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Bajrangi Singh Vs. State of Assam

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Court : Guwahati

Decided On : Apr-11-1996

Judge : B.N. Singh Neelam, J.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 2, 8, 8(C), 18, 36(B), 41, 42, 43, 50 and 52; Evidence Act - Sections 24; Code of Criminal Procedure (CrPC) - Sections 313 and 374(2)

Appeal No. : Criminal Appeal No. 35 of 1994

Appellant : Bajrangi Singh

Respondent : State of Assam

Advocate for Def. : K. Deka, Public Prosecutor

Advocate for Pet/Ap. : A.K. Bhattacharyya, P. Pathak, A.K. Sharma, N.K. Singh, S. Kataki, A.J. Das, B. Chakravarty and M. Kamki, Advs.

Disposition : Appeal allowed

Prior history : B.N. Singh Neelam, J. 1. The sole accused-appellant Bajrangi Singh preferred this appeal Under Section 374 Cr. P.C. read with Section 36(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 against the judgment of conviction and sentence dated 23-2-94 passed by the learned Special Judge, Cachar, Silchar in Special Case No. 13(A)/1991 convicting the sole accused-appellant named above Under Section 18 read with Section 8(e) of the N.D.P.S.

Act, 1985 and sentencing him to undergo RI for

Judgement :

B.N. Singh Neelam, J.

1. The sole accused-appellant Bajrangi Singh preferred this appeal Under Section 374 Cr. P.C. read with Section 36(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 against the judgment of conviction and sentence dated 23-2-94 passed by the learned Special Judge, Cachar, Silchar in Special Case No. 13(A)/1991 convicting the sole accused-appellant named above Under Section 18 read with Section 8(e) of the N.D.P.S. Act, 1985 and sentencing him to undergo RI for 10 years and also to pay a fine of Rs. 1,00,000/- in default to suffer RI for further period of 5 years.

2. This will not be out of place to mention that this Criminal Appeal was disposed of by this Court on 15-6-95 looking into the material so available on record in absence of the appellant's lawyer because no one represented the appellant for last two consecutive dates as a result of which the matter was taken up, the learned Public Prosecutor was heard and the appeal was dismissed. Against the said order of dismissal dated 15-6-95 the appellant preferred Criminal Appeal No. 1606/95 and the Apex Court vide its order dated 4-12-95 set aside the judgment dated 15-6-95 passed by this Court in this appeal and desired that the High Court should hear the said appeal afresh giving opportunity to the appellant to appear through lawyer of his choice in order to expedite the hearing of the appeal with a further direction that the counsel for the appellant should appear before this Court on 8-1-96 fixing up a date for the hearing. In pursuance of the order so passed by the Apex Court, the learned counsel for the appellant Mr. A.K. Bhattacharyya appeared and made a prayer for fresh hearing of the matter in the background of the aforesaid order of the Apex Court and in consequence thereof this appeal is heard afresh. The appellant is represented by his learned counsel Mr. A. K. Bhattacharyya whereas the State of Assam-respondent is represented by Mrs. K. Deka, the learned Public Prosecutor. Both the sides lawyers are heard at length.

3. On behalf of the appellant, his leaened counsel Mr. A.K. Bhattacharyya submitted that there are sufficient grounds warranting interference of the impugned judgment of conviction and sentence so passed which are also indicated broadly in the memo of appeal so preferred. Firstly, it is pointed out that at the time of the search so conducted the provisions of Section 50 of the NDPS Act was not strictly observed which was mandatory and non-compliance of which has vitiated the whole trial and thus only on this count, the accused-appellant is entitled to be acquitted.

4. Elaborating his this first point so raised, Mr. Bhattacharyya, the learned counsel gave the short history of the prosecution case contending that as per the prosecution case after obtaining search order from the authorised officer, the Inspector of Customs and Central Excise made a search of the premises of the accused-appellant on 6-2-91 at 12.30 PM and seized from the cow-shed situated in the premises of the accused-appellant 360 Grains of contraband opium with a weighing-scale wrapped in a paper when the seizure-list is said to have been prepared in presence of two witnesses and the accused-appellant was also arrested. Because of the accused-appellant alleged to have been contravening certain provisions of the NDPS Act particularly so contained Under Section 8(C) of the Act he is liable to be punished U Section 18 of the aforesaid Act, prosecution was launched against the accused-appellant and in course of trial 7 of the prosecution witnesses were so examined and the learned trial Court, i.e., the Special Judge in Special Case No. 13(A)/91 came to the conclusion of the prosecution establishing the guilt of the accused-appellant. Hence he was so convicted and sentenced as detailed above. In this background Mr. Bhattacharyya first of all by attacking the impugned judgment of conviction submitted that unless the person to be searched is informed about his right guaranteed Under Section 50 of the NDPS Act, on no account it can be said that the provisions so contained in the said section is complied with which is mandatory in nature. The designated officer in an offence said to have been committed under NDPS Act is thus bound to inform the person to whom he is about to search of his such right to be opted by him to be searched by the Gazetted Officer of any department or before the nearest Magistrate available and if this extremely valuable right of the person concerned is infringed that will make the whole trial vitiated and this valuable right

is so guaranteed under the provisions of Section 50 of the NDPS Act keeping in view the severity of the sentence. The onus is naturally on the prosecution to prove that the person going to be searched at that time was made to know about his such mandatory right under the law so that non-compliance of which may not be fatal to the prosecution/Furthermore, it is pointed out that the article so seized as per the provisions of law particularly Section 52 of the said Act is to be produced before the Magistrate without unnecessary delay and also to be kept in safe custody pending the orders of the Magistrate but in the instant case Mr. Bhattacharyya, the learned counsel submits that neither the provisions of Section 50 of the NDPS Act is complied with requiring the person going to be searched, i.e., the appellant to opt to be searched before the Gazetted Officer or the nearest Magistrate and furthermore by the perusal of the record it will also transpire that the article so seized, i.e., 360 grams of the substance claimed as opium by the prosecution was not kept in safe custody pending the orders of the Magistrate because in the instant case when the seized article was so placed before the Magistrate on 8-2-91 though seized on 6-2-91 the learned Magistrate (PW 2) directed the Investigating Officer as to produce the same on 11-2-91 and there is nothing on record to show that from the date of the seizure to the date of actual production, i.e., 11-2-91 the same was so kept in safe custody. In support of his this contention with regard to the noncompliance of the provisions of Section 52 of the NDPS Act the learned counsel for the appellant has banked upon a reported case AIR1978 SC 1511 : (1978 Cri LJ 1531) (Modan Singh v. State of Rajasthan). With regard to the provisions of Section 50 to be complied with strictly which is mandatory in nature and the non-compliance of which shall make the whole trial so held illegal and vitiated the learned counsel for the appellant has referred to 4 of the recent reported decisions of the Apex Court and they are 1994 (3) SCC 299 : (1994 Cri LJ 3702) (State of Punjab v. Balbir Singh) of which paragraph 16 is read wherein it is held that the non-compliance of the provisions of Section 50 of the NDPS Act which is mandatory will affect the prosecution case and thus the appellant is entitled to be acquitted. The another reported case so banked upon on this point is 1994 (6) SCC 569 : (1994 AIR SCW 4393) (Ali Mustafa Abdul Rahman Musa v. State of Kerala) of which paragraphs 6 to 9 are referred and it is pointed out that illegality in search and seizure in contravention of the provisions of Section

50 of the said Act will be fatal to the prosecution case and the person cannot be held guilty under the Act if in course of trial the prosecution fails to substantiate that the accused was acquainted with the rights so given to him Under Section 50 of the Act as to opt for such search in presence of the Gazetted Officer or the Magistrate so available at the nearest point and this provision so contained therein is to be made known to the accused by the prosecuting agency. Furthermore on this point two other reported cases are cited and they are AIR 1995 SC 1157 : (1995 Cri LJ 2074) (Mohinder Kumar v. State of Panaji Goa) and its paragraph 3 is particularly read which refers that non-compliance of the said provisions entitles the accused to acquittal. Another reported case so cited on this point is 1995 Cri LJ 2662 (Syed Mahammad Omar Sayed v. State of Gujarat) and Mr. Bhattacharyya has taken me to its paragraphs 7 to 11 as to impress upon that the provisions of Section 50 are mandatory and the officer concerned is obliged to inform the accused person of his right to be searched in presence of the Gazetted Officer or the Magistrate and if in course of trial this part is not proved and no evidence is adduced in this connection which is mandatory to be strictly adopted, the Court may come to the conclusion that the possession of illicit article by the accused could not be established in course of trial by the prosecution.

5. It is also pointed out that in the instant case while going through the evidence of the PWs so examined not a single word is uttered by any of the witnesses with regard to this mandatory provisions of Section 50 of the Act being complied with in the instant case.

6. The second limb of argument so advanced by the learned counsel for the appellant is that in the instant case on no account it can be said that the article so seized was from the conscious possession of the accused-appellant. Though there is variation in the evidence of the witnesses some one at randomly saying with regard to such seizure from the appellant's premises but the Investigating Officer of the case figuring as PW 7 is specific in stating that such seizure was made from the cow-shed of the accused-appellant so located in the back of his house though fenced but had access and entry from all the sides having no specific entrance to the said cowshed. That being the position, the seizure of the article said to be opium to the extent of 360 grams valued at Rs. 2,800/- on no account can be said

to be the seizure from his conscious possession. It is also submitted that at the time of such seizure it was expected of the prosecuting agency as to prepare the seizure-list in presence of two independent witnesses. But in the instant case though the seizure-list contains the signatures of the two witnesses out of whom only one was so produced in course of trial figuring as PW. 6, namely, Susan Singh but in his cross-examination he is very specific in saying that there was no such seizure of the seized article from the conscious possession of the appellant rather in the cow-shed he got an opportunity to see the seized article in the hands of one of the members of the searching party. On the point that such seizure on no account can be said to be seizure from the conscious. possession of the present accused-appellant, Mr. Bhattacharyya has referred to six reported cases detailed below emphatically arguing that the perusal of the same will show and throw light as to under what circumstance the article can be said to be recovered from the conscious possession of a man whereas in the instant case there is complete deviation and it is the case, as claimed by the learned counsel that since the cow-shed had access to other family members and even to the villagers on no account it can be said that the accused-appellant had only the domain over the same which was so recovered from his conscious possession. The reported cases so cited are AIR 1950 Assam 152 (1950 (51) Cri LJ 973) (Abdul Ali v. The State of Assam), AIR 1952 Assam 26 (Dular Kumar v. The State of Assam, 1986(2) GLR 39 (Khagen Saud v. The State of Assam), AIR 1980 SC 477 (Chagam Raju v. The State of Andhra Pradesh), 1973 (2) SCC 372:(1973 Cri LJ 1537) para 11 (Inder Sain v. State of Punjab and 1979 (4) SCC 344 : (1979 Cri LJ 791) (Ram Ratan v. State of Punjab). In this background relying on all the reported cases on this point detailed above the learned counsel for the appellant submits that his conviction is on mere suspicion, which, as to meet the ends of justice be not relied upon and over and above the non-compliance of the provisions of Sections 50 and 52 of the NDPS Act, there is also no such seizure of the article in question from the conscious possession of the accused-appellant rather it is from the cow-shed open from all the sides having no separate door for its exclusi ve entrance by the person keeping the said premises under lock and key and thus on this count also the judgment of conviction is bad in law. The third point which is so raised by the learned counsel for the appellant is that by looking into the report of the expert and

particularly in the background of the definition of the opium so contained Under Section 2(XV) of the NDPS Act this is also difficult to accept that the article so seized can be said to be opium. The expert's opinion, it is pointed out, is cryptic, which is challenged and it was expected of him as to express his opinion in clear and unambiguous words with regard to the ingredients of opium so found in the sample as defined under the Act which is so absent and in this connection attention is drawn on the Ground-K of the memo of appeal giving the details of the same. In that continuity attention is drawn with regard to certain confessional statement said to have been made by the accused-appellant in course of investigation before some of the Inspectors of the Customs and Central Excise Department featuring as PWs 3 and 4, namely, Shri Anup Ratan Gupta and Shri Rahul Singha. These witnesses came and deposed of their taking some statements in which as claimed by the prosecution the accused-appellant of his own accord gave details relating to his previous antecedents with regard to his being involved in such nefarious business with regard to the illegal sale of contraband opium. On this point the learned counsel for the appellant mentioned that such statement is directly hit Under Section 24 of the Evidence Act and furthermore in his statement Under Section 313 Cr. P.C. so recorded this accused-appellant is specific in stating that those statements got recorded marked as Exts. 2, 4 and 5 under undue influence, pressure and coercion which was not voluntary and that being the position it is pointed out that the learned Court below erred in relying upon those statements said to have been given by the accused-appellant as recorded by PWs. 3 and 4. Out of 7 prosecution witnesses examined, it is pointed out that PWs. 1, 3, 4 and 7 are the official witnesses being the Inspectors of Customs and Central Excise, PW 2 is the Judicial Magistrate, PW 7 is also the Investigating Officer of this case and as far as PWs 5 and 6 are concerned, PW 6 is a witness to the said seizure-list and PW 5 is claimed to be a witness to the statement so recorded by PW 4 of the accused-appellant as alleged on 6-2-91. Taking me to the evidence of PW 5, it is pointed out that he is an interested witness rather a professional witness so accommodated in the campus of the Custom's Office to be figure witness in all the cases and it is in that background that this witness does not feel shy in stating before the trial Court that he has got a tea stall near the Custom Office which is run by him for last 25 years and in his

cross-examination he further stated that his said shop is within the compound of the Custom Office and he used to do his business with the permission of the Office of the Custom, was witness in many cases and that he was indebted to the department concerned for accommodating him as put by him coming from his mouth at the foot of the cross-examination. That being the position, it is pointed out that no reliance can thus be placed to Exts. 2, 4 and 5 said to be statements of the accused-appellant giving his antecedent and furthermore by going through those statements there is no reference particularly with regard to the alleged occurrence, if any, taking place on 6-2-91 and with regard to any explanation coming from the accused-appellant of his possessing the seized article said to have been kept in the said cow-shed. In this connection on behalf of the appellant two of the reported cases are also cited and they are AIR 1963 SC 1094: (1963 (2) Cri LJ 178) (Piarilal Bhargav v. State of Rajasthan) and in this connection paragraphs 5 and 6 are referred. The second reported case so cited is AIR 1977 SC 1294 : (1977 Cri LJ 985) (Satbir Singh v. State of Punjab) as to impress upon that Exts. 2, 4 and 5 in the instant case be thus not relied upon being directly hit under the provisions of Section 24 of the Evidence Act.

7. Summing up, Mr. Bhattacharyya, the learned counsel appearing for the accused-appellant thus submitted that this is a fit case in which the judgment of conviction and sentence be thus set aside and the accused-appellant be acquitted in the background of the facts and circumstances of the case being also supported by some of the important decisions as detailed above. It is contended that there is complete violation of the provisions of Section 50 of the aforesaid Act and there is no evidence so adduced in course of trial putting up a case with regard to the compliance of the provisions of Section 50 of the NDPS Act, which in itself is sufficient as to make the accused-appellant entitled for acquittal and further more since the article so seized cannot be said to be so seized from the conscious possession of the accused-appellant, also in the background of the fact that the expert's report is vitiated and that under his statement Under Section 313, Cr. P.C. the accused-appellant is specific in stating with regard to the coercion and threats so used while getting some of his statements recorded which were so wrongly discussed and relied upon by the learned Special Judge, this is a fit case on these counts in which as to meet the ends of justice the interference of the appellate

Court is required and the accused-appellant thus can safely be acquitted in this case.

8. At the last Mr. Bhattacharyya, the learned counsel for the appellant, however, has also mentioned that though this matter was so disposed of by this Court by dismissing the appeal on 15-6-95 in the back of the accused-appellant's lawyer being heard but the Court is not bound to follow a decision of its own if so given per incuriam when at that time the latest reported cases so cited made available after the matter being remanded by the Apex Court, were not made available to the Court for perusal earlier.

9. Mrs. K. Deka, the learned public prosecutor, Assam, on the other hand, has subbmitted that the accused-appellant is convicted under the NDPS Act of his possessing opium contravening the provisions of Section 8(c) of the NDPS Act ah offence punishable Under Section 18 of the said Act and rather after convicting a lenient view is taken by awarding minimum prescribed punishment which is to the extent of 10 years of RI and fine to the tune of Rs. 100,000/-. Mrs. K. Deka further submitted that as a matter of fact the opium in question was so recovered along with a weighing scale concealed in the cow-shed of the accused-appellant of which the seizure-list was so prepared and in course of trial the accused-appellant also voluntarily stated with regard to his involvement in dealing with the contraband opium, smuggling the same for his wrongful gain and thus the judgment of conviction and sentence so awarded does not require any interference. Stringent provisions for the control and regulation of operation relating to Narcotic Drugs and Psychotropic Substance is provided under this Act as to keep check and break on the trafficking of such offences which has a nationwide effect because continuation of the same degenerates the society and therefore the legislature in its wisdom has put deterrent punishment for violation of the same which has to be looked into in all seriousness and therefore to curb these of fences NDPS Act was so brought into force. The learned public prosecutor in course of her argument has also tried to impress upon that even if there is non-compliance of the provisions of Section 50 of the NDPS Act, the evidence with regard to the seizure etc. of the contraband opium in the instant case on no account can be said to be inadmissible in evidence which was rightly

thrashed in course of trial by the learned Special Judge and in the background of the other surrounding circumstances after evaluating the evidence the learned Court below rightly came to the conclusion finding it to be a case in which the prosecution succeeded to prove the guilt and thus the judgment of conviction and sentence so passed does not require any interference. The learned Public Prosecutor also claimed to be fortified by two of the recent reported cases of the Apex Court and they are No. 1 - 1996 (2) SCC 201 : (1996 AIR SCW 846) (Raghubir Singh v. State of Haryana). It is pointed out in this connection that the choice of gazetted officer or the Magistrate has to be made by the police officer or any other officer making the search exercise and not by the accused the accused may require search to be conducted in presence of a senior officer but whether that senior officer will be the gazetted officer or magistrate that depends on the convenient availability of the gazetted officer or the magistrate and it is not for the accused as to stick upon any one of them rather it is in the hands of the officer lauching the prosecution in case of his opting to be searched by gazetted officer or magistrate as to produce him (the accused) either before the gazetted officer or before a magistrate whosoever is at the nearest point, at the earliest moment without much inconvenience, available. Mrs. K. Deka submitted that the use of the word 'nearest' in Section 50 of the NDPS Act is thus relevant. The second reported case relied upon by the learned Public Prosecutor is 1996 (2) SCC 37 : (1996 AIR SCW 422). (State of Himachal Pradesh v. Prithivichand) and in this background it is pointed out that, however, evidence obtained as a result of search and seizure is in violation of the mandatory requirement of Section 50 of the NDPS Act it does not become inadmissibble and to what extent the value is to be attached to such seizure depends upon the evidence on the facts and circumstances of each case. The Apex Court, it is pointed out has also held that discharge of accused at the stage of taking cognizance of offence on the ground of non-compliance of the provisions of Section 50 of the NDPS Act is improper. That being the position, the learned Public Prosecutor submitted that though admittedly the accused-appellant was not acquainted with the special right so given to the accused under the provisions of Section 50 of the NDPS Act as to opt search in presence of gazetted officer/ magistrate but even then the search and seizure so made and the evidence relating to that so adduced in course of trial being not inadmissible in the

background of the finding of the reported case (The State of Himachal Pradesh v. Prithivichand) (supra) the learned Special Judge was perfectly justified as to analyse on the background of the facts and circumstances of the instant case and has thus rightly convicted and sentenced the accused appellant. According to the learned Public Prosecutor, since there is no merit in this appeal the same be dismissed.

10. As to appreciate the argument so advanced on behalf of both the sides particularly with regard to the compliance or non-compliance of the provisions of Section 50 of the NDPS Act the same is quoted below for ready reference :-

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.

11. After hearing both the sides learned counsel, also after going through the grounds so taken in its memo of appeal, also keeping in mind that the order so passed in this appeal by this Court on 15-6-95 when no one appeared on behalf of the accused-appellant an order was so passed by this Court per incuriam when the Court had acted being not furnished with the latest decisions as detailed above cited on behalf of both the sides, feeling obliged to the Apex Court, giving opportunity of hearing the matter afresh, saving the situation as my conscience would have pricked if the orders so passed by this Court on 15-6-1995 would have

been allowed to continue after scrutinising the pros and cons of the provisions of the referred section of the NDPS Act with that of the reported cases so cited, I find it to be a fit case in which the argument so advanced by Mr. A K. Bhattacharyya, the learned counsel representing the accused-appellant has much of substance. In my considered opinion; there is non-compliance of the mandatory provisions of Section 50 of the NDPS Act on which no evidence is so adduced coming from the mouth of any of the witnesses with regard to the present accused-appellant being informed with the said safeguard and right bestowed upon him to be brought in his knowledge prior to such search and that being the position in my considered opinion it can safely be said that the whole trial is vitiated and the accused-appellant is entitled to be acquitted on this score alone as also held by the Apex Court in four of the reported case so cited as detailed above by the learned counsel for the accused-appellant. The second point so raised on behalf of the appellant is also convincing to methat in the background of the facts and Circumstances of the present case because of the recovery of the seized article from the cowshed which though was fenced but had no separate door affixed cannot make out a case of the article seized said to have been recovered from the conscious possession of the accused-appellant. The expert's report marked as exhibit should have also been unambiguous instead of being cryptic. The answer so given by the accused-appellant Under Section 313, Cr. P.C. is looked into with great care in which the accused-appellant is specific in stating that the statements with regard to his antecedents got so recorded under undue influence and pressure and that being the position it was unsafe as to rely upon those exhibits marked Ests. 2, 4 and 5 and to presume involvement of the accused-appellant of his committing offences coming under the purview of some of the sections of the NDPS Act under which he is convicted. Out of the 7 witnesses so examined, I find that PW 1 is one of the Inspectors of Custom and Central Excise who had accompanied PW 7 at the time of search and according to him the seizure was from the residential premises perhaps he indirectly meant the cow-shed to be situated inside the premises. In his cross-examination he is specific in stating that he heard about the detection so made by one of the members of the team and could see the seized article in the hands of one of the team-members. PW. 2, the Judicial Magistrate also speaks of adjourning the matter on 8-2-1991 to 11-2-91

when the seized articles were so produced but no definite opinion can be drawn with regard to the safe custody of the said seized article in between the period 8-2-91 to 11-2-91. As regards PWs 3 and 4 who are the Inspectors of the said department come forward simply to say with regard to the recording of the statement of the accused-appellant marked as Exts. 2,'4 and 5. PWs. 5 and 6 are the witnesses - one on the seizure-list who is PW 6 and the other witness on the statement so recorded PW. 4 on 6-2-91. P.W. 6 is specific in stating that he could not see the seizure from the conscious possession of the accused-appellant rather he is the person obliged to the Custom Department for accommodating him as to install a tea-stall in the premises of the Custom Office for last 25 years and he is brought as witness for the prosecution in good number of cases by the Officers of the Custom Department. That being the position, much reliance cannot be placed on their such statement. The last witness PW. 7 is also specific in saying that the seized article so recovered from the cow-shed of the accused-appellant adjacent to the house which was open from all the sides though there were bamboo barriers. That being the position, it can be safely said that the said cow-shed was open for all the members of the family and in that background it cannot be said to be a seizure from the conscious possession of the accused-appellant as also detailed above. In the statement Under Section 313, Cr. P.C. the accused-appellant is specific in denying all the charges and the evidence so coming against him in course of trial particularly with regard to Exts. 2, 4 and 5 which are the statements claimed by the accused-appellant in his statement Under Section 313, Cr. P.C. to have been recorded under coercion. As regards the two reported cases so cited by the learned Public Prosecutor, I find that they are in no way hindrance in coming to the conclusion that the impugned judgment of conviction and sentence so passed as to meet the ends of justice in the instant case requires interference because it is not the case here that because of the non-compliance of the provisions of Section 50 of the NDPS Act that the proceeding at the initial stage before trial is going to be quashed against a particular accused. Rather as an appellate Court even the evidence so adduced in course of trial is re-evaluated and in the whole of the evidence there is not a single word coming from the mouth of any of the witnesses with regard to the present accused-appellant being made to understand with regard to the safeguard and right so given to him under the

provisions of Section 50 of the NDPS. Act as to opt his choice to be searched before the gazetted officer/ magistrate whosoever conveniently at the nearest point is available. The testimony of the officer conducting the search, i.e. P.W. 7 is also silent on this point and nowhere he has stated while appearing as witness that he informed the accused his right of being entitled to demand search to be carried out in presence of a gazetted officer or magistrate and that the accused had not chosen to such demand Since no evidence to this effect is given in the Court in course of trial it goes to show that the accused-appellant was not informed of the protection the law gave him under the provisions of Section 50 of the NDPS Act and thus the alleged possession of illicit article under the NDPS Act cannot be said to have been established upto the hilt and beyond all reasonable doubts by the prosecution in course of trial. It was the duty of the prosecution to make aware all these rights to the accused-appellant - a protection so granted by the statute by adducing cogent evidence to show that he was made aware of such right and the non-compliance of which in the instant case which was the mandatory provision has given a fatal blow to the very prosecution case. It was incumbent on the part of the Inspector figuring here as PW 7 or PW 1 who was also another Inspector accompanying PW 7 as the member of the search party as to acquaint the accused-appellant with the procedure, which in the instant case is not done at the initial stage and on which even in the subsequent stage of the trial no evidence is adduced making the matter distinguishable with that of the two reported cases so cited relating to the circumstance of this particular case which after scrutiny of the whole of the evidence, oral and documentary, requires interference. Consequently, this appeal succeeds. The judgmerit of conviction and sentence so passed by the learned Special Judge, Cachar at Silchar dated 23-2-1994 so passed in Special Case No. 13(A) of 1991 cannot sustain and in the background of the facts and circumstances discussed above coupled with the reasoning so assigned the impugned judgment of conviction and sentence so passed thus are hereby set aside. The accused appellant is thus acquitted. The accused-appellant is directed to be released forthwith if not wanted in any other case.

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