



2024:CGHC:48350

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

(Judgment reserved on 03.12.2024)

(Judgment delivered on 09.12.2024)

CRA No. 357 of 2004

1 – G. Kashu, son of Nayadu, aged about 29 years, Caste Telugu, Occupation Agriculturist, Ankapalli, Tahsil & Police Station Ankapalli, Distt. Visakhapatnam (Andhra Present), Presently residing at Camp-1, Road No.18, Thana Chawni, District Durg (C.G). ... **Appellant**

versus

1 - State of Chhattisgarh, through District Magistrate Durg, District Durg (C.G). ... **Respondent**

For Appellant : Mr. Aman Pandey, Advocate

For State/respondent : Mr. Sanjeev Pandey, Dy. Govt. Advocate

(Hon'ble Shri Justice Sanjay Kumar Jaiswal)

C A V Judgment

1. This appeal is directed against the judgment of conviction and order of sentence dated 6th April, 2004 passed in NDPS Special Case No. 19/2003 by the Special Judge (NDPS Act) Durg, Chhattisgarh whereby the appellant has been convicted u/s 8 read with section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced to undergo R.I. for 10 years and to pay a fine of Rs.1,00,000/- (Rupees one lakh), in default of payment of fine, to further undergo additional RI for 3 years.

2. The allegation against the appellant is that on 22.10.2003 evening at 6.30

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p.m., he was keeping 66.100 Kgs. of ganja in his possession at Plat Form No.1 near GRPF Police Station, Durg thereby he violated the provisions of Section 8(c) and committed offence under section 20(b)ii)(C) of the NDPS Act.

3. The prosecution case, in brief, is that on 22.10.2003 Sub-Inspector A.S. Khan (P.W.4) was on duty at Govt. Railway Police Choki, Durg. In the evening, he left the Chowki for checking plat form which was recorded in Rosnamcha (Ex.P-9). At that time in the evening, the Samta Express Train arrived at Durg Railway station, from which accused got down along with 4 bags and a suit case and at platform where he engaged two railway porters Sadashiv (P.W.1) and Subhash Yadav (P.W.5) to take his goods to the outside Platform. When the accused was going outside the plat-farm with railway porters who were carrying 4 bags and when they reached to the end of RPF Station of Platform no.1, Sub-Inspector A.S. Khan (P.W.4) saw the accused and his property and on suspicion, they were stopped and four bags and a suit case were searched in the presence of police force and the two coolies and during search, the contraband (ganja) was found. At the same time, the Police continued their search in which no objectionable item was found in other bags. Panchnama Ex.P-1 was prepared and information regarding the right to search was given to the accused by Ex.P-2, in which the accused gave his consent for search to the office by writing STS. All the four bags and suit case were opened wherein ganja was found, which was identified by rubbing and smelling, for which, Panchnama Ex.P-3 was prepared. Further the property was taken to Dattatreya Engineering Workshop which is situated near the place of incident where the property was weighed. Upon which, 7.200 Kgs in a purple bag, 8.600 kgs in green-yellow bag, 12.600 Kgs in light yellow coloured bag; 16.400 in black coloured bag and 21.300 Kgs., in black coloured suitcase total 66.100 Kgs of Ganja was found. Weight Panchnama was prepared vide Ex.P-4 and on the spot the property was seized from accused vide seizure Memo Ex.P-5. According to the prosecution case, samples of 50-50 grams of ganja were collected form each of four bags & suit case and they were sealed vide Ex.P-5. Then the accused and property was

brought to the Railway Police Station Durg where the FIR was recorded vide Ex.P-12. The accused was arrested and Panchnama Ex.P-6 was prepared. The site map of incident was prepared vide Ex.P-7. Rosnamcha was recorded vide Ex.P.10. The property was kept preserved in Malkhana. The special report was sent to Superintendent of Police, the acknowledgment has been filed as Ex.P-14. The information regarding FIR was sent to the Court, the acknowledgment of which was filed as Ex.P-15. The samples of ganja were sent to FSL, Raipur through S.P., Railways vide Ex.P-16 and the acknowledgment was obtained vide Annexure P-17 and the FSL report (Ex.P-18) was received by Letter (Ex.P-19) wherein the samples were found to be Ganja. Further after recording the statements of witnesses and completing the investigation, the charge sheet was filed.

4. The statement of accused/appellant was also recorded in which he denied the guilt, pleaded innocence and false implication in the case. In order to prove the guilt of accused, the prosecution has examined 5 witnesses and exhibited 19 documents on its behalf. The learned trial Court after evaluating the evidence led by the prosecution and documents placed on record, convicted and sentenced the appellant as mentioned aforesaid.

5(i) Learned counsel appearing on behalf of appellant would submit that neither any contraband (ganja) was seized from the conscious possession of appellant nor the seizure was proved. Referring to the statements of independent witnesses P.W.1 & P.W.5 he would submit that these witnesses who were said to have been engaged by the accused to carry his luggage at Platform No.1 of Durg Railway Station have entirely denied the seizure from the possession of appellant or any search was conducted in their presence, therefore, the prosecution has failed to prove the alleged seizure from the appellant.

5(ii) He further referred to the statement of P.W.2 P.N. Bederkar and would submit that this witness whose weighing equipment was said to have been used has categorically denied the presence of appellant or any other witness at the time of weighing contraband except police personnel, therefore, the alleged seizure cannot

be relied upon.

5(iii) He would further submit that the seized contraband was not produced before the learned trial Court and the prosecution has not given any explanation for non-production of the same. He placed reliance on decision of the Supreme Court in ***Ashok v. State of M.P (2011) 5 SCC 123 & Gorakh Nath Prasad v. State of Bihar (2018) 2 SCC 305*** to submit that non-production of seized contraband before the trial Court will be fatal to the prosecution.

5(iv) Referring to the statement of Asst. Sub-Inspector A.S. Khan (P.W.4) learned counsel would submit that samples of 50 grams was drawn from each bag but no sample in duplicate as advised in Clause 2.4 of Standing Order 1/89 was drawn.

5(v) Learned counsel would further submit that the Assistant Sub-Inspector has also stated that the seized contraband included seeds, leaves and stems, however, as per the definition of Ganja contained in Section 2(iii)(b) of the NDPS Act, flowering of fruiting tops of cannabis plant falls within the ambit of Ganja and leaves, seeds and stems cannot be termed as ganja under the provisions of the NDPS Act. In view of the above contentions, learned counsel prays that the impugned judgment needs interference and deserves to be set aside.

6. Learned State Counsel would submit that the impugned judgment of conviction and order of sentence is well merited which do not call for any interference.

7. I have heard learned counsel for the parties and have also perused the evidence adduced by the prosecution as also the documents placed on record.

8. The learned trial Court has held that since no explanation has been given by accused for the possession of such property (ganja), consequently he was found in possession without any valid license, thereby he was convicted and sentenced for the offence u/s 8 r/w sec. 20(b)(ii)(C) of the NDPS Act.

9. From the evidence of independent witnesses namely Sadashiv (P.W.1) and Subhash Yadav (P.W.5) who are the railway porters, it is apparent that these witnesses have not supported the the case of prosecution regarding seizure of

ganja from the conscious possession of the appellant. It is more important to consider the evidence of Subhash Yadav (P.W.5). This witness has deposed that being a porter, he carries and delivers the luggage of passengers at Durg Railway Station. Narrating the incident, he has stated in his examination-in-chief that at 4-5 months back, Samta Express Train arrived at Durg railway station and among the porters, the work of carrying luggage is done on a number basis and accordingly, the turn of another porter Sadashiv (P.W.1) came. Sadashiv called him to accompany him. This witness states there were four suit cases and one bag which had to be taken out from the platform. He took one suit case and one bag whereas the Sadashiv took the other three bags and they took the luggage out from the platform and while taking luggage they were restrained by the Government Railway Police near the RPF station and were asked by the Police to take the luggage to the GRP station. Accordingly they took the luggage to GRP station and thereafter they left the place. This witness (P.W.5) categorically states that accused was not there at the luggage and further he was not moving with the luggage. He states that the police did not do any paper work with the accused. In cross examination, on a suggestion being made, this witness has stated that he cannot tell what was kept in the luggage and the police did not record his statement. P.W. 5 further categorically deposes that he did not say in the police statement dated 20.10.2003 at A to A that "....." was found from the possession of accused G. Kasu and he cannot tell how it was written. This witness has firmly denied the suggestion that the accused asked him and Sadashiv to carry four bags and one suit case. He further denied that accused was moving with the luggage and was apprehended by the Police with the goods. He has further categorically denied that the goods were checked in which ganja was found. He has further denied that proceedings were conducted on the spot, read over to him and he signed it. He further denied the suggestion that he is giving false statement to save the accused.

10. P.W.1 Sadashiv another porter has deposed in his chief examination that he does not know appellant G. Kashu. He has deposed that 1 or 1 ½ months back,

at about 6 – 7 p.m., when he and another porter Subhash were carrying luggage at Durg Railway Station, there the police caught five bags of goods, and the Police said that it was Ganja. One person was present there and at the instance of police, he signed a document. This witness states that he does not know whether the police had informed that person about the search or not and he does not know whether it was Ganja and he could not identify it there. He also categorically states that the weighing of contraband was not done in his presence. He deposes that he has simply signed a paper at the instructions of the police. In cross examination, this witness states that the police got their signatures on papers and he and Subhash Yadav (P.W.5) did not go to Datta Engineering Works to weigh the Ganja. This witness says that two-three men were standing at the place where they had picked up the luggage and there was crowd on the platform. He further deposes that when they were near the RPF station, some men ran away but this witness cannot tell that how many persons ran away. He says that having seen the police, two-three men must have run away. This witness has categorically admits that the police did not seize ganja from any bag or suitcase in his presence nor he knew what were the contents written in the documents Ex.P-1 to P-7 which he only signed at the instance of the Police.

11. Witness P.N. Bedarkar in whose workshop the ganja is stated to have been weighed is examined as P.W.2. He has stated that he owns Dutta Engineering Workshop situated in front of Durg Rly. Station wherein he was also having Weighing Scales for weighing iron. He states that about a month or two ago between 1 pm and 3 pm, the Railway Police came to his shop and they brought 2-4 suit cases which he did not count and they weighed the closed suit-cases and he did not remember how much it weighed. In other words, his evidence at a glance would reflect that this witness (P.W.2) has not at all stated that the closed suitcases which got weighed by the Police at his work-shop contain contraband (ganja). He further categorically states that there were two or three policemen and one of them was a senior officer and there was no private person with them at the time of

weighing suitcases.

12. Sub-Inspector A.S.Khan who was on duty at that time is examined as P.W.4. At para 7, he states that the sample of 50 grams each was drawn from each of the bag which was sent to FSL, Raipur for chemical examination. At para 11, he states that the seized contraband contains seeds, leaves and stems. He has further stated at para 13 that 4 bags & 1 suitcase were with railway porters namely Sadashiv and Subhash but he did not record in the document as to which porter was carrying which luggage out of the 5 items. He has not taken the signature of the person from whom he got the weighing done by Ex.P-4. At the same time, he has deposed that both these porters Subhash and Sadashiv were carrying the luggage. The witness (P.W.4) clearly admits that both these porters though were witnesses to the seizure and main documents and were present on the spot itself, however, there is no detailed description in Ex.P-4 in respect of the bags and suit case. Sub Inspector A.S. Khan further admitted the fact in para 14 that the weight of the property is including the bag and suitcase and he has not weighed the property separately from the bag and suitcase nor he had written the weight separately. This witness further at para 17 admits that when he stopped the accused, the accused himself was empty handed but there were porters carrying luggage with him and the accused did not catch both the porters. He further stated that having seen him, the accused did not escape.

13. In the present case the seized contraband was not produced before the learned trial Court as an exhibit and the prosecution has not given any plausible explanation for non-production of the same. Mere oral evidence that the ganja seized from the accused would not be sufficient to make out an offence under the NDPS Act. In ***Vijay Jain v. State of M.P (2013) 14 SCC 527*** the Supreme Court at para 10 held as under:

“10. On the other hand, on a reading of this Court’s judgment in Jitendra case (Jitendra v. State of *M.P.(2004) 10 SCC 562: 2004 SCC (Cri) 2028*, we find that this Court has taken a view that in the trial for an offence under the NDPS

Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act particularly when the Panch witnesses have turned hostile. Again, in *Ashok* [*Ashokv. State of M.P., (2011) 5 SCC 123 : (2011) 2 SCC (Cri) 547*], this Court found that the alleged narcotic powder seized from the possession of the accused was not produced before the trial Court as material exhibit and there was no explanation for its non-production and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the appellant.”

14. The independent witnesses Sadashiv (P.W.1) and Subhash Yadav have not supported the case of prosecution as both these witnesses have equivocally denied that either search was conducted in their presence or any contraband was seized from the appellant, therefore, these two witnesses have become hostile to the prosecution. The effect of not producing seized contraband before the Learned Trial Court in cases where seizure witnesses have turned hostile was discussed by the Hon’ble Supreme Court in ***Gorakh Nath Prasad v. State of Bihar (2018) 2 SCC 305*** wherein the Court held that the same will be fatal to the case of the prosecution. Para 7 is relevant here and quoted below:

7. The remaining prosecution witnesses being police officers only, it will not be safe to rely upon their testimony alone, which in any even cannot be sufficient evidence by itself either with regard to recovery or the seized material being ganja. No explanation has also been furnished by the prosecution for non-production of the ganja as an exhibit in the trial. The benefit of doubt will, therefore, have to be given to the appellant and in support of which learned Senior Counsel Shri Rai has relied upon *Jitendra v. State of M.P* [*Jitendra v. State of M.P. (2004) 10 SCC 562 : 2004 SCC (Cri) 2028*]

and reiterated in *Ashok v. State of M.P* [*Ashok v. State of M.P.*, (2011) 5 SCC 123 : (2011) 2 SCC (Cri) 547] as follows : (SCC pp.126-127, paras 12-13.

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

13. It may be noted here that in *Jitendra v. State of M.P* [*Jitendra v. State of M.P.*, (2004) 10 SCC 562 : 2004 SCC (Cri) 2028], on similar facts this Court held that the material placed on record by the prosecution did not bring home the charge against the accused beyond reasonable doubt and it would be unsafe to maintain their conviction on that basis. In *Jitendra* [*Jitendra v. State of M.P* (2004) 10 SCC 562 : 2004 SCC (Cri) 2028], the Court observed and held as under : (SCC pp. 564-565, Paras 5-6)

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

6..... The best evidence would have been seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this ‘failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the

offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that Panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned.”

In ***Naresh Kumar v. State of H.P., (2017) 15 SCC 684*** the Supreme Court had occasion to deal with the issue of independent witness turning hostile and effect of the same on the credibility of official witness and at para 8, the Court observed thus :

“8. In a case of sudden recovery, independent witness may not be available. But if an independent witness is available, and the prosecution initially seeks to rely upon him, it cannot suddenly discard the witness because it finds him inconvenient, and place reliance upon police witnesses only. In the stringent nature of the provisions of the Act, the reverse burden of proof, the presumption of culpability under Section 35, and the presumption against the accused under Section 54, any reliance upon Section 114 of the Evidence Act in the facts of the present case, can only be at the risk of a fair trial to the accused.”

Further the Apex Court in ***Makhan Singh v. State of Haryana (2015) 12 SCC 247***, specifically observed that the testimony of independent witnesses cannot be overlooked even if the testimony of the official witnesses inspires confidence. Therefore, applying the law laid down by the Supreme Court to the instant case, this Court is of the considered view that the prosecution has failed firstly prove that the bags were in the possession of the appellant or that anything was seized from him.

15. The Asst. Sub Inspector A.S. Khan (P.W.4) has deposed that one sample of 50 grams was drawn from each bag, but no sample in duplicate was drawn. The evidence of P.W.2 who is a witness to weighing goods shows that closed-suit cases got weighed by the Police at his work-shop and he did not say that such luggage contain contraband, which itself demolish the prosecution case regarding seizure procedure adopted by the Police. Further the evidence of Asst. Sub-Inspector (P.W.4) shows that 4 bags & 1 suitcase were being carried by the railway porters

namely Sadashiv and Subhash but he did not record in the document as to which porter was carrying which luggage out of the 5 items and his evidence raises doubt about the seizure. It appears that the I.O., had not complied with the procedure laid down in Standing Order 1/89. Though no procedure is prescribed either in the NDPS Act or in the NDPS Rules regarding the manner in which the samples are to be drawn but a Standing Order 1/89 has been issued by the Central Government in this regard, wherein general procedures for sampling, storage etc., have been given which reads as under :

“2.1. All drug shall be properly classified, carefully weighed and sampled on the spot of seizure.

2.2 All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchanama drawn on the spot.

2.3 The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn.

2.4 In the case of seizure of a single package/container, one sample in duplicate shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than one package/container.

2.5 However, when the packages/containers seized together are of identical size and weight, bearing identical markings, and the contents of each package given identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects, the packages/containers may be carefully bunched in lots of ten packages/containers except in the case of ganja and hashish (charas), where it may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample (in duplicate) may be drawn.

2.6 Where after making such lots, in the case of hashish and ganja, less than 20 packages/containers remain and, in the case of other drugs, less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

2.7 If such remainder is 5 or more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such remainder package/container.

2.8 While drawing one sample (in duplicate) from a particular lot, it must be ensured that representative samples in equal quantity are taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

2.9 The sample in duplicate should be kept in heat-sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelopes should also bear the No. of the package(s)/container(s) from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope along with test memos should be kept in another envelope which should also be sealed and marked "Secret Drug sample/Test memo", to be sent to the chemical laboratory concerned."

16. Perusal of Instruction 2.4 shows that an advisable clause has been provided to draw one sample in duplicate from each package/container in case of seizure of more than one package/container. Instruction 2.5 provides an exception to Instruction 2.4. It has been provided in Instruction 2.5 that when the packages/containers seized together are of identical size and weight, bearing identical markings, and the contents of each package given identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects, the packages/containers may be carefully bunched in lots of ten packages/containers except in the case of ganja and hashish (charas), where it may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample (in duplicate) may be drawn.

17. Thus, in the aforesaid situations, a representative sample can be drawn after bunching together the contents of numerous packages. The essential requirement before such an action of drawing a representative sample can be undertaken is that the contents of each package have to be subjected to colour test by U.N. drug testing Kit. Once the test is conducted and the result indicates that all the packages are identical in all respects, then a representative sample can be taken out after bunching the packages. Hence, the Investigating Officer was under an obligation to collect separate samples from each of the packets so that the analysis of the contents of each of the packets could be performed individually. As the investigating officer before drawing the samples, proceeded to mix the contents of all the packets without subjecting them to the test by the U.N. Kit, the accused has a right to contend that one of the packets might not have contained contraband ganja. If at all the prosecution desired to prove that all the packets contained ganja, then it was essential for the samples to have been collected and analysed individually from all the packets or else, the test by U.N. Kit should have been carried out on the material present in all the packets. The Hon'ble Apex Court considered a similar issue in the case of **Gaunter Edwin Kircher v. State of Goa** reported in **AIR 1993 SC 1456** and observed as below:-

“5. We shall first consider whether the prosecution has established beyond all reasonable doubt that the accused had in his possession two pieces of Charas weighing 7 gms. and 5 gms. respectively. As already mentioned only one piece was sent for chemical analysis and P.W.1 the Junior Scientific Officer who examined the same found it to contain Charas but it was less than 5 gms. From this report alone it cannot be presumed or inferred that the substance in other piece weighing 7 gms. also contained Charas. It has to be borne in mind that the Act applies to certain narcotic drugs and psychotropic substances and not all other kinds of intoxicating substances. In any event in the absence of positive proof that both the pieces recovered from the accused contained Charas only, it is not safe to hold that 12 gms. of Charas was recovered from the accused. In view of the evidence of P.W.1 it must be held that the prosecution has proved positively that Charas weighing about 4.570 gms. was recovered from the accused. The

failure to send the other piece has given rise to this inference. We have to observe that to obviate this difficulty, the concerned authorities would do better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized. If it is not practicable in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets of pieces recovered should be sent for chemical examination under a regular panchnama and as per the provisions of law.”

18. Assistant Sub Inspector A.S. Khan (P.W.4) has stated in his evidence at para 11 that the seized contraband included seeds, leaves and stems. The High Court of Rajasthan in ***Rajesh Sharma v. State of Rajasthan, 2024 SCC OnLine Raj 485*** has held that leaves and leaves without tops are not termed as Ganja. Further the High Court of Karnataka in ***K.K. Rejji v. State by Murdeshwar Police Station, Karwar, 2009 SCC OnLine Kar 325*** also differentiated between flowering tops which falls under NDPS Act and leaves, stems and seeds which are out of the purview of the Act. At para 10, the Court observed thus :

10. In the first instance, we have to go on the premise that prosecution charge against the accused is based on alleged seizure of ganja. Ganja is defined under the provision of NDPS Act as follows.--

“2(iii)(b) Ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated.”

Further the High Court of Guwahati in case of ***Chanam Ranjit Meitei v. Union of India, 2009 SCC OnLine Gau 442*** has specifically held that even though the FSL report shows presence of Ganja, ‘leaves’ and ‘seeds’ cannot be held to be covered under the provisions of the NDPS Act. Therefore, applying the ratio laid down in the aforesaid decisions (supra) to the facts of the present case, I am inclined to hold

that (i) the nature of contraband as defined u/s 2(iii)(b) of the Act is not proved and (ii) weight of the contraband cannot be determined.

19. In view of the foregoing discussion, this Court is of the considered view that there is lack of cogent evidence to convict the appellant beyond reasonable doubt for the reason that the seizure from appellant is not supported by the evidence of independent witnesses. The weighing proceedings is also not proved to be proper. Mere fact of a FSL Report being available is no confirmation either of seizure or what was seized was Ganja, in absence of production of seized item in Court as exhibit. Non-production of seized material is therefore considered fatal to the prosecution case. The testimony of official witness Assistant Sub Inspector (P.W.4) cannot be safely relied upon as his evidence is not substantial either with regard to recovery or seized material being Ganja. Therefore the impugned judgment of conviction and order of sentence of the appellant under the Special Act cannot be allowed to sustain and is accordingly set aside. The appellant G. Kasu is acquitted of the charge u/s 8 read with section 20(b)(ii)(C) of the NDPS Act.

20. In the result, the appeal is **allowed**. Appellant is on bail. His bail bonds shall continue for a further period of 6 months as per Section 437-A of Cr.P.C.

21. Let a certified copy of this judgment along with the original record be transmitted to the trial Court concerned for information and necessary action, if any.

**Sd/-
(Sanjay Kumar Jaiswal)
Judge**