

GAHC010055002021



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

CRL.A(J)/34/2021

SWMKUR MOCHAHARI
UDALGURI
ASSAM.

VERSUS

THE STTE OF ASSAM
REP. BY PP
ASSAM.

Advocate for : MR. A AHMED
AMICUS CURIAE
Advocate for : PP
ASSAM appearing for THE STTE OF ASSAM

WITH

Case No. : Crl.A./88/2021

MUNNA MOCHAHARI @ MUNNA MOCHAHARY
S/O- SRI PAULOS MOCHAHARI, R/O- ANGRAJULI, P.S. AND
DIST.- UDALGURI, ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY THE PUBLIC PROSECUTOR, ASSAM.

2:JATIN CHNDRA DEKA (INFORMANT)
SI OF POLICE
UDALGURI POLICE STATION
P.S. AND DIST.- UDALGURI
ASSAM

Advocate for the Petitioner : G UDDIN

Advocate for the Respondent : PP, ASSAM

HON'BLE MR. JUSTICE SUMAN SHYAM
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of hearing : 17.01.2023

Date of judgment: 27.01.2023
JUDGMENT & ORDER (CAV)

(Susmita Phukan Khaund, J)

Heard Mr. A. Ahmed, learned counsel appearing for the appellants, and Ms. S. Jahan, learned Addl. P.P., Assam appearing for the State/respondent No.1.

2. Both the appeals are directed against the judgment and order dated 22.01.2022 passed by the learned Special Judge, Udalguri in connection with NDPS Case No.35/2018 convicting the appellants Swmkur Mochahary (A1 for short) and Munna Mochahary (A 2 for short) under Sections 20(b) (ii) (C) of the

Narcotic Drugs and Psychotropic Substances Act, 1985 (the Act for short) and sentencing them to undergo Rigorous Imprisonment (R.I.) for 12 years and to pay a fine of Rs. 1,00,000/- each with default stipulation.

3. The learned counsel for the appellants, Mr. A. Ahmed laid stress in his argument that this case is replete with contradictions and procedural defects. The trial Court erred by convicting the appellants ignoring the contradictions and the procedural defects. It has been emphasized through the argument that the Investigating Agency did not follow the proper procedure as per Section 52(A) of the Act. It is submitted that the testimony of the witnesses are not consistent. PW-1 testified that three packets of cannabis weighing 60 kgs were recovered from the vehicle whereas, P.W. 10 testified that two bags of cannabis were recovered from the vehicle which was intercepted while transporting the contraband. It was argued that the S.I. Jatin Ch. Deka, the informant, (P.W. 1) acted de hors his jurisdiction because he lodged the FIR as S.I. of Udalguri P.S., but he was posted as I/C of Bhairabkunda O.P. at the time of lodgment of the FIR "Exhibit 1".

4. The learned counsel for the appellants relied on the decisions of the Hon'ble Supreme Court in **Krishan Chand Vs. State of Himachal Pradesh** reported in (2018) 1 SCC 222, **Karnail Singh Vs. State of Haryana** reported in (2009) 8 SCC 539, **Malber Khan and Anr Vs. The State of Assam and Anr** in CrI.A. No. 41/2021 decided on 05.01.2023, and **Union of India (UOI) Vs. Rooparam**, MANU/SC/1817/2017.

5. Per contra, the learned Addl. P.P. Ms. S. Jahan submitted through her argument that the appellants were caught red-handed while transporting Ganja in the vehicle bearing Registration No. AS 15 E 4572 of Santro Xing make. The

argument in defence that the samples which were forwarded to the Directorate of Forensic Science (DFS for short) were not numbered for proper identification, does not hold water because the Malkhana number is recorded as MR No. 86/18 on the seizure list marked as Exhibit-6. This has been highlighted by the learned Additional P.P. through her argument stating that the investigation proceeded in the correct direction, and after the articles were seized by the appellants, the same was handed over to the OC of Udalguri P.S. It has however been admitted by the Additional P.P. that provisions engrafted in Section 52 and 57 of the Act are directly dependent on the facts of the case. It was also held in *Gurbak Singh v. State of Harayana*, reported in (2001) 3 SCC 28 that the police should normally follow the provisions engrafted in Sections 52 and 57 of the Act.

6. On the anvil of these submissions, we proceed to examine whether the conviction of the appellants can be sustained.

The question that falls for consideration in this case is that whether the trial Court erred in convicting the appellants under the aforementioned sections of law.

The trial Court delineated the following points while deciding this case:-

“(i) Whether on 12-07-2018, at about 10 am the police personnel of Sonai khawrang, police post found 60 kgs of ganja in the vehicle bearing Registration No. AS 15 E 4572, under the possession of the accused persons during Naka checking in front of Sonai Khawrang Police Post?”

7. At the commencement of trial, the appellants abjured their guilt and claimed innocence to the charges framed against them. To substantiate its

stance, the prosecution adduced the evidence of 10 (ten) witnesses, who were cross-examined by the defence. The statements of the appellants under Section 313 Cr.P.C. were recorded.

8. It was held by the learned trial Court that *"since in the present case, the search was conducted in the Santro vehicle at about 10 a.m. on 12.7.2018 which is between Sunrise and Sunset, so there is no question of non-compliance of Section 42 of NDPS Act."*

9. *"On being informed, DSP Moidul Islam authorized the PW1 to seize the contraband Ganja. Then he seized the Ganja at the place of occurrence in presence of witness and this fact has been corroborated by the evidence of independent witnesses, namely, Apurba Baishya (P.W.2) and Siddheswar Baishya (P.W. 3) fortified by Exhibit 6 seizure list. Therefore, the fact that contraband Ganja (60 Kgs) were seized from inside the Santro Car along with cash amount of Rs. 3,800/- by the police in presence of independent witnesses had been fully established and there is nothing to discredit the evidence of the independent witnesses.*

(Exhibit 2), the extract copy of GDE shows that I/C of Sonaikhawrang P.P., Giasuddin Ahmed having got the information of accused person coming in a Santro Car from Bhutan side towards Udalguri carrying Ganja, reduced the information into writing and informed the senior officer about the same and proceeded to the road in front of Sonaikhawrang P.P. along with one Section of 12th APBN for naka checking. On the other hand, in his evidence, P.W. 1 SI Jatin Ch. Deka clearly deposed of having got the information from S.I. Giasuddin, I/C Sonaikhawrang P.P. about a Santro vehicle coming from Bhutan side towards Udalguri, he entered the information in the General Diary being Bhairabkunda

G.D. Entry No. 179 dated 12.07.2018 and proceeded along with the staff in search of Sonaikhawrang P.P. and conducted naka checking on the road and on search recovered 60 kgs of Ganja from inside the vehicle."

10. The learned trial Court then highlighted the authority letter by the DySP which was marked as Exhibit-3 and the Forensic Report and finally held the appellants guilty of offence under Section 20(b) (ii) (C) of the Act.

11. From the evidence of P.W. 1, it is apparent that he was authorized by the DySP vide Exhibit 3 to seize and recover suspected cannabis (*Ganja*) and other articles in connection with Sonaikhawrang P.P. GD Entry No. 176/18 dated 12.07.2018.

12. P.W. 1 S.I. Jatin Ch. Deka stated that on 12.07.2018, he was posted as I/C at Bhairabkunda OP. On that day, at around 10 AM, he received information from I/C of Sonaikhawrang, SI Giasuddin Ahmed, that two persons were transporting suspected Ganja from Bhutan towards Udalguri in a Santro Car. He registered Bhairabkunda GD Entry No. 179 dated 12.07.2018 and proceeded along with his staff to I/C Sonaikhawrang and conducted naka checking in front of the outpost and found the appellants transporting three packets of suspected cannabis weighing 60 kgs in a Santro Car. The suspected cannabis (*Ganja*) was kept inside the Santro Car. On being authorized, vide Exhibit-3, he effectuated search and seizure. He weighed the suspected cannabis at the place of occurrence in presence of witnesses and seized the same at the spot. He also took samples from the suspected cannabis (*Ganja*) weighing 24 gms each in 6 different packets for forwarding the same for forensic examination. The samples were sealed at the spot in presence of witnesses and the vehicle was also seized and the appellants were handed over to the Udalguri police. Exhibit-6 is the

seizure list relating to seizure of three packets of suspected cannabis and he proved his signature as Exhibit 6(1).

13. P.W. 1 further stated that he lodged the FIR marked as Exhibit-1 and he proved his signature on the FIR as Exhibit 1(1). His FIR corroborates his testimony in the Court.

14. Giasuddin, P.W. 10, stated that on 12.07.2018, while he was serving as ASI at Sonaikhawrang P.P. under Udalguri P.S., he received a source information at about 10 A.M. that two persons transporting Ganja in a Santro vehicle were proceeding from Bhairabkunda side and he registered G.D. Entry No. 176 dated 12.07.2018 and he proceeded to the village Bandarguri under the Sonaikhawrang P.P. and laid an ambush.

15. As soon as he noticed the Santro vehicle approaching, he stopped the vehicle and one person suddenly alighted from the vehicle and was about to flee, when he apprehended the person. On being confronted, this person identified himself as A1, but he did not divulge anything. P.W. 10 further stated that they immediately searched the vehicle and they found A2 on the driver's seat. They checked the vehicle and they recovered two bags containing suspected cannabis Ganja. One bag was inside the vehicle and the other was in the trunk of the vehicle. Then they took both the appellants and the bags containing cannabis (Ganja) to the Sonaikhawrang P.S. and informed the In-charge of Bhairabkunda P.P. and Additional S.P. Then the In-charge of Bhairabkunda P.P. (P.W. 1) came to the Sonaikhawrang P.P. and seized the cannabis Ganja from the vehicle.

16. Now this testimony of P.W. 10 is not similar to the testimony of P.W. 1.

P.W. 1 stated that he along with his staff and I/C Sonaikhawrang conducted naka checking in front of Sonaikhawrang OP and nabbed the appellants and thereafter P.W. 1 was informed about the incident, who finally came and seized the contraband which was admittedly detected by P.W. 10 and his staff.

In his cross examination, P.W. 1 testified that he reached the Sonaikhawrang police outpost at about 10 A.M. and the appellants were already detained by the I/C of Sonaikhawrang outpost. A reappraisal of the evidence brings forth this contradiction.

17. The learned defence counsel emphasized in his argument that the evidence of P.W. 1 and P.W. 10 regarding seizure of bags is contradictory. The FIR lodged by P.W. 1 depicts seizure of three packets (bosta) of suspected cannabis weighing 60 kgs in total. On the contrary, P.W. 10 clearly stated that two bags containing cannabis were seized. One bag was inside the vehicle and the other was in the dicky of the vehicle. The contradiction thwarts the evidence, moreso when the evidence by the official witnesses is not supported by the evidence of independent witnesses.

18. The learned counsel for the appellants regarding contradictions relied on the decision of Hon'ble Supreme Court in ***Krishna Chand Vs. State of Haryana*** (supra) wherein, it has been observed that:-

26. It is settled law that the testimony of official witnesses cannot be rejected on the ground of non-corroboration by independent witness. Though, in the present case, the prosecution, in support of its case, has examined the complainant, PW 6 and Umesh Kumar, PW 4 who have supported the alleged recovery of charas from the accused.

However, there are material contradictions, as pointed out in their statements, which make the prosecution case highly doubtful. In our considered view, the High Court by not taking into account the contradictions in the evidence adduced, held that in case there are minor contradictions in the depositions of the witnesses, the same are bound to be ignored and convicted the appellant as aforesaid.

27. In view of the material contradictions which have come on record, we find that the High Court wrongly convicted the appellant as the evidence adduced by the prosecution was not carefully scrutinized by the High Court. We are of the considered opinion that the High Court committed error in convicting and sentencing the appellant.

19. In the case at hand, the contradictions regarding the number of bags seized in connection with this case is a minor contradiction, but we cannot ignore the fact that the evidence of the official witnesses has not been substantiated by the evidence of the independent witnesses. Not a single independent witness could affirm with clarity that the contraband seized in connection with this case was seized from the possession of the appellants. P.W. 2, P.W. 4 and P.W.-7 were not even confident if the seized contraband was a contraband substance at all. P.W. 3 has however stated that the packets contained Ganja but he did not know from which place the Ganja was seized.

20. The learned counsel for A2 laid stress in his argument that the independent witnesses are pocket witnesses and stock witnesses. P.W. 2 and P.W. 7 are owners of jewellery shops and the other independent witnesses are P.W. 3 a businessman, P.W. 4 a village headman, P.W. 5 a shop keeper and P.W. 6 a homemaker. It is also submitted on behalf of the appellants that there is not

even a scintilla of evidence against the person Nirmal Chetry who hired the Santro Car involved in this case from P.W. 6. The Santro Car seized in connection with this case, belongs to P.W. 5, who is the husband of P.W. 6.

21. Shri Apurba Baishya, P.W. 2 stated that the incident occurred on 12.07.2018 at around 10 A.M. At that time the I/C of Sonaikhawrang outpost came to his shop and seized his electronic weighing machine and weighed suspected cannabis kept in three packets, in his presence and he affixed his signature on the seizure list. He proved his signature on the seizure list as Exhibit-6(2). P.W. 1 and P.W. 2 proved the seizure list relating to seizure of the electronic weighing machine as Exhibit-4 and their signatures as Exhibit-4(1) and 4(2) respectively. P.W. 2 also stated that Exhibit-6 is the seizure list of suspected cannabis (Ganja), vehicle, two mobiles and cash of Rs. 3,800/-. In his cross-examination P.W.2 stated that he affixed his signature at Sonaikhawrang OP. The seized cannabis were kept under packing at the time of seizure and the seized cannabis (Ganja) was not shown to him and he did not know from where those packets were brought.

22. Thus the cross-examination of P.W. 2 clearly depicts that he did not see the contents of the seized packets and he did not know, wherefrom those packets were recovered. His evidence does not substantiate the evidence of P.W. 1 as well as the evidence of P.W. 10. The cross- examination of the other jewellery shop owner also clearly depicts that he had no knowledge from which place the police brought the seized cannabis (Ganja) to the Police Station.

23. P.W. 7 stated that the informant as well as the appellants are not known to him. About a year ago, the police of Udalguri P.S. came to his jewellery shop and asked him for his mini digital measuring scale. He went to the Udalguri P.S.

and the police measured 4-5 small packets containing suspected cannabis (Ganja) kept in envelopes and after measuring the packets of suspected cannabis (Ganja) the digital measuring scale was returned to him. P.W. 1 and 7 has proved the seizure list marked as Exhibit-5 and their signatures on the seizure list as Exhibit 5(1) and 5(3) respectively. In his cross-examination too, P.W. 7 stated that he did not know from which place the Ganja was seized.

24. Shri Siddheswar Baishya, a businessman deposed as P.W. 3 that the appellants are not known to him. The incident occurred in the month of March-April in the year 2018. While he was proceeding towards Udalguri, the police at Sonaikhawrang outpost called him, as contraband had been recovered from some individuals. Accordingly, he proceeded to the police post and a police officer showed him suspected contraband, cannabis (Ganja) in three paper packets and asked him to affix his signature on the seizure list. He was shown the suspected cannabis (Ganja) by opening the packets. After preparation of seizure list relating to seizure of three packets containing cannabis (Ganja), he affixed his signature Exhibit-6(3) relating to seizure of contraband and Santro vehicle bearing Registration No. AS 15 E 9572. He also proved his signature as Exhibit-4(3) and Exhibit-5(2).

25. The evidence of P.W. 3 however does not substantiate the evidence of P.W. 1 or the evidence of P.W. 10. In his cross examination he stated that he did not know from which place the police recovered the three packets containing the contraband. He has also stated that there were many vehicles inside the Sonaikhawrang police outpost and the seized car was not pointed out to him. The suspected cannabis was purportedly found in a jute bag. The three packets were also not weighed in his presence.

26. Close on the heels of the evidence of P.W. 2, P.W. 3 and P.W. 7, the evidence of P.W. 4 also does not substantiate the evidence of P.W. 1 and P.W. 10.

27. Shri Dambaru Sarma, the Village Head Man stated as P.W. 4 that the incident occurred about 7/8 months ago. On that day, he went to the Sonaikhawrang police outpost for NRC duty. At about 11:00 A.M., he saw suspected cannabis in a jute bag which was kept in front of the police outpost and there was a gathering. He saw the appellants in the verandah of the outpost and the police asked him to affix his signature on the seizure list but he did not affix his signature on the seizure list.

He also stated that the people who were assembled mentioned that the substance might be contraband, cannabis (Ganja).

28. P.W. 5 is P.W. 6's husband. P.W. 5 Shri Akash Mazumdar, is a shop keeper and his wife, Menaka Rai Majumdar is a homemaker. P.W. 5 has testified that the incident occurred on 12.07.2018. At that time he was at Siliguri. He reached Rowta Chariali from Siliguri on 13.07.2018 and he called his wife to pick him up from the Rowta Chariali which is 25 kms away from his house. At that time his wife (P.W. 6) informed him that Nirmal Chetry came to his house on 11.07.2018 and borrowed his car in the pretext of taking his ailing father to the hospital for treatment. His wife, Menaka Rai came on a scooty and she informed him that the police officer of Sonai outpost asked her to visit the outpost. On their way back from Rowta Chariali, they went to the Sonai outpost and he was informed that his car was seized by the police as his car was used for transportation of contraband, cannabis.

In his cross examination, he stated that he did not see the appellants in the police outpost.

29. In sync with the evidence of P.W. 5, his wife stated as P.W. 6 that the appellants are known to her. On the night of 12.07.2018, at around 12 'O' clock, Nirmal Chetry/Thapa went to her house and borrowed her car as his father was seriously ailing. So she handed over her car keys to Nirmal Chetry. In her cross examination P.W. 6 stated that Nirmal Chetry was not accompanied by the appellants when he came to her house to borrow her car.

P.W.2, P.W.4, P.W.5, P.W.6 and P.W.7 failed to affirm that 'Ganja' or 'cannabis' was seized in connection with this case.

30. Thus, in view of the foregoing discussions, it is clear that this case now hinges on the evidence of the official witnesses. The independent witness have failed to substantiate the evidence of the official witnesses. P.W. 1, P.W.-8, P.W.9 and P.W. 10.

31. P.W.8's evidence reveals that the samples tested positive for cannabis (Ganja). Shri Gajendra Nath Deka is the Director of Drugs and Narcotics Division, Directorate of Forensic Science. He testified as P.W. 8 that on 16.07.2018, while he was posted as Joint Director, he received a parcel sent through a messenger vide Memo No. UDL/Crime/FSL No. 26/2018/ 2168-69 dated 13.0.72018 in connection with Udalguri P.S. Case No. 153/2018 under Section 20 (b) NDPS Act. The parcel consisted of three exhibits enclosed in a sealed envelope cover. The facsimile of the seal bore the superscript "S.P. UDL". The sealed packets marked as Exhibits "A", "B" and "C" contained 25 gms dry plant materials each marked as DN-378/2018(a) to DN-378/(2018(c)

respectively. The Exhibits tested positive for cannabis. He proved his report as Exhibit-7 and his signatures as Exhibit-7(1). The Forwarding Report was marked as Exhibit 8 and Exhibit-8(1) was the signature of Director K.C. Sarma, with which he is acquainted. His cross examination will be discussed at the appropriate stage.

32. P.W. 9. (I/O), Shri Ranjit Kalita stated that on 12.07.2018, he was posted as Second Officer at Udalguri P.S. On that day, the In-charge S.I. Jatin Ch. Deka (P.W. 1) lodged the FIR with the police at Udalguri P.S. which was registered as Udalguri P.S. case No. 153/18 and he was endorsed with the investigation.

P.W. 9 further stated that the In-charge also produced the appellants along with 60kgs of contraband, cannabis (Ganja), a Santro Car bearing Registration No. AS 15 E 4572 seized at the spot and the miscellaneous case diary. Thereafter, he went to the place of occurrence, prepared a sketch map and forwarded the samples for Forensic Examination. The samples were taken at the spot by the In-charge of Bhairabkunda OP (P.W.1). On receipt of the Forensic Report, he laid charge-sheet against the appellants under Section 20(b) of the NDPS Act. He proved the sketch map as Exhibit-9 and his signature as Exhibit-9(1) and the charge-sheet as Exhibit-10 and his signature on the charge-sheet as Exhibit-10(1).

No effective cross-examination of PW-9 was carried out.

33. P.W. 10 apprehended the appellants at Bandarguri under the Sonaikhawrang P.S. This is the place of occurrence. P.W. 9 prepared the sketch map. The place of occurrence is shown as a road in front of Sonaikhawrang P.P. The evidence of P.W. 1 and P.W. 10 however depicts that P.W. 1 came to the

outpost and seized the contraband. It has been argued by the learned counsel for the appellants that the seizure was made in the police outpost and not at the place of occurrence and this vitiates the investigation. P.W. 1 has also described the place of occurrence as a place in front of the Sonaikhawrang police outpost in his cross examination. Thus, it is clear from the cross examination of P.W. 1 and P.W. 10 that the articles were seized from the outpost and not from the place of occurrence which happens to be in front of the police outpost.

Thus reappreciation of the evidence reveals that, neither the standing order 1 of 1989 was complied with nor Section 52 (A) of the Act has been complied with. This failure coupled with the contradictions thwarts the evidence.

34. It is no more res-integra that in case of an offence under the NDPS Act which provides stringent punishment, the authorities are expected to follow the statutory procedure strictly. In this case at hand, the standing order 1 of 1989 was not complied with nor the provision of Section 52(A) of the Act has been complied with.

35. The Hon'ble Apex Court in ***Union of India Vs. Mohanlal***, (2016) 3 SCC 379, has held that the sample shall be drawn under the supervision of the Magistrate as envisaged under Section 52-A of the NDPS Act. The Apex Court held as under-

13. It is manifest from Section 52A (2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying

photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn. Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application. 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. 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. 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.

14. 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.

36. Reverting back to this case, it is held that the manner in which search and seizure was effectuated by the Investigating Agency has indeed vitiated the proceedings. Although investigation was in conformation to the provisions under Section 43 and 57 of the Act and sub section 5 and Section 100 of the Cr.P.C., yet the failure of the prosecution to produce atleast the seized samples in the Court for verification has vitiated the trial. The learned counsel for the appellant relied on the decision of the Hon'ble Supreme Court in *Union of India (UOI) v. Rooparam* in *Criminal Appeal No. 1883/2014* decided on 07.09.2017 wherein it has been observed that –

“10. On the other hand, on a reading of this Court's judgment in *Jitendra case*[[*Jitendra v. State of M.P.*, \(2004\) 10 SCC 562 : 2004 SCC \(Cri\) 2028](#)], we find that this Court has taken a view that in the trial

for an offence under the [NDPS Act](#), it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the [NDPS Act](#) particularly when the panch witnesses have turned hostile. Again, in [Ashok \[Ashok v. State of M.P., \(2011\) 5 SCC 123 : \(2011\) 2 SCC \(Cri\) 547\]](#) this Court found that the alleged narcotic powder seized from the possession of the accused was not produced before the trial court as material exhibit and there was no explanation for its non-production and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the appellant."

37. Relying on the same judgment i.e. in Roopram's case (supra), it was also argued on behalf of the appellants that the samples were not exhibited in the Court and the samples were also not marked and therefore there was no evidence to connect the Forensic Report of PW-8 with the substance that was allegedly seized from the possession of the appellants.

38. The argument of the prosecution that the M.R. No. on the seizure list i.e. Exhibit-6 being M.R. No. 86/18 is sufficient to prove the seizure of 3 packets of cannabis weighing 60 kgs along with cash of Rs. 3,800/- can be safely brushed

aside. It is clear from Exhibit 6, seizure list that a total of 3 packets of cannabis weighing 60 kgs was seized, but samples were not seized. This M.R. No. 86/18 is not sufficient to connect the Forensic Report with the samples said to have been drawn by the Investigating Agency. There is no document to substantiate seizure of samples drawn from the bulk of 'Ganja' allegedly seized in connection with this case. The contradiction in the testimonies of the witness PW-1 and PW-10, regarding the number of packets or bags seized in connection with this case also adds to the discrepancies in the evidence. It is thereby held that the evidence falls short in proving conscious possession of the contraband by the appellants.

39. It is true that PW-1 was indeed authorized by the DySP to proceed to the place of occurrence vide Exhibit-3 to effectuate search and seizure of the contraband allegedly being transported by the appellants. The learned Addl. P.P. has also refuted the argument of the learned counsel for the appellants that the evidence is not clear whether 'Ganja' or cannabis was seized in connection with this case. It is submitted that cannabis and Ganja is defined under Section 2(iii) of the Act. "Cannabis (hemp)" means-

(a) *charas*, that is, the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish;

(b) *ganja*, that is, the flowering of fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated; and

(c) any mixture, with or without any neutral material, of any of the

above forms of cannabis or any drink prepared therefrom.

40. The learned Addl. P.P. has submitted that the cross-examination of PW-8 clearly reveals that there is no dispute that the seized article is nothing but contraband and PW-8 has admitted in his cross-examination that he has not specifically mentioned about the flowering top and fruiting top of the sample and he has mentioned that the seized contraband was 'Ganja' which includes flowering top and fruiting top. In view of the above, it is thereby held that there is indeed no dispute that 'Ganja' was seized in connection with this case. 'Ganja' as clearly defined under Section 2 (iii) (b) of the Act includes flowering and fruiting top of cannabis plant. It is also clear from the evidence of the witnesses that the incident occurred on 12.07.2018.

41. Recapitulating the entire evidence it is held as follows that –

the evidence of the official witnesses was not supported by the evidence of the independent witnesses;

the contraband was seized from the police outpost at Sonaikhawrang under Udalguri P.S.;

the Standing Order 1 of 1989 was not followed scrupulously nor was the provisions under Section 52A of the Act was followed;

contradictions could be elicited through the cross-examination of the informant PW-1 and another official witness PW-10;

the samples that were sent for forensic examination were not marked for proper identification;

neither the samples nor the bulk of the seized ganja was produced in the Court and verified by the witnesses as the 'Ganja' seized in connection with this case.

42. In view of the foregoing discussions it is thereby held that the Trial Court erred in convicting the appellants under Section 20(b)(ii)(C) of the Act as the prosecution has failed to prove the charges brought against the appellants beyond reasonable doubt.

43. Before parting with this record we would like to add that it is true that presumption under Section 35 of the Act operates against the accused as soon contraband substances are found in their possession, but prosecution is obligated to prove its case beyond reasonable doubt. The burden shifts to the accused only when a strong prima facie case is established by the prosecution and not otherwise.

44. It has been held by Division Bench of this Court in *Malber Khan's* case (*supra*) that – “***Law is well settled that even in a case coming within the ambit of the NDPS Act, the prosecution would be duty bound to prove the charge beyond reasonable doubt. In the case of Noor Aga (supra) the Hon'ble Supreme Court has observed that the initial burden to prove the charge lies upon the prosecution and only when it stand satisfied that the legal burden under section 54 of the Act shift. With a view to bring within its purview the requirement of section 54 of the Act, the element of possession of the contraband has to be established so as to shift the burden on the accused. Similar view has been expressed in the case of Gangadhar @ Gangaram (supra) wherein it has been observed***

that the presumption against the accused of culpability 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.”

45. In view of above, we are clearly of the view that the deficiency in the evidence and the chinks in prosecution extends a benefit of doubt to the appellants. Although the appellants were charged u/s 20(b)(ii)(C) of the Act for allegedly transporting cannabis of commercial quantity, a dispassionate scrutiny of the evidence lends a benefit of doubt to the appellants.

46. In the result and for the reasons discussed above, both the appeals succeed. The appellants are acquitted from the charges u/s 20(b)(ii)(C) of the Act on benefit of doubt. The impugned order of conviction of the appellants and the sentence passed against them by the judgment and order under appeal is hereby set aside. The appellants are set at liberty if they are not required in any other case. The surety also stands discharged. Send back the LCR.

47. Pending application(s), if any, also stands disposed of.

JUDGE

JUDGE