

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 620 of 2008

Ramanath Sarkar

-Vs-

State of West Bengal

For the Appellant	: Mr. Debasis Kar Mr. Subhajit Chowdhury
For the State	: Mr. Bidyut Kumar Roy Ms. Rita Dutta
Heard on	: 13.09.2023, 06.10.2023
Judgment on	: 17.01.2024

Ananya Bandyopadhyay, J. :-

1. The instant criminal appeal is preferred by the appellant against the judgment and order dated 12.08.2008 and 13.08.2008 passed by the Learned Additional Sessions Judge, Special Court, Constituted under Narcotic Drugs and Psychotropic Act, 1985, Barrackpore, North 24 Parganas in S.T. No. 176 of 2007 thereby convicting the appellant for commission of offence punishable under Section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act and sentencing him to suffer rigorous imprisonment for 4 years and to pay fine of Rs.10,000/- and in default to suffer simple imprisonment for 6 months.
2. The prosecution case in short is as follows that *“On 13.11.06 in order to workout a secret information received by the Officer-in-Charge of Noapara Police Station around 16.15 hours a team of police personnel consisting of five members started on a police*

vehicle towards Durga Mandir Oriyapara. On the pointing out by the source the police party encircled the appellant and informed the Circle Inspector of such apprehension and requested him to come to the spot to act as Gazetted Officer. The appellant was purportedly informed of his statutory right of being searched before a Magistrate or a gazetted officer to which appellant agreed to be searched before the Police personnel. On search 3 Kg 250 gms of Ganga was recovered from a nylon bag alleged to have been in the hand of the appellant. The appellant disclosed his name as Ramanath Sarkar. A sum of Rs.9375/- claimed to be sale proceeds was also recovered. Thereafter seizure lists were prepared and it was signed by appellant and two independent witnesses stated to have joined the raiding party during the course of journey towards the alleged place of occurrence. Two samples of 100 gms. each were taken from the contents and duly sealed, labeled and signed. These two packets of sample were sent to Forensic Laboratory for chemical examination. Finally appellant was arrested and brought to the Police Station and the alat and sample packets were deposited in the Malkhana on the same date and sample packets were sent to chemical expert on 15.11.06 and after receiving the report, charge sheet was submitted.”

3. On receipt of the said charge sheet the Learned Additional District and Sessions Judge Special Court Barrackpore, 24 Parganas (North) had taken cognizance of the same. Subsequently a charge under section 20(b)(ii)B of the NDPS Act was framed against the present appellant, who pleaded not guilty and claimed to be tried.

4. During the course of the trial the prosecution examined six witnesses while defence examined none. Prosecution examined S.I. Nanda Dulal Ghosh, the Officer-in-Charge of Noapara Police Station as PW1, Circle Inspector Sushanta Sarkar as PW2, the two public witnesses as PW 3 and 4, S.I. Surajit Kundu as PW5 and S.I. Bhagwan Singh (the investigation officer) as PW6. Apart from the oral evidence prosecution also relied on certain documentary evidence which included the seizure lists, forwarding report, report of the chemical analyst and the formal FIR.

5. Learned Advocate for the appellant submitted that –

- i. The provisions of the Act (as amended till date) show that Legislature has provided for extremely harsh punishment both from the point of loss of liberty and fine. Likewise the law also provides for a "special rule of evidence with regard to possession of any narcotic drug or Psychotropic Substance or any material in respect whereof an accused is alleged to have committed an offence under chapter IV of the NDPS Act.
- ii. Where legislature in its wisdom has made certain provisions of the Act mandatory in order to impart fairness into the proceedings, then purposeful violation of the same renders the resultant conviction and sentence bad inasmuch as legislative mandate when violated casts a grave shadow of doubt on the veracity of the prosecution case itself. In the instant case mandatory provisions of section 42 of the NDPS Act has

been blatantly violated by the members of the raiding party.

- iii. The mandatory requirement of law as provided under section 42 of the NDPS Act is an invaluable right of an accused person and the Hon'ble Apex Court as well as this Hon'ble Court on a number of occasions has laid down that the said provision is of mandatory character and has to be followed in its true letter and spirit. Any breach of the said provision would automatically lead to the rejection of the prosecution case. In the present case the materials as collected and brought on record clearly establish the fact that pursuant to a source information the raid was conducted and thus it was obligatory on part of the prosecution to produce before the court the information which led to the raid.
- iv. In a case where punishment is extremely harsh, prosecution is under an obligation to comply with the various provisions of the Act, which starts even prior to the arrest of the accused or search and seizure and continues till the complaint is filed in court. Thus in any case under the Act, prosecution cannot be successful by merely trying to prove the incident of seizure and in doing so, by totally sidestepping the other requirements of law, which constitute the attending circumstances to the alleged recovery. Such attending circumstances, which have been termed as link evidence, are of great importance inasmuch as they complete the chain

whereby prosecution case becomes credible enough for any court of law to accept. In the case at hand, prosecution at no stage tried to prove the attending circumstance like how the contraband had been kept after its seizure and how the same reached the office of the chemical examiner and how the same was again brought back. Failure to establish these attending circumstances renders the entire prosecution case unworthy of acceptance and on this score alone the appellant is entitled to be acquitted.

- v. Although it has been claimed by the prosecution that during the search and seizure the raiding party had collected two independent witnesses. During the course of the trial however the said witnesses did not support the prosecution case and consequently were declared hostile. In such circumstances the Learned Court is/was left with only the evidence of official witnesses. For such situations the Hon'ble Apex Court as well this Hon'ble High Court has often sounded a note of caution and has held that the trial court should not ordinarily place any reliance on the mere ipse-dixit of official witnesses unless the same is corroborated by independent witnesses.
- vi. In view of the fact that the independent witness did not support the prosecution case, the prosecution could not prove the factum of alleged recovery of the contraband from the possession of the appellant. Failure on part of the prosecution to adduce any evidence in this score

renders the court incapable of scrutinizing the sequence of events including the alleged recovery of the contraband in a neutral light.

- vii. Compliance of section 52A of the Act has been held to be of a mandatory nature. Such mandatory provision had to be complied with in its true letter and spirit. In the present case there was absolutely no evidence far less any convincing evidence, which would indicate compliance of this mandatory provision.
- viii. The Learned Judge has failed to appreciate the fact that the provisions of Section 52 and 57 of the Act has not been complied with. It has been often held by the Hon'ble Apex Court that failure to comply with the aforesaid provisions of law casts a grave shadow of doubt on the prosecution case itself and no conviction should be recorded in a trial where such failure has occasioned. The Learned Judge however being oblivious of this position of law has recorded a perverse finding of guilt against the present appellant.
- ix. Prosecution at no stage could satisfactorily establish the seizure of 3.250 kgs of contraband. A careful scrutiny of the records would clearly indicate that the quantity so alleged was wholly fabricated and such claim of the prosecution has no merit. Furthermore failure on part of the prosecution to examine the chemical analyst in court had dealt a severe blow to the prosecution case itself

inasmuch as it could not be satisfactorily proved that the seized article were indeed contraband in nature.

- x. It is in the evidence of PW1, Officer -in charge of Noapara Police Station that he had no paper/document to show before the court that he had informed the S.D.O. and the S.D.P.O. after interception of the appellant. That apart this P.W.I who acted as the leader of the raiding team failed to produce any document to show that he had informed Circle Inspector about the interception of appellant and had requested the Circle Inspector to come to the place of occurrence to act as a Gazetted Officer before search and seizure. Absence of any evidence clearly portrayed that mandatory provisions of the Act have been completely violated.
- xi. PW-1 failed to establish as to who issued the command certificate and in absence such document the search, seizure and subsequent actions are manifestly unauthorized and illegal.
- xii. PW-1 failed to produce any document to establish that Circle Inspector directed him (PW-1) for causing search and seizure. Moreover he had not taken specimen impression of the seal of the Police Station affixed on the label of alamat in a separate sheet at the place of occurrence. This being a glaring omission rendered distinct identification of the sample not only difficult but most uncertain. On this score alone the prosecution case is unworthy of acceptance.

xiii. It was in the deposition of the circle inspector who figures as PW-5 that weighment chart was not prepared, photograph of appellant with alamat was not taken and inventory was not made. Failure to produce weighment chart was a serious lapse on the part of the prosecution. That apart non-preparation of inventory was a complete violation of the provisions of Section 52A of the Act which cast a serious doubt about transparency of the prosecution case

xiv. The following pieces of deposition of P.W.6 are noteworthy in this contention:

a) It is not recorded in the C.D. when he (PW6) received alamat and from whom it was received. The Malkhana no. is not noted in the C.D.

b) He had not obtained the extract of Malkhana register in connection with the safe custody of alamat and sample.

c) He did not send any sample weighing about 120 gms to the chemical examiner.

d) He did not obtain the extract of the General Diary Entry where the initial information was recorded.

e) The complainant Officer (i.e. PW1) did not take specific impression of his seal nor did he send it to the Chemical Examiner.

These pieces of evidence when assessed in the correct perspective clearly indicate that the prosecution case is nothing but an after thought and merits no consideration.

- xv. The absence of seal impression of Noapara Police Station on a separate sheet of paper required to be sent to the chemical Examiner to establish transparency and also affording an opportunity of a logical comparison of the seal impression on alamat with the seal impression on the separate sheet of paper has further cast a shadow of doubt on the prosecution case.
- xvi. A careful scrutiny of the evidence of witnesses clearly reveals that the prosecution case is an admixture of lies and is only an afterthought right from its every inception. It is apparent that prosecution had presented a concocted version right from the very inception and this fact is evident from the contradictory testimony of the witnesses adduced on behalf of the prosecution. No credence should have been placed by the Learned Judge on such contradictory stands taken by the prosecution witness and as such the prosecution case should have been dismissed on this ground alone.
- xvii. The Learned judge has failed to appreciate the fact the allegations even if taken in their entirety (though not accepting the same) do not disclose the commission of an offence punishable under section 20(b)(ii)(B) of the NDPS Act. Prosecution at no stage of the trial whatsoever could bring on record any evidence on record to prima facie satisfy about the complicity of the appellant with regard to the commission of the offences as alleged. In absence of any credible evidence on this score the impugned

judgment merits no consideration and is liable to be set aside.

xviii. On the basis of the evidence on record the charges framed against the appellant having not been proved, the impugned order of conviction and sentence passed against the appellant is unwarranted and liable to be set aside.

6. The Learned Advocate for the State submitted that the search and seizure was validly conducted. The appellant was arrested on spot with the contraband articles. The Gazetted Officer was summoned to the spot and in his presence the search and seizure was conducted and as such the prosecution was successful in proving its case and the appeal shall be dismissed.

7. A circumsppection of the prosecution witnesses revealed as follows:

- i. PW-1, serving as the O.C of Noapara police station on 13.11.2006, deposed that he had received telephonic information at approximately 4:15 pm from an undisclosed source, indicating that a person was standing at Oriyapara Chowrasta with a nylon bag containing contraband. The received information was duly recorded in the diary under GDE No. 647 dated 13.11.06, and notification thereof was transmitted to his superior officer. While in-route to the specified location, PW-1 enlisted the assistance of two local individuals, namely PW-3 and PW-4, as potential witnesses in the event that contraband was discovered. Upon arriving at the scene, the suspect was identified as the person holding a nylon bag. Subsequently, the suspect was

surrounded, and PW-2 was notified. At approximately 5:30 pm, PW-2 arrived at the location, identified himself as a gazetted officer, and presented a written communication to the appellant, offering the option of being searched either in the presence of a Magistrate or by the police team. The appellant consented to be searched by the police team. Following the appellant's consent, a search was conducted, including the witnesses. A nil seizure list was prepared and marked as Ext.1. During the search of the appellant, a polythene bag containing 3.25 kgs of ganja and Rs. 9375/- cash was recovered. The seizure list was marked as Ext.2. PW-1 extracted a 100grams sample from the ganja and forwarded it to the Drug Control for examination. The contraband was then divided into two packets, one containing 100g marked as Mat.Ext.III and the other containing 3.15 kgs marked as Mat.Ext.I. The seized cash of Rs. 9375/- was marked as Mat.Ext.II, and the polythene bag containing the ganja was marked as Mat.Ext.IV. Subsequent to the search and seizure, PW-1 returned to the police station and initiated the filing of an F.I.R marked as Ext.3 against the appellant. The investigative responsibility for the case was entrusted to PW-6 by PW-1.

- ii. During cross-examination, PW-1 affirmed the apprehending police team included PW-5, ASI Prakash Ghosh, and two other police constables. Additionally, PW-1 clarified that the source of information did not accompany them to the place of occurrence.

- iii. PW-2, serving as the C.I. of Barrackpore on 13.11.06, deposed that he received information from PW-1 regarding the apprehension of a suspect. Upon reaching the place of occurrence, PW-2 identified himself as a gazetted officer to the appellant. The signatures of PW-2 on the nil seizure list, the seizure list containing the contraband, and the packet holding the seized contraband were marked as Ext.1/1, Ext.2/1 and Ext.3/1 respectively.
- iv. PW-3 recounted that, while returning home on the aforementioned date, he was requested by police personnel near the police station to sign a blank paper. The signature of PW-3 was marked as Ext.1/2. During cross-examination, PW-3 clarified that he did not witness the appellant or the seized articles.
- v. PW-4 stated that he had signed the seizure list but lacked awareness regarding the seized articles or other details of the seizure. The signature of PW-4 was marked as Ext.1/3.
- vi. PW-5, posted at Noapara police station on 13.11.06, accompanied PW-1 to Oriyapara Durga Mandir at 5 pm. Subsequently, he observed PW-1 conducting a search of the suspect and preparing a seizure list. The signature of PW-5 on the seizure list was marked as Ext.2/2. During cross-examination, PW-5 mentioned the non-preparation of a weighment chart and the non-seizure of the appellant's photograph.
- vii. PW-6, posted at Noapara police station on 13.11.06, was entrusted with the investigation of Naihati P.S. Case No.

174/06. During the investigative process, PW-6 attested that he examined the witnesses, recorded their statements and sent the sample of ganja for chemical examination. The forwarding report was marked as Ext.4 and the chemical examination report was marked as Ext.5.

8. PW-1 in his deposition inter alia stated as follows:-

‘Regarding the notice relating to accused informing him of his right to be searched in presence of Gazetted Officer, Magistrate was not available in the C.D. Normally the notice was sent to the Court and I.O. shall be the competent person to speak about the documents. In presence of the C.I. Barrackpore he informed the accused that he can search the police officer and the witness. Police officials who were presence and also the witnesses were searched and that was the nil seizure list prepared and signed by him after search, marked exbt.-1. The accused also informed of his right to be searched in presence of Magistrate and Gazetted Officer and the accused agreed to be searched in presence of C.I. Barrackpore and the accused was then searched by him in presence of C.I. Barrackpore who was a Gazetted Officer. After searching he found a bag polythene bag in the hand of the accused and it contained ganja which after weighment by him was found contained 3.250 kgs and also cash amount of Rs.9375/-. He prepared the seizure list and that was the said seizure list prepared by him after search and seizure in presence of the witnesses and the signature of the witnesses and the accused was taken by him the S.L. marked exbt.-2. From the packet he took two packets of sample containing

100 grams and that was the said sample packet which was sealed and labelled by him in presence of the accused and on the label of the sample and also in another packet containing 3.150 kgs of contraband which was also sealed and labelled by him and signature of the witnesses and the accused was taken on the label. That was the sample packet which was sent to the Drug Control under forwarding report and challan and the packet was received. The packet and the sample was opened in his presence and the witnesses identified the label affixed on the face of the packet and the signature of the witness and the accused. The original sealed packet (alamat) marked Mat.Exbt.-I and the sample packet was marked Mat.Exbt.-III. The amount of money recovered has been kept in that packet by him containing Rs.9375/- and the packet containing the amount was marked Mat.Exbt.-II. The sample was sent to for examination by the I.O. Forwarding report and challan were marked X and XI for identification. They returned to the P.S. along with the accused and that was the alamat and he lodged that written complaint on the formal F.I.R. form and that was filled in and signed by him marked Exbt.-3. He entrusted the custody of the seized alamat and sample packet to the O/C of Malkhana of the P.S. He entrusted with investigation to S.I. Bhagwan Singh and handed over to him all the related documents. The superior officers was informed. That was the bag on which the accused was carrying the contraband (ganja) which was also seized by him. The bag was marked Mat.Exbt.-IV.'

During his cross-examination PW-1 stated the source information recorded in his FIR was Oriyapara, Durgamandir. The

name of the accused was not mentioned there. He had not brought the GDE where he had recorded the contents of information he could produce the same. There was no document that he informed the SDO, SDPO or CI (all Barrackpore). The command certificate No. 2119 dated 12.11.2006 was issued by whom had not been recorded. PW-1 had no document to that effect. The police team consisting of SI Samrajit Kundu, ASI Prakash Ghosh and two constable Tarun Biswas and N. Mishra.

With them they carried papers, carbon, seal, gala, weighment machine and weighment. They went Oriyapara on the mouth of lane. Two local persons were called. In the locality where they stopped the vehicle there was pan shop and other houses. He had not asserted the social status and education of the witnesses. The P.O. was about 5 to 7 minutes walking from the place where they stopped their vehicle. He had no document in writing that after interception of accused, the superior officers SDO, SDPO, CI (all Barrackpore) were informed. He had no document that he informed the SDO Barrackpore. He had no document that he informed the C.I. Barrackpore. He could not recall whether he first informed the SDO or the C.I.

On his information C.I. Barrackpore arrived at P.O. and introduced him as a Gazetted Officer. The accused was informed right of being searched before the Magistrate or Gazetted Officer but he had not entered in so his written complaint. He had no document that C.I. issued direction to him for causing search of the accused office of the C.I. was about 7/8 k.m. from Noapara P.S. He did not contact any nearest Army Official who are Gazetted

Officer. He had not taken any inventory of photograph. In the nil search report (exbt.-1) only two police officers had signed. He had overall in charge of the accused and the alamat. He produced the accused at the P.S. after returning to the P.S. In exbt.-1 he had not mentioned which officer searched the others. He had not seen any customer purchasing ganja or offering money to the accused.'

9. Section 43 of the Narcotic Drugs and Psychotropic Substances Act, 1985 states as follows:

“43. Power of seizure and arrest in public place.—
Any officer of any of the departments mentioned in section 42 may—

(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation.—For the purposes of this section, the expression “public place” includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.]”

10. In **Raju v. State of W.B.**¹, 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 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*

¹ (2018) 9 SCC 708

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.”*

11. In **Rizwan Khan vs. State of Chhattisgarh**², 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)*

² (2020) 9 SCC 627

“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 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.”*

12. The search and seizure in the instant case was conducted at Oriyapara Chowrasta in public glare. The search was with regard

to nylon bag containing contraband in the possession of the appellant. Since the search and seizure was conducted in a public place, the provisions of Section 42 of the N.D.P.S. Act is not applicable in this particular case. It was not mandatory to be searched by a Gazetted Officer even in view of the provisions under Section 43 of the said Act recording of the information received by the empowered officer in compliance with Section 42 of the said Act is not applicable in the instant case.

13. In ***Union of India v. Mohanlal***³, the Hon'ble Supreme Court held as follows:-

“15. *It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.*

16. *Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In*

³ (2016) 3 SCC 379

other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. *The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.*

...

19. *Mr. Sinha, learned Amicus Curiae, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification, etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter*

of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time-frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52-A (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions.”

14. In *Mangilal v. State of M.P.*⁴, the Hon’ble Supreme Court held as follows:-

“4. Sub-section (1) of Section 52A of the NDPS Act facilitates the Central Government a mode to be prescribed to dispose of the seized narcotic substance. The idea is to create a clear mechanism for such disposal both for the purpose of dealing with the particular case and to safeguard the contraband being used for any illegal purpose thereafter.

5. Sub-section (2) of Section 52A of the NDPS Act mandates a competent officer to prepare an inventory of such narcotic drugs with adequate particulars. This has to be followed through an appropriate application to the

⁴ 2023 SCC OnLine SC 862

Magistrate concerned for the purpose of certifying the correctness of inventory, taking relevant photographs in his presence and certifying them as true or taking drawal of samples in his presence with due certification. Such an application can be filed for anyone of the aforesaid three purposes. The objective behind this provision is to have an element of supervision by the magistrate over the disposal of seized contraband. Such inventories, photographs and list of samples drawn with certification by Magistrates would constitute as a primary evidence. Therefore, when there is non-compliance of Section 52A of the NDPS Act, where a certification of a magistrate is lacking any inventory, photograph or list of samples would not constitute primary evidence.

6. *The obvious reason behind this provision is to inject fair play in the process of investigation. Section 52A of the NDPS Act is a mandatory rule of evidence which requires the physical presence of a Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph taken apart from list of samples drawn.....*

...

8. *Before any proposed disposal/destruction mandate of Section 52A of the NPDS Act requires to be duly complied with starting with an application to that effect. A Court should be satisfied with such compliance while deciding the case. The onus is entirely on the prosecution in a given case to satisfy the Court when such an issue arises for consideration. Production of seized material is a factor to establish seizure followed by recovery. One has to remember that the provisions of the NDPS Act are both stringent and rigorous and therefore the burden heavily lies on the prosecution. Non-production of a physical evidence would lead to a negative inference within the*

meaning of Section 114(g) of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act).....”

15. In the instant case the investigating agency has not complied with the provisions of Section 52A of the N.D.P.S. Act. The notice was not sent, the inventory of the contraband article was not prepared, relevant photographs were not taken. There was no certification by the Magistrate with regard to such inventories, photographs and list of samples drawn which constitute the primary evidence.
16. Though the sample seized by the investigating agency was sent for Chemical Examiner's report which affirmed the same to be a contraband article. The lapses on the part of the investigating agency to comply with the provisions under Section 52A of the N.D.P.S. Act entitled the appellant to benefit of doubt.
17. In view of the above discussions, the instant criminal appeal being CRA 620 of 2008 is allowed.
18. Under such facts and circumstances, the judgment and order dated 12.08.2008 and 13.08.2008 passed by the Learned Additional Sessions Judge, Special Court, Constituted under Narcotic Drugs and Psychotropic Act, 1985, Barrackpore, North 24 Parganas in S.T. No. 176 of 2007 thereby convicting the appellant for commission of offence punishable under Section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act is set aside.
19. The instant criminal appeal being CRA 620 of 2008 stands disposed of.
20. There is no order as to costs.
21. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

22. 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.)