

GAHC010098432022



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

Case No. : Crl.A./101/2022

MOINUL HOQUE
S/O JALIL UDDIN
RESIDENT OF VILLAGE KEOTKUCHI, PS AND DIST BARPETA, ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY PP ASSAM

Advocate for the Petitioner : MR. K BHATTACHARJEE

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

JUDGMENT

Date : 20-06-2023

(M. Zothankhuma, J)

Heard Mr. K. Bhattacharjee, learned counsel for the appellant as well as Ms. B. Bhuyan, learned Additional Public Prosecutor for the State.

2. The present appeal has been filed against the judgment dated 20.04.2022 passed by the learned Sessions Judge, Barpeta in Special NDPS Case No. 31/2021, by which the appellant has been convicted under Section 21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act") and sentenced to undergo rigorous imprisonment for 15 (fifteen) years and to pay a fine of Rs. 1,00,000/-, in default to undergo rigorous imprisonment for 1 (one) year.

3. The brief facts of the case is that pursuant to the seizure of 26 numbers of 100 ml Coterex cough syrup bottles and 78 numbers of 100 ml Cossex cough syrup bottles from the house of the appellant on 18.01.2021 at about 6:00 p.m., Barpeta P.S. Case No.133/2021 under Section 22(b) of the NDPS Act was registered against the appellant. After investigation had been completed, the Investigating Officer submitted a charge-sheet, having found a *prima facie* case against the appellant under Section 22(b) & (c) of the NDPS Act.

4. Charge was framed against the appellant under Section 21(c) of the NDPS Act, to which the appellant pleaded "not guilty" and claimed to be tried.

5. 8 (eight) prosecution witnesses were examined by the learned Trial Court and the appellant was examined under Section 313 Cr.P.C. thereafter. After hearing the appellant and the Additional Public Prosecutor for the State of Assam, the learned Trial Court found the appellant to be guilty of the offence under Section 8 of the NDPS Act and was convicted under Section 21(c) of the NDPS Act, as the seized articles/contraband was of commercial quantity. The learned Trial Court awarded the sentence of rigorous imprisonment for 15 (fifteen) years and to pay a fine of Rs. 1,00,000/-, in default to undergo

rigorous imprisonment for 1 (one) year, thereafter.

6. The learned Counsel for the appellant submits that though the secret information that had been received by the police, had been taken down in writing, a copy of the same had not been sent to the immediate official superior of the person who had taken down the said information in writing. He further submits that the seized articles were not produced before the learned Trial Court during the trial, which could have proved the fact that the seized articles had been recovered from the possession of the appellant. Further, the seizure witnesses never witnessed the seizure of the contraband as per their adduced evidence. Thus, there was no proof that the seized contraband had been recovered from the house of the appellant. He also submits that the seized articles were never produced before the learned Magistrate and no inventory of the same had been taken in terms of Section 52-A of the NDPS Act. As such, due to non-compliance with the mandatory provisions of law i.e. Section 42 and Section 52-A of the NDPS Act, the proceedings against the appellant being vitiated, the impugned judgment was not sustainable in law and has to be set aside.

7. Ms. B. Bhuyan, learned Additional Public Prosecutor, on the other hand submits that failure to produce the contraband materials/seized articles before the Court during trial, cannot result in the acquittal of the appellant, inasmuch as, only the non-production of the contraband materials before the Court cannot be the ground to grant the benefit of acquittal to the appellant. In this regard, she has relied upon the judgment of the Apex Court in the case of ***State of Rajasthan vs. Sahi Ram***, reported in ***(2019) 10 SCC 649***. She further

submits that the appellant has not denied possession of the contraband articles that were recovered and seized from the house of the appellant. She also submits that there is a presumption of possession of the illegal articles on the part of the appellant in terms of Section 54 of the NDPS Act.

8. We have heard the learned counsels for the parties.

9. As can be seen from the Trial Court records, the secret information about the contraband had been recorded in GD Entry No.733 on 18.01.2021 at 6:00 p.m. by one Tapan Medhi, Police Inspector, Investigating Officer Barpeta Police Station. In the said GD Entry No.733, it is stated that it was learnt from a secret source that the appellant was running a business of selling banned intoxicating cough syrups, by hoarding a substantial amount of the same in his house. The Superintendent of Police and the Deputy Superintendent of Police (Headquarters), Barpeta were informed over phone and effort was made to take necessary action. As can be seen from the contents of the above GD Entry No.733, the information that had been received from a secret source had been informed to the superior authority over phone, though Section 42(2) of the NDPS Act required that a copy of the said information, which was taken down in writing, was to have been given to the immediate official superior of the person, who had taken down the same in writing.

10. The fact that Section 42(2) of the NDPS Act has not been complied is also clear from the evidence of PW-1, (Mr. Bakul Engti) who is a Police Officer, who states that they had received secret information that the appellant had stored a huge quantity of illegal cough syrup in his house and that the Officer-in-charge

of the Barpeta Police Station entered the said information in the General Diary Book vide Entry No. 733 dated 18.01.2021. This, in the first instance, contradicts the contents of Ext – I, i.e. GDE No. 733, as it shows that the GDE had been written by Inspector Tapan Medhi. PW-1 states in his cross-examination that he did not inform the higher authority about the GD Entry. Further, there is nothing in the Trial Court records to show that the Officer-in-charge of Barpeta Police Station had given a copy of the GD Entry No.733 to his immediate official superior. There is also nothing to prove that the Officer-in-charge of Barpeta Police Station had taken down the secret information in writing in the GD Entry No.733. Also, the GD Entry No.733 which was exhibited as Exbt.-1 by PW-1, shows that the same had been apparently recorded by Tapan Medhi, Police Inspector, who was never examined in the Trial Court as a witness. Thus there is nothing to show that the secret information received and which was entered as GD Entry No.733 was recorded by the Officer-in-Charge of the Barpeta Police Station or Tapan Medhi.

11. The above being said, the GD Entry and the FIR in the present case have both been recorded on 18.01.2021 at 6:00 p.m. In view of the information having been recorded at 6:00 p.m. and as the distance between the police station and the house of the appellant is around 5 k.ms. as stated in the FIR, the search of the appellant's house by the Police for the contraband could only have occurred after 6:00 p.m. As per the second proviso to Section 42 of the NDPS Act, 1985, the appellant's house could only be entered into and searched by the police authorities, after recording the "grounds of belief" in the absence of a search warrant or authorisation, between sunset and sunrise. In the present case, no "grounds of belief" have been recorded by the police party

which had entered into the house of the appellant after sunset, for the purpose of search and seizure of the alleged contraband goods. As such, the mandatory provisions of Section 42 has been violated.

12. The search and seizure being made on 18.01.2021 after 6:00 p.m. in Assam, i.e. winter time, when the sun sets usually between 4:30 p.m. to 5:00 p.m., it is not denied by either of the parties that sun would have set by the time the search and seizure of the contraband articles had been made by the police. In that view of the matter, it is clear that there has been violation of the second proviso to Section 42(1) of the NDPS Act.

In the Constitution Bench judgment of the Supreme Court in the case of ***Karnail Singh Vs. State of Haryana***, reported in **2009 8 SCC 539**, the Apex Court held that non-compliance with the requirements of Section 42 and 50 ND&PS Act was impermissible, whereas delayed compliance with satisfactory explanation will be acceptable compliance with Section 42. However, there is no compliance in this case, delayed or otherwise.

13. With regard to Section 54 of the ND&PS Act, which provides that may be a presumption of possession of illicit articles, the Apex Court has held in the case of ***Noor Aga Vs. State of Punjab***, reported in **2008 16 SCC 417** that the said provision required that the initial burden existed upon the prosecution to prove the foundational facts of possession of the contraband, so as to attract the rigours of Section 54, so as to shift the burden of proving that the contraband was not in his possession on the accused. It further held that the standard of proof required for an accused to prove his innocence is not as that of the prosecution, inasmuch as the standard of proof required to prove the

guilt of the accused on the prosecution is beyond all reasonable doubt, but it is preponderance of probability on the accused.

14. In the case of ***Tofan Singh Vs. State of Tamil Nadu***, reported in **2021 4 SCC 1**, the Apex Court has held that presumption of commission of an offense under Section 54 ND&PS Act is rebuttable. In the present case, the seizure witnesses have all stated that they were made to sign the document by the police. However, they have not stated that they had seen the recovery and seizure of the contraband from the house of the appellant. Thus, though Section 54 of the ND&PS Act places the burden to prove on the accused regarding non-possession of the contraband articles, it was the prosecution who had to first prove the foundational facts regarding possession of the contraband by the appellant. In this case, the foundational facts have not been proved as can be seen from the evidence adduced by the seizure witnesses, namely PW-2 to 4.

15. Section 52A of the NDPS Act deals with the disposal of seized narcotic drugs and psychotropic substances and Section 52A(2) states that where any narcotic drugs, psychotropic substances, controlled substances and conveyance 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 etc. containing such details relating to the description, quality, quantity, mode of packing etc. and other particulars as the officer referred to in sub-Section (1) may consider relevant to the identity of the narcotic drugs etc. 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 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.

16. Section 52A(3) provides that where an application has been made under sub-Section (2) of Section 52A of the NDPS Act, the Magistrate shall, as soon as may be, allow the application.

17. Section 52A(4) provides that 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 or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.

18. In the present case, there is no evidence showing that the inventories of the seized narcotic drugs had been made or produced before the Court of the Magistrate for the purpose of certifying the correctness of the inventory. No photographs were taken and no samples of the narcotic drugs has been drawn in the presence of the Magistrate.

19. In the case of ***Simarnjit Singh vs. State of Punjab*** in **Criminal**

Appeal No.1443/2023, which was disposed of by the Apex Court on 09.05.2023, the Apex Court set aside the order of conviction of the accused appellant on the ground that the drawing of samples of the narcotic drugs had not been done in terms of Section 52A(2) of the NDPS Act and as such, the same had created a serious doubt as to whether the seized articles was contraband.

20. In this case, there has been a total non-compliance of Section 52A of the NDPS Act, as not only was no inventory of the seized narcotic drugs made, but the evidence also shows that the seized contraband was not produced before the learned Trial Court during trial. As such, there was no material exhibit before the learned Trial Court to prove the connection of seizure of the contraband goods with the appellant.

21. In the case of ***Vijay Pandey vs. State of Uttar Pradesh***, reported in ***(2019) 18 SCC 215***, the Apex Court, after considering various judgments with regard to non-production of the seized contraband during trial, set aside the conviction of the appellant, as the contraband had not been produced during trial. In the case of ***Ashok @ Dangra Jaiswal vs State Of M.P.***, reported in ***(2011) 5 SCC 123***, the Apex Court has held that as the seized narcotic powder had not been produced before the learned Trial Court as a material exhibit and no explanation had been given for it's non-production, there was no evidence to connect the forensic report with the substance that had been seized from the possession of the appellant.

22. In the case of ***Mohinder Singh vs. State of Punjab***, reported in

(2018) 18 SCC 540, the Apex Court held that for proving the offence under the NDPS Act, it was necessary for the prosecution to establish that the contraband goods were allegedly seized from the possession of the accused, by producing the contraband before the learned Magistrate and the deposit of the same before the malkhana or the documents showing destruction of the contraband. In this particular case, there is no inventory made by the Police with regard to the contraband goods allegedly recovered from the appellant and even if the same had been made, the same was brought to the notice of the Magistrate. In any event, the evidence of the seizure witnesses is to the effect that they only signed the seizure list without seeing the seizure being made.

23. In the case of **Vijay Jain vs. State of Madhya Pradesh**, reported in **(2013) 14 SCC 527**, the Apex Court held that it was necessary to produce the contraband substances seized from the accused before the learned Trial Court, to establish that the contraband substances seized from the accused tallied with the samples sent to the FSL. It was further held that mere oral evidence to establish seizure of contraband substances from the accused was not sufficient. The Apex Court further held in **Vijay Jain** (supra) as follows:-

“10. On the other hand, on a reading of this Court's judgment in Jitendra v. State of M.P. (2004) 10 SCC 562, we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile. Again, in Ashok v. State of M.P. (2011) 5 SCC 123, this Court found that the alleged narcotic powder seized from the possession of the accused was not produced before the trial court as material exhibit and there was

no explanation for its non- production and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the appellant."

As can be seen from the judgments stated above, production of the inventory of the seizure or the contraband goods during trial is a *sine qua non* for establishing that the contraband goods seized from the accused tallied with the samples sent to the FSL. However, in this particular case, samples were not drawn before the learned Magistrate and no inventory of the seized articles had been made, which had to be verified by the learned Magistrate.

24. In the case of ***Sahi Ram (supra)*** the Apex Court, while considering the other decisions made by the Apex Court, regarding non production of contraband before the learned Trial Court, like in the case of ***Vijay Pandey (supra)*** and ***Vijay Jain (supra)***, has held that the benefit of acquittal extended in the above two cases due to the non production of the contraband material before the learned Trial court, was not the singular ground for acquittal to the accused. There were other facets of the case, which also weighed with the Court in extending the benefit of acquittal of the accused, besides non production of the contraband materials. In respect of the present case, on considering as to whether there are other facets of the case, besides non production of the contraband goods before the learned Trial Court, which could have a bearing with regard to whether the learned Trial Court could have come to a finding of guilt against the appellant, we find that there are other facets which would have to be taken into consideration. As has been stated in the foregoing paragraphs, there has been total non compliance with the second proviso to Section 42(1) and Section 42(2) of the NDPS Act. There is also total

non compliance with the provisions of Section 52A(2) of the NDPS Act. Further, the appellant in his examination under Section 313 Cr.PC has denied being in possession of the contraband goods.

25. As such, in view of the reasons stated above and the violation of the mandatory provisions of the NDPS Act, the non production of the seized articles before the learned Trial Court, without giving any explanation/reason for the same, is an added infraction, weighing heavily in deciding the fact that the prosecution has failed to prove it's case beyond all reasonable doubt before the learned Trial Court. The learned Trial Court has unfortunately not gone into the issues, which have been reflected in this order and as such, we are of the view that the findings of the learned Trial court is not sustainable. Consequently, the impugned judgment dated 20.04.2022, passed by the learned Sessions Judge, Barpeta in Special NDPS Case No. 31/2021 is set aside. The appellant is accordingly acquitted from the charge under Section 21(c) ND&PS Act. The respondents are directed to release the appellant from judicial custody immediately, if he is not involved in any other criminal case.

26. The appeal is accordingly allowed. Send back the LCR.

JUDGE

JUDGE

Comparing Assistant