

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1571 of 2020

Arising Out of PS. Case No.-1 Year-2018 Thana- GOVERNMENT OFFICIAL COMP.
District- Samastipur

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1. Surendra Debbarma S/o Shukuchand Debbarma Resident of Ramchandra Nagar, Birbal Para, P.S.-Zeerania, District-West Tripura, State-Tripura
 2. Tapan Debbarma S/o Sunil Debbarma Resident of Ward No.3, Abicharan Para, Near Madhu Chowudhary Para, H.S. School, P.O-Madhu Chowudhary, Mouja-Uttar Debendra Chandra Nagar, Abhi Charan, A.D.C. Village, P.S-Liphunga, District-West Tripura, State-Tripura.

... .. Appellant/s

Versus

Union of India Through Amar Shankar, I.O., Patna Zonal Unit, N.C.B.
Ministry of Home Affairs Govt. of India

... .. Respondent/s

with

CRIMINAL APPEAL (SJ) No. 528 of 2020

Arising Out of PS. Case No.-1 Year-2018 Thana- GOVERNMENT OFFICIAL COMP.
District- Samastipur

Vijay Das Son of Ramesh Das Resident of Village - Parwana, P.S.- Hathauri,
Distt - Samastipur.

... .. Appellant/s

Versus

1. The State of Bihar
2. The Union of India, Through Commissioner Narcotic Control Bureau, Patna.
Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (SJ) No. 1571 of 2020)

For the Appellant/s	:	Mr. S.K. Lal, Advocate
	:	Mr. Pritish Kumar Lal, Advocate
For the Respondent/s	:	Mr. K.N.Singh, APP
For U.O.I.	:	Mr. Awadesh Kr. Singh, CGC

(In CRIMINAL APPEAL (SJ) No. 528 of 2020)

For the Appellant/s	:	Mr. Navin Kumar, Advocate
For the Respondent/s	:	Mr. Zeyaul Hoda, APP
For U.O.I.	:	Mr. Awadesh Kr. Singh, CGC

CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT

Date : 20-08-2024



Both these appeals have been heard together and are being disposed of by this common judgment, for the reason that both arises out of same impugned judgment.

2. Both above-mentioned appeals have been preferred by the appellants/convicts under Section 374(2) of the Code of Criminal Procedure (hereinafter referred to as 'the Code') challenging the judgment of conviction dated 20.12.2019 and order of sentence dated 24.12.2019 passed by learned 1st Additional Sessions Judge-cum-Special Judge, NDPS Act, Samastipur in NDPS Case No. 07 of 2018 (arising out of N.C.B. Crime Case No. 01 of 2018 & C.R. No. 1507 of 2018), whereby the concerned Trial Court has convicted the appellants/convicts for the offences punishable under Sections 20(b)(ii)(c) and 25 of the NDPS Act, 1985, where they have been sentenced to undergo rigorous imprisonment for ten years and fine of Rs. 1,00,000/- and in default of payment of fine, further undergo simple imprisonment for six months for the offence punishable under Section 20(b)(ii)(c) of the NDPS Act and rigorous imprisonment for ten years and fine of Rs. 1,00,000/- and in



default of payment of fine, further undergo simple imprisonment for six months for the offence punishable under Section 25 of the NDPS Act. All aforesaid sentences ordered to run concurrently.

3. The case of prosecution in brief as it can be gathered from the complaint lodged by Amar Shankar (P.W. 2), Intelligence Officer, Patna Zonal Unit, Narcotics Control Bureau, that on 04-01-2018, he received a secret input that a consignment of *ganja* is to arrive at Musri Gharari, in the district of Samastipur, from Purnia in a Scorpio Vehicle bearing registration no. AS 01 AA 0199, in the night of 04-01-2018 itself. Acting upon said input a team led by P.W. 2, himself with P.N. Singh (P.W. 1), Rahul Kumar Purbey (P.W. 3), Ravi Ranjan (P.W. 4), Rajnish Kumar Choudhary, Awadesh Kumar, Arun Kumar and Sanjeev Kumar, all from Narcotics Control Bureau, Patna reached Zero Mile, Barauni and remains there till 11:00 P.M., where he further received information that alleged vehicle is still in Purnia and it will pass through, in the morning at about 10:30 A.M. from Musri Gharari. Accordingly, aforesaid team of N.C.B. Officers



reached Musri Gharari in morning and requested one Santosh Rai and Ramesh Kumar, to be remain there and to witness search & seizure, as an independent witness for which, they both agreed. On 05-01-2018 at about 11:30 A.M. N.C.B. team noticed the Scorpio vehicle bearing Registration No. AS 01 AA 0199, which was asked to stop and found with three persons inside, among whom one was the appellant namely Vijay Kumar Das who admitted carrying "*ganja*". Where after notice under section 50 of the NDPS Act was given to them, upon which they agreed for their search and search of the vehicle also, whereafter a search was made, where circular and rectangular packets were found in the secret chambers of the vehicle, containing "*ganja*" like substance, which was confirmed by test through Drug Detection Kit. On weighing all packets, it was found total of 155 kilograms of *ganja*. According to their size all such packets were divided in two lots of 19 kilograms and 136 kilograms respectively, from which two samples of 25 grams, each, were taken out from these two lots, which was re-sealed after taking out of the samples. The weight of



these two lots after taking sample became 18.950 kilograms and 135.950 kilograms respectively, which was kept and sealed in five different bags. The members of the raiding party and witnesses signed the sealed bags of *ganja*. The statement of the accused persons were taken under section 67 of the NDPS Act, wherein they confessed their guilt. In course of enquiry two of the samples were sent to Government Laboratory, Kolkata after taking permission of the District & Session's Judge, Samastipur.

4. On the basis of aforesaid complaint, the police registered a case, as N.C.B. Crime Case No. 01 of 2018 dated 30.06.2018 for the offence punishable under Sections 20 (b)(ii)(c), 23 (c), 25, 27 (a) and 29 of the NDPS Act, 1985, where after investigation, the police submitted charge-sheet.

5. The learned District & Sessions Judge, after perusal of record and materials collected during the course of investigation, took cognizance for the offences under Sections 20 (b)(ii)(c) and 25 of the NDPS Act, 1985 on 03.07.2018.



6. The learned trial court on the basis of materials collected during investigation, framed charges against appellants/convicts for the offences under Sections 20 (b)(ii) (c) and 25 of the NDPS Act, 1985, which they pleaded “not guilty” and claimed trial. Hence, trial was commenced.

7. To substantiate its case, the prosecution has examined altogether four witnesses. They are:-

Prosecution Witnesses No(s).	Names
P.W. 1	Parmanand Singh
P.W. 2	Amar Shankar (Intelligence Officer)
P.W. 3	Rahul Kumar Purbey
P.W. 4	Ravi Ranjan Kumar

8. Apart from the oral evidence, the prosecution has also relied upon following documents/exhibits in order to prove the charges:-

Exhibit No(s).	List of documents
Exhibit-1	Copy of notice handed over to appellants u/S 50 of the NDPS Act.
Exhibit-2	Search Seizure List.
Exhibit-3	Copy of notice handed over appellants and both independent witnesses u/S 67 of the NDPS Act.



Exhibit-4	Statement of all three appellants.
Exhibit-5	Arrest memos of all three appellants.
Exhibit-6	<i>Malkhana</i> receipt and seizure of alleged Scorpio car.
Exhibit-7	Report u/S 57 of the NDPS Act.
Exhibit 8	Chemical analysis report of the samples of <i>ganja</i> sent to laboratory.
Exhibit 9	Joint statement of independent witnesses u/S 67 of the NDPS Act.
Exhibit 10	Complaint Letter.
Exhibit 11	Application related to secret information.
Exhibit 12	Approval of Regional Director NCB Patna regarding team formation.
Exhibit 13	Page 70 and number 68 of the Malkhana Register NCB, Patna.
Exhibit 14	Certificate regarding indemnity of <i>ganja</i> .
Exhibit 15	Seized Scorpio vehicle.
Exhibit 16	Forwarding report of Judicial Magistrate 1 st Class regarding recovered <i>ganja</i> and Scorpio vehicle.

9. On the basis of evidence as surfaced during the trial, the learned trial court have examined the appellants/accused under Section 313 of the Code, where



they completely denied their involvement by denying all incriminating evidences surfaced during the trial and stated that they were implicated with this case falsely and claimed their complete innocence.

10. Neither any defence witness nor any document was exhibited in support of defence by appellants/convicts.

11. Being aggrieved with the aforesaid judgment of conviction and order of sentence, the appellants/convicts has preferred the present appeal.

12. Hence, the present appeal.

Argument on behalf of the appellant/convict:

13. Learned counsel appearing on behalf of appellants submitted that it is evident from the depositions of prosecution witnesses, particularly informant/P.W. 2 that sampling was not done in proper manner as per mandate of law and also as per the settled position of law by Hon'ble Apex Court through its several judgments. It is further submitted that seizure list witnesses were not examined in this case, therefore, the judgment of conviction as recorded



by learned Trial Court appears questionable. It is further submitted that mandatory compliance of Section 52A of the NDPS Act not appears followed in the present case. It is also pointed out that several important prosecution witnesses could not examined during the trial and moreover, the conviction was secured on the basis of department witnesses only.

14. Learned counsel while travelling over his argument further submitted that in the present case procedures regarding sampling, sealing and dispatching were not followed as per standing instruction No. 1 of 1988 dated 15.03.1988 of Narcotic Control Bureau, Government of India as issued under Section 52A of the N.D.P.S. Act.

15. While concluding argument, learned counsel submitted that presumption regarding possession of illicit articles as available under Section 54 of the Act and regarding "culpable mental state" as available under Section 35 of the Act can be imported only when prosecution established foundational aspects of it's case. Compliance of Section 42 of the NDPS Act is also not available. In support



of the submissions as made above, learned counsel relied upon the following reports of Hon'ble Supreme Court as available through **State of Haryana Vs. Jarnail Singh** reported in **(2004) 5 SCC 188**; **Tofan Singh Vs. State of Tamil Nadu** reported in **(2021) 4 SCC 1**; **Union of India Vs. Mohanlal and Another** reported in **(2016) 3 SCC 379**; **Gorakh Nath Prasad Vs. State of Bihar** reported in **(2018) 2 SCC 305**; **Ashok alias Dangra Jaiswal vs. State of Madhya Pradesh** reported in **(2011) 5 SCC 123**; **Jitendra Vs. State of M.P.** reported in **(2004) 10 SCC 562**; and **Noor Aga Vs. State of Punjab & Another** reported in **(2008) 16 SCC 417**.

Argument on behalf of State:

16. Per contra, learned A.P.P., while appearing on behalf of the State submitted that in the present case compliance of provision as available under Section 42 of the N.D.P.S. Act not required to be followed in present case, as recovery of contraband was made from Scorpio vehicle from a public place. It is submitted that all three appellants were in the same vehicle and as such it is safe to gather that



appellants were aware about the contraband and therefore, learned trial court rightly imported the provisions of Section 35 & 54 of the NDPS Act. It is also pointed out by learned APP that forensic report clearly indicates that contraband was "*ganja*" and as such impugned judgment of conviction as recorded by learned trial court cannot be questioned.

17. I have perused the trial court records carefully and gone through the evidences available on record and also considered the rival submissions as canvassed by learned counsel appearing on behalf of the parties.

18. As to re-appreciate the evidences, while disposing the present appeal, it would be apposite to discuss the evidences as available on record, which are as under:-

19. **P.W. 1 is Parmanand Singh,** who deposed that occurrence took place on 04.01.2018, where Amar Shankar (P.W. 2), Intelligence Officer, received a secret information that one white colour Scorpio vehicle bearing Registration No. AS 01 AA 0199 is coming towards Musri Gharari, Samastipur, with loaded "*ganja*" from Tripura. It was deposed that on the basis of said secret information



NCB Patna constituted a team having Amar Shankar (P.W. 2), Rahul Kumar Purbey (P.W. 3), where he was also one of the member, Ravi Ranjan Kumar (P.W. 4), Assistant Vigilance Officer, alongwith Rajnish Kumar, Choudhary Awadesh Kumar (both constables), Arun Kumar and Sanjeev Kumar (both drivers). Aforesaid team on 04.01.2018 arrived at Zero Mile, Barauni at about 10:00 PM and was waiting for aforesaid vehicle. In night, a further information was received that aforesaid vehicle will arrive at Musri Gharari in the morning of 05.01.2018. Consequent upon, entire team came to Musri Gharari at about 9:00 AM on 05.01.2018 at about 11:30 AM, where aforesaid vehicle found coming towards Musri Gharari, which was asked to stop and after stopping said vehicle three persons were found inside, where upon questioning driver of the said vehicle, disclosed his name as Surendra Debbarma (appellant/convict of Cr. App. (SJ) No. 1571 of 2020) another person who was sitting beside him disclosed his name as Vijay Das (appellant of Cr. App. (SJ) No. 528 of 2020) and the last person disclosed his name as Tapan Debbarma (appellant/convict of Cr. App.



(SJ) No. 1571 of 2020). It was deposed that upon further inquiry all three persons confessed that contraband/*ganja* is kept hidden inside the vehicle. Thereafter, two independent witnesses from Musri Gharari locality were asked to join the investigation. It was deposed that all three persons were told about the provisions of Section 50 of the NDPS Act, whereupon it was said that they agreed to be searched by the officers, upon which personal search was conducted where no objectionable material was recovered, thereafter alleged Scorpio vehicle was searched where, from the secret chambers created under the seat, 43 packets wrapped with brown tape was found which after opening found with brown colour dry material like substance suspected to be *ganja*. Thereafter, from each packet small quantity of *ganja* was taken out for testing by Drug Detection Kit, which upon examination confirmed seized material as *ganja*. All 43 packets on weighing found total of 155 kilograms, which was seized and on the basis of size, entire packets were divided into two lots and from each lot 25 grams of sample was taken and subsequently same was sealed in transparent



polythene, which was kept in yellow colour envelope and marked as AS1, AS2 and BS1, BS2 respectively. Rest of the materials were kept in the 6 nylon bags and was sealed with department seal. It's memo was prepared at spot itself and also search-cum-seizure list was prepared, thereof. Each envelope and bag was signed by all accused persons and by both independent witnesses and officers involved in seizure. The entire work was initiated at about 11:30 AM on 05.01.2018 and was concluded by 1:30 PM. It was deposed that all three apprehended accused persons were asked to record their statement under Section 67 of the NDPS Act. He said to record the statement of appellant/convict Surendra Debbarma, he identified accused-appellants during trial before the court.

19.1. Upon cross-examination, it was stated by him that after stopping the alleged Scorpio vehicle, it was brought to Musri Gharari Police Station, which was hardly ten steps ahead. Seizure list was stated to be prepared at Musri Gharari Police Station, where he signed it. It was stated that two independent witnesses were also called



there, who signed the seizure. Aforesaid statement of this witness clearly contradicts its earlier version as deposed in examination-in-chief that sealing and seizure were done at the place of recovery itself. He also appears contradicting the presence of two independent witnesses at place of recovery as deposed in examination-in-chief, rather he said in cross-examination that independent witnesses were called to police station. He denied the suggestion that though he is aware about the provisions of NDPS Act, but failed to call Gazetted Officer before preparing the seizure list.

20. **P.W. 2 is Amar Shankar,** who is an Intelligence Officer cum informant of this case and also one of the member of the raiding team. He supported occurrence and recovery in the same manner as deposed by P.W. 1. He identified the notice given to the appellants/convicts under Section 50 of the NDPS Act, which was issued under his signature and upon his identification same was exhibited as Exhibit No. 1, 1/1 and 1/ 2, respectively. It was also deposed by him that all 43 packets were divided in two lots, where in one lot 19 kilograms and in another 136 kilograms



of *ganja*, was divided as per size of packets, where both lots were marked as A & B. Two samples from each lot of 25 grams were taken and marked as AS1 & AS2 (from lot A) and BS1 & BS2 (from lot B). Rest of the materials were sealed in 6 nylon bags, which also bearing his signature and also the signature of accused persons and two independent witnesses. He also deposed that search-cum-seizure list was prepared by him and bearing his signature, which he identified during the trial and upon his identification same was exhibited as Exhibit No. 2. He also identified the signatures as available over notice, which was given to appellants-accused u/s 67 of the NDPS Act, which upon his identification were exhibited as Exhibit No. 3, 3/1, 3/2, 3/3 and 3/4, respectively. He also submitted that the statement of appellant-accused Surendra Debbarma was recorded by P.W. 1 (Pramanand Singh), bearing his signature, which he identified before the court and upon his identification, it was exhibited as Exhibit No. 4. Upon the request of appellant Tapan Debbarma his statement was recorded by him in presence of P.W. 1 (Pramanand Singh) which bears his



signature, which upon his identification, exhibited as Exhibit No. 4/1. The statement of Vijay Das was recorded in his own hand writing and it was recorded before P.W. 3 (Rahul Kumar Purbey), which runs in 6 pages. He identified the signature of P.W. 3 over there and upon his identification it was exhibited as Exhibit No. 4/2. It was submitted that seized *ganja* was deposited with Malkhana with permission of court and receipt was prepared of that effect bearing signature of Malkhana incharge namely Sunil Dubey (not examined) which he identified before learned trial court and upon his identification same was exhibited as Exhibit No. C. It is further stated that seized Scorpio vehicle was deposited with Musri Gharari Police Station and for said deposition a requisition was given to SHO Musri Gharari, bearing his signature and he also received receiving of vehicle alongwith key, said receipt was bearing the signature of SHO Brajnandan Singh (not examined) and upon his examination same was exhibited as Exhibit No. 6/1. He deposed to receive the chemical report of samples AS1 and BS1 from CRCL Kolkata. He also deposed to record the statement of



two independent witnesses namely Santosh Rai and Ramesh Kumar (both not examined). He identified the signature of these witnesses, which upon his identification exhibited as Exhibit 9. He deposed that investigation of this case was done by him as per departmental direction and consequent upon a complaint petition was prepared on 30.06.2018, which bears his signature, which upon his identification exhibited as Exhibit No. 10.

20.1. Upon cross-examination, he stated that after stopping the vehicle, they came to Musri Gharari Police Station from Musri Gharari Chowk. All paper work was completed at Musri Gharari Police Station. It was stated by him that he came with both independent witnesses at Musri Gharari Police Station, contradicting the version of P.W. 1. It was categorically stated by him that he did not made any endeavor to call any Gazetted Officer of the locality. He denied the suggestion that there is no any such person as of independent witnesses in the said village. It was stated by him that independent witness of seizure list is Santosh Rai, summon was issued to him, he identified said summon



where report of concerned Police Station was mentioned that no person of such name was available in this area, which was already been exhibited as Exhibit No. A. He denied the suggestion that he mentioned wrong name as seizure list witness. It was stated by him that AS2 sample was taken at the time of seizure, which bears the seal of NCB Patna bearing mark "no. 1", upon his identification it was exhibited as Material Exhibit No. I. He also identified BS2 sample which upon his identification was exhibited as Material Exhibit No. II. The representative sample taken on 11.09.2019 from lot A & B as aforesaid was taken before Sri Chandrabhushan Ram, Judicial Magistrate, 1st Class Samastipur, bearing mark A-1 and B-1, which upon his identification was exhibited before court as Material Exhibit No. III and IV. The brass seal having impressions "I" and "II" were exhibited before court, which was used for sealing purpose and which upon his identification exhibited as Material Exhibit No. V. Inventory certification of this case was done by Judicial Magistrate 1st Class, Sri Chandrabhushan Ram on 11.09.2021 in Samastipur Civil Court. The



photographs of recovered *ganja* and alleged Scorpio vehicle were done before Judicial Magistrate, which is Annexure No. 2 and 3 of the complaint and same bearing his signature and also the signature of Judicial Magistrate, 1st Class, Sri Chandrabhusan Ram, which upon his identification exhibited as Material Exhibit No. VI and VII. It was stated that he did not record the statement of photographers who took photographs of material exhibit VI and VII.

21. **P.W. 3 is Rahul Kumar Purbey,** who also supported the manner of recovery, sampling and seizure in the same manner as it was earlier deposed by P.W. 1 & P.W. 2/informant through their examination-in-chief and same not required to repeat for the sake of brevity. It was stated by him that he alongwith other raiding team members arrived at Musri Gharari Chowk on 04.01.2018 at about 10:00 PM, contrary to the statement of P.W. 1 & P.W. 2 who said to arrive at Musri Gharari Chowk on next day i.e., 05.01.2018 at about 9:30 AM. He stated to remain at Musri Gharari for about three hours, which further appears in contradiction to the statement of P.W. 1 & P.W. 2, who said



that immediately after stopping the Scorpio vehicle in issue they came to Musri Gharari Police Station, which was just ten steps ahead. It was stated by him that both independent witnesses were persuaded by them on spot itself as to join investigation, which also appears contradictory to the statement of P.W. 1. He did not investigate further regarding availability of independent witnesses despite availability of report in terms of Exhibit No. 1, that no such persons are available in locality.

22. **P.W. 4 is Ravi Ranjan Kumar,** who also deposed in the similar manner regarding raid, constitution of raiding team, sampling, seizure and sealing of contraband as it was earlier deposed by P.W. 1 & P.W. 2 through their cross-examination.

22.1. Upon cross-examination, it was stated by him that entire occurrence/recovery took place before him. He stated to arrive at Musri Gharari on 05.01.2018 at about 9:30 PM, contradicting the statement of P.W. 3. They did not informed any Gazetted Officer before search operation. He called local witness at the time of search. The name of



seizure list witness was Santosh Rai son of Devnarayan Rai resident of village Vishambharpur, Alloth, P.S. Musri Gharari, District-Samastipur but from Exhibit A, it appears that summon was issued to said Santosh Rai on aforesaid address, which upon service it was reported by SHO, Musri Gharari that no person of such name is available in this area.

23. With aforesaid factual aspects, oral and documentary evidences in hand, it appears apposite to discuss the relevant legal ratio as settled through different legal reports of Hon'ble Supreme Court which are as under:-

24. In the matter of Full Bench decision of Hon'ble Bombay High Court in the case of **Jayantilal Modi and Another Vs. State of Maharashtra** reported in **[2001 (2) Mh.L.J. 615]**, it was held while answering the reference in the following terms:

"In respect of an offence under the Narcotics Drugs and Psychotropic Substances Act, 1985, it is necessary for the empowered officer to comply with the provisions of Section 42, even when the information received by him is regarding the commission of an offence in a public place of the like mentioned in the explanation to Section 43."



25. In this context, it would be further apposite to refer paragraph '9' of the legal report in the matter of **State of Haryana Vs. Jarnail Singh (supra)** which reads as under:-

"9. Sections 42 and 43, therefore, contemplate two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. If seizure is made under Section 42 between sunset and sunrise, the requirement of the proviso thereto has to be complied with. There is no such provision in Section 43 of the Act and, therefore, it is obvious that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 of the NDPS Act for searching the vehicle between sunset and sunrise."

26. In view of above, coming back to the facts of the present case, where a submission was raised by the State as Section 42 of the Act is not required to be followed in the present case is not appearing convincing.

27. Further, Hon'ble Supreme Court held through



Ashok (supra), **Jitendra** (supra), and **Gorakh Nath Prasad** (supra) that conviction of the appellant of the case unsustainable as prosecution failed to produce the material exhibits (ganja) during the trial.

28. There is another glaring flaw in the prosecution's case as samples were admittedly not drawn in the presence of a Magistrate, as contemplated under Section 52-A(2)(b) of the Act, which is mandatory requirement, as it has been held in the matter of **Union of India Vs. Mohanlal** (supra).

29. It would be apposite to reproduce in this connection paragraph 6, 8 and 13 of the judgment of Hon'ble Supreme Court in the case of **Gorakh Nath Prasad** (supra) which are as under :-

"6. The NDPS Act provides for a reverse burden of proof upon the accused, contrary to the normal rule of criminal jurisprudence for presumption of innocence unless proved guilty. This shall not dispense with the requirement of the prosecution to having first establish a prima facie case, only whereafter the burden will shift to the accused. The mere registration of a case under the Act will not ipso facto shift the burden on to the accused from the very inception. Compliance with statutory requirements and



procedures shall have to be strict and the scrutiny stringent. If there is any iota of doubt the benefit shall have to be given to the accused.

8. The remaining prosecution witnesses being police officers only, it will not be safe to rely upon their testimony alone, which in any event cannot be sufficient evidence by itself either with regard to recovery or the seized material being ganja. No explanation has also been furnished by the prosecution for non-production of the ganja as an exhibit in the trial. The benefit of doubt will, therefore, have to be given to the appellant and in support of which learned Senior Counsel Shri Rai has relied upon *Jitendra v. State of M.P.* (2004) 10 SCC 562 and reiterated in *Ashok alias Danga Jaiswal v. State of Madhya Pradesh* (2011) 5 SCC 123 as follows:

"12. Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused.

13. It may be noted here that in *Jitendra v. State of M.P.*, (2004) 10 SCC 562, on similar facts this Court held that the material placed on record by the



prosecution did not bring home the charge against the accused beyond reasonable doubt and it would be unsafe to maintain their conviction on that basis. In *Jitendra (supra)*, the Court observed and held as under: (SCC pp. 564-65, paras 5-6)

'5.The evidence to prove that charas and ganja were recovered from the possession of the accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW 7), Angad Singh (PW 8) and Sub-Inspector D.J. Rai (PW 6), there is no independent witness as to the recovery of the drugs from the possession of the accused. The charas and ganja alleged to have been seized from the possession of the accused were not even produced before the trial court, so as to connect them with the samples sent to the forensic science laboratory. There is no material produced in the trial, apart from the interested testimony of the police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the forensic science laboratory were taken from the drugs seized from the possession of the accused. ...

6.... The best evidence would have been the seized materials which ought to have been produced during the trial and



marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned.' "

30. It is further apposite to reproduce the paragraph 27, 28, 29, 30, 31, 32, 55, 56, 57 & 58 of the judgment of Hon'ble Supreme Court in the case of **Noor Aga** (supra) as to understand the implication of Section 35 and 54 of the Act, which are as under:-

"**27.** Section 43, however, empowers an officer of any department mentioned in Section 42 to detain and search any person who he has reason to believe has committed an offence punishable under the Act in a public place. Section 50 provides for the conditions under which search of persons is to be conducted. Section 51 provides for application of the Code of Criminal Procedure, 1973 insofar as they are not inconsistent with the provisions of the Act. Section 52 provides for disposal of persons arrested and articles seized.



28. Section 52-A provides for disposal of seized narcotic drugs and psychotropic substances; sub-section (2) whereof reads as under:

"52-A. (2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of

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

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence



of such Magistrate and certifying the correctness of any list of samples so drawn.”

29. Indisputably, the proper officers of the 1962 Act are authorised to take action under the Act as regards seizure of goods, documents and things.

30. We may notice Section 110 of the 1962 Act, sub-section (1) whereof reads as under:

“110. *Seizure of goods, documents and things.*—(1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods:

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

(1-A) The Central Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant consideration, by notification in the Official Gazette, specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (1), be disposed of by the proper officer in such manner as the Central Government may, from time to time, determine



after following the procedure hereinafter specified.

(1-B) Where any goods, being goods specified under sub-section (1-A), have been seized by a proper officer under sub-section (1), he shall prepare an inventory of such goods containing such details relating to their description, quality, quantity, mark, numbers, country of origin and other particulars as the proper officer may consider relevant to the identity of the goods in any proceeding under this Act and shall make an application to a Magistrate for the purpose of—

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

(b) taking in the presence of the Magistrate, photographs of such goods, and certifying such photographs as true; or

(c) allowing to draw representative samples of such goods, in the presence of the Magistrate, and certifying the correctness of any list of sample so drawn.

(1-C) Where an application is made under sub-section (1-B), the Magistrate shall, as soon as may be, allow the application.”

31. Indisputably, the Central Government has issued guidelines in this behalf being Standing Order 1 of 1989 dated 13-6-1989 which is in the following terms:

“WHEREAS the Central Government considers it



necessary and expedient to determine the manner in which the narcotic drugs and psychotropic substances, as specified in Notification No. 4/89 dated 29-5-1989 [F. No. 664/23/89-Opium, published as S.O. 381(E)], which shall, as soon as may be, after their seizure, be disposed of, having regard to their hazardous nature, vulnerability to theft, substitution and constraints of proper storage space;

Now, therefore, in exercise of the powers conferred by sub-section (1) of Section 52-A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) (hereinafter referred to as 'the Act'), the Central Government hereby determines that the drugs specified in the aforesaid notification shall be disposed of in the following manner...."

These guidelines under the Standing Order have been made under the statute, and heroin is one of the items as substances listed for disposal under Section I of the Standing Order.

32. Paras 3.1 and 6.1 of the Standing Order read as under:

"Preparation of inventory

3.1. After sampling, detailed inventory of such packages/containers shall be prepared for being enclosed to the panchnama. Original wrappers



shall also be preserved for evidentiary purposes.

Certificate of destruction

6.1. A certificate of destruction (in triplicate) (Annexure III) containing all the relevant data like godown entry no., file no., gross and net weight of the drugs seized, etc. shall be prepared and duly endorsed by the signature of the Chairman as well as members of the Committee. This could also serve the purpose of panchnama. The original copy shall be posted in the godown register after making necessary entries to this effect, the duplicate to be retained in the seizure case file and the triplicate copy will be kept by the Disposal Committee.”

55. The provisions of Section 35 of the Act as also Section 54 thereof, in view of the decisions of this Court, therefore, cannot be said to be ex facie unconstitutional. We would, however, keeping in view the principles noticed hereinbefore, examine the effect thereof vis-à-vis the question as to whether the prosecution has been able to discharge its burden hereinafter.

Burden of proof

56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of



minimum sentence, enabling provisions granting power to the court to impose fine of more than maximum punishment of Rs 2,00,000 as also the presumption of guilt emerging from possession of narcotic drugs and psychotropic substances, the extent of burden to prove the foundational facts on the prosecution i.e. "proof beyond all reasonable doubt" would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance with the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of "wider civilisation". The court must always remind itself that it is a well-settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In *State of Punjab v. Baldev Singh* [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] it was stated: (SCC p. 199, para 28)

"28. ... It must be borne in mind that severer the



punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed.”

(See also *Ritesh Chakarvarti v. State of M.P.* [(2006) 12 SCC 321 : (2007) 1 SCC (Cri) 744])

57. It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court but it is well settled that suspicion, however high it may be, can under no circumstances, be held to be a substitute for legal evidence.

58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is “beyond all reasonable doubt” but it is “preponderance of probability” on the



accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.”

31. Standing Instruction “No. 1 of 1988” dated 15.03.1988 of Narcotics Control Bureau, Government of India issued under Section 52A of the N.D.P.S. Act prescribes the detailed procedure for sampling, sealing and despatching the seized sample to the laboratory for test. Clauses 1.4, 1.5, 1.6 and 1.9 of the Standing Instruction No. 1 of 1988 dated 15.03.1998 read as under:

“1.4 If the drugs seized are found in packages/containers, the same should be serially numbered for purposes of identification. In case the drugs are found in loose form, the same should be arranged to be packed in unit containers of uniform size and serial numbers should be assigned to each package/ container. Besides the serial numbers, the gross and net weight, particular of the drug and the date of seizure should invariably be indicated on the packages. In case sufficient space is not available for recording the above information on the package, a Card Board label, should be affixed with a seal of the seizing officer and on this Card Board label, the above details should be recorded.



1.5 Place and time of drawal of sample

Samples from the Narcotic Drugs and Psychotropic Substances seized must be drawn on the spot of recovery, in duplicate, in the presence of search (Panch) witnesses and the person from whose possession the drug has been recovered, and mention to this effect should invariably be made in the panch nama drawn on the spot.

1.6 Quantity of different drugs required in the sample

The Quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the cases of Opium, Ganja and Charas/Hashish where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.

1.9 It needs no emphasis that all samples must be drawn and sealed; in the presence of the accused, Panchnama witnesses and seizing officer and all of them shall be required to put their signatures on each sample. The official seal of the seizing officer should also be affixed. If the person, from whose custody the drugs have been recovered, wants to put his own seal on the sample, the same may be allowed on both the original and the duplicate of each of the samples.”

32. The question as to whether the compliance of the guidelines issued by Standing Instruction No. 1 of 1988



would vitiate the trial was considered by the Hon'ble Supreme Court in **Khet Singh Vs. Union of India** since reported in **AIR 2002 SCC 1450, Noor Aga Vs. State of Punjab** since reported in **(2008) 16 SCC 417** and **Union of India Vs. Balmukund and others** since reported in **2012 (9) SCC 161**.

33. In **Khet Singh** (supra) after examining the said issue the Hon'ble Supreme Court held in para 10 as under:

"10. The instructions issued by the Narcotics Control Bureau, New Delhi are to be followed by the officer in-charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer in-charge of the investigation....."

34. In **Noor Aga (supra)** after giving thoughtful consideration to the guidelines issued under the N.D.P.S. Act in the Standing Order the Hon'ble Supreme Court observed in paras 89 to 91 as under:

"89. Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-à-vis a



departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefore, it becomes obligatory on the part of the subordinate authorities to comply therewith.

90. Recently, this Court in *State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr.* [(2008) 3 SCC 582], following the earlier decision of this Court in *Union of India v. Azadi Bachao Andolan* [(2004) 10 SCC 1] held that statutory instructions are mandatory in nature.

91. The logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution."

Conclusion

35. With aforesaid settled legal propositions in hand, now coming to the fact of this case, it is apparent that



entire search operation was done in the absence of the Gazetted Officer/Executive Magistrate. It is an admitted position that none of the independent witnesses as claimed by prosecution were examined during the trial and even from Exhibit No. 1, it can be gathered that no such persons are available in said locality, who was claimed to be an independent witnesses by prosecution. From the depositions of all prosecution witnesses it appears that samples were not drawn from each and every packets. There is also a doubt regarding manner in which representative sample of seized contraband was drawn. It also appears that entire seizure and sampling and paper work were carried out at the police station and not at the place of occurrence. One of the important member of the N.C.B. raiding team i.e., P.W. 3 creates a serious doubt by stating that he alongwith other members arrived on 04.01.2018 at Musri Gharari, whereas all rest three prosecution witnesses deposed that they arrived Musri Gharari on 05.01.2018 at about 9:30 AM. Therefore, the entire work of sampling, seizure and sealing appears doubtful and is not in terms of settled propositions



of law as discussed above.

36. In view of aforesaid discussions, it can be said safely that prosecution failed to established its case, beyond reasonable doubts.

37. Hence, both above-mentioned appeals stand allowed.

38. Accordingly, the impugned judgment of conviction dated 20.12.2019 and order of sentence dated 24.12.2019 passed by learned 1st Additional Sessions Judge-cum-Special Judge, NDPS Act, Samastipur in NDPS Case No. 07 of 2018 (arising out of N.C.B. Crime Case No. 01 of 2018 & C.R. No. 1507 of 2018) is, hereby, set aside/quashed.

39. Accordingly, all above-named appellants, namely, Surendra Debbarma & Tapan Debbarma of Cr. App. (SJ) No. 1571 of 2020 & Vijay Das of Cr. App. (SJ) No. 528 of 2020 are acquitted of the charges levelled against them by the learned trial court.

40. Since appellants are in custody in connection with these cases, they are directed to be released forthwith,



if not required in any other case. Fine if any deposited, be returned to appellants forthwith.

41. Office is directed to send back the Trial Court Records (TCRs) along with a copy of this judgment to the learned trial court, without delay.

(Chandra Shekhar Jha, J.)

S.Tripathi/-

AFR/NAFR	NAFR
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