



2024:DHC:5006



**IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 08.07.2024

+ **BAIL APPLN. 2287/2022**

BANTU .....Applicant

versus

STATE GOVT OF NCT OF DELHI ..... Respondent

**Advocates who appeared in this case:**

For the Applicant :Mr. Shivendra Singh & Mr. Bikram Dwivedi, Advs.

For the Respondent :Ms. Rupali Bandhopadhya, ASC for the State for the State with Mr. NitinSingh, ARSC/Crime Branch

**CORAM  
HON'BLE MR JUSTICE AMIT MAHAJAN**

**JUDGMENT**

1. The present application is filed under Section 439 of the Code of Criminal Procedure, 1973 ('CrPC') seeking grant of regular bail in FIR No. 359/2019 dated 28.12.2019 registered at Police Station Crime Branch for offence under Section 20 of the Narcotics Drugs and Psychotropic Substances Act, 1985 ('NDPS Act'). Chargesheet has been filed against the applicant for offence under Section 20 of the NDPS Act.

**Brief Facts**

2. The case of the prosecution is that, on 28.12.2019, SI Vikrant



received information about the applicant, who allegedly used to supply 'charas' in Delhi after procuring it from Himachal Pradesh. It is alleged that the information was received that between 3:30PM to 4:30PM, the applicant would come to supply 'charas' to someone near Sanjay Akhada, Outer Ring Road, near Gurudwara at Majnu ka Tila, Delhi.

3. It is alleged that the information was reduced in writing *vide* DD No.6 at 2:15PM in compliance with Section 42 of the NDPS Act. It is alleged that at about 4:10PM, a raid was conducted and the applicant was apprehended.

4. A notice under Section 50 of the NDPS Act, was served upon the accused, and the refusal of the accused was recorded thereafter. It is alleged that during the search, one bag was recovered from the applicant's possession, from which 1.1kg charas, concealed in two packs of 550 grams each was recovered.

5. The alleged recovery is of commercial quantity of contraband.

6. Upon completion of the investigation, the chargesheet in the present case was filed against the applicant and the co-accused, under Section 20 of the NDPS Act, and charges were framed by the learned Trial Court.

7. The learned Trial Court dismissed the regular bail application moved by the applicant *vide* order dated 12.01.2022, hence the present application.

**Submissions on behalf of the applicant**

8. The learned counsel for the applicant submitted that the



applicant has been falsely implicated in the present case. He submits that there are serious infirmities in the case of the prosecution. He submitted that even though the purported recovery happened in a public place, there are no independent witnesses.

9. He submitted that the CDR filed by the prosecution itself (from Airtel) of the applicant's mobile number reveals that incoming and outgoing calls were being made from the number until 6:00PM whereas the prosecution story is that the applicant was apprehended around 4:15PM.

10. He submitted that Section 50 of the NDPS Act has not been complied with. The notice under Section 50 of the NDPS Act, purportedly served on the applicant on 28.12.2019, bears the FIR number at the top, even though the FIR was yet to be registered when the applicant was purportedly searched around 4.10PM, as per the case of the prosecution.

11. He further submitted that that non-reference of the word 'nearest' in the notice served upon the applicant under Section 50 of the NDPS Act makes the notice defective entitling the applicant to be released on bail. In support of the said contention, the learned counsel for the applicant relied upon the judgment passed by the coordinate bench of this Court in the case of *Mohd. Jabir v. State (NCT of Delhi)*: 2023 SCC OnLine Del 1827.

12. He submitted that in the present case, upon seizure, the compliance of Section 52A of the NDPS Act was not made and the sampling procedure was not carried out before the learned Magistrate.



13. He submitted that the applicant has satisfied the bar under Section 37(1)(b)(ii) of the NDPS Act of establishing reasonable grounds for believing that he is not guilty of an offence.

14. He submitted that the applicant has been in custody for more than 4 years and relied upon the observations of the Hon'ble Supreme Court in *Mohd. Muslim v. State (NCT of Delhi) : 2023 SCC OnLine SC 352*. He submitted that the applicant has clean antecedents and deep roots in the society and there is no possibility of the applicant influencing the witnesses.

15. He submitted that the trial is at the stage of examination of prosecution witnesses and only four out of thirteen witnesses have been examined by the prosecution.

16. He relied on the following judgments to buttress his arguments :
- a. *Aabid Khan v. State (NCT of Delhi): 2023 SCC OnLine Del 7668*
  - b. *Mohd. Jabir v. State (NCT of Delhi): 2023 SCC OnLine Del 1827*
  - c. *Gurpreet Singh v. State of NCT of Delhi: 2024:DHC:796*
  - d. *Surender Kumar v. Central Bureau of Narcotics: SLP (Criminal) No. 12566/2023*

**Submissions on behalf of the State / respondent**

17. *Per contra*, the Additional Standing Counsel for the State opposed the bail application. She submitted that the case pertains to recovery of commercial quantity of contraband from the possession of



accused therefore the rigours of Section 37 of the NDPS Act would be attracted. She submitted that Section 37 of the NDPS Act cannot be given liberal interpretation on the justification that it affects the personal liberty of a citizen who is yet to be tried.

18. She submitted that there is no discrepancy in the notice under Section 50 of the Act as the FIR number is usually mentioned by the IO after registration of the FIR. She submitted that Section 50 of the NDPS Act even otherwise, is not applicable as the recovery was made from the bag belonging to the applicant and not from his personal search. In support of the said contention, the learned ASC placed reliance on a judgment passed by the Hon'ble Apex Court in ***Ranjan Kumar Chadha v. State of Himachal Pradesh: 2023 SCC OnLine SC 1262.***

19. She further submitted that the use of the word 'nearest Gazetted Officer' in Section 50 of the NDPS Act is directory in nature and not mandatory. The use of the word 'nearest' or the omission to write 'nearest' does not affect/ hamper the intent or alter the safeguard of Section 50 of the Act. She argued that the non-mentioning of the word 'nearest' alone cannot amount to non-compliance with Section 50 of the NDPS Act. She stated that once the applicant was informed about his rights, the mandatory requirements of Section 50 are complied with. Therefore, there was no irregularity.

20. She submitted that the argument of the applicant with respect to non-compliance with section 52A holds no water since the provisions of Section 52A of the NDPS Act are applied for the disposal of the



case property after making inventory and keeping the samples of seized contraband. Section 52A stipulates the Disposal of seized narcotic drugs and psychotropic substances and the seized contraband which is the primary source has not been destroyed in the present case and is preserved in the malkhana of the police station.

21. She relied on the following judgments in support of her arguments:

- a. ***Irfan Saifi v. State (NCT of Delhi): 2023 SCC OnLine Del 7624***
- b. ***Sharif-ud-din v. Abdul Gani Lone : (1980) 1 SCC 403***
- c. ***Gauri Shankar Jaiswal v. Narcotic Control Bureau: SLP(Crl.) No. 13403/2023***

### **Analysis**

22. The arguments of the learned counsel for the parties were heard in detail.

23. It is settled law that the Court, while considering the application for grant of bail, has to keep certain factors in mind, such as, whether there is a prima facie case or reasonable ground to believe that the accused has committed the offence; circumstances which are peculiar to the accused; likelihood of the offence being repeated; the nature and gravity of the accusation; severity of the punishment in the event of conviction; the danger of the accused absconding or fleeing if released on bail; reasonable apprehension of the witnesses being threatened; etc.



**Rigours of Section 37 of the NDPS Act**

24. It is unequivocally established that, to be granted bail, the accused/appellant must fulfill the conditions stipulated in Section 37 of the NDPS Act. Section 37 of the NDPS Act reads as under:

*“37. Offences to be cognizable and non-bailable.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—*

*(a) every offence punishable under this Act shall be cognizable;*

*(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—*

*(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and*

*(ii) where the Public Prosecutor oppose the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.*

*(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force, on granting of bail.”*

25. The accusation in the present case is with regard to the recovery of commercial quantity of contraband. Once the rigours of Section 37 of the NDPS Act are attracted, as provided under the Section, the Court can grant bail only when the twin conditions stipulated in Section 37(1)(b) of the NDPS Act are satisfied in addition to the usual requirements for the grant of bail – (1) The court must be satisfied that there are reasonable grounds for believing that



the person is not guilty of such offence; and (2) That the person is not likely to commit any offence while on bail.

26. The learned counsel for the applicant submitted that a liberal interpretation of Section 37 of the NDPS Act must be taken into account by the Court in the present case on the following grounds :

- a) Illegality in the notice served under Section 50 of the NDPS Act in so far as it did not stipulate that the accused has a right to be searched in the presence of the 'nearest' Gazetted Officer or Magistrate;
- b) During the course of the arguments, the learned counsel also pointed out the alleged non-compliance with Section 52A of the NDPS Act, however, did not press the grant of bail on the said issue;
- c) Non-joinder of independent witnesses by the prosecution
- d) No photography and videography; and
- e) Delay in trial.

**Non-compliance with Section 50 of the NDPS Act**

27. The learned counsel for the applicant vehemently contended that the omission to incorporate the word 'nearest' in the notice constitutes non-compliance with Section 50 of the NDPS Act and thus entitles the applicant to bail. Section 50 of the NDPS Act reads as under:

***“50. Conditions under which search of persons shall be conducted.–***

***(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or***



*section 43, he shall, if such person so requires, take such person without unnecessary delay to 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.*

*(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).*

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

28. In the present case, the notice under Section 50 of the NDPS Act was served upon the applicant and he was duly apprised of his right that if he so requires, he shall be searched before a gazette officer or Magistrate. Failure to ‘inform’ the suspect about the existence of his said right would have admittedly caused prejudice to him. However, the main thrust of the argument raised by the learned counsel for the applicant is that the notice issued under Section 50 of the NDPS Act is flawed due to the omission of the word ‘nearest’ while informing the applicant of his right to be searched before a



Gazetted Officer or a Magistrate.

29. Significant reliance is placed on the order passed by a coordinate Bench of this Court, in *Mohd. Jabir v. State (NCT of Delhi)* (*supra*). It was held as under:

*“50. In my opinion the use of the word “nearest” by the legislature is intentional and has been used to ensure neutrality and independence at the time of search.*

*51. Therefore, it was improper for the IO to suggest in the notice under section 50 that “any” Gazetted Officer can be called.*

*52. In Nathi Devi v. Radha Devi Gupta, (2005) 2 SCC 271, the Hon'ble Supreme Court observed:*

*13. The interpretative function of the court is to discover the true legislative intent. It is trite that in interpreting a statute the court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, give to the words that meaning, irrespective of the consequences. Those words must be expounded in their natural and ordinary sense. When the language is plain and unambiguous and admits of only one meaning, no question of construction of statute arises, for the Act speaks for itself. Courts are not concerned with the policy involved or that the results are injurious or otherwise, which may follow from giving effect to the language used. If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In considering whether there is ambiguity, the court must look at the statute as a whole and consider the appropriateness of the meaning in a particular context avoiding absurdity and inconsistencies or unreasonableness which may render the statute unconstitutional.*

*14. It is equally well settled that in interpreting a statute, effort should be made to give effect to each and every word used by the legislature. The courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. A construction which attributes redundancy to the legislature will not be accepted except for compelling reasons*



*such as obvious drafting errors. (See State of U.P. v. Dr. Vijay Anand Maharaj [AIR 1963 SC 946 : (1963) 1 SCR 1], Rananjaya Singh v. Baijnath Singh [AIR 1954 SC 749 : (1955) 1 SCR 671], Kanai Lal Sur v. Paramnidhi Sadhukhan [AIR 1957 SC 907 : 1958 SCR 360], Nyadar Singh v. Union of India [(1988) 4 SCC 170 : 1988 SCC (L&S) 934 : (1988) 8 ATC 226 : (1988) 4 SCC 170 : AIR 1988 SC 1979], J.K. Cotton Spg. and Wvg. Mills Co. Ltd. v. State of U.P. [AIR 1961 SC 1170] and Ghanshyamdas v. CST [AIR 1964 SC 766 : (1964) 4 SCR 436].)*

*53. In the present case, not giving the word “nearest” its due meaning and importance, would make the word ‘nearest’, a surplusage, which cannot be the intention of legislature in drafting section 50.*

*54. The factum independence is also stressed in Drug Law Enforcement Field Officer's Handbook, wherein it is stated:*

*“The team should reach the locality where the target premises is situated well before the strike time and arrange two respectable independent residents in the area willing to witness the search proceedings. To ensure people agree to be a part of these proceedings, the DLEO should use a mixture of tact, gentle persuasion and legal necessity to convince people to cooperate with the law. In dire necessity, the DLEO can issue a legal notice to persons requiring them to act as witnesses. Refusal to do so when asked in writing, without reasonable cause, is an offence under Section 187 IPC read with Section 100 Cr. P.C. Once witnesses are identified, the DLEO should explain to them the purpose of the search without divulging specific details and ask them to accompany him to the target premises”*

*55. The sanctity of the above-mentioned Field Officer's Handbook was discussed by the Hon'ble Supreme Court in the case titled as Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801.*

*56. In the light of the above judgments and facts, I am of the view that the applicant's alleged refusal that he is unwilling to be searched is irrelevant. The notice u/s 50 NDPS act itself is faulty in law. Therefore, it cannot be said that accused's unwillingness to be searched in front of an officer who is a member of the raiding team is a voluntary expression of their desire for giving up their right to be searched. The notice of section 50 served to the applicant clearly violates the law and is a misdirection. As a result, I am of*



*the opinion that the applicant was misled into believing that his search was to be before any gazetted officer and not the nearest. Further the fact was conducted before ACP Rich pal is far from an independent search as ACP Rich pal was part of the raiding team.”*

30. The order passed in ***Mohd. Jabir v. State (NCT of Delhi)*** (*supra*) was subsequently followed by a coordinate bench of this Court in the case of ***Aabid Khan v. State (NCT of Delhi)*** (*supra*) wherein it was held as under :

*“20.....it is the case of the prosecution that the present applicant refused to be searched before a Gazetted Officer or a Magistrate and therefore, the question of him being searched before ‘nearest’ such officer does not arise. A perusal of the aforesaid notice reflects that the word ‘nearest’ does not find any mention as stated hereinabove. The said word is in the language of the section itself. The raiding officer in the present case ought to have given the said option to the applicant. This Court is in agreement that the judgment of co-ordinate bench in Mohd. Jabir (supra) to the effect that the word ‘nearest’ has been used in the statute with a certain intention and cannot be ignored by the concerned Investigating Officer at the time of giving notice under Section 50 of the NDPS Act.”*

31. It is essential to determine whether the omission of the word ‘nearest’ in the notice under Section 50 of the NDPS Act nullifies the notice and prejudices the applicant.

32. Section 50 of the NDPS Act mandates the empowered officer to inform the concerned suspect about the existence of his right that if he so requires, he shall be searched before a gazette officer or a Magistrate. The intention of the legislature in incorporating this provision is to ensure that the individual is aware of his right and to prevent potential misuse of power by law enforcement authorities. This safeguard aims to instill a sense of security and fairness in the



search procedure, ensuring that the concerned suspect can exercise his right to be searched in a transparent manner.

33. Constitutional Bench of the Hon'ble Apex Court in the case of ***Vijaysinh Chandubha Jadeja v. State of Gujarat : (2011) 1 SCC 609***, while explaining the scope of Section 50 and taking into account the observations enumerated in another Constitutional Bench judgment in the case of ***State of Punjab v. Baldev Singh : (1999) 6 SCC 172*** held as under :

*“24. Although the Constitution Bench in Baldev Singh case [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to “inform” the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to “inform” the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.*

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*29. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to*



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

(emphasis supplied)

34. The Hon’ble Apex Court after examining the provisions of Section 50 of the NDPS Act, held that an empowered officer must ‘inform’ the person being searched of their right to be taken before the gazetted officer or a Magistrate for the search. This information need not be in writing. Failure to inform the person of this right causes prejudice to the accused. It was further held that the court must determine compliance with Section 50 of the NDPS Act based on trial evidence, and the prosecution must be allowed to establish compliance during the trial. The provisions of Section 50 of the NDPS act are not explicitly stated as mandatory or directory, but failure to inform the person of their right may render the recovery of the contraband suspect, thus affecting the validity of the conviction and sentence.

35. The learned counsel for the applicant has not demonstrated how this omission caused any prejudice to the applicant. The applicant was duly informed of his right to be searched in the presence of a Gazetted Officer or a Magistrate, fulfilling the core requirement of Section 50 of the NDPS Act.



36. This court deems it imperative to underscore the primacy of substantial compliance over mere technical adherence, asserting that the central concern should be whether the rights of the accused were sufficiently safeguarded.

37. It is true that provisions of Section 50 of the NDPS Act have to be strictly complied with. The same, however, does not mean that each and every word mentioned in the provision has to be repeated verbatim in the notice. As long as the intention of the notice is clear and the language used substantially complies with the intention of the provision, the same would be strict compliance with the provision. Section 50 of the NDPS Act provides for the responsibility of the officer to search the suspect before the 'nearest' magistrate or gazette officer. The duty is cast upon the officer to take the person if he so requires to the nearest Gazetted Officer or a Magistrate. The right of the suspect, however, is to be informed of his right to be searched in the presence of a Gazetted Officer or a Magistrate if he so desires. The officer undoubtedly has to take him to the nearest Gazetted Officer or a Magistrate however, not informing the suspect that he would be taken to the 'nearest' Magistrate for the purpose of search will not amount to non-compliance with Section 50 of the NDPS Act. No prejudice, at this stage, is pointed out as to how the accused was prejudiced by not being informed that he would be taken to the 'nearest' Magistrate for the purpose of search. The accused in the present case has even otherwise, as stated, refused to exercise his right.



38. As long as the essence of the right is communicated effectively, ensuring that the suspect is aware of his right to be searched in the presence of a magistrate or a gazetted officer, the requirement of Section 50 of the NDPS Act is fulfilled. This approach ensures that the safeguards intended by the provision are maintained without being overtly rigid about the exact phrasing used in the notice.

39. Clearly, the essence of Section 50 of the NDPS Act is to 'inform' the concerned suspect of his right. The omission of specific words thereof, does not lead to non-compliance if no prejudice is caused. The substantial compliance with procedural safeguards is adequate if the rights of the accused are not prejudiced. The intention of legislation is that the suspect is made aware of his rights rather than rigid adherence to the statutory text. The substance of the law should prevail over its form, and technical aspects that do not compromise the rights of the suspect cannot be a ground for the grant of bail at this stage, the same is matter of trial.

40. The right is conferred under Section 50 of the NDPS Act to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting false cases. Not mentioning the word 'nearest' at the time of informing the suspect of his right to be searched before the the Gazetted Officer or a Magistrate does not in any manner takes away the safeguard.

41. The Hon'ble Apex Court emphasized the necessity of informing the suspect of his right under Section 50 of the NDPS Act. However, it did not stipulate that the omission of any word would automatically



invalidate the notice if the suspect was otherwise informed of his statutory right. The primary objective as has already been emphasized by this Court hereinabove, is to safeguard the rights of an accused, and omission of the word ‘nearest’ does not have the effect of changing the spirit of the provision.

42. It is well-established in law that when the intention of the statute is clear, the failure to reproduce the exact words or phrases verbatim does not render the provision ineffective or result in non-compliance.

43. In so far as the reliance placed by the learned counsel for the applicant in the case of *Mohd. Jabir v. State (NCT of Delhi)* (*supra*) is concerned, it is pending consideration before the Hon’ble Apex Court. In light of settled law, the mere omission of the term ‘nearest’, in the opinion of this Court, is not fatal to the case of prosecution. The use or omission of the word ‘nearest’ does not impact or undermine the intent or safeguard provided by Section 50 of the Act. Therefore, the non-mentioning of the word ‘nearest’ alone does not constitute non-compliance with Section 50 of the NDPS Act.

44. Even otherwise, the argument advanced by the learned Additional Standing Counsel for the State seems plausible to the extent that Section 50 of the NDPS Act is not applicable in the present case as the recovery was made from the bag and not from the person. [Ref: *Ranjan Kumar Chadha v. State of Himachal Pradesh* (*supra*)]. The Hon’ble Apex Court held as under :



### “FINAL ANALYSIS

*121. The only idea with which we have referred to the various decisions of this Court starting with Balbir Singh (supra) till Dayalu Kashyap (supra) is to highlight that Section 50 of the NDPS Act has been tried to be interpreted and understood in many ways. As noted earlier, in some of the decisions of this Court, the concept of “inextricably linked to person” was applied. In other words, if the bag, etc. is in immediate possession of the accused and the search is undertaken of such bag, etc., even then, according to those decisions, Section 50 would be applicable. It could legitimately be argued that the interpretation of Section 50 restricting its scope only to the search of a person of the accused would frustrate the object as the apprehension of the person concerned may continue to subsist that he may still be implicated by the police or any other person for more stringent punishment of carrying commercial quantity by getting rid of the rigor of the mandatory provision of Section 50 by implanting the contraband in a vehicle, bag, etc. accompanying the person. What we are trying to convey has been explained in the case of State v. Klein [See : John C. Derrnbachet.al., A Practical Guide to Legal Writing and Legal Method (1994)]. In the said case, the issue before the U.S. Court was that whether a person can be held guilty for the offence of burglary more particularly when such person did not enter the house per se but tried to steal the object with the help of tree snips. The statute clearly declared that for burglary to happen, the defendant should be physically present. In this case, although the defendant never entered the house, yet he did extend his tree snips through the window. The Court held that, “there is no meaningful difference between the snips and his arm because the penetration by the snips was merely an extension of Klein's person.” Therefore, in the said case, the object which a person was carrying was held to be part of his body. A similar view could also have been adopted while interpreting the term “personal search”. However, in view of plain and unambiguous statutory provision, there is no scope of interpreting Section 50 in any other manner than the interpretation explained in Baldev Singh (supra) and Pawan Kumar (supra).*

*122. It is a well-settled principle in law that the Court should not read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of the*



*legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said. Judge Learned Hand said, “Statutes should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them”. (See : Lehigh Valley Coal Co. v. Yensavage, 218 FR 547). The view was reiterated in Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama, (1990) 1 SCC 277.*

**123.** *In D.R. Venkatchalam v. Dy. Transport Commissioner, (1977) 2 SCC 273, it was observed that the Courts must avoid the danger of an a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp the legislative function under the disguise of interpretation.*

**124.** *While interpreting a provision, the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See : Rishabh Agro Industries Ltd. v. P.N.B. Capital Services Ltd., (2000) 5 SCC 515). The legislative casus omissus should not be supplied by judicial interpretative process. The language of Section 50 of the NDPS Act is plain and unambiguous. There is no scope of reading something into it as was done in many decisions of this Court which we have referred to in our judgment.*

**125.** *Two principles of construction — one relating to casus omissus and the other in regard to reading the statute as a whole — appear to be well settled. Under the first principle a casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the legislature.*



*“An intention to produce an unreasonable result”, said Danckwerts, L.J., in Artemiou v. Procopiou, [1966] 1 Q.B. 878 : [1965] 3 All ER 539 : [1965] 3 WLR 1011 (CA)] (at All ER p. 544-I), “is not to be imputed to a statute if there is some other construction available”. Where to apply words literally would “defeat the obvious intention of the legislation and produce a wholly unreasonable result”, we must “do some violence to the words” and so achieve that obvious intention and produce a rational construction. [Per Lord Reid in Luke v. IRC [[1963] A.C. 557 : [1963] 1 All ER 655 : [1963] 2 WLR 559 (HL)] where at AC p. 577 he also observed : (All ER p. 664-I) “This is not a new problem, though our standard of drafting is such that it rarely emerges.”] (See : Padma Sundara Rao (Dead) v. State T.N., (2002) 3 SCC 533)*

*126. As such, there is no direct conflict between SK. Raju (supra) and Baljinder Singh (supra). It is pertinent to note that in SK. Raju (supra) the contraband was recovered from the bag which the accused was carrying, whereas in Baljinder Singh (supra) the contraband was recovered from the vehicle. This makes a lot of difference even while applying the concept of any object being “inextricably linked to the person”. Parmanand (supra) relied upon the judgment in Dilip (supra) while taking the view that if both, the person of the accused as well as the bag is searched and the contraband is ultimately recovered from the bag, then it is as good as the search of a person and, therefore, Section 50 would be applicable. However, it is pertinent to note that Dilip (supra) has not taken into consideration Pawan Kumar (supra) which is of a larger Bench. It is also pertinent to note that although in Parmanand (supra) the Court looked into Pawan Kumar (supra), yet ultimately it followed Dilip (supra) and took the view that if the bag carried by the accused is searched and his person is also searched, Section 50 of the NDPS Act will have application. This is something travelling beyond what has been stated by the large Bench in Pawan Kumar (supra). Baljinder Singh (supra), on the other hand, says that Dilip (supra) does not lay down a good law.*

*127. In the facts of the present case, there is no scope of applying the ratio of Parmanand (supra) and SK. Raju (supra). At the cost of repetition, we may state that in the case on hand, there is nothing to indicate that the search of the person of the*



*accused was also undertaken along with the bag which he was carrying on his shoulder.*

*128. We do not propose to say anything further as regards SK. Raju (supra) as well as Baljinder Singh (supra). We adhere to the principles of law as explained by the Constitution Bench in Baldev Singh (supra) and the larger Bench answering the reference in Pawan Kumar (supra).*

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*131. The aforesaid observations made by the seven-Judge Bench of this Court, more particularly the last three lines referred to above, “These considerations become still more significant when the earlier decision happens to be a unanimous decision of a Bench of five learned Judges of this Court.” persuade us to say that we must adhere to the principle of law as explained by the Constitution Bench in Baldev Singh (supra) and the larger Bench in Pawan Kumar (supra)*

*132. For all the foregoing reasons, we are of the view that the High Court was justified in holding the appellant guilty of the offence under the NDPS Act and at the same time, the High Court was also correct in saying that Section 50 of the NDPS Act was not required to be complied with as the recovery was from the bag.”*

45. In the present case, a notice under section 50 of the NDPS Act was in fact given. However, during his body search, nothing was recovered from his body or the clothes he was wearing at the time of the search. The contraband was seized from the bag, which was being carried by the appellant.

46. The Apex Court after examining the conflicting views of the earlier judgments, held that the concept of the object being inextricably linked to the person cannot be applied. The earlier view that if the person of the accused as well as the bag which the accused was carrying is searched and the contraband is ultimately recovered from the bag, then it is as good as the search of the person, was not



agreed with. It was noted that the said view was taken without noting the larger bench's decision in *State of Punjab v. Baldev Singh (supra)*.

47. Considering the law laid down by the Apex Court in *Ranjan Kumar Chadha v. State of Himachal Pradesh (supra)*, this Court is of the opinion that the compliance with Section 50 of the NDPS Act was not required when the search was made of the bag carried by the accused person.

48. Under these circumstances, even if there were some discrepancies in complying with Section 50 of the NDPS Act, it would not adversely affect the prosecution's case.

49. Moreover, the question whether or not the procedure prescribed has been followed and whether the same has any effect on relief to the accused is a matter of trial. The Hon'ble Apex Court in *State of Punjab v. Baldev Singh (supra)* held as under:

"23. ....

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

### **Non-Joinder of Independent witnesses**

50. The learned counsel for the applicant has also raised the issue of non-joinder of independent witnesses in the present case by the



prosecution despite the applicant being apprehended in broad daylight in a public place.

51. In the present case, the applicant was apprehended by the raiding party at around 4:10 PM near Gurudwara, Majnu ka Tila, Delhi. Despite the applicant being apprehended in daytime, the police authority failed to associate any public witness. It is also pertinent to note that the present case is one where the raiding party was acting on secret information that was recorded *vide* DD No.6 at 2:15 PM itself and had sufficient time before the raid was conducted. The present was not a case of chance recovery which did not give police time to prepare. It is mentioned in the FIR that 4-5 people were requested at ISBT, Kashmiri Gate to join the raiding party, however, none of them agreed and the said persons left without disclosing their names and addresses.

52. It is trite law that the case of the prosecution cannot be rejected merely on account of the case being tethered on the testimonies of official witnesses and non-examination of independent witnesses would thus not be fatal to the prosecution's case [*Dharampal Singh v. State of Punjab : (2010) 9 SCC 608; Raveen Kumar v. State of Himachal Pradesh : 2020 SCC OnLine SC 869*].

53. Reliance on the testimonies of official witnesses is sufficient to secure conviction once it is established that the police witnesses have no animosity against the accused person so as to falsely implicate him. The testimonies of the official witnesses cannot be disregarded merely on account of them being police officials. Clearly, there is no principal



that demarks that the testimonies of official witnesses cannot be relied upon in the absence of corroboration from independent witnesses. It is open to the prosecution to furnish an explanation to justify the non-joinder of public witnesses during the course of the trial [*Jarnail Singh v. State of Punjab* : (2011) 3 SCC 521 ; *Sumit Tomar v. State of Punjab* : (2013) 1 SCC 395 ; *Mukesh Singh v. State (NCT of Delhi)* : (2020) 10 SCC 120].

54. However, it cannot be denied that the lack of independent witnesses in some circumstances casts a shadow over the case of the prosecution [Ref. *Kishan Chand v. State of Haryana* : (2013) 2 SCC 502]. In the case of *Raveen Kumar v. State of Himachal Pradesh* (*supra*), the independent witnesses had gone hostile, the Hon'ble Apex Court while dealing with the question of whether absence of independent witnesses is fatal to the prosecution's case observed that while reliable testimonies of police officials can form the basis of conviction, lack of corroboration from independent witnesses casts an additional duty on the Court to exercise a higher degree of caution while scrutinizing the testimonies of the official witnesses.

55. Section 100 of the CrPC provides that the officer conducting search under a warrant should call upon two or more independent and respectable inhabitants of the locality where the place of search is situated or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search. Section 165 CrPC lays down that whenever an officer-in-charge of a police station or a police officer making an



investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in-charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer after recording in writing the grounds of his belief and specifying in such writing, may proceed to search or to cause search to be made.

56. While irregularity and violation of the provisions of Sections 100 and 165 of the CrPC does not vitiate the seizure, the same would make it indispensable for the Court to consider the question as to whether the weight of evidence has been effected in any manner by the non-compliance or if the same has prejudiced the accused person in any manner. The Hon'ble Apex Court in the case of *State of Punjab v. Balbir Singh : (1994) 3 SCC 299* had observed as under:

*“6. At this juncture we may also dispose of one of the contentions that failure to comply with the provisions of CrPC in respect of search and seizure even up to that stage would also vitiate the trial. This aspect has been considered in a number of cases and it has been held that the violation of the provisions particularly that of Sections 100, 102, 103 or 165 CrPC strictly per se does not vitiate the prosecution case. If there is such violation, what the courts have to see is whether any prejudice was caused to the accused and in appreciating the evidence and other relevant factors, the courts should bear in mind that there was such a violation and from that point of view evaluate the evidence on record. Under Section 100 CrPC the officer conducting search under a warrant should call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search.....Section*



165(4) lays down that the provisions of this Code as to search warrants and the general provisions as to searches contained in Section 100 shall, so far as may be, apply to a search made under Section 165 also.....

7. It therefore emerges that non-compliance of these provisions i.e. Sections 100 and 165 CrPC would amount to an irregularity and the effect of the same on the main case depends upon the facts and circumstances of each case. **Of course, in such a situation, the court has to consider whether any prejudice has been caused to the accused and also examine the evidence in respect of search in the light of the fact that these provisions have not been complied with and further consider whether the weight of evidence is in any manner affected because of the non-compliance.** It is well settled that the testimony of a witness is not to be doubted or discarded merely on the ground that he happens to be an official but as a rule of caution and depending upon the circumstances of the case, the courts look for independent corroboration. **This again depends on question whether the official has deliberately failed to comply with these provisions or failure was due to lack of time and opportunity to associate some independent witnesses with the search and strictly comply with these provisions..... It thus emerges that when the police, while acting under the provisions of CrPC as empowered therein and while exercising surveillance or investigating into other offences, had to carry out the arrests or searches they would be acting under the provisions of CrPC. At this stage if there is any non-compliance of the provisions of Section 100 or Section 165 CrPC that by itself cannot be a ground to reject the prosecution case outright.** The effect of such non-compliance will have a bearing on the appreciation of evidence of the official witness and other material depending upon the facts and circumstances of each case.....

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22. We have also already noted that the searches under the NDPS Act by virtue of Section 51 have to be carried under the provisions of CrPC particularly Sections 100 and 165. **The irregularities, if any, committed like independent witnesses not being associated or the witnesses not from the locality, while carrying out the searches etc. under Sections 100 and 165 CrPC would not, as discussed above, vitiate the trial....**

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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:

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***(4-A) If a police officer, even if he happens to be an “empowered” officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity.***

***(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial.***

***The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.”***

(emphasis supplied)

57. Sections 100(4) and 100(8) of the CrPC delineate the procedure for involving independent witnesses during a search. 100(4) of the CrPC mandates that the officer or individual authorized to conduct the search must summon two or more independent and respectable inhabitants from the locality where the search is to be executed. These witnesses are required to be present during the search to observe the proceedings, ensuring transparency and fairness throughout the process. Under Section 100(8) of the CrPC, occupants of the place being searched must be allowed to attend the search and should be asked to sign the search list (inventory of seized items). In case they



refuse to sign the search list, their refusal must be recorded. The presence and signatures of independent witnesses also need to be obtained on the search list to validate the search procedure.

58. This Court, in ***Prithvi Pal Singh v. State : 2000 SCC OnLine Del 182*** and ***Thomas Karketta v. State : 2015 SCC OnLine Del 11609***, acquitted the accused persons therein after observing that the investigating authority had failed to join witnesses despite sufficient time to procure their presence. It was also observed that there was nothing on record to show that the investigating authority had sought to serve notice under Section 100 (8) of the CrPC which showed that no serious effort was made by the investigating authority to join public persons in the investigation.

59. In ***Ram Prakash v. State : 2014 SCC OnLine Del 6936***, this Court had again observed that it had become a routine practice for the police to state that passers-by were asked to join the raiding party but they declined and left the spot without disclosing their names and addresses. It was observed that the Court should be wary of accepting such explanations. In the said case, the recovery was effectuated at Old Delhi Railway Station and it was observed that a more effective explanation has to be offered for the non-association of a single public witness despite the raid taking place in a crowded public area in broad daylight.

60. Almost a decade later, it is abysmal to note that the practice of such mechanical explanations for non-association of public witnesses



being offered in almost all cases involving seizure of contraband by the police has continued.

61. In the present case as well, the raiding party was successfully able to reach the spot and lay a trap to apprehend the applicant in the intervening time after receipt of information. It is peculiar that the Investigating Agency was unable to associate even a single public witness in the same time, especially since the applicant was apprehended at a crowded place. No effort to serve any notice under Section 100 of the CrPC has been pointed out to have been made either. In such circumstances, *prima facie*, the non-joinder of independent witnesses by the prosecution is a frailty in the prosecution's case.

62. A Coordinate Bench of this Court in the case of ***Krishan @ Babu v. State : BAIL APPLN. 2804/2023*** had observed that non-joinder of a public witness when the recovery is made in public in broad daylight is a factor that ought to be considered while considering the question of grant of bail to the accused person. This Court is in agreement with the said observation.

63. As held by the Hon'ble Apex Court in the case of ***Raveen Kumar v. State of Himachal Pradesh*** (*supra*) and ***State of Punjab v. Balbir Singh*** (*supra*), absence of independent witnesses does not vitiate the trial, however, in such circumstances, an additional duty is cast on the Court to consider whether any prejudice is caused to the accused person while testing the credibility of the testimonies of the official witnesses. The same is to be tested over the course of a trial.



Any observation to this effect without affording an opportunity to the prosecution over the course of the trial to establish its case beyond reasonable doubt would be premature.

64. As noted above, it is open to the prosecution to justify the non-association of independent witnesses during the course of the trial, however, at this stage, *prima facie*, no cogent explanation has been adduced to tilt the balance in favour of the prosecution on this aspect.

65. Thus, there has been an irregularity in the search procedure and the same, at this stage, while considering the application for bail should enure to the benefit of the accused, especially when he is in custody since 28.12.2019.

#### **Absence of Videography and Photography**

66. It is also argued by the learned counsel for the applicant that even though the applicant was apprehended during daytime, and the seizure in the present case was made on the basis of secret information, the police officials made no endeavour to arrange for videography of the raid and recovery of the contraband from the applicant.

67. The Hon'ble Apex Court in the case of *Shafhi Mohd. v. State of H.P. : (2018) 5 SCC 311* underscored the importance of videography in police investigation in line with the best practices around the world given the advancement of technology. The Hon'ble Apex Court had directed the implementation of a Plan of Action proposed by the Committee of the Ministry of Home Affairs and



further directed for setting up of a Central Oversight Body to plan and implement the use of videography. The relevant portion of the said judgment is reproduced hereunder:

*“3. In order dated 30-1-2018 [Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801 : (2018) 2 SCC 807 : (2018) 1 SCC (Cri) 860 : (2018) 1 SCC (Cri) 865] it was observed: (Shafhi Mohammad case [Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801 : (2018) 2 SCC 807 : (2018) 1 SCC (Cri) 860 : (2018) 1 SCC (Cri) 865] , SCC pp. 808-09, paras 21-23)*

*“21. We have been taken through certain decisions which may be referred to. In Ram Singh v. Ram Singh [Ram Singh v. Ram Singh, 1985 Supp SCC 611] , a three-Judge Bench considered the said issue. English judgments in R. v. Maqsd Ali [R. v. Maqsd Ali, (1966) 1 QB 688 : (1965) 3 WLR 229 : (1965) 2 All ER 464 (CCA)] and R. v. Robson [R. v. Robson, (1972) 1 WLR 651 : (1972) 2 All ER 699 (CCC)] , and American Law as noted in American Jurisprudence, 2d (Vol. 29) p. 494, were cited with approval to the effect that it will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. Electronic evidence was held to be admissible subject to safeguards adopted by the Court about the authenticity of the same. In the case of tape-recording it was observed that voice of the speaker must be duly identified, accuracy of the statement was required to be proved by the maker of the record, possibility of tampering was required to be ruled out. Reliability of the piece of evidence is certainly a matter to be determined in the facts and circumstances of a fact situation. However, threshold admissibility of an electronic evidence cannot be ruled out on any technicality if the same was relevant.*

*22. In Tukaram S. Dighole v. Manikrao Shivaji Kokate [Tukaram S. Dighole v. Manikrao Shivaji Kokate, (2010) 4 SCC 329 : (2010) 2 SCC (Civ) 112 : (2010) 2 SCC (Cri) 826] , the same principle was reiterated. This Court observed that new techniques and devices are order of the day. Though such devices are susceptible to tampering, no exhaustive rule could be laid down by which the admission of such evidence may be*



*judged. Standard of proof of its authenticity and accuracy has to be more stringent than other documentary evidence.*

*23. In Tomaso Bruno v. State of U.P. [Tomaso Bruno v. State of U.P., (2015) 7 SCC 178 : (2015) 3 SCC (Cri) 54] , a three-Judge Bench observed that advancement of information technology and scientific temper must pervade the method of investigation. Electronic evidence was relevant to establish facts. Scientific and electronic evidence can be a great help to an investigating agency. Reference was made to the decisions of this Court in Mohd. Ajmal Amir Kasab v. State of Maharashtra [Mohd. Ajmal Amir Kasab v. State of Maharashtra, (2012) 9 SCC 1 : (2012) 3 SCC (Cri) 481] and State (NCT of Delhi) v. Navjot Sandhu [State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715] .”*

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*5. ....An affidavit dated 21-3-2018 has been filed by the Director, Ministry of Home Affairs (MHA) annexing thereto report of the Committee constituted by the MHA about use of videography in police investigation dated 22-11-2017. The Committee considered various issues including the present infrastructure and usage, concerns/problems raised by various States for use of videography during investigations, admissibility of electronic evidence in absence of a certificate under Section 65-B(4) of the Evidence Act, operational difficulties, lack of training, funding, forensic facilities. The Committee observed that though crime scene videography was a “desirable and acceptable best practice”, the mandatory videography required major issues being addressed. Videography may be done on “best effort” basis. The timeline should be different for different States and the Central Investigating Agencies....*

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*9. We are in agreement with the Report of the Committee of Experts that videography of crime scene during investigation is of immense value in improving administration of criminal justice. A Constitution Bench of this Court in Karnail Singh v. State of Haryana [Karnail Singh v. State of Haryana, (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887] , SCC para 34 noted that technology is an important part in the system of police administration. It has also been noted in the decisions quoted in the earlier part of this order that new techniques and devices have evidentiary advantages, subject to the safeguards to be adopted. Such techniques and devices are the order of the day. **Technology is a great tool in investigation** [Ram Singh v. Ram Singh, 1985 Supp SCC 611; R. v. Maqsd Ali, (1966) 1 QB 688 : (1965) 3 WLR 229 : (1965) 2 All ER 464 (CCA); R. v. Robson,*



*(1972) 1 WLR 651 : (1972) 2 All ER 699 (CCC); Tukaram S. Dighole v. Manikrao Shivaji Kokate, (2010) 4 SCC 329 : (2010) 2 SCC (Civ) 112 : (2010) 2 SCC (Cri) 826; Tomaso Bruno v. State of U.P., (2015) 7 SCC 178 : (2015) 3 SCC (Cri) 54; Mohd. Ajmal Amir Kasab v. State of Maharashtra, (2012) 9 SCC 1 : (2012) 3 SCC (Cri) 481; State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715]. **By the videography, crucial evidence can be captured and presented in a credible manner.***

*10. Thus, we are of the considered view that notwithstanding the fact that as of now investigating agencies in India are not fully equipped and prepared for the use of videography, the time is ripe that steps are taken to introduce videography in investigation, particularly for crime scene as desirable and acceptable best practice as suggested by the Committee of the MHA to strengthen the Rule of Law. We approve the Centrally Driven Plan of Action prepared by the Committee and the timeline as mentioned above. Let the consequential steps for implementation thereof be taken at the earliest.”*

(emphasis supplied)

68. The Hon’ble Calcutta High Court in the case of *Kalu Sk. @Kuran and Kabir Sk. v. State of West Bengal : C.R.M (NDPS) 492 of 2022 with C.R.M.(NDPS) 493 of 2022* observed that the legitimacy of the recovery of the contraband is the fulcrum of the cases under the NDPS Act. Following the said judgment as well as the guidelines in the NCB Handbook, the Hon’ble High Court observed that electronic devices enabling videography are readily available and framed guidelines for mandatory recovery:

*“Accordingly, we direct as follows:—*

- (i) In all cases involving recovery of narcotic substance particularly recovery of narcotic above commercial quantity, seizing officers shall make a video recording of the entire procedure unless for reasons beyond the control of seizing officers, they are unable to do so;*
- (ii) Reasons for failing to videograph the recovery proceeding must be specifically recorded in the investigation records particularly contemporaneous documents including seizure/inventory list;*



(iii) *Superior Police Officer not lower than the rank of Additional Superintendent of Police shall monitor recovery of narcotic substance above commercial quantity within their territorial jurisdiction and ensure due compliance of statutory provisions regarding search and seizure including compliance of the directives (i) and (ii) relating to videography of recovery and/or recording of adequate reasons for departure from such procedure;*

(iv) *Non-compliance of the directives (i) and (ii) relating to videography of recovery and/or failure to record just reasons in contemporaneous documents for its noncompliance would attract departmental proceeding so far as the seizing officer is concerned;*

(v) *Director General of Police shall issue necessary directions for due compliance with the aforesaid directives;*

(vi) *Superintendent of Police/Commissioner of Police in each district/commissionerate shall undertake training programmes to spread awareness and capacity building of officers regarding compliance of statutory requirements in the matter of search and seizure of narcotic substance under NDPS Act and compliance of the aforesaid directives relating to videograph of recovery including collection, preservation and production of such electronic evidence in Court.”*

(emphasis supplied)

69. This Court, in the case of ***Ram Prakash v. State : 2014 SCC OnLine Del 6936***, while acquitting the accused person therein, had taken into account the shoddy investigation conducted by the prosecution on account of lack of videography and found the prosecution case to be unbelievable. The Court had observed as under:

***“22. ....The Court can only observe that with so many technological advances where satellite imagery to the smallest degree of precision of any location in the world is available, the Delhi police can no longer be excused for not improving its methods of gathering and presenting evidence. Considering that the raid was going to take place in a busy place like the Old Delhi Railway Station parking lot, and in broad daylight, it should have been possible for the police to arrange for a videograph of the place or perhaps of the raid itself, if not photographs.***



*23. Also clearly there are CCTV cameras all over the place outside the Old Delhi Railway Station including its parking lot. There was no effort made to collect the CCTV footage of the relevant time. Not only would it have showed how the Appellant reached the spot with the three bags but also it could have been placed on record to show the raid placed on record to shown the raid as it took place.”*

(emphasis supplied)

70. On the other hand, another Coordinate Bench of this Court in the case of *Chidi Berr Nwayoga v. State : 2022 SCC OnLine Del 2558* rejected the contention that the case of the prosecution ought to be disbelieved as there was no videography and no CCTV footage was collected either. In this case, although the raid was conducted on secret information, the Court had explicitly noted that if the police officers had parked their cars or made an attempt for videography in advance, there was a possibility that the accused persons would get alerted about the raid and not gone ahead with the transaction.

71. It is also pertinent to note that a Coordinate Bench of this Court, in the case of *Sagar v. State (NCT of Delhi) : 2024 SCC OnLine Del 1419*, while denying bail to the accused therein, noted that the question as to whether the raiding team followed the NCB Handbook while recovery of contraband is a matter of trial which can only be deliberated upon after the prosecution has received a fair chance to prove its case beyond reasonable doubt.

72. Almost all individuals carry a mobile phone compatible for videography these days. From the above cases, it is clear that it is open for the prosecution to furnish reasons to explain and justify the absence of videography and photography in a case. Mere absence of



videography and photography of the recovery does not nullify the case of the prosecution, however, the same can in some circumstances be sufficient to create a doubt as to the veracity of the prosecution's case.

73. The Hon'ble Apex Court, in a catena of judgments has held that the more severe the punishment, greater has to be the care taken to ensure that all the safeguards provided in the statute are scrupulously followed.

74. While a little play in the joint has to be afforded to investigating agencies to enable them to discharge their duties, the authorities also have to be held accountable to prevent abuse of law. In cases where the factum of recovery of the contraband is supported only by official witnesses, lack of videography and photography, especially in the absence of independent witnesses, casts a doubt on the recovery of the contraband, unless the same is justified by cogent reasons.

75. As already noted above, in the case of absence of independent witnesses, it is to be seen whether any prejudice is caused to the accused person and testimonies of the police officials can be believed even without corroboration if the same is found to be credible. This Court is of the opinion that the same rationale would extend to cases where there is no photography and videography as well, specially when the same has been deliberated and commented upon by Courts on numerous occasions.

76. The sufficiency of the explanation, if any, is to be tested during the course of the trial after the prosecution has led its evidence, however, in the opinion of this Court, the absence of any independent



evidence to support recovery (presence of public witnesses, videography or photography) is a relevant factor while considering applications for grant of bail as the same casts a shadow over the very fulcrum of the case.

77. The Drug Law Enforcement Field Officers' Handbook (hereafter '**NCB Handbook**'), issued by the Narcotic Control Bureau (NCB), Ministry of Home Affairs, Government of India also provides that before the operation, the search team should be provided with the necessary equipment, including, a video camera. The NCB Handbook explicitly also provides that the recovery and concealment should be videographed simultaneously if possible, recording the presence of the owner of premises and witnesses, to avoid the witnesses and suspects alleging foul play during the trial.

78. It is pointed out that the procedure prescribed in NCB Handbook has been adopted by the Delhi Police in regard to the investigations in relation to the offence under the NDPS Act. It is though contended that the procedure in the Handbook is not binding, it cannot be denied that the same has been prescribed as the best and crucial practice for obtaining crucial evidence to avoid the suspect alleging foul play during the trial.

79. There is no quarrel that the conviction can be based solely relying upon the testimony of police witnesses. Various judgments passed by the Hon'ble Apex Court have been relied upon by the prosecution in support of the said contention. The Hon'ble Apex Court, after considering the facts of the case and the evidence led



during the trial, held that the evidence of the Police witness is reliable, and the same can be basis of the conviction even in the absence of independent witness.

80. An important aspect however, which cannot be ignored is that the Hon'ble Apex Court in those cases was concerned with the incident relating to the period when, admittedly, there was not much advancement in technology. The Hon'ble Apex Court in the year 2018 in *Shafhi Mohammad v. State of H.P.* (*supra*), taking note of the technological advancement, had passed certain directions. The present case relates to the allegation of recovery in the year 2019. The State, at that stage, was aware of the opinion of the Hon'ble Apex Court, emphasizing the role of audio-visual technology in enhancing, both on the efficacy and transparency in the police investigations.

81. Realizing the need of changing time, the legislature has now passed the Bharatiya Nagarik Suraksha Sanhita ('BNSs'). The practice of photography and videography has now been made mandatory. Even though it is contended that, at the relevant time, the same was not mandatory, it cannot be denied that the Courts have, time and again, discarded the prosecution's story and had emphasized on the importance of independent witnesses and additional evidence in the form of audiography and videography when the same can easily be obtained due to advancement of technology.

82. This legislative enhancement is designed to ensure a more transparent and accountable approach in investigation. BNSs, with its comprehensive emphasis on technological integration, heralds a



transformative era in criminal justice, promoting a system that is not only transparent and accountable but also fundamentally aligned with the principles of fairness and justice.

83. Photography and videography are universally accepted as the best practices for better erudition and appreciation of the evidence. The same ensures that the prosecution is able to better document the recovery during the investigation. BNSS stipulates that the proceedings of search and seizure *shall* be recorded through any audio – video means preferably through a mobile phone. As noted above, these days mobile phones are handy with almost everyone especially, in a metropolitan city like Delhi.

84. It is not the case of the prosecution that the police team were not carrying any instrument (mobile phone) at the time of raid. The same even though, is not fatal to the case of the prosecution, however, at this stage, the benefit cannot be denied to the accused.

85. This Court has come across a number of cases where the investigating authority has in fact done photography and videography of the recovery. It is peculiar that the investigating authorities, understanding the importance of such additional evidence, makes efforts to belie allegations of false implication and endorse the recovery of contraband by photography and videography in some cases, but fails to undertake any steps to do the same in other cases.

86. Even if the explanation tendered by the prosecution for non-joinder of independent witnesses is to be believed, it is more peculiar that despite the same, evidently, no effort to photograph or videotape



the recovery has been made by the prosecution in the present case to endorse the credibility of the recovery.

**Delay in trial**

87. The applicant was arrested on 29.12.2019 and has been in custody since then. The matter is at the stage of examination of prosecution witnesses and only 4 out of 13 witnesses have been examined by the prosecution. There is no likelihood of the trial being completed in the near future.

88. It is trite law that grant of bail on account of delay in trial cannot be said to be fettered by the embargo under Section 37 of the NDPS Act. The Hon'ble Apex Court, in the case of ***Mohd. Muslim v. State (NCT of Delhi)*** (*supra*) has observed as under:

*“21....Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellants deserve to be enlarged on bail.*

*22. Before parting, it would be important to reflect that laws which impose stringent conditions for grant of bail, may be necessary in public interest; yet, if trials are not concluded in time, the injustice wrecked on the individual is immeasurable. Jails are overcrowded and their living conditions, more often than not, appalling. According to the Union Home Ministry's response to Parliament, the National Crime Records Bureau had recorded that as on 31<sup>st</sup> December 2021, over 5,54,034 prisoners were lodged in jails against total capacity of 4,25,069 lakhs in the country<sup>20</sup>. Of these 122,852 were convicts; the rest 4,27,165 were undertrials.*

*23. The danger of unjust imprisonment, is that inmates are at risk of “prisonisation” a term described by the Kerala High Court in A*



*Convict Prisoner v. State*<sup>21</sup> as “a radical transformation” whereby the prisoner:

*“loses his identity. He is known by a number. He loses personal possessions. He has no personal relationships. Psychological problems result from loss of freedom, status, possessions, dignity any autonomy of personal life. The inmate culture of prison turns out to be dreadful. The prisoner becomes hostile by ordinary standards. Self-perception changes.”*

*24. There is a further danger of the prisoner turning to crime, “as crime not only turns admirable, but the more professional the crime, more honour is paid to the criminal”<sup>22</sup> (also see Donald Clemmer's ‘The Prison Community’ published in 1940<sup>23</sup>). Incarceration has further deleterious effects - where the accused belongs to the weakest economic strata : immediate loss of livelihood, and in several cases, scattering of families as well as loss of family bonds and alienation from society. The courts therefore, have to be sensitive to these aspects (because in the event of an acquittal, the loss to the accused is irreparable), and ensure that trials - especially in cases, where special laws enact stringent provisions, are taken up and concluded speedily.”*

(emphasis supplied)

89. The Hon’ble Apex Court in ***Rabi Prakash v. State of Odisha*** : **2023 SCC OnLine SC 1109**, while granting bail to the petitioner therein held as under :

*“4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent - State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act.”*



90. The Hon'ble Apex Court in ***Badsha SK. v. The State of West Bengal*** (order dated 13.09.2023 passed in **Special Leave Petition (Crl.) 9715/2023**), granted bail to the petitioner wherein who had been in custody for more than two years with the trial yet to begin.

91. Similarly, in ***Man Mandal &Anr. v. The State of West Bengal*** (**Special Leave Petition (Crl.) 8658/2023** decided on 14.09.2023), the petitioner therein had been in custody for almost two years and the Hon'ble Apex Court found that the trial is not likely to be completed in the immediate near future. The petitioner was, therefore, released on bail.

92. In ***Dheeraj Kumar Shukla v. State of U.P. : 2023 SCC OnLine SC 918***, the Hon'ble Apex Court released the petitioner therein on bail, and observed as under:

*“3. It appears that some of the occupants of the Honda City” Car including Praveen Maurya @ Puneet Maurya have since been released on regular bail. It is true that the quantity recovered from the petitioner is commercial in nature and the provisions of Section 37 of the Act may ordinarily be attracted. However, in the absence of criminal antecedents and the fact that the petitioner is in custody for the last two and a half years, we are satisfied that the conditions of Section 37 of the Act can be dispensed with at this stage, more so when the trial is yet to commence though the charges have been framed.”*

93. A Coordinate Bench of this Court in ***Gurpreet Singh v State of NCT of Delhi : 2024:DHC:796***, considered the effect of delay and observed as under:

*“16. In addition to the above, only 2 (two) out of 22 witnesses have been examined by the prosecution, and that too partially, though more than three and a half years have passed*



*since the arrest of the applicant. It may be true that the reason for the delay in the conclusion of the trial may be for various factors, may be not even attributable to the prosecution, like Covid 19 pandemic and restricted function of the Courts, however, as long as they are not attributable to the applicant/accused, in my view, the applicant would be entitled to protection of his liberty under Article 21 of the Constitution of India. Delay in trial would, therefore, be one of the consideration that would weigh with the Court while considering as application filed by the accused for being released on bail.”*

94. From the foregoing, it is evident that despite the stringent requirements imposed on the accused under Section 37 of the NDPS Act for the grant of bail, it is settled that these requirements do not preclude the grant of bail on the grounds of undue delay in the completion of the trial. Various courts have recognized that prolonged incarceration undermines the right to life, liberty, guaranteed under Article 21 of the Constitution of India, and therefore, conditional liberty must take precedents over the statutory restrictions under Section 37 of the NDPS Act.

### **Conclusion**

95. In such circumstances, this Court is of the opinion that the applicant has made out a *prima facie* case for grant of bail on the grounds of absence of independent witnesses and prolonged delay in the trial.

96. The applicant is also stated to be of clean antecedents. Therefore, I am satisfied that are reasonable grounds for believing that the applicant is not likely to commit any offence while on bail.

97. The applicant is, therefore, directed to be released on bail on furnishing a personal bond for a sum of ₹50,000/- with two sureties of



2024:DHC:5006



the like amount, subject to the satisfaction of the learned Trial Court/Duty MM / Link MM, on the following conditions:

- a. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case or tamper with the evidence of the case, in any manner whatsoever;
- b. The applicant shall under no circumstance leave the boundaries of the country without the permission of the learned Trial Court;
- c. The applicant shall appear before the learned Trial Court as and when directed;
- d. The applicant shall provide the address where he would be residing after his release and shall not change the address without informing the concerned IO/ SHO;
- e. The applicant shall, upon his release, give his mobile number to the concerned IO/SHO and shall keep his mobile phone switched on at all times.

98. In the event of there being any FIR/DD entry / complaint lodged against the applicant, it would be open to the State to seek redressal by filing an application seeking cancellation of bail.

99. It is clarified that any observations made in the present order are for the purpose of deciding the present bail application and should not



2024:DHC:5006



influence the outcome of the trial and also not be taken as an expression of opinion on the merits of the case.

100. The bail application is allowed in the aforementioned terms.

**JULY 8, 2024**  
**UG / ssh**

**AMIT MAHAJAN, J**