
Devendra Karki Vs State of Sikkim

Criminal Appeal No. 26 of 2014

Court: Sikkim High Court

Date of Decision: May 13, 2015

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 41, 42, 44, 50, 52

Hon'ble Judges: Meenakshi Madan Rai, J

Bench: Single Bench

Advocate: Tsewang Namgyal, for the Appellant; Santosh Kumar Chettri, Assistant Public Prosecutor and Prathana Ghataney, Advocates for the Respondent

Judgement

Meenakshi Madan Rai, J.

By filing this Appeal, the Appellant seeks to assail the Judgment and Order of Sentence dated 30.07.2014

passed by the Learned Court of Special Judge (SADA), South Sikkim at Namchi in S.T. (SADA) Case No. 04 of 2014. Vide the said Judgment,

the Appellant was sentenced to undergo simple imprisonment for a period of two years and to pay a fine of Rs. 2,00,000/- (Rupees Two lacs)

only, under Section 9(d) of the SADA, 2006 with a default clause of imprisonment of 6(six) months. He was also sentenced to undergo simple

imprisonment for a period of 6 (six) months with a fine of Rs. 20,000/- (Rupees twenty thousand) only, under Rule 17(1) of the Sikkim Anti Drugs

Rules, 2007 read with Section 14 of the Sikkim Anti Drugs Act, 2006 (hereinafter SADA 2006) with a default stipulation.

2. The facts as placed before the Learned Trial Court, briefly adumbrated are that the Appellant on 20.02.2014 went to Siliguri (West Bengal)

from Geyzing, West Sikkim in vehicle bearing No. SK-02J-0957. At Siliguri, he purchased controlled substances comprising of various quantities

of cough syrup of different brands, Spasmo-proxyvon capsules and Nitrosun (N-10) tablets and returned to Geyzing the same evening. At around

2200 hours, on reaching Melli Checkpost, he was detained by the Complainant (P.W. - 2) on suspicion that he was carrying controlled substances

and the matter was reported to the Station House Officer (SHO), Melli Police Station.

3. That, the option to be searched before a Magistrate, a Gazetted Officer or a Police Officer was afforded to the Appellant who opted to be

searched by any police officer. Consequently, a search was conducted by P.W. - 6 (I.O.) in the presence of two independent witnesses on which

the controlled substances described supra were recovered.

4. The controlled substances were seized vide Exhibit 3, samples separated, sealed and forwarded to the RFSL, Saramsa, East Sikkim for

Chemical Analysis and Report. MO-II to MO-VII were identified by P.W. - 6 to be the remaining controlled substances. Thereafter, on

completion of investigation, Charge Sheet was submitted against the Appellant under Section 9(b)/14 of SADA, 2006 and on receipt of RFSL

Report, supplementary Charge Sheet was also submitted.

5. The Learned Trial Court after hearing the Prosecution and the Defence, proceeded to frame charges against the Appellant under Section 9(d) of

SADA 2006 and Rule 17(1) of the Sikkim Anti Drugs Rules, 2007 read with Section 14 of the SADA, 2006.

6. Prosecution evidence comprising of six witnesses was recorded and the Learned Trial Court on consideration of the evidence on record and

placing reliance thereof found the Appellant guilty of the offences and convicted and sentenced him as reflected above. Hence, this Appeal.

7. The Learned Counsel for the Appellant raised the arguments that the Learned Trial Court erred in not appreciating the evidence of P.W. - 2 and

P.W. - 3, besides concluding that the evidence of P.W. - 4 and P.W. - 6 are convincing with regard to the place of seizure of the controlled

substances. That the Learned Trial Court also did not consider the fact that although P.W. - 2 and P.W. - 3 had stated that they took the

Appellant to the O.C. Melli Police Station, but none of the Prosecution witnesses have stated as to who brought the Appellant back from Melli

Police Station to Melli Checkpost for search, seizure and arrest. That, consideration was not taken of the fact that the mandatory provisions of

Section 24(3) and Section 30 of SADA 2006 were not complied with which ought to have resulted in the acquittal of the Appellant. It was further

contended that the Learned Trial Court did not consider the fact that neither the seized articles were in huge quantity nor was the vehicle in which

the accused travelling seized and hence the provisions of Section 9(d) of SADA, 2006 could not be attracted.

8. Learned Counsel for the Appellant, urging his prayer for acquittal before this Court has placed reliance on *Yasihey Yobi and Anr. vs. The*

Department of Customs, Shillong : AIR 2014 1 SCALE 39. He has drawn the attention of this Court to Para 10 of the decision wherein it was

inter alia held that the position in law with regard to Section 50 of the NDPS Act has been settled by the Constitution Bench in the case of *State of*

Punjab Vs. Baldev Singh, etc. etc., AIR 1999 SC 2378 : (1999) CriLJ 3672 : (1999) 157 CTR 3 : (1999) 65 ECC 695 : (1999) ECR 545 :

(1999) 81 FLR 303 : (1999) 4 JT 595 : (1999) 1 LLJ 254 : (1994) 4 SCALE 144 : (1999) AIRSCW 2494 : (1999) 6 Supreme 159 and in

Megh Singh Vs. State of Punjab, AIR 2003 SC 3184 : (2003) CriLJ 4329 : (2003) 89 ECC 709 : (2003) 1 JT 257 Supp : (2003) 7 SCALE

483 : (2003) 8 SCC 666 : (2003) 3 SCR 720 Supp : (2003) 2 UJ 1532 : (2003) AIRSCW 4536 : (2003) 6 Supreme 832 . That, application of

Section 50 (NDPS Act, 1985) is undoubtedly only in case of search of a person as contrasted to search of premises, vehicle or articles, but where

the line of separation is thin and fine between search of a person and an artificial object the test of ""inextricable connection"" is to be applied and

then conclusion is to be arrived at as to whether the search was that of a person or not. That, the Learned Trial Court failed to appreciate the ratio

as laid down in Gurjant Singh @ Janta Vs. State of Punjab, (2013) 12 AD 64 : (2014) 2 CCR 510 : (2014) 1 JT 257 : (2013) 4 RCR(Criminal)

874 : (2013) 13 SCALE 295 : (2014) 2 SCJ 418 .

9. That, the Learned Trial Court also imposed excess penalty for the offences under the provisions of Law under which the Appellant was booked

and passed the impugned Judgment without application of a judicious mind. Hence, the Judgment and Order of Sentence be set aside.

10. Mr. S.K. Chettri, Assistant Public Prosecutor for the State, per contra in his submissions contended that there was no illegality in the Judgment

of the Learned Trial Court in convicting the Appellant or on the imposition of Sentence, therefore both call for no interference.

11. The question that arises for determination before this Court is whether the Learned Trial Court correctly appreciated the relevant provisions of

law and evidence furnished by the Prosecution and whether the sentence imposed on the Appellant is correct.

12. I have carefully considered the respective submissions put forth and given careful and anxious consideration to the same. I have also perused

the impugned Judgment, the Order of Sentence, the evidence furnished by the Prosecution before the Learned Trial Court and all relevant

documents.

13. Placing the Sections of NDPS Act, 1985 and SADA, 2006 in juxtaposition, it is evident that Section 21 of the SADA, 2006 which deals with

the power of entry, search, seizure and arrest without warrant or authorization, is similar to the provisions of Section 42 of the NDPS Act.

Similarly, the provisions of Section 24 of the SADA, 2006 pertaining to conditions under which search and seizure of persons can be conducted

are on the same lines as Section 50 of the NDPS Act 1985 and Section 30 of the SADA 2006 is akin to Section 57 of the NDPS Act 1985. The

similarities are being highlighted to understand the legal perspective.

14. With regard to the application of Section 50 of the NDPS Act, 1985 (and as a corollary Section 24 of the SADA 2006), it would be

worthwhile to refer to the Judgment of the Hon"ble Apex Court in State of Punjab Vs. Balbir Singh, AIR 1994 SC 1872 : (1994) CriLJ 3702 :

(1994) 1 Crimes 753 : (1994) 70 ELT 481 : (1994) 2 JT 108 : (1994) 1 SCALE 793 : (1994) 3 SCC 299 : (1994) 2 SCR 208 . The Hon"ble

Apex Court while discussing the relevance of non compliance or failure to comply with the provisions of the NDPS Act, 1985 held in Paragraph

25 inter alia as follows:-

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

follows:-

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in

the normal course of investigation into an offence or suspected offences as provided under the provisions of Cr.P.C. and when such search is

completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder

would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer,

who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act.

If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other

provisions of the NDPS Act.....

15. The foregoing paragraph clarifies the position that where there is chance recovery the provision of Section 50 of the NDPS Act, 1985 would

not apply. That, however, from the stage of such recovery, if made by a police officer who is not empowered to conduct search and seizure under

the NDPS Act, 1985 he is required to inform the officer who is empowered to conduct such acts. The said officer is then required to proceed in

accordance with the provisions of the NDPS Act. Should the chance recovery however be made by an empowered officer, then from that stage

i.e. the stage of recovery, he should carry out his investigation in accordance with the other provisions of the NDPS Act.

16. In State of Punjab Vs. Baldev Singh, etc. etc., AIR 1999 SC 2378 : (1999) CriLJ 3672 : (1999) 157 CTR 3 : (1999) 65 ECC 695 : (1999)

ECR 545 : (1999) 81 FLR 303 : (1999) 4 JT 595 : (1999) 1 LLJ 254 : (1994) 4 SCALE 144 : (1999) AIRSCW 2494 : (1999) 6 Supreme 159

, the Hon"ble Apex Court discussed the ambit and scope of Section 50 of the NDPS Act and it was inter alia held that-

11. Section 50 of the Act prescribes the conditions under which search of a person shall be conducted. Sub-section (1) provides that when the

empowered officer is about to search any suspected person, he shall, if the person to be searched so requires, take him to the nearest gazetted

officer or the Magistrate for the purpose. Under sub-section (2) it is laid down that if such request is made by the suspected person, the officer

who is to take the search, may detain the suspect until he can be brought before such gazetted officer or the Magistrate. Sub-section (3) lays down

that when the person to be searched is brought before such a gazetted officer or the Magistrate and such gazetted officer or the Magistrate finds

that there are no reasonable grounds for search, he shall forthwith discharge the person to be searched, otherwise he shall direct that the search be

made.

12. On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises

etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest

of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under

the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted"".

17. The Hon"ble Supreme Court in Baldev Singh"s case (supra) discussed the decisions of the same Court in State of Punjab Vs. Balbir Singh,

AIR 1994 SC 1872 : (1994) CriLJ 3702 : (1994) 1 Crimes 753 : (1994) 70 ELT 481 : (1994) 2 JT 108 : (1994) 1 SCALE 793 : (1994) 3 SCC

299 : (1994) 2 SCR 208 , Ali Mustaffa Abdul Rahman Moosa Vs. State of Kerala, AIR 1995 SC 244 : (1994) 3 Crimes 456 : (1994) 6 JT 326 :

(1994) 4 SCALE 328 : (1994) 6 SCC 569 : (1994) 4 SCR 52 Supp : (1995) 1 UJ 85 , Saiyad Mohd. Saiyad Umar Saiyad and Others Vs.

State of Gujarat, (1995) CriLJ 2662 : (1995) 2 Crimes 182 : (1995) 50 ECC 117 : (1995) 78 ELT 649 : (1995) 3 JT 489 : (1995) 2 SCALE

576 : (1995) 3 SCC 610 : (1995) 3 SCR 117 : (1992) 85 STC 1 wherein it was laid down that failure to observe the safeguards while conducting

search and seizure as provided by Section 50 would render the conviction and sentence of an accused illegal. It was pointed out that in Saiyad

Mohd. (supra) a three Judge Bench upheld the view taken in Balbir Singh"s case on the point of duty of the empowered officer to inform the

suspect about his right to be searched before the gazetted officer or a Magistrate. In the relevant portion of the Judgment, it was held as follows:-

8. We are unable to share the High Court"s view that in cases under the NDPS Act it is the duty of the court to raise a presumption, when the

officer concerned has not deposed that he had followed the procedure mandated by Section 50, that he had in fact done so. When the officer

concerned has not deposed that he had followed the procedure mandated by Section 50, the court is duty-bound to conclude that the accused had

not had the benefit of the protection that Section 50 affords; that, therefore, his possession of articles which are illicit under the NDPS Act is not

established; that the precondition for his having satisfactorily accounted for such possession has not been met; and to acquit the accused.

18. In the case of State of Himachal Pradesh Vs. Shri Pirthi Chand and another, (1996) 1 AD 323 : AIR 1996 SC 977 : AIR 1995 SC 977 :

(1996) CriLJ 1354 : (1996) 53 ECC 115 : (1995) 9 JT 411 : (1996) 1 SCALE 48 : (1996) 2 SCC 37 : (1995) 6 SCR 29 Supp the Bench

agreed with the view in Balbir Singh's case regarding the duty to inform the suspect of his right as emanating from Section 50 of the NDPS Act

inter alia opining that-

Compliance of the safeguards in Section 50 is mandatory obliging the officer concerned to inform the person to be searched of his right to demand

that search could be conducted in the presence of a gazetted officer or a Magistrate. The possession of illicit articles has to be satisfactorily

established before the court. The officer who conducts search must state in his evidence that he had informed the accused of his right to demand,

while he is searched, in the presence of a gazetted officer or a Magistrate and that the accused had not chosen to so demand. If no evidence to that

effect is given, the court must presume that the person searched was not informed of the protection the law gives him and must find that possession

of illicit articles was not established. The presumption under Article 114 Illustration (e) of the Evidence Act, that the official duty was properly

performed, therefore, does not apply.

19. In State of Punjab Vs. Labh Singh, (1996) 5 AD 595 : (1996) CriLJ 3996 : (1996) 3 Crimes 74 : (1997) 57 ECC 67 : (1996) 6 JT 598 :

(1996) 5 SCALE 366 : (1996) 5 SCC 520 : (1996) 3 SCR 760 Supp it was held that the accused has been provided with a protection of being

informed of his right to be searched in the presence of a gazetted officer or a Magistrate and failure to give an opportunity to the person concerned

to avail of the protection would render the Prosecution case unsustainable.

20. In State of Punjab Vs. Jasbir Singh and Others, (1995) 4 Crimes 765 : (1996) 54 ECC 79 : (1995) 9 JT 308 : (1995) 6 SCALE 740 :

(1996) 1 SCC 288 : (1995) 5 SCR 742 Supp the relevant portion of the Judgment on the same point of law reads as follows-

.....Protection given by Section 50 is a valuable right to the offender and compliance thereof intended to be mandatory. In case the police

officers had prior knowledge that illegal transport of the contraband is in movement and persons are in unlawful possession and intends to intercept

it, conduct search and consequentially to seize the contraband, they are required to inform the offender that he has the right that the search will be

conducted in the presence of a gazetted officer or a Magistrate.....

21. In Ali Mustaffa Abdul Rahman Moosa (supra) it was found that the appellant was not given the option of being searched in the presence of a

gazetted officer or a Magistrate as envisaged under Section 50 of the NDPS Act. The Hon"ble Apex Court opined that to enable the person

concerned to ""require"" that his search be carried out in the presence of a gazetted officer or a Magistrate, it is obligatory on the part of the

empowered officer to inform the person concerned that he has the right to ""require"" his search to be conducted in the presence of a gazetted officer

or a Magistrate.

22. The case of Mohinder Kumar Vs. The State, Panaji, Goa, AIR 1995 SC 1157 : (1995) CriLJ 2074 : (1998) 8 SCC 655 may also be usefully

referred to wherein the Court opined that in the facts and circumstances of the case when the investigating officer accidentally stumbled upon the

offending articles but was himself not the empowered officer, on coming to learn that the accused persons were in possession of illicit articles, from

that stage onwards, he was under an obligation to proceed further in the matter only in accordance with the provisions of the Act.

23. Thus, from all of the above cited decisions, it is evident the ratiocination of Balbir Singh's case has not been departed from in various decisions

of the Hon^{ble} Apex Court.

24. It would be relevant in this context to point that the Hon^{ble} Apex Court in Baldev Singh's case held as follows-

28. This Court cannot overlook the context in which the NDPS Act operates and particularly the factor of widespread illiteracy among persons

subject to investigation for drug offences. It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the

safeguards provided in a statute are scrupulously followed. We are not able to find any reason as to why the empowered officer should shirk from

affording a real opportunity to the suspect, by intimating to him that he has a right ""that if he requires"" to be searched in the presence of a gazetted

officer or a Magistrate, he shall be searched only in that manner. As already observed the compliance with the procedural safeguards contained in

Section 50 are intended to serve a dual purpose - to protect a person against false accusation and frivolous charges as also to lend creditability to

the search and seizure conducted by the empowered officer. The argument that keeping in view the growing drug menace, an insistence on

compliance with all the safeguards contained in Section 50 may result in more acquittals does not appeal to us. If the empowered officer fails to

comply with the requirements of Section 50 and an order or acquittal is recorded on that ground, the prosecution must thank itself for its lapses.

Indeed in every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the

disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the

investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionable compromising

the administration of justice. That cannot be permitted.

(emphasis supplied)

25. In the same case, the Court has drawn attention to the decision of the Supreme Court of the United States of America in Miranda vs. Arizona :

16 L Ed 2d 694 (1966) and extracted the relevant portion thereafter being relevant for Baldev Singh's case-

The Latin maxim *salus populi suprema lex* (the safety of the people is the supreme law) and *salus reipublicae suprema lex* (safety of the State is

supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of

the community. The action of the State, however, must be "right, just and fair.

(emphasis supplied)

The Court therefore sought to emphasise that the rights of an accused are precious and the Investigating Agency is required to abide by the

prescribed procedure of law.

26. In the same case, although no opinion was expressed as to whether the provisions of Section 50 of the NDPS Act, 1985 were mandatory or

not but it was held that the provisions implicitly make it imperative and obligatory and cast a duty on the investigating officer (empowered officer)

to ensure that search of the person (suspect) concerned is conducted in the manner prescribed by Section 50 of the NDPS Act, 1985, by

intimating to the person concerned about the existence of his right, that if he so requires, he shall be searched before the gazetted officer or a

Magistrate and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate would cause prejudice to the accused and

render the recovery of the illicit article suspect and vitiate the conviction and sentence of the accused. That, the omission may not vitiate the trial as

such, but because of the inherent prejudice which would be caused to an accused by the omission to be informed of the existence of his right, it

would render his conviction and sentence unsustainable.

27. The above discussions have set the tone and tenor with regard to the provisions of Section 50 of the NDPS Act and the provisions of Section

24 of the SADA 2006 being almost identical, it goes without saying that the same principles of law would apply.

28. While dealing with the aspect of search of a person or his belongings, the Hon"ble Supreme Court in Rajendra and Another Vs. State of

Madhya Pradesh, (2004) 91 ECC 1 : (2003) 10 JT 349 : (2003) 10 SCALE 75 : (2004) 1 SCC 432 : (2003) 6 SCR 986 Supp : (2004) 1 UJ

754 . held that-

13. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a

container or a bag or premises. (See Kalema Tumba v. State of Maharashtra, Baldev Singh case and Gurbax Singh v. State of Haryana). The

language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles.

This position was settled beyond doubt by the Constitution Bench in Baldev Singh case. Above being the position, the contention regarding non

compliance with Section 50 of the Act is also without any substance.

29. In Namdi Francis Nwazor Vs. Union of India (UOI) and Another, (1998) 8 SCC 534 the Hon"ble Apex Court held that:-

3. On a plain reading of sub-section (1) of Section 50, it is obvious that it applies to cases of search of any person and not search of any article in

the sense that the article is at a distant place from where the offender is actually searched. This position becomes clear when we refer to sub-

section (4) of Section 50 which in terms says that no female shall be searched by anyone excepting a female. This would, in effect, mean that when

the person of the accused is being searched, the law requires that if that person happens to be a female, the search shall be carried out only by a

female. Such a restriction would not be necessary for searching the goods of a female which are lying at a distant place at the time of search. It is

another matter that the said article is brought from the place where it is lying to the place where the search takes place but that cannot alter the

position in law that the said article was not being carried by the accused on his or her person when apprehended. We must hasten to clarify that if

that person is carrying a handbag or the like and the incriminating article is found therefrom, it would still be a search of the person of the accused

requiring compliance with Section 50 of the Act. However, when an article is lying elsewhere and is not on the person of the accused and is

brought to a place where the accused is found, and on search, incriminating articles are found therefrom it cannot attract the requirements of

Section 50 of the Act for the simple reason that it was not found on the accused person. So, on the facts of this case, it is difficult to hold that

Section 50 stood attracted and noncompliance with that provision was fatal to the prosecution case.

30. In the case of Yasihey Yobin (supra) the Hon"ble Apex Court relying on the decision of Namdi Francis Nwazor (supra) held that-

.....But in cases where the line of separation is thin and fine between search of a person and an artificial object, the test of inextricable connection

is to be applied and then conclusion is to be reached as to whether the search was that of a person or not. The above test has been noticed in the

case of Namdi Francis Nwazor Vs. Union of India (UOI) and Another, (1998) 8 SCC 534 , wherein it is held that if the search is of a bag which

is inextricably connected with the person, Section 50 of the Act will apply, and if it is not so connected, the provisions will not apply. It is when an

article is lying elsewhere and is not on the person of the accused and is brought to a place where the accused is found, and on search, incriminating

articles are found therefrom it cannot attract the requirements of Section 50 of the Act for the simple reason that the bag was not found on the

accused person.....

31. Thus, these decisions lay down that provisions of Section 50 of the NDPS Act (and consequently of Section 24(3) of the SADA 2006) would

apply only if there is an inextricable connection between the bag and the person, in other words the person has to be found carrying the bag

containing the incriminating articles, if the provisions of Section 50 of NDPS Act are to be applied.

32. Learned Counsel for the State pointed out that since the search by the I.O. was of the bag of the Appellant and not his person, the provisions

of Section 24 of the SADA, 2006 were not required to be complied with.

33. In rebuttal, the Learned Counsel for the Appellant has placed reliance to the decision of the Hon^{ble} Apex Court in Yasihey Yobin (supra)

which has already been discussed herein above.

34. In the backdrop of all the above cases, reverting to the facts of the case at hand, it is evident that the vehicle in which the accused was

travelling was detained for routine checking by P.W. - 2. Thereafter, P.W. - 2 lodged Exhibit-2 before the SHO, Melli Police Station. It is also

evident that P.W. - 2 had no prior information that the Appellant was in possession of controlled substances and it was merely on suspicion that

the vehicle was detained and search and seizure carried out. The evidence of P.W. - 2 is to the effect that ""as he seemed suspicious we took him

to the Officer-in-charge (O/C) of the Melli Police Station with the bag and handed him over to the O/C"". P.W. - 3 has supported the evidence of

P.W. - 2 to the extent that the Appellant had a bag with him and on suspicion they took him to the Officer-in-charge (O/C) of the Melli Police

Station and handed him over to the O/C. P.W. - 6 (I.O.) on her part has said that ""during my investigation, I proceeded to the Checkpost where

accused had been apprehended along with his bag. When the bag was checked in the presence of witnesses Raju Tamang and Garja Man Rai

(whose presence had been secured). I recovered three Corex cough syrup bottles (100 ml each), 1 R-COF cough syrup (100 ml) and one

Lupicof Cough Syrup (100 ml) from his bag....."".

35. Having said that, I deem it necessary to point out that once the I.O. as well as P.W. - 2 and P.W. - 3 suspected that the Appellant was in

possession of controlled substances and P.W. - 2 and P.W. - 3 took the Appellant to the Melli Police Station admittedly some distance away from

the Melli Checkpost, where the vehicle was detained, the I.O. ought to have given the Appellant the option as required under Section 24 of the

SADA, 2006. In this context, Judgment of Gurjant Singh's case supra would be relevant, wherein it was held that-

.....The most crucial aspect of the case was that P.W. 6 noticed three gunny bags lying in the tractor of the appellant and felt that some

incriminating substance was kept in those gunny bags. P.W. 6, therefore, took the view that before effecting search of the gunny bags, the necessity

of affording an opportunity to the appellant to conduct the search in the presence of a Gazetted officer or a Magistrate was imperative. In other

words, after noticing three gunny bags, P.W. 6, as an investigating officer, felt the need to invoke the provisions of Section 50 and thereby provide

an opportunity to the appellant for holding any search in the presence of a Gazetted officer or a Magistrate. When once P.W. 6 could assimilate

the said legal requirement as stipulated under Section 50 of the NDPS Act, we fail to understand as to how principle No. 1 in paragraph 25 of the

decision reported in Balbir Singh (supra) could be applied. Unfortunately, the trial Court failed to understand the said principle set out in Balbir

Singh (supra) in the proper perspective while holding that neither Section 42 nor Section 50 was attracted to the facts of this case.....

36. The I.O. on cross examination had admitted that she had given an option to the accused though according to her, she was simply checking his

bag. The option given to him, was to have his bag searched either by a Magistrate or a Gazetted officer. According to the I.O. ""He, however, told

us that he was fine with me checking his bag. I may mention here that the search was conducted during odd time i.e. at around midnight"". This

clearly indicates that the I.O. had assimilated that she had to comply with the provision of Section 24 of the SADA 2006 similar to Gurjant Singh's

case. The evidence however establishes that the option was given only by way of extending an empty formality with no intention of carrying out the

letter of the law. P.W. - 6, infact is not a gazetted officer herself. Once she was aware that the option had to be extended to the appellant, she

ought to have taken steps towards fulfilling the same, which as apparent, she failed to. The late hours of the search cannot be said to be a mitigating

circumstance.

37. The argument that the search was of the bag and not of the person therefore Section 24 of the SADA 2006 does not apply, does not hold

water in view of the principle of inextricable connection laid down in Rajendra Prasad's and Nwazor's case. The evidence of P.W. - 2, P.W. - 3

and P.W. - 4 throw light on the fact that the accused was in possession of a bag and was carrying it. Hence, the provisions of Section 24 of the

SADA 2006 clearly apply to the facts of the case.

38. The Learned Trial Court has thus erred in opining that ""Since it was the bag of the accused which was being checked, P.W. - 6 was not

mandated to give any such option to the accused.

39. The ratio and import of the decision of the Hon'ble Apex Court in Gurjant Singh's case appears not to have been correctly appreciated by the

Learned Trial Court, since it appears to be under the impression that the conveyance (tractor) of the accused was being searched, when the

Judgment clearly lays down that the tractor trolley was stopped and P.W. - 6 informed the appellant that he intended to search the gunny bags, as

he suspected some incriminating article in the gunny bags. Contrary to what has been held by the Learned Trial Court, the circumstances of that

case apply to the circumstances in the instant case and the relevant paragraph has already been extracted hereinabove for perusal. The Learned

Defense Counsel relying in Gurjant Singh's case has sought to point out before the Learned Trial Court that after the I.O. became aware that the

option of being searched before the gazetted officer or a Magistrate was to be extended to the accused, instead of complying with it she failed to

do so, as is in Gurjant Singh's case.

40. With regard to non-compliance to Section 30 of SADA 2006, as agitated by the Learned Counsel for the Appellant, the Learned Trial Court

in the impugned Judgment has held that Section 30 of the SADA 2006 which is akin to Section 57 of the NDPS Act cannot be regarded as

mandatory as held by the Hon"ble Apex Court in Sajan Abraham, Appellant vs. State of Kerala (2006). In the above matter, relying on the

Judgment of Balbir Singh's case it was held that the provisions of Section 52 and 57, which deal with the steps to be taken by the officers after

making arrest or seizure under Section 41 to 44 or by themselves are not mandatory. Hence, on this account there is no infirmity in the impugned

Judgment.

41. The arguments put forth by Learned Counsel for the Appellant with regard to non-compliance of the provisions of Section 9(d) of the SADA

2006, as the vehicle was not seized appears to be untenable. The spirit behind the provision would be to prevent future transportation of controlled

substances in the vehicle belonging to the accused but when the accused is not the owner of the vehicle neither has he hired the same by reserving

it, seizing the vehicle would bear no fruit. It was a public transportation and infact non-seizure of the vehicle would probably prejudice the

Prosecution case and not the accused. Having said that, there is no necessity of entering into a protracted discussion on this point, in view of the

fact that the provisions of Section 24 of SADA 2006 have not been complied with as already discussed.

42. Dealing with the anomaly regarding place of search and seizure, P.W. - 2 and P.W. - 3 have stated that they took him to the Officer-in-

Charge, Melli Police Station and handed him over to the O.C. there, but P.W. - 6 (I.O.) has said that she proceeded to Melli Checkpost where

the accused had been apprehended and carried out the search and seizure there. Thus, there is evidently a missing link in the Prosecution case with

regard to the accused having been taken to the Melli Police Station by P.W. - 2 and P.W. - 3 with no evidence whatsoever to suggest as to who

had brought him back to the Melli Checkpost. Paragraph 21 of the impugned Judgment skirts the issue and there is no reasonable explanation as

to how the Learned Trial Court concluded that the search and seizure was done at Melli Checkpost.

43. Hence, in view of the discussions hereinabove, I am of the considered opinion that the Appellant is entitled to and is accordingly acquitted of

the charges under which he was booked.

44. Appellant be set at liberty forthwith.

45. Fine, if any, deposited by the Appellant in terms of the Order of Sentence be returned to him.

46. Records of the Learned Trial Court be remitted.