

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

**CRA (DB) 217 of 2024
With
CRAN 1 of 2025
Jahiruddin Sk.
Vs.
The State of West Bengal**

**With
CRA (DB) 234 of 2024
Samir Das @ Buro and Anr.
Vs.
The State of West Bengal**

**With
CRA (DB) 253 of 2024**

**Bijay Biswas
Vs.
State of West Bengal**

**Before: The Hon'ble Justice Arijit Banerjee
&
The Hon'ble Justice Apurba Sinha Ray**

For the appellants/petitioners in : Mr. Soubhik Mitter, Adv.
CRA (DB) 234 of 2024 Mr. Liton Maitra, Adv.
Ms. Rajnandini Das, Adv.
Mr. Ayan Biswas, Adv.

For the State : Mr. Madhusudan Sur, Ld. APP,
Mr. Dipankar Paramanik, Adv.

For the appellants/applicants in : Mr. Anshuman Chakraborty, Adv.
CRA (DB) 253 of 2024 Mr. S. S. Saha, Adv.

For the appellants/applicants in : Mr. Arnab Chatterjee, Adv.
CRA (DB) 217 of 2024 Mr. Avik Ghosh, Adv.
Ms. Ankusha Ghosh, Adv.

For the State in CRA (DB) 217 of : Mr. Joydeep Biswas, Adv.
2024 and CRA (DB) 253 of 2024

CAV on : 31.03.2026

Judgment on : 24.06.2026

Apurba Sinha Ray, J. :-

1. By judgment and order dated July 19, 2024 passed in NDPS case no. 50 of 2021 in connection with Nakashipara P.S. case no. 235 of 2021 under Section 20(b)(ii)(c)/29 of the NDPS Act, the learned Judge, Special Court, NDPS Act, Nadia at Krishnagar has convicted the appellants and two others.
2. The three appeals being nos. CRA (DB) 217 of 2024, CRA (DB) 234 of 2024, CRA (DB) 253 of 2024 have been filed by 4 convicts namely Jahiruddin Sk., Samir Das, Gopal Das and Bijoy Biswas.
3. For the sake of convenience and brevity, the three appeals are being disposed of by this common judgment.

4. Mr. Souvik Mitter, learned counsel appearing for the convict Samir Das and Gopal Das in connection with CRA (DB) 234 of 2024 has submitted that the judgment of conviction and order of sentence are liable to be set aside primarily on the ground that the provisions of Section 52A of NDPS Act were not complied with by the concerned police personnel. In this regard, the learned counsel has drawn our attention to the judgment of **Bharat Aambale vs. State of Chattisgarh** reported in **(2025) 8 SCC 452**. He has also drawn our attention to the fact that there was a long delay in sending seized samples of contraband items to the Forensic Science Laboratory. Further, no register of Malkhana was produced and exhibited. The mother quantity of seized contraband was not produced. Thirdly, samples were drawn on the spot and sent to a forensic laboratory. Fourthly, there was an attempt to comply with the provisions of Section 52A after the report was produced from the forensic laboratory. The photos of contraband articles were also taken after the receipt of a forensic Science Laboratory report. Fifthly, the seizure list was not proper and correct.
5. Mr. Mitter has further submitted that in **Bharat Aambale (supra)** case, the Hon'ble Apex Court has raised 3 issues. Firstly, there must be substantial compliance of conditions under Section 52-A of NDPS Act. Secondly, the destruction of seized contraband items after keeping the samples for test and thirdly, the certificate of inventory at

the instance of the Judicial Magistrate. Mr. Mitter has further argued that to prove that there was no substitution of seized contraband articles, the inventory is required to be done at the instance of the Judicial Magistrate who will give the certificate of correctness of the inventory done in his presence. Mere existence of labels will not prove that samples were drawn in presence of the Magistrate. He has further pointed out that no Malkhana register was produced during the trial. Moreover, the PW 1, and not the IO, sent the samples to a forensic science laboratory in violation of the relevant provisions under NDPS Act. PW 1 being the defacto complainant was authorized to bring the seized contraband articles/items to the nearest police station for keeping the same in safe custody and the law suggests that the IO shall produce such seized contraband items before the concerned Judicial Magistrate who will give the certificate of inventory of the contraband articles and the IO is entitled to draw representative samples from such seized contraband articles in presence of the Magistrate. In this case, the same was not done, and as such, Mr. Mitter has submitted that the provisions of Section 52A of NDPS Act were not complied with. There was no substantial compliance as envisaged in **Bharat Aambale** case and therefore, in his view, the appellants are entitled to an order of acquittal.

6. Mr. Arnab Chatterjee, learned advocate, appearing for Jahiruddin Sk. in connection CRA (DB) 217 of 2024 and Mr. Anshuman Chakraborty,

learned advocate appearing for the convict Bijay Biswas in CRA (DB) 253 of 2024 have adopted the argument advanced by Mr. Mitter for the appellants namely Samir Das and Gopal Das in CRA (DB) 234 of 2024.

7. Mr. Joydeep Biswas, learned counsel appearing for the State has also relied upon **Bharat Aambale (supra)** judgment. He has drawn our attention to paragraph nos. 33, 34, 46, 49, 50(iv) (ii) (vi) (x). Learned Counsel for the State has submitted that there was substantial compliance under Section 52A of NDPS Act. He has further submitted that due to Covid pandemic process of certifying correctness of inventory was delayed and, therefore, the prosecution case cannot be disbelieved merely because of such delay which was beyond the control of the I.O.
8. Learned State Counsel Mr. Biswas has further submitted that the incident occurred on 23.05.2021 and the relevant Rules, 2022 under the NDPS Act was published on 23.12.2022. According to him, prior to such commencement of Rules, the seizure of the contraband and drawing up of samples at the spot were done on the basis of circular being no. 1 of 1989 issued under the provisions of NDPS Act and accordingly, in this case also the seizure of contraband and drawing up of samples from the mother quantity were guided by the said circular no. 1 of 1989. Therefore, PW1 being the defacto complainant had rightly drawn the sample at the spot and sent the samples to the

Forensic Science Laboratory and, therefore, there is no question of violating the provisions under Section 52A of the NDPS Act.

9. Mr. Biswas has further argued that the appellants Samir Das, Jahiruddin Sk., Bijay Biswas, Gopal Das were in a Scorpio vehicle and the contraband was brought by other accused namely Sobor Ali and Saher Ali Sk. in a truck bearing no. NL-01D/8701. When these 4 appellants went inside the said truck of Sobor Ali and Saher Ali Sk. to receive the contraband, they were apprehended from the truck. It is not correct that no independent witness was present at the relevant time. On the other hand the seizure was done in presence of two independent witnesses but unfortunately, during trial one of such witness was declared hostile by the prosecution and another independent witness did not turn up. Mr. Biswas has further argued that there are several judgments which hold that the prosecution can prove the case against the accused on the basis of other materials on record even if the independent witness did not support the prosecution case.

10. Mr. Biswas has further submitted the rules called Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 [henceforth 'Rules,2022'] provide for the procedure to be followed at the time of seizure and also for storage sampling, disposal of the seized articles. Rule 29 of the said Rules, repealed the Standing Order No.1 of 88 dated 15.03.1988, Standing

Order No. 2 of 88 dated 11.04.1988 issued by the NCB, and the Standing Order No.1 of 89 dated 13.06.1989 and the G.S.R. 38(E) issued by the Government of India, alongwith the other Notifications. However, sub-rule (2) of Rule 29 states that notwithstanding such repeal, anything done or any action taken or purported to have been done or taken under the Standing Orders or notification repealed by sub-rule (1), shall in so far as it is not inconsistent with the provisions of the said Rules, be deemed to have been done or taken under the corresponding provision of the said Rules.

- 11.** It was also argued by the learned prosecutor that time and again it has been reiterated by the Hon'ble Apex Court that having considered the legislative history of Section 52 A of the NDPS Act, 1985 and other statutory standing orders as also the judicial pronouncements, it would be clear that the same would lead to an inevitable conclusion that delayed compliance or non-compliance of Section 52A neither vitiates the trial affecting conviction nor can be the sole ground to seek bail. It was further submitted that in view of Section 54 of NDPS Act, 1985, the courts are to presume unless and until the contrary is proved that the accused had committed an offence under the Act in respect of any narcotic drugs or psychotropic substances etc. for the possession of which he failed to account for satisfactorily. Unless such statutory presumption is rebutted by the accused during the course of trial, there would be a prima facie

presumption that the accused had committed the offence under the Act, if he is found to have possessed the contraband drug and substance, and if he fails to account satisfactorily, as contemplated in the said provision of Section 54. It is further submitted that as per the settled legal position even the evidence collected by an illegal search or seizure could not be excluded or discarded.

12. Mr. Biswas has relied upon paragraphs 16, 17 and 18 of the judgment in **Union of India vs. Mohanlal** reported in **(2016) 3 SCC 379**.

13. Mr. Biswas has further submitted that pursuant to the above judgment of the Hon'ble Supreme Court, the Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 was published by the Ministry of Finance (Department of Revenue) by its notification no. G.S.R. 899(E) dated 23.12.2022.

14. It was also argued on behalf of the respondent State that on 06.05.2024, a Division Bench of this High Court in **Aizul Seikh @ Ajijul Sk and Anr. Vs. The State of West Bengal (CRA 602 of 2019)** has discussed when and how samples from contraband articles were to be drawn and in what manner.

15. Mr. Biswas has relied upon paragraph nos. 18 to 25 of the judgment in **Narcotic Control Bureau vs. Kashif** reported in **2020 SCC OnLine SC 3848** in support of his contention that Section 52A prescribes the procedure to be followed by the authorized officer for

the disposal of such contraband narcotic drugs and psychotropic substances at the pre-trial stage and when the contraband articles are recovered from possession of the accused, the courts are entitled to presume unless and until the contrary is proved that the accused had committed offences under the Act in respect of such contraband articles.

- 16.** By relying upon the judgment of **Bharat Aambale (supra)**, Mr. Biswas has submitted even where there is non-compliance with the procedural requirements of section 52 A, it does not necessarily vitiate the trial or warrant an automatic acquittal. If the prosecution can otherwise establish the chain of custody, corroborate the seizure with credible testimony and prove its case beyond reasonable doubt, the mere non-compliance with Section 52A may not be fatal. By referring to **Surepally Srinivas vs. State of AP (Now state of Telangana)** reported in **2025 SCC OnLine SC 683**, decided on 25.03.2025 by the Hon'ble Apex Court, Mr. Biswas has submitted that what is to be seen in this type of case is whether there has been substantial compliance with the mandate of Section 52A and if not the prosecution must satisfy the Court that such non-compliance does not affect its case against the accused. In fact, the Hon'ble Supreme Court by the aforesaid order dated 25.03.2025 has accepted with approval the decision of **Kashif (supra)**.

17. According to Mr. Biswas in the case in hand, the contraband articles were found from the possession of the convicts and although there are minor defects in the prosecution case, the same are not fatal since the convicts have miserably failed to rebut the statutory presumption under NDPS Act. Accordingly, Mr. Biswas has urged that the conviction and order of sentence passed by the trial court should be upheld.

18. In reply Mr. Mitter has submitted that the order of conviction is based on evidence illegally admitted during trial and also for non-consideration of material pieces of evidence brought on record during cross-examination. The learned Judge had acted in defiance of the provisions of law by filling up the gap in the prosecution case by introducing imaginary facts and conjectural circumstances. Mr. Mitter has relied upon several judgments i.e. **Vijay Jain vs. State of Madhya Pradesh reported on (2013)14 SCC 527 (para 10,11,12), Yusuf @ Asif vs. State reported in 2013 SCC OnLine SC 1328 (para 12 to 17), Bharat Aambale vs. State of Chattisgarh reported in 2025 SCC OnLine SC 110 (para 50).**

Court's view:

19. From the judgments referred to above it is found that recently the Hon'ble Supreme Court in **Bharat Aambale (supra)** has laid down the following propositions. Para 50 is reproduced hereinbelow:-

"50. We summarize our final conclusion as under: -

- (I) *Although Section 52A is primarily for the disposal and destruction of seized contraband in a safe manner yet it extends beyond the immediate context of drug disposal, as it serves a broader purpose of also introducing procedural safeguards in the treatment of narcotics substance after seizure inasmuch as it provides for the preparation of inventories, taking of photographs of the seized substances and drawing samples therefrom in the presence and with the certification of a magistrate. Mere drawing of samples in presence of a gazetted officer would not constitute sufficient compliance of the mandate under Section 52A sub-section (2) of the NDPS Act.*
- (II) *Although, there is no mandate that the drawing of samples from the seized substance must take place at the time of seizure as held in Mohanlal (supra), yet we are of the opinion that the process of inventorying, photographing and drawing samples of the seized substance shall as far as possible, take place in the presence of the accused, though the same may not be done at the very spot of seizure.*
- (III) *Any inventory, photographs or samples of seized substance prepared in substantial compliance of the procedure prescribed under Section 52A of the NDPS Act and the Rules / Standing Order(s) thereunder would have to be mandatorily treated as primary evidence as per Section 52A sub-section (4) of the NDPS Act, irrespective of whether the substance in original is actually produced before the court or not.*
- (IV) *The procedure prescribed by the Standing Order(s) / Rules in terms of Section 52A of the NDPS Act is only intended to guide the officers and to see that a fair procedure is adopted by the officer in-charge of the investigation, and as such*

what is required is substantial compliance of the procedure laid therein.

- (V) Mere non-compliance of the procedure under Section 52A or the Standing Order(s) / Rules thereunder will not be fatal to the trial unless there are discrepancies in the physical evidence rendering the prosecution's case doubtful, which may not have been there had such compliance been done. Courts should take a holistic and cumulative view of the discrepancies that may exist in the evidence adduced by the prosecution and appreciate the same more carefully keeping in mind the procedural lapses.*
- (VI) If the other material on record adduced by the prosecution, oral or documentary inspires confidence and satisfies the court as regards the recovery as-well as conscious possession of the contraband from the accused persons, then even in such cases, the courts can without hesitation proceed to hold the accused guilty notwithstanding any procedural defect in terms of Section 52A of the NDPS Act.*
- (VII) Non-compliance or delayed compliance of the said provision or rules thereunder may lead the court to drawing an adverse inference against the prosecution, however no hard and fast rule can be laid down as to when such inference may be drawn, and it would all depend on the peculiar facts and circumstances of each case.*
- (VIII) Where there has been lapse on the part of the police in either following the procedure laid down in Section 52A of the NDPS Act or the prosecution in proving the same, it will not be appropriate for the court to resort to the statutory presumption of commission of an offence from the possession of illicit material under Section 54 of the NDPS Act, unless the court is otherwise satisfied as regards the seizure or*

recovery of such material from the accused persons from the other material on record.

(IX) The initial burden will lie on the accused to first lay the foundational facts to show that there was non-compliance of Section 52A, either by leading evidence of its own or by relying upon the evidence of the prosecution, and the standard required would only be preponderance of probabilities.

(X) Once the foundational facts laid indicate non-compliance of Section 52A of the NDPS Act, the onus would thereafter be on the prosecution to prove by cogent evidence that either (i) there was substantial compliance with the mandate of Section 52A of the NDPS Act OR (ii) satisfy the court that such non-compliance does not affect its case against the accused, and the standard of proof required would be beyond a reasonable doubt.”

20. In **Yusuf @ Asif (supra)** the Hon’ble Supreme Court has been pleased to hold that no evidence had been brought on record in the said case to the effect that the procedure prescribed under sub-sections (2) (3) and (4) of Section 52A of the NDPS Act was followed while making this seizure and drawing up sample such as preparing the inventory and getting it certified by the Magistrate. In the said case the Hon’ble Apex Court has discussed the case of **Mohanlal (supra)** in paragraphs 15 and 16 of the reported judgment which are profitable to quote:

“15. In Mohanlal’s case, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified would constitute primary evidence for the purposes of the trial.

16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.”

21. In **Vijay Jain (supra)**, Hon’ble Apex Court has also pointed out that samples of contraband articles are to be drawn in the presence of Judicial Magistrate.

22. It is true that in Kashif’s judgment the Hon’ble Supreme Court was pleased to hold that the heading of Section 52A of NDPS Act makes it clear that the said provision was inserted for the disposal of the seized narcotic drugs and psychotropic substances. As per the

settled rule of interpretation the section heading or marginal note can be relied upon to clear any doubt or ambiguity in the interpretation of any provision and to discern the legislative intent. The long title of NDPS Act leaves no room of doubt that the said provision of Section 52A was inserted for an early disposal of the seized narcotic drugs and psychotropic substances and such measures were introduced for respecting the relevant international commitment as well. It is further observed in the said decision that any deviation or delay in deciding the application at the instance of the Magistrate can only be characterized as irregular which should be corrected without affecting the outcome. When sufficient material is collected by the Investigating Officer to establish that search and seizure of the contraband substances was made in due compliance of the mandatory provisions of the Act, that is sufficient to hold that the accused cannot be released on bail nor acquitted in the trial. It is also held thereunder that as per Section 54 of the said Act the Courts are entitled to presume that the accused had committed an offence under NDPS Act unless and until the contrary is proved.

- 23.** Admittedly, in this case, the samples were drawn at the place of occurrence on 23.05.2021 and it is also admitted by the IO that the said sample was sent to Forensic Science Laboratory on 23.06.2021 by him. It is also found from the record that the chemical examination report was prepared on August 2, 2021. The record further shows that

the IO obtained the certificate of inventory at the instance of the Judicial Magistrate, 1st Class, 2nd Court, Krishnanagar, Nadia on 11.08.2021. Therefore, a certificate of correctness of inventory was obtained by the prosecution after receipt of the Forensic Science Laboratory or after the examination of the samples was done at the instance of the Ministry of Environment, Forests and Climate Change, Government of India. The learned State Counsel was very much vociferous that the sampling and seizure was done in view of standing order No. 1/89 dated 13th June, 1989. Admittedly, PW 1 was the Seizing Officer. Now let us examine Section II of the said standing order which dealt with general procedure for sampling, storage etc. In point no. 3.0, it has been laid down that the Seizing Officer of the concerned department should dispatch samples of the seized drugs to one of the laboratories of the Central Revenue Control or laboratory nearest to their office depending upon the availability of the test facilities. It is also laid down that the State Enforcement Agencies may send samples of seized drugs to the Director/Deputy Director/Assistant Director of their respective Forensic Science Laboratory.

- 24.** If that is the circular, it appears that PW 1 did not send the samples which he had drawn up at the spot to the concerned laboratories as directed in the said point no. 3. The record shows that the Investigating Officer had sent the samples to the concerned laboratory after one month of the seizure, which indicates that the PW

1 even did not comply with the above direction of the said standing order in letter and spirit. It is found that no Malkhana register or godown register as indicated in the said standing order was produced at the time of trial. No explanation was given in evidence where the said sample was kept by the concerned IO during one month after the seizure. If the search and seizure could have taken place during Covid Pandemic by taking STF personnel from Kolkata, there is no acceptable reason as to why such samples were not sent for chemical examination immediately after the seizure.

25. It is true that by point no. 2.2 of the standing order of 1/89 dated 13th June, 1989 the Seizing Officer was entitled to draw samples from the narcotic drugs and psychotropic substances seized on the spot of recovery in presence of search witnesses and the person from whose possession the drug is recovered. But if we peruse the judgments of **Mohanlal (supra)** and **Ajijul (supra)** we shall find that the Hon'ble Courts have deprecated such practice as the same was not within the scheme of the Act. **Kashif's** judgment has pointed out that drawing of representative samples is only for the purpose of disposal of the seized narcotics. But the Court's attention was not drawn to one essential fact that if the same is only for disposal, then where such representative samples were to be kept after certification. The Act is silent on this point. Therefore, the representative samples are drawn for chemical analysis and that has to be sent to the

laboratory. The confusion was set at rest subsequently. After emergence of case law reported in **Mohanlal (supra)** and **Kashif (supra)**, the Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 have been notified and by the said notification the standing order 1/89 dated 13th June, 1989 alongwith other standing orders were repealed by Rule 29. In sub-rule (2) of Rule 29, it has been laid down hereunder:

“(2) Notwithstanding such repeal, anything done or any action taken or purported to have been done or taken under any of the Standing Order or notification repealed by sub-rule (1) shall, in so far as it is not inconsistent with the provisions of these rules, be deemed to have been done or taken under the corresponding provision of these rules.”

26. From the said sub rule (2), it transpires that actions taken under the standing order no. 1/89 dated 13 June 1989 which are not inconsistent with the provision of Rules 2022, shall be deemed to have been taken under the corresponding provisions of Rules 2022. This saves the action of the I.O or the de facto complainant provided the same is in tune with the provisions of Rules 2022, but if the said actions are not in conformity with Rules 2022, the same are not protected or saved. Now let us examine Rules 2022 to ascertain how the sampling is required to be done. Rule 8 and Rule 9 of Rules, 2022 deals with the issues as hereunder.

“8. Application to Magistrate. – After the seized material under the Act is forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53 of the Act or if it is seized by such an officer himself, he shall prepare an inventory of such material in Form-4 and apply to the Magistrate, at the earliest, under sub-section (2) of section 52A of the Act in Form-5.

9. Samples to be drawn in the presence of Magistrate. – After application to the Magistrate under sub-section (2) of section 52A of the Act is made, the Investigating Officer shall ensure that samples of the seized material are drawn in the presence of the Magistrate and the same is certified by the magistrate in accordance with the provisions of the said-sub-section.”

27. Rule 13 of 2022 Rules has dealt with the procedure for dispatching the samples for testing. The relevant rule is hereunder.

“13. Despatch of sample for testing. – (1) The samples after being certified by the Magistrate shall be sent directly to any one of the jurisdictional laboratories of Central Revenue Control Laboratory, Central Forensic Science Laboratory or State Forensic Science Laboratory, as the case may be, for chemical analysis without any delay. (2) The samples of seized drugs or substances shall be despatched to the jurisdictional laboratories under the cover of the Test Memo, which shall be prepared in triplicate, in Form-6. (3) The original and duplicate of the Test Memo shall be sent to the jurisdictional laboratory alongwith the samples and the triplicate shall be retained in the case file of the seizing officer.”

- 28.** Therefore, the actions taken by the PW 1, the Seizing Officer and PW 8, the Investigating Officer, are not consistent with the provision of the Rules 2022 and, therefore, such actions cannot be protected by availing the standing order no. 1/89 dated 13th June, 1989. It appears that PW 1 and the IO even did not comply with the requirements under the above standing order.
- 29.** It is also true that there may be a mistake on the part of the Seizing Officer and the IO in view of the fact that on the date of occurrence the circular No. 1/89 dated 13th June, 1989 was not withdrawn or repealed from the side of the Government. We are alive to such factual aspect as very rightly pointed out by learned State Counsel, Mr. Joydeep Biswas. We are also alive to the fact that the judgments referred to in **Bharat Aambale (supra)** case has disclosed that if there was substantial compliance of the relevant provisions under NDPS Act then such mistakes on the part of the Seizing Officer or the IO should be ignored since the prosecution could have proved its case by the strength of other materials on record.
- 30.** The learned Trial Judge has time and again discussed that the prosecution has been able to prove that the contraband articles were recovered from the possession of the aforesaid convicts and others. But it is unfortunate that although there were two independent witnesses to the alleged search and seizure, one of the witnesses did not turn up and another witness was declared hostile. Therefore,

search and seizure was not proved on the strength of evidence of independent witnesses. It is true that independent witnesses may not support the prosecution case due to several reasons and that has been rightly appreciated by the learned trial judge. But it is unfortunate that time and again Hon'ble Courts are directing the concerned Seizing Officers to make videography of the process of search and seizure but it appears that the said officers are not complying with the said direction for reasons best known to them. Astonishingly, although the STF and other officials carry several equipment including testing kits, measurement kits etc. but they are not taking any instrument for making videography of the proposed search and seizure. Needless to mention, today, in all probability, all the officers have smart phones and they could have videographed the entire process of the search and seizure or taken photographs of the said process from their phone, but it appears that they did not make any videography in spite of specific direction from the Hon'ble Courts including this Court. In this regard the judgment of **Kalu Sk. v. State of W.B.**, reported in **2022 SCC OnLine Cal 4556** is very much relevant.

31. Without complying with the said direction the prosecution is relying upon witnesses who were part and parcel of the raiding party. These three witnesses are Sayantan Banerjee, Biswanath Dey and Sandipan Sinha Mahapatra. There is no reason assigned as to why

the independent witness Chandan Das was not produced. As he was a vital witness coercive measures could have been adopted. The record does not show that such action was taken. Most interestingly, PW 6 Madhusudan Pal, another independent witness, was a scribe who used to work outside of the Nakasipara Police Station. If that be so, why was he adduced as the prosecution witness? If he used to work in the adjacent place of Nakasipara P.S., in all probability, he should have supported the prosecution case since he is better protected than any other independent witness. This Court has serious doubts about the presence of PW 6 at the place of occurrence at the relevant point of time since he has stated that as per instruction of Police he signed on the documents and he was not interrogated by the IO. Therefore, from the above discussion it appears that the prosecution could have made videography of the seizure process and could have also proved the case with the help of the independent witnesses but the materials on record show that the prosecution has failed to produce any videography of the seizure process in terms of the decision of **Kalu Sk (supra)** and has further failed to obtain support from the independent witness in proving the prosecution case. In fine we are constrained to say that we are not inclined to rely upon the witnesses who were members of the raiding party.

- 32.** In view of the aforesaid discussion we find that the prosecution has failed to prove that there was substantial compliance of Section

52A of NDPS and also Rule 29 Sub rule (2) of Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022. The prosecution has further failed to prove the case by strength of independent witnesses. The drawing of samples, storage are not in accordance with relevant rules. Inventory was done in respect of 549 kgs. of narcotics whereas contraband items were seized to the tune of 525 kgs. The observation that the moisture may enhance the weight of contraband articles was not supported by any evidence nor the same was deposed by any witness. If that be so, then the storage of such contraband articles will be questionable. Moreover, we would like to say that when foundational facts concerning non-compliance of requisite conditions under the Act were duly brought on record from the side of the defence by way of cross-examination of PWs, it was the duty of the prosecution to show that the allegations are proved by other materials on record. Hence, section 54 of the Act is no help for the prosecution in such a scenario. At this stage we may recall the para 50 (VIII), (IX) & (X) of **Bharat Aambale's case (supra)** even at the cost of repetition:

“50.....

(VIII) Where there has been lapse on the part of the police in either following the procedure laid down in Section 52A of the NDPS Act or the prosecution in proving the same, it will not be appropriate for the court to resort to the statutory presumption of commission of an offence from the possession

of illicit material under Section 54 of the NDPS Act, unless the court is otherwise satisfied as regards the seizure or recovery of such material from the accused persons from the other material on record.

(IX) The initial burden will lie on the accused to first lay the foundational facts to show that there was non-compliance of Section 52A, either by leading evidence of its own or by relying upon the evidence of the prosecution, and the standard required would only be preponderance of probabilities.

(X) Once the foundational facts laid indicate non-compliance of Section 52A of the NDPS Act, the onus would thereafter be on the prosecution to prove by cogent evidence that either (i) there was substantial compliance with the mandate of Section 52A of the NDPS Act OR (ii) satisfy the court that such non-compliance does not affect its case against the accused, and the standard of proof required would be beyond a reasonable doubt.”

33. In the case in hand the search, seizure and possession of contraband was not proved by producing independent witnesses and also by the requisite videography which could have been done very easily from the side of the Seizing Officer. Therefore, we are constrained to hold that the prosecution has failed to prove the conditions to raise the statutory presumption under Section 54 of the Act, and hence the convicts are entitled to an order of acquittal.

34. Accordingly, the convicts namely Samir Das @ Buro, Jahiruddin Sk., Gopal Das and Bijoy Biswas being found not guilty

are acquitted from the charges under Section 20(b)(ii)(c)/29 of the NDPS Act and they be set at liberty at once.

35. The impugned judgment and order dated July 19th, 2024 in NDPS case no. 50 of 2021 in connection with Nakashipara P.S. case no. 235 of 2021 under Section 20(b)(ii)(c)/29 of the NDPS Act, the learned Judge, Special Court, NDPS Act, Nadia at Krishnagar is hereby set aside. The accused be released at once if not wanted in any other case.

36. CRA (DB) 217 of 2024 with CRAN 1 of 2025, CRA (DB) 234 of 2024, CRA (DB) 253 of 2024 with connected applications, if any, stand disposed of.

37. The Trial Court Record be sent down immediately.

38. Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties on compliance of all necessary formalities.

I Agree.

(ARIJIT BANERJEE, J.)

(APURBA SINHA RAY, J.)