SARJU @ RAMU

v.

STATE OF U.P.

(Criminal Appeal No. 1446 of 2009)

AUGUST 7, 2009

[S.B. SINHA AND DEEPAK VERMA, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 – ss. 8/21 and 42 – Illegal sale of morphine by appellants – Search and seizure by SHO and others – Conviction and sentence u/s. 8/21 by courts below – Sustainability of – Held: Not sustainable – s. 42 not substantially complied with – Prosecution case cannot be believed – Discrepancies in FIR – No independent witness to the search – Accused not informed of their right to be searched by Gazetted Officer – Discrepancy in the preparation of consent letter – Statement by SHO manipulated and had no authority to make search – Different case alleged by wife of accused – They filed application and sent telegram but no investigation carried out – Also Special Judge erred in letting off one of the accused under the Probation of Offenders Act – Thus, order of courts below set aside.

SHO and other members including a constable-PW-3 were on patrolling duty. The informer reported to the police party that appellants were illegally selling morphine. SHO obtained the authority letter to carry search and seizure and meanwhile the other constables kept eye on them. The search was carried out. 40 packets as also 70 gms. of morphine were recovered from the appellant, 82 gms from SB and 53 gms was recovered from RD. Trial court convicted the appellant and RD u/s. 8/21 of Narcotic Drugs and Psychotropic Substances Act and sentenced them to 10 years rigorous imprisonment. However, SB was given benefit of s. 33 and was let off

A under the Probation of Offenders Act. High Court upheld the order. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. In a case under the Narcotic Drugs and
B Psychotropic Substances Act, 1985, particularly where such serious allegations are made against the police officials, recovery of contraband in presence of the independent witness assumes significance. The provisions of the NDPS Act being harsh in nature, the
C procedural safeguards contained therein must scrupulously be complied therewith. [Paras 14 and 15] [622-E-F]

2.1. The prosecution case is shrouded in mystery.
D Although in the FIR, it was stated that information was received from the informer, but the PW 1 in his deposition before the trial judge stated differently. FIR disclosed that the information was given at about 6 O' clock in the morning and the raid was conducted at about 6.15 a.m.
E A closer look to the statement made in the FIR would show that in fact according to the informer the accused had been sitting on the road side from before 6 O'clock in the morning. Thus, it is difficult to believe the prosecution story. [Paras 9 and 13] [618-D; 622-B]

F 2.2. The accused were said to have been sitting near the house of a Member of the Legislative Assembly. There is no explanation as to why he could not be asked to be a witness to the search. The time when the information was received was not mentioned in the General Diary.
G Even the distance of the place where such information is received from the police station was not noticed. The names of the persons who refused to be a witness was not recorded. He accepted that in terms of Cr.P.C., the same should have been noted but the said provisions
H were not complied with. [Paras 11] [620-C-D]

2.3. PW-3 informed that appellants had committed an offence punishable u/s. 8/18 of the NDPS Act and they have been taken in custody before the Fard was read over to them and signatures and left thumb impression were obtained. It is accepted that the patrolling duty starts at 6-8 O' clock in the evening and finishes at 8 O'clock in the morning. The village 'BH' was about 5 to 6 furlongs before place B. According to PW 3, informer had met them 3-4 hours prior to the raid and they were sitting in the jeep when the intimation was given by the informer. The intimation was said to have been given at 'BH' road but they did not go in the search of the accused in the village wherefor no reason could be assigned. [Para 12] [621-F-H; 622-A] A B C

2.4. The statement of DW 1-wife of the appellant that they had been sitting near the gate of the Superintendent of Police at place 'B' had not been denied or disputed. The fact that an application as also a telegram had been sent has not also been denied or disputed. In a case of this nature, at least, for fair investigation, if not the prosecution, the Special Judge himself should have exercised his jurisdiction u/s. 311 Cr.P.C. He should have called the Superintendent of Police and recorded his statement; he could have also called for the original telegram from the Superintendent of Police's office or even from the Post Office. [Para 13] [622-C-D] D E F

2.5. Appellant at no point of time was informed that he had a statutory right of being searched by a Gazetted Officer. The combined reading of the depositions of the prosecution witnesses are pointers to the fact that the so-called consent letters were obtained only after they had been arrested. Even in relation to preparation of consent letters, there is a glaring discrepancy. According to PW 3, it was SHO himself who wrote the said letters but SHO had different story to tell, namely, that he himself had suffered an injury on his finger and as such he had asked G H

A some other person to write the said consent letters. It is also difficult to believe that SHO leaving the accused in the mercy of PW 2 and PW 3, would go back to place 'B' to obtain letters of approval. The nature of the statements made by him before the court clearly shows that the B same was manipulated. Even, SHO had no authority to make search. Nothing has been brought on record to show that the provisions of s. 42 of the NDPS Act were substantially complied with. [Paras 16 and 17] [625-G-H; 626-A-B; 629-G]

C

2.6. The Special Judge let off accused No. 3 under the Probation of Offenders Act. He referred to s. 33 of the NDPS Act. He misread the entire provision. There is no reason as to why such a provision had to be resorted to in the case of one of the accused only. High Court also D should have drawn the attention of the trial judge on the glaring mistake committed by him. [Para 18] [630-D]

Ritesh Chakarvarti vs. State of M.P. (2006) 12 SCC 321; *State of Punjab vs. Baldev Singh* (1999) 6 SCC 172; *Noor* E *Aga v. State of Punjab and Anr.* 2008 (9) SCALE 681; *Ranu Premji v. Customs Ner Shillong Unit* 2009 (7) SCALE 568; *State of Punjab v. Balbir Singh* (1994) 3 SCC 299; *Kamail Singh v. State of Haryana* 2009 (10) SCALE 255; *Abdul Rashid Ibrahim Mansuri v. State of Gujarat* (2000) 2 SCC F 513; *Sajan Abraham v. State of Kerala* (2001) 6 SCC 692 – referred to.

Case Law Reference:

(2006) 12 SCC 321	Referred to.	Para 14
G (1999) 6 SCC 172	Referred to.	Para 15
2008 (9) SCALE 681	Referred to.	Para 15
2009 (7) SCALE 568	Referred to.	Para 15
H (1994) 3 SCC 299	Referred to.	Para 16

			A
2009 (10) SCALE 255	**Referred to.**	**Para 17**	
(2000) 2 SCC 513	**Referred to.**	**Para 17**	
(2001) 6 SCC 692	**Referred to.**	**Para 17**	

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1446 of 2009. B

From the Judgment & Order dated 30.01.2008 of the High Court of Judicature at Allahabad at Lucknow in Criminal Appeal No. 491 of 1991.

C

Anup Kumar, Shoeb Alam, Gaurav, Ashok Anand (for Dr. Kailash Chand) for the Appellants.

Mohd. Fuzail Khan, Anil Kumar Jha for the Respondents.

The Judgment of the Court was delivered by D

S.B. SINHA, J. 1. Leave granted.

2. This appeal by special leave arises out of a judgment and order dated 30th January 2008 passed by a learned single judge of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Criminal Appeal No. 491 of 1991 whereby and whereunder the judgment of conviction and sentence dated 4th September 1991 passed by the V Additional Sessions Judge, Barabanki in Sessions Trial Nos. 393 of 1989 and 395 of 1989 convicting the appellant for commission of an offence punishable under Section 8/21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "NDPS Act") and sentencing him to undergo 10 years' rigorous imprisonment as also the fine of Rs.1 lakh, and in default, to undergo one year's rigorous imprisonment, was affirmed. E F G

3. Shrikant Mishra was the Station House Officer (SHO) of Safdarganj Police Station situate in the district of Barabanki. He and other members of the police party were on a patrolling duty. They came out of the Police Station in the night of 5th H

A January 1989 with Constable No.56 Ram Shankar Srivastava (P.W.3) and Constable No.277 – Vidya Prasad Pandey. They reached near a village commonly known as "Baghaura" in the official jeep No. UHG 4682, which was driven by one Satyadev Ojha.

B

4. An informer allegedly reported to the appellants as also one Shobhalal of village Baghaura and Ramdutt @ Dutta of village Bariarpur illegally selling morphine in packets to the truck drivers and the people of the area. According to the said informer, they were said to have been sitting on the road side C near the mill of one Vishwanath Kashyap from 6 O'clock in the morning. Appellant along with said Shobhalal and Ramdutt were said to have been identified by the said police party to be sitting on the road side at about 6.15 a.m. They became a bit perplexed and frightened after seeing the police party. "Being D assured", Shrikant Mishra, Officer-in-charge, went to Barabanki to obtain authority letter for the purpose of carrying out search and seizure. He instructed the other constables to keep an eye on them. He upon obtaining the authority letter allegedly came back from Barabanki after some time. He requested some E passer-by to become witness to the seizure. They allegedly refused.

5. Letters of consent were prepared in the names of accused to the effect that they were ready and willing to be F searched by the Officer-in-Charge in stead and place of a Gazetted Officer. Persons of all the accused were searched. From the right pocket of the sweater of the appellant 40 packets of morphine and from his left pocket about 70 grams of morphine wrapped in a paper were found. From the person of G Shobhalal about 82 grams of morphine was found; whereas from the person of Ram Dutt about 53 grams of morphine was recovered.

6. Appellant, however, has a different story to tell. According to him, the SHO as also the constables had an evil H eye on the appellant's wife. They came to his house at about

9.00 p.m. in the night of 5/6.1.1989 while his wife was serving the food to the children. He was not well. When the door of his house was knocked by a constable, his wife who examined herself as D.W.1 came out of the house and saw the Constable and the SHO. The constable was used to be called by local people as "Lala". They enquired about him. When D.W. 1 wanted to call him, the said constable said that there was no work with him but it was with her. He thereafter told the SHO that this was the same woman who goes to Chakki for grinding. On hearing that, she started going back to her house. The said constable advanced towards her. She shouted loudly. On her shouting, Sohan Lal and the appellant came. D.W. 1 was slapped by the said constable 2-3 times and thereafter the appellant was arrested. D.W.1 along with Sohan Lal and her brother-in-law went to Barabanki to the house of the Superintendent of Police by truck. The Superintendent of Police was described as 'Captain Sahib". They could not meet him at that time and on being informed that he had been sleeping and the Superintendent of Police would meet them only by 7.30 in the morning. They kept sitting in front of the gate; they met the Superintendent of Police at about 8-9 O'clock in the morning. An application was given to him. Admittedly, a telegram was also sent.

7. The learned trial judge, relying on or on the basis of the evidence of Shrikant Mishra, SHO (P.W.1) and Rama Shankar Srivastava (P.W.3) recorded a judgment of conviction. In regard to the sentence imposed to the accused, it was ordered:

> "Accused Sarju @ Ramu and Ramdutt @ Dutta under Section 8/21 of the N.D.P.S. Act, thus 10 years (10) rigorous punishment to each and Rs.1,00,000/-, Rs.1,00,000/- (Rupees One One Lac only) each is imposed fine. On non-payment of fine punishment of additional imprisonment shall have to be undergone.
>
> By giving benefit of Section 33 N.D.P.S. Act to accused Shobha Lal of Prohibition (sic Probation) of Offenders Act

A of bond of good conduct of 2 years and 2 bails of Rs.10,000/-, Rs.10,000/- (Rupees Ten Ten Thousand only) and on filing the sureties of the same amount may be released, subject to the condition that he may give written undertaking to this effect that during this period he shall not
B do any act against law and shall remain of good conduct during this period and shall maintain peace. Whenever he summoned by the Court he by being present shall received the punishment, which the Court may give him."

C 8. The High Court by reason of the impugned judgment has affirmed the said judgment while rejecting the appeals preferred by the appellant.

9. The prosecution case is shrouded in mystery. Although in the First Information Report ('FIR'), it was stated that
D information was received from the informer, but the P.W. 1 in his deposition before the learned trial judge stated:

"10. From the police station had gone in the night for the gasht. At what time went, this I can intimate by looking to
E the Roznamcha. Informer had met on the road. At what time he met, do not remember. That place also do not remember as to where he met. But had met on the Lucknow, Faizabad Marg. At the time had reached at Baghora Chhaki, that time do not remember. But it was
F recorded in the Fard. That Fard was prepared by me. Was written on my directions. The Fard which I have got written from Constable Vidhya Prasad Pandey by speaking, in the finger of my hand was injured. That is why I had not written it.....

G 11. Faizabad Barabanki Road is sufficiently operation road. Every time people keep on coming going. Kharkhara, truck, buses, and jeeps keep on coming going. We people had gone in uniform. After the meeting with the Informer the witnesses were not searched because after looking to
H the situation, would have looked for the witnesses when we

people reached at the chhaki, then accused Ramu was standing in front of Chhaki. I recognized him before hand. I had no specific acquaintance with him but these people usually used to keep sitting at the chhaki of Vishwanath, that is why I knew. Those days were sitting on the chhaki of Vishwanath. I knew and recognized him. I do not remember at this time as to who else used to sit at a distance of 5 – 7 steps from Ramu had stopped the jeep. By looking to us the accused went towards the chaki, cannot intimate this that he went running. The constable by getting down stopped him. The constable said stop, then he stopped. Behind the chhaki, leaving to fields there is village. In front of the chhaki is road and field. In the field crop was sown. After the stopping by the constable I immediately reached. Whatever the informer had intimated me, in connection with that, enquiry from the accused then he said that this matter is correct that I have Morphine. Direction was given to the employees that keep on watching them. I am going to get the authority letter. For going to Barabanki and coming back, it took me how much time I do not remember. As to at what time I reached on the spot by getting the authority letter. When I reached back at the place of the incident, then mob had not assembled there. What is important to write in the recovery Fard, I know. Stopping of jeep, going towards the chhaki of the accused, mention of stopping the accused by the constable is not in the Fard, because it was not necessary to write this. Whatever was considered necessary that was recorded. 2 – 4 people came on the spot, I asked them to witness, but they did not get prepared. I do not remember now as to which which constable were there along with. In those days at my police station Ram Shankar Srivastava was posted at the police station who was also with me at the time of the incident. His appointment was also in that very Halka. I do not know that the wife of accused Ram on date 5.1.89 night gave one application before Captain Sahib that to her husband, Daroga and contable Ram

A Shankar by catching have taken him away. On the same night took him away in the night by catching. I do not know that in this context his wife has sent telegram to Captain Sahib and the Home Secretary also."

10. The learned Trial Judge accepted that an application B and telegram were brought to his notice but he had not carried any investigation in relation thereto.

11. Vishwanath Kashyap near whose house the accused were said to have been sitting was a Member of the Legislative C Assembly. Why he could not be asked to be a witness to the search has not been explained. The time when the information was received was not mentioned in the General Diary. Even the distance of the place where such information is received from the police station was not noticed. The names of the D persons who refused to be a witness had not been recorded. He accepted that in terms of the Code of Criminal Procedure, the same should have been noted but the said provisions have not been complied with. Shrikant Mishra did not state that the accused persons were informed about their right to be E searched by a Gazetted Officer and/or that the purported consent letters marked as Exhibits A-3, A-4 and A-5 were not written by him.

12. P.W. 3 – Ram Shanker Srivastava, in his evidence, however, stated:

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"1. On date 6.1.89, I was posted in Police Station Safdarjung as Constable. On that day, I along with the Head Daroga Shri Kant Mishra by jeep were going on road holder duty. Vidhya Prasad Pandey Constable and G Driver Satyadev had come. When we people at Ferozabad Barabanki road, then the Informer of Darogaji met. He talked to Daroga Ji. Then Daroga Ji by taking we people reached at the Chakki of Vishwanath Neta in village Baghora. At that time it was the time of 6.15 O' clock in H the morning. At the chakki, Ramu @ Sarju, Shobha Lal

and Dutta @ Ramdutt were sitting. By looking to we people, got perplexed. We people got assured that they have some illegal material, as was intimated by the Informer. Daroga Ji said that you people stop, I am going to Barabanki to obtain the authority letter and he went away by jeep to obtain the authority letter. Constable Vidhya Prasad kept stopped those people. Daroga ji came back at 8.10 O'clock of the day. Then Daroga ji asked the mob assembled there to give evidence. Then those people denied to give evidence due to fear of Vishwanath Neta.

Then Daroga ji enquired about their names and addresses and said that you will give the search to me, or to Gazetted Officer or the Magistrate. Then he said we shall give the search to you. In this connection Daroga ji prepared 3 separate separate consent Fards. It was read over and by hearing it we people consented. The accused also had put their signatures and TI. The witnesses were shown. Ex. 3 and 5, by looking and reading to which, the witness is said that these are the same Fards which were prepared by Daroga ji at the site and on this are my signatures."

He furthermore informed that they have committed an offence punishable under Section 8/18 of the NDPS Act and they have been taken in custody before the Fard was read over to them and signatures and left thumb impression were obtained.

It is accepted that the patrolling duty starts at 6 – 8 O' clock in the evening and finishes at 8 O'clock in the morning. The Baghaura village was about 5 to 6 furlongs before Barabanki. According to P.W.3, the informer had met them 3 – 4 hours prior to the raid. According to P.W. 3, they were sitting in the jeep when the intimation was given by the informer. The intimation was said to have been given at the Baghaura road but they did not go in the search of the accused in the village

A wherefor no reason could be assigned.

13. The FIR disclosed that the information was given at about 6 O' clock in the morning and the raid was conducted at about 6.15 a.m. A closer look to the statement made in the FIR would show that in fact according to the informer the accused had been sitting on the road side from before 6 O'clock in the morning. It is, therefore, difficult to believe the prosecution story.

The statement of D.W.1- Smt. Kusum Devi, wife of the appellant that they had been sitting near the gate of the C Superintendent of Police at Barabanki had not been denied or disputed. The fact that an application as also a telegram had been sent has not also been denied or disputed. In a case of this nature, at least, for fair investigation, if not the prosecution, the learned Special Judge himself should have exercised his D jurisdiction under Section 311 of the Code of Criminal Procedure. He should have called the Superintendent of Police and recorded his statement; he could have also called for the original telegram from the Superintendent of Police's office or even from the Post Office.

E

14. In a case under the NDPS Act, particularly where such serious allegations are made against the police officials, recovery of contraband in presence of the independent witness assumes significance. [See *Ritesh Chakarvarti vs. State of M.P.* (2006) 12 SCC 321]

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15. It is now also well settled that the provisions of the NDPS Act being harsh in nature, the procedural safeguards contained therein must scrupulously be complied therewith.

G It was so held by a Constitution Bench of this Court in *State of Punjab vs. Baldev Singh* [1999) 6 SCC 172)] in the following terms:

"57. On the basis of the reasoning and discussion above, the following conclusions arise:

H

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

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

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

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. 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

A 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 unconscionably B compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would C render the trial unfair.

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

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

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the H contraband on the accused though any other material

recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search. A

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act." B C

{See also *Noor Aga v. State of Punjab & Anr.* [2008 (9) SCALE 681] and *Ranu Premji v. Customs Ner Shillong Unit* [2009 (7) SCALE 568]} D

In *Baldev Singh* (supra), this Court noticed *Miranda v. Arizona* [384 US 436] in the following terms:

"30. In *D.K. Basu* case the Court also noticed the response of the Supreme Court of the United States of America to such an argument in *Miranda v. Arizona* wherein that Court had said: (SCC pp. 434-35, para 33) E

> "The Latin maxim salus populi suprema lex (the safety of the people is the supreme law) and salus republicae suprema lex (safety of the State is the 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'."" F G

16. Appellant at no point of time was informed that he had a statutory right of being searched by a Gazetted Officer. The combined reading of the depositions of the prosecution witnesses are pointers to the fact that the so-called consent letters were obtained only after they had been arrested. Even H

A in relation to preparation of consent letters, there is a glaring discrepancy. According to P.W. 3, it was SHO himself who wrote the said letters but Shrikant Mishra has different story to tell, namely, that he himself had suffered an injury on his finger and as such he had asked some other person to write the said B consent letters. It is also difficult to believe that Mishra, leaving the accused in the mercy of P.W. 2 and P.W.3, would go back to Barabanki to obtain letters of approval. The nature of the statements made by him before the court clearly shows that the same was manipulated.

C We must place on record that in *State of Punjab v. Balbir Singh* [(1994) 3 SCC 299], this Court observed as under:

> "10. It is thus clear that by a combined reading of Sections 41, 42, 43 and 51 of the NDPS Act and Section 4 CrPC D regarding arrest and search under Sections 41, 42 and 43, the provisions of CrPC namely Sections 100 and 165 would be applicable to such arrest and search. Consequently the principles laid down by various courts as discussed above regarding the irregularities and illegalities E in respect of arrest and search would equally be applicable to the arrest and search under the NDPS Act also depending upon the facts and circumstances of each case.
>
> 11. But there are certain other embargoes envisaged under Sections 41 and 42 of the NDPS Act. Only a F Magistrate so empowered under Section 41 can issue a warrant for arrest and search where he has reason to believe that an offence under Chapter IV has been committed so on and so forth as mentioned therein. Under sub-section (2) only a Gazetted Officer or other officers G mentioned and empowered therein can give an authorization to a subordinate to arrest and search if such officer has reason to believe about the commission of an offence and after reducing the information, if any, into writing. Under Section 42 only officers mentioned therein H and so empowered can make the arrest or search as

provided if they have reason to believe from personal knowledge or information. In both these provisions there are two important requirements. One is that the Magistrate or the officers mentioned therein firstly be empowered and they must have reason to believe that an offence under Chapter IV has been committed or that such arrest or search was necessary for other purposes mentioned in the provision. So far as the first requirement is concerned, it can be seen that the Legislature intended that only certain Magistrates and certain officers of higher rank and empowered can act to effect the arrest or search. This is a safeguard provided having regard to the deterrent sentences contemplated and with a view that innocent persons are not harassed. Therefore if an arrest or search contemplated under these provisions of NDPS Act has to be carried out, the same can be done only by competent and empowered Magistrates or officers mentioned thereunder.

12. *Nand Lal v. State of Rajasthan* is a case where a police head constable and a station house officer were not empowered to carry out investigation and it was contended that the whole investigation was illegal and consequently the trial was vitiated. The Rajasthan High Court held that for launching the prosecution or for initiating the proceedings under the Act, the authority doing so must have a clear and unambiguous power. In *Bhajan Singh v. State of Haryana* it was observed that only officers empowered under the Act can take steps regarding entry, search, seizure and arrest and that the relevant provisions of the Act are mandatory. In *Umrao v. State of Rajasthan* it was held that the search made by a police constable without jurisdiction and investigation made by an officer not empowered, vitiate the trial. In *Shanti Lal v. State of Rajasthan* it was similarly held that search and arrest made by SHO who was not authorised under the Act, were illegal."

A 17. We must, however, notice that recently a Constitution Bench of this Court in *Karnail Singh v. State of Haryana* [2009 (10) SCALE 255] in view of difference of opinion in *Abdul Rashid Ibrahim Mansuri v. State of Gujarat* [(2000) 2 SCC 513] opining that compliance of Section 42 of NDPS Act is B mandatory in nature and in *Sajan Abraham v. State of Kerala* [(2001) 6 SCC 692] holding the said principle to be directory, opined as under:

"(a) The officer on receiving the information (of the C nature referred to in Sub-section (1) of section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1). D

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the E information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he F could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior .

(c) In other words, the compliance with the G requirements of Sections 42 (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances H involving emergent situations, the recording of the

information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001."

Even, admittedly, Shrikant Mishra had no authority to make search. Nothing has been brought on record to show that the provisions of Section 42 of the NDPS Act were substantially complied with.

18. Before parting, however, we may notice a disturbing

A fact. The learned Special Judge has let off accused No.3 Shobha Lal under the Probation of Offenders Act. He referred to Section 33 of the NDPS Act.

Section 33 of the NDPS Act reads as under:

B *"33. Application of section 360 of the Code of Criminal Procedure, 1973 and of the Probation of Offenders Act, 1958.-* Nothing contained in section 360 of the Code of Criminal Procedure, 1973 (2 of 1974) or in the Probation of Offenders Act, 1958 (20 of 1958) shall apply to a C person convicted of an offence under this Act unless such person is under eighteen years of age or that the offence for which such person is convicted is punishable under Section 26 or Section 27."

D He, therefore, misread the entire provision. We do not see any reason as to why such a provision had to be resorted to in the case of one of the accused only. The High Court, in our opinion, also should have drawn the attention of the learned trial judge on the glaring mistake committed by him.

E 19. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed. The appellant is in custody. He is directed to be set at liberty forthwith unless wanted in any other case.

F N.J. Appeal allowed.