

(2015) 09 CAL CK 0031
In the Calcutta High Court
Case No : CRA Nos. 548 and 544 of 2007

Kalimuddin Mia and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 22-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20(b)(ii)(c),
35, 41, 42, 50

Citation : (2016) CriLJ 103

Hon'ble Judges : Debasish Kar Gupta, J;Md. Mumtaz Khan, J

Bench : Division Bench

Advocate : Jyotirmoy Adhikary and Dipannita Mukherjee, for the Appellant;
Sanjoy Banerjee, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Debasish Kar Gupta, J—The subject matter of challenge in these appeals is a judgment and order of conviction dated August 6, 2007 and sentence dated August 7, 2007, passed by the learned Additional Sessions Judge-cum-Judge, Special Court under Narcotic Drugs and Psychotropic Substances Act in G.R. Case No. 446 of 2006. By virtue of the impugned judgment the appellants were convicted for commission of offence punishable under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act). By virtue of the impugned sentence Kalimuddin Mia and Mahesh Barman, appellants in CRA No. 548 of 2007 and CRA No. 544 of 2007 respectively were punished to suffer rigorous imprisonment for twelve years each and to pay a fine of Rs. 1 lakh each, in default, to suffer simple imprisonment for two years more. The period of detention which had been undergone during trial was directed to be set off accordingly.

2. The backdrop of these appeals is discussed below in a nutshell:--

"An FIR bearing No. 99/06 dated November 18, 2006 of Tufanganj Police Station,

Cooch Behar, year 2006, was lodged against the appellants for committing offence punishable under the provisions of Sections 20(b)(ii)(c) of the NDPS Act."

3. According to the above FIR, one Sanjoy Dutta, Officer-in-Charge, Tufanganj Police Station, Cooch Behar (PW 1) received an information from secret source on November 18, 2006 at 17-55 hrs. that some persons had been proceeding from Balarampur and after crossing Balarampur ghat they would come to N.H.31 for proceeding towards Baxirhat with contraband articles "ganja" in a rickshaw van. The PW 1 diarised the above information bearing G.D.E. No. 831 dated November 18, 2006. The PW 1 along with PW 3, PW 4, PW 8 and constable Ranjan Narginary went to National Club More situated on N.H.31 for apprehending the persons concerned.

4. On or about 19.05 hrs. the above raiding team noticed that a rickshaw van was coming with some jute sticks (Pat Kathy) from Chamta More. One person was driving the rickshaw van and the other one was pushing it. On interrogation they disclosed their names, Kalimuddin Mia and Mahesh Barman (the appellants of CRA No. 548 of 2007 and CRA No. 544 of 2007 respectively). They initially stated that they had been carrying jute sticks in the rickshaw van for delivery of the same to their relatives. But, after further query they admitted that "ganja" had been concealed in the above jute sticks. The PW 1 made a requisition to the Sub-Divisional Officer concerned for sending a Deputy Magistrate to the place of occurrence. He also took steps to bring a photographer at the place of occurrence to take the photographs of those articles. Sri Tapan Chattapadhyay, Circle Inspector, was informed of the above raid. After arrival of Sajal Kumar Das, working for gain in the post of Deputy Magistrate cum Deputy Collector office, Tufanganj at the material point of time (PW 9), Subhasis Modak the photographer (PW 12), Tapan Chattopadhyay, the Circle Inspector and two local witnesses, namely, Uttam Choudhury (PW 2) and Goutam Basak (PW 5), five packets of "ganja" wrapped with poly pack were recovered from the aforesaid rickshaw van. Weight of the above seized contraband article was taken in a Log Wood Shop nearby. The weight of the seized contraband article was 95 kg. and 450 gms. Five sample packets of 100 gms. of contraband article "ganja" were collected from each of the aforesaid packets. The seized "ganja" and the packets containing samples thereof were duly sealed and labels were pasted. The packets of the above seized articles were duly signed by PW 1, PW 9 aforesaid Tapan Chattapadyay and as also the local witnesses, i.e. PW 2 and PW 5. The appellants and the articles seized as also the samples collected from the seized articles were brought to the Tufanganj police station. The appellants were arrested. FIR No. 99/06 dated November 18, 2006 was lodged against the appellants for committing offence which was punishable under the provisions of Section 20(b)(ii)(c) of the NDPS Act. Sri Asit Deb Singh, Sub-Inspector of Police posted at Tufanganj Police Station at the material point of time (PW 13) was engaged as Investigating Officer. After filing of charge-sheet before the Court, charge was framed against the appellants on April 10, 2007 for commission of offence punishable under the provisions of Section 20(b)(ii)(c) of the NDPS Act.

5. The learned Court below passed the impugned judgment and order of conviction as also the sentence after taking into consideration the documentary and oral evidence of 13 prosecution witnesses as also the statement of the appellants recorded under Section 313 of Cr.P.C., amongst others.

6. It is submitted by Mr. Jyotirmoy Adhikary, learned Advocate appearing on behalf of the appellant in CRA 548 of 2007 that according to the FIR, the illicit articles were loaded in the rickshaw van from the house of Mintu Kajee. The house of the aforesaid Mintu Kajee was not searched. The appellant was a rickshaw van puller. The Mintu Kajee was the main culprit and the appellants were transporters of the illicit article. Therefore, they were not guilty of commission of offence under NDPS Act.

7. According to him, the provisions of sub-section (1) of Section 42 of the NDPS Act, with regard to search, seizure and arrest without warrant were not complied with.

8. It is further submitted by Mr. Adhikary that the provisions of Sub-section (2) of Section 42 and sub-section (2) of Section 52A of the NDPS Act, were not complied with.

9. It is also submitted by Mr. Adhikary that the PW 1, who was the leader of raiding party, did not forward the information to his immediate higher officer. According to him, the commission of offence by the appellants was not proved.

10. Reliance is place by Mr. Adhikary on the decision of Sukhdev Singh Vs. State of Haryana, (2013) 1 AD 29 : AIR 2013 SC 953 : (2013) CriLJ 841 : (2013) 2 JCC 41 : (2013) 1 JT 212 : (2013) 2 RCR(Criminal) 232 : (2012) 12 SCALE 699 : (2013) 2 SCC 212 : (2013) AIRSCW 312 .

11. It is submitted by Ms. Meenal Sinha, appearing on behalf of the appellant in CRA 544 of 2007 that the knowledge of the appellants of carrying of illicit articles was not proved.

12. According to Ms. Sinha, the provisions of sub-section (2) of Section 42 of NDPS Act read with the provision of Section 313 of Cr.P.C. were not complied with. No information was sent by the PW 1 to his immediate higher officer with regard to the search and seizure under reference.

13. According to Ms. Sinha, none of the photograph shows presence of any one of the appellants beside the rickshaw van under reference.

14. It is submitted by Mr. Sanjoy Banerjee, learned Counsel appearing for the prosecution that the knowledge of the appellants of carrying contraband article was proved from the evidence in view of corroboration of the contents of the FIR with the evidence of PW 10 and PW 11 who were local witnesses having no interest in the search and seizure under reference. It is also submitted by him that apart from the evidence of the above witnesses the above contents of the FIR were corroborated with the evidence of the leader of the raiding party PW 2,

local witness of seizure list (Exbt.2/1 and 3/1) and PW 5 (local witness of seizure list Exbt.2/2 and 3/2) and PW 9.

15. According to him, the presumption was in favour of commission of offence by the appellants in view of the provisions of Section 35 of the NDPS Act. According to him, the onus of proving the commission of offence by the appellants with knowledge was shifted on them in accordance with the provisions of Section 35 of the NDPS Act.

16. According to Mr. Banerjee, PW 5 was one of the local witnesses of the seizure list (Exbt.2/2 and 3/2) apart from the other witness. The PW 5 identified the requisition letter of the PW 1 sent to him for the purpose of remaining present the time of seizure of contraband article under reference as also the label thereof. In cross-examination he was not shaken. According to him, there was no question of complying with the requirement of the provision of Section 50 read with Section 42 of the NDPS Act. In view of the admitted fact none of the appellants was searched in person and the illicit article was recovered from the rickshaw van. With regard to the validity of the photograph, our attentions were drawn towards the existence of the saloon behind the rickshaw van corroborating with the evidence of PW 3.

17. Drawing our attention to the evidence adduced by PW 6, (employee in a motor garage situated nearby place of interrogation of the appellants) it is submitted by him that in examination in chief, the above prosecution witness stated that he had seen "ganja" beneath the jute stick in the rickshaw van. It is also submitted by Mr. Banerjee that the presence of above prosecution witness at the spot was not in dispute in view of identification of the seizure list Exbt.-3/3 as also the label Exbt.-IV as also the arrest memo relating to the arrest of the appellants.

18. According to Mr. Banerjee, the provisions of sub-section (2) of Section 52A of the NDPS Act relates to the satisfaction of the learned Court below of producing the seizure list at the time of passing necessary order for destroying the same. It had no nexus with the compliance of any procedure prescribed in the NDPS Act in connection with search and seizure of the contraband articles.

19. We have heard the learned advocates appearing for the respective parties at length and we have considered the facts and circumstances of this case.

20. The first ground of challenging the impugned judgment is the failure on the part of the prosecution to catch hold of the main culprit of commission of offence and failure to discharge the burden of proof of commission of offence by the appellants in accordance with law. We are of the opinion that the provisions of sub-sections (1) and (2) of Section 35 of the NDPS Act are relevant to adjudicate the above issue. So, the provisions of Section 35 of the NDPS Act are quoted below:--

"35. Presumption of culpable mental state.--(1) In any prosecution for an offence

under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.--In this section "culpable mental state" includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."

21. In the decision of Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, AIR 2000 SC 821 : (2000) CriLJ 1384 : (2000) 68 ECC 16 : (2000) 1 JT 471 : (2000) 1 SCALE 361 : (2000) 2 SCC 513 : (2000) 1 SCR 542 : (2000) 1 UJ 587 : (2000) AIRSCW 4802 : (2000) AIRSCW 375 : (2000) 1 Supreme 363 : (2000) 5 Supreme 415 it has been held by the Apex Court that in the event a driver of a vehicle admits that the narcotic drug has been recovered from his vehicle, the burden of proof is on him to rebut the presumption envisaged in Section 35 of the NDPS Act. The above burden of proof cast upon the driver/transporter of contraband article can be discharged through different modes. If the circumstances appearing in the prosecution case or in the prosecution evidence are such as to give reasonable assurance to the Court that the appellants could not have had the knowledge or required intention, the burden cast on him under Section 35 of the NDPS Act would stand discharged even if he had not adduced any other evidence of his own when he is called upon to enter on his defence. The relevant portions of the above decision are quoted below:--

"22. The burden of proof cast on the accused under Section 35 can be discharged through different modes. One is that he can rely on the materials available in the prosecution evidence. Next is, in addition to that, he can elicit answers from prosecution witnesses through cross-examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in the prosecution case or in the prosecution evidence are such as to give reasonable assurance to the court that the appellant could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence.

23. In this case non-recording of the vital information by the police at the first instance can be counted as a circumstance in favour of the appellant. Next is that even the information which PW 2 recollected from memory is capable of helping the accused because it indicates that the real culprits would have utilised the services of an autorickshaw driver to transport the gunny bags and it is not necessary that the autorickshaw driver should have been told in advance that the gunny bags contained such offensive substance. The possibility is just the other

way round that the said culprits would not have disclosed that information to the autorickshaw driver unless it is shown that he had entered into a criminal conspiracy with the other main culprits to transport the contraband. The prosecution did not adduce any evidence to show any such connivance between the appellant and the real culprits. There is nothing even to suggest that those culprits and the appellant were close to each other, or even known to each other earlier. Yet another circumstance discernible from the evidence in this case is that the police had actually arrayed two other persons as the real culprits and made all endeavour to arrest them, but they absconded themselves and escaped from the reach of the police.

(Emphasis supplied)

22. The facts and circumstances of these cases are taken into consideration to ascertain the substance with regard to the aforesaid grievance of the appellants in the light of the settled proposition of law discussed hereinabove.

23. From the evidence of PW 1, the leader of the raiding party, PW 2, the seizure witness of Exbts.-2/1 and 3/1, PW 5, the seizure list witness of Exbts.-2/2 and 3/2, PW 9, as also two local witnesses, PW 10 and PW 11 respectively, the search and seizure of the rickshaw van, recovery of contraband article therefrom were proved. That apart, it was proved from the evidence of the above witnesses that the appellants were plying rickshaw van with knowledge of carrying contraband article "ganja" in that rickshaw van. PW 2 and PW 5 were local witnesses. PW 2 was the seizure list witness of Exbts.-2/1 and 3/1. PW 5 was also local witness. He was the seizure list witness in respect of Exbts.-2/2 and 3/2. The evidence adduced by PW 1 and corroborated with the deposition of PW 9 and the evidences of local witnesses, i.e. PW 2 and PW 5.

24. Considering the evidences of the eyewitness and the disclosure of the fact of carrying illicit article in the rickshaw van by the appellants, we are of the opinion that in accordance with the provisions of Section 35 of the NDPS Act, the onus of the prosecution to presume carrying of contraband article with knowledge was discharged. In such circumstances the onus of the above presumption was shifted upon the appellants. None of the appellants had adduced any evidence in defence. Circumstances appearing in the prosecution case stands in the way of giving assurance to the learned Court below that the appellants could not have had the knowledge or required intention.

25. According to the provisions of sub-section (1) of Section 41 of the NDPS Act, 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, amongst other officers are empowered to conduct search, seizure and arrest without warrant or authorisation if he has reason to believe that any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under the NDPS Act has been committed. The question of presence of a Magistrate or gazetted officer arises in case of search and seizure of an

accused in person only in accordance with the provision of Section 50 of the NDPS Act. The above principle has been settled in the decision of State of Punjab Vs. Baldev Singh, etc. etc., AIR 1999 SC 2378 : (1999) CriLJ 3672 : (1999) 157 CTR 3 : (1999) 65 ECC 695 : (1999) ECR 545 : (1999) 81 FLR 303 : (1999) 4 JT 595 : (1999) 1 LLJ 254 : (1994) 4 SCALE 144 : (1999) AIRSCW 2494 : (1999) 6 Supreme 159 and the relevant portion of the above decision is quoted below:--

"57. On the basis of the reasoning and discussion above, the following conclusions arise:

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act...."

(Emphasis supplied)

26. According to the decision of the Hon'ble Supreme Court in the matter of State of Himachal Pradesh Vs. Pawan Kumar, AIR 2005 SC 2265 : (2005) CriLJ 2208 : (2005) 99 ECC 737 : (2005) 4 JT 373 : (2005) 4 SCC 350 : (2005) 1 SCR 417 : (2005) AIRSCW 2154 : (2005) 3 Supreme 321 , it is not possible to include a bag, briefcase or any such article or container etc. within the ambit of the word "person" occurring in Section 50 of the NDPS Act. The relevant portion of the above decision is quoted below:--

"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 hold all, 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."

(Emphasis supplied)

27. Considering the facts and circumstances of this case that contraband article was seized from the rickshaw van and none of the appellants was searched in person, we find that the allegation of non-compliance of provision of sub-section (1) of Section 42 of the NDPS Act was not correct.

28. So far as the question of compliance of the provisions of sub-section (2) of Section 41 of the NDPS Act is concerned, the above provision was amended by Parliament by virtue of Act 9 of 2001 with effect from October 2, 2001, i.e. long before the commission of offence in the appeals in hand. Consequent thereupon, the word "forthwith" stood amended by the words "within seventy-two hours". The Hon'ble Supreme Court held in the matter of Sukhdev Singh Vs. State of Haryana, (2013) 1 AD 29 : AIR 2013 SC 953 : (2013) CriLJ 841 : (2013) 2 JCC 41 : (2013) 1 JT 212 : (2013) 2 RCR(Criminal) 232 : (2012) 12 SCALE 699 : (2013) 2 SCC 212 : (2013) AIRSCW 312 , that whatever ambiguity or leverage was provided for under the unamended provision, was brought in by casting obligation upon the officer concerned to send the information to the superior officers within seventy-two hours from the time of receipt of information. The relevant portion of the above decision is quoted below:--

"15. Section 42 can be divided into two different parts: first is the power of entry, search, seizure and arrest without warrant or authorisation as contemplated under sub-section (1) of the said section; second is reporting of the information reduced to writing to a higher officer in consonance with sub-section (2) of that section. Sub-section (2) of Section 42 had been a matter of judicial interpretation as well as of legislative concern in the past. Sub-section (2) was amended by Parliament vide Act 9 of 2001 with effect from 2-10-2001. After amendment of this sub-section, the word "forthwith" stood amended by the words "within seventy-two house". In other words, whatever ambiguity or leverage was provided for under the unamended provision, was clarified and resultantly, absolute certainty was brought in by binding the officer concerned to send the intimation to the superior officers within seventy-two house from the time of receipt of information. The amendment is suggestive of the legislative intent that information must reach the superior officer not only expeditiously or forthwith but definitely within the time contemplated under the amended sub-section (2) of Section 42..... "

(Emphasis supplied)

29. We find that in case of taking down an information in writing under sub-section (1) of Section 42 of the NDPS Act or recording a ground for his believe

under the proviso thereto, he should within seventy-two hours send a copy thereof to his immediate superior for compliance of the provisions of sub-section (2) of Section 42 of the NDPS Act. The PW 1 informed Tapan Chattopadhyay, Circle Inspector of the information received by him within the aforesaid period. PW 1 was the Officer-in-charge of Tufanganj Police Station at the material point of time. Therefore, the aforesaid Circle Inspector was his immediate higher officer. There is no scope to interfere with the impugned judgment on the above ground.

30. For the purpose of adjudication of the grievance of the appellants with regard to non-compliance of the provision of Section 52A of the NDPS Act, the same is quoted below:--

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

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substance, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of -

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs, 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 sub-section (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 sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

31. The marginal note of Section 52A, deals with "disposal of seized narcotic drugs and psychotropic substance". The provision of sub-section (1) of the above Section, the Central Government by a notification in Official Gazette, is empowered to specify certain narcotic drugs or psychotropic substance, having regard to the hazardous nature, vulnerability of theft, substitution, constraints of proper storage space and such other relevant considerations, so that even if they are material objects seized in a criminal case, they could be disposed of after following the procedure prescribed in sub-sections (2) and (3) of Section 52A of the NDPS Act. Sub-section (1) of Section 52A of the NDPS Act, empower the Central Government to lay down the procedure for search of an accused, but only deals with the disposal of seized narcotic drugs and psychotropic substances. Reference may be made to the decision of State of Punjab Vs. Makhan Chand, (2004) 92 CTR 564 : (2004) 92 ECC 564 : (2004) 3 JT 360 : (2004) 2 SCALE 778 : (2004) 3 SCC 453 : (2004) AIRSCW 1419 : (2004) 2 Supreme 497 and the relevant portion of the above decision is quoted below:--

"10. This contention too has no substance for two reasons. Firstly, Section 52-A, as the marginal note indicates, deals with "disposal of seized narcotic drugs and psychotropic substances". Under sub-section (1), the Central Government by a notification in Official Gazette, is empowered to specify certain narcotic drugs or psychotropic substance, having regard to the hazardous nature, vulnerability of theft, substitution, constraints of proper storage space and such other relevant considerations, so that even if they are material objects seized in a criminal case, they could be disposed of after following the procedure prescribed in sub-sections (2) and (3). If the procedure prescribed in Sub-sections (2) and (3) of Section 52-A is complied with and upon an application, the Magistrate issues the certificate contemplated by Sub-section (2), then sub-section (4) provides that, notwithstanding anything to the contrary contained in the Indian Evidence Act, 1872 or the Code of Criminal Procedure, 1973, such inventory, photographs of narcotic drugs or substances and any list of samples drawn under sub-section (2) or Section 52-A as certified by the Magistrate, would be treated as primary evidence in respect of the offence. Therefore, Section 52-A(1) does not empower the Central Government to lay down the procedure for search of an accused, but only deals with the disposal of seized narcotic drugs and psychotropic substances."

(Emphasis supplied)

32. Therefore, we do not find any substance in the submissions made on behalf of the appellants in this regard for the purpose of interfering with the impugned judgment.

33. We find substance in the submissions made by Mr. Banerjee that the existence of the saloon behind the rickshaw van in the photograph corroborated the evidence of PW 3 with regard to the acceptability of the photograph.

34. Regarding the compliance of the provisions of Section 313 of Cr.P.C., it is not the proposition of law that entire prosecution evidence should be put to the accused and elicit answers only those circumstances which are adverse to accused and his explanation would help the Court in evaluating evidence properly are relevant in recording statement under Section 313 of Cr.P.C. Reference may be made to the decision of Dharampal Singh Vs. State of Punjab, (2010) 10 JT 513 : (2010) 10 SCALE 229 : (2010) 9 SCC 608 : (2010) 10 SCR 1160 : (2010) AIRSCW 6828 and the relevant portion of the above decision is quoted below:--

"21. As part of fair trial, Section 313 of the Code of Criminal Procedure requires giving opportunity to the accused to give his explanation regarding the circumstance appearing against him in the evidence adduced by the prosecution. The purpose behind it is to enable the accused to explain those circumstances. It is not necessary to put the entire prosecution evidence and elicit answer but only those circumstances which are adverse to the accused and his explanation would help the court in evaluating the evidence properly. The circumstances are to be put and not the conclusion. It is not an idle formality and questioning must be fair and couched in a form intelligible to the accused. But it does not follow that omission will necessarily vitiate the trial. The trial would be vitiated on this score only when on fact it is found that it had occasioned a failure of justice.

22. Bearing in mind the aforesaid principle when we consider the facts of the present case we find that the prosecution intends to prove that the appellants were in possession of the opium by disclosing that illicit article was recovered from the dicky of the vehicle driven and occupied by them. Possession is a mental state and what has been unfolded by the prosecution is that on search of dicky of the car opium was recovered. Circumstances aforesaid lead to the conclusion that the appellants were in conscious possession. Therefore, it cannot be said that the appellants were not told to explain the circumstances appearing against them in the evidence."

35. From the facts and circumstances of these appeals as discussed hereinabove, there was no dispute that the appellants had been carrying illicit article "ganja" in a rickshaw van driven and occupied by them. The above circumstances lead to the conclusion that the appellants were conscious possession of illicit article "ganja". Considering the question Nos. 4 to 14 of the statements recorded of both the appellants under Section 313 of the Cr.P.C. and in bald denial of the appellants in reply there was no scope for the learned Court below that there was any occasion of failure of justice.

36. The decision of Sukhdev Singh (supra) does not help the appellants in view of the distinguishable feature of that case and the point of law decided by the Hon"ble Supreme Court in that matter. It was the case of the appellant whether the case of prosecution would fail for total non-compliance with the statutory provisions of Section 42 of the NDPS Act. It was not under consideration in our case due to distinguishable facts and circumstances.

37. In view of the above, we are of the opinion that the impugned judgment, order of conviction and the sentence do not require interference.

38. These appeals are, thus, dismissed.

39. Let the Lower Court's records be sent back expeditiously.

40. Urgent photostat certified copy of this judgment, if applied for, be given to the parties, on priority basis.

Md. Mumtaz Khan, J.

41. I agree.