IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
(CRIMINAL APPELLATE JURISDICTION)
APPELLATE SIDE

Present :
Hon'ble Justice Moushumi Bhattacharya
&
Hon'ble Justice Prasenjit Biswas.

CRAN No. 1 of 2019
in
CRA 6 of 2019

Babu Mondal & Ors.
vs
The State of West Bengal

For the Appellants	:	Mr. Sekhar Kumar Basu, Sr. Adv. Mr. Kishore Dutta, Sr. Adv. Mr. Antarikhya Basu, Adv. Ms. Madhumita Basak, Adv. Mr. Sayan Mukherjee, Adv.
For the State	:	Mr. Aditi Shankar Chakraborty, Ld. APP. Mr. Arjun Chowdhury, Adv. Mr. Abhijhit Sarkar, Adv.
Last heard on	:	11.10.2023
Delivered on	:	18.10.2023

Moushumi Bhattacharya, J.

1. This is an application for grant of bail and suspension of sentence under section 389(1) of The Code of Criminal Procedure, 1973. The judgment and order dated 4th and 5th April, 2019 was passed by the learned Judge Special Court, NDPS at Cooch Behar convicting the appellants on the charges framed for commission of offences punishable under sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). The appellants were sentenced to suffer rigorous imprisonment for 15 years each and a fine of Rs. 1,50,000/- in default of which to undergo further rigorous imprisonment for 2 years.

2. Four appellants are before the Court.

3. The impugned judgment was challenged on 20.5.2019 and the present application has been filed on 26.08.2019 for suspension of the conviction and sentence and for release of the petitioners/appellants on bail pending hearing of the criminal appeal/CRA 309 of 2019 which is registered before the Circuit Bench at Jalpaiguri as CRA 6 of 2019.

4. Learned counsel appearing for the appellants assails the judgment passed by the learned Special NDPS Court on several grounds and prays for suspension of the sentence on facts as well as in law. The submissions made include violation of section 42(1)(a) read with section 42(2) of the NDPS Act as well as violation of sections 57 and 52-A of the NDPS Act. Counsel further submits that there were no independent seizure witnesses and there was also mismatch in the

quantity of samples collected and those sent for forensic testing. Counsel submits that the Gazetted Officer was a member of a raiding team as opposed to being an independent witness.

5. The learned Addl. Public Prosecutor, appearing for the prosecution, submits that the appellants should not be released since the Ld. Trial Court found the conviction to be justified on facts. The Ld. PP submits that narcotic substances about commercial quantity was recovered from the appellants and the non-compliance of the NDPS Act, if any, would not be fatal to the conviction.

6. Upon considering the submissions made on behalf of the petitioners and the material disclosed in the application, the Court has come to the following conclusions. The findings/conclusions are categorised under the following heads.

Violation of the second *proviso* to section 42(1) and section 42(1)(a) read with section 42(2) of the NDPS Act

7. Section 42 of the NDPS Act deals with the power to enter, search, seize and arrest without warrant or authorisation and empowers an officer of a designated rank as provided under section 42(1) to enter into and search any building, conveyance or place between sunrise and sunset if he has reason to believe, from personal knowledge or information given by any person and taken down in writing, that an offence in respect of any narcotic drugs or psychotropic substances which is punishable under the Act has been committed or any document or article, which may furnish evidence of the commission of

offence, is kept or concealed in any building, conveyance or enclosed places.

8. The second proviso to section 42(1) reiterates the "reason to believe" requirement of the officer before the officer can enter or search a building, conveyance or an enclosed place, that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or escape of the offender.

9. Section 42(2) contains a mandate on the officer to take down any information in writing under section 42(1) and record the grounds for his belief and thereafter to send a copy of the information taken down in writing and the grounds for his belief to his immediate official superior within 72 hours.

10. The evidence of PW 8 (the complainant) records a specific admission before the Addl. S.P, Cooch Behar (NDPS) on 13th December, 2018 that PW 8 did not give any information to the Addl. S.P after receiving the source information. The evidence also further contains an admission that PW 8 was not authorised in writing by the Addl. S.P to conduct the raid.

11. Moreover, the FIR reflects that information was received at 14:15 hours on 17.1.2018, the raid was conducted at 00:45 hours and the search and seizure was made between 02:45 hours - 05:35 hours on 18.1.2018; that is after sunset.

12. As stated above, the second proviso to section 42(1) requires an officer to record the grounds of his beliefs that a search warrant/authorisation cannot be obtained without concealment of

evidence or escape of an offender before the officer can enter and search any building, conveyance or enclosed place between sunset and sunrise. The FIR discloses that the raid was conducted at 00:45 hours and the search and seizure was made around 02:45 hours - 05:35 hours, that is after sunset.

13. Therefore, recording of ground for the "reason to believe" requirement under the second proviso to section 42(1) was admittedly not complied with as is clear from the statement made in the FIR.

14. In *Sarija Banu @ Janarthani @ Janani v. State through Inspector of Police; (2014) 12 SCC 266*, the Supreme Court noted that there was a serious violation of section 42 of the NDPS Act and held that compliance of section 42 is mandatory. In *State of Rajasthan v. Jagraj Singh @ Hansa; (2016) 11 SCC 687*, the Supreme Court held that if an officer has to carry out search between sunset and sunrise, he must record the grounds of his beliefs under the second proviso to section 42(1) of the NDPS Act and the empowered officer who takes down any information in writing and records the ground under the proviso to section 42(1) must forthwith send a copy thereof to his immediate official superior. The Supreme Court held that total non-compliance with the provision would affect the case of the prosecution and the compliance is mandatory to that extent.

15. Section 57 of the NDPS Act requires a person making any arrest or seizure under the Act to make a full report of the particulars of such arrest or seizure to his immediate official superior within 48 hours

following the arrest. The evidence of PW 8 at page 28 amounts to an admitted violation of section 57 of the NDPS Act.

The Gazetted Officer was a member of the raiding team and was not "independent"

16. The first paragraph of the FIR names one Shri Debasish Ghosh, C.I. Mathabhanga who is PW 13 and who accompanied the raiding team from Setai More. The FIR states that Debasish Ghosh accompanied "us" for the raid. The FIR is by the O.C, Sitalkuchi Police Station. The FIR therefore shows that the Gazetted Officer was not an independent person and the alleged desire expressed by the accused person to be searched by an Officer does not constitute a voluntary relinquishment of the right under section 50 of the NDPS Act. Section 50 enumerates the condition under which a search may be conducted by a duly authorised Officer under the provision of sections 41, 42 and 43. In *Ishdan Seikh v. Union of India; CRA 90 of 2020*, a Division Bench of this Court held that a Gazetted Officer who had proceeded to the place of occurrence on the belief that the accused person may be carrying narcotic drugs cannot be said to be an independent person before whom the law contemplates a search. The Division Bench proceeded to hold that acceptance of the offer by the appellant to be searched before an Officer who is a member of the raiding team cannot be said to be a voluntary expression of desire to be searched before an Officer.

17. The mandatory compliance of section 50 of the NDPS Act can also be found in a recent judgment in *Ranjan Kumar Chadha vs. State of Himachal Pradesh; Criminal Appeal Nos. 2239-2240 of 2011,* where

the Supreme Court held that section 50 only contemplates search before a gazette officer and a magistrate.

Violation of section 52-A of the NDPS Act

18. Section 52-A of the NDPS Act enumerates the manner in which the seized narcotic drugs and psychotropic substances may be disposed of by the concerned Officer. Section 52-A(2) mandates that substances which have been seized and forwarded to the empowered Officer shall be inventoried identifying particulars of the substances or the packing, country of origin and other particulars as the Officer under section 52-A(1) may consider relevant in any proceeding under the Act. The concerned Officer shall also make an application to any Magistrate for the purpose of certifying the correctness of the inventory, taking photographs in the presence of Magistrate and certifying the correctness of photographs and drawing representative samples of the drugs/substances in the presence of the Magistrate and certifying the correctness of the list of samples drawn.

19. The evidence placed before the Court does not reflect that the concerned Officer complied with the mandate of section 52-A of the NDPS Act. The Supreme Court in *Union of India v. Mohanlal; (2016) 3 SCC 379* directed that seized narcotic drugs and psychotropic or other controlled substances shall be forwarded to the Officer-in-charge at the nearest P.S or the Officer empowered under section 53 of the Act who shall approach the Magistrate and that the sampling shall be done under the supervision of the Magistrate. A more recent judgment of the Supreme Court in *Bothilal v. The Intelligence Officer Narcotics Control*

Bureau; 2023 (3) Supreme 644 relied on *Mohanlal* to hold that samples drawn and certified by the Magistrate in compliance with section 52-A(2) and (3) constitutes primary evidence for the purpose of the trial.

Mismatch in the quantity of samples collected and those sent to the forensic expert

20. The second page of the FIR and the Report of the Central Forensic Laboratory reflects a discrepancy between the quantity of narcotic substances seized as samples and the quantity reflected in the Report of CFSL. The prosecution has not been able to explain the discrepancy in the quantity and a doubt therefore lingers on the difference between the samples seized and the samples sent to the CFSL. In *Rajesh Jagdamba Avasthi v. State of Goa; (2005) 9 SCC 773*, the Supreme Court noted the mismatch in the *charas* recovered from the appellant and the quantity received by the Science laboratory and found that the discrepancy considerably eroded the credibility of recovery proceeding including the possibility of tampering with the seized substances.

The seizure was done in the P.S on the following day and not at the place of occurrence but

21. This would appear from the deposition of PW 5 and PW 6 (seizure witnesses) who were declared hostile and was also corroborated by PW 7, Smt. Jamuna Burman during her cross-examination. The signatures of the accused were also not obtained by the Investigating Officer in the seizure list.

22. Further, there were no independent seizure witnesses which is a mandatory requirement under section 100(4) of the Cr.P.C. Section 100(4) requires the Officer making a search under Chapter VII to call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situated or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search.

The infirmities in the impugned judgment dated 4.4.2019 and why the findings are contrary to the material on record:

23. The learned NDPS Court, Cooch Behar, came to the following findings:

(i) Section 42 of the NDPS Act has duly been complied with by the seizing Officer/complainant by reducing the information in writing and by informing the same to his superior Officer and by acting as per the directions of his superior Officer namely the Addl. S.P, Mathabhanga.

(ii) The Addl. S.P, Mathabhanga, was duly informed as per the mandate of section 42 of the NDPS Act. The C.I., Mathabhanga (PW 13) was physically present at the time of search and seizure as also the B.D.O, Sitalkuchi (PW 10) who was also present as an Executive Magistrate. Therefore, the entire process of search and seizure conducted by the O.C. Sitalkuchi, P.S was duly authorised by the superior Officer and Executive Magistrate.

(iii) The information was communicated to the superior Officer after confirmation of which and under the direction of the superior Officer,

the complainant (PW 8) left the P.S at 22.05 hours and was accompanied by C.I., Mathabhanga which indicates substantial compliance of section 41(2) of the NDPS Act.

(iv) None of the accused persons have taken the plea that the houses from where the *ganja* was recovered and seized did not belong to the accused persons or that they were not present in the said house at the time of search and seizure.

(v) The prosecution's stand is corroborated from the evidence of all the witnesses in relation to the search, seizure and recovery of contraband substance. The evidence also identifies the accused persons.

24. The above findings of the NDPS Court in the impugned judgment are directly contrary to the material placed before the Court and the evidence of the witnesses.

25. As stated above in the earlier part of this judgment, the complainant (PW 8) did not reduce the information received at Sitalkuchi P.S in writing with regard to commission of an offence under the NDPS Act. The complainant also did not forward the same to his superior i.e Addl. S.P within 72 hours as is required under section 42(2) of the NDPS Act. The evidence of the complainant PW 8 is contrary to the finding of the learned Trial Court.

26. Further, as stated above, FIR clearly states that the information was allegedly received at 14.15 hours on 17.1.2018, raid was conducted at 00.45 hours and the search and seizure was made around 02.45 hours - 05.35 hours on 18.1.2018 that is after sunset. The mandate of

the second *proviso* to section 42(1), which requires an Officer to record the grounds for his beliefs before the Officer can enter and search a building between sunset and sunrise, was clearly not complied with.

27. The finding of the trial court is also contrary to the evidence of I.O. (PW 2) who stated that no investigation was done to ascertain the ownership of the houses with the help of the BDO.

28. The seizure list does not bear any signature of the accused persons. The seizure was allegedly made at the place of occurrence on and from 2.45 hours - 5.35 hours as deposed by the complainant in the FIR.

29. The material was seized and the samples drawn thereafter namely *ganja* weighing about 72 kgs 390 gms from the possession of the accused persons from their houses as confirmed by the laboratory Report.

30. The findings further overlook the discrepancy between the seized contraband and the samples sent for chemical examination which would appear from the written complaint dated 18.1.2018 and the CFSL Report dated 24.4.2018.

31. The violation of section 42(1)(a) read with section 42(2) of the NDPS Act has not been specifically dealt with in the impugned judgment and the finding of the learned Trial Court is contrary to the evidence which was placed before the Trial Court and before us in the course of hearing of the present application. The other procedural irregularities with regard to the seizure list not bearing the signatures of the accused persons and the contradictions in the evidence with regard

to the place where the seizure was made or where the seizure list was prepared have also been overlooked by the learned Trial Court.

32. In our view, the above reasons are sufficient for suspending the sentence and releasing the petitioners/appellants on bail subject to the conditions that follow in the later paragraphs of this judgment.

33. The prosecution's defence of the impugned judgment on due compliance of section 42(1) and (2) as well as 57 is contrary to the evidence which has been placed before us. The prosecution has also urged that the issue of mismatch in the quantity of the samples seized and the samples drawn was not taken in the Trial Court and further that procedural lapses, if any, should not result in the relief prayed for.

34. The defence, in our opinion, apart from being contrary to the relevant material and the facts emanating therefrom, is also not acceptable since the statutory rights conferred upon an accused in a special statute like the NDPS, should be given their due importance. This is by reason of the fact that any lapse on the part of the authorities in a penal statute such as NDPS Act, should be strictly construed.

Section 389(1) of The CrPC

35. Section 389 of the Cr.P.C deals with suspension of sentence pending the appeal and release of appellant on bail. Sub-section (1) of section 389 empowers the Appellate Court to suspend the execution of the sentence or the order appealed against pending any appeal by a convicted person subject to the reasons being recorded in writing. The Appellate Court is also empowered to order release of the convicted

person on bail or on his own bond subject to the satisfaction of the two *provisos* to section 389(1) of the Cr.P.C.

36. There is a difference between grant of bail under section 439 of the Cr.P.C and suspension of sentence under section 389 of the Cr.P.C. While section 439 is at the stage of pre-trial arrest where there may be a presumption of innocence, section 389(1) deals with suspension of sentence post-conviction. The Appellate Court in the latter considers a case where there is already a finding of guilt and the question therefore of presumption of innocence becomes negligible. The Appellate Court while hearing a case under section 389(1), must deal with the merits of the appeal and other relevant factors for ariving at the conclusion that there are strong reasons for grant of bail notwithstanding an order of conviction and must record the existence of such compelling reasons for suspension of sentence and grant of bail.

37. Incidentally, the prosecution has relied on *Preet Pal Singh* to argue that the present case is not one which is fit for suspension of sentence and grant of bail. We however find that *Preet Pal Singh* was in relation to an offence under the Indian Penal Code and the Dowry Prohibition Act, 1961 as opposed to the present case which is under the NDPS Act. The Supreme Court also found that the High Court in that case had actually suspended the execution of the sentence and granted bail to the respondent no. 2 without recording any reasons. Hence, *Preet Pal Singh* does not assist the prosecution.

38. The Supreme Court in *Kashmira Singh v. The State of Punjab (1977) 4 SCC 291* noted that the practice not to release a person on bail

who has been sentenced to life imprisonment was evolved in the High Courts and the Supreme Court on the basis that once a person has been found guilty and sentenced to life imprisonment he could not be let-loose as long as his conviction and sentence are not set aside. The concerned expression by the Supreme Court should not be paraphrased but should be reproduced; the extract is given below:

> *"2. .... The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to unjustified? Would it be just at all for the Court to tell a person : "We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, ,until we hear your appeal, you must remain in jail, even though you may be innocent ?" What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and-sentence.*

39. The *lacunae* in the impugned judgment in the present case and the issues which have either been overlooked, misconstrued or

erroneously dealt with by the learned Trial Court persuade us to hold that this is a fit case where we can invoke the powers under section 389(1) of the Cr.P.C for suspension of the order of conviction and sentence and direct release of the petitioners/appellants on bail pending the hearing of CRA 309 of 2019 (registered before the Circuit Bench at Jalpaiguri as CRA 6 of 2019).

The written show-cause of the Public Prosecutor

40. The first *proviso* to section 389(1) of the Cr.P.C requires the Appellate Court to give an opportunity to Public Prosecutor (PP) for showing cause in writing against the release of a convicted person who is convicted of an offence punishable with death/imprisonment for life/imprisonment for a term of 10 years or more. The Court accordingly gave this opportunity to the learned PP to show-cause in writing. The written objection on behalf of the State and the learned PP/APP was filed in Court. The petitioners/appellants filed a counter to the written objection of the learned PP.

41. We have considered the show-cause in writing under the *proviso* to section 389(1) as well as the counter of the petitioners. The written objection of the PP has been given under 10 grounds. Each of these grounds are being dealt under separate headings. Our conclusions on the written objection are as follows.

A. No violation of section 42(1)(a) read with section 42(2) of the NDPS Act.

42. The learned PP has relied on the evidence of the complainant and on the disclosure made to the superior authority i.e Additional

Superintendent of Police. According to the PP, the information was diarised vide GDE No. 744 dated 17.01.2018.

Court's view

43. Contrary to the stand taken by the PP, the evidence of PW 8 shows that PW 8/complainant did not reduce the same in writing after receiving the secret information at the Sitalkuchi PS, that an offence under the NDPS Act had been committed. PW 8 also did not forward the same to his superior i.e. Additional Superintendent of Police within 72 hours as required under section 42(2) of the NDPS Act.

44. Further, the evidence of PW 8 shows the *lacunae* in GDE No. 744 dated 17.01.2018 which was shown to the witness and the witness/PW 8 testified that GDE No. 744 does not mention that the BDO accompanied the raiding team.

B. Violation of section 42(1) second *proviso* is of no relevance

45. The PP has also taken an objection on the ground that in view of the incriminating material and quantity thereof recovered from the appellants, the ground of violation of section 42(1) second *proviso* of NDPS Act is of little significance.

Court's view

46. Admittedly, the information was allegedly received at 19:15 hours on 17.01.2018; the raid was conducted at 00:45 hours and the search and seizure was made around 02:45 hours – 05:35 hours on 18.01.2018, i.e after sunset. The second *proviso* to section 42(1) requires recording of the reasons to believe that an Officer is required to enter and search any building between sunset and sunrise as an

warrant / authorisation may lead to concealment of evidence or the offender escaping. Admittedly, the search and seizure in the present case was done after sunset without recording the reasons for belief under the second proviso to section 42(1) of the NDPS Act. The PP has not given any reasons for violation of this mandatory statutory provision and the justification given on the quantity of material recovered from the appellants is not an answer to the violation of the statutory provision.

C. The member of the raiding team was independent

47. According to the PP, the search and seizure was witnessed by an Executive Magistrate i.e. B.D.O, Mathabhanga and one Circle Inspector of Police who was a Gazetted Officer; hence, it cannot be said that the Gazetted Officer was the only person who was supposed to be an independent Officer to witness the search and seizure.

Court's view:

48. The first paragraph of the FIR shows that Mr. Debashis Ghosh, CI, Mathabhanga (PW 13) officiated as the Gazetted Officer accompanied the raiding team from Setai more. When the Gazetted Officer accompanies the raiding team, he cannot be said to be an independent person and even if the accused persons / appellants expressed their desire to be searched by such an Officer that would not constitute voluntary relinquishment of the right under the provisions of the NDPS Act. Further, although the B.D.O accompanied the raiding team and signed the seizure list as a witness, the prosecution and the Investigating Officer did not treat the B.D.O / PW 10 as a Gazetted

Officer. PW 13 on the other hand, officiated as the Gazetted Officer in this case, was by no means independent. As stated above, this was also noted in *Ishdan Seikh vs. Union of India, CRA 90 of 2020*.

D. Section 57 of the NDPS Act is directory and not mandatory :

49. According to the PP violation of section 57 of the NDPS Act would not *ipse facto* violate the trial or conviction since in the present case, the contraband articles were seized from the houses of the appellants and were produced before the Judicial Magistrate for inventorising under section 52A of the Act. Therefore, the prosecution has been able to prove the seizure. The PP has relied on *Gurbax Singh vs. State of Haryana; AIR 2001 SC 1002* in this respect.

Court's view:

50. In the present case, there has been total non-compliance of section 57 of the NDPS Act which would have a bearing on the appreciation of evidence regarding arrest and seizure. Hence, the pleadings of the appellants challenging the arrest and seizure is also grounded on the violation of section 57 of the NDPS Act and the appellants should be given the benefit in view of such total non-compliance. [Ref : *Mohan Lal vs. State of Rajasthan; (2016) 6 SCC 222*]

E. Once the possession of contraband substances is proved all other considerations become irrelevant :

51. The objection of the PP with regard to the accused persons not being identified by the four prosecution witnesses during trial is that

the NDPS Act is a special legislation enacted for curbing the use and circulation of drugs where stringent provisions are required. The non identification of the accused persons by the four prosecution witnesses is therefore irrelevant.

Court's view :

52. Members of the raiding team i.e. PW 1, PW 11, PW 12 and PW 13 could not identify the accused persons. This is an undisputed position and hence vitiates the credibility of the witnesses and rebuts statutory embargo under section 37 of the NDPS Act.

F. The consideration of the seizure list

53. The seizure list needs to be considered to disproof the allegation that the seizure was done on the next day and not at the place of occurrence.

Court's view:

54. PW 5 and PW 6 i.e the seizure witnesses deposed that the seizure was done at the Police Station on the next day and not at the place of occurrence. The evidence is also that there were no independent seizure witnesses at the relevant point of time. PW 5 and PW 6 however were subsequently declared hostile which would be evident from the fact that the seizure was done at the Police Station and the fact that the Investigating Officer was also not present at the time of search and seizure would appear from the evidence of PW 7 Smt. Jamuna Barman. It would be clear from the evidence that the signature of the accused person was not obtained in the seizure list by the Investigating Officer as the same was prepared in a hurry at the Police

Station. The PP's contention of considering the seizure list is not relevant since the seizure list has never been discredited; it is the prosecution's case that the seizure list was prepared at the Police Station as stated by PW 7.

G. The Appeal Court cannot go beyond the records of the learned Trial Court

55. The other objection taken by the PP is that the records of the learned Trial Court reveal that the plea of mismatch of quantity of material collected was never raised or argued during the trial.

Court's view:

56. As discussed above, the fact remains that 18 samples of 50gms each were drawn from 9 mother containers. 9 out of 18 were sent to Central Forensic Science Laboratory.

57. The Lower Court Records were sent to this Court at the appellate stage for appreciation of evidence collected and exhibited during trial. The blatant mismatch of quantity collected and quantity sent to the forensic expert as evident from the exhibits are well within the purview of the Appellate Court. Reference: *Rajesh Jagadamba Avasthi v. State of Goa; (2005) 9 SCC 773* where the Supreme Court dwelt on this very aspect and found the credibility of the recovery proceeding to be eroded and the case of the prosecution being rendered doubtful.

H. No violation of section 52-A of the NDPS Act

58. According to the P.P, the inventory and certification was done before the learned Judicial Magistrate on 20.1.2018.

Court's view :

59. Whenever a sample is collected from the source container, the sample has to be drawn in the presence of a Magistrate and the correctness of the inventory as well as the list of samples drawn must be certified by a Magistrate. Apart from the Magistrate officiated under section 52-A of the Act not being examined, the documents placed before the Court show that there has not been due compliance of section 52-A of the Act. Admittedly, the inventory list was not prepared. Reference : *Union of India v. Mohanlal; (2016) 3 SCC 379* where the Supreme Court took serious note of the non-compliance of section 52-A of the Act.

I. The complaint is only with regard to procedural latches which do not vitiate the trial or conviction

60. The learned P.P has objected to release on the grounds that these are only procedural matters and there is no serious violation of any of the provisions of the NDPS Act.

Court's view

61. There are several facts to prove the faulty investigation made in the present case. These facts would include that no document was seized with regard to ownership of the houses, no label was put on the mother containers, the Malkhana-in-charge was not examined and the Malkahana register was also not seized, the IO did not collect any document with regard to the information reduced in writing by PW 8 and none of the prosecution witnesses were interrogated by the investigating agency. The investigating agency also failed to establish

the ownership of the house/place of seizure. Therefore, the entire search and seizure process of the alleged contraband which is the genesis of the NDPS case, cannot be accepted as credible. Moreover, the P.P's reliance on *Preet Pal Singh v. State of Uttar Pradesh; 2020 (8) SCC 645* is misplaced since in that case, Supreme Court was of the view that the High Court had granted bail without looking into the evidence and had "casually" suspended the execution of the sentence and granted bail to the concerned accused, pending his appeal, without recording any reasons.

J. Absence of independent witness does not vitiate the case of prosecution

62. According to the P.P, absence of an independent witness does not *ipso facto* vitiate the prosecution case if the testimony of the police witnesses inspires the confidence in the mind of the Court. In this case, the learned Trial Court found the testimony of the official witnesses to be sufficient for holding the appellants guilty of commission of the offence.

Court's view

63. It is of significance that PW 5 and PW 6 (seizure list witnesses) were civic volunteers and were hence not independent. The lack of independence violates the mandatory requirement under section 100(4) of Cr.P.C which requires that before making a search in a closed place, the Officer shall call upon two or more independent and respectable inhabitants of the locality in which the place of search is situated to attend and witness the search.

Conclusion

64. The present matter has been heard at length on several occasions with proper elucidation on the merits of the appeal and appreciation of the evidence-on-record. The infirmities in the investigation and the violations of the mandatory provisions, dealt above, including of section 42, 52-A of the NDPS Act read with section 100 of the Cr.P.C, persuades this Court to suspend the sentence imposed upon the petitioner/appellants and grant bail to the petitioners/appellants pending hearing of the appeal CRA 6 of 2019.

65. Such orders are not unusual or unheard of as would be evident from the orders passed under section 389(1) of the Cr.P.C. by Co-ordinate Benches sitting in the Jalpaiguri Circuit including in *CRA 40 of 2021 with CRAN 1 of 2022 (Subh Kumar @ Karan @ Shub Kumar).*

66. CRAN 1 of 2019 is accordingly allowed by suspending the order of conviction and sentence of the four petitioners/appellants before us. The appellants shall be released on bail upon furnishing bail bonds of Rs. 10,000/- each with two sureties each of like amount and shall be to the satisfaction of the Special NDPS Court, Cooch Behar. The appellants shall not influence or induce witnesses or tamper with evidence and each of the appellants shall make himself available whenever called upon to do so for the hearing of the appeal. The appellants shall also not leave the jurisdiction of the local P.S. without leave of the Special NDPS Court, Cooch Behar. Each of the appellants shall also report their presence before the Special NDPS Court, Cooch

Behar, a week before the date fixed for hearing of the appeal. CRAN 1 of 2019 is disposed of in terms of the above.

67. The parties will have liberty to mention CRA 6 of 2019 before the appropriate Bench of the Jalpaiguri Circuit.

68. The Case Records may be sent back to Jalpaiguri Circuit Bench.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

Prasenjit Biswas, J.

I agree.

(**Prasenjit Biswas, J.**) (**Moushumi Bhattacharya, J.**)