

GAHC010223412010



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

Case No. : Crl.A./138/2010

UNION OF INDIA,
REPRESENTED BY THE DEPUTY COMMISSIONER, CUSTOMS DIVISION,
GUWAHATI, GOVT. OF INDIA, NILAMANI PHUKAN ROAD,
CHRISTIANBASTI, GUWAHATI-781005, ASSAM.

VERSUS

BALWINDER SINGH and ANR,
S/O LATE BACHAN SINGH, PUNJAB GARAGE, P.O. and P.S. BIRATI, DIST. 24
PARGANAS, KOLKATA-700051, WEST BENGAL.

2:BINOY DAIMARY @ SHRI GARO DAIMARY

S/O SHRI CHANDRA DAIMARY
VILL. and P.O. MACHKHUTI
P.S. UDALGURI
DIST. UDALGURI
ASSAM

Advocate for the Petitioner : MR.S C KEYAL, C.G.C.,MRD C CHAKRABORTY,ASSTT.S.G.I.

Advocate for the Respondent : MR. D GOGOI(AMICUS CURIAE), ,,

**BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND**

JUDGMENT & ORDER (ORAL)

Date : 13-08-2024

Heard learned Standing Counsel Mr. S.C. Keyal for the appellant and learned Amicus Curiae Mr. D. Gogoi for the respondents Shri Balwinder Singh and Shri Binoy Daimary.

2. The appellant Union of India has filed this application under Section 378 (2) of the Code of Criminal Procedure, 1973 (the CrPC for short) read with Section 36-B of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act for short) challenging the judgment and order dated 14.12.2009 by the learned Additional Sessions Judge, Kamrup, Guwahati in connection with Sessions (Special) Case No. 45(K)/2008, passing an order of acquittal of Balwinder Singh and Binoy Daimary (hereinafter referred to as the respondents or R-1 and R-2 respectively).

3. The genesis of the case was that on 17.09.2007, on a tip off, a team of Officers of Anti-Smuggling Unit, Guwahati Customs Division, rushed towards Baihata Chariali, Kamrup and kept vigil over the commuting vehicles. As a result of the surveillance, the officers spotted a truck of TATA model bearing registration No. NL-08/A-0437 at about 16.30 hrs. on NH-52 at Baihata Chariali. As the details of the truck matched with the information, the truck was halted. The respondents were the occupants in the truck. On being confronted, the respondents denied that they were carrying any contraband in the truck but on further enquiry, the driver admitted that they were carrying cannabis (ganja) in the truck.

4. The truck was brought to the Headquarter of Customs at Guwahati and

the truck was searched in presence of the respondents. 49 (Forty Nine) bags of ganja (cannabis) concealed between 197 bags of kutoo (fafar) were recovered from the truck. The total weight of the ganja was 1357.350 Kgs. The ganja was thus seized along with the truck. 2 (Two) samples of 24 grams each were drawn from the seized quantity and sealed in presence of the respondents and other independent witnesses and the same were forwarded to Forensic Science Laboratory (At present DFS) for chemical examination.

5. Investigation commenced and on the following day, the respondents were forwarded to the learned Chief Judicial Magistrate, Kamrup, Guwahati. Samples were sent for chemical examination and statements of the witnesses were recorded.

6. On finding sufficient materials against the respondents, a complaint was filed against the respondents. At the commencement of trial, a formal charge under Section 20(b)(ii)(c) of the NDPS Act was framed, read over and explained to the respondents, who pleaded not guilty and claimed to be tried. To substantiate their case, the prosecution adduced the evidence of 7 (Seven) witnesses and the witness were cross-examined to refute the charges. On the incriminating materials projected through the evidence, several questions were asked to the respondents under Section 313 of the CrPC. The answers of the respondents were however evasive in nature.

7. The learned Standing Counsel for the Customs Mr. S.C. Keyal on behalf of the Union of India has submitted that after elaborate discussions, suddenly the learned trial Court truncated the discussions and acquitted the respondents on the ground that Section 42 of the NDPS Act was not complied with. The learned counsel has prayed to set aside the order of acquittal as the judgment of the learned trial Court prima facie clearly reveals that the respondents were held

complicit by the learned trial Court but at the end of the judgment, only on the ground that Section 42 of the NDPS Act was not complied with, the respondents were acquitted from the charges.

8. On the contrary, learned Amicus Curiae has submitted that Section 42 of the NDPS Act has to be mandatorily followed and has relied on the decision of the Hon'ble Supreme Court in *Bhupatbhai Bachubhai Chavda and Ors. Vs. State of Gujarat* reported in MANU/SC/0303/2024 and the decision of the Hon'ble Supreme Court in *Mallappa & Ors. Vs. State of Karnataka* reported in (2024) 3 SCC 544.

9. Now the question that falls for consideration is that whether the trial Court has erred in passing the order of acquittal. To decide this case in its property perspective, it is necessary to re-appreciate the evidence.

10. Sri Dibyendu Bhumik was the Inspector of Customs Division at the relevant point of time. He has deposed as PW-1 that on 17.09.2007, he was posted as Inspector of Customs, Anti-Smuggling Unit Guwahati. On that day, as directed by the Superintendent of Anti-Smuggling, Customs Division, B. Dey (PW-6) and he himself, along with a team of Officers rushed towards Baihata Chariali and kept surveillance along NH-52 on the vehicles approaching from Rowta towards Mangaldoi. A fully loaded truck bearing registration No. NL-08/A-0437 was spotted at about 16:30 hours. As the detail of this truck was similar to the tip off received by the team, the truck was halted. The respondents were in the truck. They were confronted in presence of two independent witnesses and the driver finally admitted that the truck was transporting ganja/cannabis. The truck was brought to the nearest Headquarter of Guwahati and properly checked. Ganja was found concealed under 197 bags of kutoo. The ganja was weighed in presence of independent witnesses and other official witnesses and

1357.350 kgs of ganja without the bags and 14421.75 kgs of ganja along with the bags, was the total weight which surfaced after weighing the contraband. 2 (Two) samples each weighing 24 grams were drawn from the bags in presence of the witnesses and the respondents. The samples were seized, sealed and forwarded for chemical examination.

11. This witness has proved Exhibit-1 as the inventory of the goods seized and he has identified Exhibit-1(1) and Exhibit-1(2) as the signatures of Seizing Officer, Manash Mukherjee as he is familiar with his signature. He has identified Exhibit-2 as the weighment sheet and Exhibit-2(1) as the signature of B. Dey (PW-6) as he is acquainted with his signature and Exhibit 2(2) as the signature of Seizing Officer Manash Mukherjee. The total value of the contraband was ascertained and the value was around Rs.33,93,375/- (Rupees Thirty Three Lacs Ninety Three Thousand Three Hundred Seventy Five).

12. PW.-1 has further deposed that all the recovered documents and the goods were seized under the NDPS Act and the respondents were arrested and forwarded to custody. On completion of the formalities, final complaint was submitted against the respondents. This witness has also identified Exhibit-3 as the Panchnama prepared in his presence and in the presence of independent witnesses. He has also identified Exhibit-3(1), 3(3), 3(5), 3(7) and 3(9) as the signatures of Hemen Das and Exhibit-3(2), 3(4), 3(6), 3(8) and 3(1) as the signatures of Kaji Aminur Rahman. He has proved his signature as Exhibit-3(11) on the panchanama. He has identified the final complaint as Exhibit-4.

13. In his cross-examination, PW-1 has testified that the entire procedure commencing from investigation up-to the seizure of the articles were properly conducted in presence of the independent witnesses namely Hemen Das and Kaji Aminur Rahman as well as in presence of the other witnesses. He has

admitted that the independent witnesses were not present while the samples were drawn.

14. Another Inspector of Customs, Shri Sib Sankar Basumatary deposed as PW-2 that on 17.09.2007 he was working as Inspector of Customs Division, Guwahati. On that day, the Superintendent of Customs Preventive Unit directed him verbally to accompany a team of Customs Officer under the leadership of Manas Mukherjee, comprising of Inspector B. Roy Choudhury, D. Bhaumik and R.W. Anal. They proceeded towards the place of occurrence and kept vigil on NH-52 and at about 16:30 hours they intercepted the aforementioned truck bearing registration No. NL-08/A-0437. They confronted the occupants of the truck in presence of 2 (Two) independent witnesses and the driver confessed that they were transporting ganja in the truck. They brought the truck with the loaded articles to the nearest Customs Office of Guwahati along with the driver and the other occupants. The truck was loaded with the consignment of kutoo and ganja was concealed under the consignment of kutoo. The ganja was weighed and seized in connection with this case. He has identified Exhibit-1 as the seizure list and Exhibit-1(2) as the signature of M. Mukherjee as he is familiar with the signature of his colleague. He has further stated that the weighment sheet was prepared by Mr. M. Mukherjee and he has identified the weighment sheet as Exhibit-2 and Exhibit-2(1) as the signature of B. Dey (PW-6) as he is familiar and acquainted with his signature and Exhibit-2(2) as the signature of M. Mukherjee. He has further stated that investigation was conducted by Manash Mukherjee, Inspector of Customs. In his cross-examination, he has admitted that all the bags were unloaded in their office but the labourers were not cited as witnesses in this case.

15. In sync with the evidence of PW-1 and PW-2, another Inspector of

Customs Shri Utpal Das deposed as PW-3 that on 17.09.2007 acting upon a specific information, he rushed towards NH-52 at Baihata Chariali and kept vigil along the Mangaldoi route. At about 4:30 PM they noticed the truck No. NL-08/A-0437 near Baihata Chariali and as the details of the truck matched with the information they had received, the truck was halted and checked. Two occupants namely Balwinder Singh and Binoy Daimary were found in the truck. Initially both the occupants denied that they were transporting ganja but later, on being confronted, they admitted that they were transporting ganja through the truck. The truck was brought to the nearest office and checked in presence of independent witnesses and 49 bags of ganja were found concealed under 197 bags of kutoo. The ganja was weighed with the help of departmental weighment scale in presence of witnesses. He has identified Exhibit-1 as the seizure list and Exhibit-1(1) as the signature of M. Mukherjee, known to him and Exhibit 2 as the wieghment sheet prepared by M. Mukherjee in presence of witnesses. He has also identified Exhibit-4 as the final complaint and Exhibit-4(1) to 4(16) as the signatures of M. Mukherjee.

16. He has admitted in his cross-examination that 10 (Ten) persons from the Customs Department were present at the time of investigation. Ganja was carried in sacks which were wrapped in polythene bags and then put inside the gunny bags. He has also admitted in his cross-examination that the samples were drawn from 2/3 bags only.

17. This is a discrepancy in the investigation. 49 (Forty Nine) bags were allegedly recovered from the truck and samples were drawn from only 2/3 bags. This discrepancy also affects the total weight of the ganja as deposed by the witnesses. It is true that all the witnesses have mentioned in chorus that on naka checking at Baihata Chariali, the truck bearing registration No. NL-08/A-

0437 was halted and ganja was found in the truck. They have also stated that the respondents were carrying the ganja in the truck but this discrepancy in the investigation extends a benefit of doubt to the respondents. The remaining part of the cross-examination of PW-3 is not noteworthy.

18. Close on the heels of the evidence of PW-1, PW-2 and PW-3, another Inspector Mr. B. Roy Choudhury deposed as PW-4 that on 17.09.2007 while he was posted at Anti-Smuggling Unit, Customs Division, Guwahati, the Superintendent Mr. B. Dey (PW-6) received a secret information about contraband being transported through a vehicle bearing registration No. NL-08A-0437 towards Baihata Chariali. Accordingly, a team was constituted under the leadership of Manash Mukherjee, IO (PW-7). They reached Baihata Chariali at about 11:30 AM, and then they noticed a truck, the description which tallied with the description of the secret information. The respondents were confronted by the investigating team and they replied that they were carrying agricultural produce and, finally admitted that they were carrying contraband in the truck. Search was conducted and 49 (Forty Nine) sacks were found containing ganja. They prepared the weighment sheet marked as Exhibit-2 and he has identified the signature of the IO, M. Mukherjee as Exhibit-2(3). He has also identified the seizure list as Exhibit-1 and Exhibit-1(1) as the signature of the IO, M. Mukherjee.

19. Several discrepancies have been surfaced through the evidence of PW-4. PW-4 has stated that the truck was checked at about 11:30 AM while the other witnesses have stated that the truck was checked at 4:30 PM. PW-4 admitted in his cross-examination that there were no independent witnesses at the place of occurrence. Investigation was conducted by the entire Investigating Team of the Customs Department. PW-4's evidence is not similar to the evidence of PW-1,

PW-2 and PW-3.

20. Another Inspector of Customs Shri K.W. Amal deposed as PW-5 that on 17.09.2007 their Superintendent B. Dey (PW-6) received secret information that contraband was being transported through a truck towards Baihata Chariali. A team was constituted under the leadership of Manash Mukherjee (PW-7), IO. They went to Baihata Chariali and reached Baihata Chariali at about 11:30 AM. They kept vigil and noticed a truck, the description of which matched the information received on a tip off. They halted the truck and found 2 (Two) occupants in the vehicle. In presence of the witnesses both the occupants were asked about the articles in the truck but the respondents replied that they were carrying agricultural produce. The respondents finally admitted that they were carrying contraband concealed under the agricultural produce. The truck was then brought to the office and searched in presence of the respondents and the witnesses and 49 sacks were found in the truck carrying ganja. The samples were also drawn in presence of witnesses. The statement of respondent Balbinder Singh was recorded by Inspector Amit Kumar Singh in Hindi. This witness identified Exhibit-5 as the statement of Balbinder Singh and Exhibit-5(1) to 5(5) as the signatures of Balbinder Singh in Punjabi and 5(7) as the signature of Superintendent A.K. Singh with which he is familiar. He has proved his signature as Exhibit-5(8) to 5(12).

21. Contrary to the evidence of PW-1, PW-2 and PW-3, this witness too deposed that the truck was halted at 11:30 AM near Baihata Chariali whereas PW-1, PW-2 and PW-3 deposed that the truck was halted at 4:30 PM at Baihata Chariali. Cross-examination of this witness is not noteworthy.

22. The Superintendent of Customs, Guwahati Division Shri B. Dey deposed as PW-6 that on 17.09.2007 he received a secret information relating to

contraband being transported through truck bearing No. NL-08-A/0437 from Rowta towards Baihata Chariali. A team was constituted and the team proceeded towards Baihata Chariali and spotted the truck, the description of which was similar to the information received. The truck was signaled and stopped. The respondents were inside the truck and initially they denied that they were carrying contraband inside the truck but the respondents finally admitted that they were carrying contraband in the truck. 49 (Forty Nine) bags of cannabis (ganja) were recovered from the truck under 197 bags of kutoo. Ganja was weighed around 1357.350 kgs. The inventory was prepared by the IO. He has identified the inventory as Exhibit-1.

23. PW-6 further deposed that the samples were drawn in presence of the witnesses in duplicate and forwarded for chemical examination. He has also identified Exhibit-8 as the forwarding letter and he has proved his signature as Exhibit-8(1). The FSL report reveals that the samples tested positive for cannabis (ganja). He further stated that he did not visit the place of occurrence but the entire investigation was conducted under his supervision and after receipt of FSL report, he submitted charge sheet against the respondents vide Exhibit-4 and the team which was constituted went to the spot.

24. In his cross-examination, he has admitted that the respondents were arrested at Customs Office at Guwahati. He was not present at the place of occurrence when the vehicle was intercepted. The sample was forwarded for chemical examination on 18.09.2007 through a special messenger. Before forwarding the sample to the FSL, the sample was kept under his custody for one day. He has testified in his cross-examination that he has no other samples in his custody. As per weighmentsheet, the ganja packets were of medium size, on an average measuring at about 30 kgs. The samples were not forwarded to

the FSL through the Chief Judicial Magistrate, Kamrup, Guwahati.

25. At this juncture, it is apt to mention that the poignant point of this case narrows down to the question whether Section 42 of the NDPS Act was complied with during the investigation. The evidence of PW-1, PW-2, PW-3, PW-4, PW-5 and PW-6 does not at all hint that Section 42 of the NDPS Act was complied with.

26. Manas Mukherjee is the IO and his evidence also reveals that Section 42 of the NDPS Act was not complied with. He has deposed as PW-7 that on 17.09.2007, he was posted as Inspector of Anti-Smuggling Unit, Guwahati. On that day, on the basis of a secret information received by B. Dey (PW-6), directing them to proceed towards Baihata Chariali, he along with R.H. Roy, R.W. Anal and Utpal Das proceeded towards Baihata Chariali and reached Baihata Chariali at about 3.30 PM and moved towards Rowta-Mangaldoi side and at about 4.30 PM, they spotted a fully loaded truck bearing registration No. NL-08/A-0437, the description of which vehicle was similar to the information they had received. They halted the truck and confronted the respondents who were present in the truck. Initially, the respondents denied that they were carrying ganja in the truck. Finally the respondents succumbed under interrogation and confessed that they were carrying contraband concealed under 197 bags of kutoo. On searching the truck, they recovered 49 bags of cannabis and weighed the same and the total cannabis weighed around 1357.350 kgs and the total weight of the ganja along with 197 bags of kutoo and other bags was 14421.75 kgs. The ganja was valued at Rs.33,93,375/- (Rupees Thirty Three Lacs Ninety Three Thousand Three Hundred Seventy Five). The truck and the ganja were seized in connection with this case. Two samples of 24 grams each were drawn in presence of the respondents and two

other independent witnesses. The samples were sealed and forwarded for chemical examination. He has proved Exhibit-2 as the weightment sheet of ganja (cannabis) and Exhibit-2(2) as his signature and Exhibit-2(1) as the signature of Mr. B. Dey (PW-6). He has also identified the signatures of the respondents. He has further deposed that Hemen Das and Kaz Amu Rahman were two independent witnesses who were present during the entire investigation. He has also proved the statement of the accused. It is pertinent to mention that the statement of the accused is not relevant as it has already been observed by the Hon'ble Supreme Court that the statement of the accused under Section 67 of the NDPS Act cannot be accepted as evidence.

27. PW-7 has further deposed that the samples which were drawn, were forwarded for chemical examination and he has identified the forwarding letter as Exhibit-8. The receipts from the FSL along with other documents are not relevant documentary evidence to connect the respondents to the crime. It has surfaced through the evidence of PW-7 that the owner of the kutoo had taken custody of the same but the owner of the kutoo could not be identified. The evidence of PW-7, IO reveals that the complaint was filed against the respondents but there is not a whisper in the evidence that the Senior Officer was informed about the apprehension of the accused and seizure of the articles in compliance to Section 42 of the NDPS Act. Further the cross-examination of IO reveals that the samples were drawn at the place where the truck was halted. The evidence of all the witnesses PW-1 up-to PW-7 reveal that the vehicle was taken to the nearest Customs Office but it appears that the samples were drawn at the place where the vehicle was halted. Moreover, the cross-examination of the IO also reveals that the seized ganja was not produced in the Court for identification. The IO has conducted the investigation and the

duplicate sample ought to have been produced before the IO for identification but that was not produced before the Court. This is another discrepancy in the prosecution.

28. All the witnesses named one independent witness Haren Das who has deposed as PW-8 that the incident occurred on the day of Biswakarma Puja in the year 2007. At about 3:00 PM, while he was returning home from his sister's house, he was waiting at Bahiata Chariali for a vehicle. At that time another vehicle approached and there were several occupants in the vehicle. He noticed that the occupants of the vehicle were police personnel who requested him to accompany them to the nearby place. Initially, he refused to go with the police personnel and on being requested again, he accompanied them to Baihata Chariali. The police then halted a truck at Baihata Chariali and confronted the occupants in the truck. Later, he learnt that ganja was being carried in the truck. The vehicle was then taken to Guwahati and on their instructions, he accompanied the police personnel to Guwahati at Christianbasti and the truck also proceeded to Christianbasti. He affixed his signature on a document at Christianbasti. He identified one document as Exhibit-2. He has admitted that some samples were drawn and he has affixed his signatures as the samples were drawn in his presence. He has proved the documents as Exhibit-3 and Exhibit-2(5), Exhibit-3(1), Exhibit-3(6), Exhibit-3(7) and Exhibit-3(9) as his signatures. He has also identified Exhibit-1 as the inventory of the goods seized and Exhibit-1(4) as his signature.

29. The irony is that this witness has failed to identify the respondents. The samples which were allegedly drawn in his presence were also not produced in the Court to be proved. He has failed to identify the samples drawn and the articles seized in connection with this case and this extends a benefit of doubt

to the respondents. Contradictions also emerged as to the place where the samples were also produced. The evidence of PW-7 reveals that samples were drawn at the place of occurrence where on the contrary, the evidence of other witnesses including the evidence of PW-8 reveals that samples were produced at the Customs Office at Christianbasti

30. In the wake of the foregoing discussions, this Court is constrained to hold that the investigation was conducted in a slipshod manner. Section 42 of the NDPS Act was not complied with. The independent witnesses have not supported the prosecution case. The evidence of the independent witnesses is contradictory to the evidence of the official witnesses.

31. The Scientific Officer was examined as CW-1 and he has stated that samples were forwarded in connection with this case tested positive for cannabis (ganja). There is not even an iota of doubt that ganja was seized in connection with this case but due to the discrepancies in the investigation and the prosecution and the dissimilarities emerging in the evidence of the witnesses, a benefit of doubt has to be extended to the respondents.

32. It has been held by the Hon'ble Supreme Court in the decision of *Bhupatbhai Bachubhai Chavda and Ors.* (supra) that :

“6. It is true that while deciding an appeal against acquittal, the Appellate Court has to reappreciate the evidence. After re-appreciating the evidence, the first question that needs to be answered by the Appellate Court is whether the view taken by the Trial Court was a plausible view that could have been taken based on evidence on record. Perusal of the impugned judgment of the High Court shows that this question has not been adverted to. Appellate Court can interfere with the order of acquittal only if it is satisfied after reappreciating the evidence that the only possible conclusion was that the guilt of the Accused had been established beyond a reasonable doubt. The Appellate Court cannot overturn order of acquittal only on the ground that another view is possible. In other words, the judgment of acquittal must be found to be perverse. Unless the Appellate Court records such a finding, no interference can be made with the order of acquittal. The High Court has ignored the well-settled principle that an

order of acquittal further strengthens the presumption of innocence of the accused. After having perused the judgment, we find that the High Court has not addressed itself on the main question.

7. The second error the High Court committed is found in paragraph 23 of the impugned judgment. The High Court has gone to the extent of recording a finding that the Appellants have failed to adduce evidence in their support, failed to examine the defence witness and failed to establish falsity of the prosecution's version. This concept of the burden of proof is entirely wrong. Unless, under the relevant penal statute, there is a negative burden put on the Accused or there is a reverse onus clause, the Accused is not required to discharge any burden. In a case where there is a statutory presumption, after the prosecution discharges initial burden, the burden of rebuttal may shift on the Accused. In the absence of the statutory provisions as above, in this case, the burden was on the prosecution to prove the guilt of the Accused beyond a reasonable doubt. Therefore, the High Court's finding on the burden of proof is completely erroneous. It is contrary to the law of the land."

33. It has also been held by the Hon'ble Supreme Court in *Mallappa & Ors (supra)* that:

"36. Our criminal jurisprudence is essentially based on the promise that no innocent shall be condemned as guilty. All the safeguards and the jurisprudential values of criminal law, are intended to prevent any failure of justice. The principles which come into play while deciding an appeal from acquittal could be summarized as:

- (i) Appreciation of evidence is the core element of a criminal trial and such appreciation must be comprehensive – inclusive of all evidence, oral or documentary;*
- (ii) Partial or selective appreciation of evidence may result in a miscarriage of justice and is in itself a ground of challenge;*
- (iii) If the Court, after appreciation of evidence, finds that two views are possible, the one in favour of the accused shall ordinarily be followed;*
- (iv) If the view of the Trial Court is a legally plausible view, mere possibility of a contrary view shall not justify the reversal of acquittal;*
- (v) If the appellate Court is inclined to reverse the acquittal in appeal on a re-appreciation of evidence, it must specifically address all the reasons given by the Trial Court for acquittal and must cover all the facts;*
- (vi) In a case of reversal from acquittal to conviction, the appellate Court must demonstrate an illegality, perversity or error of law or fact in the decision of the Trial Court."*

34. In the wake of the foregoing discussions, it is thereby held that the respondents deserve a benefit of doubt

35. Appeal is devoid of merits and thus dismissed.
36. Send back the Trial Court Records along with the copy of the judgment and order.

JUDGE

Comparing Assistant