

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.808 of 2021

Arising Out of PS. Case No.-114 Year-2019 Thana- MADHAURAH District- Saran

Mange Ram, S/O Bhagwan Ram, R/o village- Ojariya, P.S./Tahsil- Taranagar,
District- Churu, State- Rajsthan

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 197 of 2023

Arising Out of PS. Case No.-114 Year-2019 Thana- MADHAURAH District- Saran

Ramchandra Kumar, S/O Shyam Lal, Resident of Village and Post-
Hamirwas, P.S.- Baigarh, District- Jhujhunun, Rajasthan.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 808 of 2021)

For the Appellant/s : Mr. Ansul, Advocate
Mr. Amir Alam, Advocate
Ms. Zainab Khan, Advocate

For the Respondent/s : Mr. Ajay Mishra, APP

(In CRIMINAL APPEAL (DB) No. 197 of 2023)

For the Appellant/s : Mr. Dhananjay Kumar, Advocate
Mr. Kundan Kumar Ojha, Advocate
Mr. Navneet Prabhakar, Advocate

For the Respondent/s : Mr. Bipin Kumar, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR

PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 20-09-2023

These appeals have been preferred by the appellants



under Section 374(2) of the Code of Criminal Procedure, putting to challenge a judgment of conviction dated 29.10.2021 and an order of sentence dated 01.11.2021, passed by learned 1st Additional Sessions Judge, Saran at Chapra in NDPS Case No. 04 of 2019, arising out of Marhourah P.S. Case No. 114 of 2019, CIS Registration No. 04 of 2019, whereby the appellants have been convicted and sentenced as under:-

Criminal Appeal (DB) No. 808 of 2021				
Appellant	Penal Provision	Sentence		
		Impriso nment	Fine (Rs.)	In default of fine
Mange Ram	Section 20(b)(ii)(C) of the NDPS Act	R.I. for 15 years	1,50,000/-	S.I. for three years
Criminal Appeal (DB) No. 197 of 2023				
Appellant	Penal Provision	Sentence		
		Impriso nment	Fine (Rs.)	In default of fine
Ramchandra Kumar	Section 20(b)(ii)(C) of the NDPS Act	R.I. for 15 years	1,50,000/-	S.I. for three years

2. Based on the self-statement of the Officer-in-Charge of Marhourah Police Station, namely, Ram Baleshwar Ray (PW-8) recorded at 10:30 PM on 07.03.2019 (Thursday) at Madhawa-Taraiya Road, near Sarkari Gachhi, the concerned Marhourah P.S. Case No. 114 of 2019 came to be registered for the offences punishable under Sections 8/20(ii)(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act for short) read with Section 120-B of the IPC.



3. It is the informant's case, as disclosed in the said self-statement, that a secret information was received by him at 2:30 PM about concealment of huge quantity of *ganja* in a truck (container) having registration number of Rajasthan which could be recovered on an immediate search failing which miscreants might have the opportunity to remove the contraband. A *sanha* was immediately entered in the station diary and an information was given to the superior police officials. The Sub-Divisional Officer, Marhourah was requested to make available a Magistrate for assisting the raid proposed to be conducted. The Circle Officer, Marhourah, namely, Om Prakash (PW-6) was deputed, who reached Marhourah Police Station at 3:15 PM, whereafter in the leadership of the Officer-in-Charge, a Circle Officer (PW-6, said to be a Magistrate), Sub-Inspector Ashok Kumar Das (PW-3), Sub-Inspector Shiv Amit Prakash Koushik (PW-1), Assistant Sub-Inspector Sitalal Prasad Gupta (PW-2) and armed police personnel reached *Sarkari Gachhi* at 4:00 PM. A truck (container) was found parked there, around which five persons were seen standing, namely, Arman Ali, Sunil Kumar, Mange Ram (an appellant), Ramchandra Kumar (an appellant) and Deo Nath Sah. On seeing the police party they started fleeing away but all of them except co-accused Deo Nath Sah were apprehended on



chase. It is the further case of the informant, as disclosed in his self-statement, that he enquired from the persons so apprehended as regards the reason why they were trying to flee away, in response to which Ramchandra Kumar, Mange Ram (the appellants) and Sunil Kumar disclosed about presence of huge quantity of *ganja* in the truck and that Arman Ali (a co-accused) was given the responsibility by the owner of the truck, namely, Sandip Shyoran to deliver the *ganja* to co-accused Deo Nath Sah. Accordingly, they had brought the contraband as directed and were waiting for Deo Nath Sah for delivering the consignment. Personal search of the persons so apprehended was conducted by the officials leading to recovery of mobile phones from these appellants and two other co-accused who were apprehended. Search of the truck led to recovery of a total of 201 kg 300 gm of substance in 20 packets which appeared to be *ganja*. Further, two samples were drawn from each of the 20 packets. Thus, altogether 40 samples were drawn from 20 packets. All the packets were sealed and signatures of the independent witnesses, the Magistrate and the persons apprehended were obtained. Seizure-list was prepared and a copy of the seizure-list was handed over to all the four persons apprehended by the police party.

4. Before we deal with the subsequent developments as



per the prosecution's case and the evidence of the witnesses, we must notice, at this stage itself, that this is an undisputed fact that the self-statement of the informant (PW-8) was not written by him (PW-8) rather the same was written, according to the informant himself, by someone else on his instructions. It is also apparent from the FIR that the four persons apprehended were not occupying the truck from which *ganja* was recovered and they were apprehended based on suspicion arising out of the fact that they were seen fleeing away after having noticed the presence of the police. Thirdly, the accused persons are said to have disclosed to the police about the presence of *ganja* in the truck and their admission made before the police regarding the purpose for which they were carrying the contraband article in the truck at the instance of co-accused Sandip Shyoran.

5. Be that as it may, the FIR, as has been noted hereinabove, was registered at 11:45 PM (according to the prosecution's case search was conducted at 4:00 PM). We reiterate, at this stage, that the place where the truck was found parked from which recovery of articles was made, was at a distance of two kilometers from the police station. The police, upon completion of investigation submitted chargesheet against these appellants and co-accused Arman Ali and Sunil Kumar,



keeping the investigation pending against other persons named in the FIR. Cognizance was subsequently taken of the offence punishable under Section 20(b)(ii)(C) of the NDPS Act. Charge was framed against these appellants and co-accused Arman Ali and Sunil Kumar on 18.07.2019 for commission of the offence punishable under Section 20(b)(ii)(C) of the NDPS Act. The appellants and the other two accused persons denied the charge and claimed to be tried.

6. At the trial, the prosecution examined altogether nine witnesses including the informant (PW-8), the Circle Officer who was part of the raiding party as Magistrate (PW-6) and the Investigating Officer (PW-9). Rest of the prosecution's witnesses were members of the raiding party except the seizure-list witnesses, namely, Umesh Singh (PW-4), Vijay Kumar Singh (PW-5) and PW-7 a formal witness who had produced before the trial court the material exhibit.

7. In addition to the oral evidence of the prosecution's witnesses, the prosecution brought on record following documentary evidence to substantiate the charge against the persons put to trial :-

(i) Signature of Umesh Singh on the seizure-list-
Exhibit-1

(ii) Signature of witness Vijay Kumar Singh on the



seizure-list- Exhibit-1/1

(iii) Signature of the Magistrate Om Prakash C.O.

Marhowrah on the seizure-list -Exhibit-2

(iv) Seizure-list -Exhibit-3

(v) Self-statement of the informant-Exhibit-4

(vi) Endorsement on the self-statement-Exhibit-5

(vii) FSL report-Exhibit-6

8. After closure of the prosecution's evidence, the appellants were questioned under Section 313 of the CrPC so as to give them an opportunity to explain the incriminating circumstances emerging against them based on the evidence of the prosecution's witnesses. It transpires from the record that co-accused Arman Ali and Sunil Kumar absented themselves at the stage of examination under Section 313 of the CrPC. Accordingly, their case was separated and the trial proceeded against these two appellants only. The appellants denied the circumstances explained to them.

9. The trial court, after having appreciated the evidence adduced at the trial, has reached a conclusion, as recorded in the impugned judgment of conviction, that the prosecution was able to establish charge against these appellants for commission of the offence punishable under Section 20(b)(ii)(C) of the NDPS Act as they failed to discharge the onus cast upon them under Section 54 of the NDPS Act. After having convicted the appellants, the trial



court sentenced them to imprisonment and fine by the impugned order dated 01.11.2021, as has been noted at the outset.

10. Mr. Ansul, learned counsel appearing on behalf of the appellant in Criminal Appeal (DB) No. 808 of 2021, assailing the impugned finding of the trial court, has submitted that the prosecution miserably failed to establish at the trial that any incriminating material was recovered from the conscious possession of the appellants. The appellants were not occupying the vehicle, which is an admitted fact. It is the prosecution's case itself that the appellants were standing somewhere near the truck. There is evidence adduced at the trial to the effect that there were more than hundred people standing near the truck and the appellants were apprehended by the police only on the allegation that they were seen fleeing away. He has further submitted that there is complete non-compliance of Section 52A (2)(b) of the NDPS Act, inasmuch as, the samples were not drawn in the presence of a Magistrate, which is requisite under the said provision. Presence of Circle Officer at the time of seizure as a Magistrate cannot be said to be true compliance of the requirement under Section 52A (2)(b) of the Act for the reason that the Circle Officer is not a judicial magistrate and the expression 'any magistrate' falling under sub-section (2) of



Section 52A of the NDPS Act means ‘Judicial Magistrate’ only within the meaning of Section 3 of the Code of Criminal Procedure, 1973. He has further argued that, according to the prosecution’s case, two samples, each from the 20 packets so seized i.e., 40 samples were prepared each containing 100 gm of the seized article at the time of seizure itself on 07.03.2019. For the first time, an application was made, four days thereafter, on 11.03.2019 before the learned Special Court seeking permission to send the samples to the Forensic Science Laboratory. The permission was granted by an order dated 13.03.2019. He has drawn our attention to the FSL report (Exhibit-6) to submit that two plastic canes marked 1 and 2 containing 95 gm and 70 gm of *ganja* were received by the Forensic Science Laboratory (FSL for short) as against the sample containing 100 gm of *ganja*, according to the prosecution’s case. The integrity of the sample drawn at the place of seizure and sent to the Forensic Science Laboratory thus stood compromised, he contends. He has relied on a Supreme Court’s decision in case of **Rajesh Jagdamba Avasthi v. State of Goa** reported in (2005) 9 SCC 773 to bolster his contention.

11. He has also submitted that the permission was granted by the trial court on 13.03.2019 for sending the samples



to the FSL, according to the prosecution's case, whereas the report of the Forensic Science Laboratory refers to a letter dated 12.03.2019 advising dispatch of sample which was received 16 days thereafter on 29.03.2019 by a special messenger. There is no explanation as to how and where the samples were kept, in the meanwhile, in safe storage. Furthermore, according to the prosecution's case itself 40 samples were prepared, two each from the 20 packets. Rest of the 38 samples, said to have been prepared, were not produced before the trial court as material exhibit. It is also evident from the depositions of the prosecution's witnesses that the seized substance was not kept in safe storage in *malkhana*. In any event, the prosecution also failed to connect the material exhibit produced at the trial with the FSL report. He has argued that though the Forensic Science Laboratory in the report found that the article sent for examination was *ganja* having chief psychoactive ingredient in Tetrahydrocannabinol (THC), no question was put to the appellants under Section 313 of the CrPC in that regard. Such being the circumstance, the trial court ought not to have taken into account the said result of examination of the Forensic Science Laboratory.

12. Mr. Dhananjay Kumar, learned counsel appearing on behalf of the appellant in Criminal Appeal (DB) No. 197 of



2023 has adopted the submissions advanced by Mr. Ansul, learned counsel for the appellant in Criminal Appeal (DB) No. 808 of 2021.

13. Learned Additional Public Prosecutor representing the State has submitted that the informant after having received the secret information took all necessary steps requisite under the provisions of NDPS Act for causing proper search and seizure of the contraband in the presence of Circle Officer who is an Executive Magistrate. He submits that the samples were drawn in presence of the said Executive Magistrate and, therefore, there has been compliance of Section 52A(2)(b) of the NDPS Act. He has further argued that the result of forensic science examination clearly says that the articles seized from the truck was *ganja*. The article was seized on the basis not only of the secret information which the informant had received but also on the disclosure made by these appellants and other two co-accused persons. He has submitted that the difference in the weight of *ganja* taken at the time of preparation of sample and at the time when it was received in the Forensic Science Laboratory is not of much significance for the reason that the difference is not substantial and *ganja* leaves have a tendency of drying up. The reduction of weight, he contends, in such circumstance, is of not as significant



as would require this Court to interfere with the finding of conviction recorded by the trial court. He has submitted that the prosecution's witnesses including the seizure-list witnesses have fully supported the prosecution's case. The Magistrate, in whose presence seizure was conducted and seizure-list was prepared and the samples were taken, has also fully supported the prosecution's case. In such circumstance, the finding of conviction recorded by the trial court upon taking aid of Section 54 of the Act cannot be said to be suffering from any legal infirmity as the appellants could not put forth any justification in support of their defence.

14. We have perused the impugned judgment and order of the trial court as well as the lower court's records. We have given our thoughtful consideration to the rival submissions advanced on behalf of the parties.

15. In our opinion, one of the core issues, which has arisen in the present case is as to whether the recovery of the articles can be said to have been made from conscious possession of these appellants. This is an admitted fact that the appellants were not occupying the vehicle. They were rather said to be standing near the vehicle. The witnesses have deposed at the trial that based on the secret information they had gone to the place called *Sarkari Gachhi*. On reaching that place, they had seen four



persons standing near the truck who had started fleeing away on seeing the police vehicle. They were apprehended. Their disclosure, said to be made to the police about the presence of *ganja* in the truck (container), is the only basis for their implication. We have not been able to notice any evidence adduced at the trial to connect these appellants either with the truck or with the materials so seized in any manner other than the disclosures said to have been made by them to the police.

16. From the depositions of prosecution's witnesses, who were members of the police team, it can be easily seen that they had suspected that these were the persons who were connected with the said truck having a registration number of Rajasthan as they were seen fleeing away. We find it difficult to sustain the finding recorded by the trial court, in the aforesaid background that the prosecution was able to establish conclusively at the trial that the recovery of contraband, if any, was made from the conscious possession of these appellants.

17. It is pertinent to mention, as has been pointed out by the learned counsel for the appellants, that no driving license nor any other paper was received from the possession of these appellants which could connect them either with the truck or with any other material recovered from the truck.



18. Another question of seminal importance has arisen in the present case is as to whether the Circle Officer (PW-6) can be treated to be a Magistrate who could be said to be competent for the purpose of drawing samples under Section 52A (2)(b) of the NDPS Act. Section 52A reads thus:-

"52A. Disposal of seized narcotic drugs and psychotropic substances.-- (1) *The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.*

(2) *Where any ³[narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such ³[narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the ³[narcotic drugs, psychotropic substances, controlled substances] or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the ³[narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act*



and make an application, to any Magistrate for the purpose of--

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of ⁴[such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

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

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of ⁵[narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.]"

19. The Supreme Court in case of ***Union of India v. Mohanlal*** reported in ***(2016) 3 SCC 379*** has elaborately dealt with the requirements of Section 52A. While dealing with the said provision, it has been laid down in paragraphs 15 to 17 as under:-

"15. It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances



taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.”

20. Following observation in paragraph 19 of the Supreme Court’s decision in case of **Mohanlal** (supra) can also be usefully referred to in this regard:-

“19.There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned.



The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time-frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52-A (supra).....”

21. Further, while summing up the issues involved in the case of **Mohanlal** (supra), the Supreme Court issued certain directions including the one which is contained in paragraph 31.1, which reads as under:-

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

22. Section 3 (1) (a) of the CrPC states that any reference, without any qualifying words, to a Magistrate, shall be construed, unless the context otherwise requires, in relation to an area outside a metropolitan area, as a reference to a Judicial



Magistrate. We deem it proper to reproduce Section 3 of the CrPC, which reads as under:-

"3. Construction of references.—(1) In this Code,—
(a) any reference, without any qualifying words, to a Magistrate, shall be construed, unless the context otherwise requires,—

(i) in relation to an area outside a metropolitan area, as a reference to a Judicial Magistrate;

(ii) in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;

(b) any reference to a Magistrate of the second class shall, in relation to an area outside a metropolitan area, be construed as a reference to a Judicial Magistrate of the second class, and, in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;

(c) any reference to a Magistrate of the first class shall,—

(i) in relation to a metropolitan area, be construed as a reference to a Metropolitan Magistrate exercising jurisdiction in that area;

(ii) in relation to any other area, be construed as a reference to a Judicial Magistrate of the first class exercising jurisdiction in that area;

(d) any reference to the Chief Judicial Magistrate shall, in relation to a metropolitan area, be construed as a reference to the Chief Metropolitan Magistrate exercising jurisdiction in that area.

(2) In this Code, unless the context otherwise requires, any reference to the Court of a Judicial Magistrate shall, in relation to a metropolitan area, be construed as a reference to the Court of the Metropolitan Magistrate for that area.

(3) Unless the context otherwise requires, any reference in any enactment passed before the commencement of this Code,—

(a) to a Magistrate of the first class, shall be construed as a reference to a Judicial Magistrate of the first class; (b) to a Magistrate of the second class or of the third class, shall be construed as a reference to a Judicial Magistrate of the second



class;

(c) to a Presidency Magistrate or Chief Presidency Magistrate, shall be construed as a reference, respectively, to a Metropolitan Magistrate or the Chief Metropolitan Magistrate;

(d) to any area which is included in a Metropolitan area, as a reference to such metropolitan area, and any reference to a Magistrate of the first class or of the second class in relation to such area, shall be construed as a reference to the Metropolitan Magistrate exercising jurisdiction in such area."

23. It is not at all in controversy that the place where the search was conducted, recovery was made by the police does not fall within any metropolitan area. Sub-Section (2) of Section 52A uses expressions "any Magistrate" and "such Magistrate". The prefix "any" cannot be said to be qualifying the word "Magistrate" to mean either Executive or Judicial Magistrate. In our opinion, the word "Magistrate" is not qualified under sub-section(2) of Section 52A otherwise and, therefore, applying Section 3 of the CrPC, it can be conclusively held that the word "any Magistrate" underlying Section 52A(2) of the Act means any Judicial Magistrate. The Circle Officer, in our opinion, cannot be said to be a Magistrate for the purpose of exercise of function under Section 52A(2)(b) of the NDPS Act.

24. Situated thus, we are of the view that the samples cannot be said to have been drawn in the presence of a Magistrate in compliance of Section 52A(2)(b) of the NDPS Act read with



the law laid down by the Supreme Court in case of **Mohanlal** (supra).

25. Thirdly, we find force in submission advanced on behalf of the appellants that there is apparent and substantial difference between the weight of sample taken from each of the packets and the weight received from the FSL. Similar discrepancy though in relation to *charas* had came up for consideration before the Supreme Court in case of **Rajesh Jagdamba Avasthi** (supra), wherein the Supreme Court after having noticed the facts of that case held that the prosecution was not able to explain the discrepancy in the weight which rendered the case of the prosecution doubtful. Paragraphs 12, 13 of the said decision are relevant and therefore are being reproduced hereinbelow :-

"12. However, there appears to be substance in the other submissions urged on behalf of the appellant, namely, that the weight of the substance sealed in two envelopes was found to be different from the weight of the substance received by the laboratory as deposed to by PW 1. It is not disputed that from the shoe on the right foot 100 gm of charas was recovered, which was sealed in envelope A. According to PW 1, the Junior Scientific Officer, when that envelope was opened and the substance weighed it was found to be 98.16 gm. Similarly, from the shoe on the left foot 115 gm of charas was recovered which was packed and sealed in envelope B. But only 82.54 gm of the substance was found in envelope B when the same was opened by PW 1. A similar submission was urged before the High Court and the High Court also found that this discrepancy could not be explained by



the prosecution. The High Court observed that there was no doubt that envelope B which was said to contain 115 gm of charas was found to contain only 82.54 gm of charas and this could not be considered to be a minor discrepancy. However, the High Court was of the view that even if this sample contained in envelope B was not considered against the appellant on account of discrepancy in the weight, since there was no material discrepancy in the weight of the charas found in the other envelope A, the case against the appellant stood established on the basis of the charas recovered, packed and sealed in envelope A.

13. It, therefore, concluded that the appellant could be held guilty for unauthorised possession of 98.16 gm of charas found in envelope A, if not for the total quantity of 180.70 gm as charged."

26. Fourthly, the appellants were not questioned on the point of result of forensic examination of the contraband said to have been seized from the truck in question, while examining them under Section 313 of the CrPC. In view of the various decisions of the Supreme Court, it was impermissible for the Court to have relied upon such circumstance in respect of which the appellants were not questioned under Section 313 of the CrPC.

27. There is yet another glaring aspect of the matter which cannot be lost sight of. According to the prosecution's case, 20 packets containing *ganja* were seized from the truck and two samples were drawn from each of such packets (total 40 packets). Apparently, either two samples from one packet or one each from two of the packets were sent to the FSL, according to them. In



such view of the matter, the prosecution cannot be said to have proved that the remaining 38-39 packets also contained *ganja*. As a matter of fact, the informant did not follow at all the procedure for preparation of sample in accordance with the instructions issued by Standing Order No. 1/89 dated 13.06.1989 by the Ministry of Finance, Department of Revenue. Most surprisingly, the prosecution did not produce the rest of the 38 samples by way of material exhibits before the trial court.

28. The trial court's opinion that the appellants failed to discharge the onus under Section 54 of the NDPS Act was completely misplaced for the reason that the prosecution was not able to lay successfully the foundation of recovery of contraband from possession of these appellants in accordance with the procedure prescribed under the NDPS Act. There is no gainsaying that considering the stringent provisions of the NDPS Act it has been repeatedly held by the Courts that all the safeguards provided under the Act must be strictly adhered to and any failure on the part of the prosecution shall give the person facing trial, benefit of doubt.

29. Considering the facts and circumstances as noted-
9above, we do not find it safe to uphold the finding of conviction recorded by the trial court.



30. Accordingly, the impugned judgment of conviction and the order of sentence dated 29.10.2021/ 01.11.2021 passed by learned 1st Additional Sessions Judge, Saran at Chapra in NDPS Case No. 04 of 2019, arising out of Marhourah P.S. Case No. 114 of 2019, CIS Registration No. 4 of 2019 are set aside. The appellants stand acquitted of the charge of offence punishable under Section 20(b)(ii)(C) of the NDPS Act.

31. These appeals are allowed accordingly.

32. The appellants are in jail custody. Let them be released forthwith, if they are not required in any other case.

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

Rajesh/-

AFR/NAFR	NAFR
CAV DATE	NA
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