

GAHC010160512020



THE GAUHATI HIGH COURT

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

CRIMINAL APPEAL(Jail) NO. 84/2020

Pinak Sankar Basu

.....Appellant

-VERSUS-

1. The State of Assam, represented by Public Prosecutor, Assam
2. Sri Bichitra Kalita [ASI of Tihu Police Station], S/o
– Late Mohan Chandra Kalita, R/o – Village –
Sankara, P.O. & District – Nalbari, Assam

.....Respondents

Advocates :

Appellant	:	Mr. A. Kalita, Amicus Curiae
Respondent no. 1	:	Ms. A. Begum, Additional Public Prosecutor, Assam
Date of Hearing	:	25.06.2024
Date of Judgment & Order	:	19.07.2024

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
HON'BLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT & ORDER

[M. Choudhury, J.]

The instant criminal appeal from Jail under Section 383, Code of Criminal Procedure, 1973 ['the CrPC' or 'the Code', for short] is preferred to assail a Judgment and Order dated 16.12.2019 passed by the Court of learned Special Judge, Nalbari in NDPS Case no. 11 of 2018, which arose out of Tihu Police Station Case no. 78/2018. By the Judgment and Order dated 16.12.2019, both the two charge-sheeted accused persons including the accused-appellant – Pinak Sankar Basu, have been convicted for the offence punishable under Section 20[b][ii][C] of the Narcotic Drugs and Psychotropic Substances [NDPS] Act, 1985. On being found guilty, both the accused persons including the accused-appellant, have been sentenced to undergo rigorous imprisonment for 12 [twelve] years each and to pay a fine of Rs. 1,50,000/- each, in default of payment of fine, to undergo rigorous imprisonment for a further period of 1 ½ [one and half] years each.

2. The investigation was set into motion on institution of a First Information Report [FIR] before the Officer In-Charge, Tihu Police Station by an Assistant Sub-Inspector of Police [ASI], Bichitra Kalita [P.W.2] as an informant on 21.05.2018. The FIR was shown to be instituted in reference to Tihu Police Station General Diary Entry no. 382 dated 21.05.2018.
3. In so far as the contents of the FIR [Ext.-3] lodged in reference to Tihu Police Station General Diary Entry no. 382 are concerned, it inter alia stated that an information was received at Tihu Police Station on that day to the effect that a car was coming from Guwahati side by National Highway no. 31 towards Barpeta and the car was illegally carrying some amount of Cannabis [Ganja]. On the basis of the information and under supervision of the Officer In-Charge, Tihu Police Station, a

search was conducted by the Police personnel from Tihu Police Station in a silver coloured Hyundai Accent car bearing registration no. WB-06/1392 at a place in front of Nathkuchi Police Post situated on National Highway no. 31 leading to Barpeta from Guwahati. On being searched, seventeen packets of different weights, wrapped in plastic, containing suspected contraband, Cannabis [Ganja] were found. The persons sitting in the driver seat and in the front seat of the vehicle bearing registration no. WB-06/1392 [‘the vehicle’, for short] were identified as [i] Sankar Yadav, son of Jagdish Ray, Khajur Bagan, Agartala, Tripura; and [ii] Pinak Chandra Basu, son of Pranab Basu, Gandhigram, Agartala, Tripura [‘the accused-appellant’] respectively. On their interrogation, it was learnt that they were accompanied by the owner of the vehicle [name unknown], a resident of Bidyanagar, Tripura. It was divulged that the suspected contraband, Cannabis [Ganja] were being carried in the vehicle from Agartala to West Bengal. It was further mentioned in the FIR that the owner of the vehicle was also travelling with the two accused persons, but seeing the Police personnel in patrolling duty conducting checks, he fled away. The FIR further mentioned that the suspected contraband, Cannabis [Ganja] in the form of seventeen nos. of packets of various sizes were seized and counted in presence of the senior most official. It was further mentioned that the vehicle was also seized. On being weighed, the packets containing suspected contraband, Cannabis [Ganja] were found to be 77.36 kgs. The accused persons were arrested at the place of occurrence and they were kept in Jail hajat.

4. On receipt of the FIR [Ext.-3], the Officer In-Charge, Tihu Police Station registered the same as Tihu Police Station Case no. 78/2018, on 21.05.2018, for the offences under Section 20[b][ii][C] and Section 29 of the NDPS Act, 1985. There was a separate entry in the FIR [Ext.-3] to the effect that the FIR was received from one Girish Chandra Das, CB no. 368 of Tihu Police Station at 04-45 p.m. on 22.05.2018. After registration of the FIR, the Officer In-Charge, Tihu Police Station, Nabajit Talukdar [P.W.4] took up the investigation as its Investigating Officer [I.O.].
5. During the course of investigation, the two arrested accused persons and the seized contraband, Cannabis [Ganja] were produced before the Court of learned Judicial Magistrate, First Class, Tihu on 22.05.2018. When the two accused persons were so produced with Forwarding Report, Arrest Memo, Inspection Memo, Notice and

Medical Report, the learned Judicial Magistrate, First Class, Tihu initially remanded the accused persons to Police custody for three days till 25.05.2018, with a further direction to produce them before the learned Special Judge, Nalbari on 25.05.2018. On 22.05.2018, the I.O. [P.W.4] also made a prayer before the learned Judicial Magistrate, First Class, Tihu to see the Seizure List, M.R. no. 18/2018 [Ext.-1] and the seized materials. The learned Judicial Magistrate, First Class, Tihu after seeing the Seizure List, M.R. no. 18/2018 [Ext.-1] and the seized materials, returned the same to the I.O. [P.W.4] vide Order dated 22.05.2018. On the same day, another prayer was made by the I.O. [P.W.4] before the learned Judicial Magistrate, First Class, Tihu to certify the correctness of the inventory and also sought permission to take photographs of the seized materials of the inventory and for certification of the photographs as true. Prayers for collecting samples from the seized materials and for certification of the correctness of the list of samples were also made by the I.O. [P.W.4] on 22.05.2018 and those prayers were allowed by the learned Judicial Magistrate, First Class, Tihu by Order dated 22.05.2018. Out of seventeen nos. of packets containing suspected Cannabis [Ganja], samples [original/duplicate] were drawn from Packet no. 1 to Packet no. 4 and they were accordingly marked in the presence of the learned Judicial Magistrate, First Class, Tihu. The prayer of the I.O. [P.W.4] for sending the samples to the Forensic Science Laboratory [FSL], Assam, Guwahati for expert opinion was also allowed by the Order dated 22.05.2018.

6. The samples drawn from the seized materials were forwarded by the Deputy Superintendent of Police [HQ], Nalbari to the Director, FSL, Assam, Guwahati vide a Forwarding Letter bearing Memo no. PNB/Crime-SR/2018/2045 dated 23.05.2018 [Ext.-7] for necessary examination by an expert and to send the Report of opinion to him at the earliest. The Forensic Science Laboratory [FSL] Report on the samples was forwarded by the Directorate of Forensic Science [DFS], Assam, Guwahati vide its Report no. DFS.941/2018/967/DN-266/2018 dated 28.05.2018 [Ext.-8] under the signature of Dr. D.J. Hazarika [P.W.5], Deputy Director, Drugs and Narcotics Division, DFS, Assam reporting that the samples gave positive test for Cannabis [Ganja].
7. The I.O. [P.W.4] upon completion of investigation into the case, Tihu Police Station Case no. 78/2018, submitted a charge-sheet under Section 173[2], CrPC vide

Charge-Sheet no. 60/2018 [Ext.-9] on 30.06.2018 finding *a prima facie case* for the offences punishable under Sections 20[b][ii][C]/29, NDPS Act, 1985 well established against the two accused persons including the accused-appellant.

8. On submission of the Charge-Sheet [Ext.-9], the learned Special Court, Nalbari by Order dated 27.09.2018, directed to register the case as an NDPS Case. Accordingly, the case was registered as NDPS Case no. 11 of 2018. After securing the appearance of the two accused persons from Jail on 05.01.2019; after hearing the prosecution side and the defence side and upon perusal of the materials available in the case records, the learned Special Judge, on 05.01.2019, framed the following charge against the two accused persons :-

That you on 21.05.2018 at Nathkuchi Police Check Post [on NH-31] under Tihu Police Station were found in possession of 17 nos. of packets containing ganja of total weight of 77.36 kg in contravention of provision of the NDPS Act and thereby committed an offence punishable under Section 20[ii][C] of the NDPS Act.

9. When the charges were read over and explained to the two accused persons, they pleaded not guilty and claimed to be tried. During the course of the trial, the prosecution side examined five nos. of witnesses and exhibited a number of documents to bring home the charges against the two accused persons. After closure of the evidence from the prosecution side, the accused persons were examined under Section 313, CrPC and their plea was denial. The defence did not adduce any evidence. After appreciation of the evidence/materials on record and hearing the learned counsel for the parties, the learned Special Court has convicted the two accused persons including the accused-appellant, for the offences, mentioned above, and they have been sentenced in the manner, indicated above. Aggrieved thereby, the accused-appellant has preferred the instant criminal appeal from Jail.
10. We have heard Mr. A. Kalita, learned Amicus Curiae for the accused-appellant and Ms. A. Begum, learned Additional Public Prosecutor for the respondent State.

11. Mr. Kalita, learned Amicus Curiae appearing for the accused-appellant has contended that the prosecution has miserably failed to bring the primary evidence as regards seizure, inventory and sampling of the allegedly seized contraband, Cannabis [Ganja] on record. It is his submission that the mandatory procedure laid down in Section 52A of the NDPS Act, 1985 was not followed in the case in hand. It was the duty of the prosecution to lead primary evidence as regards the allegedly seized contraband either by producing the seized contraband physically or in the alternative, the documentary evidence in the forms of the inventory, the photographs of the seized contraband, Cannabis [Ganja] and the list of samples drawn, with proper certification of the Magistrate, on record, but the prosecution did not adhere to any of them. As a consequence, the entire trial stood vitiated as the evidence on the above aspects in any other form was inadmissible in law. He has further contended that though from the Order dated 22.05.2018 of the learned Judicial Magistrate, First Class, Tihu, it appears that proceedings in purported compliance of the procedure laid down in Section 52A of the NDPS Act, 1985 was shown to be held, but, during the trial, the purported primary evidence emerging from the said proceedings was not placed before the learned trial court. The documentary evidence led during the trial were originated either from the place of seizure of the alleged contraband substance or from the precincts of Tihu Police Station, as evident from the evidence of the two seizure witnesses, P.W.1 and P.W.3. In order to support his submissions, Mr. Kalita has referred to the decisions of the Hon'ble Supreme Court of India in *Union of India vs. Mohan Lal*, reported in [2016] 3 SCC 379; and *Mangilal vs. State of Madhya Pradesh*, reported in [2023] 10 SCR 517. He has also drawn attention to a Notification no. G.S.R.38[E] dated 16.01.2015 issued by the Government of India in exercise of the powers conferred under Section 52A of the NDPS Act, 1985. Since the prosecution did not take any permission for the disposal of the seized contraband during the pendency of the trial, the seized contraband were, therefore, presumably in possession and custody of the State. Not presenting the seized contraband before the learned Special Court physically is to be held as a situation to draw adverse presumption against the prosecution. Learned Amicus Curiae has also contended that samples were not drawn from each of the packets containing suspected Cannabis [Ganja], but only from four packets. Contending as above, learned Amicus Curiae has submitted that the Judgment and Order of conviction and sentence passed against

the accused-appellant is not sustainable in law and the same is liable to be set aside.

11. *Au contraire*, Ms. Begum, learned Additional Public Prosecutor appearing for the respondent State has extensively referred to the provisions of Section 52A of the NDPS Act, 1985 and the proceedings recorded in the Order dated 22.05.2018 before the Court of learned Judicial Magistrate, First Class, Tihu. It has been contended by the learned Additional Public Prosecutor that the documentary evidence led during the course of the trial had emanated from the proceedings dated 22.05.2018. It is contended that the material exhibits, Mat. Ext.-1 to Mat. Ext.-16 fulfilled the condition of primary evidence and as such, non-production of the seized contraband substance physically, though presumably not disposed of with permission during the trial, would not have the effect of vitiating the trial. In the proceedings, held on 22.05.2018, the learned Magistrate had accorded permission to draw samples and to take photographs. Thus, it cannot be said that the prosecution did not lead admissible evidence during the trial and the learned trial court had erred in convicting the accused-appellant for the offences under the NDPS Act, 1985. It is contended that transportation of contraband substance like Cannabis [Ganja] is a serious offence and that the accused-appellant was transporting contraband substance, Cannabis [Ganja] has been established from the FSL Report [Ext.-8] of the DFS, Assam. By canvassing so, the learned Additional Public Prosecutor has supported the Judgment and Order of conviction and sentence in so far as the accused-appellant is concerned.
12. We have given due consideration to the rival submissions advanced by the learned counsel for the parties. We have also gone through the testimonies of the witnesses and the other evidence/materials on record, available in the case records of Special Case no. 11 of 2018, in original. The citations referred to by the learned counsel are duly taken note of and considered.
13. The prosecution witnesses - P.W.1 and P.W.3 – were witnesses to Ext.-1, Seizure List, M.R. no. 18/2018 dated 21.05.2018; Ext.-2, Seizure List, M.R. no. 58/2018 dated 21.05.2018; and to the photographs, Mat. Ext.-1 to Mat. Ext.-16. The prosecution witnesses – P.W.2 and P.W.4 – were Police witnesses. P.W.2 was the

informant whereas P.W.4 was the I.O. of the case. P.W.5, Dr. Dhrubajyoti Hazarika was the Deputy Director, Directorate of Forensic Science [DFS], Assam, Guwahati.

14. P.W.1, Rupak Pathak had a photo studio at Nathkuchi Chowk Bazar. In his evidence-in-chief, P.W.1 deposed to the effect that there was a Patrolling Post at Nathkuchi Chowk. Police personnel used to conduct checking of vehicles at that Patrolling Post. On the incident, P.W.1 testified that at the time of naka chaki checking of vehicles at Nathkuchi Patrolling Post, Police personnel found contraband, Cannabis [Ganja] in packets carried by the accused persons in a Maruti Swift vehicle. He further stated that Police seized the said contraband, Cannabis [Ganja] and measured it on an electronic weighing machine belonging to one Basanta Barman [not a witness]. P.W.1 further stated that the seizure was made in his presence and he had seen the accused persons carrying the contraband, Cannabis [Ganja] in the vehicle when Police personnel checked their vehicle. P.W.1 further stated that Police personnel took photographs of seized contraband, Cannabis [Ganja] in his presence, which he had seen before the Court on the date of his evidence, and identified those photographs of seized contraband, Cannabis [Ganja] as Mat. Ext.-1 to Mat. Ext.-8. He also exhibited the two Seizure Lists, that is, Ext.-1 : Seizure List, M.R. no. 18/2018 dated 21.05.2018; and Ext.-2 : Seizure List, M.R. no. 58/2018 dated 21.05.2018, as a witness. P.W.1 further stated that Police took the samples of Cannabis [Ganja] from the whole lot of seized Cannabis [Ganja] in his presence and he identified Mat. Ext.-9 to Mat. Ext.-16 as photographs of those samples taken by Police.

- 14.1. In cross-examination, P.W.1 stated that his shop was situated at a distance of less than 100 metres from Nathkuchi Patrolling Post and at the time of the incident, he was in his shop. He further stated that P.W.2 called him from Nathkuchi Patrolling Post over phone and informed him that they had apprehended one vehicle carrying contraband, Cannabis [Ganja]. As he was asked to reach the place of occurrence, he went there and noticed a gathering. P.W.1 further stated that as he was an owner of a studio, P.W.2 asked him to take photographs of the seized contraband, Cannabis [Ganja] and accordingly, he took photographs of the seized contraband, Cannabis [Ganja], which were exhibited by him before the Court that day. He further stated that he saw the seized contraband, Cannabis [Ganja] in the Police

Station in packed conditions. P.W.1 further stated that the packets were not opened in his presence. P.W.1 deposed to have seen the seized vehicle in the campus of Nathkuchi Patrolling Post and the seized contraband, Cannabis [Ganja] inside the vehicle. P.W.1 further stated that he neither read the Seizure List nor the contents of the Seizure List were read over to him. He, however, stated that the Seizure List contained about the seizure of the contraband, Cannabis [Ganja] and he put his signature in the Seizure List in the Police Station along with P.W.3, who was also present in the Police Station at that time. P.W.1 also stated that the packets of contraband, Cannabis [Ganja] were not counted but they were weighed and he was present at the time of weighment, which showed 70 kg. P.W.1 stated that his statement was recorded in the Police Station. P.W.1 denied suggestions that he did not make statement before Police that the contraband, Cannabis [Ganja] were weighed in his presence; and that he did not take the photographs of the seized contraband, Cannabis [Ganja]. P.W.1 further stated that he had seen the seized contraband, Cannabis [Ganja] in the Police Station and did not know wherefrom the seized contraband, Cannabis [Ganja] were brought.

15. P.W.3, Harish Das stated that he knew the accused persons from the date of the incident. He stated that he had a shop near the place of occurrence where the Police apprehended the accused persons with contraband, Cannabis [Ganja] during naka chaki checking. P.W.3 stated that he was present when Police personnel seized Cannabis [Ganja] from the accused persons along with a four-wheeler vehicle and he put his signature in the Seizure List of Cannabis [Ganja], Ext.-1. P.W.3 further stated that after seizure of the Cannabis [Ganja] from the possession of the accused persons, Police personnel weighed the quantity of Cannabis [Ganja] in a weighing instrument, which was seized vide a seizure list, Ext.-2 in his presence. P.W.3 deposed that samples were taken from the seized Cannabis [Ganja] by Police for chemical examination and also took photographs of seized Cannabis [Ganja] in his presence. P.W.3 identified the photographs of seized Cannabis [Ganja] as Mat. Ext.-1 to Mat. Ext.-8. P.W.3 further identified photographs of the samples taken from seized Cannabis [Ganja] by Police as Mat. Ext.-9 to Mat. Ext.-16. The witness further stated that the accused persons were sitting in the back seat of the vehicle when he saw them.

- 15.1. In cross-examination, P.W.3 deposed that his shop was located at a distance of about 200 metres from naka chaki checking post. At the time of the incident, he was in the shop of P.W.1 for doing photocopy and when Police called P.W.1 to take photographs, P.W.1 took him along to the Police Out Post. P.W.3 stated that he was not present when the accused persons were apprehended by Police with the vehicle. He saw the Cannabis [Ganja] in the Police Out Post. Police personnel also showed him the samples of the seized Cannabis [Ganja], which were already prepared by the Police personnel before his arrival in the Police Out Post. P.W.3 stated that he neither counted the numbers of seized Cannabis [Ganja] packets nor he was told about the number of packets by Police. He saw both the accused persons inside the Police Out Post. P.W.3 stated that he had no knowledge wherefrom the weighing machine was brought. P.W.3 further stated that measurement of Cannabis [Ganja] was not done in his presence. He had put the signature in the Police Station in the Seizure List without reading the contents of the Seizure List. P.W.3 mentioned that photographs were printed subsequently. It was further stated by P.W.3 that he had forgotten the registration number of the seized vehicle but remembered the colour of the vehicle as black.
16. From a reading of the testimonies of the two witnesses, P.W.1, who was an owner of a photo studio and a photographer, and P.W.3, who is an owner of a shop, it has emerged that on the date of the incident, Police personnel from Nathkuchi Police Out Post were carrying out checking of vehicles at the Patrolling Post on National Highway no. 31 connecting Barpeta with Guwahati. At the said Patrolling Post, the four-wheeler vehicle wherein the two accused persons viz. [i] Sankar Yadav; and [ii] Pinak Chandra Basu, were found to be the occupants, was intercepted. When the vehicle was searched, contraband substance, that is, Cannabis [Ganja] in seventeen nos. of packets were found and seized vide a Seizure List [Ext.-1], M.R. no. 18/2018. The four-wheeler vehicle was also seized vide the Seizure List [Ext.-1]. It was P.W.1 who was asked to take photographs of the seized contraband, Cannabis [Ganja] and accordingly, P.W.1 took photographs of the seized contraband, Cannabis [Ganja] on the date of the incident, 21.05.2018. P.W.3 also supported the testimony of P.W.1 on the point that photographs of the seized contraband, Cannabis [Ganja] were taken in his presence on the date of seizure itself, that is, on 21.05.2018. Both these prosecution witnesses – P.W.1 and P.W.3

– identified the photographs of seized contraband, Cannabis [Ganja] as Mat. Ext.-1 to Mat. Ext.-8, which, according to them, were taken on 21.05.2018 in the Police Out Post. Both these prosecution witnesses had, however, deposed that they were not aware about the contents of the Seizure List [Ext.-1]. P.W.1 stated that Police personnel took samples from the contraband, Cannabis [Ganja] in his presence whereas P.W.3 stated that samples were taken from the seized contraband, Cannabis [Ganja] by the Police personnel but the process was done in his absence. P.W.3 stated that he was, however, shown the samples of the seized contraband, Cannabis [Ganja], which were already prepared by the Police personnel before his arrival in the Police Out Post. Both these prosecution witnesses – P.W.1 and P.W.3 – identified the photographs of the samples taken from the seized contraband, Cannabis [Ganja] by the Police as Mat. Ext.-9 to Mat. Ext.-16. That a photographer was called to take photographs of seized contraband, Cannabis [Ganja] and the seized vehicle was admitted by the informant-P.W.2 in his evidence-in-chief.

17. P.W.2, Bichitra Kalita was serving as the In-Charge, Nathkuchi Patrolling Post on 21.05.2018. On 21.05.2018, P.W.2 was directed by the Officer In-Charge, Tihu Police Station to place naka chaki checking at Nathkuchi Patrolling Post as an information was received from a secret source that one four-wheeler was coming with narcotic drugs. Accordingly, naka chaki checking was placed and checking of vehicles was started. At the time of checking, they found the vehicle carrying seventeen nos. of packets and on checking, those were found out to be Cannabis [Ganja]. P.W.2 testified to the effect that three persons were present when the vehicle was intercepted but one person managed to flee away. The other two occupants, that is, the two accused persons present before the Court could be apprehended. After finding that Cannabis [Ganja] were being carried in the vehicle, the same were seized and brought inside the campus of Nathkuchi Patrolling Post along with the apprehended accused persons, who were in the vehicle. P.W.2 further stated that recovered packets of Cannabis [Ganja] were seized by preparing the Seizure List, Ext.-1 in presence of witnesses. The packets of Cannabis [Ganja] were seized by the Officer In-Charge, Tihu Police Station, that is, P.W.4. A photographer was called to take photographs of the seized Cannabis [Ganja] and the seized vehicle. The packets of Cannabis [Ganja] so seized, were thereafter, measured by a weighing machine, which was seized vide Seizure List, Ext.-2. P.W.2

also exhibited the FIR lodged by him as Ext.-3 with his signature therein as Ext.-3[1].

- 17.1. During cross-examination, P.W.2 named the Police personnel who were present with him at the check point at the time of naka chaki checking. P.W.2 stated that the Officer In-Charge, Tihu Police Station, that is, P.W.4 reached the place of occurrence after a while. It was under the supervision of a Sub-Inspector of Police viz. Kanak Chandra Sarma, the accused persons were apprehended. The accused persons were after being apprehended, brought to Nathkuchi Patrolling Post and they were handed over to the Officer In-Charge, Tihu Police Station, P.W.4. P.W.2 further stated that it was P.W.4, who prepared the Seizure List in his presence and prepared the inventory of the seized goods. P.W.2 denied suggestions that no such incident of apprehending of the accused persons along with Cannabis [Ganja] took place; and that he lodged the FIR as per the advice of his superior officer.

18. P.W.4, Nabajit Takukdar, on 21.05.2018, was serving as the Officer In-Charge, Tihu Police Station. P.W.4 deposed to the effect that at about 10-00 a.m. on that day, that is, on 21.05.2018, he received one information from the Superintendent of Police, Nalbari that one vehicle was coming from Guwahati by National Highway no. 31 carrying Cannabis [Ganja]. On receipt of the said information, he made an entry in the General Diary vide General Diary Entry no. 342 dated 21.05.2018 and proceeded to National Highway no. 31 in front of Nathkuchi Patrolling Post and put naka chaki checking. During the checking of vehicles passing through the naka chaki checking point, one silver coloured Hyundai Accent vehicle coming from Guwahati side was noticed. P.W.4 stated that the vehicle stopped at a little distance from the naka chaki checking point and one person was seen to have run away after alighting from the vehicle. Immediately, they proceeded towards the vehicle bearing registration no. WB-06/1392. On reaching near the vehicle, they found two occupants inside the vehicle as [i] Sankar Yadav; and [ii] Pinak Chandra Basu, the accused-appellant. On looking inside the vehicle, suspicious goods were noticed and when search of the vehicle was made, those were suspected to be Cannabis [Ganja]. Accordingly, suspected Cannabis [Ganja] were seized and weighed. On weighment, the same was found to be 77.36 kg. After seizure of the suspected Cannabis [Ganja], he took the two accused persons to the Police Station along with

the suspected Cannabis [Ganja]. P.W.4 further deposed that the seized contraband, Cannabis [Ganja] were produced before the learned Judicial Magistrate, First Class, Tihu and it was before the learned Judicial Magistrate, First Class, Tihu samples from the seized Cannabis [Ganja] were drawn and sent to the Directorate of Forensic Science [DFS], Assam for examination. P.W.4 stated to have collected the Forensic Science Laboratory [FSL] Report [Ext.-8] from the DFS, Assam and as the FSL Report gave positive test for Cannabis [Ganja], he finding incriminating materials against the accused persons, laid the Charge-Sheet [Ext.-9] under Sections 20[b][ii][C]/29 of the NDPS Act, 1985. P.W.4 exhibited the following documents :- [i] Ext.-1 : the Seizure List, M.R. no. 18/2018 whereby suspected Cannabis [Ganja] wrapped seventeen nos. of packets and the vehicle carrying those, were seized; [ii] Ext.-2 : the Seizure List, M.R. no. 18/2018 whereby a weighing machine was seized; [iii] Ext.-3 : the FIR lodged by P.W.2; [iv] Ext.-4 : the Sketch Map of the P.O. drawn by P.W.4; [v] Ext.-5 : the Authority Slip by which samples of seized Cannabis [Ganja] were sent for FSL examination; [vi] Ext.-6 : the Authorization Letter authorizing P.W.4 to conduct search and seizure issued by Keshab Chandra Phukan, Deputy Superintendent of Police [HQ], Nalbari; [vii] Ext.-7 : the Communication dated 23.05.2018 whereby the samples were sent to the FSL for examination and report; [viii] Ext.-8 : the FSL Report; and [ix] Ext.-9 : the Charge-Sheet no. 60/2018 dated 30.06.2018. P.W.4 identified a number of signatures appearing in the afore-mentioned documentary evidence. P.W.4 further identified photographs of seized Cannabis [Ganja], seized vide the Seizure List, Ext.-1 as Mat. Ext.-1 to Mat. Ext.-8.

- 19.1. During cross-examination, the I.O. [P.W.4] stated that he received the information from the Superintendent of Police, Nalbari and he visited the place of occurrence on 21.05.2018. He stated that he prepared the inventory on the National Highway no. 31 in front of Natkuchi Patrolling Post where naka chaki checking was conducted. P.W.4 stated that the inventory of the seized narcotic drugs and sample packets of the contraband, Cannabis [Ganja] were prepared before the learned Judicial Magistrate and the prosecution witness, P.W.1 was asked to take the photographs of the samples. P.W.4 stated to have informed the higher officials about the seized items. P.W.4 deposed that he was not shown the seized contraband, Cannabis [Ganja] in the Court. P.W.4 testified to the effect that he measured the seized

contraband on the spot after seizure and the seizure witnesses were present at the time of seizure and at the weighment of the seized contraband. P.W.4 denied suggestions to the effect that he did not seize the contraband [Ganja] from the possession of the accused persons; that he did not carry out a proper investigation; that without recovery of any contraband, Cannabis [Ganja], he had proceeded with the case against the accused persons; and that he submitted the Charge-Sheet without any valid reason. P.W.4 also denied suggestions that the signatures of the seizure witnesses were taken in the Police Station; and that the weighment of the seized cannabis [Ganja] was made in the Police Station.

20. There is variation in the testimonies of the prosecution witnesses on the point of seizure. P.W.1 stated that in the Seizure List, Ext.-1, he put his signature in the Police Station along with P.W.3 who was also present in the Police Station at that time. P.W.3 stated that he had put the signature in the Police Station in the Seizure List without reading the contents of the Seizure List. P.W.2 deposed that after finding that Cannabis [Ganja] were being carried in the vehicle, the same were seized and brought inside the campus of Nathkuchi Patrolling Post along with the apprehended accused persons, who were in the vehicle. P.W.2 stated that recovered packets of Cannabis [Ganja] were seized by preparing the Seizure List, Ext.-1 in presence of witnesses by the Officer In-Charge, Tihu Police Station, that is, P.W.4. In the version of P.W.2, it has emerged that the accused persons after being apprehended, were brought to Nathkuchi Patrolling Post and thereafter, they were handed over to P.W.4, who prepared the Seizure List and prepared the inventory of the seized goods in his [P.W.2] presence. On the other hand, P.W.4 stated that he prepared the inventory on the National Highway no. 31 in front of Nathkuchi Patrolling Post itself. P.W.4 denied suggestions that the signatures of the seizure witnesses were taken in the Police Station.
21. P.W.5, Dr. Dhrubajyoti Hazarika deposed to the effect that on 24.05.2018, he was serving as the Deputy Director in the Directorate of Forensic Science [DFS], Assam, Guwahati. On that day, a sealed packet was received from the Director, DFS in connection with Tihu Police Station Case no. 78/2018 and the packet consisted of four sealed exhibits in an envelope cover, with a facsimile seal on it. P.W.5 further stated that the four exhibits – Ext.-1 to Ext.-4, containing 26 grams of dry plant

materials each, were marked by him as DN-233/2018[a] to DN-266/2018[d] respectively. On careful examination of those exhibits, DN-233/2018[a] to DN-266/2018[d], the exhibits gave positive test for Cannabis [Ganja]. P.W.5 exhibited the FSL Report as Ext.-8 with his signature therein as Ext.-8[1].

21.1. During cross-examination, P.W.5 stated that he opened and sealed the parcel himself and performed the forensic test.

22. As the contestation between the rival parties is with regard to the procedure followed in making seizure of the contraband, Cannabis [Ganja]; preparation of the inventory; certification of the inventory; taking and certifying photographs of the seized contraband, Cannabis [Ganja]; and on the drawal of samples and its certification; etc. *qua* the provisions contained in Section 52A of the NDPS Act, 1985, it is apposite, at this juncture, to refer to Section 52A. For ready reference, Section 52A of the NDPS Act, 1985, after its amendment vide Act no. 16 of 2014 w.e.f. 01.05.2014, is quoted hereinbelow in its entirety :-

52A. Disposal of seized narcotic drugs and psychotropic substances.—

[1] The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

[2] Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police

station or to the officer empowered under Section 53, the officer referred to in sub-section [1] shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section [1] may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of –

- [a] certifying the correctness of the inventory so prepared; or
- [b] taking, in the presence of such magistrate, photographs of such drugs, substances or conveyances and certifying such photographs as true; or
- [c] allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

[3] Where an application is made under sub-section [2], the Magistrate shall, as soon as may be, allow the application.

[4] Notwithstanding anything contained in the Indian Evidence Act, 1872 [1 of 1972] or the Code of Criminal Procedure, 1973 [2 of 1974], every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section

[2] and certified by the Magistrate, as primary evidence in respect of such offence.

23. As per sub-section [2] of Section 52A, where any contraband or conveyance has been seized and forwarded to the Officer In-Charge of the nearest Police Station or to an officer empowered under Section 53, such officer is required to prepare an inventory of such contraband or conveyance containing such details, mentioned therein, or such other identifying particulars of the contraband or conveyance or the packing in which they are packed or country of origin and other particulars as the Officer In-Charge or the empowered officer, as the case may be, may consider relevant to the identity of the seized contraband or conveyance in any proceedings under the NDPS Act, 1985. The officer has to make an application to a Magistrate for the purpose of [a] certifying the correctness of the inventory so prepared; or [b] taking, in the presence of such Magistrate, photographs of such seized contraband or conveyance and certifying such photographs as true; and [c] allowing to draw representative samples of such seized samples, in the presence of such Magistrate and certifying the correctness of any list of samples. A mandate is contained in sub-section [3] to the effect that where an application is made under sub-section [2], the Magistrate shall, as soon as may be, allow the application. Sub-section [4] of Section 52A is with a non-obstante clause. It has prescribed that notwithstanding anything contained in the Indian Evidence Act, 1872 or the CrPC, every court trying an offence under the NDPS Act, 1985, shall treat the inventory, the photographs of the seized contraband or conveyance and any list of samples drawn under sub-section [2] of Section 52A and certified by the Magistrate, as primary evidence in respect of such offence.

24. The provisions of Section 52A of the NDPS Act, 1985 has come under consideration of the Hon'ble Supreme Court of India in the case of *Union of India vs. MohanLal*, reported in [2016] 3 SCC 379. The Hon'ble Supreme Court of India in *MohanLal* has observed as under :-
 15. It is manifest from Section 52-A[2][c] [supra] that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer

empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of [a] certifying the correctness of the inventory, [b] certifying photographs of such drugs or substances taken before the Magistrate as true, and [c] to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section [3] of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.
17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A[4] of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections [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.

* * * * *

27. Section 52-A as amended provides for disposal of the seized contraband in the manner stipulated by the Government under sub-section [1] of that section. Notification dated 16.01.2015, in

supersession of the earlier Notification dated 10.05.2007 not only stipulates that all drugs and psychotropic substances have to be disposed of but also identifies the officers who shall initiate action for disposal and the procedure to be followed for such disposal. Para 4 of the Notification, inter alia, provides that officer in charge of the police station shall within 30 days from the date of receipt of chemical analysis report of drugs, psychotropic substances or controlled substances apply to any Magistrate under Section 52-A[2] in terms of Annexure 2 to the said Notification.

28. Sub-para [2] of Para 4 provides that after the Magistrate allows the application under sub-section [3] of Section 52-A, the officer mentioned in sub-para [1] of Para 4 shall preserve the certified inventory, photographs and samples drawn in the presence of the Magistrate as primary evidence for the case and submit details of seized items to the Chairman of the Drugs Disposal Committee for a decision by the Committee on the question of disposal. ...

* * * * *

30. In order to avoid any confusion arising out of the continued presence of two notifications on the same subject we make it clear that disposal of narcotic drugs and psychotropic and controlled substances and conveyances shall be carried out in the following manner till such time the Government prescribes a different procedure for the same :

* * * * *

- 30.3. Cases in which the proceedings are still pending before the Courts at the level of trial court, appellate court or before the Supreme Court: In such cases the heads of the department concerned shall ensure that appropriate applications are moved by the officers competent to do so under Notification dated 16.01.2015 before the Drugs Disposal Committees concerned and steps for disposal of such narcotic drugs and psychotropic and

controlled substances and conveyances taken without any further loss of time.

31. To sum up we direct as under:

31.1. No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A[2] of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section [3] of Section 52-A, as discussed by us in the body of this judgment under the heading 'seizure and sampling'. The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order.

* * * * *

25. The procedure prescribed in Section 52A of the NDPS Act, 1985 has again come up for consideration in the case of *Mangilal vs. State of Madhya Pradesh*, reported in **[2023] 10 SCR 517**. The relevant excerpts from the decision in *Mangilal* are quoted hereinbelow :-

4. Sub-section [1] of Section 52A of the NDPS Act facilitates the Central Government a mode to be prescribed to dispose of the seized narcotic substance. The idea is to create a clear mechanism for such disposal both for the purpose of dealing with the particular case and to safeguard the contraband being used for any illegal purpose thereafter.
5. Sub-section [2] of Section 52A of the NDPS Act mandates a competent officer to prepare an inventory of such narcotic drugs with adequate particulars. This has to be followed through an appropriate application to the Magistrate concerned for the purpose of certifying the correctness of inventory, taking relevant

photographs in his presence and certifying them as true or taking drawal of samples in his presence with due certification. Such an application can be filed for anyone of the aforesaid three purposes. The objective behind this provision is to have an element of supervision by the magistrate over the disposal of seized contraband. Such inventories, photographs and list of samples drawn with certification by Magistrates would constitute as a primary evidence. Therefore, when there is non-compliance of Section 52A of the NDPS Act, where a certification of a magistrate is lacking any inventory, photograph or list of samples would not constitute primary evidence.

6. The obvious reason behind this provision is to inject fair play in the process of investigation. Section 52A of the NDPS Act is a mandatory rule of evidence which requires the physical presence of a Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph taken apart from list of samples drawn. In due compliance of Section 52A[1] of the NDPS Act the Ministry of Finance [Department of Revenue] issued a Notification No. G.S.R. 339[E] dated 10.05.2007 which furnishes an exhaustive manner and mode of disposal of drugs ending with a certificate of destruction:

* * * * *

7. To be noted, the aforesaid notification was in existence at the time of the commission of the offence alleged in the case on hand, stood repealed with effect from 23.12.2022 vide Notification No. G.S.R.899[E]. In any case a notification issued in derogation of the powers conferred under sub-section [1] of Section 52A of the NDPS Act can never contradict the main provision, particularly sub-Section [2]. However, any guideline issued by way of a notification in consonance with Section 52A of the NDPS Act has to be followed mandatorily.
8. Before any proposed disposal/destruction mandate of Section 52A of the NPDS Act requires to be duly complied with starting

with an application to that effect. A Court should be satisfied with such compliance while deciding the case. The onus is entirely on the prosecution in a given case to satisfy the Court when such an issue arises for consideration. Production of seized material is a factor to establish seizure followed by recovery. One has to remember that the provisions of the NDPS Act are both stringent and rigorous and therefore the burden heavily lies on the prosecution. Non-production of a physical evidence would lead to a negative inference within the meaning of Section 114[g] of the Indian Evidence Act, 1872 [hereinafter referred to as the Evidence Act]. The procedure contemplated through the notification has an element of fair play such as the deposit of the seal, numbering the containers in seriatim wise and keeping them in lots preceded by compliance of the procedure for drawing samples...

26. The decision in *MohanLal* [supra] has made reference to two Central Government Notifications, that is, [i] Notification no. G.S.R.339[E] dated 10.05.2007; and [ii] Notification no. G.S.R.38[E] dated 16.01.2015. On the other hand, the decision in *Mangilal* [supra] has referred to two Central Government Notifications, which are [i] Notification no. G.S.R.339[E] dated 10.05.2007; and [ii] Notification no. G.S.R.899[E] dated 23.12.2022. It was noted in *Mangilal* [supra] that the Notification no. G.S.R.339[E] dated 10.05.2007 was in existence at the time of commission of the offence alleged in the said case, stood repealed with effect from 23.12.2022 vide Notification no. G.S.R.899[E]. The date of occurrence of the alleged crime in *Mangilal* [supra] was 20.05.2010. On the other hand, in *MohanLal* [supra], it was recorded that Notification no. G.S.R.38[E] dated 16.01.2015 was in supersession of the earlier Notification no. G.S.R.339[E] dated 10.05.2007.
27. In view of the above observations recorded in *MohanLal* [supra] and *Mangilal* [supra], all the afore-mentioned three Notifications, that is, [i] Notification no. G.S.R.339[E] dated 10.05.2007; [ii] Notification no. G.S.R.38[E] dated 16.01.2015; and [iii] Notification no. G.S.R.899[E] dated 23.12.2022; are carefully perused by us. On such perusal, it is found that the Notification no. G.S.R.38[E] dated 16.01.2015 was in supersession of the Notification no. G.S.R.339[E] dated

10.05.2007 whereas the Notification no. G.S.R.899[E] dated 23.12.2022 was in supersession of the Notification no. G.S.R.38[E] dated 16.01.2015. Thus, we are of the respectful view that the Notification no. G.S.R.38[E] dated 16.01.2015 was not brought to the notice of the Hon'ble Supreme Court at the time of deciding the case in *Mangilal* [supra].

28. All the afore-mentioned three Notification had/have been issued by the Ministry of Finance [Department of Revenue], Government of India in exercise of the powers inter alia conferred by Section 52A of the NDPS Act, 1985. The Notifications had/has laid down detail procedure for disposal of the narcotic drugs, psychotropic substances, controlled substances ['contraband substances', for short] and conveyances, after their seizure.
29. In the present case, the date of occurrence of the alleged crime was 21.05.2018 when the alleged seizure of the seventeen nos. of packets of contraband, Cannabis [Ganja] were made from the vehicle bearing Registration no. WB-06/1392 wherein the two accused persons were found to be occupants. Thus, on the date of occurrence of the alleged offence, it was the Notification no. G.S.R.38[E] dated 16.01.2015 which was in force, as it was superseded only by the Notification no. G.S.R.899[E] dated 23.12.2022. Clause 4 of the Notification no. G.S.R.38[E] dated 16.01.2015 had provided for the manner of disposal of the seized contraband substance.
30. For ready reference, Clause 4 of the Notification no. G.S.R.38[E] dated 16.01.2015 are reproduced hereinbelow :-

Manner of disposal. –

[1] Where any narcotic drug or psychotropic substances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, of the Act, or if it is seized by such an officer himself, he shall prepare an inventory of such narcotic drugs or psychotropic substances, controlled substances or conveyances as per Annexure 1 to this notification and apply to any Magistrate under sub-section [2] of

Section 52A of the said Act as per Annexure 2 to this notification within thirty days from the date of receipt of chemical analysis report of seized narcotic drugs, psychotropic substances or controlled substances.

[2] After the Magistrate allows the application under subsection [3] of section 52A of the said Act, the officer mentioned in subparagraph [1] shall preserve the certified inventory, photographs and samples drawn in the presence of the Magistrate as primary evidence for the case and submit details of the items to the Chairman of the Drug Disposal Committee for a decision by the Committee on the disposal, and the aforesaid officer shall send a copy of the details along with the items seized to the officer-in-charge of the godown.

30.1. As the contents of Annexure 1, mentioned in Clause 4 [supra], are also of import and relevance, the same is also extracted hereinbelow :-

Annexure 1
INVENTORY OF SEIZED NARCOTIC DRUGS,
PSYCHOTROPIC SUBSTANCES, CONTROLLED SUBSTANCES
AND CONVEYANCES
 [under Section 52A (2) of the Narcotic Drugs and Psychotropic
 Substances Act, 1985]

Case No. :.....

Seizing agency:.....

Seizing officer :.....

Date of seizure :.....

Place of seizure :.....

Name and designation of the officer preparing this inventory :

TABLE

Sl. No.	Narcotic Drug/Psychotropic Substance/Controlled Substance/Conveyance	Quality	Quantity	Mode of packing	Mark and numbers	Other identifying Particulars of seized items or packing	Country of origin	Remarks
[1]	[2]	[3]	[4]	[5]	[6]	[7]	[8]	[9]

Signature, name and designation of the officer

**Certification by the Magistrate under sub-section [3] of Section 52A
of the Narcotic Drugs and Psychotropic Substances Act, 1985**

Whereas the above officer applied to me under sub-section [2] Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985 to certify the above inventory, and sub-section [3] of that section requires any Magistrate to whom an application is made to allow the application as soon as may be, I, having been satisfied that the above inventory is as per the seizure documents and the consignments of seized goods related to the case presented before me, certify the correctness of the above inventory.

Signature, name and designation of the Magistrate

31. In view of extensive reference to the proceedings held, on 22.05.2018, before the learned Judicial Magistrate, First Class, Tihu by the two contesting sides, it would be apposite to quote the relevant excerpts of the proceedings from the Order dated 22.05.2018 :-

Judicial Magistrate, First Class, Tihu

22.05.2018

Later on, The I/O of the case has submitted a prayer for seeing the seizure list and the seized articles. Prayer of the I.O. is allowed.

Seen the seizure list and the seized materials and the same are returned to the I.O.

Seizure list [MR 18/18] –

1. One packet –8.740 kg of suspected ganja
2. One packet –9.180 kg of suspected ganja
3. One packet –0.970 kg of suspected ganja
4. One packet –5.580 kg of suspected ganja

5. One packet –1.000 kg of suspected ganja
6. One packet –1.000 kg of suspected ganja
7. One packet –1.000 kg of suspected ganja
8. One packet –1.000 kg of suspected ganja
9. One packet –1.000 kg of suspected ganja
10. One packet –1.000 kg of suspected ganja
11. One packet –1.000 kg of suspected ganja
12. One packet –1.026 kg of suspected ganja
13. One packet –5.350 kg of suspected ganja
14. One packet –11.290 kg of suspected ganja
15. One packet –5.600 kg of suspected ganja
16. One packet –11.300 kg of suspected ganja
17. One packet –11.350 kg of suspected ganja
18. One silver colour Hyundai Accent Vehicle bearing registration no. WB-06/1392.

Also seen the prayer of the I/O of the case to certify the correctness of the inventory as well as permission to take photographs of the seized items of the inventory and certify the photographs as true.

Further, the I/O has prayed for collecting samples of the seized articles in my presence and also prayed to certify the correctness of the list of sample drawn. Prayer of the I/O is allowed.

I have certified the correctness of the inventory prepared as per Section 52A of the NDPS Act and have certified the correctness of the enclosed inventory.

The photographs [enclosed] are taken in my presence and certified as true.

The list of sample are drawn in my presence and sealed.

Out of 17 [seventeen] packets of suspected Ganja, samples from packet nos. 1, 2, 3 and 4 are drawn in my presence which are accordingly marked as Ext.1 [original/duplicate], Ext.2

[original/duplicate], Ext.3 [original/duplicate] and Ext.4 [original/duplicate].

The I/O has further prayed for sending the samples of the seized articles marked as Ext.1, Ext.2, Ext.3 and Ext.4 to FSL Guwahati for expert opinion. Prayer is allowed.

N.B. –

1. Ext.1 [original 26 gram, duplicate 28 gram]
2. Ext.2 [original 26 gram, duplicate 26 gram]
3. Ext.3 [original 26 gram, duplicate 30 gram]
4. Ext.4 [original 26 gram, duplicate 24 gram]

32. From the proceedings on 22.05.2018, it is discernible that out of seventeen nos. of packets containing suspected Cannabis [Ganja], two samples [original & duplicate] each were taken out from four nos. of packets. The learned Magistrate had observed that the list of sample was drawn and sealed in his presence. From the list of samples so prepared, four samples, marked as Ext.-1 to Ext.-4, each containing 26 gram, were sent to the Forensic Science Laboratory [FSL] for opinion and the FSL Report dated 28.05.2018 [Ext.-8] gave positive test for Cannabis [Ganja] in respect of those exhibits, Ext.-1 to Ext.-4. The proceedings of 22.05.2018 further shows that the I.O. of the case, P.W.4 prepared an inventory of the seized Cannabis [Ganja] and had sought certification from the learned Magistrate. From the Order dated 22.05.2018, it further transpires that the learned Magistrate has certified the correctness of the inventory prepared as per Section 52A of the NDPS Act, 1985. The learned Magistrate had further observed that the photographs [enclosed] were taken in his presence and he certified them as true.
33. It was not the case of the prosecution that the seized contraband, Cannabis [Ganja] weighing 77.36 kg in total, seized vide the Seizure List [Ext.-1] had been disposed of at any point of time prior to culmination of the trial following the procedure laid down in Section 52A of the NDPS Act, 1985 and in the then extant Notification no. G.S.R.38[E] dated 16.01.2015 issued by the Central Government under Section 52A. It may be pertinent to mention that the then prevailing Notification, that is,

Notification no. G.S.R.38[E] dated 16.01.2015 had provided for a detailed procedure for mode and manner of disposal of the seized contraband substance through a Drug Disposal Committee with issuance of a Certificate of Destruction finally. Since it is not the case of the prosecution that the contraband, Cannabis [Ganja] seized in the present case, had been destroyed following such procedure, it can be presumed that such seized contraband, Cannabis [Ganja] were in safe custody and possession of the prosecution.

34. In the trial, it was incumbent for the prosecution to produce and exhibit the entire quantities of seized contraband, Cannabis [Ganja], weighing 77.36 kgs, which were allegedly seized from the possession of the accused. In *Jitendra vs. State of Madhya Pradesh*, [2004] 10 SCC 562, it has been observed that the best evidence would have been the seized material, which ought to have been produced during the trial and marked as material objects and 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, 1985. Subsequently, in the case of *Noor Aga vs. State of Punjab*, [2008] 16 SCC 417, it has been held that physical evidence of a case of this nature being the property of the court should have been treated to be sacrosanct. Non-production thereof would warrant drawing of a negative inference within the meaning of Section 114[g] of the Evidence Act, 1872. Conspicuously, during the trial, the seized contraband, Cannabis [Ganja], weighing 77.36 kgs, were not produced physically before the Court.
35. By the incorporation of sub-section [4] of Section 52A of the NDPS Act, 1985, with non-obstante clause, an alternative mode for primary evidence has been provided for. As per the mandate contained therein, every court trying an offence under the NDPS Act, 1985, shall treat the inventory, the photographs of the seized contraband substance, taken before the Magistrate, and the list of samples, drawn in presence of the Magistrate, under sub-section [2] thereof and certified by the Magistrate, as primary evidence in respect of such offence.
36. In view of such alternative mode of presenting primary evidence and non-production of the seized quantities of contraband, Cannabis [Ganja], weighing

77.36 kgs, before the trial court, obligation was clearly cast on the prosecution to produce and exhibit [i] the inventory of the seized contraband substance, Cannabis [Ganja], weighing 77.36 kg; [ii] the photographs of the seized contraband, Cannabis [Ganja], which were taken before the Magistrate and were seized from the possession of the accused; and [iii] the list of samples drawn before the Magistrate; under sub-section [2] of Section 52A of the NDPS Act, 1985, with due certification from the Magistrate, as primary evidence in order to bring the charge under Section 20[b][ii][C] of the NDPS Act, 1985 home against the accused in this case. The Notification no. G.S.R.38[E] dated 16.01.2015, extracted above, had prescribed the form in which the Magistrate was required to give the certificate under Section 52A to an inventory.

37. When the documentary evidence and the material exhibits produced during the course of the trial before the learned trial court are looked at, it is found that no inventory of seized contraband substance, Cannabis [Ganja] weighing 77.36 kg, with certification by the Magistrate, as per Annexure-1 to the then prevailing Notification no. G.S.R.38[E] dated 16.01.2015 was produced before the trial court by the prosecution. The prosecution neither produced any list of samples drawn, as recorded in the proceedings dated 22.05.2018 with due certification of the Magistrate nor produced the duplicate samples of Ext.-1 to Ext.-4 before the trial court. It is pertinent to mention that in the Order dated 22.05.2018, it was recorded that the correctness of the inventory prepared had received due certification from the Magistrate. In the Order dated 22.05.2018, the Magistrate had recorded that the photographs were taken in his presence and he certified them as true. The Order dated 22.05.2018 recorded that 'the photographs [enclosed] are taken in my presence and certified as true'. What is mandated by sub-section [2] of Section 52 of the NDPS Act, 1985 is taking, in presence of the Magistrate, of photographs of seized contraband substance or conveyances and certifying such photographs as true by the Magistrate. From the Order dated 22.05.2018, it is not discernible whether the seized contraband, Cannabis [Ganja], and weighing 77.36 kg, involved in the case, had been produced before the Magistrate in the proceedings held on 22.05.2018. In their testimonies, the prosecution witnesses, P.W.1 and P.W.3 had deposed to the effect that the exhibited photographs – Mat. Ext.-1 to Mat. Ext.-8 on one part and Mat. Ext.-9 to Mat. Ext.-16 on the other part – were taken before

them in the Police Station on the date of recovery and seizure of the contraband substance, Cannabis [Ganja] on 21.05.2018. In fact, P.W.1 had claimed that he was the photographer who took those photographs, Mat. Ext.-1 to Mat. Ext.-16. Mat. Ext.-1 to Mat. Ext.-8 were identified by P.W.1 and P.W.3 as photographs of the seized contraband, Cannabis [Ganja]. P.W.1 and P.W.3 identified the photographs, Mat. Ext.-9 to Mat. Ext.-16 as photographs of the samples taken from the seized contraband, Cannabis [Ganja] by Police. On the face of such testimony, the very origin of the material exhibits, Mat. Ext.-1 to Mat. Ext.-16 has come under a cloud.

38. It has been held in *Mangilal* [supra] that when there is non-compliance of Section 52A of the NDPS Act, 1985 and where a certificate of a Magistrate is lacking, any inventory, photograph or list of samples would not constitute primary evidence. It has been further held therein that any guidelines issued by a notification in consonance with Section 52A of the NDPS Act, 1985 has to be followed mandatorily. A notification which the statute has provided for issuance in the Official Gazette, has statutory force and such a statutory notification is to be treated as a part of the statute. The Notification no. G.S.R.38[E] dated 16.01.2015 was issued in exercise of powers conferred by Section 52A of the NDPS Act, 1985 and it was published in the Gazette of India in issue dated 16.01.2015. Thus, the Notification no. G.S.R.38[E] dated 16.01.2015 had statutory force.
39. It is a well settled proposition that if a manner of doing a particular act is prescribed, then the act must be done in that manner and in no other manner. The Notification no. G.S.R.38[E] dated 16.01.2015 mandated preparation and certification of the inventory in a particular manner and in a prescribed format. Absence of any certification by the Magistrate of the inventory in the prescribed manner stands in clear violation of the statutorily prescribed mode.
40. As per the Notification no. S.O.527[E] dated 16.07.1996 issued in exercise of the powers conferred by clauses [viii] and [xxiia] of Section 2 of the NDPS Act, 1985, a quantity of Cannabis [Ganja] equal to or above 20 kg is commercial quantity. Section 20 of the NDPS Act, 1985 has prescribed for punishment in relation to cannabis plant and cannabis. As per Section 20[b][ii][C], if the quantity involves is commercial quantity, the convict is punishable with rigorous imprisonment for a

term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees. Since the offences under the NDPS Act, 1985 are serious in nature and prescribe stringent punishment, compliance with statutory prescriptions and procedures shall also have to be strict and scrutiny is also stringent. The statute mandates that the prosecution must prove strict compliance. If there is any kind of doubt, the benefit shall have to be given to the accused.

41. On evaluation of the evidence produced by the prosecution during the course of the trial, it is found that the prosecution had failed to lead primary evidence in the form of the seized contraband, Cannabis [Ganja] weighing 77.36 kg, allegedly seized from the possession of the accused. In the absence of any proof regarding disposal of the seized contraband, Cannabis [Ganja] weighing 77.36 kg in the manner permissible, non-production of the seized contraband, Cannabis [Ganja], weighing 77.36 kgs, physically before the trial court has given rise to an adverse presumption under Section 114[g] of the Evidence Act, 1872 against the prosecution. The prosecution had also failed to bring on record the primary evidence, in the form of [i] the inventory of the seized contraband substance, Cannabis [Ganja] weighing 77.36 kg; and [iii] the list of samples drawn; under sub-section [2] of Section 52A of the NDPS Act, 1985, with due certification from the Magistrate in the form prescribed, before the trial court. There is clear doubt about the place where the photographs, exhibited as Mat. Ext.-1 to Mat. Ext.-8 were taken in the face of the testimonies of P.W.1 & P.W.4 and in absence of certification as 'true' by the Magistrate in them. In the absence of primary evidence in the above forms, the other evidence led by the prosecution in the present case, as enumerated above, could not be termed as valid pieces of primary evidence to prove the charge framed against the accused-appellant. Once it is established that the prosecution had failed to lead above primary evidence, as a corollary, the trial as a whole stands vitiated.
42. In the light of the discussion made above and for the reasons assigned therein, we are of the firm opinion that in view of presence of too many material irregularities creating serious dents in the case of the prosecution and the failure on the part of the prosecution to lead primary evidence, as enumerated above, vitiating the trial as a whole, the conviction of the accused-appellant is not sustainable in law and the

same deserves to be set aside. Therefore, we set aside the Judgment and Order dated 16.12.2019 passed by the Court of learned Special Judge, Nalbari in NDPS Case no. 11 of 2018 in so far as the accused-appellant is concerned. In the result, the criminal appeal stands allowed.

43. Consequently, the accused-appellant is to be released forthwith, if his detention is not required in connection with any other case or for any other purpose.
44. This Court records its appreciation for the assistance rendered by Mr. Kalita, learned Amicus Curiae. The learned Amicus-Curiae is to be paid remuneration as per the rules in force.
45. The office to send back the case records to the trial court forthwith.

JUDGE

JUDGE

Comparing Assistant