

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 214 of 2020

With

CRAN 3 of 2021

Davinder Singh @ Davindar & Anr.

Vs.

Union of India

For the Appellants : Mr. Soumyajit Das Mahapatra, Adv.
 Mr. Ali Ahsan Alamgir, Adv.
 Ms. Riya Das, Adv.
 Ms. Rabia Khatoon, Adv.

For the Union of India : Mr. Kaushik Dey, Adv.

Heard on : September 08, 2022
 Judgement on : September 14, 2022

DEBANGSU BASAK, J.:-

1. The appellants have assailed the judgement of conviction dated July 3, 2020 and order of sentence dated July 6, 2020 passed by the learned Additional Sessions Judge cum Judge Special Court (NDPS Act), Berhampore, Murshidabad, in NDPS Case No. 53 of 2010.

2. The Directorate of Revenue Intelligence (DRI) had lodged a complaint with the Court that, on the basis of a

specific intelligence, to the effect, that a truck loaded with Ganja would pass through National Highway 34 on May 9, 2010, a team of DRI officers and staff had kept vigil on National Highway 34 at Girja More of Murshidabad district. At about 4 AM of May 9, 2010 the team had spotted a truck and intercepted it. Three persons including the driver had been found inside the truck. They had disclosed their identities. On preliminary search several rectangular packets of identical sizes wrapped with blue, black, white and green coloured polythene and pasted with cello tape had been found concealed under waste dry ash. The apprehended persons had claimed before the officers that they were under life risk at the spot and preferred the office of the DRI. They were thereafter taken to the office of the DRI where a total number of 181 packets containing Ganja had been recovered from the three accused. Three mobile phones along with other articles had been recovered during personal search of the apprehended persons. Weight of the Ganja had been found to be 3429.300 kgs.

3. After completion of the investigations, senior intelligence officer had submitted a complaint against seven

accused on November 20, 2010. Two of the accused being the appellants had faced trial. The other accused were either absconding or could not be apprehended and therefore the case had been filed as against them.

4. On November 25, 2013, charges under the provisions of Narcotics Drugs and Psychotic Substances Act, 1985 had been framed. The accused persons had pleaded not guilty to the charge. By the impugned judgement of conviction and the order of sentence, the appellants have been convicted under section 20 (b) (ii) (c) of the Act of 1985 and sentenced to suffer rigorous imprisonment for 15 years and to pay a fine of Rs. 1 lakh and in default to suffer simple imprisonment for six months.

5. Learned advocate appearing for the appellants have submitted that, the prosecution failed to prove the charges beyond reasonable doubt. He has contended that, the investigating officer was not examined by the prosecution. Consequently, the prosecution had caused prejudice to the defence as the defence was denied the opportunity to cross examine him and elicit vital contradictions. He has contended that, although, non-examination of the investigating officer is

not always fatal unless prejudice is shown by the accused, in the facts of the present case, the appellants were prejudiced by non-examination of the investigating officer by the prosecution. He has contended that, whether the investigating officer went to the place of occurrence to investigate into the matter, whether he examined the so-called independent witnesses and if so when and how, whether he examined any other witnesses of the locality where the persons were apprehended and where the seizure took place, whether he drew any sketch map of the place of occurrence, how the samples had been produced before the learned Court below and how those were sent for chemical examination, whether the mother packets were stored in the Malkhana by himself or by the complainant, how statement under Section 67 of the Act of 1985 was recorded and whether procedural safeguards were followed or not, whether he sought for requisition order by which prosecution witness No. 2 could be present at 200 km away from his workplace at Kolkata are some of the questions which the investigating officer ought to have been answered by the investigating officer.

6. He has contended that, non-examination of the investigating officer is not on the ground of incapacitation of such investigating officer or for any cogent reason. The prosecution had simply not produced him at the trial. In support of his contention, he has relied upon **2008 volume 15 Supreme Court Cases 306 (Rajiv Arora vs. Union of India)**.

7. Learned advocate appearing for the appellants has contended that, the chemical examination report had not been approved in accordance with law before the trial court and was therefore incorrectly marked as an exhibit. He has relied upon **Rajiv Arora (supra)** in support of his contention. Relying upon **1972 Volume 4 Supreme Court Cases 562 (Sait Tarajee Khimchand and Others vs. Yelamarti Satyam @ Satteyya and Others)** he has contended that, since the investigating officer did not come to the witness box, the marking of the chemical examination report as an exhibit was incorrect.

8. Learned advocate appearing for the appellants has contended that, a number of documents had been marked as exhibits in a batch. According to him, tender of such

documents and marking them as exhibits in a batch are non est in the eye of law.

9. Referring to the oral evidence on record, learned advocate appearing for the appellants has contended that, the presence of the prosecution witness No. 2 at the place of occurrence is suspect. He has contended that, the distance between Kolkata and the place of occurrence is about 200 km and that there was no requisition or order from the superior officer to prosecution witness No. 2 to be present at the place of occurrence.

10. Learned advocate appearing for the appellants has submitted that, prosecution witness No. 4 is a stock witness as will appear from his admission made in cross examination. The practice of having stock witness had been deprecated by the Hon'ble Supreme Court in **1995 Volume 4 Supreme Court Cases 255 (Pradeep Narayan Madgaonkar and Other vs. State of Maharashtra).**

11. Learned advocate appearing for the appellants has contended that, the seizure did not take place in front of two independent witnesses. He has contested the presence of prosecution witness No. 3 at the locale.

12. Relying upon **2019 SCC online Cal 8007 (Sk. Bhalu and Another vs. State of West Bengal and Sk. Khaiber and Another vs. State of West Bengal)** learned advocate appearing for the appellants has submitted that, the seized articles need to be produced at the time of trial before the witnesses for identification and if the same was not done, seizure cannot be proved. In the facts of the present case, according to him, the same was not done.

13. Referring to **2002 Volume 10 Supreme Court Cases 283 (Sunderbhai Ambalal Desai vs. State of Gujrat with C.M. Mudaliar vs. State of Gujarat)** and **2018 Volume 2 Supreme Court Cases 305 (Gorakh Nath Prasad vs. State of Bihar)**, learned advocate appearing for the appellants has contended that, in the present case, only the samples were produced while the mother seized article or the certificate under section 52A were not produced before the learned trial judge.

14. Learned advocate appearing for the appellants has submitted that, the most vital chain of links in between apprehension to chemical examination to conclusion of trial is where the alleged seized contraband was stationed. He has

referred to **2005 volume 3 Supreme Court cases 59 (State of Rajasthan vs. Gurmail Singh)** in support of his contention that the Malkhana register was not produced and that no witness was produced to prove the storage of the seized articles in the interregnum.

15. Learned advocate appearing for the appellant has contended that the investigation was a mere table work. The narcotics had been planted and the appellant falsely implicated He has pointed out that, the appellants had filed an application on the first date of production before the learned Court on May 10, 2010 that the appellants wanted to retract from the seizure list.

16. Referring to the questions put under section 313 of the Criminal Procedure Code, learned advocate appearing for the appellants has contended that, the same were confusing and that the same did not grant a fair and appropriate opportunity to the appellant to explain the circumstances. In support of his contention, he has relied upon **2004 volume 7 Supreme Court Cases 502 (Naval Kishore Singh vs. State of Bihar).**

17. Relying upon **All Indian Reporter 1924 Calcutta 323 (Mamfru Chaudhuri vs. Emperor)** learned advocate for

the appellants has submitted that, the evidence adduced by the prosecution does not establish any infraction of the Act of 1985 by any of the appellants. Consequently, he has prayer for acquittal.

18. Learned Advocate appearing for the DRI has submitted that, the prosecution was able to prove the charges beyond reasonable doubt as against the appellants. He has contended that, 181 packets of Ganja of a total weight of 3,429.300 Kgs were recovered and seized from the possession of the accused persons including the appellants. He has referred to the seizure list. He has submitted that, the appellants are presumed to have committed the offence under the provisions of the Act of 1985 until the contrary is proved. He has referred to Sections 35 and 54 of the Act of 1985. He has referred to Section 106 of the Evidence Act and submitted that, it is for the appellant to establish how they came to be in possession of the commercial quantity of narcotics seized from their possession as such facts are within their special knowledge. In support of such contention, he has relied upon **2013 Volume 14 Supreme Court Cases 420 (Gian Chand and Others vs. State of Haryana).**

19. Referring to the contention of the narcotics being implanted, learned advocate appearing for the DRI has contended that, given the size of the narcotics seized, the question of planting the same on the accused does not arise. In support of such contentions, he has relied upon **2005 Volume 3 Supreme Court Cases 164 (State of Punjab vs. Balwant Rai)**.

20. Relying upon **2002 Volume 4 Supreme Court Cases 380 (Khet Singh vs. Union of India)** learned advocate appearing for the DRI has submitted that, where due to situation and circumstances, preparation of the inventory may not be possible at the spot, the same may be made at some other place and that adopting such a course of action is permissible.

21. At the trial, prosecution had examined four witnesses. The prosecution had tendered various documents which were marked as Exhibits 1 to 6. The prosecution had also tendered material exhibits which were marked as material Exhibit I and II. After the completion of the evidence of the prosecution, the accused persons were questioned under Section 313 of the Criminal Procedure Code on February 27, 2019. The accused

persons had admitted that the trucks were intercepted by the DRI on May 9, 2010. They had, however, claimed that their signatures were taken on blank papers by the officers of the DRI. The accused persons, however, did not adduce any evidence at the trial.

22. The prosecution had examined the Senior Intelligence Officer of DRI as PW-1. He had stated that, he received a tip-off about the movement of narcotics. He had intimated his superior officer about such tip-off on May 8, 2010 by a writing which has been tendered in evidence and marked as Exhibit 1. Thereafter, he had proceeded to work on such secret information. At about 6 P.M he had reached Girja More of Berhampore Police Station and remained in the vicinity of that area adjoining National Highway 34 keeping an watch. At about 4 A.M on May 9, 2010, he had located a truck coming from north-east side and proceeding along National Highway 34 towards Nabadwip. The team had ascertained the truck. They had intercepted such truck at the Girja More. They had found three persons in the cabin of the truck. Bikram Singh was found on the driver seat of the truck while two other persons being the appellants herein, had been found in the

cabin of the truck. Such persons had identified themselves. He had identified the appellant in Court.

23. PW-1 had stated in his testimony that, the truck was carrying dry coal-ash. On interrogation, three persons had disclosed that dry Ganja had been kept sealed inside the truck under the dry coal-ash. The DRI team had expressed their intention that the narcotics should be confiscated when, the accused had requested that the same may be done at the office of the DRI since the accused were apprehending about safety and their life. DRI team had removed some dry coal ash and noticed the existence of dry Ganja inside the truck. They had used the NDPS detection-kit to ascertain the nature of the drugs when the result came as positive. Thereafter, they had removed the truck to their office at Berhampore. The DRI had searched and seized the narcotics in presence of independent witnesses. The narcotics that had been kept in the form of brick pieces were removed from the sealed place of the truck. 181 brick shape Ganja had been recovered from the truck with a net weight of 3429.300 Kgs. DRI team had prepared a list of the same and observed the seizure formalities regarding the seizure of the same. DRI had seized the narcotics,

documents regarding the truck, three mobile phones from the apprehended persons which PW-1 had stated in his testimony that the formalities noted at about 5 P.M. Thereafter, the statements of the three apprehended persons had been taken in the office. DRI had prepared two sample packets of 25 grams each of the brick shaped mother packet of Ganja. All the packets had been packed, sealed, labelled and numbered. One sample packet in support of each brick mother packet of Ganja had been sent for examination after observing formalities through Court. The samples had been prepared on seizure of the same in presence of the team of the DRI and the accused persons.

24. PW-1 had identified the seven sample packets during the testimony. He has identified his hand writing with the official seal on the same. He has also identified the seal of the learned Judge, Special Court dated May 10, 2010. He has stated that, the document contained the signatures of the accused persons. The packets had been marked as material exhibit I series, signature of the PW-1 and the seal in the packets had been marked as Material Exhibit I/I series. PW-1 in his testimony has stated that the mother packets of all the

seized narcotics were sent for storing at the office godown at Berhampore. He had identified the inventory of the goods seized under Section 43 of the Act of 1985. The same had been marked as Material Exhibit II with a signature being marked as Material Exhibit II/I.

25. PW-1 in his testimony has stated that, notices under Section 67 of the Act of 1985 had been served upon the three apprehended persons. The apprehended persons had recorded their statements pursuant to such notices. He had tendered the notices and the statements which were marked as Exhibit 3 and 4 respectively at the trial. He had stated that he had read and explained the scope and ambit of the notices served upon the accused. He had translated their statements in English and recorded the same. He had stated that the accused had set their respective signatures in his presence on the statement on May 9, 2010. He had identified the arrest memos in respect of the three apprehended persons. He had also collected the report of the analysis of the sample seized which had been tendered and marked as Exhibit 6.

26. The defense had cross-examined PW-1 elaborately. Nothing favourable to the defence could be elicited from him.

In cross-examination, he had stated that, after seizure of the narcotics, the same was kept in the official godown. He, however, had admitted that he could not produce any document regarding keeping of the contraband goods at the godown at Berhampore.

27. Another DRI official had been examined as PW-2. He has stated that on May 9, 2010, as per the instruction of the ADJ, DRI, Kolkata he had come down to Berhampore DRI office. He had reached such office on May 9, 2010 at about 10 A.M. At that point of time he had noticed one truck being stationed at the campus of the DRI with the registration No. JK-02X/2335. The said truck had been found to be loaded with some packets suspected to be containing Ganja. He had narrated how the packets of narcotics had been disgorged from the truck and the steps taken with regard thereto. He had stated that he had prepared the statements of the accused. He had tendered the seven sample packets which were taken from the mother packet as Material Exhibit I. He had stated that PW-1 had collected the samples packed and sealed the same. He has assisted PW-1 in accordance with that the instruction of PW-1. In cross-examination, the

defense had not been able to elicit anything favourable to them.

28. The prosecution had examined PW-3 who witnessed the seizure as an independent witness. In his evidence, he had stated that on May 9, 2010 he was out on a morning walk and was proceeding towards Girja More. At Girja More he had been called by 3/4 persons. They had shown him the card with D.R.I written on it. They had told him that they had detained a vehicle and inside the vehicle some article was found and sought his assistance. He had agreed to cooperate with the DRI officials. Thereafter, DRI officials took him to a vehicle which was at Girja More. Thereafter, they had brought the vehicle to the DRI office at Bidyasagar More. He had stated that the vehicle was a lorry. He had stated that some dust like substances was on the lorry. After removal of some dusts, some packets were found underneath the dust. Thereafter, the packets had been unloaded. DRI officials had kept some packets and told him that the packets contained Ganja. Thereafter, the DRI officials had put some samples into the carry bag. DRI officials had stated to him that the weight of the packets were about 3400 to 3450 Kg. They had told him

that about 180 packets were there in the lorry. He had also seen samples being put in packets and, thereafter, seizure list to be prepared. He had seen labels being affixed on the packets. He has put his signature on such documents.

29. PW-3 had identified his signature on all the pages of the inventory on the seizure list cum recovery memo cum inventory of seized articles which was marked as Exhibit 2/2 collectively. He had also identified his signature on the seven packets which were marked as Material Exhibit I/II. In cross-examination, the defense could not elicit anything favourable to them.

30. PW-4 is another independent witness who had been examined by the prosecution. He had stated that on May 9, 2010, he found one lorry being parked in front of the chamber of Dr. S.K.Roy where he used to go. Two officers had called him and asked him to be a witness. At the truck there were dry ash and beneath that there was Ganja. He had stated that samples were taken, tested and weighed in his presence. He had stated that he had signed on the sealed packet. He had identified his signatures. In cross-examination, he had stated

that it is true that he had deposed his witness in 3/4 cases of DRI.

31. The appellants had been examined under Section 313 of the Criminal Procedure Code. The appellants had admitted that they were in the truck on that particular time. They had also admitted that they had boarded the truck at Guahati on May 4, 2010.

32. The following facts have emerged from the evidence led at the trial :-

- i. PW-1 had received information about movement of narcotics by a truck on May 8, 2005 through National Highway 34.
- ii. PW-1 had informed his superior authority over such issue by a writing dated May 8, 2018 which had been marked as Exhibit 1.
- iii. PW-1 along with a team of DRI personnel had proceeded to work on the information. They had reached Girja More on Berhampore Police Station and remained in the vicinity of the area beside National Highway 34.

- iv. At about 4 A.M on May 9, 2010 the team had located a truck fitting the description of the information, coming from north-east side and proceeding towards Nabadwip along the National Highway 34.
- v. DRI team had intercepted the truck at Girja More on National Highway 34.
- vi. DRI team had found three persons inside the truck namely Bikram Singh, Davindra Singh and Vira Singh. (Davindra Singh and Vira Singh are the appellants).
- vii. DRI team had searched the truck, found dry coal-ash on removal of some portion, noticed the existence of dry Ganja concealed under the cover of dry coal-ash.
- viii. DRI team had used NDPS detection-kit to ascertain the nature of the contraband. DRI team had found that the contraband tested positive.
- ix. DRI team had requested PW-4 to be a witness to the seizure at Girja More.

- x. The three apprehended persons had requested DRI team to remove the truck along with the contraband to the DRI office as they were apprehensive of their life.
- xi. In terms of such request DRI team had taken the vehicle carrying the contraband goods to their office. PW-4 had also accompanied the DRI team to their office.
- xii. DRI team had observed search and seizure formalities in presence of independent witnesses being PW-3 and 4.
- xiii. DRI team had found 181 brick shape Ganja on the truck whose net weight was 3,429.300 Kgs.
- xiv. DRI team had seized the contraband, documents regarding the truck, three mobile phones from the apprehended person, and the dry coal-ash waste which was used as a cover to conceal the contraband articles as will appear from Exhibit 2.

- xv. DRI had served notices under Section 67 of the Act of 1985 on the three apprehended persons as will appear from Exhibit 3 collectively.
- xvi. DRI team had recorded the statements of the apprehended persons as will appear from Exhibit 4 collectively.
- xvii. The apprehended persons were arrested and their arrest memos had been tendered in evidence and marked as Exhibit 5.
- xviii. DRI team had prepared two sample packets of 25 grams each from each of the brick shape mother packets of Ganja. All these packets had been packed, sealed, labelled and numbered and one sample packet in respect of each brick seized mother packet of Ganja had been sent for examination after observing all formalities on that aspect through the Court. The samples had been prepared on seizure of the same in presence of the DRI team and the accused persons.

- xix. The mother packets and sample packets had been labelled, sealed and signed by the DRI team as well as the apprehended persons.
- xx. Seven sample packets had been sealed and labelled by PW-1. He had proved his handwriting, the official seal, the instrument of authentication along with seal of the Judge Special Court dated May 10, 2010, the signatures of the accused persons with dated, the signature of the witness, and tendered same in evidence as Material Exhibit I series. Signature of PW-1 with date and seal had been marked as Material Exhibit I/I series.
- xxi. PW-1 had tendered in evidence and marked Material Exhibit II 7 sample packets of the contraband seized.
- xxii. DRI team had sent the samples of the seized goods to the appropriate authority for chemical analysis and collected the report thereon. The report had been tendered and marked as Exhibit 6.

xxiii. Exhibit 6 has established that the seized contraband was Ganja.

xxiv. The seized quantity of Ganja has been established to be of 3,429.300 Kgs.

xxv. The appellants in their statements under Section 313 had admitted to have boarded the truck on May 4, 2010 at Guahati.

33. The appellants have contended that, the Investigating Officer was not examined by the prosecution and, therefore, the appellants were prejudiced by not being able to elicit any contradiction from him. Examination of the Investigating Officer is material when, a prosecution witness deposes in Court which is contrary to the statement that he recorded under Section 161 of the Criminal Procedure Code, with the Investigating Officer. In order to confront such prosecution witness with the statement he had made before the police and recorded under Section 161 of the Criminal Procedure Code, the examination of the Investigating Officer assumes significance. Short of such a scenario, the non-examination of the Investigating Officer is not fatal to the case of prosecution.

34. In the facts of the present case, nothing has been placed before us to suggest that, any prosecution witness made a statement in Court which is contrary to the statement under Section 161 of the Criminal Procedure Code. In fact, PW-1 prepared the notices under Section 67 of the Act of 1985 to which the appellants recorded their statements under the supervision of PW-1. The defense had cross-examined the PW-1 on such aspect elaborately during trial

35. ***Rajiv Arora (supra)*** has been rendered in the context of a Court martial. It has held that, whether prejudice has been caused by non-examination of witnesses named in the charge sheet is essentially a question of fact. An inference is required to be drawn having regard to the facts and circumstances obtaining in each case. In the facts of the present case, the appellants have not been able to establish that, the appellants suffered any prejudice by the non-examination of the Investigating Officer.

36. ***Sait Tarajee Khimchand (supra)*** has been rendered in a Civil Suit. It has held that, mere marking of an exhibit does not dispense with the requirement of proof of the document. In the facts of that case the proof of the plaintiff's

books of account became important because the plaintiff accounts were impeached and falsified by the defendants because of larger payments than those admitted by the plaintiff. In such context, it had been held that, the entries in the books of accounts were required to be proved by the plaintiff.

37. In the facts of the present case, the chemical examination report has been marked as exhibit 6 at the trial. Appellant did not raise any objection to the marking of the chemical examination report as an exhibit, at the trial. Exhibit 6 is admissible under Section 293 of the Criminal Procedure Code, 1973.

38. It has been contended on behalf of the appellant that a number of documents had been marked as exhibits in a batch. According to the appellant, the same is non est in the eye of law. At the trial, the summons under Section 67 of the Act of 1985 to the apprehended persons have also been tendered and marked as Exhibit 3 in a batch. The prosecution had tendered the statements recorded by the apprehended three persons as Exhibit 4 in a batch. The three arrest memos of the three accused persons have been tendered and marked

collectively as Exhibit 5. Signature of PW-3 on all the batches of the inventory have been tendered and marked as Exhibit 2/2 collectively. Signature of PW-4 on all the batches of the inventory has been marked as Exhibit 2/3 collectively. The documents that have been marked as Exhibit were proved in accordance with law. Nothing has been placed before us to establish that documents cannot be marked as exhibit in a batch, where otherwise, such documents were duly proved in accordance with the Evidence Act.

39. The appellants have questioned the presence of PW-2 at the office of the DRI on May 9, 2010. PW-2 has stated that, he had travelled from Kolkata to Berhampore and reached the office about 10.30 A.M in the morning on May 9, 2010 when he found the vehicle being parked outside the office of the DRI. Evidence of PW-1 has established that PW-1 had informed his superior officers in Kolkata on May 8, 2010 with regard to impending interception. PW-2 in his evidence has also stated that he had come to the Berhampore DRI office on May 10, 2010 in terms of the instruction of ADJ DRI Kolkata and that he reached the locale on 10.30 A.M. He had reported to PW-1, since PW-1 was the Senior Intelligence Officer of DRI at

that place. PW-2 had explained his presence at the time, place and date sufficiently well. The evidence placed on record, does not lead one infer that the presence of the PW-2 at the office of the DRI was not natural.

40. Appellants have contended that PW-4 is a stock witness in view of his admission that PW-4 deposed in 3/4 matters of DRI, in cross-examination. The presence of PW-4 has to be understood in the context of the deposition of PW-1 and PW-4. PW-4 had stated in his examination-in-chief that he used to go to the chamber of Dr. S.K Roy in the morning. Such chamber was situated at Berhampore Bidyasagar Statue More. The chamber was near to the officer of the DRI. PW-1 in his cross-examination had stated that, in the vicinity of their office, there are number of Doctor's Chambers and shops.

41. In such circumstances it is not unnatural for DRI personnel to call upon PW-4 to be witnesses in other instances of search and seizure also. After analysing the deposition of the prosecution witnesses, the Supreme Court in ***Pradeep Narayan Madgaonkar and Other (supra)*** has found the explanation given by prosecution witnesses for their presence at the relevant time to be poles apart. Consequently,

those two witnesses had been found to be unreliable in the facts of that case. The same factual scenario is not obtaining in the present case, so far as the PW-4 is concerned and the presence of PW-4 at the time of the seizure is natural.

42. Appellants have also contested the presence of PW-3 at the time of the seizure. Again, PW-3 in his deposition had stated that he was out of a morning walk and was proceeding towards Girja More when a request was made by the DRI team to him for assistance to which he agreed to render. He was taken from Girja More by a vehicle to the office of the DRI and had witnessed the search and seizure. In cross-examination, nothing favourable had been elicited in favour of the defence from him. In the facts and circumstances of this case. We are not in a position to return a finding, that the presence of PW-3 at the locale is not natural.

43. It has been contended on behalf of the appellants relying upon **Sk. Bhalu and Another (supra)** that seized articles were required to be produced at the time of the trial. In **Sk. Bhalu and Another (supra)** the Court was concerned with an offence punishable under Section 395 of the Indian Penal Code, 1860. In the facts of that case, it was held that no

steps were taken to inventorise or take photographs of the seized articles before returning the same to the person concerned. Efforts had also not been made to ensure production of such articles during trial. It has been observed that, the aforesaid steps ought to have been taken by the trial Court to ensure preservation and production of best evidence during trial.

44. In the facts of the present case, DRI team had prepared 2 sample packets of 25 g each from each of the brick shaped mother packets of ganja. All the packets had been sealed, labelled and numbered after observing all formalities. Seven sample packets which had been sealed and labelled were sent for testing through the court. One set of sample packets sealed, labelled and containing the endorsement of authentication along with the seal of the learned judge had been produced at the trial and marked as material Exhibit I. The chemical examination report which had been marked as Exhibit 6 at the trial establishes that the contraband seized was Ganja.

45. *Sunderbhai Ambalal Desai (supra)* has dwelt on the powers of sections 451 and 457 of the Criminal Procedure

Code, 1973. In respect of narcotic drugs it has held that, for its identification, procedure under Section 451 of the Criminal Procedure Code should be followed for recording evidence and disposal. Its identity could be on the basis of evidence recorded by the Magistrate. Samples also should be sent immediately to the chemical analyser so that subsequently, a contention may not be raised that the articles which were seized was not the same. In the facts of the present case, we have not found any infraction of the observations made therein.

46. In ***Gorakh Nath Prasad (supra)*** the Supreme Court has observed that, although the Act of 1985 provides for a reverse burden of proof upon the accused, contrary to normal rules of criminal jurisprudence for presumption of innocence unless proved guilty, it however, does not dispense with the requirement of the prosecution to having first established a prima facie case, only whereafter, burden will shift to the accused. In the facts of the present case, the prosecution has established beyond all reasonable doubt that, the appellants are guilty of the charge.

47. In the facts of ***Gurmail Singh (supra)***, the Supreme Court has found that the link evidence adduced by the prosecution was not satisfactory. The case has been considered in light of the law prevailing in 1995. The Act of 1985 has undergone various amendments thereafter. Moreover the factual scenarios present in the instant case are different.

48. In ***Naval Kishore Singh (supra)*** it has been held that, the questioning of the accused under Section 313 of the Criminal Procedure Code had been done in the most unsatisfactory manner. It has held that, under Section 313 of the Criminal Procedure Code, the accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him. At least, the various items of evidence, which had been produced by the prosecution, should have been put to the accused in the form of questions he should have been given opportunity to give his explanation. The practice of putting the entire evidence against the accused put together in a single question and giving an opportunity to explain the same, had been deprecated as the accused may not be in a position to give a

rational and intelligent explanation. In the facts of the present case, various items of evidence as well circumstances which the prosecution had placed at the trial, were placed before the appellants and the appellants had been afforded an opportunity to explain the same. It cannot be said that, the appellants had been denied a reasonable opportunity of explanation provided under Section 313 of the Criminal Procedure Code, at the trial.

49. *Mamfru Chowdhury (supra)* has held that, conviction at the criminal trial should be based on affirmative proof by prosecution and not on the absence or weakness of the explanation of the accused. In the facts of the present case, the prosecution has been able to prove the charge against all reasonable doubt as against the appellants.

50. *Gian Chand and others (supra)* has held as follows: –

“19. From the conjoint reading of the provisions of Sections 35 and 54 of the Act, it becomes clear that if the accused is found to be in possession of the contraband article, he is presumed to have committed the offence under the relevant provisions of the Act until the contrary is proved. According to Section 35 of the Act, the court shall presume the existence of mental state for the commission of an offence and it is for the accused to prove otherwise.

20. Thus, in view of the above, it is a settled legal proposition that once possession of the contraband articles is established, the burden shifts on the accused to establish that he had no knowledge of the same.

21. Additionally, it can also be held that once the possession of the contraband material with the accused is established, the accused has to establish how he came to be in possession of the same as it is within his special knowledge and therefore, the case falls within the ambit of the provisions of Section 106 of the Evidence Act, 1872 (hereinafter referred to as "the 1872 Act").

22. In State of W.B. v. Mir Mohammad Omar [(2000) 8 SCC 382 : 2000 SCC (Cri) 1516 : AIR 2000 SC 2988] this Court held that if the fact is specifically in the knowledge of any person, then the burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.

"38. ... Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish

certain facts which are particularly within the knowledge of the accused.” (SCC p. 393, para 38)”

51. In ***Balwant Rai (supra)*** the accused person had been found sitting on certain bags kept by the side of the road. On search, such bags had been found to contain narcotics. In such facts, it had been held that, it was not a case of personal search and therefore the requirements of Section 50 of the Act of 1985 was not attracted.

52. ***Khet Singh (supra)*** has held that, evidence collected through search and seizure, which may be procedurally irregular in terms of the standing instructions, is admissible at trial, if no serious prejudice is caused to the accused. In the facts of that case, the seizure list was not prepared at the spot but was later prepared at the customs office. Such a procedure had been accepted to be sufficient compliance. In the facts of the present case, the prosecution has sufficiently explained why the seizure list had been prepared at the office of the DRI. It had been done at the invitation of the accused and no prejudice had been caused to the accused by such a course of action being adopted by DRI.

53. In the facts of the present case, the prosecution has been able to establish that, commercial quantity of narcotics

was seized from the appellants. The learned trial judge had, by the impugned judgement of conviction, found the appellants guilty of an offence punishable under section 20 (b) (ii) (c) of the Act of 1985 for transporting 3429. 300 kgs of Ganja. By the impugned order of sentence, the learned judge had, sentenced to the appellants to 15 years of rigorous imprisonment and a fine of Rs. 1 lakh and in default to suffer simple imprisonment for six months for the offence punishable under section 20 (b) (ii) (c) of the Act of 1985 in terms of section 235 (2) of the Criminal Procedure Code. The learned Trial Judge had also directed that the period during which the convicts were in custody, be set off from the period of sentence.

54. In view of the discussions above, we have found no ground to interfere with the impugned judgement of conviction and the order of sentence. The appeal is dismissed.

55. By an order dated September 13, 2021 the prayer for suspension of sentence imposed by the learned Trial Judge had been allowed. The appellants had been enlarged on bail pending the disposal of the appeal. In view of the dismissal of the appeal, the bail granted to the appellants pursuant to the

order dated September 13, 2021 stands cancelled. The Appellants shall surrender forthwith to undergo the remaining portion of the sentence. In default, the jurisdictional Court will take appropriate steps.

56. Period of detention suffered by the appellants during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon the appellants in terms of Section 428 of the Criminal Procedure Code.

57. Trial court records along with the copies of this judgement be transmitted forthwith to the appropriate Court for necessary compliance.

58. Urgent Photostat certified copy of this judgement and order, if applied for, be given to the parties on compliance of all formalities.

59. CRA 214 of 2020 is dismissed. All connected applications including CRAN 3 of 2021 are disposed of accordingly.

[DEBANGSU BASAK, J.]

60. I agree.

[MD. SHABBAR RASHIDI, J]