

GAHC010160732011



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

Case No. : Crl.A./5/2011

KAPIL DEV GOSWAMI,
S/O BIJULY GOSWAMI, R/O WARD O. 1, RANGAPARA TOWN, P.S.
RANGAPARA, DIST. SONITPUR, ASSAM.

VERSUS

THE STATE OF ASSAM,

Advocate for the Petitioner : MR.N N JHA

Advocate for the Respondent :

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

JUDGMENT

Date : 10-01-2023

Heard Mr. N.N. Jha, learned counsel appearing on behalf of the appellant. Also heard Mr. B. Sarma, learned Addl. P.P. for the State of Assam.

2. This appeal is directed against the Judgment & Order dated 07.08.2010 passed by the Special Judge, NDPS, Sonitpur, Tezpur, in connection with Special NDPS Case No. 6 of 2008 convicting Shri Kapil Dev Goswami (hereinafter referred to as the appellant) under Section

20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the Act for short) to undergo Rigorous Imprisonment for 3 years and pay a fine of Rs. 25,000/- with default stipulation.

3. A First Information Report (FIR) was lodged by Shri Reba Kanta Bora (hereinafter referred to as the informant), PW-5 stating that on 12.08.2008 at about 1 PM, while Subedar No. 3100363 Shri Chidar Gambu of Assam Rifles, and his jawans were on their way to conduct a search operation, they caught the appellant red-handed on the road, near a railway track of Ward No. 1 of Rangapara town. The appellant was carrying '*Ganja*' (cannabis) in three plastic bags, on his bicycle. Following materials were found inside the three plastic bags:

1.	6 Kgs of <i>ganja</i> kept in a polythene packet.
2.	4 ^{1/2} Kgs of <i>ganja</i> in a polythene packet.
3.	200 gms of <i>ganja</i> in a plastic jar.
4.	1088 numbers of Victor cigarettes filled up with <i>ganja</i> .
5.	68 numbers of small plastic packets containing about 10 gms of <i>ganja</i> each, and
6.	96 tiny paper foils of <i>ganja</i> weighing 400 gms (total weight).

4. The bicycle carrying the *ganja* was numbered as No. 128891 and was of Hero make. The above mentioned articles including the bicycle were seized from the possession of the appellant and samples were drawn from the seven separate items and forwarded to the FSL (at present DFS), Guwahati. The appellant was arrested and forwarded to the Court. The FSL report depicted a positive test for *ganja*. The informant lodged the FIR on 11.09.2008.

5. The investigation had already commenced on the basis of a G.D. Entry, prior to lodgement of the FIR.

6. It is submitted on behalf of the appellant that there was a month's delay in the lodgement of the FIR. The incident allegedly occurred on 12.08.2008 and the FIR was lodged belatedly on 12.09.2008, without assigning the reasons of delay. The independent witnesses have not supported the prosecution case.

7. The learned counsel for the appellant assiduously argued his case and took us through the cross-examination of the witnesses pointing out the contradictions in the evidence.

8. On the contrary the learned Addl. P.P. for the State of Assam Mr. B. Sarma laid stress in his argument that the delay in the lodgement of the FIR can be ignored. The investigation was launched on the basis of the G.D. Entry. The investigation is not flawed. The samples tested positive for cannabis (*ganja*) and the appellant was caught red-handed transporting the *ganja* on his bicycle.

9. The Trial Court delineated the following point to decide this case:-

“Whether on 12.08.2008 at Ward No. 1 of Rangapara Town under Rangapara Police Station, the accused Kapil Dev Goswami illegally possessed 12 Kgs 180 gms of ganja (cannabis) and 1088 numbers of cigarettes containing ganja, as alleged?”

10. The point that falls for consideration in this case is that whether the Trial Court erred in convicting the appellant under Section 20(b)(ii)(B) of the Act to undergo Rigorous Imprisonment for 3 years with fine.

11. To substantiate its stance, the prosecution adduced the evidence of six witnesses whereas the defence adduced the evidence of two witnesses. The statement of the appellant was recorded under Section 313 Cr.P.C. to enable him to explain the evidence appearing against him and his responses were recorded.

12. The learned Trial Court held that the evidence was crystal clear that Pw-6 received information from Chidar Gambu, (PW-4) that he found *ganja* in possession of the appellant and then he registered the G.D. Entry No. 368 dated 12.08.2008 and the G.D. Entry register was exhibited as Exhibit-10. It was held that in the instant case the informant was PW-4 and not PW-5 because the G.D. Entry was made on the basis of the information received from PW-4 Chidar Gambu. It was also held by the learned Trial Court that there was no violation of provision of Section 42 of the Act because the provision of Section 42 comes into play on entry into and search of any building, conveyance or enclosed place but the provision of Section 43 comes into play when seizure is made in a public place or in transit. In the instant case the seizure was made in a public place. It was held that the evidence is manifestly clear that the appellant was caught red handed carrying a total amount of *ganja* weighing 12 kgs

180 gms and 1088 cigarettes containing *ganja*. It was held that the defence witnesses could not dislodge the evidence adduced by the prosecution and the bag allegedly recovered from the appellant contained nothing but *ganja*.

13. The learned counsel for the appellant relied on the decision of the Hon'ble Supreme Court in the case of *State of Andhra Pradesh v. M. Madhusudhan Rao (2008) 71 AIC 8* wherein it has been observed that – "*Delay in lodging the FIR should be satisfactorily explained because delay, more often than not results in embellishment and exaggeration, which is the creature of an afterthought. A delayed report not only gets bereft of the advantage of spontaneity, but, the danger of introduction of coloured version, exaggerated account of an incident or a concocted story as a result of deliberations and consultations, also creeps in, casting a serious doubt on its veracity*".

14. The learned counsel for the appellant also relied on the decision of the High Court of Judicature of Punjab and Haryana at Chandigarh in *Bhuta Khan v. State of Punjab* decided on 26.08.2022 in connection with *CRAS 262 SB 2018 (O&M)* in which case the appellant was acquitted because the seized articles which were sent for lab test could not be connected with the articles which were tested by the forensic laboratory. The learned counsel for the appellant also relied on the decision of this Court in *Babul Rajput & Ors. Vs. State of Assam (2020) 2 Crimes (HC678)* in which case the appellant was acquitted because seizure of the samples were not made as per proper procedure and because of the fact that investigation was also conducted by the informant.

15. On the anvil of these observations, I proceed to examine whether the conviction of the appellant can be sustained based on the evidence on record. I have given my anxious consideration to the submissions at the Bar and have also scrutinised the evidence brought on record.

16. The evidence of PW-1 Shri Gajendra Nath Deka, Deputy Director, Drugs and Narcotic Division, FSL, Kahilipara depicts that the samples in connection with this case tested positive for cannabis. In his cross-examination he admitted that he was not aware who received the samples, but he opened the parcel for examination. He admitted that he did not mention the description of the seal sent by the forwarding authority. He did not explain the delay of 7

days and he also did not mention the place from where the samples were seized. It is argued by the learned counsel for the appellant that on failure to mention the description of the seal, renders the report suspect. In my opinion, a close scrutiny of the evidence however reveals that the description of the seized articles mentioned in Exhibit-2 tallies with the description of the articles stated by PW-1.

17. PWs 2 & 3 are seizure witnesses and they are also independent witness. They have not supported the prosecution case. Shri Sahadev Mandal, PW-2 and Kamal Sah, PW-3 have stated that the appellant has a pan shop near their garment store. One day the police came to their shop and asked them to affix their signatures on papers and accordingly they affixed their signatures. They identified their signatures as Exhibit 3(1) and 4(1) and 3(2) and 4(2) respectively. They admitted in their cross-examination that the police did not read over the contents of the exhibits and they did not know what kind of articles were seized by the police and they did not see the seized articles.

18. Subedar No. 3100363 Shri Chidar Gambu testified as PW-4 that on 12.08.2008 while they were on patrolling duty at Rangapara town, he noticed the appellant trudging along with his bicycle. There was a bag with some articles on his bicycle. The articles in the bag were *ganja* in cigarette form and other forms as well. They then informed the police over phone and also by sending messenger. Accordingly, police arrived at the place of occurrence. Police seized the articles and weighed the same. Police prepared seizure list and he affixed his signature on the seizure list. Exhibit- 3 is the Seizure List and Exhibit-3(1) is his signature. The police took away the appellant alongwith the articles.

19. (i) He, (PW-4), also identified two plastic bags containing *ganja* as materials Exhibits-1 and 2 and two plastic jars containing *ganja* as material Exhibits- 3 and 4 in the Court.

(ii) He identified material Exhibits 5 as 68 small packets containing *ganja* of about 10 grams each/ per packet.

(iii) He had identified material Exhibit No. 6 as 96 small paper packets containing *ganja* and material Exhibit-7 as 1088 cigarettes containing *ganja* and the brand of the cigarette packets as "Victory".

(iv) He identified material Exhibit-8 as one red coloured bicycle No. TQ-128891 of Hero Model.

20. He (PW-4) admitted in his cross-examination that he did not ask the appellant whether he would like to be searched in front of a Magistrate or Police Officer. He admitted that he was not empowered by the government for search and seizure of *ganja*. He had also stated that he informed the senior officer Lt. Col. Sidartha about the police and he informed the police about the incident. He admitted that he was accompanied by 10 personnel during his patrolling duty but he could not recollect their names. He informed the Rangapara police station in writing and handed over the appellant and the seized articles to Rangapara police. He admitted that no document was submitted to the police supporting the fact that the appellant was the owner of the bicycle. He could not recall the number of the bicycle or the brand of the bicycle. He could not recall the number of cigarette packets or the number of blank cigarettes found at that time. He could not recollect the quantity of *ganja* seized from the appellant. Finally he admitted that he could not identify the appellant. He also admitted that he was the only person in the group who was examined by the police as a witness.

21. Admittedly PW-4 was not empowered to investigate a case under this Act. Another discrepancy in the evidence is that he failed to identify the appellant as the same person he had apprehended. In his evidence in chief, he confidently described all the articles seized from the appellant, but he faltered when he was cross-examined. In cross-examination, he admitted that he was unable to describe specifically the seized articles in detail.

22. The learned counsel for the appellant laid stress in his argument that the first person who allegedly apprehended the appellant failed to identify him in the Court.

23. S.I. Shri Rebo Kanta Borah testified as PW-5 that on 12.08.2008, he was attached as S.I. of Police at Rangapara P.S. On that day at about 1:30 PM, Shri Chidar Gambu, Subedar of Assam Rifles informed Rangapara police that he caught, one cyclist named Kapil Dev Goswami red handed while carrying *ganja* and cigarettes containing *ganja* from near the Rangapara police point. O/C Shri Tapash Chakravorty of Rangapara P.S. registered GD entry No. 368 dated 12.08.2008 and he obtained permission from the Dy. S.P. HQ. Tezpur and then he (PW-5) went to the place of occurrence. The *ganja* was kept near the shop of the

appellant. He went to the place of occurrence and seized the articles from the possession of the appellant. The articles seized are as follows:

1.	6 Kgs of suspected <i>ganja</i> contained in a polythene packet.
2.	4 ^{1/2} Kgs of suspected <i>ganja</i> in a polythene bag.
3.	400 gms of suspected <i>ganja contained</i> in a plastic jar.
4.	200 grams of suspected <i>ganja</i> contained in a plastic pet jar.
5.	1088 numbers of cigarettes in filter types of cigarettes containing suspected <i>ganja</i> rolled into the cigarettes known as "Victory" cigarettes.
6.	68 small plastic packets contained suspected <i>ganja</i> weighing about 10 grams in each packet.
7.	96 small packets covered with paper containing ganja, weighing about 400 gms, total.
8.	One red coloured bicycle No. UP-128891 (Hero) bicycle.

24. PW-5 further testified that he seized one balance, one weight of 50 grams, one weight of 500 grams and one 1000 grams weight, from a person named Ajoy Roy near the place of occurrence. He took samples of 10 grams each from item Nos. 1 to 4, sample of one cigarette from item No. 5, sample of 5 grams each from item Nos. 6 and 7 in presence of witnesses. He packed the samples and forwarded the same for forensic examination. He arrested the appellant under Section 42 of NDPS Act in view to prosecute him under Section 20 of the NDPS Act. After a few days he received the forensic report which gave positive test for cannabis (*ganja*). Then he lodged the FIR against the appellant. He proved the FIR as Exhibit-5 and his signature on the FIR as Exhibit-5(1) and the signature of the O/C, Tapash Chakraborty as Exhibit 5(2). Exhibit-6 is the printed format of the FIR. He prepared the sketch map marked as Exhibit-7 and he proved his signature on the sketch map as Exhibit-7(1). He proved his signature on the seizure lists as Exhibit-3(4) and Exhibit-4(3). Exhibit-8 is another seizure list through which he seized weights and balance. He returned the seized weights and balance to the shopkeeper. He proved authority slip by the Dy.S.P. headquarter as Exhibit-9. He examined the witnesses and handed over the Case Diary to the O/C after

completion of investigation. The O/C, Tapash Chakraborty submitted charge sheet against the appellant after receipt of forensic report.

25. PW-5 further identified –

- (i) Material Exhibit-1 and material Exhibit-2 as the plastic bags containing *ganja*;
- (ii) Material Exhibit-3 and material Exhibit-4 as the two plastic jar containing *ganja*;
- (iii) Material Exhibit-5 as 68 small plastic packets containing suspected *ganja* of 10 grams each per packet;
- (iv) Material Exhibit-6 as 96 small paper packets containing *ganja*;
- (v) Material Exhibit-7 as 1088 nos. of cigarettes containing *ganja* and the cigarette brand was named as 'Victory'.
- (vi) Material Exhibit-8 is one red coloured bicycle No. UP-128891 of Hero make.

PW-5 stated that the afore-mentioned articles were seized from the possession of the appellant.

26. In his cross-examination PW-5 testified that Subedar Chiddar Gambu, (PW-4) never verbally informed the police about the incident in the police station. On the contrary he, (PW-5) stated that G.D. Entry was made on the basis of the verbal information. He admitted that in Exhibit-6, in Column 3 in Clause-C, it was recorded that the information was received at 3 PM and he visited the place of occurrence on 12.08.2008 about 4:30 PM. He lodged the FIR (Exhibit-5) on 11.09.2008 without explaining the reasons of delay in lodgement of the FIR. He admitted in his cross-examination that he was not empowered to search and seize *ganja* and to investigate case involving NDPS Act. He (PW-5) denied that he had no power to investigate this case as the Dy.S.P. headquarter had no authority to authorise him to investigate this case. He admitted that the O/C did not endorse his name to investigate the case. He admitted about many shops around the place of occurrence which are situated at the crossroads. He admitted that he had mentioned about only one shop on the sketch map at the place of occurrence. He had stated that there were no people at that time as there was an Assam Bandh call by AAMSU on the day of the incident. When he reached the place of occurrence, the appellant was inside his pan shop. He was accompanied by Terang, a UBC-

constable and Gambu, PW-4. He did not inform the appellant that he could be searched in presence of a Gazetted Officer or a Magistrate near the place of occurrence. He prepared a seizure list, inventory and arrest memo and documents at the place of occurrence. Kamal Sah, PW-3 weighed the articles. He produced the seized articles before the SDJM on 13.08.2008. He prepared the samples and sealed the same at the place of occurrence. He did not draw any sample before the Magistrate. He did not seize any document relating to the bicycle. The seized articles were kept inside the police station and brought from the Malkhana of the police station to the Court.

27. Shri Tapash Chakraborty stated as PW-6 that on 12.08.2008, he received an information from Chidar Gambu, Subedar of 46th Assam Rifles that some *ganja* was recovered including *ganja* in cigarette form, near the traffic police point from one Kapil Dev Goswami. Then he, (PW-6) informed the Dy.S.P. headquarter and he entrusted R.K. Bora, (PW-5) to investigate the case. On receiving the information he registered G.D. Entry No. 368 dated 12.08.2008. Exhibit-10 was the G.D. register and Exhibit-10(1) was the G.D. Entry No. 368 dated 12.08.2008 and Exhibit 10(2) was his signature. Reba Kanta Bora (PW-5) investigated the case and handed over the Case Diary after completion of investigation. On going through the Case Diary, he found sufficient materials against the appellant under Section 20 of the NDPS Act and laid charge sheet against him. He identified his signature on the charge sheet as Exhibit-11(1).

The appellant adduced the evidence of two defence witnesses to refute the charges.

28. Shri Bhuttu Sahani stated as DW-1 that the appellant had a pan shop near the Hanuman Mandir. The incident occurred about 2 years ago and at the relevant time he heard a commotion at the police point and he went there. One boy took a bag from the appellant, and he did not know what was inside the bag. As the appellant had a pan shop, the appellant used to keep pan, cigarettes, etc. in his pan shop for sale. The appellant never dealt in *ganja*. He was cross-examined but no effective cross-examination was carried out by the prosecution.

29. Shri Subhash Singh testified as DW-2 that on the day of the incident he had accompanied the appellant. The appellant had a bag on his bicycle and one person

demanded the bag from the appellant. The appellant refused to handover his bag and then the boy snatched away the bag from the appellant. The bag contained nothing but tamul pan. The appellant was not a peddler. When the police arrived, he went away. He had been acquainted with the appellant for about 10/12 years. He, PW-2 was cross-examined, but no effective cross-examination was carried out by the prosecution.

30. A careful scrutiny of the evidence clearly reveals that the sketch map marked as Exhibit-7 depicts that there is a pan shop belonging to the appellant near the place of occurrence adjoining the garment shop of Shri Sahadev Mandal abutting the railway line opposite to the appellant's house. G Aliman's house is located near the Hanuman Mandir and there is a town hall also near the place of occurrence. The Investigating Officer, PW-5 admitted in his cross-examination about many shops around the place of occurrence, but he stated that there were no people around the place of occurrence due to the Assam Bandh call by AAMSU on that day. On the contrary PW-4 admitted that people were present at the place of occurrence. He did not mention about a deserted road due to a Bandh call by AAMSU. The independent witnesses PW-2 and PW-3 denied any knowledge about the incident. They have not substantiated the seizure of the articles vide Seizure Lists Exhibit-3 and Exhibit-4. Thus the entire case hinges of the evidence of PW-4 and PW-5. As the independent witnesses PW-2 and PW-3 did not support the seizure of the articles vide Seizure Lists Exhibit-3 and Exhibit-4, reliance has to be placed on the evidence of PW-4 and PW-5 regarding seizure of the alleged *ganja* from the possession of the appellant.

31. The evidence reveals that the appellant was apprehended by PW-4 a Subedar and then on finding *ganja* in the bag, PW-4 informed the police and then PW-5 arrived at the place of occurrence. Thus it is apparent that PW-4 was the first person to unravel that the appellant was carrying *ganja* on his bicycle inside a bag. Although PW-4 identified the material exhibits produced in the Court, yet in his cross-examination he said that he could not recall how many cigarettes were inside the bags. He did not know the brand of the cigarette packets. He failed to mention the quantity of *ganja* inside the plastic bag. He admitted in his cross-examination that the police prepared all the documents in the police station and got his signature in the documents in the police station. He also failed to identify the appellant in the dock. He also could not remember from whose possession the weighing scale was seized by the police to

weigh the seized *ganja*. Evidently he was the first person to search the appellant. It is apparent that he initially learnt that the appellant was carrying the alleged *ganja* as he informed the police about the transportation of *ganja* by the appellant on his bicycle. His evidence failed to substantiate that the appellant was caught red handed while transporting 'ganja'.

32. It has been argued by the learned counsel for the appellant that the search was made by the Subedar Shri Chidar Gambu, PW-4 in violation of Section 42 of the Act and PW-4 admitted that he was not empowered to search the appellant. It was also argued on behalf of the appellant that the evidence of PW-4 reveals that he was accompanied by 10 personnel but not a single person accompanying him during the search of the appellant was examined as a witness. Can PW-4 be relied upon as a witness? Apparently not. Initially in his evidence-in-chief he described all the articles confidently as described in the seizure list. The defence was successful to rebut his evidence through effective cross-examination. In cross-examination PW-4 admitted that he could not remember the exact quantity of *ganja* or the brand of cigarettes. He even failed to identify the person whom he had apprehended.

33. It is true that presumption under Section 35 of the Act operates against the accused as soon as contraband substances are found in his possession, but prosecution is obligated to prove its case beyond reasonable doubt and then the burden shifts to the accused.

34. Contrary to the evidence of PW-4, PW-5 testified that all the articles were seized in the place of occurrence and the documents i.e. the seizure lists, inventory and arrest memo were also prepared at the place of occurrence. Without any substantiating evidence, the evidence of PW-5 that the seizure lists were prepared at the place of occurrence cannot be relied upon. It is also not clear from the evidence of the other police officer, PW-6, that the seizure lists were prepared at the place of occurrence. PW-5 further stated that after he received information about transportation of *ganja* from PW-4, he went to the place of occurrence and seized the articles from the possession of the appellant. PW-5's evidence reveals that when they reached the place of occurrence, the appellant was in his shop. The appellant's pan shop is not the place of occurrence. It is clear from the evidence that the place of occurrence was near the railway crossing. PW-5 further testified that he went to the appellant's pan shop and seized the articles. The articles were indeed not seized in the place of occurrence, but were

seized in the appellant's pan shop, where the documents were also prepared. The Standing Order 1 of 1989 was to be followed scrupulously which was however ignored by the Investigating Officer. The contradictions in the evidence of the Investigating Officer, PW-5 and the evidence of PW-4 regarding preparation of documents like seizure lists or inventories in the police station also causes a dent in the evidence. Contrary to the evidence of PW-5, the evidence of PW-4 reveals that seizure lists and documents were prepared in the police station. It is clear from PW-5's evidence that he carried out the investigation. The G.D. Entry No. 368 dated 12.08.2008 was registered by PW-5 and thereafter he embarked upon the investigation. After he received the forensic report which gave positive test for cannabis, he lodged the formal FIR on 12.09.2008.

35. The learned counsel for the appellant laid stress in his argument that the FIR was lodged after one month. The learned Addl. P.P. laid stress in his argument that investigation already commenced on the basis of the G.D. Entry and FIR was lodged after the forensic report was received by the Investigating Officer, PW-5. This does not vitiate the investigation. FIR is marked as Exhibit-5.

36. This argument of the learned Addl. P.P. does not hold water. The PW-5 did not assign any reasons for the inexplicable delay in lodgement of the FIR. Awaiting for report of the lab test to submit charge sheet can be accepted, but waiting for one month for forensic report to lodge an FIR cannot be contemplated to be a valid reason.

37. It is also submitted on behalf of the appellant that the Subedar not being an authorised person under Section 42 to conduct search, conducted search, in violation of Section 42 of the NDPS Act. The appellant was also not given a preference to be searched by Magistrate or a nearest Gazetted Officer and the Seizure List and other documents were prepared in the police station which was admitted by PW-4. It is also submitted that the samples were not drawn as per proper procedure and not kept in safe custody. The cross-examination of PW-5 clearly depicts that the drawn samples were kept in the police station malkhana. No register regarding the custody of drawn samples was produced or exhibited in the Court.

38. The other defect highlighted on behalf of the appellant is that the investigation appears

to be biased, because the complainant himself is the Investigating Officer and the evidence of the complainant-cum-Investigating Officer was not substantiated by the evidence of the other witnesses.

39. It is true that seizure of articles at the place of occurrence was not substantiated by the independent witnesses PW-2 and PW-3. It has already been held in my foregoing discussions that while drawing samples, Standing Order 1 of 1989 was not complied with. Although, it is claimed that search was made as per Sub Section (5) of Section 100 Cr.P.C., the seizure witnesses did not support the prosecution case.

40. The question that arises is whether the appellant's conviction, based squarely on the evidence of the Investigating Officer cum informant can be held to be appropriate. There is no embargo in convicting an accused on the basis of the evidence of an Investigating Officer who is also an informant, if the evidence of the informant who conducted the investigation and finally laid charge sheet is found to be *Singh v. State (Narcotic Branch of Delhi)* referred in (2020) 10 SCC 120 that –

“11. Therefore, as such, there is no reason to doubt the credibility of the informant and doubt the entire case of the prosecution solely on the ground that the informant has investigated the case. Solely on the basis of some apprehension or the doubts, the entire prosecution version cannot be discarded and the accused is not to be straightway acquitted unless and until the accused is able to establish and prove the bias and the prejudice. As held by this Court in the case of Ram Chandra (supra) the question of prejudice or bias has to be established and not inferred. The question of bias will have to be decided on the facts of each case [See Vipan Kumar Jain (supra)]. At this stage, it is required to be noted and as observed hereinabove, NDPS Act is a Special Act with the special purpose and with special provisions including Section 68 which provides that no officer acting in exercise of powers vested in him under any provision of the NDPS Act or any rule or order made there under shall be compelled to say from where he got any information as to the commission of any offence. Therefore, considering the NDPS Act being a special Act with special procedure to be followed under Chapter V, and as observed hereinabove, there is no specific bar against conducting the

investigation by the informant himself and in view of the safeguard provided under the Act itself, namely, Section 58, we are of the opinion that there cannot be any general proposition of law to be laid down that in every case where the informant is the investigator, the trial is vitiated and the accused is entitled to acquittal. Similarly, even with respect to offences under the IPC, as observed hereinabove, there is no specific bar against the informant/complainant investigating the case. Only in a case where the accused has been able to establish and prove the bias and/or unfair investigation by the informant-cum-investigator and the case of the prosecution is merely based upon the deposition of the informant-cum-investigator, meaning thereby prosecution does not rely upon other witnesses, more particularly the independent witnesses, in that case, where the complainant himself had conducted the investigation, such aspect of the matter can certainly be given due weightage while assessing the evidence on record. Therefore, as rightly observed by this Court in the case of Bhaskar Ramappa Madar (*supra*), the matter has to be decided on a case to case basis without any universal generalisation. As rightly held by this Court in the case of V. Jayapaul (*supra*), there is no bar against the informant police officer to investigate the case. As rightly observed, if at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the investigating officer the question of bias would depend on the facts and circumstances of each case and therefore it is not proper to lay down a broad and unqualified proposition that in every case where the police officer who registered the case by lodging the first information, conducts the investigation that itself had caused prejudice to the accused and thereby it vitiates the entire prosecution case and the accused is entitled to acquittal."

41. In this case at hand, the discrepancies in the investigation and chinks in the prosecution lends a benefit of doubt to the appellant.

The investigation was conducted in a slipshod manner;

the evidence of PW-5 regarding an Assam Bandh call by AAMSU is not substantiated by the

evidence of PW-4,
the PW-4 failed to identify the appellant;
the standing order 1 of 1989 was not scrupulously followed;
the articles were not seized in the place of occurrence but in the appellant's shop;
contradictions in the evidence of PW-4 and PW-5 stares back; and
the independent witnesses did not substantiate the evidences of the official witnesses.

42. In view of the foregoing discussions, it is hereby held that it would be perilous to convict the appellant on the basis of the evidence of PW-5 who is the informant as well as the Investigating Officer. In this case the evidence of the informant-cum-Investigating Officer appears to be biased and the appellant may be prejudiced if convicted on the basis of the evidence of the sole witness, PW-5, who is the informant as well as the investigating officer.

43. It has also been held by this Court in Babu Rajput and Others v. State of Assam (2022) 678 that –

“19. It is the settled law that in case of any offence under the NDPS Act which provides stringent punishment, the authorities are expected to follow the statutory procedure strictly which is found to be absent in the present case. Rather the way the investigation carried out and search, seizure and collection of samples were made by the informant himself makes the entire prosecution case suspect. In view of all these loopholes and aberrations in conducting the search and seizure coupled with the fact that the investigation was also carried out by the informant himself vitiates the prosecution and as such, in my considered view the conviction and sentence of the appellants on the basis of such investigation cannot be sustained or at least the appellants would be entitled to benefit of doubt. Being of the above view, the conviction and sentence of the appellants are hereby set aside and all the three appeals stand allowed.”

44. In the instant case the entire case hinges on the evidence of PW-5. It has been held in the foregoing discussions that PW-5 vacillated when he stated in his evidence-in-chief that he seized the contraband from the place of occurrence and on the contrary when he stated in

his cross-examination that the articles were seized from the appellant's shop. It will be apt to reiterate that the appellant's shop was not the place of occurrence. Considering the facts and circumstances of this case, it is held that it would be perilous to rely solely on the evidence of PW-5 to hold the appellant guilty of an offence of such serious a nature.

45. It is thereby held that the evidence on record was inadequate to convict the appellant and he ought to have, therefore been acquitted of the charges framed against him. The appellant is acquitted from the charges under Section 20(b)(ii)(B) of the Act on benefit of doubt. The appellant is to be set at liberty if he is not wanted in connection with any other case.

The sureties stand discharged.

Send back the LCR.

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

JUDGE

Comparing Assistant