence dated 11.11.2022 passed by the learned Special Judge (NDPS), Dhalai Judicial District, Ambassa in Special (NDPS) 29 of 2019 whereby accused Sanjit Rudra Paul alias Sanju (*hereinafter*

referred to as 'S') [appellant in CrI.A(J) No.02 of 2023] has been convicted under Section 21(b)/25/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (*hereinafter referred to as 'NDPS Act'*) and sentenced to suffer rigorous imprisonment for 5(five) years for the commission of offence punishable under Section 21(b) of the NDPS Act and to pay a fine of Rs.50,000/- only for the said offence with a default sentence of 6(six) months. He has also been sentenced to suffer rigorous imprisonment for 3(three) years for the commission of offence punishable under Section 25 of the NDPS Act and to pay a fine of Rs.20,000/- only for the said offence with a default sentence of 6(six) months. He has been further sentenced to suffer rigorous imprisonment for 2(two) years for the commission of offence punishable under Section 29 of the NDPS Act and to pay a fine of Rs.20,000/- only for the said offence with a default sentence of 6(six) months; the other accused persons i.e. Surendra Debbarma (*hereinafter referred to as 'SD'*) [has not preferred appeal], Prasanta Deb alias Jiban (*hereinafter referred to as 'P'*) [appellant in CrI.A(J) No.04 of 2023] and Krishna Charan Debroy alias Maran (*hereinafter referred to as 'K'*) [appellant in CrI.A(J) No.03 of 2023] have been convicted under Section 29 of the NDPS Act and sentenced to undergo rigorous imprisonment for 2(two) years for the commission of offence punishable under Section 29 of the NDPS Act and to pay a fine of Rs.20,000/- only for the said offence with a default sentence of 6(six) months.

2. Prosecution story, as alleged in the FIR lodged by Sub-Inspector Sri Manoj Kumar Pal on 24.09.2019 [Exhibit P-7, P-7/1] along with complaint petition [Exhibit P-6, P-6/1, P-6/2] *inter alia* alleged that on 24.09.2019 at about 1305 hours, a secret information was received at Ambassa Police Station that some drug peddlers assembled in the house of accused S of Betbagan

(Dolubari) for selling drugs. Accordingly, the matter was entered in Ambassa PS GD Entry No.21, dated 24.09.2019 and the same was informed to the higher authority seeking permission to conduct search/raid in the house of accused **S**. Based on such information, the complainant along with SDPO, Ambassa, Executive Magistrate, Ambassa, SI Subir Saha and other police personnel went to the house of accused **S** located at Betbagan, cordoned the western vity hut of accused **S** and found the four accused persons namely **SD**, **P**, **K** including accused **S**. On reaching the spot, SI Manoj Kumar Pal prepared pre-search memo in presence of SDPO, Ambassa, Executive Magistrate and independent witnesses and entered into the hut. On observation of the body language of the accused persons, it was suspected that they might have carried any contraband goods with them for illegal selling. The detained persons were asked whether they desired to be searched by police in presence of a gazetted officer. Thereafter, the informant searched all the four persons namely **S**, **SD**, **P** and **K** with a prior consent, in the presence of SDPO, Ambassa, Executive Magistrate and independent witnesses. Before search of their body, the bodies of the police team were got self-searched by witnesses. During search in presence of witnesses, informant recovered 131 numbers of small vial wrapped with a plastic packet from the pocket of accused **S** which contained powder based brown/yellow colour Heroin. On asking, accused **S** confessed that he is a wholesaler of Heroin in and around Ambassa area and 3(three) other FIR named accused persons came to purchase Heroin from the accused **S** for selling in the local market. Accordingly, complainant SI Manoj Kumar Pal seized the contraband Heroin along with 131 numbers of vial and mobile phone of accused **S** under a proper seizure list in presence of witnesses. Thereafter, the accused persons were arrested and after return to police station, the complainant

lodged a Suo Motu complaint which was registered as Ambassa Police Station case No.2019 ABS 053 dated 24.09.2019 against the accused persons for the commission of offences punishable under Section 22(b)/25/29 of the NDPS Act. The case was endorsed to SI Subir Saha for investigation.

3. Investigating Officer Sri Subir Saha [PW 9] visited the place of occurrence, prepared hand sketch map with separate index and examined the witnesses under Section 161 of Cr.P.C. He also seized a message and details report was sent to SP, Dhalai relating to search, recovery and seizure of contraband. He then approached the learned Court below to draw samples of the seized contraband and for certification of correctness of inventory of the seized contraband, and also for certifying the photographs. The representative and control samples were thereafter drawn and certificate of correctness was issued by the learned Judicial Magistrate, First Class, Ambassa. After preparation of inventory on 26.09.2019, he kept the seized contraband items in the District NDPS godown and obtained receipt voucher. On 27.09.2019, he arranged to send the samples to State Forensic Science Laboratory for examination through SDPO, Ambassa. He also collected report from SFSL, Narsingarh. After completion of investigation, he submitted charge sheet against all the accused persons for the offences punishable under Section 22(b)/25/29 of the NDPS Act. Cognizance was taken by the learned Court below for all these above offences. Police papers were supplied to the accused persons under Section 207 of Cr.P.C. Thereafter, charges were framed under Section 20(b)(ii)(B)/29 of the NDPS Act against the accused persons. The contents of charges were read over and explained to the accused persons in Bengali language in open Court to which they pleaded not guilty and claimed to be tried. The following charges were framed against the accused persons:

“That, on or about the 24th day of September, 2019 at any time before 1350 hours at Betbagan, Dalubari in the house of accused Sanjit Rudra Pal alias Sanjo under Ambassa Police station, all of you in contravention of the provision of Section 8(c) of the NDPS Act, 1985 have possessed 68.30 gram Heroin in 131 numbers of vial with intend to sell Heroin in and around Ambassa area and thereby all of you have committed an offence punishable under Section 20(b)(ii)(B) of the NDPS Act, 1985 and within the cognizance of this Special Court.

Secondly, that, on or before 24-09-2019 at any time at Betbagan, Dalubari in the house of accused Sanjit Rudra Pal alias Sanjo under Ambassa police station, all of you were party to a criminal conspiracy to commit an offence punishable under Chapter-IV of the NDPS Act and thereby all of you have committed an offence punishable under Section 29 of the NDPS Act, 1985 and within the cognizance of this Special Court.”

The contents of the separate charge framed against accused Sanjit Rudra Pal @ Sanjo read as follows:-

“That, you on or about the 24th day of September, 2019 at any time before 1350 hours at Betbagan, Dalubari under Ambassa Police station being the owner and occupier of a house knowing fully permitted the said house to be used by the other three charge-sheeted accused persons namely, 1. Shri Surendra Debbarma, 2. Shri Prasanta Deb and 3. Shri Krishna Charan Debroy alias Maran for the commission of an offence punishable under Chapter-IV of the NDPS Act and thereby you have committed an offence punishable under Section 25 of the NDPS Act, 1985 and within the cognizance of this Special Court.”

4. A request was made by the Special P.P to alter the charge so framed against the accused persons, as there was a defect in the charge under Section 20(b)(ii)(B) of the NDPS Act read with Section 29 of the said Act. On the request of the learned Special P.P. to modify the charge, the Special Court heard the Special P.P. as well the defence counsel on the point of alteration and modification of charge. After hearing both sides, fresh charge under Section 21(b) of the NDPS Act read with Section 29 of the said Act was framed against the accused persons which were read over and explained to them in Bengali language in open Court to which they pleaded not guilty and claimed to be tried. Charge under Section 25 of the NDPS Act against the accused S remained as before. However, the learned counsel for both sides did not pray for denovo trial on the alteration of charge. The altered charge read as follows:

“That, on or about the 24th day of September, 2019 at any time before 1350 hours at Betbagan, Dalubari in the house of accused Sanjit Rudra Pal alias Sanjo under Ambassa Police station, all of you in contravention of the provision of Section 8(c) of the NDPS Act, 1985 have possessed 68.30 gram Heroin in 131 numbers of vial with intend to sell

Heroin in and around Ambassa area and thereby all of you have committed an offence punishable under Section 21(b) of the NDPS Act, 1985 and within the cognizance of this Special Court.

Secondly, that, on or before 24-09-2019 at any time at Betbagan, Dalubari in the house of accused Sanjit Rudra Pal alias Sanjo under Ambassa police station, all of you were party to a criminal conspiracy to commit an offence punishable under Chapter-IV of the NDPS Act and thereby all of you have committed an offence punishable under Section 29 of the NDPS Act, 1985 and within the cognizance of this Special Court.”

5. Prosecution adduced 9 (nine) witnesses which are as under:

- (i) PW-1:- Shri Asish Dasgupta,*
- (ii) PW-2:- Shri S. Curzon Halam,*
- (iii) PW-3:- C/6903 Shri Nirode Lal Das,*
- (iv) PW-4:- Shri Suman Kumar Chakraborty,*
- (v) PW-5:- Shri Ashim Paul,*
- (vi) PW-6:- Shri Rupak Rudra Pal,*
- (vii) PW-7:- Shri Manoj Kumar Pal,*
- (viii) PW-8:- Shri Himadri Sarkar,*
- (ix) PW-9:- Shri Subir Saha,*

6. Several documents were exhibited by the prosecution during trial, which are as under:

- “(i) Exhibit P-1:- Pre-search memo,*
- (ii) Exhibit 1/1:- Signature of PW-1 on the pre-search memo,*
- (iii) Exhibit 1/2:- Signature of PW-2 on the pre-search memo,*
- (iv) Exhibit 1/3:- Signature of PW-5 on the pre-search memo,*
- (v) Exhibit 1/4:- Signature of PW-6 on pre-search memo,*
- (vi) Exhibit 1/5:- Signature of PW-7 on the pre-search memo,*
- (vii) Exhibit 2/1:- Signature of PW-1 on the seizure list,*
- (viii) Exhibit 2/2:- Signature of PW-2 on the seizure list,*
- (ix) Exhibit 2/3:- Signature of PW-5 on the seizure list,*
- (x) Exhibit 3:- Forwarding note dated 05.11.2019,*
- (xi) Exhibit 4/1:- Signature of PW-3 on the seizure list dated 08.10.2019,*
- (xii) Exhibit 5(i) & 5(ii):- SFSL report dated 18.10.2019,*
- (xiii) Exhibit P-6:- Suo-motu complaint,*
- (xiv) Exhibit P-6/1:- Signature of PW-7 on the suo-motu complaint*
- (xv) Exhibit P-6/2:- Registration endorsement of PW-8,*
- (xvi) Exhibit P-7:- Printed FIR,*
- (xvii) Exhibit P-7/1:- Signature of PW-8 on the printed FIR,*
- (xviii) Exhibit P-8 (As a whole):- Hand-sketch map,*
- (xix) Exhibit P-9 (As a whole):- Index of hand-sketch map,*
- (xx) Exhibit P-10 (As a whole):- Inventory,*

- (xxi) Exhibit P-11 (As a whole):- Photographs,*
(xxii) Exhibit P-12 (As a whole):- Certificate of correctness of the inventory, sampling and photographs,
(xxiii) Exhibit P-13 (As a whole):- Godown receipt along with signature of godown In-charge,
(xxiv) Exhibit P-14 (As a whole):- Detailed report with signature of PW-9,”

No defence exhibit was adduced. The accused persons also did not adduce any witness on their behalf. They were examined under Section 313 of the Cr.P.C in respect to the incriminating materials elicited during evidence, to which they denied and claimed themselves to be innocent. The learned Trial Court framed the following issues for determination:

- “12. (i) Whether the accused persons on 24.09.2019 at any time before 1350 hours at Betbagan, Dolubari in the house of accused Sanjit Rudra Pal @ Sanjo were found in possession of 7.60 grams of Heroin without any valid document and or licence?
- (ii) Whether the accused persons were assembled in the house of Sanjit Rudra Pal @ Sanjo on the aforementioned date, time and place for the purpose of selling and distribution of drugs followed by a conspiracy hatched by them in the commission of offence?
- (iii) Whether the accused Sanjit Rudra Pal @ Sanjo being the owner of his house on the aforementioned date, time and place permitted other accused persons namely, Surendra Debbarma, Prasanta Deb @ Jiban and Krishna Charan Debroy @ Maran to use his house premises for the purpose of consumption, selling and distribution of drugs?”

7. Learned Trial Court, after consideration of the material evidence on record and the provisions of Section 35 of the NDPS Act and the offending provisions under which they were charged and also upon hearing learned counsel for the prosecution and the defence, proceeded to render a finding that accused S is the main peddler and supplier of drugs and other three accused persons are the consumers and distributors of drugs in the locality and all the accused persons conspired for the purpose of selling and distribution of drugs in the locality. The accused S used his house premises for the purpose of illegal trade of NDPS in collusion with the other accused persons. Based on these findings, the accused S was convicted under Section 21(b)/25/29 of the NDPS

Act, and the other accused persons i.e. the other two appellants namely **P** and **K** and one non-appellant namely **SD** were convicted under Section 29 of the NDPS Act. Learned Trial Court however, also held that the prosecution had failed to prove the offences under Section 21(b) against the other 3(three) accused persons namely **P**, **K** and **SD**. The learned Court thereafter proceeded to pass the order of sentence against the accused persons on 11.11.2022 as referred to hereinabove.

8. Heard Mr. P.K. Biswas, learned senior counsel assisted by Mr. R. Nath, learned counsel for the appellant **S** and Mr. B. Deb, learned counsel assisted by Mr. Victor Ghosh, learned counsel for the appellants **K** and **P**. The impugned judgment and order of conviction and sentence upon the appellant **S** has been assailed *inter alia* on the following grounds:

(1) That the informant, SI Manoj Kumar Pal [PW-7] has stated in his examination-in-chief that he lodged a Suo Motu complaint on 24.09.2019 on receiving a secret telephonic information that few drug peddlers assembled in the house of the appellant **S** and were dealing with drugs. He further stated that the said information was recorded in GD Entry No.21 dated 24.09.2019 and reduced in writing and the matter was informed to the Officer-in-Charge, Ambassa PS and to the higher authority. He took permission for the next course of action, but did not say the exact copy of the information received by him through telephone was sent to the superior police officers. As such, the prosecution failed to comply the mandatory provision under Section 42(2) of the NDPS Act. The prosecution did not even produce the copy of GD Entry in which the information was received by him and recorded. Further, PW 1 who was the SDPO also did not say that he received the exact copy of information

reduced into writing that was sent to him by PW 7. PW 9, who was the IO, has remained completely silent about the copy of GD Entry in which information was received by PW 7 and reduced into writing. In this regard, reliance has been placed upon paragraphs 8, 12, 14 and 15 of the decision of the Apex Court in the case of *Darshan Singh v. State of Haryana* reported in (2016) 14 SCC 358.

(2) PW 1-SDPO, Ambassa PS stated in his examination-in-chief that he interrogated all the accused persons who denied the presence of any contraband drug in their possession and then the police personnel expressed their intention to search the bodies of the above named 4(four) accused persons in his presence and that of PW 2-Shri. S. Curzon Halam, DCM, Ambassa. PW 1 also stated that when all the 4(four) persons gave their consent, they searched the bodies of the 4(four) persons including the appellant S in presence of independent witnesses, but in cross-examination, he has stated that he did not obtain consent of the accused persons in writing. He also stated that the consent was taken verbally and their signatures were obtained in the search memo. However, this witness nowhere stated that he informed the accused S and other accused persons that they have a right to be searched in presence of gazetted officer or in presence of a Magistrate which is the mandatory requirement under Section 50 of the Act. PW 2-DCM, Ambassa also stated that the police officer prepared one search memo in presence of accused persons and other independent witnesses and obtained his signature on that search memo. The police officer accompanied by other police personnel conducted search and recovered alleged contraband articles from the possession of the appellant S; but this witness did not say about compliance of Section 50 of the NDPS Act. PW 5 has stated that the contraband items were recovered from the dwelling hut

of the appellant **S**, claiming himself to be an eye witness of the search; but he did not say that these articles were seized from the person of the appellant. PW 6 stated that he learned that some illegal substances were recovered and the police personnel present there, asked him to put signature on paper; but he did not know the contents of the seizure. PW 7 has also stated that personal search was conducted in presence of SDPO, Ambassa, Executive Magistrate, Ambassa and independent witnesses; but did not say that the consent of the accused persons were taken before being searched or they were informed as of their right to be searched in presence of a Magistrate. There is no evidence on record that the accused persons gave consent of their personal search. Therefore, the provisions of Section 50(1) have been violated and the appellant **S** is entitled to be acquitted of the charges. In this regard, reliance has been placed at paragraphs 9 and 11 of the decision of the Apex Court in the case of **Harchand Singh and another v. State of Haryana** reported in **AIR 1974 SC 344** on the proposition that when two sets of contradictory evidence are there on an issue of fact, they are not trustworthy to be believed.

(3) PW 9-the IO, in his examination-in-chief, stated that he prepared inventory of the seized contrabands and other materials and produced it before learned Court of Judicial Magistrate First Class, Ambassa which is marked as Exhibit P-10. According to the prosecution, the incident took place on 24.09.2019 at 1305 hours, but PW 4 has stated that the samples of contraband were sent by the office of SDPO, Ambassa- PW 1 on 27.09.2019 in connection with Ambassa PS Case No.2019 ABS 053 dated 24.09.2019. PW 1 did not say where those samples were kept and in whose custody they remained till 27.09.2019. They also did not say on which date they were packed and sealed and how it had gone to the office of SDPO, Ambassa from the end of

Officer-in-Charge of the PS. PW 4 has stated that there was no reference in the face of the sealed packet regarding date and time when the sealed packet was handed over to Shri Buddha Debbarma from the office of SDPO, Ambassa. The prosecution was bound to bring on record the evidence showing that those contrabands were kept in malkhana with receipt of malkhana mentioning the mode of packing and the date of packing. The prosecution is completely silent on this aspect. Learned counsel for the appellant S has also placed reliance on paragraph 27 of the decision of the Apex Court in the case of **Pradeep Kumar v. State of Chhattisgarh** reported in (2023) 5 SCC 350. Reliance is also placed on the judgment and order dated 28.04.2023 of the Coordinate Bench of this Court in the case of **Shri Mithu Kumar and another v. The State of Tripura** passed in **Crl.A(J) No.03/2022**. It is submitted that if the consent was not taken in a format before personal search and there was no scoring out of the options expressed in the words “*I require/do not require*”, the prosecution had failed to comply the mandatory requirement under Section 50 of the NDPS Act making the accused aware of his right to be searched before a gazetted officer or a Magistrate. As such, the conviction was set aside as being vitiated for non-compliance of Section 50 of the NDPS Act and the accused were acquitted of the charge.

9. Mr. Biswas, learned senior counsel for the appellant S further states that confession of the appellant was recorded, but no such confession has been brought on record nor can it be treated as a substantive piece of evidence. In this regard, he has placed reliance at paragraph 7 of the decision rendered by the Apex Court the case of **The State of Bombay v. Rusa Mistry and another** reported in **AIR 1960 SC 391**. Learned counsel for the appellant S has also

referred to the provisions of Section 52-A of the Act and submitted that the inventory was not properly prepared.

10. On these grounds learned senior counsel for the appellant **S** has prayed that the findings of the learned Special Court suffer from serious errors of law and non-appreciation of evidence; and moreover, the prosecution has failed to prove the charges beyond reasonable doubt. The prosecution has also failed to undertake mandatory compliance of Section 42(1) and Section 50(1) of the NDPS Act which has vitiated the entire trial. As such, the appellant **S** may be acquitted of the charges.

11. Mr. B. Deb, learned counsel for the appellants **K** and **P** have adopted the arguments advanced by learned senior counsel for the appellant **S**. Apart from that, he has also referred to the First Information Report and submitted that there is no explanation as to why a search warrant could not be obtained in terms of Section 41(1) of the NDPS Act before proceeding to search the house of the appellant **S**. Learned counsel for the appellants **K** and **P** has also referred to the deposition of PW 1, PW 2, PW 5, PW 6, PW 7 and PW 8. It is submitted that PW 1, in his cross examination, has stated that he did not obtain any search warrant before arrival to the place of occurrence. He even did not obtain consent of the accused persons in writing. Even the provisions of Section 100 of the Cr.P.C has not been complied with by the police personnel as well as PW 7- the Complainant SI Manoj Kumar Pal who conducted the raid, because no independent witnesses were called from the locality. The seizure list witnesses i.e. PW 5 and PW 6 were not of the same locality of the accused persons. If the evidence of the prosecution witnesses is seen in entirety, it would be evident that no reason has been assigned by the police as to why they did not

obtain search warrant before conducting search in the house of the accused **S** in violation of Section 42(1)(d) of the Act. He submitted that no recovery has been made from the present appellants i.e. **K** and **P** of any contraband items. They have been falsely implicated in the instant case on the basis of alleged confessional statement made before the IO. The IO did not make any prayer before the Court for recording confessional statement of accused **S**. Moreover, PW 1 has nowhere stated about his tour diary which is required to be maintained as per the Police Regulations of Bengal Rules. By referring to the statement of PW 2-DCM, Ambassa, it is stated that from his evidence also there is no single iota of evidence on record as to whether any independent witnesses from the locality were called. PW 5-one of the seizure list witnesses, a resident of Kamalacherra under Ambassa PS who stated that on 24.09.2019, he was returning to the motor stand and reached near the house of accused **S** at Betbagan, Dolubari under Ambassa PS where he noticed large number of persons gathered in front of the house of the accused. He also went to know about the incident from the police personnel present there besides an Executive Magistrate and came to know that huge quantity of drugs was recovered from the house of the appellant **S**. Police also showed him a polythene bundle containing some plastic containers which contained powder like substances supposed to be drug. Police asked him to put signature and obtained his signature on two papers - on search memo and on seizure list which are Exhibit 1/3 and Exhibit 2/3. From his statement, it is clear that he is not a resident of the locality and by the time he reached the place of occurrence, the police had already recovered contraband items and there was a huge gathering. Therefore, there is a violation of Section 100(4) of the Cr.P.C by not calling local personnel to be as seizure list witnesses. In his cross examination, he has

categorically stated that contents of the documents on which his signatures were obtained, were not read over to him and at the time of search in the house of accused S, he was not present. Therefore, PW 5 was not a seizure witness during search and seizure. Similarly, PW 6 is a resident of Kamalacherra and has been adduced as seizure witness. He also has stated in similar manner that when he reached the place of occurrence and stopped his vehicle, he learnt that some illegal substances were recovered and the police personnel asked him to put his signature on a paper which is marked as Exhibit 1/4. In his cross examination, he has also stated that the documents were not read over to him on which he has signed. However, learned trial Court, without considering all these vital lacunae in the prosecution case, wrongly convicted the aforesaid appellants without considering that both the PW 5 and PW 6 were not present at the time of alleged seizure. Learned counsel has also referred to the deposition of PW 7 and submitted that the said witness had no explanation as to why he did not obtain any search warrant which is in violation of Section 42(1)(d) of the NDPS Act, nor did he prepare any post-search memo. He has also not stated as to why the provisions of Section 57 of the NDPS Act, which are mandatory, were not complied with. As such, there was total non-compliance of the procedure prescribed under Section 42, 50 and 57 of the NDPS Act read with Section 100 of the Cr.P.C and Police Regulations of Bengal Rules. PW 9 is the IO of the case who has submitted the charge sheet against the 4(four) accused persons. From his evidence, it is seen that he had prepared interrogation report of the accused persons, but no prayer was made for recording their confessional statement before any Magistrate. As such, the statements of accused persons are not admissible in the eye of law.

12. Mr. B. Deb, learned counsel for the appellants **K** and **P**, has also referred to Exhibit P-10 which is the inventory and referred to the statement of PW 7 in cross examination where he has stated that inventory was not prepared. It is submitted that these appellants have no criminal antecedents and as such, they deserve to be acquitted of the charges on failure of the prosecution to apply the mandatory provisions under the NDPS Act and on the basis of such unreliable evidence. Reliance is placed upon paragraphs 90, 102 and 103 of the decision of the Apex Court in the case of *Tofan Singh v. State of Tamil Nadu* reported in **(2021) 4 SCC 1**.

13. Mr. Ratan Datta, learned Public Prosecutor has *inter alia* made the following submissions in support of the findings recorded by the learned Trial Court and the truthfulness of the prosecution case:

(i) He has referred to the FIR recorded by PW 7-SI Manoj Kumar Pal where in the first few lines itself it is stated that on 24.09.2019 at 1305 hours, he had received telephonic secret information that few drug peddlers had assembled in the house of the appellant **S** and were dealing for drug selling activities. The FIR also states that GD Entry No.21 dated 24.09.2019 was made. The Officer-in-Charge, Ambassa PS and also the higher authority were informed and he got permission for next course of action. The format of the FIR at Column 3(c) also refers to the same GD Entry. The FIR was registered after completion of the search. Though, FIR is not a substantive piece of evidence, but it corroborates the evidence adduced by the prosecution witnesses during trial. Reference is made to the statement of PW 7-SI Manoj Kumar Pal who is the informant. It is stated that PW 7 had during course of his examination-in-chief categorically stated that he had noted the matter in GD Entry No.21 dated

24.09.2019, reduced the information in writing in the GD Entry book and informed the Officer-in-Charge, Ambassa PS and to the higher authority, and took permission for next course of action. No question was raised by the defence in the cross examination as to whether the GD Entry was sent to the higher authorities and the Officer-in-Charge, Ambassa PS. He has placed provisions of Section 42(1) and sub-section 2 thereof and submitted that the informant, being an SI, was an empowered officer under Section 41(1) of the Act, which has been substituted by Act 9 of 2001, and who had reason to believe that such offence of drug paddling was being committed in the house of the accused S. Therefore, he had reason to believe and the copy of the information has to be submitted to the higher authority within seventy-two hours as per Section 42(2) of the NDPS Act. Earlier the requirement was that the information had to be sent forthwith. In this regard, he has relied upon paragraphs 31, 36, 37 and 40 of the decision rendered by the Apex Court in the case of *Laxmibai and another v. Bhagwantbuva and others* reported in (2013) 4 SCC 97 in support of the argument that when no doubt has been raised by the defence by raising any query during cross examination regarding sending of GD Entry during trial, such a point is not available to be raised during the appellate stage. He has also pointed out that the GD Entry Number is specifically mentioned in the search memo [Exhibit P-1, P-1/1, P-1/2, P-1/3, P-1/4, P-1/5] and the seizure list [Exhibit P-2, P-2/1, P-2/3]. As such, there is full compliance of Section 42(1) and sub-section 2 of the NDPS Act.

(ii) Learned Public Prosecutor has also strongly refuted the submission of learned counsel for the appellants that there was non-compliance of Section 50(1) of the NDPS Act. He has again referred to the statement, made in the FIR by PW 7- informant SI Manoj Kumar Pal, which shows that the

detained persons were asked if they wanted to be searched in presence of a gazetted officer. Such statement is also corroborated by PW 1 during his examination who is the SDPO, Ambassa. All the 4(four) accused persons gave verbal consent to be searched. PW 2 is the DCM, Ambassa and a gazetted officer, in whose presence the search was made. Learned Public Prosecutor submits that there is no requirement for seeking consent in a written manner or in a format as per Section 50(1) of the Act. In this regard, reliance is placed upon paragraphs 23, 24, 29 and 30 of the decision of the Constitution Bench of the Apex Court in the case of *Vijaysinh Chandubha Jadeja v. State of Gujarat* reported in **(2011) 1 SCC 609**. The Apex Court has clearly held that it is not necessary that information required to be given under Section 50 should be in a prescribed format or in writing. It is further pointed out from the statement of the accused persons under Section 313 of the Cr.P.C, that no questions or objections were raised by the accused persons that they were not informed of the right to be searched in presence of a gazetted officer, nor was any such question put to PW 1 and 2 during cross examination. In this regard, he has placed reliance upon paragraph 15 of the decision of the Apex Court in the case of *Prabha Shankar Dubey v. State of M.P.* reported in **(2004) 2 SCC 56**. It is submitted that the decision is on the very issue of compliance of Section 50 and 57 of the NDPS Act.

(iii) Learned Public Prosecutor has referred to the provisions of Section 52, 52-A, 55 and 57 of the NDPS Act and submitted that they are only directory in nature, as has been held in the case of *Babubhai Odhavji Patel and others v. State of Gujarat* reported in **(2005) 8 SCC 725**. It is pointed out that the seizure was made on 24.09.2019 and it was produced on 27.09.2019. The inventory has been exhibited as Exhibit P-10. As such, any allegation regarding

non-preparation of inventory or non-compliance of Section 52-A of the Act is not tenable on facts or in law. As regards the contention of the appellants that no local witnesses were examined as seizure list witnesses, learned Public Prosecutor submits that PW 5 was an independent witness. He has, during his examination, admitted his signatures as Exhibit P-1/3 and P-2/3 on search memo and the seizure list respectively. Learned Public Prosecutor for the respondent-State submits that the GD Entry No.21 dated 24.09.2019 has been duly produced before the Court from the case diary and police records and can be looked into by this Court under Section 172(3) of the Cr.P.C which is the unfettered power of the Court. In this regard, he has referred to the decision of the Apex Court in the case of *Mukund Lal & Anr. v. Union of India & Anr.* reported in (1988) SCR Supl.(3) 524. Learned Public Prosecutor submits that the case of *Darshan Singh* (Supra) relied upon by learned senior counsel for the appellant S, is on a different set of facts where no information was reduced in writing in terms of Section 42(1) of the NDPS Act and only an FIR was sent to the superior authority. Learned Public Prosecutor has also distinguished the decision of learned Division Bench of this Court in the case of *Sri Mithu Kumar and another* (supra) by referring to the ratio rendered by the Apex Court in the case of *Vijaysinh Chandubha Jadeja* (supra) where it has been held that it is not necessary that the information required to be given under Section 50 of the NDPS Act should be in a prescribed format or in writing.

14. As such, learned Public Prosecutor has submitted that the offences under Section 21(b)/25/29 of the NDPS Act are serious in nature and are socio-economic offences where the legislature has prescribed strict provisions such as Section 35 of the NDPS Act which provides that the Court shall presume the existence of such mental state in a prosecution for an offence under the Act and

it is for the accused to prove that he had no such mental state with respect to the act charged as an offence. As such, the findings of the learned Trial Court are sound, weighty and after due appreciation of the evidence on record. The investigating agency has complied with the mandatory procedures under Section 42(1) and Section 50(1) of the NDPS Act, and there is no infirmity in the prosecution case which warrants interference by this Court in appeal. The accused persons were found to have entered into a conspiracy for selling of illicit and contraband drugs for which the legislature has provided rigorous imprisonment which may extend to 10(ten) years with fine of Rs.1,00,000/- under Section 21(b) of the NDPS Act. The appellant S has also been punished for allowing his premises to be used for commission of an offence under Section 25 of NDPS Act. The other two appellants have been found to be in criminal conspiracy to commit an offence punishable under Section 29 of the NDPS Act and, therefore, have rightly been convicted for the charge of conspiracy by the learned Trial Court. Learned Public Prosecutor submits that the appeals are, therefore, fit to be dismissed.

15. I have considered the submission of learned counsel for the parties at length and gone through the materials and the evidence placed from the lower court records. I have also perused the impugned judgment and the decisions cited by the rival parties.

16. At the outset, it is appropriate to refer to the offending provisions under which the prosecution was lodged against the accused persons under Section 21(b), 25 and 29 of the NDPS Act. In this regard, it is apposite to refer to the provisions of Section 21(b), 25 and 29 of the NDPS Act:

“[21. Punishment for contravention in relation to manufactured drugs and preparations.— Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder,

manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable,—

(a) * * *

(b) where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(c) * * *

[25. Punishment for allowing premises, etc., to be used for commission of an offence.]— Whoever, being the owner or occupier or having the control or use of any house, room, enclosure, space, place, animal or conveyance, knowingly permits it to be used for the commission by any other person of an offence punishable under any provision of this Act, shall be punishable with the punishment provided for that offence.]

29. Punishment for abetment and criminal conspiracy.—(1) Whoever abets, or is a party to a criminal conspiracy to commit, an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in Section 116 of the Indian Penal Code (45 of 1860), be punishable with the punishment provided for the offence.

(2) A person abets, or is a party to a criminal conspiracy to commit, an offence, within the meaning of this section, who, in India, abets or is a party to the criminal conspiracy to the commission of any act in a place without and beyond India which—

(a) would constitute an offence if committed within India; or

(b) under the laws of such place, is an offence relating to narcotic drugs or psychotropic substances having all the legal conditions required to constitute it such an offence the same as or analogous to the legal conditions required to constitute it an offence punishable under this Chapter, if committed within India.”

The NDPS Act has been enacted with stringent provisions for control and regulation of operations relating to narcotic drugs and psychotropic substances and to provide deterrent punishments. Since stringent provisions have been provided under this Act, there is an obligation on the prosecution for strict compliance of the mandatory provisions. The NDPS Act also provides for presumption of culpable mental state under Section 35, where the Court shall presume the existence of such mental state in any prosecution for an offence under this Act which requires a culpable mental state of the accused. But it shall be a defence for the accused to prove the fact that he had no such mental state with respect of the Act charged as an offence in that prosecution. The explanation shows that “culpable mental state” includes intention, motive,

knowledge of a fact and believe in, or reason to believe, a fact. For the purposes of this section, a fact is said to be proved only when the Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

17. As the prosecution story unfolds, PW 7-the informant, upon receipt of secret telephonic information that few drug peddlers had assembled in the house of the appellant S and were dealing for drug selling activities, made a note in the GD Entry bearing No.21 dated 24.09.2019 and informed the Officer-in-Charge, Ambassa PS and also to the higher authority, and got permission for next course of action. The First Information Report at Column 3(c) also refers to the GD Entry No.21 dated 24.09.2019 at 1305 hours. Similar reference of the GD Entry is evident from the search and the seizure memo which are Exhibit P-1, P-1/1, P-1/2, P-1/3, P-1/4, P-1/5 and Exhibit P-2, P-2/1, P-2/3. The deposition of PW 7-the informant is worth reference at this stage as regards the compliance of Section 42(1) of the NDPS Act :

“On 24.09.2019 I was posted as Sub-Inspector of Ambassa Police Station.

On that day I lodged suo-moto complaint with the Officer-In-Charge of Ambassa Police Station against the accused persons namely Shri Sanjit Rudra Pal alias Sanjo, Shri Surendra Debbarma, Shri Prasanta Deb and Shri Krishnacharan Deb Roy alias Maran for the commission of offences punishable under Sections 22(b)/25/29 of the NDPS Act, 1985.

On 24.09.2019 at about 13.05 hours received a telephonic information from reliable sources that few drug peddlers were assembled in the house of accused Shri Sanjit Rudra Pal alias Sanjo of Betbagan (Dolubari) and they were dealing with drugs in the locality.

Thereafter, we noted the matter in GD vide GD Entry No.21 dated 24.09.2019 and reduced the information in writing in the GD Entry Book and the matter was informed to Officer-In-Charge of Ambassa Police Station and to the higher authority and took permission for next course of action.

Myself accompanied with SDPO, Ambassa, Executive Magistrate and other Police Station staff went to Betbagan in the house of accused Shri Sanjit Rudra Pal alias Sanjo and cordoned the house and collected independent witnesses.

Before we conducted search in the house of the accused Shri Sanjit Rudra Pal alias Sanjo, I prepared pre-search memo on the spot at about 13.50 hours in presence of the witnesses which bears my signature.

On identification the pre-search memo is marked as **Exhibit P-1** and the signature of the witness on the pre-search memo is marked as **Exhibit P-1/5** respectively.

Thereafter, on suspicion the accused persons were offered to be searched before any Gazetted Officer to which they answered in the affirmative and accordingly I conducted search of all the accused persons in presence of SDPO, Ambassa, Executive Magistrate, Ambassa and independent witnesses and prior to that we have also got ourselves to be searched by the independent witnesses.”

18. The plea being raised regarding non-sending of the GD Entry at this appellate stage, appears to be a novel argument, since no such objection or question was raised to PW 7 during his cross-examination. The observation of the Apex Court at para 13 & 14 of ***State of UP vs. Nahar Singh (Dead) & Ors; (1998) 3 SCC 561*** on this issue is extracted hereunder:

“13. It may be noted here that that part of the statement of PW 1 was not cross-examined by the accused. In the absence of cross-examination on the explanation of delay, the evidence of PW 1 remained unchallenged and ought to have been believed by the High Court. Section 138 of the Evidence Act confers a valuable right of cross-examining the witness tendered in evidence by the opposite party. The scope of that provision is enlarged by Section 146 of the Evidence Act by allowing a witness to be questioned:

(1) to test his veracity,

(2) to discover who he is and what is his position in life, or

(3) to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

14. The oft-quoted observation of Lord Herschell, L.C. in Browne v. Dunn [(1893) 6 R 67] clearly elucidates the principle underlying those provisions. It reads thus:

“I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses.”

This aspect was unfortunately missed by the High Court when it came to the conclusion that explanation for the delay is not at all convincing. This reason is, therefore, far from convincing.”

19. Ld. Public Prosecutor has also produced the Case Diary to show that the same was sent by PW 7-the informant to the Officer-in-Charge, Ambassa PS and also to the superior officer recording his reasons to believe. Informant, being an SI of Police, is an Empowered Officer by the State Government within the meaning of Section 42(1) of the Act. As such, the contention of the appellants that the informant did not obtain a search warrant for proceeding to search the premises of the appellant S, are not tenable as the informant, being an Empowered Officer, has after recording the information received and his reasons to believe, and after obtaining permission from the superior authority including the Officer-in-Charge, Ambassa PS had the authority to proceed for search. The decision in the case of **Darshan Singh** (supra) relied upon by learned senior counsel for the appellant S is not applicable to the facts of the instant case, as the facts of the said case show that no such information was recorded in writing by the informant; rather only the copy of the FIR was sent to the superior officers. As such, the contention of the appellants, that the mandatory requirement under Section 42(1) of the NDPS Act has not been complied, does not merit acceptance.

The appellants have also alleged non-compliance of Section 50(1) of the Act regarding their right to be informed and searched before a gazetted officer. In this regard, the learned counsel for the appellants submitted that the requirement of obtaining consent should be in writing or in a format by striking out the relevant particular. They have also relied upon the judgment of the learned Division Bench of this Court in the case of **Sri Mithu Kumar** (supra). However, this issue is no longer *res integra* in view of Constitution Bench decision of the Apex Court in the case of **Vijaysinh Chandubha Jadeja** (supra). Paragraphs 23 to 27 and 29 of the decision are extracted hereunder:

“23. In the above background, we shall now advert to the controversy at hand. For this purpose, it would be necessary to recapitulate the conclusions, arrived at by the Constitution Bench in Baldev Singh case [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] . We are concerned with the following conclusions: (SCC pp. 208-10, para 57)

“(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

*

*

*

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.”

24. Although the Constitution Bench in Baldev Singh case [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to “inform” the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to “inform” the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but

would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.

25. As noted above, sub-sections (5) and (6) were inserted in Section 50 by Act 9 of 2001. It is pertinent to note that although by the insertion of the said two sub-sections, the rigour of strict procedural requirement is sought to be diluted under the circumstances mentioned in the sub-sections viz. when the authorised officer has reason to believe that any delay in search of the person is fraught with the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, etc., or article or document, he may proceed to search the person instead of taking him to the nearest gazetted officer or Magistrate. However, even in such cases a safeguard against any arbitrary use of power has been provided under sub-section (6). Under the said sub-section, the empowered officer is obliged to send a copy of the reasons, so recorded, to his immediate official superior within seventy-two hours of the search. In our opinion, the insertion of these two sub-sections does not obliterate the mandate of sub-section (1) of Section 50 to inform the person, to be searched, of his right to be taken before a gazetted officer or a Magistrate.

26. The object and the effect of insertion of sub-sections (5) and (6) were considered by a Constitution Bench of this Court, of which one of us (D.K. Jain, J.) was a member, in *Karnail Singh v. State of Haryana* [(2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887]. Although in the said decision the Court did observe that by virtue of insertion of sub-sections (5) and (6), the mandate given in *Baldev Singh* case [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] is diluted but the Court also opined that it cannot be said that by the said insertion, the protection or safeguards given to the suspect have been taken away completely. The Court observed: (*Karnail Singh* case [(2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887], SCC p. 553, para 31)

“31. ... Through this amendment the strict procedural requirement as mandated by *Baldev Singh* case [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] 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 : 1999 SCC (Cri) 1080] is diluted.”

27. It can, thus, be seen that apart from the fact that in *Karnail Singh* [(2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887], the issue was

regarding the scope and applicability of Section 42 of the NDPS Act in the matter of conducting search, seizure and arrest without warrant or authorisation, the said decision does not depart from the dictum laid down in Baldev Singh case [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] insofar as the obligation of the empowered officer to inform the suspect of his right enshrined in sub-section (1) of Section 50 of the NDPS Act is concerned. It is also plain from the said paragraph that the flexibility in procedural requirements in terms of the two newly inserted sub-sections can be resorted to only in emergent and urgent situations, contemplated in the provision, and not as a matter of course. Additionally, sub-section (6) of Section 50 of the NDPS Act makes it imperative and obligatory on the authorised officer to send a copy of the reasons recorded by him for his belief in terms of sub-section (5), to his immediate superior officer, within the stipulated time, which exercise would again be subjected to judicial scrutiny during the course of trial.

29. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.”

20. In the present case, both the PW 1-SDPO, Ambassa- and PW 2-DCM, Ambassa, a gazetted officer, were present at the time of seizure. The accused persons have given verbal consent to be searched. No dispute has been raised by the accused persons under Section 313 of Cr.P.C that they were not informed of the right to be searched in the presence of a gazetted officer. No such question was raised before PW 1 and PW 2 in their cross-examination. In this regard, learned Public Prosecutor for the State has rightly relied upon paragraph 15 of the decision of the Apex Court in the case of **Prabha Shankar Dubey** (supra) which is directly on the issue of compliance of Section 50 and 57 of the NDPS Act and is extracted hereunder:

“**15.** Additionally, it may also be noticed that while giving statement under Section 313 of the Code of Criminal Procedure, 1973 (for short “the Code”), the accused did not say that he was unaware of his rights or that he was misled on that account in any manner. On the contrary, in general and vague manner it was only said that he did not know or he had no idea of

the allegations. Though that by itself is not sufficient to convict the accused in view of the procedural safeguards required to be observed by compliance with the requirements of Section 50, yet that is of some relevance in appreciating the grievance, now sought to be ventilated. There is no infirmity in the impugned judgment to warrant interference. The appeals are accordingly dismissed.”

As such, this Court, upon consideration of the materials on record and the evidence adduced by the prosecution, is of the considered view that the prosecution had followed the mandatory requirement of informing the accused persons of their right to be searched in the presence of a gazetted officer and they gave their verbal consent to be searched whereafter the search was undertaken in the presence of the SDPO, Ambassa and PW 2-DCM, Ambassa , a gazetted officer. As such, the instant ground of challenge also does not appeal to the Court.

21. Appellants have taken a plea that there was a 3(three) day gap in producing the seized article which is not in conformity with Section 52-A and 57 of the NDPS Act. In this regard, it is apposite to refer to the provisions of Section 52-A, 55 and 57 of the Act :

“[52-A. 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, substances or 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 inventory, 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.]

55. Police to take charge of articles seized and delivered.—An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.

57. Report of arrest and seizure.—Whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior.”

The Apex Court has, in case of *State of Punjab v. Balbir Singh* reported in (1994) 3 SCC 299 and followed in *Babubhai Odhavji Patel* (supra) held that the provisions of Section 52 and 57, which deals with the steps to be taken by the officers after making arrest or seizure, are themselves not mandatory. If there is non-compliance or lapses like delay, the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on appreciation of evidence regarding arrest or seizure as well as merits of the case. The appellants have not been able to show that any prejudice has been caused to them on account of the delay of 3 days in producing the seized articles before the learned Magistrate.

22. Though the appellants have taken a plea that the inventory was not prepared, but Exhibit P-10 is the inventory of the seized articles and is available on the lower court records. The seizure was made on 24.09.2019, then the reports were handed over to the Investigating Officer and it was produced within 3(three) days on 27.09.2019 before the learned Magistrate. As such, the allegation of gap in the production of seized articles and delay is not such, which affects the prosecution case as to doubt its veracity. Moreover, as has been held by the Apex Court, compliance of these provisions is only directory in nature.

23. Though learned counsel for the appellants have placed the evidence of PW 5 and PW 6, who were the seizure list witnesses, to advance the proposition that these witnesses are not of local area and do not fulfil the conditions under Section 100(4) of Cr.P.C, and that the seizure was not made in their presence; but both the witnesses have affirmed their signature on the search memo and seizure list which are Exhibit P-1/1, P-1/2, P-1/3, P-1/4, P-1/5 and Exhibit P-2/1, P-2/2, P-2/3 respectively. Moreover, the testimonies of other prosecution witnesses, such as PW 1, PW 2 and PW 7 testimonies corroborate the factum of search and seizure. As such, the absence of local witness during the search and seizure would not render the seizure vitiated. Moreover, PW 1 is the SDPO of Ambassa and PW 2 is the DCM, Ambassa. As such, the statements of PW 5 and PW 6, in their cross-examination, alone cannot discredit the factum of search and seizure made in presence of the accused persons and other prosecution witnesses and moreover, the accused persons have also recorded their signatures on the search and seizure memo. As the PW1 being the empowered officer had conducted the search after recording his reasons to believe based on the secret information and obtained prior

permission of the superior office in terms of Section 42(1) of the Act, there was no requirement or necessity to obtain a search warrant before proceeding to search and seize the contraband.

24. Taking into regard all these material evidence on record, this Court is of the firm view that the prosecution has been able to establish the charges beyond reasonable doubt. The learned Trial Court has, after due consideration of the evidence on record, rightly convicted the appellant **S** for the charges under Section 21(b)/25/29 of the NDPS Act and the other two appellants namely **K** and **P** for the charges under Section 29 of the NDPS Act. As such, no grounds for interference are made out on the part of the appellants herein.

25. The appeals, being devoid of merit, are dismissed. Send down the LCRs forthwith.

26. Pending application(s), if any, also stands disposed of.

(APARESH KUMAR SINGH), CJ