

IN THE HIGH COURT AT CALCUTTA

Criminal Application

Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 238 of 2020

Hossain Sk..... Appellant (in jail)

Versus

The State of West Bengal

For the appellant : Mr. Milon Mukherjee, Id. Sr. Adv.

: Mr. Rahul Ganguly, Adv.

For the State : Mr. Prasun Kumar Datta, Id. APP.

: Mr. Sanjoy Bardhan, Adv.

: Mr. Santanu Deb Roy, Adv.

Hearing concluded on : 27th February, 2023

Judgment on : 24th March, 2023

Md. Shabbar Rashidi, J.

1. The appeal is directed against the judgment of conviction dated August 10, 2020 and order of sentence dated August 12, 2020 passed by learned 5th Additional

Sessions Judge cum Special Court under NDPS Act in connection with NDPS Case No. 59 of 2019 convicting the appellant under Section 20 (b)(ii)(c) of the Narcotic Drugs and Psychotropic Substance Act, 1985.

- 2.** One Sub-inspector of police of Sagardighi Police Station received source information at 10.15 hours on March 14, 2019 to the effect that the truck bearing Registration No. NL01N/9322 loaded with huge quantity of ganja was coming from Gauhati to Berhampore. The officer reduced the information into writing by lodging a GDE and informed the matter to his superior. According to the directions of the superior officer, the informant along with force proceeded from Sagardighi police station to work out the information. They also carried the necessary articles like Pin, paper, seal, weighing machine et cetera. At about 11. 05 hours the raiding team reached near the Dohalia More. At about 12. 25 hours a truck having registration No. NL 01/9322 was found coming from Moregram side. The said truck was detained and the driver, helper and another

person sitting inside the Cabin were apprehended. The aforesaid persons were informed about the source information and the reason for their apprehension. They disclosed their identity as Johan Joy Reang, Biplab Rieng and Hossain Sk. Thereafter, the informant searched for local witnesses. Two of them namely Sarwar Marsid and Bashiruddin Sk. agreed to stand witnesses to the search and seizure.

3. The detained persons were also intimidated in writing that as the information had revealed commission of an offence under NDPS Act, there could be searched in presence of a Magistrate or a Gazetted Officer. As agreed by the detained persons, upon a request from the informant, the joint BDO of Sagardighi arrived at 15. 05 hours to act as a Gazetted Officer.

4. The apprehended persons were provided with the option to search the police personnel which they denied. Thereafter the police officer, in presence of the joint BDO and the local witnesses as well as in presence of the

detained persons, the detained truck was thoroughly searched. During such search, a number of ganja packets of different weight wrapped with blue colour and polythene sheets and reddish colour polythene Tape concealed inside the driver's cabin in a chamber behind the driver's seat were recovered. The de facto complainant took 10 numbers of plastic packets of ganja each in three batches and 7 packets and 3 packets thereof in separate batches, and after removing all the rapper and polythene sheets which on weighing stood at 90 Kgs each of the 10 packet batches, 70 Kgs in the 7 bag batch and 20 Kgs in 3 packet batch. Two samples of hundred grams each were collected from each batch and were kept in two papers envelop. The remaining 89 kg and 800 grams of ganja of the ten packet batches, 69 Kgs 800 grams of ganja of the seven packet batch and 19Kgs 800 grams of ganja from 3 packet batch was poured inside big size plastic sacks. Mother packet, sample packets and wrapper and tapes were sealed and labelled with specific markings.

- 5.** All the aforesaid articles including the truck were seized by the de facto complainant under proper seizure list signed by the detained persons, independent witnesses and the gazetted officer. In all, 360 kilograms of ganja were seized. The process of search and seizure continued between 15. 25 hours 17. 35 hours. Upon interrogation, the detained persons disclosed that they have been involved in illegal dealing of ganja for many years and that the consignment recovered on the date of occurrence was to be delivered to one Rajesh Ghosh.
- 6.** On return to the police station, the de facto complainant lodged the written complaint U/S 20 (C)/29 of the NDPS Act against the three apprehended accused persons.
- 7.** On the basis of such written complaint Sagardighi police Station Case No. 104 dated March 14, 2019 under section 20 (C)/29 of the NDPS Act was started against the three accused persons.

- 8.** The police took up investigation and on completion thereof submitted chargesheet against four accused persons. Accordingly on the basis of materials in the case diary charges under section 20(b)(ii)(C)/29 of the NDPS Act were framed against the accused persons. The accused persons pleaded not guilty to the charges and claimed to tried.
- 9.** In order to bring home the charges levelled against the accused persons, the prosecution examined as many as 11 witnesses. In addition, prosecution also relied upon certain documentary as well as material exhibits.
- 10.** Upon completion of the evidence of the prosecution, the accused persons, including the appellant were examined under section 313 of the Code of Criminal Procedure. The accused persons pleaded innocence in such examination and denied recovery of anything from the possession. However, the accused persons declined to adduce any defence witness.

11. At the conclusion of the trial, by the impugned judgement of conviction and order of sentence, three accused persons including the appellant were convicted for the offences punishable under section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substance Act. The accused Johan Jay Reang and accused Hossain Sk. were sentenced to suffer rigorous imprisonment for 10 years each and a fine of ₹ 1 lakh each and in default of payment of fine to undergo imprisonment for another two years each. However, the case of accused Biplab Reang was split up pending report on his age. The accused Rajesh Ghosh was, however, acquitted of the charges.

12. In assessment of the impugned judgment of conviction and order of sentence, it has been submitted on behalf of the appellant that the truck which was carrying the contraband articles was never produced before the court. It was also contended that the owner of the truck was never investigated. Learned advocate for the appellant also submitted that the accused persons were not identified

properly at the trial. Many of the police personnel were members of the raiding team failed to identify the accused persons.

13. It was also contended that the search and seizure of the contraband articles were faulty and not in accordance with the established law. The seizing officer opened all the packets containing the contraband without weighing the same.

14. It has further been submitted that the seizing officer acted in contravention of the established principles envisaged under the provisions of section 50 and 52A of the NDPS Act by opening all the packets of the contraband and mixing up the same and thereafter distributing it into five gunny bags.

15. Learned advocate for the appellant also drew our attention to the testimony of PW3 and PW4 where they have stated that they signed on a blank paper. It was also contended that the weight of the samples sent for chemical examination does not match with that mentioned in the

report and as such, according to learned advocate for the appellant, the search and seizure was done in a faulty manner.

16. On the other hand, learned advocate for the State submitted that in the instant case there was no search of the person of the accused persons. The entire contraband was recovered from a specially made chamber on the back side of driver's seat inside the driver's cabin. Therefore, compliance of the provisions of section 50 of NDPS Act was not at all required. On such proposition, learned advocate for the State relied upon the case of **Sk. Raju @Abdul Haque @Jagga V. State of West Bengal** reported in **2019 (1) SCC (Cri) 371**; **State of Himachal Pradesh V Pawan Kumar** reported in **(2005) 4 SCC 350** and **Kalemba Tumba V state of Maharashtra** reported in **(1999) 8 SCC 257**.

17. Learned advocate for the State also submitted that the search and seizure was made in total compliance of the provisions of section 42 of the NDPS act, though, the

seizure was made from a truck in transit and from the joint conscious possession of the accused persons on a public pathway.

18. Learned advocate for the State further submitted that the search and seizure was made in presence of independent witnesses who have signed on the seizure list. It is contended that the aforesaid witnesses have not attributed any remonstrance of forceful obtainment of their signatures on Blank papers before any authority whatsoever. They have also not raised such issue at the time of first remand. The aforesaid witnesses have also not disclosed the purpose of their visit to the police station. In such circumstances, according to the submissions made on behalf of the State, the trial or the seizure cannot be said to be vitiated. Learned advocate for the State relied upon the decision in the case of **Surinder Kumar V State of Punjab** reported in **(2020) 2 SCC 563**.

19. Learned advocate for the State also stated that the seized articles were deposited with the Malkhana on March

14, 2019. The samples were sent for chemical examination on March 14, 2019. Learned advocate for the State has pointed out the testimony of PW 9 where the witness has stated that the seal and labels on five packets as well as the sacks were found intact at the trial. The chemical examination report also testifies that the sea and labels attached to the sample packets sent for chemical examination were found intact and tallied with the specimen seal sent to such office. As such, they chain of custody of the seized contraband articles have been duly proved at the trial and the same is beyond the scope of any manipulation. In support of such contention, learned advocate for the State relied upon the case of **State of Rajasthan V Sahi Ram** reported in **(2019) 10 SCC 649** and the case of **Than Kumar V State of Hariyana** reported in **(2020)5 SCC 260**.

20. It has been submitted by learned advocate for the State that if the chain of custody of the seized contraband is proved beyond reasonable doubts, there is no need to

produce the entire contraband materials in court at the trial. in support of such contention, learned advocate for the State has cited the case of State of **Punjab V Makhan Chand, (2004) 3 SCC453.**

21. Relying upon the case of **Sumit Tomar V state of Punjab, (2013) 1 SCC 395**, learned advocate for the state has contended that mixing up of the contents of narcotic drugs recovered from different bags is not erroneous unless serious prejudice caused to the appellant is shown. Learned advocate for the State also cited the decision of state by **CBI V Dilbagh, (2004) 13 SCC 99** in support of his contention that minor discrepancies in the weight of the contraband would not vitiate the entire seizure.

22. Learned advocate for the State submitted that the impugned judgment of conviction and order of sentence are quite justified and does not deserve any interference.

23. At the trial, one assistant sub- inspector of police deposed as PW 1. He has stated that on March 14, 2019 he accompanied sub- inspector Samir Babu who received an

information regarding transportation of huge quantity of ganja near Dhuhai Mor. He further stated that one track was apprehended and SI Samir Babu informed the matter to the officer in charge and BDO. BDO was not available for which PW1 went to the office of joint BDO and handed over a requisition to him. He also accompanied the said joint BDO to the place of occurrence. The vehicle was searched in presence of the joint BDO and a total of three quintals and 60 KGs of ganja contained in 40 packets were recovered. PW1 also stated that all the formalities were performed in presence of the joint BDO and the recovered ganja was packed in five sacks which was sealed and labeled. Thereafter, the raiding team returned to the police station with the seized contraband articles and the accused persons. He identified two of the accused persons in court.

24. One constable of police was examined as **PW 2**. He also stated that on March 14, 2019, the second officer in charge of the police station SI Samir Babu received a source information. PW 2 accompanied SI Samir Babu to

work out the said information. One truck loaded with ganja was coming from Umarpur to Berhampore. The raiding team including PW 2 waited for the truck at Dhuhul Mor. The offending truck was apprehended as per the direction of Samir Babu. Three persons were found in the said truck, were apprehended. On interrogation the aforesaid persons admitted that the truck was carrying ganja. The vehicle was searched in presence of joint BDO and a total of three quintets and 60 Kgs. Of ganja was recovered from the said truck. The ganja was seized and all the formalities regarding search and seizure were performed in presence of the joint BDO. The recovered contraband was packed five sacks and was sealed and labeled. Thereafter, the raiding team returned to the police station with the accused, recovered contraband and the vehicle. PW 2 identified the two accused persons present in the court on the date of his examination.

- 25.** One of the independent witnesses was examined as PW 3. He identified his signatures on the seizure list dated

March 14, 2019 which were marked as Exhibit 1 and Exhibit 2. He however, stated that he signed on the seizure list at the police station and at the instance of police officer. He also identified five packets (Mat Exhibit I series) and his signature on the label attached to such packets (Exhibit 1/1 series. PW 3 also identified his signatures on the labels attached to the four sacks and two smaller sacks. In his cross-examination PW 3 stated that he signed on a blank paper and he was not apprised of the purpose of his signature.

26. The other independent witness deposed as PW 4. He also identified his signatures on sample packets and the labels attached to such packets as well as that attached to the sacks. He also stated that he signed on blank paper at the police station and at the instance of police.

27. A police constable attached Sagardighi police station deposed as PW 5. He has stated that on March 14, 2019, the second officer of the police station was received a source information and he accompanied the second officer

in working out the information. He went to Dhuhul Mor where one truck moving from Umarpur to Berhampore loaded with ganja. The said truck was intercepted and the persons were found inside the truck and were apprehended. On interrogation the aforesaid persons admitted that the truck was carrying ganja. The vehicle was searched in presence of joint BDO and on such search, a total of 360 kg of ganja was recovered contained in 40 packets. He further stated that all the formalities were observed in presence of the joint BDO and the seized ganja was packed in five sacks which was sealed and labelled. Thereafter they returned to the police station.

28. One NVF attached to Sagardighi police station deposed as PW 6. This witness also stated that on March 14, 2019 he accompanied the second officer of the police station to Dhuhul Mor. He also stated that one track was intercepted with three persons and 360 kg of ganja in 40 packets were recovered and seized from the said truck. He has also testified that the search and seizure was

conducted in presence of joint BDO. This witness also claims to have accompanied PW1 in bringing the joint BDO from his office. The seized contraband was kept in five sacks and the sacks versus properly sealed and labeled.

29. One police constable was examined as PW 7. He has stated that on August 10, 2019 he went to the office of SDCRL, Kolkata and received the report of the chemical examination which he handed over to the investigating officer of this case.

30. The joint BDO deposed as PW 8. He has stated in his deposition that on March 14, 2019, he was posted as Joint Block Development Officer of Sagardighi Block. He also stated that on the said date, he was called upon by SI Samir Kumar Dutta at the Dhuhul Mor where a track loaded with illegal narcotic was apprehended. PW8 also stated that 40 packets of ganja weighing 360 kg was recovered in his presence which was seized. PW8 proved his signature on the seizure lists (Exhibit 1/3 and Exhibit 2/2). He also proved his signatures on the labels attached to the

sacks containing the contraband. PW8 also proved the requisition sent by SI Samir Kumar Dutta which was marked as Exhibit 3.

31. In his cross-examination, PW8 stated that he signed on the seizure list at the place of occurrence and he put his signature at the particular place shown by the police. He further stated that he also went to the police station as some works relating to the case were yet to be accomplished. On completion of the unfinished works at the police station he left.

32. The seizing officer and the de facto complainant deposed as PW9. He has stated that on March 14, 2019 he received information that a huge quantity of ganja was being transported by truck number NL01N/9322 from Gauhati via Moregram, Birbhum to Berhampore. He further stated that the information was reduced into writing by lodging a GDE and informed the same to his superior officer. Thereafter, upon making a separate GDE, PW9, formed a raiding team consisting of police personnel and

after taking all the necessary materials like stationary, seals, testing kit et cetera, the raiding team proceeded to the place pointed by the source.

33. He further stated that the raiding team reached near the place of occurrence at Dhuhul More at about 11. 05 hours and set up an ambush. At 12. 25 hours, the offending truck was spotted which was intercepted. Three persons were sitting inside the truck. PW 9 informed the aforesaid persons orally as well as in writing about the information regarding transportation of contraband by the aforesaid track. Two passersby were requested and agreed to be independent witnesses of search and seizure. He then contacted with The Block development officer and on his proposal a written requisition was sent to the joint block development officer. In persons of the written requisition, the joint The Block development officer arrived at the place of occurrence at 15. 05 hours. The detained persons disclosed their identity as Johan Reang, Biplab Reang and Hossain Sk. Thereafter, PW 9 proceeded to conduct the

search of the person of detained persons as well as in the truck. There was a big chamber built behind the seat of the driver in the truck and insight the said chamber, 40 packets of ganja wrapped in red and blue polythene packets were recovered. PW 9 prepared a lot of 10 packets each and then opened the said packets for the purpose of weighing. PW 9 also stated that a total of 360 kg of ganja was recovered. Samples were collected from each lot and the entire quantity of recovered ganja was the fact in separate sacks. The sample packets and the sacks of mother quantity of the contraband were sealed and labelled with specific markings and all the articles were seized under proper seizure list. The accused persons were arrested for the possession of illegal narcotics. Thereafter, the seized articles, the accused persons and the vehicle were brought to the police station where PW 9 lodged a written complaint. He proved the written complaint which was marked as Exhibit 3 and the endorsement of receipt of the written complaint by the duty officer was marked as

Exhibit 3/1. The Formal First Information Report was proved by PW9 as Exhibit 4. PW9 also proved the seizure list and search list dated March 14, 2019 prepared in his pen and signature (Exhibit 1/4 and Exhibit 2/3). He also proved three copies of notice under section 50 of the NDPS Act as well as the arrest memos. He also identified the sacks of contraband materials. PW9 also proved the copy of Sagardighi PS GDE No. 615 and 616 dated March 14, 2019 through which, PW9 informed his superior and proceeded to work out the information (Exhibit 7 and Exhibit 8). He also proved Sagardighi PS GDE No. 69 dated March 14, 2019 through which the raiding team returned to the police station after completion of the raid recovery such seizure and arrest et cetera (Exhibit 9).

- 34.** PW9 was cross-examined at length on behalf of the accused persons including the appellant. In his cross-examination PW9 has stated that the GDE number was collected from 615 to 616 which were done by him at the place of occurrence itself as the error was brought to his

notice. He further admitted that the details of the members of the raiding team and they stationary taken with them were not mentioned in the GDE book. The entries under GDE number 615 and 616 were proved by PW9 in his cross-examination as Exhibits A and B.

35. The first investigating officer of the case was examined as PW 10. He stated that he was entrusted with the investigation of Sagardighi PS case No. 104 on March 14, 2019. In course of investigation he paid used the written complaint, examined the complainant and the available witnesses. He also visited the place of occurrence and prepared rough sketch map with index thereof (Exhibit 10). He then forwarded the accused together with the seized articles to court for certification and thereafter she sent the seized contraband to SPCRL, Kolkata for chemical examination. He also submitted a prayer for shown arrest of the accused Rajesh Ghosh. PW 10, made over the investigation of the case on June 20, 2019 on account of his transfer. He identified the accused persons in court as

well as the sacks and sealed packets of the seized articles which he sent for chemical examination. PW 10 was also cross-examined on behalf of the appellant.

36. The second investigating officer deposed as PW 11. He has stated that he was entrusted with the investigation of the case on June 25, 2019. He further stated that in course of his investigation, he perused the investigation conducted by his previous investigating officer. PW 11 collected the chemical report through one constable of police PW7. He proved the said chemical report which was marked as Exhibit 11. Thereafter, PW 11 submitted charge sheet against four accused persons on August 19, 2019, under Section 21(c)/29 of the Narcotic Drugs and Psychotropic Substance Act, 1985.

37. From the evidence on record it transpires that the de-facto complainant, PW9, received source information of the transportation of huge quantity of contraband narcotics at about 10.15 Hrs. on March 14, 2019. He reduced the same into writing and informed it to his superior officer.

Thereafter, PW9 along with the force proceeded for the reported place to work out the information. The raiding team came to the place of occurrence/report at 11.05 hrs. The reported vehicle was spotted and intercepted at 12.25 hrs. Three persons including the appellant were found inside the vehicle. Exhibit 7 is the GD entry, through which, the source information was reduced into writing by PW9 in compliance of the provisions under section 42 of the Act of 1985. By Exhibit 9, the apprehended accused persons including the appellant and the seized articles were produced before the police station and case being Sagardighi police station case number 104 dated March 14, 2019 was started.

38. It was the further case of the prosecution that since, the de facto complainant had a source information regarding transportation of narcotic drugs by the said vehicle; he proposed to search the aforesaid vehicle. According, notices under section 50 of the NDPS Act were served upon the appellant and the other persons in the

truck. Although, body search of the detained persons was not proposed, nevertheless, notices under section 50 of the NDPS Act were served. The Block development officer of Sagardighi was called upon to act as a gazetted officer and due to his unavailability, the joint The Block development officer was called upon who acted as a gazetted officer in whose presence the search and seizure was conducted. Exhibit 12 is the written requisition calling upon the joint The Block development officer.

39. The seizing officer, PW9, offered the appellant to search his person. A search was conducted upon the person of PW9 but nothing objectionable could be found. Exhibit 2 was to show that such a search was conducted on the person of the seizing officer.

40. According to the case made out by the prosecution, upon search of the vehicle, 360 kg of ganja was recovered contained in 40 packets kept in a specially made chamber in the driver's cabin of the offending truck. PW9 collected samples from the recovered contraband. Thereafter the

mother contraband along with the sample packets were sealed and labelled on the spot in presence of independent witnesses and the gazetted officer. The mother packets of the contraband, samples collected thereof and the offending vehicle were seized by PW9 under a seizure list dated March 14, 2019. Exhibit 1 is the said seizure list through which the contraband articles 6, samples and the vehicle were seized. Exhibit 1 contains the signatures of the independent witnesses, the gazetted officer in whose presence, the seizure was made, and that of the accused persons including the appellant. Thereafter, the seized articles as well as the accused persons including the appellant were brought to the police station where a written complaint was lodged by PW9 starting a case under the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985.

41. So far as the search and seizure of articles said to be narcotic drugs from the possession of the appellant is concerned, at the trial PW9 has deposed in support of the

written complaint lodged by him and narrated the details of the search and seizure. The fact of search and seizure, the place of such search, date and time thereof and recovery of alleged contraband from the possession of the appellant and other accused persons have been totally supported by the prosecution witnesses namely PW 1, PW 2, PW6 and PW7, who were part of the raiding team conducting the search and seizure. The gazetted officer, PW8, in whose presence, searched and seizure was made has also testified the details of such search and seizure being made at NH-34.

42. Learned advocate for the appellant has challenged the veracity of the prosecution case with reference to search and seizure of contraband. It is contended that the independent witnesses PW3 and PW4 have not supported the case of the prosecution. Although, both of them identified their signatures on the seizure list and the labels attached to the packets of contraband but have stated in their deposition that they signed on some white blank

papers at the police station and at the instance of police. Learned advocate for the State has stated that the aforesaid witnesses, though, signed on the seizure list and the labels at the place of occurrence but retracted at the trial. Such retraction is not credible. The said witnesses, PW3 and PW4, have not disclosed the occasion and cause of their visit to the police station.

43. We find substance in the contentions of learned advocate for the State, in so far as the story of signing on white blank papers seems unlikely and not credible. The seizure list, Exhibit 2 is not a blank paper rather a printed format of Search/Seizure list. Different columns of it are also in printed format. Signatures of PW3 and PW4 on such proforma, appears under the printed heading of 'signature/LTI of witnesses'. Not only that, the aforesaid witnesses also put their signatures on the 'Police Arrest/custody Memo' which is again printed standard proforma. As such, the statement that the witnesses signed on white blank papers does not stand and the contention of

retraction by the aforesaid witnesses seems to be more reliable. More so, learned advocate for the State has contended that the testimony of a witness cannot be discarded only on the ground that he is an official witness belonging to police or a particular department. The State has relied upon the case of **Surinadar Kumar(supra)** wherein the Hon'ble Supreme Court was pleased to lay down that,

“16. In *State (NCT of Delhi) v. Sunil* [*State (NCT of Delhi) v. Sunil*, (2001) 1 SCC 652 : 2001 SCC (Cri) 248] it was held as under : (SCC p. 655),

It is an archaic notion that actions of the police officer should be approached with initial distrust. It is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law, the presumption should be the other way round. That official acts of the police have been regularly performed is a wise

**principle of presumption and recognised even by
the legislature.”**

44. In the instant case, the members of the leading team as well as the Gazetted Officer PW8 have convincingly supported the case of the prosecution with reference to the search and seizure. As noted above, the independent witnesses PW3 and PW4 have not supported the prosecution case of search and seizure of narcotics from the possession of the appellant but we have seen that the retraction of such witnesses was not reliable.

45. Nowhere in the case of the prosecution, it has been brought forth that a personal search upon the body of the appellant or of the other accused persons was carried out.

46. It is an established law that compliance of the provisions of Section 50 of the NDPS Act is not required where personal search of the body of the accused is not involved. The prosecution case enfolds that the seizing officer PW9 had a serious input that narcotics were being transported by a truck which was intercepted and articles

said to be narcotic contraband where recovery upon search of the vehicle. Such contention on behalf of the respondent state has not been controverted by the appellant. Nevertheless, a personal search was proposed by PW9 and a notice under Section 50 of the NDPS Act (Exhibit 5 series) was duly served upon the appellant as well as the other accused persons. As no personal search of the appellant and the other accused persons was affected in the present case in compliance of the provisions of the section 50 of the NDPS Act was not at all required since such contention on behalf of the appellant was not controverted on behalf of the appellant and in the facts and circumstances of the case we are of the opinion that compliance of Section 50 of the said Act of 1985 was not required and actually not affected.

- 47.** The seizing officer PW9 in his written complaint as well as in his deposition has stated that the seizure was made at public place over National Highway-34. A personal search was also proposed and accordingly notices under Section 50 of the NDPS Act were served upon the appellant

and other accused persons, though, not actually executed. The evidence on record goes to show that upon receipt of the source information, PW9 reduced the same into writing under the General Diary Entry book and informed the matter to his superior officer. Exhibit 7 goes to show that the source information was duly reduced into writing and it was brought into the notice of the officer-in-charge for information and necessary permission. It is contended on behalf of the learned advocate for the State that the provisions of Section 42 was duly complied with. In the case of **Sk Raju(supra)**, it was laid down by the Hon'ble Supreme Court to the effect that,

9. We are unable to accept the submission made by the learned counsel for the appellant that Section 42 is attracted to the facts of the present case. In *State of Punjab v. Baldev Singh* [*State of Punjab v. Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] ("*Baldev Singh*"), Dr A.S. Anand, C.J. speaking for a Constitution Bench of this Court, held : (SCC p. 189, para 10)

48. The Hon'ble Supreme Court in the aforesaid case also laid down the distinction of a search and seizure from an enclosed place and from a public place or public conveyance in the following terms:-

“11. In *Krishna Kanwar v. State of Rajasthan* [*Krishna Kanwar v. State of Rajasthan*, (2004) 2 SCC 608 : 2004 SCC (Cri) 607; *Rajendra v. State of M.P.*, (2004) 1 SCC 432 : 2004 SCC (Cri) 314] , a two-Judge Bench of this Court considered whether a police officer who had prior information was required to comply with the provisions of Section 42 before seizing contraband and arresting the appellant who was travelling on a motorcycle on the highway. Answering the above question in the negative, the Court held : (SCC pp. 615-16, para 16).”

“16. ... Section 42 comprises of two components. One relates to the basis of information i.e. : (i) from personal knowledge, and (ii) information given by person and taken down in writing. *The second is that the information must relate to commission of offence punishable under Chapter IV and/or keeping or concealment*

of document or article in any building, conveyance or enclosed place which may furnish evidence of commission of such offence. Unless both the components exist Section 42 has no application. Sub-section (2) mandates, as was noted in Baldev Singh case [State of Punjab v. Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior. Therefore, sub-section (2) only comes into operation where the officer concerned does the enumerated acts, in case any offence under Chapter IV has been committed or documents, etc. are concealed in any building, conveyance or enclosed place. Therefore, the commission of the act or concealment of document, etc. must be in any building, conveyance or enclosed place.”(emphasis supplied)

“12. An empowered officer under Section 42(1) is obligated to reduce to writing the information

received by him, only when an offence punishable under the Act has been committed in any building, conveyance or an enclosed place, or when a document or an article is concealed in a building, conveyance or an enclosed place. Compliance with Section 42, including recording of information received by the empowered officer, is not mandatory, when an offence punishable under the Act was not committed in a building, conveyance or an enclosed place. Section 43 is attracted in situations where the seizure and arrest are conducted in a public place, which includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.”

49. The ratio laid down in the case of **Paban Kumar (supra)** the Hon’ble Supreme Court discussed the implications of personal search for the purpose of effecting search and seizure. We have noted hereinbefore that personal search of the appellant or another accused person was not effectuated in the case, the provisions of Section 50 of the NDPS Act, were not attracted. Accordingly, the ratios laid down in the case of **Paban**

Kumar (supra) and **Kalemba Tumba(supra)** are not applicable in the facts and circumstances of the present case.

50. According to the case of the prosecution, the articles said to be contraband narcotics were searched and seized from the conscious possession of the appellants on March 14, 2019. Exhibit 11 goes to establish that the aforesaid articles were sent for chemical examination on March 19, 2019. Upon examination of the sample packets marked with Exhibit A/1 to Exhibit E/1, the contents thereof were found positive for the presence of Cannabis (ganja) which comes under the purview of the NDPS Act, 1985. According to the case set out by the prosecution, the Seizing Officer PW9 took samples of 100 grams each in the packets containing the samples of the seized contraband, which were found by State Drugs Control and Research Laboratory (SDCRL), Government of West Bengal and were received with intact seals, tallied with the specimen seal forwarded with the memo. Although, it has

been contended on behalf of the appellant that the sample packets containing 100 grams of seized contraband in each packet were found to contain different weights of the samples ranging from 129 grams to 137 grams, which was slightly in excess of the samples, alleged to have been sent by the Seizing Officer. However, the difference in the weight of the seized contraband collected by the seizing officer and that recorded by the chemical examiner appears to be very meagre. There could be various reasons for such difference. Slight difference in the weight of the samples of the seized contraband cannot be taken to vitiate the veracity of the prosecution case especially, when the seal on the packets containing the samples of contraband were found intact and tallied with the specimen seal. Similar views were noted by the Supreme Court in the case of **Dilbagh (Supra)** wherein the Hon'ble Supreme Court held that,

“8. The other ground on which the High Court has acquitted the respondent is that there was a

difference in weight. In such cases what has to be ensured is that what has been recovered is what has to be sent for chemical analysis. In case there is any doubt that what was received by the Chemical Analyser is not the same, then the benefit of that doubt could be given to the accused. But in cases where it is proved that what was sent to the Chemical Analyser is the same as what was recovered, minor differences in weight would not vitiate the trial.”

- 51.** Learned advocate for the appellant has also challenged the case of the prosecution on the ground that the seized contraband was never produced in the Court at the trial. In the case of **Sahi Ram (supra)** and **Than Kumar (supra)**, the Hon’ble Supreme Court observed in similar terms that,

“18. If the seizure of the material is otherwise proved on record and is not even doubted or disputed, the entire contraband material need not be placed before the court. If the seizure is otherwise not in doubt, there is no requirement that the entire material ought to be produced before the court. At times the material could be so bulky, for instance as in the present material

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

52. In the case at hand, the prosecution has convincingly established that the contraband narcotics were recovered from the conscious possession of the appellant. Samples were collected and were sent for chemical examination. The sample packets so sent for chemical examination were received intact with seals.

53. We are not unmindful of the provisions of Section 52A of the Narcotic Drugs and Psychotropic Substance Act, 1985, which ordains the destruction of the seized

contraband even before the trial begins. In fact, subsequent to the promulgation of Section 52A of the Narcotic Drugs and Psychotropic Substance Act, destruction of the seized contraband becomes a rule and preserving it for production at the trial is an exception. In that view of the facts, non production of the entirety of seized contraband at the trial cannot imprint a dent on the veracity of such search and seizure of contraband.

54. In the case of **Makhan Chand (Supra)**, the Hon'ble Supreme Court noted that,

“10. This contention too has no substance for two reasons. Firstly, Section 52-A, as the marginal note indicates, deals with “disposal of seized narcotic drugs and psychotropic substances”. Under sub-section (1), the Central Government, by a notification in the Official Gazette, is empowered to specify certain narcotic drugs or psychotropic substances, having regard to the hazardous nature, vulnerability to theft, substitution, constraints of proper storage space and such other relevant considerations, so that even if they are material

objects seized in a criminal case, they could be disposed of after following the procedure prescribed in sub-sections (2) and (3). If the procedure prescribed in sub-sections (2) and (3) of Section 52-A is complied with and upon an application, the Magistrate issues the certificate contemplated by sub-section (2), then sub-section (4) provides that, notwithstanding anything to the contrary contained in the Indian Evidence Act, 1872 or the Code of Criminal Procedure, 1973, such inventory, photographs of narcotic drugs or substances and any list of samples drawn under sub-section (2) of Section 52-A as certified by the Magistrate, would be treated as primary evidence in respect of the offence. Therefore, Section 52-A(1) does not empower the Central Government to lay down the procedure for search of an accused, but only deals with the disposal of seized narcotic drugs and psychotropic substances.”

“11. Secondly, when the very same Standing Orders came up for consideration in *Khet Singh v. Union of India* [(2002) 4 SCC 380 : 2002 SCC (Cri) 806] this Court took the view that they are merely intended to guide the officers to see that

a fair procedure is adopted by the officer in charge of the investigation. It was also held that they were not inexorable rules as there could be circumstances in which it may not be possible for the seizing officer to prepare the mahazar at the spot, if it is a chance recovery, where the officer may not have the facility to prepare the seizure mahazar at the spot itself. Hence, we do not find any substance in this contention.”

55. Therefore, since the provisions of Section 52A of the Narcotic Drugs and Psychotropic Substance Act deals only with the disposal of the seized contraband narcotics, and that too, the same can be suitably moulded in the specific facts and circumstances of each case. As such, its non compliance cannot destroy the trial.

56. As noted hereinbefore, 40 packets of contraband narcotics were recovered. The seizing officer took the mother recovery in batches of 10 packets, 10 packets, 7 packets and 3 packets each and collected samples in accordance with such batches. The appellant has questioned the mixing up and collection of samples in

such batches. The Supreme Court, in the case of **Sumit Tomar (Supra)** has noted that mixing up of seized contraband and collection of samples there from cannot be faulted unless serious prejudice is shown to have been caused. No prejudice is shown to have been caused to the appellant, in the present case, for such mixing up and collection of samples by the seizing officer.

57. At the time of advancing argument, learned advocate for the appellant has also contended that the charges were framed in English language. It was also stated that the accused persons including the appellant was examined under Section 313 of the Code of Criminal Procedure and such examination was noted down in English language which is not known to the appellant. However, the materials on record go to show that charges were framed on September 27, 2019 and the Trial of the case culminated into the impugned judgment of conviction on August 12, 2020. Nowhere in this period or even during the examination of the appellant under Section 313 of the

Code of Criminal Procedure, the appellant ever raised such a point that he was not able to understand the charges or the evidence led at the trial or even that the questions confronted to the appellant in his examination under Section 313 of Code of Criminal Procedure was not understood by the appellant. On the contrary, it appears that the appellant understood each and every question put to him during his examination under Section 313 of the Code of Criminal Procedure and responded to such question quite rationally. As such, we do not find much force in such contention of the appellant.

58. It was also contended that no question regarding identification of the present appellant was brazen out to the witnesses at the trial. True it is, some of the prosecution witnesses did not identify the appellant at the trial but the aforesaid witnesses have testified the case of the prosecution so far as the search, recovery and seizure of the narcotic contraband from the possession of the accused persons including the appellant are

concerned. Moreover, the appellant never challenged his signatures on the seizure list, arrest memo and other documents including the labels attached to the seized articles. It is to be noted that most of the prosecution witnesses are official witnesses and they come across several search and seizure in different types of cases including the one under Narcotic Drugs and Psychotropic Substances Act, 1985. It may not be possible for such officials to identify each and every individual with whom they came across in connection with a particular article or specific case over a period of time. Therefore, non identification of the appellant by some of the prosecution witnesses at the trial, cannot be taken to vitiate the entire trial.

59. Therefore, in the light of discussions made hereinabove, we find no reason to interfere with the impugned judgment dated August 10, 2020 passed by learned 5th Additional Sessions Judge cum Special Court. The same is consequently affirmed.

60. Accordingly, the instant appeal being **CRA 238 of 2020** hereby stands dismissed.

61. Trial Court records along with a copy of this judgment; be sent down at once to the learned Trial Court for necessary action.

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

[MD. SHABBAR RASHIDI, J.]

63. I agree.

[DEBANGSU BASAK, J.]