

GAHC010215842023



2024:GAU-AS:8963

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

Crl.A No. 392/2023

Md. Manirut Jaman @ Moni,
S/O Late Ashar Ali,
R/O Village: Durabandhi Beel,
P.S. Moirabari,
District-Morigaon, Assam,
Pin-782126.

.....Appellant

-Versus-

The State of Assam

.....Respondent

For Petitioner : Mr. N.N.B. Choudhury, Advocate

For Respondent(s) : Mr. R.J. Baruah, APP.

Date of Judgment : 09.09.2024

BEFORE

HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA
JUDGMENT & ORDER(CAV)

- 1.** Heard Mr. N.N.B. Choudhury, learned counsel for the appellant. Also heard Mr. R.J. Baruah, learned Additional Public Prosecutor appearing for the State of Assam.
- 2.** This appeal under Section 374(2) of the Code of Criminal Procedure, 1973 has been filed by the appellant, Md. Manirut Jaman @ Moni, impugning the judgment dated 27.07.2023 and order dated 02.08.2023, passed by the learned Sessions Judge-cum-Special Judge, Morigaon, Assam, in NDPS Case No. 71/2021, whereby the appellant was convicted under Section 21(c) of the NDPS Act, 1985 and was sentenced to undergo rigorous imprisonment for 10(ten) years and to pay a fine of Rs. 1,00,000/- (Rupees One Lakh only) and in default of payment of fine to undergo further imprisonment for 1(one) year.
- 3.** The facts relevant for consideration of the instant criminal appeal, in brief, are as follows:
 - i.** that on 28.09.2021, one Sri Mridul Hazarika, SI of Police had lodged an FIR before the Officer-In-Charge of Moirabari Police Station, *inter alia* alleging that on that day, at about 2:30 AM, he received an information through reliable sources that Md. Manirut Jaman @ Moni, who was also required in connection with Moirabari P.S.

Case No. 398/2021 has stored huge quantities of suspected narcotic drugs in his house.

- ii.** On receipt of the said information, the first informant accompanied by the Officer-In-Charge of Moirabari Police Station, rushed to the spot after taking necessary permission from the Circle Inspector of Lahorighat. On reaching the house of the appellant, the informant and other police team found the appellant in his residence and on conducting search therein 13 numbers of Eskuf Codeine Phosphate Syrup were recovered from his possession.
- iii.** On receipt of the aforesaid FIR, Moirabari P.S. Case No. 398/2021 was registered under Section 21(c)/25 of the NDPS Act, 1985 and the investigation was initiated.
- iv.** Ultimately, on completion of the investigation, charge-sheet was laid against the above-named appellant under Section 21(c)/25 of the NDPS Act, 1985.
- v.** The appellant was arrested on the date of recovery of contraband from his residence, i.e. on 28.09.2021, and he faced the trial remaining in custody.
- vi.** On 15th December 2021, after hearing the submissions made by both the sides and after considering the materials on record, learned Special Judge Morigaon had framed charges, against the appellant, under Section 21(c)/25 of the NDPS Act, 1985. When the said charges

were read over and explained to the appellant, he pleaded not guilty and claimed to be tried.

- vii.** To bring home the charges against the appellant, the prosecution side had examined as many as 6(six) prosecution witnesses.
 - viii.** The appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 during which he has denied the truthfulness of the testimony of prosecution witnesses. He has also stated that he is innocent and police picked him up from his house stating that a warrant of arrest is pending against him. He has also stated that no search was made in his house on that day, when he was picked up and arrested. The appellant, however, adduced no evidence in his defence.
 - ix.** Ultimately, by the judgment which is impugned in this appeal, learned Special Judge, Morigaon had convicted and sentenced the appellant in the manner as discussed in the paragraph No. 2 of this judgment herein above.
- 4.** Before considering the rival submissions made by learned counsel for both the parties, let me go through the evidence adduced by the prosecution witnesses, during the trial, which is available on record.
- 5.** PW-1, namely, Anowar Hussain has deposed before the Trial Court that he is the Government Gaonburah of Gariabori Pathar, Gariabori Gaon, and In-Charge Gaonburah of Durabnahi

Gaon and Durabnahi Pathar. He has deposed that on 28.09.2021, at about 3:00 AM, the police personnel of Moirabari Police Station called him to the residence of the appellant and accordingly, he reached there within 5 to 7 minutes. He has further stated that upon his arrival, the police knocked the door of the house of the appellant and called him. The appellant opened the door and thereafter, police searched the residence of the appellant and recovered expired medicines in a carton and also cough syrup bottles. He submitted that the police had seized those cough syrup bottles. He had exhibited seizure list as Exhibit P-1/PW-1 and his signatures thereon as Exhibit P-1(i).

- 6.** During cross-examination PW-1 has deposed that he had forgotten the exact numbers of cartons, however, there might have been 15-20 cartons having 24 bottles in each carton. He has answered in negative to certain suggestive questions put to him by the learned defence counsel.
- 7.** PW-2, namely, Abul Kashem, has deposed that the appellant is known to him and on 28.09.2021, at about 3:00 AM, the personnel of Moirabari Police Station came to his house, and took him along with them to the house of the appellant, along with the Gaonburah Anowar Hussain. He has further deposed that they reached the house of the appellant at about 3:30 AM, and police knocked the door of the house of the appellant and when the appellant opened the door, the police entered into his

house and conducted search therein. It is also deposed by PW-2 that during search various medicines like substances were found from his house and some of them were kept in a gunny bag in the veranda of the house. Those were in bottles. He has further deposed that the bottles were seized by the police and he signed on the seizure list. He exhibited the seizure list as P-1/PW-1 and his signatures thereon as Exhibit P-1(ii).

- 8.** During cross-examination PW-2 has deposed that he saw one bag outside veranda only and he did not look into the said bag. He has also deposed that he had not gone through the content of the seizure list and seized articles were not shown to him.
- 9.** PW-3, namely, Mridul Hazarika had deposed that on 28.09.2021, he was posted as Officer-In-Charge of Moirabari Police Station. On that day, at about 2:30 AM, he received one information through secret sources regarding concealment of huge quantity of narcotic drugs in the residence of the appellant. Accordingly, G.D. Entry No. 598 dated 28.09.2021 was made at 2:30 AM. The extract copy of said G.D. Entry is exhibited as P-2/PW-2 and the signatures of PW-3 thereon is exhibited as Exhibit P-2(i). PW3 has further deposed that thereafter on 3:30 am, he along with SI Kiran Dihingiya and other police staff reached the residence of the appellant and conducted search therein. He has further deposed that during search operation, he found one black colour polythene packet kept on the wall of the veranda and after opening the said bag,

he found 13 bottles of 100 ml each of Eskuf codeine based cough syrup. He has further deposed that thereafter he seized those bottles in presence of witnesses. He exhibited the seizure list as P-1 and his signatures thereon as P-1(iii). He has further deposed that thereafter the appellant was apprehended and was brought to the police station, along with the seized articles. The seized articles were kept in police malkhana. On that day, i.e. on 28.09.2021, at about 11:00 AM, he lodged the FIR, which is exhibited as Exhibit P-3 and his signatures thereon as Exhibit P-3(i). He has further deposed that thereafter Moirabari P.S. Case No. 398/2021 was registered and Mr. M.A. Bora, SI of Police was entrusted to conduct the investigation. He has also deposed that he had given his seizure report to his immediate superior officer. He has also deposed that he prepared the inventory of the seized article on 29.09.2021 and produced the seized article before the Court with an application for certification under Section 52A of the NDPS Act, 1985. He has exhibited the inventory dated 29.09.2021 as Exhibit P-4. He also exhibited the application made under Section 52A of the NDPS Act, 1985 as Exhibit P-5. He has also submitted that the samples from the seized bottles were drawn in presence of the Magistrate from seized cough syrup bottles and samples were sent to Forensic Laboratory through SP Office. He has further deposed that photograph of seized articles were taken in presence of and counter-sign by the Magistrate. He exhibited

the photographs of seized contraband as Exhibit P-6. He has also deposed that the Magistrate had issued the certificate by certifying the correctness of photographs and the inventory. Exhibit P-6. (i) is the certificate given by the Magistrate on the body of photograph and Exhibit P-4(ii) is the certificate given by the Magistrate on the body of the inventory.

- 10.** During cross-examination, he has deposed that he had asked the Gaonburah and the inmates of the house of the accused to search his body, but has not mentioned the same in the case diary. He has also deposed that he did not note about the number of persons living in the house from where the cough syrup were recovered. He has also deposed that for keeping the seized seizure list in malkhana, a malkhana register has to be maintained. He has also deposed that while giving his statement to the Investigating Officer, he did not state that seized articles were kept in police malkhana. He had answered in negative to certain suggestive questions put to him by the learned defence counsel.
- 11.** PW-4, namely, Jiabur Rahman, has deposed that on 28.09.2021 at about 6:00 AM, police personnel went to the residence of the appellant where the police also called PW-4 and he was asked to sign one paper where he had put his thumb impression. At this stage, PW-4 was declared as hostile and during cross-examination by the prosecution side, he has answered in negative to the suggestions put to him by the prosecution side.

- 12.** During cross-examination by the learned defence counsel, PW-4 has deposed that police did not show any article to him and police took his signatures on white papers.
- 13.** PW-5, namely, Sri Chandan Das has deposed that on 29.11.2021, while he was working as Scientific Officer, Drugs and Narcotics Division, at DFS, Assam, Kahilipara his Office received one parcel dated 30.09.2021 in connection with Moirabari P.S. Case No. 398/2021 for examination of the contents thereof. He has also deposed that one sealed envelope marked as "EXHIBIT-A" having a sealed plastic bottle with 100 ml of liquid substances branded as "Eskuf", which was marked by him as DN-1991/2021 was required to be examined. He has further deposed that after examination, the said Exhibit gave positive tests for codeine phosphate and the amount of codeine phosphate found in the said exhibit was 180.2 mg. He has exhibited his report as Exhibit P-9/PW5, wherein his signature was exhibited as Exhibit P-9/1.
- 13.1** During cross-examination PW-5 has deposed that the samples were received at their office and thereafter the Director had handed over the same to him for chemical examination. He has also deposed that in his report he has not mentioned the batch number of sample received.
- 14.** PW-6, namely, Muktab Ali Bora, SI of Police, who is the Investigating Officer of the case, has deposed that on 28.09.2021, while he was posted as Attached Officer at

Moirabari Police Station, he was entrusted with the investigation of Moirabari P.S. Case No. 398/2021 under Section 21(c)/25 of the NDPS Act, 1985. He has deposed that he recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1973 and prepared the sketch-map of the place of occurrence, which is exhibited as Exhibit P-10, wherein his signature is exhibited as Exhibit P-10(i). He has also submitted that on that day, he filed one petition under Section 52A of the NDPS Act, 1985 for drawing of the samples and for taking photographs and issuance of certificates and certification of correctness of the inventory. He exhibited the said petition as Exhibit P-11. PW-6 has further deposed that the samples were drawn in presence of a Magistrate. He has also submitted that he obtained the certificates under Section 52A about correctness of the inventory and another certificate showing correctness of the photographs of the seized contraband. He exhibited the said certificates as Exhibit P-12 and Exhibit P-13 respectively. He also exhibited the photographs of the seized articles as Exhibit-14. He has also submitted that he collected the Forensic Laboratory Report which gave the test of "heroin" and on completion of the investigation, he submitted the charge-sheet against the appellant under Section 21(c)/25 of the NDPS Act, 1985. He has exhibited the charge-sheet as Exhibit P-15, wherein, his signatures is exhibited as Exhibit P-15(i).

- 15.** During cross-examination, he has deposed that the earlier Investigating Officer had kept the seized article in police malkhana. He has also deposed that the seized contraband was recovered from the veranda.
- 16.** We have already discussed herein before that during his examination under Section 313 of the Code of Criminal Procedure, 1973, the appellant has pleaded his innocence and denied the truthfulness of the testimony of prosecution witnesses. He has also stated that the police picked him up from his house by stating that a warrant of arrest is pending against him. He also stated that on that day no house search was made by the police in his house.
- 17.** Mr. N.N.B. Choudhury, learned counsel for the appellant has submitted that in this case the trial got vitiated due to non-compliance of the mandatory provisions under Section 52 A of the NDPS Act, 1985. He has submitted that as per Section 52A(2)(c), the Investigating Officer/Officer-In-Charge of Police Station has to make an application to any Magistrate for the purpose of allowing to draw representative samples of such drugs or substance, in the presence of such Magistrate and certifying the correctness of the list of such samples so drawn.
- 18.** The learned counsel for the appellant has submitted that in the instant case, no list of sample was prepared and certified as mandated by Section 52A of the NDPS Act, 1985.
- 19.** The learned counsel for the appellant has submitted that

Section 52A (2) mandates three things under clause a, b and c, namely: -

- a. Certification of the correctness of inventory so prepared;
- b. Certification of the photographs of the contraband which were taken in presence of the Magistrate; and
- c. Certification of the correctness of any list of samples drawn in presence of the Magistrate.

- 20.** However, the learned counsel for the appellant submits that in the instant case, no list of samples was prepared and therefore, there is a flagrant violation of the mandatory provisions of Section 52A of the NDPS Act, 1985 in this case.
- 21.** The learned counsel for the appellant has also submitted that PW-3, who is the Officer-In-Charge of Moirabari Police Station has exhibited only two certificates, namely, Exhibit-P-6(i) which is the certificate given regarding the genuineness of the photograph and P-4(ii), which is the certificate regarding the correctness of the inventory. He submits that no certificate regarding the list of samples as mandated by Section 52A of the NDPS Act, 1985 was given in this case.
- 22.** The learned counsel for the appellant has also submitted that the procedural requirement to be followed under Section 52A of the NDPS Act, 1985 is mandatory in nature.
- 23.** To buttress his submission, the learned counsel for the appellant has cited a ruling of the Apex Court of India in the

case of "***Union of India Vs. Mohanlal*** reported in **(2016) 3 SCC 379.**"

24. He has also cited following rulings of the Apex Court to show that non-compliance of mandatory provisions of Section 52A of the NDPS Act, 1985 would vitiate the trial: -

- a. "*Bothilal Vs. Narcotics Control Bureau*"** reported in **2023 SCC Online SC 498;**
- b. "*Simarnjit Singh Vs. State of Punjab*"** reported in **2023 SCC Online SC 906;**
- c. "*Yusuf @ Asif Vs. State*"** reported in **2023 SCC Online SC 1328.**

25. The learned counsel for the appellant has also submitted that the prosecution side also failed to exhibit the seized contraband or the representative sample thereof, which was necessary to be produced before the Trial Court during trial and such non-production is fatal to the prosecution case. In support of his submission, the learned counsel for the appellant has cited following rulings: -

- a. "*Noor Aga Vs. State of Punjab*** reported in **(2008) 16 SCC 417;"**
- b. "*Vijay Jain Vs. State of M.P.*** reported in **(2013) 14 SCC 527;"**
- c. "*Vijay Pandey Vs. State of Uttar Pradesh*** reported in **(2019) 18 SCC 215."**

26. The learned counsel for the appellant has also submitted that the sample of the seized contraband was not drawn in pursuant

to the procedure laid down by the Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022. Hence, it is submitted that the conviction of the appellant under Section 21(c) of the NDPS Act, 1985 is liable to be set aside.

- 27.** The learned counsel for the appellant has also submitted that the prosecution side has failed to show that the chain of custody of the contraband seized was properly maintained.
- 28.** It is submitted that though the police witnesses have deposed that the seized contraband was kept in Police Malkhana after its seizure. However, no malkhana register was exhibited and the prosecution side has failed to show as to whether the seized contraband as well as sample drawn therefrom was kept safely before it was sent to the forensic laboratory for examination.
- 29.** The learned counsel for the appellant has also submitted that the prosecution side has failed to prove the chain of custody of the samples after it was drawn from the contraband before learned Magistrate, till it reached the forensic laboratory for examination, it makes the prosecution case very weak and on that ground itself, the appellant is liable to be acquitted.
- 30.** To buttress his submission, the learned counsel for the appellant has cited following rulings:-

- a. *“State of Rajasthan Vs. Gurmail Singh”* reported in (2005) 3SCC 59;
- b. *“State of U.P. Vs. Hansraj”*

reported in (2018) 18 SCC 355;
c. “Mohammed Khalid & Anr. Vs.
State of Telangana” reported in 2024
SCC Online SC 213.

- 31.** The learned counsel for the appellant has also submitted that there is also other glaring inconsistencies between the testimonies of prosecution witnesses which makes the prosecution case very weak. He submits that though the forensic laboratory report shows that the samples which were sent for forensic laboratory examination were found to contain “codeine phosphate”, however, PW-6, who is the Investigating Officer of the case, has deposed before the Court that the forensic laboratory examination of the seized contraband showed that the seized contraband contains “heroin”.
- 32.** The learned counsel for the appellant has also submitted that though the seizure list shows that the contraband was seized at about 3:45 PM, on 28.09.2021, however, all the seizure witnesses have stated that the seizure was made at 3:30 AM on 28.09.2021. The learned counsel for the appellant has submitted that this glaring inconsistency has been overlooked by the learned Special Judge, Morigaon while arriving at a finding of guilt of the appellant.
- 33.** The learned counsel for the appellant has, therefore, submitted that the prosecution side has failed to prove the guilt of the appellant beyond all reasonable doubt, however, the said fact

was totally overlooked by the learned Special Judge, Morigaon, while convicting the appellant under Section 21(c) of the NDPS Act, 1985. Hence, he submits that the conviction of the appellant is liable to be set aside and the appeal filed by the appellant may be allowed.

- 34.** On the other hand, Mr. R.J. Baruah, learned Additional Public Prosecutor has submitted that the prosecution side has followed all the mandatory procedural requirements during the investigation as well as during the trial.
- 35.** The learned Additional Public Prosecutor has submitted that all the mandatory requirements of Section 52A of the NDPS Act, 1985 were duly followed by the prosecution side. He has submitted that the inventory which is required to be prepared under Section 52A of the NDPS Act, 1985 was duly prepared and correctness of the same has also been certified by the Magistrate on the body of the inventory itself which has been exhibited as Exhibit-P-4 by the prosecution side.
- 36.** The learned Additional Public Prosecutor has also submitted that the Exhibit P-6 which is the photographs of the seized contraband has also been certified for its correctness by the learned Judicial Magistrate.
- 37.** The learned Additional Public Prosecutor has submitted that in order dated 29.09.2021, passed in Moirabari P.S. Case No. 398/2021, the learned Judicial Magistrate 1st Class, has allowed the prayer made by the Investigating Officer regarding the

following matters: -

- a. For certifying the correctness of inventory;
 - b. For permitting taking photographs of the seized items in the inventory and to certify its correctness;
 - c. For allowing to draw representative samples in front of the Magistrate and thereafter, certify the correctness of the sample so drawn.
- 38.** Thus, he submits that from the order dated 29.09.2021, it is apparent that mandatory provision of Section 52A (2) was complied with in the instant case. He also submits that though in the inventory prepared in this case, no batch number of the seized cough syrup bottles have been mentioned, however, as the inventory has been certified to be correct by the Magistrate, the same would not get vitiated merely for not mentioning the batch number therein.
- 39.** The learned Additional Public Prosecutor has also submitted that as the inventory and photographs of the sample of the seized contraband after certification may be used as primary evidence in respect of offence, hence, production of seized contraband or the representative sample thereof during the trial is not necessary and such non-production would not in any manner effect the prosecution case adversely.
- 40.** The learned Additional Public Prosecutor has therefore submitted that in this case, the learned Sessions Judge-cum-

learned Special Judge, Morigaon has correctly arrived at the finding of guilt of the appellant and same requires no interference by this Court in this appeal. He, thus, prays for dismissal of the appeal.

- 41.** I have considered the submissions made by learned counsel for both the sides and have gone through the materials available on record, including the Trial Court records of NDPS Case No. 71/2021, which was called for in connection with this case.
- 42.** I have also gone through the rulings cited by learned counsel for both the sides in support of their respective submissions.
- 43.** On perusal of the seizure list of the suspected contraband which is exhibited as Exhibit P-1 (PW1), it appears that date and time of the seizure mentioned therein is as "on 28.09.2021 at 3:45 PM", however, all the prosecution witnesses have stated that the seizure was mentioned early in the morning around 3.30 AM. None of the prosecution witnesses has stated that the seizure of the contraband was made at 3:45 PM, in the afternoon, at the residence of the appellant, which is a glaring inconsistency, which appears to have been overlooked by the learned Special Judge, Morigaon.
- 44.** Learned Special Judge, Morigaon also appears to have overlooked a fact that all the seizure witnesses have given different account of the seizure of the contraband. Whereas, the PW-1 has deposed that the Cough syrup bottles were recovered from a carton, however, the PW-2 has deposed that

the Cough syrup bottles were seized from a gunny bag. On the other hand, the PW-3 as deposed that the Cough syrup bottles were recovered from a black coloured plastic bag. These inconsistencies adversely affect the probative value of the evidence tendered by such witnesses and creates reasonable doubt regarding the seizure of the contraband from the house of the appellant as alleged.

- 45.** Moreover, on perusal of Exhibit P-5, which is the application made by the Officer-In-Charge of Moirabari Police Station on 29.09.2021 under Section 52 A of the NDPS Act, 1985 requesting the Magistrate to do the following things: -
- a. Certify the correctness of the inventory;
 - b. Permit taking photographs in presence of the Magistrate, of the seized items and to certify such photographs as true;
 - c. Allow drawing of the representative samples in presence of the Magistrate and certify the correctness of the list of samples so drawn.
- 46.** It appears that by order dated 29.09.2021, passed in Moirabari P.S. 398/2021 though the learned Magistrate had allowed the said prayer, however, it appears that no separate list of samples drawn was prepared in this case, neither any certification of such a list was in fact made by the learned Magistrate. It also appears that though in the order dated 29.09.2021, the total weight of cough syrup bottles seized was

stated to be 1300 ml with weight of each cough syrup bottle to be 100 ml and though batch number was also mentioned in the order as DESL041. However, no separate list of samples drawn was prepared and the veracity of same was certified by the Magistrate as mandated by Section 52A(2)(c) of the NDPS Act, 1985.

- 47.** For the sake of convenience, relevant sub-sections of Section 52 A of the NDPS Act, 1985 are reproduced hereinbelow:-

“52A. Disposal of seized narcotic drugs and psychotropic substances.-

(1) —

(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 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 or 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 subsection (2), the Magistrate shall, as soon as may be, allow the application.*

(4) *Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Criminal Procedure Code, 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 subsection (2) and certified by the Magistrate, as primary evidence in respect of such offence.”*

48. In the case of “***Yusuf @ Asif Vs. State***” reported in “**2023 SCC Online SC 1328**”, the Supreme Court of India has observed as follows: -

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.

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."*

49. In the case of ***Union of India Vs. Mohanlal*** (supra), the Apex Court of India has observed as follows: -

“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."

- 50.** In the instant case, it was required that after drawing of representative samples, a list of such samples should have been prepared containing such details relating to its description, quality, quantity, mode of packing, batch No. or other such identifying particulars of the sample drawn and thereafter the correctness of the list of samples so drawn should have been certified by the Magistrate. However, in the instant case, it appears that no list of representative samples

drawn was prepared, hence certification regarding the correctness of same by the Magistrate does not arise. This seems to be violation of the mandatory procedural requirement as envisaged by section 52 A of NDPS Act, 1985.

51. This Court is of considered opinion that as the Apex Court has observed in a catena of its rulings that the compliance with the procedural requirement of Section 52A of the NDPS Act, 1985 is mandatory in nature and any non-compliance would create serious doubt about the veracity of the prosecution case. Hence, in the instant case also, this court is of considered opinion that due to non-compliance of the mandatory procedural requirement of Section 52 A of the NDPS Act, 1985, the prosecution side has failed to prove the guilt of the appellant beyond all reasonable doubt. Accordingly, the conviction of the appellant under Section 21(c) of the NDPS Act, 1985 in the considered opinion of this Court is unsustainable, therefore, same is liable to be set aside.

52. There also appears to be force in the submissions of learned counsel for the appellant that chain of custody was not maintained while sending the samples after its drawal from the contraband till it reached the Forensic Laboratory for its examination. It appears that though the PW-6 has deposed that the contraband was kept in Police Station Malkhana, however, apart from oral testimony nothing was produced to substantiate this evidence. No malkhana register was produced

to show that the samples which were drawn from the contraband were kept in malkhana before it could be sent to the Forensic Laboratory for its examination.

- 53.** We have seen that no list of samples was prepared in this case. One another disturbing aspect in this case is that, though the inventory (Exhibit-P-4) was certified by the learned Magistrate, however, on perusal of the said inventory, it appears that same was not prepared conforming to the requirements as mandated under Section 52 A of the NDPS Act, 1985. It is provided in Section 52 A of the NDPS Act, 1985 that the concerned officer 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 proceedings under this Act. However, in the instant case the inventory mentions only about the name of the seized cough syrup, i.e., "Eskuf" and no other details relating to its description like mode of packing, marks, numbers or such other identifying particulars of the contraband or the packing in which it was packed,

country of origin and other particulars has been mentioned in the inventory (Exhibit-P-4). Moreover, in the absence of a list of samples, there is nothing on record to show that the sample examined by the Forensic Laboratory was drawn from the lot of 13 cough syrup bottles which were alleged to have been seized from the house of the appellant.

- 54.** The penal provisions of the NDPS Act, 1985 prescribes very harsh punishment for the offender, therefore, it is incumbent for the prosecution side that the mandatory procedural requirement to be followed by the prosecution in such a case are to be strictly followed. Any lapse on that count would dent the prosecution's case and would give advantage to the accused.
- 55.** In the instant case, there are irreconcilable contradictions in the evidence of the prosecution side, as well as there are lapses in not following the mandatory procedural requirements, for which the conviction of the appellant, by the impugned judgment, in the considered opinion of this Court, is not sustainable.
- 56.** For the reasons discussed in the foregoing paragraphs, this Court is of considered opinion that the prosecution side has miserably failed to prove the guilt of the appellant under Section 21(c) of the NDPS Act, 1985. Accordingly, the impugned judgment is hereby set aside.
- 57.** The appellant is acquitted of charge under Section 21(c) of the

NDPS Act, 1985.

- 58.** The appellant shall be released forthwith if not wanted in connection with any other case.
- 59.** The appeal is accordingly allowed.
- 60.** The Registry is directed to send back the Trial Court records to the concerned court along with a copy of this judgment immediately.

JUDGE

Comparing Assistant