

**HIGH COURT OF TRIPURA
AGARTALA
CRL.A(J) NO.29 OF 2023**

Shri Karnajit Das,
S/o. Shri Raj Mohan Das,
Of Anandapur, P.S. Sonamura,
Dist.- Sepahijala Tripura.

.....Appellant(s)

Versus

The State of Tripura.

.....Respondent(s)

For the Appellant(s) : Mr. Subrata Sarkar, Sr. Advocate.
Ms. V. Poddar, Advocate.

For the Respondent(s) : Mr. S. Lodh, Special P.P.

Date of hearing : 23.07.2024.

Date of delivery of
Judgment & Order : 30/07/2024

Whether fit for reporting : YES.

**HON'BLE MR. JUSTICE T. AMARNATH GOUD
HON'BLE MR. JUSTICE BISWAJIT PALIT
J U D G M E N T & O R D E R**

T. AMARNATH GOUD(J)

This present appeal has been filed under Section 374 of the Code of Criminal Procedure 1973 against the Judgment and Order of Conviction and Sentence dated 29.05.2023 passed by the learned Additional Sessions Judge, Sepahijala District, Bishalgarh in connection with Case No. Special NDPS 18 of 2022 convicting the appellant to suffer Rigorous Imprisonment for 10

years with a fine of Rs.1,00,000/-(Rupees one lakh) only with default stipulation for the commission of the offence punishable under Section 20(b)(ii)(c) of the NDPS Act.

2. The brief fact of this case is that on 16.02.2022, S.I. Raju Bhowmik, along with other police staff from Bishalgarh P.S., was conducting a vehicle check near the SDPO, Bishalgarh Office on National Highway-08. They noticed a Maruti Suzuki Dzire car, with registration TR01-BF-0640, speeding from Bishalgarh towards Agartala. Despite giving a stop signal, the driver tried to evade but was detained by the police. The driver appearing nervous was found with several plastic sacks in the car boot emanating a scent consistent with '*Ganja*'. Upon questioning, the driver Karnajit Das i.e. the appellant herein, admitted to the presence of '*Ganja*' in the vehicle. The higher police authority was informed, leading to a seizure operation following permission from S.P., Sepahijala, in the presence of an Executive Magistrate. The search revealed 5 sacks weighing 70kg in total, suspected to be dry Ganja. The contraband, the car, and two mobile phones were seized on the spot and the same was documented in a seizure list. S.I. Raju Bhowmik lodged a *suo motu* FIR against Karnajit Das under Sections 20(b)(ii)(C)/25/29 of the NDPS Act. This resulted in Bishalgarh P.S. case No. 2022 BLG 008 dated 16.02.2022. S.I. Sanjay Majumder,

the Investigating Officer (I.O. in short), took over the case. Post-investigation, including the examination of witnesses and documentation, the accused-Karnajit Das was arrested and forwarded to the Court. Upon the conclusion of the investigation, a charge sheet was filed against the accused under various sections of the NDPS Act, 1985. On 27.07.2022, charges under section 20(b)(ii) (C) of the NDPS Act were formally framed against the accused, to which he pleaded not guilty, leading to the commencement of the trial. After thorough investigation and legal procedure, the learned Trial Court in Special (NDPS) 18 of 2022, convicted the appellant for the commission of offence punishable under Section 20(b)(ii)(C) of Narcotic Drugs and Psychotropic Substances Act. Aggrieved, the appellant has preferred this appeal before this Court.

3. Heard Mr. Subrata Sarkar, learned Sr. counsel assisted by Ms. V. Poddar, learned counsel appearing for the convict-appellant as well as Mr. S. Lodh, learned Special P.P., appearing for the State-respondent.

4. Mr. Sarkar, learned Sr. counsel appearing for the appellant submits that the witnesses provided inconsistent statements about the place of seizure and the location of the seized contraband within the vehicle. The police Sub-Inspector i.e. P.W.-1

did not inform his superior authority in writing after the seizure, nor could he confirm the details about the seizure vehicle. Regulatory guidelines under the NDPS Act, such as sending of messages to superior authority and providing detailed reports were not followed. Police only obtained the signature of one witness during the seizure, ignoring the possibility of other independent witnesses. Further, the deposition of the independent witness i.e. P.W.-2 totally aligns with the prosecution version which creates suspicion about the authenticity of the said witness. Essential records like Malkhana register were not produced during the trial which further raises doubt on the prosecution's version of the story. Gaps exist in the timeline of the handling and testing of the seized samples, questioning the authenticity of the prosecution. Further, there are discrepancies between the statements of the witnesses and the investigation exhibits multiple lacunas. Moreover, the remnants of the sample for evidence were not presented in the Court below.

5. On the point that essential records of Malkhana register were not produced during the trial, the learned Sr. counsel relied upon **Para-3** of the Judgment of the Hon'ble Supreme Court reported in **(2005) 3 SCC 59** titled as State of **Rajasthan Vs. Gurmail Singh**. The same is produced here-in-under:-

"3. We have perused the judgment of the High Court. Apart from other reasons recorded by the High Court, we find that the link evidence adduced by the prosecution was not at all satisfactory. In the first instance, though the seized articles are said to have been kept in the

malkhana on 20th May, 1995, the Malkhana register was not produced to prove that it was so kept in the malkhana till it was taken over by PW-6 on June 5, 1995. We further find that no sample of the seal was sent along with the sample to Excise Laboratory, Jodhpur for the purpose of comparing with the seal appearing on the sample bottles. Therefore, there is no evidence to prove satisfactorily that the seals found were in fact the same seals as were put on the sample bottles immediately after seizure of the contraband. These loopholes in the prosecution case have led the High Court to acquit the respondent."

6. On the point of non-compliance with Section 57 of the NDPS Act, learned Sr. counsel relied upon **para-9** of the Judgment of the Hon'ble Supreme Court reported in **(2001) 3 SCC 28** titled as **Gurbax Singh Vs. State of Haryana**. The same is produced here-in-under:-

"9. The learned counsel for the appellant next contended that from the evidence it is apparent that the I. O. has not followed the procedure prescribed under Sections 52, 55 and 57 of the N.D.P.S. Act. May be that the I.O. had no knowledge about the operation of the N.D.P.S. Act on the date of the incident as he recorded the FIR under Section 9/1/78 of the Opium Act. In our view, there is much substance in this submission. It is true that provisions of Sections 52 and 57 are directory. Violation of these provisions would not ipso facto violate the trial or conviction. However, I.O. 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. In the present case, I.O. has admitted that the seal which was affixed on the muddamal article was handed over to the witness P.W.1 and was kept with him for 10 days. He has also admitted that the muddamal parcels were not sealed by the officer in charge of the police station as required under Section 55 of the N.D.P.S. Act. The prosecution has not led any evidence whether the Chemical Analyser received the sample with proper intact seals. It creates a doubt whether the same sample was sent to the Chemical Analyser. Further, it is apparent that the I.O. has not followed the procedure prescribed under Section 57 of the N.D.P.S. Act of making full report of all particulars of arrest and seizure to his immediate superior officer. The conduct of panch witness is unusual as he offered himself to be a witness for search and seizure despite being not asked by the I.O., particularly when he did not know that the substance was poppy husk., but came to know about it only after being informed by the police. Further, it is the say of the Panch witness that Muddamal seal used by the PSI was a wooden seal. As against this, it is the say of PW2 SI/IO that it was a brass seal. On the basis of the aforesaid evidence and faulty investigation by the prosecution, in our view, it would not be safe to convict the appellant for a serious offence of possessing poppy-husk."

7. On the point of proper scientific examination of the seized item, learned Sr. counsel referred to **paras-10 to 13** of the Hon'ble Apex Court Judgment reported in **(2011) 5 SCC 123** titled

as **Ashok alias Dangra Jaiswal Vs. State of Madhya Pradesh.**

The same is given here-in-under:-

"10. The seizure of the alleged narcotic substance is shown to have been made on March 8, 2005, at 11:45 in the evening. The samples taken from the seized substance were sent to FSL on March 10, 2005, along with the draft, Exhibit P.31. The samples sent for forensic examination were, however, not deposited at the FSL on that date but those came back to the police station on March 12, 2005 due to some mistake in the draft or with some query in respect of the draft. The samples were sent back to the FSL on March 14, 2005, after necessary corrections in the draft and/or giving reply to the query and on that date the samples were accepted at the FSL. From the time of the seizure in the late evening of March 8, 2005, till their deposit in the FSL on March 14, 2005, it is not clear where the samples were laid or were handled by how many people and in what ways.

11. The FSL report came on March 21, 2005, and on that basis the police submitted charge-sheet against the accused on March 31, 2005, but the alleged narcotic substance that was seized from the accused, including the appellant was deposited in the Malkhana about two months later on May 28, 2005. There is no explanation where the seized substance was kept in the meanwhile.

12. Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-

production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused.

13. It may be noted here that in *Jitendera and another v. State of M.P.*, (2004) 10 SCC 562, on similar facts this Court held that the material placed on record by the prosecution did not bring home the charge against the accused beyond reasonable doubt and it would be unsafe to maintain their conviction on that basis. In *Jitendra* (supra), the Court observed and held as under:-

"5.The evidence to prove that charas and ganja were recovered from the possession of the accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW 7), Angad Singh (PW 8) and Sub-Inspector D.J. Rai (PW 6), there is no independent witness as to the recovery of the drugs from the possession of the accused. The charas and ganja alleged to have been seized from the possession of the accused were not even produced before the trial court, so as to connect them with the samples sent to the Forensic Science Laboratory. There is no material produced in the trial, apart from the interested testimony of the police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the Forensic Science Laboratory were taken from the drugs seized from the possession of the accused. Although the High Court noticed the fact that the charas and ganja alleged to have been seized from the custody of the accused had neither been produced in the court, nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the Chemical Examiner in a properly sealed condition and those were found to be charas and ganja. The High Court observed, "non-production of these commodities before the court is not fatal to the prosecution. The defence also did

not insist during the trial that these commodities should be produced". The High Court relied on [Section 465 CrPC](#) to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.

6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the [NDPS Act](#). In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned. The suggestion made by the defence in the cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with the police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the investigating officer was also not examined. Against this background, to say that, despite the panch witnesses having turned hostile, the non-examination of the investigating officer and non-production of the seized drugs, the conviction under the [NDPS Act](#) can still be sustained, is far-fetched."

8. On the point of examination of the seized item, learned Sr. counsel relied upon **para-9** of the Hon'ble Apex Court Judgment reported in **(2018) 17 SCC 627** titled as **Mohan Lal Vs. State of Punjab**. The same is reproduced here-in-under:-

"9. Standing Order No. 1 of 88 issued by the Narcotics Control Bureau in clause 1.13 reads as follows:

"Mode and time limit for dispatch of sample to Laboratory.

The samples should be sent either by insured post or through special messenger duly authorised for the purpose. Dispatch of samples by registered post or ordinary mail should not be resorted to. Samples must be dispatched to the Laboratory within 72 hours of seizure to avoid any legal objection.

(emphasis added)

13.A fair trial to an accused, a constitutional guarantee under Article 21 of the Constitution, would be a hollow promise if the investigation in a NDPS case were not to be fair or raises serious questions about its fairness apparent on the face of the investigation. In the nature of the reverse burden of proof, the onus will lie on the prosecution to demonstrate on the face of it that the investigation was fair, judicious with no circumstances that may raise doubts about its veracity. The obligation of proof beyond reasonable doubt will take within its ambit a fair investigation, in absence of which there can be no fair trial. If the investigation itself is unfair, to require the accused to demonstrate prejudice will be fraught with danger vesting arbitrary powers in the police which may well lead to false implication also. Investigation in such a case would then become

an empty formality and a farce. Such an interpretation therefore naturally has to be avoided.

16. Furthermore, the sample not having been deposited in the malkhana coupled with non-examination of the private witnesses , an adverse inference was drawn therein against the prosecution. This Principle has been reiterated in Bhola Singh Vs. State of Punjab."

9. Again on the point of seized item, learned Sr. counsel referred to **Para-10** of the Judgment of the Hon'ble Apex Court reported in **(2013) 14 SCC 527** titled as **Vijay Jain Vs. State of Madhya Pradesh**. The same is produced here-in-under:-

"10. On the other hand, on a reading of this Court's judgment in Jitendra case, 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 Ashok³ 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."

10. Stating thus, learned Sr. counsel submits that the prosecution has not been able to prove the case beyond reasonable doubt and urged this Court to allow this appeal and set aside the impugned Judgment and Order of conviction.

11. On the other hand, Mr. S. Lodh, learned Special P.P., appearing for the State-respondent countered the submission of learned Sr. counsel that the materials which were seized were

not produced before the Court stating that the same is not necessary.

In this regard learned Spl. P.P. relied upon **Paras-14 and 15** of the recent Judgment of the Hon'ble Apex Court reported in **(2021) 19 SCC 197** titled as **Kallu Khan Vs. State of Rajasthan**. The same is given here-in-under:-

"14. At this stage, the argument advanced by the appellant regarding non- production of contraband in the court due to which benefit of doubt ought to be given to the accused, is required to be adverted to. In State of Rajasthan v. Sahi Ram , this Court held that when the seizure of material is proved on record and is not even disputed, the entire contraband material need not be placed on b record. It is not a case in which the appellant has proved beyond reasonable doubt that while sending the samples for forensic tests, seals were not intact or the procedure has been materially not followed by protecting the seized substance or was not stored properly, as specified in Mohanlal in which case the directions were given to be followed on the administrative side. However, in the facts of the case, the said judgment is not of any help to the appellant.

15. Similarly, in Than Kunwar v. State of Haryana 13, this Court observed that if seizure is otherwise proved and the samples taken from and out of contraband material were kept intact; the report of the forensic expert shows potency, nature and quality of contraband material, essential ingredients constituting offence are made out and the non-production of contraband in the court is not fatal. As discussed above, the appellant has failed to show that the findings recorded by two courts suffer from any perversity or illegality on the said issue and warrant interference."

Learned Spl. P.P. submits that contravened items were seized properly and an independent seizure witness is also there who clearly stated that the articles were seized. Learned Spl. P.P. on the location of the seized contraband within the vehicle argued that P.W.-1 in the FIR stated that the same was found in the boot space/dicky of the car and only SDPO said that when he opened the back door he found the item. But, all other witnesses deposed a similar location for recovery of the contraband items

from the vehicle. However, all of the witnesses deposed that the contraband items were seized from inside the vehicle. So there is no question about the seizure of the contraband items from the vehicle that the accused-appellant was driving.

12. On the point that who sent the seized item to malkhana, learned Spl. P.P. submits that in the *suo-moto* FIR registered by P.W.-1, it is stated that '*on arrival at PS being Malkhana in charge, I have kept all the seized articles at BLG PS Malkhana vide Bishalgarh PS M/R No-02/2022 which refers to Bishalgarh PS GD entry No.30 Dated-16.02.2022*' and in his deposition as P.W.-1, he stated that '*the seized contrabands were later on deposited in the PS Malkhana by the I.O*'. So, there is no contradiction in his statement. Further, P.W.-10, the officer-in-charge in his deposition also stated that S.I. Raju Bhowmik was in charge of Malkhana on the date of the alleged incident. With regard to how it was sent, learned Spl. P.P. submits that P.W.-9, the SDPO in his cross-examination stated that on 16.03.2022 he sent the samples of SFSL, and from the report, it revealed that the items were forwarded by the SDPO on 10.03.2022. Though there is a minor discrepancy, the same can be attributed to typographical mistake as the document itself is endorsed by the competent authority.

13. On non-compliance of Section 57 of the NDPS Act, learned Spl. P.P., relied upon para-9 of the **Gurbax Singh Vs. State of Haryana(supra)** wherein it is stated that *'It is true that provisions of Sections 52 and 57 are directory. Violation of these provisions would not ipso facto violate the trial or conviction.'* Learned Spl. P.P., further submits that the appellant was arrested by the I.O., the detailed report was submitted by the I.O., and inventory was also prepared by the I.O. Some minor wrongs are there in the proceeding but the same is not fatal.

In this regard, learned Spl. P.P., also referred to relevant portion of the Judgment of the Hon'ble Supreme Court reported in **(2020) 3 SCC 321** titled as **Varinder Kumar Vs. State of Himachal Pradesh**. The same is produced here-in-under:-

7.....Sections 52 and 57 of the NDPS Act being directory in nature are of no avail to the appellant."

14. On the point of compliance of Section 42 of the NDPS Act, learned Spl. P.P. submits that the same is not required in the context of the case because the police did not receive any prior information about the contraband item but the same was found during checking. On the point of R/G form, learned Spl. P.P. submits that the same was despatch on 16.02.2022 and received on

16.02.2022. Further, it was endorsed by the Superintendent of Police Sepahijala District himself.

15. On the point of inventory not being prepared at the spot, learned Spl. P.P. submits that though there is some procedural fault, the same was prepared by I.O. certified by the Magistrate, and sent to SFSL with seal and cover. As such, there is no chance of manipulation. Further, the SFSL certified that the seized item was a contraband item i.e. 'ganja' not other things.

16. With regard to the applicability of Section 42 of the Act, learned Spl. P.P., again referred to paras-12 and 13 of **Kallu Khan Vs. State of Rajasthan(supra)** , the same is produced here-in-under:-

"12. After hearing and on perusal of the record and the evidence brought, it is apparent that on apprehending the accused, while making search of the motorcycle, 900 gm of smack was seized to which seizure and sample memos were prepared, as proved by the departmental witnesses. In the facts of the case at hand, where the search and seizure was made from the vehicle used, by way of chance recovery from public road, the provisions of Section 43 of the NDPS Act would apply. In this regard, the guidance may be taken from the judgments of this Court in Raju and Sk. Sakkar, However, the recovery made by Pranveer Singh (PW 6) cannot be doubted in the facts of this case.

13. Now reverting to the contention that the motorcycle seized in commission of the offence does not belong to the accused, however seizure of the contraband from the motorcycle cannot be connected to prove the guilt of the accused. The trial court on appraisal of the testimony of witnesses, Constable Preetam Singh (PW 1), Constable Sardar Singh (PW 2). SI Pranveer Singh (PW 6) and Constable Rajendra Prasad (PW 8), who were members of the patrolling team and the witnesses of the seizure, proved beyond reasonable doubt, when they were on patrolling, the appellant came driving the seized vehicle from the opposite side. On seeing the police vehicle, he had taken back the motorcycle which he was riding. However, the police team apprehended and intercepted the accused and made the search of vehicle, in which the seized contraband smack was found beneath the seat of the vehicle. However, while making search at public place, the contraband was seized from the motorcycle driven by the accused. Thus, recovery of the contraband from the motorcycle of the appellant was a chance recovery on a public road. As per Section 43 of the NDPS Act, any officer of any of the departments, specified in Section 42, is having power of seizure and arrest of

the accused from a public place, or in transit of any narcotic drug or psychotropic substance or controlled substance. The said officer may detain in search any person whom he has reason to believe that he has committed an offence punishable under the provisions of the NDPS Act, in case the possession of the narcotic drug or psychotropic substance appears to be unlawful. The learned Senior Counsel representing the appellant is unable to show any deficiency in following the procedure or perversity to the findings recorded by the trial court, affirmed by the High Court. The seizure of the motorcycle from him is proved beyond reasonable doubt, therefore, the question of ownership of vehicle is not relevant. In the similar set of facts, in Rizwan Khan, this Court observed that the ownership of this vehicle is immaterial. Therefore, the argument as advanced by the learned Senior counsel is of no substance and meritless."

17. Learned Spl. P.P., further argued that in the presence of P.W.-2, i.e., the independent witness, the seizure was made. Stating thus, learned Spl. P.P. submits that the conviction as passed by the learned Trial Court be upheld as the same is just and proper.

18. Heard and perused the evidence on record.

19. It is admitted position that the appellant herein was the driver of the vehicle from which the contraband items were seized. All the witnesses who made search, seizure, and arrest i.e. P.W.-1, Sri Raju Bhomwik, Sub-Inspector of Police, P.W.-3, Additional SDJM Bishalgarh, P.W.-5, the constable of Police, P.W.-9, the SDPO, P.W-10, the O/C Bishalgarh P.S, P.W.-11, the I.O., and P.W.-2, Sri Goutam Deb, the independent witness have unequivocally stated that the accused-appellant herein was the driver of the vehicle at the time of the search and contraband items were seized from the vehicle which was in possession of the accused-appellant. On the point of non-compliance of Sections 52

and 57 of the Act, this Court considering the principle given by the Hon'ble Supreme Court in the ***Gurbax Singh Vs. State of Haryana(supra)*** and ***Varinder Kumar Vs. State of Himachal Pradesh*** is convinced with the submission of learned Spl. P.P. Further, the evidence of P.W.-6, Sri Suman Kumar Chakraborty, Deputy Director (Chemistry Division) TSFSL read with the SFSL report reveals that all the samples were sealed with the impression of Magistrate. It is evident that the samples were drawn in the presence of the Magistrate and sent to the SFSL and as per the report, the samples were positive for the presence of '*Ganja*'. This Court aligns with the submission of the learned Spl. P.P., that though there is some minor procedural fault, but, the same is not fatal and prosecution has been able to prove that the accused-appellant herein on 16.02.2022 was found in conscious possession of 70 kgs of dry '*Ganja*' in 5 numbers of plastic sacks which he was transporting in the said vehicle. Further, this Court is of the opinion that as the sacks containing contraband items were multiple and the same could have been hidden in multiple locations inside the car, it explains the minor discrepancy among the deposition of the witnesses on the location of the contraband item inside the vehicle. However, the deposition of the witnesses are unequivocally clear that the said contraband items were found inside the crime vehicle.

Furthermore, the Judgments as cited by the learned Spl. P.P. supports and strengthens the case of the prosecution. In the light of the above discussion and evidence, this Court is of the opinion that the Judgments as cited by the learned Sr. counsel appearing for the convict-appellant are not relevant to the facts of this case.

20. In view of the above, discussion, this present appeal stands dismissed and the impugned Judgment and Order of Conviction dated 29.05.2023 is upheld. As a sequel, stay if any stands vacated. Pending application(s), if any also stands closed.

Send down the LCRs.

B. PALIT, J

T. AMARNATH GOUD, J

suhanjit

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