

GAHC010002902012



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Criminal Appeal No. 8 of 2012

1. Shri Kebejjii Ngoupuni,
S/o Shri Ngoupani,
R/o Laii, P.S.-Tadubi,
District: Senapati, Manipur.

2. Smti Dephro Lakho,
W/o Shri Kevejii Ngoupani,
R/o Laii, P.S. Tadubi,
District: Senapati, Manipur.

.....Appellants/Accused

-Versus-

1. The State of Assam,
Represented by Public Prosecutor.

.....Respondent.

Advocates for the petitioner: Mr P K R Choudhury.

Advocate for the respondent: Mr K K Parasar, Addl. P.P.

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of Hearing : 23.04.2024
Date of Judgment : 30.07.2024

JUDGMENT AND ORDER (CAV)

(Susmita Phukan Khaund, J.)

This appeal is directed against the Judgment and Order dated 22.11.2011, passed by the learned Sessions Judge, Golaghat, in Special Case No. 3/2010, Golaghat PS GD Entry No. 800 dated 20.12.2009, under Sections 20 (b) (ii) (C) of the Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS, for short), whereby Sri Kebejii Ngoupuni and Smt Dephro Lakho (hereinafter, also referred to as the appellants or the accused), were convicted under the aforementioned section of law and sentenced to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs. 1,00,000/- (Rupees One Lac Only) each, with default stipulation.

2. The genesis of the case was that, on the evening of 20.12.2009, at Rangajan, in National Highway – 39 (shortly as NH-39), under Golaghat Police Station of Golaghat District, 1 quintal, 1 kg, 130 grams of suspected ganja, packed in 25 packets of black polythene paper were recovered from the possession of the appellants, while they were carrying the contraband in a Maruti Gypsy, bearing Registration No. NL-04/3985. Then Golaghat PS Case No. 64/2010 under Section 22 of the NDPS Act, was registered on the basis of an FIR lodged by Sri Tileswar Konwar, SI of Golaghat Police Station (hereinafter, also referred to as the informant and the Investigating Officer, IO, in short), who after completion of investigation,

submitted charge sheet against the appellants under Section 22 of the NDPS Act.

3. At the commencement of trial, charges under Section 20 (b) (ii) (C) of the NDPS Act were framed and read over and explained to the appellants, who abjured their guilt and claimed to be tried. To substantiate its stance, the prosecution examined 10 witnesses and the defence cross-examined the witnesses to refute the charges.

4. On the incriminating materials projected through the evidence of the prosecution witnesses, several questions were asked to the appellants. The answers of the appellants were evasive. The appellants did not tender any evidence in defence. The learned trial Court delineated the following points to decide this case brought up against the appellants-

“Whether on 20.12.2009, at evening time at Rangajan on the NH-39 under Golaghat Police Station of Golaghat District, accused Nos. 1 and 2 were found possessing/transporting 1 quintal 1kg 130 gms. Ganja (cannabis) in the 'said motor car' in contravention of the provisions of NDPS Act or rule, order made thereunder and thereby, committed the offence punishable under Sections 20(b)(ii) (c) of the NDPS Act, 1985? If so, what should be the punishment as per law?

Decision of the learned Trial Court:

5. It has been held by the learned Trial Court that during the cross examination of the witnesses PW-2, PW-3, PW-5 vis-à-vis the cross examination of the IO, PW-9, no contradictions could be elicited by the defence. From the evidence of the S.I. of Police, PW-2, it has surfaced that she was checking motor vehicles along with the BSF and police personnel

on 20.12.2009 and while checking the vehicle seized in connection with this case, 25 (Twenty Five) packets of ganja were recovered from the vehicle, which were kept under the motor vehicle by fastening the same with wire. She has also described that the weight of the ganja was more than 1(One) quintal. She has corroborated the evidence of the informant cum IO. Her cross-examination could not be contradicted by the defence.

6. The evidence of PW-5 and PW-6 reveals that the vehicle was driven by a man while the woman was the passenger in the vehicle. The police detained the woman and the driver, who were brought to the Golaghat Police Station. The fact that during the checking of the motor vehicle, the petitioners were found carrying ganja in the vehicle remained un-contradicted and un-rebutted despite the vigorous cross examination of the witnesses PW-2, PW-3, PW-4, PW-5 and PW-6 vis-à-vis the cross examination of the PW-9. The PW-4 is the Deputy Commandant of BSF and he has also supported the prosecution case.

7. PW-7 and PW-8, Md. Hekim Ali and Md. Abdul Gafur are residents of Lanka and they were in the Nursery near the PO at that relevant point of time. They have not supported the evidence of the prosecution and were declared as hostile witnesses. However, it could be established from the relevant part of the evidence that the police called them to the PO from the nearby Nursery and took their signatures on Exhibit-3. The learned Trial Court has held that a scrutiny of the Exhibit-3 reveals that 1 quintal 1 kilogram 130 grams of ganja was seized from the appellants. The learned Trial Court relied on the cross examination by the prosecution and has held that the cross examination of the prosecution has been confirmed by the evidence of IO, PW-9 and has held the appellants guilty of the offence of transporting ganja.

8. It was observed by the learned Trial Court that the PW-10 also conducted the investigation and his evidence reveals that he recorded the statement of the informant under Section 161 of the CrPC and he forwarded the appellants to judicial custody, whereas the evidence of PW-1, the Scientific Officer reveals that samples forwarded in connection with this case tested positive for ganja. It was also held by the learned Trial Court that it has been clearly established that :

“12. From the foregoing discussion, the following points have been clearly established:

- (a) That the accused Nos. 1 and 2 were caught red handed by the police and BSF personnel while they were transporting cannabis (ganja) by the 'said motor car'.*
 - (b) That the quantity of cannabis was 1 quintal 1 Kg. 130 gms.*
 - (c) That the report of FSL, Assam, Guwahati confirmed that sample of seized contraband goods were cannabis (ganja).*
 - (d) That the accused persons and seized contraband goods were handed over to Golaghat police station by the first informant after making seizure of the goods and arrest of the accused persons.*
- 13. In view of foregoing discussion, it is held that charge u/s 20(b) (ii)(c) of the NDPS Act has been evinced against the accused persons and, therefore, they are convicted under the aforesaid section of Law.”*

Arguments for the appellants:

9. It is submitted by the learned counsel for the appellants that Section 55 of the NDPS Act was not complied with. The appellants deserve acquittal on that score alone. It is further submitted that the prosecution has failed to prove conscious possession. Independent witnesses have turned hostile. When the evidence is not bolstered by the evidence of

independent witness, the prosecution evidence falls flat.

10. It is further submitted that the investigation was carried out in a slipshod manner. The articles were seized on 20.12.2009, but from 20.12.2009 to 24.12.2009, the seized articles were kept in the malkhana and not produced in the Court. There are no independent witnesses in this case. The registered owner of the vehicle from where the articles were seized was not made a witness in this case.

11. The learned counsel for the appellants has relied on the decision of Hon'ble the Supreme Court in ***Khekh Ram –Vs- State of Himachal Pradesh***, reported in **(2018) 1 SCC 202** and has submitted that Section 50 of the NDPS Act was not complied with during investigation by the Investigating Agency.

12. Relating to the articles kept in the malkhana, the learned counsel for the appellants has relied on the decision of Hon'ble the Supreme Court in ***S K Raju @ Abdul Haque @ Jagga -Vs- State of West Bengal***; reported in **(2018) 9 SCC 708**.

Arguments by the prosecution:

13. It is submitted by the learned Additional Public Prosecutor that there is direct evidence against both the appellants. During naka checking, the vehicle of gypsy make, was checked and 1 quintal 1 kg 130 grams of suspected ganja was found inside the gypsy and only 2 occupants were found in the gypsy and this is nothing but conscious possession of the contraband. The appellants were well aware that they were carrying a humongous amount of ganja in their gypsy. The witnesses have categorically implicated the appellants. As a well reasoned judgment has been rightly passed, this appeal is liable to be dismissed as the same

is devoid of merits.

Discussions and Decision:

14. Now, the question that falls for consideration is whether the learned trial Court has erred in convicting the appellants. To decide this case in its proper perspective, the evidence is re-appraised.

15. The informant Sri Tileswar Konwar deposed as PW-9 that on 20.12.2009, he was serving as SI of Police under the Golaghat Police Station, and at about 07:00 pm, at Rangajan Tri-juncture (cross-roads) of the NH-39, he was checking motor vehicles, along with the Border Security Force (BSF) personnel. At that time, they recovered 25 packets of ganja from the vehicle of Maruti Gypsy model and seized the same and arrested the driver and occupant of the motor vehicle. The driver disclosed his name as Sri Kebejjii Ngoupuni and the occupant disclosed her name as Smti Daphro Lakho. Both the driver and the occupant, i.e., the appellants were arrested in connection with this case and forwarded to judicial custody. Two samples were drawn from the seized packets and forwarded for chemical examination to the Forensic Science Laboratory (at present, DFS).

16. PW-9 has further testified that before drawing samples from the contraband, he weighed the contraband with the help of a weighing scale, procured from the nearby tea-garden factory of Rangajan Tea Estate and from a nearby grocery shop. The entire contraband weighed around 1 quintal 1 kg 130 grams. The chemical examination report was sent from the DFS, which disclosed that the samples were of ganja (cannabis). Then, he lodged the FIR. He proved the FIR as Exhibit-10. PW-9 further stated that he seized the

vehicle carrying the contraband along with two mobile phones which were found in the pocket of the shirt of the appellant, Kebejjii Ngoupuni.

17. It is apt to mention at this juncture that PW-9 has also conducted a part of the investigation. He was confronted about the earlier statements made by some of the witnesses whose statements he recorded during investigation.

18. In his cross-examination, PW-9 has deposed that in Exhibit-3 as well as in the forwarding report of the appellants, the case number has been shown as "Golaghat PS GD Entry No. 800 dated 20.12.2009". At the time of forwarding of the appellants before the Court and at the time of production of seizure list, the contraband was not produced before the Court. As per order of the Court, he (PW-9) produced the seized contraband before the Court on 24.12.2009.

19. It is apt to mention at this juncture that the learned counsel for the appellants laid stress in his argument that the seized articles were produced in the Court on 24.12.2009 and it has also been admitted by PW-9 in his cross-examination that after recovery, the seized ganja was kept in the malkhana of the Police Station and the sample was forwarded to the Forensic Science Laboratory (DFS), on 23.12.2009. PW-9 has also mentioned in his cross-examination that a register is maintained in the malkhana. He has also admitted in his cross-examination that he has not mentioned the malkhana registration number in the Case Diary, regarding storing the samples in the Police Station malkhana.

20. It is also submitted by the learned counsel for the appellants that PW-9 has admitted in his cross-examination that the samples were sent for chemical examination on 23.12.2009.

By drawing the attention towards the cross-examination of PW-9, learned counsel for the appellants laid stress in his argument that Section 55 of the Act has not been properly complied with. No malkhana register was produced in the Court in support of PW-9's submission that the seized articles were kept in safe custody in the Police Station malkhana, pending orders of the Magistrate. Even the malkhana register was not mentioned in the Case Diary. Moreover, the articles were kept for 4 days in the Police Station malkhana before the same were produced in the Court. There is every possibility that these were not the same articles, which were seized in connection with this case and possibility of sending samples of some other contraband for chemical examination cannot be ruled out. The remaining part of the cross-examination of PW-9 will be discussed at an appropriate stage.

21. Smt Tripti Gogoi, SI of Police has deposed as PW-2 that on 20.12.2009, she was posted as SI (probationary) at Golaghat Police Station. On that day, at Rangajan, she along with the BSF personnel were checking motor vehicles. While they were checking motor vehicles, they halted a Maruti Gypsy bearing Registration No. NL-04/3985, approaching from Dimapur side. The occupants of the vehicle also informed them that they were approaching from Dimapur side. On checking the vehicle, 25 polythene packets were recovered from the vehicle. On suspicion, they opened the packets and they found ganja like substance inside the packets. Then they brought one weighing scale from the nearby tea-garden factory and weighed the contraband and found that the contraband was more than 1 quintal. From each packet, they have drawn sample of about 100 grams and prepared 50 samples and then seized the remaining ganja like substance and they produced the appellants and the seized articles in the Court.

21.1. In her cross-examination, PW-2 has stated that the OC, Tileswar Konwar, and ASI, Niren Phukan, were present during checking and they intercepted the vehicle at about 3/4 pm. She has stated that there are residences near the place of occurrence. The IO, Sri Garga Narayan Bora investigated this case. Moreover, Tileswar Konwar prepared the seizure list. She has denied the suggestion of the learned defence counsel that she has not mentioned before the IO that they have found some packets wrapped with polythene below the exterior of the vehicle. This has been contradicted by the PW-9 through his cross-examination as per Section 145 of the Indian Evidence Act, 1872 (Evidence Act, for short), qua Section 162 CrPC. PW-9, IO-cum complainant has admitted in his cross-examination that PW-2 has not stated in her initial statement under Section 161 CrPC that 25 packets containing bhang were recovered. PW-9 has also affirmed that PW-2 has not mentioned in her initial statement under Section 161 CrPC that 100 samples were drawn out from each of the 25 packets and, thereafter, 50 samples were prepared for chemical examination.

22. Another witness, an A.S.I. of Police Sri Niren Phukan deposed as PW-3 that he has identified both the appellants and has stated that on 20.12.2009, while he was posted at Golaghat as ASI at about 4:30 PM, they were on duty of checking motor vehicles at Rangajan NH-37. At that time, a vehicle was approaching from Dimapur side. They stopped the vehicle, a white coloured gypsy bearing registration No. NL-04-3985, and started checking the same. They found several black coloured polythene packets on the entire lower part of the vehicle. On checking the packets they found ganja like substance inside the packets. They weighed the packets and the total weight of the packets were found to be 1 quintal. The IO seized the packets and thereafter, he (PW-3) left for his duty.

23. In his cross examination he (PW-3) has testified that he could not recall whether the BSF or the Assam Police intercepted the vehicle. The contradiction that could be elicited as per Section 162 of the CrPC *vis-a-vis* Section 145 of the Evidence Act on the cross examination of PW-3 and the cross examination of PW-9, complainant-cum-IO is that PW-3 failed to mention in his initial statement that 1 (One) quintal of ganja was recovered from a white coloured gypsy which was approaching from Dimapur side. This contradiction can be safely brushed aside.

24. PW-3 and PW-9 were together present at the place of Occurrence (PO) and both PW-3 and PW-9 had noticed the white coloured gypsy approaching from Dimapur side and both PW-3 and PW-9 together checked the vehicle and recovered the ganja weighing 1 (One) quintal.

25. When PW-9 recorded his statement, it was indeed not necessary for PW-3 to repeat and explain once more how PW-3 was present with PW-9 when the vehicle approaching from Dimapur side was intercepted and checked. Both the patrolling team who were present at the PO, were aware of this fact. In fact, this cannot be considered as an omission under Section 161, 162 of the CrPC *vis-a-vis* Section 145 of the Evidence Act.

26. Md. Irfan, Deputy Commandant of 10 BSF, Sai Complex deposed as PW-4 that on 20.12.2009 he was present at the PO. On that day, at about 2:00 PM, they along with the State police were checking motor vehicles at Rangajan when a white coloured gypsy bearing registration No. NL-04-3985 approaching from the Dimapur side was also halted and checked by the team. After checking the vehicle, they found 12 (Twelve) packets covered by polythene paper and after searching and checking the packets, they found ganja like

substance inside the packets. The packets weighed 1 (One) quintal 1 (One) kg. The police seized the ganja along with the vehicle. He proved his signature as Exhibit 3(1) of the seizure list. This witness identified both the appellants and has stated that both the appellants were present in the vehicle at the time of the incident.

27. PW-4 has admitted in his cross examination that the PO is near a tea factory and there are few residences and a school at the PO. Around 10/15 passengers were also present at that time at the PO. He could not recall who had prepared the seizure list. The police did not take his signatures on the sample of ganja drawn from the bulk.

28. The learned counsel for the appellants tried to draw the attention of this Court towards his initial statement before the IO. The IO has admitted in his cross examination that PW-4 did not mention in his statement under Section 161 of the CrPC that at the time of checking 12 (Twelve) packets of bhang had been recovered from the gypsy. This cannot be considered as an omission *per se*.

29. It is thus fathomable that when their statements were recorded by PW-9, the witnesses did not find it necessary to recount the entire case to a member of the same team conducting the investigation. At the same time, the submission of the learned counsel for the appellants cannot be ignored that the Investigating Team did not follow the proper procedure. It cannot be ignored that the procedure as per Section 55 of the NDPS Act was not properly followed.

30. Reverting back to this case, another Constable who was a member of the same team conducting the search operation, Sri Diganta Khatoniar testified as PW-5 that on 20.12.2009 he went to Rangajan NH-39 along with DSP, O/C of Golaghat Police Station and other police

officials in order to check the motor vehicles at about 1:00 PM. While checking the motor vehicles they signaled one white coloured vehicle approaching from Dimapur side towards Numaligarh to halt. Then, he along with the other police officials checked the vehicle and found 25 (Twenty Five) bundles containing suspected ganja from different parts of the vehicle. Some packets were recovered under the bonnet and under the seat. After recovery of the packets containing ganja, the packets were weighed by the SI Garga Narayan Borah. The vehicle was driven by the male accused and a woman was seated in the vehicle. Both the occupants of the vehicle were apprehended and brought to the Golaghat Police Station. The ganja was seized.

31. This witness identified the seized ganja in the Court. He has stated that Material Exhibits 1 to 25 are the bundles containing the seized ganja, which were recovered from the possession of the appellants.

32. The learned counsel for the appellants highlighted the cross examination of this witness stating that PW-5 stated that about 200 people were gathered at the PO near Rongdoi Tea Factory. He stated that one Mukul Saikia, O/C interrogated him regarding the incident. He admitted that he did not affix his signatures on Material Exhibits 1 to 25.

33. Although PW-5 has stated that Mukul Saikia recorded his statement, yet the IO PW-9 stated in his cross examination that PW-5 did not mention in his initial statement that he accompanied the DSP, O/C and the other police officials to the PO for checking motor vehicles, commuting through the PO.

34. PW-9 has also admitted in his cross examination that PW-5 did not mention in his initial

statement that 25 packets of ganja were recovered from different parts of the vehicle including the seat and the bonnet and the appellants were present in the vehicle which was transporting ganja.

35. Through the cross examination of PW-5, the learned counsel for the appellants tried to project that his evidence is a deviation from the evidence of other witnesses. He has stated that 200 people were present in the PO whereas not a single witness has stated that 200 people were present at PO. PW-4 has stated that 10/15 passengers were present at the PO. Moreover, PW-5 deposed that the ganja was found on the seat and in the bonnet, but PW-2 stated that ganja was found below the exterior of the vehicle and PW-3 deposed that the ganja was recovered from the lower part of the vehicle. These dissimilarities between the evidence of the witnesses cast a shadow of doubt over their veracity.

36. Several dissimilarities between the evidence of the prosecution witnesses have also surfaced. PW-2 who accompanied PW-9 during investigation stated that after drawing samples, they produced the appellants and the seized articles in the Court, while on the contrary the IO, PW-9 has deposed that the seized articles were produced in the Court after 4 (Four) days.

37. In the interregnum these articles were kept in the Malkhana of the Police Station. PW-2 has deposed that 50 (Fifty) samples were drawn from the packets but the IO, PW-9 has affirmed through his cross-examination that PW-2 has not mentioned in her initial statement that 50 (Fifty) samples were drawn from 25 (Twenty Five) packets. PW-9 conducted the investigation but he has not described in what manner the samples were drawn. He has deposed that 2 (Two) samples were drawn from the seized packets and it has to be

deciphered that 50 (Fifty) samples may have been drawn from the 25 (Twenty Five) packets seized in connection with this case.

38. Due to the contradictions and the discrepancies, the prosecution has failed to prove beyond reasonable doubt that the samples were drawn as per proper procedure. Thus, it can be safely held that the benefit of doubt has to be extended to the appellants and conscious possession of the contraband cannot be attributed to the appellants.

39. It has been held by the Hon'ble Supreme Court in ***Khekh Ram Vs. State of Himachal Pradesh***, reported in **(2018) 1 SCC 202** that :

“24. This Court in Krishan Chand case noticed the contradiction on the above aspects in the evidence of PW 4 and PW 6 and observed that those could not be glossed over as minor, more particularly in the background of the allegation of false implication made by the appellant-accused. It held the view that from the evidence it appeared that the place where the appellant-accused had been apprehended was not an isolated one as one house of Govind Singh, DW 2 was located nearby. This Court thus rejected the version of the prosecution that independent witnesses could not be associated as the place was desolate. In all, in view of the above inconsistencies and the deficiencies in prosecution evidence, this Court held that the possession of the contraband by the appellant-accused and seizure thereof from him was doubtful. It noted as well that though there was a reference of recovery of knife at the time of opening of the bag allegedly carried by the appellant-accused, it did not find place in the seizure memo which further created doubt in the prosecution case. The conviction was set aside holding that the High Court had failed to take note of the contradictions in the evidence in the proper perspective and had failed thereby to appreciate that harsher is the punishment, the stricter ought to be the proof of the charge.”

40. Reverting back to this case, it is held that the dissimilarities, contradictions and the discrepancies pointed out by the learned counsel for the appellants lends a benefit of doubt to the appellants.

41. The decision of the Hon'ble Supreme Court in *S K Raju @ Abdul Haque @ Jagga* (supra) relied upon by the learned counsel for the appellants is not relevant to this case.

42. Another team member Gopal Konwar deposed as PW-6 that on 20.12.2009 while he was serving as a Constable at Golagahat Police Station, he went to Rangajan to discharge his duty by checking motor vehicles commuting through that route. He accompanied the other police officials to the PO. While checking motor vehicles, they found a gypsy approaching from Dimapur side towards Numaligarh and they halted the vehicle and checked the same and found ganja inside the vehicle. The police also seized the suspected ganja and brought the same to the Golagahat Police Station. The driver and the woman who were found inside the vehicle were detained by the police.

43. PW-6 failed to identify the appellants in the dock and he had also stated that the seized contraband was not produced for identification and verification in the Court. Thus, PW-6 did not support the prosecution case.

44. A daily waged labourer Md. Hakim Ali as PW-7 failed to identify both the appellants, who were present in the dock when PW-7's deposition was recorded. PW-7 deposed that about a year back, at about 3:00 PM, he along with Rajul Ahmed, Abdul Gafur (PW-8) were working in the nursery near NH-39. At that time, the police called them and asked them to affix their signatures. He has proved his signature as Exhibit 3(2). This witness was however declared as a hostile witness on the prayer by the prosecution, who was allowed to cross examine him. The cross examination of the prosecution is not noteworthy as the witness has totally denied the suggestion of the prosecution. Similarly, another witness Abdul Gafur who was present along with this witness has also not supported the evidence. He too stated that on the date of the incident, the police called him and took his signature on a blank piece of paper. This witness has also identified his signature as Exhibit 3(3).

45. Sri Garga Narayan Bora deposed as PW-10 that while he was serving as an SI of Golaghat Police Station, on 20.12.2009, he was also the In-Charge as the O/C was absent. He received the FIR lodged by Tileswar Konwar (PW-9) and he registered the Golaghat Police Station Case No. 64/2010 under Section 22 of the NDPS Act. He embarked upon the investigation. He interrogated the first informant and recorded his statement under Section 161 of the CrPC. He took custody of the appellants and then arrested them and subsequently, the appellants were forwarded to judicial custody. He has proved the FIR as Exhibit 10 and his signature as Exhibit 10(2). He has identified the signature of Tileswar Konwar (PW-9) as Exhibit 11(1) and the signature of Additional S.P. (Head Quarter), Golaghat, Sri Bir Bikram Gogoi as Exhibit 3(7) as he is acquainted with the signature of his seniors. PW-10 further deposed that after completion of investigation, he submitted charge sheet against the appellants. He has proved the charge sheet as Exhibit 12 and Exhibit 12(1) as his signature and 12(2) as the signature of Mukul Saikia, the then O/C of Golaghat Police Station. In his cross examination he has stated that during investigation he recorded the statement of only one witness i.e. the informant. He has also stated that PW-9 did not mention about the total quantity of suspected contraband seized in connection with this case.

46. Recapitulating the entire evidence, it is held that the evidence of PW-2, PW-3, PW-4, PW-5, PW-9 and PW-10 clearly depicts that while checking the motor vehicles at Rangajan NH-39 in the afternoon of 20.12.2009, the white coloured gypsy transporting 1 quintal 1 kg 130 grams of ganja was halted by the patrolling team consisting of the State Police and BSF personnel. The vehicle was checked and a total number of 25 packets covered with black polythene paper were found at different parts of the body of the vehicle, under the bonnet and the seat as well as under the vehicle and on the backside of the vehicle. These packets

were opened and ganja was found inside the packets and the packets were seized in connection with this case.

47. Samples were drawn and forwarded for forensic examination. The procedure of drawing samples will be discussed later. The forensic examination report was received which clearly reveals that the sample seized in connection with this case were ganja/cannabis. Gajendra Nath Deka, Deputy Director, Drugs and Narcotic Division in the Directorate of Forensic Science of (DFS at present) deposed as PW-1 that :

“On 24.12.2009 he was working as Deputy Director, Drugs and Narcotic Division in the Directorate of Forensic Science, Assam, Kahilipara, Guwahati. On that day he received a parcel through their Director in connection with Golaghat PS GDE No. 800 dtd. 20.12.2009. The parcel consisted of 25 exhibits enclosed in a carton with cloth cover which was sealed with the impression of a seal corresponding with the seal impression forwarded

Description of articles.

25 sealed envelopes marked as "1(A) to 1(Y) containing 100 gms dry plant material in each which were marked by him as DN-491/2009 (a) to DN-491/2009 (y) accordingly.

Result of examination :

On detailed examination –

The exhibits DN-491/2009 (a) to DN-491/2009 (y) tested positive tests for cannabis (Ganja).

Ext. 1 is his report and Ext. 1(1) is his signature. Report was forwarded by Director

Incharge Dr. R.N. Khound. Ext.2 is the forwarding letter and Ext.2(1) is the signature of Director Incharge Dr. R.N. Khound, with which he is familiar.”

48. In the instant case, the core question is that whether this case suffers from discrepancies as procedure under Section 55 of the NDPS Act was not strictly adhered to. The other questions that fall for consideration are that:

(i) Whether the samples were properly drawn?

(ii) Whether the seized articles were properly exhibited in

the Court and,

(iii) Whether the discrepancies in the prosecution, investigation and evidence extend a benefit of doubt to the appellants?

49. In the instant case, the learned counsel for the appellants has laid stress in his argument that the seized articles were not properly identified. The independent witnesses in whose presence the articles were seized did not at all support the prosecution case. They were declared as hostile witnesses. Another witness who has identified the Material Exhibits was not a seizure witness. He has not even affixed his signature on the Material Exhibits 1 to 25. Thus, his evidence relating to verification and identification of the seized articles in the Court cannot be considered at all as he is not a proper seizure witness.

50. It is submitted on behalf of the appellants that as the seized articles were not produced in the Court to be identified by the seizure witnesses, the entire prosecution case falls through.

51. It has been held by the *Hon'ble Supreme Court in Union of India Vs. Rooparam vide order dated 07.09.2017 in Criminal Appeal No. 1883/2014 (MANU/SC/1817/2017)* that:

“7. In *Ashok @ Dangra Jaiswal v. State of M.P.* MANU/SC/0340/2011 : (2011) 5 SCC 123 : [2011 ALL SCR 895], it was again observed by this Court that –

1 2. 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.

1 3. It may be noted here that in *Jitendra v. State of M.P.* [MANU/SC/0727/2003 : (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* [MANU/SC/0727/2003 : (2004) 10 SCC 562 : 2004 SCC (Cri) 2028], the Court observed and held as under : (SCC pp. 564-65, 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 (PW 7), Angad Singh (PW 8) and Sub-Inspector D.J. Rai (PW 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. Although the High Court noticed the fact that the charas and ganja alleged to have been seized from the custody of the accused had neither been produced in the court, nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the chemical examiner in a properly sealed condition and those were found to be charas and ganja. The High Court observed, ‘non-production of these commodities before the court is not fatal to the prosecution. The defence also did not insist during the trial that these commodities should be produced’. The High Court relied on Section 465 Code of Criminal Procedure, 1973 to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.

6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the 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. The suggestion made by the defence in the cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with the police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the investigating officer was also not examined. Against this background, to say that, despite the panch witnesses having turned hostile, the non-examination of the investigating officer and non-production of the seized drugs, the conviction under the [NDPS Act](#) can still be sustained, is far-fetched."

52. Reverting back to this case, it has not escaped the notice of this Court that the learned Trial Court held the appellants guilty on the basis of the Exhibit-3 which has been denied by the hostile witnesses PW-7 and PW-8 and which has been proved by the IO, PW-9. PW-7 has stated that he did not read the contents of Exhibit-3 but he has affixed his signature on the same and PW-8 has also admitted that the police did not read over the contents of the Exhibit-3 but asked him to affix his signature on the same. The fact that PW-5 is not a seizure witness cannot be ignored despite the fact that he has identified that Material Exhibits 1 to 25 were the bundles containing the suspected ganja, which were recovered from the possession of the accused (appellants). It has been admitted by PW-5 in his cross examination that he has not affixed his signature on the Material Exhibits 1 to 25. Moreover, the IO, PW-9 has stated in his cross examination that PW-5 did not mention in his initial statement that he accompanied DSP, O/C and other police officials to the PO for checking duty and 25 (Twenty Five) packets containing ganja were recovered from the vehicle and the appellants were present in the vehicle carrying ganja. He has also not mentioned in his initial statement that 25 (Twenty Five) packets were recovered from different spaces in the vehicle including the space under the seat and the bonnet under the vehicle.

53. Thus material contradictions could be elicited through the cross examination of PW-5 who despite being not a seizure witness tried to identify the articles seized in connection with this case without his signatures on the articles. It appears that the prosecution tried to fill-in the lacunae of their failure to produce the seized articles before the seizure witnesses, by trying to prove the seized articles by a police officer who was not a seizure witness.

54. The prosecution has failed to connect the seized articles with the materials sent for chemical examination. It has been admitted by the IO cum informant, PW-9 in his cross examination that the seized articles were produced in the Court on 24.12.2009. It is clear from the Exhibit-3 proved by the IO that the articles were seized on 20.12.2009 and the same were produced on 24.12.2009 i.e. after a lapse of 4 (Four) days. The IO, PW-9 has admitted that when the appellants were forwarded to the Court, the seized articles were not produced in the Court but the same were produced in the Court on 24.12.2009. The articles were kept in the Police Station Malkhana but the MR Number has not been recorded, despite the fact that a malkhana register is maintained by them.

55. The learned counsel for the appellants laid stress in his submissions that if the malkhana registration number not is mentioned, how could it be ascertained that the articles which have been kept in the Malkhana are the articles which have been forwarded for chemical examination. Articles seized in connection with another case may have been forwarded and this extends the benefit of doubt to the appellants. It is submitted that it was the duty of the IO to produce the seized articles before the Magistrate on the same day but the articles were kept in the Malkhana for 4 (Four) days and thereafter produced, and before producing the articles the samples were already forwarded for chemical examination. Proper

procedure was not followed. The investigation was conducted in a slipshod manner.

56. I have considered the submissions and I find force in the submissions of the learned counsel for the appellants. The IO, PW-9 indeed conducted the investigation in a perfunctory manner. In view of my foregoing discussions and in the light of the decision of the Hon'ble Supreme Court in Rooparam's case (supra), it is held that the prosecution has failed to prove the seized articles which were seized in connection with this case. Section 55 of the NDPS Act was also not complied with. The Officer-In-Charge of a Police Station should take charge and keep in safe custody, pending the orders of the Magistrate, all seized articles under this Act, which may be delivered to him, and shall allow a Police Officer to accompany such articles to the Police Station to affix his seal to such articles or to take samples of the articles so taken with a seal of the Officer-In-Charge of the Police Station.

57. It is submitted by the learned counsel for the appellants that in this case there is no instance of samples being sealed with a seal of the Officer-In-Charge of the Police Station. This fact has not been brought during trial. No malkhana register has been exhibited nor any MR Number has been recorded. Adding to the discrepancies, the articles were kept for 4 (Four) days before the same were produced before the Magistrate and it has been admitted by the IO, PW-9 in his cross examination.

58. In the wake of the foregoing discussions, it can be safely held that this case is fraught with discrepancies and the appellants deserve a benefit of doubt, *moreso*, when the cross examination of the IO reveals that the owner of the Maruti gypsy is one Mukesh Jain of Dimapur, but he did not make an endeavor to find out the registered owner of the vehicle. This owner of the vehicle was neither examined as a witness nor arrayed as an accused.

59. In the wake of my foregoing discussions, the appellants are acquitted from the charges under Sections 20 (b) (ii) (C) of the NDPS Act, 1985, on benefit of doubt. The decision of the learned Trial Court dated 22.11.2011 in connection with Sessions (Special) case No. 3/2010 is hereby set aside.

60. However, keeping in view the provisions of Section 437-A CrPC, the appellants 1. Shri Kebeji Ngoupuni and Smti. Dephro Lakho are directed to furnish personal bond in sum of Rs.30,000/- (Rupees Thirty Thousand) each and assure the bond in the like amount before the learned Trial Court which shall be effective for a period of six months.

61. Appeal is allowed. Send back the Trial Court Record.

JUDGE

Comparing Assistant