

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.343 of 2019**

Arising Out of PS. Case No.-164 Year-2016 Thana- MUFFASIL District- Aurangabad

KAMAKHAYA GIRI Son of Late Indradeo Giri Resident of Village -
Shankarpur, P.S.- Haspura, Distt - Aurangabad.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 482 of 2019

Arising Out of PS. Case No.-164 Year-2016 Thana- MUFFASIL District- Aurangabad

UPENDRA GIRI Son of Late Ramasish Giri Resident of Village - Devi
Bigha, P.S.- Daudnagar, Distt - Aurangabad.

... .. Appellant/s

Versus

THE STATE OF BIHAR

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 698 of 2019

Arising Out of PS. Case No.-164 Year-2016 Thana- MUFFASIL District- Aurangabad

RAM LAKHAN TIWARI @ RAM LAKHAN TIWARY S/o Late Raj Devan
Tiwari @ Late Raj Devan Tiwary R/o village- Daudnagar, Patel Nagar, D.N.
College, P.S.- Daudnagar, District- Aurangabad

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 1080 of 2019

Arising Out of PS. Case No.-164 Year-2016 Thana- MUFFASIL District- Aurangabad

SURAJ SAO @ RUKHI SAO Son of Late Fagu Sao Resident of Village -
Haspura, P.S.- Haspura, Distt - Aurangabad (Bihar)

... .. Appellant/s

Versus



The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 343 of 2019)

For the Appellant : Mr. Jitendra Kumar Giri, Advocate

For the State : Mr. Ajay Mishra, APP

(In CRIMINAL APPEAL (DB) No. 482 of 2019)

For the Appellant : Mr. Anil Kumar, Advocate

For the State : Mr. Ajay Mishra, APP

(In CRIMINAL APPEAL (DB) No. 698 of 2019)

For the Appellant : Mr. Patanjali Rishi, Advocate

For the State : Mr. Ajay Mishra, APP

(In CRIMINAL APPEAL (DB) No. 1080 of 2019)

For the Appellant : Mr. Pankaj Kumar, Advocate

For the State : Mr. Ajay Mishra, APP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 02-08-2023

These appeals are directed against the judgment of conviction and order of sentence dated 08.03.2019 and 14.03.2019 respectively, rendered by the 1st Additional Sessions Judge-cum-Special Judge (NDPS) Act, Aurangabad in G.R. No.12/2016/05/2017, arising out of Aurangabad Muffasil P.S. Case No.164/2016, whereby all the appellants have been convicted for the offences punishable under Sections 8-20 (b) ii (C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act') and sentenced to undergo R.I. for 14 years and to pay a fine of Rs.1,50,000/- each and in default of payment of fine to undergo S.I. for six months each.



2. The prosecution story, in brief, is as under:

It is stated in the FIR given by S.I., Md. Saud Akhtar Ansari, SHO of Muffasil Police Station, District Aurangabad that he got secret information on 02.10.2016, at about 08:10. a.m. that a pick-up van bearing Registration No. BR 04M 0561 is being used in transportation of huge quantity of Ganja. On the basis of the said information, entry was made in the station diary and the Superintendent of Police, Aurangabad alongwith other superior officers were informed about the same. Thereafter a team of police officers was constituted. The aforesaid pick-up van was intercepted and stopped near Batane river. During search, four persons, namely, Raushan Kumar, Ram Lakhan Tiwary, Upendra Giri and Suraj Sao @ Rukhi Sao were found sitting in the said van. It is further stated that during search, Rs.1,20,000/- was found from possession of Raushan Kumar, Rs.50,000/- was recovered from possession of Upendra Giri and Rs.1,00,000/- was found from possession of Ram Lakhan Tiwary. It is also alleged that from pick-up van 898 Kgs. of Ganja was recovered and seized. During further enquiry, it was revealed by the accused that the said consignment was handed over to them by one Taslim Arif @ Guddu for the purpose of delivery to Om Prakash Giri and Kamakhya Giri. It is also



stated by the said accused, who were found in the pick-up van, that they had kept the aforesaid amount to grease palms of the concerned to get rid of hurdles.

3. On the basis of the aforesaid self statement of informant, Aurangabad Muffasil P.S. Case No.164/2016 was registered for the offences punishable under Sections 8/20 (b) ii (C) of the NDPS Act against seven accused persons. The Investigating Officer carried out the investigation and thereafter filed charge-sheet against all the accused before the competent court. Thereafter the said case was transferred to 1st Additional Sessions Judge-cum-Special Judge (NDPS) Act, Aurangabad.

4. During course of the trial, charge was framed against the accused. The same was explained to the accused and when the accused pleaded not guilty and claimed to be tried, the prosecution examined ten witnesses and produced documentary evidence before the Trial Court. Further statement of the accused was also recorded under Section 313 Cr.P.C. and after conclusion of the trial, the Trial Court has convicted the present appellants-accused. However, one of the accused, namely, Taslim Arif @ Guddu has been acquitted. The present appellants have, therefore, preferred these appeals.

5. Heard Mr. Jitendra Kumar Giri [in Criminal Appeal



(DB) No.343 of 2019], Mr. Anil Kumar [in Criminal Appeal (DB) No.482 of 2019], Mr. Patanjali Rishi [in Criminal Appeal (DB) No.698 of 2019] and Mr. Pankaj Kumar [in Criminal Appeal (DB) No.1080 of 2019] for the appellants and Mr. Ajay Mishra, learned APP for the State in all the appeals.

6. Learned counsel appearing for the appellants-accused would mainly submit that out of ten witnesses, eight witnesses are police personnel and, therefore, they are interested witnesses. Two other formal witnesses have been examined by the prosecution. However, the prosecution has failed to examine any independent witnesses. Thus, the Trial Court ought not to have relied upon the deposition given by the interested witnesses. It is further submitted that there is no recovery of Ganja from physical possession/conscious possession of the appellants-accused and the seized Ganja was found from the pick-up van, as alleged by the prosecution. However, so far as carrying out the search is concerned, the Investigating Agency has not complied with the mandatory provisions of NDPS Act. Search was not carried out in presence of Gazetted Officers or Magistrate and, therefore, on the ground of violation of mandatory provisions of NDPS Act, the Trial Court ought to have acquitted the appellants-accused. Learned counsel



appearing for the defence also contended that while collecting the samples from the packets which were prepared by the Investigating Agency, proper procedure has not been followed and, therefore, the report given by the concerned FSL may not be believed by this Court. It was further submitted that the guidelines issued by the Hon'ble Supreme Court in the case of Union of India Vs. Mohanlal & Anr., reported in (2016) 3 SCC 379 has not been followed and thereby there is violation of provisions contained in Section 52A of the NDPS Act.

7. Learned counsel appearing for the accused Ram Lakhan Tiwary has submitted that the said accused was only an occupant of the vehicle and he was not at all aware about the fact that alleged Ganja is being kept in the said pick-up van. Learned counsel appearing for the appellants-accused, therefore, urged that impugned order of conviction passed by the concerned Trial Court be quashed and set aside.

8. On the other hand, learned counsel appearing for the respondent-State have vehemently opposed these appeals. Mainly it has been contended that on the basis of the secret information received by the concerned police officer, In-charge of the Police Station, necessary entry was made in the station diary and after following the procedure prescribed under the



NDPS Act and after giving information to the superior officer, a team was constituted to intercept the vehicle in question. It is also submitted that when the vehicle was intercepted, four persons were found sitting in the said vehicle and from possession of the concerned appellants-accused, amount of Rs.1,20,000/- was found from possession of Raushan Kumar, Rs.50,000/- was recovered from possession of Upendra Giri and Rs.1,00,000/- was found from possession of Ram Lakhan Tiwary. Thus, the said accused were carrying the aforesaid huge amount of cash. It is further submitted that during search of the vehicle huge quantity of 898 Kgs. Ganja was also found. It is submitted that from the deposition given by the prosecution witnesses, it is clear that the concerned Investigating Agency has followed the mandatory provisions contained in the NDPS Act and, therefore, it is not correct on the part of the appellants to contend that there is violation of the mandatory provisions of the aforesaid Act. It is also contended by learned counsel for the State that when the sample was sent for necessary analysis, the FSL has specifically opined that the substance sent for analysis is Ganja. It is submitted that the prosecution has proved the case against the appellants-accused beyond reasonable doubt and no error was committed by the Trial Court while passing the



impugned order of conviction. It is argued that the present appeals be dismissed.

9. We have considered the submissions canvassed by learned counsel for the parties. We also perused the materials placed on record and the record and proceedings of G.R. No.12/2016/05/2017.

10. From the deposition given by PW1, Jai Shankar Prasad Singh, S.I., it is revealed that the said witness was working as JSI in Aurangabad Muffasil Police Station on 02.10.2016. It is stated by the said witness that on 02.10.2016 at 08:10 a.m., SHO Saud Akhtar Ansari received an information that some miscreants are coming on a pick-up van with huge quantity of *Ganja* from Dehri side. On the basis of the said information, SHO, Ansari entered the said information in Station Diary and constituted a team in which SHO himself, Raja Ram Singh, S.I., Amit Kishore Rajak, S.I., Jai Shankar Prasad, S.I. (PW1) and seven officers from Reserve Police Force and four Home Guards were members of the said team. The said witness further deposed that at about 09:10 a.m., all the officers proceeded and reached near river Batane bridge. At that time, a white coloured pick-up van bearing Registration No.BR 04M 0561 reached there. The said vehicle was intercepted and



SHO asked the persons who were found sitting on the said vehicle about their identity. The said persons disclosed their names as Raushan Kumar, Suraj Sao, Upendra Giri and Ram Lakhan Tiwary. It is further stated that SHO asked all the aforesaid persons whether they are ready to give search before the Magistrate. However, all the aforesaid persons gave their consent that the concerned police officer can make a search. Thereafter, in presence of the two independent witnesses, namely, Vijay Kumar and Sajjan Kumar, the police made search of all the accused persons and Rs.1,20,000/- was recovered from the pocket of Raushan Kumar, Rs.1,00,000/- from Ram Lakhan Tiwary and Rs.50,000/- from Upendra Giri. Three mobiles were also recovered from all the three persons. When SHO asked about the cash recovered from the said persons, they replied that the said money was kept with a purpose to get rid of any difficulty in the way during transportation of seized article *Ganja*. It is further deposed that when pick-up van was searched, plastic and jute bags were kept on it in which *Ganja* was kept. The said *Ganja* was weighed and it was found that the weight of the said *Ganja* was 898 Kgs. The samples of *Ganja* was taken out in 6 lots and 12 packets were prepared. Seizure Memo was prepared in presence of two independent witnesses.



The said witnesses also put their signatures on it and the accused had also put their signatures. Thereafter all the accused persons were arrested at the spot alongwith another accused, Kamakhya Giri. It is further stated that formal FIR was thereafter lodged.

11. Amit Kishore Rajak, S.I., has been examined as PW-2. The said witness has also stated that he was working as S.I. in Muffasil Police Station, Aurangabad. The said witness has also narrated similar type of facts which were stated by PW1. The said witness also stated that there were bags in the vehicle, total weight 898 Kgs., having *Ganja* in the bags and all the packets were made of 6 lots and marked as S1, S2, S3, S4, S5 and S6. It is further stated that 12 samples were also made of 24 Gms. each. The accused told that they are bringing *Ganja* from Village Garhani of District Bhojpur from Pappu who is at present Village Head (Mukhiya) and they were going to Haspura for giving delivery to Kamakhya Giri and Om Prakash Giri. The said witness further deposed that cash money was given by aforesaid Pappu to manage the police in the way. The said witness also stated that SHO prepared the seizure list in presence of two independent witnesses.

12. PW3, Rajiv Ranjan, Constable of the same Police



Station and PW5, Ramraj Singh, S.I., who were also members of the raiding party, have also stated the similar aspects in their deposition.

13. PW6, Sajan Kumar and PW8, Vijay Kumar are the witnesses who have identified their signatures on the seizure list. The said witnesses also identified their signatures on the arrest memo. Similarly, they also identified their signatures on consent letters of the accused. The said witnesses also stated that seizure list and arrest memo were prepared by SHO, Saud Akhtar Ansari.

14. PW4, Md. Saud Akhtar Ansari, who was working as S.I. and has given the First Information Report, stated during course of his examination-in-chief that on 02.10.2016, he received secret information at about 08:10 a.m. that *Ganja* smugglers are coming from the side of Barun in a pick-up van and, therefore, he informed the SDPO and constituted a team in which S.I., Amit Kishore Rajak, Jai Shankar Prasad, Ramraj Singh, seven Constables and four Home Guards were members. He was also having investigation kits bag, strings, packing material etc. and proceeded at about 09:00 a.m. from police station and reached at NH near Batane river where he noticed that a pick-up van bearing Registration No.BR 04M 0561 was



coming. The said vehicle was intercepted and four persons were found sitting in the said vehicle. The said persons were informed that the police personnel have received information that there is *Ganja* in the said vehicle and, if they wish, they can be searched in presence of any Magistrate. However, all the four persons gave their consent that the police officers can make a search. Four persons disclosed their names as Raushan Kumar, Upendra Giri, Ram Lakhan Tiwary and Rukhi Sao. On written consent search was made. The said witness also identified two seizure lists. The accused as well as two independent witnesses, namely, Vijay Kumar and Sajan Kumar also put their signatures on seizure list. Cash was found from possession of the concerned accused persons and thereafter during search, 898 Kgs. of *Ganja* was also found from the said pick-up van.

15. PW7, Raj Kumar Pandey has carried out the investigation. He recorded the statement of the witnesses. The said witness also received 12 envelopes of 25 Gms. each sample, seizure list and FIR. He has also visited the place of incident, prepared the map and all the accused persons were produced before the concerned court with seized articles and thereafter the samples were sent to Forensic Science Laboratory, Patna and Calcutta for necessary examination. After



investigation, the said witness filed charge-sheet against the concerned accused persons.

16. PW10, Harihar Yadav has identified the Station Diary in which he has made entry about Muffasil P.S. Case No.164/2016. It has been mentioned that a team was constituted and they proceeded to the place of occurrence. Station Diary Entry No.32 to 40 has been identified by him.

17. We have gone through the oral as well as documentary evidence produced before the Trial Court and we have re-appreciated the entire evidence. From the evidence produced before the Trial Court, it would emerge that on the basis of the secret information received by the informant, necessary entry was made in the station diary and the superior officer was also informed about the information. Thereafter a team of police officers was constituted and the members of the said team proceeded at the place of incident on the basis of the information received by the informant. As per the information received, a white coloured car bearing Registration No.BR 04M 0561 was coming near Batane river. It was stopped and intercepted by the said team of officers. In the said car, four persons were found sitting and all the persons were specifically informed about the information received by the concerned



prosecution witness and all the accused were specifically informed that they can be searched in presence of Magistrate, if they want. However, all the accused who were found in the vehicle gave their consent that the said police officers can carry out the search. Thereafter, in presence of the two independent witnesses, the said persons were searched and Rs.1,20,000/- was found from possession of Raushan Kumar, Rs.50,000/- was recovered from possession of Upendra Giri and Rs.1,00,000/- was found from possession of Ram Lakhani Tiwary. Thereafter, from the aforesaid vehicle, 898 Kgs. of *Ganja* was also found. From the evidence produced by the prosecution, it is further revealed that the concerned police officials have followed the mandatory provisions prescribed under the NDPS Act. It is pertinent to note that accused Om Prakash Giri was the owner of the vehicle in question and, in fact, the said accused submitted application before the concerned court for release of the vehicle in question. It is also pertinent to note that it is not in dispute that certain material was found from the vehicle in question and, on the contrary, during cross-examination certain questions were asked by the defence from which it is revealed that it is the case of the accused that, in fact, the seized article was Marigold and not *Ganja*. Thus, it is revealed that some material was found



from the vehicle in question which was seized in presence of the accused persons as also in presence of two independent witnesses and all of them have signed the seizure *Panchnama*. It further transpires from the record that the Investigating Agency has, after following due procedure, prepared different packets from the seized material for the purpose of sending the same for analysis to FSL. The FSL report given by FSL, Patna, Bihar is also placed on record and result of examination is as under:-

“DESCRIPTION OF ARTICLE(S) CONTAINED IN PARCELS(S)

The wooden box contained six yellow paper envelopes marked here as A, B, C, D, E & F which separately contained one yellow polythene packet marked here as A1, B1, C1, D1, E1 & F1. The yellow polythene packets marked A1, B1, C1, D1, E1 & F1 which separately contained some dry, pressed, greenish brown flowering & fruiting like vegetable substances.

RESULT OF EXAMINATION

The dry, pressed, greenish brown flowering & fruiting like vegetable substances contained in the yellow polythene packets marked A1, B1, C1, D1, E1 & F1 as described above were found to be Ganja containing Tetra Hydro Cannabinol (THC) as their chief intoxicating ingredient.

Ganja is the flowering and fruiting top's of the female plant of cannabis sativa.”



Thus, from the aforesaid report given by FSL, it is clear that the article seized from the vehicle in question is *Ganja*.

18. In the case of Mohanlal and Anr. (supra), the Hon'ble Supreme Court has considered the provisions contained in Section 52A of NDPS Act and thereafter made observations with regard to the storage and disposal of the drugs lying in the police *Malkhanas* and other places used for storage. It has been observed in para 15 to 17 as under:

“15. It is manifest from Section 52-A(2)(c) (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.”

19. In the Standing Order No.1/89, Section II provides
GENEREAL PROCEDURE FOR SAMPLING, STORAGE
ETC. At this stage, it is relevant to consider certain observations made by the Hon’ble Supreme Court in the case of **Kallu Khan Vs. State of Rajasthan**, reported in **2021 SCC Online SC 1223** wherein the Hon’ble Supreme Court has considered various decisions in paragraph-10 and observed in paragraph-10, 14 and 15 as under:

“10. On the other hand, learned counsel representing the State contends that it is not a case based on recovery of contraband from personal search of the accused, in fact, recovery is from the motor cycle i.e. the vehicle used in commission of offence. Therefore, the mandatory compliance of Section 50 of NDPS Act do not attract in the case. Reliance is placed on a Constitutional Bench judgment of this Court in *Vijaysinh Chandubha Jadeja v. State of Gujarat*, (2011) 1 SCC 609. Reliance has further been placed on the case of *State of Punjab v. Baljinder Singh*, (2019) 10 SCC 473. It is urged that the recovery is a chance recovery from the motor cycle, used in the commission of offence,



therefore, the provisions of Section 43 of NDPS Act would attract. Reliance is placed on the judgment of this Court in *S.K. Raju v. State of West Bengal*, (2018) 9 SCC 708. As per Section 43 of NDPS Act, Pranveer Singh-PW6 is competent for the search and seizure and the High Court has rightly recorded the findings on this issue. It is also contended that in case, the search and seizure is otherwise proved, production of contraband article in court is not required. It is urged that conviction based on the police witnesses without having an independent witness is not always fatal. In support of the said contention, reliance is placed on the judgment of this Court in *Surinder Kumar v. State of Punjab*, (2020) 2 SCC 563 to urge that merely because the prosecution did not examine any independent witness would not necessarily lead to conclusion that accused was falsely implicated. In the said judgment, law laid down in the case of *Jarnail Singh v. State of Punjab*, (2011) 3 SCC 521 has been re-affirmed. It is lastly urged that the concurrent findings are not normally required to be interfered with unless there is a perversity. Reliance is placed on the judgments of this Court in *State of U.P. v. Krishna Gopal*, (1988) 4 SCC 302, *Ganga Kumar Srivastava v. State of Bihar*, (2005) 6 SCC 211, *Jarnail Singh* (supra) and *S.K. Sakkar v. State of West Bengal*, (2021) 4 SCC 483. In reply to the contention of the appellant regarding not having any connection of the vehicle with the accused to prove his guilt, reliance is placed on a judgment of this Court in *Rizwan Khan v. State of Chhattisgarh*, (2020) 9 SCC 627, however prayed for dismissal of appeal.

14. Similarly, in the case of *Than Kumar v. State of Haryana*, (2020) 5 SCC 260, this Court observed that if seizure is otherwise proved and the samples taken from and out of contraband material were kept intact; the report of forensic expert shows potency, nature and quality of contraband material, essential ingredients constituting offence are made out and the non-production of contraband in the Court is not fatal. As discussed above, the appellant has failed to show that findings recorded by two Courts



suffer from any perversity or illegality on the said issue and warrant interference.

15. Simultaneously, the arguments advanced by the appellant regarding non-compliance of Section 50 of NDPS Act is bereft of any merit because no recovery of contraband from the person of the accused has been made to which compliance of the provision of Section 50 NDPS Act has to follow mandatorily. In the present case, in the search of motor cycle at public place, the seizure of contraband was made, as revealed. Therefore, compliance of Section 50 does not attract in the present case. It is settled in the case of *Vijaysinh* (supra) that in the case of personal search only, the provisions of Section 50 of the Act is required to be complied with but not in the case of vehicle as in the present case, following the judgments of *Surinder Kumar* (supra) and *Baljinder Singh* (supra). Considering the facts of this Court, the argument of non-compliance of Section 50 of NDPS Act advanced by the counsel is hereby repelled.”

20. In the case of **Than Kunwar v. State of Haryana**, reported in **(2020) 5 SCC 260**, the Hon’ble Supreme Court has observed in paragraph-30 to 32 as under:

“30. The Court also went to hold in *Sahi Ram* that if seizure is otherwise proved on record and it is not even doubted or disputed, it need not be placed before the Court. The Court further held that if the seizure is otherwise proved what is required to be proved is the fact that samples taken out of a contraband are kept intact. This Court held as follows: (SCC pp. 657-58, paras 15-16 & 18)

“15. It is true that in all the aforesaid cases submission was advanced on behalf of the accused that failure to produce contraband material before the court ought to result in acquittal of the accused. However, in none of the aforesaid cases the said submission singularly



weighed with this Court to extend benefit of acquittal only on that ground. As is clear from the decision of this Court in *Jitendra*, apart from the aforesaid submission other facets of the matter also weighed with the court which is evident from paras 7 to 9 of the decision. Similarly in *Ashok*, the fact that there was no explanation where the seized substance was kept (para 11) and the further fact that there was no evidence to connect the forensic report with the substance that was seized (para 12) were also relied upon while extending benefit of doubt in favour of the accused. Similarly, in *Vijay Jain*, the fact that the evidence on record did not establish that the material was seized from the appellants, was one of the relevant circumstances. In the latest decision of this Court in *Vijay Pandey*, again the fact that there was no evidence to connect the forensic report with the substance that was seized was also relied upon to extend the benefit of acquittal.

16. It is thus clear that in none of the decisions of this Court, non-production of the contraband material before the court has singularly been found to be sufficient to grant the benefit of acquittal.

* * *

18. If the seizure of the material is otherwise proved on record and is not even doubted or disputed, the entire contraband material need not be placed before the court. If the seizure is otherwise not in doubt, there is no requirement that the entire material ought to be produced before the court. At times the material could be so bulky, for instance as in the present material when those 7 bags weighed 223 kg that it may not be possible and feasible to produce the entire bulk before the court. If the seizure is otherwise proved, what is required to be proved is the fact that the samples taken from and out of the contraband material were kept intact, that when the samples were



submitted for forensic examination the seals were intact, that the report of the forensic experts shows the potency, nature and quality of the contraband material and that based on such material, the essential ingredients constituting an offence are made out.”

31. In the facts of this case, no doubt the contraband article weighed 6 kg 300 gm. A perusal of the judgment of the trial court does not appear to suggest that the appellant had taken the contention regarding non-production of the contraband before the trial court. This contention as such is not seen as taken before the High Court. This is a case where the sample was produced. There is no argument relating to the tampering with the seal. We further notice that in the deposition of the investigating officer (PW 7), he has stated as follows:

“The case property is Ext. P-1, sample is Ext. P-2, sample seal is Ext. P-3 and the bag in which the case property was recovered from the possession of the accused present in the court is Ext. P-4.”

32. In the facts of this case, we have no hesitation to reject the contention of the appellant.”

21. From the aforesaid decisions, it is revealed that if the seizure of the material is otherwise proved on record and is not even doubted or disputed, the entire contraband material need not be placed before the court. If the seizure is otherwise proved what is required to be proved is the fact that the samples taken from and out of contraband material were kept intact, that when the samples were submitted for forensic examination the seals were intact, that the report of forensic expert shows the potency, nature and quality of the contraband material and that



based on such material, the essential ingredients constituting an offence are made out.

22. Keeping in view the aforesaid decisions rendered by the Hon'ble Supreme Court, if the evidence led by the prosecution before the Trial Court is examined, we are of the view that the Trial Court has properly appreciated the entire evidence and thereafter specifically recorded the finding that during course of search and seizure, the provisions contained in the NDPS Act are properly complied with. From the FSL report also, it is revealed that the seized article samples sent for analysis was *Ganja*. Merely because there was no space in the police *Malkhana* for keeping huge quantity of 898 Kgs. of *Ganja*, the same was kept in the vehicle, it cannot be said that there is violation of any of the provisions of the NDPS Act or the direction issued by the Hon'ble Supreme Court. It is specific case of the prosecution that vehicle with seized *Ganja* was taken to the court and the concerned Judge himself has verified the said seized article which was kept in the vehicle.

23. We find from the Trial Court records that all the members of the raiding team, who have been examined at the trial, have stated in unison that the procedure to be followed under Section 50 of the N.D.P.S. Act was complied with and



only on the appellants having agreed to be searched before the raiding team, that a search was conducted.

24. Section 52(A) of the N.D.P.S. Act deals with disposal of seized Narcotics Drugs and Psychotropic Substances Act. The section emphasizes that whichever narcotic drugs, psychotropic substances or controlled substances or the conveyances are seized, ought to be forwarded to the officer-in-charge of the nearest police station or to the officer empowered under Section 53. Before doing that, an inventory shall be prepared, containing such details relating to the description, quality, quantity, mode of packing, marks and numbers with other identifying particulars of such seized drugs, and an application would be made to a Magistrate for the purposes of certifying the correctness of the inventory so prepared; or taking, in the presence of such Magistrate, photographs of such drugs and certifying such photographs as true or allowing the drawing of representative samples of each of the drugs or substances and certifying the correctness of any list so drawn.

25. The section further emphasizes that every Court trying the offence under the N.D.P.S. Act would treat the inventory, the photographs and any list of samples drawn and certified by the Magistrate as primary evidence in respect of



such offence.

26. In the present case, no effort though appears to have been made for intimating any Magistrate before whom the samples could have been drawn but that itself, would be no ground to disbelieve the correctness of the sampling procedure and sending it to the chemical laboratory for testing whether it is narcotic. We say so for the reason that though in **Union of India Vs. Mohanlal & Anr.** (*supra*), the Supreme Court, on an analysis of Section 52(A) of the N.D.P.S. Act, found that a Magistrate is required to oversee the process of sampling, but, more often than not, that was not being done. The explanation, perhaps, was that according to Section 52(A)(4) of the N.D.P.S. Act, samples drawn and certified by the Magistrate in compliance with sub-Sections (2) and (3) of Section 52(A), constitute primary evidence for the purpose of the trial, especially in the absence of production of the narcotics so seized. But there is no provision in the N.D.P.S. Act, which mandates the taking of samples at the time of seizure, but the statutory provisions governing the taking of samples in various standing orders issued by the Central Government, such requirement of the presence of Magistrate at the time of sampling is insisted upon. The Supreme Court, thus, was of the



view that even under such a situation, when two provisions stand in juxtaposition, with a conflict, such conflict ought to be resolved in favour of the Statute on the first principles of interpretation, but the continuance of the statutory notification in its present form, might create confusion in the minds of the authorities concerned while discharging their duties. It was, therefore, suggested at that occasion, that the Central Government would do better in re-examining the matter and taking suitable steps in the afore-noted direction.

27. This observation in **Union of India Vs. Mohanlal & Anr.** (*supra*) led to the Standing Orders No. 1 of 1988/1989 respectively being followed normally. However, in the present, a new rule has been enacted under the name and style of Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022. These rules are to be prospective in operation but, *mutatis mutandis*, are similar to the standing instructions, referred to earlier, especially with respect to the necessity of the samples being drawn in presence of the Magistrate.

28. Thus, only because a Magistrate was not present when samples were drawn, we have no other reasons to doubt the correctness of the prosecution version that the appellants



were carrying narcotics with them.

29. We have also gone through the reasoning recorded by the Trial Court while passing the impugned order of conviction and we are of the view that the Trial Court has not committed any error while passing the impugned order of conviction and, therefore, we are not inclined to interfere with the same in the present appeals filed by the appellants-accused.

30. Accordingly, all these appeals are dismissed.

(Ashutosh Kumar, J.)

(Vipul M. Pancholi, J.)

Sanjay/-

AFR/NAFR	NAFR
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