

GAHC010121372012



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Criminal Appeal No. 106 of 2012

Md Hasen Ali,
S/o Late Sabil Chand,
Samadhar Patty,
Haibargaon, Nagaon,
Dist. & P.S.- Nagaon.

.....Appellant.

-Vs-

State of Assam
Represented by the Public Prosecutor, Assam.

.....Respondent.

Advocates for the appellant: Mr R Sarma,

Advocate for the respondent: Mr B Sarma, Addl. P.P., Assam

BEFORE
HON'BLE MRS. JUSTICE MALASRI NANDI

Date of Judgment : 27.02.2023

JUDGEMENT AND ORDER (CAV)

Heard Mr R Sarma, learned counsel for the appellant and Mr B Sarma, learned Additional Public Prosecutor appearing on behalf of the State of Assam.

2. The appellant has challenged his conviction and sentence for the offence punishable under 20 (b) of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter, referred to as "NDPS Act") on a trial held by the learned Sessions Judge, Nagaon, in Sessions Case No. 320/03, vide Judgment and Order dated 04.06.2012, convicting the appellant and sentencing him to undergo Rigorous Imprisonment for 1 (one) year and to pay a fine of Rs. 1,000/-, and in default, further Rigorous Imprisonment for 3 (three) months.

3. The brief facts of the case is that on 18.08.2003, at about 12:10 pm, the informant/Excise Inspector had searched the house of the appellant and recovered 5 kgs of suspected ganja from his house. Subsequently, the said ganja was seized and the sample of said ganja was sent for chemical examination and on receipt of the report of chemical examination, it appears that the seized article gave positive test of ganja (cannabis). Thereafter, the Excise Inspector had submitted Offence Report under Section 20 (b) (i) of NDPS Act.

4. On appearance of the accused appellant before the Special Court, charge was framed against him under Section 20 (b) (i) of the NDPS Act, which was read over and explained to

the accused appellant, to which he pleaded not guilty and claimed to be tried.

5. The prosecution to prove the guilt of the accused/appellant, examined three witnesses. On the other hand, the defence side did not adduce any evidence in support of his case. After completion of trial, the statement of the accused appellant was recorded under Section 313 CrPC and the incriminating material found in the evidence of witnesses were put to him, to which he denied the same. After hearing the arguments given by the learned counsel of both sides, the learned trial had convicted the accused appellant as aforesaid. Hence, this appeal.

6. Learned counsel for the appellant has argued that the prosecution has failed to prove the case against the appellant beyond reasonable doubt as the alleged seizure witness, Utpal Chakraborty was not examined. The chemical examination report was also not proved by examining the person who issued the chemical examination report. It is also submitted that the Investigating Officer of the case was also not examined.

7. Learned counsel for the appellant has further contended that the prosecution has failed to prove the recovery of ganja from the house of the appellant, inasmuch, as the independent witness to the alleged seizure of ganja from the possession of the appellant, Utpal Chakraborty was not examined by the prosecution. As such, the conviction of the appellant based on such seizure list, vide Exhibit-1 is not tenable in law.

8. It is also submitted that when PW-2 stated that there were houses of other persons at the place of occurrence, the prosecution could have examined any of those witnesses to establish the occurrence of the incident and also the recovery of ganja as alleged. In the absence of such effort by the prosecution to examine any independent witness, the finding of the learned trial Court regarding recovery of ganja from the house of the appellant and its

seizure is unsustainable.

9. Learned counsel for the appellant also submitted that the prosecution could not prove the actual amount of seized material, by exhibiting the same and there is some contradiction in the evidence of PWs, as one of them stated the amount as about 5 kgs. There is no evidence of actual weight of the seized materials. Hence, the trial Court has no basis to hold that the seized materials are more than the small quantity.

10. Learned counsel for the appellant has further submitted that the prosecution has failed to exhibit the FSL Report to prove the said articles of ganja nor did they examine anybody from the FSL to prove the articles as ganja. As such, the conviction solely on the basis of oral evidence is not sustainable in law and is liable to be set aside.

11. On the other hand, learned Additional Public Prosecutor supporting the impugned Judgment and Order submits that the appellant was found in possession of 5 kgs of ganja, which is more than the small quantity and this fact has been proved on the basis of FSL Report. He further submits that the evidence led by the prosecution witness is consequent and cogent and no grounds are made out to warrant interference in the conviction and sentence order by the learned trial Court.

12. I have considered the submissions of learned counsel for both the parties. I have also perused the Judgment of the trial Court as well as the evidence of the witnesses, examined before the trial Court.

13. PW-1 is Dibyapratim Bora, Assistant Sub-Inspector of Excise, who deposed in his evidence that on 18.08.2003, at about 12:00 noon, he along with the Excise Inspector went to Samadarpatty, Nagaon and searched the house of the accused and recovered 5 kgs of

ganja and accordingly, said ganja was seized by preparing seizure list, vide Exhibit-1. The said ganja was sent for chemical examination and the chemical examination report gave positive test for ganja (cannabis).

14. In his cross-examination, PW-1 replied that accused Hasen Ali was sitting wherein the ganja was kept. The neighbour, Utpal Chakraborty was present at that time.

15. PW-2 is Excise Constable, Giasuddin Ahmed, who also deposed before the Court in the same tune that on 18.08.2003, he along with the Excise Inspector visited the house of Hasen Ali and found 5 kgs of ganja which was seized accordingly. He also stated that at the time of seizure, the neighbour Utpal Chakraborty was present.

16. PW-3 is the informant, Excise Inspector, Nagaon. From his deposition, it reveals that he accompanied PW-1 and 2 on the date of incident in the house of accused Hasen Ali and on being searched his house, 5 kgs ganja was recovered. On getting secret information, he searched the house of accused. PW-3 also stated that one Utpal Chakraborty was also present at the relevant time of seizure of ganja from the house of accused appellant, and he being the witness put his signature in seizure list, vide Exhibit-1.

17. On scrutiny of the evidence of PWs-1, 2 and 3, it reveals that they visited the house of accused appellant, on receipt of secret information, but none of the witnesses had stated that on getting secret information about keeping/storing of ganja in the house of the accused, any GD Entry was made or they have followed the provision of Section 42 of the NDPS Act or which was taken down in writing and then sent the copy of the information to the superior officer.

18. Under the provisions of Section 42 of the NDPS Act, a procedure has been prescribed,

so far as the search and seizure, arrest of a person and Sub-Section (2) provides that in case if the person who received information and it is not practical, to obtain warrant for search. He has to record the grounds and then after the seizure send a copy of the information received within 72 hours to the immediate superior officer.

19. In the case in hand, the prosecution has exhibited only Exhibit-1, i.e., seizure list. The witnesses are totally silent whether they recorded the receipt of information regarding ganja kept in the house of accused. The witnesses are also silent whether they have sent any information to their superior officers regarding receipt of information about ganja kept inside the house of the accused appellant. The witnesses also did not say anything that the samples were said to have been taken in presence of the witnesses. The evidence of prosecution reveals that samples were sent to the FSL for chemical examination. Though report of chemical examination is available on record, but the chemical examiner was not examined who issued the certificate and ultimately, the chemical examination report was not exhibited before the trial Court.

20. So far as seized psychotropic substances (ganja), its disposal is concerned, the procedure is prescribed under Section 52- A of the NDPS Act. Clause – 1 and Clause-2 deal with the manner in which the psychotropic substances has to be disposed of. Under the provision of Clause-II of the NDPS Act, it provides that the Officer-in-charge or the officer empowered under Section 53 has to prepare an inventory of such psychotropic substance containing such details, relating to their description, quality, quantity, mode of packing, marks, numbers, or such other identifying particulars of the said substance and in Clause-(a) of Sub-Section-(2), the correctness of the inventory made aforesaid has to be certified in presence of the Magistrate. The photographs of such drugs or substances and certification of

such photographs has to be made and the sample has to be drawn from said substances in the presence of Magistrate and there has to be a certificate of correctness of any list of sample so drawn.

21. Under the provisions of Sub-Section (4) of Section 52-A, the Court which is trying the offence, has to treat the inventory, the photographs of psychotropic substances or any list of samples drawn under Sub-Section (2) has to be certified by the Magistrate and it has to be treated as primary evidence in respect of such offence.

22. Unfortunately, in the case at hand, PW-3, the Excise Inspector who had taken part in the raid and the seizure of aforesaid ganja has not followed this procedure. The seized material was never placed before the Magistrate. No inventory was drawn. There was no certification, no photographs were taken before the Court and nothing has been produced to endorse the aforesaid facts. What has been done by PWs-1, 2 and 3, is that after the seizure of material vide Exhibit-1, the samples were sent for chemical examination. It is not clear from their evidence that whether the samples were taken at the place of seizure or all the seized materials were taken in the Excise office or any other place. So, it could be concluded that neither the complainant nor the Investigating Agency has followed the mandatory provisions of Section 52-A of the NDPS Act.

23. Admittedly, the chemical examiner, who issued the chemical examination report was not examined in the case and the chemical analyst report was also not exhibited before the learned trial Court. From his report, it cannot be ascertained, as to who brought the samples from the place of seizure or the Excise office to the office of the chemical examiner. The prosecution has not examined the person, who carried the sample articles and therefore,

there is a material lacuna in the case of prosecution. This lacuna assumes importance for the reason that the samples were not drawn before the Magistrate as contemplated under Section 52-A of the NDPS Act and no inventory was preferred in respect of the seized ganja as alleged. When there is a doubt with regard to the seized material, as to whether it is ganja or not, it was incumbent upon the prosecution to examine the person, who carried the said article. The possibility of tampering the samples cannot be over ruled.

24. Under the provisions of Section 57 of the NDPS Act, whenever any arrest and seizure is made under the NDPS Act, it is necessary for the officer to make a full report of all the particulars of such arrest or seizure to his immediate official superior within 48 hours, next after such arrest or seizure. On this aspect of the matter, it is relevant to note that it is PW-3, the Excise Inspector, who took lead in the seizure, vide seizure list, Exhibit-1. When it was seized by him and he arrested the accused on the same day, it was necessary for him to submit a report to his next superior, but no such report is available in the case record. The witness, PW-3 is totally silent whether he informed his superior about the seizure and arrest of the accused, as contemplated under the aforesaid provision. Therefore, on scrutiny of the evidence led by the prosecution would further reveal that there is non-compliance of the provisions of Section 57 of the NDPS Act.

25. It appears from the evidence of PWs-1, 2 and 3 that they visited the house of the accused appellant, on receipt of secret information and recovered 5 kgs of ganja from his house and the accused/appellant was present, when the seizure was made, but to prove the fact that he is the owner of the premises, the witnesses did not collect any document from the accused/appellant that he is the owner of the said house.

26. From the evidence of PW-3, it appears that the accused appellant was found sitting where the ganja was kept. None of the witnesses had indicated that the said land or house belongs to the accused/appellant. Mere statement of the witnesses that the house belongs to the accused is not sufficient to establish the case against the appellant that it was he who was in possession of the said land and house, from where the said ganja was recovered.

27. On perusal of Exhibit-1, it reveals that one Utpal Chakraborty was present when the seizure was made, but the said Utpal Chakraborty was not examined before the trial Court. Learned Sessions Judge has mentioned in the judgment that in spite of issuance of several summons to the said witness, the prosecution has failed to produce him. But, ultimately, except PWs-1, 2 and 3, no any independent witness was examined.

28. In the case of *Ashok @ Dangra Jaiswal vs. State of Madhya Pradesh*; reported in (2011) 5 SCC 123, there was non-compliance of the provisions of Section 52-A of the NDPS Act and the independent witnesses did not support the seizure. There was no evidence as regards the handling of samples before it reached the hands of chemical analyst and the independent witnesses turned hostile. In the aforesaid circumstances, the Apex Court acquitted the accused.

29. In another case reported in *Central Bureau of Narcotics vs. Bahadur Singh*; (2010) 15 SCC 111, dealt with the violation of provisions Sections 42 and Section 57 of NDPS Act. The independent witnesses have resiled from their statements and there were so many discrepancies. The Apex Court granted an order of acquittal.

30. In another case, reported in (2013) 2 SCC 502; (*Kishan Chand vs. State of Haryana*), the Hon'ble Apex Court held that the accused is entitled to an order of acquittal due to

contravention of Section 42 and 57 of the NDPS Act.

31. Considering the facts on the hand in the context of the aforesaid provisions of the NDPS Act and the principle laid down by the Hon'ble Apex Court, for violation of mandatory provisions, this Court is of the opinion that impugned Judgment of conviction and sentence passed by the trial Court cannot be sustained. Learned Special Judge, Nagaon, has not taken into consideration the aforesaid provisions and just believed the evidence of witnesses to award conviction.

32. In the result, the appeal is allowed.

33. The Judgment and Order dated 04.06.2012, passed by the learned Sessions Judge, Nagaon, in Sessions Case No. 320/03, is set aside. The accused appellant is acquitted of the charge under Section 20 (b) (i) of the NDPS Act and set at liberty forthwith. The fine, if paid by the appellant, shall be refunded to him accordingly.

34. Send down the LCR.

JUDGE

Comparing Assistant