

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A 279 of 2008

**Subhasis @ Subhasish Majumder @ Bubun
-Vs-
The State of West Bengal**

For the Appellant : Mr. Swapan Mallick
Ms. Sudeshna Das

For the State : Ms. Faria Hossain

Heard on : 27.09.2023, 29.09.2023, 16.10.2023,
19.01.2024

Judgment on : 20.03.2024

Ananya Bandyopadhyay, J. :-

1. This appeal is preferred against the judgment and order of conviction dated 05.04.2008 and 07.04.2008 passed by the Learned Additional Sessions Judge, Special Court under N.D.P.S. Act, Barrackpore in Sessions Case No. N-27/2007 convicting the appellant under Section 20(b)(ii)(B) of N.D.P.S. Act and sentenced to suffer rigorous imprisonment for 4 years and to pay a fine of Rs. 10,000/- in default to suffer rigorous imprisonment for 3 months.

2. The prosecution case gained its momentum on the basis of a suomoto complaint dated 19.04.2006 replicated as follows:-

“In producing herewith the arrested accused person named Subhasis Majumder @ Bubun (28 yrs.) S/o Sri Prasanta @ Kesto Majumder of Halisahar, Rathtala, P.O.- Halisahar, P.S. Bizpur, Dist.-North 24 Parganas

along with seized articles, viz (i) One paper packet containing 5 Kgs. 100 grms. Of dry ganja leaf marked as exhibit 'A' (ii) One paper packet containing 50 (fifty) grms., of dry ganja leaf taken as sample, marked as exhibit 'B' from the exhibit 'A' (iii) One old nylon bag as per original seizure list. I S.I. Monirul Islam Sarkar of Bizpur P.S. do hereby lodged this complaint against the above noted accused person to the effect that today 19.04.2006 at 06.15 hrs. I received a secret telephonic information from my source that one notorious and highly wanted criminal Subhasis Majumder @ Bubun is selling ganja at workshop road (from Tetultala to Kanchrapara railway workshop) near V.S.N.L. main gate Halisahar P.S. Bizpur& 1 diaried this information vide Bizpur P.S. G.D.E. No.-1079 dated 19.04.06 and informed the O.C. Bizpur P.S. about this information, and as per his order myself along with S.I. Gautam Saha, A.S.I. Tilak Banerjee, A.S.I. Samir Karmakar, Const. 517 Manik Ghosh, Const. 2637 Subrata Mallick, Const. Ashoke Saha being accompanied by the O.C. Bizpur P.S. Sri Prasenjit Banerjee left P.S. to workout the information by jeep (Govt.) no.-WBP 3029. When we were about to move out from the P.S. at that very time D.D.I. Barrackpore, one Inspector Prabir Sanyal also arrived at the P.S. he also stated that he arrived at this P.S. to verify same information as he has also received the same information from his source. He also accompanied us. At the time of getting departure from the P.S., we took investigation Kit including weigh balance and different weights, camera etc. At 07.00 hrs., we reached at Halisahar Tetultala more and from these we collected disinterested witnesses namely (i) Soumen Das (24) S/o Sri Sunil Das of Kumorpara, 2 No. gate of W.B.N.V.F training

centre P.O. Kanchrapara P.S. Bizpur (ii) Mahesh Bansfore (31) S/o Lt. Balwant Bansfore of Rath tala, Gram Kanchrapara P.O. Kanchrapara P.S. Kalyani, Dist. Nadia and requested them remain present during search and they voluntarily agreed to remain present. At about 07.05 hrs we reached near the V.S.N.L., Halisahar main gate and contacted with my source and as identified by him. We started moving towards the pointed out person, after keeping our vehicles at a safe distance. On seeing the arrival of police the said pointed out person started running away. We chased him trolly and when the person fleeing away he repeatedly He fell down, but at chase we were able to surround him and detained him. We disclosed our identity to him and on asking he stated his name and address as noted above. I then issued notice upon him stating that he is person are to be searched as he is possessing ganja as per our information and he received the notice and stated that he should be searched in presence of C.1. Naihati, Gazzeted Officer. Accordingly the O.C. Bizpur P.S. informed C.I. Naihati Sri Anup Bandhayapaday and requested him to come to the spot and O.C. Bizpur P.S. also informed S.D.P.O. Barrackpore over telephone and requested him to keep ready one Ld. Executive Magistrate. On arrival of C.I. Naihati I offered him to search ourselves first and accordingly he searched us but found nothing except Govt. arms and ammunition I also prepared a nil search list, which has been duly signed by us and acknowledged by him. In presence of the above noted witnesses and as per direction of the C.I. Naihati I searched his (accused) persons and recovered one old nylon bag from his right hand and found one confessed paper packet inside the said bag. On

interrogation he confessed that he brings ganja to sell it in the locality. On opening the paper packet we found dry ganja leaf. With the help of weigh balance & different weights the dry ganja leaf was found to weight a total of 5 Kgs. 100 grms. I then took out 50 grms., of dry ganja leaf from the total recovery as sample in a paper packet. After observing all legal formalities I seized (i) One paper packet containing 5 Kgs. 100 grms. of dry ganja leaf, marked as Exhibit "A" (ii) One paper packet containing 50 grms. of dry ganja leaf taken as sample from Exhibit 'A' and marked as exhibit 'B' (iii) One old nylon bag, inside which Sl. no. (i) was found to kept, under proper seizure list duly signed by the witnesses, C.I. Naihati, D.D.I. Barrackpore as the aced, failed to produce any valid documents in support of possessing and carrying such dry ganja leaf. I also labelled and sealed the said seized articles. I also supplied a copy of seizure list to the accused and he received the same. I then arrested him for violating the provision of 20(b) of N.D.P.S. Act after observing all legal formalities & communicating the ground of his arrest. I also took photograph of the above noted accused along with seized articles."

3. Learned Advocate for the appellant submitted that –

- i. The investigating officer S.I. Ajoy Roy Chowdhury was a member of the raiding party which would appear from the evidence of PW-6 constable Manik Ghosh. As such the investigating officer was an interested person which has caused serious prejudice to the appellant.
- ii. It would appear from the evidence of PW-7 Monirul Islam that he along with Inspector PW-4 and others reached to the spot. As such

the Inspector A.K. Bandhyopadhyay was a member of raiding party, was an interested witness and his presence did not fulfill requirement of Section 50 of the N.D.P.s. Act. As such the search and seizure was not conducted in accordance with the provision of N.D.P.S. Act.

- iii. The police had taken action on the unrecorded information, as such the trial has been vitiated and the appellant had been seriously prejudiced.
- iv. There was no evidence that weight of the alleged seized articles was done in presence independent seizure witnesses and not chart was prepared to that effect on the other had it was the evidence of PW-3 that he signed on a blank paper and he did not seen any seized article nor any person from whom it was seized. As such the search and seizure was not done at the alleged place of occurrence and also not in accordance with the provision of the N.D.P.S. Act.
- v. Except PW-2 and PW-3 all the witnesses are police personnel and those two independent witnesses nowhere deposed that the appellant was told about his right to be searched in presence of Gazatted Officer or Magistrate, nor any information was sent to the S.D.P.O. or I.C. It would appear from the cross-examination of PW-8 that there was no document to prove that the complainant informed the officials from the place of occurrence. In cross-examination PW-7 stated that Inspector Prabir Sanyal is an Inspector of Bengal Police. No other Gazatted Officer was contacted in connection with the search and seizure.

- vi. In order to prove the case prosecution has examined as many as 8 witness and exhibited document Ext. 1-8 and MAT Ext. I-III. Out of 8 witnesses PW-1 namely A.S.I. Pranab Kumar Goswami attached to Bijpur P.S. North 24 Parganas who received the written complaint S.I. Monirul Islam Sarkar (PW-7), the complaint has been marked as Ext. 1 and Formal F.I.R. marked as Ext. 2 filed by PW-1.

During cross-examination PW-1 deposed that he did not receive any signature from the complainant.

- vii. PW-2 Ashok Saha, Constable attached to Bijpur P.S. North 24 Parganas was member of raiding party the Ganja was brought to P.S. and seizure list was prepared at P.S. seized alamat marked as Ext. 3.
- viii. PW-3 Mahesh Bansal – seizure witness signature on seizure list marked as Ext. 3/2. During his cross-examination he deposed that he signed on the seizure list on a black paper. He did not see any alamat and any person at that time.
- ix. PW-4 Anup Kumar Bandhopadhyay, Inspector of Police (Gazetted Officer) in his presence seizure list was prepared.

During his cross-examination he deposed that he has not seen any level in Mat Ext. I and II. The quantum of Ganja was not mentioned in the level. There was no signature of him and independent witness. There was no mention in the seizure list that search was made in his presence.

- x. PW-5 S.I. Prasenjit Banerjee O.C. Bijpur P.S. North 24 Parganas. He received information from S.I. Monirul Islam Sarkar which was incorporated in G.D. He accompanied PW-7.

During cross-examination he deposed that weighment chart was prepared, inventory list was not prepared, no separate impression of the seal used at the place of occurrence was taken in separate sheet.

- xi. PW-6 Manik Ghosh – Constable, member of raiding party seizure witness marked Ext. 3/4. He accompanied PW-7 and other officers. During cross-examination he deposed that at the time of raid only police personnel was there. S.I. Ajoy Chowdhury was also there.
- xii. PW-7 S.I. Monirul Islam Sarkar – Complainant, during examination in chief he deposed that he could not recall the G.D. Entry number. Out of 2 witnesses one is Soumen Das and other witness he could not recall.

During cross-examination he deposed that the place, time and signature was not there in notice under Section 50 of N.D.P.S. Act. There was no signature on the level. Only P.S. Case No. The level he prepared which he found inside the sample packet. He had informed O.C. Bijpur P.S. North 24 Parganas verbally. He did not inform in writing. Inspector Prabir Sanyal was an Inspector of Bengal Police. No other Gazetted Officer was contacted in connection with search and seizure. The place, time and signature were not mentioned.

- xiii. PW-8 Ajoy Roy Chowdhury – I.O. of the case. He sent the alamat and the sample affixing his seal and signature to the Court for

sending the sample to the FSL. He received the report of FSL which has marked as Ext. – 7. Challan and forwarding report marked as Ext. 6. He examined the witness except PW-3, PW-4 and PW-5. No other person had been cited as witness before the Court. He drew the sketch map Ext. 8. After completion of investigation he submitted Charge-Sheet.

- xiv. During cross-examination he deposed that he had not taken any G.D. Entry. There was no document that the complainant informed the matter to S.D.P.O. or I.C. There was no document that the complainant informed the matter informed the official from the place of occurrence. As per evidence of PW-6 I.O., PW-8 was a member of raiding party. PW-8 has not taken extract of G.D. entry. The alamat was in custody of duty officer. There was no note when he received back from Court. As per evidence PW-3 and PW-8 was a member of raiding party. There was no document that the complaint informed the matter to S.D.P.O. or I.C. There was no document that the complainant informed the matter in the official form the place of occurrence. The search and seizure was improper.
- xv. The G.D. entry was not produced. There was several contradiction in the evidence of the prosecution witnesses. The photograph was not exhibited. The inspector Prabir Sanyal had been the inspector of the Bengal police. The investigation has faulty. One of the witnesses Soumen Das was not examined. Inventory was not prepared. Weighment chart was not prepared. The sample of 64

grams of ganja was not sent for examination to the FSL. The extract of the Malkhana entry was not collected.

3. The Learned Advocate for the State referred to paragraph 5, 6, 7, 8 of the impugned judgment stating that the queries and contentions of the Learned Advocate for the appellant had been aptly answered in the aforesaid paragraphs in the impugned judgment.
4. A circumspection of the prosecution witnesses revealed as follows:
 - i. PW-2 in his deposition stated that they arrested one person viz. Bubun Majumder, who was present in Court and was identified. They brought the accused to P.S. A bag was recovered from Bubun containing ganja. The ganja was brought to P.S. and S/L was prepared at the P.S. The seized alamats were identified. The seized alamats were marked as Exbt.-1 and 2. His signature on the S/L identified and marked as Exbt.-3/1.
 - ii. PW-3 in his deposition identified his signature on the S/L marked as Exbt.-3/2. In his cross-examination he stated that at the time of seizure he did not see any seized alamats or any person.
 - iii. PW-4 in his deposition stated that on the relevant date, at about 07:10 hrs., after getting information from S.I. Prasenjit Banerjee he went near the gate of V.S.N.L. Halisahar. On reaching there, he found one Bubun Majumder was detained by other police officers having ganja in his possession. He disclosed his identity as a Gazette Officer. He asked him whether he wanted to be searched in his presence, to which he agreed. Prior to that, Subhashish Majumder searched them. As per his instruction, Manirul Islam

Sarkar searched the accused in his presence and other witnesses. From the bag which he was holding in his right hand a packet wrapped with old newspaper was taken out and opened to find ganja therein. He was asked whether he had any document to prove that he was carrying ganja lawfully, to which he could not produce. Consequently as per his instruction, Manirul Islam seized the said ganja weighing 5.1 kgs., and 50 grams was taken as sample. Both the packet were sealed and labelled, seizure list was prepared in his presence and his signature was marked as Exbt.-3/3.

- iv. In his cross-examination PW-4 stated he could not find any label on Mat-exbt. – I and II. On both the packets, the quantum of ganja was not mentioned on the labels. His signature and that of independent witnesses were absent. In the seizure list did not mention that search was made in his presence.
- v. PW-5 in his deposition stated that on the relevant date he received an information from S.I., Manirul Islam that one person would reach along with ganja near V.S.N.L. gate, Halisahar. The said fact was incorporated in the G.D. Thereafter, he along with other officers went to the P.O. On the way they collected two witnesses. On reaching there, he found a person who disclosed his name as Bubun Majumder @ Subhasish Majumder. They also noticed that he had a bag in his hand and on asking, he disclosed that he was carrying ganja. Accordingly, he asked him whether he wanted to be searched in presence of Gazetted Officer or magistrate, to which he agreed to be searched in presence of Gazetted Officer. Thereafter, C.I. was

informed and accordingly, C.I. was present there and he disclosed his identity and also told the said person that he can search them. Accordingly, search was conducted by the said person. A nill seizure list was prepared. Thereafter, in presence of independent witnesses, the search was conducted and from the said bag, there was a packet containing ganja was found. The said search was conducted as per the instruction of C.I. After taking weight of the ganja, it was found to be 5.1 kgs. Thereafter the said ganja was seized by Manirul Islam. After taking 100 grams of ganja from the total quantum, as sample and it was sealed and labelled. The rest quantity was sealed and labelled in a packet. A seizure list was prepared. Thereafter, the accused was arrested. Along with the accused and the seized alamat, they returned to the P.S. and Manirul Islam lodged a complaint. Accordingly, Bijpur P.S. Case No. 82 dated 19.04.2006 was started u/s 20(i)(b) of N.D.P.S. Act. He was interrogated by the I.O.

- vi. In cross-examination PW-5 stated that no weighment chart was prepared. Inventory list was not prepared. No separate impression of the seal used at the P.O. was taken in a separate sheet. Only a few person walked through the road in from the V.S.N.L. gate. There was no shop or residential house there.
- vii. PW-6 in his deposition stated that he was a constable being no. 517, at that time he attached to Bijpur P.S. On 19.04.2006 he was attached to the P.S. at the same post. On that date he along with Manirul Islam Sarkar (S.I.) and other official went to Halisahar,

Tetultala. On reaching there they found that one person was standing there and on seeing them he fled away. They intercepted him. C.I. Was informed. He came there. In presence of him search was conducted and from the possession of the person 5.1 kgs was recovered. A seizure list was prepared. He signed on the same. The signature was identified and marked as Exbt.-3/4. Thereafter they returned to P.S. His senior officers observed all the formalities before departing from the P.O. He could not identify the accused.

- viii. In his deposition PW-6 stated that at the time of raid only police personnel were there. Then S.I. Ajay Roy Chowdhury was also there. He interrogated them on the date of incident.
- ix. PW-7 in his deposition stated that on 19.04.06 in the morning at about 06:15 a.m. he got source information that a person selling contraband (ganja) near V.S.N.L. gate Taldanga near on the workshop road. Said information was noted in G.D. by him but he could not recall the GDE No. Then he informed the O/C S.I. Presenjit Banerjee and they were about to leave the P.S. for the place of occurrence. Then C.I. DDI Prabir Sanyal also stated that he got similar information and he wanted to participate in the raiding team and then they i.e., Inspector Sanyal, S.I. Gautam Saha, A.S.I. Tilak Banerjee, A.S.I. Samir Karmakar along with inspector Sanyal and others reached to the spot. On the way they took two witnesses name of one witness was Soumen Das, name of the other witness he did not recall. They informed the witnesses about the purpose of their visit and requested them to accompany them and they

consented to accompany them. After reaching the P.O. at about 07:00 a.m., near V.S.N.L. gate Tetultala the source identified the accused Bubun Majumder and he had a plastic bag on his right hand. Seeing them he wanted to flee but they encircled him and informed C.I. Naihati. C.I. Naihat arrived after some time. The accused Subhasis Majumder @ Bubun was presence in court and identified. They informed him that he can take search of the police personnel and search was about to make by the accused but nothing was found. Blank seizure list was prepared and that was the said seizure list marked as Exbt.-5. He then issued notice to him and that was the said notice prepared and signed by him marked exbt.-4. Intimating the person of his right for being searched in presence of gazette or C.I. Naihat., who was also gazette officer. The accused wanted to be searched in presence of C.I. Naihati. The accused had a plastic nylon bag on his right hand and the bag on search found contained a packet. The packet contained loose contraband (ganja) and after weighment in their office kits which they had carried with them. It was found that the total quantity of ganja was 5.1 kgs same of 50 grams was taken. Both the contraband found and also the sample packet was packed, sealed and signed after labelling the same and he obtained signature of the accused on the label and also the witnesses.

The said alamat which was recovered from the accused and that was the said plastic bag which was found in possession of right hand of the accused. All the articles including the bag was seized

from the possession of the accused. Under that seizure list which was prepared and signed by him along with the witnesses and signature of the accused was taken, marked as Mat. Exbt.- II and II. The accused conscious that he was come to sell ganja in the locality. The photograph of the accused was taken along with alamat in a digital camera by him. The digital camera was provided to them by the office. (The prosecution failed to produce photograph and prayed to defer the examination of the witness and undertook produce the same.) The photograph of the accused with alamat was taken by him in digital camera and the photograph was in the C.D., by the negative could not be placed as it was taken by digital camera.

- x. In his cross-examination PW-7 stated that the exbt.-A (the entire contents of contraband) was weighing about 5.1 kgs. Exbt.-B was weighing about 50 grams the total contents was 5.1 kgs. He had informed O/C Bizpore P.S. verbally. He did not inform in writing. Inspector Prabir Sanyal was an inspector of Bengal Police. No other gazette officer was contacted in connection with search and seizure. The signature obtained in the notice was also under carbon impression. The place, time and the signature of witnesses were not there in the notice u/s 50. He did not sent the specimen impression of his seal along with the alamat. The alamat was opened in presence of the court. The label contained in the packet of sample was written by him marked Mat. Exbt.- II/1. There was no label attached or affixed in the alamat bulk. There was no signature on the label only P.S. case number 82 dated 09.04.06 was there. The

P.S. case was entered after the F.I.R. was registered. His specimen impression of seal was not written in the alamat or in the sample. The label he prepared which was found inside the sample packet was not affixed to the sample packet. He did not use his personal seal either in the sample packet or in the alamat packet. No weighment chart was prepared. No inventory was there.

- xi. PW-8 in his deposition stated that he was entrusted with investigation of P.S. Case No. 82 dated 19.04.06. He perused the F.I.R. and C.D. handed over to him and also the alamat. On the same day he sent the alamat and the sample affixing his seal and signature to the court for sending the same to the FSL and it was received to the FSL on 20.04.06. These were the challan and forwarding report marked exbt.-6 and 5/1. He received the report of the FSL. That was the said report marked exbt.-7. He examined the witnesses Soumen Das, Mahesh Bansfore, C.I. Anup Banerjee, S.I. Tilak Banerjee and others. After visiting the P.O. he drew the sketch map with index marked exbt.-8 and 8/1. The alamat was produced in the court that day and on the label of the alamat his personal seal was affixed. (already marked mat. exbt.). He submitted charge sheet after investigation.
- xii. In his cross-examination PW-8 stated that nylon bag marked Mat. Ext. III was not a new bag but it was the same which has been handed over to him. He had not taken extract of GDE No. where the initial source of information was recorded. There was no document that the complainant informed the matter the SDPO of I/C. There

was no document that the complainant informed the officials from the place of occurrence. He received the alamat from the duty officer but it was not noted in the C.D. The time of receipt of alamat has not been noted in the C.D. The time of receipt of alamat has not been noted in the C.D. The alamat was sent to the court on the same day i.e., on 19.04.06 at 11:35 a.m. Till the time it was in his custody and he was making the alamat ready for FSL. He had not noted in the C.D. when it was received back from Court. The alamat was in custody of the duty officer when it was returned to the P.S. after duly signed. Malkhana register was maintained at the P.S. The Malkhana Entry No. 65/06 (serial no. had been mentioned in the C.S.) but he had not collected the extract of Malkhana entry. He had not mentioned in the sketch map who identified the P.O. Mahesh Bansfore and Soumen were examined at the P.O. as noted in the C.D.

5. In ***Raveen Kumar vs. State of Himachal Pradesh***¹, the Hon'ble Supreme Court held as follows:-

“19. It would be gainsaid that lack of independent witnesses is not fatal to the prosecution case. [Kalpnath Rai v. State, (1997) 8 SCC 732 : 1998 SCC (Cri) 134 : AIR 1998 SC 201, para 9] However, such omissions cast an added duty on courts to adopt a greater degree of care while scrutinising the testimonies of the police officers, which if found reliable can form the basis of a successful conviction.

20. The trial court held that no independent witness supported the prosecution case and that the testimonies of the star police-

¹ (2021) 12 SCC 557

witnesses, namely, PW 2 and PW 5, were contradictory. Both these observations are unreasoned and unsubstantiated by the evidence on record. The High Court, on the contrary, has given cogent and lucid reasons as to how the testimony of PW 1 (alleged hostile independent witness) also substantially supports the prosecution case.

21. Although declared hostile by the prosecution, Nam Singh (PW 1), admits to being literate and having signed his statement on the spot. During cross-examination he admits to having duly perused the contents of these documents before having signed them, and of not being under any form of police pressure, thus, seriously undermining any oral statement to the contrary. His deposition independently establishes that the Maruti van of the appellant had indeed been stopped, the appellant's consent was taken, a search had been conducted, certain items were seized and some substance had been weighed and sealed. Although PW-1 claimed not to have specifically witnessed seizure of the charas, but he has not denied so either. He submits that he had gone back to his shop to attend to some customers at that stage of the search. However, he admits to having been shown the extracted sample of charas, which he identified before the trial court. Thus, far from undermining the prosecution version, PW 1's statement broadly corroborates and strengthens the seizure of contraband substance from the possession of the appellant.

22. As regards the question of contradiction between PW 2 and PW 5's statements, we find that the High Court's observations are unimpeachable. It would indeed be patently wrong to suggest that PW 5 deposed that the independent witnesses were called after the suspected contraband had already been recovered from underneath the driver's seat. In fact, both PW 2 and PW 5 unequivocally state that the polythene bag was inspected only after the independent witnesses had arrived.

There might be some confusion over the timing of removal of the other substances, being the tins of ghee, honey, maize, etc., but such trivialities are not material.”

6. In ***Khekh Ram vs. State of Himachal Pradesh***², the Hon’ble Supreme Court held as follows:-

“32. The photographs, claimed by the prosecution to have been taken by the investigating officer, PW 8 with his digital camera to correlate the seized article with the one captured therein, to state the least, wholly lack in credence and persuasion. Not only, as expected, the photographs with the kind of camera used, do not record the date of the procedure i.e. 20-10-2009, some of those do not bear any date whereas the rest are dated 5-1-2008, 7.06 a.m. The prosecution has failed to offer any explanation whatsoever for this anomaly. It is thus more than apparent that the appellant has been implicated in the offence wholly due to the recovery of his bank passbook from the vehicle for which as a consequence his name was recorded in all the documents prepared in connection with the exercise undertaken. In absence of any other cogent, coherent and clinching evidence of his identification as the driver of the Alto car carrying the contraband, this document to reiterate, cannot be acted in isolation to base his conviction. Having regard to the materials on record, it is clear that his arrest in connection with this case was due to the recovery of his bank passbook from the car and not on the basis of his spot identification. The prosecution, in our view, has failed to adduce conclusive and consistent evidence to bring home the charge against the appellant.

33. It is a common place proposition that in a criminal trial, suspicion however grave, cannot take the place of proof and the prosecution to succeed has to prove its case and establish the

² (2018) 1 SCC 202

charge by adducing convincing evidence to ward off any reasonable doubt about the complicity of the accused. For this, the prosecution case has to be in the category of “must be true” and not “may be true”. This Court while dwelling on this postulation, in Rajiv Singh v. State of Bihar [Rajiv Singh v. State of Bihar, (2015) 16 SCC 369 : (2015) 4 SCC (Cri) 837] dilated thereon as hereunder : (Rajiv Singh case [Rajiv Singh v. State of Bihar, (2015) 16 SCC 369 : (2015) 4 SCC (Cri) 837] , SCC pp. 392-93, paras 66-69)

“66. It is well-entrenched principle of criminal jurisprudence that a charge can be said to be proved only when there is certain and explicit evidence to warrant legal conviction and that no person can be held guilty on pure moral conviction. Howsoever grave the alleged offence may be, otherwise stirring the conscience of any court, suspicion alone cannot take the place of legal proof. The well-established cannon of criminal justice is “fouler the crime higher the proof”. In unmistakable terms, it is the mandate of law that the prosecution in order to succeed in a criminal trial, has to prove the charge(s) beyond all reasonable doubt.

67. The above enunciations resonated umpteen times to be reiterated in Raj Kumar Singh v. State of Rajasthan [Raj Kumar Singh v. State of Rajasthan, (2013) 5 SCC 722 : (2013) 4 SCC (Cri) 812] as succinctly summarised in para 21 as hereunder : (SCC pp. 731-32)

‘21. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that “may be” proved and “will be proved”. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between “may

be” and “must be” is quite large and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between “may be” true and “must be” true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between “may be” true and “must be” true, the court must maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense.’

68. In supplementation, it was held in affirmation of the view taken in *Kali Ram v. State of H.P.* [*Kali Ram v. State of H.P.*, (1973) 2 SCC 808 : 1973 SCC (Cri) 1048] that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.

69. In terms of this judgment, suspicion, howsoever grave cannot take the place of proof and the prosecution case to succeed has to be in the category of “must be” and not “may be” : a distance to be covered by way of clear, cogent and unimpeachable evidence to rule out any possibility of wrongful conviction of the accused and resultant miscarriage of justice. For this, the Court has to essentially undertake an exhaustive and analytical appraisal of the evidence on record and register findings as warranted by the same. The above proposition is so well established that it does not call for multiple citations to further consolidate the same.”

7. In **Rizwan Khan vs. State of Chhattisgarh**³, the Hon’ble Supreme Court held as follows:-

“**12.** It is settled law that the testimony of the official witnesses cannot be rejected on the ground of non-corroboration by independent witness. As observed and held by this Court in catena of decisions, examination of independent witnesses is not an indispensable requirement and such non-examination is not necessarily fatal to the prosecution case [see Pardeep Kumar [State of H.P. v. Pardeep Kumar, (2018) 13 SCC 808 : (2019) 1 SCC (Cri) 420]].

13. In the recent decision in Surinder Kumar v. State of Punjab [Surinder Kumar v. State of Punjab, (2020) 2 SCC 563 : (2020) 1 SCC (Cri) 767] , while considering somewhat similar submission of non-examination of independent witnesses, while dealing with the offence under the NDPS Act, in paras 15 and 16, this Court observed and held as under : (SCC p. 568)

“15. The judgment in Jarnail Singh v. State of Punjab [Jarnail Singh v. State of Punjab, (2011) 3 SCC 521 : (2011) 1 SCC (Cri) 1191] , relied on by the counsel

³ (2020) 9 SCC 627

for the respondent State also supports the case of the prosecution. In the aforesaid judgment, this Court has held that merely because prosecution did not examine any independent witness, would not necessarily lead to conclusion that the accused was falsely implicated. The evidence of official witnesses cannot be distrusted and disbelieved, merely on account of their official status.

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 around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature.’”

14. *Applying the law laid down by this Court on the evidence of police officials/police witnesses to the facts of the case in hand, referred to hereinabove, we are of the opinion as the police witnesses are found to be reliable and trustworthy, no error has been committed by both the courts below in convicting the accused relying upon the deposition of the police officials.”*

8. In **Raju v. State of W.B.**⁴, the Hon’ble Supreme Court held as follows:-

“10. *In Narayanaswamy Ravishankar v. Directorate of Revenue Intelligence [Narayanaswamy Ravishankar v. Directorate of Revenue Intelligence, (2002) 8 SCC 7 : 2002 SCC (Cri) 1865] , a three-Judge Bench of this Court considered whether*

⁴ (2018) 9 SCC 708

the empowered officer was bound to comply with the mandatory provisions of Section 42 before recovering heroin from the suitcase of the appellant at the airport and subsequently arresting him. Answering the above question in the negative, the Court held : (SCC pp. 8-9, para 5)

“5. In the instant case, according to the documents on record and the evidence of the witnesses, the search and seizure took place at the airport which is a public place. This being so, it is the provisions of Section 43 of the NDPS Act which would be applicable. Further, as Section 42 of the NDPS Act was not applicable in the present case, the seizure having been effected in a public place, the question of non-compliance, if any, of the provisions of Section 42 of the NDPS Act is wholly irrelevant.”

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.*

13. *The appellant was walking along the Picnic Garden Road. He was intercepted and detained immediately by the raiding party in front of Falguni Club, which was not a building, conveyance or an enclosed place. The place of occurrence was accessible to the public and fell within the ambit of the phrase “public place” in the Explanation to Section 43. Section 42 had no application.*

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16. *In Vijaysinh Chandubha Jadeja v. State of Gujarat [Vijaysinh Chandubha Jadeja v. State of Gujarat, (2011) 1 SCC 609 : (2011) 1 SCC (Cri) 497] (“Vijaysinh”), a Constitution Bench of this Court interpreted Section 50 thus : (SCC pp. 617-18 & 622, paras 20, 29 & 31)*

“20. The mandate of Section 50 is precise and clear viz. if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so.

29. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law-enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

31. We are of the opinion that the concept of “substantial compliance” with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in *Joseph Fernandez* [*Joseph Fernandez v. State of Goa*, (2000) 1 SCC 707 : 2000 SCC (Cri) 300] and *Prabha Shankar Dubey* [*Prabha Shankar Dubey v. State of M.P.*, (2004) 2 SCC 56 : 2004 SCC (Cri) 420] is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in *Baldev Singh* case [*State of Punjab v. Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080].”

17. The principle which emerges from *Vijaysinh* [*Vijaysinh Chandubha Jadeja v. State of Gujarat*, (2011) 1 SCC 609 : (2011) 1 SCC (Cri) 497] is that the concept of “substantial compliance” with the requirement of Section 50 is neither in accordance with the law laid down in *Baldev Singh* [*State of Punjab v. Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080], nor can it be construed from its language. [Reference may also be made to the decision of a two-Judge Bench of this Court in *Venkateswarlu* [*Myla Venkateswarlu v. State of A.P.*, (2012) 5 SCC 226 : (2012) 2 SCC (Cri) 686].] Therefore, strict compliance with Section 50(1) by the empowered officer is mandatory. Section 50, however, applies only in the case of a search of a person. In *Baldev Singh* [*State of Punjab v. Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080], the Court held : (SCC p. 190, para 12)

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

In *State of H.P. v. Pawan Kumar* [*State of H.P. v. Pawan Kumar*, (2005) 4 SCC 350 : 2005 SCC (Cri) 943] (“*Pawan Kumar*”), a three-Judge Bench of this Court held that the search of an article which was being carried by a person in his hand, or on

his shoulder or head, etc., would not attract Section 50. It was held thus : (SCC pp. 360 & 363, paras 11 & 16)

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

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

18. *In Parmanand [State of Rajasthan v. Parmanand, (2014) 5 SCC 345 : (2014) 2 SCC (Cri) 563] , on a search of the person of the respondent, no substance was found. However, subsequently, opium was recovered from the bag of the respondent. A two-Judge Bench of this Court considered whether compliance with Section 50(1) was required. This Court held that the empowered officer was required to comply with the requirements of Section 50(1) as the person of the respondent was also searched. [Reference may also be made to the decision of a two-Judge Bench of this Court in Dilip v. State of M.P. [Dilip v. State of M.P., (2007) 1 SCC 450 : (2007) 1 SCC (Cri) 377]] It was held thus : (Parmanand [State of Rajasthan v. Parmanand, (2014) 5 SCC 345 : (2014) 2 SCC (Cri) 563] , SCC p. 351, para 15)*

“15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application.”

19. Moreover, in the above case, the empowered officer at the time of conducting the search informed the respondent that he could be searched before the nearest Magistrate or before the nearest gazetted officer or before the Superintendent, who was also a part of the raiding party. The Court held that the search of the respondent was not in consonance with the requirements of Section 50(1) as the empowered officer erred in giving the respondent an option of being searched before the Superintendent, who was not an independent officer. It was held thus : (Parmanand case [State of Rajasthan v. Parmanand, (2014) 5 SCC 345 : (2014) 2 SCC (Cri) 563] , SCC pp. 352-53, para 19)

“19. We also notice that PW 10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before the nearest gazetted officer or before PW 5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW 5 J.S. Negi by PW 10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to the nearest Magistrate or the nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW 10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW 5 J.S. Negi, the Superintendent, who was part of the raiding party. PW 5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW 5 J.S. Negi, the search would have been vitiated or not. But PW 10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when

such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW 10 SI Qureshi is vitiated.”

9. Considering the rival contentions of the Learned Advocate for the appellant as well as the Learned Advocate for the State and assailing the evidence on record, it appeared that the prosecution successfully proved the recovery of 5.1 kg. of sample from the nylon bag carried by the appellant in his right hand on 19.04.06 between 7:25 hrs to 8:25 hrs at the main gate of BSNL at Workshop Road, Halisahar under P.S.- Bijpur. The report of the Drug Controller/Chemical Examiner marked as Exhibit-7 evinced the sample of 50 gms dry leaves seized under the seizure list along with the forwarding report marked Exhibit-3 and Exhibit-6 series respectively was weighed to be 64 gms which was the gross weight inclusive of 50 gms of sample as well as the sealed packet along with the label examined to be the contraband, i.e. ‘Ganja’. The Gazetted Officer was the member of a raiding party and the compliance under Section 50 of the N.D.P.S. Act was not required since the person of the appellant was not searched. Section 42 of the N.D.P.S. Act was complied with. The evidence of the raiding party comprised the interested witnesses cannot be discarded since the same had discharged their official duty without any connivance or personal interest to falsely implicate the appellant. Therefore, the evidence of police officials can be relied upon as mentioned in the decisions cited above.
10. The appellant could not produce valid documents for possessing the contraband “Ganja” which was more than the smaller quantity but lesser

than the commercial quantity having violated the provisions of Section 8 of the N.D.P.S. Act.

11. In view of the aforesaid delineation of evidence, the provisions of the N.D.P.S Act and the decisions cited above, the prosecution was successful in proving its case without any irregularity in search and seizure, the recovery of the 'Ganja' from the bag in the possession of the appellant. Considering the facts and circumstances of the case and the lapse of time, the conviction is upheld under Section 20(b)(ii)(B) of N.D.P.S. Act. However, the sentence is reduced to two (2) years.
12. In view of the above discussions, the instant criminal appeal is dismissed modifying the sentence to two (2) years.
13. There is no order as to costs.
14. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
15. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)