

GAHC010196932017



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

Case No. : Crl.A./193/2017

MD HASSAN
S/O MD. AYAZ UDDIN, VILL. MANIPUR PART-I, P.O. BASKANDI, P.S.
LAKHIPUR, DIST. CACHAR, ASSAM, PIN 788101

VERSUS

UNION OF INDIA and ANR
REPRESENTED BY NCB

2:PAVAN BAISANE

INTELLIGENCE OFFICER
NARCOTICS CONTROL BUREAU
GUWAHATI ZONAL UNIT
GUWAHATI

Advocate for the Petitioner : MS.P BORAH

Advocate for the Respondent :

- B E F O R E -

HON'BLE MR. JUSTICE ARUN DEV CHOUDHURY

For the Appellant : Ms. S. K. Nargis, Advocate.

For the Respondents : Mr. S. C. Keyal, Standing Counsel.

Narcotics Control Bureau.

Date of hearing : 10.10.2023

Date of judgment : 19.10.2023

JUDGMENT & ORDER (CAV)

1. Heard Ms. S. K. Nargis, learned counsel for the appellant and Mr. S. C. Keyal, learned Standing Counsel for Narcotics Control Bureau.
2. The present appeal is directed against the Judgment and Order dated 08.02.2017 passed by the learned Additional Sessions Judge, No.3, FTC, Kamrup (M), Guwahati in NDPS Case No. 4/2016 whereby the accused appellant is convicted and sentenced to undergo Rigorous Imprisonment (R.I.) for 10 (ten) years with fine of Rs. 1,00,000/- in default imprisonment for another 1 (one) year under Section 21(c) of NDPS Act.
3. The prosecution story in brief is that on 04.08.2015 at about 2200 hrs. Sri Suresh Kr. Singh, (PW-) Intelligence Officer, NCB, Guwahati Zonal Unit received an information from reliable source that one person namely Md. Hassan was carrying a consignment of suspected heroin and he will be arriving from Dimapur to Guwahati by Avadh Assam Express. After getting the said information, Sri Suresh Kr. Singh reduced it to writing and intimated to immediate superior officer, Ms. Tulika Morang, Superintendent, NCB, Guwahati and accordingly, Sri Pravin Kumar, Zonal Director, NCB, Guwahati constituted a team comprising of Tulika Morang, Superintendent, Sri Sanjay Singh, IO. Sri Suresh Kr. Singh, IO., Sri Santu Saha, IO., Sri P. Bishwarjit Singh, IO., Sri P. Baisane, IO., Sri Ruskin Talukdar, IO., Sri Hirdesh Kumar, Havildar, Sri S. Brahma, Sepoy, Sri Bikram Singh, Sepoy, Sri B. S. Yadav, Sepoy, Sri Sandeep Kumar, Sepoy, Sri Vipin Kumar, Sepoy, Sri Atul Giri, Sepoy. The team went to

Guwahati Railway Station and reached there at about 20:10 hrs. The NCB team approached two persons namely, Sri Biren Das and Ripon Saikia, standing on platform No. 5 of Ghy Rly Station to be the independent witnesses of any search and seizure if taken place after sharing the information to them. The train arrived at the platform No. 5 at about 22:05 hrs. The NCB team entered into general coach which was third from the engine with two independent witnesses and identified the suspected person. After sharing the information, the suspect identified himself as Md. Hasan. Since the coach was crowded and also, from the security point of view, the NCB team along with the accused with his bag and two independent witnesses, came to RPF office at Platform No. 1 for seizure formalities and other related works.

4. After issuing notice under Section 50 NDPS Act, by Sri S. K. Singh, to the suspected, which his consent, the team searched the suspected Md. Hasan in person but no any contraband was recovered. Thereafter, the bag of the suspected person was searched in presence of the suspect and independent witnesses and recovered a packet of morphine in it. A small quantity was tested by NCB drug detection kit which gave positive test. The weight of the recovered morphine was taken which amount to 1.5 kg and statement of the Md. Hasan was recorded. The recovered suspected morphine was seized and panchnama was prepared and its samples were drawn up on the spot. Accordingly, the suspected was arrested and produced before the Court enroute to his remand to judicial custody. Thereafter, the samples were sent to FSL examination and report was collected which gave positive test to morphine with percentage to be 29.65. At the end, the complainant lodged the final complaint against the accused Md. Hasan to face trial in the Court.

5. After producing the accused before the Court, the copies of the case were furnished to him immediately. Both party then was heard and after perusal of relevant documents, the charge was framed under Section 21(c)/29

NDPS Act against the accused. The charge was read over and explained to the accused who pleaded not guilty and claimed to be tried.

6. To bring home the charges, the NCB examined as many as 5 witnesses including the independent witnesses. It is to be noted that there are some defects in marking the number of witnesses inasmuch as there was no PW-4. The statement of the accused was recorded under section 313 Cr.P.C., where he took the plea of denial of the complaint case. But no defence evidence was tendered by him.

7. Thereafter, the learned trial Court convicted and sentenced the accused to undergo Rigorous Imprisonment (R.I.) for 10 (ten) years with fine of Rs. 1,00,000/- in default imprisonment for another 1 (one) year under Section 21(c) of NDPS Act. Assailing such judgment and conviction, the present criminal appeal is filed.

8. On the basis of the aforesaid evidence, the learned trial court concluded that the appellant is guilty of the offences and accordingly, pass the impugned judgment as discussed herein above.

9. Before determining the legality and validity of such conviction, let this Court now examine the deposition of the witnesses so as to arrive at a just and fair decision.

I. **PW1- Ruskin Talukdar** during examination-in-chief deposed that on 4-8-2015 he was posted at NCB, Guwahati as Intelligence Officer and on that day one Suresh Kr Singh, Intelligence Officer received an Information which was reduced to writing stating that one person Md. Hassan is coming from Dimapur to Guwahati by Abadh Assam Express with a consignment of Heroin and It was reduced to writing by Suresh Kumar Singh and submitted to his immediate superior Tulika Morang, Superintendent. Thereafter, a team was formed for nabbing Md. Hassan. The team reached Guwahati Railway Station at 8:10pm Upon reaching

Platform No.5, the NCB team approached two persons standing there and disclosed about the information and requested them to be independent witnesses in the seizure and search procedure. The Abadh Assam Express arrived at 10:05 pm. Upon indication by informant, their team, with Independent witness boarded the general coach third from the engine and identified the suspect. Since the coach was crowded, their team with independent witnesses and Md Hassan together with his belonging went near RPF Office at Platform No 1. There, Md Hassan was issued with notice U/S 50 by Suresh Kr Singh and search was conducted on his body. However no contraband was found except a few documents. Thereafter the bag which was carried by Md Hassan was opened in presence of two independent witnesses and amongst few garments, a polythene packet was recovered. It contained a brown colored powder. Upon testing of brown colored powder by NDPS Kit of NCB, it received positive test of Narcotic Drugs. Thereafter the polythene packet containing brown colored powder was weighted with electronic scale and the weight was found 1.5kg. The documents recovered from the bag were also seized. A sample in duplicate was drawn in presence of two independent witnesses and Md Hassan at platform no 1. The signature of the accused, two independent witnesses and seizing officer were taken on the samples. Thereafter, notice U/S 67 NDPS Act issued to Md Hassan and his statement was recorded. Based on the confessional statement of Md Hassan, he was arrested by Suresh Kr Singh, intelligence officer of the case. Then, the accused and seized articles were brought to NCB Office. The sample drawn was sent to FSL for examination. The FSL report was received which tested positive of Narcotic Drugs. The Investigating officer Pawan Baishane was appointed formally for the case. Due to absence of Pawan Baishane for leave, he

received the FSL Report and, he sent a copy to the accused through jail superintendent. Ext. 1 is the office copy of forwarding chemical examination. Ext. 1(1) is his signature. Ext 1(2) is the signature of accused. Ext. 2 is the office copy Forwarding (sic) to accused, Ext. 2(1) is his signature. Ext. 2(2) signature of the accused.

During cross-examination, he deposed that he had not given any statement to I/O regarding search and seizure process. He also stated that he did not know if the I/O prepared the sketch map of place of occurrence received, seat etc. He also denied the suggestion that he was not in the team and he deposed falsely.

II. **PW 2- Pawan Atmaram Baishane.** during examination- in-chief, deposed that on 4.8.15 while he was posted as Intelligence officer, NCB, Guwahati, on that day, Sir Suresh Kr. Singh Intelligence officer NCB, received Information from reliable sources that a person namely Md. Hasan will be carrying a consignment of Heroin from Dimapur to Guwahati by Abadh Assam Express. Thereafter Suresh Kr. Singh reduced the same information into writing and forwarded it to immediate superior officer, Ms Tulika Morang, Superintendent, NCB Guwahati. Then, as per office order a team was constituted and as per that office order Sri Suresh Kr Singh was given the responsibility of seizing officer. The NCB team left the office at around 7:30pm and reached Guwahati Rail Station at 8:10pm. The team had 14 members including him. Then the NCB team went to platform no. 5 where Abadh Assam Express was supposed to arrive. NCB team requested two persons to be the independent witness in the process of search and seizure if any of the said person to which they readily agreed. The Abadh Assam Express arrived at 10:05 pm and informant indicated the general coach which was third from the engine. The NCB team went inside the general coach and approached

the suspected Md Hassan who was carrying black and violet bag with him. From the security point of view, Md Hassan was taken to the near of RPF office at platform No 1 of Guwahati Railway Station. The personal search of Md Hassan was conducted with due process of law, NCB team found one transparent polythene packet wrapped with celotape which contained brown coloured powder, small amount of brown colored powder was taken out and tested with Narcotic Drug Detection Kit carried by NCB Team and it gave positive result of morphine. On asking what was inside the polythene packet, Md Hassan said that it was morphine. Weight of transparent packet was found to be 1.5kg. After that seizure formalities were completed by Suresh Kr Singh, Intelligence Officer. The search and seizure list with Panchnama was prepared on the spot. Md Hassan was arrested at around 2am on 5.8.15 being based on his voluntary statement made U/S 67 NDPS Act. He was appointed as Investigating Officer on 7.8.15 of the case. During the course of investigation the result of FSL examination was received in connection with this case. According to that report, it was positive for Morphine and percentage of Morphine was found to be 29.65 on the samples. After going through all documents he filed the said complaint on 3.2.16 against Md Hassan having found prima facie material against him U/S 8(C)/21(C)/29 NDPS Act. Ext 3 is his complaint. Ext 3(1) to 3(8) are his signatures.

During cross-examination, he deposed that he had made 6 persons as witness of the case. He also deposed that He had not drawn up any sketch map of PO. At the time of testing Independent witness were present. He denied the suggestion that He had done investigation mechanically and falsely apprehended the accused.

III. **PW3-Suresh Kr Singh** during examination-in-chief he

deposed that on 4.8.15, he was posted as Intelligence Officer NCB Guwahati and on that day, one casual informer informed him that one person namely: Md Hassan is carrying a consignment of heroin in his bag and he was travelling in general compartment 3 coach of Abadh Assam Express from Dimapur to Guwahati. After that the information was reduced to writing by him and intimated to Ms Tulika Morang, Superintendent NCB Guwahati. A team was constituted as per direction of Superior Officer, NCB, Guwahati. He was appointed as seizing officer of the case. After that the team left Guwahati NCB office at about 19:30 hours on 4.8.15 and reached at Guwahati Railway station at about 20:10 hours. The said team reached the platform no5 of Guwahati Railway Station where Abadh Assam was supposed to arrive. thereafter he contacted two persons namely Biren Das and Nripen Saikia who were standing on Platform No-5 and requested them to be independent witnesses. Accordingly, the Abadh Assam Express from Dimapur reached Guwahati railway station at about 22.05 hours. After indication by their informant, NCB team alongside the two independent witness entered the general compartment 3rd from the engine and identified the suspected person with the help of the informant. On asking he introduced himself as Md Hassan S/O Ayazuddin, R/O vill- Manipur P-1, PS- Lakhipur, Dist- Cachar. Since the coach was crowded and on security points, the NCB team along with suspected person with a bag which was carried by Md Hassan with two independent persons got down from train and went to near RPF office at platform No1 for any search and seizure. Then, he issued a notice U/S 50 NDPS Act to Md Hassan wherein he was intimated to him that it is his legal right that his personal search may be conducted before a Magistrate or a Gazetted Officer to which he refused to do so in writing. Ext.6 was notice issued U/S 50 NDPS Act, Ext.6 (1)

was his signature with office seal, Ext. 6(2) signature of Md Hassan on acknowledgement signed in his presence, Ext.7 was written consent issued to him by Md Hassan, Ext.7(1) was signature of Md Hassan made before him. The consent is made in presence of independent witnesses. After that the personal search of Md Hassan was carried on by him in presence of two Independent witnesses. After that his bag which he carried was opened in presence of two independent witnesses and other team member and on opening, one plastic packet wrapped with celotapes was recovered. He, in the presence of suspect and two independent witness torn the packet and brown coloured powder material was recovered. Small amount of powder was tested with Narcotic drug detection kit which was carried by NCB team. The said powder tested positive of Morphine in the Narcotic Drug Detection Kit. After that the plastic packet was weighed which amounts to 1.5kg. After that photograph was taken of the consignment. On the spot questioning Md Hassan confessed that it was Morphine. Md Hassan also revealed that he was involved in Illegal trafficking of morphine for last many years for monetary benefit. On the reasonable belief that an offence has been committed U/S 8(c) NDPS Act punishable U/S 21(c) NDPS Act, the entire consignment of Morphine was seized from Md Hassan. After that, he drew two samples respectively of 5gm each of suspected Morphine. The search cum seizure process was completed at about 1230 hrs on 5.8.15 without causing any injury and damage to any property. After that, he issued notice U/S 67 NDPS Act to Md Hassan to record his voluntary statement at platform No1 near RPF office Guwahati Railway Station. After that his voluntary statement was recorded by Santosh Saha before him wherein Md Hassan confessed his guilt. On the basis of the confessional statement, he arrested the accused. After that, the team

return to Guwahati NCB office and deposited seized material with samples to NCB godown. After that, at about 15hours all seized articles were taken out of the Godown to produce before CJM court. The accused Md Hassan was produced on 5.8.15 before the CJM court after his Medical examination.

During cross-examination, he deposed that he had not mentioned about name of Informer. He had not prepared any map of place of occurrence. He denied the suggestion that the accused never gave his confession. He also stated that it is not true that he had not seized any contraband from the accused.

IV. **PW5: Smti Tulika Morang** during examination-in-chief, she deposed that on 4.8.15 while she was posted at Guwahati Zone NCB as superintendent and that day her Junior officer Suresh Kr Singh Intelligence Officer received an information that one person Md Hassan was coming with a heroin consignment by Abadh Assam Express. It was reduced to writing and forwarded to her and so she passed office note and forwarded to Prabin Kr. Zonal Director NCB Guwahati. She deposed that a team of officers were deputed to Guwahati Railway Station and to take action as per law. Ext.4 was the said Information reduced to writing and Ext.4(2) is her signature. Ext. 4(3) signature of Prabin Kr, Zonal Director. Accordingly a team was formed. Thereafter the team reached Guwahati Railway Station at about 8.10pm. At platform 5, the team requested two person to be witness in the operation and accordingly they namely Biren Das and Ripam Silkla agreed to become witness. The team waited for the train. At about 10.05pm Abadh Assam Express arrived at Platform No 5. Accordingly, the team with two Independent witnesses entered into general coach compartment at 3rd position from the engine and the Informer pointed the person the team is looking for.

The team introduced themselves to Md Hassan and asked him to cooperate with the team. The person introduced himself as Md Hassan. Thereafter, the team with Md Hassan with his bag and two witnesses came down from Train and came to Platform No 1 near RPF office. Suresh Kr Singh Issued notice u/s 50 of NDPS Act to Md Hassan and explained his legal right regarding his decision to be searched before a Magistrate or Gazetted Officer. But Md Hassan gave consent for search by the team. After personal search no contraband was found from body of Md Hassan. But some documents were found. Thereafter, the bag of Md Hassan was opened and found one polythene packet wrapped by yellow cellotape. The polythene packet was opened and brown color powder was found in the the same. A small quantity of brown powder was tested by drug detection kit which gave positive result of morphine. The weight was taken by digital weighing machine which shows it was 1.5kg. The consignment was seized and duplicate sample was collected. The seizure list and panchnama were prepared and it were sealed. After that the signature of seizing officer, Independent witness and accused was taken on the seized articles.. As per section 67 NDPS Act, the statement of accused was recorded and he was arrested. The team along with seized article and accused with two independent witnesses returned to office. The seizing officer handed over seized article to her to keep in godown and accordingly, she kept the same in godown. Thereafter, she produced the seized articles to seizing officer to produce the articles before Court. After that she received back the seized articles and kept in godown. Ext 12 is godown receipt no 1 and Ext 12(1) is her signature.

During cross-examination, she deposed that Paban Baishane was I/O of the case. The I/O did not record her statement. Seizing officer

approached two independent witnesses at platform 5. She denied the suggestion that she was not a team member and was not sent to railway station.

V. **PW6: Biren Das** during examination-in-chief, he deposed that on a day in the year 2015 he came to Guwahati Railway Station to go to Rangia. There RPF personnel took him towards platform No. 5, where there was a black bag. One small packet was taken after opening the bag. There was some powder like thing in the bag. Then, they take his signature on the seizure list. The powder was of 1.5-2kg. The powder was found from a person named Md Hassan. He deposed that he could not properly recognise the accused in the Court. Ext.8 was the seizure list. Ext 8(11) to (15) is his signature. He denied the suggestion that he did not know anything about the case.

10. The first argument advanced by the learned counsel for the appellant is that there is total violation of Section 52 A of the NDPS Act and there is also non adherence of the notification issued in exercise of power under Section 52A (1) by the Ministry of Finance, (Department of Revenue) dated 10.05.2007 detailing the procedure for disposal of drugs and collection of sample.

11. Countering such argument Mr. S. C. Keyal, learned Standing Counsel for the NCB argues that in the case of **Gurbak Singh vs State of Haryana** reported in **2001 3 SCC 28**, the Hon'ble Apex Court held that the Section 52 and 57 of the NDPS Act are discretionary and violation thereof, would not ipso facto vitiate the trial or conviction. He further contends that in the present case the samples were drawn in compliance with Standing Order 1/89 and therefore, there is no violation of Section 52A (1) (2) of NDPS Act inasmuch as he submits that on the date and time of seizure i.e. on 04.05.2015, the Standing Order 1/89 was holding the field.

12. As the basic argument is violation of Section 52A of the NDPS Act, let us

first deal with such issue:-

- I. The seizure was done on 04.05.2015.
- II. Standing order 1/89 was issued on 13.06.1989 in exercise of power under Section 52A(1) of the NDPS Act.
- III. The Ministry of Finance (Department of Revenue) issued another notification in exercise of power under Section 52A(1) of the NDPS Act being notification No. GSR-339(E) dated 10.05.2007, which provides an exhaustive manner and mode of disposal of drugs along with certificate of the structure. Thus the aforesaid notification was in existence at the time of commission of the offence. Though the said notification was subsequently repealed by another notification dated 23.12.2022.
- IV. Law is by now well settled that the notification issued under the provision of Section 52A(1) of the NDPS Act cannot be in derogation or be in contradiction with the main provision more particularly sub Section 2 of Section 52A of the NDPS Act.
- V. In the case of ***Union of India –VS- Mohan Lal and Another*** reported in ***2016 3 SCC 359***, while interpreting Section 52A(2) of the NDPS Act, the Hon'ble Apex Court held as follows:-

“15. It is manifest from Section 52-A(2) include (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-sections (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.”*
(Emphasized is supplied by this Court)

VI. Now coming to the case in hand, it is an admitted position that that samples were drawn without taking recourse to the sub Section 2 of Section 52A of the NDPS Act which is crystal clear from the evidence of PWs more particularly from PW-3, PW-5 and PW-6 as discussed hereinabove, inasmuch as it is not disputed even by the learned Standing Counsel for NCB resulting non adherence of provision of Section 52A of the NDPS Act, though the learned Standing Counsel has tried to convince this Court that the samples were drawn in strict adherence of Standing Order 1/89 issued in exercise of power under Section 52A(1) of the NDPS Act. However, such argument donot find favour from this Court for more than one reason, firstly, on the date of the seizure, the Standing Order 1/89 was not holding the field rather the notification dated 10.05.2007

was holding the field. Secondly, as held hereinabove, the adherence of Section 52A(2) of the NDPS Act is mandatory and as held in ***Mohan Lal*** (supra) non adherence of such provision shall vitiate the entire prosecution. Furthermore, any notification issued cannot contradict or take away the mandate of the principle provision of the Act, in this case Section 52A(2) of the NDPS Act.

VII. In the case in hand, from the evidence of PW-3, PW-5 and PW-6, it is established that the alleged sample were drawn at the place and time of seizure. It is also established beyond reasonable that the samples were neither drawn in presence of Magistrate or under supervision of the Magistrate. No certifications by Magistrate following the procedure as laid down under Section 52(A) of the NDPS Act were exhibited. Even the competent person who did the FSL examination and submitted the report was not examined.

VIII. The evidence as discussed hereinabove above laid by the prosecution clearly establishes that the seizure is not in conformity with the law laid down in the case of ***Mohan Lal*** (supra). Therefore, this Court is of the unhesitant view that a doubt has been created whether the material/substance recovered was contraband or not. The fact also remains that the forensic expert was not even examined by the prosecution. Therefore, the prosecution has not only failed to establish the case against the accused/appellant beyond reasonable doubt but also failed to establish the foundational fact that the materials seized from the accused/appellant were narcotic substance.

IX. From the evidences of PW-1, PW-2, PW-3 and PW-5, it is clear that procedure as mandated under Section 52A of the Act was not at all adhered to in the case.

X. In view of the aforesaid, findings, this Court need not go the further argument advanced by the learned counsel for the parties, and in the considered opinion on the basis of the consideration and discussions made hereinabove, the appellant is entitled for acquittal granting him benefit of doubt. Accordingly, the present appeal stands allowed.

13. Accordingly, the impugned Judgment and Order dated 08.02.2017 passed by the learned Additional Sessions Judge, No.3, FTC, Kamrup (M), Guwahati in NDPS Case No. 4/2016 whereby the accused appellant is convicted and sentenced to undergo Rigorous Imprisonment (R.I.) for 10 (ten) years with fine of Rs. 1,00,000/- in default imprisonment for another 1 (one) year under Section 21(c) of NDPS Act is set aside and the appellant be released forthwith, if not in custody in connection with any other case. The bail bond stands discharged.

J U D G E

Comparing Assistant