

GAHC010013252021



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

Case No. : CrI.A./28/2021

PRADIP JHA
S/O- LATE RAMJI JHA, R/O- VILL.- MAZBAT TOWN, P.S. MAZBAT, PIN-
784507, DIST.- UDALGURI (BTAD), ASSAM AND ALTERNATE ADDRESS-
M/S. MAA TEA GARDEN NO. 1 GAROGAON, MAZBAT, DIST.- UDALGURI,
BTAD, ASSAM

VERSUS

THE STATE OF ASSAM
REP. BY THE LEARNED PUBLIC PROSECUTOR, ASSAM.

2:MANTU KUMAR DEKA
S/O- LATE BENUDHAR DEKA
SUB INSPECTOR OF POLICE MAZBAT PS
MAZBAT
DIST.- UDALGURI (BTAD)
ASSA

Advocate for the appellant : Mr. A. Bhattacharya

Advocates for the respondent : Ms. S. Jahan, Addl. P.P.

:::BEFORE:::

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 13.10.2023

Date of judgment & order : 22.11.2023

JUDGMENT & ORDER (CAV)

(M. Thakuria, J)

Heard Mr. A. Bhattacharya, learned counsel for the appellant. Also heard Ms. S. Jahan, learned Additional Public Prosecutor for the State respondent.

2. This is an appeal under Section 374 of the Code of Criminal Procedure against the impugned judgment and order dated 26.11.2020, passed by the learned Special Judge Cum District and Sessions Judge, Udalguri, in Special (NDPS) Case No. 20 of 2015, arising out of Mazbat P.S. Case No. 20/2015, under Sections 20(b)(ii)(C)/27(A) of the NDPS Act, whereby, the present accused/appellant was convicted under Section 20(b)(ii) (C) of the NDPS Act, along with the co-accused, namely, Rinush Basumatary, and thereby sentenced to undergo R.I. for 15 years along with a fine of Rs. 1,00,000/- in default to undergo S.I. for another 6 (six) months.

3. The brief fact of the case is that on 01.04.2015, a team of Narcotics Control Bureau (NCB), Guwahati Zonal Unit, arrived at Mazbat Police Station and shared a written information that one Pradip Jha of Mazbat was involved in

trafficking of Ganja and huge quantity of Ganja was presently stocked at a Godown at Panbari. On the basis of the said information, at about 9.00 p.m., a joint search operation was conducted by the NCB and Udalguri Police at the suspected Godown at Panbari in the house of one Samiran Basumatary on being led by Shri Pradip Jha in presence of SDPO Bhergaon. During the search, 30 packets of suspected Ganja weighing approx. 660 Kgs was recovered from the said house and out of which, 24 packets were of 20 Kgs and 6 packets were of 30 Kgs. The recovered suspected Ganjas were accordingly seized at the place of occurrence on being authorized by SDPO Bhergaon. The sample packets were also prepared at the place of occurrence in presence of witnesses. The accused persons, namely, Pradip Jha and Rinush Basumatary, were examined at the place of occurrence and were accordingly arrested. As per the statement of Rinush Basumatary, said Pradip Jha was involved in financing of trafficking Ganja. And, accordingly the F.I.R. was lodged.

4. Initially, the investigation was conducted by P.W.-12, who was the Officer-In-Charge of Lalpani OP under Mazbat P.S. But, subsequently, the investigation was conducted by P.W.-11 and after completion of investigation, the Charge-Sheet was submitted under Sections 20(b)(ii)(C)/27(A) of the NDPS Act.

5. The learned Trial Court initially framed charge under Section 20 (B) of the NDPS Act, but at the stage of judgment, it found the charge framed to be defective and on 14.06.2016, the charge was altered and charges were framed under Sections 20(b)(ii)(C) of the NDPS Act against the accused persons and in addition, the present appellant was also charged under Section 27(A) of the NDPS Act.

6. During the course of trial, the prosecution examined as many as 12 prosecution witnesses and the defence did not adduce any evidence. However, they took the plea of denial while recording their statement under Section 313 Cr.P.C. After completion of the trial, the learned Trial Court convicted the accused/appellant, along with the co-accused, vide judgment and order dated 26.11.2020, and sentenced them to undergo R.I. for 15 years along with a fine of Rs. 1,00,000/- for the offence under Section 20(b)(ii)(C) of the NDPS Act and in default of payment of fine S.I. for another 6 months. Being aggrieved and dissatisfied with the impugned judgment and order passed by the learned Special Judge Cum District and Sessions Judge, Udalguri, the present appeal has been preferred by the present appellant.

7. Mr. A. Bhattacharya, learned counsel for the appellant, submitted that 660 Kgs of Ganjas were allegedly recovered from an empty water tank, which was behind the house occupied by the co-accused, Rinush Basumatary, and the land belonged to the father of said Rinush Basumatary, i.e. one Samiran Basumatary, and the present appellant had been convicted only on the ground that he led the police and NCB party to the empty water tank from where the Ganja had been recovered. He further submitted that the discovery of the Ganja had not been done on the basis of voluntary statement made by the appellant, as required under Section 27 of the Indian Evidence Act, and as such, the appellant could not have been connected with the recovery and discovery of the Ganja.

8. Further it is submitted that the learned Trial Court did not appreciate the

evidence on record in its true perspective and arrived at a wrong finding, convicting the accused/appellant vide judgment and order dated 26.11.2020 and hence, the same is bad in law and liable to be dismissed. There are major contradictions in the statements of the witnesses rendering each of the prosecution witnesses to be doubtful. But the learned Trial Court gave too much reliance upon the statement of prosecution witnesses and reached to an erroneous conclusion and wrongly convicted the appellant under Section 20(b)(ii)(C) of the NDPS Act.

9. He further submitted that the evidence of the Executing Officer, who was a constable in Mazbat Police Station, is to the effect that he had been instructed to serve summons upon Gaira Basumatary and Lila Basumatary, who are the seizure witnesses, however the local public and the village headman told him that no persons by the above names were residing in the village, as per the address allegedly given by the said seizure witnesses. Thus, it cast a doubt on the authenticity of seizure memo, as the seizure witnesses could not be found. Further he submitted that the P.Ws.- 1, 2 & 3 had been declared as hostile witnesses without following the procedure for declaring hostile witnesses, as required under Section 154 of the Indian Evidence Act. Further, from the evidence of P.W.-7, who is another seizure witness, it reveals that he does not know anything about the seizure. However, the learned Court below failed to appreciate that the present case is a case based on circumstantial evidence where the prosecution failed to establish a complete chain of relation between the accused persons and therefore the decision arrived at by the learned Court below is erroneous and bad in law. He further submitted that as per the allegation, the contraband was seized on 01.04.2015, but from the evidence of

P.W.-4, the Deputy Director, Drugs and Narcotics Division, Directorate of Forensic Science, Assam, it is evident that the parcel was received by him only on 04.04.2015, i.e. 72 hours after the alleged seizure, which violates the mandatory provision of NDPS Act and thus, the impugned judgment and order of conviction, being highly perverse and erroneous, is liable to be set aside and quashed.

10. Further he submitted that from the evidence of P.W.-5, it is seen that P.W.-5 did not inform the accused persons the requirement of presence of a Magistrate at the time of search and seizure, as he did not feel the necessity to call any Magistrate or Gazetted Officer and thus, from his evidence itself, it is crystal clear that proper procedure was not followed as per the NDPS Act. Moreover, P.W.-6 also deposed in his evidence that after the seizure, the samples were kept in the custody of Police Malkhana, but during the course of trial, the prosecution also failed to produce the Malkhana Register to prove the said contention and as such, the prosecution could not establish the genuineness of the contraband allegedly seized from the appellant.

11. The learned counsel for the appellant further submitted that the I.O. miserably failed to make any application before the concerned Magistrate under Section 52A (2) of the NDPS Act for certifying the correctness of the inventory and allow to draw representative samples of such contraband allegedly recovered from the possession of the accused which is a mandatory provision of law to be complied with. Further, there are major contradictions in the evidences of P.Ws.- 8 & 10 with regard to the place of occurrence and they are also not aware about the owner of the house from where the alleged recovery was done.

Though, initially the accused- Pradip Jha was charged under Section 27A of the NDPS Act, but the I.O. deposed before the Court that he has not recorded any evidence to substantiate the allegation against the accused- Pradip Jha showing his involvement in financing or trafficking of Ganja. Furthermore, from his evidence, it is also seen that the original authority letter empowering SI Mantu Deka (P.W.-6) to carry out the investigation for recovery of the alleged contraband in connection with Mazbat P.S. GDE 11, dated 01.04.2015, is also not available, either in the Case Diary nor it was attached with the Charge-Sheet. But the learned Court below miserably failed to appreciate the mandatory provision of Sections 41 & 42 of the NDPS Act while appreciating the evidence and passing the judgment.

12. The learned Court below also failed to appreciate the fact that there is no evidence against the present appellant to bring home the charge under Section 20(b) of the NDPS Act and thus, the punishment under Section 20(b)(ii)(C) of the NDPS Act is absolutely arbitrary, illegal and highly mechanical which is liable to be set aside and quashed.

13. Accordingly, the learned counsel for the appellant has submitted that there is total violation for compliance of the mandatory provision of Section 42, 52A of the NDPS Act and also the prosecution could not establish that the statement of the present accused/appellant recorded during the investigation was voluntary and that he led the police officer for alleged recovery of the contraband.

14. In support of his submissions, the learned counsel for the appellant further relied on the following case laws:

- (i) **(2002) 9 SCC 618 (T. Thomson Vs. State of Kerala & Anr.)**, wherein, the Hon'ble Supreme Court had discussed the requirement of compliance of Section 41 (2) of the NDPS Act and in paragraph No. 6 of the said judgment, it has been held as under:

“6. Shri Sadrul Anam, learned Counsel who argued for the first accused contended that there was no written authorisation for PW. 1 to conduct a search in the house and therefore, the search must be held without authority. [Section 41\(2\)](#) requires such authorisation only if the officer of gazetted rank (specified in the Sub-section) wants any other officer subordinate to him to conduct the search. If the gazetted officer himself is to conduct the search or raid it is unnecessary for him to get any other authorisation from another Gazetted Officer.”

- (ii) **(1999) 8 SCC 649, (Rammi @ Rameshwar Vs. State of Madhya Pradesh)**, wherein, the Hon'ble Supreme Court has discussed Section 27 of the NDPS Act and its admissibility and the same reads as under:

“True, such information is admissible in evidence under [Section 27](#) of the Evidence Act, but admissibility alone would not render the evidence, pertaining to the above information, reliable. While testing the reliability of such evidence the court has to see whether it was voluntarily stated by the accused.

PW-13 Investigating Officer has said in his evidence that the accused were arrested on the succeeding day of the occurrence from a different place and they were interrogated by him. But PW-12 (the driver of the bus) has said in his evidence that after he reached the police station on the same evening he saw the three accused inside the police station. We do not know whether it was an error which PW-12 committed during cross-examination. No doubt the Public Prosecutor who conducted the prosecution did not choose to put any question to PW-12 also in re-examination.”

(iii) **Crl. A./41/2021 (Malber Khan & Anrl. Vs. State of Assam & Anr.)**, passed by this Court on 05.01.2023, wherein, in paragraph Nos. 23 & 28 of the judgment, the provision of Sections 35 & 54 of the NDPS Act have been discussed and it is observed that the presumption against the accused of culpability of mental state under Sections 35 and 54 of the Act to explain possession satisfactorily are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond reasonable doubt. Further it is observed that once the prosecution succeeds in leading evidence to prima facie establish conscious possession of contraband, it is only then that the burden under sections 35 and 54 of the Act of 1985 would shift upon the accused persons.

(iv) **Crl. A./101/2022 (Moinul Hoque Vs. The State of Assam)**, passed by this Court on 20.06.2023, wherein also, the presumption of possession as well as the compliance of Section 42 of NDPS Act has been discussed. Paragraph Nos. 13 & 14 of the said judgment reads as under:

“13. With regard to Section 54 of the NDPS Act, which provides that may be a presumption of possession of illicit articles, the Apex Court has held in the case of Noor Aga Vs. State of Punjab, reported in 2008 16 SCC 417 that the said provision required that the initial burden existed upon the prosecution to prove the foundational facts of possession of the contraband, so as to attract the rigours of Section 54, so as to shift the burden of proving that the contraband was not in his possession on the accused. It is further held that the standard of proof required for an accused to prove his innocence is not as that of the prosecution, inasmuch as the standard of proof required to prove the guilt of the

accused on the prosecution is beyond all reasonable doubt, but it is preponderance of probability on the accused.

14. In the case of Tofan Singh Vs. State of Tamil Nadu, reported in 2021 4 SCC 1, the Apex Court has held that presumption of commission of an offence under Section 54 NDPS Act is rebuttable. In the present case, the seizure witnesses have all stated that they were made to sign the document by the police. However, they have not stated that they had seen the recovery and seizure of the contraband from the house of the appellant. Thus, though Section 54 of the NDPS Act places the burden to prove on the accused regarding non-possession of the contraband articles, it was the prosecution who had to first prove the foundational facts regarding possession of the contraband by the appellant. In this case, the foundational facts have not been proved as can be seen from the evidence adduced by the seizure witnesses, namely PW- 2 to 4."

- (v) (2008) 16 SCC 417 (Noor Aga Vs. State of Punjab & Anr.),** wherein, the Hon'ble Apex Court has expressed the view that "an initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden 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 the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused."

15. The learned counsel for the appellant further submitted that the Section 313 Cr.P.C. confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial. He accordingly submitted that the accused/appellant clearly stated while recording his statement under Section 313 Cr.P.C. that he is innocent and on the night of incident, the police picked up him from his home and took him to the police station. In this context, he relied on a decision of Hon'ble Apex

Court reported in **(2019) 13 SCC 289 (Reena Hazarika Vs. State of Assam)**, wherein, in paragraph No. 19 thereof, it has been discussed as under:

“19. Section 313 CrPC cannot be seen simply as a part of audi alteram partem. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313 (2) CrPC. The importance of this right has been considered time and again by this Court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. If the accused takes a defence after the prosecution evidence is closed, under Section 313 (1)(b) CrPC the Court is duty-bound under Section 313 (4) CrPC to consider the same. The mere use of the word “may” cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available, is an entirely different matter. If there has been no consideration at all of the defence taken under Section 313 CrPC, in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 CrPC and to either accept or reject the same for reasons specified in writing.”

16. Per contra, Ms. S. Jahan, learned Additional Public Prosecutor, has submitted that the prosecution has able to prove the search and seizure and the articles were seized following the proper procedure of law. She admitted that out of 3 (three) seizure witnesses, 2 (two) could not be found, but that cannot be the only reason to disbelieve the entire prosecution story, wherein the prosecution has been able to prove the recovery of the contraband from the conscious possession of the present appellant, who led the police for recovery of the same from the house of the co-accused. She further submits that the house may belong to the father of the co-accused- Rinush Basumatary, i.e. one

Samiran Basumatary, but the fact is proved that the present appellant led the police/ investigating team to the place where the contraband were kept in an empty water tank, which is in the compound of the co-accused- Rinush Basumatary. It is submitted that though some of the witnesses did not support the prosecution case and they were declared as hostile witness, but the other prosecution witness supported the case of the prosecution and it is established that the contraband was recovered from the conscious possession of the present accused appellant. Further, the statement of the accused/appellant was recorded under Section 67 of the NDPS Act which was voluntarily and after recording of the statement, the accused/appellant also led the investigating authority to the place wherefrom the contraband was recovered. Except a plea in his statement recorded under Section 313 Cr.P.C., there is no evidence to show that he was tortured or that his statement was not voluntary.

17. In connection with the conscious possession, the learned Additional Public Prosecutor relied on a decision of Hon'ble Apex Court reported in **(2015) 6 SCC 222 (Mohan Lal Vs. State of Rajasthan)** and submits that in paragraph No. 9 of the said judgment, the Hon'ble Apex Court discussed the term "possess" in context of narcotic drug laws, means actual control, care and management of the drug. She further emphasized on paragraph No. 16 of the said judgment, which reads as under:

"Term "possess." Under narcotic drug laws, means actual control, care and management of the drug. Collini v. State Tex. Cr. App. 487 S.W. 2d 132, 135. Defendant 'possesses' controlled substance when Defendant knows of substance's presence, substance is immediately accessible, and Defendant exercises "dominion or control" over substance. State v. Hornaday 105 Wash. 2d 120, 713 p. 2d 71, 74."

18. Relying on the aforesaid judgment, it is submitted by the learned Additional Public Prosecutor that here in the instant case, it is the accused/appellant who had control over the contraband and thus, he led the police/investigating authority to the place where the contraband was kept concealed in an empty water tank. Thus, the prosecution has established conscious possession of the contraband by the present accused/appellant and it is the appellant who kept the contraband in an empty water tank in the house of co-accused, Rinush Basumatary, wherefrom the contraband was recovered and thus, there is nothing to disbelieve the prosecution story in regards to the possession of contraband by the accused/appellant. She further submits that there cannot be any ground to disbelieve the testimony of police personnel, being the witnesses of a case in absence of any independent witnesses, if otherwise the evidence of the police officers are acceptable and believable. In this context, she relied on a decision of Hon'ble Supreme Court which is reported in **(2014) 12 SCC 419 (Madhu & Ors. Vs. State of Karnataka)** and further gave emphasise on paragraph Nos. 10 & 11 of the said judgment, which reads as under:

“10. Learned counsel for the appellants has vehemently argued that in some of the recoveries, though a large number of people were available, but only police personnel were made recovery witnesses. Thus, the whole prosecution case becomes doubtful.

The term 'witness' means a person who is capable of providing information by way of deposing as regards relevant facts, via an oral statement, or a statement in writing, made or given in Court, or otherwise.

In Pradeep Narayan Madgaonkar & Ors. v. State of Maharashtra, AIR 1995 SC 1930, this Court dealt with the issue of the requirement of the examination of an independent witness, and whether the evidence of a police witness requires corroboration. The Court held that though the same must be subject to strict scrutiny, however, the evidence of police officials cannot be discarded merely on the ground that they belong to the police force and are either interested in the investigation or in the prosecution. However, as far as possible the corroboration of their evidence on material particulars should be sought.

(See also: Paras Ram v. State of Haryana, AIR 1993 SC 1212; Balbir Singh v. State, (1996) 11 SCC 139; Kalp Nath Rai v. State (Through CBI), AIR 1998 SC 201; M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence, AIR 2003 SC 4311; and Ravinderan v. Superintendent of Customs, AIR 2007 SC 2040).

11. Thus, a witness is normally considered to be independent unless he springs from sources which are likely to be tainted and this usually means that the said witness has cause to bear such enmity against the accused so as to implicate him falsely. In view of the above, there can be no prohibition to the effect that a policeman cannot be a witness or that his deposition cannot be relied upon if it inspires confidence."

19. The learned Additional Public Prosecutor further submitted that to attract Section 27 of the Evidence Act, it is not necessary that the accused should have been arrested and it is enough if he comes into the hands of the police officer or is under some sort of surveillance or restriction. She further submits that except for the statement made under Section 313 Cr.P.C., there is no evidence that the statement made by the accused was not voluntary. The statement was properly recorded under Section 67 of the NDPS Act and on the basis of which, the police also recovered the contraband on being led by the accused appellant. He may not be arrested when the recovery was made, but it cannot be denied that at the time of recovery, the accused/appellant was in the custody of police and after some sort of interrogation, he led the police to the spot of recovery. In this context, she further relied on the decision of Hon'ble Allahabad High Court, passed in **Crl. A./322/1977, dated 06.09.2021, (Sangam Lal Vs. State of U.P.)** and mainly relied on paragraph Nos. 18, 19 & 20 of the judgment, which reads as under:

"18. In Chotey v. State of U.P. MANU/UP/0448/1953 : 1954 Cri LJ 1445, the Court after referring to the aforesaid decision observed that there is distinction between an accused being "under arrest" and an accused being in "custody". In re, Ram Chandran AIR 1960 Mad 191, it was ruled that the interpretation of the word "custody" in various decisions has proceeded in so far as to suggest that "police custody" in terms of Section 27 might well include surveillance, interrogation before arrest, etc. Where a person submits himself to the custody of a police officer with the consciousness that

temporarily at least he is in such custody, or such control, whether formally authorised in some manner or otherwise. This question has been considered threadbare in the Constitution Bench decision of the Apex Court in State of U.P. v. Deoman Upadhyaya MANU/SC/0060/1960 : AIR 1960 SC 1125, where in para 12 of the reports, it was held as under:

(12) There is nothing in the Evidence Act which precludes proof of information given by a person not in custody which relates to the facts thereby discovered; it is by virtue of the ban imposed by Section 162 of the Cr.P.C., that a statement made to a police officer in the course of the investigation of an offence under Chapter 14 by a person not in police custody at the time it was made even if it leads to the discovery of a fact is not provable against him at the trial for that offence. But the distinction which it may be remembered does not proceed on the same lines as under the Evidence Act, arising in the matter of admissibility of such statements made to the police officer in the course of an investigation between persons in custody and persons not in custody, has little practical significance. When a person not in custody approaches a police officer investigating an offence and offer to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him he may appropriately be deemed to have surrendered himself to the police. Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. A person directly giving to a police officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the "custody" of the police officer within the meaning of Section 27 of the Indian Evidence Act:

19. The law is, therefore, well-settled that in order to attract Section 27 of the Evidence Act, it is not necessary that the accused should have been under arrest and it is enough if he has come into the hands of a police officer or is under some sort of surveillance or restriction. A person giving information to the police officer may be deemed to have submitted himself to the custody of the police officer within the meaning of Section 27 of the Evidence Act. Therefore, the contention raised by Sri Mishra cannot be accepted and the information given by the Appellant leading to the discovery of the incriminating articles referred to above is fully admissible in evidence.

20. Learned Counsel for the Appellant also urged that in normal course of events, the Investigating Officer should have made a search of the entire house of the Appellant

and he could have easily found the blood stained gandasa, underwear and baniyan which had been concealed below the bag of bidi leaves and, consequently, the information given by the Appellant cannot be said to have led to the discovery of the articles. The contention raised has no substance in view of pronouncement of the Apex Court in Karan Singh v. State of U.P. MANU/SC/0151/1972 : AIR 1973 SC 1385, where it was held as under:

Merely because the accused had first told the police that he would show them the knife and then took them to the place where it was hidden, his evidence leading to the discovery of blood stained knife could not be said to be inadmissible on the ground that the police already knew the place where the knife would be found."

20. She further submitted that a vague stand about the torture which was taken at the time of recording statement under Section 313 Cr.P.C. cannot be the only ground to held that the statement made by the accused was involuntary. In this context, she also relied on a decision of Hon'ble Supreme Court passed in **M. Prabhulal Vs. The Assistant Director, Directorate of Revenue Intelligence**, reported in **(2003) 8 SCC 449 : (2003) Supp 3 SCR 958**, and further give emphasize on paragraph No. 5 of the judgment, which reads as under:

"5. It has been established that the Customs Office was about 20 kms. from the place where the truck and the car were apprehended. Having regard to the large quantity of the heroin, the said vehicles with accused Nos. 2, 3 and 6 were brought to the Customs Office. Further accused Nos 1 and 2 did not know Tamil. A Hindi knowing officer had to be arranged. There was under the circumstances no delay in recording the statements of the appellants. Further, it is also to be borne in mind that the appellants did not make any complaint before the Magistrate before whom they were produced complaining of any torture or harassment. It is only when their statements were recorded by the trial judge under [Section 313](#) of Code of Criminal Procedure that a vague stand about the torture was taken. Under these circumstances, the confessional statements cannot be held to be involuntary. The statements were voluntarily made and can, thus, be made the basis of appellants' conviction."

21. Relying on the judgment referred above, the learned Additional Public Prosecutor has submitted that the learned Court below rightly convicted the accused/appellant under Sections 20(b)(ii)(C) of the NDPS Act, as the prosecution could establish the case beyond all reasonable doubt against the present accused/appellant and thus, the interference of this Court in the judgment and order dated 26.11.2020, passed by the learned Special Judge Cum District and Sessions Judge, Udalguri, in Special (NDPS) Case No. 20 of 2015, is not at all necessary.

22. After considering the submissions made by the learned counsels for both sides, we have perused the case record and the judgment passed by the learned Special Judge Cum District and Sessions Judge, Udalguri. The main contention of the appellant is that the contraband was not recovered from the conscious possession of the accused/appellant and his statement was not voluntary and the same was recorded before his arrest. He also raised the issue that there was no proper compliance of Section 41, 42 & 52A of the NDPS Act and at the same time, there were a lot of contradictions in the evidence of P.Ws. Further, as per the case of the appellant, the prosecution also failed to prove the seizure of the contraband, as 2 (two) of the seizure witnesses could not be traced out by the prosecution and 2-3 witnesses also did not support the prosecution case and were declared hostile by the prosecution.

23. On the other hand, it is the contention of the State respondent that the prosecution could establish the case beyond all reasonable doubt. The conscious/constructive possession of the contrabands are also proved. At the

same time, it is also seen that the statement made by the accused/appellant was voluntary in nature and on the basis of which, the recovery was made. Further, as per the State respondents, there was a proper compliance of mandatory provisions of the NDPS Act and that the evidence of Police Officers/N.C.B. Officials cannot be disbelieved only on the ground that they are the police officers, when the prosecution could establish the case against the accused/appellant even in the absence of 2 (two) of the independent seizure witnesses.

24. Coming to the compliance of Sections 41 & 42 of the NDPS Act, it is seen that on the basis of an information received at Mazbat Police Station from NCB, Guwahati Jonal Unit, who shared the written information that one Pradip Jha (present appellant) of Mazbat stored huge quantity of Ganja at a Godown at Panbari, a joint search operation was conducted by the NCB and the Udalguri Police at about 9.00 p.m. in the house of one Samiran Basumatary in presence of SDPO Bhergaon wherefrom 660 Kgs of suspected Ganjas were recovered and accordingly, those packets of Ganjas were seized at the place of occurrence on being authorised by SDPO Bhergaon. From the evidence of P.W.-6, it is seen that before his departure from the place of occurrence, the SDPO gave him a written authority to seize the contraband, though the said written authority was not exhibited by the prosecution and the original copy is also not available in the Case Diary. However, from the record and the judgment passed by the learned Special Judge Cum District and Sessions Judge, Udalguri, it is seen that one photocopy of the said authority letter is available in the Case Diary, though the copy of the original was not produced at the time of hearing of the case or at the time of filing of Charge-Sheet. But, it cannot be denied that during the

entire search and seizure operation, the SDPO was present along with the NCB Officials and even if the prosecution failed to produce the original copy of the authority letter, but the fact remains that the entire search and seizure operation was conducted in presence of a Gazetted Officer, i.e. the SDPO, as well as the NCB Officials. Thus, the recovery of contraband as well as the search and seizure was within the knowledge of the SDPO, the superior officer, as well as the NCB Officials. The learned Special Judge Cum District and Sessions Judge, Udalguri, also discussed in detail about the availability of photocopy of the authority letter authorised by SDPO, Bhergaon in the Case Diary. But, it is a fact that the original copy of the authority letter given by the SDPO has not been exhibited by the prosecution nor it was found available in the Case Diary at the time of hearing of the case. In this context, the learned Special Judge Cum District and Sessions Judge, Udalguri, discussed in detail about the provision of Section 294 Cr.P.C. and discussed that the document can be looked into under Section 294(2) of the Cr.P.C. for the purpose of appreciation of evidence of the case. Accordingly, it is seen that even if the prosecution failed to exhibit the authority letter, it cannot be denied that the authority letter was issued by SDPO as one photocopy of the said letter is available in the Case Diary and at the same time, it is also an admitted fact that the superior officer, i.e. SDPO, was all along present at the time of search and seizure of the contraband and the entire procedure was conducted only in the presence of all NCB Officials and the SDPO.

25. Coming to the point raised by the learned counsel for the appellant with regard to compliance of Section 50 of the NDPS Act, it was submitted that from the evidence of P.W.-5, it reveals that the accused persons were not informed

about the requirement of the presence of the Magistrate at the time of search and seizure and he did not feel necessary to call any Magistrate or Gazetted Officer at the time of search and seizure. But, here in the instant case, it is seen that the entire search and seizure was carried out in the presence of the SDPO, who is a Gazetted Officer. As per Section 50 of the NDPS Act, option should be given to the accused person as to whether he wanted to be searched in the presence of a Gazetted Officer or Magistrate and thus, the accused is required to be apprised of his right conferred under Section 50 of the NDPS Act, giving him the option to be searched in the presence of a Gazetted Officer or the Magistrate. It is a fact that here in the instant case, the search was not conducted in the presence of any Magistrate or the accused may not be provided with the option as to whether he wanted to be searched in presence of a Magistrate. But the fact remains that the entire search and seizure operation was conducted in presence of a gazetted rank officer, i.e. the SDPO, who was all along present at the time of search and seizure. Thus, it cannot be held that there was strict non-compliance of Section 50 of the NDPS Act, as search and seizure process was conducted in presence of NCB Officials as well as the Gazetted Officer, i.e. the SDPO. Moreso, the applicability of Section 50 comes only when there is a search on the body of the accused person. In this regard, a decision can be cited reported in **AIR 2010 SC (Supp) 582, Ajmer Singh v. State of Haryana**, wherein it is held as under:

“Provision of Section 50 of the NDPS Act are applicable only in the case of personal search of the accused and the same are not applicable when the contraband is recovered either from the briefcase or bag or vehicle. Since in the present case, contraband was recovered from the bag hanging on the back of the appellant, therefore, provision of Section 50, NDPS cannot be pressed in service.”

26. In **State of Haryana vs. Suresh AIR 2007 SC 2245**, it has been held by the Hon'ble Supreme Court as under:

“A bag, briefcase or any such article or container, etc can, under no circumstances, be treated as body of human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like bag, a brief-case, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc, of varying size dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head etc. Therefore, it is not possible to include these articles within the ambit of the word “person” occurring in Section 50 of the Act.”

27. The applicability of Section 52-A does not arise at all in the facts and circumstances of this case, since there was no petition for pre-trial disposal of the seized contraband in this case. The question of preparing an inventory and the above section will come into play only when there is such a petition on behalf of the prosecution before the Court. The seized contraband can be disposed off by the Officer mentioned in Section 52-A(1), only after making an Application before the Magistrate for following 3 Alternative Procedures, for such disposal of the contraband:-

- (a) By certifying the correctness of the inventory so prepared; or
- (b) By taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or
- (c) By 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.

28. However, in the instant case, there was no such petition for disposing off the seized contraband. Thus, the entire prosecution story cannot be disbelieved only in absence of strict compliance of Section 52-A of the NDPS Act.

29. Mr. Bhattacharya, learned counsel for the appellant, also raised the point that the prosecution could not prove the seizure of the contraband from the possession of the accused/appellant. He submits that the 3 (three) of the prosecution witnesses have already been declared hostile and the 2 (two) seizure witnesses could not be traced out who claimed their presence at the time of seizure of the said contraband. But, from the other evidence of the prosecution witnesses, it is seen that the entire operation was carried out in presence of the NCB officials as well as the Mazbat Police, after receiving the information from the NCB Zonal Unit, Guwahati. It is also a fact that the NCB, Zonal Unit of Kolkata, received an information regarding the illegal storage of the contraband in Mazbat area. Accordingly, the Zonal Unit of NCB, Guwahati, arrived at Mazbat Police Station and there was a joint operation of the Mazbat Police and NCB Officials in presence of SDPO, Bhergaon. Thus, even if the 2 (two) seizure witnesses could not be traced out, but from the other witnesses including the police officials, it is very well established that the search and seizure was conducted on the night of occurrence and the contraband was seized from an empty water tank from the compound of one Samiran Basumatary, the father of the co-accused, Rinush Basumatary. P.Ws.-5, 6 & 7, the police officials and the P.Ws.-8 & 9, the Intelligence Officer, Government of India from West Bengal, P.W.-10, Sepoy of NCB Guwahati Zonal Unit, were

present at the time of search of seizure. There are some minor contradictions in the evidence of these witnesses, but the evidence of these prosecution witnesses could not be rebutted by the defence in respect of the recovery of contraband from a empty water tank which was shown by the accused/appellant- Pradip Jha. The witnesses may not be aware about the house or to whom the land belongs to or there may be some contradictions in regard to the place wherefrom it was recovered, as some of the witnesses have deposed that it was a Godown and as per some witnesses, it was a Latrine Tank and some witnesses have deposed that the entire contraband was recovered from a water tank which was in the compound/ campus of the house of the co-accused, Rinush Basumatary. More so, the hostile witness, i.e. P.W.-3, Smti Milita Basumatary, who is the wife of accused- Rinush Basumatary, also deposed that her husband was arrested by police for recovery of Ganja from her house, which otherwise supports the prosecution version with regard to the recovery of the Ganja from the campus of the accused- Rinush Basumatary. Thus, the P.Ws.-5, 6, 7, 8, 9 & 10 cannot be disbelieved only due to some minor contradictions and the prosecution could establish the search and seizure from the house of co-accused, Rinush Basumatary, which was stored in a water tank like compartment and 660 Kgs of Ganjas were accordingly recovered and seized by the police officials in presence of the NCB personnel.

30. It is the case of the prosecution that the NCB Officials of the Kolkata Zonal Unit got the specific information that one Pradip Jha had illegally stored the contraband in Mazbat Area and accordingly, on the basis of the said information, the NCB Officials from Kolkata as well as the Guwahati Zona Unit arrived at the Mazbat Police Station. During the course of argument, it is submitted by the

learned counsel for the appellant that they could not say anything with regards to the information received by the NCB Officials against the accused- Pradip Jha, regarding the illegal storage of contraband. But, as per Section 68 of the NDPS Act “no officer acting in exercise of powers vested in him under any provision of this Act or any rule or order made thereunder shall be compelled to say whence he got any information as to the commission of any offence.” In this context, the Hon’ble Apex Court in the case of **Mukesh Singh Vs. State (Narcotic Branch of Delhi)**, reported in **2020 SCC OnLine 700**, has held in paragraph Nos. 11 & 12 of the judgment as under:

“11. Therefore, as such, there is no reason to doubt the credibility of the informant and doubt the entire case of the prosecution solely on the ground that the informant has investigated the case. Solely on the basis of some apprehension or the doubts, the entire prosecution version cannot be discarded and the accused is not to be straightway acquitted unless and until the accused is able to establish and prove the bias and the prejudice. As held by this Court in the case of Ram Chandra (supra) the question of prejudice or bias has to be established and not inferred. The question of bias will have to be decided on the facts of each case [See Vipin Kumar Jain (supra)]. At this stage, it is required to be noted and as observed hereinabove, [NDPS Act](#) is a [Special Act](#) with the special purpose and with special provisions including [Section 68](#) which provides that no officer acting in exercise of powers vested in him under any provision of the [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. Therefore, considering the [NDPS Act](#) being a special Act with special procedure to be followed under Chapter V, and as observed hereinabove, there is no specific bar against conducting the investigation by the informant himself and in view of the safeguard provided under the Act itself, namely, [Section 58](#), we are of the opinion that there cannot be any general proposition of law to be laid down that in every case where the informant is the investigator, the trial is vitiated and the accused is entitled to acquittal. Similarly, even with respect to offences under the [IPC](#), as observed hereinabove, there is no specific bar against the informant/complainant investigating the case. Only in a case where the accused has been able to establish and prove the bias and/or unfair investigation by the informant-cum- investigator and the case of the prosecution is merely based upon the deposition of the informant-cum-investigator, meaning thereby prosecution does not rely upon other witnesses, more particularly the independent witnesses, in that case, where the complainant himself had conducted the investigation, such aspect of the matter can certainly be given due weightage while assessing the evidence on record. Therefore, as rightly observed by this Court in the case of Bhaskar Ramappa Madar (supra), the matter has to be decided on a case

to case basis without any universal generalisation. As rightly held by this Court in the case of V. Jayapaul (supra), there is no bar against the informant police officer to investigate the case. As rightly observed, if at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the investigating officer the question of bias would depend on the facts and circumstances of each case and therefore it is not proper to lay down a broad and unqualified proposition that in every case where the police officer who registered the case by lodging the first information, conducts the investigation that itself had caused prejudice to the accused and thereby it vitiates the entire prosecution case and the accused is entitled to acquittal.

12. From the above discussion and for the reasons stated above, we conclude and answer the reference as under:

I. That the observations of this Court in the cases of [Bhagwan Singh v. State of Rajasthan](#) (1976) 1 SCC 15; [Megha Singh v. State of Haryana](#) (1996) 11 SCC 709; and [State by Inspector of Police, NIB, Tamil Nadu v. Rajangam](#) (2010) 15 SCC 369 and the acquittal of the accused by this Court on the ground that as the informant and the investigator was the same, it has vitiated the trial and the accused is entitled to acquittal are to be treated to be confined to their own facts. It cannot be said that in the aforesaid decisions, this Court laid down any general proposition of law that in each and every case where the informant is the investigator there is a bias caused to the accused and the entire prosecution case is to be disbelieved and the accused is entitled to acquittal; II. In a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore on the sole ground that informant is the investigator, the accused is not entitled to acquittal. The matter has to be decided on a case to case basis. A contrary decision of this Court in the case of [Mohan Lal v. State of Punjab](#) (2018) 17 SCC 627 and any other decision taking a contrary view that the informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled."

31. From the discussion made above, it is seen that the entire prosecution case is mainly based on the evidence of the police officials as well as the NCB Officials who claimed their presence at the time of search and seizure and the P.Ws.-11 & 12 are the I.O. who investigated the case on the basis of the F.I.R. lodged by the P.W.-6. The learned Additional Public Prosecutor, as referred above, has cited a decision of Hon'ble Supreme Court in the case of **Madhu & Ors. Vs. State of Karnataka**, reported in **(2014) 12 SCC 419**, wherein it is

observed by the Hon'ble Apex court that there cannot be any prohibition to the effect that a policeman cannot be a witness or that his deposition cannot be relied upon if it inspires confidence. Here in the instant case also, it is seen that it is not the case of the defence that the police personnel had any previous enmity with the accused/appellant. The operation was conducted only after receiving information from the NCB Officials, who personally arrived at the Mazbat Police Station and the accused/appellant led the police team to the place of occurrence from where the contraband was recovered. Thus, there is no evidence that the police personnel had any previous grudge or enmity against the accused/appellant to adduce any false evidence against him and thus, the evidence of the P.Ws.-5 6, 7, 8, 9 & 10 cannot be disbelieved only on the ground that they are the police or NCB Officials.

32. Mr. Bhattacharya, learned counsel for the appellant, also raised the point with regard to admissibility of evidence under Section 27 of the Evidence Act and it is submitted that the statement which is alleged to have been made by the accused/appellant is not voluntary as required under Section 27 of the Evidence Act. He submitted that the accused/appellant was picked up from his house, took him to the police station and it is alleged that he led the police to the spot of the recovery before his arrest. Thus, no proper procedure has been complied with to admit the evidence under Section 27 of the Evidence Act. The statement cannot be considered as voluntary one to accept in the evidence and he specifically took the plea in his statement recorded under Section 313 Cr.P.C. that he is innocent and on the night of incident, he was sleeping and police picked him up from his house and took him to the police station. But, here in the instant case, it is seen that the accused/appellant never disputed this fact

and he came up with the story only at the time of recording his statement under Section 313 Cr.P.C. There is no other evidence that the statement made by the accused was not voluntary. Though there was no formal arrest of the accused/appellant, but the fact cannot be denied that he was under the police custody and he led the police to the spot of recovery after interrogating him. The learned Additional Public Prosecutor also relied on a decision of Hon'ble Allahabad High Court passed in **Crl. A./322/1977, dated 06.09.2021, (Sangam Lal Vs. State of U.P.)**, wherein, in paragraph No. 12 of the judgment, the Allahabad High Court had relied on a decision of Hon'ble Apex Court which was reported in AIR 1960 SCC 1125 and in paragraph No. 12 of the said judgment, as referred above, the Hon'ble Apex Court has expressed the view that *"a person directly giving to a police officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the "custody" of the police officer within the meaning of Section 27 of the Indian Evidence Act."* Further, the Hon'ble Apex Court has also expressed the view that *"to attract Section 27 of the Evidence Act, it is not necessary that the accused should have been under arrest and it is enough if he has come into the hands of a police officer or is under some sort of surveillance or restriction."*

33. So, only on the basis of the statement or stand taken by the accused/appellant while recording his statement under Section 313 Cr.P.C., his statement cannot be considered as involuntary.

34. Coming to the point raised by the learned counsel for the appellant in regards to presumption under Sections 35 & 54 of the NDPS Act, it is seen that

the learned counsel relied on a decision of this Court passed in **Crl. A./41/2021 (Malber Khan & Anrl. Vs. State of Assam & Anr.)** and also relied on another decision of Hon'ble Apex Court reported in **(2008) 16 SCC 417 (Noor Aga Vs. State of Punjab & Anr.)**.

35. 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 proof upon the accused. The Hon'ble Supreme Court in the case of **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.*"

36. In the case of **Noor Aga Vs. State of Punjab & Anr.**, reported in **(2008) 16 SCC 417**, the Hon'ble Apex Court has expressed the view that "*an initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden 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 the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused.*"

37. Section 35 of the NDPS Act also speaks about the presumption of culpable

mental state. For ready reference, Section 35 of the NDPS Act is extracted herein below:

“35. Presumption of culpable mental state.—

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. Explanation.—In this section “culpable mental state” includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.”

38. Here in the instant case, from the entire evidence on record as well as the entire circumstances of this case, it is seen that the prosecution could establish the culpable mental state of the accused/appellant who stored the contraband illegally in the house of the accused- Rinush Basumatary and also the prosecution could establish the foundational facts of the case and thus, the presumption as per Section 54 of the NDPS Act can be taken against the accused/appellant. As the prosecution could establish the foundational facts of the case against the accused/appellant in regards to commission of the offence, the burden shifts to the accused/appellant to prove his innocence by adducing any rebuttal evidence, but the accused/ appellant failed to discharge his burden and only the plea of denial is not at all sufficient to disprove the case of the prosecution.

39. Admittedly, there are some minor contradictions in the evidence of the prosecution witnesses and some sort of lapses are there on the part of the Investigating Officer, but from the evidence of prosecution witnesses, it is seen

that the prosecution could establish the fact of the case that on the basis of the information received by the NCB Zonal Unit, Kolkata, the search and seizure operation was conducted with the help of NCB Officials, Guwahati Zonal Unit, and the police officials of Mazbat Police Station and the entire operation was also conducted in presence of SDPO, Bhergaon. Further, it is also established that the accused, after interrogation in the police station, led the entire investigating team to the spot of recovery and the contrabands were concealed/stored in an empty water tank in the house of co-accused, Rinush Basumatary. There may not be strict compliance of Section 42 or 50 of the NDPS Act, but it cannot be denied that even though the informant failed to record his satisfaction, yet the fact remain same that the entire process of search and seizure was conducted in presence of the SDPO, Gazetted Rank Officer. Though the prosecution failed to produce the original copy of the authority letter, which was not available in the case record as well as in Case Diary, but from the evidence, it is also seen that the photocopy of the authority letter was also available in the Case Diary and the copy of the Case Diary was also served to the accused/appellant. So, merely in absence of the original authorisation letter, the entire case of the prosecution cannot be disbelieved which is otherwise proved by the prosecution witnesses.

40. In view of above, we find that the learned Special Judge Cum District and Sessions Judge, Udalguri, has committed no illegality or irregularity while passing the impugned judgment and order dated 26.11.2020, in Special (NDPS) Case No. 20 of 2015, arising out of Mazbat P.S. Case No. 20/2015, under Sections 20(b)(ii)(C)/27(A) of the NDPS Act, convicting the present accused/appellant under Section 20(b)(ii) (C) of the NDPS Act, along with the

co-accused, namely, Rinush Basumatary, and thereby sentenced to undergo R.I. for 15 years along with a fine of Rs. 1,00,000/- in default to undergo S.I. for another 6 (six) months.

41. In the result, we do not find any merit in this appeal and accordingly, the same stands dismissed. The judgment and order dated 26.11.2020, passed by the learned Special Judge Cum District and Sessions Judge, Udalguri, in Special (NDPS) Case No. 20 of 2015, arising out of Mazbat P.S. Case No. 20/2015, convicting the accused/appellant under Sections 20(b)(ii)(C)/ 27(A) of the NDPS Act, stands upheld.

42. Send back the case record.

JUDGE

JUDGE

Comparing Assistant