



HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.808 of 2023

1. Chandrashekhar Shivhare, S/o Shyamlal Shivhare, aged about 42 years, R/o 148, Bibhar Thok, Tehsil Baberu, Banda (Uttar Pradesh)
2. Shivshankar Gupta S/o. Ram Avatar Gupta, aged about 28 years, R/o. Prabhakar Nagar, Housing Baberu, Banda (Uttar Pradesh)

---- Appellants
(In Jail)

Versus

Intelligence Officer, Revenue, Intelligence Directorate (D.R.I.),
Nagpur Regional Unit, 6th Floor, B Wing, C.G.O. Complex
Seminary Hills, Nagpur (Maharashtra)

---- Respondent

Criminal Appeal No.1028 of 2023

Buddhu Krishani, S/o Daya Krishani, aged about 38 years, R/o at
Village Ramraj Giri, Post Maniyam Konda, Malkangiri, District –
Malkangiri (Odisha)

---- Appellant
(In Jail)

Versus

Union of India through its Directorate of Revenue Intelligence,
(D.R.I.) Nagpur Regional Unit, 6th Floor, B Wing, C.G.O.
Complex Seminary Hills, Nagpur, District Nagpur (Maharashtra)

---- Respondent

And

Criminal Appeal No.1294 of 2023

Baldev Prasad Gupta S/o Kalideen Gupta, aged about 42 years,
R/o Mohalla Kalukuan, Near Bank of Baroda, District Banda
(Uttar Pradesh)

---- Appellant





(In Jail)

Versus

Intelligence Officer, Directorate of Revenue Intelligence (D.R.I.),
Nagpur Regional Unit, 6th Floor, B-Wing, C.G.O. Complex
Seminary Hills, Nagpur (Maharashtra)

---- Respondent

For Appellants:	Mr.Prasoon Agrawal, Advocate in CRA No.808 of 2023
For Appellant:	Ms.Mamta Jaiswal, Advocate in CRA No.1028/2023
For Appellant:	Mr.Harsh Prabhakar, Mr.Harsh Gattani and Mr.Anubhav Singh, Advocates
For Respondent:	Mr.Maneesh Sharma, Advocate

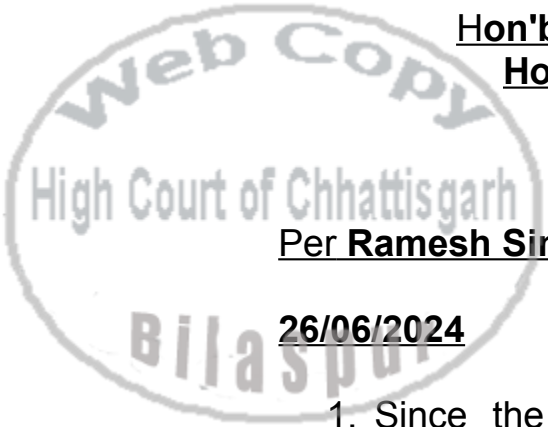
**Hon'ble Shri Ramesh Sinha, Chief Justice and
Hon'ble Shri Sachin Singh Rajput, Judge**

Judgment on Board

Per Ramesh Sinha, C.J.

26/06/2024

1. Since the aforesaid three criminal appeals have been filed against the impugned judgment dated 3.3.2023 passed by the Special Judge (NDPS Act), Raipur in Special Criminal Case No.04/2019, they were clubbed & heard together and are being disposed of by this common judgment.
2. Appellants-Chandrashekhar Shivhare and Shivshankar Gupta have preferred Criminal Appeal No.808/2023 under Section 374(2) of the CrPC questioning the impugned judgment dated 3.3.2023 passed by the Special Judge (NDPS Act), Raipur in Special Criminal Case No.04/2019, by which they have been convicted for offence under Section 29 read with Section 20(b)(ii)



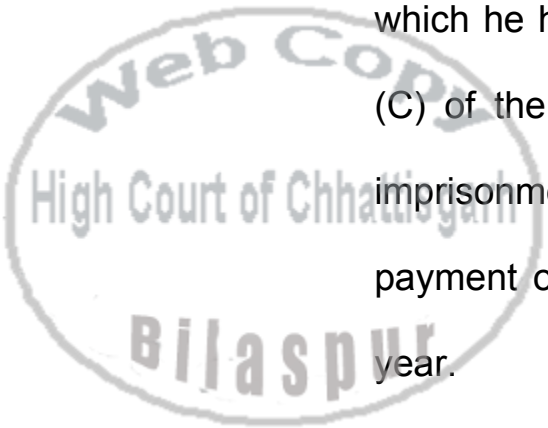


(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called as 'NDPS Act') and sentenced them to undergo rigorous imprisonment for 20 years and fine of Rs.2,00,000/-, in default of payment of fine to further undergo rigorous imprisonment for 1 year.

3. Appellant-Buddhu Krishani has preferred Criminal Appeal No.1028/2023 under Section 374(2) of the CrPC questioning the impugned judgment dated 3.3.2023 passed by the Special Judge (NDPS Act), Raipur in Special Criminal Case No.04/2019, by which he has been convicted for offence under Section 20(b)(ii) (C) of the NDPS Act and sentenced him to undergo rigorous imprisonment for 20 years and fine of Rs.2,00,000/-, in default of payment of fine to further undergo rigorous imprisonment for 1 year.

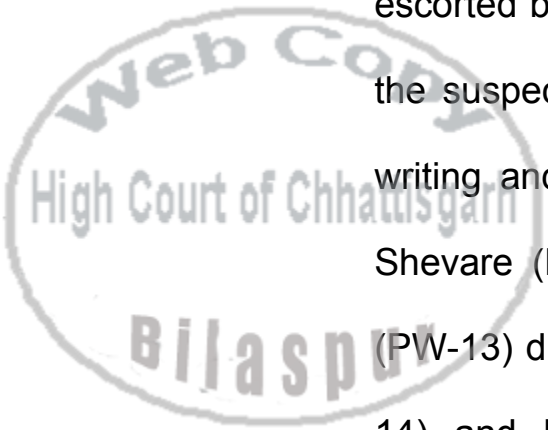
4. Appellant-Baldev Prasad Gupta has preferred Criminal Appeal No.1294/2023 under Section 374(2) of the CrPC questioning the impugned judgment dated 3.3.2023 passed by the Special Judge (NDPS Act), Raipur in Special Criminal Case No.04/2019, by which he has been convicted for offence under Sections 29 read with Section 20(b)(ii)(C) of the NDPS Act and sentenced him to undergo rigorous imprisonment for 20 years and fine of Rs.2,00,000/-, in default of payment of fine to further undergo rigorous imprisonment for 1 year.

5. Case of the prosecution, in brief, is that on 13.09.2018 at 11





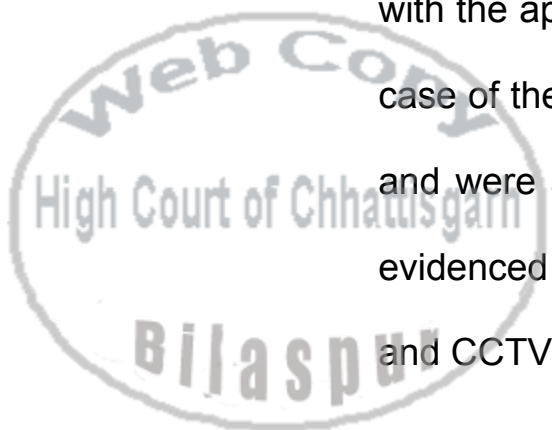
A.M. the Intelligence Officer Mr.Chand Prakash received information from an informer that a truck bearing registration No. CG 04 JB 7703 is being used to smuggle a consignment of ganja. Mr.Chandra Prakash, Intelligence Officer (PW-14) reported to his superior official Dilip Shevare, Assistant Director, Directorate (PW-13) with the gist of intelligence received by him that a truck bearing registration No. CG 04 JB 7703, carrying a material suspected to be “Ganja”, is moving from Rajahmundri, Andhra Pradesh to Uttar Pradesh. Further, the said truck was escorted by some people who are supposed to be the buyers of the suspected material. The said information was reduced into writing and put up for consideration/further orders before Dilip Shevare (PW-13). After receiving oral approval, Dilip Shevare (PW-13) directed team comprising of I.O. Chandraprakash (PW-14) and Nilesh Kadu (PW-6) to be constituted. Ultimately, Chandraprakash (PW-14), Dilip Shevare (PW-13) (Gazetted Officer), S.B.Powraj (Gazetted Officer), Nilesh Kadu (PW-6) (Intelligence Officer), Arun Sakpal (Head Constable) and A.K.Pandit (PW-5) (Gazetted Officer) left from Nagpur to Raipur. The said team reached CGST Bhawan, Raipur and thereafter proceeded towards Keshkal Ghat, Kondagaon, District Bastar allegedly accompanied with Som Sonwani (PW-1), Dipak Prajapati (PW-2) and four officers from CGST. The team identified a truck bearing registration No. CG 04 JB 7703 parked at Santosh Dhaba, near Keshkal Ghat, Kondagaon, District





Bastar. A person named Buddhu Krishani (appellant in Criminal Appeal No.1028/2023) was found standing near the truck, who on questioning allegedly admitted to be the driver of the said truck. Thereafter, the officers also allegedly identified a car of TATA brand model Zest of dark grey colour parked near dhaba bearing registration No. UP 90 N 5172 in which the present appellants were allegedly sitting. The respondent allegedly summoned the appellants to the office of the Commissioner CGST, Raipur for further examination of cargo. The team along with the appellants stopped at Hotel Aanandam, Kanker. It is the case of the appellants that they were staying at Hotel Aanandam and were apprehended from there at around 1.45 A.M. as also evidenced by the Guest Register maintained at Hotel Aanandam and CCTV footage produced during the course of the trial.

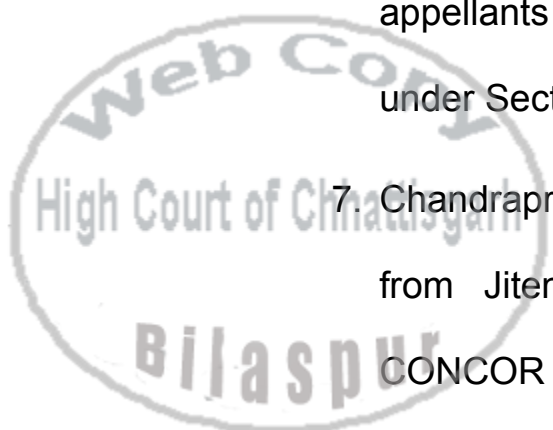
6. As per the case of the prosecution, all the accused then allegedly reached the office of the Commissioner CGST, Raipur on account the summons served to them. Their personal search was conducted. The truck was allegedly opened in presence of the panch witnesses and was found to be loaded with 482 bags of salt. On further examination, the team allegedly found 36 rectangular HDPE bags of contraband identified as Ganja hidden in the truck. The truck was then sent for weighing at Arora Dharam Kanta, NH 43, near Fruit Market, Devpuri, Raipur which allegedly weighed the suspected contraband material and the same aggregated to 1840 kg. Inside the rectangular 36 HDPE





bags, 137 large packets wound by brown adhesive tape, 36 big packets wound by blue adhesive tape and 59 small packets wound by blue plastic were stated to have been found and totalling to 232 packets of different sizes cumulatively weighing 1840 kgs. Thereafter, all the packets were numbered. 137 large packets were numbered as 1/137 to 137/137, 36 big packets were numbered as 1/36 to 36/36 and 59 small packets were numbered 1/59 to 59/59. All the packets thereafter were placed in 10 steel trunks and numbered and sealed with wax seal. The appellants were arrested and their statements were recorded under Section 67 of the NDPS Act.

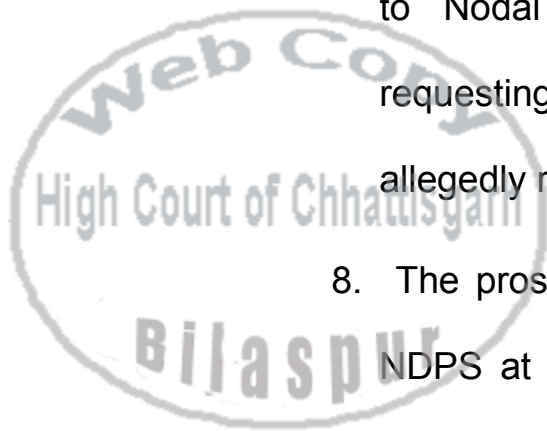
7. Chandraprakash (PW-14) allegedly received a telephonic call from Jitendra Bahadur Singh (PW-20), Terminal Manager, CONCOR that four packets wrapped by brown adhesive tapes have been observed over the driver's cabin in CCTV. The team comprising of Chandraprakash (PW-14), Anil Pandit (PW-5) and K.V.L. Narsimhan (PW-9) left for CONCOR Terminal. Panchnama was drawn at CONCOR, Inland Container Depot, Raipur for 4 packets of ganja allegedly weighing 10 kg. each. The seized packets were numbered 1/4 to 4/4. Four packets cumulatively weighing 40 kg. handed over to the custodian at CONCOR, Raipur at 3 P.M. and were kept in a steel truck sealed by wax seal. An application was preferred by the respondent to SDM, Raipur instead of "Judicial Magistrate" for drawn for representative samples under Section 52-A of the NDPS Act.





Samples were allegedly drawn in the presence of the SDM, Raipur. The test memo/secret drug sample containing 12 representative samples were forwarded to the Joint Director, Central Revenue Control Laboratory. The forensic analysis of Nokia mobile phone alleged to have been recovered from appellant-Baldev Prasad Gupta was carried out and extraction reports of data extraction were generated. On examination of samples, the Chemical Examiner concluded that the sample received tested positive for Ganja vide Ex.P-10. Letter was sent to Nodal Officer, BSNL by the Intelligence Officer, DRI requesting CDR and SDR with respect to Mobile No.9451048569 allegedly recovered from appellant-Baldev Prasad Gupta.

8. The prosecution filed the complaint before the Special Judge, NDPS at Raipur against the appellants under Sections 20, 28 and 29 of the NDPS Act.
9. Learned Special Judge has framed the charges against the appellants under Sections 28 and 29 read with Section 20(b)(ii) (C) of the NDPS Act.
10. After the charges were framed, Call Log details from extraction report of Model – Samsung J700F/DD phone allegedly recovered from appellant-Baldev Prasad Gupta (IMEI – 356273/07/651748/4, IMEI – 356274/07/651748/2) were generated.
11. In order to bring home the offence, the prosecution examined as

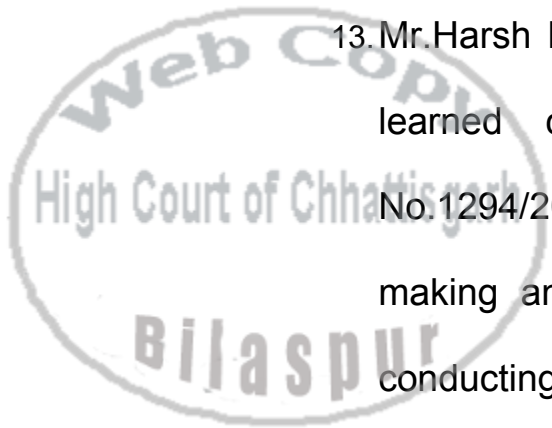




many as 14 witnesses and exhibited 45 documents Exs.P-1 to P-45 in support of case of the prosecution. The appellants have examined two defence witnesses in their support i.e. Prasanjit Bhattacharya (DW-1) and Naval Kishore (DW-2).

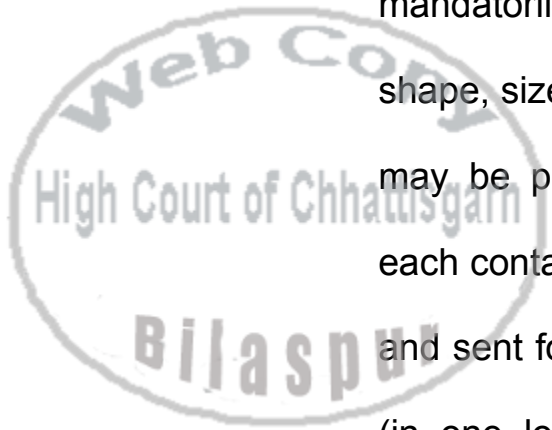
12. The Special Judge upon appreciation of oral and documentary evidence available on record, by its judgment dated 3.3.2023, convicted and sentenced the appellants as mentioned in opening paragraph of this judgment, against which, these criminal appeals have been preferred.

13. Mr. Harsh Prabhakar, Mr. Harsh Gattani and Mr. Anubhav Singh, learned counsel appearing for the appellant in CRA No.1294/2023 would submit that the act of the respondent in making an application dated 18.09.2018 to SDM, Raipur for conducting proceedings under Section 52-A of the NDPS Act and consequent proceedings conducted by him are in teeth with the mandate of Section 52-A of the NDPS Act. The SDM, Raipur being an 'Executive Magistrate' and not a 'Judicial Magistrate' is not qualified under the NDPS Act to conduct proceedings under Section 52-A of the NDPS Act. They relied upon the judgment of the Patna High Court in the matters of **Mange Ram v. The State of Bihar**, Criminal Appeal (DB) Nos.808 of 2021 and the Delhi High Court in the matter of **Air Customs v. Mosafier Alizahi & Ors**, CRL.M.C.1490 of 2020 and submit that the notification dated 23.12.2022 issued by the Ministry of Finance with respect to the rules formulated by the Central Government under Section



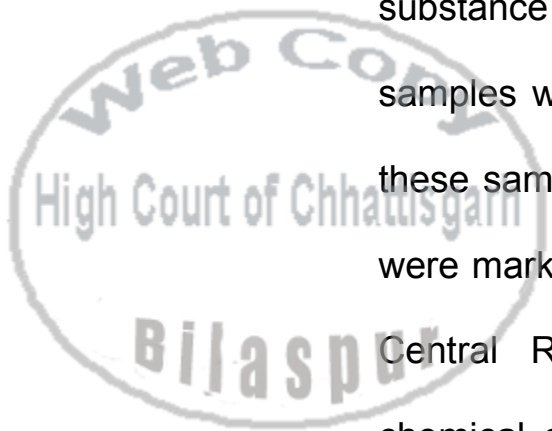


52-A of the NDPS Act makes it clear that such proceedings will be conducted before 'Judicial Magistrate'. They would further submit that the Standing Orders bearing No.01/1988 and 01/1989 mandate that where more than one container/package is seized, the respondent is required to draw a sample from each of the individual container/package and test each of the sample with the 'field testing kit'. Before drawing of representative samples, in case of seizure of more than one package, one sample in duplicate from each package is to be drawn mandatorily. If the seized container/packages are identical in shape, size and weight then lots of 10 or 40 containers/packages may be prepared and thereafter representative samples from each container/package in a particular lot are to be drawn, mixed and sent for testing. Mixing of the contents of container/package (in one lot) and then drawing the representative samples is, therefore, not permissible under the Standing Orders and rightly so as such a sample would cease to be a representative sample of the corresponding container/package. In the present case, random sampling was conducted and 2 packets were drawn from trunk No.1, 1 packet from rest of 10 trunks totalling to 12 packets and thereafter, 2 samples of 30 grams each were drawn from said 12 randomly picked packets which were later kept in zip-lock polythene. Therefore, conviction of the appellant is liable to be set aside on account of the sampling process being vitiated. Reliance has been placed on **Gaunter Edwin Kircher**





v. State of Goa, Secretariat Panaji, Goa, (1993) 3 SCC 145 and **Murtuja Ali v. State of Chhattisgarh, CRA No.944 of 2021** (Bilaspur High Court). They would also submit that the guidelines issued under the Standing Orders 1/88 and 1/89 are mandatory and have the binding force of law. Reliance has been placed upon **Noor Aga v. State of Punjab** reported in **(2008) 16 SCC 417** and **Union of India v. Balmukund** reported in **(2009) 12 SCC 161**. They contended that as per the version of the prosecution, a total of 236 packets of the alleged contraband substance were seized, out of which, on 26.09.2018, a total of 24 samples were drawn (12 original and 12 duplicate). Thereafter, these samples were kept in separate light green envelopes and were marked as Original/Duplicate accordingly and were sent to Central Revenue Control Laboratory, Mumbai (CRCL) for chemical analysis. However, none of the samples or the bulk case property i.e. 236 packets alleged to have been seized by the prosecution were produced before the learned trial Court for being marked as exhibits. Hence, at no point of time, learned trial Court had the opportunity to inspect/verify the contents of either 236 packets or any samples which from the basis of the conviction of the appellant. Such material evidence, on which the entire prosecution is predicated, should have been produced before the trial Court and its conscience ought to have been satisfied about its existence. Non-production thereof would warrant drawing of an adverse inference within the meaning of





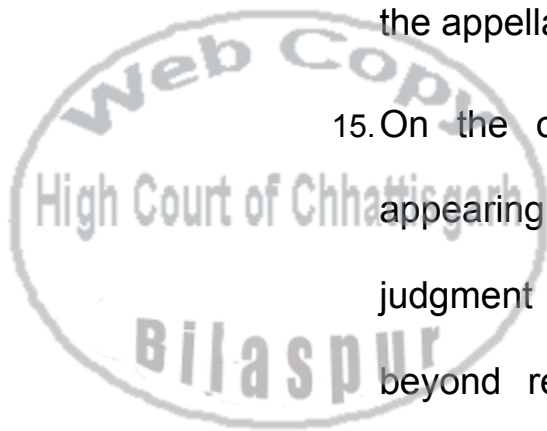
Section 114(g) of the Indian Evidence Act, 1872. Reliance is placed upon the judgment of the Supreme Court in the matter of **Jitendra v. State of M.P.** reported in **(2004) 10 SCC 562**. As such, the appeal deserves to be allowed and the impugned judgment deserves to be set aside.

14. Mr. Prasoona Agrawal, learned counsel appearing for the appellants in CRA No.808 of 2023 and Ms. Mamta Jaiswal, learned counsel appearing for the appellant in CRA No.1028 of 2023 adopted the submissions made by the learned counsel for the appellant in CRA No.1294 of 2023.

15. On the other hand, Mr. Maneesh Sharma, learned counsel appearing for the respondent, would support the impugned judgment and submit that the prosecution has proved its case beyond reasonable doubt and the learned trial Court after considering the material available on record and evidence adduced by the prosecution has rightly convicted and sentenced the appellants as mentioned above, in which no interference is called for.

16. We have heard the learned appearing for the parties, considered their rival submissions made herein-above and also went through the records with utmost circumspection.

17. The respondent on 13.09.2018 had allegedly seized 2 mobile phones from appellant Baldev Prasad Gupta namely Mobile Samsung J700F/DD, (IMEI-356273/07/651748/4 and IMEI

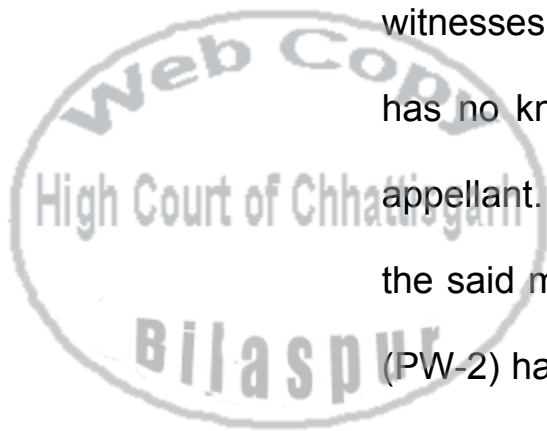




356274/07/651748/2) and Mobile NOKIA TA-1030, (IMEI 357317082287118 and IMEI 357317082287117). Further, BSNL Mobile No.9451048569, Idea Sim No.89911100000717445523 (number not mentioned) and Airtel Sim No.8991541601271749817 (number not mentioned) were also seized from the appellant.

18. Chandraprakash (PW-14) has deposed that mobile phones were seized and were kept in separate envelopes, signature of accused were taken, along with signature of independent witnesses. However, Som Sonwani (PW-1) has deposed that he has no knowledge about the seizure of mobiles phones of the appellant. He further deposed that he has no knowledge whether the said mobile phones were sealed in packets. Dipak Prajapati (PW-2) has deposed that he has no knowledge whether the said mobile phones were sealed. Anil Pandit (PW-5) has deposed that no mobile phone was seized in his presence.

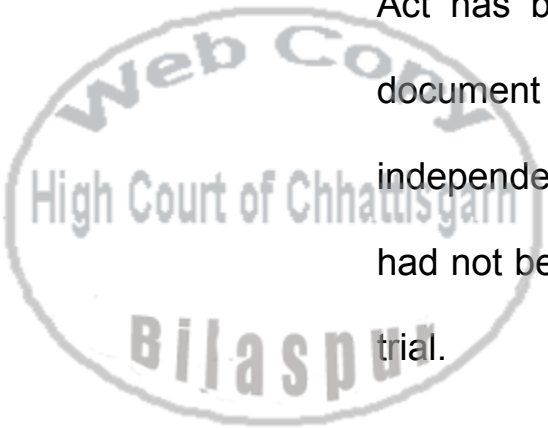
19. There exists missing linkages with respect to the chain of custody of mobile phones. As per Chandraprakash (PW-14) mobile phones were seized by him. As highlighted earlier, Som Sonwani (PW-1), Dipak Prajapati (PW-2) and Anil Pandit (PW-5) have deposed that they have no knowledge whatsoever about the seizure even though they were allegedly present with Chandraprakash (PW-14) for proceedings conducted at CGST, Raipur Office.





20. The intelligence inputs received did not refer to any particular car in which the alleged buyers would be travelling nor their names. No copies of the summons served are annexed with the prosecution complaint and neither proved during the course of trial. The prosecution has conjured a narrative that the accused were arrested near Santosh Dhaba so as to link them with the truck allegedly carrying contraband and the person who weighed the material at Arora Dharam Kanta had not been examined, neither the certificate under Section 65B of the Indian Evidence Act has been produced to prove the electronically generated document allegedly issued by Arora Dhram Kanta. One of the independent witness to the panchnama namely Niranjan petkar had not been examined by the prosecution during the course of trial.

21. The samples were allegedly drawn in the presence of the SDM, Raipur. However, the entire process of sampling was in breach of Standing Order bearing No.01/1988 and 01/1989 and was thus vitiated. The samples were drawn as the officers randomly picked up 2 packets from trunk No.1, 1 packet from rest of 10 trunks totalling to 12 packets picked randomly and were kept in zip-lock polythene. Thereafter, 24 zip-locked polythene were kept in envelopes which were sealed with the seal of 'Commissioner Central Excise Raipur MP'. Photographs of the proceedings were allegedly taken, however, curiously the same were never produced during the course of trial. As per the





panchnama dated 13.09.2018, Mobile No.5451048569 was seized from the appellants on the same date, however, the CDR and SDR were requested after the delay of two months. Curiously, no CDR or SDR was annexed by the respondent along with its complaint.

22. Chandraprakash (PW-14) had deposed that mobile phones of the appellants were seized by him and were kept in separate envelopes, signature of accused were taken, along with signatures of independent witnesses. However, he is silent with respect to further custody of the mobile phones. K.V.L.Narsimhan (PW-9) has deposed that in Nagpur office there is an almirah to keep the seized objects and record of almirah is preserved. On 29.10.2018, the said almirah was under the charge of Anil Kumar Pandit (PW-5). He further deposed that after he received the said mobiles from Anil Kumar Pandit (PW-5) he recorded the said details of removal of mobiles in his record. From the said record, it can be proved that he received the said mobiles mentioned in Exs.P-23 and P-25 from Nagpur office. The said record of the almirah has neither been produced nor proved by the respondent. However, Anil Kumar Pandit (PW-5) has deposed that no mobile phone was seized in his presence. He further deposed that on 06.11.2018, when CDR were sought with respect to mobile phones, at that time, the mobile phones were in the custody of Chandraprakash. Significantly, he does not depose about being the custodian of





the mobile phones anytime thereafter.

23. As per panchnama dated 16.12.2019 (Ex.P-7) and panchnama dated 29.10.2018 (Ex.P-23), K.V.L. Narsimhan (PW-9) carried the mobile phones to Mumbai for forensic analysis of the mobile phones. None of the independent witnesses of the panchnama have been examined and significantly neither the alleged forensic experts have been examined by the respondent during the course of trial. The chain of custody of the case property viz. mobile phones remains doubtful even though the case against the present appellants is essentially premised on the basis of the forensic analysis of the mobile phones. Therefore, the material omission of the respondent to satisfactorily prove the custody of the mobile phones casts a dent to the integrity in the chain of custody and the appellants are entitled to benefit of doubt.

24. The Delhi High Court in the matter of **Hannan v. State of NCT of Delhi reported in 2013 SCC OnLine Del 1416** held as under:-

“8. The next aspect pertains to securing of the custody of the samples till they were sent to FSL and the case property. Statement of PW8 MHC(M) Bhaiya Ram is relevant in this regard. He states that on 25th July, 2006 he was posted at PS Hazrat Nizamuddin and was working as MHC(M). On that date Inspector V.P. Dahiya deposited two suitcases, two bags and four samples duly sealed with the seal of NK and VPD along with FSL form which he entered at serial No. 2843 of register No. 19 and deposited the case property in the malkhana. On





28th August, 2006 he sent the four samples of this case to FSL Rohini through HC Shamim Akhtar vide RC No. 80/21/06. He further states that on 18th October, 2006 he received all the four samples along with the result through Constable Shamim duly sealed with the seal of FSL and deposited the same in the malkhana. However, the most material aspect has not been stated by this witness in his examination-in-chief, i.e. as long as the samples and the case property remained in his custody the same were not tampered with. Further PW2 HC Ram Chander stated that seal after use was given to HC Shamim Akhtar. HC Shamim Akhtar PW9 in his testimony does not say that the seal after use was handed over to him. This witness also had taken the samples to the FSL, however he does not say that till the time he deposited the samples in the FSL the same were not tampered with.

9. As regards the contradiction with regard to the colour of the polythene bags and the colour of the contraband recovered, it may be noted that PW2 has stated that black Ganja was recovered from Pink panni, one suitcase and both the bags, whereas PW3 and PW5 has stated that black colour Ganja was recovered from pinkish orange polythenes kept in the two suitcases and two hand bags. Further PW2, PW3 & PW5 have stated that cream colour Ganja was recovered from the other suitcase. Thus a perusal of the testimony of the witnesses show that there is some contradiction with regard to the colour of the contraband recovered from the polythene bag in which they were found.

10. In view of the fact that the two material witnesses PW8 MHC(M) Bhaiya Ram and PW9 Ct. Shamim Akhtar in whose custody the case property was did not state





that the case property was not tampered with, I am of the considered opinion that the prosecution has failed to prove the link evidence. In view of the peculiar facts of the case, the Appellant is acquitted of the charges framed. The appeal is disposed of. The Appellant be released forthwith if not required in any other case.”

25. The case of the prosecution against the convicts other than driver i.e. accused Buddhu Krishani is essentially premised on the mobile extraction reports and the CDR's of the appellants as well as that of other co-accused. The said reports and CDR's stand unproved in accordance with law.

26. The learned trial Court has rejected the defence evidence of the appellants i.e. CCTV photographs of Hotel Aanandam, Kanker (Exs.D-3 to D-36) and CCTV footage on the ground that the same had not been proved by the relevant witnesses as required under law, however, even though the relevant authors of the extraction reports and nodal officers from telecom companies of the mobile phones were not examined, the same have been erroneously treated as proved and relied upon by the learned trial Court.

27. The Division Bench of this Court in the matter of **Lavkush Shukla v. State of Chhattisgarh** reported in **2024 SCC OnLine Chh 1359** held as under:-

“45. So far as authenticity of the call detail reports and issuance of certificate under Section 65-B of the Evidence Act is concerned, PW-6, Dhiraj Kumar Jain,



Assistant Nodal Officer, Reliance Jio, Raipur, has stated in his evidence that their office has issued the call detail report of mobile number 7879429035 vide Ex.P/27, certificate of Section 65-B of the Evidence Act, Ex.P/28 and covering letter Ex.P/29 in which signature of one Sanjeev Nema is there who is the Assistant Nodal Officer. The person who has generated the call details from his computer has not been examined. This witness has stated in his deposition that the said document has not been generated or prepared by him. He further admitted that the documents customer application form Ex. P-26 and call detail P-27 have not been generated from his computer. P.W. 16, Pankaj Chandra, Supdt. Of Police, Cyber Cell, Raipur, has stated that his office is not able to collect information by access through server of the service provider company. He is unable to say as to who generated the CDR of Ex. P-50 and send it to Gudhiyari Police Station and the same is not generated by him. He also unable to say as to who, by which computer, on what date and from which place of his service provider company has taken the printout of CDR. There is no certificate of Section 65-B of Evidence Act alongwith the CDR Ex. P-50 from its service provider company Airtel. Likewise, PW-18, Pankaj Ramaiya, have stated that call detail report of mobile number 964444852, Ex.P/63, certificate of Section 65-B of the Evidence Act Ex.P/62 and covering letter Ex.P/64 was issued by the Nodal Officer Awadh Jain. The call detail report of mobile number 7089220000, Ex.P/65, was also issued by their Nodal Officer Awadh Jain. The said Nodal Officer Awadh Jain has not been





examined by the prosecution. He has admitted that he has not generated the call details and certificate Ex.P/62 to P/65. He also denied generating of same in his presence. He also shows his unawareness as to who has generated the said call details, on what date, at which place and in which computer it was generated. He also states that there is no endorsement of IP address, file address or location of the server in the document Ex.P/62. The documentary evidence of an record under the Evidence Act, in view of Section 65-A can be proved only in accordance with the provisions of Section 65-B. An electronic record shall not be admitted in evidence unless requirement under Section 65-B is satisfied as discussed by Hon'ble Supreme Court in 2020 (7) SCC 1, Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal.”

28. As per the case of the prosecution, the team in order to conduct the the raid first gathered at CGST Bhawan, Raipur on 13.09.2018 at 9 P.M. and left for Keshkal. They arrived at Keshkal at around 1 A.M. and were there till 2.20 A.M. and reached back at Raipur on 14.09.2018 at 6 A.M. The appellants were allegedly apprehended near Santosh Dhaba at around 1.10 A.M. However, evidence of unimpeachable integrity suggests that the appellants were arrested from Hotel Aanandam, Kanker on 14.09.2018 at around 1.50 A.M. In the photographs and CCTV video, it is pellucid that Anil Kumar Pandit (PW-14) along with his team is apprehending the appellants. Further, there

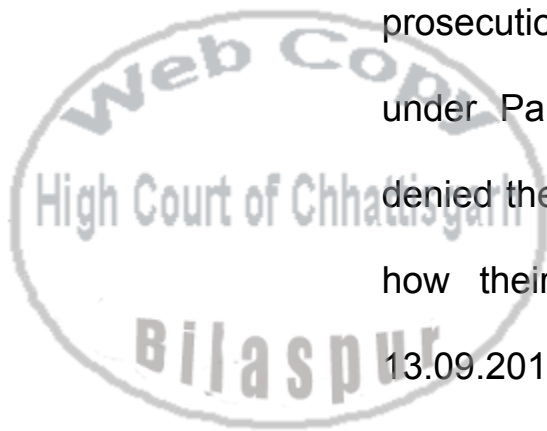




exists material contradictions in the depositions of the raiding team which conducted proceedings at Hotel Aanandam, Kanker. Anil Kumar Pandit (PW-14) has deposed that he did not go inside the hotel and he was standing outside the hotel. Per contra, Dilip Vana Shevare (PW-13) has deposed that Anil Kumar Pandit (PW-14) also accompanied them inside the hotel and went upstairs with them.

29. Som Sonwani (PW-1) and Dipak Prajapati (PW-2) who are the alleged witnesses to the raid, did not support the case of the prosecution and have even denied the proceedings conducted under Panchnama dated 13.09.2018. They have not merely denied their presence and participation, but have also explained how their signatures were obtained on panchnama dated 13.09.2018. The evidence of formal witnesses who are in a sense interested witnesses is thus required to be weighed against the independent witnesses who have no motivation to suppress the truth.

30. The case of the prosecution is that the respondent had raided the truck in the middle of the night at a very busy dhaba i.e. Santosh Dhaba and even though there were more than 20-30 individuals present, still the respondent failed to associate any of them as independent witnesses. Nilesh Kadu (PW-6) deposed that he had not requested any local person to join the proceedings as independent witness. Chandraprakash (PW-14) had deposed that there were people present at the spot.



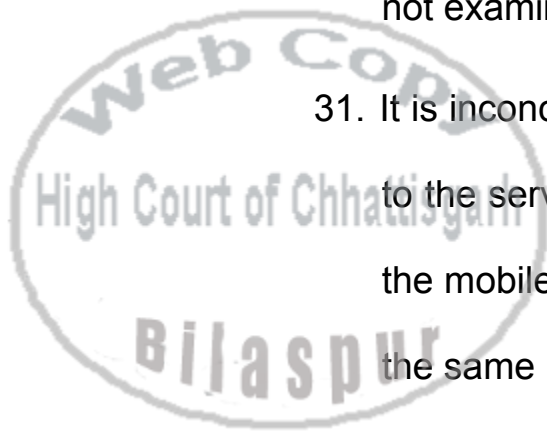


However, he had not requested anyone to be independent witness to the proceedings. Dilip Shevare (PW-13) has deposed that there were 3-4 cars at Santosh Dhaba, however, no notice was given to the by-standers near Santosh Dhaba to be present in the proceedings. Therefore, even though the independent witnesses were present at the spot, the reluctance of the respondent to join them in proceedings casts further doubt upon the case of the respondent. Further, the officials from CGST, Raipur who allegedly accompanied the raiding party were also not examined before the Court.

31. It is inconceivable that though the respondent had written a letter to the service provider requesting CDR and SDR with respect to the mobile No.9451048569 attributed to the appellants, however, the same has not been proved by the prosecution.

32. The Supreme Court in the matter of **Tomaso Bruno and another v. State of Uttar Pradesh** reported in **(2015) 7 SCC 178** has held as under:-

“24. With the advancement of information technology, scientific temper in the individual and at the institutional level is to pervade the methods of investigation. With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant to establish the guilt of the accused or the liability of the defendant. Electronic documents strictu sensu are admitted as material evidence. With the amendment to the Indian Evidence Act in 2000, Sections 65-A and 65-B were introduced into Chapter V relating to





documentary evidence. Section 65-A provides that contents of electronic records may be admitted as evidence if the criteria provided in Section 65-B is complied with. The computer generated electronic records in evidence are admissible at a trial if proved in the manner specified by Section 65-B of the Evidence Act. Sub-section (1) of Section 65-B makes admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfilment of the conditions specified in sub-section (2) of Section 65-B. Secondary evidence of contents of document can also be led under Section 65 of the Evidence Act. PW-13 stated that he saw the full video recording of the fateful night in the CCTV camera, but he has not recorded the same in the case diary as nothing substantial to be adduced as evidence was present in it.

26. The trial court in its judgment held that non-collection of CCTV footage, incomplete site plan, non-inclusion of all records and sim details of mobile phones seized from the accused are instances of faulty investigation and the same would not affect the prosecution case. Non-production of CCTV footage, non-collection of call records (details) and sim details of mobile phones seized from the accused cannot be said to be mere instances of faulty investigation but amount to withholding of best evidence. It is not the case of the prosecution that CCTV footage could not be lifted or a CD copy could not be made. ”

33. In order to prove the weight of the alleged contraband substance, the respondent relied upon Exs.P-33 and P-34 i.e. weighing slips ostensibly issued by Arora Dharam Kanta.





Admittedly, the said slips are ex-facie computer generated. However, no certificate under Section 65-B of the Indian Evidence Act, 1872 have been filed by the respondent in order to prove the same. Chandraprakash (PW-14) has deposed and admitted that Exs.P-33 and P-34 are computer generated receipts and in order to prove the same no certificate of the person who prepared them are annexed with the complaint. Chandraprakash has further deposed that the individual who took the truck to Arora Dharam Kanta have not been included in the list of witnesses. He deposed that no one from Arora Dharam Kanta who weighed the truck have been included in the list of witnesses by him. He deposed and admitted that in order to prove Exs.P-33 and P-34 he has not made any witness.

34. It is trite law that electronic evidence can be proved only in accordance with the provisions of Section 65-B of the Indian Evidence Act, 1872. The respondent has thus failed to satisfactorily prove the weight of the alleged contraband and in absence of the same, conviction for commercial quantity cannot be sustained. In this regard, the decision of the Supreme Court in the matter of **Ravinder Singh alias Kaku v. State of Punjab** reported in **(2022) 7 SCC 581** is relevant. In **Ravinder Singh** (supra) the Supreme Court has held as under:-

“21. Lastly, this appeal also raised an important substantive question of law that whether the call records produced by the prosecution would be





admissible under section 65-A and 65-B of the Indian Evidence Act, given the fact that the requirement of certification of electronic evidence has not been complied with as contemplated under the Act. The uncertainty of whether *Anvar P.V. vs P.K. Basheer*¹ occupies the filed in this area of law or whether *Shafhi Mohammad v. State of H.P.*² lays down the correct law in this regard has now been conclusively settled by this court by a judgement dated 14-7-2020 in *Arjun Panditrao Khotkar vs Kailash Kushanrao Gorantyal*³ wherein the court has held that: (*Arjun Panditrao Khotkar*, SCC pp. 56 & 62, paras 61 & 73)



“61. We may reiterate, therefore, that the certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in *Anvar P.V.* (supra), and incorrectly “clarified” in *Shafhi Mohammed* (supra). Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in *Taylor v. Taylor*⁴, which has been followed in a number of the judgments of this Court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if lead in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose.

1 (2014) 10 SCC 473
2 (2018) 2 SCC 801
3 (2020) 7 SCC 1
4 (1875) LR Ch D 426



73.1 Anvar P.V. (supra), as clarified by us hereinabove, is the law declared by this Court on Section 65-B of the Evidence Act. The judgment in Tomaso Bruno (supra), being per incuriam, does not lay down the law correctly. Also, the judgment in Shafhi Mohammad (supra) and the judgment dated 03.04.2018 reported as Shafhi Mohammad v. State of H.P., do not lay down the law correctly and are therefore overruled.

73.2 The clarification referred to above is that the required certificate under Section 65-B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him. In cases where the “computer” happens to be a part of a “computer system” or “computer network” and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4).”

22. In light of the above, the electronic evidence produced before the High Court should have been in accordance with the statute and should have complied with the certification requirement, for it to be admissible in the court of law. As rightly stated above, oral evidence in the place of such certificate, as is the case in the present matter, cannot possibly suffice as Section 65-B(4) is a mandatory

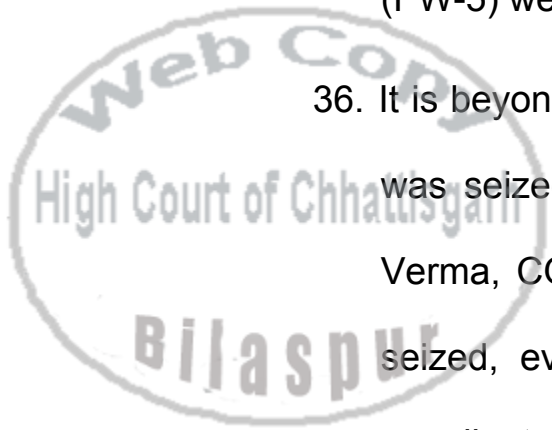




requirement of the law.”

35. As per the case of the prosecution, the appellants, inter alia, was allegedly apprehended from a TATA Zest Car near Santosh Dhaba. However, the existence of the said TATA Zest Car becomes doubtful. It is submitted that Dilip Vana Shevare (PW-13) has deposed that accused Buddhu Krishani was driving the truck to Hotel Aanandam from Santosh Dhaba. He further deposed that accused Buddhu Krishani along with truck, four wheeler, independent witnesses, Arun Sakpal and Anil Pandit (PW-5) were waiting outside Hotel Aanandam.

36. It is beyond comprehension that the truck TATA CG 04 JB 7703 was seized and custody of which was given to Komal Prasad Verma, CONCOR Inland Container Depot and the car was not seized, even though the case of the prosecution is that the appellant was in the car near the said truck and was escorting it. Therefore, the absence of TATA Zest car as a case property renders the version of the prosecution facile and probablises the defence of the appellants that they were arrested from Hotel Aanandam, Kanker and not Santosh Dhaba. No summons/notice were served to the appellants under Section 67 of the NDPS Act by the respondent as there exists no document on record to evidence the same. Further, Dilip Vana Shevare (PW-13) had deposed that no such summons were served to any of the accused. Anil Pandit (PW-5) had deposed that summons were served to the appellants. He had further deposed that from the





records it is not evident that summons were served to the appellants. Dilip Vana Shevare (PW-13) deposed that no summons were served on the spot by Anil Pandit (PW-5) to any of the accused and no such summon is annexed with the complaint. Therefore, in absence of documentary evidence and contradictory depositions in this regard, it cannot be assumed that summons were served to the appellants under Section 67 of the NDPS Act.

37. On 17.09.2018 Chandraprakash (PW-14) is said to have received a telephonic call from Jitendra Bahadur Singh (PW-12), Terminal Manager, CONCOR that four packets wrapped by brown adhesive tapes have been seen over the driver's cabin in CCTV. The team of Chandraprakash (PW-14), Anil Pandit (PW-5) and K.V.L. Narsimhan (PW-9) left for CONCOR Terminal and seized the same. It is evident that while the custody of the truck was given to Jitendra Bahadur Singh (PW-12), at the time the truck was brought in campus of CONCOR, it was thoroughly checked and nothing was found. Jitendra Bahadur Singh (PW-12) deposed that no panchnama was prepared before him and neither he signed on any document. He further deposed that an inventory is maintained, however, no entry in the inventory with respect to 4 packets were made. Panchnama dated 18.09.2018 was prepared at CONCOR Terminal by Chandraprakash (PW-14). However, one of the independent witness to the said panchnama namely Niranjana Petkar has not





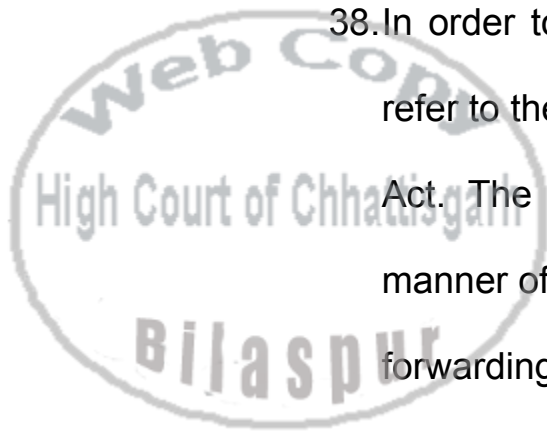
been examined. In absence of the examination of the independent witness, this suspicious subsequent discovery is further under cloud of suspicion. Planting of the said 40 kgs of ganja cannot be ruled out due to the fact that neither the independent witness had been examined nor the CCTV footage in which the said 4 packets were seen had been produced;/proved by the respondent. Therefore, sans any cogent and reliable evidence the subsequent discovery of 40 kgs of ganja on 17.09.2018 cannot be countenanced.

38. In order to test the above submissions, it would be relevant to refer to the provisions of Section 52A(2), (3) and (4) of the NDPS Act. The aforesaid provisions provide for the procedure and manner of seizing, preparing the inventory of the seized material, forwarding the seized material and getting inventory certified by the Magistrate concerned. It is further provided that the inventory or the photographs of the seized substance and any list of the samples in connection thereof on being certified by the Magistrate shall be recognized as the primary evidence in connection with the offences alleged under the NDPS Act.

39. For the sake of convenience, relevant sub-sections of Section 52A of the NDPS Act 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 subsection (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 subsection (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.

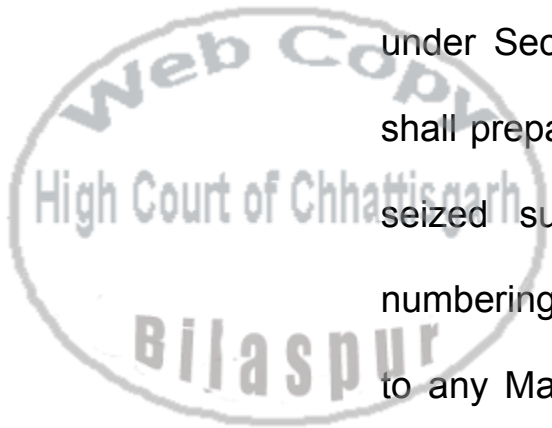
(3) Where an application is made under subsection (2), the Magistrate shall, as soon as may be, allow the application.



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

40. 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.

41. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed under subsections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples





were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of subsection (2) of Section 52A of the NDPS Act.

42. It is an admitted position on record that the samples from the seized substance were drawn by the police in the presence of the SDM, Raipur and not in the presence of the 'Judicial Magistrate'. There is no material on record to prove that the Judicial Magistrate had certified the inventory of the substance seized or of the list of samples so drawn.

43. In this regard, the notification of the Ministry of Finance (Department of Revenue) dated 23rd December, 2022 states as under:-

MINISTRY OF FINANCE

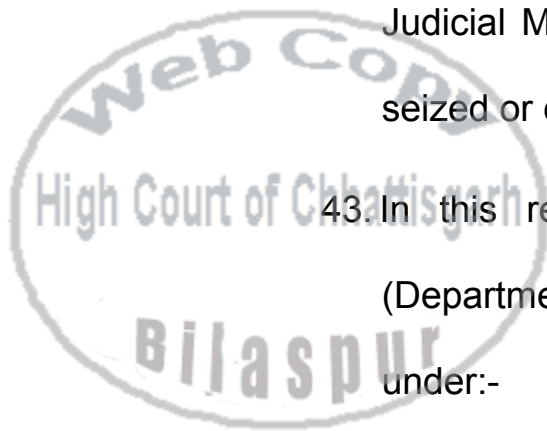
(Department of Revenue)

NOTIFICATION

New Delhi, the 23rd December, 2022

G. S. R. 899(E). In exercise of the powers conferred by section 76; read with section 52A; of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government hereby makes the following rules, namely:-

CHAPTER-1





PRELIMINARY

1. **Short title and commencement.**- (1) These rules may be called the Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. **Definitions.** - (1) In these rules, unless the context otherwise requires, -

(a) "Act" means the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985);

(b) "container" means a portable receptacle in which narcotic drugs, psychotropic substances and controlled substances are placed for convenience of movement;

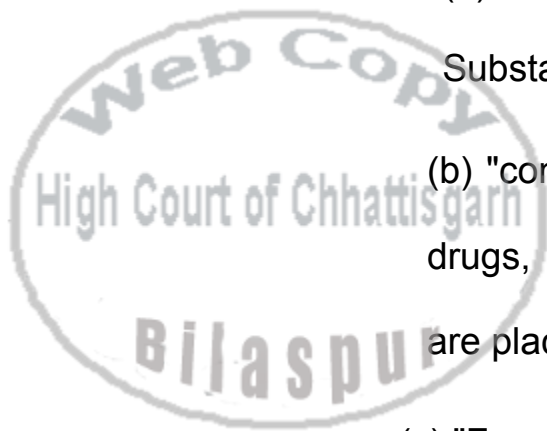
(c) "Form" means the forms appended to these rules;

(d) "Magistrate" means the judicial magistrate;

(e) "package" means the narcotic drugs, psychotropic substances and controlled substances covered in paper or in a box.

(2) Words and expressions used herein and not defined, but defined in the Act shall have the same meanings as respectively assigned to them in the Act.

44. In the matter of **Union of India v. Mohanlal and another** reported in **(2016) 3 SCC 379**, the Supreme Court while dealing





with Section 52A of the NDPS Act has held as under:-

“15. It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband, the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified





by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

18. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.”

45. Recently, the Supreme Court in the matter of **Yusuf @ Asif v. State** reported in **2023 SCC OnLine SC 1328** has held as under:-

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

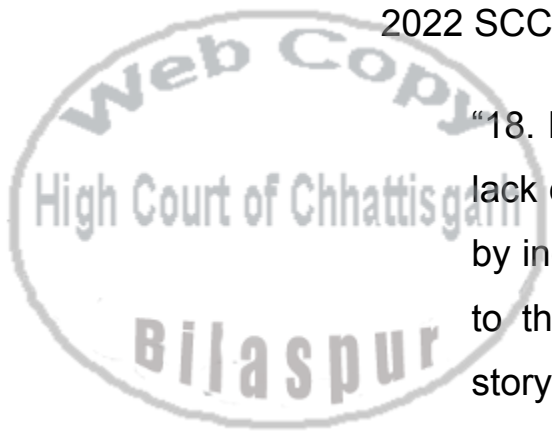




17. Accordingly, we are of the opinion that the failure of the concerned authorities to lead primary evidence vitiates the conviction and as such in our opinion, the conviction of the appellant deserves to be set aside. The impugned judgment and order of the High Court as well as the trial court convicting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

46. The Supreme Court in the matter of **Sanjeet Kumar Singh alias Munna Kumar Singh v. State of Chhattisgarh** reported in 2022 SCC OnLine SC 1117 has held as under:-

“18. But if the Court has - (i) to completely disregard the lack of corroboration of the testimony of police witnesses by independent witnesses; and (ii) to turn a Nelson’s eye to the independent witnesses turning hostile, then the story of the prosecution should be very convincing and the testimony of the official witnesses notably trustworthy. If independent witnesses come up with a story which creates a gaping hole in the prosecution theory, about the very search and seizure, then the case of the prosecution should collapse like a pack of cards. It is no doubt true that corroboration by independent witnesses is not always necessary. But once the prosecution comes up with a story that the search and seizure was conducted in the presence of independent witnesses and they also choose to examine them before Court, then the Court has to see whether the version of the independent witnesses who turned hostile is unbelievable and whether there is a possibility that they have become turncoats.”

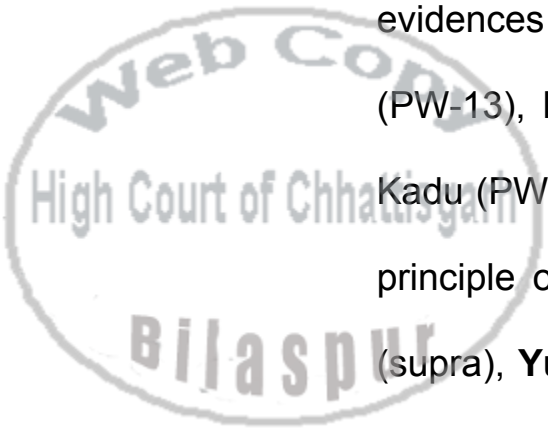




47. Hence, the act of the Intelligence Officer of drawing samples from all the packets at the time of seizure is not in conformity with the law laid down by the Supreme Court in **Mohanlal** (supra). This creates a serious doubt about the prosecution's case that substance recovered was a contraband. Therefore, the case of the prosecution is not free from suspicion and the same has not been established beyond a reasonable doubt.

48. Considering the submissions advanced by the learned counsel for the parties, material available on record, also considering the evidences of Anil Kumar Pandit (PW-5), Dilip Vana Shevare (PW-13), Intelligence Officer Chandraprakash (PW-14), Nilesh Kadu (PW-6), Jitendra Bahadur Singh (PW-12) and applying the principle of law laid down by the Supreme Court in **Mohanlal** (supra), **Yusuf @ Asif** (supra), **Sanjeet Kumar** (supra) and this Court in **Lavkush Shukla** (supra), we are of the considered opinion that the prosecution has failed to prove its case beyond reasonable doubt and the trial Court has also committed grave legal error in convicting and sentencing appellants- Chandrashekhar Shivhare and Shivshankar Gupta for offence under Section 29 read with Section 20(b)(ii)(C) of the NDPS Act, Appellant-Buddhu Krishani for offence under Section 20(b)(ii)(C) of the NDPS Act and appellant-Balram Prasad Gupta for offence under Section 29 read with Section 20(b)(ii)(C) of the NDPS Act. As such, the judgment impugned deserves to be set aside.

49. For the foregoing reasons, Criminal Appeal No.808/2023 filed on



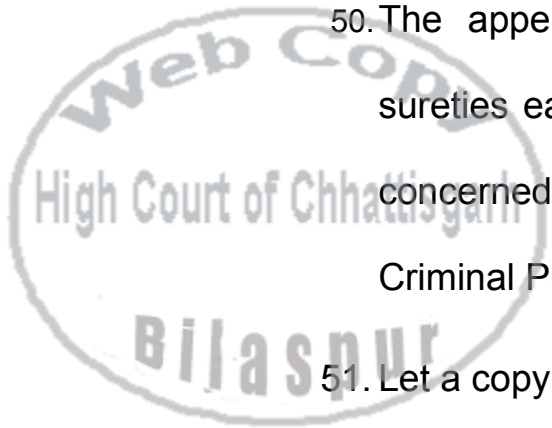


behalf of appellants-**Chandrashekhar Shivhare** and **Shivshankar Gupta**, Criminal Appeal No.1028/2023 filed on behalf of appellant-**Buddhu Krishani** and Criminal Appeal No.1294/2023 filed on behalf of appellant-**Baldev Prasad Gupta** are allowed and the impugned judgment dated 3.3.2023 passed by the Special Judge (NDPS Act), Raipur in Special Criminal Case No.04/2019 is set-aside. The appellants are acquitted of the said charges. They are in jail. They shall be set at liberty forthwith if no longer required in any other criminal case.

50. The appellants are directed to file personal bond and two sureties each in the like amount to the satisfaction of the Court concerned in compliance with Section 437-A of the Code of Criminal Procedure, 1973.

51. Let a copy of this judgment and the original record be transmitted to the trial court concerned forthwith for necessary information and compliance.

52. Before parting with the judgment, we wish to observe that the Directorate of Revenue Intelligence (DRI), which is a specialized investigating agency with respect to the Narcotic Drugs, has not conducted the investigation considering the mandatory provisions of law as has been provided under the NDPS Act and has failed in its duty as in the present case huge quantity of contraband article was seized and because of lapses on the part of the investigating agency, the mandatory provisions under the





NDPS Act have not been followed. With the heavy heart, we have to allow these appeals.

53. Considering the aforesaid fact, we direct the Directorate of Revenue Intelligence (DRI) to issue advisories that in any such cases, if the prosecution is launched, the investigating agency should strictly follow the mandatory provisions under the relevant Act so that the accused may not take the benefit of such lapses as the offence like the present one which is the offence against the society which weakens the basic structure of the society. Such offence has to be dealt with strictly in accordance with law with heavy hand in order to protect the future of this country.

54. The Registrar (Judicial) of this Court is directed to send a copy of this judgment to the Directorate of Revenue Intelligence (DRI), Nagpur Regional Unit, 6th Floor, B-Wing, C.G.O. Complex Seminary Hills, Nagpur (Maharashtra) forthwith for necessary information and further compliance.

Sd/-

(Sachin Singh Rajput)
Judge

Sd/-

(Ramesh Sinha)
Chief Justice



HIGH COURT OF CHHATTISGARH AT BILASPUR

CRA No.808 of 2023

Chandrashekhar Shivhare and another

-Versus-

Intelligence Officer, Revenue, Intelligence Directorate

Head-Note

1. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of sub-section (2) of Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985.

2. Non-production of CCTV footage, non-collection of call records (details) and sim details of mobile phones seized from the accused cannot be said to be mere instances of faulty investigation but amount to withholding of best evidence.

