

GAHC010282602023



undefined

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

Case No. : CRL.A(J)/16/2024

RAJESH SARKAR
S/O-LATE SUBAL SARKAR, RESIDENT OF VILL-SOKOLANI PATHAR GAON,
P.S.-PULIBOR, DISTRICT-JORHAT, ASSAM

VERSUS

THE STATE OF ASSAM AND ANR.
REPRESENTED BY P.P., ASSAM

2:FIRDUSH AHMED
S.I.
SON OF MD. MOSTAK HUSSAIN
PULIBOR POLICE STATION
DISTRICT-JORHAT
ASSAM (INFORMANT

Advocate for the Petitioner : Mr. B. Halder

Advocate for the respondents: Mr. P. Lahkar, APP

BEFORE
HONOURABLE MR. JUSTICE SANJEEV KUMAR SHARMA

Date on which judgment is reserved: 12.02.2026

Date of pronouncement of judgment: 19.02.2026

Whether the pronouncement is of

the operative part of the judgment?: NA

Whether the full judgment has been pronounced: Yes

JUDGMENT AND ORDER (CAV)

- 1.** Heard Mr. B. Halder, learned counsel for the appellant and also heard Mr. P. Lahkar, learned Addl. P.P. for the State.
- 2.** This appeal has been preferred under Section 374 (2) of the Code of Criminal Procedure, 1973 by the appellant, namely, Rajesh Sarkar impugning the judgment and order dated 25.07.2023 passed by the learned Special Judge Jorhat in Special (NDPS) Case No. 60/2021 whereby the present appellant has been convicted under Section 20(b)(ii)(C) of the NDPS Act, 1985 and has been sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1,00,000/- and in default of payment of fine further rigorous imprisonment for 3 months.
- 3.** The facts giving rise to the instant case are as follows:-

On 24-06-2021, Md. Firdus Ahmed, the then S.I. (P), Pulibar Police Station, lodged an F.I.R., stating that on the same day, at about 03:20 p.m., he received a secret information that one Sri Rajesh Sarkar, S/o, Late Sufal Sarkar, Resident of Sokolani Pathar Gaon, P.S. Pulibar, District-Jorhat, was selling 'ganja' [Cannabis] since long, and now he had stocked the said illegal 'ganja' in his residence and selling the same from his house to the nearby local people as well as might take it to some other unknown location for delivery.

The Officer also stated that he then made G.D. Entry vide Pulibar P.S. G.D. Entry No. 463 dated 24/06/2021, and informed the matter to his senior officials.

Thereafter, he went to the house of aforesaid Sri Rajesh Sarkar along with the Officer-in-charge, Pulibar P.S. and other police personnel and searched the house of Sri Rajesh Sarkar. On search, he recovered 06 (six) packets of suspected 'ganja' [Cannabis] weighing 40 kg & 306 grams from the possession of Sri Rajesh Sarkar, which was duly seized in presence of local people. That, at the time of search and seizure of those contraband, the accused Sri Rajesh Sarkar was present in his residence but he could not give any satisfactory explanation about the source of the seized 'ganja'. Upon completion of investigation, the I.O. submitted the charge-sheet u/s 20 (b) (ii) (C) of NDPS Act, 1985.

After receipt of the case record and after hearing the accused as well as the learned Special Public Prosecutor and after going through the materials on record, charge u/s 20 (b) (ii) (C) of NDPS Act was framed against the accused Sri Rajesh Sarkar. The charge was read over and explained to the accused and on being asked, he refused to plead guilty and claimed to be tried. During trial, prosecution side examined 07 (seven) witnesses. The accused was examined u/s 313 Cr.P.C. during which he denied the truthfulness of the testimony of the prosecution witnesses and pleaded innocence. The accused declined to adduce any evidence in defence.

4. The learned Special Judge after the conclusion of the trial and upon consideration of the evidence on record and after hearing the prosecution as well as the defence proceeded to convict and sentence the accused/appellant as aforesaid. Hence this appeal.

5. Learned counsel appearing for the appellant submitted that this is a case where there has been total non-compliance with the provisions of Section 42 of the Act compliance and on that ground alone the appellant is liable to be acquitted. Besides, there are other glaring infirmities in the prosecution case which would be pointed out in course of the hearing.

6. Per contra, learned Addl. P.P. has submitted that there has been substantial compliance with Section 42 and moreover the independent witnesses have also supported the prosecution case. Having regard to the respective submissions, it would be apposite to go through the evidence on record.

PW 1/Sri Basudev Sarkar, testified that he knows accused Sri Rajesh Sarkar as he hails from his locality and the accused had a shoe shop in the daily bazaar at Sokolating. PW 1 also stated that the incident occurred in the year 2021, but he had forgotten the date and month of incident. This witness further stated that on the date of incident, he witnessed gathering near the residence of accused. PW 1 further deposed that he also witnessed police personnel in the residence of accused and then the Second Officer of Pulibar Police Station asked him to sign on a piece of paper. This witness also stated that he signed as a witness on the seizure-lists/ Exhibit 1 & Exhibit 2. This witness was declared hostile by the prosecution side and when cross-examined by the prosecution side, he denied to have stated before police that *"On the date of incident, police made a search in the house of the accused and recovered 05 (five) bags of 'ganja' from his house and 01 (one) more bag of 'ganja' from his old house, in his presence. We have noticed the said 'ganja'. Police weighed the said 'ganja' and found 40.036 kgs of 'ganja' in the aforesaid bags. The said ganja were separately packed, sealed with 'Lah' and he signed in the seizure-list as a*

witness". PW 1 further denied to have stated before police that "accused used to sell 'ganja' earlier also".

During his cross-examination by defence, PW1 stated that he does not know anything about the search made in the house of the accused by police personnel. PW 1 also admitted that he had not seen any weighing machine/balance and further that he had not seen anything being weighed by police in his presence.

PW-2/Sri Bubul Kurmi, has deposed that he knows the accused as the latter belonged to his locality and on the date of incident, police recovered 'ganja' from the house of accused and requisitioned weighing balance from him. Further version of this witness is that police seized 40 kgs of 'ganja' from the accused and prepared seizure-list/ Exhibit 1 wherein Exhibit 1 (2) is his signature. PW 2 also stated that police prepared another seizure-list/Exhibit 2 of the weighing balance which was seized by him and he put his signature on the aforesaid seizure-list as Exhibit 2 (2).

During cross-examination, PW 2 stated that the seized 'ganja' was recovered from the shop of accused and the same was weighed inside his shop and at that time, 10-15 people were present there but he does not know as to who had gathered near the shop of accused at that time. PW 2 further stated that he does not know specifically from which place inside the shop of the accused, the 'ganja' was recovered by police. This witness admitted during cross-examination that in Sokolani Pathar Gaon, 'wild bhang' used to grow and local people used to cut the same and keep it in their houses and in their locality, people used the 'wild bhang' for treatment of their cattle.

PW-3/Sri Rajen Chandra Bhuyan, has deposed that on the date of incident, at about 2-2:30 p.m., he saw police personnel entering the shop of accused

which is located in front of his residence and that, at that time, he was sitting outside his residence in a chair. This witness further stated that police called him to the house of accused where he witnessed a packet containing wild bhang which police seized by preparing seizure- list/Exhibit 1 wherein he put his signature as a witness as Exhibit 1 (3).

During cross-examination, PW 3 stated that he does not know what was written in the seizure-list where he had put his signature. It is further testified by this witness that he does not know from where the packet containing 'wild ganja' was recovered by police and he had not witnessed what was inside the packet as it was sealed at that time.

Evidence of **PW 4/Sri Bharat Bawri** is to the effect that on the date of incident, police called him to the residence of accused and showed him some packets which were kept outside the shop of accused and some packets were inside the shop of accused. Thereafter, police seized the said 'ganja' by preparing seizure-list/Exhibit 1 wherein Exhibit 1 (4) is his signature. PW 4 further stated that police also seized one weighing balance by preparing seizure-list/Exhibit 2 wherein Exhibit 2 (3) is his signature.

During cross-examination, PW-4 by defence counsel admitted that his statement was not recorded by the investigating officer of this case and police did not seize the weighing balance in his presence.

PW 5/Md. Firdus Ahmed, who was the Investigating Officer stated that on 24/06/2021, while he was posted as Attached Officer, Pulibar Police Station, at about 3:20 p.m., they received information through reliable source that the accused Sri Rajesh Sarkar had stored 'ganja' in his house which is located at Socklant Pathar under Pulibar Police Station. PW 5 also stated that the information was entered in General Diary Register vide No.463 dated

24/06/2021, and thereafter he along with police staff proceeded to the residence of accused. PW 5 further deposed that during search operation of the residence of accused, they found 05 (five) separate sacks containing approximately 40 KG of 'ganja' in total inside the accused's house which was near the front door of his residence. PW 5 also stated that the 'ganja' was weighed with the help of digital weighing machine which was procured from a nearby shop. This witness exhibited the seizure-list of digital weighing machine as Exhibit 2 and his signature thereon as Exhibit 2 (4). PW 5 also testified that the 'ganja' was seized by him in presence of witnesses as well as accused by preparing seizure-list/Exhibit 1 wherein Exhibit 1 (5) is his signature. Thereafter, the accused and the seized 'ganja' were brought to Pulibar Police Station by him and later on, the seized 'ganja' was handed over to the Officer-in-charge, Pulibar Police Station. PW 5 further stated that he also prepared Sketch Map of the place of occurrence with index which he exhibited as Exhibit 4 and his signature thereon as Exhibit 4 (1).

In cross examination, PW 5 stated that he had not mentioned in the F.I.R. the exact time as to when the search operation was conducted by him. PW 5 admitted that he had not prepared any separate notings regarding his entry into the premises along with the other persons for conducting search in the residence of accused. Further admission of this witness is that he had not mentioned in his F.I.R. that 05 (five) separate bags of 'ganja' were recovered from the house of the accused. PW 5 also admitted that he did not state before the investigating officer of this case as to where from the contraband was recovered from the house of the accused. Lastly, PW 5 admitted that he had not mentioned in his F.I.R. that the contraband was weighed with the help of an electronic weighing machine brought from one Sri Babul Kurmi.

PW6 Sri Jyoti Prasad Das, another investigating officer of this case, deposed that Md. Firdus Ahmed, S.I. of Police, lodged an F.I.R. at Pulibar Police Station and thereafter he took up the responsibility of the investigation. PW 6 also stated that he examined the informant Md. Firdus Ahmed and thereafter recorded the statement of accused Sri Rajesh Sarkar. PW 6 further testified that on 26/06/2021, he prepared the Inventory which he exhibited as Exhibit 6. This witness also exhibited the certificate issued by the Judicial Magistrate 15t Class, Jorhat, as Exhibit 7, certifying the correctness of the Inventory prepared by him. This witness also exhibited the photographs of the seized contraband as Exhibit 9 to Exhibit 42. PW 6 also stated that he prepared 06 (six) number of samples of the seized contraband which were sent to the F.S.L. Guwahati for expert's opinion. This witness also collected the F.S.L. Report which he exhibited as Exhibit 43 and on completion of investigation, he laid charge-sheet/Exhibit 44 against the accused Sri Rajesh Sarkar, u/s 20 (b) (ii) (C) of NDPS Act, 1985.

During cross-examination, PW 6 admitted that he had not submitted any authorization letter u/s 42 of the NDPS Act, 1985 along with the charge-sheet; that he was authorized by the Officer-in-charge, Pulibar P.S. to investigate the case but the Officer-in-charge, Pulibar P.S. is not of Inspector rank; that he had not seized the contraband recovered in this case but the same was done by the seizing officer; that he had not weighed the seized contraband; that he had not searched the house of accused Sri Rajesh Sarkar on the relevant day and that he had not named Sri Gobin Chandra Bora as a witness in this case.

The evidence of **PW7/Smt. Shravane Rajkhowa**, Scientific Officer, Drugs & Narcotics Division, Directorate of Forensic Science, Kahilipara, Guwahati is to the effect that on 27/06/2021, while she was posted as Scientific Officer, Drugs & Narcotics Division, Directorate of Forensic Science, Kahilipara, Guwahati, she

received a parcel from her Director-cum-Chemical Examiner to the Government of Assam, which was received by him from the D.S.P. [Headquarter], Jorhat, No.318/2021, u/s 20 (b) (ii) (C) of NDPS Act, 1985. PW 7 further deposed that on examining the exhibits **DN-1151/2021 (a1) to DN-1151/2021 (a6)**, the same **gave 'positive' tests for Cannabis [ganja]**. This witness gave her report as Exhibit 43 wherein Exhibit 43 (1) is her signature.

This witness during cross-examination stated that she had not mentioned the procedure in examining the samples in her report; that she had not mentioned in her report that she had followed the procedure prescribed by The United Nation Drugs Testing Manual.

PW 1/Sri Basudev Sarkar turned hostile and was cross-examined by the prosecution during which he denied to have stated before police about witnessing seizure of 'Ganja' from the premises of the accused.

In cross-examination by the defence, he has expressed ignorance about the search.

7. Section 42 of the NDPS Act provided as follows:-

“42. Power of entry, search, seizure and arrest without warrant or authorisation.—(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or

any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,—

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry ;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

"Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances, granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that] if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under subsection (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.]"

8. The PW 5 who was the in-charge of Salakati police outpost and the informant of the case as well as the seizing officer stated that he had received the information at 3.20 p.m. which was entered in the GD vide GDE number 463

dated 24.06.2021 and thereafter, the police team proceeded to the PO. However, during cross-examination he stated that he went to the place of occurrence without making any GD entry. He deposed that the distance from the police outpost to the PO is about 14 k.m. and yet he stated that after proceeding from the outpost at 3.20 p.m., he reached the place of occurrence at 3.30 p.m. i.e., within 10 minutes.

9. Subsequently, during the course of cross-examination PW5 stated that before going to the place of occurrence and before receiving the information at 3.20 p.m. they got information regarding this incident at about 12 noon on that day. If that be so, there is no mention of taking down such information received at 12 noon on that day, in writing. There is admittedly no GD entry with regard to any information any such information received at 12 noon. Therefore, the first condition of Sub-section 1 of Section 42 evidently has not been complied with. Even assuming that a GD entry was made in respect of the information said to have been received at 3.20 p.m, the said entry has not been exhibited at the trial and therefore no evidence other than the oral testimony of the PW5 is available to support the said contention.

Moreover, there is nothing to show that the informant had communicated such information to his immediate Superior Officer within 72 hours. It may be noted that although he stated that the Officer-in-Charge of Pulibar police station was also present when they made house search of the residence of the appellant, that does not amount to compliance with Sub-section 1 & 2 of Section 42, NDPS Act which requires information to be taken down in writing and the said writing be communicated to the immediate official superior within severely two hours. Although, the PW5 I.O. had stated in his cross-examination that before proceeding to the house of the accused/appellant the information was given to

the Superior Officer that is Circle Inspector of Pulibar police station who authorized them to proceed to the place of occurrence in writing, the same does not amount to compliance with the requirement of Sub-section 1 & 2 of Section 42 NDPS Act, as no such written communication has been brought on record.

10. PW5 also stated that he was authorized for investigation. He had not submitted any authorization letter issued under Section 41 of the NDPS Act along with the charge-sheet. Therefore, from the evidence of the prosecution witnesses themselves, it becomes abundantly clear that there has been total non-compliance with the provisions of Section 42 of the NDPS Act.

11. The Hon'ble Supreme Court in the case of ***Karnail Singh Vs. State of Haryana*** reported in ***(2009) 8 SCC 539*** after analyzing the decisions in ***Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat*** reported in ***(2000) 2 SCC 513*** and ***Sajan Abraham Vs. State of Kerala*** reported in ***(2001) 6 SCC 692*** had come to the following conclusion:-

“35. In conclusion, what is to be noticed is that Abdul Rashid' did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham² hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:-

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

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

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

12. In ***Abdul Rashid (Supra)*** which was a case where there was total non-compliance with the provisions of Section 42 (2), the Apex Court expressed the view that it was imperative that the police officer should take down the information and forthwith send a copy thereof to his immediate Superior Officer and the action of the police officer on the basis of the unrecorded information would become suspect, though the trial may not be vitiated on that score alone.

13. From the aforesaid two decisions, it transpires that non-compliance with the provisions of Section 42 of the NDPS Act, may not entirely vitiate the trial, but would compel the Court to treat the evidence regarding recovery with a great deal of suspicion.

14. The learned trial court has also relied upon the decision in ***Karnail Singh (Supra)*** wherein at paragraph 33 it has been held that the non-compliance with the provision of Section 42 may not vitiate the trial if it does not cause any prejudice to the accused, although, it was finally laid down that total non-compliance with the provisions of the said section is not permissible.

15. The learned trial Court also relied upon another decision of the Apex Court in the case of ***Koluttumottial Razak Vs. State of Kerala*** reported **(2000) 4 SCC 465**, wherein it was held that non-compliance with Section 42 of the NDPS Act, 1985 will render a resultant search and seizure suspect and in such a situation evidence of the police officer would be required to be corroborated by

independent evidence.

16. The approach of the learned trial Judge cannot be faulted as in the Constitution Bench decision of the Hon'ble Apex Court in ***Karnail Singh (Supra)***, despite stating that non-compliance with Section 42 NDPS Act is impermissible, it has not been stated that the consequence thereof would be the vitiation of the trial. The Constitution Bench also did not disagree with the finding of the Court in ***Abdul Rashid (Supra)*** wherein it was held that total non-compliance though may not vitiate the trial would render the action of the police suspect.

17. Therefore, it is necessary to once again to carefully examine what was deposed to by the independent witnesses and as to whether they fully supported the factum of recovery. The first independent witness to be examined was P.W.1 who entirely denied having witnessed the recovery and was declared hostile and in cross-examination on behalf of the accused, he claimed that he did not know anything about the search and put his signature on being asked by the police on account of trust. He did not see any weighing machine/balance or anything being weighed in his presence. Therefore, the evidence of PW1 does not support the prosecution case in any manner.

18. PW2 deposed that police recovered ganja from the house of the accused and requisitioned weighing balance from him. But, he nowhere stated that he was present when the recovery was made. Rather, during cross-examination he stated that the ganja was recovered from the shop of the accused and also weighed inside the shop of the accused though he had stated in his examination in chief that the ganja was recovered from the house of the accused. He did not know the weight of the ganja although it was on his weighing machine that the ganja was weighed. Therefore, PW2 can hardly be regarded as a very credible

witness especially since the very location from which the ganja was seized is not consistently stated by the said PW.

19. PW3 who is a resident of the same locality as that of the accused stated that at about 2.00-2.30 p.m. he saw police entering the shop of the accused which is located in front of his house and police called him to the house of the accused where he saw a packet containing wild bhang. But during cross-examination he stated that he did not know from where the packet containing the wild ganja was recovered by the police and he did not know what was written in the seizure list where he had put his signature.

20. From the above, it is more than apparent that he did not witness any actual seizure and more so because his version that police seized one packet of ganja from the house of the accused is at variance with the evidence of PW5, the Seizing Officer who deposed to have seized five packets of ganja from the PO.

21. Next comes PW4, who deposed that on the date of the incident, police called him to the house of the accused and showed him some packets which were kept outside the shop of the accused and some packets were inside the shop of the accused, whereas, the prosecution version is that the ganja was seized from the house of the accused. The very fact that the PW4 deposed that police showed him the ganja leads to the inference that the ganja was not recovered in his presence but he was shown the same after the alleged recovery. In cross-examination he stated that he did not know what was written in the seizure list.

22. Therefore, what transpires from the above is that none of the independent witnesses either individually or cumulatively supported the case of the prosecution as regards recovery of the ganja from the house or shop of the

accused. Therefore, there cannot be said to have been any independent corroboration of the testimony of the police officers.

23. Thus situated, in view of the total non-compliance with the provisions of Section 42 of the NDPS Act, coupled with the non-corroboration of the testimony of the police officials by the independent witnesses as discussed above, there is no escape from the conclusion that the prosecution failed to establish its case beyond reasonable doubt and hence, impugned judgment and sentence cannot be sustained. Consequently, the same is set aside.

24. The appeal stands **allowed**. The appellant be set at liberty forthwith.

JUDGE

Comparing Assistant