



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

Criminal Appeal No. 42/2021
&
Criminal Appeal No. 92/2022

(i) Criminal Appeal No. 42/2021

TH. THOIBA SINGH
S/O- LATE TH. NAGESHAR SINGH,
R/O- OLD CHECKON KHANGLABUNG,
P.S.- PAROMPAT, DISTRICT- IMPHAL EAST(MONIPUR),
PIN- 795001.

.....Appellant.

VERSUS

1. THE STATE OF ASSAM,
REPRESENTED BY PP, ASSAM.
2. CUSTOMS PREVENTIVE FORCE
CACHAR, SILCHAR, P.S.- SILCHAR
DISTRICT- CACHAR, ASSAM. PIN- 788001.

.....Respondents.

Advocate for the Petitioner : MR. L R MAZUMDER

Advocate for the Respondents : Mr. S.C. Keyal,
SC, Central Excise & Customs.

(ii) Criminal Appeal No. 92/2022

SHRI THANGJAM THOIBA SINGH
S/O- TH. NAGESHOR SINGH
R/O- OLD CHECKON KHANGLABUNG
P.O.- IMPHAL, P.S.- POROMPAT, DISTRICT- IMPHAL EAST

MANIPUR NOW AT SILCHAR HAZRAT JAIL, CACHAR,
SILCHAR.

.....Appellant.

VERSUS

THE UNION OF INDIA,
REPRESENTED BY THE SUPERINTENDENT OF CUSTOMS
PREVENTIVE FORCE, SILCHAR,
C.R. BUILDING, CIRCUIT HOUSE ROAD,
P.O. AND P.S.- SILCHAR-788001.

.....Respondent.

Advocate for the Petitioner : MR. L R MAZUMDER

Advocate for the Respondent : Mr. S.C. Keyal,
SC, Central Excise & Customs.

**BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN**

Date of Hearing : 07.12.2023

Date of Judgment : ***26th February, 2024***

JUDGMENT AND ORDER

Heard Mr. L.R. Mazumder, learned counsel for the appellant. And also heard Mr. S.C. Kayel, learned Standing Counsel, Central Excise & Custom.

2. This appeal is preferred by appellant, namely, Shri Thangjam Thoiba Singh, challenging the correctness or otherwise of the judgment and order, dated 31.07.2018, passed in NDPS Case No.06/2015, under

sections 20(b)(ii)(c) of NDPS Act. It is to be noted here that vide the impugned judgment and order, the learned Court below has convicted the appellant, u/s 20(b)(ii)(C) of NDPS Act and sentenced him to suffer rigorous imprisonment for 10(ten) years and also to pay a fine of Rs.1,00,000/-only, in default to suffer simple imprisonment for 1(one) year.

3. The background facts, leading to filing of the present appeal, are adumbrated herein below:-

“Acting on a tip off on 31.5.15, at about 11 am, Custom Officials, at Jugang Hill road had intercepted the Truck bearing registration No.MN-04A-4836, which was coming from Jiribam side towards Silchar and on checking the Truck the Custom Officer had found a total 113 packets of Ganja (Cannabis) weighing 1814.9 Kg (net) of worth Rs.90,74,500/- in compressed form, wrapped with newspaper and polythene sheets stacked inside a cavity of the said Truck, which was driven by Sri Thangjam Thoiba Singh, and seized the same by preparing seizure list.

Thereafter, the Departmental Case No.02/CL/NDPS /PREV./SIL/2015-16, dated 31.5.15, was registered, u/s 20(b)(ii)(c) r/w section 23 & 25 of the NDPS Act and carried out investigation and on completion of the same offence report was submitted against the appellant, u/s 20(b)(ii)(c), read with section 23 & 25 of the NDPS Act, before the learned court below.

Thereafter, the learned Special Judge (NDPS), Cachar, Silchar had framed charges against the appellant, after hearing learned Advocates of both sides, under sections u/s 20(b)(ii)(c)

NDPS Act and on being read and explained over the same to the appellant, he pleaded not guilty and claimed to be tried. Thereafter, the learned Court below had examined as many as 05 witnesses, including the I.O. and thereafter, hearing argument of both sides, found that the prosecution side has succeeded in establishing the case against the appellant, under sections 20(b)(ii)(c) NDPS Act and thereafter, convicted and sentenced him as aforesaid.”

4. Being aggrieved, the appellant has preferred this appeal and also another appeal from the Central Jail, Silchar on the following grounds:-

- (i) That, the learned court below has failed to appreciate the evidence in its proper perspective and came to a perverse finding;
- (ii) That, the learned court has failed to appreciate the fact that the prosecution side did not comply with section 42/52/55/57 of the NDPS Act;
- (iii) That, the learned court below has failed to appreciate the fact that the FSL expert was not examined to prove the report;
- (iv) That, the Malkhana Register was not produced and proved before the court to establish that the contraband substances were kept in proper custody before sending samples to FSL;
- (v) That the learned court below has committed grave error in fact and law in passing the impugned judgment and order.

5. Mr. L.R. Mazumder, the learned counsel for the appellant, besides reiterating the points mentioned in the memo of appeal and as discussed herein above, submits that P.W. 1 and 2 are not believable as

they are ready made witness for the prosecution in many cases. Mr. Mazumder also submits that there is no evidence to show that the contraband substances were kept in safe custody in Malkhana before sending the same to FSL and that the expert, who had submitted the report, has also not been examined by the prosecution side and the report has not been duly proved. Another contention so made by Mr. Mazumder is that incriminating circumstances that were appearing from the evidence on the record have not been put to the appellant during his examination under section 313 Cr.P.C. Therefore, Mr. Mazumder submits that the impugned judgment and order failed to pass the legal scrutiny and therefore, it is contended to allow the appeal.

6. On the other hand, Mr. S.C. Keyal, learned Standing Counsel for the respondent - Central Excise & Custom has supported the impugned judgment and order. Mr. Keyal submits that the provision of section 42/55/57 NDPS Act has duly been complied with by the prosecution side. Mr. Keyal further submits that at the relevant time there was no notification in respect of section 52(A) NDPS Act as the Judgment of Mohanla was not there and the same was prospective in nature. Referring to section 294 Cr.P.C. Mr. Keyal submits that examination of FSL expert is not mandatory. Further, Mr. Keyal submits that the learned Court below has rightly convicted the appellant and the same warrants no interference of this Court and therefore, it is contended to maintain the same. Mr. Keyal, referring to a decision on Hon'ble Supreme Court in **Akhtar v. State of Uttaranchal** reported in **2009 13 SCC 722**, submits that it has been held in said case that if the defense had admitted the genuineness of the post-mortem report before the Trial Court, the genuineness and veracity of the document stands proved and shall be treated as valid evidence under Section 294 Cr.P.C.

7. Having heard the submission of learned Advocates of both sides, I have carefully gone through the petition and documents placed on record and also perused the record of the learned Court below and the impugned judgment and order.

8. Before directing a discussion to the points so raised in this appeal it would be beneficial to have a glimpse upon the evidence of the witnesses so examined by the learned court below. Be it noted here that the prosecution side has examined as many as five witnesses and exhibited as many as 18 documents.

9. That, out of the 5 witnesses examined by the prosecution side the evidence of P.W.3, namely, Shri Nilakanta Singh is important. At the material time he was serving as Inspector, Customs & Preventive Force at Cachar, Silchar. His evidence reveals that on 31/5/15, he received a secret information regarding movement of cannabis from Imphal to Silchar. He then reported the matter to higher authorities pursuant to section 57 of the NDPS Act, and thereafter, a team was formed and they proceeded towards Jugang Hills under Lakhipur P.S. and at around 10.30 am they intercepted one Truck, being driven by accused Th. Thoiba Singh, bearing registration No. MN-04A-4836, which was coming from Imphal towards Silchar and on checked the Truck, found one secret chamber behind the driver's cabin and recovered contraband items i.e. ganja packet/cannabis wrapped by newspapers and polythene packets in rectangular shapes. Thereafter, they brought the said Truck along with the driver to the Silchar office and having unloaded and counting the packets they have found all total 113 packets, containing Ganja and seized the same in presence of witnesses, namely, Taposh Paul and Manab Das who were asked and conceded to be witnesses to the process of seizure etc. Then weighing

the packets of Ganja with digital weighing machine brought by their staff, they found the net weight 1814.90 Kg, and he confirmed Ext.1, the weighing sheet and his signature Ext.1 (7) with seal. Then they have prepared an inventory in presence of the witnesses and seized the Ganja, the driving license of the accused and also the Truck vide Ext. 2, and he also recorded the voluntary statement of the accused, Ext. 3, in presence of witnesses, including Superintendent Utpal Bhattacharjee. His evidence also reveals that he prepared the questionnaire statement, Ext.4, of the accused driver, in presence of witnesses and the Superintendent namely, Utpal Bhattacharjee and the said statement is also subscribed by the independent witnesses. Thereafter, he had taken two sample packets, containing 10 grams, each, randomly from the seized packets and kept the samples in a plastic pouch which was kept inside an envelope sealed by sealing wax, in presence of two witnesses, the accused and the Superintendent. Thereafter, he had made a prayer before the Court for authentication of the inventory, sample, etc. and then as per order of the Court the Ld. JMFC., Mr. A. Saikia was deputed for the said purpose, who had visited their office on 3/6/15 and also verified the seized goods and in his presence he had re-drawn two samples packets following the same procedure and M.Ext.1 is the sample packet retained by them and M.Ext.1 (2) is the signature of the accused in the sample packet given in his presence. M.Ext.1 (3) is the Certificate given by Mr. A. Saikia. The other sample packet, taken in presence of Mr. A. Saikia was sent to the FSL, Guwahati. Ext. 6 & 7 are the forwarding letters issued by the FSL, Guwahati and Ext.6 (1) & 7(1) are the FSL reports and both the reports showed positive test for cannabis. Thereafter, on receipt of the FSL reports he had taken follow up actions, and on completion of investigation, he had submitted the Offence Report against the accused

vide Ext.8 in which Ext. 8(1) to 8(23) are his signatures. He also confirmed Ext.9, the DRI-1 Form, by which he informed his Superintendent in writing on 31/5/15 as regard the receipt of information, which bears the signature of Sri Utpal Bhattacharjee, the Superintendent.

10. The appellant had cross-examined this witness but the probative value of his examination-in-chief remained un-rebutted during cross-examination. He categorically denied the suggestion that the vehicle was not intercepted at Jujang Hill. He denied that witness Taposh Paul and Manab Das are associated with their department and their signatures were taken in blank papers. He denied adducing false evidence.

11. The evidence of P.W.3 also finds support from the evidence of P.W.4 - Shri Utpal Bhattacharjee, Superintendent of Customs Preventive Unit at Silchar. His evidence reveals that P.W.3 was entrusted for the purpose of investigation in respect of recovery of contraband substances from a Tata Truck, which was intercepted at Jujang hills and brought to Silchar office and thereafter, formal seizure was made. His evidence also reveals that the accused was the driver of the Truck and after completion of all the formalities, the accused was arrested and his statement, Ext.3 was recorded and Ext.3 (15) to 3 (18) are his signatures. He also confirmed Ext.4, the questionnaire statement of accused, wherein, Ext. 4 (9) & 4(10) are his signatures. In cross-examination, this witness reveals that he did not visit Jujang Hills, where the Truck was intercepted and that witness Manab Das and Taposh Paul are familiar to him, but, he denied that they are stock witness of the department. Thus, it appears that nothing tangible could be elicited in cross-examination to discredit this witness.

12. P.W.1- Shri Taposh Paul and P.W.2- Manab Das are the witness of seizure and they also lend support to the version of P.W.3. The evidence of P.W.1 reveals that he had a tea stall near the Customs Office at Silchar and he had seen the accused in the Customs Office at Silchar on 31/5/15. His evidence also reveals that he had seen a Truck being detained by the customs authorities which was driven by the accused and from the said Truck, the customs officers have recovered as many as 113 packets and weighed the same with electronic weighing machine and the quantity was noted in a list - Ext.1, which was signed by the Inspector of customs, the accused, and by him as well as by the outsider and Ext.1(1) & 1(2) are his signatures and Ext.1(3) & 1(4) are the signatures of the accused signed in his presence. His evidence also reveals that the Truck, along with the packets were also seized by the customs authorities vide Ext.2, which also bears his signatures, Ext.2 (1) and Ext.2 (2) is the signature of the accused which was put in his presence. His evidence also reveals that thereafter, the Inspector of customs interrogated the accused and recorded his statement - Ext.3 in his presence and also in presence of the outsider and Ext.3 (1) to 3(4) are his signatures and Ext.3 (5) to 3(8) are the signatures of the accused. His evidence also reveals that Ext.4 is the questionnaire statement of the accused, over which Ext. 4(1) & 4(2) are his signatures and Ext.4 (3) and 4(4) are the signatures of the accused put in his presence. Thereafter, the Inspector of customs had prepared Ext.5, the "Panchnama" wherein Ext.5 (1) & 5(2) are his signatures.

13. The appellant has cross-examined him at length but failed to elicit anything tangible to discredit him. It is elicited that he had seen the accused driving the Truck and that the officers stated that Ganja was

recovered from the same. It is further elicited that the sample packets were sealed in his presence and weighed the same with weighing machine. He denied the suggestion that he is an interested witness.

14. The evidence of P.W.2 - Shri Manab Das reveals that on one day in the month of May 2015, at about 12.30 pm, while he was in a Tea Stall near PWD quarters, he had seen a Truck entering into Customs Office and it was driven by the accused and he went there along with other people and there he found the customs officers unloading total 113 nos. of packets from the rear side of the driver's cabin of the said Truck, which were weighed by the Customs Officers and at that time he was present there and a list was prepared and Ext.1 is the said list wherein Ext.1(5) & 1(6) are his signatures and thereafter, seized the said packets in their presence vide Ext.2, wherein Ext.2(3) is his signature. Then the Customs Inspector interrogated the accused and recorded his statement - Ext.3, wherein Ext.3 (9) to 3(12) are his signatures and Ext.4 is a separate questionnaire statement of the accused recorded in his presence wherein Ext.4 (5) and 4(6) are his signatures. Thereafter, the Customs Inspector has prepared -Ext.5, the "Panchnama" wherein Ext.5 (3) & 5(4) are his signatures and M.Ext.1 is a packet in which sample of the seized material was put and in which M.Ext.1 (1) is his signature.

15. Cross-examination of this witness also could elicit nothing tangible to discredit his version. It is elicited that the packets, so recovered from the vehicle contained dry leaves of Ganja as told by the customs officials and weight of the same was more than 1800 Kgs. It is also elicited that some time back, he had also deposed in a NDPS case No.15/14 in the District Court and he stated that he worked as a Security Guard. He

denied the suggestion that he was not present at that time and that the custom officials took his signature on a blank paper.

16. Thus, it appears that P.W.1 and P.W.2 also lends support to the version of P.W.3 and 4, in respect of recovery and seizure of contraband substances from the vehicle being driven by the appellant. Though the learned counsel for the appellant submits that these two witnesses are interested witness, yet, in view of the explanation, so forthcoming for their presence at the place of seizure and having not been disputed the same, I find their evidence worthy of credence. Merely because P.W.2 was a witness in another case, his otherwise clear and cogent evidence cannot be discarded. Having appreciate, analyze and assessed their evidence with the yardstick of probabilities, its intrinsic value and animus of the witnesses, I find the submission of Mr. L.R. Mazumder, the learned counsel for the appellant, in respect of this two witnesses devoid of substance.

17. P.W.5 Achyutananda Saikia is a Judicial Magistrate First Class, Cachar, Silchar. His evidence reveals that on 1/6/15, the CJM., Cachar, Silchar, had directed him to complete the legal requirements as per law as provided u/s 52-A (2) of the NDPS Act, in connection with the prayer for authentication and certifying the correctness of the inventory and also correctness of the sample drawn. Accordingly, on 3/6/15, he visited the Office of the Customs Preventive Force, Silchar and verified the goods seized and drawing of samples in presence of witnesses in the Office of the Customs Preventive Force, Silchar and the goods were-

- (i) 113 packets of dry leaves believed to be Ganja(Cannabis) compressed in rectangular form wrapped with newspapers and

polythene sheets measuring 1814.900 Kgs in total as detailed in weighment sheet marked as Annexure-A to the inventory.

- (ii) A six wheeler truck bearing registration No. MN-04A-4836, Tata Motors (TC 1312) having Chassis No. 388002MVZ143050; and
- (iii) One driving licence in the name of Thangjam Thoiba Singh.

18. His evidence also reveals that during verification he had found that the seized goods and the inventory prepared to be correct and accordingly, he certified authenticating the inventory prepared. His evidence also reveals that the samples were also drawn of the compressed dry leaves randomly from packet Nos. 1, 29, 57, 86 and 113 which were homogeneously mixed and the samples were marked as S-1 the original and S-2 the duplicate each containing 25 gms. of Ganja and the samples were marked and heat sealed with sealing wax using departmental seal. His evidence also reveals that representative sample of dry leaves of Ganja were also drawn in his presence from packet No.70 weighing 25 gms, which were heat sealed with sealing wax using departmental seal and the samples were marked as S-1 the original and S-2 the duplicate and he had duly certified the correctness of the samples drawn finding the samples drawn to be correct and that photographs were also taken before him on 3.6.15, of the seized goods and samples drawn and were authenticated by him and thereafter, he had submitted the report - Ext. 10, dated 8/6/15, to the Ld. CJM., Cachar, Silchar and Material Ext.1 is one of the sample packets, in which M.Ext.1 (3) is his signature and Ext.11 is the copy of Inventory produced before him during inspection and Ext.12 is the weighment sheet (in two sheets) and Ext.13 to Ext.17 are the photographs of the vehicle, cavity therein from where the contraband

was brought out and the contraband packets and Ext.18 is the envelope in which the photographs (Ext.13 to 17) were produced before him and he had certified the said photographs.

19. It is elicited in his cross-examination that photographs were taken in the office of the Customs Preventive Force, Silchar in his presence by a digital camera and other witnesses were also present but only two signed in his presence. It is also elicited that he did not see the accused at that time and that everything with regard to Ext.11 & 12 were done by the Customs Officer and thereafter, he had put his signatures.

20. Section 52(A) of NDPS Act provides for disposal of seized narcotic drugs and psychotropic substances. It read as under:-

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs, psychotropic substances, controlled substances or conveyances 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, substances or conveyances 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 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, psychotropic substances, controlled substances or conveyances and any list of samples drawn under subsection (2) and certified by the Magistrate, as primary evidence in respect of such offence.

21. But, in the case in hand, from the evidence discussed above, it becomes apparent that the investigating officer had prepared the

inventory, Exhibit- 2 and 11, on 31.05.2015, in presence of the witnesses. Further, it appears that he had also drawn samples on the same day i.e. 31.05.2015. Material Exhibit-1 is the testament of such fact as it bears the date, seal and signatures of witnesses and this fact has not been disputed by the prosecution side. It also appears that thereafter, on 01.06.2015, the I.O. had made a prayer to the Chief Judicial Magistrate, Cachar, Silchar for authentication of the inventory, samples etc. and then P.W. 5 was deputed for that purpose and then P.W.5 had visited the office of the Customs Preventive Force on 03.06.2015 and verified the goods seized and drawing of samples in presence of witnesses, including the photographs. The evidence of P.W.5 also reveals that samples of dry leaves of Ganja were drawn in his presence from packet No. 70, weighing 25 grams, which were heat sealed with sealing wax using departmental seal and the samples were marked as S-1(original) and S-2(duplicate) and he confirmed Material Exhibit-1, packet of sample drawn, and the photographs Exhibits-13, 14, 15, 16 and 17.

22. But, having examined the Material Exhibit-1 and the Photographs - Exhibits-13 to 17, I find that the sample was drawn on 31.05.2015, and the witness and the I.O., who had drawn the sample, had signed it on 31.05.2015. And the learned Magistrate-P.W.5 had signed it on 03.06.2015. Further, Exhibits-13 to 17 indicates that it was signed by the learned Magistrate on 04.06.2015. These discrepancies in the evidence of P.W.5 and Material Exhibit-1 and Exhibits 13 to 17 raises serious doubt about the veracity of the prosecution version about drawing sample from the seized contraband substances in presence of Magistrate on 03.06.2015. In fact, it was drawn in presence of witnesses on 31.05.2015, itself and later on, certificate of the Magistrate on the

sample so drawn, was taken on 03.06.2015, and the signatures on the photographs were taken on 04.06.2015.

23. Now, the question is, in view of the discrepancies discussed herein above, can it be said that the provision of section 52(A) of the NDPS Act is complied with in letter and spirit though the same appears to be complied with at first instance.

24. It is to be noted here that in the case of **Union of India v. Mohanlal, (2016) 3 SCC 379**, while dealing with section 52-A of the NDPS Act, Hon'ble Supreme Court has held as under:-

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

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

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section

52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

25. In the case of **Mangilal vs. The State of Madhya Pradesh** reported in **2023 LiveLaw (SC) 549**, Hon'ble Supreme Court has held as under:-

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

26. So, what is contemplated in the case of Mohanlal (supra) is that the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct and that the question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise.

27. In the instant case, as discussed herein above, Material Exhibit-1 and the Photographs - Exhibit-13 to 17, indicates that the sample was drawn on 31.05.2015, and the witness and the I.O., who had drawn the sample, had signed it on 31.05.2015. However, the learned Magistrate-P.W.5 had signed it on 03.06.2015. Besides, Exhibits-13 to 17 indicates that it was signed by the learned Magistrate on 04.06.2015. Thus, the entire process of drawing of samples, appears to be not in conformity with Section 52A of the NDPS Act and the law laid down by Hon'ble

Supreme Court in the case of **Mohanlal (supra)**. These discrepancies in the evidence of P.W.5 and Material Exhibit-1 and Exhibits-13 to 17, raises serious doubt about the veracity of the prosecution version about drawing sample from the seized contraband substances in presence of Magistrate on 03.06.2015. In fact, it was drawn in presence of witnesses on 31.05.2015, itself and later on, certificate of the Magistrate on the sample so drawn, was taken on 03.06.2015, and the signatures on the photographs were taken on 04.06.2015.

28. That, as regard the submission of Mr. Mazumder, the learned counsel for the appellant, submits that section 42 of the NDPS Act has not been complied with, the record reveals that P.W.3, who conducted search and seizure, is an authorized person. The evidence of P.W.3 reveals that immediately after receiving the information of movement of contraband substances, he had intimated the same to the higher authorities as per section 57 of the NDPS Act. P.W.4 also testified to the fact that P.W.3 was entrusted for the purpose of investigation of this case, where contraband substances were recovered and seized. This issue was also raised before the learned trial court and the learned court below had dealt with the same as under in paragraph No.16 of the impugned judgment:-

*"16. During argument made by the defense counsel, it was raised that the prosecution has failed to produce any document to show that the PW-3 was authorized by the higher authority for search and arrest of the accused. As such the prosecution has failed to comply the provision u/s 41, 42, 43 and 49 of NDPS Act. The defense relied upon the decision of Hon'ble Gauhati High Court reported in **(2001) 3 GLT 184 (Kailash Choudhury Vs State Of Assam)**. The Ld. Counsel for the prosecution submitted that the PW-3 was never put this question during cross examination that*

he was not authorized. The Prosecution stated that the PW-3 is the Inspector of Customs & Preventive Force. The Ld. Counsel for the Prosecution submitted that there is a Gazette Notification dated 14/11/1985 where by the inspector is authorized to conduct search and seizure. On perusal of the offence report (Ext-8), I found that the prosecution has mentioned about the Govt. Of India Notification No. 7/85, F.No.664/51-opium whereby the Inspector of Customs Preventive Force is empowered with the power of an Officer-in-charge of a Police Station u/s 53 of the NDPS Act 1985 to conduct investigation of offences under the NDPS Act. The said Notification is available in the record and the Investigating Officer (PW-3) in this case is of the rank of Inspector of Customs Preventive Force. Therefore I found that the plea taken by the defence that the Investigation Officer is not authorized to conduct the investigation is not acceptable. Therefore the decision cited by the defense in this regard is not applicable in this case."

29. Having examined the finding, so recorded herein above, by the learned court below, in the light of evidence of P.W.3 and P.W.4, I find that the learned court below has arrived at the finding that the provision of section 42 of the NDPS Act has been complied with. That being so, the finding of the learned court below requires no interference of this court.

30. That, as regards the delay in sending the sample to FSL by the I.O. and absence of evidence of keeping the same in safe custody, I find from the record of the learned court below that the I.O. had seized the contraband substances on 31/5/15 and send the sample to FSL on 03.06.2015. It appears from the Exhibit-8 that having sent the sample No.1 to the FSL he had kept the sample No.2 in the safe custody of the office. But, there is no evidence as to how and where the samples,

which were drawn on 31.05.2015, were kept till sending of the sample No.1 to FSL. Mr. Mazumder, the learned counsel for the appellant has rightly pointed this out and I find substance in the same and the case law, i.e. **State of Gujarat vs. Ismail U Haji Patel and Another**, reported in **(2003) 12 SCC 291** and **State of Rajasthan vs. Tara Singh** reported in **(2011) 11 SCC 559**, where emphasis was laid on proper storage and custody of the seized Narcotic Drugs and Psychotropic Substances and dispatching the same to FSL. It is to be noted here that there is no evidence herein this case to establish that seized articles were kept in safe custody in proper form. Therefore, it cannot be said that the provision of section 55 of the NDPS has been complied with.

31. Though, Mr. Mazumder submits that there is no evidence to show as to who had sent the samples to FSL, yet, from the Exhibit- 6 and 7 the letters dated 09.06.2015 and 10.06.2015, of the Director-Cum-Chemical Examiner shows that the samples were sent to FSL by the Superintendent (Anti Smuggling), Customs Preventive Force, Cachar, Silchar. And as such the contention of Mr. Mazumder is misplaced one.

32. That, as regard the submissions of Mr. Mazumder in respect of non examination of the FSL expert to prove the FSL Report, I find from the record that this issue was raised before the learned court below by the appellant and the learned court below had dealt with the same as under in paragraph No. 24 and 25 as under:-

*24. The defense submitted that the seized materials were dry leaves of ganja and it is not ganja under the meaning of Section 2 (iii) (b) of the NDPS Act. Moreover the prosecution has failed to examine the FSL expert to prove that the seized materials are ganja. He relied on the decision of Hon'ble **Supreme Court***

(Kumar Mishra vs State of Goa) in the Criminal Appeal No. 361 of 2009.

25. The Ld. Counsel for the prosecution submitted that the defense did not put any such question to the witnesses and the FSL reports were exhibited without any objection. Therefore, the defense do not have the right to agitate the matter in their argument. Moreover he stated that the expert need not be examined when the matter is exhibited without any objection from defense. He relied on the decision of the Hon'ble **Supreme Court reported in (2009) 13 SCC 722.**

26. The PW-1 and PW-2 stated that they saw that the seized packets contains dry leaves and the Custom Officers told them that it were ganja. The FSL reports were exhibited by PW-3 and without any objection from the defense. The defense did not challenge the said report during cross examination of PW-3. The Ext-6(1) and Ext-7(1) are the two reports given by the D. J. Hazarika Deputy Director, Drugs and Narcotic Division. FSL Kahilipara. In both the reports the expert opined that the sample consists of 25 gms of **Dry Plant materials** and they are tested positive for cannabis (Ganja). Therefore the seized materials are not the dry leaves of ganja but consists the plant part of cannabis. Therefore the seized materials falls within the definition of Ganja. As regard non examination of the FSL expert, the Hon'ble Supreme Court has observed in **(2009) 13 SCC 722 that "it has been argued that non examination of medical officers concerned is fatal for the prosecution. However, there is no denial of the fact that the defense has admitted the genuineness of the injury report and post mortem examination report before the trial court. So the genuineness and authenticity of the documents stands proved and be treated as valid evidence u/s 294 of Cr.P.C. It is settled position of law is that if the genuineness of a document filed by the party is not disputed by the opposite party it can be read as substantive evidence under sub section 3 of section 294 of CrPC. Accordingly, the post mortem report, if its**

genuineness is not disputed by the opposite party, the post mortem report can be read as substantive evidence to prove the correctness of its content without the doctor concerned being examined. "In this instant case the defense did not object the FSL reports and never put any question on its genuineness. Therefore the report can be considered as a substantive evidence. More over the said report was issued by the D. J. Hazarika, Deputy Director, Drugs and Narcotic Division. FSL Kahilipara and it can be used as an evidence in trial as per the provision u/s 293 of CrPC without examining the expert unless the report is challenged for its genuineness. Therefore non examination of the FSL expert by the prosecution would not make the expert reports Ext-6(1) and Ext-7(1) inadmissible in evidence.

33. Having examined the reason so assigned by the learned court below as to why non-examination of the FSL Expert caused no dent to the prosecution version appears to be just and plausible and to the considered opinion of this court the same required no interference of this court.

34. That as regard the submission of Mr. Mazumder that incriminating circumstances were not put to the accused/appellant during examination under section 313 Cr.P.C. this court finds that Mr. Mazumder has failed to point out to the court at the time of hearing as to what are the incriminating circumstances which the court below has omitted to put to the appellant and how prejudice is caused to the accused/appellant. In absence of such material, this court is unable to record concurrence to the submission of Mr. Mazumder, the learned counsel for the accused.

35. What is transpired from the discussion made herein above is that the learned court below has failed to consider the aspect of non compliance of the provision of section 52-A NDPS Act and also section 55 of the said Act and on such count a serious doubt arises about the

veracity of the prosecution version. Thus, it cannot be said that the impugned judgment and order, so passed by the learned court below, has been able to withstand the legal scrutiny, and on such count it requires interference of this court and the accused/appellant is entitled to be acquitted of both the charges on benefit of doubt.

36. In the result, I find sufficient merit in these appeals and accordingly, the same stands allowed. The impugned judgment and order of conviction in the appeals No. 42/2021 and 92/2022, stands set aside and quashed. The appellant is acquitted on benefit of doubt. The appellants, if languishing in jail hazoot, shall be released forthwith. Send down the record of the learned court below forthwith with a copy of the judgment and order.

Sd/- Robin Phukan
JUDGE

Comparing Assistant