

GAHC040005012023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

Case No. : Crl.A./14/2023

Batungsi Rai @ Bakamlu Pul and 2 Ors.
W/o Sri Arun Rai,
Permanent Address Village Tissue, PO Medo, PS Wakro, District Lohit, Arunachal Pradesh, Pin 792001 2: Sangsi Krong @ Bajusai Sambal
Age:
Occupation :

3: Thongsi Bengia @ Temlu Pisa
Age:
Occupation

VERSUS

THE STATE OF AP
Represented by the Public Prosecutor.

Advocate for the Petitioner : Mr. S K Deori

Advocate for the Respondent : Ms. L. Hage, Addl. P. P. of A.P.

:::BEFORE:::
HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 28.07.2023

Date of Judgment & Order : 11.08.2023

JUDGMENT & ORDER (CAV)

Heard Mr. S. K. Deori, learned counsel for the appellants. Also heard Ms. L. Hage, learned Additional Public Prosecutor for the State respondent.

2. This is an appeal filed under Section 374(2) of the Code of Criminal Procedure against the impugned judgment and order dated 23.03.2023, passed by the learned Special Judge (NDPS), Tezu, in NDPS Case No. 01(LDV)/2016, convicting the accused appellant under Section 17(b) of the NDPS Act, 1985, and sentenced him to undergo Rigorous Imprisonment for 7 (seven) years and to pay fine of Rs. 50,000/- in default Simple Imprisonment for 6 (six) months.

3. The brief facts of the prosecution case is that on 12.06.2015, at about 1430 hours, one written F.I.R. was submitted by Sub-Inspector S. M. Singha before the Officer-In-Charge, Roing Police Station, alleging *inter alia* that 2-3 numbers of ladies, who supply opium in Roing Township area, are likely to reach Roing by State Transport Bus from Tezu with huge quantity of opium to supply to their customers. On receipt of the information, at 10.30 hours, a police team led by S.I. S. M. Singha went to the State Transport Office premises at Roing

and nabbed 3 (three) ladies, namely, (i) Smti Batungsi Rai @ Bakamlu Pul, (ii) Smti Sangsi Krong @ Bajusai Sambal & (iii) Smti Thongsi Bengia @ Temlu Pisa. During search, the opium like substance weighing 3 Kg 622 grams in total were recovered from the their possession and seized at the spot complying all necessary procedures. On receipt of the said F.I.R., the Officer-In-Charge, Roing Police Station, registered Roing P.S. Case No. 49/2015, under Section 17(c) of the NDPS Act *read with* Section 34 of the Indian Penal Code, and the investigation was taken up by Sub-Inspector S. M. Singha. During investigation, 1516.92 grams of opium strip cloths numbering 117 pieces were seized from Smti Batungsi Rai @ Bakamlu Pul (Rai), 838.80 grams of opium strip cloths numbering 66 pieces were seized from Smti Sangsi Krong @ Bajusai Samba and 1277.28 grams of opium strip cloths numbering 99 pieces were seized from the possession of Smti Thongsi Bengia @ Temlu Dellang (Pisa). The said opiums were seized in presence of the witnesses and samples were also marked and thereafter the samples were produced before the learned Chief Judicial Magistrate, Roing, along with the seized materials in sealed packages and then it was kept in malkhana. The said sample packages were marked as A1, B1 & C1 and forwarded to FSL Banderdewa and accordingly, as per FSL report, it was identified as opium and thereafter, the Charge-Sheet was filed against the accused persons under Section 17(c) of the NDPS Act.

4. Thereafter, the learned Chief Judicial Magistrate, Roing, sent the case for trial before the Special Court (NDPS), East Session Division, Tezu, and the accused persons were accordingly charged under Section 17(b) of the NDPS Act. During framing of charge, the charge was altered under the provision of

216 Cr.P.C. from Section 17(c) to Section 17(b) of the NDPS Act. The prosecution, accordingly, examined 6 (six) numbers of witnesses and on completion of the prosecution evidences, the accused persons were also examined under Section 313 Cr.P.C., wherein, they took the plea of total denial.

5. The learned Special Judge (NDPS), Tezu, accordingly, framed the point for determination as to “whether on 12.06.2015, the accused persons were found in possession of intermediate quantity of opium at Roing Bus Station in contravention of Section 17(b) of the NDPS Act, 1985? If yes, what punishment is deserved by the accused persons?”

6. After hearing the arguments put forwarded by the learned counsels for both sides and considering the evidences on record, the learned Special Judge (NDPS), Tezu, convicted the accused appellants under Section 17(b) of the NDPS Act and sentenced them to undergo Rigorous Imprisonment for 7 (seven) years with a fine of Rs. 50,000/- in default Simple Imprisonment for 6 (six) months.

7. On being aggrieved and dissatisfied with the judgment and order passed by the learned Special Judge, the present appeal has been preferred by the accused persons.

8. It is submitted by Mr. S. K. Deori, learned counsel for the appellants, that the learned Court below erred in law as well as in fact while convicting the accused persons/appellants and as such, the order of conviction and sentence is

liable to be set aside and quashed. Further it is submitted that there was no materials to frame charge against the present accused appellants and the learned Special Judge (NDPS) ought to have dismissed the case at the time of framing of charges due to non-compliance of provision laid down under Sections 41(2) & 41(3) of the NDPS Act. It is further submitted that the search was conducted after receiving an information from reliable sources, but the informant has not followed the procedure laid under Sections 41(2) & 41(3) of the NDPS Act and as per the said Sections, he should have been authorized by the superior officer for search and seizure. But the learned Special Judge (NDPS) erroneously held that the informant/I.O. has the authority/power to search under Section 43 of the NDPS Act. More so, the learned Trial Court ought to have considered the provision under Section 50 of the NDPS Act, which is not at all followed by the police at the time of searching the contrabands from the possession of the appellants. As per Sections 42 & 43, it is required to make a G.D. entry and also to inform in writing to the nearest Gazetted Officer before search of a person under the NDPS Act. But, there is no evidence at all on the record to support the contention that G.D. entry was made before the search procedure.

9. Further it is submitted that from the record, it reveals that there was total non-compliance of Section 50(4) of the NDPS Act, under which provision a lady officer can only search female accused and the lady officer, who is stated to be present at the time of search, was also not examined by the prosecution to prove as to whether the search was conducted by lady police officer. Further, the scientific officer, who submitted the FSL report, was also not authorised

under the provision of Section 293(4)(e) Cr.P.C. to submit any report with regard to authenticity of the contrabands. Though it is stated by the P.W.-1, in his evidence, that lady ASI Das was directed to search the accused ladies, but, surprisingly, the prosecution did not examine the said lady ASI holding that she is not the material witness and as such, her witness was not recorded and the prosecution witness was closed on 24.01.2018. Further it is submitted that the P.Ws.-3, 4 & 5 are stated to be the seizure witness, but from their depositions, it is very much clear that no Magistrate was present at the time of seizure. Further, as per P.W.-4, he has not seen the police seizing the contrabands from the possession of any accused persons and he put his signature in the seizure list at Roing Bus Station. As per P.W.-5 also, he is not aware from whom the contrabands were seized.

10. Thus, it is submitted that the learned Trial Court overlooked the cardinal principles of criminal jurisprudence that the prosecution has to prove his case beyond all reasonable doubt and if there is any shadow of doubt, the benefit goes to the accused. But, here in the instant case, there being abundant of shadow of doubt of conscious possession of contraband, the benefit of doubt ought to have been given to the appellant. But the learned Court below, on contrary, passed the judgment and order convicting the accused appellants under Section 17 (b) of the NDPS Act. Accordingly, it is submitted that the conviction was passed by the learned Special Judge (NDPS) very casually and without appreciating the evidence on record in its true perspective and hence, the same is liable to be set aside and quashed.

11. In support of his submissions, the learned counsel for the appellants also relied on the following case laws:-

- (i) **Noor Aga Vs. State of Punjab & Anr.**, reported in **(2008) 16 SCC 417.**
- (ii) **State of Rajasthan Vs. Tara Singh**, reported in **(2011) 11 SCC 559.**
- (iii) **Union of India Vs. Mohanlal & Anr.**, reported in **(2016) 3 SCC 379.**
- (iv) **Saulat Rasool Vs. State of Assam & Anr.**, reported in **2022 SCC OnLine Gau 1329.**

12. Accordingly, relying on the above decisions, it is submitted by the learned counsel for the appellants that in spite of several discrepancies and even after non-compliance of Sections 41(2), 41(3), 52 & 50(4) of the NDPS Act, the learned Court below very casually come to a decision and passed the judgment and order convicting the accused appellants. It is further submitted that there was non-compliance of Section 52-A of the NDPS Act and it is already seen that there is no evidence at all to prove that the contraband was seized from the conscious possession of the appellants. Merely seizing the contrabands from the possession of the accused cannot be sufficient to convict the accused unless the prosecution prove that the contrabands were seized from the conscious possession of the accused.

13. In this context, the learned counsel for the appellants further stressed on

the paragraph No. 17 of the above cited judgment of this Court, reported in **2022 SCC OnLine Gau 1329**, which is reads as under:

"17. It may pertinently be mentioned here that as held in Gorakh Nath Prasad (supra), the Hon'ble Supreme court held that NDPS Act provides for a reverse burden of proof upon the accused, contrary to the normal rule of criminal jurisprudence for presumption of innocence unless proved guilty. However, this rule shall not dispense with the requirement of the prosecution to having first establish a prima facie case, only whereafter the burden will shift to the accused. ... The evidence of PW-2 shows that as per the aforesaid direction, he proceeded to the Platform No. 1 accompanied by one Constable and one Home Guard as the accused along with the contraband containing packets had been already brought down to the said Railway Platform No. 1 by the train checking party."

14. Further, in support of his submission that there was no evidence that immediately after the seizure of the contrabands, it was kept in the malkhana and without any further delay those were sent before the FSL which is required under the provision of NDPS Act, the learned counsel for the appellants give stress on paragraph Nos. 5 & 6 of the above referred judgment of Hon'ble Supreme Court reported in **(2011) 11 SCC 559**, which are read as under:

"5. We find, however, that the second aspect on which the High Court has opined calls for no interference. As per the prosecution story the samples had been removed from the Malkhana on the 26-2-1998, and should have been received in the laboratory the very next day. The High Court has, accordingly observed that the prosecution had not been able to show as to in whose possession the samples had remained from 26-2-1998 to 9-3-1998. The High Court has also disbelieved the evidence of P.W. 6 and P.W.9, the former being the Malkhana incharge and the latter being the Constable, who had taken the samples to the Laboratory to the effect that the samples had been taken out on the 9th of March, 1998 and not on the 26-2-1998. The Court has also found that in the absence of any reliable evidence with regard to the authenticity of the letter dated 26-2-1998 it had to be found that the samples had remained in some unknown custody from the 26-2-998 to 9-3-1998."

6. We must emphasise that in a prosecution relating to the Act the question as to how and where the samples had been stored or as to when they had despatched or received in the laboratory is a matter of great importance on account of the huge penalty involved in these matters. The High Court was, therefore, in our view, fully justified in holding that the sanctity of the samples had been compromised which cast a doubt on the prosecution story. We, accordingly, feel that the judgment of the High Court on the second aspect calls for no interference. The appeal is, accordingly, dismissed. The respondent is on bail. His bail bonds stand discharged."

15. In another case referred to by the learned counsel for the appellants, which was reported in **(2016) 3 SCC 379**, the Hon'ble Apex Court has framed some guideline which are given in paragraph No. 31 of the judgment and those are reads as under:

"31. To sum up we direct as under:

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.

31.2. The Central Government and its agencies and so also the State Governments shall within six months from today take appropriate steps to set up storage facilities for the exclusive storage of seized Narcotic Drugs and Psychotropic and controlled Substances and conveyances duly equipped with vaults and double locking system to prevent theft, pilferage or replacement of the seized drugs. The Central Government and the State Governments shall also designate an officer each for their respective storage facility and provide for other steps, measures as stipulated in Standing Order No. 1/89 to ensure proper security against theft, pilferage or replacement of the seized drugs.

31.3. The Central Government and the State Governments shall be free to set up a storage facility for each district in the States and depending upon the extent of seizure and store required, one storage facility for more than one districts.

31.4. Disposal of the seized drugs currently lying in the police Malkhanas and other places used for storage shall be carried out by the DDCs concerned in terms of the directions issued by us in the body of this judgment under the heading 'disposal of drugs.'

16. In this context, the learned Additional Public Prosecutor, Ms. L. Hage, has submitted that the learned Special Judge (NDPS) passed the judgment and order considering the evidences of the witnesses as well as also considering that there is a compliance of Section 50 as well as Section 42 of the NDPS Act. More so, it is also seen that the independent witnesses were also examined at the time of seizure and in their presence, the contrabands were seized from the possession of the accused appellants. Further she submitted that even if for the argument's sake it is admitted that there was non-compliance of Section 41(2) of the NDPS Act, in that case also, the trial cannot be vitiated, rather it may be considered as an irregularity and which cannot affect the case of the prosecution. She, accordingly, relied on a decision of Hon'ble Apex Court passed in **Appeal (crl.) 396 of 1990 (State of Punjab Vs. Baldev Singh)**, and further give emphasis on paragraph Nos. 3, 4-A & 4-B of the judgment, which are read as under:

“(3) Under [Section 42\(2\)](#) such empowered officer who takes down any information in writing or records the grounds under proviso to [Section 42\(1\)](#) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(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."

17. The learned Additional Public Prosecutor further submitted that from the contents of the F.I.R. as well as from the evidences, it is seen that the search was not a personal search, but it was made in a vehicle in presence of witnesses and thus, it cannot be said that there was non-compliance of Section 50 of the NDPS Act and accordingly, she relied on another decision of Hon'ble Supreme Court passed in **Criminal Appeal Nos. 1565-66 of 2019 (State of Punjab Vs. Baljinder Singh & Anr.)** and mainly stressed on paragraph Nos. 16 & 17 of the said judgment, which read as under:-

"16. As regards applicability of the requirements under Section 50 of the Act are concerned, it is well settled that the mandate of Section 50 of the Act is confined to "personal search" and not to search of a vehicle or a container or premises.

17. The conclusion (3) as recorded by the Constitution Bench in Para 57 of its judgment in Baldev Singh clearly states that the conviction may not be based "only" on the basis of possession of an illicit article recovered from personal search in violation of the requirements under Section 50 of the Act but if there be other evidence on record, such material can certainly be looked into."

18. Accordingly, the learned Additional Public Prosecutor has submitted that the learned Court below committed no error or mistake while convicting the accused appellants under Section 17 (b) of the NDPS Act and hence, the interference of this Court is not at all necessary in the judgment and order dated 23.03.2023, passed by the learned Special Judge (NDPS), Tezu, in NDPS Case No. 01(LDV)/2016.

19. After hearing the submissions made by the learned counsel for both sides,

I have perused the case record, the annexures as well as the judgment passed by the learned Court below.

20. It is the argument put forwarded by the learned counsel for the appellants that there was total non-compliance Sections 41(1), 41(3), 42 & 52-A of the NDPS Act as well as he raised the point that there was no lady officer at the time of seizure and the prosecution also failed to examine the vital witness- ASI Das, who was claimed to be present at the time of seizure, but, surprisingly, the said lady ASI was not examined and dropped by the prosecution. More so, it is argued that there are sufficient contradictions amongst the witnesses which were not considered by the learned Court below and in the same time, it is also argued that the seizure list as well as the seized articles etc. were also not produced before the concerned Magistrate and even no signatures were obtained in the samples sent to FSL for examination.

21. On the other hand, it is the argument from the prosecution side that the articles were searched and seized by complying the proper provision of law as well in present of the independent witnesses. In the same time, the I.O. also complied with the provision of Sections 50/52 of the NDPS Act while seizing the articles.

22. So, after considering the submissions made by the learned counsels for both sides, I find that before arriving at any decision, it is pertinent to scrutinized the prosecution witnesses and the exhibits produced by the prosecution.

23. P.W.-1 is the SI Richie Moyong, who deposed that on the day of incident, he along with Officer-In-Charge, Roing Police Station, SI S. M. Singha, went to transport office for checking and in the course of checking, SI Singha directed one lady ASI Das to search 3 (three) suspected ladies (the present accused appellants) and during search, they recovered gift boxes from the suspected ladies and accordingly, opium like substance were found inside the gift boxed and thereafter, it was seized. The contrabands were also weighed and the same were sent for examination and the accused appellants were arrested.

24. In his cross-evidence, he admitted that before conducting search, he never asked the accused persons whether they wanted to be searched by any Gazetted Officer and the bags, where the gift boxes were brought, were also not seized and the paper, which were used in wrapping the suspected opium, were also not seized and no Magistrate was present at the time of seizure.

25. P.W.-2, Shri S. M. Singha, who is the I.O. of this case, deposed that he received an information that 2-3 ladies were coming to supply opium in Roing Township and likely to reach Roing with huge quantity of opium. Accordingly, he along with his team, rushed to State Transport Station and nabbed those ladies and seized the contrabands, which were wrapped in cloths, from their possession. Samples were also collected and the same were marked as A1, B1 & C1 and all the seizure were done in presence of independent witnesses and after completion of all the formalities, written F.I.R. was submitted before the Officer-In-Charge, Roing, which was accordingly registered under Section 17(c)

of the NDPS Act *read with* Section 34 of the Indian Penal Code. The seized contraband samples were also sent to FSL Banderdewa for expert opinion. After collecting the report, he accordingly filed the Charge-Sheet. During his examination, he also exhibited seizure list and other relevant documents along with the Charge-Sheet.

26. In his cross-examination, he stated that he seized the contrabands and lodged the F.I.R. and also took up the investigation by himself. But the seizure was not made in presence of the Magistrate. All the accused persons were apprehended at Bus Station by a lady constable and their belongings were seized. But, after arrest of those accused persons, they were not brought before the Magistrate and the samples were sent before the FSL for expert opinion and verifying the percentage of opium in the seized cloth strips. But, from his evidence, it is seen that the percentage of the opium is not reflected in the FSL report.

27. P.W.-3 is a seizure witness/independent witness and as per him, he put his signature in the seizure list. But from his cross-evidence, it is seen that he could not say in which seat of the bus the accused persons were travelling on the day of alleged incident and he was also not present at the time of weighing the contrabands as those were weighed inside the APST counter. He also admitted that no Magistrate was present at the time of seizure.

28. P.W.-4 is the another seizure witness/independent witness and from his evidence, it is seen that though he put his signature in the seizure list, but he

was not present at the time of seizure of the contrabands from the possession of the accused persons.

29. P.W.-5 is another seizure witness/independent witness who put his signature in the seizure list. But he also could not say from whom the police seized the contrabands and he was also not aware about the contents of the seizure memo, though he put his signature on the same.

30. P.W.-6 is the FSL expert and she came to depose as a Chemical Engineer and she stated that the samples, which were sent for examination, was opium and accordingly, she also exhibited the FSL report. From her cross-evidence, it is seen that she received cloth smeared opium weighing 24 grams, but, during examination, it was found that only 12.9 grams of opium substance were there and rests were cloths and impurities substance. But she did not give any percentage of opium in the contraband.

31. So, considering the statements of the witnesses, the learned Special Judge (NDPS), East Sessions Division, Tezu, passed the impugned judgment and order dated 23.03.2023, in NDPS Case No. 01(LDV)/2016, convicting the accused appellant under Section 17(b) of the NDPS Act, 1985, and sentenced them to undergo Rigorous Imprisonment for 7 (seven) years and to pay fine of Rs. 50,000/- in default Simple Imprisonment for 6 (six) months.

32. The learned Special Judge (NDPS), in its judgment, relied on a judgment of Constitution Bench of Hon'ble Supreme Court in **State of Punjab Vs.**

Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080, wherein, it is observed that the Section 43 NDPS Act, 1985, deals with the power of seizure and arrest of the suspect in "public places" and provisions of Section 42 NDPS Act, 1985, does not apply. However, in case of only "personal search", Section 50 of the NDPS Act is applicable and not for search of vehicle, premises etc. Further, the learned Special judge also relied on another 2 (two) decisions of Hon'ble Apex Court in **Karnail Singh Vs. State of Haryana [(2009) 8 SCC 539]** and **State of Punjab Vs. Baljinder Singh [(2019) 10 SCC 473]**, and accordingly, it has been observed by the learned Special Judge that the compliance of Section 50 of the NDPS Act is required only for the personal search and there was compliance of Section 42 of the NDPS Act also. Further, the learned Special Judge relied on a judgment of Hon'ble Apex Court in the case of **Mukesh Singh Vs. State (NCT of Delhi)**, reported in **(2020) 10 SCC 120**, wherein, it is observed that as per Section 68, it provided that no officer acting in exercise of power vested in him under the provision of NDPS Act or any rule or order made thereunder shall be compelled to say from where he got any information as to the commission of any offence. The learned Special Judge further relied on another decision of Hon'ble Supreme Court in the case of **Rizwan Khan Vs. State of Chhatisgarh [(2020) 9 SCC 67]**, wherein, it has been held that "it is a settled position of law that the testimony of the official witnesses cannot be rejected on the ground of non-corroboration by independent witness."

33. Accordingly, it is observed by the learned Special Judge (NDPS) that the independent witnesses or the official witnesses have no personal dislike towards

the accused persons to falsely implicate them and the official witness clearly establish the fact that the accused persons arrived at Roing from Tezu and purchased the gift boxes where the opium were hidden and the same were brought with a view to sale in the market. Accordingly, considering all these aspects, the learned Special Judge convicted the accused appellants under Section 17(b) of the NDPS Act.

34. But, from the evidences of the P.Ws., it is seen that neither the seizure and sampling were done in absence of any Magistrate nor any opportunity was given to the accused appellants to be searched in presence of any Magistrate. Further it is a fact that under Section 50 of the NDPS Act, the requirements under Section 50 (i) (ii) (iii) (iv) is necessary when there is a personal search. Accordingly, the view of the prosecution that as the search was made in the vehicle and in the public premises, there is no requirement of compliance of Section 50 of the NDPS Act. But, from the evidences of the prosecution witnesses, it is very much evident that though the accused appellants were nabbed from a bus stand, but all the accused appellants were personally searched and it is the claim of the prosecution that one lady ASI Das was present at the time of search and she was engaged for the personal search of all the accused/ladies. It is also admitted by all the witnesses that there was no Magistrate while the accused appellants were personally searched by the said lady ASI. It is not a case that there was a chance of recovery of the contrabands, but the case of the prosecution is that there was an information from a reliable source that 3 (three) ladies are coming with huge quantity of opium, and, in spite of that, the accused appellants were not provided with any

opportunity to be searched or seizure in presence of any Gazetted Officer. Moreover, surprisingly, it is also seen that the lady ASI, who conducted the personal search of those lady accused persons, was also not examined by the prosecution saying that she is not a material or a vital witness for the prosecution. Thus, there is total non-compliance of Section 50 of the NDPS Act, which is mandatory under NDPS Act.

35. Though the learned counsel for the appellants raised the point that there was a total non-compliance of Sections 41(2) & 41 (3) of the NDPS Act, and submitted that the I.O. was not authorised by any superior officer for search and seizure, which is mandatory in nature, and the same ground is also can be a ground of acquitting the accused appellants and the learned Special Judge has erroneously held that the informant/I.O. has the authority/power to search, but it is fact that the I.O./the seizing officer was the Officer-In-Charge of the concerned police station and accordingly, he is authorised to search under Section 43 of the NDPS Act.

36. Coming to the compliance of Section 52 of the NDPS Act, it is seen that the seized articles were not immediately produced before the Magistrate concerned nor there is any signature of the Magistrate. In the same time, the accused persons, along with the seized contrabands, were also not produced before the Magistrate after their arrest nor there is preparation of any inventory by the I.O. and there is no evidence that the seized articles were immediately sent to the malkhana. Further, there is also no evidence that the seized contrabands were immediately sent for FSL for examination without any delay. Thus, it is seen that the prosecution did not comply with the provision under

Section 52-A of the NDPS Act, which is for disposal of seized narcotic drugs and psychotropic substance. As per Section 52-A Sub-Section 2, it is also required the certification of the seized samples regarding correctness of the sample drawn by the I.O. and the inventory is also to be certified regarding the correctness by the Magistrate concerned.

37. For ready reference, Section 52-A Sub-Section 2, 3 & 4 of the NDPS Act is extracted hereinbelow:

"52A. Disposal of seized narcotic drugs and psychotropic substances.

...

(2) Where any narcotic drug or psychotropic substance 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 or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances 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 or psychotropic substances in any proceedings under this Act and make an application, to any 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 or substances 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.

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

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872)

or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”

38. But, here in the instant case, it is seen that there is total non-compliance of Section 52-A and there is no evidence at all that the I.O. prepared the inventory in regards to the seized contrabands nor there is any evidence that there was a certificate issued by the concerned Magistrate regarding the correctness of inventory as well as the correctness of the list of the samples drawn within the contrabands.

39. Sub-section (2) of Section 52A of the NDPS Act mandates a competent officer to prepare an inventory of such narcotic drugs with adequate particulars. This has to be followed through an appropriate application to the Magistrate concerned for the purpose of certifying the correctness of inventory, taking relevant photographs in his presence and certifying them as true or taking drawal of samples in his presence with due certification. Such an application can be filed for anyone of the aforesaid three purposes. The objective behind this provision is to have an element of supervision by the magistrate over the disposal of seized contraband. Such inventories, photographs and list of samples drawn with certification by Magistrates would constitute as a primary evidence. Therefore, when there is non-compliance of Section 52A of the NDPS Act, where a certification of a magistrate is lacking any inventory, photograph or list of samples would not constitute primary evidence. **[Criminal Appeal No. 1651 of 2023 (Mangilal Vs. the State of Madhya Pradesh)]**

40. As per the guideline of the Hon'ble Apex Court in case of **Mohanlal & Anr. (supra)**, as relied by the learned counsel for the appellants, it is observed that the officer concerned should approach the Magistrate with an application under Section 52-A Sub-Section 2 of the Act which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of the Section 52-A of the NDPS Act. It is also provided that the sampling should be done in presence of Magistrate and it should immediately be brought before the Magistrate for sampling.

41. Coming to the evidence of independent witnesses, it is seen that there are 3 (three) independent witnesses who are being examined by the prosecution, i.e. P.Ws.- 3, 4 & 5, and claimed to be the seizure witnesses and also claimed that the articles were seized in their presence. But, from their cross-evidence, it is seen that none of the witnesses were aware about the seizure of the contrabands from the possession of the accused persons nor they have seen the recovery of the contrabands from the possession of the accused appellants. All these witnesses simply put their signatures in the seizure list without knowing about the seized contrabands and they were not present at the time of weighing the samples. Thus, though 3 (three) independent witnesses were examined by the prosecution, but they failed to establish the case and to prove the fact that the seizure was made in their presence and the contrabands were seized from the conscious possession of the accused appellants. It is a settled position of law that the testimony of the official witnesses cannot be rejected only on the ground of non-corroboration by the independent witnesses. But, here in the instant case, it is seen that the I.O. or the seizing officer failed to comply with

the mandatory provision of the NDPS Act and it is evident that the seizure procedure were completed in absence of any Magistrate concerned even without giving any opportunity to the accused appellants to be searched in presence of any Gazetted Officer. Further, the prosecution failed to establish the conscious possession of the contrabands by the accused appellants. In the same time, it is very surprising that the only lady officer, in whose presence the search was made, was not examined by the prosecution, rather the prosecution dropped the said witness stating that she is not a material witness of the prosecution case. So, in absence of the evidence of the said lady officer, it cannot be held that there was a proper search and seizure of the contrabands or the contrabands were recovered from the conscious possession of the accused appellants.

42. Further it is seen that the I.O. had the prior information that 3 (three) ladies were coming with huge quantity of opium and accordingly, they on the prior information, nabbed those 3 (three) accused persons and made the search. Thus, it is seen that it is not a case of chance recovery where the I.O. has not get a chance to inform any Gazetted Officer to be present at the time of search and seizure, but in spite of the prior information, the I.O./seizing officer did not take any steps to comply with the provision under Section 50 of the NDPS Act. Neither the I.O. complied with the provision of Section 50 of the NDPS Act nor the accused along with the seized contrabands were produced before the Magistrate immediately after their arrest and there is also non-compliance of Section 52 of the NDPS Act. I.O. also did not make any effort in preparing the inventory or to obtain the certificate of correctness from the

concerned Magistrate and in the same time, it is also seen that no signatures were obtained in the samples which were sent to FSL for examination. Further it is seen that there is no evidence at all that the contrabands were immediately sent to malkhana for safe custody of the contrabands and there is also no evidence that the samples were sent to FSL without any delay after the said seizure.

43. As per Section 54 of the NDPS Act, presumption can be taken that the accused has committed the offence under this Act unless and until the contrary is proved and provides a reverse burden of prove upon the accused. But, here in the instant case, it is seen that the prosecution failed to establish the foundational fact to establish the case against the accused persons in regards to commission of the offence to shift the burden to the accused to prove their innocence. In the case of **Saulat Rasool (supra)**, as cited by the learned counsel for the appellants, this Court, considering the judgment passed by the Hon'ble Supreme Court in **Gorakh Nath Prasad Vs. State of Bihar, (2018) 2 SCC 305**, has held in paragraph 17 of the judgment that *"a reverse burden of proof lies upon the accused, contrary to the normal rule of criminal jurisprudence for presumption of innocence unless proved guilty. However, this rule shall not dispense with the requirement of the prosecution to having first establish a prima facie case, only whereafter the burden will shift to the accused."*

44. So, considering the entire discussions made above, it is seen that the prosecution case suffers from material procedural irregularity and there is total

non-compliance of Sections 50, 52-A & 57 of the NDPS Act. Further it is seen that the independent witnesses also did not support the prosecution case that the contrabands were recovered from the conscious possession of the accused/appellants. In the same time, the non-examination of the vital/material witness of the prosecution, i.e. the lady ASI, who, as per prosecution, made the search of the accused appellants, also reveals that the prosecution failed to discharge the initial burden of proof regarding the conscious possession of the contraband by the accused appellants beyond all reasonable doubt and hence, in such a situation, the reverse burden does not lie upon the accused appellants to prove their innocence.

45. In the result, the appeal is allowed. The judgment and order dated 23.03.2023, passed by the learned Special Judge (NDPS), Tezu, in NDPS Case No. 01(LDV)/2016, convicting the accused appellant under Section 17(b) of the NDPS Act, 1985, stands set aside. The appellants are acquitted of all the charges. Bond, if any, shall stand discharged. The appellant shall be released forthwith if not required in any other case.

46. Send back the case record.

JUDGE

Comparing Assistant