

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRA 529 of 2018

Salim Saikh @ Salim Sk @ Selim Sk

-vs.-

The State of West Bengal

For the Appellant : Mr. Sumanta Chakraborty

For the State : Mr. S. G. Mukherji, Ld. P.P.
Mr. Ranabir Roy Chowdhury,
Mr. Sandip Chakraborty,
Mr. Mainak Gupta.

Heard on : 07.07.2022, 12.07.2022, 15.07.2022,
22.07.2022, 26.07.2022, 18.08.2022,
23.08.2022 & 26.08.2022.

Judgment on : 25.11.2022

Tirthankar Ghosh, J:-

The present appeal has been preferred against the judgment and order of conviction and sentence dated 21.12.2017 and 22.12.2017 passed by the Learned Judge, Special Court under the NDPS Act in connection with Sessions Trial No. 2(06)2016 arising out of Sessions Case No. 04(03)2016 (NDPS Case No. 3/2016) thereby convicting the appellant for commission of offence under Section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act and

sentencing him to suffer Rigorous Imprisonment for seven years and pay a fine of Rs.50,000/- in default to suffer further rigorous imprisonment for one year.

Taratala Police Station case no. 04/16 dated 05.01.2016 was registered for investigation under Section 20(b)(ii)(B)/29 of the NDPS Act on the basis of a complaint lodged by Sub-Inspector of Police Shyama Prasad Biswas of Narcotic Cell, DD, Kolkata with the Officer-in-charge, Taratala Police Station. The complainant received information that in the afternoon on 05.01.2016 a person would be selling Narcotic drugs near Jana Nayak Hemanta Basu Market, as such he took permission from the Assistant Commissioner, Narcotic Cell, DD, Kolkata and formed a raiding team. At about 13.30 hrs. on 05.01.16 the raiding team left for their destination and reached near Shri Guru Furniture at 1 No. Taratala Road at 15.00 hrs. On being pointed out by the source a male person was intercepted at about 15.45 hrs. at the Northern side footpath of Taratala Road in front of the furniture shop. The complainant and the other members of the team disclosed their identity and two persons who gathered there agreed to be witnesses. The person who was detained disclosed his identity as Salim Saikh S/o. Lt. Abdul Subhan, village Chandan Nagar (Mullick Para), Banerjee Hat Road, PS. Mahestala, 24 Parganas (South). The detainee was offered option to be searched in presence of Gazetted Officer or Learned Magistrate and the said terms were also explained to him, however, the detainee refused to go anywhere. As no Gazetted Officer was available in the locality the complainant informed his superior and at about 18.00 hrs. Inspector Prasanta Bhowmick, Additional O/C, Taratala PS reached in

uniform. The Additional O/C gave the detainee second option when the detainee insisted to be searched at the spot in presence of Gazetted Officer. The detainee searched the complainant and except personal belongings nothing could be recovered, the complainant thereafter initiated search of the detainee in presence of the persons available and found a large size white nylon bag having red borders fitted with two handles having green, black and white stripes on it. On opening the bag one black coloured polythene packet containing some plant like substances were found. A small quantity of the same was tested by the complainant with the aid of test kit and it was found to be ganja. On weighing the same it was found to be 7 kg. and on further search cash of Rs.40/- was recovered from the trouser's pocket of the detainee. The complainant thereafter took out 100 grams sample from the seized contraband, packed, labelled and sealed the same with the mark 'S'. Remaining 6 kg.900 grams was packed, labelled inside a white nylon bag and was marked as 'A'. The cash of Rs.40/- was also packed, labelled and sealed in an envelope and marked as 'B'. The accused as also the witnesses signed the seizure list. The accused/detainee could not render any explanation regarding the possession of contraband/ganja. Thus, he was arrested at about 19.15 hrs. The complainant thereafter came to the police station along with seized Alamat and submitted the complaint requesting to proceed with the case against the accused person under Section 20(b)(ii)(B) of the NDPS Act.

The case was endorsed to Sub Inspector Rabsan Mondal for Investigation which was on the basis of complaint of S.P. Biswas, SI of Narcotic

Cell, DD Lalbazar (Special). The Investigating Officer handed over the case along with the seized alamat to Sub Inspector Siladitya Sarma of Narcotic Cell DD Lalbazar for investigation. After completion of investigation charge-sheet was submitted against the accused/appellant under Section 20(b)(ii)(B) of the NDPS Act.

The learned Special Court on 20.06.2016 was pleased to frame charge against the accused/appellant under Section 20(b)(ii)(B) of the NDPS Act. The contents of the charge were read over to the accused/appellant to which he pleaded not guilty and claimed to be tried.

The prosecution in order to establish its case relied upon 7 witnesses which included PW1, Amal Kumar Dhar, Director State Drug Control and Research Laboratory; PW2, SI Shyma Prasad Biswas for Narcotic Cell, DD, Kolkata; PW3, Rabsan Mondal, 1st Investigating Officer of the case; PW4, Abdus Salam Sk, ASI of Police and member of the raiding team; PW5, Inspector, Prasanta Bhowmick, Gazetted Officer; PW6, Shymal Halder, seizure list witness who turned hostile and PW7, S.I. Siladitya Sarma, 2nd Investigating Officer of the case.

PW1, Amal Kumar Dhar, Director, State Drug Control and Research Laboratory deposed that on 07.01.2016 their laboratory received a brown envelope marked as 'S' from Taratala Police Station in connection with Taratala PS case no. 4 dated 05.01.2016 vide memo No.05(N)-Cell/DD dated 06.01.2016 which was forwarded through DCP, Special, DD Lalbazar, Kolkata. On receipt

of the sample their laboratory marked Laboratory number 41(N)/2016 dated 07.01.2016. The condition of the seal of the parcels were found intact and tallied with the specimen seal forwarded with the Memo. The gross weight of the sample was found 119 grams and on opening the packet greenish herbal material containing flowering and fruiting tops, seeds, leaves and stalks were found. The sample was tested by Chemist, Kriti Saha in his presence and under his supervision and guidance. On an analysis of the sample it was found to be positive for presence of cannabinoids, as such conclusion was made to be ganja. The test report was prepared by the Data Entry Operator which bears his signature and also of the Laboratory Chemist with date. The sample was again packed and sealed in their laboratory envelopes with seal impression of State Drugs Control Laboratory and sent back to the police personnel along with the report. The forwarding memo under which the report was sent along with remnants in sealed packet was collectively marked as Ext.1 (series). The Off-white envelope in which the remnants were returned bears the official seal and his signature and also the signature of the Chemist with date. The signature and seal was identified by the witness which is marked as Mat Ext.I/1. The seal and signature in brown colour envelope was also opened. The witness identified his signature which was marked as Mat Ext.I/2. Inside the brown colour envelope there was a loose label and ganja. The said brown envelope containing ganja, loose label along with off-white colour envelope was collectively marked as Mat Ext.I.

PW2, Shyama Prasad Biswas is Sub-Inspector of Police attached to Narcotic Cell, DD, Kolkata and he is complainant of the case. The witness narrated the incident that at about 12.30 hrs. he received a credible source information that one drug seller namely, Selim Sk would be coming to the Taratala PS area for supplying /selling narcotics drugs on 05.01.2016. The said information was reduced to writing and placed before the O.C., Narcotic Cell and after taking his permission a raiding team consisting of five members which included SI Kalyan Biswas, ASI Md. Aftabuddin, Lady ASI Kuheli Sarkar and Constable Abdul Salam Sk was formed and permission was sought from AC, Narcotic Cell, DD, Kolkata to conduct the raid under Taratala PS area which was granted at about 13.00 hrs. The information which was reduced to writing was produced in Court and was marked as Ext.2. The permission letter which was sent to AC, Narcotic Cell which bears the signature of the witness was marked as Ext.3. At 13.30 hrs. the raiding team left along with packaging materials, testing kit, weighing scale, brass seal of DCDD Special and at about 15.00 hrs. reached near Jananayak Hemanta Basu Market. At about 15.45 hrs. source pointed out a person who was walking down Taratala Road with a white colour nylon bag being carrying in his right hand. He was detained with the help of the raiding team members in front of Sriguru Furniture Shop at 1, No. Taratala Road under PS Taratala, Kolkata-700088. The detained person was disclosed regarding the identity of the raiding team and the purpose of such detention, when some local persons gathered there and two persons from the crowd expressed their willingness to become witness namely, Shyamal

Halder and Babon Saha. The detainee was asked his name who disclosed his name as Selim Sk. He identified the accused in Court. Thereafter the accused was informed about his legal right to be searched in presence of a gazetted officer or a Magistrate on the spot or he could be taken to the nearest Magistrate or Gazetted Officer. He was also explained the meaning of the terms Gazetted Officer and Magistrate, in reply the accused stated he wanted to be searched in presence of a Gazetted Officer on the spot, and refused to go anywhere else. On the spot an option was written by the witness in English and the contents of the same were explained to the accused in Bengali. As per the request of the accused his acceptance was written down in Bengali and the same was read over to him and the detainee signed the same. The witness/complainant also put his signature on the option. The two witnesses namely Shyamal Halder and Babon Saha also signed on the option in presence of the raiding team members. The option was written by the complainant in his hand writing on the spot and his signature along with signature of the witnesses and the accused in respect of his option was marked as Ext.4. The witness thereafter searched for a Gazetted Officer in the vicinity but the same could not be found so he had to inform for sending Gazetted Officer at the spot and on or about 18.00 hrs. an Inspector in uniform reached the spot and disclosed his identity as Inspector Prasanta Bhowmick, Additional O.C. of Taratala P.S. and as per order of the superior he had been sent for supervising the search and seizure under NDPS Act as a Gazetted Officer. The Gazetted Officer was introduced with two witnesses and the detainee and he was also

appraised about such fact, thereafter Inspector Prasanta Bhowmick reconfirmed from the detainee as to whether he was willing to be searched in presence of him or not, to which the detainee agreed and opted to be searched by the complainant/witness. The second option was served upon the detained person which was written in English on the spot as per dictation of Inspector Prasanta Bhowmick and the contents were explained to the detainee who admitted it to be correct. The second option was written down and the detainee stated that he intend to be searched in his presence. The detainee searched the person of the witnesses but found nothing except some personal belongings. The Gazetted Officer Prasanta Bhowmick asked him to write down his acceptance on option two, when the detainee expressed his incapacity so the witness had to write down the same as per version of the detainee which was read over and the contents were admitted by him to be correct. The witness signed on the second option and the detainee also signed the same under the acceptance. The two witness and raiding team members also put their signatures on the second option. The signature on the second option of the witness was marked as Ext.5. Signatures of the witness on the option-2 was marked as Ext.5/1 and 5/2. Thereafter in presence of the Gazetted Officer search was conducted and the white colour nylon bag containing red borders and handles with green white and black stripe and inside a black colour polythene packet further containing flowering and fruiting tops of cannabis plant was found. A small quantity of the said substance was tested with the testing kit and the presence of ganja was found to be positive. On weighment of

the contraband/ganja it was found to be around 7 kgs. and sum of Rs.40/- cash in denomination of 10X4 was recovered from the right side pocket of the wearing trouser of the accused. In presence of the Gazetted Officer raiding team members, witness and the detained person, a seizure list containing two pages was prepared. The witness took out 100 grams from the seized ganja as sample and packed, labelled and sealed it in a brown colour envelope, marking it as 'S' and rest of the ganja i.e. 6 kgs 900 grams including white colour nylon bag and black colour polythene packet was also packed, labelled and sealed and marked as 'A' and the cash of Rs.40/- was also marked as 'B'. The witness identified the seizure list which was marked as Ext.6. The detained accused person Selim Sk could not render any satisfactory explanation or any paper in support of his such possession of ganja. So he was arrested at about 19.50 hrs. on the spot and the ground of arrest was also communicated to him. A memo of arrest and inspection memo was also prepared at the spot. The inspection memo and the arrest memo with signatures thereon prepared by the witness were marked as Ext.7 and Ext.8 respectively. The witness thereafter prepared the complaint in the official computer addressed to the Officer-in-charge, Taratala Police Station and requested him to initiate/register a case under the NDPS Act against Selim Sk and his associates. The seized materials, accused person and all the documents were handed over to the Officer-in-charge, Taratala Police Station and an inventory list was prepared by the witness in his own hand writing with his signature thereon. The said inventory list was marked as Ext.9. The official thereafter returned to Lalbazar and

submitted a report of arrest to AC, Narcotic Cell. The letter of complaint which was prepared by the witness was signed by him and was marked as Ext.10. The report of arrest submitted to the OC which was in the hand writing of the witness and signed by him, was marked as Ext.11. The white colour nylon bag which contained 6 kgs 900 grams Ganja seized from the accused, the loose label bearing the signature of the complainant and other witnesses and another copy of label which was kept inside the bag. The off-white colour nylon bag with red border and green, white stripes containing 6kgs 900 grams ganja was marked as Mat Ext.II. The bag was cut open and from inside another loose label was taken out wherein the signatures were appearing. The signature of witness on the loose label was marked as Mat Ext.II/1 and Mat Ext. II/2 respectively. The sample packet containing 100 grams of ganja which was taken from the mother packet contained the signature of the complainant along with the witnesses. Another label inside the inventory with signature of the complainant and the witnesses along with the accused and the raiding team members contained the signature of the complainant on loose label and was identified and marked as Mat Ext.I., signature in the label was marked as Mat. Ext.I/3 and Mat Ext.I/4 respectively. Another brown colour sealed envelope mark 'B' containing Rs.40/- i.e. Rs.10X4 which bears the signature of the complainant, the witness and the raiding team members and the loose label kept inside the envelope was marked as Mat. Ext.III. Signature of the witness on the label and loose label were marked as Mat Ext.III/1 and III/3. The witness identified the accused in Court.

PW3, SI Rabban Mondal is the Investigating Officer of the case. He stated that on 05.01.2016 he received a letter of complaint from S.P. Biswas, Sub-Inspector, Narcotic Cell, DD Lalbazar and after the OC, Taratala PS endorsed the same to him he registered Taratala PS case no. 4/2016 dated 05.01.2016 under Section 20(b)(ii)(B)/29 of the NDPS Act. He identified the signature of the Officer-in-charge and the endorsement of the Officer and signature of the O.C on the letter of complaint with his seal which was marked as Ext.10/1. The Formal FIR was filled up by him and bears his signature which was marked as Ext.12. The witness stated that before filling up the Formal FIR he lodged GDE, kept the seized articles in the malkhana after making proper entry in the register and the accused was kept in the lock up after making proper entry in the lock up register. The GDE no. 318 dated 05.01.2016 was lodged by him which bears his signature. True copy of the same duly certified by the Officer-in-charge of Taratala PS was marked as Ext.13. The original Malkhana register containing entry no.4 dated 05.01.2016 was in receipt of the seized articles. A true copy of the said entry no.4 dated 05.01.2016 duly certified by the Officer-in-charge, Taratala PS was produced and marked as Ext.14. The witness deposed that thereafter he received a message from DC DD Special that the case was required to be handed over to Narcotic Cell DD for further investigation. The message which was received from DC DD Special and endorsed to him by OC was marked as Ext.15. GDE No. 320 was lodged and the case docket along with the accused and seized alamats were handed over to Sub-Inspector Siladitya Sarma of Narcotic Cell.

The said GDE Entry was prepared by the witness which bears his signature, the true copy of the same was produced before the Court along with original GDE which was marked as Ext.16. The witness also signed on the alamat and identified his signature on the mother packet which was marked as Mat Ext.II/3. The witness identified his signature on the sample packet which was marked as Mat Ext.I/5. On the identification of the witness, another envelope of seized article was marked as Mat Ext.III/3. The witness identified the accused in Court.

PW4 is Abdus Salam Sk, Assistant Sub-Inspector of Police and member of the raiding team. The witness deposed that on 05.01.2016 he accompanied S.I. S.P. Biswas in a raid at Taratala P.S area and for that they left Lalbazar at about 13.30 hrs and reached at 1 No. Taratala Road under Taratala P.S. at about 15.00 hrs. Witness stated that along with him, SI Kalyan Biswas, ASI Aftabuddin, Lady ASI Kuheli Sarkar and two police personnel were also in the raiding team. At about 15.45 hrs. source pointed out a person who was coming along Taratala Road with one white colour bag and red border in his hand. SI Kalyan Biswas detained the person and disclosed his identify, when some people gathered there and on request Shymal Halder and Baban Saha amongst those people agreed to become witness. The detained person disclosed his name as Selim Sk and SI S.P. Biswas gave option to the detainee as to whether he would like to be searched in presence of a Gazetted Officer to which he agreed. As no Gazetted Officer could be found in the locality superiors were informed and at about 18.00 hrs. Additional OC Taratala PS Prasanta

Bhowmick arrived in his official vehicle. He was introduced by SI S.P Biswas to the accused, when he gave 2nd option to the detainee that he may search SI S.P Biswas prior to he being searched. The detainee searched S.P Biswas but no narcotic substance was found from his possession except his personal belongings, thereafter S.I. S.P. Biswas searched the detainee first, then the bag in his possession was opened and from which one black coloured polythene packet containing flowering and fruiting tops of cannabis plant was found. Cash of Rs.40/- was also recovered from the right side pocket of his trouser. A small portion was tested by S.I. S.P Biswas from the recovered cannabis by his test kit and the same confirmed as narcotic substance. On weighing the substance it was found to be 7kgs cannabis flowering and fruiting tops and from the said material 100 grams were taken out as sample material. The sample packet and the mother packet containing 6kgs 900 grams were packed separately, labelled and sealed. The cash was also packed, labelled and sealed. The mother packet was marked as 'A' and Cash was marked as 'B', sample packet was marked as 'S'. The witness signed on all the labels, option and seizure list. His statement was also recorded, his signatures on the first option, second option and the seizure list were marked as Ext.4/1, Ext.5/3, Ext.6/1 and Ext.6/2 respectively. At about 19.50 hrs. the detainee was arrested and brought to Taratala Police Station and send inside the lock up. The signature of the witness on label of the mother packet, sample packet and the envelope containing cash of Rs.40/- was marked as Mat. Ext.II/4, Mat Ext.I/6 and Mat Ext.III/4 respectively. The witness identified the accused in Court.

PW5, Inspector Prasanta Bhowmick is Additional OC Taratala PS, who deposed that on 05.01.2016 at about 5.30 p.m. he got instruction from his superior officer that he should proceed to 1, No. Taratala Road in front of Sriguru Furniture at Jananayak Hemanta Basu Market, Kolkata 700088 under Taratala PS where one male person has been detained by the police official of Narcotic Cell DD on suspicion of carrying ganja. The witness was asked to supervise the search and seizure as a Gazetted Officer. Accordingly he left police station after lodging a general diary vide no. 310 dated 05.01.2016, he reached the spot at about 18.00 hrs. and saw there was a gathering. A police official came forward and introduced him as SI Shyama Prasad Biswas of Narcotic Cell, DD Lalbazar. He also produced his identity card and introduced him to the detained person Selim Sk and apprised him of the whole matter. Said S.P. Biswas introduced him to the witness Shymal Halder and Babon Saha and he was informed also regarding the first option being given to the detainee who expressed his willingness to be searched in presence of a Gazetted Officer. The witness explained the meaning of Gazetted Officer to the detainee and gave second option to the effect that he can search S.I. S.P. Biswas before his own search to which he agreed and searched S.P. Biswas but no narcotic substance except his personal belongings were found. Thereafter S.P Biswas searched the detainee under his supervision and the white colour nylon bag with red stripe on his right hand which was carried by him and from inside the said bag one black colour polythene packet containing flowering tops with pungent smell was found. S.I. S.P Biswas took a small quantity of material

and tested the same, which responded positive indicating presence of ganja. The weight of which was found to be 7 kgs 100 Grams were taken from the mother sample and the same was packed, labelled and sealed and marked 'S' for sample. Rest 6 kgs 900 grams along with the bag and polythene packet were packed, labelled and sealed on the spot and marked as 'A' and on further search cash of Rs.40/- was found in the right side pocket of trouser of detainee which was packed, labelled and sealed and marked as 'B'. A seizure list was prepared which was signed by him along with the detainee, both the witnesses and S.I. S.P. Biswas. S.I. S.P. Biswas then recorded the statement of the witness and left the place for Taratala Police Station for further course of action. The witness identified the accused in Court. Signature of the witness on second option was marked as Ext.5/4 and Ext.5/5 respectively. Signature in the seizure list containing two sheets, signed on both pages were marked as Ext.6/3 and Ext.6/4 respectively. The label and loose labels which bears the signature of the witness on the mother packet containing 6 kgs 900 grams were identified by the witness and marked as Mat Ext. II/5 and Mat Ext.II/6 respectively. The label and loose labels which bears the signatures in the sample packet marked 'S' containing 100 grams of sample was marked as Mat Ext.I/7 and Mat Ext.I/8 respectively. The label and loose labels which bears the signature in the envelope containing cash of Rs.40/- was marked as Mat. Ext.III/5 and Mat Ext. III/6 respectively.

PW6 is Shymal Halder who denied of having any knowledge regarding any incident which took place on 05.01.2016 and he stated that the police

official took his signature on blank papers as such the witness was declared hostile by the prosecution.

PW7, is Sub-Inspector Siladitya Sarma who deposed that on 05.01.2016 while he was in his office DC DD (Special) entrusted him to take up further investigation of Taratala PS Case no. 4 dated 05.01.2016 under Section 20(b)(ii)(B) of NDPS Act. Accordingly he reached Taratala PS and met with OC Taratala PS who told him that S.I. Robsan Mondal of Taratala PS registered a case. He met with S.I. Robsan Mondal, he handed over him all the relevant documents, seized alamats in packed, sealed and labelled condition and custody of the accused Selim Sk. Thereafter a General Diary was made in this regard vide GDE No. 320 dated 05.01.2016 and he signed the said GDE at Taratala police station. The witness also signed the P.S. Malkhana Register vide Entry No. 4/2016 dated 05.01.2016, the said GDE along with signature on the GDE Entry, a true copy of the GDE along with his signature was marked as Ext.16/1. The Malkhana Entry Register which bears his signature was also shown to him which was marked as Ext.14/1. The witness stated that thereafter he left Taratala P.S. along with custody of accused Selim Sk and seized alamat for Calcutta Medical college and Hospital and there he conducted the medical examination of the accused and left for Lalbazar. The witness identified the accused in Court. The witness after reaching Detective Department sent the accused to Central Lockup and deposited the seized Alamats in D.D. Malkhana vide D.D.M.K. No. 2184 of 2016 dated 05.01.2016. The original Malkhana Register along with its true copy was produced before

the Court and the same was marked as Ext.17. The witness stated that on the next date he produced the accused in Court along with seized alamats and also sent the seized exhibits containing narcotic drugs to State Drug Control and Research Laboratory for Chemical Examination and Expert opinion for taking permission from the Court. Carbon copy of the requisition under which the seized alamats was sent to State Drug Control and Research Laboratory for Chemical examination was produced and was marked as Ext.18. The Chemical Examination Report which confirmed that the seized material was ganja was received and thereafter obtaining permission from his superior charge-sheet was submitted against the accused under Section 20(b)(ii)(B) of the NDPS Act. Three packets of seized alamats which were received, was identified and marked as Mat. Ext.I, Mat Ext.II and Mat Ext.III.

Mr. Sumanta Chakraborty, learned Advocate appearing for the Appellant argued that though PW2, who is the complainant was competent to conduct the raid yet the permission he sought from the Assistant Commissioner of Police did not contain any subjective satisfaction as to why permission should be granted in conducting the raid. It has also been argued that the name of the accused was appearing in the permission which was sought for from the Assistant Commissioner of Police which itself shows that with a prejudiced mind the investigation of the case commenced and the same was bound to vitiate the search and seizure that was conducted. Learned Advocate drew the attention of the Court to Directorate of Revenue & Anr. –Vs. – Mohammed Nisar

Holia reported in (2008) 2 SCC 370, paragraph 17 which was relied is set out as follows:

“17. This Court times without number has laid great emphasis on recording of reasons before search is conducted on the premise that the same would be the earliest version which would be available to a court of law and the accused while defending his prosecution. The provisions contained in Chapter IV (sic V) of the Act are a group of sections providing for certain checks on exercise of the powers of the authority concerned which otherwise would have been arbitrarily or indiscriminately exercised. The statute mandates that the prosecution must prove compliance with the said provisions. If no evidence is led by the prosecution, the court will be entitled to draw the presumption that the procedure had not been complied with. For the said purpose, we are of the opinion that there may not be any distinction between a person's place of ordinary residence and a room of a hotel.”

Learned Advocate appearing for the appellant also submitted that there are illegalities in the FIR, as the complainant was unnamed and the same was after the seizure. This according to the learned advocate is astonishing in view of the fact that PW2 while taking permission from his superior categorically assigned a reason that he was received an information in his office at 12.30 hrs and intended to conduct a raid at the place mentioned therein. Learned Advocate by referring to the Police Regulations of Calcutta, 1968 tried to emphasize that such information should have been passed to the Officer-in-charge, Taratala PS who was empowered under the law to register the FIR.

PW2, SI of police attached to Narcotic Cell DD was not at all authorised to conduct the search and seizure. Another issue which was canvassed was regarding PW5 Additional O.C. of Taratala PS who acted as Gazetted Officer in this case. Learned Advocate submitted that as Taratala PS GDE No.310 dated 05.01.2016 was not proved and the Gazetted Officer reached at the spot at 18.00 hrs, the same was prior to the FIR being registered. This witness stated that he was asked by his superior to go the place of offence for supervising the search and seizure as Gazetted Officer, as such PW2 did not ask PW5 to supervise such search or seizure and as such Section 50 of the NDPS act has not been complied with on the point of intimation. Advancing his argument on the point of illegalities learned Advocate submitted that there was no mention in the inspection memo regarding the seizure of the ganja and Rs.40/- neither the memo of arrest refers to any seized articles. It has been pointed out that the appellant was detained at 18.45 hrs, there was no GD Entry made and the entry in respect of the column relating to disclosure of name of the friend was also left blank. There was non-compliance of Section 43 as also Section 50 of the NDPS Act and the option which was given to the accused was irrelevant because the appellant was illiterate and the option was written in English. By pointing out to the evidence of PW7 i.e. the Investigating Officer of the case learned Advocate pointed out that, he deposed that he kept the seized articles in Malkhana of Detective Department on 05.01.2016, but Ext.17 did not contain his signature. Learned Advocate also submitted that one of the independent witnesses turned hostile while other witness did not turn up in

spite of repeated bailable warrant of arrest being issued. There was non-compliance of Section 52A of the NDPS Act and as such the whole case as made out by the prosecution before the Court of law is full of illegalities which makes the search and seizure doubtful and entitles the accused/appellant to be acquitted of the charges.

Mr. Ranabir Roy Chowdhury learned Advocate appearing for the State submitted that in this case, on receipt of information the complainant, PW2, SI of Police attached to Narcotic Cell DD, did not waste any time and after obtaining permission from his superior formed a raiding team and proceeded to the spot. Evidence reflects that the appellant was intercepted and detained, he was offered an option when he refused to go anywhere and expressed his intention to be searched on spot by a Gazetted Officer. As no Magistrate or Gazetted Officer was available information was sent to superiors when the Additional OC of Taratala Police Station was informed to supervise the search and seizure. The search and seizure was carried out in presence of Gazetted Officer and the recovery was made from the bag carried by the appellant. Learned Advocate submitted that so far as the provisions of Section 42, 43 and 50 is concerned the same has been complied with and the appellant at this stage has unnecessarily relied upon Police Regulations of Calcutta. It has been contended that if there is a difference between the Act and the Regulations, obviously the NDPS Act and the Cr.P.C. will have an overriding effect over the Police Regulations of Calcutta. It has been emphasized that Additional OC Taratala PS had the full authority to act as a Gazatted Officer and the appellant

has been unable to show that there has been any non-compliance in respect of Section 50 of NDPS Act as the appellant was explained in Bengali which is written in the document of option (Ext.4 and Ext.5). The independent witnesses being absent or hostile in course of the prosecution, is immaterial, in view of the fact that search and seizure which has been effected was never questioned on material particulars by the appellant. It has been observed by the Hon'ble Apex Court that even non-examination of independent witnesses do not vitiate search and seizure until and unless it is shown by the appellant that any fraud has been committed. State also contended that so far as Exbt.17 is concerned there is signature of SI Siladitya Sarma, Investigating Officer of the case and materials which were received from Taratala PS and kept in the DD Malkhana would be transparent from the contents thereof (Ext.17). Learned Advocate relied upon Raveen Kumar –Vs. – State of Himachal Pradesh reported in 2020 AIR SC 5375 and submitted that it has been held that if the testimonies of Police Officials are found to be reliable the same forms a basis of successful conviction.

I have considered the issue relating to search and seizure which was addressed by the learned Advocates appearing for the appellant as well as for the State. Additionally, I have taken into consideration the thrust of the argument advanced by the appellant in respect of Section 52A of the NDPS Act as also the issue that in the present case only the police witnesses are relied upon by the prosecution and the two independent witnesses did not support the prosecution case. Before proceeding with the other issues, I am of the

opinion that the principles set out by the Hon'ble Supreme Court in State of Rajasthan –Vs. – Sahi Ram reported in (2019) 10 SCC 649 is to be taken into consideration. In the reported case the Hon'ble Supreme Court was pleased to hold that if the seizure is otherwise proved on record and it is not even doubted or disputed then in that case the only other thing which is required to be proved in respect of the samples being taken out from the contraband are kept intact. In this case the first and second option which was offered was admitted in evidence without any objection from the defence. The inventory list along with search and seizure and seizure list also was marked as an exhibit without any resistance from the defence. In cross-examination of PW2, Sub-Inspector Shyma Prasad Biswas only routine question of denial were asked and there was no specific resistance regarding the documents which were marked as exhibit and also in relation to the recovery of the contraband and the preparation of the seizure list on the basis of such recovery. The issue which has been canvassed by the learned Advocate for the appellant do not have any foundation on the facts of the present case and the learned Advocate for the appellant has tried to build up a case on the basis of certain precedents which have no relation to the factual foundation in respect to the evidence on record. In paragraph 18 of Sahi Ram's (supra) case it has been held as follows:

***“18.** If the seizure of the material is otherwise proved on record and is not even doubted or disputed, the entire contraband material need not be placed before the court. If the seizure is otherwise not in doubt, there is no requirement that the entire material ought to be*

produced before the court. At times the material could be so bulky, for instance as in the present material when those 7 bags weighed 223 kg that it may not be possible and feasible to produce the entire bulk before the court. If the seizure is otherwise proved, what is required to be proved is the fact that the samples taken from and out of the contraband material were kept intact, that when the samples were submitted for forensic examination the seals were intact, that the report of the forensic experts shows the potency, nature and quality of the contraband material and that based on such material, the essential ingredients constituting an offence are made out.”

The other issues relating to the independent witnesses not supporting the prosecution case, I am of the opinion that the same is not very vital as it is a settled proposition of law that non-supporting of the independent witness is not fatal to the prosecution case but it is the duty of the Court to act with greater degree of caution while scrutinising the testimony of the police witnesses. On an assessment of the materials available on records, I am of the view that the prosecution has been able to prove the case beyond reasonable doubt and the same at no point of time could be dislodged by the defence and as such the judgment and order of conviction and sentence passed by the learned trial Court do not call for any interference.

Thus, the order of conviction and sentence passed by the learned trial Court is hereby affirmed.

Accordingly, CRA 529 of 2018 is hereby dismissed.

Pending Applications, if any, are consequently disposed of.

The appellant in on bail, his bail bonds stand cancelled and he is directed to surrender before the jurisdictional Court.

Department is directed to send back the Lower Court Records to the learned trial Court and communicate this judgment, so that effective steps are taken by the learned trial Court.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)