



THE GAUHATI HIGH COURT
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)
PRINCIPAL SEAT AT GUWAHATI

Criminal Appeal (J) No. 115/2018

Shri Tarun Das,
S/o Late Babulal Das,
Village – Bormura Miri Pathar,
P.S. - Dhola,
Dist. – Tinsukia, Assam.

.....Appellant.

-Versus-

1. The State of Assam,
Represented by Public Prosecutor.
2. Dhola Mahila Samitee,
represented by Sapna Maheswari;
W/O Paban Maheswari
Village:- Bormura Miri Pathar,
P.S. - Dhola,
Dist. – Tinsukia, Assam.

.....Respondents.

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN

Appearance:-

For the Appellant : Ms. B. Sharma, Amicus Curiae.

For the Respondents : Mr. P.S. Lahkar, Addl. P.P., Assam.

Date of Hearing : 27.08.2024

Date of Judgment : **09.09.2024**

Judgment & Order (CAV)

Heard Ms. B. Sharma, learned amicus curie for the appellant and Mr. P.S. Lahkar, learned Additional Public Prosecutor for the State respondent.

2. In this appeal, under Section 383 of the Code of Criminal Procedure (Cr.P.C.) the appellant, namely, Tarun Das has challenged the correctness or otherwise of the judgment and order dated 28.09.2018, passed by the learned Addl. Special Judge (NDPS), Tinsukia, in NDPS Case No. 14(T)/2016, arising out of Dhola P.S. Case No. 39/2016, under Section 20(b) of NDPS Act.

3. It is to be noted here that vide impugned judgment and order dated 28.09.2018, the learned Addl. Special Judge (NDPS), Tinsukia, has convicted the appellant under Section 20(b) of NDPS Act, and sentenced him to undergo rigorous imprisonment for a period of seven years and also to pay a fine of Rs. 25,000/-, in default, to suffer rigorous imprisonment for another six months.

4. The background facts leading to filing of the present appeal are adumbrated herein below:-

“The members of Mahila Samitee of Dhola Bazar, on 05.07.16, at 3:30 PM, acting on a tip off, about keeping of psychotropic substance in the house of accused Tarun Das situated at Bormura Miripather, had surrounded his house and also informed the Dhola Police Station. After sometime the Dhola police arrived there and conducted search in the house of the accused and recovered and seized about 5 Kg of Bhang, the leaves and flower tops of cannabis, from his house, which were kept concealed in his house.

On receipt of an FIR from the Mahila Samitee the Officer-in-Charge Dholla P.S. registered a case, being Dholla P.S. Case No. 39/2016, under Section 20(b) of NDPS Act and endorsed Padma Gogoi to investigate the case. The I.O. then visited the place of occurrence, examined the witnesses, prepared sketch map and arrested the accused and forwarded him to the court. He also seized the psychotropic substances preparing seizure list and thereafter, drawn up samples and forwarded the same to the FSL. Thereafter, he had collected the report. Then on completion of the investigation, the I.O. had laid charge sheet against the accused namely, Tarun Das to stand trial in the court under Section 20(b) of NDPS Act.

Thereafter, on appearance of the appellant before the learned trial court, the court had complied with the provision of Section 207 Cr.P.C. and thereafter, hearing learned Advocates of both sides had initially framed charge against the accused/appellant under Section 17(c) of the NDPS Act. But subsequently altered the charge to Section 20(a)(b) of the NDPS Act as under:-

- (i) That, on 05.07.16 at about 3:30 P.M at Bormora Miripothar village under Dhola PS in the district of Tinsukia you had been found cultivating cannabis plant and thereby committed an offence punishable under section 20(a) of the NDPS Act?
- (ii) That, on the same day, time and place you had been found producing, manufacturing, possessing 4.8 Kgs. of Ganja (cannabis) for selling, transporting, importing, inter-state, exporting, inter-State or

uses cannabis and thereby committed an offence punishable under section 20(b) of the NDPS Act?

Thereafter, the learned trial court had read over and explained the charges to the accused/appellant to which he pleaded not guilty and claimed to be tried.

During trial, the prosecution side had examined as many as nine (9) witnesses. After closing the prosecution witnesses the learned trial court had examined the accused/appellant u/s 313 Cr.P.C.

Thereafter, hearing arguments of learned Advocates of both sides, the learned trial court held that the charge under Section 20(b) of NDPS Act was established against the accused/appellant and accordingly, convicted him and sentenced as aforesaid.

5. Being highly aggrieved, the accused/appellant had preferred this appeal through the Superintendent of Jail, Tinsukia District Jail. The accused/appellant, having not been represented by any counsel, Ms. Bijita Sharma is appointed as Amicus Curiae to represent the accused/appellant.

6. Ms. Sharma, learned Amicus Curiae for the accused/appellant submits that the accused/appellant has raised following points for consideration of this court:-

- (i) That, the I.O. had not prepared the Inventory of this case;
- (ii) That, the I.O. had seized the articles at the place of occurrence and drawn up the samples then and there;
- (iii) That, the provision of Sections 41, 42, 50 and 52-A of NDPS Act had not been complied with.
- (iv) That, the seized articles were not produced before the court;

- (v) That, the guidelines issued by Hon'ble Supreme Court in the case of **Union of India v. Mohanlal**, reported in (2016) 3 SCC 379, is totally ignored;

6.1. These lacuna, on the part of the investigating agency, according to Ms. Sharma, has raised serious doubt about the veracity of the prosecution case and on such count the conviction and sentence cannot sustain. Therefore, Ms. Sharma has contended to allow this appeal and to set aside the impugned judgment and order.

7. Per contra, Mr. P.S. Lahkar, learned Additional Public Prosecutor has supported the impugned judgment and order dated 28.09.2018, so passed by the learned trial court. Mr. Lahkar further submits that the I.O has prepared inventory, but the same was not exhibited during trial. To a pointed query of this court, Mr. Lahkar fairly submits that there is absence of evidence to show compliance of Sections 41, 42, 50 and 52A of the NDPS Act.

8. Having heard the submission of learned Advocates of both the parties, I have carefully gone through the memo of appeal and the grounds mentioned therein and also gone through the record of the learned trial Court and the impugned judgment and order, dated 28.09.2018, so passed by the learned trial Court.

9. I have carefully gone through the evidence of the prosecution witnesses and the exhibits. The FIR (Ext.-1), reveals that the occurrence took place on 05.07.2016, at about 5:00 p.m. in the evening in the house of the accused/appellant, situated at Bormura Miri Pathar.

10. That the record of the learned trial Court especially the G.D. Entry and the FIR reveals that the occurrence took place on 05.07.16, at about 3:30 pm, in the house of the accused/appellant situated at Bormura Miri Pathar

Gaon, under Dhola Police Station. It also appears that acting on a tip off, about presence of psychotropic substance in the house of the accused/appellant, the members of Dhola Mohila Samitee had surrounded the house of the accused/appellant and also reported the matter to police. On receipt of the said piece of information the Officer-in-Charge, Dhola P.S. had recorded a General Diary Entry, No. 94, dated 05.07.2016, Exhibit-3, and proceeded to the place of occurrence and thereafter, conducted search in the house of the accused/appellant and recovered 4.8 kg Ganja and seized the same preparing seizure list, in presence of witnesses. Thereafter, on the same day, formal FIR- Exhibit-1, was lodged with the P.S. by Mrs. Sapna Mahaswari, the then Chairperson of Dholla Bazar Mahila Samittee. Thus, there appears to be no delay in lodging the FIR as well as intimation to police so as to spell inveracity in prosecution version.

11. That, perusal of the record of the learned trial Court also reveals that the prosecution side, in order to bring home the charges against the accused/appellant had examined following witnesses:-

1. PW.1, Mrs. Sapna Maheswari
2. PW.2, Smt. Joonmoni Phukan,
3. PW.3, Smt. Smriti Rekha Kalita,
4. P.W.4, Smt. Manokhi Kalita,
5. PW.5, Smt. Ranju Devi,
6. PW.6, Smt. Nita Sharma,
7. PW.7, Sri Padma Gogoi,
8. PW.8, Smt. Gita Choudhury,
9. PW.9, Smt. Deepsikha Buragohain.

11.1 Further, the record of the learned trial court reveals that the prosecution side has exhibited following documents:-

1. Ext. 1, is the Ejahar,
2. Ext. 2 the Seizure-list,
3. Ext. 3 is the Extract copy of GDE no. 94, dated 05.07.16,
4. Ext. 4 is the zimmanama,
5. Ext. 6, 7 are the FSL Report,
6. Ext. 8, charge-sheet.
7. Ext. 9 is the sketch map,

12. Here in this case, the charge was framed against the accused/appellant under section 20(a) and 20(b) of the NDPS Act. Section 20 of the NDPS Act provides for punishment for contravention in relation to cannabis plant and cannabis. It read as under:-

Whoever, in contravention of any provisions of this Act or any rule or order made or condition of licence granted there under:-

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable- (i) where such contravention relates to clause (a) with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees; and (ii) Where such contravention relates to sub-clause (b),-

(A) and involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine, which may extend to ten thousand rupees, or with both;

(B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend

to ten years and with fine which may extend to one lakh rupees;

(C) and involves commercial quantity, 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: Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

13. Since herein this case, the charges are under Sections 20(a) and 20(b) of the NDPS Act our discussion will remain confined to only to the ingredients of these two sections. As it appears Section 20(a) relates to cultivation of cannabis plant. And Section 20(b) relates to production, manufacture, possession, sell, purchases, transports, imports inter-State, exports inter-State or uses cannabis plant. Now, let it be seen how far the prosecution side has succeeded in establishing the basic ingredients of the said charges.

14. As stated herein above, the prosecution side has examined as many as nine witnesses and seven documents. First, let it be seen whether the contraband substances, allegedly recovered from the possession of the accused/appellant is cannabis or Ganja or not. In order to establish the same the prosecution side has relied upon the evidence of the I.O., whom it had examined as P.W.7. His evidence reveals that having seized the contraband substances he had drawn up samples and sent the same to the FSL, Guwahati, through Addl. SP, Sadiya. Thereafter, he had collected the report thereof, being Ext.-7 which was forwarded vide forwarding letter being Ext. 6. His evidence also reveals that the FSL Report indicates that the sample gave positive test for cannabis. He had confirmed the signature of Sri D.J. Hazarika, Deputy Director of FSL, being Ext. 6(1) and 7(1), over the Ext. 6 and 7. A careful perusal of the Ext.-7 indicates that sample gave positive test

for cannabis (Ganja). Notably, the person who had examined the sample and submitted report is not examined by the prosecution side. But, it appears that Ext.7 is not disputed by the accused/appellant. Thus, it appears that the contraband substances allegedly recovered from the house of the accused/appellant, is cannabis. Now, it is to be seen how far the prosecution side has succeeded in establishing the possession of the contraband substances by the accused/appellant.

15. In this regard the prosecution side has relied upon the evidence of P.W.1 to P.W.9. It appears that P.W.1, 2, 3, 4, 5, 6, 8, and 9 all are members of Dhola Bazar Mahila Samittee. P.W. 1 is Mrs. Sapna Maheswari, who had lodged the FIR, Exhibit-1 with the Police Station, was the President of said Mohila Samittee. Her evidence reveals that on 1st of July, 2016 in the monthly meeting of the Mohila Samittee the people of the neighborhood of the accused, Tarun Das gave an application informing them that in the house of Tarun Das some people came and consumed bhang (Ganja). Then on 5th July, 2016 at about 3 P.M, about 45 women went to the house of the accused and before that they had informed the O/C of Dhola P.S. that they are going to the house of accused person. On reaching the house of the accused, they met the accused and enquired from him about selling of Ganja. However, he denied the same. Then some of the members went behind the house of the accused and had found Ganja lying behind his house. Then they entered in to the house of the accused person and found some packets containing Ganja. Then they have collected and gathered the plastic container containing Ganja inside the room and informed the police accordingly. Then police reached the place of occurrence about 4 P.M. and brought the accused along with the Ganja to the P.S. She then lodged the Ejahar, Ext.-1, with the police station. Her evidence also reveals that the said Ganja, weighing 5 Kg, was seized by preparing seizure list (Ext.-2).

16. It is, however, elicited in cross-examination of this witness that they have not informed in writing to Dhola Police Station prior to visit of the house of the accused person and that she did not remember who went to the backside of the house of the accused, but, they had seen the plants of Ganja behind the house of the accused. It is also elicited that Ext.-2 was blank at the time of her signing and that she does not know the contents of Ext.-2. Thus, it appears that on being informed by the people of the neighbourhood of the accused, Tarun Das about consuming bhang (Ganja), the members of Mahila Samittee had visited the house of the accused on 5th July, 2016 at about 3 P.M, and that they had informed the O/C of Dhola P.S. that they are going to the house of accused and that they have found Ganja lying behind his house and then they entered in to the house of the accused person and found some packets and plastic container, containing Ganja, inside the room of the accused, remains un-rebutted.

17. PW.2- Smt. Joonmoni Phukan, PW.3- Smt. Smriti Rekha Kalita, P.W.4- Smt. Manokhi Kalita, PW.5- Smt. Ranju Devi, PW.6- Smt. Nita Sharma, PW.8, Smt. Gita Choudhury and PW.9-Smt. Deepsikha Buragohain all are members of Dholla Bazar Mahila Samittee who had accompanied P.W.1 to the house of the accused on the date of occurrence and all of them dittoed the same facts like P.W.1 and corroborated the evidence of the P.W.1 in material particulars. P.W.2, 3, 4, 5, and P.W.9 were the witnesses of seizure of Ganja by police from the house of the accused and they confirmed the Seizure List, Ext.-2 and their signatures thereon. Their evidence also reveals that having found Ganja in the house of the accused, they informed the same to police and police arrived at the house of the accused and seized the same vide Ext.-2. P.W.2 and 3 have also confirmed Material Exhibit 1 and 2, the seized Ganja from the house of the accused. The evidence of all these witnesses remained un-impeached in their cross-examination.

18. P.W.7- S.I. Padma Gogoi is the I.O. who had investigated the case and laid charge sheet, Ext.-8, against the accused/appellant. His evidence reveals that on 05.07.2016, while he was working at Dhola P.S. on that day at about 3:40 P.M., the then O/C, Sri Ranjan Doley, received a phone call from one lady, namely, Sapna Maheswari of Bormora Miri Pathar and she had informed that the Mohila Samittee had surrounded the house of accused, Tarun Das on account of recovery of suspected narcotic substances in his house. Then the O/C, had recorded a G.D entry, being GDE No. 94, dated 05.07.16, Ext. 3, and entrusted him to investigate the case. Then he had visited the place of occurrence along with staff and the O/C, Sri Ranjan Doley. Then he informed the matter over phone to the SP, Sadiya. The S.P, Sadiya accordingly, directed him to continue investigation. Then they conducted search in the house of accused, in presence of Mahila Samitee members, and recovered about 4.8 KG of suspected "Ganja" from the house of accused, Tarun Das. He then brought a weighing machine (Doga Palla) and weighed the seized articles and found it weighing 4.8 Kg and thereafter seized the same vide seizure list, Ext. 2. After weighing the seized articles, he had returned the weighing machine (Doga Palla) to Sri Diganta Buragohain and Ext. 4 is the said Zimma nama.

19. His evidence also reveals that he had divided the suspected narcotic materials into three parts, of 25 grams each. Thereafter, he obtained signatures of witnesses and of accused on the samples. Thereafter, he had prepared sketch map, Ext.-9, and examined the witnesses. Thereafter, they came back to the P.S along with the seized articles and the accused person. Thereafter, Smt. Sapna Maheswari, President of Dhola Mahila Samitee lodged an Ejahar- Ext.-1, before the P.S. and upon the same, the O/C vide Dhola Police Station had registered a case, being Dholla P.S. Case No.39/16, u/s 20(b) of NDPS Act and endorsed him to carryout investigation. He then arrested the accused and forwarded him to the court.

Thereafter, he had sent the sample drawn by him to FSL, Guwahati through Addl. SP, Sadiya and collected the report, Ext.-7 which indicates that the sample gave positive test for cannabis (Ganja). Then on completion of investigation, he laid Charge-sheet - Ext. 8 - against the accused, Tarun Das, to stand trial u/s 20(b) of NDPS Act.

20. Nothing tangible could be elicited in cross-examination of this witness to discredit his evidence. He denied the suggestion that he was informed by the informant prior to filing the Ejahar in this case. However, he admitted that in the Ext. 2, he had not mentioned the place of seizure. He denies the suggestion that the seizure list was prepared at the Police Station. It is also elicited that during the course of his investigation he had not found any person, consuming "Bhang" in the house of the accused. He, however, admitted that nothing has been mentioned about "Bhang" being grown in the homestead of the accused person in the case diary. It is also elicited that he had not conducted search in the house of the accused/appellant with search warrant.

21. Thus, recovery of Ganja and seizure of the same from the house of the accused/appellant appears to be established from the evidence of the prosecution witnesses, as discussed herein above. But, it appears that while conducting search and seizure, the I.O.- P.W.7 had not followed the mandatory provision of Section 41, 42 and 50 of the NDPS Act. Non-compliance of these provisions and its consequences have elaborately been dealt with by Hon'ble Supreme Court in the case of **State Of Punjab vs. Balbir Singh reported in 1994 SCC (3) 299** in the following paragraphs:-

"25. The question considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:

1. If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of Cr.P.C. and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41 (1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42 (1) can act under the provisions of the NDPS Act. If such arrest or search

is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41 (2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42 (1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42 (1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial. Under Section 42 (2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42 (1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the

prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CR.P.C fails to strictly comply with the provisions of Section 100 and 165 Cr.P.C including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41 (2) of the Act carries out a search, he would be doing so under the provisions of Cr. P.C namely Section 100 and 165 Cr.P.C and if there is no strict compliance with the provisions of Cr.P.C then such search would not per se be illegal and would not vitiate the trial. The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Section 41 (2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided there under. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so

requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Section 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Section 41(2) to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case”.

22. In the case in hand admittedly, the I.O. had conducted search in the house of the accused/appellant without search warrant, though he had prior information. Moreover, neither he nor the O/C appears to be empowered officer to conduct search and seizure. Moreover, the search and seizure was conducted after receiving prior information. Though P.W.7, in his evidence stated that he had reported the matter to the Superintendent of Police, who had asked to continue investigation yet, no such authorization is produced and proved during trial. Thus, non-compliance of statutory provisions u/s 41, 42 and 50 of the NDPS Act is writ large in the given facts and circumstances on the record.

23. Thus, I find substance in the submission of Ms. Sharma, the learned Amicus Curiae for the appellant that the mandatory provision of Sections 41, 42, 50 and 52A of the NDPS Act were violated here in this case. It also appears that the representative sample was not drawn in presence of the

Magistrate and the inventory was also not exhibited and proved though appears to be prepared and the law laid down by Hon'ble Supreme Court in the case of **Union of India v. Mohanlal**, (2016) 3 SCC 379, has not been followed.

24. It is to be noted here in the case of **Mohanlal** (supra), Hon'ble Supreme Court has held as under:-

“15. It is manifest from Section 52-A (2) include (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.

25. In the case of *Mangilal vs. The State of Madhya Pradesh* reported in 2023 LiveLaw (SC) 549, Hon'ble Supreme Court has held as under:-

“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.”

26. Again in the case of *Simarnjit Singh vs. The State Of Punjab*, in Criminal Appeal No. 1443 of 2023 (Arising out of

S.L.P.(Cr1.) No. 1958 of 2023) decided on 9 May, 2023, Hon'ble Supreme Court has held that –"drawing samples from all the packets at the time seizure is not in conformity with the law laid down by this Court in the case of **Mohanlal (2016) 3 SCC 379**. This creates a serious doubt about the prosecution's case that substance recovered was a contraband."

27. Again in the case of **Yusuf @ Asif vs. State, in Criminal Appeal No. 3191 of 2023 arising out of SLP (Cr1.) No. 3010 of 2023, dated 13 October, 2023**, the Hon'ble Supreme Court had reiterated aforesaid principles as under:-

"16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated."

28. Now, advertent to the facts and circumstances here in this case, I find that after recovery of contraband substances, the officer concerned i.e. P.W.7 never approached the Magistrate for certifying the correctness of the inventory, certifying photographs of such drugs or substance, which of course not taken in this case before the Magistrate as true and for grant of permission to draw representative sample so drawn in his presence. Thus, the entire process of search and seizure and also drawing of samples was not in accordance with Section 52A of the NDPS Act and in conformity of the law laid down by Hon'ble Supreme Court in the case of **Mohanlal (supra)**. This

creates a serious doubt about the prosecution's case, and the same cannot be said to be established beyond all reasonable doubt, in the given factual background.

29. The learned trial court had totally ignored these aspects in the impugned judgment. Thus, the impugned judgment and order, so passed by the learned court below, has failed to withstand the legal scrutiny and on such count it requires interference of this court. The appellant is entitled to be acquitted of both the charges on benefit of doubt.

30. In the result, I find sufficient merit in this appeal and accordingly, the same stands allowed. The impugned judgment and order of conviction dated 28.09.2018, stands set aside and quashed. The accused/appellant stands acquitted on benefit of doubt. The appellant, if languishing in jail hazoot, shall be released forthwith. Send down the record of the learned court below forthwith with a copy of the judgment and order.

J U D G E

Comparing Assistant