



vinita

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO.1069 OF 2024
WITH
CRIMINAL MISC. APPLICATION NO. 1070 OF 2024/F

Mr. Joseph Achola Ouma,
Presently lodged in Central
Jail at Colvale, 56 years of Age,
Kenyan National, r/o c/o Pravin
Pagi, H.No.9/1 -A,
Patnem, Canacona Goa,
and n/o 343, Suna, Dugori,
Kenya

.....APPELLANT.

VS

1. State of Goa (As represented
by the Officer in charge/ Police
Inspector, Canacona Police
Station) Canacona, Goa)
2. State of Goa, Thr.
The. The Public Prosecutor
High Court Building Alto-
Betim, Porvorim, Goa

... RESPONDENTS

Mr. Shivraj Gaonkar, Ms D. Gaonkar and Mr Shithil Prabhu
Dessai and Mr Prabhav Sirvoicar, Advocates for the
Appellant.

Mr. Pravin N. Faldessai, Addl. Public Prosecutor for the
Respondent/State.

CORAM:- SHREERAM V. SHIRSAT, J.

DATED:- 19th January, 2026.

JUDGMENT:

1. The present Appeal has been filed challenging the impugned Judgment and Order dated 16.11.2024, passed by the Additional Sessions Court, South Goa at Margao in Case No.NDPS/6/2019, whereby the Appellant has been convicted for the offences punishable under Sections 22(c) and 21(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) and has been sentenced to undergo rigorous imprisonment for period of ten years and to pay fine of Rs. 1,00,000/- (Rupees one lakh only) and in default two years for the offence punishable under Section 22(c) and to undergo five years rigorous imprisonment and to pay fine of Rs. 50,000/- (Rupees fifty thousand only) in default to undergo imprisonment for one year for offence under Section 21(b).

2. Brief facts of the prosecution's case are as under:

(a) On 29.01.2019 at 13:45 hrs, the complainant, PSI Damodar Shirodkar, received an information from a reliable source that one Kenyan person will deliver narcotic drugs to his prospective customers near Komarpant Samaj Hall at Colomb at about 16:30 hrs. Thereafter the said information was reduced in writing

and its copy was sent to SDPO Quepem, Dy. S.P. Uttam Raut Dessai.

(b) Two panch witnesses were secured for conducting narcotic raid and were introduced to rest of the members of the raiding party which consisted of aforementioned SDPO, complainant and 5 other police personnel of Canacona Police Station. Further, the seal of Canacona Police Station having its inscription as well as sealing and packing material, stationery, weighing machine and drug detection kit were carried by the raiding party.

(c) At 15:45 hrs the raiding party proceeded in two private vehicles followed by the SDPO in his official vehicle. On reaching the spot, they all took their concealing positions.

(d) At about 16:35 hrs one person, matching the description received, was seen walking towards Komarpant Samaj Hall. The members of the raiding party surrounded him and the complainant introduced himself as also the other members of the raiding party. Upon questioning, the Appellant disclosed his identity

and his current address. The complainant informed the Appellant regarding the information received and that he wants to conduct his personal search for narcotic drugs.

(e) Before commencing with the search, the appellant was informed about his right to be searched in presence of a Gazetted Officer and the SDPO was introduced to him as being a Gazetted Officer. In addition, the appellant was informed about his right to search the members of the raiding party. The appellant declined to avail both the rights.

(f) Following the same, the complainant conducted personal search of the appellant during which white powder suspected to be cocaine and a small bottle containing some liquid suspected to be LSD was found in the right side front pocket of the Appellant's pants.

(g) Thereafter testing was done and weight of the contraband was ascertained. The cocaine weighed on the weighing machine was found to be 3.10 gms. The LSD was found to be 7.53 gms along with the container. After weighing, packing and sealing was done on the

spot. The panchanama concluded at 18.30 hours and a copy of the panchanama was handed over to the Appellant.

3. Thereafter the Appellant came to be arrested and after investigation the complaint/chargesheet came to be filed. Thereafter, charge was framed against the Accused/Appellant to which he pleaded not guilty. The prosecution then examined 12 witnesses to prove the charge.

4. The following witnesses were examined by the prosecution:

Witness Examined	Nature of witness
PW 1 Shekhar Komarpant	Panch witness of trap panchanama
PW 2 Ramchandra Naik	PSI, part of the raiding team
PW 3 Mahendra Bhandari	Police photographer
PW 4 Sudesh Narvekar	Drew inventory proceedings for drawing of sample
PW 5 Raghuraj Faldessai	Mamlatdar
PW 6 Prashal Dessai	PSI, part of the raiding team
PW 7 Umanath Tubki	Guest house owner occupied by accused.
PW 8 Pravin Pagi	Manager of the guest house

PW 9 Damodar Shirodkar	Complainant, PSI who led and conducted the raid.
PW 10 Dhiraj Devidas	Investigating officer
PW 11 Ramesh Shirodkar	Investigating officer
PW 12 S. N. Rasool	Conducted analysis of the seized material.

5. On completion of prosecution evidence, statement of Appellant under Section 313 Cr. P.C. was recorded. The case of the Appellant was of total denial. Upon hearing the Appellant and the prosecution, the Ld. Additional Sessions Judge, South Goa at Margao, was pleased to hold the Appellant guilty as charged, and sentenced him to undergo rigorous imprisonment for period of ten years and to pay fine of Rs. 1,00,000/- (Rupees one lakh only) and in default two years for the offence punishable under Section 22(c) and to undergo five years rigorous imprisonment and to pay fine of Rs.50,000/- (Rupees fifty thousand only) in default to undergo imprisonment for one year for offence under Section 21(b).

6. The Appellant has preferred Appeal before this Court. The Ld. Counsel for the Appellant/Accused raised several

grounds assailing the order of the Trial Court viz Non-compliance of Section 50 of the Act, presence of Gazetted Officer as a part of raiding team at the time of search under section 50, violation of section 55 of the NDPS Act, results of the experts were not reliable since no actual data was collected during the test was brought before the court.

7. Per Contra, the Ld. Addl. Public Prosecutor has submitted that the prosecution has proved its case beyond reasonable doubt and there has been proper compliance of Section 50 and all other mandatory provisions of the Act. The Ld. Addl. Public Prosecutor submitted that the Appellant has been found with commercial quantity and the trial court has rightly convicted the Appellant.

8. Heard, Ld. Counsel Mr. Shivraj Gaonkar for the Appellant and the Ld. Addl. Public Prosecutor Mr. Pravin Faldessai for the State.

9. Although several grounds have been raised, the main ground on which much thrust and emphasis has been laid is complete non-compliance of section 50 of the NDPS Act on the part of the raiding team. It will therefore have to be seen whether the evidence that has come on record, the

compliance under Section 50 of NDPS Act can be said to done in total letter and spirit or is there a gross non-compliance of Section 50 of the NDPS Act as submitted by the Ld. Counsel for the Appellant.

10. Before analysing the evidence of the prosecution witnesses since the thrust of the arguments is on non-compliance of Section 50 of the NDPS Act, the Section 50 is reproduced herein below as under :-

“50. Conditions under which search of persons shall be conducted.—(1) *When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 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.

87[(5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance

or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974)[88](#).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.]

11. Analysis of the evidence of PW 1, PW 2, PW 6, PW9 will be pivotal to arrive at a proper conclusion.

ANALYSIS OF THE EVIDENCE

12. PW 1 is the Panch Witness Shekar Komarpant, who acted as a panch at the time of raid. It has come in the evidence of PW1 as under,

“PSI Damodar Shirodkar informed the accused that the police had come along with the Gazetted officer and that he could search the raiding party and the panchas before the police searched him. The accused declined to be checked in the presence of the Dy.S.P., who was the gazetted officer referred by PSI Damodar Shirodkar. The accused also declined the search of the raiding party and the panchas.”

It has further come in the evidence of PW1 that *“after the accused was stopped, the police informed him that they have a right to search the accused and that the Dy.S.P. was present. If he remembers correctly, the personal search of the accused was carried out by PSI Damodar Shirodkar.”*

The panchanama which was exhibited at Exhibit 12 records that *“At that time it was 16:40 hrs. Further PSI Damodar Shirodkar introduced himself as Police Sub Inspector of Canacona Police Station and by showing him his police identity card and also introduced the members of raiding party and the panchas. Upon asking his name by PSI D. Shirodkar he disclosed his name as Joseph Achola Ouma, age 51 years, Kenyan National presently residing at Colomb, Patnem. Further PSI D. Shirodkar also introduced Dy.Sp Raut Dessai to the said person.”*

“Before commencing his personal check PSI D. Shirodkar informed Joseph Achola Ouma that he has right to be searched in presence of a Gazetted

Officer, Accordingly PSI D. Shirodkar again introduced Shri. Uttam Raut Dessai as a Gazetted Officer. Further PSI D. Shirodkar informed him that he has right to search the members of the raiding party including panchas but he declined both the officer”.

13. Analysis of the evidence of the PW 1, panch witness will show that there was no proper appraisal of the statutory right of Section 50 of the NDPS Act, to the Applicant. In the first place the option given to the Applicant is not in consonance with the mandatory requirements of section 50 of the NDPS Act. This witness does not say that the Applicant was given an option of conducting a search before a Gazetted Officer or a “Magistrate” and on the top of it, after giving a sole option of search before the Gazetted officer it was supplemented by introducing Shri. Uttam Raut Desai as a Gazetted Officer. The manner in which the appraisal has been done completely undermines the sanctity of section 50 of the Act. Undoubtedly some latitude can be given as far as panch witness is concerned, as due to several factors such as passage of time, understanding capacity of the panch witness etc, the panch witness may

not be able to recollect in exact words what appraisal was given.

14. It is held in the case of ***Bharwada Bhoginibhai Hirjibhai V/s State of Gujarat*** reported in ***AIR 1983 SC753*** thus:-

.....(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

There is therefore a possibility that the panch witness might have missed out on the exact words uttered by the raiding team and therefore it will be necessary to see what other witnesses have deposed especially the police personnel who were the members of the raiding team.

15. It has come in the evidence of PW2, Ramchandra Naik, PSI, attached to Canacona Police Station, who was the member of the raiding party, as under

“I say that SDPO Uttam Raut Desai reached at the Police Station. PSI Damodar Shirodkar introduced the panchas to the raiding party members which consisted of himself, PSI Prashal Dessai, PC Rajesh Pagi, PC Uday Shet, PC Sandesh Naik, SDPO Quepem and PSI Damodar Shirodkar.

“PSI Damodar Shirodkar along with both panchas, himself, PC Rajesh Pagi and Uday Shet proceeded in a private vehicle. PSI Prashal Dessai and PC Sarvesh Naik proceeded in another private vehicle and SDPO Uttam Raut Dessai proceeded in his official vehicle.”

“PSI Damodar Shirodkar then introduced himself to the said person as PSI of Canacona Police Station and also introduced the members of the raiding party. PSI Damodar Shirodkar then asked the said person his name and he disclosed his name as Joseph Ouma. PSI Damodar Shirodkar had also introduced SDPO to the said person.”

“PSI Damodar Shirodkar informed the accused that he had received reliable information that the

*accused had come to deliver the drugs to his customer and further informed the accused that he wants to take his personal search. PSI Damodar Shirodkar had also told the accused that he has got the right to search the raiding party. The accused refused to take the search of the raiding party. Before commencing the personal search of the accused PSI Damodar Shirodkar had also told the accused that the **Gazetted Officer SDPO Quepem was also present at the spot and he has right to be searched in his presence**, however he declined.”*

It has come in the cross examination “*PSI Damodar Shirodkar explained to the accused that the Dy. Sp. Uttam Raut Dessai was a Gazetted Officer. I further say that in my opinion the accused understood the meaning of the word “Gazetted Officer’.*”

It has further come in the cross examination of PW2 that “*The SDPO (Dy.SP) Mr. Dessai reached the police station after information, but he do not remember the exact time. The said information*

was given by PSI Damodar Shirodkar. The SDPO Dessai left the spot after the search was complete. The search was done in his presence.”

16. Upon analysis of the evidence of PW 2 it can be seen that he is PSI, a police witness and a member of the raiding team and therefore his evidence would have more weightage than that of the panch witness who for the reasons stated above could possibly deviate from his version. However, this witness also in unequivocal terms has deposed that before commencing the personal search of the accused/appellant, PSI Damodar Shirodkar (PW9) had told the accused that the Gazetted Officer SDPO Quepem was also present at the spot and he has right to be searched in his presence, however he declined. This witness was present when PW 9 PSI Damodar Shirodkar before search of the person of the Appellant was supposed to inform the him about his rights to be searched in presence of nearest Gazetted Officer or a Magistrate, however, PW No 2 does not even whisper about any appraisal given by PW 9 PSI Damodar Shirodkar, in terms of Section 50 of the Act about having informed the suspect about his right to be searched before a Gazetted Officer or a Magistrate. To make things worst, the suspect is informed that Gazetted Officer was

present at the spot and he has right to be searched in his presence.

17. Such an appraisal in the opinion of the court is in utter breach of the mandate of Section 50 of the NDPS Act.

18. The evidence of PW 6, PSI Prashal Dessai, attached to Canacona Police Station, who was also a part of the raiding team, also confirms and exhibits the non-compliance of section 50 of the Act. It has come in the evidence of PW6 that:-

“PSI Shirodkar also introduced the panchas and the raiding party to the said person. He also informed him that he has a right to be searched in the presence of Gazetted Officer and introduced him to SDPO Quepem since he is the Gazetted Officer.”

19. The evidence of PW6 is very categorical about the Appellant having been given only one option of carrying out search before a Gazetted Officer and further informing the Appellant about presence of Gazetted Officer.

20. The analysis of the evidence of PW 9, Damodar Shirodkar, who has arranged and led the raiding party would

be very crucial on this aspect. This witness corroborates the version of PW 6 to grossly exhibit non-compliance of section 50 of the NDPS Act. It has come in the evidence of PW9 that,

“ I say that the members of the raiding party consisting of myself, both panchas, SDPO Uttam Raut Dessai, PSI Prashal Dessai (PW6), PSI Ramchandra Naik (PW2), PC Sandesh Naik, PC Rajesh Pagi and PC Uday Shet. I had briefed all the raiding party members, SDPO and pancha witnesses about the information received and the narcotic raid to be carried out at near Komarpant Samaj Hall, Patnem Colomb and they left to proceed at the spot.”

“I say that myself, pancha witnesses, PSI Ramchandra, Uday Shet and Rajesh Pagi proceeded with private vehicle followed by PSI Prashal Dessai and PC Sandesh Naik with other private vehicle and SDPO Quepem, DY.SP. Shri Uttam Raut Dessai followed the vehicle of Prashal Dessai with his Government vehicle.”

“I say that I further introduced himself to the said

person as Police Sub-Inspector of Canacona police Station and so also introduced the raiding party and Dy.S.P. Shri Uttam Raut Dessai.

*“ Further I informed him that before commencing a personal search **he has a right to be searched in the presence of Gazetted Officer.** I say that I further introduced Dy. SP. U. Dessai who is a gazetted officer to him. Further, he also informed the accused that before commencing a search he has a right to search him and pancha witnesses and raiding party. However, he declined both the offers.”*

21. Even this witness who was the leader of the raiding team is consistent with the evidence of the other witnesses in proving and establishing non-compliance of section 50 of the NDPS Act. This witness also confirms that the Appellant was not given the option of “search before a Magistrate” and only option given was search before a Gazetted Officer which is in total defiance of mandate of the section 50 of the NDPS Act.

22. The Ld. Counsel for the Appellant has relied upon following judgments in support of his contention.

- a. *Mohanlal Khetaram Jangid V/s State of Maharashtra, 1998 (5) Bom.C.R. 771*
- b. *Hatibu Mungis Khamishi V/s Narcotic Cell & another, 2004 (Supp.) Bom.C.R. 822.*
- c. *Ishdan Seikh V/s Union of India, 2022 SCC Online Cal 1545.*
- d. *Ranjan Kumar Chadha Versus State of Himachal Pradesh, 2023 SCC Online SC 1262.*
- e. *Sardar Singh V/s State of Rajasthan, RLW 1996 (2) Raj.*
- f. *Vijaysinh Chandubha Jadeja vs State of Gujrat (2011) 1 SCC SUPREME COURT CASES 609.*
- g. *Hamidkhan HussainKhan v State of Maharashtra 1996 (2)Mh.L.J 258*
- h. *Krishan Kumar v State of Haryana 1996 SCC Online P& H 988.*

ANALYSIS OF THE JUDGMENTS RELIED UPON BY THE
APPELLANT

23. In *Mohanlal Khetaram Jangid V/s State of Maharashtra*, (supra) it has been observed in paragraphs 12, 13, 14 and 15 as under:-

“12. After having considered the arguments advanced at the bar and the relevant evidence on record, we are of the opinion that the prosecution has failed to prove compliance of section 50. On this aspect PSI Sawant (P.W.4) has deposed as under:

“P.I. Ghuge then told them that they have to take their search. He further gave them understanding that they had a right to be searched in presence of a Gazetted Officer if they desire so as provided under the law. It was also disclosed to them that he himself and PI Singh were also Gazetted Officer who were in the raiding party. Those 2 accused person declined that they did not want to go before the Gazetted Officer for their search.”

13. The above evidence shows that the accused were made aware of their right of being searched before a Gazetted Officer. However, the evidence of P.S.I. Sawant does not tally with the contents of panchanama Ex.X. The relevant portion of the panchanama reads as

follows:

“The above mentioned persons were asked whether they wanted to be searched by a Gazetted Officer as provided u/s 50 of N.D.P.S. Act. 1985. However, they said that they did not want to be searched by a Gazetted Officer. Nevertheless, they were told that P.Is. Ghuge and Singh present with the raiding party were Gazetted Officers.”

(emphasis supplied)

14. What is recorded in the panchanama is that the accused were asked whether they wanted to be searched by a Gazetted Officer. It is also indicated in the panchanama that the accused were told that PI Ghuge and PI Singh present with the raiding party were Gazetted Officers. Amit Shaikh, who is the panch-witness, has deposed as follows :

“Then that tall officer asked them whether they want to be searched in presence of a Gazetted Officer and he told that he himself was a Gazetted Officer. They declined to say anything.”

15. Thus, the evidence of the panch-witness read with the panchanama Ex. X indicates that the accused were

told by P.S.I. Sawant that whether they would like to be searched in the presence of a Gazetted Officer and he told them that he himself was a Gazetted Officer. In substance, the officer told the accused that they had a right to be searched before a Gazetted Officer and he himself being a Gazetted Officer would proceed with the himself. This in our opinion, is hardly a compliance with the provisions of section 50 of the Act. The object of section 50 is clear. It intends, to ensure that, if so required by the accused should be taken in front of an independent and a responsible officer. This independent and responsible officer in section 50 has been mentioned as either a Gazetted Officer or a Magistrate. Even though the raiding party could be accompanied by a Gazetted Officer, surely such a Gazetted Officer would not be an independent or responsible officer contemplated by section 50, as he cannot be considered to be an independent officer. Hence, when the accused is informed that he will be searched in the presence of a Gazetted Officer who is a member of the raiding party, same will not amount to compliance with the provisions of section 50.”

24. In the case of *Hatibu Mungis Khamishi V/s Narcotic Cell & another*, (supra) has in paragraphs 8 and 9 observed thus:-

“8. In the present case, the appellant was asked whether he wants to be searched before a Gazetted Officer or a Magistrate and immediately P.I. Tawade told him that he himself was a Gazetted Officer. Shri Tiwari, Counsel for the appellant, has severely critilized this action on the part of P.I. Tawade and omission of the prosecution to examine him. Shri Tiwari submitted that when such an opportunity was given to the appellant to think over this so called offer, P.I. Tawade immediately informed him that he was a Gazetted Officer and therefore his opportunity of selecting the option has been polluted. This Court finds substance in his submission. The evidence adduced by the prosecution in this case spells out, that P.I. Tawade immediately uttered that he was a Gazetted Officer and immediately asked him whether he wanted to be searched before a Magistrate or a Gazetted Officer, as his substantive evidence shows. Section 50 has to be considered in this context and in the context the

judgment of the Supreme Court in matter of K. Mohanan v. State of Kerala (supra). It was to be kept in view, that in paragraphs 6 and 7 the Supreme Court has pointed out that before conducting the, if Police Officer Concerned merely asked the accused/appellant whether he was required to be produced before a Gazetted Officer or a Magistrate for the purpose of but not informing him about his right in that behalf under law, it will have to be held that mandatory requirement of section 50 has not been satisfied. The Supreme Court further observed in that judgment that "if he had been told about his right under law to have himself searched, what would have been the answer given by the accused cannot be gauged by us at this distance of time". More particularly so, when the main defence adopted by the appellant at all stages was that section 50 of the Act was not complied with. In this case what was asked to the appellant was whether he wanted to be searched before a Gazetted Officer or a Magistrate and immediately P.I. Tawade told him that he was Gazetted Officer. Is it not amounting to polluting his selection of option? Was it not misguiding him while selecting option? When the

accused is illiterate, does not know English properly, the duty of the Investigating Officer is more important and he has to act fairly and to explain the accused that he is having a right to be searched before a Magistrate of a Gazette Officer and he is to be given sufficient opportunity of thinking of it and to select whether he should be searched before a Magistrate or a Gazetted Officer or he should be searched by the raiding party itself. It is unfair to give him a suggestion which would tempt him or induce him to opt to before the Investigating Officer or the leader of raiding party who may be a Gazetted Officer. It is to be noticed in this context that the law indicates that such Gazetted Officer should be independent officer, he should not be interested in the result of success of the said raid, because in this type of cases the members of the raiding party are likely to be rewarded in terms of promotion or prizes or money. Leave it aside, such officers are likely to be rewarded by promotion or good points. Therefore, the Gazetted Officer should not be connected with the raid or should not be connected with the object of achieving the conviction against the accused.

“9. Leave it aside, in this case without giving appellant opportunity of thinking, immediately he was given a filler and he was attempted to be induced of selecting to be searched before P.I. Tawade and his colleagues. Can it be said to be compliance of section 50 in its correct spirit? The answer would be "no. It also would be unequivocally heralding a method adopted by P.I. Tawade which was not fair. What is not fair cannot be consistent with the legal provisions. At least it can be said that the concerned officer was not following procedure laid down by law while collecting evidence, which would aid himself for the purpose of achieving the conviction against accused and would be adding a feather in his cap in the nature of reward or promotion. Therefore, it cannot be said that in this case, fair means have been applied by the investigating agency before searching the person of the appellant and collecting the evidence to show that from the pocket of his pant, a polythene bag was found which was containing brown sugar or heroin diacetyl morphine.”

25. In the case of ***Ishdan Seikh V/s Union of India*** (supra), the Court has held at paragraphs 14, 15, 16 and 17 as under:-

“14. The next question which arises is whether offer made by NCB officers to the appellants that they have a right to be searched before a Magistrate or a Gazetted Officer or a Gazetted Officer, who is a member of the raiding party is in consonance with the statutory requirements of Section 50 or not.”

“15. In State of Rajasthan v. Parmanand (supra), negating the argument on behalf of the prosecution that an offer to be searched before the nearest Magistrate or Gazetted Officer or a Gazetted Officer of the raiding party is a valid compliance of Section 50 of the NDPS Act, the Court held as follows:—

“19. We also notice that PW10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before the nearest Gazetted Officer or before PW5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW5, J.S. Negi by PW10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to the Magistrate or the

nearest Gazetted Officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW5 J.S. Negi, the Superintendent who was part of the raiding party. PW5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW5 J.S. Negi, the search would have been vitiated or not. But PW10 SI Qureshi could not have given a third opinion to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such opinion would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW10 SI Qureshi is vitiated.”

“16. In the present case, the appellants were misled by the incorrect offer given to them that they could be searched by a Gazetted Officer who is a member of the raiding party. A Gazetted Officer who had proceeded to

the place of occurrence after entertaining reasonable belief that the accused persons may be carrying narcotic substance cannot be said to be an independent person before whom the law contemplates a search. In this backdrop, acceptance of the offer by the appellants to be searched before an officer who is a member of the raiding party cannot be said to be a voluntary expression of their desire to be searched before such officer. There is a clear misdirection in law in the offer given to the appellants and accordingly they were misled to agree to a search before an officer who was a member of the raiding party. By no stretch of imagination, such acknowledgement on their part can be said to be a voluntary relinquishment of the right enshrined under Section 50 of the NDPS Act.”

“17. Crux of the safeguard enshrined in Section 50 of the NDPS Act is that an accused should be made aware of his right to be brought before a Magistrate or a Gazetted Officer prior to a personal search. Such offer may be oral or in writing but the terms of the offer must be clear, unequivocal and not create confusion in the mind of an accused with regard to the lawful

requirements prior to the search in any manner whatsoever.”

26. *Ranjan Kumar Chadha Versus State of Himachal Pradesh*, (supra) has held as under:-

“41. Thereafter, the Court considered whether the failure to comply with the conditions laid down in Section 50 of the NDPS Act by the empowered or authorised officer while conducting the search affects the prosecution case, and held as under:—

“18. ... It is obvious that the legislature while keeping in view the menace of illicit drug trafficking deemed it fit to provide for corresponding safeguards to check the misuse of power thus conferred so that any harm to innocent persons is avoided and to minimise the allegations of planting or fabricating by the prosecution, Section 50 is enacted.”

42. The Court thereafter held as under:—

“20. ...When such is the importance of a right given to an accused person in custody in general, the right by way of safeguard conferred under Section 50 in the context is all the more important and valuable.

Therefore it is to be taken as an imperative requirement on the part of the officer intending to search to inform the person to be searched of his right that if he so chooses, he will be searched in the presence of a Gazetted Officer or a Magistrate. Thus the provisions of Section 50 are mandatory.”

“47. This Court in Baldev Singh (supra) further observed that the conditions prescribed in Section 50 are an obligation imposed upon the empowered officer and the same must be duly complied with before conducting any search of a person. The relevant observations are reproduced hereunder:—

“24. ... There is, thus, unanimity of judicial pronouncements to the effect that it is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has a right to require his search being conducted in the presence of a gazetted officer or a Magistrate and that the failure to inform the suspect of his right, would render the search illegal because the suspect would not be able to avail of the

protection which is inbuilt in Section 50. Similarly, if the person concerned requires, on being so informed by the empowered officer or otherwise, that his search be conducted in the presence of a gazetted officer or a Magistrate, the empowered officer is obliged to do so and failure on his part to do so would also render the search illegal and the conviction and sentence of the accused bad.”

(Emphasis supplied)

“48. This Court in Baldev Singh (supra) also explained the purpose behind the safeguards engraved under Section 50 and the reason as to why the right of the suspect to have his search conducted before a Gazetted Officer or Magistrate ought to be zealously guarded by the courts. It was held as under:—

“25. To be searched before a gazetted officer or a Magistrate, if the suspect so requires, is an extremely valuable right which the legislature has given to the person concerned having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act. It appears to

have been incorporated in the Act keeping in view the severity of the punishment. The rationale behind the provision is even otherwise manifest. The search before a gazetted officer or a Magistrate would impart much more authenticity and creditworthiness to the search and seizure proceeding. It would also verily strengthen the prosecution case. There is, thus, no justification for the empowered officer, who goes to search the person, on prior information, to effect the search, of not informing the person concerned of the existence of his right to have his search conducted before a gazetted officer or a Magistrate, so as to enable him to avail of that right. It is, however, not necessary to give the information to the person to be searched about his right in writing. It is sufficient if such information is communicated to the person concerned orally and as far as possible in the presence of some independent and respectable persons witnessing the arrest and search. The prosecution must, however, at the trial, establish that the empowered officer had conveyed

the information to the person concerned of his right of being searched in the presence of a Magistrate or a gazetted officer, at the time of the intended search. Courts have to be satisfied at the trial of the case about due compliance with the requirements provided in Section 50. No presumption under Section 54 of the Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the court, that the requirements of Section 50 were duly complied with.

“26. The safeguard or protection to be searched in the presence of a gazetted officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. We have already noticed that severe punishments have been provided under the Act for mere possession of illicit drugs and narcotic substances. Personal search, more particularly for offences under the NDPS Act, are critical means of obtaining evidence of possession and it is, therefore, necessary that the safeguards

provided in Section 50 of the Act are observed scrupulously. The duty to inform the suspect of his right to be searched in the presence of a gazetted officer or a Magistrate is a necessary sequence for enabling the person concerned to exercise that right under Section 50 because after Maneka Gandhi v. Union of India it is no longer permissible to contend that the right to personal liberty can be curtailed even temporarily, by a procedure which is not “reasonable, fair and just” and when a statute itself provides for a “just” procedure, it must be honoured. Conducting a search under Section 50, without intimating to the suspect that he has a right to be searched before a gazetted officer or a Magistrate, would be violative of the “reasonable, fair and just procedure” and the safeguard contained in Section 50 would be rendered illusory, otiose and meaningless. Procedure based on systematic and unconscionable violation of law by the officials responsible for the enforcement of law, cannot be considered to be a “fair”, just or reasonable procedure. We are not persuaded to

agree that reading into Section 50, the existence of a duty on the part of the empowered officer, to intimate to the suspect, about the existence of his right to be searched in the presence of a gazetted officer or a Magistrate, if he so requires, would place any premium on ignorance of the law. The argument loses sight of a clear distinction between ignorance of the law and ignorance of the right to a “reasonable, fair and just procedure”.

X X X

“49. As to what would be the consequences of a recovery made in violation of Section 50, it was observed in Baldev Singh (supra) that it would have the effect of rendering such incriminating material inadmissible in evidence and hence, cannot be relied upon to hold the accused guilty for being found to be in unlawful possession of any contraband. The Court further held that it would not impede the prosecution from relying upon recovery of any other incriminating article in any other independent proceedings. It was further held that the burden of proving that the conditions of

Section 50 were complied with, would lie upon the prosecution to establish.

“51. Thus, the Constitutional Bench in express terms laid down that although the non-compliance of Section 50 may not vitiate the trial yet would render the recovery of the contraband doubtful and may vitiate the conviction of the accused.

55. However, a five-Judge Bench of this Court in Vijaysinh Chandubha Jadeja v. State of Gujarat, (2011) 1 SCC 609, overruled the decisions in Prabha Shankar Dubey (supra) and Joseph Fernandez (supra) and disapproved the concept of “substantial compliance” and held that the obligation under Section 50 is mandatory and the failure to comply with the same would render the recovery of illicit article suspicious and vitiate the conviction, more particularly if the basis of conviction is the recovery of illicit article from the accused during search. The person to be searched is to be specifically informed that he has a right to be searched in presence of a Gazetted Officer or Magistrate. The Court also held that while it is the choice of police to take the

suspect either before a Gazetted Officer or Magistrate, an endeavour should be made to take him before Magistrate. The relevant observations made therein are reproduced below:—

“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 subsection (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.

“56. In Parmanand (supra) this Court held that Section 50 confers a right upon the accused to be searched either by a Gazetted Officer or Magistrate, and as such while informing the suspect of its right, only the aforesaid two options can be provided. Section 50 could be said to be violated where a third option is also offered, be it that of being searched by the superintendent of police or by the police officer himself.

“57. Although a superintendent of police is a Gazetted Officer, yet the reason why this court in Parmanand (supra) held the third option to be bad in law is because, first, in that case the Superintendent of Police was a part of the raiding party and as such was not an independent witness and secondly, as discussed, Section 50 provides for only two options, either a Magistrate or Gazetted

Officer.

“58. Thus, the person intended to be searched under Section 50 must be told in clear and unambiguous words that he has a right to have the search conducted in presence of either a Gazetted Officer or Magistrate. The person concerned must be made aware of his right and must be given only two options that have been provided under the section.

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

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

(ii) ...

(iii) Before conducting a search, it must be

communicated in clear terms though it need not be in writing and is permissible to convey orally, that the suspect has a right of being searched by a Gazetted Officer or Magistrate.

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

(v)..

(vi)...

(vii)...

(viii)...

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

(x) ...

27. In *Sardar Singh V/s State of Rajasthan, RLW 1996 (2) Raj* (supra), it has been held at paragraphs 17 to 18 as under :-

“(17). In the present case a close scrutiny of the

statement of P.W.5 search officer leads towards an irresistible conclusion that he himself has admitted that he had not made a reference in notice given to the accused under Sec. 50 of the N.D.P.S. Act Ex.D/1 indicating that he has option to be searched by a Magistrate also. Thus the omission of expression ' Magistrate' in Ex. D/L is admitted by P.W. 5 search officer himself. It is further admitted by P.W.5 in his deposition that he did not make entry in the notice Ex.D/1 to the effect that accused-appellant has option as of right to be searched by a Gazetted Officer or by a Magistrate. The statement of P.W.5 was also recorded under Sec. 161 Cr. P.C. which is marked as Ex. D/3. In his statement under Sec. 161 Cr. P.C. no explanation has been given for the omission of the aforesaid facts in the notice under Sec. 50 of N.D.P.S. Act Ex.D/Ex. Ex.P/1 search memo and Ex.P/2 seizure memo also do not indicate about the full option given by P.W.5 to the accused appellant under Sec. 50 of the N.D.P.S. Act.

“(18). From the aforesaid discussion it is crystal clear that the appellant was given only one option

to be searched in presence of a Gazetted Officer. The option to be searched in presence of Magistrate was not given to the accused-appellant. It is further evident from Ex.D/1 that the S.H.O., P.W.5 has not written in notice Ex.D/1 given to the accused-appellant under Sec. 50 of the N.D.P.S. Act that he has a statutory right to be searched by a Gazetted Officer or by a Magistrate.

“(19). For the reasons stated above in the present case the provisions of Sec.50 of the N.D.P.S. Act have not been complied with. In my considered opinion non-compliance of mandatory provisions contemplated under Sec. 50 of the N.D. P.S. Act are fatal for the prosecution.

“(22). In my considered opinion having regard to the grave consequences and the stringent provisions of the N.D.P.S. Act visiting to the accused with' severe punishment the legislature has enacted the safeguard contained under Sec. 50 of the N.D.P.S. Act which has to be followed religiously by the search officer. To obviate any doubt as to the possession of the contraband article

under the N.D.P.S. Act the accused is entitled to be searched in presence of a Gazetted Officer or a Magistrate. The provisions in this regard under Sec. 50 of the N.D.P.S. Act are mandatory and language thereof obliges an officer concerned to inform the person to be searched to the effect that he is entitled as of right about the search to be conducted in presence of a Gazetted Officer or a Magistrate.”

28. In ***Vijaysinh Chandubha Jadeja vs State of Gujrat*** (supra), in paragraphs 29 it has been observed as under:-

“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.”

29. In **Hamidkhan HussainKhan v State of Maharashtra**, (supra), has held at paragraph 6, thus:-

“6.... In Balbirsingh's case cited supra, compliance of section 50 of the Act is held to be mandatory and, therefore, strict compliance of the conditions mentioned in section 50 of the Act is necessary. It is argued on behalf of the State that P.W. 9 Sitikar was well aware of the provisions of section 50 and therefore, he has mentioned in his report Exh. 23 and in panchanama Exh. 17. It may be seen that the report i.e. F.I.R. Exh. 23 or Panchanama Exh. 17 or

Seizure Memo. Exh. 18 are not substantive pieces of evidence and the substantive piece of evidence is deposition of P.W. 9 before the Court. In his deposition, he has not mentioned about 'Magistrate'. He has also not mentioned the same fact in any of the above documents. All he has stated is 'Gazetted Officer or other officer'. A person of the status of P.S.I. is expected to interpret the language of section 50 in the correct perspective. Therefore, it is very difficult to agree that expression 'other officer' includes 'Magistrate'. In a Criminal Law, the word, 'Magistrate' assumes special significance. We, therefore, find that there is no strict compliance of section 50 of the Act. In Syed Jamirs case, cited supra, Investigating Officer, P.W. 2 Khillare had asked the accused whether he would like to give his search in presence of panchas or the Gazetted Officer and the accused declined. The facts of this case are distinguishable because there is no substantive evidence of P.W. 9 Sitikar about this requirement. In that case, non-mention of the word, 'Magistrate' was not the

matter for consideration. In Meher Mohd. Rafiqs case, it is held as under :--

“Search of accused conducted in presence of A.C.P. a Gazetted Officer, but without any option to accused to be searched before a Magistrate is a partial compliance of mandatory section 50 of N.D.P.S. Act, conviction cannot be sustained.”

In this case, Balbirsingh’s case and other cases are also relied upon. In this view of the matter, failure to give option to be searched before the Magistrate is non-compliance of section 50 of the Act and, therefore, the conviction is not sustainable. The finding of conviction recorded by the trial Judge is, therefore, liable to be quashed and set aside.

*30. In **Krishan Kumar v State of Haryana** (supra), it has been held as under :-*

“6. Taking advantage of this evidence on the record, it has been argued that provisions of sub-section (1) of Section 50 of the Act have not been complied with because the offer given to the appellant was

partial. The said contention cannot be ignored. It has substance. The Supreme Court in the case State of Punjab v. Balbir Singh, (1994) 1 RCR (Cri) 737 : (1994) 3 SCC 299 : AIR 1994 SC 1872 emphatically and categorically held that provisions of sub-section (1) of Section 50 are mandatory. In other words, offer must be given in terms of the said provisions to an accused that if he likes his person can be searched before a Gazetted Officer or a Magistrate. It is thereafter that the said person exercises his option in this regard. Admittedly, in the present case, the option given to the appellant was only confined to his right to be taken before a Gazetted Officer. No option was given that if he likes he can be taken to a Magistrate. It follows from the above said that the option given was partial. Since provisions of sub-section (1) of Section 50 are mandatory, partial option will not serve the purpose and the appellant's counsel rightly urged that prejudice is caused.

31. The Ld Addl. Public Prosecutor has relied upon the judgement of the Hon'ble Supreme Court in the case of **State**

of Rajasthan v. Ram Chandra, reported in (2005) 5 SCC 151 and has invited the attention to the following paragraphs and submitted that the search is conducted in the presence of a superior officer, in order to lend transparency and authenticity to the search.

“21. The conclusions of the High Court would have been correct if the officer proposing to effect the search is a gazetted officer and he gives option to be given under Section 50 to the person detained to be searched in his presence. In that event, the requirement of Section 50 would not be met because the officer proposing to effect the search cannot act in dual capacity; first as an officer authorised under Section 42 to search a person and second as the gazetted officer in whose presence the accused may opt to be searched.

“22. The object of the Act being that the search is conducted in the presence of a superior officer, in order to lend transparency and authenticity to the search, it cannot be held as a principle in law that if a superior officer happens to be with the officer authorised (which the High Court has described as

being a member of the raiding party) the position would be different. The High Court proceeds on the basis that there may be bias on the part of the officer because he was accompanying the officer authorised. Such a presumption is not legally available.

32. There can be no doubt about that police officer being a Gazetted Officer is qualified to witness a search in terms of section 50 of the Act, however such an officer who is part of the investigating team cannot be considered as an independent officer. To achieve the object of section 50 of the Act, which is to check the misuse of power and to eliminate the instances of false implication and planting of contrabands, it is very important that the Gazetted Officer should not be a part of the raiding team or the investigating team but should be an independent person and therefore giving of the third option to the suspect that the suspect has an option of getting searched from the Gazetted officer of the raiding team is something which should not be resorted to, as is beyond the purview of the section.

33. Thus from the analysis of the judgments referred hereinabove it is abundantly clear that the prosecution has

utterly failed to follow the mandate of section 50 of the NDPS Act. It is amply clear that the appellant was given only one option to be searched in presence of a Gazetted Officer. The option to be searched in presence of Magistrate was not given to the accused-appellant. The obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is mandatory and requires strict compliance.

34. As held in the case of ***Ranjan Chaddha*** (supra) that before conducting a search, it must be communicated in clear terms though it need not be in writing and is permissible to convey orally, that the suspect has a right of being searched by a Gazetted Officer or Magistrate. The non-compliance of mandatory provisions contemplated under Sec. 50 of the N.D.P.S. Act is fatal for the prosecution having regard to the grave consequences and the stringent provisions of the N.D.P.S. Act with severe punishment the legislature has enacted, the safeguard contained under Sec. 50 of the N.D.P.S. Act which has to be followed piously by the search officer.

35. The whole purpose of search before any Gazetted Officer or Magistrate is to obviate any doubt as to the possession of the contraband article under the N.D.P.S. Act

that the accused is entitled to be searched in presence of a Gazetted Officer or a Magistrate. The provisions in this regard under Sec. 50 of the N.D.P.S. Act are mandatory and language thereof obliges an officer concerned to inform the person to be searched to the effect that he is entitled as of right about the search to be conducted in presence of a Gazetted Officer or a Magistrate. The option of right to be searched before a “Magistrate” is conspicuously absent in the present case and a third option of search before a Gazetted Officer present at the spot is given. This in my opinion is directly in the teeth of section 50 of the N.D.P.S. Act.

36. The object of section 50 is clear. It intends, to ensure that, if so required by the accused, he/she should be taken in front of an independent and a responsible officer. This independent and responsible officer in section 50 has to be as either a Gazetted Officer or a Magistrate. Even though the raiding party is accompanied by a Gazetted Officer, such a Gazetted Officer would not be an independent or responsible officer contemplated by section 50, as he cannot be considered to be an independent officer. Hence, when the accused is informed that he will be searched in the presence of a Gazetted Officer who is a member of the raiding party, as

stated above, the same will not amount to compliance with the provisions of section 50. While informing the right, only two options of either being searched in presence of a Gazetted Officer or Magistrate must be given, who also must be independent and in no way connected to the raiding party. The decision making capacity of the accused should not get influenced. The Accused must be given a clear and flawless option that he has a right to be searched before a nearest Gazetted Officer or a Magistrate, any third option will be contravening and compromising the validity and sanctity of the provision. What has been done in the present case is that in the first place no option of right to be searched before a Magistrate has been given and to further damage or cause dent to the appraisal, the Appellant was also informed in clear terms that the Gazetted Officer SDPO Quepem was also present at the spot and that he has a right to be searched in his presence, thereby polluting his selection of option.

37. A serious note needs to be taken of this issue. It appears that the officers conducting such searches were themselves not aware of the requirements of law and what was expected of them to communicate to the suspect.

38. The trial court has not properly appreciated the import

of section 50 of the Act. The trial court has completely misdirected itself in reaching to a conclusion about compliance of section 50 of the Act, even when it was writ large on the face of it that the officer conducting the search has not given the option of “search before a Magistrate” as is mandated by section 50 of the Act. Further it is obscure as to what the trial court wanted to arrive at when the trial court observes that PW 9 though has not taken the accused before the Gazetted Officer or the Magistrate, however the Dy. SP had come along with the raiding party members separately in his official vehicle who is a Gazetted Officer and the Dy SP did not participate in raid, but was introduced to the accused as a Gazetted Officer who was present in order to conduct the search only and hence it cannot be said that there is non-compliance , merely because the accused was not taken before a Gazetted Officer. Such an interpretation in my opinion does not stand to the scrutiny of section 50 of the Act.

39. This Court has not dilated upon other grounds which were raised by the Appellant, as on this count alone the conviction deserves to be set aside.

40. In the result, the following order:-

(i) The Appeal is allowed.

(ii) The impugned judgment and order dated 16.11.2024 passed by the Addl. Sessions Judge, South Goa at Margao in Case No. NDPS/6/2019 convicting and sentencing the Appellant is quashed and set aside.

(iii) Consequently, the Appellant is acquitted of all the charges.

(iv) The Appellant who is in custody shall be released forthwith, unless required in any other case.

(v) Before being released, the Appellant shall execute P. R. Bond in the sum of Rs. 50,000/- (Rupees Fifty thousand only) under Section 481 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (Corresponding to Section 437A of the Cr.P.C.) for his appearance, in the event an appeal is preferred against the acquittal.

41. Appeal stands disposed of accordingly. Pending Applications, if any, stand disposed of.

SHREERAM V SHIRSAT, J.