

GAHC010191412024



2026:GAU-AS:441

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

Case No. : Crl.A./313/2024

MOKSEDUL HOQUE
S/O. LATE HAMIDUR RAHMAN, R/O. VILL- CHAGOLIA PART 2, P/S.
GOLAKGANJ, DIST.- DHUBRI, ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR
REP. BY THE PP, ASSAM.

2:S.I. JITUMONI BAISHYA
P/S. CHAGOLIYA
DIST.- DHUBRI
ASSAM

Advocate for the Petitioner : MR. SURAJIT DAS,

Advocate for the Respondent : MR. R.J. Baruah, Addl.PP, ASSAM,

:::BEFORE:::

HON'BLE MR. JUSTICE SANJEEV KUMAR SHARMA

Date on which judgment is reserved : 18.11.2025

Date of pronouncement of judgment : 09.01.2026

Whether the pronouncement is of the : No.

operative part of the judgment ?

Whether the full judgment has been : Yes

pronounced?

JUDGMENT & ORDER (CAV)

(Sanjeev Kumar Sharma, J)

Heard Mr. Surajit Das, learned counsel for the appellant. Also heard Mr. R J Baruah, learned Addl. Public Prosecutor for the State of Assam.

2. This is an appeal under Section 415 of the BNSS, 2023 against the impugned judgment and order dated 30.07.2024 passed by the learned Special Judge, (Addl.) Dhubri in Special (NDPS) Case No. 179 of 2023 arising out of Golokganj P.S Case No. 193 of 2023 convicting the accused/appellant U/S 22(C) of NDPS Act, 1985 and sentenced to undergo rigorous imprisonment for 10 (ten) years along with a fine of Rs. 1,00,000/- (Rupees One Lakh) only, and in default of payment of fine, another rigorous imprisonment for another 1 (one) year.

3. The prosecution case, in brief, is that the informant S.I Jitumani Baishya

lodged an FIR with the O/C of Golakganj P.S on 12.04.2023 stating that I/c of Chagolia O.P had received information from reliable source that a huge quantity of contraband was being kept stored at the house of Moksedul Hoque (A-1) of Chagolia Part-2, backside of Pundibari L.P School and was being sold in the locality. Accordingly, GDE No. 194 dated 11.04.2023 was entered and O/C of Golakganj P.S along with other senior officers, were informed, and he was ordered to take necessary action. Written authorization was issued to him by DSP(HQ) as empowered by Govt. of Assam vide Notification No. Ex. 145/85/301 dated 15.05.1995 under Section 41(2) of NDPS Act. Thereafter, he along with other staff rushed to the spot and arrived at the house of A-1 and met the independent witnesses namely Sankar Sarkar, Patano Adhikary, Manobindu Sarkar and Sofidul Miah. Thereafter, the police team thoroughly searched the house of A-1 and recovered 18 numbers of Eskuf cough syrup of 100 ML each, suspected to have codeine phosphate from the drain kept concealed near the stored bamboo firewood from his possession and seized the same in presence of witnesses following the formalities. The accused person was apprehended and then, the police team returned to the police station along with the accused and the seized articles. Accordingly, the instant FIR was lodged.

4. On completion of investigation, charge-sheet bearing CS No. 234/2023

dated 25.06.2023 was submitted against A-1 under Section 21(c) of NDPS Act.

5. Charge under Section 22(c) of NDPS Act was framed against the accused who pleaded not guilty and claimed to be tried. In course of trial, prosecution side examined 6 (six) PWs and 2 (two) CWs. Further, learned counsel on behalf of the accused filed a petition bearing No. 670 dated 25.06.2024 stating that examination of FSL Expert is not vital and contents of the same were accepted by him. Moreover, PW- Nurul Islam and Rofiquel Alom were struck off vide order dated 03.02.2024 and 30.03.2024, respectively.

6. PW-1 S.I Jitumani Baishya in his evidence has stated that the I/C Chagolia Out Post under Golakganj P.S received secret information that one person namely Moksedul Hoque of village Chagolia Part-II had kept concealed suspected contrabands in his house and he was selling those drugs to the nearby area. Accordingly, GDE No. 194 dated 11.04.2023 was made. He informed his superior authorities over phone regarding the matter. He was issued authorization letter for conducting search and seizure by DSP(HQ). Thereafter, he along with other police personnel went to the residence of the accused and found him near Pundibari L.P School located near his house. He informed the VDP Secretary along with his team to witness in their search and seizure operation. Witnesses reached the place of occurrence and along with

them, police team went to the residence of accused. They got their body searched by the witnesses before entering into the premises of residence of accused. They recovered 18 nos. of Eskuf cough syrup from the premises of accused in presence of independent witnesses. He sealed and packed those cartons and then, he along with the accused and the suspected contrabands, returned back to Chagolia Out Post. In the Police Out Post, he recorded the statement of accused and the witnesses and handed over the accused and the seized contrabands to the O/C of Golakganj P.S. The suspected contrabands were deposited to Malkhana of Golakganj P.S and he duly received the Malkhana receipt against the deposit of suspected contrabands. Then, he lodged the instant FIR.

7. During cross-examination, the I.O stated that the MCD which he submitted is neither paginated nor certified. He also admitted that no search warrant was obtained from the Magistrate. In the FIR lodged by him or in the GDE made by him, nothing has been mentioned regarding the urgency of the search. He further admitted that the content of the GDE were not communicated to his superior authority in writing, but vide Exbt. P-4/PW-1 he communicated to his superior authority regarding the compliance of Section 42 of the NDPS Act. He further admitted that there is no memo number mentioned in the authorization

letter which he received from DSP(HQ) through special messenger UBC/368 one D. Sangma. The dak book regarding the receipt of the authorization letter was not seized by him and neither he sent the serial No. of the dak book against which he received the authorization letter. PW-1 further stated during cross-examination that no other neighbors were associated with the search and seizure operation except for the VDP people. He went on to state that he returned to Chagolia Out Post at 03:30 AM and handed over the contraband to the O/C of Golakganj P.S on the same day at about 12:10 PM and during that time, the seized contraband was in their office Malkhana at Chagolia Out Post and no register is maintained at the said Out Post regarding deposition of the articles in the Malkhana. He also admitted that he did not mention anything about the compliance with the provisions of Section 42 of the NDPS Act in his FIR or GDE or in his statement recorded under 161 Cr.P.C. The I/O also stated that he did not seize any ownership document nor did he make any investigation from the concerned Government Officials regarding the ownership of the residence from where the suspected contraband were recovered and that he never visited the house of the accused before the incident. PW-1 denied the other suggestions put to him by the defence including the proposition that the authorization letter was procured subsequently from the concerned authority, and that he did not comply with the provisions of Section 42 of the NDPS Act.

8. PW-2 Shankar Sarkar in his evidence has stated that he is a member of VDP of Chagolia Part-II. The informant called him to the police station to accompany them as they were going to apprehend an accused person. 18 numbers of cough syrups were recovered from the residence of the accused by the police. He put his signature in the seizure-list.

9. In cross-examination, PW-2 has admitted that he does not know the number and names of the inhabitants of the residence from where the suspected contrabands were recovered. He did not know the brand name of the cough syrup. His body was not searched by any of the independent witnesses before entering into the residential premises of accused person. A-1 was not found near the school which was located near his residence. He did not read the contents of the seizure-list but, police read over the contents of the same. He only put his signature on a paper in which police told him that 18 numbers of cough syrup were seized. The seizure-list was handwritten by the police and nothing was printed on the seizure-list. PW-2 has denied the other suggestions put to him by the defence.

10. PW-3 Patano Adhikary in his evidence has stated that the police took him to the residence of the accused person. In his presence, the police recovered 18 numbers of cough syrup from below the bed of the accused from his residence.

He put his signature in the seizure-list.

11. In cross-examination, PW-3 has stated that he knows the accused person by face, but he does not know his name and his residential address. He is a member of VDP of village Chagolia Part- II. He also knows other VDP members, i.e. seizure witnesses. Police did not call any nearby person to witness the search and seizure operation. He works under Superintendent of (Addl.) Police as VDP member. He does not know the contents of the seizure-list and police also did not read over the contents of the seizure-list to him. PW-3 has denied the other suggestions put to him by the defence.

12. PW-4 Sofidul Miah has stated in his evidence that one day, the police took him to the residence of the accused along with them. He saw the police recover about 18 bottles of cough syrup from the residence of the accused and he put his signature on the seizure-list.

13. In cross-examination, PW-4 has stated that at the relevant time, only the accused and his wife were present. He is the VDP Secretary of Chagolia Part-II village. Other seizure witnesses are the members of the VDP. Nobody searched their bodies before entering into the residence of accused. Some police personnel entered into the residence of the accused and others remained

outside of the said house. They (VDP members) did not search the bodies of the police personnel, who entered into the residence of the accused person. He did not see the neighboring people called by the police. The police did not read over the contents of the seizure-list. PW-4 has denied the other suggestions put to him by the defence.

14. PW-5 S.I. Nirmal Chanda has stated in his (Addl.) evidence that on the date of occurrence, O/C of Golakganj P.S. entrusted the instant case for investigation to him. He recorded the statement of the informant, independent witnesses and accused person. He prepared a sketch map, produced the inventory before the Hon'ble Magistrate and also took steps for sending the samples of suspected contraband to FSL through S.P. Office, Dhubri.

15. In cross-examination, PW-5 has admitted that in the FIR as well as in the statement of the informant recorded under Section 161 Cr.P.C., there is no mention about the communication to the superior authority about the contents of GDE. The authority letter was not issued to the informant on 12.04.23. He started the investigation at 10.10 a.m on 12.04.2023. He was informed over phone to initiate the investigation by the O/C, Golakganj P.S. He did not seize the seal used in the instant case. After preparing the inventory, the suspected contraband was in his custody from 13.04.23 till 18.04.23 at Chotogoma Out

Post. He did not record the statement of DSP(HQ), O/C of Golakganj P.S., Sheristadar of Golakganj P.S. and one D. Sangma. He did not find any role of D. Sangma. PW-5 has denied the other suggestions put to him by the defence.

16. PW-6 SI(P) Mehbub Ali has stated in his evidence that he submitted the charge-sheet against the accused Moksedul Hoque under Section 21(c) of NDPS Act.

17. In cross-examination, PW-6 has admitted that there is no pagination and certification in the case diary. PW-6 has denied the other suggestions put to him by the defence.

18. CW-1 UBC/293 Mishak Sangma in his evidence has stated that he went to serve the summons to witness Nurul Islam in his address, however, he failed to find any person with that name in the village, after making inquiry from the VDP secretary and BLO. Therefore, the summons could not be served to the said witness.

19. The learned counsel appearing for the petitioner submitted that this is a case of total non-compliance of Section 42(2) of the NDPS Act.

20. Referring to the aforesaid provision, it is submitted that the first part

thereof pertains to recording the information in writing and the second part concerns recording of grounds of belief necessitating the search operation between sunset and before sunrise. The learned counsel has laid much stress on the requirement of recording the grounds of belief, in the event the search is carried out after sunset and before sunrise and also the necessity of communicating the same to the superior officer. In this regard, the learned counsel has referred to the decision of the Apex Court in ***Karnail Singh vs. State of Haryana, (2009) 8 SCC 539***, wherein it had been held that delayed compliance of the provisions of Section 42(2) of the NDPS Act with satisfactory explanation may be acceptable, but total non-compliance with the requirement of Sub-Sections 1 & 2 of Section 42 of the NDPS Act is impermissible. The learned counsel has also cited the decision of the Apex Court in ***State of Rajasthan vs. Jagaraj Singh, (2016) 11 SCC 687***.

21. It is further submitted that in the present case, the seizure was made at around 02:05 AM on 12.04.2023 and the contraband was handed over to the O/C only at 12:10 PM and during this long period the contraband was with the informant, whereafter the same was produced before the Magistrate on 18.04.2023 after a delay of 6 (six) days for which there is no sufficient explanation.

22. The learned counsel has referred to the decision of the Supreme Court in ***Kailash vs. State of Maharashtra, 2025 SCC OnLine SC 1977***, wherein it has been held as follows:-

“ In the light of the discussion above, in our view, mere non-production of the seized contraband during trial may not be fatal if there is reliable evidence in respect of its seizure, drawing of samples therefrom, and FSL report relating to the sample drawn from the seized material. However, to ensure that no adverse inference is drawn against the prosecution for non-production of the seized contraband, documents prepared in terms of the provisions of [Section 52-A](#), inter alia, evidencing preparation of inventory of seized contraband and drawing of samples therefrom, would have to be brought on record. Likewise, evidence should be there that the sample drawn from the inventory was sent to FSL in a sealed container/envelop, as per guidelines, and that the seal was found intact at the end of FSL. This is to obviate any doubt regarding sample being tampered in transit. Similarly, FSL’s report along with the sample tested by it is to be placed on record so that there remains no doubt regarding the sample tested.”

23. It is submitted that in the present case, there is no evidence as to how the inventory was prepared and samples were drawn or whether the samples were sent to the FSL in the sealed container and that in the FSL the seal was found intact. Not only was the seized contraband not exhibited during the trial, even the FSL report along with the tested sample was never brought on record and therefore it is not known if the sample that was tested was actually the same as that which was drawn from the seized contraband.

24. Further, with regard to the non-examination of the Scientific Officer and the failure to bring on record the FSL report, learned counsel has referred to the decision of the Delhi High Court in Crl. A. No. 331/2017, wherein it has been held as follows:-

“It is true that in view of Section 293 of the Criminal Procedure Code, the report in question need not have been proved by summoning the author thereof, but that does not mean, that during trial nobody had to tender the same in evidence and have the same exhibited by deposing that either he himself went to the FSL Laboratory and collected the report in question or deposing that during investigation he obtained the report in question and that the same pertains to the investigation

conducted in the case which was being tried. It must be deposed that the report in question pertains to the case at hand."

25. It is also submitted that in view of the admission of the I/O that he had never previously visited the house of the accused nor seized any ownership documents, and the fact that the accused was not found inside the house at the time of search, prosecution could not prove that the house from where the contraband was allegedly seized belonged to the accused, and therefore, no liability can be fastened on the accused/appellant. It is lastly submitted that Section 52(A) of NDPS Act requires that the inventory, the samples drawn, list of samples and the photographs are to be certified by the Magistrates and will be considered as primary evidence. But here in this case not only the samples drawn were not exhibited, the photograph of the seized substance was not certified and exhibited.

26. In view of the multiple infirmities and lapses in the investigation pointed out, the impugned judgment is liable to be set aside, submits learned counsel for the appellant.

27. Mr. R J Baruah, learned Addl. Public Prosecutor submitted that upon

perusal of the evidence of the seizure witnesses i.e. PW Nos. 2, 3 & 4, the recovery of the contraband has been duly proved inasmuch as, PW-2 stated that the contents of the seizure list were read over to him before he signed the same, and therefore, the same was within the knowledge of PW-2. Although PW Nos. 3 & 4 did not know about the contents of the seizure list, they subsequently deposed to having seen the police recover the contraband from the house of the accused. It is further submitted that on many occasions independent witnesses and neighbors are reluctant to participate in such search and seizures operations for various reasons, and there is no hard and fast rule that the evidence of VDPs is to be discarded unless supported by other independent witnesses, especially in view of absence of any evidence regarding any enmity between the VDP personnel and the accused.

28. Learned Addl. Public Prosecutor further submitted that there was substantial compliance with the provisions of Section 42 of the NDPS inasmuch as, in view of PW-4/Exbt. P-4/PW-1 by which, the PW-1 communicated in writing to superior authority regarding compliance of Section 42 of the NDPS Act and upon perusal of the GDE, it appears that all the relevant details about the secret information received by the PW-1 was informed over phone to various authorities including S.P to brief him. Upon such instructions, an authorization

letter was issued by Dy. S.P (HQ), Dhubri. Further, prosecution by exhibiting the Malkhana receipt as exhibit Exbt-5/PW-1 has also proved the chain of custody.

29. It is finally submitted that in view of the aforesaid evidence, the prosecution proved the recovery of the contraband from the possession of the accused/appellant and thereby, the presumption under Section 54 of the NDPS Act was rightly raised by the learned Trial Court, which the accused appellant failed to rebut and therefore, there is no infirmity in the impugned judgment or sentence.

30. I have given my anxious consideration to the rival submissions as well as to the material on record. Section 42 of the NDPS Act provides as follows:-

“Section 42. Power of entry, search, seizure and arrest without warrant or authorisation.—

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including paramilitary forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in

rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed, or any document or other article which may furnish evidence of the commission of such offence, or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset—

- (a) enter into and search any such building, conveyance or place;*
- (b) in case of resistance, break open any door and remove any obstacle to such entry;*
- (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to*

confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that in respect of the holder of a license for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector.

Provided further that, if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording an opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.”

31. From the above, it is abundantly clear that the concerned officers who receive the information are required to take down the same at any rate in writing which has been done in the present case by way of GDE No. 194 dated 11.04.2023 (Exbt – 1/PW 1). Sub-section 2 of Section 42, thereafter, requires that such information taken down in writing shall be communicated to his immediate official superior within 72 hours.

32. The I/O in his evidence has clearly admitted during cross-examination that the contents of the GDE were not communicated to his superior authority in writing, which would imply that the information reduced to writing under Sub-section (1) of Section 42 NDPS Act, was never communicated to his immediate superior whether before or after 72 hours. PW-1 has sought to explain this by way of Exbt. P-4/PW-1 which is as follows:-

"

Dated 11/04/23

To,

The Deputy Superintendent of Police, (HQ)

Dist Dhubri

Ref- Chagolia OP GDE No 194 Dtd 11/04/23

Sub- Compliance of Sec 42 of NDPS Act

Sir,

With respectfully I have the honour to inform you that I have received the information in connection with above noted reference regarding Narcotic Drugs and Psychotropic Substance and report before you under the provision of Sec 42 NDPS Act seeking authorization from your end.

Submitted for favour of your kind perusal."

33. As submitted, the said communication does not disclose the nature of the information or any details thereof and although the reference to Chagolia O.P GDE No. 194 dated 11.04.2023 is made in the aforesaid communication, the I/O has clearly admitted that the contents of the said GDE were not communicated to his immediate superior officer in writing. The aforesaid communication itself does not show that a copy of the information taken down in writing i.e. the

aforesaid GDE was enclosed along with the said communication.

34. Under the aforesaid circumstances, there appears to be force in the contention of the appellant that the Exbt.P-3/PW-1 authority Letter dated 11.04.2023, containing no memo number permitting the PW-1 to proceed to the house of the accused Md. Moksedul Hoque and to search the said house as per the secret information received appears to be a made-up document. Since the Exbt. P-4/PW-1 communication dated 11.04.2023 does not contain any particulars of the information received and a copy of GDE was also not communicated in writing, the information regarding the accused and his address could not have been known to the issuing authority of the authority letter i.e. the Dy. S.P(HQ), Dhubri. It is also noticed that the date mentioned on top of Exbt. P-4/PW-1 communication was initially written as 12.04.2023 and so was the date below the signature of the PW-1, which has been corrected by hand as 11.04.2023 at both places, thereby raising doubts about the time or date on which the said communication was made.

35. Coming to the second proviso to Sub-section 1 of the Section 42 of the NDPS Act, it being an admitted position that the search and seizure was carried out during the night, the concerned police officer was required to record the grounds of his belief regarding the urgency of the matter because of which he

could not wait for a search warrant or authorization, without affording the opportunity for the concealment of evidence or facilitating for the escape an offender. In the instant case, although PW-1 claims to have obtained the authorization letter from the Dy. S.P(HQ), Dhubri i.e. Exbt P-3/PW-1, because of which it may well be argued that recording of such grounds of belief was not necessary. But, since it has been found that the authority letter itself is a doubtful one, the recording of the grounds of belief as referred to in the second proviso to Sub-section 1 to Section 42 of the NDPS Act must be insisted upon. But no such ground is available in the Exbt. P-4/PW-1. In fact, even in the GDE, recording the secret information, no such ground requiring search and seizure operation to be carried out without authorization after sunset and before sunrise has been mentioned and therefore, the communication thereof to the immediate official superior within 72 hours as required by Sub-section 2 of Section 42 NDPS Act, or even thereafter, is not of any consequence.

36. Furthermore, there is a gap of about 10 hours from the time of alleged seizure till its deposition at the Malkhana, Golakganj P.S during which time it was lying in the custody of PW-1 at Chagolia Out Post and admittedly, no Malkhana register was maintained at the said Out Post, although the I/O has stated that upon seizure of the contraband he had sealed the same, no such

seal/fascimile has been exhibited. In a matter involving such serious consequences for the appellant, the mere word of the I/O of the PW-1 that he had sealed the contraband is, in the view of this Court, not sufficient. Furthermore, the FSL report has not been brought on record by the prosecution through the I/O as an exhibit and although in view of Section 293 Cr.P.C, it was not necessary to prove the FSL report by summoning the author thereof, I am complete agreement with the decision of the Delhi High Court referred to by the learned counsel for the petitioner that it was necessary for the same to have been tendered the evidence by the I/O, or the person who collected the same from the FSL, in order to show that the report pertains to the case in hand.

37. The learned Trial Court has therefore fallen into error in taking into consideration the said FSL report, notwithstanding the fact that defence had filed a petition stating that examination of the FSL expert is not vital. It is stated in the aforesaid petition No. 670 dated 25.06.2024 that the accused is in custody for a long time and it is not so vital to examine the Forensic expert, who is an official witness and that the report of the forensic expert was accepted. That by itself, however, does not obviate the need to bring the FSL report, perhaps the most vital document of the case on record. As held by the Apex Court in *Kailash* (supra), the FSL report along with the sample tested by it is to

be placed on record so that there remains no doubt regarding the sample tested and admittedly, in the instant case, neither has been brought on record.

38. It is surprising to note that the PW-6 who submitted the charge- sheet in the instant case deposed that he collected the FSL report in connection with the instant case and yet the prosecution did not get the said FSL report exhibited through PW-6 for reasons best known to it.

39. PW-5 S.I Nirmal Chandra, who produced the seized articles before the Magistrate, got the inventory certified and exhibited the said inventory as Exbt. P -9/PW-5 and the list of samples as Exbt. P-10/PW-5, but did not depose to anything regarding taking any photographs in the presence of the Magistrate and getting them certified as true and this is despite the fact that the said photographs are found tagged within the records of the case. This is also another indicator of the casual attitude of the prosecution.

40. In view of the aforesaid infirmities for the prosecution case as discussed above, more particularly the total non-compliance with Section 42 of the NDPS Act, the trial has been vitiated and the consequent judgment and sentence therefore cannot be sustained and the same are accordingly set aside. The appeal stands allowed.

41. The appellant be set at liberty forthwith. Send back the TCR.

JUDGE

Comparing Assistant