



GAHC010198282023



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

Case No. : CrI.A./331/2023

LANAHMAI STEPHEN THINGAO AND ANR.
S/O LANAHMAI PHAOSHI STEPHEN,
R/O KHAMSON, MAO MARAM SUB DIVISION, P.S.- SENAPATI, DIST.-
SENAPATI, MANIPUR, PIN- 795106.

2: VEIPUH PROU @ ROKU BAIPU
S/O H. DAVID

R/O KODOM KHAVII VILLAGE
P.S.- PHAIBUNG (EARLIER TADUBI)
DIST.- SENAPATI
MANIPUR
PIN- 795106

VERSUS

THE STATE OF ASSAM
REP. BY THE PUBLIC PROSECUTOR.

Advocate for the Petitioner : MR. A M BORA, MS. C CHOUDHURY, MR. B BHAGAWATI, MR.
V A CHOWDHURY

Advocate for the Respondent : PP, ASSAM,

- B E F O R E -
HON'BLE MR. JUSTICE ARUN DEV CHOUDHURY

For the Appellant : Mr. A.M Bora, Sr.Adv



: Mr. V.A. Chowdhury, Adv.

For the Respondents : Mr. M.P. Goswami, Addl. PP

Date of hearing : 02.08.2024

Date of judgment : 23.09.2024

JUDGMENT & ORDER (CAV)

1. Heard Mr. A.M. Bora, learned senior counsel assisted by Mr. V.A Chowdhury, learned counsel for the appellant. Also heard Mr. M.P. Goswami, learned Addl. PP, Assam.
2. The present appeal is filed under section 36B of the NDPS Act, 1985 read with section 374 (2) of the Cr.P.C against the judgment and order of conviction dated 27.07.2023 passed by learned Special Judge, NDPS, Karbi Anglong whereby the appellants were convicted and sentenced to suffer rigorous imprisonment for 10 years with a fine of Rs.50,000/- for offence under section 21(c) of the NDPS Act, 1985 (hereinafter referred to as Act, 1985) and in default to undergo simple imprisonment for another 6 months.
3. The prosecution case in a nutshell is that on 08.05.2022 at around 11.15 PM, a black coloured Maruti Ciaz (without registration number) was stopped at the naka checking which was driven by one Lanahmai Stephen Tingao (A1) with Veipuh Prou @ Roku Baipu (A-2) as co passenger. On being checked, 1995.29 grams of suspected heroin



was recovered from the dicky of the car. Seizure list was prepared and formal FIR was thereafter lodged by SI (UB) Lutfur Rahman.

4. On receipt of the FIR, Dillai PS Case No.12/2022 was registered on 09.05.2022 and the appellants were arrested. According to the prosecution, representative samples were prepared in presence of the Magistrate and was sent to FSL for expert examination and on conclusion of investigation, investigating authority submitted charge sheet being CS No.13/2022 dated 26.07.2022 against accused Lanahmai Stephen Thingao (A-1) and Veipuh Prou @ Roku Baipu (A-2) under sections 22(c), 27A and section 29 of the Act, 1985.

5. On receipt of the charge sheet, the special case was registered and cognizance was taken. Charges were framed under sections 21(c), 27A and Section 29 of the Act, 1985 against the above named appellants. The appellants pleaded not guilty accordingly the trial commenced.

6. To bring home the charge, the prosecution examined as many as 6 witnesses and exhibited certain documents. The accused were examined under Section 313 Cr.P.C. however, they did not adduce any evidence. Thereafter, the impugned judgment and sentence was passed as recorded hereinabove. Being aggrieved the present appeal is preferred.

7. Mr. A. M. Bora, learned Senior Counsel for the appellant argues that the articles alleged to have been seized were not kept in safe custody from the time of alleged seizure i.e. from 01:00 AM of 09.05.2022 till its production before the Magistrate on 10.05.2022. Thus, there is a serious doubt whether the materials produced are actually the

seized materials. In support of such contention, Mr. Bora, learned Senior Counsel relies on the judgment of the Hon'ble Apex Court in the case of ***Valsala -Vs- State of Kerela*** reported in ***1993 (3) SCC (Supp) 665*** and ***Md. Khalid -Vs- State of Telangana*** reported in ***2024 SCC Online SC 213***.

8. Mr. Bora further contends that the custody of the seized materials itself is doubtful inasmuch as from the evidence of PW-4, the Seizing Officer and the PW-6, the Investigating Officer, it is established that the alleged contraband has travelled from the place of seizure to Dillai Police Station and thereafter, to Bokajan Police Station and there is no evidence, how the seized materials reached Bokajan Police Station from Dillai Police Station.

9. The accused are entitled for acquittal for non adherence of Section 52A of the Act, 1985. No application under such provision was exhibited nor was the list of sample tendered in evidence duly certified by the Magistrate. There is no material to suggest adherence of the mandate of law of mixing all the seized materials to make it a homogeneous and representative of the seized material. It is contended that the list of sample stated to be prepared before the Magistrate was also not exhibited.

10. According to Mr. Bora, learned Senior counsel for the appellants, during the course of trial no evidence was produced that alleged contrabands were disposed of inasmuch as PW-6 i.e. the I.O. in his examination deposed that seized drugs were not destroyed by them.

11. It is seriously contended by the learned senior counsel for the appellants that there is no evidence to suggest that inventory of seized

articles was prepared by the Officer in Charge of the police station , as per mandate of Section 52A(2) of the Act, 1985.

12. It is strenuously argued that there is total noncompliance of Section 42 of the Act, 1985. Admittedly, the seizure was made at 01 AM on 09.05.2022, however, proviso to sub section 1 of Section 42 was not complied with. No grounds were recorded by the seizing officer as to why the seizure has to be made at night without affording opportunity for concealment of evidence etc., inasmuch as there is no evidence on record that a copy of such recorded ground was intimated to superior officer within 72 hours as mandated under Section 42(2) of the Act, 1985. In support, the decision of the Hon'ble Apex Court rendered in the case of ***State of Rajasthan vs Jag Raj Singh*** reported in ***2016 11 SCC 687*** is pressed.

13. Countering such argument, Mr. M. P. Goswami, learned Additional Public Prosecutor contends that there is no violation of Section 42 of the Act, 1985. The Exhibit-P-3/PW-4, (GD Entry) clearly establishes that due authorization was given after getting information as regards movement of the contraband from the PW-4. The PW-3 is the officer empowered to give authorization and she herself was present all along during the search. Therefore, non exhibiting of said authorization letter is not fatal, as authority letter is a part of record. Alternatively, it is argued that the reasons were recorded in the GD Entry for conducting search and seizure after the sunset. Therefore, in the given facts of the present case, proviso to Section 42 and Section 42(2) of the Act, 1985 would not be attracted as information was duly forwarded before search and seizure and the Seizing Officer was duly authorized to conduct search and

seizure. In this regard, Mr. Goswami, learned Additional Public Prosecutor relies on the decision of the Hon'ble Apex Court rendered in ***State of Haryana vs Jarnail Singh*** reported in **(2004) 4 Supreme 3**. Accordingly, he contends that there is substantial compliance of Section 42 and no prejudice has been caused to the petitioners and therefore, such ground cannot be a ground for acquittal. In support, decision of the hon'ble Apex Court rendered in the case of ***Karnail Singh vs State of Haryana*** reported in **(2009) 8 SCC 539** is pressed.

14. According to Mr. Goswami, the PW-1 and PW-2 were the independent seizure witnesses who had fully supported the prosecution case of seizure and recovery from the conscious possession of the accused. Such testimony was corroborated by PW-3 and PW-4. Therefore, the proof of such seizure and conscious possession, the burden shifts upon the accused to discharge that he is not guilty in terms of Section 54 of the Act, 1985, which the accused failed in the present case.

15. The doubt raised as regards the chain of custody is an afterthought and it has been raised for the first time before this Court and there is no challenge or suggestion alleging that the contraband was not kept at Malkhana at Dillai Police Station. Therefore, such contention cannot be entertained at this appellate stage, argues Mr. Goswami.

16. The evidence of PW-6 and order dated 10.05.2022 of the learned Magistrate, it is clear that samples and photographs were taken in presence of the Magistrate. The order of the Magistrate also reveals that the facsimile of the seal was "O/C BJN P.S." In fact, the samples were drawn in terms of Section 52 A (2) of the Act, 1985. The certificate

issued by the Magistrate certifies as regards the correctness of the inventory and that the photographs and samples were drawn before the Magistrate and sealed in front of the Magistrate and thus, there is no violation of Section 52 A of the Act, 1985. It is his further contention that though entire contrabands were not produced, the same will not vitiate the trial inasmuch as non production cannot be sole ground of acquittal of the accused.

17. I have given anxious considerations to the arguments advanced by the learned counsel for the parties and also perused the material available on record.

18. Before dealing with the arguments advanced by the learned counsel for the parties, let this court first look into the depositions and testimonies of the witnesses.

I. **PW-1, Md. Abdul Ali** is an auto driver and he was returning from Dimapur after dropping passengers. His house is at Dillai gate where the police had set up the naka checking. PW-1 saw recovery of 152 numbers of soap cases from the dickey of the black coloured car concealed in 2 rice bags. PW-1 further stated that the police weighed the recovered drugs in his presence and found the total weight to be around 2 KG. It is testified that police prepared the seizure list and he put his signature in the seizure list as witness. PW-1 identified the appellants as persons travelling by the black coloured Ciaz car from which the contraband was recovered. PW-1 in his cross examination has deposed that while he was returning from Dimapur, police signaled his auto-rickshaw to stop at the naka checking and accordingly he

stopped his vehicle. At that time PW-1 saw recovery of contraband from the dickey of the black coloured car. PW-1 further deposed that he used to drive auto rickshaw and has developed friendly relation with the police personnel of the locality.

II. **PW-2, Jit Bahadur Chetry** deposed that one day in the night hours police stopped a car at 12th mile, Dillai gate and recovered 152 numbers of drugs packet from inside the said vehicle. At that time two persons were inside the vehicle. Once the recovery was made, police weighed the drugs packet and prepared the seizure list and PW-2 put his signature as a witness in the seizure list. PW-2 in his cross examination stated that he was a member of village defence party and he has signed as a witness in other drug related cases earlier also. PW-2 further deposed that PW-1 was not present at that time and that apart he could not identify the two accused persons travelling in that car on that night.

III. **PW-3, Deputy SP Nahid Karishma** deposed in her evidence that on the day of occurrence at about 10.30 PM, the OC of Dillai PS, SI Lutfur Rahman informed her about transportation of large quantity of drugs from Dimapur to Assam through NH-36. On receiving the information she rushed to Dillai where the other police personnel stopped a black coloured Ciaz Car without registration number. The vehicle was searched in her presence and 152 numbers of plastic soap boxes were recovered from the dickey of the car concealed in two rice bags. PW-3 identified A1 Lanahmai Stephen Thingao and A2 Veipuh Prou @ Roku Baipu as



the persons who were inside the car. A field test was conducted and the recovered drugs gave positive result for heroin. PW-3 in her cross examination deposed that she gave authorization letter to SI, Lutfur Rahman to search and seize in night hours. PW-3 further deposed that at the time of seizure there were two independent witnesses present, however, she does not remember their names.

IV. **PW-4, SI (UB) Lutfur Rahman** who is the informant of this case deposed in his evidence that he received secret information about transportation of huge quantity of drugs from Dimapur to Assam and immediately reported the matter to Deputy SP, his superior officer. Then he went to 12th mile Naka checking points and at about 11:15 PM intercepted a black coloured Ciaz car without having any registration number. The car was searched in presence of local witnesses and they recovered 152 numbers of soap boxes containing suspected heroin from the dicky of the car. The heroines were kept concealed in two rice bags. PW-4 further deposed that accused Lanahmai Stephen Thingao and Veipuh Prou @ Roku were inside the car and were immediately taken into custody. PW-4 in his evidence further deposed that the recovered drugs were tested by Deputy SP Nahid Karishma and gave positive result for heroin. The recovered heroin was then weighed and found to be 1995.29 grams. Thereafter, PW-4 prepared a seizure list and the witnesses put their signatures in it. The seizure was video recorded and PW-4 lodged the FIR. During cross-examination of PW-4, the defence tried to elicit that prayer



for drawl or representative samples were made belatedly. However, record goes to show that prayer for drawing representative samples was made by SI Rafsanjani Ahmed on 09.05.2022 itself and bears the seal and signature of Judicial Magistrate First Class. PW-4 further deposed that as per record, on the same day i.e., 09.05.2022 the seized contraband was produced before the Magistrate and on 10.05.2022 the representative samples were taken in presence of the Magistrate.

V. **PW-5, Dr. Abhijit Gogoi** deposed in his evidence that on 13.05.2022 he was posted as Scientific Officer of Drugs and Narcotics Division, Directorate of Forensic Science, Kahilipara and on that day he received a sealed carton box in connection with Dillai PS Case No.12/2022 for examination. The sealed coarton box consisted of 15 samples in a sealed envelope cover. Each exhibit was having a closed polythene packet containing 5.31 g, 5.52g, 5.51g, 5.8g, 5.62g, 5.41g, 5.51g, 5.48g, 5.75g, 5.61g, 5.67g, 5.81g, 5.61g, 5.51g and 5.57g of brown colour powdery substances, marked as DN – 1198/2022 (a₁) to DN-1198/2022 (a₁₅). PW-5 further deposed that he examined the samples as per the United Nations Drugs Testing Laboratory Manual and found that exhibits DN-1198/2022(a₁) to DN-1198/2022(a₁₅) gave positive test for heroin and the percentage of heroin in each exhibit was found to be 87.52%. PW-5's report is marked as Exhibit-P9/PW-5. In his cross examination PW-5 remained firm in his opinion.

VI. **PW-6, SI Rafsanjani Ahmed** is the investigating officer and his testimony is formal in nature. PW-6 in his deposition stated that he made a prayer for collecting representative samples on 09.05.2022 itself and it the Magistrate conducted the proceeding on 10.05.2022. It is stated by PW-6 that on 12.05.2022 he sent the samples to FSL, Guwahati for examination. The samples tested positive for heroin and on 22.07.2022 PW-6 received the FSL report from Forensic Laboratory, Guwahati. Then, after completing the investigation, he submitted the charge sheet vide CS No.13/22 dated 26.07.2022 against both the accused appellants Lanahmai Stephen Thingao and Veipuh Prou @ Roku under sections 21(c), 27 and 29 of the Act,1985. PW-6 in his cross examination admitted that he was not present at the time of recovery of the contraband and seizure. PW-6 in his cross examination admitted that representative samples were sent on 12.05.2022 even though the samples were certified and sealed by Magistrate on 10.05.2022. The defence side put a question to PW-6 that whether the chain of the custody of the seized articles were during the period from 10.05.2022 to 12.05.2022.

19. The fundamental argument of Mr. Bora, learned Senior counsel is as regards non-compliance of Section 42 and 52A of the Act, 1985 and according to Mr. Bora, there is total noncompliance and according to Mr. Goswami, there is substantial compliance. Now in the backdrop of such argument and the evidence available on record, let this court deal with the issues.



20. Law is by now well settled that the procedure more particularly, the procedure relating to search ,seizure, disposal of narcotics etc are to be strictly followed, inasmuch as the Act,1985 contains stringent provision. As one of the important contentions is non adherence of provision of section 42, let this court first deal with Section 42.

21. Chapter V of the Act 1985 specifically deals with the "Procedure". Section 42 under this Chapter clearly prescribes that certain specific authorities are empowered to carry out search and seizure in a prescribed manner with a power to such officer to give an authorization to a subordinate, only when such officer has reason to believe that an offence punishable under Act, 1985 has been committed etc and the officer while doing so, is to reduce such information, if any, into writing. Thus, two conditions are necessary i.e., the Magistrate or the officer mentioned in the Section are empowered to authorize search and seizure and that they have reason to believe that an offence under chapter IV has been committed or that such arrest or search was necessary for other purposes mentioned in the Act, 1985.

22. Section 42 of the Act,1985 makes it further clear that the empowered officer can enter, search, seize and arrest even without warrant or authorization, if he has reason to believe from his personal knowledge or information taken down in writing that an offence under Chapter IV of the Act, 1985 is committed. Proviso to sub section 1 of Section 42 even empowers him/ her to enter and search such building or conveyance or enclosed space at any time between sunset and sunrise when the officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the



concealment of evidence or facility for escape of an offender, however, he is to record the ground of such belief and send the same to his immediate official superior in terms of sub section 2 of Section 42.

23. It is equally well settled that though delayed compliance with satisfactory explanation about the delay is acceptable compliance of Section 42 of the Act, 1985, total non compliance of Section 42 is impermissible under law and such non-compliance may vitiate the entire trial.

24. Now, coming to the case in hand, as per the seizure list (Ext P-25/PW6), admittedly, the seizure was conducted in the night of 9.05.2022 at 1 AM. The evidence of PW-4, the informant SI, PW-6, the I.O and PW-3, the Deputy Superintendent of Police are vital. According to PW-4, he received the secret information at around 10.30 PM and he informed the matter to PW-6 and made a General Diary Entry vide Dillai PS GD No.162 dated 08.05.2022. The extract copy of such GD entry is also exhibited as exhibit P-3, P-4. Though, the GD Entry reflects that he has received the information from the source, however no satisfaction was recorded in terms of Sub section 2 of proviso to section 42 and there is nothing on record to show that there is compliance of Sub section 2 of section 42 and there is no exhibit to suggest such compliance.

25. Though PW-4 deposed that as the operation of search, seizure and arrest would probably be before the sunrise, a written authorization was issued to him by PW-6 and according to him same was entered in Dillai PS Case No 162 dated 08.05.2022, however, nothing is discernible from the exhibit-P-3 i.e., from the extract copy of GD E No. 162. Though PW-6 also deposed that she was informed by PW-4 as regards the movement



of narcotic drugs and she directed PW-4 to set up a naka and she was present at the place of occurrence, however, nothing has been exhibited regarding any written authorization nor anything has been produced by the prosecution to suggest that sub section 2 of section 42 was complied subsequently.

26. Another aspect of the matter is that as per the version of the PW4, he received the secret information on 08.05.2022 at about 10.30 pm and made GD entry No. 162 dated 08.05.2022 and admittedly the search was conducted at about 11.15 p.m. i.e. after sunset. As recorded hereinabove, the prosecution has not exhibited any written authority from the superior officer for conducting the alleged search and seizure. Neither the GD Entry 162 exhibited by the persecution reflects any satisfaction that he has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence etc., nor anything has been exhibited to suggest that the grounds recorded was sent to immediate superior officer within 72 hours as per mandate of proviso to Section 42 of the Act, 1985. Therefore, in the considered opinion of this court, there is total noncompliance of Section 42 in this regard.

27. Thus, such search and seizure, is bound to be held to be without sanction of law and the same is inherently illegal. That being so, such search and seizure cannot form the basis of a proceeding in respect of offences under Chapter IV of the Act, 1985 and use of such a material by prosecution shall vitiate the trial. This court cannot be oblivious of the object of the Act, 1985 that such Act is enacted to control and regulate the operations relating to narcotic drugs and substances, however, this

court cannot also be unmindful at the same time that the safeguards provided under this Act, 1985 more particularly, section 42 is to be followed.

28. The argument of Mr. Goswami that the authorized officer was herself present with the search team at the time of seizure and therefore, there is compliance of Section 42 do not find favor from this court inasmuch as, such authorization cannot be verbal and that the accused cannot be allowed to be prejudiced for the failure of the prosecution in non exhibiting the written authorization inasmuch as, in absence of exhibiting the same, such authorization can neither be relied nor the accused had any opportunity to cross examine on veracity of such document.

29. Now coming to the Section 52A of the Act, 1985 said Section deals with disposal of seized narcotic drugs and psychotropic substance. Section 52A(2) mandates that where any contraband has been seized and forwarded to the officer-in-charge of the nearest police station or to an officer empowered under Section 53, such officer is mandated to prepare an inventory of such contraband or conveyance containing such detail mentioned therein or such identifying particulars of the contraband or conveyance or the packing in which they are packed or country of origin and other particulars as the officer-in-Charge or the empowered officer may consider relevant to the identity of the seized contraband or conveyance in any proceeding under the Act, 1985. Thus, the determination of identity is a vital aspect.

30. Such provision further mandates that the officer is to make an application to a Magistrate for the following purposes:

- I. Certifying the correctness of the inventory so prepared or;
- II. Taking photograph of such seized contraband and conveyance in presence of the Magistrate and certifying such photograph by the Magistrate to be true and;
- III. Allowing to draw representative sample of such seized material in presence of the Magistrate and for certifying the correctness of the list of samples.

31. Thus, not only the identity of the inventory but also certification as regards correctness of such inventory is prescribed. It is important to note that sub-section 3 of Section 52A mandates that when an application under Subsection 2 is filed, the Magistrate is required to allow the application as soon as possible. Another important aspect of the provision of Section 52A is Subsection 4, which is a non-obstante clause. It prescribes that notwithstanding anything contained in the Indian Evidence Act, 1872, the inventory, the photographs or the list of samples certified by the Magistrate is recognized as primary evidence in respect of such offence.

32. The provision of Section 52A of the Act, 1985 was elaborately dealt with by the Hon'ble Apex court in the case of ***Union of India vs Mohanlal*** reported in ***(2016) 3 SCC 379***. Such provision was again elaborately dealt by the Hon'ble Apex Court in ***Mangilal Vs State of Madhya Pradesh*** reported in ***(2023) 10 SCR 517***. The Hon'ble Apex court in both the cases also elaborately dealt with the notification issued by the Ministry of Finance (Department of Revenue), Government of India in exercise of its power conferred by Section 52A of the Act, 1985.

The said notification had laid down the detail procedure of disposal of narcotic drugs, psychotropic substance, control substances and conveyance after their seizure.

33. In ***Mohanlal (supra)***, the Hon'ble Apex Court mandated that immediately after seizure of narcotic drugs and psychotropic and control substances and conveyance, the same should be forwarded to the O/C of the nearest police station or to the officer empowered under Section 53 of the Act. It was further mandated that the officer concerned shall then approach the Magistrate with an application under Section 52A(2), which is to be allowed by the Magistrate under Subsection 3 of the said Section as soon as possible and the sampling shall be done under supervision of the Magistrate.

34. In ***Mangilal (Supra)***, it was held that the object of Subsection 1 of Section 52A of the Act, 1985 is to create a clear mechanism for disposal of the seized material and to ensure that the contrabands are not used for any illegal purposes. The object of Subsection 2 of Section 52A is to have an element of supervision by the Magistrate over the disposal of seized contraband and until and unless there is certification prescribed under such provision such invented photograph or list of samples would not constitute primary evidence.

35. It was further laid down by the Hon'ble Apex Court that though any notification issued under Subsection 1 of Section 52A cannot contradict the main provision, particularly Subsection 2 of Section 52A, however, guidelines issued by way of notification under Section 52A of the Act has to be followed mandatorily. The Hon'ble Apex Court in ***Mangilal (supra)*** further held that Court must have a satisfaction as regards compliance of

such provision, while deciding the case and the onus of such proof on such compliance lies upon the prosecution, when such an issue arises for consideration. It was further held that production of seized material is a factor to establish the recovery followed by the seizure. Nonproduction of physical evidence in terms of Section 114(g) of the Indian Evidence Act, 1872 is relaxed by virtue of Subsection 2 of Section 52A.

36. It is a well settled proposition of law that the best evidence would be the seized material itself and generally, oral evidence as to the feature of the seized material and the production of seizure list does not discharge the heavy burden, which lies in prosecution, more particularly, when the offence is punishable with the stringent sentence under Act, 1985. It is also equally settled that the physical evidence of a case under Act, 1985 is the property of court and nonproduction thereof, may warrant drawing of negative inference within the meaning of Section 114(g) of the Indian Evidence Act, 1872 and therefore, the alternative mode for primary evidence as prescribed under Subsection 4 of the Section 52A of the Act, 1985 is to be strictly followed to treat the evidence to be in the standard of primary evidence.

37. From the aforesaid discussion, this court safely conclude that compliance of Section 52A is crucial for ensuring that the evidence collected is admissible in court. If the procedure for sampling, certification and disposal of said substances is not followed correctly, it may result in exclusion of the evidence as in absence of it the chain of custody and the integrity of evidence would be compromised. It is equally true that there may be a distinction between substantial compliance and mere technical noncompliance. If the essential

requirement of Section 52A is made and the non-compliance does not materially affect the outcome of the case or the right of the accused, the court may over look minor procedural lapses. A note of caution is that the prejudice of the accused is an important facet in this regards. It is yet another aspect that non-compliance of Section 52A of the Act, 1985 can have a serious legal consequence particularly in term of admissibility of evidence and the over all fairness of the trial. Court is to ensure that such procedural lapses are carefully scrutinized to protect of the right of the accused, while considering the integrity of the prosecution case. While minor technical lapses may be ignored under the principle of substantial compliance, significant noncompliance that compromises the integrity of the evidence or the fairness of the trial can lead to exclusion of evidence, acquittal of the accused or setting aside a conviction on appeal.

38. In the case in hand, it is seen that the seizure list of the alleged contraband was exhibited by PW2 through Ext P-2. In terms of the seizure list the seizure was carried out at 1 am on 09.05.2022. The I/O, PW6 deposed that he brought the alleged contraband to the Magistrate on 10.05.2022. The PW-6 further deposed he drew sample before the Magistrate on 10.05.2022 and sample was sent to FSL on 10.05.2022. In the case in hand, the PW6, I/O deposed that the seized drugs were not destroyed by them. The prosecution has also not led any primary evidence by producing the alleged contraband. Thus, such non-production of the seized contraband physically before the trial court is against the mandate of Section 114(g) of the Indian Evidence Act, 1872. Though it is stated by the PW6 that he produced the contraband before the Magistrate on 10.05.2022 and that samples were taken before the

Magistrate, however the prosecution had also failed to prove that the procedure for preparing the inventory of the said contraband substance and the samples were drawn before the Magistrate inasmuch as though a certificate of the Magistrate is exhibited as Ext P-25/PW6. Such certificate is not in terms of the mandate of the provision prescribed. However, by way of such exhibit i.e. P-25/PW6, the Magistrate certified that the inventory is as per the seizure document and the consignments of said seized goods is related to the case and the inventory is correct. However, what is mandated under law and as recorded hereinabove, is not only the correctness of inventory so prepared but also certification that the photographs of such seized contrabands was taken before the Magistrate and that such photographs are true and also that the samples were drawn in presence of the Magistrate and the samples are correct. However, as recorded hereinabove, except a certification to the effect that inventory is correct, nothing is there. Perusal of the said exhibits, clarifies that such exhibit is a certificate in terms of Sub Section 3 of Section 52A. However, the Magistrate has not certified that is not in terms of Annexure 1 of notification dated 06.01.2015. Even if, it is assumed such certificate is a certificate certifying the correctness of the inventory of the said contraband substance, however no list of samples drawn under Subsection 2 of Section 51A of the Act, 1985 with due certification from the Magistrate in the form prescribed were not exhibited before the trial court. Though, certain photographs were exhibited, in absence of such certificate under Subsection 2 of Section 52A, no presumption can be drawn that the samples were taken in presence of the Magistrate. Thus, until and unless the certification is



there and in absence of physical exhibit of the contraband allegedly seized from the accused person and in absence of the certificate as required, it cannot be presumed that the sample were taken in presence of the Magistrate. Therefore, in the considered opinion of this Court, there was no evidence to establish that it is the representative sample of the contraband seized and that it is the true photographs of such sample taken before the Magistrate. That being the position, the prosecution has failed to show that there is compliance of Section 52A of the Act and therefore, the prosecution has not only failed to lead primary evidence in this regard in terms of Section 114(g) of the Indian Evidence Act, but also failed to produce any evidence by way of the alternative mode of primary evidence as prescribed under Sub Section 4 of Section 52 of the Evidence Act. Thus, there was neither primary evidence nor secondary evidence. That being the position, in the considered opinion of this Court, the prosecution case is liable to fall on this count.

39. Now let this court deal with the argument as regards safe custody of the seized contraband. From the evidence of PW1 and PW2, the two independent seizure witnesses, the prosecution has been able to establish that the occurrence took place on 09.05.2022 at Dillai, 12 mile after 11 pm and the police personnel searched a Ciaz vehicle and recovered 152 numbers of soap cases in two numbers of rice bag kept concealed from the dickie of the car and that the two accused persons were the only occupants of the vehicle. According to the PW1, he also saw the said 152 numbers of soap cases in the court. These two witnesses have also deposed that the police prepared the seizure list and they put their signatures. From the evidence, the recovery of soap cases



is established as deposed by PW1 and PW2. Though as per the prosecution's version PW1 and PW2 are the independent witnesses to the recovery, however these two witnesses have not deposed anything about the factum that the seized contraband were sealed on the spot by the seizing officer immediately after it was recovered in their presence nor they had stated that they had witnessed sealing of the recovered contraband. PW4 is the seizing officer. Though, he had deposed that he had recovered 150 nos. of soap boxes containing suspected heroin wrapped with small polythene packet in soap boxes from the dickie for the car, which were concealed in two numbers of rice bags and the heroin was field tested by the PW3, however, he has not deposed anything as regard the factum of sealing the alleged narcotic on the spot. The PW3, the DSP during her examination in chief has also not ascertained that the recovered contraband was sealed in her presence. Though, she had deposed as regards field testing at the place of occurrence and weighing of such contrabands and though in her cross-examination, she deposed that the recovered heroin were packed and sealed in a cartoon at the place of occurrence after signing of independent witnesses including her and the cartoon was then taken to Dillai Police Station. However, as recorded hereinabove, none of the seizure witnesses supported such version. The I/O, i.e. PW6 had also not deposed anything as regards sealing of the contraband. Therefore, a serious doubt has been created as regards time and place of sealing the alleged contraband and whether it was sealed at the spot in presence of the independent witness and sealed at any other place that too in presence of witnesses.



40. In view of the discussion made hereinabove and in the totality of the matter, this court is of the considered opinion that there were serious lapses and there is total non-compliance of Section 42 and 52A of the Act, which shall vitiate the entire trial.

41. Yet another aspect of the matter is that the PW6 has deposed that samples were kept in the Bokajan Police Station and it was sent to the FSL by a messenger only on 12.05.2022 i.e. after two days. During his cross-examination, he could not ascertain whether the samples were kept in safe custody for two days in the Malkhana of the police station, rather he deposed, in his cross examination that no register of Malkhana was maintained and that in the same Malkhana, there were seized materials of other cases. It is his admitted statement that the seized drugs were not destroyed by them and seized drugs were sent to the Court through a challan. However, such challan was also not attached with the case record. Therefore, a doubt has been created not only as regards the safe custody of the samples for two days at the Malkhana of the police station but also whereabouts of the seized contraband. Therefore, on this count also this court is having no doubt in mind to hold that there is clear contravention of the Section 52A of the Act, which entails the accused for acquittal.

42. Accordingly, the judgment and order dated 27.07.2023 passed by learned Special Judge, NDPS, Karbi Anglong whereby the appellants were convicted and sentenced to suffer rigorous imprisonment for 10 years with a fine of Rs.50,000/- for offence under section 21(c) of the NDPS Act, 1985) and in default to undergo simple imprisonment for another 6 months is set aside and quashed. **Accordingly, appeal**

stands allowed. The appellant shall be put at liberty forthwith if they are not in custody in any other case. LCR be returned back.

43. A very disturbing fact emerges from the evidence of the I/O that the I/O is not aware of whereabouts of the drugs seized. Neither it was exhibited in trial nor could anything be brought on record as regards destruction of such huge quantity of the alleged contraband. Though, it is deposed by the I/O that it was sent to the court, the I/O has failed to bring on record or to produce anything to show that it was actually sent to the custody of the court. Order dated 10.05.2022 of the learned Judicial Magistrate First Class, Bokajan, Karbi Anglong reveals that the said Magistrate directed the Officer-in-Charge, Dillai police station to make necessary prayer for disposal of the said substances before the District Drug Disposal Committee within thirty days from receipt of the chemical analysis report of the said substance from the Forensic Science Laboratory and the Drug Disposal Committee shall take a decision in this regard as per law. The trial court records or the records of Magistrate also do not disclose anything as regards availability of same under Court's custody nor there is any material showing disposal of the substance. Thus the seized contraband is neither available in the Malkhana of the police station, nor in the court or anything on record is available as regards any direction issued by the District Drug Disposal Committee for disposal of the seized narcotic. The Hon'ble Apex Court in ***Mangilal (supra)*** has dealt with the object and importance of disposal of seized contraband, however, no satisfactory material is available suggesting that narcotic drugs alleged to have been recovered have already been disposed.



44. In view of the aforesaid, this court is of the opinion that this court cannot be a mute-spectator of such an action and accordingly, the DGP, Assam is directed to make an enquiry as regards the status of disposal of the alleged seized contraband and to file a report before this court. The DGP may complete such enquiry by any of his subordinate officer, who shall not be an officer below the rank of Superintendent of Police. The Registrar (Vigilance) shall also obtain a report from the learned District & Sessions Judge, Karbi Anglong as well as from the District Drug Disposal Committee as regards disposal of the narcotic in connection with NDPS case No. 57/2022. Such report be furnished within a period of six weeks from today. After such report is submitted, the case record of this appeal be again placed before this court for necessary order if any. A copy of this order be furnished to DGP, Assam and learned District & Session Judge, Karbi Anglong.

JUDGE

Comparing Assistant