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GAHC010254432018

2024:GAU-AS:10132

THE GAUHATI HIGH COURT

[THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH]

CRIMINAL APPEAL 67/2019

Sri Binod Yadav, S/O Sri Ram Krishna Yadav, Village and P.O. Laukaha, P.S. Supaul, Dist - Supaul, Bihar

.....Appellant

-**VERSUS**-

1. The Union of India
2. Kshetrimayum Ramesh Singh, Inspector, Customs Division, Guwahati.

.....Respondents

CRIMINAL APPEAL 283/2017

Sri Avneesh Kumar Rajput, S/O Ahalkar Singh, Village - Haratpura, P.O. Jakhawa, P.S. Kurawali, Dist - Mainpuri, Uttar Pradesh

.....Appellant

-**VERSUS**-

1. The Union of India
2. Kshetrimayum Ramesh Singh, Inspector, Customs, Division, Guwahati.

.....Respondents

Advocates :

Appellant	:	Ms. S.K. Nargis, Advocate
Respondent	:	Mr. S.C. Keyal, Standing Counsel, Customs
Date of Hearing	:	02.08.2024
Date of Judgment & Order	:	04.10.2024

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BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
HON'BLE MR. JUSTICE MRIDUL KALITA

JUDGMENT & ORDER

[*M. Choudhury, J*]

A. The Assail :-

1. Both these two criminal appeals, preferred under Section 374[2], Code of Criminal Procedure, 1973 ['the Code' or 'CrPC', for short] read with Section 36B of the Narcotic Drugs and Psychotropic Substances Act, 1985 ['the NDPS Act', for short] are directed against a Judgment and Order dated 03.10.2016 passed by the Court of learned Sessions Judge [FTC] No. 3, Kamrup [Metro], Guwahati [hereinafter referred to as 'the Special Court', for short] in NDPS Case no. 24 of 2015, which arose out of Customs Case no. 06/CL/NARC/AS/GAU/2014-15 dated 05.12.2014. The criminal appeal, numbered as Criminal Appeal no. 67 of 2019 is preferred by the accused-appellant, Binod Yadav [hereinafter also referred to as 'A-1', at places, for easy reference] whereas the other criminal appeal, numbered as Criminal Appeal no. 283 of 2017 is preferred by the accused-appellant, Avneesh Kumar Rajput [hereinafter also referred to as 'A-2', at places, for easy reference].

B. The verdict of the Special Court :-

2. By the Judgment and Order dated 03.10.2016, both the accused-appellants have been convicted for the offence under Section 20[b][ii][C] of the NDPS Act, 1985 ['the NDPS Act', for short]. On finding the accused-appellants guilty of the offence under Section 20[b][ii][C], NDPS Act, they have been sentenced to undergo rigorous imprisonment for fifteen years each and to pay a fine of Rs. 1,00,000/- each, in default of payment of fine, to undergo imprisonment for another year. It has been observed that the period already undergone in jail by the accused-appellants shall be set-off under Section 428, CrPC.

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C. The case of the prosecution :-

3. The case of the prosecution was stated in a Report filed by the Investigating Officer [I.O.] of the case before the Court of learned Chief Judicial Magistrate, Kamrup [Metro], Guwahati on 06.12.2014 in connection with Customs Case no. 06/CL/NARC/AS/GAU/2014-15 dated 05.12.2014, immediately after the alleged seizure of 1093.68 Kgs of Cannabis [Ganja] on 05.12.2014. For ready reference, the relevant excerpts of the said Report filed by the I.O. [P.W.8], an Inspector of Customs at the Anti-Smuggling Unit, Customs Division, Guwahati and empowered under Section 53 of the NPDS Act, are reproduced hereinbelow :-

> **1. That on 05.12.2014, acting on specific information the officers of Anti-Smuggling Unit, Guwahati Customs Division, Guwahati [hereinafter referred to as the said officers] effected seizure of a 29 [twenty nine] packages containing Ganja [Cannabis] from two closed body 6 wheeler container truck bearing registration no. HR-65-7758 and HR-65-8403 under the provisions of the NDPS Act, 1985, after observing all the requisite formalities. The persons mentioned above were arrested under Section 43 the NDPS Act, 1985.**
>
> **2. That on 04.12.2014 at around 22-30 hrs specific information was received to the effect that a huge quantity of Ganja contained in 25/30 packages would be loaded in two white coloured closed body container trucks bearing registration no. HR-65-7758 and HR-65-8403 at Rowta area around midnight. It was further informed that both the trucks are plying under the banner of SAFEXPRESS will be loaded with tea. That after loading of the Ganja both the trucks will proceed out of the region and are expected to cross Baihata Chariali area. The information received is reduced in writing and handed over to Shri D.C.Bania, Superintendent, Anti-Smuggling Unit, Customs Division, Guwahati for information and necessary action.**

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3. Accordingly, on receipt of the information a team of officers is formed comprising of Shri D.C. Bania, Superintendent, Shri Rideep Hazarika, Superintendent, M.I. Singh, Inspector, Ksh Ramesh Singh, Inspector, P.K.Deka, Inspector, Shri Hara Ratan Singh, Shri N. Mondal, Sepoy and Shri Rajen Sharma, H/Havilder. Thereafter the team led by Shri D.C. Bania, Superintendent proceeded to Baihata area and laid naka at suitable place on the NH-31 from around 01-00 hrs on 05.12.2014. Before laying naka the officers approached several persons and told them about the information and requested them to be witnesses to the whole operation. But all of them refused and left the area without disclosing their name or address. Thereafter, the officers continued keeping surveillance and in course of the surveillance at around 02-00 hrs saw two white coloured 6-wheeler close body container trucks coming from Baihata Chariali side. On close observation found the registration number of the first truck HR-65-8403 and the registration number of the other truck following this truck to be HR-65-7758. As the description and the registration number of the both the closed body container trucks matched with the information received, the officers signalled both the trucks to stop.

4. On being signalled to stop the truck bearing registration no. HR-65-7758 immediately stopped but the other truck bearing registration no. HR-65-8403 slowed down and stopped at a distance from the naka party and before the Customs Officers could approach the truck no. HR-65-8403 both the driver and the assistant left the truck and fled away under the cover of fog and darkness. Although the Officers tried to nab them they failed because of heavy dew and darkness. The Officers then approached the driver of the truck HR-65-7758 and after introducing themselves inquired with him regarding the goods loaded in the truck and his destination. On being inquired the driver introduced himself as Shri Binod Yadav and told the Officers that both the trucks are transporting a consignment of packaged tea. At

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the time of interception the assistant of the truck was also present in the truck and on inquiry he introduced himself as Shri Avneesh Kumar Rajput. The Officers then informed Shri Binod Yadav, the driver of the truck HR-65-7758 that they have specific information that both the container trucks are transporting a huge quantity of Ganja concealed under the load of the packages containing tea. As such the Officers informed them that they would take both the trucks to the Customs Office, Guwahati for detailed checking and requested Shri Binod Yadav to place the truck at the Customs Office located at Nilamoni Phukan Path, Christian Basti, Guwahati. Accordingly Shri Binod Yadav agreed and accompanied the Customs Officers to the Customs Office. The other container truck bearing no. HR-65-8403, the driver and khalasi of which managed to run away was also brought to the Customs Divisional Office, driven by Shri Har Ratan Singh, driver, Customs Division, Guwahati.

5. At the Customs Division Office on being asked Shri Binod Yadav, driver of the truck HR-65-7758 and Shri Avneesh Kumar Rajput, helper of the truck opened the locked rear door of the container of both the trucks with the help of a spanner and on opening both the trucks were found to be loaded with packages containing packaged tea of TATA brand. Thereafter, the packages containing the packaged tea were removed from the rear of both the trucks with the help of labourer in presence of Shri Binod Yadav and Shri Avneesh Kumar Rajput, driver and helper of the truck HR-65-7758 respectively and in presence of two independent witnesses. After a portion of the packages containing tea were removed from the rear, several rectangular shaped HDPE packages could be found concealed under the consignment of tea packages. The Officers then removed one such package from the truck bearing no. HR-65-7758 and examined the contents of the package in presence of Shri Binod Yadav and Shri Avneesh Kumar Rajput, driver and helper of the truck HR-65-7758 respectively and in presence of the witnesses and on examination at 04-00 hours the package was found to contain

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Ganja in compressed form. Thereafter all the rectangular shaped HDPE packages numbering 17 [seventeen] were unloaded from the truck HR-65-7758. Similarly several rectangular HDPE packages were recovered from the truck no. HR-65-8403. All the HDPE packages numbering 12 [twelve] recovered from the other container truck were then examined in presence of Shri Binod Yadav and Shri Avneesh Kumar Rajput, driver and helper of the truck HR-65-7758 respectively and in presence of the witnesses and all the packages were found to contain Ganja in compressed form. Thereafter the remaining tea packages were unloaded from both the trucks in presence of Shri Binod Yadav and Shri Avneesh Kumar Rajput, driver and helper of the truck HR-65-7758 respectively and in presence of the witnesses. The recovered 29 [twenty nine] packages were then weighed in the electronic weighing scale allotted to the Anti-Smuggling Unit, Customs Division, Guwahati in presence of Shri Binod Yadav and Shri Avneesh Kumar Rajput, driver and helper of the truck HR- 65-7758 respectively and in presence of the witnesses and the weight of each packet containing Ganja was recorded in a separate sheet truck wise in presence of Shri Binod Kumar and Shri Avneesh Kumar Rajput, driver and helper of the truck HR-65-7758 respectively and in presence of the witnesses. The net weight of Ganja was ascertained at 1093.68 kgs. The recovered quantity of Ganja was then seized at 12-30 hours under the provisions of the NDPS Act, 1985. The consignment of packages containing tea packages recovered from the two container trucks used for concealing the seized quantity of Ganja was also seized under the provisions of the NDPS Act, 1985. Both the carrier container trucks HR-65-8403 and HR-65-7758 used for transportation of the consignment of contraband Ganja were also seized along with the documents related to the truck and the driver and cash recovered from the truck as per the provisions of the NDPS Act, 1985. On being inquired both Shri Binod Yadav and Shri Avneesh Kumar Rajput handed over their respective mobile handsets which were also seized under the provisions of the NDPS Act. All the seized articles were then listed in an Inventory of

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goods seized in presence of Shri Binod Yadav and Shri Avneesh Kumar Rajput, driver and helper of the truck HR-65-7758 respectively and in presence of the witnesses. In this connection a case was registered vide Narcotics Case no.06/CL/NARC/AS/GAU/2014-15 dated 05.12.2014 and the cumulative value of the seized goods were estimated at Rs 1,22,99,221/-

6. A copy of the Inventory along with Annexure is handed over to Shri Binod Yadav, driver of the truck bearing registration no. HR-65-7758.
[Information reduced into writing enclosed Inventory of goods seized dated 05.12.2014 along with Annexure enclosed]

7. Samples in duplicate each weighing 30 gms were drawn from each of the 29 packets containing Ganja and sealed in presence of Shri Binod Yadav and Shri Avneesh Kumar Rajput, driver and helper of the truck HR-65-7758 respectively and in presence of the witnesses for chemical testing by Govt. Laboratories. Both Shri Binod Yadav and Shri Avneesh Kumar Rajput, driver and helper of the truck HR-65-7758 respectively, the two witnesses and the Seizing Officer had put their dated signature on each packet containing the sample drawn.

8. After completion of the seizure formalities including drawal of sample which concluded at around 12-30 hrs on 05.12.2014 all the 29 packages were labeled and then sealed in presence of Shri Binod Yadav and Shri Avneesh Kumar Rajput, driver and helper of the truck HR-65-7758 respectively and in presence of the witnesses.

9. The seized articles were deposited with the Divisional godown vide GR no. 12/14-15[NARC] dated 05.12.2014.

10. That examination of the accused persons reveals that both, Shri Binod Yadav, driver of the 6 wheeler closed body container truck bearing registration no. HR-65-7758 and Shri

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Avneesh Kumar Rajput, the assistant of the said truck are directly / consciously involved in the illicit trafficking of a huge quantity of Ganja [Cannabis] and that in contravention of the provisions of Section 8[c] of the NDPS Act 1985 and have thus committed an offence punishable under Section 20 r/w Section 22 and 29 of the NDPS Act 1985. Hence both the accused persons were arrested on 05.12.2014 under Section 43 of the NDPS Act 1985 and the grounds of arrest were communicated to them.
[Arrest memo dated 05.12.2014 enclosed]

11. That the offence so committed involves illicit trafficking of a huge commercial quantity of narcotics drugs and is therefore a non-bailable and cognisable offence within the meaning of Section 37 of NDPS Act 1985 as amended.

12. That the medical examination of the accused person was done on 06.12.2014

13. That on preliminary enquiry it appears that a huge racket is involved and some more persons are likely to be arrested in the case. It is therefore prayed that as the two accused persons have committed an offence involving illicit trafficking of a huge commercial quantity of Ganja which is cognizable in nature within the meaning of Section 37 [1] [a] & [b] of the NDPS Act, 1985 as such the accused persons may not be enlarged on bail.

14. The documents including the seizure list prepared, the seized articles and the samples drawn may kindly be seen.

D. The Investigation :-

4. One Ksh. Ramesh Singh, Inspector, Customs Division, Guwahati was appointed as the Investigating Officer [I.O.] of the case, Customs Case no. 06/CL/NARC/AS/GAU/2014-15 by an Order dated 05.12.2014. Finding the two

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accused persons, A-1 and A-2 being directly and consciously involved in illicit trafficking of Cannabis [Ganja] as the driver and khalasi respectively of the container truck bearing registration no. HR-65/7758 [also referred to hereinafter as 'the subject-vehicle', at places, for easy reference], they were arrested under Section 42[1][d] read with Section 43[b] of the NDPS Act, on 05.12.2014. According to the Investigating Agency, they were arrested on the reasonable belief that they had committed an offence punishable under Section 20 of Chapter IV of the NDPS Act, by involving themselves in carriage, concealment and transportation of commercial quantity of Cannabis [Ganja]. Both the accused persons after their arrest, were produced before the Court of learned Chief Judicial Magistrate, Kamrup [M], Guwahati on 06.12.2014 along with all the seized goods and samples drawn and the said learned Court after seeing the seized goods, the inventory and samples drawn, remanded both the accused persons, A-1 and A-2 to judicial custody.

5. The samples drawn were thereafter, forwarded to the Director-cum-Chemical Examiner, Forensic Science Laboratory [FSL], Directorate of Forensic Science [DFS], Assam, Guwahati vide an Office Letter dated 08.12.2014 for chemical examination. The Deputy Director, Drugs and Narcotics Division, Directorate of Forensic Science [DFS], Assam after chemical examination submitted a report vide Report no. DFS.1199/2014/2257/DN-421/2014 dated 12.12.2014 recording a finding that the exhibits, that is, the samples gave positive test for Cannabis [Ganja] and the said Report dated 12.12.2014 was forwarded by the Director-cum-Chemical Examiner, DFS, Assam vide an Office Letter dated 23.12.2014.

6. It is the further case of the prosecution that a report of arrest and seizure was submitted to the higher authority, that is, the Commissioner of Customs, North Eastern Region, Shillong and other higher authorities in compliance of the provision of Section 57 of the NDPS Act, 1985. A cash amount of Rs. 6,165/- which was recovered from the subject-vehicle, was deposited into the Divisional Godown on 08.12.2014.

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7. During the course of investigation, one Shishpal Sharma, Head – Tea Business, M/s Transolution Private Ltd., Guwahati had appeared before the Superintendent of Customs on 09.12.2014 in response to a Summons dated 09.12.2014 and Shishpal Sharma submitted an application of even date praying for release of Tata Tea packages seized along with the Cannabis [Ganja] supported by consignment notes, stock transfer advice, carriage agreement, etc. A petition for zimma was also preferred by Shishpal Sharma as the Authorised Representative of M/s Transolution Private Ltd. before the learned Special Court for taking custody of 745 nos. of packages containing Tata Tea. The learned Special Court vide an Order dated 15.12.2014 was pleased to allow interim custody of those seized goods on furnishing of an indemnity bond of Rs. 5,00,000/-. On submission of an indemnity bond for Rs. 5,00,000/- on behalf of M/s Transolution Private Ltd. on 16.12.2014, those 745 nos. of packages of Tata Tea so seized, were released in favour of M/s Transolution Private Ltd.

8. In response to a Summons dated 09.12.2014, the Operation Manager, M/s Safe Express Private Ltd., Guwahati viz. Arbind Kishor appeared before the Superintendent of Customs on 10.12.2014 and produced copies of the consignment notes for Tata Tea in respect of the two container trucks bearing registration nos. HR-65/7758 and HR-65/8403 and the copies of the driving licences of the drivers of the said two trucks. It was revealed that both the trucks were supplied to M/s Safe Express Private Ltd. by the owner, M/s Mor Motors, Kurukshetra, Haryana after execution of a contract agreement and Shishpal Sharma was the owner of M/s Mor Motors. Thereafter on 12.12.2014, a representative of M/s Mor Motors submitted the registration papers of the two trucks. The antecedents of the two accused persons, A-1 and A-2 along with other persons suspected to be involved in the alleged offence, were verified. After verification, it was revealed that the two trucks belonged to M/s Mor Motors, Kurukshetra, Haryana.

9. Statements of a number of persons were recorded under Section 67, NDPS Act. The I.O. also collected Call Detail Records [CDRs] of the accused persons, A-1 and

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A-2 to find out about the persons with whom the accused persons were in regular contact.

10. A zimma petition was preferred before the learned Special Court on behalf of M/s Mor Motors for taking interim custody of the two trucks bearing registration nos. HR-65/7758 and HR-65/8403 and the learned Special Court vide an Order dated 09.01.2015, allowed interim custody of the two trucks on furnishing an indemnity bond of Rs. 5,00,000/- for each truck. On submission of two indemnity bonds of Rs. 5,00,000/- each on 09.01.2015, both the trucks were released on interim custody to M/s Mor Motors.

E. The Complaint :-

11. After completion of investigation into the case, Customs Case no. 06/CL/NARC/AS/GAU/2014-15, a Complaint under Section 36A[1][d], NDPS Act 1985 came to be submitted before the learned Special Court, Kamrup [M], Guwahati on 02.06.2015 inter alia with a prayer to take cognizance of the offences under Section 8, Section 20[b][ii][C] and Section 29 of the NDPS Act against the two accused persons, A-1 and A-2 and to punish them thereunder, apart from confiscating 1093.684 Kgs of Cannabis [Ganja]. In Schedule-A to the Complaint, a list of witnesses was appended.

F. The Charge :-

12. On receipt of the Complaint under Section 36A[1][d], NDPS Act, the Special Court registered the same as NDPS Case no. 24 of 2015. On appearance of the two accused persons, A-1 and A-2 before it and after hearing the learned Standing Counsel, Customs and the learned defence counsel, the learned Special Court had, on 24.08.2015, framed the following charge against the accused persons, A-1 and A-2 :-

> **That on or about 05.12.2014 at about 22.30 hours Customs Division, Guwahati apprehended both of you while you were transporting huge quantity of Ganja in**

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vehicle no. HR-65/7758 and that you thereby committed an offence punishable under Section 20[b][ii][C] of NDPS Act within my cognizance.

When the charge was read over and explained to the accused persons, they pleaded not guilty and claimed to be tried.

G. The Trial :-

13. During the course of the trial, the prosecution side examined the following prosecution witnesses to bring home the charge against the two accused persons, A-1 and A-2 : -

P.W.s	Name	Designation/Status
P.W.1	Ridip Hazarika	Inspector of Customs
P.W.2	Gajendra Nath Deka	Deputy Director, FSL
P.W.3	Dr. Satyen Roy	Superintendent of Customs
P.W.4	Dwipen Chandra Bania	Superintendent of Customs
P.W.5	Punya Kumar Deka	Inspector of Customs; Seizing & Arresting Officer
P.W.6	Shiv Sankar Basumatary	Inspector of Customs
P.W.7	Suraj Thapa	Seizure Witness
P.W.8	Ksh. Ramesh Singh	Inspector of Customs & Investigating Officer

Apart from the oral testimony of the afore-mentioned prosecution witnesses, the prosecution side also exhibited fourteen nos. of documents and thirty nos. of material objects as exhibits during the trial and the same would be referred to in the later part of the Judgment.

14. After closure of evidence from the prosecution side, both the accused persons, A-1 and A-2 were examined under Section 313, CrPC and they were thereby, provided with the opportunity to explain the circumstances appearing in the prosecution evidence against them. During such examination, the accused persons took the plea of denial stating that the case of the prosecution was false. When the accused

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persons, A-1 and A-2 were asked as to whether they would like to tender any evidence in their support, both of them declined to adduce any defence evidence.

15. After hearing the learned Standing Counsel, Customs and the learned defence counsel; and upon evaluation of the evidence/materials on record, the learned Special Court has proceeded to deliver the Judgment on 03.10.2016 holding that the prosecution had been able to prove its case against the two accused persons, A-1 and A-2 beyond all reasonable doubt. The two accused persons, A-1 and A-2 have accordingly, been convicted for the offence under Section 20[b][ii[[C] [incorrectly mentioned as Section 20[C]] of the NDPS Act. After hearing the two accused persons under Section 235[2], CrPC on the point of sentence, they have been sentenced in the manner, mentioned above.

16. Aggrieved by and dissatisfied with the Judgment and Order of conviction and sentence passed by the learned Special Court, the present two criminal appeals have been preferred.

17. We have heard Ms. S.K. Nargis, learned counsel for both the appellants and Mr. S.C. Keyal, learned Standing Counsel, Customs for the respondents.

H. Submissions of the accused-appellants :-

18. Ms. Nargis, learned counsel for the accused-appellants has advanced submissions in the following manner :-

I. If the Officer mentioned under Section 42[1] of the NDPS Act takes down any information in writing under sub-section [1] of Section 42 or records grounds for his belief under the proviso thereto, he is required to send a copy thereof to his immediate official superior within seventy-two hours. In the case in hand, P.W.1 who took down the information in writing, did not comply with the said procedure of sending the information to his immediate official superior. P.W.1 had only informed about the information taken down in writing as regards transportation of the contraband substance, Cannabis [Ganja] vide Ext.-1, to P.W.4 on 04.12.2014.

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Learned counsel for the accused-appellants has contended that P.W.4 could not be regarded as the immediate official superior of P.W.1 as, on the relevant date – 04.12.2014, both P.W.1 and P.W.4 were holding equal rank of Superintendent. With such contention, it has been projected that there was non-compliance of the statutory prescription contained in Section 42 read with Section 43 of the Evidence Act.

II. It has been contended that after search, recovery and seizure of the alleged contraband substance, Cannabis [Ganja] and arrest of the two accused persons, A-1 and A-2, no full report containing the details on the aforesaid aspects was sent within the period of forty-eight hours, as mandated by Section 57 of the NDPS Act. It has been contended that such non-compliance of the procedure has the effect of vitiating the entire process of search, recovery, seizure and arrest and consequently, the trial.

III. By referring to the procedure laid down in Section 52A, more particularly, sub-section [2] thereof, learned counsel for the accused-appellants has contended that there were clear violations by the respondent Customs authorities in matters of getting the Inventory certified and drawing samples from the allegedly seized packets containing Cannabis [Ganja] from the subject-vehicle, that is, the truck bearing registration no. HR-65/7758 wherein the two accused persons, A-1 and A-2 were the occupants. It has been contended that no photographs of the packets allegedly containing Cannabis [Ganja] were taken in presence of a Magistrate and as a result, there was no certification by the Magistrate. During the trial, the prosecution side did not exhibit the remnants of the sample which were received back from the DFS/FSL after chemical examination, in a proper manner. In such view of the matter, no evidentiary value can be attached to the Chemical Examination Report [Ext.-3] given by the FSL/DFS.

IV. Learned counsel for the accused-appellants has contended that there was defect in the charge framed against the accused persons, A-1 and A-2 as there was no mention about the specific quantity of the contraband substance therein. It has been contended that different nos. of packets allegedly containing contraband

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substance, Cannabis [Ganja] were seized from two trucks bearing registration no. HR-65/7758 and HR-65/8403. As the charge framed was a defective one, the trial, as a result, stood vitiated.

V. In support of the above submissions, the decisions referred to are : [i] **Noor Aga vs. State of Punjab and another, [2008] 16 SCC 417**; [ii] **Union of India vs. Mohanlal and another, [2016] 3 SCC 379**; [iii] **Yusuf @ Asif vs. State, 2023 INSC 912**; [iv] **Bothilal vs. Intelligence Officer, Narcotics Control Bureau, 2023 SCC OnLine SC 498**; [v] **Mangilal vs. State of Uttar Pradesh, 2023 INSC 634 : [2023] 10 SCR 517**; [vi] **Simarnjit Singh vs. State of Punjab, 2023 SCC OnLine SC 906 : 2023 LiveLaw [SC] 570**; and [vii] **Mohammed Khalid and another vs. the State of Telangana, 2024 INSC 158 : [2024] 5 SCC 393.**

VI. By canvassing as above, learned counsel for the accused-appellants has contended that the impugned Judgment and Order of conviction and sentence passed against the accused-appellants, A-1 and A-2 is not sustainable in law and the same is, therefore, is liable to be set aside and the accused-appellants are liable to be acquitted.

I. Submissions of the respondents :-

19. Au contraire, Mr. Keyal, learned Standing Counsel, Customs Department has supported the impugned Judgment and Order of the learned Special Court with the following submissions :-

I. There was no violation of the provisions contained in Section 42 and Section 43 of the NDPS Act with regard to sending of a copy of the information taken down in writing by P.W.1 as P.W.4 was the immediate official superior of P.W.1, the Officer who had taken down the information in writing. Though during the interregnum, P.W.1 had been promoted to the rank of Superintendent, yet, P.W.4 had to be taken as the immediate official superior of P.W.1 and the evidence/materials on records had amply demonstrated such fact. With such projection, it has been

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contended that the argument of the learned counsel for the accused-appellants on that court is misplaced and baseless.

II. With regard to the provision contained in Section 57 of the NDPS Act, it has been submitted that it is not mandatory to send such report within the time-limit mentioned therein. There has to be substantial compliance. In the present case, there was compliance of the directory provision as a Report, exhibited as Ext.-9, was duly submitted and the same is evident from the testimony of the prosecution witnesses.

III. During the trial, all the 29 nos. of packets involving entire quantity of the seized contraband substance, Cannabis [Ganja] were exhibited and marked as material exhibits. An Inventory was also prepared and presented before the jurisdictional Magistrate at the earliest point of time and the Inventory was also seen by the Magistrate. It is the contention that there was clear instruction regarding drawal of samples in Clause 2.1 and Clause 2.2 in the Standing Order no. 1/89 dated 13.06.1989 and the said Standing Order was issued in exercise of the powers conferred by Section 52A of the NDPS Act. In the case in hand, samples were drawn in conformity with the procedure laid down in the Standing Order no. 1/89 and as such, there was no illegality in the matter of procedure of drawal of samples. If Paragraph 31.1 of the decision in **Mohanlal** [supra] is read in proper perspective, it is discernible that no exception can be taken if the samples were drawn from the seized contraband substance at the place of search and seizure, considering the date of such search and seizure, which was before the decision in **Mohanlal** [supra] was rendered. It has, thus, been submitted that the decision in **Mohanlal** [supra] should be considered to have only prospective effect in the light of the doctrine of prospective overruling in so far as the manner of drawing of samples from seized contraband is concerned. It has been submitted that Rule 29 of **the Narcotic Drugs and Psychotropic Substances [Seizure, Storage, Sampling and Disposal] Rules, 2022** ['the 2022 Rules', for short] has clarified the position as regards prospectivity. It has been canvassed that the Standing Order no. 1/89 was repealed only by the 2022 Rules. Until the Standing Order no. 1/89 was repealed it was in force. Therefore, no objection can be taken to the

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manner of drawing samples from seized contraband at the spot/place of search, recovery and seizure.

IV. With regard to the charge framed against the two accused persons, A-1 and A-2 is concerned, it has been submitted that though admittedly, there was no mention about the specific quantity of contraband substance therein but there was clear mention of the subject-vehicle, HR-65/7758 and the offence under Section 20[b][ii][C] of the NDPS Act which was clearly indicative of the fact that the accused persons were charged for commercial quantity of Cannabis [Ganja] transported by the subject-vehicle. As apparently no prejudice was caused and no such plea was raised during the trial on that issue, such an issue cannot be agitated at the appellate stage.

V. To buttress the contentions advanced on behalf of the respondent Customs Department, the decisions in [i] **State of Punjab vs. Balbir Singh, [1994] 3 SCC 299**]; [ii] **Sajan Abraham vs. State of Kerala, [2001] 6 SCC 692**; [iii] **Karnail Singh vs. State of Haryana, [2009] 8 SCC 539**; [iv] **Bahadur Singh vs. State of Haryana, [2010] 4 SCR 402**; [v] **Union of India vs. Mohanlal and another, [2016] 3 SCC 379**; and [vi] **Darshan Singh vs. State of Haryana, [2016] 14 SCC 358**; have been referred to.

J. Reply submissions of the accused-appellants :-

20. In reply submissions, it has been contended that sub-section [1] of Section 52A of the NDPS Act has made provision for seizure and disposal of the seized contraband substance. From sub-section [2] of Section 52A, it is ex-facie apparent that after seizure of any contraband substance, the procedure laid down therein is to be followed mandatorily. It is only after certification as regards the correctness of the Inventory, taking of photographs in the presence of Magistrate and certifying such photographs as proof and drawal of samples before the Magistrate and their certification, the seized contraband substance can be disposed of. The Standing Order no. 1/89 cannot have effect on these aspects. It has, thus, been contended that even if the Standing Order no. 1/89 had mentioned about the manner of

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drawing samples, the Central Government could not have done so in view of presence of sub-section [2] in Section 52A in the NDPS Act. As the 2022 Rules have been framed under Section 52A of the NDPS Act, the 2022 Rules cannot overwrite the statutory prescription contained in Section 52A[2] of the NDPS Act. Thus, the Rules, 2022 can only have the effect of repealing the Standing Order no. 1/89 and cannot supplant Section 52A[2] of the NDPS Act. The Judgment in **Mohanlal** [supra] did not overrule any precedent and as such, there cannot be any question of prospectivity.

21. We have duly considered the submissions advanced by the learned counsel for the parties and have also gone through the evidence/materials on record including the testimonies of the prosecution witnesses and the documentary evidence, available in the case records of NDPS Case no. 24 of 2015. We have also considered the decisions referred to by the learned counsel for the parties in support of their respective submissions.

K. The Prosecution Evidence :-

22. At the inception, the testimony of the prosecution witnesses, 8 [eight] in nos., can be referred to.

23. P.W.1, Ridip Hazarika stated that on 04.12.2014, he was working as Inspector in Anti-Smuggling Unit at the Customs Division, Guwahati. In his evidence-in-chief, P.W.1 deposed that on 04.12.2014, he received a secret information regarding transportation of Ganja in two nos. of closed body container trucks bearing registration nos. HR-65/8403 and HR-65/7758. As per the secret information so received, both the trucks were loaded with packages of tea and Ganjas were loaded somewhere at Rowta area. Both the trucks were of white colour and were operating under the banner of 'SAFE EXPRESS'. The information was also to the effect that the trucks were expected to cross Baihata Chariali area around 02-00/02-30 a.m. on 05.12.2014. P.W.1 stated that on receiving the information, he reduced the information into writing and informed his immediate superior officer, D.C. Bania [P.W.4], Superintendant of their Unit and handed over the text of the

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information to him. D.C. Bania [P.W.4] then directed him [P.W.1] to form a team and to take necessary steps. P.W.1 exhibited the information which he reduced into writing as Ext.-1 with his signature and the signature of D.C. Bania [P.W.4] therein as Ext.-1[1] and Ext.1[2] respectively. P.W.1 further stated that he formed a team comprising [i] himself [P.W.1]; [ii] D.C. Bania [P.W.4]; [iii] P.K. Deka [P.W.5]; [iv] Ramesh Singh [P.W.8]; and [v] M.I. Singh wherein, except D.C. Bania [P.W.4], all others were Inspectors of Custom. In the team, one Hawildar and one Driver were also included. The team left the Office at 11-30 p.m. on 04.12.2014 by a departmental vehicle and reached Baihata Chariali at around 12-30 a.m. After reaching Baihata Chariali, the team put naka on Rangia side on the National Highway no. 31. It was at around 02-00 a.m. on 05.12.2014, the team saw two trucks, matching with their information, coming from Mangaldai side. When the team signaled both the trucks to stop, the truck bearing registration no. HR-65/7758 stopped near the naka party. However, the other truck bearing no. HR-65/8403 stopped at a distance from the naka party. The team when approached towards the said truck, the driver and the helper of the truck bearing HR-65/8403 fled away from the spot. When the driver and the helper of the other truck bearing registration no. HR-65/7758 were approached and enquired by the team, the driver introduced himself as Binod Yadav [the appellant, A-1 in Criminal Appeal no. 67/2019] and the helper introduced himself as Avneesh Kumar Rajput [the appellant, A-2 in Criminal Appeal no. 283/2017]. They told the team members that the trucks were loaded with tea packages. P.W.1 further deposed that then the team introduced themselves to the driver and the helper of the truck bearing registration no. HR-65/7758 and told them about receipt of the information that both the trucks were loaded with Ganja. P.W.1 stated that he asked the driver, Binod Yadav [A-1] to place the truck at the Customs Office located at Nilamoni Phukan Path, Christian Basti, Guwahati and the driver accordingly agreed and brought the truck to the Customs Office. The other truck, by driving it through a departmental driver - Har Ratan Singh, was also brought to the Customs Office at Guwahati. The trucks and the team reached the Customs Office at around 04-00 a.m. on 05.12.2014. At the Customs Office, when the trucks were checked, packages of TATA Tea were found loaded. When the tea packages were unloaded, several HDPE [High Density Polyethylene] packages, concealed among the tea

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packages, were found. When the contents of the HDPE packages were checked in presence of the driver [A-1], the helper [A-2] and the witnesses, the team found Ganja in compressed form. 17 [seventeen] nos. of similar HDPE packages were recovered from the truck bearing registration no. HR-65/7758 [the subject-vehicle] and 12 [twelve] nos. of similar packages were recovered from the truck bearing registration no. HR-65/8403. Each of the packages containing Ganja was weighed by the team in the departmental electronic weighing machine in presence of the driver [A-1], the helper [A-2] and the witnesses and the weight of each package was noted in a Weighment Sheet. P.W.1 stated that the net total weight of the recovered Ganja was 1093.68 kgs and the same were seized by P.K. Deka, Inspector of Customs [P.W.5] along with the tea packages, the documents of the trucks and the two trucks, besides an amount of Rs. 6,165/- and two mobile handsets of the driver [A-1] and the helper [A-2]. P.W.1 deposed that all the seized articles were then listed in an Inventory as per the provisions of Section 42, Section 43 and Section 49 of NDPS Act in presence of the driver [A-1], the helper [A-2] and the witnesses. P.W.1 exhibited the Inventory dated 05.12.2014 as Ext.-2 and his signature therein as Ext.-2[1]. P.W.1 stated that the investigation of the case was conducted by Ksh. Ramesh Singh [P.W.8], Inspector of Customs. P.W.1 identified the accused persons present before the court on the date of his testimony as the persons whom the team apprehended with the truck bearing registration no. HR-65/7758.

23.1. During cross-examination, P.W.1 stated that D.C. Bania [P.W.5], Superintendent of Customs was the then Empowered Officer whereas Ksh. Ramesh Singh [P.W.8], Inspector of Customs was the complainant of the case. It was P.K. Deka [P.W.4], Inspector of Customs who acted as the Seizing Officer [S.O.] & Arresting Officer. P.W.1 stated that Ext.-1 was prepared by him and he signed it as the Superintendent of Customs, as by that time, he was promoted as Superintendent. P.W.1 reiterated that the signature exhibited as Ext.-1[2] was the signature of D.C. Bania [P.W.5], Superintendent of Customs. P.W.1 further stated that though he did not read the complaint, but he knew its contents wherein he was referred to as the Inspector as well as the Superintendent. He further stated that in the Inventory [Ext.-2], it was mentioned that at about 12-30 hours on 05.12.2014,

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formal seizure was made. He denied a suggestion that at the time of seizure, he mentioned himself as Inspector though he was a Superintendent, only to improve the case. He denied a suggestion of the defence that he did not forward the information to his immediate superior officer.

24. P.W.2, Gajendra Nath Deka was, on 08.12.2014, serving as the Deputy Director in the Drugs and Narcotics Division, Forensic Science Laboratory [FSL], Assam. P.W.2 stated that on 08.12.2014, he received a parcel from the Director, In-Charge, FSL in connection with Customs Case no. 06/CL/NARC/AS/Gau/2014-15 dated 05.12.2014 and the parcel consisted of 29 exhibits, enclosed with a sealed envelope having facsimile. He testified that the 29 sealed exhibits were marked as S-10[1]/CL/14-15 to S-10[29]/CL/14-15 respectively and they had 29 closed polythene packets containing 30 grams dry plant materials each and they were marked as DN.421/2014[a/1] to DN.421/2014[a/29] respectively. P.W.2 stated that on examination, the exhibits marked as DN.421/2014[a/1] to DN.421/2014[a/29] gave positive test for Cannabis [Ganja]. P.W.2 exhibited the FSL Report as Ext.-3 with his signature therein as Ext.-3[1]. P.W.2 also exhibited the Forwarding Report of the Director, In-Charge, FSL as Ext.-4 and the signature of the then Director, In-Charge, FSL, M.N. Bora therein as Ext.-4[1] stating that he knew the signature of M.N. Bora.

24.1. In cross-examination, P.W.2 stated that he examined the suspected materials.

25. P.W.3, Dr. Satyen Ray was, on 05.12.2014, serving as a Superintendent in the Customs Division, Guwahati. P.W.3 deposed to the effect that at around 05-00 a.m. on 05.12.2014, Dipen Chandra Bania [P.W.4], the then Senior Superintendent, informed him [P.W.3] that on the previous night, the Customs Officers had seized two trucks loaded with Ganja and those two trucks were brought to their Office. P.W.3 further stated that at 06-30 a.m., he [P.W.3] went to the Office and going there, he [P.W.3] saw that suspected Cannabis [Ganja] were being unloaded from a vehicle bearing registration no. HR-65/7758. He then appointed P.K. Deka [P.W.5] as the Seizing Officer and Mr. Ramesh Singh [P.W.8] as the Investigating Officer. Thereafter, Cannabis [Ganja] were unloaded from

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other vehicle bearing registration no. HR-65/8403. The packets containing suspected Cannabis [Ganja] were weighed on the digital weighing machine of the Office in presence of him [P.W.3] and other witnesses. P.W.3 exhibited the Weighment Sheet as Ext.-5 along with his signature therein as Ext.-5[1]. P.W.3 further stated that on weighment, weight of the suspected Cannabis [Ganja] was found to be 1093.68 kgs. P.W.3 exhibited the Order whereby he appointed the Seizing Officer and the Investigating Officer, as Ext.-6 with his signature therein as Ex.-6[1]. P.W.3 also stated that the Cannabis [Ganja] were brought in both the vehicles by hiding them under the packets containing tea. He further stated that the Seizure List & the Inventory [Ext.-2] were prepared in the Office and he subscribed his signature in the Inventory as Ext.-2[1]. P.W.3 testified that the Investigating Officer collected samples of the seized Cannabis [Ganja] in 29 packets and those 29 packets of samples were given to him. He then put the 29 packets of samples in one packet and forwarded the packet from his office to the FSL vide Ext.-7 and he subscribed his signature therein as Ext.-7[1]. P.W.3 also exhibited a Receipt given by the FSL as Ext.-8 and the Report [Ext.-9] submitted as per the provision of Section 57 of the NDPS Act with his signature therein as Ext.-9[1] and Ext.-9[2] respectively.

25.1. When P.W.3 was cross-examined, he stated that he appointed the Seizing Officer [S.O.] and the Investigating Officer [I.O.] at around 07-00 a.m. P.W.3 further stated that a total of 29 packets were recovered from both the trucks. He further stated that it was on 08.12.2014, the samples were sent vide Ext.-7. He denied a suggestion that he violated the provision of Section 57 of the NDPS Act during the time of sending Ext.-7.

26. P.W.4, Dipen Chandra Bania was, on 04.12.2014, serving as the Superintendent in the Department of Customs. P.W.4 testified to the effect that around 10-30 p.m. on 04.12.2014, Ridip Hazarika [P.W.1], an Inspector of Customs, who got promoted to the post of Superintendent around that time, received an information from a secret source that two trucks carrying Ganja were coming towards Baihata Chariali. After P.W.1 informed him [P.W.4] about carrying of Ganja by two trucks over phone, he and P.W.1 came to the office. P.W.1 reduced the information on a

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paper, Ext.-1 and handed over the same to him [P.W.4]. P.W.4 exhibited his signature in Ext.-1 as Ext.1[2]. On receipt of the information vide Ext.-1, P.W.4 stated to have ordered P.W.1 in writing to intercept the two trucks at Baihata. P.W.4 also passed an Order to form a team consisting of [i] Ridip Hazarika [P.W.1], Inspector of Customs; [ii] P.K. Deka [P.W.5], Inspector of Customs; [iii] Ramesh Singh [P.W.8], Inspector of Customs; [iv] Sanjib Das, Inspector of Customs; [v] Ranjan Sarma, Constable, Customs; and two others. P.W.4 further deposed that the team, led by him, proceeded to Baihata Chariali and the team arrived at Baihata Chariali at around 12-30 a.m. P.W.4 further stated that when at around 01-00 a.m. the team found two trucks, matching with the information they received, proceeding towards Baihata Chariali, the team ordered the two trucks to stop. The first of the two trucks did not stop at their signal and ran away. However, the second truck made a halt. When the team members chased the first truck, the driver and the handyman of the truck fled away from the scene after stopping the truck at a distance of half-kilometer. Finding the key of the truck in the ignition point, a Departmental driver drove the truck to the Office situate at Christian Basti, Guwahati along with the other truck wherefrom the driver, Binod Yadav [A-1] and the helper, Avneesh Kumar Rajput [A-2] were apprehended. P.W.4 testified that when the two apprehended accused persons were asked, they confessed that Ganjas were brought along with packages of tea. As it was at about 04-00 a.m. the bags of tea were unloaded from the trucks at the Customs Office with the help of labourers and in presence of witnesses. P.W.4 stated that 17 [seventeen] packets of Ganja were found in the truck bearing registration no. HR-65/7758 and 12 [twelve] packets of Ganja were found in the truck bearing registration no. HR-65/8403. When the packets of Ganja were weighed, the weight was found to be of 1093 kgs. It was P.K. Deka [P.W.5], Inspector of Customs, who seized the packets of Ganja.

26.1. In cross-examination, P.W.4 stated that Ramesh Singh [P.W.8], Inspector of Customs was given the charge of investigation. It was P.W.4, P.K. Deka, Inspector of Customs who arrested the accused persons and produced them before the Court. P.W.4 further stated that during the occurrence, Ridip Hazarika [P.W.1], Inspector of Customs got promoted and joined as Superintendent. P.W.4 further

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stated that he called the owners of the seized vehicles, whose names he did not remember. The owners had provided the names of the driver of the vehicle and the statements of the owners were also recorded. P.W.4 stated that when they intercepted the two trucks at around 02-00 a.m. on 05.12.2014 they could not find any independent witness at Baihata Chariali. P.W.4 denied a suggestion that the accused persons were innocent and were not involved in the incident.

27. P.W.5, Punya Kumar Deka stated that on 05.12.2014, he was posted as Inspector of Anti–Smuggling Unit in the Customs Office, Guwahati and on that day, as per information received on 04.12.2014, a team was formed wherein he was a member. It was at around 11-00 p.m. on 04.12.2014, the team proceeded to Baihata Chariali by an office car. P.W.5 stated that on reaching Baihata Chariali, he conducted naka checking on the National Highway on Rangiya side. It was at around 02-00 a.m., the team saw two white colour closed trucks proceeding from the Baihata Chariali side. As the registration numbers of the two trucks matched with their information, the team signaled the trucks to stop at naka point. One of the trucks bearing registration no. HR-65/7758 stopped normally but the other truck went ahead. After travelling a short distance, the other truck also stopped but the occupants of the said truck bearing registration no. HR-65/8403 fled away leaving the truck. When the driver and the other occupant of the truck bearing registration no. HR-65/7758 were asked, they disclosed their identities as Binod Yadav [A-1] and Avneesh Kumar Rajput [A-2] respectively. On further enquiry, they disclosed that the truck was loaded with tea packets. Thereafter, both the trucks were taken to the Customs Office immediately. When the goods loaded in the two trucks were checked, they were found loaded with tea bags. But after some tea bags were removed, some HDPE packets were noticed. On checking, those HDPE packets were found to have contained ganja. 17 nos. of HDPE packets containing Ganja were found in the truck bearing registration no. HR-65/7758 and 12 nos. of HDPE packets containing Ganja were found in the truck bearing registration no. HR-65/8403. When all the 29 packets were weighed in the Departmental weighing instrument in presence of P.W.1 and P.W.8, the total weight was found to be 1093.68 kgs. Thereafter, they drew duplicate samples from each of the 29 bags containing Ganja under the supervision of Dr. Satyendra

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Ray [P.W.3], Superintendent. P.W.5 exhibited the Weighment Sheet as Ext.-5 and the signatures of Dr. Satyendra Ray [P.W.3], Superintendent, the accused - Binod Yadav [A-1] and the accused - Avneesh Kumar Rajput [A-2] in Ext.-5 as Ext.-5[1], Ext.-5[3] and Ext.-5[4] respectively along with his signature therein as Ext.-5[2]. P.W.5 exhibited the Seizure List as Ext.-2 and his signatures therein as Ext.-2[3], Ext.-2[4] and Ext.-2[5] respectively. P.W.5 also identified the signatures of the accused - Binod Yadav [A-1] and the accused - Avneesh Kumar Rajput [A-2] in Ext.-2. According to P.W.5, the accused persons and the independent witnesses were present at the time of seizure and he was inter-alia assisted by Ridip Hazarika [P.W.1] and Ramesh Kumar Singh [P.W.8]. P.W.5 stated that the 17 nos. of packets – SI-1 to SI-17 – of dry plants, believed to the Ganja, seized from the truck bearing registration no. HR-65/7758 weighed @ 624.97 kgs [net] and the 12 nos. of packets – SI-2 to SI-12 – of dry plants, believed to the Ganja, seized from the truck bearing registration no. HR-65/8403 weighed @ 468.71 kgs [net]. He also stated that a total of 745 packets of tea – 354 packets from truck bearing registration no. HR-65/8403 and 391 packets of tea from truck bearing registration no. HR-65/7785 - were recovered. After describing the other articles which were seized, P.W.5 stated that all the articles were seized in connection with Customs Case no. 06/CL/NARC/AS/Gau/2014-15 dated 05.12.2014 and prior to such seizure, he was appointed as the Seizing Officer [S.O.] by Dr. Satyendra Ray, Superintendent vide Ext.-6. P.W.5 also stated that he also prepared a Panchnama as Ext.-10. As per the statement [Ext.-13] given by the accused - Binod Yadav [A-1] and recorded by him [P.W.5], the tea bags were loaded at Amingaon and thereafter, they proceeded to Rowta and after loading Ganja there, they returned on the next day. P.W.5 further stated that the accused persons were produced before the Court on 06.12.2014 along with the seized articles and the samples. P.W.5 deposed that he drew a test memo of samples mentioning the name of the accused, sample number, case number and date of test packing with seal impression and facsimile along with quality and weight of the sample. P.W.5 exhibited the Test Memo prepared for FSL examination as Ext.-12. He stated that the samples were forwarded by the Department along with the Test Memo [Ext.-12] by a Letter [Ext.-7] dated 08.12.2014 and in return, the FSL acknowledging the receipt of samples contained in one cartoon box, forwarded a Report [Ext.-8].

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P.W.5 also exhibited a Report in Form-F vide Memo no. VIII[10]24/CUS/AS/Gau/14-15/1602-5 dated 08.12.2014 prepared by Dr. Satyendra Ray [P.W.3] and forwarded to the Director General, New Delhi and to the Deputy Director, NCB, Guwahati as Ext.-9 and he identified his signatures therein as Ext.-9[1], Ext.-9[3] and Ext.-9[4] respectively apart from the signature of Dr. Satyendra Ray as Ext.-9[2]. P.W.5 further testified that he had brought the seized articles along with the duplicate samples and exhibited the seized packets of Cannabis [Ganja] in sealed condition, having the signatures of the two accused and the two independent witnesses, as Mat. Ext.-1 to Mat. Ext.-29. He also stated that the exhibits contained his signature as well as the signatures of Dr. Satyendra Ray [P.W.3] and those were also signed by the learned Chief Judicial Magistrate, Kamrup [M]. P.W.5 also exhibited a paper carton in sealed condition containing 29 packets of samples of Ganja, and stated that each sample of 30 grams were drawn from each packet for two set of samples. P.W.5 also recognized the two accused persons before the Court.

27.1. During cross-examination, P.W.5 stated that the accused persons were arrested by him. There was no order in writing to him by his superior officer to arrest the accused persons. P.W.5 denied a suggestion that he was not authorized, on 04.12.2014, to go to Baihata Chariali and to seize and collect samples. It was due to darkness and fog, the occupants of the truck bearing registration no. HR-65/8403 could not be apprehended. The trucks were not checked at Baihata Chariali. After the trucks were taken to their Office at 04-00 a.m. on 05.12.2014, two independent witnesses from Pathar Kuwari were found near the Office. The defence gave few suggestions to P.W.5 and the same were denied by him.

28. P.W.6, Shiv Shankar Basumatary was serving as Inspector of Customs, Guwahati on 05.12.2014. In his evidence-in-chief, P.W.6 stated that in the early morning of 05.12.2014, he was asked by Dipen Chandra Bania [P.W.4], Superintendent of Customs that a team of Customs Officers intercepted two trucks and after interception, the trucks were brought to the Office at Guwahati. P.W.4 further informed to P.W.6 that the details contained in the truck would require an examination. Accordingly, he [P.W.6] reached the Customs Office, Guwahati to

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assist Punya Kumar Deka [P.W.5], Inspector of Customs, who was conducting searches in the trucks. P.W.6 further stated that during the searches, 29 packets of Ganja concealed under packets of tea were recovered in presence of the driver and the handyman, apprehended along with the truck. Those 29 packets of Ganja were then weighed in the weighing machine of the Customs Department, before their seizure and before drawal of samples from them by Punya Kumar Deka [P.W.5], Inspector of Customs in presence of the driver, the handyman and two independent witnesses. An Inventory was also prepared by P.W.5, the Seizing Officer of the case of recovery. P.W.6 stated that on weighment, the total weight of seized Ganja packets were found @ 1093.68 kgs. P.W.6 exhibited the Inventory as Ext.-2 and his signature with seal therein as Ext.-2[12].

28.1. When P.W.6 was cross-examined, he stated that he was not with the team of Customs officials and he was not aware as to when the team of Customs officials returned to the Customs Office. P.W.6 stated to have reached the Customs office at about 04-00 a.m.

29. P.W.7, Suraj Thapa has claimed himself as a plumber by occupation and as a resident of Pathar Kuwari, Police Station - Noonmati. In his evidence-in-chief, P.W.7 stated that when at about 04-00 a.m. on a day on or about two years ago, he was on a way to a house at Christian Basti for looking at a boring crack, he was called by three persons. The three persons took him to a building where he noticed two closed body trucks with drivers. It was in his [P.W.7] presence, the trucks were searched and during the search, packets containing Ganja were found. When the packets of Ganjas were weighed, the weight was found out to be about 1100 kgs. P.W.7 stated that the driver and the handyman were present at that time and he identified the accused persons present in the court as the driver and the handyman of the trucks. P.W.7 exhibited the Inventory of goods seized as Ext.-2 and his signature therein as Ext.-2[13] and Ext.-2[14] respectively. P.W.7 also exhibited the Weighment Sheet [Ext.-5] and his signature therein as Ext.-5[1]. P.W.7 also exhibited the Panchnama [Ext.-10] and his signatures therein as Ext.-10[3], Ext.-10[4], Ext.-10[5], Ext.-10[6], Ext.-10[7], Ext.-10[8] and Ext.-10[9].

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29.1. During cross-examination, P.W.7 stated that he used to reside in his own house, which was at a distance of 10 kilometre from Christian Basti, Guwahati. P.W.7 disclosed that he did not have any plumber certificate. P.W.7 stated that he was not in a position to say where he was going at 04-00 a.m. on the relevant day and he cannot name the bye-lane and the owner of the house where he was going for work on that day. He said that he could not say the names of the persons who called him near the trucks. P.W.7 stated that he unloaded the packets from the trucks till 12 noon and for that work, he received labour charges. He further stated that the contents of the documents were written before he signed those documents. P.W.7 denied suggestions that he did not see the driver and the handyman of the trucks; and that except signing the documents, he did not know anything.

30. P.W.8, Ksh. Ramesh Singh was, on 05.12.2014, posted as Inspector, Anti-Smuggling Unit in the Customs Division, Guwahati. In his examination-in-chief, P.W.8 deposed to the effect that on 04.12.2014, Senior Inspector of Customs, Ridip Hazarika, P.W.1 received an information that two trucks bearing registration nos. HR-15/7758 and HR-65/8403, loaded with Ganja, were coming from Rowta side and would cross Baihata Chariali on 05.12.2014 and there would be around 2-3 persons. On the basis of the said information, a team to be led by their Superintendent - Dipen Chandra Bania, was formed and the team proceeded to Baihata Chariali area on 04.12.2014. After reaching Baihata Chariali area, the team including him [P.W.8] kept surveillance from 1 O'Clock on 05.12.2014. Though they requested the passersby to be witnesses but none of them had accepted the request. At around 02-00 a.m., they saw two trucks, whose registration nos. were found matched with the information received. Accordingly, the two trucks were signaled to stop by the team. To the signal, only the truck bearing registration no. HR-65/7758 stopped. The other truck bearing registration no. HR-65/8403 did not stop at the signal and proceeded further. However, it stopped at a distance of about 500 meters from the Naka checking point. When the officers from the team reached near the truck bearing registration no. HR-65/8403, the driver and the assistant were found to have fled away. They could not be found due to heavy fog and darkness. When the driver and the assistant of the truck bearing registration

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no. HR-65/7758 were enquired, they disclosed their identities as Binod Yadav [A-1] and Avneesh Kumar Rajput [A-2]. On further query about the goods loaded in the truck, the driver [A-1] informed that the truck was loaded with a consignment of tea bags. Thereafter, on instruction of the Superintendent - Dipen Chandra Bania, the truck was brought to the Customs Office at Guwahati for checking by Binod Yadav [A-1]. The other truck bearing registration no. HR-65/8403 was brought to the Customs Office by Departmental driver named Har Ratan Singh. At the Customs office both the trucks were opened by breaking the locks by Binod Yadav [A-1] and Avneesh Kumar Rajput [A-2] in presence of witnesses. On checking the trucks in presence of both the accused persons and the independent witnesses, tea bags were found loaded. When some bags of tea were removed, a nos. of HDPE bags were found concealed under the tea bags. On removal, 17 [seventeen] nos. of HDPE bags were counted in the truck bearing registration no. HR-65/7758 and from the truck bearing registration no. HR-65/8403, 12 [twelve] HDPE bags were recovered. When those HDPE bags were checked in presence of the two accused persons and the independent witnesses, the same were found to have contained Ganja. The HDPE bags were then weighed and after weighing, they were seized. P.W.8 further stated that samples were drawn from each of the HDPE packets and thereafter, the Inventory [Ext.-2] was prepared wherein he subscribed his signature as Ext.-2[15]. P.W.8 who stated that he was present at the time of weighment of the HDPE bags, exhibited the Weighment Sheet at Ext.-5 with his signature therein as Ext.-5[5]. P.W.8 further stated that he was appointed as the Investigating Officer [I.O.] of the case by an Office Order dated 06.12.2014 [Ext.-6] by Satyendra Roy, Superintendent of Customs under his signature, Ext.-6[1]. P.W.8 stated that during investigation, antecedents of the accused persons were verified and he recorded the statement of the accused, Avneesh Kumar Rajput [A-2] vide Ext.-13. P.W.8 exhibited his signature with seal in Ext.-13 as Ext.-13[1] and the signature of Satyendra Roy [P.W.3] who was present at the time of recording, as Ext.-13[2]. P.W.8 stated that the FSL Report was received and the same showed that the samples contained Ganja. P.W.8 stated that after going through the documents, he filed the Complaint under the NDPS Act against both the accused persons. P.W.8 exhibited the Complaint as Ext.-14 and his signature with

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seal therein as Ext.-14[1] to Ext.-14[46]. P.W.8 also identified the two accused persons who were present before the Court at the time of his testimony.

30.1. During cross-examination, P.W.8 stated that the name of the driver of the truck bearing registration no. HR-65/7758 was one Jagdish Sailendra and one Dharmendra was its Khalasee. But, he [P.W.8] did not record their statements though he had recorded the statements of the owners of the trucks. One Shish Pal Sharma was the owner of the tea bags in the two trucks. P.W.8 also stated that one Shiva Mahato was their independent witness but his statement was not recorded. P.K. Deka [P.W.5] as the Seizing Officer [S.O.] recorded the statement of Binod Yadav [A-1]. P.W.8 also stated that he typed the statement of the accused, Avneesh Kumar Rajput [A-2], who was arrested by P.K. Deka [P.W.5]. P.W.8 denied a suggestion that Ridip Hazarika [P.W.1] did not forward the secret information to his superior officer.

L. Documentary Evidence and Material Exhibits :-

31. During the course of the trial, the prosecution side exhibited the following 14 nos. of documents and 30 nos. of material exhibits :-

Documentary Evidence	
Exhibit No.	Description
Exhibit-1	Information taken down in writing under Section 42[1], NDPS Act
Exhibit-2	Seizure List & Inventory of Goods Seized dated 05.12.2014
Exhibit-3	Report dated 12.12.2014 of the FSL/DFS, Assam
Exhibit-4	Office Letter dated 23.12.2014 of the FSL/DFS forwarding Ext.-3 Report
Exhibit-5	Weighment Sheet of 29 packages recording net weight of 1093.68 kgs
Exhibit-6	Order dated 05.12.2014 appointing Seizing Officer & I.O.
Exhibit-7	Letter dated 08.12.2014 of P.W.3 to the FSL/DFS forwarding samples
Exhibit-8	DFS/FSL Letter dated 08.12.2014 acknowledging receipt of samples
Exhibit-9	Report dated 08.12.2014 submitted under Section 57, NDPS Act.
Exhibit-10	Panchnama prepared on 05.12.2014
Exhibit-11	Statement recorded of the accused person, Binod Yadav [A-1]

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Exhibit-12	Test Memo recording drawal of 29 samples on 05.12.2014
Exhibit-13	Statement recorded of the accused person, Avneesh Kr. Rajput [A-2]
Exhibit-14	Complaint filed under Section 36A[1][d], NDPS Act on 02.06.2015
Material Exhibits	
Mat. Ext.-1 to Mat. Ext.-29	29 HDPE packages seized on 05.12.2014
Mat. Ext.-30	Paper Carton containing 29 packets of samples

M. The relevant statutory provisions :-

32. As the contestation of the parties is on compliance or non-compliance of the statutory provisions contained in Section 42, Section 43, Section 52A and Section 57 respectively of the NDPS Act, it would be appropriate to quote the said provisions in extenso herein for ready reference.

The Narcotic Drugs and Psychotropic Substances Act, 1985 :-

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

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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 :

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

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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.

43. Power of seizure and arrest in public place.—

Any officer of any of the departments mentioned in section 42 may —

[a] seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act 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;

[b] detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation.— For the purposes of this section, the expression 'public place' includes any public conveyance,

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hotel, shop, or other place intended for use by, or accessible to, the public.

52A. Disposal of seized narcotic drugs and psychotropic substances.—

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

[2] Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section [1] shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section [1] may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any

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proceedings under this Act and make an application, to any Magistrate for the purpose of –

[a] certifying the correctness of the inventory so prepared; or

[b] taking, in the presence of such Magistrate, photographs of such drugs, substances or conveyances and certifying such photographs as true; or

[c] allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

[3] Where an application is made under sub-section [2], the Magistrate shall, as soon as may be, allow the application.

[4] Notwithstanding anything contained in the Indian Evidence Act, 1872 [1 of 1972] or the Code of Criminal Procedure, 1973 [2 of 1974], every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section [2] and certified by the Magistrate, as primary evidence in respect of such offence.

57. Report of arrest and seizure. –

Whenever any person makes any arrest or seizure, under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior.

N. The Penal Provisions involved :-

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33. As per the definition provided in Section 2[iii][b] of the NDPS Act, 'Cannabis [Hemp]' means Ganja, that is, the flowering of fruiting tops of the Cannabis plant [excluding the seeds and leaves when not accompanied by the tops], by whatever named there may be known or designated. As per Section 2[xiv], 'Narcotic Drug' inter alia means Cannabis [Hemp]. Section 20[b][ii][C] has provided that whoever, in contravention of any provisions of the NDPS Act or any rule or order made or condition of licence granted thereunder, inter alia possesses or purchases or transports Cannabis, involving commercial quantity, shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees; provided that the Court may, for reasons to be recorded in the Judgment, imposed a fine exceeding two lakhs. In view of Section 2[viia], 'commercial quantity', in relation to narcotic drugs, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette. As per Entry no. 55 of the relevant notification issued under Section 2[viia] of the NDPS Act, a quantity of Ganja above twenty kg is commercial quantity.

O. Discussion and Reasons for Decision :-

[i] Ref : Section 42 and Section 43, NDPS Act.

34. The provision contained in sub-section [1] of Section 42 of the NDPS Act has *inter alia* prescribed that an officer above the ranks mentioned therein or an Empowered Officer [hereinafter referred to as 'the Empowered Officer', for easy reference], 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 the NDPS 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 the relevant provisions of the NDPS Act or concealed in any building, conveyance or enclosed space, may between sunrise or sunset, enter

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into and search any such building, conveyance or place; seize such drug or substance and any other article and conveyance or any document; and detain and search, and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under the NDPS Act.

34.1. The proviso to sub-section [1] of Section 42 has laid down that if the Empowered 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 the escape of an offender, the Empowered Officer may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise, after recording the grounds of his belief.

34.2. Sub-section [2] of Section 42 has provided that where an Empowered 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.

35. The provisions contained in Section 42, as a whole, has come for consideration before a Constitution Bench of the Hon'ble Supreme Court of India in **Karnail Singh vs. State of Haryana**, reported in **[2009] 8 SCC 539**. After surveying a number of precedents, the Constitution Bench has observed as under :-

> **35. In conclusion, what is to be noticed is that *Abdul Rashid,* [2000] 2 SCC 513; did not require literal compliance with the requirements of Sections 42[1] and 42[2] nor did *Sajan Abraham,* [2001] 6 SCC 692; *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,**

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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

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> **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.**

36. Section 43 of the NDPS Act has contemplated seizure and arrest of an offender in a public place. Discussing the distinction between the provisions of Section 42 and Section 43 of the NDPS Act, the Hon'ble Court in **Karnail Singh** [supra] has observed as under :-

> **26. The material difference between the provisions of Sections 42 and 43 of the NDPS Act is that Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article, etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful.**

37. It is not in dispute that the case in hand, the two close body container trucks bearing registration nos. HR-65/7758 and HR-65/8403 were intercepted in the wee hours of 05.12.2014 at a place near Baihati Chariali towards Rangia side on the National Highway no. 31, which is indubitably a public place. Such interception of the two trucks was on the basis of a secret information received by P.W.1 from a

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source at around 10-30 hours on 04.12.2014. P.W.1, in his testimony, deposed that he reduced the information into writing and exhibited the information which he reduced into writing, as Ext.-1. P.W.1 further testified that after reducing the information into writing, the same [Ext.-1] was informed to his immediate official superior, D.C. Bania [P.W.4], Superintendent of their unit and P.W.1 identified the signatures of D.C. Bania [P.W.4] in Ext.-1 as Ext.-1[1] and Ext.-1[2] respectively. P.W.4, D.C. Bania also testified to the effect that at around 10-30 p.m. on 04.12.2014, after receipt of information by P.W.1, both he and P.W.1 came to the office. P.W.1 thereafter, reduced the information on paper, Ext.-1 and handed over Ext.-1 to him. On receipt of the information vide Ext.-1, P.W.4 stated to have ordered P.W.1 in writing to intercept the two trucks by passing an order to form a team consisting of few Inspectors of Customs and other staff, along with him. The prosecution had exhibited the said information reduced into writing as Ext.-1, which had the following contents :-

Information Received

Received an information at around 10-30 hours today on 04.12.2014 to the effect that a huge quantity of Ganja contained in 25/30 packages will be loaded in 2 [two] 6-wheeler closed body white coloured container truck bearing Regd. No. HR-65/8403 and HR-65/7758 which is already loaded with a consignment of tea. It was also informed that both the truck is operating under the SAFEXPRESS banner. The consignment of Ganja is expected to be loaded in both the trucks around mid night in Rowta area and after loading the truck will proceed out at the region. The truck is expected to cross Baihata Chariali area en route to the destination at around 03-30/04-00 hours on 05.12.2014.

Immediate steps may kindly be taken to intercept both the trucks before it cross Baihata Chariali area and proceed out of the region.

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Sd/- R. Hazarika

04.12.2014

Superintendent

Shri Hazanna, Supdt. ┐
Shri P.K. Deka, Insp ┘ **For immediate action**

Along with other officers should form a team and organize naka near Baihata Chariali & intercept the trucks.

Sd/- D. Bania

04.12.2014

Superintendent

38. The contentions of the two appellants here is that P.W.4 was not the immediate official superior of P.W.1 as both were of the same rank, that is, Superintendent of Customs on 04.12.2014 or thereafter and therefore, there was non-compliance of the provision contained in Section 42[2] of the NDPS Act. On perusal of Ext.-4, it can be seen that both P.W.1 and P.W.4 signed as Superintendent of Customs. On a combined reading of the testimony of the prosecution witnesses, it has emerged that on 04.12.2014, D.C. Bania [P.W.4] was working as a Superintendent of Customs. Dr. Satyen Ray [P.W.3] who was also in the rank of Superintendent of Customs stated that D.C. Bania [P.W.4] was serving as Senior Superintendent of Customs. It has also emerged that P.W.1 who was an Inspector of Customs, got promoted to the rank of Superintendent of Customs on a date in and around the date of occurrence, 04.12.2014/05.12.2014. As per **the Oxford Dictionary of English, Third Edition**, the word, '**Superior**' means higher in rank, status or quality; a superior officer; [noun] a person superior to another in rank or status, especially a colleague in a higher position. As per **the Black's Law Dictionary**, Ninth Edition, the word, '**Superior**' means of a rank, office, power, etc. higher; elevated; possessing greater power or authority; entitled to exert authority or command over another. As per **the Oxford Dictionary of English, Third Edition**, the word, '**Immediate**' means nearest in time, relationship or rank; his immediate superior in the department. From the above meanings ascribed to the words, 'immediate' and 'superior', no infirmity can be found as regards the procedure followed by P.W.1 after reducing the secret information in writing in the

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form of Ext.-1, in placing it before P.W.4 even if on 04.12.2014, both P.W.1 and P.W.4 were in the rank of Superintendent of Customs, yet, P.W.4 being the Senior Superintendent of Customs or being promoted to the rank of Superintendent of Customs at an earlier point of time, would still be an immediate superior officer to P.W.1. Since the information reduced in writing in the form of Ext.-1 was immediately shown on 04.12.2014 by P.W.1 and endorsed by P.W.4 on 04.12.2014 itself and thereafter, P.W.4 also passed an order on it to form a team, also on 04.12.2014, there is no apparent infirmity in the procedure so followed vis-a-vis the provisions contained in Section 42[2] of the NDPS Act. Further, the compliance with the requirements of Section 42[1] and Section 42[2] in regard to writing down the information received and sending a copy thereof to the immediate superior officer preceded the interception of the two trucks and also search, recovery and seizure. Thus, the contention raised by the appellant on non-compliance of the provisions contained in Section 42 of the NDPS Act is found to be without substance.

[ii] Ref : Section 57, NDPS Act.

39. Section 57 of the NDPS Act has called for an action after arrest and seizure. It has been prescribed therein that whenever any person makes any arrest or seizure, under the NDPS Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior. In the present case, the two trucks bearing registration nos. HR-65/7758 and HR-65/8403 were intercepted in the wee hours of 05.12.2014. P.W.3, Satyen Ray stated that he vide an Order dated 05.12.2014 [Ext.-6] appointed P.K. Deka [P.W.5], Inspector of Customs, Anti-Smuggling Unit as the Seizing Officer [S.O.]. From the Order dated 05.12.2014 [Ext.-6], it is revealed that P.W.3 had thereby appointed P.K. Deka [P.W.5] as the Seizing Officer [S.O.]. In his testimony, P.K. Deka [P.W.5] stated that after being appointed as the Seizing Officer [S.O.] vide the Order dated 05.12.2014 [Ext.-6], he seized seventeen nos. of packets [net weight = 624.97 Kg] and twelve nos. of packets [net weight = 468.71 Kg] respectively, of dry plants believed to be Ganja from truck no. HR-65/7758 [the subject-vehicle] and truck no. HR-65/8403

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respectively by preparing a Panchnama [Ext.-10] after recording the weights of each packet in a Weighment Sheet [Ext.-5] and preparing an Inventory of Goods Seized [Ext.-2] recording full details of the materials seized including the twenty nine packets containing dry plants believed to be Ganja. Both the Inventory of Goods Seized [Ext.-2] and the Panchnama [Ext.-10] were prepared on 05.12.2014. Both the accused persons, A-1 and A-2 were also arrested by P.W.5, P.C. Deka as an Arresting Officer also on 05.12.2014.

40. Being the Seizing & Arresting Officer, an obligation, as per Section 57, was cast on P.W.5, P.C. Deka to make a full report of all the particulars of such arrest and/or seizure within forty-eight hours next after such seizure and/or arrest. It is the case of the prosecution that P.W.5, P.C. Deka complied with the prescription of Section 57 by making a Report on 08.12.2014, which the prosecution had exhibited as Ext.-9 through the prosecution witnesses, P.W.3, P.C. Deka and P.W.5, Satyen Ray who had subscribed their signatures therein as Ext.-9[1] & Ext.-9[2] and Ext.-9[3] & Ext.-9[4] respectively. On perusal of the Report [Ext.-9], it is noticed that the Report was made under the seals and signatures of P.W.3, P.C. Deka and P.W.5, Satyen Ray. The Report [Ext.-9] with the head, 'First Information Report' contained details of [i] date and time of seizure; [ii] place of seizure; [iii] method of concealment; [iv] quantity of goods recovered; [v] description of seized goods; [vi] estimated value; [vii] estimated value of the truck seized for transportation; [viii] registered case no.; [ix] officer by whom seized; and [x] persons arrested. The Report [Ext.-9] had an Appendix in Form no. F wherein apart from other details, follow up actions likely to be taken were mentioned. Apart from forwarding the Report [Ext.-9] mainly to the Commissioner of Customs [Prevention], North Eastern Region, Shillong, it was also forwarded to [i] the Director General, Narcotics Control Bureau, New Delhi; [ii] the Director General of Revenue Intelligence, New Delhi; [iii] the Commissioner of Customs, North Eastern Region, Shillong; and [iv] the Deputy Director, Narcotics Control Bureau, Eastern Zonal Unit, Guwahati.

41. The point which has been raised here is that after completion of seizure and arrest on 05.12.2014, the Report under Section 57, NDPS Act was forwarded only on

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08.12.2014, which was beyond forty-eight hours and, thus, there was failure to make the full report within forty-eight hours next after such seizure and/or arrest.

42. Thus, the issue is not about not making of a report under Section 57, but making of a delayed report. In this connection, the decisions in **Balbir Singh** [supra] and **Sajan Abraham** [supra] are of relevance.

42.1. In **Balbir Singh** [supra], the Hon'ble Supreme Court as regards compliance of Section 57, has observed as under :-

> **25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:**
>
> *** * * ***
>
> **[6] The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.**

42.2. Following **Balbir Singh** [supra], the Hon'ble Supreme Court in **Sajan Abraham** [supra] has observed in the following manner :-

> **12. The last submission for the appellant is, there is non-compliance with Section 57 of the Act. He submits under it, an obligation is cast on the prosecution while making an arrest or seizure, the officer should make full report of all particulars of such arrest or seizure and send it to his immediate superior officer within 48 hours of such arrest or seizure. The submission is, this has not been done. Hence**

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> **the entire case vitiates. It is true that the communication to the immediate superior has not been made in the form of a report, but we find, which is also recorded by the High Court, that PW 5 has sent copies of FIR and other documents to his superior officer, which is not in dispute. Ext. P-9 shows that the copies of the FIR along with other records regarding the arrest of the appellant and seizure of the contraband articles were sent by PW 5 to his superior officer immediately after registering the said case. So, all the necessary information to be submitted in a report was sent. This constitutes substantial compliance and mere absence of any such report cannot be said to have prejudiced the accused. This section is not mandatory in nature. When substantial compliance has been made, as in the present case, it would not vitiate the prosecution case. In the present case, we find PW 5 has sent all the relevant material to his superior officer immediately. Thus we do not find any violation of Section 57 of the Act.**

42.3. In **Bahadur Singh** [supra] also, the Hon'ble Supreme Court has held that as far as compliance with the provisions of Section 57 of the NDPS is concerned, the same is not mandatory.

43. From the decisions in **Balbir Singh** [supra] and **Sajan Abraham** [supra], it is clear that substantial compliance of Section 57 of the NDPS Act will suffice and making of a report of seizure and/or arrest within forty-eight hours next after such seizure and/or arrest is not a sine qua non as necessary as the provision is directory. As in the case in hand though the Report [Ext.-9] was not made and sent within forty-eight hours from seizure and arrest made on 05.12.2014, since the Report [Ext.-9] was made on 08.12.2014 making and sending of the Report [Ext.-9] constituted substantial compliance. As substantial compliance had been made and no prejudice was alleged or shown, it is to be held that there is no violation of the provision contained in Section 57 of the NDPS Act in the present case.

[iii] Ref : Section 52A, NDPS Act.

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44. In exercise of the power conferred by sub-section [1] of Section 52A, the Central Government can, having regard to the hazardous nature, vulnerability of theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as the Central Government may, from time to time, determine after following the procedure thereinafter specified.

44.1. As per sub-section [2] of Section 52A, where any contraband or conveyance has been seized and forwarded to the Empowered Officer, such Officer is required to prepare an Inventory of such contraband or conveyance containing such details, mentioned therein, or such other identifying particulars of the contraband or conveyance or the packing in which they are packed or country of origin and other particulars the Empowered Officer may consider relevant to the identity of the seized contraband or conveyance in any proceedings under the NDPS Act. The Officer has to make an application to a Magistrate for the purpose of [a] certifying the correctness of the Inventory so prepared; or [b] taking, in the presence of such Magistrate, photographs of such seized contraband or conveyance and certifying such photographs as true; and [c] allowing to draw representative samples of such seized contraband, in the presence of such Magistrate and certifying the correctness of any list of samples.

44.2. A mandate is contained in subsection [3] to the effect that where an application is made under sub-section [2], the Magistrate shall, as soon as may be, allow the application.

44.3. Sub-section [4] of Section 52A is with a non-obstante clause. It has prescribed that notwithstanding anything contained in the Indian Evidence Act, 1872 or the CrPC, every court trying an offence under the NDPS Act, shall treat the Inventory, the photographs of the seized contraband or conveyance and any list of samples

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drawn under sub-section [2] of Section 52A and certified by the Magistrate, as primary evidence in respect of such offence.

45. The Standing Order no. 1/89 dated 13.06.1989 was issued by the Central Government in exercise of the powers conferred by sub-section [1] of Section 52A of the NDPS Act determining the narcotic drugs and the psychotropic substances which were to be disposed of, and laying down the manner in which such specified narcotic drugs and psychotropic substances were to be disposed of after seizure. Ganja was included in the list of specified narcotic drugs in the Standing Order no. 1/89.

46. The expression '**after following the procedure hereinafter specified**' appearing in Section 52A[1] is of significance. From a combined reading of sub-section [1] and sub-section [2], it becomes evident that after seizure of the specified contraband substances, such specified contraband substances are to be disposed of only after following the procedure thereinafter specified. The procedure to be followed before disposal of the specified contraband substances is mentioned in sub-section [2] of Section 52A. In other words, the disposal of the specified contraband substance is to be preceded by [i] preparation of an Inventory of such seized specified contraband substances by the Empowered Officer containing the details mentioned therein; [ii] making of an application by the Empowered Officer to a Magistrate for the purpose of [a] certifying the correctness of the Inventory so prepared; or [b] taking, in the presence of such Magistrate, photographs of such seized contraband or conveyance and certifying such photographs by the Magistrate as true; and [c] allowing to draw representative samples of such seized samples, in the presence of such Magistrate and certifying the correctness of any list of samples.

47. Turning to the evidence/materials on record, it is evident from the Panchnama [Ext.-10] prepared on 05.12.2014; the First Information Report read with Appendix-A thereto [Ext.-9] submitted in compliance of Section 57 of the NDPS Act on 08.12.2014; and the Complaint [Ext.-14] filed under Section 36A[1][d] of the NDPS Act; that after seizing 29 nos. of HDPE packages suspected to have

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contained Cannabis [Ganja], weighing 1093.6 kgs as per the Weighment Sheet [Ext.-5], in the office premises of the Customs Office situated at Christian Basti, Guwahati in the early morning hours on 05.12.2014, an Inventory of Goods Seized [Ext.-2] was prepared on 05.12.2014 at the same place. After preparing the Inventory of Goods Seized [Ext.-2], samples in duplicate, weighing 30 grams each, were drawn from the 29 nos. of packages suspected to have contained Cannabis [Ganja] and those samples were seized in presence of the accused persons, A-1 and A-2 and in presence of other witnesses for sending those samples to the FSL/DFS for chemical examination. The prosecution witnesses – P.W.1, P.W.3, P.W.5, P.W.6, P.W.7 and P.W.8 – had all testified about the preparation of the Inventory of Goods Seized [Ext.-2] in the premises of the Customs Office, Guwahati on 05.12.2014. The prosecution witnesses – P.W.3, P.W.5, P.W.6 and P.W.8 – had all testified that samples were drawn in duplicate from each of the 29 nos. of HDPE packages containing suspected Ganja in the premises of the Customs Office, Guwahati on 05.12.2014.

48. After seizure of 29 nos. of HDPE packages containing suspected Cannabis [Ganja]; preparation of the Inventory of Goods Seized [Ext.-2]; drawal of samples from those seized 29 nos. of HDPE packages; and arrest of the two accused persons, A-1 and A-2; those were produced before the Court of learned Chief Judicial Magistrate, Kamrup [Metro], Guwahati on 06.12.2014. An application was also submitted by the Seizing and Arresting Officer, P.K. Deka [P.W.4] [the contents of the application are already extracted in paragraph 3 hereinabove] with the following prayer :-

> **The documents including the seizure list prepared, the seized articles and the samples drawn may kindly be seen.**
>
> **In view of the above, it is respectfully prayed that your honour may be pleased to pass an order remanding the aforesaid accused persons to Judicial Custody and also allow custody of the seized 1093.68 kgs [N] of Ganja and both the 6-wheeler closed body container truck bearing registration no. HR-65-8403 [Engine no. DAEZ403336 and Chessis no.**

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MB1A3DYC1DEAK6323] and HR-65-7758 [Engine no. CSHZ115723 and Chessis no. MB1A3DYC8CPRF6005] all the seized articles till decision of the case.

and/or

To pass such other order as your honour may deem fit and proper.

It is also prayed that the Inventory Goods Seized along with other documents and the samples drawn along with the seized article may please be seen.

49. On 06.12.2014, the learned Chief Judicial Magistrate, Kamrup [Metro], Guwahati passed the following order :-

Seizing Officer Sri P.K. Deka has produced inventory of the goods seized, 29 pkts of sample, cash amount of 6,165/- and seized Ganja with a prayer for perusing and seen.

Inventory of Goods Seized, 29 pkts of sample, cash amount and seized Ganja are seen. Inventory be kept with C.R. and seized articles are to be returned to S/O.

Accused persons [1] Sri Binod Kumar, aged 35 years, S/o- Ram Krishna Yadav and [2] Sri Avneesh Kumar Rajput, aged 19 years, S/o Ahalkar Singh are produced before the court under arrest by customs staff in connection with the above noted case.

On being asked accused persons have stated that their family members will engage advocate to defend them.

Considering the nature of the case accused persons are remanded to hajot till 20.12.2014.

Superintendent of Central Jail is directed to produce the accused persons on the next day before the Hon'ble Special Judge, Kamrup.

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Send the C.R. to the Court of the Hon'ble Special Judge.

50. In the above facts and circumstances obtaining in the case, the primary basis for the respondent Customs authorities to support the manner in which the Inventory of Goods Seized [Ext.-2] and the process in which samples were drawn in duplicate from each of the 29 packages containing suspected Cannabis [Ganja], is the Standing Order no. 1/89 dated 13.06.1989. It is worthwhile to mention that in Clause 2.1 and Clause 2.2 in the Standing Order no. 1/89, the following procedure for drawal of samples was laid down : -

> **Samples, Classification,**
>
> **2.1. All drugs be properly classified carefully, weighed and sampled on the spot of seizure.**
>
> **2.2. All the packages/containers shall be serially numbered and in lots for sampling. Sample from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses [Panchas] and the person from whose possession the drug is recovered, and mention to this effect should invariably be made in the panchnama drawn on the spot.**

51. It has been contended on behalf of the respondent Customs authorities that the above procedure for drawing of samples from the seized contraband, Cannabis [Ganja] in the case in hand was followed in letter and spirit and as such, there can be no occasion to take any exception. The argument is on the plank that since such procedure of drawing samples was laid down in the Standing Order no. 1/89 and it being a statutory notification, the process of drawing samples followed in the present case was in conformity with the procedure laid down in the NDPS Act. It has been contended that the Standing Order no. 1/89 dated 13.06.1989 was issued inter alia to standardise the procedures for drawing of samples from seized narcotic drugs and psychotropic substances and also for forwarding and testing of samples as well as for their final disposal. As the Standing Order no. 1/89 dated

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13.06.1989 was issued in exercise of the powers conferred by sub-section [1] of Section 52A of the NDPS Act, it has been contended that the same is to be read as part and parcel of the main statute.

52. It is noticed that in Clause 4.0 of the Standing Order no. 1/89, the following was also laid down :-

> **4.0. Where any narcotic drug or psychotropic substance has been seized and forwarded to the Officer In-Charge of the nearest police station or to the officer empowered under Section 53, the officers, referred to in paragraph 3.3 ..... of the order shall prepare an inventory of such narcotic drugs or psychotropic substance containing such details relating to their description, quality, mode of packing, marks, numbers or such other identifying particulars as may considered ..... relevant to the identity of the aforesaid drugs in any proceedings under the Act and make an application to any Magistrate for such purpose –**
>
> **[a] Certifying the correctness of the inventory so prepared; or**
> **[b] Taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or**
> **[c] Allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.**

53. As the grounds raised by the learned counsel for the parties are to be examined qua the observations made in the decision in **Mohanlal** [supra], it would be appropriate to extract the relevant excerpts from the paragraphs from the decision relating to seizure and sampling to appreciate the rival contentions.

[2016] 3 SCC 379 : Union of India vs. Mohanlal and another : Decided on 28.01.2016, :-

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11. ..... we are in these proceedings concerned with the following three issues only for the present : [i] Seizure and sampling of the narcotic drugs and psychotropic substances, [ii] their storage, and [iii] their destruction.

Seizure and sampling

12. Section 52-A[1] of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government has in exercise of that power issued Standing Order No. 1 of 1989 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10.05.2007 and the other dated 16.01.2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of Standing Order No. 1 of 1989 states that samples must be taken from the seized contraband on the spot at the time of recovery itself. It reads :

> **2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses [panchas] and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.**

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

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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.

18. Be that as it may, a conflict between the statutory provision governing taking of samples and the Standing Order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a

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conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

19. ……The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time-frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section [3] of Section 52-A [supra]……

31. To sum up we direct as under :

31.1. No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A[2] of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section [3] of Section 52-A, as discussed by us in the body of this judgment under the heading 'seizure and sampling'. The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order.

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54. It is true that a statutory rule or notification is to be treated as a part of the statute. Such rules or notification made under a statute are considered to have the same effect as if they are in the main act. It is trite to say that the same principles of interpretation are applicable to subordinate legislation as well as statutory notification. When a comparison is made between the procedure of drawal of samples laid down in sub-section [2] of Section 52A and the procedure laid down in Clause 4.0 of the Standing Order no. 1/89, it can be noticed that Clause 4.0 of the Standing Order no. 1/89, in essence, is in conformity with sub-section [2] of Section 52A. But, on comparison, the procedure of drawal of samples mentioned in Clause 2.2 of the Standing Order is different from the procedure laid down in sub-section [2] of Section 52A and also the procedure laid down in Clause 4.0 of the Standing Order no. 1/89.

55. In view of such different procedures regarding drawal of samples, the issue which can arise is : which of the procedures is to be followed. Had there been no procedure regarding drawal of samples from seized contraband laid down in the governing statute, that is, the NDPS Act, it would have been open for the respondent authorities to contend that the Standing Order no. 1/89 and any of the two procedures laid down in Clause 2.2 and Clause 4.0 therein would operate for drawal of samples from seized contraband. In absence of a specific statutory provision for drawal of samples in the parent statute it would have been open to fill up the gaps with the issuance of a statutory notification like Standing Order no. 1/89. It is too well settled that a statutory notification can supplement a statutory provision but it cannot amend or supersede or supplant or prevail over a statutory provision. If a statutory notification is incongruent to a statutory provision of the parent statue then it would be the statutory provision which would prevail in all situations and as a consequence, the statutory notification which is incongruent to the statutory provision would have no existence in law.

56. In view of such settled provision of law, it is the procedure for drawal of samples from seized contraband set forth in sub-section [2] of Section 52A of the NDPS Act, inserted by Act 2 of 1989 and in existence on and from 29.05.1989, which would prevail and this view is for the settled law that when any statutory provision

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provides a particular manner for doing a particular act then the said act must be done in accordance with the manner prescribed therefor in the statute and in no other manner.

57. Learned Standing Counsel, Customs by specifically referring to the observation to the effect that '*the Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction*', appearing in paragraph 18 of **Mohanlal** [supra], has contended that as the decision in **Mohanlal** [supra] was rendered on 28.01.2016, the decision does not have any bearing in the present case as search, recovery and seizure of the contraband and drawing of samples therefrom in the present case were made much earlier on 05.12.2014 and the decision in **Mohanlal** [supra] would have prospective effect only.

58. The contention advanced by the learned Standing Counsel, Customs Department that the decision in **Mohanlal** [supra] would have prospective effect only and, in essence, the doctrine of prospective overruling is applicable, upon due consideration is found not acceptable. It has been held in the nine-Judge decision in **Mineral Area Development Authority and another vs. M/s Steel Authority of India and another, 2024 INSC 607**, dated 14.08.2024, that the doctrine of prospective overruling is applied when a constitutional court overrules a well-established precedent by declaring a new rule but limits its application to future situations for the underlying objective to avert injustice or hardships. It has been observed that the doctrine is being found to have applied by the court either while overruling its earlier decision, which was otherwise final, or when deciding on an issue for the first time. The object is to validate all the actions taken before the date of declaration in the larger public interest. It has been further observed that the doctrine of prospective overruling has been applied by the Hon'ble Supreme Court in situations where the new declaration results in the invalidation of legislation which would otherwise have been valid under the old declaration.

59. The appellant **Noor Aga** [supra] was an Afghan national who arrived at Raja Sansi Airport on 01.08.1997. As he was found carrying a carton, the Customs officials at

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the Airport suspecting that the appellant was carrying contraband or any other suspicious item, checked the carton whereupon 22 packets of polythene containing brown powder were allegedly recovered. The same was weighed; the gross weight whereof was found to be 1 kg 400 gm. Thereafter, representative homogeneous samples of each packets in small quantities were taken weighing 5 gm each and those were purported to have been sealed. The recovered item was taken into possession vide a recovery memo and a panchnama. The samples were sent to the Central Forensic Laboratory on 05.08.1997. The weight of the said samples was found to be 8.7 gm. The document has been found to have tinkered with, as the words 'net weight' were crossed and converted into 'gross weight'. The alleged contraband was found to be of white colour containing diacetylmorphine. The contraband articles were produced before the Magistrate on 30.01.1999. The purpose of production has been found mired in controversy. The appellant contended that the same was for the purpose of authentication and the Customs Authorities contended that the contraband articles were produced for the purpose of obtaining a judicial order for destruction thereof. No order was passed by the learned Magistrate for destruction of the contraband and no application for destruction was filed.

59.1. Though the provisions of Section 52A of the NDPS Act came for consideration and a reference to the Standing Order no. 1/89 was made in **Noor Aga** [supra], but the conflict between them as regards drawing of samples from the recovered and seized contraband did not come for consideration. In **Noor Aga** [supra], the prosecution did not produce before the learned trial court the physical evidence in the form of bulk quantity of heroin allegedly recovered and it was contended that the same had been destroyed. It is in that context it has been observed that the law required that the authority to destroy recovered contraband must flow from an order passed by the Magistrate and the Hon'ble Supreme Court has found that no prayer was made for destruction of the allegedly recovered bulk quantity of heroin or for disposal thereof otherwise. The Hon'ble Supreme Court has also observed in the following manner :-

> **93. The only course of action the prosecution should have resorted to is to obtain an order from the competent court of**

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the Magistrate as envisaged under Section 52-A of the Act in terms whereof the officer empowered under Section 53 upon preparation of an inventory of narcotic drugs containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as he may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings thereunder make an application for any or all of the following purposes :

> **"[a] Certifying correctness of the inventory so prepared; or**
> **[b] Taking, in the presence of such Magistrate, photographs of substances and certifying such photographs as true; or**
> **[c] Allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn."**

60. It is found that no precedent which was overruled by **Mohanlal** [supra], has been cited by the respondent side to support the contention regarding the decision in **Mohanlal** [supra] to have prospective effect after overruling of any such precedent. Further, contrary to the submission advanced by the respondent side, the direction made in paragraph 31.1 in **Mohanlal** [supra] is to be read conjointly with the observations made in paragraph 15 to paragraph 18 therein. In our considered view, by the observation, '*the Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction*', the Central Government was directed to re-examine the matter and to take suitable steps for removing the confusion created by the statutory notification, Standing Order no. 1/89. By no stretch, it can be accepted that the procedure of drawing samples from seized contraband at the spot had received judicial imprimatur in respect of those proceedings where after

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search, recovery and seizure, samples were drawn at the place of seizure, prior to 28.01.2006, the date when the decision in **Mohanlal** [supra] was rendered.

61. At this juncture, it would be apposite also to allude to the background facts and observations made in some of the decisions, referred to by the learned counsel for the parties.

[a] Criminal Appeal No. 3191 of 2023 : Yusuf @ Asif vs. State : 2023 INSC 912 : Decided on 13.10.2023.

Facts : On the basis of an information received by the Intelligence Officer of Narcotics Control Bureau [NCB], a lorry parked near Puzhal Central Jail, Chennai was intercepted by NCB in the early morning hours on 28.03.2000. Four persons were found in the lorry and upon search, they were found in possession of commercial quantity [20 kgs] of heroin kept in two jute bags. The samples were drawn from each of the packets i.e. 14 big and 12 small polythene packets kept in the two jute bags and they were seized under a seizure memo [Mahazar]. All the four persons [A-1 to A-4] were arrested after receiving analyst report that the seized substance was heroin. Consequently, Crime no. 113/2000 was registered. The trial court upon consideration of the evidence on record held all the four persons guilty under the provisions of the NDPS Act and convicted them to undergo rigorous imprisonment for ten years and to pay fine of Rs. 1,00,000/- each, with default stipulation. All the four accused persons preferred appeals before the High Court. During pendency of the appeals, A-4 died and the appeal was dismissed as abated against him. The High Court had thereafter, dismissed the appeals of the remaining accused persons. Before the Hon'ble Supreme Court only A-1 who was the owner of the contraband, preferred the appeal. It was contended that the entire action of seizure and sampling was illegal as it was done in violation of the mandatory provisions of Section 52A[2] of the NDPS Act as the procedure prescribed therein was not followed in seizing the alleged narcotic substance and drawing the samples. The NCB contended that the search was carried out in presence of a Gazetted Officer and after seizure, two samples from each packet were drawn and packed separately and were sealed by affixing the

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seal of the NCB. It was in the above background, the Hon'ble Supreme Court has held as under :-

> **12. A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, the officer so referred to in sub-section [1] shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.**
>
> **13. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed under sub-sections [2], [3] and [4] of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of sub-section [2] of Section 52A of the NDPS Act.**
>
> **14. It is an admitted position on record that the samples from the seized substance were drawn by the police in the presence of the gazetted officer and not in the presence of the Magistrate. There is no material on record to prove that the Magistrate had certified the inventory of the substance seized or of the list of samples so drawn.**

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15. In Mohanlal's case, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.

16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.

17. Accordingly, we are of the opinion that the failure of the concerned authorities to lead primary evidence vitiates the conviction and as such in our opinion, the conviction of the appellant deserves to be set aside. The impugned judgment and order of the High Court as well as the trial court convicting the appellant and sentencing him to rigorous imprisonment of 10 years with fine of Rs. 1 lakh and in default of payment of fine to undergo further imprisonment of one year is hereby set aside.

[b] Criminal Appeal no. 451 of 2011 and Criminal Appeal no. 1185 of 2011 : Bothilal vs. Intelligence Officer, Narcotics Control Bureau : 2023 SCC OnLine SC 498 : Decided on 26.04.2023

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Facts : An Intelligence Officer [I.O.], NCB, South Zonal Unit, Chennai received information on 16.05.2002 and based on the information, the I.O. along with staff of NCB and two independent witnesses conducted a raid at a room in a hotel where the accused, A-4 was staying. During the raid, the accused persons, A-1 to A-3 were found present in the said room apart from A-4. From the room, a bag containing narcotic substance [heroin] weighing 5.067 kgs was seized. Out of the accused persons, A-1 and A-3 were convicted inter alia for the offence under Section 8[c] r/w Section 21[c] and Section 29 of the NDPS Act by the trial court. When they [A-1 and A-3] preferred appeals before the High Court, the High Court dismissed the appeals confirming the conviction. The sentence imposed on them were, however, reduced to 10 years. The other to accused persons, A-2 and A-4 were also convicted for different offences punishable under the NDPS Act. Before the Hon'ble Supreme Court in the two criminal appeals preferred by the two accused persons, A-1 and A-3, it was argued that the Officer who seized the bags containing alleged contraband, drew representative samples of the contraband. It was contended that the Officer had no power to do so and it could have been done only under the permission of the Magistrate in accordance with Clause [c] of sub-section [2] of Section 52A. It was contended that only the samples drawn under sub-section [2] of Section 52A and certified by the Magistrate could be treated as primary evidence in respect of an offence under the NDPS Act. Reliance has been placed in the decision in **Union of India vs. Mohan Lal, [2016] 3 SCC 379**. The Hon'ble Supreme Court of India has observed in the following manner :-

> **15. Admittedly, PW2 drew two samples from each of the packets of the contraband found in the hotel room and kept them in two separate plastic covers. These covers were sealed and the remaining contraband was also sealed. Thus, the prosecution claims that the samples were prepared even before the packets were sent to the Station House Officer. The submission of the learned senior counsel appearing for the appellant in Criminal Appeal 451 of 2011 was that a grave suspicion is created about the prosecution's case as this action by the P.W.2, was contrary to Section 52A of NDPS Act.**

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16. In paragraphs 15 to 17 of the Mohanlal's case, [2016] 3 SCC 379; it was held thus :

*** * * * ***

17. Thus, the act of P.W.2 of drawing samples from all the packets at the time of seizure is not in conformity with what is held by this Court in the case of Mohanlal, [2016] 3 SCC 379. This creates a serious doubt about the prosecution's case that the substance recovered was contraband.

[c] Mangilal vs. State of Uttar Pradesh : 2023 INSC 634 : [2023] 10 SCR 517 : Decided on 12.07.2023.

Facts : The appellant was charged and convicted under Section 8[b] r/w Section 15[c] of the NDPS Act by the Special Court and he was sentenced to undergo rigorous imprisonment for ten years. The conviction was confirmed by the High Court when the appellant preferred an appeal. It was on the basis of an information received through a telephonic message on 20.05.2010 that the appellant and a co-accused [died during trial] were in the process of supplying narcotic substance [poppy straw], an Assistant Sub-Inspector of Police with his staff, without wasting time on the procedural compliance, stopped a tractor in which bags containing the contraband were found and the bags were seized. A Panchnama was written at the place of occurrence, samples were also taken at the place of occurrence and the reason for arrest of the accused persons were informed to them. Thereafter, a case, Crime no. 53/2010 under Section 8[b] r/w Section 15[c], Section 25 and Section 29 of the NDPS Act was registered and a final report was filed before the jurisdictional court on 13.09.2010. Before the Hon'ble Supreme Court, reliance is placed in **Union of India vs. Mohan Lal, [2016] 3 SCC 379.** In **Mangilal** [supra], the Hon'ble Supreme Court as regards the provisions contained in Section 52A of the NDPS Act, has observed as under :-

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4. Sub-section [1] of Section 52A of the NDPS Act facilitates the Central Government a mode to be prescribed to dispose of the seized narcotic substance. The idea is to create a clear mechanism for such disposal both for the purpose of dealing with the particular case and to safeguard the contraband being used for any illegal purpose thereafter.

5. Sub-section [2] of Section 52A of the NDPS Act mandates a competent officer to prepare an inventory of such narcotic drugs with adequate particulars. This has to be followed through an appropriate application to the Magistrate concerned for the purpose of certifying the correctness of inventory, taking relevant photographs in his presence and certifying them as true or taking drawal of samples in his presence with due certification. Such an application can be filed for anyone of the aforesaid three purposes. The objective behind this provision is to have an element of supervision by the Magistrate over the disposal of seized contraband. Such inventories, photographs and list of samples drawn with certification by Magistrates would constitute as a primary evidence. Therefore, when there is non-compliance of Section 52A of the NDPS Act, where a certification of a magistrate is lacking any inventory, photograph or list of samples would not constitute primary evidence.

6. The obvious reason behind this provision is to inject fair play in the process of investigation. Section 52A of the NDPS Act is a mandatory rule of evidence which requires the physical presence of a Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph taken apart from list of samples drawn. In due compliance of Section 52A[1] of the NDPS Act the Ministry of Finance [Department of Revenue] issued a Notification No. G.S.R. 339[E] dated 10.05.2007 which

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furnishes an exhaustive manner and mode of disposal of drugs ending with a certificate of destruction :

*** * * * * * * * * ***

7. To be noted, the aforesaid notification was in existence at the time of the commission of the offence alleged in the case on hand, stood repealed with effect from 23.12.2022 vide Notification No. G.S.R.899[E]. In any case a notification issued in derogation of the powers conferred under sub-section [1] of Section 52A of the NDPS Act can never contradict the main provision, particularly sub-Section [2]. However, any guideline issued by way of a notification in consonance with Section 52A of the NDPS Act has to be followed mandatorily.

8. Before any proposed disposal/destruction mandate of Section 52A of the NPDS Act requires to be duly complied with starting with an application to that effect. A Court should be satisfied with such compliance while deciding the case. The onus is entirely on the prosecution in a given case to satisfy the Court when such an issue arises for consideration. Production of seized material is a factor to establish seizure followed by recovery. One has to remember that the provisions of the NDPS Act are both stringent and rigorous and therefore the burden heavily lies on the prosecution. Non-production of a physical evidence would lead to a negative inference within the meaning of Section 114[g] of the Indian Evidence Act, 1872 [hereinafter referred to as the Evidence Act]. The procedure contemplated through the notification has an element of fair play such as the deposit of the seal, numbering the containers in seriatim-wise and keeping them in lots preceded by compliance of the procedure for drawing samples. ....

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[d] CRIMINAL APPEAL NO.1443 OF 2023 : SIMARNJIT SINGH vs. STATE OF PUNJAB : 2023 SCC OnLine SC 906 : 2023 LiveLaw [SC] 570 : Decided on 09.05.2023.

Facts : When a Sub-Inspector of Police along with other Police Officers was doing patrolling duty at a bridge on a canal, a tempo carrying two occupants was intercepted. Thereafter, a search was conducted in presence of the District Superintendent of Police. The search led to recovery of 8 bags of poppy husk which were concealed under tarpaulin. From each bag, two samples of 250 grams were taken and made into 16 parcels. The residue of poppy husk in each bag was found to be 29.5 kgs. The appellant was convicted by the Special Judge for the offence under Section 15 of the NDPS Act and the appeal preferred before the High Court was also dismissed. Before the Hon'ble Supreme Court, it was submitted that the prosecution was vitiated as the work of drawing sample was done by the concerned officer, P.W.7 without taking resort to sub-section [2] of Section 52A of the Evidence Act and it was pointed out that the samples were drawn by P.W.7 immediately after the seizure. In such backdrop, the Hon'ble Supreme Court has held as under :-

> **7. We have perused the evidence of PW-7 Hardeep Singh in which he has stated that from the eight bags of poppy husk, two samples of 250 gms each were drawn and converted into 16 parcels. This has been done immediately after the seizure.**
>
> **8. In paragraphs 15 to 17 of the decision of this Court in Mohanlal's case, it was held thus:**
>
> *** * * * ***
>
> **9. Hence, the act of PW-7 of drawing samples from all the packets at the time seizure is not in conformity with the law laid down by this Court in the case of Mohanlal, [2016] 3 SCC 373. This creates a serious doubt about the prosecution's case that substance recovered was a contraband.**

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10. Hence, the case of the prosecution is not free from suspicion and the same has not been established beyond a reasonable doubt. Accordingly, we set aside the impugned judgments in so far as the present appellant is concerned and quash his conviction and sentence.

11. The appeal is accordingly allowed.

[e] Mohammed Khalid and another vs. the State of Telangana : 2024 INSC 158 : [2024] 5 SCC 393 : Decided on 01.03.2024.

Facts : The appellants [A-1, A-2, A-3 and A-4] were convicted under Section 8[c] r/w Section 20[b][ii][C] of the NDPS Act by the Special Court and they were sentenced to undergo rigorous imprisonment for ten years each and to pay a fine of Rs. 1,00,000/- each, with default stipulation. During pendency of the appeal before the High Court, A-1 expired. The prosecution case was that on receipt of a credible information on 08.05.2009 regarding transportation of Ganja by two persons in a Toyota Qualis vehicle, the said vehicle with A-1 and A-2 as its occupants, was intercepted. A search proceeding was conducted in presence of a Gazetted Officer and independent witnesses. Three bundles of Ganja weighing around 80 kgs found lying in the vehicle were seized. A-1 and A-2 were interrogated at the spot. Three samples weighing about 50 grams were drawn from each bundle of contraband and remaining muddamal Ganja was seized vide a confession-cum-seizure panchanama. One part of the sample was handed over to A-1 and A-2. One part of sample collected from the recovered contraband was forwarded to the Forensic Science Laboratory [FSL] wherefrom a report was received concluding that the sample was of Ganja as defined under Section 2[b] of the NDPS Act. It was after the conviction by the Special Court, the appeals were preferred before the High Court and after rejection of those appeals, two appeals were preferred by A-2, A-3 and A-4 before the Hon'ble Supreme Court. It emerged from the evidence on record that the Seizure Officer [P.W.1] collected three samples of Ganja at the spot. On the said procedure, the Hon'ble Supreme Court has observed as under :-

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> **22. Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the Investigating Officer, PW-5 for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate. In this view of the matter, the FSL report [Exhibit P-11] is nothing but a waste paper and cannot be read in evidence. .....**

62. From a survey of the background facts and the observations made in respect of the afore-mentioned decisions, it is clearly discernible that the events of search, recovery and seizure of the contraband as well as of drawing of samples from seized contraband in those cases, occurred prior to the decision rendered in **Mohanlal** [supra] on 28.01.2016. The decisions were rendered by the Hon'ble Supreme Court after the verdicts of the trial court and the first appellate court, that is, the jurisdictional High Court. It is trite legal position that appellate jurisdiction is co-extensive with the original court's jurisdiction as far as evaluation and appreciation of evidence and reaching finding on facts and the appellate court is free to reach its own conclusion on evidence notwithstanding any finding reached by the trial court. An appeal is considered to be in continuation of the original proceedings; and by way of an appeal, the entire proceedings are before the appellate court. A court exercising the appellate power has obligation not only to consider the questions of law but also to consider the questions of fact. The appellate court has the responsibility to analyse the evidence particularly when the offence alleged is of a serious nature and the offender has been visited with heavy punishment, at least, in the form of sentence. The rendering of the afore-mentioned decisions on the dates, quoted above, has clearly pointed towards the proper procedure about drawing of samples from seized contraband and also about the consequence for not drawing samples in the manner prescribed by the statutory prescription contained in Section 52A[2] of the NDPS Act.

63. By Notification bearing no. G.S.R.899[E] dated 23.12.2022, the Central Government in exercise of powers conferred by Section 76 read with Section 52A of the NDPS Act has framed a set of rules, **the Narcotic Drugs And Psychotropic Substances [Seizure, Storage, Sampling and Disposal] Rules, 2022**. Chapter III : 'Sampling' has provided for the procedure for drawing samples from seized

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contraband in conformity with the procedure laid down in sub-section [2] of Section 52A of the NDPS Act. By Rule 29 : 'Repeal and Savings', the statutory notification, Standing Order no. 1/89 dated 13.06.1989 has been repealed with the provision that notwithstanding such repeal, anything done or any action taken or purported to have been done or taken under the Standing Order no. 1/89 shall be deemed to have been done or taken under the corresponding provision of the said rules. It may be mentioned that the Standing Order no. 1/89 had, apart from dealing on seizure and sampling, had also dealt with matters of storage, disposal, etc. of seized contraband. Even such repeal and saving clause would not save and salvage an incident of drawing of samples from seized contraband on the spot from illegality as the statutory prescription as regards the manner of drawing of samples is in existence in Section 52A[2] on and from 29.05.1989, the date when Section 52A was inserted in the NDPS Act for 'narcotic drugs'. It requires a mention again that a set of rules in the nature of subordinate legislation cannot prevail over the governing statute.

64. Reverting back to the case in hand, the prosecution has contended that an Inventory of the Goods Seized [Ext.-2] was prepared following due procedure and the said Inventory of Goods Seized [Ext.-2] was duly 'seen' by the Magistrate. As such, there was due compliance of the procedure prescribed in Clause [a] of sub-section [2] of Section 52A of the NDPS Act. From a look at the Inventory of Goods Seized, exhibited as Ext.-2, it is noticed that the same was marked as 'seen' by the learned Chief Judicial Magistrate, Kamrup [M], Guwahati on 06.12.2014. There is distinction between something 'seen' and something 'certified'. Ordinarily, 'seen' means perceiving something with the eyes; discerning something visually. On the other hand, if one certifies something it means he has attested or confirmed in a formal statement. Certificate means an official document attesting a fact. Thus, certificate is associated with a more responsible act.

65. From the evidence/materials on record, it has not emerged that on any date after 06.12.2014, the respondent Customs authorities had applied before the Magistrate for certifying the correctness of the Inventory of Goods Seized [Ext.-2] so prepared, after search, recovery and seizure of the contraband substance,

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Cannabis [Ganja] weighing 1093.68 kg. It is a fact that the respondent Customs authorities had, during the trial, produced and exhibited physical evidence in the form of 29 HDPE packages, seized on 05.12.2014, as Mat. Ext.-1 to Mat. Ext.-29. From production of Mat. Ext.-1 to Mat. Ext.-29 during the trial, it is discernible that the prosecution did not dispose of the seized contraband, Cannabis [Ganja] till that stage of the trial following the procedure laid down in Section 52A[1] of the NDPS Act and the Standing Order no. 1/89. One of the reasons for non-disposal of the seized contraband, Cannabis [Ganja] can be prima facie made relatable to non-compliance of the procedure laid down in Clause [a], Clause [b] and Clause [c] of Section 52A[2] of the NDPS Act as without following the procedure laid down therein, disposal of seized contraband substance is not permissible under sub-section [1] of Section 52A of the NDPS Act.

66. From the prayer made in the application dated 06.12.2014, filed before the Court of learned Chief Judicial Magistrate, Kamrup [Metro], Guwahati, it is clearly evident that there was no prayer made to the learned Magistrate to certify the correctness of the Inventory of Goods Seized [Ext.-2]. Prayer was made only for seeing the Inventory of Goods Seized [Ext.-2]. In the said application dated 06.12.2014, it was made clear that samples were already drawn from the seized contraband substance, Cannabis [Ganja] and a prayer was made only to 'see' the samples drawn from the seized contraband substance, Cannabis [Ganja]. It is also clear that no application was made before the learned Magistrate for the purpose of taking photographs of seized contraband substance, Cannabis [Ganja] in his presence and for certifying such photographs as true ones. It is also evident that no application was made before the learned Magistrate on that day, that is, 06.12.2014 for the purpose of allowing to draw representative samples from the 29 HDPE packets suspected to have contained Cannabis [Ganja] in his presence and for certifying the correctness of any list of samples so drawn. The prosecution side has not been able to bring any evidence/material on record to indicate that there was an application for allowing to draw representative samples from the 29 HDPE packets suspected to have contained Cannabis [Ganja] and for certifying the correctness of any list of samples so drawn. In the absence of any such application filed under sub-section [2] of Section 52A of the NDPS Act, there is no

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question of the Magistrate to allow any application under sub-section [3] of Section 52A of the NDPS Act.

67. If the procedure laid down in sub-section [2] and sub-section [3] of Section 52A is complied with and on an application being made, the Magistrate issues the certificates contemplated by sub-section [2], then sub-section [4] of Section 52A has laid down that, notwithstanding anything to the contrary contained in the Indian Evidence Act, 1872 or the Code of Criminal Procedure, 1973, such inventory, photographs of the seized contraband substance taken before the Magistrate and certified by him, and the list of samples drawn in presence of the Magistrate whose correctness has been certified by him, would be treated as primary evidence in respect of an offence under the NDPS Act in the trial by the concerned Special Court.

68. In view of such mandate as regards presenting primary evidence before the trial court, obligation was clearly cast on the prosecution to produce and exhibit, *firstly,* the Inventory of Goods Seized [Ext.-2], that is, Cannabis [Ganja] weighing 1093.68 kgs, with due certification of the Magistrate as regards the correctness of such Inventory; *secondly,* the photographs of the seized contraband, Cannabis [Ganja], which were taken before the Magistrate and with due certification of such photographs as true from him; and *thirdly,* the list of samples drawn from the seized contraband, Cannabis [Ganja] and a certificate from the Magistrate regarding the correctness of the list of samples so drawn; under sun-section [2] of Section 52A of the NDPS Act as primary evidence in order to bring home the charge under Section 20[b][ii][C] of the NDPS Act against the two accused persons, A-1 and A-2 in the trial of NPDS Case no. 24 of 2015.

69. When the documentary evidence and the material exhibits produced during the course of the trial before the learned Special Court are examined in the above backdrop, it is found that the Inventory of Goods Seized [Ext.-2] bears no certification of the Magistrate as regards its correctness. The prosecution did not exhibit any photographs of the seized contraband substance, Cannabis [Ganja] which were taken in presence of the Magistrate and were certified by the

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Magistrate as true. Since no samples were drawn from the seized contraband substance before the Magistrate, there is no question of certifying the correctness of any list of samples so drawn by the Magistrate.

70. It is now a settled position that the object and purport behind the procedure laid down in Section 52A of the NDPS Act is to inject the element of fair play in the process of investigation and to leave out any chance of foul play. It has been held in **Mangilal** [supra] that when there is non-compliance of Section 52A of the NDPS Act and where a certificate of a Magistrate is lacking, any inventory, photographs or list of samples would not constitute primary evidence. Section 52A has been held to be a mandatory rule of evidence requiring the physical presence of the Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph taken, apart from the list of samples drawn. From the decision in **Mohanlal** [supra] and also from the decisions, enumerated in paragraph 60 hereinabove, it is found to be settled that in the absence of any evidence/materials on record establishing that the samples of the seized contraband were drawn in presence of the Magistrate and the correctness of the list of samples so drawn duly certified by the Magistrate any samples drawn dehores the said procedure would not be treated as a valid piece of primary evidence in the trial and when it is found that there is no primary evidence available, the trial as a whole, would vitiate. It has been also settled that if no proceedings under Section 52A of the NDPS Act were undertaken by the investigating agency for obtaining samples in presence of the jurisdictional Magistrate, the chemical examination report given as regards the contraband substance seized cannot also be read into evidence.

71. Upon evaluation of the evidence/materials led by the prosecution during the course of the trial, it is found that the prosecution had failed to lead primary evidence in the form of [i] an Inventory of the seized contraband substance, Cannabis [Ganja] weighing 1093.68 kgs; [ii] photographs of such seized contraband substance, Cannabis [Ganja] taken in presence of the Magistrate; and [iii] the list of samples drawn; with due certification from the Magistrate; before the learned Special Court in terms of the statutory prescription set forth in sub-

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section [2] read with sub-section [4] of Section 52A of the NDPS Act. Though the prosecution has produced the seized contraband substance, Cannabis [Ganja] in 29 HDPE packets weighing 1093.68 kgs as Mat. Ext.-1 to Mat. Ext.-29 before the learned trial court, it had not led any evidence as regards the manner in which they were kept during the period from the date of seizure till their production before the Court at the subsequent date. Be that as it may, the decision in **Mohanlal** [supra] has clarified the real position as regards Section 52A in view of presence of a contradictory notification in the form of the Standing Order no. 1/89, as regards drawing of samples from the seized contraband substance. It is pertinent to mention that other than the manner as laid down in Clause [c] of sub-section [2] of Section 52A of the NDPS Act as regards drawing of samples from seized contraband substance for the purpose of chemical examination, the NDPS Act has not envisages any other permissible mode of drawing of samples from seized contraband substance. In absence of the primary evidence on the points of drawing of sample in presence of the Magistrate and of certification of the list of samples so drawn, the evidence regarding giving of positive test for Cannabis [Ganja] by the FSL/DFS vide its Report [Ext.-3] cannot also be read into evidence. In such obtaining fact situation, the other evidence led by the prosecution cannot be held to be sufficient to prove the charge framed against the accused-appellants, A-1 and A-2 beyond all reasonable doubt.

72. The upshot of the discussion made above and the reasons assigned therein is that in view of presence of material irregularities creating serious doubt in the case of the prosecution and the failure on the part of the prosecution to lead vital primary evidence on the aspects above especially on the aspects of drawing of samples, the case of the prosecution has become a case not free from suspicion and doubt. The learned Special Court appears to have not noticed the material infirmity in the case of the prosecution qua Section 52A of the NDPS Act and as a result, has fallen into error in returning the finding of guilt against the two accused persons, A-1 and A-2. Since the offences under the NDPS Act are serious in nature and have prescribed stringent punishment, compliance with the statutory prescriptions and procedures contained therein shall also have to be strict and scrutiny is also stringent. It is also a settled proposition of law in the case of doubt, the benefit of

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doubt, at all stages, goes in favour of the accused. Once it is established that the prosecution has failed to lead vital primary evidence, as a corollary, the trial as a whole, would stand vitiated. For the same, the accused persons in the case in hand, A-1 and A-2 are clearly entitled to the benefit. As a result, we find that the impugned judgment and order of conviction and sentenced passed by the learned Special Court is not sustainable in law and the same is deserved to be set aside.

73. In view of the finding reached above on the aspect of failure to lead primary evidence in the matter of drawing sample, it is found not necessary to examine on the issue of validity or otherwise of the charge framed and on the issue of causing prejudice or not.

P. Order :-

74. Accordingly, the following order is passed :-

[i] The impugned Judgment and Order dated 03.10.2016 passed by the learned Special Court in NDPS Case no. 24 of 2015 is set aside.

[ii] Both the accused-appellants, A-1 and A-2 are acquitted of the charge under Section 20[b][ii][C] of the NDPS Act.

[iii] Both the criminal appeals, Criminal Appeal no. 67/2019 and Criminal Appeal no. 283/2017 are allowed.

[iv] The accused-appellants, A-1 and A-2 are to be released forthwith from custody if their detention are not required in connection with any other case or for any other purpose.

[v] The fine amount, if any, deposited by the accused-appellants, A-1 and A-2 shall be refunded to them.

75. The Registry to send back the case records to the Special Court forthwith.

JUDGE **JUDGE**

Comparing Assistant

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