



GAHC010034402020

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THE GAUHATI HIGH COURT

(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

Case No: Crl.A. No. 103/2021

1. Shri Naveen Kumar @ Naveen Prakash and Anr.
S/O- Om Prakash,
R/O- Vill- Sharifpur, P.O.- Sharifpur, P.S.- Kurawali, District-
Mainpuri, State- Uttar Pradesh.
2. Rakesh Babu
S/O- Late Lal Singh
R/O- Uddetpur
P.O.- Paronkh
P.S.- Auchha
Dist- Mainpuri
State- Uttar Pradesh

.....petitioners

VERSUS

1. Union Of India and Anr.
Represented By Customs
2. Punya Kumar Deka



Inspector
Customs Division
Guwahat

.....respondents

:: BEFORE ::

HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHOUND

For the Petitioner : Ms. S.K. Nargis

For the Respondent : Mr. S.C. Keyal (Customs Dept.)

Date of Hearing : **17. 02.2022**

Date of delivery of
Judgment and Order : **14.02.2023**

JUDGMENT & ORDER (CAV)

- 1.** Heard Ms. S.K. Nargis, learned counsel for the appellants. Also heard Mr. S.C. Keyal, learned Standing Counsel, Customs for the respondents.
- 2.** This appeal is directed against the Judgment and Order dated 18.10.2016 passed by the Additional Sessions Judge-cum-Special Judge No. 2, Kamrup (M) Guwahati in NDPS Case No. 10/2015 convicting accused persons,(1) Naveen Kumar @ Naveen Prakash (hereinafter referred to as A1) and (2) Rakesh Babu@

Rakesh Kumar (hereinafter referred to as A2). Both A1 and A2 were convicted vide Judgment and Order dated 18.10.2016 under Sections 20(b)(ii)C/29 of the NDPS Act to undergo RI for 10 years and to pay a fine of Rs.1,00,000/- (Rupees one lakh only) each with default stipulation.

3. The case in brief is that on 19.08.2014, acting on specific information, the officers of Anti-Smuggling Unit, Guwahati Customs Divisions, intercepted a truck bearing Registration No. HR-55-N-2225 at Baihata Chariali at about 0330 hours. The Custom Officers recovered 20 packets of suspected cannabis concealed by a load of miscellaneous Emami products, from a truck which can be described as a 10 wheeler truck. 804.64 Kgs of suspected cannabis was seized by the Custom Officers which was carried by the truck meant for transporting Emami products. The driver of the vehicle was A1 while A2 was the helper. The contraband was seized as per procedure and inventory was prepared and thereafter the appellants were arrested and forwarded to the Court. A formal complaint against the appellants was filed after positive test of cannabis was received from the forensic laboratory and the appellants were booked under Sections 20(b) (1) C/29 of the NDPS Act.

4. At the commencement of trial charge under Sections 20(b)(ii)C/29 of the NDPS Act was framed and read over and explained to the appellants and they abjured their guilt and claimed innocence.

5. To substantiate its stance, the prosecution adduced the evidence of 10 witnesses. On the incriminating circumstances arising against them the responses of the appellants to the questions under Section 313 Cr.P.C. was recorded.

6. The learned trial Court delineated the following points for determination:-

“Whether the accused persons on 19.08.2014 entered into a criminal conspiracy for possessing, selling and trafficking cannabis and on that day at about 0330 hours at Baihata Chariali under Baihata Chariali police station officers of Anti-Smuggling Unit, Guwahati Customs Division recovered 804.64 Kgs of ganja (cannabis) concealed by a load of miscellaneous Emami products in a 10 wheelers truck bearing Registration No. HR-55-N-2225 and thereby the accused persons are liable to be punished u/s 20(b)(1)C/29 of the NDPS Act.”

7. The learned counsel for the appellants laid stress in her argument that the informant R. Hazarika was not made a witness in this case to the disadvantage of the appellants which lends a benefit of doubt to the appellants. The truck was allegedly intercepted at Baihata Chariali, but the vehicle was brought all the way to Narengi. Seizure was not effectuated at the place of occurrence nor seizure was effectuated as per Section 52A of the Act.

8. It is averred that the aforementioned truck was not even taken to the Police Station from Baihata Chariali despite the fact that several Police Stations falls between the route from Baihata Chariali to Narengi.

9. The learned counsel for the appellants assiduously submitted her argument and the remaining part of her argument will be discussed at the appropriate stage.

10. The learned Standing Counsel Mr. S.C. Keyal refuted the argument of the learned counsel for the appellants by stating that the appellants were caught red-handed while transporting ganja. *Mens rea* is evident as they concealed the ganja under the Emami products and the truck was meant to carry only the

Emami products.

11. The presumption under Section 35 operates against the appellants and they have failed to discharge their burden as they could not give any explanation as to why they were caught carrying 804.64 Kgs of ganja in a truck carrying Emami products. *Actus reus*, conscious possession was not refuted.

12. The learned counsel for the respondents relied on the following decisions:

(i) (2008) 16 SCC 417(Noor Aga-Vs-State of Punjab).

(ii) (2021)4 SCC 1(Tofan Singh-Vs-State of Tamil Nadu).

(iii) 2021(1) GLT 790 (Thounaojam Punima Singh-Vs-Union of India & Anr).

13. The learned Standing Counsel for the Customs relied on the following decisions:-

(i) Baldev Singh Vs. State of Haryana (2015) 17 SCC 554,

(ii) Rizwan Khan Vs. State of Chhattisgarh (2020) 9 SCC 627,

14. The trial Court held that the provision under Section 52-A of the Act was scrupulously followed and the appellants failed to discharge their burden of conscious possession of the contraband. It was held by the learned Trial Court that the corroborating evidence of the witnesses proved this case against the appellants to the hilt.

15. On the anvil of these observations, the question that falls for consideration is that whether the trial Court has erred in convicting the appellants under the aforementioned Sections of law.

16. PW 1, Dr. Satyen Roy, an official witness has submitted that on 18.08.2014, Shri Rideep Hazariak, an Inspector received an information at



around 8:30 P.M. to the effect that in a 10 wheeler truck ganja was being loaded at a place named Rowta. The truck was carrying Emami products and was supposed to cross Baihata Chariali between 3:30 to 4:00 A.M. on 19.08.2014. The information was reduced into writing and was submitted to the Senior Superintendent, Shri D.C. Bania at about 8:30 P.M. on 18.08.2014. The Superintendent D.C. Bania constituted a team of officers which included himself, PW-2, PW-3, PW-6 and PW-10 who was also entrusted to effectuate seizure of the articles. They started at around 9.30 P.M. and reached Baihati Chariali at about 10.30 P.M. on the same night i.e. on 18.08.2014. The checkpoint was erected 150 metres away from Mangaldai. They tried to procure seizure witnesses but as it was midnight, the public refused to be witnesses to the seizure of articles at about 3.30 a.m. On 19.08.2014, a truck answering to the description they have received, approached towards them and they stopped the truck. They introduced themselves to the two occupants of the truck which was loaded with

Emami products and they asked the driver if any other product was loaded in the truck, which the driver denied. When the handyman was asked to open the trunk of the truck, the driver confessed about the ganja which was in the truck. On being directed, the two occupants i.e. the driver and the handyman brought the truck to the residential complex of the Investigating Officers at Narengi and they all reached Pattharqarry at 5.30 A.M. on 19.08.2014. Many people assembled and Santosh Rai and Bicky Shah were asked to be the witnesses of the proposed seizure. The lock and seal of the truck was removed by the driver himself and the Emami products were unloaded. Alongwith some cartons containing Emami products, certain tightly packed polythene packets were found and these polythene bags totalling up to 20 bags were segregated. Inside

these packets, plant based materials believed to be ganja was found which were weighed on an electronic scale in presence of the aforementioned two witnesses. The total quantity of ganja weighed 804.64 kilograms. He proved the weighment sheet as Exhibit-1 and Exhibit-1(1) and Exhibit1 (2) as his signatures. The ganja was seized and inventory was prepared and samples were drawn from each of the tightly packed polythene packets numbering upto 30 packets in presence of the appellants and two independent witnesses. He proved the panchnama as Exhibit-2 and Exhibit-2 (1) as his signature on the panchanama. He also proved his signature on the statement of A-2 as Exhibit-3(1). On personal search of the driver and handyman Rs. 10,570/- was recovered from A-1. A-1 and A-2 were arrested at 5.00 P.M. and forwarded to the Magistrate on the following day. A separate inventory as per Section 52-A of the act was also prepared with respect to the seized dried plant based materials believed to be ganja. He proved the inventory as Exhibit-4 and Exhibit-4 (1) and Exhibit 4 (2) as his signatures. He identified the driver as A-1 and the handyman as A2. His cross-examination will be discussed at the appropriate stage.

17. In sync with the evidence of PW-1, Sib Sankar Basumatry has testified as PW-2, Sri Sanjib Kumar Das has testified as PW-3, Sri Dwipen Ch. Bania has testified as PW-4, Sri M.I. Singh has testified as PW-6 and Sri Punya Kumar Deka has testified as PW-10.

18. PW-1 was the Superintendent of Anti Smuggling Unit, Customs Division, Guwahati at the time of the incident. The PW-2, PW-3, PW-6, PW-7, PW-10 are the Inspectors of Anti Smuggling Unit, Guwahati Customs Division. D.C. Bania, at present has retired from the same Customs Division. His evidence as PW-4 that he has received a secret information from Rideep Hazarika has been substantiated by PW-1, 2, 3, 6 and 10. PW-1, 2, 3, 4, 6 and 10 have also stated

that the team constituted by the Superintendent i.e. PW-4 proceeded to Biswanath Chariali to apprehend the vehicle, which was described through the secret information. At about 3.30 a.m., the truck was intercepted and then the vehicle was taken to the Central Excise and Customs Department quarter complex at Narengi. On the next date i.e. 19.08.2014, at about 5.00 A.M., the trunk of the vehicle was opened and the articles were unloaded and ganja was recovered which was hidden under the Emami products. The evidence of PW-1, 2, 3, 4, 6 and 7 clearly depicts that the truck was brought from near the Biswanath Chariali to Narengi. Their evidence also depicts that A-1 and A-2 were found inside the truck. After the ganja was unloaded, PW-6 seized the ganja in presence of the independent witnesses namely, Biki Shah, PW-8 and Santosh Rai, PW-9.

19. PW-1, 2, 3, 6, 7, 8 and 9 have testified that 20 packets of ganja were recovered from the truck. The suspected ganja weighed 804.6 kilograms. PW-4 has stated that the suspected ganja weighed 840 kilograms and PW-9 has stated that the suspected ganja weighed 800 kilograms while PW-6 did not mention the number of packets containing the suspected ganja. The learned defence counsel kept harping on about the contradictions regarding the weight of ganja described by PW-4 and PW-9 stating that this contradiction has to be taken seriously as the accused/appellants are booked under a serious offence.

20. Weightment sheet was prepared by the PW-6 who seized the contraband in presence of the independent witnesses. He proved his signature on the weightment sheet as Exhibit-1(4) and 1(5). PW-6 further stated that he prepared the inventory in presence of the appellants and the independent witnesses and he proved his signatures on the inventory as Exhibit-6(4), 6(5) and 6(6). He also prepared the inventory as per 52(A) of the NDPS Act and he proved his

signatures on the said inventory as Exhibit-4(4) and 4(5). He prepared the panchnama, marked as Exhibit-2 and his signature as Exhibit-2(2) was identified by him on the panchnama. Further, PW-6 stated that he drew 20 samples in duplicate from 20 packets of seized ganja and prepared the Form-F. He proved the Form-F as Exhibit-9 and Exhibit-9(1) as his signature. He further stated that after effecting seizure, he arrested both A-1 and A-2 and produced them before the Chief Judicial Magistrate, Kamrup(M). After effectuating seizure, he deposited the seized articles under the Divisional go-down and received the report from the godown in-charge, which was marked as Annexure-14 and he identified the signature of the godown In-Charge as 14(1). He proved the brief facts of the case as Exhibit-15 and Exhibit-15(1) as his signature. He identified the seized packets in the Courts as material Exhibit-1 to 21. He also identified both the appellants A-1 and A-2. On cross-examination, only one question was asked by the defence and to this, PW-6 answered that the seizure was made in the official quarter.

21. I would like to reiterate that the learned defence counsel assiduously placed her argument and she left no stone unturned to point out each and every flaw in the investigation. The evidence of PW-1, 2, 3, 4, 6, 7 and 9 fits like hand in glove, but their evidence is not substantiated by the evidence of PW-8 and 9. Were the steps taken by the investigating agency defective? To decide this case, a re-appreciation of the evidence and evaluation of the same will lead us to the answer. At this juncture, it is clear that PW-6 was the officer to effectuate the seizure of the contraband and PW-10 was entrusted with the investigation by PW-4 and PW-4 who was posted as Superintendent at that point of time formed the investigating team. PW-2 recorded the statement of A-1 who confessed voluntarily that he was consciously involved in trafficking the



seized contraband. He proved the statement of A-1 as Exhibit-5. The statement was recorded in presence of PW-4 and was taken by Sunil Tiwary. He proved his signature on statement as Exhibit-5(1). PW-3 identified his signature on the weighment sheet as Exhibit-1(3). His evidence also substantiates that 1,544/- cartons of Emami products and 20 packets of ganja was inside the container body of the truck which was seized by PW-6 and both A-1 and A-2 were arrested in their presence and in the presence of the independent witnesses. PW-3 identified his signature on the inventory as Exhibit-6 and Exhibit-6(1). He has also substantiated the evidence of PW-2 that the statement of appellants were recorded by PW-2. The PW-3 further testified that he was not present till the conclusion of the investigation because he personally took the samples to the Directorate of Forensic Science and handed over the samples to the lab on 20.08.2014. He proved the acknowledgement as Exhibit-7. He stated that PW-6 recovered Rs. 11,070/- from the possession of the appellant. However, he could not correctly identify the driver. He stated that the name of the handyman is Naveen Kumar (A-1). This contradiction was also pointed out by the learned counsel for the appellants.

22. PW-4 identified his signature on the inventory as Exhibit-6(2) and 6(3). He proved his signatures on the weighment sheet as Exhibit-1(4) and 1(5). He too stated that PW-6 prepared the inventory as per provision of Section 52-A, and he identified his signature on the inventory as 4(2) and 4(3). He proved the written secret information report submitted to him by Rideep Hazarika as Exhibit-8. He proved the signature of Rideep Hazarika as Exhibit-8(1) and 8(2) as he is acquainted with the hand writing of Rideep Hazarika, who is a colleague. He proved his signature on the report as Exhibit-8(3) and Exhibit-8(4). He also testified that A-1 Naveen Kumar, confessed of possession of ganja

and admitted that he carried the ganja from Rowta. PW-1 recorded the statement of A-1. He proved the statement as Exhibit-5 and Exhibit-5(2), 5(3), 5(4), 5(5) as his signatures. He entrusted PW-10 with the charge of investigation vide Exhibit-10 and he proved his signature as Exhibit-10(1) and 10(2).

23. Cross-examination of the witnesses will be discussed at the appropriate stage regarding the statements of the appellants under Section 67 of the Act. The learned counsel for the appellant laid stress in her argument that it has been held in ***Tofan Singh Vs. State of Tamil Nadu (2021) 4 SCC 1***, that -

“158.2 :-That the officers who are invested with powers under section 53 of the NDPS Act are “police officers” within the meaning of section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

(ii) That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.”

24. It is true that the statements of the appellants under Section 67 of the Act cannot be used as evidence in this case, and indeed the statements of the witnesses under Section 67 of the Act will not be used as evidence against the appellants.

25. PW-7 was not present at the first place of occurrence. He was present at the Patharquarry quarter complex. He testified that he reached the quarter complex at about 6 A.M. On 19.08.2014, at around 6.30 a.m. the intercepted truck and their team arrived at the quarter complex and after a few minutes, the truck was checked in presence of two independent witnesses. On examination, it was found that the right side of the truck was locked. The right

side of the truck was unlocked with the help of a key handed over by A-1, the driver of the truck and left side of the door and the seal was broken by A-1. Several packages of Emami products were found. With the help of labourers, the packages of Emami products were unloaded in presence of the accused and the two independent witnesses. After removing the packages of the Emami products, they found some HDPE packets. There were 20 HDPE packets which were unloaded and counted. All the tightly packed HDPE packets were opened and examined in presence of the accused/appellant and the two independent witnesses i.e. PW-8 and 9. Ganja was found in each of the 20 packets. The packets were weighed with the help of an electronic weighting machine and the procedure was recorded on the weighment-sheet and inventory was prepared. He proved his signature on the inventory as Exhibit-6(1) and his signature on the weighment-sheet as Exhibit-1(6).

26. The independent witness PW-8 Biki Shah, is a day labourer. He stated that in the year 2014, one morning he was proceeding to his place of work. At Patharquarry, two persons who identified themselves as Customs Officers requested him to be a witness of seizure. He went to Brahmaputra Apartment and saw one parked truck. The driver of the truck opened the container and some articles were recovered. 20 packets of ganja was recoverd. The Customs Officers collected the ganja from each of the packets. A total of 800 kilograms were weighed. He proved his signature on the seizure list as Exhibit-6(7) and 6(8). He also proved his signature as Exhibit-4(6) and 4(7) and he proved his signature on the panchnama as Exhibit-2(6) and 2(7).

27. The learned counsel for the appellants laid stress in her argument that Exhibit-6 is an inventory and not a seizure list. PW-8 has also admitted in his cross-examination that the seized articles were not produced in the Court for



verification. PW-8 has also admitted that he could not read or write in English and the Customs Officer had read over the contents before taking his signature. The failure of the prosecution to produce the seized samples for verification by the seizure witnesses also causes a dent in the evidence.

28. It is also submitted on behalf of the appellants that the other independent witnesses did not support the prosecution case. PW-9 has admitted in his cross-examination that he did not know from where the truck was seized and the seized articles were not produced in the Court. He also admitted that he did not read the documents, on which he has proved his signatures as Exhibit-1(7), and 1(8), 6(9) and 6(10), 4(8) and 4(9) and 2(8) and 2(12).

29. It is true that the seized articles ought to have been verified by the individuals who were witnesses during the seizure of the suspected contraband. It is held that the independent witnesses have not supported the prosecution case, more so, when the seizure was not made at the place of occurrence and the samples were not drawn in presence of Magistrate or the samples were not prepared at the place of occurrence. The place of occurrence is clearly where the vehicle was seized i.e on the outskirts of Mangaldai i.e. between Biswanath Chariali and Mangaldai. The Investigating Agency brought the truck all the way from Mangaldai to Narengi Patharquarry without halting in the police stations enroute between Mangaldai and Patharquarry but taking a detour and conveniently placing the loaded truck in the residential complex.

30. Reverting back to the further evidence-in-chief of the I/O, the I/O, PW-10, stated that the truck carrying the suspected ganja belongs to SAFECO LOGISTIC PVT. LTD. He PW-10, recorded the statement of A-2 and Inspector Sanjib Kumar Das, PW-3 sent the samples to the Forensic Science Laboratory for examination and he assisted the Inspector Sanjib Kumar Das. After receipt of

the lab test report, he submitted the final complaint against the appellants. He proved the final complaint as Exhibit-16 and Exhibit-16(1) up to 16(42) as his signatures.

31. It is apparent from the evidence of PW-5 that the articles seized from the truck are nothing but *ganja*. Dr. Dhrubojyoti Hazarika, the Deputy Director of Drugs & Narcotic Division of DFS testified as PW-5 that on 20.08.2014, while working as Deputy Director, he received the sealed parcel in connection with Guwahati Customs Division Case No. 05/CL/NARC/AS/GAU/2014-15 dated 19.08.2014, and the parcel contained 20 exhibits enclosed in a sealed carton box. The facsimile of the seal was found to be "as Unit Custom Div Ghy". The description of the articles are :-

20 sealed envelopes marked as S/06(12) S/06(20) having 20 closed polythene packets containing about 30 gms dry plant materials each marked as DM/264/2014(a) to D/264/2014(t).

32. PW5 further testified that on careful examination, after following United Nations Drugs Testing Manual, the result of the examination was found as follows:-

33. The exhibits gave positive test for cannabis (*ganja*). He has proved his report as Exhibit-9 and his signature as Exhibit-9(1). He further stated that his report was forwarded to the Director Mr. M.M. Bora vide forwarding letter marked as Exhibit-10 and he identified the signature of Mr. M.N. Bora as Exhibit 10(1).

34. The learned counsel for the appellants laid stress in her argument that the seizure list was not to be found in the record and inventory is not a seizure list. However, the learned Standing Counsel for the respondent emphasized through



his argument that the document identified as inventory was the seizure list because it is in the evidence of the prosecution witnesses that the inventory was prepared as per Section 52A of the Act. It is submitted by the learned Standing Counsel for the respondent that the evidence of PW-1, PW-3 and PW-4 depicts that the Exhibit-4 was prepared as per Section 52A of the Act and the evidence of PW-6 depicts that exhibit-6 was prepared as per Section 52A of the Act. In this instant case, Exhibit-4 is described as the inventory by the witnesses PW-1, PW-3 and PW-4 and the Exhibit-6 is described as the inventory under Section 52 A by PW-6.

35. The learned Standing Counsel projected that Exhibit-4 is clearly mentioned to be a seizure list under Section 52A NDPS Act, 1985 in connection with seizure Case No. 05/CL/NARC/AS/GAU/ 2014-15 dated 19.08.2014. This Memo number has also been described by PW-5 who conducted the lab test of the seized articles sent through this memo number. The nomenclature may not be similar and the witnesses described Exhibit-4 as inventory but Exhibit-4 is nothing but seizure list under Section 52A of the Act.

36. I have scrutinized both the documents Exhibit-4 and Exhibit-6. It is mentioned in the Exhibits 4 and 6 that "samples are drawn in duplicate from the seized quantity each of 30 gms (30 gms X 20 gms = 600 gms) X 2 = 1200 gms". PW-6 effectuated seizure of the contraband and samples were also drawn from the contraband seized in connection with this case.

Section 52A of the Act mandates “ **(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers**



or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to ay Magistrate for the purpose of –

- (a) certifying the correctness of the inventory so prepared; or**
- (b) taking, in the presence of such Magistrate, photographs of [such drugs, substances or conveyances] and certifying such photographs as true; or**
- (c) Allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.**

Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.”

37. I have scrutinized the Exhibit-4 available in the LCR. The Exhibit-4 clearly mentions about drawing of samples as per Section 52A. The samples were drawn and produced before the CJM as per Section 52A. The inventory has also been prepared and photographs have been taken and produced before the CJM, Kamrup, Guwahati. The nomenclature of referring to the inventory as seizure list cannot be considered as a discrepancy. However, the evidence of PW-6 referring Exhibit-6 as the inventory as per Section 52A shows the apathetic manner in which the prosecution was conducted. The Exhibit-6 is not the seizure list but an inventory of the goods seized. A close scrutiny of the Exhibit-6 which is available

in the Case record depicts that the articles were seized under Section 42/43/44 of the Act and not under Section 52A of the Act. The person who was entrusted to effect seizure was PW-6 and he identified Exhibit-6 as the seizure list through which seizure was effectuated as per Section 52A which is contradictory to his testimony in the Court. Exhibit-6 is not the seizure list identified by PW-6 but the inventory. Ext-4 is the seizure list as per Section 52A of the Act.

It has been observed by this Court in ***Thounaojam Punima Singh v. Union of India 2021 (1) GLT 790*** that –

“sample must be taken from the seized contraband on the spot at the time of recovery itself. However, noticing the conflict between the said provision in para 2.2 of the standing order of 1989 as well as the provision of [Section 52-A](#) of the NDPS Act, the Apex Court in Union of India Vs. Mohanlal, (2016) 3 SCC 379, clearly mandated that the sample shall be drawn under the supervision of the Magistrate as envisaged in [Section 52-A](#) of the NDPS Act. The Apex Court held as under:-

"15. It is manifest from [Section 52A](#) (2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under [Section 53](#) who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn. Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application.

16. Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise.

This is so especially when according to [Section 52-A\(4\)](#) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of [Section 52-A](#) above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

18. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

19. Mr. Sinha, learned Amicus, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and [Section 52-A](#) in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of [Section 52A](#) (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions.

31.1 . No sooner the seizure of any Narcotic Drugs and Psychotropic and controlled Substances and Conveyances is effected, the same shall be forwarded to the officer in-charge of the nearest police station or to the officer empowered under [Section 53](#) of the Act. The officer concerned shall then approach the Magistrate with an application under [Section 52A\(ii\)](#) of the Act, which shall be allowed by the Magistrate as soon as may be required under Sub-Section 3 of Section 52A, as discussed by us in the body of this judgment under the heading 'seizure and sampling'. The sampling shall be done under the supervision of the magistrate as discussed in paras 13 and 14 of this order."



15. From the mandate of the Apex Court in Mohanlal's case(supra), it is abundantly clear that sample must be taken under the direct supervision of the Magistrate, which was not done in the instant case. Even the Standing Order 1 of 1989 was also not complied with in respect of taking sample. Therefore, the violation of [Section 52A](#) of the NDPS Act as well as the mandate of the Supreme Court in Mohanlal's case in respect of taking sample of the contraband is apparent in the instant case."

38. Reverting back to this case it is held that in this case too, neither the Standing Order 1 of 1989 was followed nor Section 52A of the Act was complied with in letter and spirit. The samples were drawn in some private housing complex and thereafter inventories were prepared and produced before the Magistrate. This is a major discrepancy which thwarts the evidence collected against the appellants.

39. If the evidence of the formal witnesses are not supported by the evidence of independent witnesses, the trial in certain cases may not be vitiated if the evidence of the formal witnesses are found to be unbiased and reliable. In this case there are too many discrepancies in the evidence and the evidence of the independent witnesses which do not support the prosecution evidence adds to the list of discrepancies. One important witness Mr. Ridip Hazarika was not also produced by the prosecution as witness nor was he cited as a witness. The other most relevant discrepancy is the fact that the person who effectuated seizure has identified the inventory as a seizure list. Pw-6 testified that Exhibit-6 is the inventory prepared under Section 52A of the NDPS Act but the document



Ext.-6 reveals that it was prepared as per Sections 42, 43 and 44 of the Act. This is the nonchalant way in which the evidence was adduced and the investigation was conducted. The seizure list per se section-52 A is Exhibit-4 and not Ext-6.

40. It is submitted on behalf of the appellants that the trial Court did not consider the cross-examination of the witnesses and on the basis of the discrepant evidence-in-chief of the witnesses convicted the appellants. The PW-1 and PW-3 did not know where the naka checking was held and this has been revealed through their cross-examination. PW-1 could not recall if the truck intercepted was a close bodied truck. He and PW-3 admitted in their cross-examinations that several police stations fall enroute between Baihata Chariali and Patharquarry but they have not taken the truck to the nearest police station and they, straightway, after taking a detour went to Patharquarry. It is also apt to mention at this juncture that the seized samples were not produced in the Court for verification by the witnesses PWs-1, 2, 3, 4, 6, 7, 8, 9 & 10. This is another lapse in the evidence. At least the seized samples in duplicate which were under the custody of the Court ought to have been produced for verification by the seizure witness or even by the witnesses who seized the articles. It has been held by the Hon'ble Apex Court in *Union of India v. Rooparam Manu/SC/1817/2017* that-

“6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the [NDPS Act](#). In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned. The suggestion made by the defence in the cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with the police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the investigating officer was also not examined. Against this background, to say that, despite the panch witnesses having turned hostile, the non-examination of the investigating officer and non-production of the seized drugs, the conviction under the [NDPS Act](#) can still be sustained, is far-fetched.”

41. In this case at hand, the witnesses to the seizure turned hostile and the samples of the contraband were not produced in the Court to substantiate the evidence.

42. At this juncture, I would like to discuss the decisions of the Hon’ble Supreme Court relied by the learned Standing Counsel for the Customs. It has been held in ***Baldev Singh Vs. State of Haryana*** (supra):-

“17. In his statement under Section 313 Cr.P.C., no plea has been taken that the appellant was not in conscious possession of the contraband. The appellant has only pleaded that he being falsely implicated and that a false case has been foisted against him in the police station. In his statement under Section 313 Cr.P.C., the appellant had not stated anything as to why would the police foist the false case against the appellant. It is to be noted that huge quantity of poppy straw was recovered from the possession of the appellant. Admittedly, the police officials had no previous enmity with the appellant. It is not possible to accept the contention of the appellant that he is being falsely implicated as it is highly improbable that such a huge quantity has been arranged by the police officials in order to falsely implicate the appellant.

19. From the evidence led by the prosecution, it has been proved beyond reasonable doubt that the accused being the driver of the tractor was in conscious possession of the thirty

three bags of poppy husk in the trolley attached to the tractor. Upon appreciation of evidence, High Court rightly reversed the acquittal and convicted the appellant under Section 15 of the NDPS Act. The occurrence was in the year 1990 and the appellant has suffered a protracted proceeding of about twenty five years. In the facts and circumstances of the case, the sentence of imprisonment imposed on the appellant is reduced from twelve years to ten years."

43. The learned counsel for the appellant has relied on the decision of Hon'ble Supreme Court in ***Noor Aga Vs. State of Punjab (2008) 16 SCC 417***, wherein, it has been held that:-

"58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is 'preponderance of probability' on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt."

44. In the instant case, it has already been held in my foregoing discussions that there are too many discrepancies in the evidence and flaws in the prosecution, which causes a dent in the evidence. The foundational facts, in fact were not proved beyond reasonable doubt. The argument that the appellants failed to discharge their burden of possession of the contraband has to be brushed aside.

45. The learned Standing Counsel for the Customs has also relied on the decision of the Hon'ble Supreme Court in ***Rizwan Khan Vs. State of Chhattisgarh*** (supra) wherein, it has been held that:-

“ It is settled law that the testimony of the official witnesses cannot be rejected on the ground of non-corroboration by independent witness. As observed and held by this Court in catena of decisions, examination of independent witnesses is not an indispensable requirement and such non-examination is not necessarily fatal to the prosecution case, [see Pardeep Kumar (supra)].”

46. It has already been held in my foregoing discussions that the non-corroboration of the testimonies of the official witnesses by independent witnesses was not held to be fatal to this case. In this case, the non-corroboration of the testimonies of the official witnesses by the evidence of the independent witnesses added to list of discrepancies in the investigation as well as in the prosecution of this case.

47. In sum and substance, it is hereby held that the discrepancy thwarts the evidence. Conscious possession of the contraband by the appellants has not been proved beyond reasonable doubt.

48. The appellants get the benefit of doubt because of the reasons enumerated herein below:-

(i) The place of occurrence was at Baihata Chariali but the truck was brought from Baihata Chariali to Narengi despite the fact that many police stations fall within the route from Baihata Chariali to Narengi.

(ii) The truck was opened in the residential complex of the Customs Officers at Pattarquary in Narengi.

(iii) The standing order 1 of 1989 was not followed scrupulously nor the procedure under Section 52-A of the Act was followed as per the guidelines of the Hon'ble Supreme Court in Union of India Vs. Mohanlal and Another (2016) 3



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(iv) Non production of the duplicate samples drawn from the bulk of the seized contraband in the Court for verification by the witnesses who were witnesses to the seizure and drawing of samples of the contraband.

(v) Non-corroboration of the testimonies of the official witnesses by the evidence of the independent witnesses.

49. The NDPS Act prescribes stringent punishment. Hence, a balance must be struck between the need of the law and the enforcement of such law on the one hand and the protection of citizens from oppression and injustice on the other. This would mean that a balance must be struck in.

50. I would also like to reiterate that the procedural requirements were required to be strictly complied with. The Investigation Agency failed to scrupulously to follow the procedure. The fact of recovery has not been proved beyond all reasonable doubt which is required to be established before the doctrine of reverse burden is applied. Recoveries have not been made as per the procedure established by law. The investigation of the case was not fair, and as such the conviction cannot be sustained.

51. The appeal is hereby allowed. The impugned judgment and order is set aside and both the appellants A-1 and A-2 are acquitted from the charges under Sections 20(b)(ii)C/29 of the NDPS Act on benefit of doubt. Both the appellants are to be set at liberty if they are not wanted in any other case. Surety stands discharged. Pending application(s) if any stands disposed of.

Send back the LCR.

JUDGE



Comparing Assistant

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