

IN THE HIGH COURT AT CALCUTTA

CIRCUIT BENCH AT JALPAIGURI

Criminal Application

Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA (DB) 24 of 2022

In the matter of : Amal Barman.....Petitioner

with

CRA (DB) 11 of 2023

In the matter of : Noor Amin Mia@ Nur Amin Mia.....Petitioner

With

CRA (DB) 13 of 2023

In the matter of : Paresh Sen.....Petitioner

With

CRA (DB) 58 of 2023

In the matter of : Mahasin Ali @ Mohasin Ali.....Petitioner

For the appellants

CRA (DB) 24/2022 : Mr. Hillol Saha Podder

CRA (DB) 11/2023 and

CRA (DB) 58/2023 : Ms. Mousumi Das

Ms. Pratusha Dutta Chowdhury
Ms. Riya Agarwal

CRA (DB) 13/2023 : Mr. Sudip Guha
Mr. Sandip Guha Ray

For the State

CRA (DB) 11/2023 and

CRA (DB)58/2023 : Mr. Aditi Shankar Chakraborty, Ld. APP
Mr. Aniruddha Biswas

CRA(DB) 24/2022 : Mr. Aditi Shankar Chakraborty, Ld. APP
Mr. Nilay Chakraborty

CRA(DB) 13/ 2023 : Mr. Aditi Shankar Chakraborty, Ld. APP
Mr. Biswarup Roy,

Heard on : November 30, 2023

Judgement on : December 19, 2023

Md. Shabbar Rashidi, J.:

1. The four appeals emanate out of a common judgment of conviction dated July 22, 2022 and order of sentence dated July 25, 2022 passed by learned 1st Additional Sessions Judge, Cooch Behar in NDPS Case

No. 53 of 2020 arising out of Sahebganj Police Station
Case No. 307 of 2020 dated July 27, 2020.

2. By the impugned judgment and order the appellant and others were convicted for the offences punishable under Sections 20 (b) (ii) (C)/29 of the Narcotic Drugs and Psychotropic Substance Act, 1985. They were sentenced to suffer Rigorous Imprisonment for 10 years each and to pay a fine of ₹. One lakh each. In default of payment of fine the convicts including the appellant were directed to undergo Rigorous Imprisonment for a further period of six months.

3. On July 27, 2020 at about 10.55 hrs. the de-facto complainant i.e. a lady Sub-inspector of police of Sahebganj police Station, received a source information to the effect that a white coloured Bolero vehicle would be proceeding from Abutara towards Ghatpar with good quantity of Ganja for the purpose of selling the same illegally. The de-facto complainant

reduced the information into writing by noting the said information in a General Diary Entry (GDE) being GDE No. 1370 dated July 27, 2020.

4. Under direction from the Officer-in-charge of Sahebganj Police Station, the de-facto complainant, accompanied by force, proceeded to work out the information under special Command Certificate (CC). at about 11.15 hrs on July 27, 2020, the raiding party headed by the de-facto complainant reached Ghatpar and set up an ambush. After a while the vehicle was seen coming towards the naka point. Noticing the police picket, the driver stopped the vehicle and tried to run away leaving the vehicle. He was however apprehended. The offending vehicle was also intercepted by the de-facto complainant. Two persons were found inside the vehicle who also tried to flee away.

5. The de-facto complainant interrogated the three persons. Some Ganja like materials were recovered kept on the rear seat of the vehicle. The apprehended persons failed to give a satisfactory answer for the possession of the said articles. On further interrogation, the apprehended persons allegedly confessed of possessing 'Ganja' they were taking for the purpose of selling in a clandestine manner.

6. Consequently, the de-facto complainant detained the three persons and the vehicle and informed the matter to the Officer-in-Charge requesting to arrange for a gazetted officer for the purpose of search and seizure. At the request of the Officer-in-Charge, the de-facto complainant sent a requisition to the Circle Inspector requesting his presence at the spot for the purpose of search and seizure. She also sent a requisition to the police station for providing electronic weighing machine. The Circle Inspector and the

Officer-in-Charge arrived at the spot at about 12.55 hrs. They introduced themselves to the detained persons and served them with option to search their persons including that of the police personnel before the detainees were searched. The de-facto complainant also served option to the detainees in writing but they refused to search the police personnel.

7. Under direction of the Circle Inspector, the de-facto complainant proceeded to search the sacks containing Ganja in presence of the witnesses. No public witness came forward. The seized articles were weighed which was found to be 28 kilograms and 200 grams in weight. Since the detainees failed to give any satisfactory answer, the aforesaid articles were seized under a seizure list prepared by the de-facto complainant at the spot. Samples were collected and the sample packets as well as the sacks were duly sealed and labelled between 13.15 hrs. and 14.05 hrs.

on completion of the aforesaid formalities, the detainees were arrested and brought to the police station with the seized articles. The arrested persons were handed over to the Officer-in-Charge and the seized articles were deposited with the PS malkhana at 14.50 hrs on July 27, 2020. A written complaint in this regard was also submitted.

- 8.** On the basis of such written complaint, Sahebganj PS Case No. 307 of 2020 dated July 27, 2020 under Sections 20 (b) (ii) (c) of the NDPS Act, 1985 was started against three detained persons including the appellant. Police took up investigation on completion thereof submitted chargesheet against four accused persons. Accordingly, in consideration of materials in the case diary, charges under Sections 20 (b) (ii) (c)/29 of the NDPS Act, were framed against the accused persons including the appellant on February 25, 2021. Appellant pleaded not guilty of the charges.

9. In order to bring home the charges, at the trial, prosecution examined 11 witnesses in all. In addition, the prosecution also proved certain documentary evidences. Upon conclusion of the trial, the appellant and others were examined under Section 313 of the Code of Criminal Procedure. Attention of the appellant was drawn to the circumstances in the evidence, appearing against him, where he claimed the allegations to be false and pleaded his innocence.

10. Learned advocate for the appellants submitted that although, the seized contraband was recovered from the vehicle, personal search of the de-facto complainant was carried out. However, such personal search was conducted in complete violation of the provisions contained under Section 50 of the Act of 1985. In support of such contention, learned advocate for the appellants relied upon **(2014) 5 Supreme**

Court Cases 345 (State of Rajasthan Vs. Parmanand and Another).

- 11.** Learned advocate for the appellants further argued that there was notable difference in the weight of the sample contraband. According to the evidence on record two sample packets of 50 grams each were prepared at the time of seizure which was sent for chemical examination. However, the sample packet tested by the Forensic Science Laboratory was found to contain 26.2 grams of contraband. According to the learned advocate for appellant, the difference in weight of the contraband sent for chemical examination was significant and raises a genuine doubt. A conviction on the basis of such evidence is not justified. In this regard, learned advocate for the appellant relied upon **(2005)9 Supreme Court Cases 773 (Rajesh Jagdamba Avasthi vs State of Goa)** and **2017 SCC**

OnLine Cal 15573 (Khairul Basar Sk. @ Basar Vs State of West Bengal).

12. Learned advocate for the appellants also contended that the report submitted by the Forensic Science Laboratory is not trustworthy in as much as there was notable difference of weight of the sample sent for chemical examination and that was received by the CFSL. It was also argued that the samples were sent for chemical examination which was not received. Later on, it was again sent to the same authority for examination after about two months and that too, without permission of the learned court. In this connection learned advocate for the appellant has relied upon **(2013) 2 Supreme Court Cases 590 (Thana Singh Vs Central Bureau of Narcotics).**

13. Learned advocate for the appellant further submitted that samples were sent for chemical examination without the inventory being certified by

learned Magistrate. There was serious violation of the provisions of Section 52A of the Act of 1985. As such, the report submitted by the CFSL cannot be relied upon. In support of such contention, learned advocate for the appellants cited the decision of the Hon'ble Supreme Court rendered in **(2016) 3 Supreme Court Cases 379 (Union of India Vs Mohanlal and Another)**.

14. Learned advocate for the appellants also contended that the officer concerned, conducted search and seizure of the contraband without any permission in writing from her superior officer. Even after the search and seizure was complete, no report, as contemplated under Section 42 (2) of the NDPS Act was forwarded. Such violation rendered the entire process of search and seizure doubtful.

15. It was also contended that the place of occurrence where search and seizure was conducted

was in a crowded place. In spite thereof, no independent witness could be arranged at the relevant time which tells upon the veracity of the entire process of search and seizure. Besides, material contradictions in the testimony of witnesses, was pointed out to dislodge the prosecution case.

16. On the other hand, learned advocate appearing for the State submits that minor contradictions in the testimony of the witnesses do not vitiate the entire case. It was also contended that the entire evidence, taken as a whole, gives rise to an overwhelming implication that the appellants were found in possession of contraband articles without any valid authority in this regard.

17. Learned advocate for the State submitted that there sufficient evidence as against the appellants and the learned trial court rightly held the appellants guilty.

18. As noted above, in order to prove the charges, prosecution examined 11 witnesses. the police constable who was a member of the raiding team, deposed as PW1. In his deposition, he stated that on July 27, 2020, the de-facto complainant received a source information regarding transportation of Ganja. He along with other police personnel accompanied the de-facto complainant to Ghatpar at about 11.15 hrs. There a white Bolero vehicle was intercepted. The vehicle was searched and about 25/26 kilograms of 'Ganja' was recovered from the said vehicle kept in a big white polythene bag. The de-facto complainant informed the Circle Inspector and on his arrival at the spot, the contraband articles were seized under a seizure list. Two sample packets of 50 grams each were also prepared and it was sealed and labelled. He further stated that upon completion of all formalities, the raiding team returned to the police station with the three accused persons, seized contraband and the

vehicle. PW1 proved his signature on the seizure list (Exhibit 1). He also identified his signature on the labels attached to the contraband packet, polythene bag and the vehicle. (Mat. Exhibit I, II and III respectively). He however failed to identify the appellant and other accused persons.

19. In his cross examination, PW1 stated that the raiding party did not offer to be searched by the accused persons prior to their search.

20. Two persons from the locality were examined as PW2 and PW3. They are hearsay witnesses and did not add any value to the case either of the prosecution or the defense.

21. The de-facto complainant herself deposed as PW4. She stated that on July 27, 2020 at about 11 am, she received a source information to the effect that a white Bolero vehicle carrying Ganja was moving from Abutara road towards Ghatpar. She informed the

matter to the officer-in-charge whereupon she was directed by the officer-in-charge to work out the information. She also reduced the information into writing by lodging a GDE. PW4 also stated that she was directed to form a team for working out the information. Accordingly, she formed a team of police personnel and proceeded to Ghatpar.

22. Reaching at the spot at about 11.30 hrs, the team started naka checking. A white Bolero car reached near Ghatpar and suddenly stopped. One person started to flee away seeing the police personnel, however, he was detained. Two other persons were found sitting inside the vehicle. A white colour bag was also seen on the back seat inside the car. The said persons failed to give any answer regarding the bag. Accordingly, the said persons were detained with the vehicle and the officer-in-charge was informed.

23. As per directions of the officer-in-charge, PW4 sends requisition to the Circle Inspector to act as gazetted officer. Accordingly, PW4 sent a requisition through a Civic Volunteer (Exhibit 2). She further stated that the officer-in-charge also arrived at the spot before the Circle Inspector. On arrival, the Circle Inspector disclosed his identity and served option in writing upon the detained persons for mutual search (Exhibit 4 series). The detained persons refused to search the police personnel.

24. PW4 further stated that after such formalities, she proceeded to search the vehicle and brought out the bag from inside the car and found the same to be containing 28.2 kilograms of 'Ganja'. PW4 collected to sample packets of 50 grams each and seized the mother packets along with the sample under a seizure list duly signed by the accused persons, the gazetted officer and other witnesses (Exhibit 1/1). She also

identified the seized contraband produced in court (Mat. Exhibit I). She then arrested the accused persons under proper arrest memos (Exhibits 5 series). PW4 also identified the sack of ganja (Mat. Exhibit II) and the General Diary Entry lodge by her (Exhibit 7).

25. After such search, seizure and arrest, the accused persons along with the seized articles and the vehicle were brought to the police station. A complaint was lodged by PW4 (Exhibit 6). PW4 identified the appellants in court. PW4 was cross examined at length. In her cross examination, she stated that she did not receive any permission in writing from her superior officer to work out the information. She also did not serve written notice upon the local people to be a witness of search and seizure. She also admitted that she did not sent any special report to her superior officer with regard to the search and seizure.

26. An Assistant Sub-inspector of police was examined as PW5. He stated that on July 27, 2020 he accompanied PW4 to a naka duty at Ghatpar at about 10.35 am. There he found white Bolero vehicle. The driver of the vehicle stopped the vehicle at some distance and tried to flee but he was detained. He further stated that the vehicle was searched and found a white sack on the rear seat of the vehicle having a smell of ganja. PW5 also stated that PW4 informed the matter to the officer-in-charge and on his instructions, the Circle Inspector was contacted.

27. PW5 also brought the weighing machine from the police station as directed by PW4. Thereafter, on arrival of the Circle Inspector and officer-in-charge, the sack found in the car was opened and found to contain 28.2 kilograms of 'ganja'. The same was sealed, packed and labelled after extracting two samples of 50 grams each. PW5 proved his signatures

on the seizure list as well as labels attached to the seized articles. He could identify one of the appellants. Thereafter, the arrested persons along with the seized articles were brought to the police station. PW5 was also cross examined at great length. However, nothing favourable could be elicited by the defence.

28. A Civic Volunteer deposed as PW6. He stated that on July 27, 2020 at about 10.30/11.00 am he accompanied PW4 to Ghatpar and started naka checking. During such checking one white sack was recovered from the rear seat of a white Bolero vehicle. There were three persons in the said car including the driver. On checking, the sack was found to contain ganja. The matter was informed to the officer and PW4 did all the formalities. PW6 however, could not identify the appellants in court.

29. Another civic volunteer was examined as PW7. He stated that on July 27, 2020 at about 10.53 AM he

accompanied PW4 to Ghatpar. On the way, PW7 was informed that one vehicle was coming with illegal article. The police party started naka checking. One white bolero vehicle came their which try to flee away but the police party intercepted the vehicle. A white colour sack was found on the rear seat of the vehicle with three persons sitting inside the vehicle. PW7 further stated that PW4 informed the matter to the officer-in-charge. Circle Inspector came to the spot. On search, the sack was found to contain ganja which was sealed, labelled and seized at the spot. The sack was found to contain about 28 kilograms of ganja. Thereafter, the seized article along with real state person where brought to be police station at about 2.30 pm. PW7 however failed to identify the accused persons or the seized article.

30. Another Civic Volunteer deposed as PW8. He stated that on July 27, 2020 at about 11.00 am, he

also accompanied PW4 to Ghatpar. He further stated that he was also informed by PW4 that one white Bolero car will be coming through the road with some illegal articles. The police team started naka checking. At about 11.15 am a white Bolero car came there. The police team detained the car and was found to contain pungent smell of ganja. Three persons were sitting inside the car. PW8 also stated that the matter was reported to the officer-in-charge. After sometimes, the Circle Inspector arrived at the spot. On search ganja was recovered from the car. PW8 however, could not say the weight of the seized articles and could not identify the accused persons in court.

31. Yet another Civic Volunteer was examined as PW9. He also accompanied PW4 to the spot at Ghatpar where search and seizure was carried out. He has narrated the incidents exactly in line with that stated by PW7 and PW8.

32. The recording officer deposed as PW10. He stated that on July 27, 2020 he received a written complaint from PW4 and started Sahebganj Police Station Case No. 307 of 2020 dated July 27, 2020. He proved the endorsement of receipt of the written complaint (Exhibit 6/1) and the formal First Information Report filled up in his pen (Exhibit 8). He further stated that he also received the arrested persons, seized articles and documents which PW10, handed over to the officer-in-charge.

33. The investigating officer was examined as PW11. He stated that he was endorsed with the investigation of Sahebganj Police Station Case No. 307 of 2020 dated July 27, 2020. In course of investigation, he prepared rough sketch map of the place of occurrence with index (Exhibit 9). He also examined the available witnesses and recorded their statements under Section 161 of the Code of Criminal

Procedure. He also prepared inventory of the seized articles and produced the same before learned Magistrate (Exhibit 10). PW11 also seized a mobile phone from house of one of the accused under a seizure list. On completion of the investigation, PW11 submitted chargesheet against four accused persons.

34. He further stated that he had sent the seized articles Central Forensic Science Laboratory (CFSL) on October 14, 2020 but it was not received. It was directed to be sent to State Drug Control. However, PW11 again sent the samples to CFSL on December 08, 2020 which was received on December 10, 2020. PW11 tendered the report of CFSL in evidence which was marked as Exhibit 14. He also identified the envelope through which the sample was sent to CFSL written in his pen (Mat. Exhibit IV).

35. In his cross examination, PW11 stated that the inventory prepared by him did not contain any note if

the mother contraband was sealed with lac seal or that it was properly sealed. He also stated that he did not submit the photograph of the inventory articles.

36. As noted, the appellants were charged for the unauthorized possession of narcotic contraband that's to say 'Ganja'. Evidence of PW4 exhibits that she received information of the transportation of contraband. It is the case that receiving such information, PW4 reduced the same into writing by way of lodging a GDE. She then informed the officer-in-charge of the police station where PW4 was posted and as per his direction, she proceeded to work out information by forming a raiding team of police personnel.

37. A police officer is not obliged to disclose the source but in order to bring sanctity to the actions of a police officer, the Act of 1985 has provided for certain

procedures to be maintained while making search and seizure of narcotic contraband.

38. It has been specifically made out on behalf of the appellants that the concerned officer i.e. PW4 acted in complete violation of Section 42 (2) of the NDPS Act which provides sending the information reduced into writing or grounds of his belief recorded, to his immediate superior within 72 hours. PW4 admitted in her evidence, that she did not send any such report to her superior. Not only that, as apparent from the evidence on record, PW4 received the source information at about 11.00 am while she was in the police station. She lodged a GDE with regard to the information and proceeded to work out the information under direction from the officer-in-charge. It is also admitted position that she did not receive any permission in writing from her superior to work out the information.

39. Section 41 of the Act of 1985 deals with the power of issuance of warrant or authorization by a Magistrate or gazetted officer of specified authorities. The language used in section 41 (2) as '*may authorise any officer subordinate to him....*' clearly indicates that the authorization must be express and definite and indicates that it should ordinarily be in writing.

40. PW4 was so authorized by her officer-in-charge. The said officer-in-charge did not come forward to depose in the case in order to testify that he actually authorized PW4 to work out the information. It is not the case of prosecution that PW4 had no time to send a copy of information to her superior and obtain a permission or authorization in writing.

41. In Karnail Singh (Supra) it was laid down that,

“35. In conclusion, what is to be noticed is that Abdul Rashid [(2000) 2 SCC 513 : 2000 SCC (Cri) 496] did not require literal compliance with the requirements of

Sections 42(1) and 42(2) nor did Sajan Abraham [(2001) 6 SCC 692 : 2001 SCC (Cri) 1217] hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take

action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate,

if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got

strengthened with the amendment to Section 42 by Act 9 of 2001.”

42. PW4 admitted in her deposition that she never sent the copy of information reduced into writing, to her superior officer as required under Section 42 (2) of the NDPS Act. The aforesaid situation coupled with the absence of independent witnesses cast serious shadow of doubt regarding the veracity of the case of the prosecution. It is admitted in evidence that the place of occurrence was a crowded public place. Neither PW4 nor any other witness spoke of an attempt to invite independent witnesses at the time of search and seizure. There is no case that private witnesses were requested to stand as witness to search and seizure but none was willing. Therefore, the ratio laid down in **(2010) 3 SCC 746 (Ajmer Singh Vs State of Haryana)** and **1996 (3) SCC 338 (Tahir Vs State)**

relied by the State are not applicable in the facts and circumstances of the present case.

43. The appellant also questioned the reliability of the case on the ground that there was mismatch in the quantity of the sample sent for chemical examination. According to the testimony of the witnesses including PW4, two sample packets of 50 grams each were prepared which were sent for chemical examination. The Central Forensic Science Laboratory received the sample packet with only 26.2 grams of contraband sample. Such sample was examined and a report positive for narcotic, was given by the examiner.

44. The samples were collected on July 27, 2020. According to the evidence of PW4 it was handed over to the officer-in-charge on the said day itself. However, the sample was sent for chemical examination on October 14, 2020 i.e. after over two

months. No evidence whatsoever has been brought forth as to the custody of such articles during such period of over two months. Neither it has been stated by any of the witness that it was deposited in the malkhana nor any malkhana register has been prove to establish the safe custody of the seized contraband.

45. The evidence also shows that on the said date it was not received by CFSL and was returned with specific direction to send the same to State Drug Control for chemical examination. Nevertheless, admittedly, the seized contraband was not sent to State Drug Control rather it was again sent to CFSL and that too after another two months i.e. on December 08, 2020. There is no explanation offered on the part of the prosecution for not sending the same to State Drug Control and as to its custody for another couple of months. There is no evidence of

the person who carried the seized contraband to CFSL as to how he received the same from the custody for taking the same to CFSL on two different occasions.

46. Absence of adequate evidence with regard to proper custody of the seized contraband, coupled with significant difference in the weight of the seized contraband sample sent and received by CFSL, surely raises a genuine doubt. In **Rajesh Jagdamba Avasthi (Supra)** it was held that,

“14. We do not find it possible to uphold this finding of the High Court. The appellant was charged of having been found in possession of charas weighing 180.70 gm. The charas recovered from him was packed and sealed in two envelopes. When the said envelopes were opened in the laboratory by the Junior Scientific

Officer, PW 1, he found the quantity to be different. While in one envelope the difference was only minimal, in the other the difference in weight was significant. The High Court itself found that it could not be described as a mere minor discrepancy. Learned counsel rightly submitted before us that the High Court was not justified in upholding the conviction of the appellant on the basis of what was recovered only from envelope A ignoring the quantity of charas found in envelope B. This is because there was only one search and seizure, and whatever was recovered from the appellant was packed in two envelopes. The credibility of the recovery proceeding is considerably eroded if it is found that the quantity actually found by

PW 1 was less than the quantity sealed and sent to him. As he rightly emphasised, the question was not how much was seized, but whether there was an actual seizure, and whether what was seized was really sent for chemical analysis to PW 1. The prosecution has not been able to explain this discrepancy and, therefore, it renders the case of the prosecution doubtful.”

47. The evidence on record goes to establish that although, the contraband articles were recovered from vehicle but the witnesses have stated that the accused persons were also searched by the police personnel at the time of search and seizure. PW4 as well as the other witnesses have stated that while being detained, the accused persons were served upon option. It also came out from the evidence on record that a gazetted officer

was summoned at the spot and on his arrival, the said gazetted officer i.e. the circle inspector also served upon option to the detained persons. There are contradictory statements in the evidence with regard to such option being served upon the detained the persons. It transpires from the evidence of PW4 that the said option was with regard to the mutual search to which the accused persons refused to search the person of the police force. There is no clear evidence on record that the detained persons were served with the option specifically indicating their right to be searched in presence of a magistrate or a gazetted officer. Exhibit 4 series is the option in writing served upon the persons which speaks of an option provided to the detained persons to search the person of the members of the raiding party. It does not speak of the right of the detained persons to be searched in presence of a magistrate or a gazetted officer.

48. The evidence on record also goes to show that the matter was informed to the officer-in-charge of the police station by the seizing officer and as per his instructions, the circle inspector was contacted to act as a gazetted officer. In fact, the circle inspector, Dinhata arrived at the spot to act as such gazetted officer in whose presence a search and seizure was conducted. However, the said circle inspector was not examined on behalf of the prosecution. So far as Exhibit 4 series is concerned, the accused persons were never informed of their right to be searched in presence of a magistrate or a gazetted officer. Such an action on behalf of the seizing officer seems to be violative of the provisions contained under Section 50 of the said Act of 1985. In the case of **Paramanand and another (supra)**, the issue involved in the said case was that of individual service of communication upon each and every accused informing him of his right to be

searched in presence of a magistrate or a gazetted officer in view of the provisions under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985. However, it was laid down by the Hon'ble Supreme Court that non-service of individual communication upon each and every accused informing him of his right to be searched in presence of magistrate or gazette officer results in vitiation of the proceeding. It was noted in the said case that,

“18. It bears repetition to state that on the written communication of the right available under Section 50(1) of the NDPS Act, Respondent 2 Surajmal has signed for himself and for Respondent 1 Parmanand. Respondent 1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorised Respondent 2 Surajmal to sign on his behalf and convey his consent. Therefore,

in our opinion, the right has not been properly communicated to the respondents. The search of the bag of Respondent 1 Parmanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.”

49. In the instant case as noted above, the appellants were served with a notice said to be under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (Exhibit 4 series). The language used in the said notice does not speak of the right of the appellants to be searched in presence of a magistrate or a gazetted officer. Although a gazetted officer was called upon and the search and seizure is said to have taken place in his presence but the said gazetted officer was never produced by the prosecution at the trial.

50. In the facts and circumstances of the case applying the ratio laid down in the case of

Paramanand (supra), there appears to be clear-cut violation of the provisions contained under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and benefit should inure to the appellants.

51. As evident from the materials on record, the seized contraband sample was sent to Central Forensic Science Laboratory for chemical examination on October 14, 2020. However, it was not received and returned with a direction to send the same to the state drug control. The investigating officer, therefore, chose to send the said samples again to the Central Forensic Science Laboratory in the month of December 08, 2020. At that time, it was received by Central Forensic Science Laboratory. Chemical examination was done and report in this regard was prepared. There is no case of re-testing of the samples. At best, it could be delayed testing. In

view of the facts, the ratio laid down in the case of **Thana Singh (supra)** is not attracted in the facts and circumstances of the present case.

52. Section 52A of the said Act of 1985 deals with the disposal of the Narcotic Drug and Psychotropic Substances. In the case of **Mohanlal and another (supra)**, it was held that,

“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.”

53. In the instant case, however, samples were drawn up at the time of search and seizure which was later sent for chemical examination. In terms of the provisions of Section 52(A) (2) (C) of the said Act, the seized contraband is required to be forwarded to the officer-in-charge or the authorized officer who is required to prepare an inventory and apply before the magistrate for the purpose of certifying (a) the correctness of the inventory, (b) certifying the narcotic drugs and psychotropic substances taken by the magistrate as true and (c) drawing representative samples in the presence of the magistrate and certifying the correctness of the list of sample so drawn. In the case of **Mohanlal (supra)**, the Hon'ble Supreme Court also held that,

“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) 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.”

54. In the facts of the present case, admittedly the samples were drawn at the time of seizure. It is also admitted possession that no photographs of the seized articles were ever taken either by the officer conducting raid or by the officer-in-charge to whom the seized articles were made over.

55. Exhibit 10 goes to show that the seized articles were recovered on July 27, 2022 and it was made over

to the officer-in-charge on the same day. The officer-in-charge applied for certification before the learned Magistrate on July 28, 2020, which was duly certified by the magistrate. Therefore, it appears that the provisions of Section 52 A of the Narcotic Drugs and Psychotropic Substances Act, 1985 has been substantially complied, though, photograph of the contraband was not taken. In the aforesaid circumstances, applying the ratio laid down in the case of **Mohanlal (supra)**, it cannot be said that the seized contrabands were sent for chemical examination without due certification from the learned Magistrate.

56. The state has relied upon **AIR 1999 Supreme Court 833 (Mohan Singh versus State of M. P.), AIR 1987 SC 1328 (Dalbir Sing and others versus State of Punjab), AIR 1974 SC 21 (Bhagwan Tana Patil versus State of Maharashtra), (2002) 8 SCC**

381 (Gangadhar Behera and others versus Sate of Orissa) and an unreported decision of Hon'ble Supreme Court in criminal appeal No. 56 of 2016 **(Smt. Shamim Versus State)**, with regard to the appreciation of evidence in a criminal trial. We are not minded to disregard the evidence adduced in the present case only on the ground that they are police personnel. We also do not intend to discard the evidence led at the trial on the basis of trivial contradictions. We humbly subscribe to the ratio laid down in the aforementioned cases cited on behalf of the State. However, non-compliance of the provisions of Section 41(2), 42(2) and Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 is something which cannot be overlooked. The evidence on record also exhibits the material irregularities in the proper custody of the seized contraband for a considerable period of over four months from July 27, 2020, till December 8, 2020. There is every reason to

suspect whether report submitted by the CFSL actually belongs to the contraband seized in connection with the instant case or some other materials. There is significant difference in the weight of the sample contraband. Such irregularities apparent on the face of the evidence on record has not been explained by the prosecution.

57. In consideration of the facts and circumstances emanating from the evidence in the present case, it seems appropriate that some sensitization program should be arranged to sensitize the officers dealing with the narcotic drugs vis-à-vis procedures laid down in the Narcotic Drugs and Psychotropic Substances Act, 1985. We, therefore, request the ADG of Police North Bengal to arrange for sensitization programs for police personnel dealing with/ likely to deal with narcotics as expeditiously as possible.

58. In the light of the discussion made hereinbefore, we are not in a position to uphold the impugned judgment of conviction and order of sentence. The same is liable to be set aside.

59. Accordingly, all the four appeals being **CRA (DB) 24 of 2022, CRA (DB) 11 of 2023, CRA (DB) 13 of 2023** and **CRA (DB) 58 of 2023** are allowed.

60. The appellants Amal Barman, Noor Amin Mia@ Nur Amin Mia, Paresh Sen and Mahasin Ali @ Mohasin Ali, be acquitted and set at liberty forthwith, if not wanted in connection with any other case, upon execution of a bond to the satisfaction of the trial Court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.

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

62. Urgent 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.