



## MANDATORY OR DIRECTORY PROCEDURE ? A PRACTICAL SOLUTION IN BALBIR SINGH

### I Introduction

THE SUPREME Court through a landmark decision in *State of Punjab v. Balbir Singh*<sup>1</sup> has resolved the controversial issue as to whether the procedure for arrest, search and seizure under the Narcotic Drugs and Psychotropic Substances Act 1985 (NDPS Act) is directory or mandatory. Decision by the apex court was essential especially in light of the conflicting decisions on this point by various High Courts.

### II Brief outline of NDPS Act

The NDPS Act was enacted in 1985 to make stringent provisions for the control and regulation of operations related to narcotic drugs and psychotropic substances. It punishes possession, manufacture and cultivation, *etc.*, of certain drugs with minimum mandatory sentences of ten years extendable to twenty years and fines upto Rs. two lakhs. Chapter V, with which the court was really concerned, deals with the procedure regarding entry, arrest, search and seizure.

### III Law regarding procedure for arrest, search, seizure, etc.

A special procedure for arrest, search and seizure has been prescribed under the NDPS Act. Under sections 41 and 42 only certain classes of magistrates and empowered officers<sup>2</sup> are competent to issue warrants and conduct investigation for search, arrest and seizure respectively if they have 'reason to believe' that a person has committed an offence under the Act. An empowered officer under section 42 can search, seize and arrest without warrant or authorisation between sunset and sunrise if he has 'reason to believe' that it would not be possible to obtain warrant or authorisation without giving an opportunity for concealment of evidence or escape of an offender. In such cases he must record the grounds of his belief and send it to his immediate official superior.<sup>3</sup> Section 50 requires the empowered officer to conduct the search before a gazetted officer or magistrate if "such person so requires". It also empowers the gazetted officer or magistrate to discharge such person if he finds no reasonable ground for search.

While section 51 states that the provisions of the Criminal Procedure Code (CrPC) shall be applicable as regards arrest, seizure and search as long as they are not inconsistent with NDPS, section 52 requires the arresting officer to inform the

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1. J.T. 1994 (2) S.C. 108.

2. These officers should be superior in rank to a peon, sepoy or constable of the departments of central excise, narcotics, customs, revenue, intelligence or any other department of the central government and if he is a state government officer, he must be specifically empowered.

3. Proviso to s.42 (1).



arrested person about all the grounds for such arrest. In addition to this, according to section 57, the officer shall within forty-eight hours make a report of the particulars of arrest or seizure to his immediate official superior.

#### IV Area of conflict

The court had to decide the following issues :

- (i) What is the extent of applicability of CrPC and the status of search conducted under it while investigating other offences which lead to recovery of prohibited substances under NDPS Act.
- (ii) Whether issue of warrants and conduct of investigation by authorities other than those authorised under sections 41 and 42 respectively would vitiate the trial and what is the interpretation of the term 'reason to believe'.
- (iii) Whether the requirement of informing a person of the option of being searched before a gazetted officer or magistrate is mandatory or obligatory.
- (iv) Whether the provisions relating to recording of reasons, submission of report to superior officers and informing the accused of the grounds of arrests are mandatory or directory.

#### V Response of court

##### (1) Rule of interpretation

The court relied on its earlier judgment in *Re Presidential Election*<sup>3a</sup> and *Govind Lal Chagganlal Patel v. The Agriculture Produce Market Committee*<sup>4</sup> to evolve the rule that to decide whether a particular rule or provision is mandatory or directory, the primary consideration shall be the relation of that provision to the general object intended to be secured by the legislation, i.e., the intention of the legislature. It held that while NDPS Act was enacted to combat the menace of drugs, prevention of harm to innocent people as a result of the abuse of stringent provisions by officers was also intended to be ensured.<sup>5</sup>

##### (2) Applicability of CrPC

Since sections 100<sup>6</sup> and 165<sup>7</sup> of CrPC are not inconsistent with the provisions of the Act, they were held to be applicable for effecting search, seizure and arrest

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3a. A.I.R. 1974 S.C. 1682.

4. A.I.R. 1976 S.C. 263.

5. See, *supra* note 1 at 121-2.

6. S. 100 (4) requires the presence of two or more independent and respectable inhabitants of the locality when search is conducted.

7. S. 165 deals with search without warrants and delegation of the power to search to a subordinate officer. In both cases, the reasons have to be in writing.



under the Act also. The above stance immediately raises the question whether non-compliance of joining public witnesses or the requirement of recording reasons in writing under sections 100 and 165 respectively would be total to the prosecution.<sup>8</sup> The court after referring to many decisions<sup>9</sup> held that non-compliance of these provisions would amount to only an irregularity and that the court has to consider whether any prejudice has been caused to the accused. Only in such a case will non-compliance be fatal to the prosecution.<sup>10</sup> The above conclusion of the court is welcome, especially keeping in mind the difficulties faced by enforcement agencies in getting public witnesses during search operations. A factual analysis of each case would also ensure that the accused's rights are not affected in the process of strengthening the prosecution.

### (3) Legality of recovery of drugs during investigation for other offences

The court has held that when a police officer conducting investigation under CrPC (including search) comes across in the person of the suspect some prohibited drug, compliance with section 50 does not arise as search was not begun with the purpose of recovering a prohibited drug. For the rule to apply the investigation must have been for some other offence.<sup>11</sup> The search would be valid up to this point. From that point onwards, if he is an empowered officer under the NDPS Act, he should continue the investigation in accordance with NDPS Act. Otherwise, he should inform an empowered officer to carry on with the investigation.

### (4) Competency of authorities and 'reason to believe'

As mentioned above only certain magistrates and officers of higher rank are authorised to issue warrants and conduct searches under sections 41 and 42 respectively. The court was of the opinion that the designation of superior officers was an important safeguard in view of the deterrent sentences contemplated and therefore any action by an incompetent magistrate or officer would *per se* be illegal and vitiate the trial.

'Reason to believe' does not mean subjective satisfaction of the official concerned. It would only mean a *bona fide* exercise of the authority conferred.<sup>12</sup>

### (5) Condition precedent to conduct of search

Section 50 requires that a person shall be searched before a magistrate or gazetted officer 'if the person to be searched so requires'. There was disagreement among the various High Courts as to whether this imposed a mandatory obligation

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8. The Delhi High Court in *Sunari alias Chamari v. State*, (1988) 2 Cr.J.R. (Del.) 522, held that non-joining of public witnesses is fatal but a contrary view was taken by the Bombay High Court in *Abdul Sattar v. State*, 1989 Cri.L.J. 430.

9. *State of Maharashtra v. Natwarlal Damodardas Soni*, A.I.R. 1980 S.C. 593, *Bai Radha v. State of Gujarat*, (1969) 2 S.C.R. 799 and *Sunder Singh v. State of U.P.*, A.I.R. 1956 S.C. 411.

10. See, *supra* note 1 at 117.

11. For *e.g.*, a police officer while searching a person for recovery of a stolen article comes across narcotic drugs.

12. See also, *Pratap Singh v. Director of Enforcement, Foreign Exchange Regulation*, A.I.R. 1985 S.C. 989.



on the empowered officer to inform the person of this option.<sup>13</sup> The Supreme Court relied on the famous US decision of *Miranda v. Arizona*<sup>14</sup> and held that a mandatory obligation in fact exists and failure to inform the person would vitiate the trial. The court has kept in mind the importance of protecting the liberty of the individuals and rightly held this provision to be mandatory.

#### **(6) Requirement of recording of reasons, informing grounds of arrest, etc.**

The requirement of recording, (i) reasons for searches conducted between sunset and sunrise, and (ii) any prior information, have been held to be mandatory. Section 52 which requires the arresting officer to inform the accused of all the grounds of arrest and section 57 providing for a detailed report have been held to be not *per se* mandatory but non-compliance will have a bearing on the evidence. It is respectfully submitted that section 52 should have been mandatory as it was framed to safeguard the rights of an accused under article 22(1) of the Constitution.

### **VI Conclusion**

The problem of balancing the protection of individual liberty on the one hand and needs of law enforcement agencies on the other is a perennial problem of statehood.<sup>15</sup> The Supreme Court has to a large extent tried to achieve this delicate balance by making only certain important safeguards mandatory. A suggestion which might ensure personal responsibility of the officers acting under NDPS Act would be effective implementation of section 58 which provides for punishment for vexatious entry, search, seizure or arrest.

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13. The Himachal Pradesh High Court in *State of H.P. v. Sudarshan Kumar*, 1989 Cri. L.J. 1412, has held this provision to be mandatory but the Bombay High Court in *Wlfrid Joseph Dawood Lama v. State of Maharashtra*, 1990 Cri L.J. 1034 was of the opinion that this obligation arises only after the person himself requests.

14. 384 U.S. 436 (1966).

15. Lewis Meyers, *Shall we Amend the 5th Amendment* 228.

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