

GAHC040014862023

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

Case No. : CRL.A(J)/38/2023

Biswajit Narzary
S/o Lt. Sanjit Narzary, R/o Lamabari Village, PO/PS Mazbat, District Udalguri,
Assam

VERSUS

THE STATE OF AP
Through the Public Prosecutor

Advocate for the Petitioner : Legal Aid Counsel, Abhisek Bhattacharjee, Abhijit Bhattacharya, O
Binggep

Advocate for the Respondent : P P of AP,

BEFORE
HONOURABLE MR. JUSTICE PRANJAL DAS

Advocate for the appellant : Mr. A. Bhattacharya
Advocate for the State respondent : Ms. L. Hage, Addl. P.P

Date on which judgment is reserved : **05.08.2026**

Date of pronouncement of judgment : **21.08.2026**

Whether the pronouncement is of the operative part of the judgment ? : No

Whether the full judgment has been : Yes

pronounced?

JUDGMENT & ORDER (CAV)

Date : -21-08-2026

Heard Mr. A Bhattacharya, learned counsel for the appellant.
Also heard Ms. L. Hage, learned Addl. P.P appearing for the State.

Introductory facts:

2. The instant criminal appeal has been filed by the convict **Biswajit Narzary** against the judgment dated 09-01-2023 and sentence order dated 13-01-2023 passed by the learned Special Judge of East Kameng, West Kameng and Tawang at Bomdila in *Special NDPS Case No. 13 of 2020* arising out of *Kalaktang Case No. 15 of 2018* - whereby the appellant has been convicted under the provisions of section 20(b)(ii)(C) of the NDPS Act and sentenced to undergo rigorous imprisonment for 10 years and pay a fine of Rs. 1 lakh (in default to undergo simple imprisonment for 3 months). He has been given the benefit of set off. The convict/appellant is presently in jail undergoing the sentence.

3. The prosecution case in brief is that on 06-10-2018, a complaint was lodged by Inspector Pyiloki Lotha of Sashastra Seema Bal with the allegations that on 06-10-2018 they got an information around 2:00 P.M that a blue colour Alto K10 vehicle bearing Registration No. AS-27A-7077 was coming from Kalaktang side and accordingly, checking was launched under the leadership of the informant and his team. It is further stated that around 4:10 P.M on the same day a

blue colour Alto K10 vehicle bearing Registration No. AS-27A-7077 was coming towards the checking and upon the driver being signaled to stop he stopped the vehicle and tried to run away, whereupon he fell down on the road and got bruised. He was caught by the SSB troops and upon checking the vehicle in the presence of two witnesses being ASI Deepak Dole and Head Constable A. Shankar Singh on the spot, it was found that there were four white coloured polythene bags containing suspected cannabis. It was found that bag A contained 4 kgs of cannabis; bag B contained 4 kgs of cannabis; bag C contained 5 kgs; bag D contained 4 kgs; bag E contained 4 kgs; bag F contained 4 kgs and bag G contained 4 kgs. Upon being asked, the detained person stated that he was carrying the cannabis to deliver at Mazbat area and he could not show any documents and accordingly, the apprehended person along with the total 29 kgs of seized cannabis and the vehicle were handed over to the Police.

4. On the basis of the aforesaid complaint, *Kalaktang Case No. 15 of 2018* was registered under section 20(B) of the NDPS Act and was endorsed to take up the investigation. The investigation progressed and upon completion of investigation, final form in the form of Charge-Sheet being C.S No. 02 of 2020 dated 11-01-2020 was filed against the appellant under section 20(B) of the NDPS Act. The charge sheet listed 8 witnesses.

5. Subsequently, upon completion of the usual formalities pertaining to copies etc., the learned Trial court vide order dated 18-02-

2021 framed charge against the appellant under section 20(b) of the NDPS Act. The charge upon being read over to the appellant, as accused was denied by him, whereupon the Trial started. During the Trial, the prosecution examined 8 witnesses. Thereafter, the appellant as accused was examined under section 313 Cr.PC. The defense did not adduce any evidence. After completion of the Trial, the appellant was convicted and sentenced as already mentioned above. Hence, the present appeal.

Evidence:

6. PW1 is Deepak Doley who stated in his deposition that on 06-10-2018, at 900 Chain, during surprise checking, the accused was apprehended along with suspected ganja and that he was coming in an Alto car. He further testified that the total suspected ganja was around 29 kgs and later he handed over the accused along with ganja to the OC of Kalaktang Police Station. Testifying further, PW1 stated that during surprise checking, he along with other personnel comprising 4 personnel were conducting checking and Inspector P.Lotha was leading the checking and Mr. A Shankar was also participating in the check. He proved the seizure list of the seized items as P. Ex.1 and his signature thereon as P.Ex.1 (A). He proved another seizure list as P.Ex.2 and his signature thereon as P.Ex.2(A). However, during his testimony he stated that he was not sure whether the accused standing on the dock was the present convict/appellant. He further stated that he saw him once during the time of apprehension and do not properly remember the face of the accused. In cross-examination, he stated that he had seen the suspected contraband at the time of the seizure.

7. In cross-examination, he stated that he had seen the suspected contraband at the time of seizure but he does not remember whether these were weighed or not by the Police at the time of taking over by the Police. He stated that he did not know whether the vehicle apprehended was the personal car of the accused or a hired vehicle. He stated that seizure list Exhibit P.Ex.2 was prepared on the spot. He denied the suggestion that they had falsely implicated the accused. However, he admitted that the sample was not collected in his presence. He stated that the distance between place of occurrence and Police Station was about 15 kilometers and he even admitted the possibility that there could be manipulation of seized contraband between the place of occurrence and the Police Station. This witness was re-examined by the prosecution and in re-examination he clearly stated that there was no manipulation of seized contraband from the place of occurrence to the Police Station.

8. PW-2 is A. Shankar Singh who stated that in the year 2018 at 900 Chain they intercepted a vehicle and seized suspected ganja from it. He stated that many SSB personnel participated in the operation including Mr. P. Lotha and PW-1. He stated that the apprehended person was from Assam who was later on handed over along with the ganja to the OC of Kalaktang Police Station. He proved as exhibit Ex.1(B) as his signature on seizure list Exhibit P. Ex.1. He also proved his signature on another seizure list as Exhibit P.Ex.2(B). He stated the distance between the place of occurrence and the Police Station to be about 20 kilometers. In cross-examination, he stated that the seized items were not shown to him by the Police and he did not witness the sample collection. He also stated that he did not know about the car of the accused and as to whether it was a personal car or hired vehicle. He also admitted the possibility of manipulation of seized contraband in between place of occurrence and

Police Station. However, he denied that the car along with the contraband was not seized and also denied about false implication against the accused. Upon re-examination by the prosecution, PW-2 clarified that there was no manipulation of seized contraband between the place of occurrence and the Police Station. He stated further that the seized items were brought by them and handed over to the Police and thereafter, P.Ex.1 was prepared. With regard to the re-examination, PW-2 was cross-examined by the defense in which he stated that the seized items were handed over to the Police by his Senior Officer and he has personally witnessed the process of handing and taking over.

9. PW-3 Bidyut Paul is a seizure witness. He stated that the owner of the vehicle was Bholadas Panika and the vehicle was an Alto. He proved the zimma document as Exhibit P.Ex.3 and his signature thereon as Exhibit P.Ex3(A); stating further that vehicle was handed over to the said Bholadas Panika. In cross-examination he stated that his name is Bidyut Paul and that he does not know why Police has written his name as Bappi Paul.

10. PW-4 Raja Paul is another zimma witness stating the same name Bholadas Panika as the owner of the vehicle. He also proved his signature on the zimma document as Exhibit P.Ex.3. He stated about handing over of the vehicle to the owner. Cross-examination was declined.

11. PW5 Mr. T. Aran is an executive official who was stated to be ADC Kalaktang at the relevant time and he has stated about destroying the cannabis in connection with this case and other cases in his capacity as a Magistrate. He proved the certificate of correctness of inventory, photographs and samples as Exhibit P Ex.4 and his signatures P Ex.4 and P Ex.5(a). He proved the correctness certificate as Exhibit P Ex. 6 and his

signature as P Ex. 6(a). In cross examination, he admitted that seized cannabis of several cases were destroyed and that he had not given permission for destruction of cannabis in the present case. He also stated that he cannot say as to whether the collected samples were drawn from the seized cannabis in this particular case or not.

12. PW6 Pyiloki Lotha is the Investigating Officer of the case and he stated in his deposition that on 06-10-2018 upon receiving information about transportation of contraband, Naka checking was laid and during such checking one Alto K10 vehicle bearing Registration No. AS-27A-7077 was signaled to stop whereupon though the vehicle stopped the driver tried to run away but fell down and sustained injuries. He further testified about the driver being apprehended and upon search 7 plastic bags containing suspected ganja weighing 29 kgs was found. He proved the FIR as Exhibit P.Ex.8 with Ext. 8(a) being his signature. He proved the seizure list as Exhibit 1 and 2 and his signatures being Exhibit 1 (c) and 2(c). In cross examination, he admitted that the Naka was conducted on prior information but the information was not written down in office and he had not intimated his Commanding Officer nor police or Magistrate. He stated that sometimes checking fails due to information leakage and so he has not informed anyone before the checking. He admitted that during seizure there were no civil witnesses. He admitted that he had not sealed the contraband substance after recovery and that there was no MR number. However he denied that the accused has been falsely implicated.

13. PW7 Miding Borang adduced evidence on behalf of the FSL stating that a sample of the case was examined by scientific officer S. Iboma Devi and upon such examination it gave positive test for cannabis. He proved the FSL report as exhibit P. Ex.13 and as P. Ex.13(a) the signature of S.

Iboma Devi which he identified. He exhibited as M.Ex.13 the sample returned after the examination. In cross examination, he clarified that he had not conducted the examination himself.

14. PW-8 Dige Tayeng stated in his deposition that on 06-10-2018 he was posted at the Kalaktang Police Station as the OC and on that day one written FIR was received from Inspector Pyiloki Lotha of the 61st Battalion of SSB alleging that on 06-10-2018 at around 2 P.M based on input SSB personnel conducted checking of one Alto K10 vehicle bearing Registration No. AS-27A-7077. That it was further stated that at the time of checking the vehicle was signaled to stop whereupon the driver stopped but tried to run away and while doing so fell on the road and sustained some bruises and he was apprehended by the SSB personnel. Testifying further, PW-8 stated that during checking of the vehicle they recovered seven plastic bags containing suspected ganja measuring 29 Kgs and subsequently, the accused as well as the contraband was handed over to the Police Station. Upon receipt of the FIR, he registered Kalaktang P.S Case No. 15 of 2018 under section 20(B) of the NDPS Act and undertook the investigation himself. Testifying further, he stated that during investigation he re-seized the ganja and forwarded the ganja for FSL examination. He took photographs of the seized ganja, car and accused person. He prepared inventory of the contraband ganja taking photograph of the same and placed it before the Magistrate and on his prayer, the contraband was destroyed by the Magistrate. Upon completion of investigation, he submitted charge-sheet against the accused/Biswajit Narzary under section 20(B) NDPS Act. He proved the seizure lists as Exhibit P Ex.1 and P.Ex.2 proving his signatures thereon as Exhibit P.Ex.1(d) and P. Ex.2(d). He proved as Exhibit P.Ex.4 application for

certifying correctness of inventory photograph and sample as Exhibit P.Ex.4, identifying signature thereon as P. Ex.4(d). He proved the inventory-cum-correctness certificate of the contraband as Exhibit P.Ex.5 and his signature there on his Exhibit P.Ex.5(d). He also proved the correctness certificate of contraband issued by Magistrate as Exhibit P.Ex.6. He proved the FIR as Exhibit P.Ex.8 and his signatures there on as Exhibit P.Ex.8(b) to (d). He proved as P.Ex. 9, the proforma of seizure. He proved as Exhibit P.Ex.15, the inventory of seized contraband and his signature there on as Exhibit P.Ex.15(a). He proved as Exhibit P.Ex.16 the certificate of registration of seized vehicle. He proved the charge-sheet as Exhibit P.Ex.18 and his signatures there on his Exhibit P.Ex.18(a) to (d). He proved as material Exhibit 1, 2 and 3, the photographs of the seized substances and his signatures thereon as material Exhibit 1(a to e). He proved as Material Exhibit 13, the return sample of seized cannabis received from the FSL Bandardewa. He proved as Material Exhibit 14 to 16, the photographs of the seized vehicle and his signatures thereon as Exhibit Mat. Ex.14(a) to 16(a).

15. In cross-examination by defense, PW-8 he stated that checking was conducted as per specific information. He further stated that in the FIR the informant has not mentioned as to whether the complainant had written down the information and intimated to his superior officer. He stated that the contraband was not produced at the Police Station with seal and that the informant had not mentioned about the custody of the seized contraband before producing at Police Station. He also admitted that there were no independent witnesses on Exhibit P.Ex.1 and Exhibit P.Ex.2. He stated that during seizure no Magistrate was present. He also stated that during seizure he had not taken any photograph or video. He also stated that he had not mentioned the date, time, weight regarding

the sample sent for FSL. He had also not mentioned regarding the custody of the sample. He stated that FSL was done prior to the inventory and sampling during destruction. He stated that he had collected the sample of seven bags without mixing the same. He also stated that he had not explained the delay in sending the sample to FSL examination. He stated that he had not mentioned regarding custody of the seized materials and that application of correctness inventory were made for several cases together and that during certification of the correctness of inventory he had produced the seized materials before the Magistrate. He also admitted that the destruction of materials was done together of several cases. He stated that inventory was prepared after more than a year of seizing the same and that during this period the seized materials were kept at malkana under the charge of the in-charge. But the same has not been mentioned in the charge-sheet. However, he denied that the accused has been wrongly implicated or investigation not carried out properly. He also denied that the inventory was not as per the format provided under section 52(A) of the NDPS Act.

Submissions:

16. Mr. Bhattacharya, the learned counsel for the appellant, submits that the prosecution case suffers from several procedural lapses as a result of which the appellant has been prejudiced during the trial. It is submitted that the Malkhana register was never exhibited and that all the witnesses of seizure were police personnel. It is submitted that one Bholadas, stated to be the owner of the vehicle, was not made a witness and that the said Bikash Boro was from a different case.

17. It is submitted that there is also no evidence of any bruises to show that the accused ran away from the place of occurrence at the time of the

alleged apprehension. It is submitted that the purported seizure was on 06-10-2018, but the inventory was prepared on 26-11-2019 and that said time gap is violative of the provisions of the NDPS Act. The learned counsel for the appellant also questions that there are doubts about the FSL report and as to whether the same contraband which was seized was the one which was examined at the FSL laboratory.

18. Referring to the 2022 NDPS Rules, the learned counsel submits that as per Rule 13, the inventory has to be prepared before the Magistrate without any delay, but here there was a delay of one year, thereby vitiating the proceedings completely. It is submitted that the seized contraband was not properly mixed in. The learned counsel summing up his submissions, submits that apart from fatal procedural infirmities, the prosecution case has violated mandatory provisions of the NDPS Act and therefore, the impugned judgment and order is vitiated and liable to be set aside.

19. In support of his contentions, the learned counsel for the convict/appellant cites the following decisions:

(i) *Union of India -versus- Mohan Lal & Another*, reported in (2016) 3 SCC 379, (para-16).

(ii) *Arif Khan @ Agha Khan -versus- State of Uttarkhand*, in Cril. Appeal No. 273/2007, Cril. Appeal No. 27/2018, (para-23).

(iii) *Rishi Dev @ Onkar Singh -versus- State (Delhi Admn.)*, (para-23).

(iv) *Surepally Srinivas -versus- State of Andhra Pradesh* in Criminal Appeal No. 1474/2025, (para-13,14, 15).

(v) *Bharat Aambale -versus- State of Chattisgarh*, reported in 2025 INSC 78.

20. On the other hand, Ms. L. Hage, the learned Additional Public Prosecutor, submits that the seizure was made on 06-10- 2018 and that the seals were intact and sent to the Malkhana on the same day and on 11-12-2018, it was sent to the FSL. It is submitted by the prosecution that the chain of custody is complete and proper and that the procedures followed have not caused any prejudice to the appellant as accused during the trial. It is submitted that there was no seizure from his body and therefore, the question of compliance with section 50 does not arise. She submits that the seizure witnesses have supported the prosecution case regarding the seizure of the contraband from the vehicle.

21. It is submitted by the learned Additional Public Prosecutor that there might be some minor procedural lapses but the chain of circumstances is complete. It is submitted that any infirmity with regard to compliance under section 52A of the NDPS Act cannot be ground for acquittal. It is submitted that the conduct of the accused in trying to run away from the place of occurrence is a relevant factor to be taken into account. Summing up her submissions, the learned Additional Public Prosecutor supports the impugned judgment and order and prays for dismissing of the appeal.

In support of her contentions, the learned Additional PP cites the following decisions:

(i). *Bikash Boro -versus- The State of Arunachal Pradesh & Others*, passed in Crl. A No. 12/2024 dated 30.01.2026.

(ii) *Narcotics Control Bureau -versus- Kashif*, reported in 2024 SCC OnLine SC 3848, (para-39).

(iii) *Mehboob Shah -versus- State of Madhya Pradesh, 2026 INSC 729*, (para-15 & 17).

Discussion:

22. Section 42 of the NDPS Act provides inter-alia that when such operation to find contraband is conducted by an authorised officer based on information about such illegal drugs being concealed in any building, conveyance or enclosed space - upon the said information being taken down in writing - then within 72 hours, the said information has to be sent to his immediate superior official. For ready reference, the entire contents of section 42 of the NDPS Act may be reproduced herein below, with the relevant provisions underlined:

“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 para-military 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, or 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 VA 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 VA 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:

²[Provided that in respect of holder of a licence 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 authorisation cannot be obtained without affording 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.”
(emphasis added)

23. The leading authority on the law pertaining to section 42 of the NDPS Act is the Constitutional Bench judgment of the Hon’ble Supreme Court in the case of **Karnail Singh v. State of Haryana**, reported in **(2009) 8 SCC 539**. One of the main principles laid down therein is that section 42 and its compliance is mandatory. However, while a total non-compliance may not be excusable, but in certain situations, substantial compliance could fulfill the requirement of section 42 of the NDPS Act. The relevant para of Karnail Singh (supra) may be reproduced herein below:

“35. In conclusion, what is to be noticed is that Abdul Rashid [(2000) 2 SCC 513 : 2000 SCC (Cri) 496] did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham [(2001) 6 SCC 692 : 2001 SCC (Cri) 1217] hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) *The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).*

(b) *But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.*

(c) *In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.*

(d) *While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42.* To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the

information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.” (emphasis added)

24. The underlying principle behind these procedural safeguards is that considering the nature of offences under the NDPS Act, certain procedural safeguards are held to be essential so as to guard against any possibility of false implication. The objective of the procedural requirements is to ensure that in a situation when a person is prosecuted for offences under the NDPS Act, it is proved to the satisfaction of the judicial conscience of the Court that the contraband in the nature of narcotic drugs or psychotropic substances have been seized actually and properly from the accused. That, the chain of custody has been maintained and that, the contraband which was actually seized at the place of occurrence is the contraband which is examined in the Forensic Laboratory.

25. The decision in *Arif Khan @ Agha Khan (supra)* relied upon by the appellant side, would not be much relevant to the present adjudication, as in paragraph No.-23 of the said decision, the Hon’ble Apex Court emphasised the mandatory nature of section 50 of the Act. It is well settled that section 50 of the NDPS Act applies to a situation where bodily search is conducted on the accused and contraband recovered from such bodily search. The decision of the Constitutional Bench of the Hon’ble Apex Court in the *State of Punjab -versus- Baldev Singh*, reported in (1999) 6

SCC 172 holds the field and the said decision mandates strict compliance with the provisions of section 50 of the Act.

26. In the instant case, the recovery has been from bags allegedly carried by the appellant - in his vehicle and though section 42 was applicable as the search was conducted in a conveyance (vehicle) - Section 50 would not be applicable as contraband was not recovered pursuant to any bodily search.

27. One of the contentions of the appellant side is that the prosecution case herein involves gross irregularities in compliance with the procedure of sampling, inventory, etc. as envisaged under section 52A of the Act, and in terms of the law laid down in *Mohan Lal (supra)*. The learned counsel for the appellant refers to para 16 of the said judgment and upon perusing the same, I find that the principles laid down therein have relevance to the present case. Therefore, paragraph-16 of *Mohan Lal (supra)* may be reproduced herein:

“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.”

28. As mentioned earlier, the informant, Inspector Pyiloki Lotha, adduced evidence as PW6 during the trial. From his testimony, it emerges that a secret information was received regarding transportation of contraband, whereupon the Naka checking was laid.

29. PW-6 is an eyewitness to the incident as he stated to be part of the team conducting the operations at the time of the Naka checking. Though, he has stated about the driver of the vehicle trying to run away upon being stopped and sustaining bruises on the knee and he has also stated about the subsequent recovery of seven plastic bags containing suspected ganja, which after weighing was found to be 29 kgs – that however, in his cross-examination, he has admitted that the information received was neither written down nor intimated to the Commanding Officer. It may be mentioned herein that PW6 was a personnel of the SSB. From the cross-examination conducted by defence, it is revealed that PW6 led the operation which was conducted on prior information, but the said information was not written down in his office and higher officials of SSB or Police were not intimated. It also emerges from his testimony that he had not intimated the Police and Magistrate. He justified the non-sending of information on the ground that it risked leakage of information.

30. Another aspect that emerges from the cross-examination of PW6 is that the contraband was not sealed by him after the recovery, and he handed over the same at the Police Station. He also admitted in cross-examination that there is no MR number. However, he denied that the appellant as accused was falsely implicated.

31. The revelation from the testimony of PW-6 (informant-cum-eyewitness) shows that there was complete non-compliance with the provisions of section 42 of the Act. Here, it is not a case of any substantial compliance or partial compliance. No attempt was made to comply with the provision of section 42 of the Act. Risk of information leakage could not justify non-compliance with section 42 of the Act, which is mandated under the law, statutorily laid down, and explained as such by the Hon'ble

Apex Court. Therefore, the total non-compliance with the provisions under section 42 of the Act constitutes a significant infirmity in the prosecution case.

32. Both PW 1 and PW 2 were eyewitnesses to the occurrence as revealed from their testimony and both of them have stated in cross-examination that the samples were not collected in their presence.

33. PW 2 has also stated that the seized items were not shown to him by the Police. Interestingly, both of them have initially stated in cross-examination that there was a possibility that the contraband could be manipulated between the place of occurrence and Police Station. However, they were re-examined by the prosecution later where they specifically stated that there was no manipulation of the contraband between the place of occurrence and the police station. Nevertheless, such nature of the testimony of PW 1 and PW 2 in their cross-examination has weakened the evidentiary value of their testimony, and also regarding the chain of custody. Another infirmity that has been noticed in the testimony of PW 1 is that, though he was part of the operation, but at the time of his deposition, he could not identify the accused properly, stating that he was not sure whether he was the same person who was apprehended at the time of the incident.

34. The testimony of PW 3 and PW 4 is not so crucial as they have mainly stated about the owner of the vehicle in the question and signed as witnesses on the zimma document.

35. From the testimony of PW 7, I.O in his cross-examination, it is revealed that the contraband was not produced at the Police Station with seal, and the informant had not mentioned about the custody of the seized contraband before producing at the Police Station. It may be mentioned

herein that PW 6, the informant had also stated that there was no MR number with regard to the seized contraband, which is a matter of surprise.

36. It is an admitted position that there were no independent seizure witnesses pertaining to the seizure of the contraband. The same has also been stated specifically by PW 7, the I.O, in his cross-examination. The law is settled that testimony about seizure is not to be disbelieved merely because the witnesses are policemen. It would depend upon the facts and circumstances of the case, and in an appropriate situation, such police witnesses can also be found to be reliable and trustworthy. However, there is no doubt about the desirability of having independent witnesses from the public as witnesses to search and seizure. That would enhance the credibility of the prosecution case.

37. The testimony of Executive official PW-5, who certified the inventory, also weakens the prosecution case. It is revealed from his testimony that he had not given permission for destruction of cannabis in the instant case and that seized cannabis of several cases were destroyed together. However, more importantly, the statement that damages the prosecution case most is his statement that he cannot say as to whether the collected samples were drawn from the seized cannabis in this particular case or not. For a person who, in his capacity as Magistrate, had certified the correctness of the inventory, proving the relevant documents in this regard, to say in cross-examination that he cannot say whether samples were drawn from the seized cannabis in this particular case constitutes an infirmity and weakens the prosecution case. Such nature of the testimony of a vital witness like PW-5 also throws doubt regarding the integrity of the seized items and their chain of custody.

38. An infirmity that emerges from the testimony of PW 8 is that he had not mentioned the date, time, weight regarding the sample sent for FSL, and also did not mention anything regarding the custody of the sample. He admitted that he had not explained the delay in sending the sample.

39. It has emerged from the cross-examination of PW 8, the I.O, that apart from not mentioning regarding custody of the seized materials, when he made application for inventory, he clubbed several cases together and subsequently, destruction of materials of different cases was also done together. This is undoubtedly an infirmity in the procedure envisaged under section 52A of the NDPS Act and as explained by the Hon'ble Apex Court in *Mohan Lal (supra)*, which has already been noticed above.

40. In the case of *Suryapally Srinivas (supra)*, the Hon'ble Apex Court made it clear that a minor breach of Standing Order No. 1 up to 1989 laying down procedure for sampling, storage, disposal of seized contraband would not necessarily vitiate a conviction. However, the Court emphasized that there should be substantial compliance of the statutory provisions and the procedure laid down in the Standing Order. Paragraph No.-12 is reproduced herein below:

"12. We do not propose to hold that a conviction should be interdicted for any minor breach of Standing Order No.1/89. What is required is a substantial compliance of the statutory provisions and the procedure laid down in such standing order."

41. In the same decision, i.e., *Suryepally Srinivas (supra)*, the Hon'ble Apex Court referring to *Bharat Ambale (supra)* and *Kasif (supra)* stated that the purpose of section 52A read with Standing Order No.1 of

1989 serves a broader purpose of strengthening the evidentiary framework of the NDPS Act and in a situation where there has not been even substantial compliance of the same, the Court has to be convinced that such non-compliance has not affected the prosecution case against the accused. The relevant paragraph-13 may be reproduced here in below:

“13. In Bharat Aambale (supra), this Court held that the purport of [Section 52-A](#), NDPS Act read with Standing Order No. 1/89 extends beyond mere disposal and destruction of seized contraband and serves a broader purpose of strengthening the evidentiary framework under the [NDPS Act](#). This decision stresses upon the fact that what is to be seen is whether there has been substantial compliance with the mandate of [Section 52-A](#) and if not, the prosecution must satisfy the court that such non-compliance does not affect its case against the accused. This is also what has been held in Kashif (supra).”

42. One startling aspect which is revealed from the testimony of PW-8 Dayal, the I.O in his cross-examination is that the inventory was prepared more than a year after seizing of the contraband, and that during this period; the seized materials were in the Police Malkhana. Though, the forensic examination has returned a positive finding about cannabis (ganja), but upon carefully scrutinizing the FSL report (Exhibit 13), I find that it is dated 31-01-2019 and it refers to the letter received from Police dated 07-12-2018. Therefore, though the I.O as PW-8 has stated about sending the contraband for inventory after a year, but Exhibit 13, the FSL report and communication dated 31-01-2019 sent by the forensic official to the office of the Superintendent of Police, West Kameng District refers to the police forwarding letter dated 7-12-2018. Nevertheless, even going by the same, there was a delay of approximately two months in sending sample to the FSL from the date of the incident on 6-10-2018. In

this context, the appellant side has referred to a decision of the Delhi High Court in *Rishi Dev @ Onkar Singh (supra)*. In that case, the Court found the delay of three months in sending the sample to be fatal, vitiating the conviction. The relevant paragraph-23 is reproduced herein below:

“23. This Court finds that the prosecution has in this case failed miserably in satisfying the requirement of the law. The delay of three months in sending the sample for testing the instant case must be held to be fatal to the case of the prosecution since on the facts of this case, this Court is not satisfied that the seized sample was properly preserved during the period of the delay and that the sample sent for testing was the one that was seized. Since the accused is entitled to succeed on this ground, this Court is not examining other grounds urged by the accused.”

43. The prosecution has referred to the decision of *Kashif (supra)* where the Hon’ble Apex Court has emphasised interpretation of the provisions of the NDPS Act, keeping in mind the scheme, object and purpose of the Act. The relevant paragraph 39 may be reproduced herein below:

“39. The upshot of the above discussion may be summarized as under:

- (i) The provisions of **NDPS Act** are required to be interpreted keeping in mind the scheme, object and purpose of the Act; as also the impact on the society as a whole. It has to be interpreted literally and not liberally, which may ultimately frustrate the object, purpose and Preamble of the Act.*
- (ii) While considering the application for bail, the Court must bear in mind the provisions of **Section 37** of the NDPS Act which are mandatory in nature. Recording of findings as mandated in **Section 37** is sine qua non is known for granting bail to the accused involved in the offences under the **NDPS Act**.*
- (iii) The purpose of insertion of **Section 52A** laying down the*

procedure for disposal of seized Narcotic Drugs and Psychotropic Substances, was to ensure the early disposal of the seized contraband drugs and substances. It was inserted in 1989 as one of the measures to implement and to give effect to the International Conventions on the Narcotic drugs and psychotropic substances.

(iv) Sub-section (2) of [Section 52A](#) lays down the procedure as contemplated in sub-section (1) thereof, and any lapse or delayed compliance thereof would be merely a procedural irregularity which would neither entitle the accused to be released on bail nor would vitiate the trial on that ground alone.

(v) Any procedural irregularity or illegality found to have been committed in conducting the search and seizure during the course of investigation or thereafter, would by itself not make the entire evidence collected during the course of investigation, inadmissible. The Court would have to consider all the circumstances and find out whether any serious prejudice has been caused to the accused.

(vi) Any lapse or delay in compliance of [Section 52A](#) by itself would neither vitiate the trial nor would entitle the accused to be released on bail. The Court will have to consider other circumstances and the other primary evidence collected during the course of investigation, as also the statutory presumption permissible under [Section 54](#) of the NDPS Act.”

44. Similarly, in *Mehboob Shah (supra)*, relied upon by the prosecution, the court delved into the provisions under section 52A of the Act. The relevant paragraph 15 and 17 may be reproduced herein below:

“15. It is undisputed that the samples were drawn by PW-9 himself at the time of seizure and not in the presence of a Magistrate. However, the appellant has failed to demonstrate that such non-compliance has caused him any serious prejudice. It is pertinent to note that the [NDPS Act](#), as it then stood, did not prohibit drawing of samples at the spot of seizure. As noticed above, the requirement under [Section 52A](#) is procedural in nature. The documents like panchnama, seizure memo, arrest memo, etc., prepared by the Investigating Officer on the spot or

*during the course of investigation constitute primary evidence, with regard to search and seizure of the contraband, which cannot be overlooked merely because of some lapse or non-compliance is found with [Section 52A](#) of the Act. [See: *Kashit (supra)*]*

17. In view of the foregoing discussion, we find that the Trial Court and the High Court have meticulously appreciated the entire evidence. On such close scrutiny, both the Courts below have rightly concluded that the prosecution has proved its case beyond reasonable doubt. We find no perversity or legal infirmity in the findings recorded by the Courts below so as to warrant interference under [Article 136](#) of the Constitution.”

45. It is no doubt true that the NDPS Act has a very important objective of tackling the drug menace in our part of the world and a hyper-technical approach should not be taken to defeat the objectives of the Act. Nevertheless, the underlying philosophy behind the procedural safeguards required to be followed have been referred to earlier. The body of laws that has been developed by the Hon’ble Apex Court with regard to the various procedural safeguards envisages mandatory and/or substantial compliance with many of the safeguards, failing which the fate of the prosecution case would be adversely affected.

46. In the instant case, upon analyzing and appreciating the prosecution evidence as discussed above, one finds that there have been **multiple infirmities** in complying with procedural safeguards and the mandate of the law in this regard. These can be briefly **summarized** herein below:

(i) Total non-compliance with section 42 of the Act about recording the information and sending it to higher authority within 72 hours.

(ii) Significant laxity in seizure and sealing of the contraband. The statement of the IO that even the MR number was not given.

(iii) The contraband was deposited in an unsealed manner.

(iv) Proper procedural safeguards envisaged under section 52A of the Act read with Order 1 of 1989 were not followed. The inventory was sought to be made before the Magistrate, clubbing several cases together.

(v) There is hardly any evidence regarding proper drawing of sample in terms of section 52A of the Act, the NDPS Rules and the Standing Orders governing the field.

(vi) There is significant delay of two months in sending the contraband to the FSL, even if we overlook the statement of the I.O in his evidence that inventory was done more than a year after seizure.

(vii) There is lack of evidence regarding proper and safe keeping of the contraband in the police station from the time of the seizure till sending of the contraband to the FSL.

47. To sum up, the 4 (four) major infirmities in the prosecution case herein are; non-compliance with the provision under section 42 of the NDPS Act; gross irregularities in sampling and inventory; lack of evidence regarding chain of custody and delay in sending the sample for forensic examination.

48. In view of so many infirmities in the procedural aspects of the prosecution case, including non-compliance with section 42 of the NDPS Act, the prosecution case, in my considered view, suffers from fatal defects. To that extent, I find force in the contentions of the learned counsel for the appellant.

49. In a prosecution under the NDPS Act, the Investigating Agency and the

prosecution have to be alive to the importance of chain of custody, both from the point of view of defence and the judicial conscience of the Court. It has to be convincingly proved that the contraband which was seized was the contraband which was examined in the FSL. During investigation, the I.O has to make sure that such chain of custody evidence is gathered and during the trial, the prosecution has to ensure that the proper chain of custody evidence is adduced in support of the prosecution case.

50. The importance of tackling the drug menace cannot be overemphasized. The criminal justice system, which is one of the guardians of the societal interest, cannot afford technical acquittals in NDPS prosecutions.

51. Coming back to the instant case, in view of the deficiencies in the prosecution case, which have been found to be fatal by this court, the conviction and sentence of the appellant is required to be interfered with in this appeal.

Decision:

52. Accordingly, the impugned judgment dated 09-01-2023 and sentence order dated 18-01-2023, passed by the learned Special Judge, NDPS of East Kameng, West Kameng and Tawang at Bomdila in Special NDPS Case No. 13 of 2020 (arising out of Kalaktang Case No. 15 of 2018) convicting and sentencing the accused/appellant is hereby **set aside**.

53. The appellant shall be set at liberty forthwith, unless wanted in any other case.

54. Return back the original TCR to the learned trial court.

55. A copy of this judgment and order shall be sent to the Superintendent

of Police, West Kameng for his kind information.

56. The criminal appeal stands **allowed** and disposed of.

JUDGE

Comparing Assistant