

GAHC010155782024



2024:GAU-AS:11287

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CrI.A./248/2024

RAJKUMAR MANDAL
S/O LATE SURJYA KANTA MANDAL,
RESIDENT OF VILLAGE AGRONG, PS PANBARI, DIST CHIRANG, PO
ANANDA BAZAR ASSAM

VERSUS

1. THE STATE OF ASSAM AND ANR
REPRESENTED BY PP ASSAM

2:KUMUD CHANDRA TALUKDAR
SI OF POLICE
S/O LATE KANAK CH. TALUKDAR
PS BIJNI
DIST CHIRANG
ASSAM

Advocate for the Petitioner : MR. M BISWAS, LD. ADV.

Advocate for the Respondent : MR. D. DAS, LD. ADDL. PP, ASSAM,

**BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA**

Date of hearing : 20.09.2024

Date of Judgment : 20.11.2024

JUDGMENT & ORDER (CAV)

Heard Mr. M. Biswas, learned counsel for the appellant. Also heard Mr. D. Das, learned Additional Public Prosecutor for the State respondent No.1.

2. This appeal is filed under Section 415 of the Bharatiya Nagarik Suraksha Sanhita, 2023, against the Judgment dated 22.07.2024, passed by the learned Special Judge, Bijni, Chirang, in Special (N) Case No. 19(B)/2022. The appellant was convicted under Sections 20(b)(ii)(B) of the NDPS Act and sentenced to undergo rigorous imprisonment for 3(three) years and 6 (six) months, as well as to pay a fine of Rs. 20,000/- (Rupees twenty thousand) only. In default of payment, the appellant is to undergo rigorous imprisonment for a further period of 60 (sixty) days.

3. The prosecution story in brief is as follows:

3.1. On 24.09.2022, SI Sri Kumud Chandara Talukdar lodged an FIR with the Officer-in-Charge of Bijni Police Station, alleging that on the same day at about 4 P.M, he received information from the SDPO, Bijni, that two persons would travel from Panbari towards No.1 Agrang via Panbari road to sell Ganja using two motorcycles. The SDPO, Bijni, directed him to conduct Naka checking at No.1 Agrang near Ananda Bazar. Subsequently, he, along with five other police personnel, went to Ananda Bazar and arrived there at about 5:30 PM. During the check, they noticed two individuals approaching from the Bishnupur side on

two motorcycles, each carrying plastic gunny bags. When they signaled for the individuals to stop, one of them managed to flee, taking advantage of the darkness, leaving behind his motorcycle and gunny bag. They apprehended Rajkumar Mandal (the present appellant). In the presence of witnesses, two motorcycles and two white gunny bags were recovered. One gunny bag contained four plastic packets weighing about 19 kg 961 grams, while the other contained four plastic packets totaling 20 kg 475 grams. The FIR was registered as Bijni P.S. case No. 161/2022. In light of the FIR, the accused/appellant was arrested on 25.09.2022 and has been in jail since then. The charge-sheet in this case was submitted on 30.11.2022, and charges under Sections 20 (b) (ii) (C)/29 were framed, putting the accused on trial. To support the case, the prosecution examined 10 (ten) witnesses, including four independent witnesses and five official witnesses. During the trial, the prosecution exhibited 13 (thirteen) documents. The accused/appellant denied the allegations in his statement recorded under Section 313 Cr.P.C, pleading his innocence.

3.2. After hearing the arguments from both sides, the learned Trial Court passed the impugned Judgment dated 22.07.2024 in connection with Special (N) Case No. 19(B)/2022, convicting the appellant under Sections 20 (b) (ii) (B) of the NDPS Act, sentencing him to rigorous imprisonment for 3 (three) years and 6 (six) months, and imposing a fine of Rs. 20,000/- (twenty thousand), with a default sentence of 60 (sixty) days of rigorous imprisonment.

4. Being highly aggrieved and dissatisfied with the impugned Judgment passed by the learned Special Judge, Bijni, Chirang, in Special (N) Case No. 19(B)/2022, the present appellant has preferred this appeal with a prayer for setting aside and quashing the impugned Judgment dated 22.07.2024.

5. Mr. Biswas, learned counsel for the appellant has submitted that the

learned Trial Court passed the impugned Judgment mechanically, without proper application of mind, making the impugned order liable to be set aside. He submits that the learned court below erred in law and fact, warranting the impugned judgment's overturning. Furthermore, he contended that the learned Trial Court made a jurisprudential error in assessing the prosecution's evidence and overlooked the mandatory provisions of the NDPS Act, making this a suitable case for this Hon'ble Court to set aside the conviction and release the appellant.

6. The prosecution failed to establish the chain of custody for the contraband alleged to have been seized. According to the Search and Seizure List dated 24.09.2022 (Exhibit-5), the contraband was seized on 24.09.2022 at 8:15 P.M, corroborated by P.W.1(present appellant). However, P.W.11 testified that the contraband was received at the Forensic Science Laboratory on 26.09.2022 by a special messenger. P.W.1 stated, "I handed over the seized articles at the police station, and the in-charge of the Malkhana issued a receipt thereon". Exhibit-P8 is a notice and Exhibit-P 8(1) is the signature on the receipt; however, the said Exhibit-P8 relates to a G.D Entry dated 25.09.2022, not 24.09.2022. Moreover, Exhibit- P8 does not contain a time or date for its entry into the Malkhana. While other documents were produced before the Magistrate on 25.09.2022 and marked as "seen," Exhibit-P8 was not, suggesting it may have been prepared later. Furthermore, Exhibit-P8 is claimed to have been signed by ASI Prunkrishna Ray, who has not been examined, meaning Exhibit-P8 is not proved. There is also no record as to who removed the contraband from the godown for production before the Magistrate or when it was done. Additionally, there is no mention of the seal affixed on the samples in the FSL report or by any prosecution witness. The messenger who supposedly delivered the contraband

to the FSL was not examined, nor is his name disclosed. Moreover, the Malkhana register was not produced to prove that the contraband was kept in the Malkhana or taken out for presentation before the Court or FSL. Thus, the prosecution failed to prove the chain of custody, which is essential for a conviction under the NDPS Act.

7. He further submitted no samples were produced before Court out of eight duplicate samples which were drawn. Out of the three independent witnesses whose signatures appear in the Seizure List, two were examined: (a) Bharat Chandra Barman as P.W.2 and (b) Jyotis Kr Barman as P.W.4. P.W.2 stated in cross-examination, "Exhibit-5 was not read over to me. I do not know what articles were in the gunny bags. I put my signature as directed by police and do not know anything about the case". P.W.4 said, "One day, around 8:00 P.M, I went to Agrang Bridge to bring my uncle, Shri Bharat Barman. I saw police at the scene and noticed two bikes. Police took my signature on Exhibit-4 (3). I don't know why the police took my signature". None of the witness implicated the appellant in the seizure of the contraband.

8. The prosecution also failed to comply with Section 57 of the NDPS Act, which mandates that "whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours, report all particulars of such arrest or seizure to his immediate official superior." No such report was sent in this case. Additionally, the prosecution did not prove compliance with Section 42(2) of the NDPS Act, which requires that "where an officer takes down any information in writing under subsection (1) or records grounds for his belief under the proviso, he shall within seventy-two hours send a copy to his immediate official superior."

9. Moreover, there was a complete violation of Section 52A of the NDPS Act,

as no certificate certifying the correctness of the inventory was produced. No photographs were exhibited, nor was there a certificate confirming the photographs' authenticity. The prosecution also failed to provide a list of samples or any certificate certifying its correctness. Although P.W.10 stated that samples were drawn before the SDJM, Bijni, no order from the Magistrate was produced to show that the samples were indeed drawn in his presence. Additionally, no staff from the court of the learned SDJM, Bijni was examined to confirm that the samples were drawn before him.

10. Finally, there was non-compliance with Section 55 of the NDPS Act, which states that "the officer-in-charge of the police station shall take charge of and keep in safe custody all articles seized under this act, pending the orders of the Magistrate." None of these requirements were met in this case, particularly regarding the sealing of contraband by the Officer-in-Charge of the police station.

11. Mr. Biswas, learned counsel for the appellant has submitted that the prosecution could not prove any link with the samples received in the FSL and the FSL report with the samples drawn in the present case. There is no link evidence between the samples allegedly drawn in the instant case with that of the samples received in the FSL of which Exhibit-13 (FSL Report) is claimed to be the report, because none of the description of the samples mentioned in the FSL Report had been deposed or stated by P.W. 10 (IO) who claimed to have drawn the samples and sent to FSL.

12. He further submits that there has been total non-compliance with Sections 42(2) and 57 of the NDPS Act. Additionally, there is complete non-compliance with Section 52A(2) of the NDPS Act, which is mandatorily required to be followed. He also submitted that the Ganja/duplicate sample was not produced

before the Court, which constitutes a serious flaw in the case under the NDPS Act. Furthermore, he pointed out that the independent witnesses, as mentioned above, did not support the prosecution's case. He also submitted that the prosecution failed to prove the chain of custody of the sample.

13. In support of his submissions, he relies on the following decisions: -

- i. ***Vijay Pandey vs. The State of Uttar Pradesh***, reported in (2019) 18 SCC 215, wherein, the Hon'ble Apex Court held that the mere production of a laboratory report stating that the sample was tested as narcotics is not conclusive proof by itself. The sample must be produced before the Court, and it must be shown that the sample seized and the sample sent to the FSL are correlated and proven by the prosecution.
- ii. ***The State of Gujarat vs. Ismail U. Haji Patel & Anr.***, reported in (2003) 12 SCC 291, wherein, the Hon'ble Supreme Court expressed the view that, in NDPS cases, the safe custody of the contraband must be proved under Section 55 of the Act.
- iii. ***The State of Rajasthan vs. Tara Singh***, reported in (2011) 11 SCC 559, wherein, the Hon'ble Apex Court reiterated that safe custody must be proved by the prosecution.
- iv. ***The State of Rajasthan v. Gurmail Singh***, reported in (2005) 3 SCC 59, wherein, the Hon'ble Supreme Court held that the prosecution must provide link evidence to prove that the contraband seized was sent to the FSL for examination. Furthermore, the samples and the seal should be sent to the Excise Laboratory for comparison with the seal appearing on the sample.
- v. ***Md. Diluwar Hussain & Anr. vs. The State of Assam*** (Judgment dated 11.08.2023, passed in CrI. A. No. 177/2022), wherein the Co-Ordinate Bench of

this Court expressed the view that the failure to produce the Malkhana Register in Court, and the failure of the Investigating Officer to confirm that the samples were kept in safe custody, casts a shadow of doubt over the veracity of the case of the prosecution and the investigation.

vi. **Md. Manirut Jaman @ Moni vs. The State of Assam**, passed in CrI. A. No. 392/2023, dated 09.09.2024, wherein, in paragraph 52 of the said judgment, this Court held that *"It appears that though the PW-6 has deposed that the contraband was kept in Police Station Malkhana, however, apart from oral testimony nothing was produced to substantiate this evidence. No malkhana register was produced to show that the samples which were drawn from the contraband were kept in malkhana before it could be sent to the Forensic Laboratory for its examination"*.

vii. **Pardesi Ram vs. The State of M.P.**, reported in 2011 1 Crime (HC) 329, wherein, in paragraph 8 of the said judgment, it has been held that *".....There is no evidence led by the prosecution that the sealed samples and the spicemen impression of the seal and seized articles were deposited in the Malkhana of the police station for safe custody. Neither the Moharrir of the Malkhana was examined nor Malkhana Register has been produced in evidence by the prosecution in order to prove that after seizure, the articles of the ganja tree along with sample were kept in the safe custody. There is no evidence as to where seized ganja and sample thereof etc were kept, from the date of the seizure till the date it is alleged to be received in the Forensic Science Laboratory. The mandate of Section 55 of the Act obliges the Investigating Officer to ensure the safe custody of the ganja to rule out every possibility of tampering....."*

viii. **Ram Karan vs. The State of Himachal Pradesh**, reported in (2007)

SCC Online HP 65, the Hon'ble Himachal Pradesh High Court, in paragraph 11 of the said judgment, it has been held that; *"As noticed by us above, the totality of the circumstances including the fact that the Malkhana register does not show any entry on 08.06.2004 when the contraband was supposed to have been deposited leaves no doubt in our mind that the appellant is not guilty of the offences for which he was charged. Why and under what circumstances the entries were not made nor the register exhibited in the Court, further strengthens our conclusion that the appellant is innocent of the offences....."*

14. In regard to non-compliance with Sections 42(2) and 57 of the NDPS Act, the learned counsel for the appellant relies on the following decisions;

i. *Karnail Singh vs. The State of Haryana*, reported in (2009) 8 SCC 539, wherein, in paragraph 35(d) of the judgment, it was held that; *"While total non-compliance of requirements of sub-sections (1) and (2) of [Section 42](#) is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of [Section 42](#). To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of [Section 42](#). But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of [Section 42](#) of the Act....."*

ii. *Swapan Mazumdar vs. The State of Assam*, reported in (2018) 4 GLT 448, wherein, it was observed that compliance with Section 57 of the NDPS Act is mandatorily required for the prosecution to prove its case.

15. Citing the above-mentioned judgments, the learned counsel for the appellant, Mr. Biswas, submits that in the present case, the information regarding the carrying of the alleged ganja was received by P.W.1 while he was at the police station. This information was recorded in writing as Exhibit-1 (the G.D. Entry No. 356, dated 24.09.2022 at 4:00 P.M.). Afterward, at 5:00 P.M., one hour later, he left the police station and reached the place of interception at 5:30 P.M. Despite having sufficient time to send a report of the information to his superior officer, he failed to do so. It is noted that the information was provided by one SDPO, Bijni, Sekhar Jyoti Roy; however, he has not been examined by the prosecution.

16. In regard to non-compliance with Section 52A of the NDPS Act, Mr. Biswas, learned counsel for the appellant, has relied on the following decisions:

- i. ***Union of India vs. Mohanlal and Anr.***, reported in (2016) 3 SCC 379, and specifically relies on paragraph No.31.1 of the said judgment.
- ii. ***Mangilal vs. The State of M.P.***, reported in 2023 SCC Online SC 862, where reliance is placed on paragraphs 5, 6, and 8.
- iii. ***Simarnjit Singh vs. The State of Punjab***, reported in 2023 Livelaw (SC) 570.

17. Citing these decisions, the learned counsel for the appellant, Mr. Biswas, has submitted that in the case of *Mangilal* (supra), it was held in paragraph 8 of the judgment that;

“Para-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](#)). The procedure contemplated through the notification has an element of fair play such as the deposit of the seal, numbering the containers in seriatimwise and keeping them in lots preceded by compliance of the procedure for drawing samples. The afore-stated principles of law are dealt with in extenso in [Noor Aga v. State of Punjab](#), (2008) 16 SCC 417:

“89. Guidelines issued should not only be substantially complied with, but also in a case involving penal proceedings, vis-à-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith”.

18. Further, Mr. Biswas submits that in the present case, there has been total non-compliance with Section 52A of the NDPS Act. According to the evidence of P.W. 10, it is clear that no application was made before the concerned Magistrate for certifying the correctness of the inventory, although a certificate appears at the bottom of Exhibit-9, on which the inventory was prepared. It is also submitted that the signature of the Magistrate was not exhibited during the trial. Additionally, he submits that while the prosecution claims that the samples were drawn in the presence of the SDJM, Bijni, they have failed to prove this. No application for the drawing of the samples has been exhibited, nor has the Magistrate's order been presented before the Court. Moreover, there is no evidence from the prosecution witnesses confirming that the Magistrate's

signature was on the sample packets that were sent for examination.

19. Mr. Biswas, learned counsel for the appellant, has submitted that there is a serious flaw in the case, as the prosecution failed to produce the seized ganja or the duplicate sample before the Court during the trial. In support of his submission, he relies on the following decisions:

i. ***Vijay Jain vs. The State of Madhya Pradesh***, reported in (2013) 14 SCC 527; and

ii. ***Jitendra & Anr. vs. The State of Madhya Pradesh***, reported in (2004) 10 SCC 562, wherein the Hon'ble Apex Court expressed the view that: "*The seized materials ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and the production of panchanama does not discharge the heavy burden which lies on the prosecution.*"

iii. ***Noor Aga vs. The State of Punjab***, reported in (2008) 16 SCC 417, wherein, the Hon'ble Apex Court reiterated that it is the duty of the prosecution to prove that the contraband was recovered from the possession of the accused.

20. During the course of the arguments, Mr. Biswas also raised the issue of the evidence provided by the independent witnesses. He submitted that the two independent witnesses, i.e. the P.W Nos. 2 and 3, examined by the prosecution, do not support the case. Both witnesses were unaware of the contraband that was alleged to have been recovered from the possession of the accused. Thus, none of the independent witnesses implicated the appellant, and the prosecution failed to prove the seizure of the contraband from the possession of the accused/appellant.

21. In regard to the failure of the independent witnesses to support the

prosecution's case, Mr. Biswas relies on the following decisions:

- i. ***Krishan Chand vs. The State of Himachal Pradesh***, reported in (2018) 1 SCC 222; and
- ii. ***Union of India vs. Leena Martin & Ors.***, reported in (2018) 4 SCC 490.

22. On the other hand, Mr. Das, learned Additional Public Prosecutor, has submitted that the prosecution has proved the seizure through the seizure witnesses, i.e., P.W. Nos. 1, 2 and 3. The inventory was also prepared and certified by the Magistrate, as required under Section 52A of the NDPS Act. He further submitted that since the SDPO, Bijni was present at the place of seizure, compliance with Section 42(2) of the NDPS Act is not necessary, as the superior officer was present along with the informant (P.W.1). Additionally, there is no cross-examination evidence from the prosecution witnesses regarding the custody of the contraband, and this issue was raised by the appellant only for the first time before the Court.

23. He further submitted that, according to the prosecution's case, the contraband was seized on 24.09.2022, and a G.D. entry was made. The contraband was immediately handed over to the police station by the informant and the seizing officer, and it was sent for FSL testing on 26.09.2022. Therefore, the time gap cannot be seen as detrimental to the prosecution's case. The search and seizure were conducted based on the information received, and since the SDPO himself was part of the seizing team, it cannot be said that there was total non-compliance with Sections 42(2), 52, and 57A of the NDPS Act, as claimed by the accused/appellant.

24. Mr. Das, learned Additional Public Prosecutor has submitted that the

learned Trial Court rightly passed the impugned Judgment dated 22.07.2024, convicting the accused/appellant after proper appreciation of the evidence on record. Therefore, no interference by this Court is necessary in the judgment passed by the learned Special Judge, Bijni, in Special (N) Case No. 19(B)/2022.

25. After hearing the submissions made by the learned counsels for both sides, it is found necessary to assess the evidence of the prosecution witnesses (PWs) and the relevant documents produced during the trial.

26. P.W.1 is the informant and also the police officer who received the information from the SDPO, Bijni. Accordingly, a G.D. entry was made (vide G.D. entry No. 356) on 24.09.2022. Following the instructions of the SDPO, P.W.1 made arrangements for naka checking. With the authorization letter, he proceeded for naka checking along with other staff members, apprehended the accused/appellant, and recovered two motorcycles along with two gunny bags containing suspected cannabis. Thereafter, after complying with all necessary formalities, the contraband was seized in the presence of witnesses, along with other articles. The co-accused, Nityananda Sarkar, had already fled the scene.

27. From the evidence of the PWs, it is seen that P.W.2, a local resident, who was present at the time of the search and seizure. P.W.3, a police constable, who accompanied the informant to the place of occurrence. P.W.4 is an independent witness who was present at the location where the motorcycles were seized. P.W.5, a home guard, was with the informant at the scene. P.W.6 is a shopkeeper from whom an electronic weighing machine was seized. The remaining PWs, namely P.Ws. 7 and 8, are hearsay witnesses who merely heard about the incident involving the recovery of contraband from the possession of the accused/appellant. P.W.10 is the investigating officer (IO) who investigated the case, and P.W.11 is the FSL expert.

28. Thus, P.W. Nos. 1, 10, and 11 are the vital witnesses for the prosecution, while P.W. Nos. 2, 3, and 4 are the seizure witnesses. It is a fact that P.W.2 was present at the place of occurrence and he claimed that the police seized the articles in his presence, however, he could not say who owned the cannabis, nor was he aware if the police had searched the body of the accused. It may not be possible for P.W.2 to know the ownership of the motorcycles or the gunny bags, but, it is clear from his evidence-in-chief that the police seized the articles in his presence. He was not cross-examined on this point. However, in his cross-examination, he stated that Exhibit-5 (the seizure list) was not read over to him.

29. P.W.3, another seizure witness, was also present at the time of the recovery and accompanied P.W.1 (the informant) to the place of occurrence. In his cross-examination, it is seen that no other persons were present at the locality at the time of the seizure. He could not remember the registration number of the motorcycles, which is quite possible, as it is not uncommon for a person to forget such details after two years.

30. P.W.4 supports the prosecution's case to the extent that, at the time of the incident, he arrived at the place of occurrence, saw the two motorcycles, and signed the seizure list. However, he was unaware of the reason why the police took his signature. There was no suggestion made to him that the motorcycles were not seized in his presence.

31. Thus, the evidence of P.W. Nos. 2, 3, and 4 cannot be outrightly disbelieved. The fact remains that the prosecution seized the articles in the presence of these witnesses, even though they may not have been aware of the contents of the seizure list or the ownership of the motorcycles and contraband.

32. Turning to the evidence of P.W.1, who is a vital witness for the

prosecution, it is seen that he made the G.D. entry after receiving information from the SDPO. He also obtained an authorization letter from the SDPO before proceeding to the place of occurrence for naka checking. P.W.1 exhibited the office order regarding the issuance of the authorization letter (Exhibit-3), and he also produced the seizure lists as Exhibits 4 and 5. Along with these, he exhibited the materials as Exhibits 1, 2, and 3 which included photographs of the accused/appellant with the recovered cannabis, as well as photographs of the two motorcycles seized from the place of occurrence. After completing the search and seizure, P.W.1 lodged the FIR at the police station, and the Investigating Officer (IO) recorded his statement under Section 161 of the Cr.P.C.

33. Thus, it cannot be said that there was a total non-compliance with Section 42(2) of the NDPS Act. The SDPO himself was present along with the seizure team. Based on the information received from the SDPO, P.W.1 and his staff carried out the naka checking. Additionally, P.W.1 not only made the G.D. entry but also properly obtained the authorization letter from his superior, which was exhibited as Exhibit-3. Furthermore, it is the prosecution's case that the information was provided by the SDPO, who accompanied the seizing team. As the SDPO is a superior officer authorized under Section 42(2) of the NDPS Act, all required formalities were observed. Therefore, it cannot be held that there was total non-compliance with Section 42(2) of the NDPS Act.

34. In *Mohammad Hussain Farah vs. Union of India* (2000) 1 SCC 329, the Hon'ble Supreme Court held that "*when a search is carried out by officers authorized under Section 41, compliance with Section 42 of the NDPS Act is not required*". In the present case, P.W.1 has complied with all the required formalities, including registering the G.D. entry, obtaining the authorization

order, and producing the authorization letter (Exhibit-3).

35. Regarding the compliance with Section 55 of the NDPS Act, it is seen that after the seizure, P.W.1 handed over the seized articles to the police station. The in-charge of the Malkhana issued a receipt upon receiving the articles from P.W.1. P.W.1 exhibited the receipt as Exhibit-8, and Exhibit-8(1) contains the signature of P.W.1. However, learned counsel for the appellant, Mr. Biswas, raised the issue that the Malkhana register and the entry by the Malkhana in-charge were not produced or exhibited during the trial.

36. It is an admitted fact that the Malkhana register was not produced before the learned Trial Court. However, the receipt issued by the Malkhana in-charge was duly exhibited. This receipt contains a detailed description of the articles handed over to the Malkhana in-charge, and the in-charge also signed the receipt acknowledging the receipt of those articles.

37. Mr. Biswas, learned counsel for the appellant, also raised the issue regarding the non-compliance of Section 52-A of the NDPS Act.

38. For ready reference, Section 52-A, Sub-sections 2, 3 & 4 of the NDPS Act are extracted below:

“52A. Disposal of seized narcotic drugs and psychotropic substances. ...

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed,

country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of

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

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

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) 20/24 or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

39. It is submitted by the learned counsel for the appellant, Mr. Biswas, that although the inventory was prepared by the Investigating Officer (IO) and the signature of the magistrate appears at the bottom of Exhibit-9 (the inventory), the magistrate who signed the document was not examined, nor did the prosecution produce any order for the drawal of the sample in the presence of the learned SDJM, Bijni. However, from Exhibit P-9, it is evident that the inventory was duly prepared by P.W.10, the IO, and the inventory was certified by the learned SDJM, Bijni. The failure to examine the learned magistrate who signed the document cannot, therefore, be a valid reason to disbelieve or

discard Exhibit-9, as the inventory was properly prepared and certified by the magistrate in compliance with Section 52-A of the NDPS Act. It is also an admitted fact that the magistrate generally passes the order for drawing the sample in his or her presence, based on instructions from the learned Special Judge. After the sample is drawn or the inventory is certified, the record is generally handed over to the learned Session Judge.

40. In the present case, upon perusal of the LCR, it is seen that an order for the drawing of samples was issued, and accordingly, on 25.09.2022, the learned magistrate passed the order. The samples were drawn in his presence, and the inventory was also prepared and certified by the concerned magistrate. Thus, it is evident that there is compliance with Section 52-A of the NDPS Act, as required under the law. The mere non-exhibition of the order or the non-examination of the magistrate who signed the inventory cannot be the ground to disbelieve or discard the entire procedure of preparing the inventory and exhibiting the same.

41. Regarding non-compliance of Section 57 of the NDPS Act, Mr. Biswas, learned counsel for the appellant, has relied on the decision of the co-ordinate bench of this Court passed in ***Swapan Mazumdar*** (supra). Section 57 of the NDPS Act, for ready reference is extracted hereinbelow:

“Section 57: Whenever any person makes any arrest or seizure, under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior”.

42. In the instant case, based on the evidence on record and other materials,

it is evident that after obtaining the authorization letter and in the presence of the SDPO, P.W.1 conducted the search and seizure at the place of occurrence. In this regard, he also made the GD entry on 24.09.2022. The search and seizure process was completed around 10:30 P.M. on the same day, and on the following day, within 48 hours, the matter was reported by P.W.1 to the police station, and the FIR was lodged accordingly. Therefore, it cannot be held that there was non-compliance with Section 57 of the NDPS Act. On the contrary, it is clear that the seizing officer (P.W.1) reported the matter to his superior officer within the prescribed 48-hour period and lodged the FIR.

43. Furthermore, it is an admitted fact that the entire search and seizure operation was conducted based on the information received from the SDPO, who was also present along with the team. In this regard, the Hon'ble Supreme Court, in ***Md. Dilbagh Singh v. State of Punjab*** (Criminal Appeal No. 1096/2016), has held that;

“Qua the imputation of non-adherence of the requisites of [Section 57](#) of the Act, suffice it to note that both the Courts below, on an analytical appreciation of the evidence on record have concurrently concluded that the Investigating Officer at the site, had after the arrest of the accused persons and or seizure of the contraband forwarded the information with regard thereto to his higher officer, namely, Deputy Superintendent of Police without any delay and that the related FIR with the necessary endorsements therein had reached the Ilaka Magistrate on the same date i.e. 28.08.2007 at 9 p.m. There is no evidence forthcoming or referred to by the learned counsel for the petitioner to either contradict or decimate this finding based on records. In this view of the matter as well, the assertion of non-compliance of [Section 57](#) of the Act does not commend for acceptance. In our view, having regard to the facts available, the requirements of [Section 57](#) of the Act had been duly complied with as well”.

44. The issue raised by the learned counsel for the appellant is that the

prosecution has failed to establish the link between the contraband allegedly seized from the possession of the accused/appellant, the samples drawn, and the samples received at the FSL. Mr. Biswas, learned counsel for the appellant, submitted that according to P.W.10 (the Investigating Officer), the samples and seized articles were drawn in the presence of the SDJM, Bijni, and subsequently sent to the FSL, Guwahati. However, the prosecution has not provided other details, such as the police station case number, the manner in which the samples were packed, the signature of any witness or the accused on the sample packets, the mode of dispatch to the FSL, the date of dispatch, the sealing of the samples, the facsimile used on the samples, the memo number, or the forwarding letter accompanying the samples. These omissions, according to the appellant's counsel, create doubts about the chain of custody and the integrity of the samples sent for analysis.

45. He further submitted that there is no linked evidence connecting the samples allegedly drawn in the instant case to those received at the FSL, as per Exhibit-13. According to the learned counsel for the appellant, while P.W.1 testified that the seizure occurred on 24.09.2022 at 8:15 P.M., the Forensic Expert (P.W.11) stated that the contraband was received by him at the FSL on 26.09.2022 via a special messenger. P.W.1, however, claims to have handed over the seized articles to the police station, and the Malkhana in-charge issued a receipt, which was exhibited as Exhibit-8. From Exhibit-8, it appears that the GD entry was made on 25.09.2022, not 24.09.2022 as claimed by P.W.1. Furthermore, Exhibit-8 does not mention the date or time when the articles were entered into the Malkhana. In this context, Mr. Biswas, learned counsel for the accused/appellant placed reliance on the following decisions:

- i. **Vijay Pandey vs. The State of Uttar Pradesh** (2019) 18 SCC 215;
- ii. **The State of Gujarat vs. Ismail U. Haji Patel & Anr.** (2003) 12 SCC 291;
- iii. **The State of Rajasthan vs. Tara Singh** (2011) 11 SCC 559;
- iv. **The State of Rajasthan vs. Gurmail Singh** (2005) 3 SCC 59;
- v. **Md. Diluwar Hussain & Anr. vs. The State of Assam** (Judgment dated 11.08.2023, passed in Crl. A. No. 177/2022);
- vi. **Md. Manirut Jaman @ Moni vs. The State of Assam** (Judgment dated 09.09.2024, passed in Crl. A. No. 392/2023);
- vii. **Pardesi Ram vs. The State of M.P.** (2011) 1 Crimes (HC) 329; and
- viii. **Ram Karan vs. The State of Himachal Pradesh** (2007) SCC Online HP 65.

46. Citing the above decisions, Mr. Biswas, learned counsel for the appellant, has submitted that the Hon'ble Supreme Court, along with various High Courts, has consistently held that, it is the duty of the prosecution to establish that the seized articles were kept in proper custody and in proper form. The prosecution must also establish the link between the seized articles and the samples sent for examination. Furthermore, it is essential for the prosecution to produce the malkhana register to prove that the seized articles were securely stored in the malkhana until they were forwarded to the FSL.

47. In the present case, from the evidence of P.W.1, it is seen that immediately after the seizure of the contraband, he handed over the seized articles to the in-charge of the malkhana at the police station. In acknowledgment, the malkhana in-charge, ASI Purna Krishna Roy, issued a receipt, which was duly signed and exhibited as Exhibit-8. The receipt, Exhibit-8, contains a detailed description of

the seized articles.

48. Though the prosecution did not produce the malkhana register during the trial, the receipt issued by the malkhana in-charge serves as a record that all items were properly described and acknowledged. Thus, it is clear that the seized articles were immediately handed over to the malkhana for safe custody. On 26.09.2022, the samples were received by the Forensic Science Laboratory (FSL), and as per the testimony of P.W.11, the FSL expert, the requisition and samples were marked with seals (A-1/C-1, A-2/D-1, A-3/E-1, A-4/F-1, B-1/G-1, B-2/H-1, B-3/I-1, B-4/J-1), each containing 25 grams of the dry plant material. The samples were received by the FSL within 48 hours of the seizure, and all were found sealed and properly marked.

49. Although there was a one-day delay in sending the samples to the FSL after the contraband was handed over to the malkhana, this delay cannot be regarded as a significant flaw in the prosecution's case. The only discrepancy lies in the date mentioned in the receipt (Exhibit-8), where the GD entry date is incorrectly noted as 25.09.2022, whereas the correct date of the GD entry was 24.09.2022. However, this does not undermine the prosecution's case, as the GD entry number remains consistent (No. 356). The discrepancy in the date of the GD entry on the receipt does not render the entire prosecution case unreliable, especially when the seized articles were immediately placed in the malkhana, and the samples were sent to the FSL without inordinate delay.

50. In the case of **Gurmail Singh** (supra), cited by the learned counsel for the appellant, there was a delay of 15 days in sending the seized articles to the FSL, with no satisfactory evidence regarding their custody in the malkhana. Such circumstances are not present in the current case.

51. In the present case, the one-day delay in sending the samples to the FSL cannot be considered an inordinate delay. Furthermore, apart from the discrepancy in the date on Exhibit-8, all other necessary particulars were provided when the seized articles were handed over to the malkhana in-charge. The description of the articles was duly recorded in the receipt issued by the malkhana in-charge (Exhibit-8), ensuring that there was no ambiguity regarding the items seized. Moreover, the seized articles were produced before the learned Magistrate, and the inventory prepared in this regard was also duly certified by the Magistrate. Therefore, despite the minor discrepancy regarding the date, the prosecution has maintained a proper chain of custody and complied with the relevant procedural requirements under the NDPS Act.

52. Mr. Biswas, learned counsel for the appellant, has raised the issue of reverse burden under Sections 35 and 54 of the NDPS Act. He submitted that the reverse burden comes into play only after the prosecution has established a prima facie case against the accused/appellant. Mere registration of a case under the NDPS Act does not automatically shift the burden of proof to the accused from the very outset. The presumption of guilt under Section 35 and Section 54, which requires the accused to explain possession of contraband satisfactorily, is rebuttable. It does not absolve the prosecution from its fundamental duty to prove the charge beyond a reasonable doubt.

53. In other words, the reverse burden provisions in Sections 35 and 54 are not absolute; they are subject to rebuttal by the accused. To support this argument, Mr. Biswas has relied on the following decisions:

i. *Abdul Rashid Ibrahim Mansuri v. The State of Gujarat* [(2000) 2 SCC 513];

- ii. ***Gorakh Nath Prasad v. The State of Bihar*** [(2018) 2 SCC 305]; and
- iii. ***Gangadhar @ Gangaram v. The State of Madhya Pradesh*** [(2020) 9 SCC 202].

54. As per Section 54 of the NDPS Act, a presumption is created that the accused/appellant has committed an offence under the Act unless and until the contrary is proved by the accused. This provision imposes a reverse burden of proof upon the accused, meaning that once the prosecution establishes the basic facts of the case, the accused is required to explain the possession of the contraband or otherwise rebut the presumption of guilt. The Hon'ble Apex Court in the case of **Gorakh Nath Prasad Vs. State of Bihar, (2018) 2 SCC 305**, has expressed the view that, *a reverse burden of proof lies upon the accused, contrary to the normal rule of criminal jurisprudence for presumption of innocence unless proved guilty. However, this rule shall not dispense with the requirement of the prosecution to having first establish a prima facie case, only whereafter the burden will shift to the accused.*

55. In the present case, from the entire discussion made above, it is clear that the prosecution has established a prima facie case against the accused/appellant. The evidence shows that on the specified date, the accused was found in possession of contraband (ganja) along with a co-accused. The contraband was seized by the police after conducting a naka checking based on prior information received. Following the seizure, the necessary formalities were observed, and the samples of the contraband were drawn, sealed, and sent to the Forensic Science Laboratory (FSL) for examination, which confirmed the substance as cannabis/ganja.

56. Furthermore, it is evident that the prosecution properly followed the prescribed procedures under the NDPS Act, including the registration of GD entry, compliance with seizure formalities, and the forwarding of the contraband to the FSL within a reasonable time. The prosecution was able to prove its case beyond a reasonable doubt, establishing the accused's involvement in the possession and trafficking of the seized contraband. On the other hand, the accused/appellant failed to discharge his burden of proving any defence or rebutting the prosecution's evidence. Despite being provided an opportunity to cross-examine the prosecution witnesses and present any evidence in his defence, the accused failed to produce any rebuttal evidence or raise any doubt on the prosecution's case.

57. In light of these facts and after a thorough examination of the evidence on record, this Court is of the opinion that the judgment passed by the learned Special Judge, Bijni, Chirang in Special (N) Case No. 19(B)/2022 on 22.07.2024 is based on a proper appreciation of the law and the facts of the case. The conviction of the accused/appellant is well-founded and does not warrant any interference by this Court and accordingly the same stands dismissed.

58. With above observation, this criminal appeal stands disposed of.

59. Sent back the Case Record.

JUDGE

Comparing Assistant