



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

PRINCIPAL SEAT AT GUWAHATI

Criminal Appeal No. 200/2023

1. Sumen doimary,
S/o Manowal @ Manual Doimar,
R/o Mazbat,
P.S.- Mazbat,
Dist.- Udalguri.
2. Sankar tirki
S/o Late Atowa Tirki
Vill.- Lamabari
P.S. & Dist.- Udalguri.

.....Appellants.

-Versus-

1. The State of Assam,
Represented by the Public Prosecutor of Assam.
2. Jugal Kalita
S/o Basanta Kalita,
S.I. of Tezpur Police Station,
Dist. - Sonitpur, Assam.

.....Respondents.

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN

For the Appellants : Mr. A. Bhattacharya. Advocate.

For the Respondents : Mr. B.B. Gogoi, Addl. P.P.

.....Advocate.

Date of Hearing : 30.01.2024

Date of Judgment : ***8th April, 2024***

JUDGMENT AND ORDER

Heard Mr. A. Bhattacharya, learned counsel for the appellants and also heard Mr. B.B. Gogoi, learned Additional Public Prosecutor, Assam, appearing for the State respondent No.1.

2. This appeal, under Section 374(2) of the Code of Criminal Procedure, 1973, is directed against the judgment and order dated 23.03.2023 passed by the learned Special Judge, Sonitpur, Tezpur, in Special (NDPS) Case No.05/2018, arising out of Tezpur P.S. Case No.2147/2018 under Section 20(b) of the NDPS Act. It is to be noted here that vide impugned judgment and order dated 23.03.2023, the learned Court below has convicted the appellants under Section 20(b)(ii)(C) of the NDPS Act and sentenced them to suffer rigorous imprisonment for 10(ten) years and also to pay a fine of Rs. 1,00,000/- each, with default stipulation.

3. The background facts, leading to filing of the present criminal appeal, are briefly stated as under:-

“On 15.10.2018, at about 7:00 a.m. in the morning, acting on a tip off, the informant ASI Jugal Kalita of Kacharigaon Police Out Post along with 20th Assam Rifle Party and other police personnel conducted Naka checking in front of Trade Industry, Mission Chariali and during the course of checking, they intercepted one vehicle, bearing Registration No. AS-27-C-3784 with two persons in the said vehicle and having been searched they have found

four packets of suspected ganja, weighing 20 kg and seized the same in presence of DSP, Headquarter and the names of the two persons, whom they have apprehended are Sankar Tirki and Sumen Doimary of Rangabari and Neheruwa village, Majbat, respectively. Thereafter, the informant has lodged one FIR on 15.10.2018 with the Officer-in-Charge, Tezpur Police Station, upon which the Officer-In-Charge, Tezpur Police Station has registered a case, being Tezpur P.S. Case No.2147/2018 under Section 20(b) of the NDPS Act and endorsed S.I. Upen Sarma to investigate the same. The I.O. then visited the place of occurrence, examined the witnesses and arrested the accused persons and forwarded them to Court and drawn up sample from the seized contraband substances and send the same to the FSL for examination and thereafter collected the report. Then on completion of investigation the I.O. laid charge-sheet against the appellants Sankar Tirki and Sumen Doimary to stand trial in the Court under Section 20(b) of the NDPS Act. Thereafter, on production of the accused persons before the learned Court below and after hearing learned Advocates of both the parties after complying the provision of Section 207 of the Code of Criminal Procedure, the learned Court below, having found a prima facie case made out under Section 20(c) of the NDPS Act against the accused/appellant and framed charge under the said section of law and on being read and explained over, the accused persons pleaded not guilty to the same. Thereafter, the learned Court below has examined as many as 10 witnesses and also exhibited as many as 8 documents and after closing the prosecution evidence, the learned Court below has examined the appellants under Section 313 Cr.P.C. and

thereafter, hearing arguments of learned Advocates of both the parties, the learned Court below has convicted the appellants under Section 20(b)(ii)(C) of the NDPS Act and sentenced them as aforesaid."

4. Being aggrieved, both the appellants preferred this criminal appeal for setting aside the impugned judgment and order on the following grounds:-

- (i) That the learned Court below has failed to appreciate the evidence in its proper perspective and arrived at an erroneous finding of guilt of the appellants and as such, the impugned judgment and order dated 23.03.2023 is liable to be set aside.
- (ii) That the learned Court below has failed to appreciate that there are major contradictions in the version of the prosecution witnesses rendering their evidence doubtful.
- (iii) That the learned Court below has overlooked the failure on the part of the prosecution and the investigating agency in adhering to the mandatory provision of Section 41, 42 and 50 of the NDPS Act, non-compliance of which caused serious prejudice to the appellants.
- (iv) That the learned Court below has also failed to appreciate that the prosecution side failed to comply with the mandatory provision of Section 52A(2) of the NDPS Act while seizing and sealing the alleged contraband from the alleged possession of the appellants, as there is no material to show that proper inventory, as enumerated in the said section has been prepared, which cast serious doubt upon the allegation of seizing and sealing the contraband substance from the place of occurrence.

- (v) That the learned Court below has also failed to appreciate that the present case is based on circumstantial evidence where the prosecution side has failed to establish the complete chain of events.
- (vi) That the learned Court below has also failed to consider the fact that except the evidence of the PW-2, who is the informant of the case, no other materials to corroborate his version and as such, conviction of the appellants under Section 20(b)(ii)(C) of the NDPS Act is bad in law, and
- (vii) That the learned Court below has also failed to interpret Section 54 of the NDPS Act in its proper perspective and therefore, it is contended to allow this appeal.

5. Mr. Bhattacharya, learned counsel for the appellants besides reiterating the grounds mentioned herein above also canvased before this Court that the charge under Section 20(b)(ii)(C) of the NDPS Act is not proved beyond all reasonable doubt. Mr. Bhattacharya, further submits that there are material contradictions in the version of the prosecution witnesses and the same cast serious doubt about the veracity of the prosecution version. Mr. Bhattacharya, further pointed out that the mandatory provision of Section 41, 42, 50 and 52A(2) of the NDPS Act has not been complied with and thereby serious prejudice is caused to the appellants and therefore, it is contended to allow the appeal.

6. Mr. Bhattacharya has also referred following case laws in support of his submission:-

- (i) **Union of India v. Mohanlal & Anr.** reported in **(2016)3 SCC 379.**

- (ii) **Yusuf @ Asif v. State**, in **Criminal Appeal No.3191/2023 [Arising out of SLP(Crl.) No.3010/2023]** and
- (iii) **Simarnjit Singh v. State of Punjab**, in **Criminal Appeal No.1443/2023 [Arising out of SLP(Crl.) No.1958/2023]**.

7. On the other hand, Mr. B.B. Gogoi, learned Additional Public Prosecutor, Assam, has supported the impugned judgment and order. Mr. Gogoi submits that the learned Court below has discussed all the relevant points and arrived at the finding on the basis of the materials available on the record and arrived at a just finding, which warrant no interference of this Court. Mr. Gogoi, further submits that the learned Court below has imposed minimum punishment upon the appellants and therefore, it is contended to uphold the same.

8. Having heard the submission of learned Advocates of both sides, I have carefully gone through the memo of appeal and the documents placed on record and also perused the impugned judgment and order dated 23.03.2023 and the record of the learned Court below and also gone through the case laws referred by Mr. Bhattacharya, learned counsel for the appellants.

9. It appears from the FIR-Exhibit-3, Kachari Gaon Police Out Post General Diary Entry No.314, dated 15.10.2018 - Exhibit-2, and the Seizure List - Exhibit-1, that the occurrence took place on 15.10.2018, at around 7:00 a.m. in the morning, at Mission Chariali, in front of Trade Industry. More or less all the prosecution witnesses corroborated the same. It is to be mentioned here that the defence side had not disputed the date time and place of occurrence.

10. Further, it appears that acting on a tip off, the informant (PW-2) ASI Jugal Kalita, of Kachari Gaon Police Out Post, had recorded a GD Entry No. 314 dated 15.10.2018-Exhibit-2 and then along with other

police staff and Assam Rifle personnel proceeded to the place of occurrence and intercepted one vehicle, bearing Registration No.AS-27C-3784 and found the present appellants in the said vehicle and having conducted search, they have recovered four packets of Ganja, weighing 20 kg, and having apprehended the accused persons he had reported the matter to his superior authority over phone. The the DSP Head quarter and SI Upen Sharma and other police officials arrived at the place of occurrence and S.I. Upen Sharma had seized the suspected Ganja, weighing 20 kg in presence of the witnesses and in presence of DSP Headquarter. Thereafter he had lodged the FIR-Exhibit-3. Nothing tangible could be elicited in cross-examination of this witness.

11. The evidence of P.W.2 finds support from the evidence of P.W.1 Shri Narayan Sharma who is a witness of seizure and he confirmed the seizure list Exhibit-1. He heard that police recovered and seized Bhang with one Tata Magic vehicle. P.W.3 Satya Kurmi is a Police Constable of Kachari Gaon Police Out Post and at the relevant time he was attending duty along with Assam Rifles. And during checking they have apprehended a Magic Vehicle and recovered four packets of Ganja, Material Exhibit-1, 2, 3, and 4, and also apprehended the two accused.

12. The recovery and seizure of Material Exhibit-1, 2, 3, and 4, from the Tata Magic vehicle finds support from the evidence of P.W.4 - Nayak Subeder Ramesh Aswal, P.W.5 – Havildar Santaram 20th Assam Rifle, also. But, as per P.W. 4 and 5 accused Sumen Doimary was the driver of the Tata Magic vehicle and the other person was in a Scooty and was guiding the Tata Magic and he fled away as soon as they apprehended the Tata Magic, but they apprehended him also.

13. The evidence of PW-9, the Investigating Officer also supported the version of the informant. His evidence reveals that having received information about recovery of contraband substance by the I/C Kacharigaon Police Out Post and Army personnel on 15.10.2018, from a TATA Magic vehicle, bearing Registration No.AS-27C-3784, the Officer-in-Charge sent him to investigate the same. Then along with DSP –Shri Swapan Kumar Seal, he went to the place of occurrence i.e. Mission Chariali, near Army Camp and having been authorized by the DSP, he had seized the vehicle and suspected four packets of ganja, weighing, 20 kg, vide seizure list (Exhibit-1) in the vehicle and thereafter, he had collected one electronic weighing machine from a nearby shop of Dildar Hussain and weight the suspected ganja with the said machine which he seized vide seizure list (Exbt.-4) and thereafter, he had recorded the statement of the witnesses and arrested accused persons, namely, Sankar Tirki and Sumen Doimary at the place of occurrence. Thereafter, he had collected four samples, 50 grams each, from the four packets of Ganja. Thereafter he had brought accused persons and seized articles to Police Station and he had sent the sample of contraband substance, as per direction of Additional S.P. to the FSL, Kahilipara and thereafter, he collected the FSL report and handed over the case diary to the Officer-in-Charge, Tezpur Police Station.

14. It is elicited in his cross-examination that he had sealed the samples packets at the place of occurrence and he had produced the seizure list and seized contraband substances before the learned Chief Judicial Magistrate, Sonitpur, Tezpur, on 16.10.2018. But, admittedly, he had not produced the sample before the learned CJM. It is further elicited that the contraband substances were detected by Assam Rifles

personnel during checking and he had seized the same from the vehicle.

15. P.W. 7 – DSP- Swapan Kr. Seal also lend support to the version of the informant in respect of recovery of Ganja. He also confirmed that he had authorized S.I. Upen Sharma vide Authorization Letter - Exhibit-7.

16. Further it also appears that samples from the contraband substances were drawn and the same were sent to the FSL and the FSL report (Exbt.-5) indicates that the samples gave positive test for cannabis (ganja), which is proved by the PW-6, Sri Gajendra Nath Deka, Director of FSL, Kahilipara, Guwahati.

17. Thus, it also appears from the evidence discussed above that the recovery and seizure of Material Exhibit-1, 2, 3, and 4, from the Tata Magic vehicle, which was being driven by accused Sumen Doimary stands established. However, there is contradiction in the version of P.W.4 and 5 with other prosecution witnesses regarding travelling of the other accused in the Tata Magic from where the four packets of Ganja were recovered and seized. While P.W.4 and 5 testified that the other accused was travelling in a Scooty and guiding the Tata Magic, the other Prosecution witnesses such P.W. 2, 3 and 9 testified that both were in the Tata Magic. But, the said scooty was not recovered and seized, which cast a serious doubt about the veracity of the evidence of PWs-4 and 5 regarding involvement of the accused/appellant Sankar Tirki with the offence charged.

18. Now, the question is whether the mandatory provisions, as submitted by Mr. Bhattacharya, learned counsel for the appellants have been complied with here in this case or not.

19. It is to be noted here that the learned court below, while dealing with this issue, in the paragraph 22 of the judgment had held that in view of the proviso to Section 42(1) of the NDPS Act, the I.O. in the present case need not require to forward his grounds of believe to immediate superior authority within 72 hours as provided in Section 42(2) of the NDPS Act, as the I.O. was the empowered Officer and thereafter, relying upon a decision of the Hon'ble Supreme Court in the case of **State of Punjab v. Balbir Singh**, the learned Court below has arrived at a finding that recording of the grounds of believe is not required, as the I.O. is an empowered Officer under Section 41 and 42 of the NDPS Act.

20. Though the finding, so recorded by the learned court below, appears to be justified in respect of compliance of said provisions of law, yet, it appears that no finding has been recorded by the learned court below in respect of compliance of the provision of section 52(A) of the NDPS Act in its letter and spirit. Thus, there appears to be substance in the submission of Mr. Bhattacharyee, the learned counsel for the appellant.

21. It is to be noted here that in the case of **Union of India v. Mohanlal, (2016) 3 SCC 379**, while dealing with section 52-A of the NDPS Act, Hon'ble Supreme Court has held as under:-

"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.

22. In the case of **Mangilal vs. The State of Madhya Pradesh** reported in **2023 LiveLaw (SC) 549**, Hon'ble Supreme Court has held as under:-

"6. The obvious reason behind this provision is to inject fair play in the process of investigation. Section 52A of the NDPS Act is a mandatory rule of evidence which requires the physical presence of a Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph taken apart from list of samples drawn."

23. Again in the case of **Yusuf @ Asif vs. State, Criminal appeal No.3191 of 2023** [Arising out of SLP (Crl.) No. 3010 of 2023] Hon'ble Supreme Court has held as under:-

"12. A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, the officer so referred to in sub section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.

13. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed under subsections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of sub-section (2) of Section 52A of the NDPS Act.

14. It is an admitted position on record that the samples from the seized substance were drawn by the police in the presence of the gazetted officer and not in the presence of the Magistrate. There is no material on record to prove that the Magistrate had certified the inventory of the substance seized or of the list of samples so drawn.

.....

16. 16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be

a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.

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

24. Again in the case of **Simranjit Singh vs. State of Punjab**, in **Criminal Appeal No. 1443 of 2023 [Arising out of SLP (Crl.) No. 1958 of 2023]**, Hon'ble Supreme Court, referring to paragraph No. 15, 16 and 17 in the case of **Mohanlal** (supra) has held that drawing of sample from all the packets at the time of seizure is not in conformity with the law laid down by this court in **Mohanlal** (supra). This creates serious doubts about the prosecution case that substance recovered was contraband.

25. So, what is contemplated in the case of **Mohanlal** (supra) is that 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 and that 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. Moreover, drawing of sample from all the packets at the time of seizure is not in conformity with the law laid down in the case of **Mohanlal** (supra).

26. What is transpired from the discussion made herein above is that the learned court below has failed to consider the aspect of non compliance of the provision of section 52-A NDPS Act and also section

55 of the said Act and on such count a serious doubt arises about the veracity of the prosecution version. Besides, there is evidence to show that the P.W.9 had drawn sample from all the packets of seized Ganja, which is contrary to the law laid down in the case of **Mohanlal** (supra). Over and above the remnant of the samples so drawn is also not produced and exhibited before the learned Court below so as to co-relate the same with the samples seized from the accused/appellant, which also raised doubt about the veracity of the prosecution version. Reference in this context may be made to a decision of the Hon'ble Supreme Court in the case of **Vijay Pandey v. State of U.P.**, reported in **(2019) 18 SCC 215**.

27. This being the position, it cannot be said that the impugned judgment and order, so passed by the learned court below, has been able to withstand the test of legal scrutiny, and on such count it requires interference of this court and the accused/appellants are entitled to be acquitted of both the charge on benefit of doubt. Mr. Bhattacharyee, the learned counsel for the appellant has rightly pointed this out during arguments and I find substance in the same and the ratios, laid down in the cases referred by him, also fortified his submission.

28. Thus, this Court is weighed by the following facts and circumstances in arriving at the finding:-

- (i) There is material contradiction in the version of the eye witnesses regarding apprehension and involvement of the accused/appellant Sankar Tirki.
- (ii) Mandatory provision of Section 52A of the NDPS Act has not been complied with.

- (iii) Remnant of the sample examined by PW-6, the forensic expert was not produced before the Court so as to co-relate the same with the samples drawn from the contraband substances seized from the possession of the accused.

29. In the result, I find sufficient merit in these appeals and accordingly, the same stands **allowed**. The impugned judgment and order of conviction dated 23.03.2023, passed by the learned Special Judge, Sonitpur, Tezpur, in Special (NDPS) Case No.05/2018, stands set aside and quashed. The appellant is acquitted on benefit of doubt. The appellants, if languishing in jail hazoot, shall be released forthwith. Send down the record of the learned court below forthwith with a copy of the judgment and order. The parties have to bear their own cost.

Sd/- Robin Phukan
JUDGE

Comparing Assistant