

GAHC010052022021



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

Case No. : CrI.A./84/2021

MADHU GUPTA

S/O- LATE AMIT GUPTA, R/O- U-98, MANGALPURI N BLOCK, SARASWATI
VIHAR, P.S. MANGALPURI, NORTH WEST DELHI, PIN- 110083.

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY P.P., ASSAM

2:SI (UB) BISWAJIT RABHA
S/O- LATE RAM PRASAD RABHA
R/O- PANJABARI
GUWAHATI
P.S. SATGAON
DIST.- KAMRUP(M)
ASSAM AND OFFICE ADDRESS- GUWAHATI RAILWAY POLICE STATION
(GRPS)
RAILWAY STATION
PANBAZAR
GUWAHATI
DIST.- KAMRUP(M)
ASSAM

Advocate for the Petitioner : MS. S K NARGIS

Advocate for the Respondent : MS. S. JAHAN(ADDL.PP, ASSAM)

Linked Case : CrI.A./87/2021

CHITRANJAN GUPTA
S/O- LATE JAGADISH GUPTA
R/O- 215
G BLOCK
MANGALPURI
P.S. MANGALPURI
NORTH WEST DELHI
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ASSAM.

Advocate for : MS. S K NARGIS
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR.

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

JUDGMENT

Date : 27-07-2023

1. Heard Ms. SK Nargis, learned counsel for the appellant and Ms. S. Jahan, learned
Addl. P.P. appearing for the State of Assam.

2. Both the appeals are directed against the judgment & order dated 23.02.2021 passed by the learned Special Judge, Kamrup (M), Guwahati in NDPS Case No. 16/2019 whereby the appellant Mrs. Madhu Gupta of Criminal Appeal No. 84/2021 and the appellant Sri Chitranjan Gupta of Criminal Appeal No. 87/2021 were convicted and sentenced to undergo Rigorous Imprisonment for 10 years with fine of Rs. 1 lakh with default stipulation u/s 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act for short).

3. The genesis of the case was that on 27.11.2018, the complainant SI Biswajit Rabha of Guwahati GRPS lodged an FIR that at about 7:30 AM ASI Shrawan Kumar Jha along with police personnel were on duty, checking Coach No. A of train No. 12423DN-Dibrugarh-NDLS Rajdhani Express stationed at Platform No. 1 of Guwahati Railway Station and recovered five (5) packets of *ganja* wrapped with black coloured polythene paper from the appellants seated at seat nos. 1 & 3. Two (2) packets of suspected *ganja* was recovered while checking the bag of Madhu Gupta which was carried in her ash coloured VIP trolley bag and this was seized from her possession. The packets weighed 20 kgs containing 10 kgs each. On checking the bags of Chitranjan Gupta, two (2) packets of suspected *ganja* was found inside his purple coloured VIP trolley bag and one packet inside his maroon coloured airbag weighing 30 kgs in total, containing 10 kgs in each packet. These bags were also seized from the possession of Chitranjan Gupta in presence of witnesses. Samples of the contraband was drawn and the same was forwarded for forensic examination. On being confronted, both the appellants admitted that they were carrying the suspected contraband from Dimapur for commercial purpose with a view to sell the same in New Delhi. They have also admitted that they had purchased the suspected *ganja* from one unknown local 'Naga person' @ Rs. 1500/- per kg. The search and seizure was made in presence of witnesses. Both the appellants were

detained in platform No. 1 of Guwahati Railway Station. On receipt of information G.D. Entry was made and an authority letter u/s 41(2) of the NDPS Act was issued in the name of SI Biswajit Rabha for action as per NDPS Act, whereafter investigation commenced.

4. After investigation, search and seizure, both the appellants were arrested at the place of occurrence under Section 43 of the NDPS Act and handed over to the Officer-in-Charge of Guwahati GRPS along with the seized articles.

5. Based on the FIR, GRPS, Guwahati Case No. 320/2018 u/s 20(C)/29 of the NDPS Act was registered and WSI, (IO for short) was entrusted with the preliminary investigation. The WSI Smt. B. Hazarika recorded statements of several witnesses and forwarded the samples collected for chemical examination. After completion of investigation, chargesheet was laid against the appellants u/s 20(C)/29 of the NDPS Act.

6. At the commencement of the trial charge u/s 20(b)(ii)(C) of the NDPS, 1985 was framed and read over to the appellants. Both the appellants adjured their guilt and claimed innocence.

7. To substantiate its stance, the prosecution examined 7 witnesses and the defence cross-examined the witnesses to refute the charges. Several questions were asked to the appellants on the incriminating circumstances against them and their responses were recorded. It is pertinent to mention that initially the appellants were willing to adduce evidence but later they did not adduce any evidence in defence.

8. The learned trial Court held that as this case is a case of chance recovery, there is no applicability of Section 42 of the NDPS Act. It was held that there is no confusion regarding the place of occurrence as the evidence of the witnesses clearly reveal that the articles were

found while checking Coach No. A-5 and then as the train started departing, the appellants were brought down from the coach to platform No. 1. It was held by the learned trial Court that there is no dispute that the samples forwarded to the forensic laboratory were the samples drawn from the seized articles. The signatures of the appellants have been proved by the witnesses on the seizure list as well as on the seized articles marked as Ext.-2 and 4 and Material Ext.- V and VI. It was also held by the learned trial Court that compliance of Section 55 of the NDPS Act cannot be insisted upon and this has also been observed by the Hon'ble Supreme Court in the case of *Karnail Singh v. State of Rajasthan*, reported in *2000 - Vol. - 7 SCC 632* and in *Hardip Singh's* case reported in (2008) 8 SCC 55. It was also held by the learned trial Court that trial was not vitiated although the inventory was prepared by the IO and not by the OC u/s 52 A of the Act. It was also held that there was absolute compliance of Section 57 of the Act because that the contraband was seized by the accused from the seizing officer on being authorised by the OC u/s 41(2) of the NDPS Act who was the immediate superior and also empowered officer u/s 53 of the NDPS Act. The seized articles along with the accused were produced before the Magistrate and the same was seized and the signatures of the appellants were taken on the seizure memo. The entire procedure of search, seizure, arrest and forwarding of the appellants have been done with the knowledge of the specially empowered gazetted officer, who used his power with circumspection.

9. The learned trial Court relied on the decision of the Hon'ble Apex Court in *1989 SCC (Cri) 48, State of U.P. v. Anil Singh* and held that as recovery was made inside the train, generally the shopkeepers or the passengers are reluctant to adduce evidence. The non-examination of independent witnesses however is not fatal to the prosecution case. It was held that personal search was not necessary as the contraband was found inside the bags

which were in the possession of the appellants. It was also held that the IO did not clarify where the seizure-list was prepared or typed but it has surfaced from the evidence that both the appellants have affixed their signatures on the seizure-list which cannot be considered as defective seizure-list. It was also observed that the appellants were present all along, at the time of search and seizure till they were handed over to the GRPS and no suggestion was made by the defence to the effect that the signatures were not made voluntarily by the appellants. As there was no evidence regarding meddling of the samples, the argument regarding safe custody of the samples and the seized articles was not accepted by the learned trial Court. It was also held that due to the corroborating evidence of the witnesses regarding seizure and sampling of the contraband, the fact that the facsimile of the seal used as an impression on the samples was not forwarded, does not indicate that the samples were not seized from the articles i.e. the contraband recovered from the possession of the appellants. As there was no prayer for pre-trial disposal of the seized contraband it was held that the compliance of Section 52A of the NDPS Act was not required in this case. It was held by the learned trial Court that prosecution could prove beyond the reasonable doubt that the appellants were travelling by the Coach No. A-5 of the 12423DN-Dibrugarh-NDLS Rajdhani Express and they were found in possession of 50 kgs of *ganja* inside two trolley bags and one airbag and they were travelling by seat Nos. 1 and 3 of the Coach No. A-5. They were held guilty of offence u/s 20(b)(ii)(C) of the NDPS Act and were convicted under the aforesaid sections of law and sentenced to undergo Rigorous Imprisonment of 10 years and to pay a fine of Rs. 1 lakh with default stipulation.

Submissions

10. The learned counsel for the appellants has submitted that the trial Court has

misinterpreted the mandate of Sections 41 and 42 of the NDPS Act in its proper perspective. The appellants have never disputed that the alleged search and seizure was conducted by any unauthorised officer. The PW-1 (informant) deposed that an information was received by the OC of the GRPS, Guwahati from the train checking party led by PW-2 and the said information was reduced into writing by the said officer and accordingly G.D. Entry No. 900 dated 27.11.2018 was registered and he authorised PW-1 to conduct search and seizure. It is an admitted fact that there was prior information which was reduced into writing and thereafter search and seizure was allegedly made and the Officer-in-charge did not comply with the provisions mandated u/s 42 of the Act. It is contended that the trial Court has also misinterpreted the provisions of Section 43 of the Act. On plain reading of Section 43 of the Act, the rigours of Section 42 may not be attracted. The provisions of Section 52-A of the Act was misconstrued. It is manifest from Section 52-A(2)(c) that upon seizure of the contraband the same is to be forwarded either to the Officer-in-Charge of the nearest police station or to the officer empowered u/s 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for the purpose of :-

- a] certifying the correctness of the inventory;
- b] certifying photographs of such drugs or substances taken before the Magistrate as true and
- c] to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

11. In the present case no such formality has been followed by the investigating agency. The IO as PW-7 has deposed, that she prepared the inventory but she was not the

empowered officer as per the Act and was not authorised to prepare the inventory. The prosecution has also failed to follow the guidelines while collecting the samples notified by the gazette notification dated 31.06.1989. There was overwriting of the figure 28 grams which was corrected as 24 grams. The other lapse in the prosecution was that the godown register was not produced and exhibited during trial.

12. It is submitted on behalf of the appellants that there is no evidence that the female appellant was searched by the IO. The failure of compliance of the procedure laid down u/s 50(4) of the Act thwarts the evidence. The prosecution has failed to prove that the seized samples were kept in safe custody observing the provisions of Section 55 of the Act. It is alleged that theseized samples were not sealed and kept properly under safe custody. Tampering of evidence thus cannot be ruled out. Although the provisions u/s 55 and 57 are directory however, IO cannot ignore these provisions and such failure will have a bearing on the appreciation of the evidence regarding arrest of the accused or seizure of the articles. Section 100(4) of the Cr.PC was not followed in letter and spirit. The evidence of the official witnesses are contrary despite the fact that they were present from inception till the conclusion of investigation. It is also contended that no train ticket was seized from the possession of the appellants. The place of occurrence has been described in the sketchmap as the platform No. 1 whereas the witnesses have deposed that the appellants were intercepted inside the train. The Ext.-8 is the photostat copy regarding the 'passenger current status enquiry report' which cannot be accepted as evidence. The remaining part of the arguments will be discussed at the appropriate stage.

13. The learned Addl. P.P. has laid stress in her argument that provision u/s 42 was not required to be complied with as the recovery was a general recovery without prior

information. There was no violation of Section 43 of the NDPS Act. The G.D. Entry was made by the PW-1 and authorisation letter was also issued for search and seizure. It is submitted that two packets were seized from the appellant Madhu Gupta and four samples were prepared at the place of occurrence. 30 kgs were seized from the appellant Chitranjan Gupta and 6 packets of samples were prepared. The inventory mentioned in the FIR was prepared. It has been proved beyond reasonable doubt that the appellants were in conscious possession of the contraband. They have identified the bags containing *ganja* as their bags. It is submitted that Sections 52 and 57 of the Act are directory and not mandatory. The depositions of PWs-2, 3, 5 and 6 are corroborating statements. The respondents have relied on the decision of the Hon'ble Supreme Court in *Gurbax Singh v. State of Haryana*, reported in (2001) 3 SCC 28.

Charges

14. On the anvil of these submissions, I proceed to decide this appeal. The trial Court decided the case on the following points:-

(I) *Whether, on 27.11.2018 at around 07.30 AM, in the down Dibrugarh New Delhi Rajdhani Express Train, which was standing in the Platform No. 1 of the Guwahati Railway Station, the accused were found travelling in the said train and accused Mrs. Madhu Gupta was found possessing 20 kilograms of cannabis (ganja) and accused Chitranjan Gupta was found possessing 30 kilograms of cannabis (ganja) in contravention of the provisions of the NDPS Act, 1985 and that both the accused persons thereby committed an offence punishable under Section 20(b)(ii)(C) of the NDPS Act, 1985?*

15. The question that falls for consideration in this case is that whether the trial Court has erred while convicting the appellants u/s 20(b)(ii)(C) of the Act.

Discussions and decision

16. Biswajit Rabha has testified as PW-1 that on 27.11.2018 while he was posted at the GRPS, Guwahati as Sub-Inspector, a railway checking party was led by ASI Shrawan Kumar Jha (PW-2), who informed the OC of the Guwahati GRPS that they have recovered suspected *ganja* from the two passengers of down Rajdhani Express who were in Coach No. A-5 and seat Nos. 1 and 3. The OC then issued an authority letter, authorising him to take action as per the NDPS Act. Accompanied by his staff he went to the place of occurrence in platform No. 1 of the Guwahati Railway Station near the RPF post and found the checking party with two confined passengers along with two trolley bags and one maroon coloured airbag. PW-1 has proved the authority letter as Ext.-1 under objection, as the authority letter was a photocopy. He has also identified the signature of the Officer-in-Charge.

17. PW-1 has further deposed that he weighed the *ganja* which was recovered from the bag of the appellant Chitranjan Gupta in presence of witnesses and he also seized :-

- one Vivo mobile handset;
- one railway ticket;
- one debit card of Allahabad Bank;
- one gold chain;
- one Timex wrist watch; and
- cash of Rs. 550/- from Chitranjan Gupta.

He (PW-1) found *ganja* in two packets wrapped in black polythene and the packets weighed 10 kgs each, summing up to a weight of 20 kgs. He (P-1) further deposed that he found one packet of *ganja* inside a maroon coloured bag and weighed the same and the weight was 10 kgs. Thereafter he seized 30 kgs of *ganja* in presence of witnesses vide Ext.-2, seizure list. He proved his signature on the seizure-list as Ext.-2(1). He collected 6 packets of samples, 2

packets from each bag for forwarding the same to the Directorate of Forensic Science (DFS for short) for chemical examination.

He proved the duplicate samples of seized *ganja* as Material Ext.-I.

He proved the envelope containing the other seized articles, seized from the possession of the appellant Chitranjan Gupta as Material Ext.-II and his signature as Ext-II(1).

Material Ext-III was identified by him as the trolley bag containing the *ganja* and

Material Ext-IV was identified by him as the maroon coloured airbag containing *ganja*.

18. PW-1 further testified that he interrogated the appellant Chitranjan Gupta who admitted that on 26.11.2018, they came from Delhi and stayed at Dimapur in a hotel and purchased 5 packets of *ganja* from an unknown Naga person. He came to Guwahati by the aforesaid Rajdhani Express train. The Officer-in-Charge of the Guwahati GRPS registered G.D. Entry No. 900 dated 27.11.2018 after receiving the information regarding recovery of *ganja*. He proved the extract copy of the G.D. Entry as Ext.-3 and the signature of the OC as Ext.-3(1).

19. PW-1 has further deposed that he recovered two packets of *ganja* from the bag of the appellant Smt. Madhu Gupta and weighed the same in presence of witnesses which weighed 10 kgs in each packet totalling to a weight of 20 kgs. He seized one wrist watch, one Aadhar Card, a pair of silver 'payal' and one gold ring. He collected 4 packets of samples, two packets from each bag and forwarded the same to DFS for chemical examination. He proved the seizure list as Ext.-4 regarding seizure of articles recovered from the possession of the

appellant Madhu Gupta. He proved his signatures on the seizure list as Ext.4(1) and the signature of the appellant Madhu Gupta as Ext.4(2). He proved the duplicate sample of the seized *ganja* as M Ext.-I. He proved M Ext.-V as the envelope containing and other articles seized from the possession of the appellant Madhu Gupta. He proved his signature as Ext.-V(1). He identified the signature of the appellant Madhu Gupta as Ext.-V(2). He identified both the appellants who were present in the Court. He identified the trolley bags along with the airbag. He (PW-1) stated that the appellants disclosed their identities and admitted their guilt and thereafter he arrested them along with the seized articles and took them to the GRPS and handed them over to the OC. He lodged the FIR with the police at GRPS. He proved his signature on the FIR as Ext.-5(1). He then deposited the seized articles in the Malkhana of the GRPS.

20. Thus is it apparent that PW-1 is the informant who has admitted in his cross-examination that he did not register the G.D. Entry before proceeding to the place of occurrence. He also admitted that he did not see wherefrom the accused was brought to the platform No. 1. He has admitted that the bags were not sealed. He has also admitted that the name of the appellant was not mentioned on the maroon coloured bag nor the name of the appellant Madhu Gupta was mentioned on the ash coloured trolley bag. He did not take the signature of ASI S.K. Jha (PW-2) on the seizure list. He also admitted in his cross-examination that he did not examine any vendor or other person present in platform No. 1 as witnesses. He has not mentioned in the seizure-list that he had collected sample of 24 gms each.

21. The learned counsel for the appellants has laid stress in her argument that the samples

were not seized as per provision of the standing order 1/89. Even the amount of sample seized from each bag was not mentioned by PW-1. It is not clear from his evidence if the ash coloured trolley bag belongs to the appellant Madhu Gupta or if the maroon coloured bag belongs to the appellant Chitranjan Gupta.

22. On the contrary, the learned Addl. P.P. laid stress in her argument that conscious possession has been proved by PW-1, who has stated that when he interrogated the appellant Chitranjan Gupta, he confessed that on 26.11.2018 they came from Delhi and stayed in Dimapur in a hotel. He purchased 5 packets of *ganja* from an unknown Naga person and then they boarded the train from Dimapur to Guwahati.

23. Whether this admission of the appellant before PW-1 can be considered as admission of conscious possession? Does this admission exonerate appellant Madhu?

24. ASI Sri Shwaran Kumar Jha testified as PW-2 that on 27.11.2018 he was posted at GRPS, Guwahati. On that day he along with constable Nikunja Das, woman constable Remruotpui Songate and head constable Sailendra Nath Pathak were entrusted with train checking duty at Guwahati Railway Station from 6 AM to 10 PM. At around 7/7:30 AM, the Dibrugarh, New Delhi bound Rajdhani Express train arrived at platform No. 1 of Guwahati Railway Station. They then boarded Coach No. A5 for checking. During checking the passenger travelling in seat No. 1 i.e. the appellant Chitranjan Gupta was apprehended carrying *ganja* like substance in a suitcase. Another passenger Smt. Madhu Gupta was travelling on Seat No. 3. Both the appellants were travelling together. They found one trolley bag and one maroon coloured airbag with Chitranjan Gupta and they found one ash coloured trolley bag with Madhu Gupta. The woman constable checked the ash coloured trolley bag of

Madhu Gupta and found *ganja* inside the bag. The train then started to depart and they brought down both the appellants to platform No. 1 along with the *ganja* in their bags. Thereafter he (PW-2) informed the Officer-Incharge of the Guwahati GRPS Sri Utpal Das about the matter. Sub-Inspector Biswajit Rabha (PW-1) was sent with an Authority Letter. Biswajit Rabha (PW-1) arrived with the weighing scale and he interrogated Chitranjan Gupta and Madhu Gupta. Both Chitranjan and Madhu informed Biswajit Rabha that they have come from Dimapur to proceed to Delhi. Sub-Inspector Biswajit Rabha inspected the trolley bag and airbag of the appellant Chitranjan Gupta and found two packets of *ganja* in the trolley bag and one packet of *ganja* in the airbag. Then Biswajit Rabha (PW-1) weighed the packets of *ganja* and found the weight to be 10 kgs in each packet totalling to 30 kgs in three packets. Biswajit Rabha then inspected the ash coloured trolley bag of the appellant Madhu Gupta and found two packets of *ganja* wrapped with black polythene. The Sub-Inspector (PW-1) weighed both the packets of *ganja* and found 10 kgs in each packet totalling to 20 kgs.

25. PW-2 further deposed that Sub-Inspector Biswajit Rabha (PW-1) collected two packets of samples from each of the aforesaid 5 packets of *ganja*, and a total of 10 packets of samples were drawn and sealed, and two seizure-lists were prepared and signatures of the witnesses were taken. The Sub-Inspector (PW-1) also seized the E-ticket, voter ID card, Adhaar card, mobile phone and gold chain from the appellant Chitranjan Gupta. He (PW-1) also seized the voter ID card, Aadhar card, silver ring and mobile phone from the appellant Madhu Gupta. Thereafter, they along with the appellants and seized articles went to the GRPS, Guwahati. PW-2 identified the purple coloured trolley bag as Material Ext.-III, as the bag being recovered from the possession of the appellant Chitranjan Gupta. He also identified

the maroon coloured airbag recovered from the possession of Chitranjan Gupta as Material Ext.-IV. He identified the ash coloured trolley suitcase recovered from the possession of the appellant Madhu Gupta as Material Ext.-VI.

26. Thus it is as clear as crystal that the PW-1 was authorised by the OC of the Guwahati GRPS to take action as per NDPS Act. The corroboration of the depositions PW-1 and PW-2 clearly proves that authority letter was issued to PW-1 to take action as per the NDPS Act. The evidence of PW-1 and PW-2 also clearly reveals that the appellants were brought down from train to platform No. 1. PW-1 has deposed that he met the appellants in the platform No. 1 and not inside the train. He was not present when the appellants were checked inside the train by PW-2. As soon as he reached the platform No. 1, he checked the bags. The evidence of PW-2 clearly reveals that the woman constable Remruotpui Songate checked the ash coloured trolley bag which was found in possession of the appellant Madhu Gupta. The evidence of PW-1 and PW-2 also reveals that PW-2 and his party was entrusted with the duty of train checking, when they came across the appellants who were found carrying *ganja* like substances. Thereafter information was sent to the Guwahati GRPS and PW-1 arrived with the Authority Letter and the weighing scale and he conducted the search and seizure.

27. The learned counsel for the appellants laid stress in her argument that it was for the first time that the PW-2 deposed in the Court that on 27.11.2018 he came along with Nikunja Das, woman constable Remruotpui Songate and head constable Sailendra Nath Pathak as they were entrusted with train checking duty at railway station from 6 AM to 10 PM. The learned counsel for the appellants however elicited contradictions u/s 145 of the Indian Evidence Act, 1872 (Evidence Act for short) qua Section 162 Cr.PC. It has been affirmed by the IO, SI Smt. Binu Hazarika as PW-7 that PW-2 did not mention u/s 161 Cr.PC that the

appellant Chitranjan Gupta was travelling on seat No. 1 and Madhu Gupta was travelling on Seat No. 3. PW-2 also did not mention u/s 161 Cr.PC that the trolley bag and the airbag of the appellant Chitranjan Gupta had three packets of *ganja* inside and two packets of *ganja* were recovered from the trolley bag of the appellant Madhu Gupta. He also did not mention u/s 161 Cr.PC that each packet contained 10 kgs of *ganja* totalling to 30 kgs and each packet inside the bag of Madhu Gupta contained 10 kgs. of *ganja* summing upto 20 kgs. PW-2 also did not mention u/s 161 Cr.PC (as affirmed by PW-7) that two packets each of samples were drawn from 5 packets and a total of 10 packets of samples were drawn and seized in presence of witnesses.

28. The argument regarding the appellant Smt. Madhu Gupta not being checked by a woman constable holds no water because the evidence of PW-2 regarding checking the bag of Smt. Madhu Gupta by a woman constable has remained un-contradicted and un-controverted even after the cross-examination of PW-2 vis-a-vis the cross-examination of IO (PW-7). The evidence of PW-2 that Biswajit Rabha (PW-1) came with an Authority Letter and the weighing scale has also remained un-contradicted and un-controverted even after the cross-examination of PW-2 vis-a-vis the cross-examination of PW-7. Thus the argument of the learned counsel that proper procedure as mandated u/s 42 & 43 of the NDPS Act was not followed, can be safely brushed aside, but at the same time it has to be borne in mind that although articles were seized in his presence, PW-2 has not affixed his signature on the seizure-list. The fact that certain contradictions could be elicited through the cross-examination of PW-2 vis-a-vis the cross-examination of the IO cannot be ignored.

29. Another member of the team led by PW-2 is Sri Nikunja Das who has testified as PW-3 that on 27.11.2018, while working as a constable, he along with ASI Shrawan Kumar Jha,

woman constable Remruotpui Songate and head constable Sailendra Nath Pathak were entrusted with the duty of train checking at the Guwahati Railway Station from 6 AM to 10 PM. At around 7 AM, the Down Rajdhani Express train arrived from Dibrugarh at platform No. 1. They boarded the Coach No. A-5 for checking. During checking, they found three bags from the possession of the passengers travelling by the seat Nos. 1 and 3. They asked the passengers to open the bags and display the contents and they noticed suspected *ganja* in the bags.

30. PW-3 further testified that ASI Shrawan Kumar Jha (PW-2) then informed the OC of the Guwahati GRPS, Inspector Utpal Das about the matter, who sent ASI Biswajit Rabha (PW-1) to the place of occurrence. The train was about to depart and they brought down both the appellants to platform No. 1 along with all the bags containing *ganja*. In the bags, in the possession of Chitranjan Gupta, they found three packets of *ganja* weighing 10 kgs each, totalling to 30 kgs. They found two packets of *ganja* weighing 10 kgs each totalling to 20 kgs inside the bag of the appellant Madhu Gupta. Sub-Inspector Biswajit Rabha (PW-1) collected two packets of samples from each of the aforesaid five packets of *ganja* totalling to 10 packets of *ganja* and these samples were sealed. Thereafter the appellants along with the sealed packets were taken to Guwahati GRPS. He has proved Ext-2 and Ext.-4 as the seizure-lists relating to seizure of *ganja* and he has proved his signatures on the seizure-lists as Ext.-2(2) and Ext.-4(3). He has identified the purple coloured trolley bag recovered from Chitranjan Gupta as Material Ext.-III and ash coloured trolley bag recovered from Madhu Gupta as Material Ext.-VI.

31. The contradiction that could be elicited from the cross-examination of PW-3 is that he testified that PW-1 went to the Coach No. A-5 and brought down the accused-

persons/appellants to platform No. 1, whereas PW-1 and PW-2 have already testified that both the appellants were brought down to platform No. 1 by the patrolling party. The evidence of PW-1 and PW-2 reveals that as the train was moving away, the appellants were brought down to platform No. 1 and thereafter PW-1 arrived at the railway station.

32. This contradiction also cannot be ignored and brushed aside, more so, when, major contradictions could be elicited through the cross examination of PW-2 vis-a-vis the cross-examination of PW-7. It would be apt to reiterate that PW-7 has affirmed that Pw-2 has not stated u/s 161 Cr.PC that appellants were travelling by seats numbered as 1 and 3 and the appellant Chitranjan had 3 packets of *ganja* in his trolley and airbag and Madhu had two packets of *ganja* in her trolley bag. PW-2 has also not mentioned in his initial statement about the weight of the *ganja* and the samples drawn from the recovered *ganja*. PW-3 has also admitted that the trolley bags Material Ext.-III and Material Ext.-VI were not sealed. PW-3 has also admitted that the seizure-lists were prepared by hand at the place of occurrence and later the seizure list was typed in the GRPS and thereafter he affixed his signatures marked as Ext-2(2) and Ext.-4(4).

33. The learned counsel for the appellants laid stress in her arguments that the signatures Ext.-2(2) and Ext.-4(3) cannot be accepted as evidence, because these signatures were not given by PW-3 at the place of occurrence in compliance of standing order 1/89. The learned counsel for the appellants has also laid stress in her argument that the bags marked as Material Ext.-III, Material Ext.-VI and Material Ext.-IV do not belong to the appellants. Not a single witness could prove with proper documents that the bags belong to the appellants. The PW-3 has admitted that no document proving that the bags belong to the appellants was recovered from Material Ext.-III, Material Ext.-IV or Material Ext.-VI.

34. It is true that PW-2 accompanied by the Railway Police conducted the checking, but he has failed to mention u/s 161 Cr.PC that the trolley bag of Chitranjan had 2 packets of *ganja*, the airbag contained 1 packet of *ganja* and the trolley bag of Madhu had 2 packets of *ganja*, but his evidence that Chitranjan had one purple coloured trolley bag and one marooned coloured airbag in his possession and Madhu had one ash coloured trolley bag in her possession was not contradicted. However, the IO, PW-7, has also affirmed that PW-2 did not mention u/s 161 Cr.PC that Chitranjan was travelling by seat No. 1 and appellant Madhu was travelling by seat No. 3. Will these contradictions cause a dent in the evidence? PW-2 led the train checking team. His signatures were not taken on the seizure lists Ext.-2 and Ext-4. Moreover, he did not specifically mention the number of packets recovered from appellant Chitranjan and Madhu in his statement u/s 161 Cr.PC. He gave his statement u/s 161 Cr.PC in a mechanical manner. The contradictions which surfaced through his cross-examination vis-a-vis the cross-examination of the IO, PW-7, are indeed major contradictions. The other official witnesses except PW-3 have also not specifically described how many packets were found with appellant Chitranjan or Madhu. At least corroboration on this point was required when the official witnesses deposed about the incident. Moreover, although the official witnesses have stated that the appellants were seated on seat No.-1 and 3, they have not specifically stated who was seated on seat No. 1 and which appellant was seated on seat No.-3. No ticket or document was produced and exhibited in this support. Ext.-8 is a photocopy of passenger list without the names of the appellants. The e-ticket was not exhibited. It is reiterated that PW-2's evidence in this aspect has been contradicted and controverted.

35. The evidence of PW-5 Sri Sailendra Nath Pathak reveals that on 27.11.2018, he was posted at Guwahati GRPS as head constable. On that day from 5 AM to 10 PM, he was on

train checking duty at Guwahati Railway Station. At around 7 AM, the Dibrugarh-New Delhi bound Rajdhani Express train arrived at platform No. 1. Then he entered into the train and started checking the coaches. In the Coach No. A-5 and seat Nos. 1 and 3, they found a man and a woman with two trolley bags and one airbag. They checked the bags and found suspected *ganja* like materials. Then they brought them along with the bags to the platform. Thereafter, ASI Shrawan Kumar Jha (PW-2) informed the OC of the Guwahati GRPS Sri Utpal Das, who sent ASI Biswajit Rabha (PW1) to the place of occurrence. The ASI Biswajit Rabha, found two packets in the two trolley bags and one packet in the airbag. He weighed the packets and found that each packet contained 10 kgs of *ganja* and a total amount of 50 kgs of *ganja*. Thereafter Biswajit Rabha collected samples from each packet. He also recovered railway ticket, mobile phone, Aadhar Card, ATM Card, wrist watch and some money from them. He seized the articles and took the accused/appellants and the seized articles along with the bags to the Guwahati GRPS. PW-5 proved his signature on the seizure-lists as Ext.- 2(3) and 4(4).

36. The learned counsel for the appellants emphasised through her argument that the evidence of PW-5 does not substantiate the evidence of PWs-1, 2 & 3. His evidence reveals that 50 kgs of *ganja* was found in two packets recovered from two trolley bags and one packet recovered from the airbag. All the witnesses PWs-1, 2, 3 & 5 have admitted in their cross-examination that they did not inform the T.T.E of the said coach about recovery of the *ganja* from the possession of the appellants.

37. Smt. Remruotpui Songate has testified as PW-6 that on 27.11.2018, she was posted at GRPS, Guwahati as woman constable. On that day she along with ASI Shrawan Kumar Jha (PW-2), constable Nikunja Das (P-3) and head constable Sailendra Nath Pathak (PW-5) were

entrusted with the train checking duty at Guwahati Railway Station from 6 AM to 10 PM. At around 6:30/7 AM, the 12423 Down Rajdhani Express train arrived at platform No. 1. They then boarded the train and started checking the luggage of the passengers. While checking in the Coach No. A-5, in the seat Nos. 1 and 3 they found that the passengers were sleeping. One was a male passenger and the other was a female passenger. They awoke the passengers and asked them about their destination. The passengers informed them that they have come from Guwahati and they were proceeding to Delhi. They checked the bags of the passengers and they found suspected *ganja* in their bags. Then ASI Shrawan Kumar Jha informed the matter to the officer-in-charge of Guwahati GRPS namely, Inspector Utpal Das, who sent ASI Biswajit Rabha (PW-1) to the place of occurrence with an Authority Letter. As the train started to depart, they brought down the passengers i.e. the appellants to platform No. 1. Meanwhile Biswajit Rabha (PW-1) arrived with a government weighing scale. PW-1 then interrogated them and the passengers. He also weighed the suspected *ganja* inside the bags and found a total of 50 kgs. of suspected *ganja*. The passengers were carrying two trolley bags and one airbag. ASI Biswajit Rabha (PW-1) collected packets of samples of the suspected *ganja* and seized the same. The ASI (PW-1) also seized two mobile phones, a pair of anklet, two wrist watches from the passengers. Thereafter the passengers were taken to the Guwahati GRPS along with the seized articles. She proved her signatures on the seizure-lists as Ext.-2(4) and 4(5). She identified the trolley bags and the airbag as Material Ext.-III, IV, and VI.

38. Both PW-5 and PW-6 have admitted in their cross-examinations that they had not mentioned u/s 161 Cr.PC that the appellants were sleeping in Coach No. A-5 on seat Nos. 1 and 3. PW-6 has also admitted that they did not find any documents except the seized bags

to support the fact that the bags belong to the appellants.

39. It is apparent that both PW-5 and 6 have affirmed through their evidence-in-chief and cross-examination that two packets of *ganja* were found in each of the trolley bags and one packet was found in the airbag. Thus the evidence of PWs-5 and 6 relating to the number of packets found in the airbag and trolley bags substantiates the evidence of the other witnesses, PWs-1, 2 and 3. The packets found inside the two trolley bags marked as Exts.-III, IV and VI contained *ganja*. Accordingly, this has been affirmed by PW-4. The PWs 5 and 6 have however not specifically stated that appellant Chitranjan was carrying an airbag and trolley bag while appellant Madhu was carrying the ash coloured trolley. Although there is not an iota of doubt that 50 kgs of *ganja* was recovered in connection with this case on 27.11.2018 at about 7.00 AM, yet the fact that the failure of PW-5 and PW-6 to mention in their initial statement u/s 161 Cr.PC that one appellant was travelling by seat No. 1 and the other appellant was travelling on seat No.-3 thwarts the evidence.

40. Dr. Dhrubajyoti Hazarika has testified as PW-4 that on 28.11.2018, while working as Deputy Director of Drugs & Narcotics Division, at Directorate of Forensic Science, he received the sealed parcels from the Director in connection with Guwahati GRPS Case No. 320/18, dated 27.11.2018, under Sections 21(C)/29 of NDPS Act. The parcel consisted of five exhibits enclosed in a sealed envelope. The facsimile of the seal was found to be GHTY:GRPS.

Description of article:-

1. One sealed envelope marked as "A-1, 2" (original), having two closed ploythene packets containing 24 grams of dry plant materials in each. He marked the packets as DN-610/2018(a1) and DN-610/2018(a2), respectively.

2. One sealed envelope marked as "C-1, C-2 and C-3" (original), having 3 (three) closed polythene packets containing 24 grams of dry plant materials in each. He marked the packets as DN-610/2018 (b1) to DN-610/2018(b3), respectively.

He examined the samples as per the UNOs Drug testing manual and found that the Ext. DN-610/2018(a-1), DN-610/2018(a2) and DN-610/2018(b1) to DN-610/2018(b3) gave positive tests for Cannabis (Ganja).

Ext. 6 is his report and Ext.6(1) is his signature therein.

The report was forwarded by the then Director Mr. G.N. Deka. Ext.7 is the said forwarding letter and Ext.7(1) is the signature of Mr. G.N. Deka, known to him.

34. In his cross-examination PW-4 has stated that he did not find any special mark on the polythene packets (forwarded for chemical examination).

41. The IO Smt. Binu Hazarika testified as PW-7 that on 27.11.2018 she was posted as Sub-Inspector at Guwahati GRPS. On that day she was entrusted to investigate this case. She embarked upon investigation, recorded the statement of the informant and visited the place of occurrence. She produced the sample before the Court and deposited the same along with the inventory list in the Malkhana and forwarded the sample for forensic examination on the next date. She also collected the passenger chart of the train in which the accused/appellants were travelling. She has identified the passenger chart under objection as Ext-8, as the passenger chart was a Photostat copy. PW-7 has further deposed that on 18.12.2018, she received the examination report of the samples from the DFS which gave positive test for cannabis. She informed the appellants Chitranjan Gupta and Madhu Gupta about the FSL report. She prepared the inventory of the seized articles. Ext.-10 is the inventory of the list of

articles seized from the possession of the appellant Chitranjan Gupta and Ext. 11 is the inventory of the list of articles seized from the possession of the appellant Madhu Gupta. She has proved her signatures on inventory as Ext.-10(1) and Ext.-11(1). After completion of investigation she submitted charge-sheet against the appellants u/s 20(C)/29 of the NDPS Act. She has proved the charge-sheet as Ext.-9 and her signatures on the charge-sheet as Ext.-9(1) and 9(2).

42. In her cross-examination, the IO has admitted that she has not mentioned in the charge-sheet that she has received the samples and other articles in sealed condition. She has also not mentioned in the charge-sheet, where she had kept the samples and the seized articles after she received the same. She has admitted that the names of the passengers are not mentioned on Ext.-8, which is regarding the status of one ticket and which is not a passenger chart.

43. PW-7 has further deposed in her cross-examination that Ext.-10 and Ext.-11 was prepared at the place of occurrence. She was not the Seizing Officer and was not authorised to prepare an inventory. She has not enclosed the extract copy of the Malkhana Register along with the charge-sheet. She has also not mentioned in the charge-sheet where the samples were kept within the interim period from 27.11.2018 to 28.11.2018. She had sent the samples with specific marks but she has not similarly marked the packets of the suspected *ganja*. She has admitted that she has not enclosed any certificate with the charge-sheet and she has kept the samples and the contraband in safe custody.

44. By projecting the above cross-examination of PW-7, the learned counsel for the appellants emphasised through her argument that when coinciding similar marks were not

made on the packets of *ganja*, it cannot be affirmed that the same samples were drawn from the same packets of ganja seized in connection with this case. It is not clear if the inventories marked as Exts.-10 and 11 are relating to the same packets mentioned in Ext.-2 and Ext.-4.

45. The learned counsel for the appellants contended that the IO, PW-7 has admitted that she has not mentioned the name of the person through whom she forwarded the samples for forensic examination and she has not cited him as witness in this case. PW-7 has also deposed in her cross-examination that she did not send the impression of the seal used for sealing the samples forwarded to the forensic laboratory separately. No seizure of any documents were made in support of the evidence that the train checking party was actually entrusted with the train checking duty on the date of the incident. It is argued by the learned counsel for the appellants that PW-2, 3 and 5 have admitted in their cross-examination that no documents were seized by the IO (PW-7) in support of the fact that they were entrusted with the train checking duty on the date of the incident. So stating, the learned counsel for the appellants submitted that the role of the checking party especially PWs-2, 3 & 5 appears to be doubtful without any documentary evidence. It is also argued on behalf of the appellants that the IO could not unveil the person referred to as 'Naga person' from whom the appellant Chitranjan has allegedly purchased the *ganja*. She has admitted that the figures and words 28 grams was over written as 24 gms in the FIR and she could not say who had overwritten the words and figures 28 gms as 24 gms in the FIR. She has also admitted that the place of occurrence is shown as platform No. 1 in the sketch map which was prepared by Biswajit Rabha (PW-1). The learned counsel for the appellants has also laid stress in her argument that the place of occurrence according to the sketch map is contradictory to the evidence adduced by the witnesses PWs-1, 2, 3, 5 & 6. She has also admitted that she has

not submitted any document that she has complied with the provision of Sections 42 and 57 of the Act.

46. On the contrary the learned Addl. P.P. laid stress in her argument that the answers of the accused-persons u/s 313 Cr.PC were evasive in nature. The accused-persons have merely denied the incriminating evidence against them. They have stated that the allegations are false and that they are innocent. They have denied that they are the owners of the trolley bags. Both the appellants have stated that they have visited Guwahati for *Kamakhya darshan*. Moreover Section 42 is not applicable to cases of chance recovery. It is to be noted that this is a case of chance recovery and Section 42 has no application.

47. In *Ram Kumar v. Central Bureau of Narcotics*, reported in (2008) Vol.-5 SCC 385 it has been observed that:-

“It is to be noted that this is a case of a chance recovery and Section 42 has no application. It is the case of the prosecution as stated by Shri A.B. Acharya (PW-4) and Devilal Prajapati (PW-2) who were posted as Superintendent and Inspector of Narcotics Department at the relevant point of time that on 5.9.1997 they wanted to make casual inspection. The driver and the conductor were duly informed. On inspection two persons sitting on the seats Nos. 1 and 2 were found suspicious and on being asked they disclosed their names as Aziz Khan and Ram Kumar respectively. Thereafter, they were given both options to be searched in terms of Section 50 of the Act and they consented for their search to be done before P.W.4. Panchanama was prepared. During search 710 gms. of brown sugar was recovered from the appellant which was kept inside the shoes and 800 gms. of brown sugar was recovered from Aziz Khan. On verification and analysis it was found that the seized substance was brown sugar. Statement of both the accused was recorded. The evidence of witnesses clearly established that it was a case of chance recovery in a public place effected during routine checking. The

contraband articles were recovered from the exclusive possession of the appellant and the co-accused.”

48. Reverting back to this case, it is held that the evidence of PWs-1, 2, 3 & 5 clearly depicts that this is a case of “chance recovery”. PWs-2, 3, 5 and 6 were on duty and on a routine check up they unearthed 50 kgs of ‘ganja’ allegedly transported from Dimapur. Thus Section 42 has no application in this case.

49. The learned Addl. P.P. has also relied on the decision of the Hon’ble Supreme Court in *Gurbax Singh v. State of Haryana*, reported in (2001) 3 SCC 28 wherein it has been observed that:-

“It is true that provisions of Sections 52 & 57 are directory. Violation of these provisions would not ipso facto violate the trial or conviction. However, IO cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article.”

50. It is submitted by the learned counsel for the appellants that it has been misconstrued that this is a case of chance recovery. The police team was on routine checking and they found the appellants inside the train and after searching their bags, the contrabands were allegedly recovered. Thereafter the OC was informed and PW-1 who was authorised by the OC conducted the search and seizure. No evidence regarding the constraints of Section 42 of the NDPS Act is forthcoming as the information regarding search, seizure and recovery of the contraband was not reduced to writing and forward to the superior officer within 72 hours. It is also submitted that as PW-1 was forwarded by the OC to conduct the search and seizure after receiving information from PW-2 regarding recovery of suspected contraband from the possession of the appellants, this cannot be considered as a case of chance recovery.

51. This argument of the learned counsel for the appellants however holds no water. This is indeed a case of chance recovery during routine checking by the officers empowered to conduct railway checking.

52. The learned counsel for the appellants also laid stress in her argument that Section 100(4) of the Code of Criminal Procedure requires that before making a search, the officer conducting the search shall call upon two or more independent witnesses and respectable inhabitant of the locality. The learned counsel for the appellants relied on the decision of the Hon'ble Supreme Court in *Kamaljit Singh @ Papu v. State of Punjab*, reported in (2020) 14 SCC 9. In this case the appellant Kamaljit Singh was acquitted from the charges u/s 15 of the NDPS Act as the prosecution had failed to explain why the sole independent witness was not examined and also on other grounds. It was held that:-

“All these deficiencies, in our opinion, create serious doubt and are fatal to the prosecution case, for which reason the appellant desires to be acquitted of the stated offence by giving him the benefit of doubt. We order accordingly. The bail bond stands discharged. The appeal is allowed.”

53. After considering the submissions at the bar, it is held that the failure of the prosecution to produce any independent witness in this case adds to the list of discrepancies in the evidence.

54. It is also submitted by the learned counsel for the appellants that the standing order 1/89 dated 31.07.1989 provides that if any search and seizure is made under the NDPS Act, the seizure list must be prepared at the spot. In this case, it is noticed that the exhibited seizure lists were not prepared at the spot. PW-3 has deposed that a handmade seizure list

was prepared at the spot, but thereafter he gave his signature on a computerised seizure-list at the GRPS. It was also submitted on behalf of the appellants that the inventory was not prepared as per section 52A of the Act. The IO (PW-7) has deposed that she had prepared the inventory in the instant case.

55. As mandated by Section 52A of the NDPS Act, if any narcotic drugs has been seized and forwarded to the officer-in-charge of the nearest police station or the officer empowered u/s 53, the officer referred to in sub-Section (1) shall prepare an inventory of such narcotic drugs and then make an application, to any Magistrate for the purpose of :-

- (a) -----
- (b) -----
- (c) -----"

56. The learned counsel for the appellants has relied on the decision of the Hon'ble Supreme Court in *Union of India v. Mohanlal and Another*, reported in (2016) 3 SCC 379 wherein it has been observed that :-

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

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

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

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

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

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

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

57. Reverting back to his case, it is held that neither the standing order 1/89 was not complied with nor was the procedure as mandated u/s 52A of the NDPS Act was complied with. This is another lacuna in the prosecution. The I/O (PW-7) was not the officer effectuating the seizure, nor was she the officer-in-charge. She has also admitted that she was not authorised to prepare the inventory. She was not empowered u/s 53 of the Act. PW-1 conducted the search and seizure, at the place of occurrence. The seizure lists were typed at the police station. On this aspect alone, the appellants get the benefit of doubt.

58. Further the learned counsel for the appellants laid stress in her argument that Section 57 of the Act requires an officer to report within 48 hours of every arrest and seizure to his immediate superior officer, giving the details and particulars of such arrest or seizure to his immediate official superior, right from the time of receiving the information of the possession of contrabands and thereafter the progress made at each stage, so as to ensure against fabrication of a police case. In the instant case there is no evidence that the provisions of Section 57 of the Act has been complied with. This adds to the list of discrepancies in the prosecution.

59. It has been observed in *Gurbax Singh's* case (*supra*) that:-

“It is true that the provisions of Section 52 and 57 are directory. Violation of these provisions could not *ifso facto* violate the trial or conviction. However, the IO cannot totally ignore these provisions and such failure will have a bearing on the appreciation of evidence regarding the arrest of the accused or seizure of the provisions.”

60. Reverting back to this case, it is held that the failure of the IO to comply with the provisions as mentioned in our foregoing discussions has a bearing on the evidence in this case.

61. It has been argued that the evidence of the IO (PW-7) clearly reveals that there is no

evidence that the seized articles and the samples were kept in safe custody. As per Section 55 of the NDPS Act which mandates that- *"the officer-in-charge of the police station shall take charge and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of the police station and which shall be delivered to him and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station."*

62. It is submitted by the learned counsel for the appellants that the IO (PW-7) has admitted in her cross-examination that she has not mentioned where she kept the samples from 27.11.2018 to 28.11.2018 in the charge-sheet nor has she enclosed any certificate along with the charge-sheet that the samples and the contraband were kept in safe custody. No Malkhana register was also exhibited to prove the fact that the samples were kept in safe custody. The evidence of PW-1 that the seized articles were deposited in the Malkhana has thus remained unsubstantiated by the IO as well as the evidence of other witnesses or by any documentary evidence. Except PW-1, not a single official witness deposed that the seized articles were deposited in the Malkhana of the GRPS.

63. It has been observed by the Hon'ble Supreme Court in *State of Uttar Pradesh v. Hansraj alias Hansu*, reported in (2018) 18 SCC 355 that:-

"The learned counsel appearing for the State has drawn our attention to the evidence of PW-1, Sub-inspector (Ram Chandra Misra) and PW-2 (P.C. Sharma) who in their evidence stated that the substance which was recovered and sealed were deposited in the Police Station Godown and later produced before the Court. Though the witnesses have stated that the substance was deposited in the Police Station Godown and later produced before the Court as pointed out by the High Court that there is no evidence to show that as to how and at what time and date the samples were taken by the carriers

for analysis. It has also come on evidence that constables viz. Asharam and Karam Chand have taken the sample of charas and liquor packets respectively to the laboratory, were also not examined by the prosecution.

The High Court has also pointed out that it was incumbent on the part of the prosecution to lead the evidence to show as to how and in what conditions the articles were preserved at the Police Station and how safely they were taken from there to the respective chemical examiners by its carriers. Learned counsel for the State has submitted that the investigating officer in this particular case has passed away and, therefore, the prosecution was handicapped in adducing the necessary evidence. Notwithstanding the death of the Investigating Officer, nothing prevented the prosecution from examining any other witness who was associated with the investigation and adducing necessary evidence to prove as to how and in what conditions the articles were preserved at the Police Station/Police Station Godown."

64. In the instant case too there is not a whisper in the evidence in what manner the samples were kept safely. The Malkhana Register was also not exhibited to prove the fact that the samples were kept in safe custody.

65. It is also observed by the learned Supreme Court in *Vijay Pandey v. State of Uttar Pradesh*, reported in (2019) 18 SCC 215 that:-

"The failure of the prosecution in the present case to relate the seized sample with that seized from the appellant makes the case no different from failure to produce the seized sample itself. In the circumstances the mere production of a laboratory report that the sample tested was narcotics cannot be conclusive proof by itself. The sample seized and that tested have to be correlated. The observations in *Vijay Jain vs. State of Madhya Pradesh*, (2013) 14 SCC 527, as follows are considered relevant."

66. Reverting back to this case, it is held that the evidence of the chemical analyser PW-4 depicts that the samples forwarded for examination tested positive for cannabis (*ganja*) but in his cross-examination he has stated that he could not find any special mark on the polythene packets. Thus the submissions of the learned counsel for the appellants that without any specific mark to identify the samples forwarded to the forensic laboratory, it could not be ascertained that the samples were taken from the contraband seized in connection with this

case cannot be ignored. The PW-7 (IO) has admitted in her cross-examination that she did not send the impression of the seal which was used to seal the samples forwarded to the forensic laboratory. The safe custody of the samples during the transit was also not proved. In view of my foregoing discussions, it is hereby held that all the deficiencies in the investigation, as well as in the prosecution, create serious doubts which are fatal to the prosecution case. The evidence depicts that 50 kgs of *ganja* was seized while the police team led by PW-2 was on duty but the discrepancies in the investigation and evidence relating to search, seizure, arrest etc. fails to establish a case against the appellants. It cannot be ignored that the search, seizure and arrest was conducted in a busy area, but not a single independent witness was examined. Contradictions surfaced in the evidence of the official witnesses.

67. The recapitulation of the entire evidence reveals that :-

indeed no documents were seized to prove the fact that the appellants were travelling by seat Nos. 1 and 3;

The samples which were forwarded for chemical examination were not specifically marked for comparison with the seized article;

No independent witnesses were examined in the area as busy as platform No. 1;

Overwriting on the FIR regarding the amount of sample as 24 gms in place of 28 gms has been admitted by the IO;

The amount of sample drawn from the seized '*ganja*' in connection with this case has not been specifically mentioned by the officer effectuating seizure and sampling;

Non-compliance of provision u/s 57 of the Act;

Non-compliance of provision u/s 52-A(2)(c) in letter and spirit;

Non-compliance of provision u/s 55 of the Act;

Contradictions surfacing in the evidence of the official witnesses, and so on and so forth.

68. If any of the provisions u/s 52A, 57, 55, 100(4) Cr.PC etc., in isolation have not been complied with, then conviction would have sustained, but when all the procedures as

mentioned above have not been scrupulously followed by the officials conducting the investigation, it cannot be held that the foundational facts have been proved by the prosecution beyond a reasonable doubt. The benefit of doubt has to be extended to the appellants, as the provisions of NDPS Act are stringent. The discrepancies vitiate the credibility of the prosecution case.

69. It has been observed by the Hon'ble Supreme Court in *Noor Aga v. State of Punjab* *State of Punjab MANU/SC/2913/2008 : (2008) 16 SCC 417* that:-

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

70. In sum and substance, it is hereby held that the discrepancies in the investigation and prosecution thwarts the evidence. The statutory presumption therefore does not operate against the appellants. Conscious possession of the contraband by the appellants has not been proved beyond reasonable doubt.

71. In view of the aforesaid features of the case, it will be unsafe to sustain the conviction of the appellants.

72. Therefore, appeals are allowed setting aside the order of conviction and sentence passed by the learned Special Judge, Kamrup (M), Guwahati in NDPS Case No. 16/2019

whereby the appellant Mrs. Madhu Gupta and Sri Chitranjan Gupta were convicted and sentenced to undergo Rigorous Imprisonment for 10 years with fine of Rs. 1 lakh with default stipulation u/s 20(b)(ii)(C) of the NDPS Act. Both the appeals being Criminal Appeal No. 84/2021 and Criminal Appeal No. 87/2021 are hereby allowed. The appellants are to be set at liberty if they are not wanted in any other case.

72. Send back the LCR.

73. Surety stands discharged.

74. Pending application(s), if any, is/are disposed of.

JUDGE

Comparing Assistant