

IN THE COURT OF THE SPECIAL JUDGE::::UDALGURI

**Present : Sri. P. Saikia,
Special Judge,
Udalguri.**

**SPL (NDPS) 17/2017
(U/S 20 (b) NDPS Act)**

State of Assam

-Vs-

**(1) Anjan Sarma,
S/O Ranjit Sarma
Village- Ward No. 2 Nalbari.
(2) Himan Rabha,
S/O Golok Rabha
Village- Nalbari
Both of PS- Udagluri,
District- Udalguri. Assam
.....Accused.**

For the Prosecution : Mr. A. Basumatary, Public Prosecutor.

**For the Accused : Mr. M.C. Narzary, and
Mr. R. Khakhly, Learned Advocate.**

Date of Evidence : 29.5.18,5.7.18, 9.11.18, 17.6.2019.

Date of argument : 19.8.2019.

Date of judgment : 29.8.2019.

J U D G M E N T

1. The run up of the fact to the prosecution case, in brief, is that on 15/02/17 Tarun Ch. Nath ASI of police of Kalaigaon police station lodged an FIR with the Officer-In-Charge of Kalaigaon police station that on 14/02/17 at about 7:15 PM at Bakultal Chowk they were on a NAKA checking duty with probation DSP namely Surjya Kanta Maran, commando party and other police staff. In course of NAKA checking duty one Indica vehicle bearing registration

number AS01/BB-1749 was coming from Udalguri side. They gave signal to stop the vehicle but the driver of the vehicle refused to stop the vehicle. However they could manage to detain the vehicle. On checking of the vehicle they found a bag containing suspected cannabis (Ganja) and there were two persons inside the vehicle. On being interrogated the driver of the vehicle identified himself as Anjan Sarma and the other person sitting on the front side of the vehicle identified himself as Himan Rabha. Then they informed the Officer-In-Charge of Kalaigaon PS, who immediately rushed to the place of occurrence and did other works regarding investigation. The officer-in-charge of the police station seized the suspected cannabis (Ganja) along with the vehicle and also arrested the accused persons. Thereafter the accused persons alongwith the seized cannabis (Ganja) and the vehicle were brought to the Kalaigaon police station. During the investigation the investigating officer sent the samples of suspected cannabis (Ganja) to the forensic science laboratory (FSL) for examination. As per the FSL report the sample of the seized cannabis (Ganja) gave positive test for cannabis (Ganja) and accordingly submitted charge sheet against the accused persons Anjan Sarma and Himan Rabha U/S 20(b) NDPS Act to face trial in the court.

2. On receipt of the charge-sheet and upon perusal of the materials on the case record in its entirety my learned predecessor in office having found a prima facie case and sufficient ground for proceeding against accused persons framed formal charge U/S 20(b) of NDPS Act. The charge so framed on being read over and explained to accused persons to which they pleaded not guilty and claimed to be tried.

3. In order to establish its case, the prosecution all together examined 8 (eight) witnesses including the informant and the investigating officer of the case. That apart, the prosecution has also relied on some documents bringing on record.

4. On conclusion of the recording evidence of the case the accused persons namely Anjan Sarma and Himan Rabha in their statements recorded

U/S 313 CrPC took a common plea of denial that the seized cannabis (Ganja) was recovered from their vehicle. According to them they have been falsely implicated and, therefore, pleaded their innocence. However, they have admitted that the police detained their vehicle while they were coming towards Udalguri at Bakultal under Kalaigaon police station.

5. Against the above backdrop of the fact and circumstances of the case, the points for determining in the present case are...

- I) Whether on 14-02-17, 17 KG of cannabis (Ganja) were recovered from the exclusive and conscious possession of the accused persons from their vehicle bearing Registration number AS01/BB-1749 (Indica Vista colour silver)?
- II) Whether the accused persons brought the cannabis (Ganja) in the vehicle bearing Registration number AS01/BB-1749 for the purpose of sale with conscious possession without any lawful authority?

6. I have heard the arguments advanced by the learned counsel for both the side and also carefully scanned the materials on record on its entirety.

Decision thereon with reasons for decisions thereof:-

7. PW-1, Tarun Ch. Nath ASI of police, Rowta PS is the informant of the case. He has deposed to the effect that on 14-02-17 he was posted at Kaliaigaon PS as ASI of police. On that day at about 7 PM at Bakultal chowk he along with probation DSP Surjya Kanta Maran along with police staff were conducting NAKA checking duty. During that time one Indica vehicle came from Kabirali side towards Mangaldai. Though they gave signal to stop the vehicle but the vehicle refused to stop. However, they managed to restrain the vehicle for checking. During checking of the vehicle they found a bag containing suspected cannabis (Ganja) like substance in the dickie of the vehicle. Then they informed the officer-in-charge of Kalaigaon police station. On getting such information officer-in-charge of Kalaigoan police station

immediately came to the place of occurrence and did other works regarding investigation. He lodged an FIR in this regard. He has proved and marked the FIR. Ext. 1 is the FIR. Ext. 1(1) is his signature. The two persons who were apprehended by them at the place of occurrence are Anjan Sarma and one Rabha who are present in the dock of the court. He handed over the vehicle alongwith the articles to the officer-in-charge Kalaigaon police station.

In cross examination, he has stated that Anjan Sarma was the driver of the vehicle. The Dy. Superintendent of police Surjya Kanta Maran and unarmed branch constable Satish Bora were present at the place of occurrence. DSP Surjya Kanta Maran and he himself checked the dickie. Weighment of the seized cannabis (Ganja) was taken at the place of occurrence by the officer-in-charge Kalaigaon police station. The weight of the article was about 17 KG. He does not know when the articles were sent to forensic science laboratory (FSL). At the time of taking samples no magistrate was present. He has denied the defence suggestion that the articles were not recovered from the vehicle of the accused persons and the said bag was found on the road and he has falsely implicated the accused persons showing that the bag was recovered from their vehicle.

8. PW-2, Satish Borah is a unarmed branch constable, Kaliagon PS. According to his evidence on 14-02-17 he along with DSP, ASI Tarun Ch. Nath and commando staff conducted NAKA checking duty. At that time one white coloured Indica was coming from Kabirali side towards Mangaldai. They gave signal but the driver refused to stop the vehicle. However, the commando party managed to restrain the vehicle and on checking they found a plastic bag in the dickie of the vehicle containing cannabis (Ganja) like substance. The vehicle was driven by accused Anjan Sarma. On being informed the officer-in-charge, Kalaigaon police station came to the place of occurrence and weighed seized articles.

In cross examination, he has revealed that plastic bag was brought by commando party. The measuring scale with weights were brought from a nearby shop by their officer and weighed the recovered suspected cannabis (Ganja). The name of the owner of the shop is Kamaleswar. At the time of search and seizure, shops were open and people were present at the spot.

No magistrate was present at that time. He does not know regarding taking of samples. He has denied the defence suggestion that the articles were not recovered from the vehicle of the accused and the said bag was found from road and he falsely implicated the accused showing that the bag was recovered from their vehicle.

9. PW-3 is Surjya Kanta Maran who is presently working as DSP (HQ) Dima Hasao. He has testified to the effect that on 14-02-17 he was posted as Dy. Superintendent of police at Udalguri. On that day, he along with Tarun Ch. Nath, Satish Bora and commando party established a NAKA checking. He stopped a vehicle Indica but he did not stop. However they managed to stop the vehicle with the help of their commando party. Accused Anjan Sarma was in the driving seat. On being ordered accused Anjan Sarma alighted from the vehicle. When they opened the dickie of the vehicle they found cannabis (Ganja) like substance. He informed the officer-in-charge of the Kalaigaon PS who came to the place of occurrence immediately. The officer-in-charge of Kalaigaon police station conducted investigation of the case under NDPS act. Investigation regarding measurement, packing etc. was done by the officer-in-charge Kalaigaon police station.

In cross examination, he has stated that the officer-in-charge Kalaigaon police station prepared seizure list on the spot and also took the signatures of the seizure witnesses then and there at the place of occurrence. The packets were closed with gum but he seal was made at the police station. He was not present at the time of making seizure of the packets. He does not know as to whether civilian witnesses were present at the time. No magistrate was present at the time of sealing. He has denied to the defence suggestion that articles were not recovered from the vehicle of the accused and the said bag was found on the road and he falsely implicated the accused showing that bag was recovered from their vehicle.

10. PW-4, Amit Singha is a seizure witness. As per his testification he knows the informant of this case Tarun Ch Nath who is a police officer. On 14-02-17 the police officer Tarun Ch Nath and other police staff were conducting checking at Kalaigaon town. At that time one Indica vehicle was coming from Udalguri towards Kalaigaon. When the vehicle reached the

police checking point the police signalled to stop the vehicle but the driver of the vehicle refused to obey the stop signal. Then police restrained the vehicle from proceeding and conducted search in the vehicle and managed to recover one bag from the dickie of the vehicle and opening the bag it was found that the bag contained suspected contraband cannabis (Ganja). The accused persons who are present in the dock were found inside the vehicle. Later police weighed the seized bag in his presence and found 17 KG of contraband cannabis (Ganja) and he put his signature in the seizure list. He has proved and marked the seizure list as Ext 2 and Ext. 2(1) is his signature. Later the accused persons were taken into custody by police .

In cross examination, he has stated that he owns utensil shop near the place of occurrence. The place where the vehicle was stopped by the police is 20 metres away from his shop. The police personnel were conducting NAKA checking at the place of occurrence from 7 PM. The vehicle came near the checking point at about 7:20 to 7:30 PM. The police give signal to stop the vehicle being occupied by the accused persons but they did not stop the vehicle. However, due to immediate interception, the police managed to detain the vehicle. As his shop is close to the checking point which is also a traffic point during that time he was standing near the traffic point. As soon as the vehicle was intercepted by police he proceeded to the police station and at that time there were many persons at the traffic point. When the vehicle was stopped the accused persons were inside the vehicle and they unlocked the dickie of the vehicle for conducting checking by the police. He does not remember as to which of the accused had opened the dickie. When the police recovered the bag containing suspected cannabis (Ganja) in the dickie of the vehicle he was standing at a distance of about 5 meters from the police point. The suspected cannabis (Ganja) was kept inside a plastic bag. The seizure list of contraband cannabis (Ganja) was prepared and his signature was taken at the spot after showing him the suspected cannabis (Ganja) contained in the bag. He has denied the defence suggestion that the seized contraband cannabis (Ganja) had not been recovered from the accused persons who were in the vehicle. He has further denied the defence suggestion that seized contraband cannabis (Ganja) had been recovered from someone else and not from the accused persons.

11. PW-5, Bijoy Dhar is another seizure witness. His evidence discloses that on 14-02-17 he was proceeding from his house to Kalaigaon town. When he reached Kalaigaon traffic point he saw gathering of crowd in that traffic point. Out of curiosity he went there then he saw police recovered one bag containing contraband cannabis (Ganja). The police showed the recovered contraband cannabis (Ganja) kept inside the bag to all the persons gathered there. Thereafter the police prepared seizure list where he put his signature as witness thereon. Ext. 2 is the seizure list of the contraband cannabis (Ganja). Ext. 2(2) is his signature. Before weighing contraband cannabis (Ganja) police also seized one weighing scale with weights from one shop and he put his signature in the seizure list which is marked as Ext. 3 wherein Ext. 3(1) is his signature.

In cross examination, he has disclosed that he does not know as to wherefrom the police recovered the contraband cannabis (Ganja).

12. PW-6 Amalesh Sarkar is also a seizure witness. He has deposed to the effect that he knows the informant of the case but he does not know the accused persons present in the dock. In the month of February 2017 one day police were conducting checking at Kalaigaon police point near his shop at around 7-7:30 PM. During that time an Indica vehicle came in that way and the same was stopped by police and brought some suspected cannabis (Ganja) like substance in a plastic bag from the said vehicle. Police also came to his shop and asked him to hand over his measuring scale and weight for weighing the suspected cannabis (Ganja) recovered from the vehicle and accordingly, seized his measuring scale and weights in his presence. In a moment police came to his shop and returned the measuring scale with weights which were seized from him. Ext. 2 is the seizure list of the contraband cannabis (Ganja) and one Indica vehicle. Ext. 2(3) is his signature. Ext. 3 is the seizure list of weighing scale and weight. Ext. 3(2) is his signature.

In cross examination, he has revealed that he has a hardware shop near the Kalaigaon police point. Police off and on conduct checking in that spot. At the time of incident he was at his shop. Police weighed the recovered cannabis (Ganja) in his shop from a vehicle which was caught by police. The

police took his signatures in the seizure list after writing something there. He does not know what was written in the seizure list. He did not see the accused persons when the police recovered suspected cannabis (Ganja) contained in a plastic bag.

13. PW 7 Gajendra Nath Deka, Director of Forensic Science, Assam, Kahilipara has deposed in his evidence that on 17-02-17 while he was posted as Joint Director, Regional Forensic Science Laboratory, Assam, vide Memo No. UDL/ Crime/ FSL-26 / 2017/ 467-68 dated 16.2.2017 he received one parcel per messenger in connection with Kalaigaon P.S. case No.16/2017 U/S 20(b) NDPS Act. The parcel consists of three exhibits enclosed in a sealed envelope cover. The facsimile of the seal was found to be "S.P. UDALGRRI"

DESCRIPTION OF ARTICLES

Three sealed envelopes marked as Exhibit-"A", Exhibit-"B" and Exhibit-"C" respectively containing 49g, 41g and 42g dry plant materials respectively marked here as DN-53/2017(a) to DN-53/2017(c) accordingly.

RESULT OF EXAMINATION:-

The Exhibits DN-53/2017(a) to DN-53/2017(c) gave positive tests for Cannabis (Ganja).

His report was forwarded to the S.P., Udalguri by the then Director, Sri K.C. Sarma. Ext.4 is his report. Ext.4(1) is his signature. Ext.5 is the forwarding report. Ext.5(1) is the signature of then Director, Sri K.C. Sarma which he knows.

In cross examination, he has stated that he has not mentioned the procedure of examination of report. However, he follows United Nations drugs testing manual. He received dry plant material. In the description of the articles he mentioned only plant material. This cannabis (Ganja) are female plant. Remnants of the samples were sent to the SP Udalguri.

14. PW-8, Dimbeswar Das is presently working as inspector CID Assam Guwahati. His testimony discloses that on 14-02-17 he was posted as the OC

of Kalaigaon police station. At around 7:56 PM, Dy. Superintendent of police, Surjya Kt Moran informed him over telephone that on the same day at about 7:50 PM while he was on NAKA checking duty with commando and police staff at Bakultal chowk, at that time one Indica vehicle bearing registration number AS01/BB-1749 approached towards them and when the car was signalled to stop, the driver refused to stop. However the vehicle was eventually detained and on search they recovered one plastic bag containing suspected cannabis (Ganja). There were two persons inside the vehicle. The driver identified himself as Anjan Sarma and the co-passenger identified himself as Himan Rabha. Accordingly, both of them were apprehended. On the basis of the said information they recorded GD entry No. 322 dated 14-02-17 and proceeded to the place of occurrence. He seized the vehicle as well as the contraband cannabis (Ganja) recovered from the dickie of the vehicle in presence of witnesses. On way to place of occurrence he seized one digital weighing scale and went to the place of occurrence. At the spot itself he measured the suspected cannabis (Ganja) and found 17 KG of suspected cannabis (Ganja). He took 6 packets of samples for sending to FSL at the spot containing 25 grams each. He also seized the vehicle bearing registration No. AS01/BB-1749. Later, the accused persons and the seized vehicle and cannabis (Ganja) were brought to the Kalaigaon police station. In this connection ASI Tarun Ch. Nath lodged FIR in the Kalaigaon police station. He being the officer-in-charge thereof registered a case vide Kalaigaon PS case No. 16/17 U/S 20(b) NDPS Act and launch the investigation of the case. During the investigation he arrested the accused persons and also collected the FSL report. The samples having given the positive result he laid the charge-sheet against the accused persons U/S 20(b) NDPS Act. Ext 2 and 3 are the seizure lists. Ext 2(3) and 3(4) are his signatures. Ext. 6 is the seizure list of documents of vehicle including registration certificate and driving license. Ext. 7 is the sketch map. Ext. 7(1) is his signature. Ext. 8 is the charge-sheet. Ext. 8(1) is his signature.

In cross examination, he has divulged that he went to the place of occurrence after receiving the telephonic information from Dy. Superintendent of police S. Moran. He has not mentioned in the seizure list Ext. 2 as to from whom he recovered and seized the contraband cannabis (Ganja) at the place of occurrence. He only mentioned that he seized the recovered contraband cannabis (Ganja) from the place of occurrence. No

Magistrate was present when sample was collected from the suspected cannabis (Ganja). He did not prepare the inventory of the seized cannabis (Ganja). He sent the samples on 16-02-17 for forensic examination though the same were seized on 14-02-17. He kept his seized samples during that time on the "Malkhana" of the police. He deputed unarmed branch constable Gobind Rabha to send to the forensic science laboratory (FSL) Guwahati on 17-02-2017. As per the receipt the samples were delivered on 17-02-17. He does not remember how many packets of the seized samples were sent to the FSL from the SP office Udalguri though he collected 6 samples from the seized contraband cannabis (Ganja). He does not remember whether he received the remnants of the seized samples along with the report of the FSL. He has denied the defence suggestion that he had not recovered and seized the cannabis (Ganja) from the vehicle bearing registration number AS01/BB-1749 which was driven by accused Anjan Sarma and Himan Rabha who travelled as co-passenger.

15. Mr. A. Basumatary, appearing for the state in support of the prosecution case has seriously argued that prosecution has succeeded to prove the charge against the accused persons on sufficient evidence adduced by the prosecution confirms the mandatory provisions of the NDPS Act.

16. Per contra, Mr. M.C. Narzary and Mr. R. Khakhary counsels for the defence have strenuously argued that the provision of the section 42 & 50 of the NDPS have not been complied with and the alleged contraband had not been in the exclusive possession of the accused persons and as a consequence prosecution has failed to prove its case beyond all reasonable doubt that the accused persons were in exclusive possession of the seized contraband cannabis (Ganja) and therefore accused persons are liable to be acquitted from the charges punishable U/S 20(b) NDPS Act.

17. Before appreciating the rival submissions it would be apposite to advert to the evidence on record in its entirety.

18. On consideration of the above discussion of the evidence on the record, it is amply evident that PW-1 Tarun Ch. Nath the first informant of the case on 14-02-17 was conducting NAKA checking at Bakultal chowk at about 7 PM alongwith DSP Surjya Kt. Moran, PW-3 and police staff. During that time one Indica vehicle came from Kabirali side towards Mangaldai where they gave signal to stop the vehicle but the vehicle refused to stop. However, they managed to restrain the vehicle for checking. During checking, of the vehicle registration number AS01/BB-1749 they found a bag containing suspected cannabis (Ganja) like substance in the dickie of the vehicle. There were two persons in the vehicle apprehended by them. They identified himself as Anjan Sarmah who was driving the vehicle and the co-passenger identified himself as Himan Rabha. Both of them were apprehended and the matter was informed to the officer-in-charge Udalguri police station Dimbeswar Das PW8. On getting such information PW-8 Dimbeswar Das immediately came to the place of occurrence. The recovered suspected cannabis (Ganja) was weighed and found 17 KG which was seized at the spot. In this regard he submitted an FIR as Ext. 1.

19. The evidence of first informant PW 1 Tarun Ch. Nath has been corroborated by the PW 3 Surjya Kt. Moran. He has testified to the effect that on 14-02-17 while he was posted as DSP at Udalguri on that day he along with the informant PW 1 Tarun Ch. Nath and other police staff established a NAKA checking. At that time they signalled to stop an Indica vehicle but the vehicle refused to stop. However, they managed to stop the vehicle with the help of commando party. There were 2 persons in the vehicle, one was driving the vehicle. The driver on being asked to identify himself disclosed his name as Anjan Sarma. When they checked the dickie of the vehicle they found cannabis (Ganja) like substance then they informed the Officer-in-charge of the Kalaigaon PS who came to the place of occurrence immediately and conducted investigation of the case regarding measurement, packing etc. at the spot.

20. The evidence of PW8 Dimbeswar Bora as regards the seizure of the suspected cannabis (Ganja) from the vehicle bearing registration number AS01/BB-1749 would show that on 14-02-17 while he was posted as officer-in-charge of kalaigaon PS at about 07:56 PM, PW 3 Surjya Kt. Moran informed him over telephone that on the same day at about 7:15 PM while they were on NAKA checking duty with commando and police staff at Bakultal Chowk that time one Indica vehicle bearing registration No. AS01/BB-1749 approached towards them and when the car was signalled to stop the driver refused to stop. However, the vehicle eventually stopped and on search they recovered one plastic bag containing suspected cannabis (Ganja). There were two persons inside the car. The driver identified himself as Anjan Sarmah and the co-passenger identified himself as Himan Rabha. Accordingly they were apprehended. On the basis of said information he recorded GD entry and proceeded to the place of occurrence. On way to the place of occurrence he seized one digital weighing scale with weights. At the spot he measured the suspected cannabis (Ganja) and found 17 KG of suspected cannabis (Ganja) which was kept in the gunny bag. He took six packets for sending to FSL containing 25grams each and seized the recovered contraband cannabis (Ganja) at the spot in presence of independent witnesses and also seized the vehicle and in this connection PW 1 Tarun Ch. Nath lodged an FIR. As per the report of FSL the sample had given positive result he laid the charge sheet against the accused U/S 20(b) NDPS Act.

21. PW 4, 5 and 6 who are the independent witnesses of the locality have also confirmed their presence at the time of search and seizure of contraband cannabis (Ganja) from the vehicle bearing registration No. AS01/BB-1749 while the accused persons were travelling in their vehicle. They have uniformly and consistently deposed that after seizure of the contraband cannabis (Ganja) at the place of occurrence they put their signatures in the seizure list. Their evidence could not be impaired in regarding recovery and seizure of contraband cannabis (Ganja) from the possession of accused persons which was kept in the dickie of the vehicle.

22. It is also manifest from the testimony of PW 7 Gajendra Nath Deka the chemical analyst as well as the FSL examination report Ext. 4 authenticated by him that the seized materials gave positive test of cannabis (Ganja). Though PW 7 was cross examined by the defence nothing could be elicited from him to establish to the contrary that the seized materials were not contraband cannabis (Ganja).

23. Thus, this is amply evident that seized material was contraband cannabis (Ganja) and the same was recovered and seized from the vehicle bearing registration No. AS01/BB-1749 which was driven by accused Anjan Sarmah and other accused Himan Rabha travelling as a passenger.

24. The accused persons in their statements recorded U/S 313 CrPC have simply denied no contraband cannabis (Ganja) containing in a bag was recovered from the vehicle while they were travelling but they have admitted that one bag containing some substance was recovered from the dickie of the vehicle. But the accused persons did not give any evidence that they were not in conspicuous possession of the seized cannabis (Ganja) recovered from their vehicle as burden was on the accused to account for their possession.

25. Learned defence counsel has submitted that the mandatory provision of the sections 42 and 50 had not been complied with. Controverting these arguments the learned PP for the state has contented that in the present case sections 42 and 50 of the NDPS Act are inapplicable as the cannabis (Ganja) was recovered from the private vehicle when the accused persons were travelling in a public road.

26. In view of the above rival submissions it would be appropriate to consider whether provision of section 42 and 50 of NDPS act are mandatory or not in the fact and circumstances of the case.

27. In the instant case, a search of one bag containing suspected cannabis (Ganja) was conducted which was kept in the dickie of the vehicle while the vehicle was driven by accused Anjan Sarmah and accused Himan Rabha was travelling as co-passenger.

28. The provision of Section 42(1) and (2) of the NDPS Act are read as under:-

"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 persons 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 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."

29. The Hon'ble Supreme Court in the matter of **Kishan Chand v. State of Haryana [(2013) 2 SCC 502] : (AIR 2013 SC 357)** has held that :-

"In Karnail Singh (2009) 8 SCC 539 it has been held by a Constitution Bench that if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per Section 42(1) (a) to (d) of NDPS Act and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior. The compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a

reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.”

30. Looking to the above-mentioned judicial precedent laid down by the Hon'ble Supreme Court, this Court finds that the provisions of Section 42 (1) and (2) of the NDPS Act are mandatory in nature. But, in special circumstances, to record in writing such information and sending a copy thereof to the immediate official superior may be postponed for a reasonable period and after the search and seizure it may be complied with.

31. Now, it is expedient to consider as to whether the provisions of Section 43 of the NDPS Act are Applicable in the case in hand, instead of provisions of Section 42 (1) and (2) of the NDPS Act.

32. In this context, it would be pertinent to refer the provisions of Section 43 of the NDPS Act which is reproduced below:-

“43. Power of seizure and arrest in public places. Any officer of any of the departments mentioned in section 42 may–

(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or

controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation.- For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public."

33. The Hon'ble Supreme Court in the matter of **State of Haryana v. Jarnail Singh and others [(2004) 5 SCC 188] : (AIR 2004 SC 2491)** has observed in para-9 that :

"9. Sections 42 and 43, therefore, contemplate two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. If seizure is made under Section 42 between sunset and sunrise, the requirement of the proviso thereto has to be complied with. There is no such proviso in Section 43 of the Act and, therefore, it is obvious that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 of the NDPS Act for searching the vehicle between sunset and the sunrise.

34. The Hon'ble Supreme Court in the matter of **Mohanlal v. State of Rajasthan [(2015) 6 SCC 222] : (AIR 2015 SC 2098)** has laid down the following judicial precedent: –

"Seizure has taken place beneath a bridge of public road accessible to public- As the place is a public place and Section 43 comes into play, the question of non-compliance of Section 42(2) does not arise."

35. As per prosecution case, alleged place of occurrence is a public place at Bakultal Chowk where the informant PW 1 ASI of police Tarun Ch. Nath and PW 3 Surjya Kt. Morang, DSP Udalguri had been conducting NAKA checking duty where the vehicle bearing registration number AS01/BB-1749 driven by the accused Anjan Sarmah and other accused Himan Rabha was sitting next to him were asked to stop the vehicle but when they tried to escape from that spot the vehicle was immediately detained with the help of other police staff at the spot. Thus, it is abundantly clear the place of

occurrence is a public place. Thereafter, search was made in the vehicle and a bag containing suspected cannabis (Ganja) was recovered from the dickie of the vehicle in presence of both the accused persons. In such a sudden checking by the NAKA checking party without prior information in the matter and in presence of PW 3 Surjya Kt. Moran being in the rank of DSP and a gazetted officer the procedure of informing a superior officer U/S 41 and 42 of the act is not applicable. Thus, looking to this fact and the aforementioned Judicial precedent laid down by Hon'ble Apex Court we are of the considered view that instead of the provision of the section 42, provisions of section 43 of NDPS Act are applicable.

36. Now we consider as to whether provisions of Section 50(1) of the NDPS Act are mandatory or not.

37. Hon'ble Supreme Court in the matter of **Kishan Chand (AIR 2013 SC 357) (supra)** in para 20 observed as under:-

"20. While dealing with the requirement of complying with the provisions of Section 50 of the Act and keeping in mind its mandatory nature, a Bench of this Court held that there is need for exact compliance without any attribute to the element of prejudice, where there is an admitted or apparent non-compliance. The Court in the case of State of Delhi v. Ram Avtar alias Rama [(2011) 12 SCC 207 : (2012) 1 SSC (Cri) 385] held as under: (SSC pp. 216-177, paras 26-27) (AIR p. SC 364)

"26. The High Court while relying upon the judgment of this Court in Baldev Singh and rejecting the theory of substantial compliance, which had been suggested in Joseph Fernandez, found that the intimation did not satisfy the provisions of Section 50 of the Act. The Court reasoned that the expression "duly" used in Section 50 of the Act connotes not "substantial" but "exact and definite compliance". Vide Ext. PW 6/A, the appellant was informed that a gazetted officer or a Magistrate could be arranged for taking his search, if he so required. This intimation could not be treated as communicating to the appellant that he had a right under law, to be

searched before the said authorities. As the recovery itself was illegal, the conviction and sentence has to be set aside.

27. It is a settled canon of criminal jurisprudence that when a safeguard or a right is provided, favouring the accused, compliance therewith should be strictly construed. As already held by the Constitution Bench in *Vijaysinh Chandubha Jadeja*, the theory of "substantial compliance" would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudice against the suspect. The safeguard cannot be treated as a formality, but it must be construed in its proper perspective, compliance therewith must be ensured. The law has provided a right to the accused, and makes it obligatory upon the officer concerned to make the suspect aware of such right. The officer had prior information of the raid; thus, he was expected to be prepared for carrying out his duties of investigation in accordance with the provisions of Section 50 of the Act. While discharging the onus of Section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of Section 50 of the Act. Non-compliance with the provisions of Section 50 of the Act would cause prejudice to the accused, and, therefore, amount to the denial of a fair trial.

38. Looking to the above-mentioned judicial precedent, this Court finds that provisions of Section 50(1) of the NDPS Act are mandatory in nature.

39. Now we consider as to whether provisions of Section 50(1) of the NDPS Act are applicable or not in the case in hand.

40. The Hon'ble Supreme Court in the matter of **Jarnail Singh and others (AIR 2004 SC 2491) (supra)** has held that:-

"A Constitutional Bench of this Court in State of Punjab v. Baldev Singh [(1999) 6 SCC 172 : (1999 AIRSCW 2494) exhaustively considered

the various provisions of the NDPS Act. As regards application of Section 50 of the NDPS Act, the Court came to the following conclusion:-

"On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted."

41. The Hon'ble Supreme Court in the matter of **Ajmer Singh v. State of Haryana [(2010) 3 SCC 746] : AIR 2010 SC (Supp) 582** has held in para- 16 as under:-

"16. In **State of H.R v. Pawan Kumar [(2005) 4 SCC 350 : (2005 AIR 2010 SCW 2154) : 2005 SCC (Cri) 943]** this court has stated: (SCC p. 360, para 11) (AIR p. 10 page SC 2270)

"11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act."

42. The Hon'ble Supreme Court in the matter of **Makhan Singh v. State of Haryana [(2016) 1 SCC (Cri) 96] : (2015 AIR SCW 3557** as laid down the following judicial precedent:

“Since the vehicle was searched and contraband was seized from vehicle, compliance with Section 50 of the NDPS Act was not required.”

43. In the present case in hand, alleged search of one bag was conducted which was kept in the dickie of Indica vehicle which was driven by the accused Anjan Sarmah and other accused Himan Rabha was travelling alongwith him in the front seat of the vehicle. Hence, no questions of the search of the accused persons are involved in this case. Therefore, having considered the circumstances and aforecited judicial precedent laid down by the Hon'ble Apex Court it is evident in the present case in hand; section 50(1) of the NDPS Act is not applicable.

44. It is further submitted there was non-compliance with the requirements of the section 55 of the NDPS Act. But the learned counsel has not been able to point out which part of the section 55 was not complied with. The prosecution evidence clearly discloses that the seized article cannabis (Ganja) was produced before the officer-in-charge Kalaigaon PS. He has put his seal over those seized cannabis and thereafter he drew samples from the seized cannabis for sending for chemical analysis and the same were examined by the chemical analyser. The report (Ext. 4) of the chemical analyser (PW-7) as well as his evidence would clearly demonstrate that the samples examined by him were the article connected with this case. There was no suggestion given to PW 7 but the seal of block bears no signature of the accused or witnesses. Thus the defence has not been able to prove that the aforesaid seizure and seal put in the samples were in any manner tampered with before it was examined by the chemical examiner.

45. Another submission that has been advanced by the learned counsel for the defence is that the seized articles were not sent immediately for chemical examination and as there was delay of 2 days in sending these samples in Narcotics for chemical examination pales into insignificance as in our considered opinion that mere delay in sending sample of the Narcotics to the chemical examination is not sufficient to conclude that the sample has

been tampered with. The FSL Report, Ext. 4 dated 17/02/17 states that one letter alongwith a sealed packet was received with seals intact. The seal being intact, the description of the case number and the impression of seal having been fixed on memo of recovery where there is no required for justification of the present case on the ground of delay on this score. The Hon'ble Apex Court had occasion to deal with a similar issue. In the case of **Balbir Kaur v. State of Punjab, (2009) 15 SSC 795 : AIR 2009 SC 3036 : 2009 AIR SCW 4875** made the following observations :

"As far as delay in sending the samples is concerned, we find the said contention untenable in law. Reference in this regard may be made to the decision of this Court in Hardip Singh case, AIR 2009 SC 432 : 2008 AIR SCW 7514, wherein there was a gap of 40 days between seizure and sending the sample to the chemical examiner. Despite the said fact the Court held that in view of cogent evidence that opium was seized from the appellant and the seals put on the sample were intact till it was handed over to the chemical examiner, delay itself is not fatal to the prosecution case."

46. In the instant case it has already seen from the evidence of chemical analyst (PW 7) that till the date of parcels of the samples were received by him, the seal put on that parcel was intact and tailed with the samples impression of the seal. Therefore, it has been clearly proved and established that there is no tempering of aforesaid seal in the samples at any stage and the samples received by the analyst for the chemical examination contained the same cannabis (Ganja) which was recovered from the possession of the accused persons. Deeply there was two days delay in material and would not dent the prosecution case.

47. It is also apposite to note that there is no dispute that the initial burden to prove the case is on prosecution who is to establish that accused persons were in conscious possession of cannabis (Ganja). But once the possession is established in view of the section 35 and 54 of the NDPS Act the burden is shifted to the accused persons to prove that they have no

culpable mental state. The accused persons are required to satisfactorily explain the possession of articles.

48. The next ground of assail pertains to factum of conscious possession of substance of learned counsel for defence is that they had only moving in the vehicle and have no knowledge what the bag contained. As the evidence on record put show categorically the accused persons were moving in the vehicle which was driven by accused Anjan Sarmah and the other accused Himan Rabha was sitting in the front seat. When their vehicle was intercepted at the place of occurrence one bag of Cannabis Ganja weighing 17 KG was recovered in the dickie of the vehicle. At the instance of the police, when the vehicle was signalled to stop they refused to stop the vehicle and rather tried to escape from the spot. However, the vehicle was eventually detained. Had the accused persons no knowledge about the contents of the bag they would not have tried to escape from the spot.

49. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in chapter IV of the Act which relates to offence for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

50. It is highlighted that unless the possession was coupled with requisite mental element, i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

51. The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in **Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors. (AIR 1980 SC 52)**, to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

52. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

53. As noted in **Gunwantlal v. The State of M.P. (AIR 1972 SC 1756)** possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.

54. The word 'possession' means the legal right to possession. See **Health v. Drown (1972) (2) All ER 561 (HL)**. In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. See **Sullivan v. Earl of Caithness (1976 (1) All ER 844 (QBD)**.

55. Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

56. Whether there was conscious possession has to be determined with from the factual backdrop. The facts which can be called out from the reference on the evidence on record is that the accused persons were travelling in the vehicle. They also identified themselves. Both of them were definitely known to each other as it has not explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle. Accused Anjan Sarmah was undisputedly the driver of the

vehicle and other accused Himan Rabha was travelling with him. Accused Himan Rabha has not taken the plea that he was taking a lift in the vehicle. So it is obvious that both of them are known to each other and their presence which has proven, establishes their control over bag and these circumstances clearly establishes that they were aware of the contraband cannabis (Ganja) inside the bag which was found in the dickie of the vehicle and in such situation, it is difficult to accept that they were not in conscious possession of cannabis (Ganja).

57. In **Dharampal Singh v. State of Punjab, (2010) 9 SCC 608 : 2010 AIR SCW 6828 : 2011 (2) AJR 573**, it has been ruled that the expression "possession" is not capable of precise and complete logical definition of universal application in the context of all the statutes. Recently, in **Mohan Lal v. State of Rajasthan, (2015) 5 SCALE 330 : 2015 AIR SCW 3043**, after referring to certain authorities, the Hon'ble Apex Court has held as follows :

From the aforesaid exposition of law it is quite vivid that the term "possession" for the purpose of Section 18 of the NDPS Act could mean physical possession with animus, custody or dominion over the prohibited substance with animus or even exercise of dominion and control as a result of concealment. The animus and the mental intent which is the primary and significant element to show and establish possession. Further, personal knowledge as to the existence of the "chattel" i.e. the illegal substance at a particular location or site, at a relevant time and the intention based upon the knowledge, would constitute the unique relationship and manifest possession. In such a situation, presence and existence of possession could be justified, for the intention is to exercise right over the substance or the chattel and to act as the owner to the exclusion of others. In the case at hand, the appellant, we hold, had the requisite degree of control when, even if the said narcotic substance was not within his physical control at that moment. To give an example, a person can conceal prohibited narcotic substance in a property and move out thereafter. The said person because of necessary animus would be in possession of the said substance even if he is not, at the moment, in physical control. The situation cannot be viewed differently when a person conceals and hides the prohibited narcotic substance in a public space. In

the second category of cases, the person would be in possession because he has the necessary animus and the intention to retain control and dominion.

58. In the view of the aforesaid enunciation of law, once possession is found, the accused is presumed to be in conscious possession as has been held in **Ram Singh v. Central Bureau of Narcotics, (2011) 11 SCC 347 : AIR 2011 SC 2490 : AIR 2011 SC (Cri) 1466 : 2011 AIR SCW 3106 : 2011 Cri LJ 3579**. If the accused takes a stand that he was not in conscious possession, he has to establish the same, as has been held in Dharampal Singh (Supra).

59. That aside, in their statements U/S 313 CrPC no plea has been taken that the accused persons were not in conscious possession of contraband cannabis (Ganja) except disclosing that a bag was recovered from their vehicle. They have only pleaded that they being falsely implicated and a false case have been foisted against them. In their statements U/S 313 CrPC they have not stated anything as to why police foist the false case against them. It is to be noted that 17 KGs of contraband cannabis (Ganja) was recovered from the dickie of the vehicle which was driven by the accused Anjan Sarmah and accused Himan Rabha occupied the front seat of the vehicle when the vehicle was detained by the police. The recovery and seizure of contraband cannabis (Ganja) by the police officials have also been bolstered by the evidence of independent witnesses who were present at the spot at the time of search and seizure of the contraband cannabis (Ganja). Moreover the police official had no previous enmity with the accused persons and their plea of being falsely implicated is found to highly improbable in order to falsely implicate them. There is nothing even to suggest that accused persons were not close to each others or even not known to each other earlier. Rather it is amply established by overwhelming evidence that both the accused persons have entered into criminal conspiracy to transport contraband cannabis (Ganja). In other words, the evidence on Record clearly establishes that the accused persons knew about transportation of contraband cannabis (Ganja) and each had a role in transportation and possession with conscious knowledge of what they were doing.

60. In the factual scenario of the present case not only possession but conscious possession has been established. It has not been shown by the accused persons that the possession was not conscious in the logical background of Sections 35 and 54 of the Act.

61. Taking the cumulative effect of the facts, circumstances and evidence on record, it appears that prosecution has proved the case against the accused persons in no manner of doubt for the contravention of the provision U/S 20(b) NDPS Act.

62. In the result, the accused persons Anjan Sarmah and Himan Rabha are Convicted U/S 20(b) of the NDPS Act. The accused persons are going to be secluded in Jail detention. Since the provision of section 360 of CrPC are and the provision of section 4 of provision of Offenders Act, 1958 are not applicable in the case for being above 18 years of age and for not being convicted U/S 26 or 27 of the act as provided U/S 33 of the NDPS Act 1985. The convicts are therefore, heard U/S 235(2) of the CrPC. Both the convicts have taken a common plea that they are pursuing their studies and their family comprises their parents.

63. Considering their clemency vis-a-vis the nature and gravity since proved against them is lesser than commercial point of cannabis (Ganja) but greater than small quantity of cannabis (Ganja) was recovered and seized from their conscious possession, the accused persons Anjan Sarma and Himan Rabha are sentenced to rigorous imprisonment for 5 (five) years with a fine of Rs. 20,000/-(Twenty Thousand) only each, in default, of payment of fine to undergo further rigorous imprisonment for 1 (one) year U/S 20(b) of the NDPS Act 1985.

64. I do hereby order that the terms of imprisonment in the event of non payment of fine, shall run consecutively. The period of detention underwent by the convicts shall be set off under the provision of the section 428 of the CrPC.

65. The seized contraband cannabis (Ganja) be confiscated to the State Government and be destroyed in due procedure of law.

66. Let a free copy of Judgment be furnished to the convicts forthwith.

67. Judgment signed, delivered and pronounced in the open court today the 29th day of August,2019.

Dictated and corrected by me and each page bears my signatures.

(P.Saikia)
Special Judge,
Udalguri.

(P.Saikia)
Special Judge,
Udalguri.

APPENDIX:

A)Prosecution witnesses:

- i) PW1 Tarun Ch. Nath.
- ii)PW2 Satish Borah.
- iii)PW3 Surjya Kanta Maran.
- iv)PW4 Amit Singha.
- v)PW5 Bijoy Dhar.

- vi)PW6 Amalesh Sarkar.
- vii)PW7 Gajendra Nath Deka.
- viii)PW8 Dimbeswar Das.

B)Defence witness: Nil.

C)Exhibits:

- i) Ext.1 FIR.
- ii) Ext.2,3,6 Seizure lists.
- iii) Ext.4 FSL Report.
- iv)Ext.5 Forwarding letter of FSL.
- v)Ext.7 Sketch map.
- vi)Ext.8 Charge-Sheet.

Dictated and corrected by me.

Special Judge,
Udalguri.