

IN THE HIGH COURT AT CALCUTTA

Criminal Appeal

Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

The Hon'ble Justice Md. Shabbar Rashidi

CRA 247 of 2021

Sankar Aich @ Babai

Versus

The State of West Bengal

For the appellant: Mr. Pran Gopal Das, Adv.

: Ms. Kaniz Kulsum, Adv.

: Mr. Shuvojeet Gupta, Adv.

For the State : Mr. Sanjoy Bardhan, Adv.

: Mr. Palash Chandra Majhi, Adv.

Hearing

concluded on : January 30, 2023

Judgment on : February 10, 2023

Md. Shabbar Rashidi, J.:

1. Preferring this appeal, the appellant has assailed the judgment of conviction dated April 04, 2019 and order of sentence dated April 05, 2019 passed by the learned 6th Additional and Sessions Judge, Barasat, North 24-Parganas in connection with the Case No. N-138 of 2015 convicting the appellant under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985.
2. On July 01.07.2015 at 17.35hrs, the de facto complainant received a secret information regarding the carriage of ganja from near Kestopur, VIP Road. Upon receiving such information, the de facto complainant recorded the same under Baguiati P.S. GDE No. 1516 dated July 01.07.2015. The matter was brought to the notice of the Inspector-in-charge, Baguiati P.S. Accordingly; the de facto complainant was directed to work out the information. In pursuance of such direction by the Inspector-in-charge, the de facto complainant along with the Force

left the Police Station by lodging a GDE in this regard. The raiding party also carried all the necessary articles for conducting search and seizure accompanied by the source. The raiding party reached at Kestopur, VIP Road near Reebok showroom at about 17.55hrs. They also arranged for two independent local persons Gautam Mondal and Debasish Sarkar to be witnesses from the raid, search and seizure. The raiding team set up an ambush near the aforesaid place leaving their vehicles away. At about 17.10hrs, one person was noticed moving suspiciously with a big yellow coloured nylon sack. He stopped near the Reebok showroom. Upon identification by the source, the raiding team surrounded the said person. On enquiry, the said person disclosed identity as Sankar Aich @ Babai and thereafter exposed that the bag he was carrying contained ganja.

- 3.** The de facto complainant incidentally reported the matter to the Inspector-in-charge of Baguiati Police Station over phone and requested him to come

to the spot as a Gazetted Officer. At 18.30hrs, the inspector-in-charge, Baguiati P.S. arrived at the place of occurrence and as per his instruction, a notice was served upon the detained person in writing to the effect that he was suspected to carry gana and the police wanted to search him. He was also served with another notice that stated he had the right to search the Police Personnel in presence of Gazetted Officer to which he expressed his willingness. All the Police Personnel including the de facto complainant and the inspector-in-charge were searched by the detained person but no incriminating materials could be found on the person of the Police Personnel and the witnesses. One search list was prepared in the mean time. Thereafter, the de facto complainant conducted search upon the detained person and 22.700 kg (twenty two kg and seven hundred grams) ganja was recovered from the yellow coloured nylon sack being carried by the accused. The ganja was taken out from the packet and two separate packets of hundred gram ganja in each were prepared by wrapping brown paper

as its Test Sample and Security Sample respectively. The rest amount of ganja i.e. 22.500 kgs were packed in a white nylon bag tied in jute thread. Thereafter, all the exhibits including the yellow coloured nylon bag were properly packed, sealed and labelled in presence of the witness and were seized under proper seizure list in presence of the witness. The seizure list was signed by the witness as well as by the accused. The process of search and seizure was completed between 19.40hrs and 20.25hrs.

4. On interrogation, the apprehended person failed to produce any document to justify possession of the quantity of ganja he was carrying. Accordingly, the accused was arrested. The person of the accused was also search but nothing could be found. Inventory was prepared and thereafter the raiding team returned to the Police Station along with the accused person.
5. On the basis of the written complaint lodged by the de facto complainant, Baguiati P.S. Case No. 627 dated 17.07.2015 under Section 20(b)(ii)(c) of Narcotic Drugs and Psychotropic Substances Act, 1985 was

started against the accused Sankar Aich @ Babai and as such the police took up the investigation and on completion of investigation submitted charge sheet against the appellant. Accordingly on the basis of materials in the Case Diary, charge under Section 20(b)(ii)(c) of the said Act was framed. The appellant pleaded not guilty and claimed to be tried.

6. In order to prove the charge levelled against the appellant, prosecution examined nine witnesses.

7. One member of the raiding party deposed as PW1. He has stated that on 17.07.2015, he went into a raid under the leadership of SI P. Mondal at Kestopur in front of Reebok showroom on the basis of a source information. On going there, one person was detained with sack. Being intercepted, the said person disclosed his name as Sankar Aich @ Babai and also disclosed that he was carrying ganja. PW1 also stated that the matter was brought to the notice of IC Baguihati P.S. who came to the spot and in his possession, the detained person was searched. Ganja weighing 22.700 kgs was recovered from his sack.

PW1 proved his signature on the seizure list (Exbt. 1). He also signed on the Search list, Inventory list, Weighment Chart and Specimen Seal Impression, each he identified (Exbt. 2,3,4 and 5 respectively).

- 8.** The de facto complainant himself deposed as PW2. He stated that on 17.07.2015, being posted at Baguiati P.S., he received an information at 17.35hrs about illegal trafficking of ganja by one person. He recorded GDE in respect of receipt of source information being GDE No. 1516 dated 17.07.2015. He further stated that the matter was brought to the notice of IC Baguiati and as per his instruction, PW2 along with the Force left the P.S. to work out the said information taking the usual investigation kits. Such exhibit was also entered into the General Diary Entry being GDE No. 1517 dated 17.07.2015. The extract copies of the GDEs were marked as Exhibit 6. They reached Keshtopur Reebok showroom at 17.55hrs and set up an ambush leaving his vehicle away. At about 18.10hrs, one person was noticed going towards the said spot with a bag. He was identified by the source.

At the request of PW2, two passersby namely Debasish Sarkar and Gautam Mondal volunteered to stand witnesses. Thereafter, the suspected person was detained. He disclosed his name as Sankar Aich and that he was carrying ganja. PW2 further stated that the matter was intimated to the IC, Baguiati P.S. who arrived at the place of occurrence at about 18.30 hrs and disclosed himself as a Gazetted Officer. Thereafter, PW2 served notice upon the detained person informing him that PW2 wanted to search him on suspicion of carrying contraband. The carbon copy of notice was detained by PW2 and marked as Exhibit 7. The detained person agreed to be searched in presence of the inspector-in-charge but no written reply was given by the detainee. PW2 also stated that the detainee searched the police personnel. However, no incriminating material was recovered and a nil seizure list was prepared in this regard (Exbt. 2/1). Thereafter, on search, the bag in the possession of the said person was found to contain ganja which weighed 22.700 kg. Two samples of hundred grams were

separated from the main bulk. After that, the main bulk, the sample and nylon bag were sealed and labelled signed by the witnesses. The aforesaid articles were seized by PW2 under a seizure list (Exbt. 1/1). PW2 also prepared Weighment Chart (Exbt. 4/1), Inventory list (Exbt. 3/1). PW2 also stated that as the detained person failed to produce any document to justify his possession of ganja, he was arrested under proper arrest memo (Exbt.8) and returned to P.S. PW2 wrote a written complaint and proved the same (Exbt. 9). PW2 also identified the accused and the main bulk, tests sample, security sample and the seized bag (MAT Exbt. I,II,III and IV respectively). The witness was cross-examined and in his cross-examination, he admitted that in the carbon copy of the notice served upon the accused, signature of the accused was in original.

- 9.** One of the members of the raiding party was examined as PW3. He stated that on 17.07.2015, he was posted at Baguiati P.S. and went to conduct raid under the leadership of SI P. Mondal at about 05.45

p.m. at Kestopur near the Reebok showroom. He further stated that reaching there, one person moving suspiciously with a bag was detained. The said person disclosed his identity as Sasnkar Aich. He also disclosed that he was carrying ganja. The matter was intimated to the inspector-in-charge and upon his arrival, the bag of the suspect was searched. On such search, 22.700 kgs of ganja was recovered. Two samples of hundred gram each were separated from the main bulk. The contraband were sealed and labelled on the spot and were seized under a seizure list. PW3 proved his signature on the seizure list (Exbt. 1/2) and on the Inventory list as well as the search list (Exbt. 3/2 and 2/2 respectively). He also stated that as the suspect failed to produce any document to justify the possession of ganja, he was arrested and returned to the P.S. PW3 identified the appellant in Court.

- 10.** Another member of the raiding party deposed as PW4. He has stated that on 17.07.2015, he was posted at Baguiati P.S. as a constable of police. On

the said date, under the leadership of the SI Pratapaditya Mondal. He went for a raid near the Reebok showroom at Kestopur. They reached the spot at about 05.40 p.m. On the basis of a secret information, one person was apprehended who was coming to said spot with a yellow coloured plastic bag. He was detained on suspicion. The suspect disclosed his name as Sankar Aich. He further disclosed that he was carrying ganja. Thereafter, in presence of the inspector-in-charge, Baguiati P.S., the bag of the detainee was searched and 22.700 kgs of ganja was recovered, which was seized under a seizure list. PW4 proved his signature on the seizure list (Exbt. 1/2). He also signed on the Inventory list, Weighment chart and Specimen Seal Impression. The search was conducted in presence of the two witnesses. PW4 also stated that as the detained person could not produce any document in support of the possession of ganja, he was arrested. Thereafter, the raiding party returned to the Police Station. PW4 also identified his

signature on the labels attached to the seizure list. He was interrogated by the Investigating Officer.

11. PW5 is another Police Constable who was the member of the raiding party. He has corroborated and reiterated the statements of PW3 and PW4 regarding search, recovery and seizure of ganja from the possession of the appellant. He also proved his signature on the seizure list (Exbt. 1/4) and identified his signature on the labels attached to the seized articles. PW5 however failed to identify the appellant in Court.

12. The Recording Officer deposed as PW6. He has stated that on 17.07.2015, he was posted at Baguiati P.S. as Sub-inspector of Police. He started a case being Baguiati P.S. case No. 627 dated 17.07.2015 on the basis of a complaint lodged by SI Pratapaditya Mondal. PW6 proved his endorsement of receipt on the written complaint (Exbt. 9/1) and the formal First Information Report (Exbt. 10).

13. The Inspector-in-charge of Baguiati P.S. deposed as PW7. He has stated that on 17.07.2015, while he

was posted at Baguiati P.S. as Inspctor-in-charge, SI Pratapaditya Mondal had received a secret information to the effect that one person was engaged in trafficking of ganja. He further stated that the matter was intimated to him and was duly entered into the GDE Book. PW7 instructed the SI Pratapaditya Mondal to work out the information with available Force. He also stated that he was informed that the Police team had detained a person at the Reebok More, Kestopur and PW7 was requested to go to the spot as a Gazetted Officer. He accordingly reached the spot at about 18.30 hrs and found that one person was detained by the Force. On interrogation, the said person disclosed his name as Sankar Aich. The detained person was offered with an option to be searched in presence of PW7, who having been a Gazetted Officer. PW7 proved the carbon copy of the notice served upon the appellant. The detainee was also offered to search the Police Personnel. However, on such search, nothing incriminating could be recovered from the possession of the Police

Personnel and therefore a nil seizure list was prepared in this regard. PW7 proved his endorsement in the said document (Exbt. 2/5). PW7 further stated that thereafter the bag of the detained person was searched in his presence and on such search, 22.700 kgs of ganja was recovered from the bag in presence of the two independent witnesses, which were seized under a seizure list. PW7 proved his signature on the seizure list (Exbt. 1/5). Thereafter, the two samples of hundred gram each were taken and the seized articles were sealed and labelled. One Inventory list of the seized ganja was prepared to which he signed (Exbt.3/4). He also proved his signatures on the Weighment chart, Specimen Seal Impression (Exbt. 4/3 and 5/2 respectively). PW7 also stated that as the said person failed to produce any document regarding possession of ganja, he was arrested under a proper memo of arrest. He recorded his statement under Section 161 of the Code of Criminal Procedure before the Investigating Officer. PW7 identified the appellant in Court. He also identified the signatures on the

samples, main bulk and the bag containing MAT Exbt. I, II, III and IV.

14. One of the seizure list witnesses deposed as PW8. He identified his signatures on seizure list, search list, Inventory list of the contraband, Weighment chart and Sample Seal Impression (Exbts.1/6, 2/6, 3/5, 4/4 and 3/3 respectively). In his deposition, PW8 stated that in the Month of July, 2015, he was gossiping in a tea stall at Kestopur at around 05.36 p.m. At that time, the said Police Officer came there and informed that one person who was doing illegal acts was to be arrested and for this, PW8 was requested to remain present at the time of search and seizure. PW8 and his friend Surajit and Debasish agreed to assist the Police Personnel. They went to the spot and noticed that the detained person had one nylon bag in his hand. One of the Police Officers had informed the Inspector-in-charge of Baguiati P.S. over telephone. They kept waiting. About 15/20 minutes later, the Inspector-in-charge arrived at the spot and thereafter the detained person searched PW8 and

others. After that the said person was searched by the Inspector-in-charge and as such ganja was recovered from his bag. PW8 also stated that the ganja was weighed by one of the Police Officers with weighing scale, which came to approximately 22 kgs. The witnesses including PW8 were asked to sign on some papers and labels of the seized articles. PW8 stated that the name of the detained person was Sankar Aich. However, he was unable to identify the said person due to passage of time. PW8 proved his signature on the labels of the packets shown to him. He also stated that he was interrogated by Police and the statement was reduced into writing.

- 15.** The Investigating Officer of the case deposed as PW9. He stated that being endorsed with the investigation of the case, he perused the complaint, visited the place of occurrence and prepared rough sketch map thereto with index (Exbt.11). In course of Investigation, he examined available witnesses and recorded their statements under Section 161 Cr. PC. He also examined the accused and forwarded the

accused and the Alamants to Court. He also sent six samples upon chemical examination under the exact challan (Exbt.12) and therefore collected the Chemical Examination report from the FSL (Exbt.13). As per such report, the sample was found to be ganja. On completion of investigation, PW9 submitted charge sheet on 12.09.2015 against the accused Sankar Aich @ Babai under Section 20(b)(ii)(c) of Narcotic Drugs and Psychotropic Substances Act,1985. He further stated that the endorsement in the Malkhana Register was tallied with column 11(4) of the charge sheet. PW9 also proved the seized articles and his signature on the label attached to them (Exbts.I/1, II/1,III/1 and IV/1). PW9 was cross-examined on behalf of the appellant but nothing favourable could be extracted from his cross-examination.

16. On completion of the examination of the prosecution witnesses, the appellant was examined under Section 313 of the Code of Criminal Procedure. In his examination, the appellant claimed the

allegations as false and pleaded as not guilty.

However, he declined to adduce any evidence witness.

17. Accordingly, on the basis of evidence on record, learned trial court, by the impugned judgment and order, convicted the appellant and sentenced him to rigorous imprisonment for 10 (Ten) years and a fine of Rs. 1, 00,000/- (One Lac) and in default of payment of fine to undergo rigorous imprisonment for a further period of 3 months, for the offence punishable under Section 20 (b)(ii)(c) of the Narcotic Drugs and Psychotropic Substance Act, 1985.

18. Learned advocate for the appellant has pointed out the anomalies in the deposition of prosecution witnesses with regard to the time of apprehension of the appellant and arrangement of the independent witnesses as also non identification of the appellant by the independent witness. It is argued the in consideration of such anomalies, the case of the prosecution is rendered highly incredible.

19. It was further contended that the case made out by the prosecution is also bad for deficiency in

compliance of Section 50 of the Narcotic Drugs and Psychotropic Substance Act on the ground that there was no endorsement by the appellant that he received and understood the notice under Section 50. There was no time mentioned in the notice and the carbon copy of the notice contained original signature of the appellant. It also did not contain the signature of the Gazetted Officer i.e. Inspector-in-charge. In this regard learned advocate for the appellant relied upon paragraphs 29 and 32 of the decision in the case of **Vijaysing Chandubha v State of Gujrat reported in 2011 (1) SCC 609** which was followed in in the case of **State of Delhi v. Ram Avtar alias Ram** reported in **2011 (12) SCC 2007**.

20. On the same proposition of the compliance of the provisions under Section 50 of the NDPS Act, learned advocate also cited the decision in the case of **Beckodan Abdul Rahiman v State of Kerala, 2002 (4) SCC 229** and also that in the case of **Laxmi Sardar & Anr. V State of West Bengal** reported in **2015 SCC online Cal 2281**. Learned advocate for the

appellant contended that the alleged search and seizure was done in presence of a Gazetted Officer, who was police personnel and that the provisions contained in Section 50 of the NDPS Act was not complied with. It was also contended that all the prosecution failed to produce all the independent witnesses at the trial. for the aforesaid reasons, it is submitted that the case of the prosecution is doubtful. As such, the impugned judgment and order is liable to be set aside.

21. On the other hand, learned advocate for the State has submitted that in the facts and circumstances of the case, as the search and seizure was made from a public place, the compliance of Section 42 of the Act was not required. Moreover, it is submitted that though, duly complied with, the provisions of Section 50 of the NDPS Act, it was not at all required in the case as the search and seizure were not made on the person of the appellant. it was also argued on behalf of the State that PW8 has sufficiently explained his incapacity to identify the

appellant in court. Furthermore, the chemical examiner has duly testified that the samples were received in his office in sealed condition and the appellant has not challenged the delay in sending the samples for examination despite opportunity, the same cannot be challenged. It was contended on behalf of the State that the impugned judgment and order is well founded, on the basis of convincing evidence is liable to be affirmed.

22. In support of his contentions, learned advocate for the State relied upon the decision in the case of **Sk. Raju alias Abdul Haque alias Jagga v State of West Bengal** reported in **(2018) 9 SCC 708**, **Jagat Singh v State of Uttarakhand (2016) 13 SCC 119**, **State BY CBI v Dilbagh (2004) 13 SCC 99** and **Than Kunwar v State of Haryana (2020) 5 SCC 260**.

23. The case as made out by the prosecution is that the de-facto complainant, upon receipt of source information, duly reduced such information into writing, informed his superior officer and under direction of such superior proceeded to work out the

information. He was accompanied by the source. Reaching the place pointed out in the source information, the raiding team set up an ambush. Being identified by the source, the appellant was intercepted on the suspicion of carrying 'ganja'.

24. The appellant was served with a notice under Section 50 of the Narcotic Drugs and Psychotropic Substance Act (Ext.7) informing his right to be searched in presence of a Magistrate or a Gazetted Officer. Upon arrival of the Gazetted Officer, the bag of the appellant was searched in presence of two witnesses which was found to contain 22.700 Kgs. Of ganja. The appellant failed to provide valid documents for the possession of ganja for which the contraband was seized upon taking samples under proper seizure list (Ext.1/1) and the appellant was arrested.

25. Exhibit 1/1 is the seizure list through which the contraband articles were seized. The said document contains the signature of its maker, the witnesses and the appellant as well. Not only that, the appellant also put his signature on search list, through which, he

searched the person of the police personnel (Ext.2/1), the inventory prepared on spot (Ext.3/1), weighment chart (Ext.4/1) and the memo of arrest (Ext.8). No explanation has been advanced on behalf of the appellant as how his signatures appeared on the said documents. The trend of cross examination of the prosecution witnesses on behalf of the appellant and in consideration of the aforementioned documents it seems safely established that the appellant was apprehended with a sack which was said to contained contraband articles like ganja. The presence of appellant at the relevant date and time at the place of occurrence i.e. Kestopur near Reebok Showroom within the jurisdiction of Baguiati Police Station is well established. Similarly it is also established that the appellant was then carrying one bag or sack. The said sack was searched observing all legal formalities in presence of a Gazetted Officer and witnesses and he was arrested on the charges of carrying contraband articles like ganja. The case of the prosecution regarding search, seizure and arrest of the appellant

has been overwhelmingly supported by all the witnesses examined by the prosecution. They have monotonously narrated the prosecution case with reference to the apprehension of the appellant as well as search and seizure of suspected contraband from the possession of the appellant and have proved their signatures on the aforesaid documents.

26. The appellant has assailed the impugned judgment of learned trial court on the ground of defects in the compliance of the provisions regarding notice under Section 50 of Narcotic Drugs and Psychotropic Substance Act. In the case of **Vijaysinh (Supra)** it was laid down that,

29. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations

of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-Section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right

provided to him under the said provision.”

27. In the case of **State of Delhi v Ram Avtar (Supra)**, it was observed that while discharging the onus of Section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of Section 50 of the Act. Non compliance with the provisions of Section 50 of the Act would cause prejudice to the accused and, therefore, amounts to the denial of a fair trial.

28. On similar lines, in the case of **Laxmi Sardar (Supra)**, it was laid down that,

“We have, therefore, no hesitation to hold that the conviction of the appellants cannot be sustained in law firstly, due to the reasons that the right available to the appellants under

the provisions of sub-Section (1) of Section 50 of NDPS Act, was not communicated to them clearly, individually in an unambiguous language; and secondly, the arrest of the appellants on the place of occurrence was not proved due to non-compliance of the provision of Clause (i) of sub-Section (b) of Section 41B of the Cr.P.C.”

29. To the contrary, it has been pointed out on behalf of the State that since the person of the appellant was not subject to search, compliance of Section 50 of the said Act was not at all warranted. On such proposition, learned advocate for the State has relied upon the case of **Raju v. State of W.B., (2018) 9 SCC 708**, wherein it was laid down by the Supreme Court that

17. The principle which emerges from Vijaysinh [Vijaysinh Chandubha Jadeja v. State of Gujarat, (2011) 1 SCC 609 : (2011) 1 SCC (Cri) 497] is that the

concept of “substantial compliance” with the requirement of Section 50 is neither in accordance with the law laid down in Baldev Singh [State of Punjab v. Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] , nor can it be construed from its language. [Reference may also be made to the decision of a two-Judge Bench of this Court in Venkateswarlu [Myla Venkateswarlu v. State of A.P., (2012) 5 SCC 226 : (2012) 2 SCC (Cri) 686] .] Therefore, strict compliance with Section 50(1) by the empowered officer is mandatory. Section 50, however, applies only in the case of a search of a person. In Baldev Singh [State of Punjab v. Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] , the Court held : (SCC p. 190, para 12)

“12. On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises, etc.”

In State of H.P. v. Pawan Kumar [State of H.P. v. Pawan Kumar, (2005) 4 SCC 350 : 2005 SCC (Cri) 943] (“Pawan Kumar”), a three-Judge Bench of this Court held that the search of an article which was

being carried by a person in his hand, or on his shoulder or head, etc., would not attract Section 50. It was held thus : (SCC pp. 360 & 363, paras 11 & 16)

“11. ... In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word “person” occurring in Section 50 of the Act.

16. ...After the decision in Baldev Singh [State of Punjab v. Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] , this Court has consistently held that Section 50 would only apply to search of a person and not to any bag, article or container, etc. being carried by him.”

30. In the case of Jagat Singh (Supra) the Hon’ble Supreme Court was pleased to observe that,

“12. We find from the record of the case that the recovery of contraband was made from the appellant in the public place. In this view of the matter, the case in hand fell under Section 43 of

the NDPS Act. So far as compliance with Section 50 is concerned, the prosecution proved that PW 5, who was a gazetted officer, was called and then in his presence the recovery of contraband was made from the appellant. We, thus, find that compliance with Section 50 was made in letter and spirit as provided therein and, therefore, no fault can be found in ensuring its compliance.

13. In the light of these two material issues, which were proved by the prosecution by proper evidence, the two courts below, in our opinion, rightly held that the prosecution was able to prove their case beyond the reasonable doubt against the appellant and hence, the appellant had to suffer conviction as awarded by the trial court. We, therefore, concur with the finding of the two courts which, in our view, does not call for any interference in this appeal.”

- 31.** In the case of **Than Kunwar (Supra)**, it was observed that compliance of Section 50 is mandatory only in case of search of the person of the suspect and not in the case of a search of his belongings like bag.

32. In the instant case, it is explicit from the evidence on record that when the appellant was apprehended, the bag or sack carried by him was intended to be searched. PW 2, has stated in his deposition that the appellant was spotted carrying a bag in his possession. There is no case of search of the person of the appellant in the evidence. In fact, the witnesses have testified that when the appellant was apprehended, he disclosed that he was carrying ganja. Moreover, the search and seizure in this case, was made at a public place, in front of Reebok Showroom at Kestopur.

33. Nevertheless, a notice under Section 50 of the NDPS Act was served upon the appellant informing him the intended search of his body and luggage (Ext.7). PW2 and other witnesses have testified that such notice was duly served upon the appellant. Exhibit 7 also bears the signature of appellant on it establishing such service. Not only that, the Gazetted Officer (PW7) who was informed to come to the place of search and seizure arrived at the spot. He in his

deposition stated that he also informed the appellant and the appellant offered to be searched in presence of PW7, a gazetted officer. On such offer of the appellant, search of the bag carried by him was conducted. There is no evidence whatsoever, that the person of the appellant was also searched. The language used in Exhibit 7 clearly indicates that the appellant was given with the option of being searched in presence of a Magistrate or a Gazetted Officer. Therefore, in our consideration, the provisions of Section 50 of the Act, was duly and sufficiently complied with in letter and spirit. In that view of the aforesaid facts, the contention of non-compliance of the provisions of Section 50 of the NDPS Act, cannot be sustained.

- 34.** Section 50 of the Act, contemplates the search in presence of a Magistrate or a Gazetted Officer. There is no classification to the effect that the gazetted officer must be from one or the other agency. The prosecution in not choosing some gazetted officer from an agency other than the police cannot be faulted.

Similarly, the signature of the gazetted officer on the notice under Section 50 of the Act, is not contemplated in the said provision. It is incumbent upon the seizing officer to serve the notice. In fact, notice in writing is also not contemplated. The only requirement of the said Section is to put the accused on notice of his rights to be searched in presence of a Magistrate or a gazetted officer.

35. After search and seizure, the seized articles were sent for examination. The seized articles were kept at Malkhana. PW 9 has deposed about the relevant entries in the Malkhana Register under which it was deposited.

36. PW9 has also proved the report of the chemical examiner (Exhibit 13). The report reflects that the seized articles were received by the chemical examiner with intact seal. The report also discloses that the seized articles, on examination, were found to be ganja, a Narcotic Drug under the purview of Narcotic Drugs and Psychotropic Substance Act, 1985. The variation in gross weight and remnant weight of the

sample cannot be taken to vitiate the prosecution case. There may be many reasons for such variation in the weight. But so long as the seal is found intact there appears no reason to doubt the genuineness of the sample and the report on its basis.

37. In that view of the aforementioned facts, it is well established that the appellant was found in possession of 'ganja' which is a narcotic substance as defined under the provisions of Narcotic Drugs and Psychotropic Substance Act, 1985. The appellant failed to produce any valid document required for the possession of Narcotic Substance. As such his possession of ganja cannot be said to be an authorized possession. The quantity of ganja that was recovered from his possession was surely of commercial quantity punishable under the provisions of the Narcotic Drugs and Psychotropic Substance Act.

38. On the basis of discussions made hereinbefore, we are of the considered opinion that the impugned judgment and order is well founded based on

convincing evidence and does not warrant any interference.

39. Consequently, the impugned judgment of conviction dated April 04, 2019 and order of sentence dated April 05, 2019 passed by the learned 6th Additional and Sessions Judge, Barasat, North 24-Parganas in connection with the Case No. N-138 of 2015 is affirmed.

40. Accordingly, the instant appeal being **CRA No.247** of **2021** is hereby dismissed.

41. Period of detention already undergone by the appellant during investigation, enquiry and trial shall be set off in terms of the provisions of Section 428 of Code of Criminal Procedure.

42. Trial court records along with copies of this judgment be sent down at once to the learned trial Court as well as the Superintendent of Correctional Home for necessary compliance.

43. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

44. Connected applications, if any, shall also stand disposed of.

[MD. SHABBAR RASHIDI, J]

45. I agree.

[DEBANGSU BASAK, J.]