

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Before:

The Hon'ble Mr. Justice Joymalya Bagchi

And

The Hon'ble Mr. Justice Ajay Kumar Gupta

C.R.A. 393 of 2018

Sujit Biswas
Vs.
State of West Bengal

For the Appellant : Mr. Bikash Ranjan Bhattacharya, Sr. Adv.
Mr. Rabi Sankar Chattopadhyay, Adv.
Mr. Uday Sankar Chattopadhyay, Adv.
Mr. Sayan Chattopadhyay, Adv.
Ms. Trisha Rakshit, Adv.
Ms. Ayesha Iman, Adv.
Mr. Rokon Ali Molla, Adv.

For the State : Mr. Saibal Bapuli, learned APP
Mr. Bibaswan Bhattacharya, Adv.

Heard on : 24.11.2022, 30.11.2022 & 02.12.2022

Judgment on : 02.12.2022

Joymalya Bagchi, J. :-

1. Appellant has assailed the judgment and order dated 21.06.2018 passed by the learned Judge, Special Court (NDPS Act), Raiganj, Uttar Dinajpur, convicting the appellant for the offence punishable under section 20(b) of the NDPS Act and sentencing him to suffer rigours

imprisonment for fifteen years and to pay a fine of Rs. 2,00,000/-, in default, to suffer further simple imprisonment for one year more for the offence punishable under Section 20(b)(ii)(C) of the NDPS Act.

Prosecution case:-

2. Prosecution case as alleged against the appellant is to the effect that on 20.05.2013 District Enforcement Department of Raiganj received information regarding illegal trading of Ganja. Accordingly, P.W. 1 (Madhab Chandra Das) who was attached to the District Enforcement Branch proceeded with force to work out the information. They held raid in the house of the appellant. Huge quantity of Ganja was recovered from his house. P.W. 1 informed DSP, DEB and one Executive Magistrate. They arrived at the spot. Substance suspected to be Ganja weighing to the tune of 96.5 kgs. was recovered and kept in four gunny bags and a plastic bag (as per seizure list).

3. Seizure list was prepared in the presence of the officers, Executive Magistrate and independent witnesses. Appellant was arrested. Samples taken were kept in the plastic bag in the presence of the Executive Magistrate. Seized consignments and the appellant were brought to the police station.

4. P.W. 1 lodged written complaint resulting in registration of Police Station Case No. 438 of 2013 dated 20.05.2013.

5. In the course of investigation, appellant is alleged to have made a disclosure statement before the investigating officer (P.W. 12). Pursuant to his disclosure statement 27.5 kgs. of substance suspected to be Ganja

kept in two gunny bags was recovered from an open jute field. The said consignment was also seized. Two samples were drawn from the consignment. Samples were sent for forensic examination. Chemical examiner's report confirmed the presence of Ganja in the samples marked as Exbt.-10 collectively. Charge-sheet was filed against the appellant. Charge under Section 20(b)(ii)(C) of the NDPS Act was framed. Appellant pleaded not guilty and claimed to be tried by the impugned judgment and order. He was convicted and sentence as aforesaid.

Arguments at the Bar:-

6. Mr. Sayan Chattopadhyay, learned Counsel for the appellant has challenged the conviction on the following issues:-

- (a) Seized consignments have not been produced before the Court. No explanation is forthcoming where the consignments were kept or disposed of. No inventory under Section 52A certified by the Magistrate was also produced. Independent witnesses and some of the official witnesses have not supported the recovery of Ganja. Hence, recovery of Ganja is not proved beyond doubt. Even the samples allegedly drawn from the second consignment have not been produced in Court;
- (b) Samples were not drawn from all the bags recovered from the house of the appellant.

Hence, the appellant is entitled to an order of acquittal.

7. Mr. Bhattacharya, learned Counsel for the State submits evidence of the official witnesses is convincing and clearly establish the recovery of

a large volume of Ganja from the appellant. Independent witnesses admitted their signatures on the seizure list. They were extensively cross-examined with regard to their previous statements before police. Samples were drawn from the seized consignments and upon examination showed the presence of Ganja. Hence, prosecution case is proved beyond doubt.

Analysis:-

8. Prosecution case comprises of two parts. Firstly, on 02.05.2013 in the afternoon it is alleged 96.5kgs. of Ganja was recovered from the room of the appellant. Subsequently, it is contended on the leading statement of the appellant, 27.5 kgs. of Ganja was recovered in two gunny bags from an open jute field.

9. P.Ws. 1, 2, 3, 7, 8, 11 and 12 are the officers attached to DEB Department who were present in the course of recovery of Ganja from the house of the appellant.

10. P.W 1 (Madhab Chandra Das) is the de facto complainant. He deposed 96.5 kgs. of Ganja kept in a number of bags was recovered from the house of the appellant. Samples were drawn from the plastic bag containing 19.5 kgs. of Ganja. Photographs were taken of the seized articles. He proved the written complaint marked as "Exbt. -1" as well as the seizure list. He proved the labels on the samples marked as "Exbt.-3" and "Exbt.-3/1". He also identified the samples which were produced in court marked as "Material Exbt.-1" and "Material Exbt.-2".

11. P.Ws. 2, 7, 8, 11 and 12 have corroborated P.W. 1 with regard to the aforesaid recovery. They, however, were inconsistent with regard to the number of bags in which Ganja was kept.

12. P.W 10 (Brojogopal Dey Sarkar) is the photographer who took photographs of gunny bags at the spot. He proved the photographs.

13. P.W. 3 (Durga Narayan Paul) is also a member of the raiding team with regard to the first seizure. He deposed that he fell ill in the course of the raid and had not seen the recovery.

14. P.Ws. 4 (Gopal Roy) and 5 (Bhola Pal) are the independent witnesses to the aforesaid recovery. They did not support the prosecution case. They were extensively cross-examined with reference to their earlier statements to the police.

15. With regard to subsequent recovery, P.W. 12 (Bikash Chandra Singha), investigating officer, deposed during investigation appellant made a disclosure statement to him. To work out the disclosure statement, appellant was taken to an open jute field and one white coloured gunny bag containing Ganja to the tune of 13.5 kgs. and a yellow coloured gunny bag containing 14 kgs. of Ganja totalling 27.5 kgs. in all was recovered. He prepared seizure list marked as "Exbt.-5". He took samples from the said consignment. He proved the labels in respect of the samples. He was corroborated by P.W 11, DSP, DEB with regard to the aforesaid recovery.

16. However, P.W. 6 (Sagar Thokdar) a home guard who was present at the time of recovery as well as an independent witness (P.W. 7) to the said recovery turned hostile.

17. Mr. Chattopadhyay has assailed recovery of 96.5 kgs of Ganja from the residence of the appellant primarily on the ground that the said consignment had not been produced in Court. No evidence in the form of malkhana register is forthcoming where the consignment was kept. No inventory was prepared under section 52A of the NDPS Act (which is primary evidence with regard to seized consignment certified by the Magistrate) and produced in Court. He referred to ***Union of India vs. Jarooparam***¹.

18. I have given anxious consideration to the aforesaid submissions. No inventory of the consignment certified by a Magistrate under section 52A of the NDPS Act which is the primary evidence in respect of the offence has compliance of section 52A of the NDPS Act is mandatory (see ***Union of India vs. Mohanlal And Another***²). However, in the absence of a certificate under section 52A of the NDPS Act it is incumbent on the prosecution to produce the seized narcotics or at least the samples drawn therefrom in the Court to repel an adverse inference being drawn against it. In ***Noor Aga v. State of Punjab***³ the Apex Court held:-

“100. Physical evidence of a case of this nature being the property of the court should have been treated to be sacrosanct. Non-production thereof would warrant drawing of a negative inference within the meaning of Section 114(g) of the Evidence Act. While there are such a large number of

¹ (2018) 4 SCC 334

² (2013) 3 SCC 379

³ (2008) 16 SCC 417

discrepancies, if a cumulative effect thereto is taken into consideration on the basis whereof the permissive inference would be that serious doubts are created with respect to the prosecution's endeavour to prove the fact of possession of contraband by the appellant.

96. Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act."

19. In *State of Rajasthan vs. Sahi Ram*⁴ the Apex Court clarified the impact of non-production of the seized narcotics. The Bench after adverting to various authorities concluded as follows:-

"16. It is thus clear that in none of the decisions of this Court, non-production of the contraband material before the court has singularly been found to be sufficient to grant the benefit of acquittal."

20. It further held:-

"18. If the seizure of the material is otherwise proved on record and is not even doubted or disputed, the entire contraband material need not be placed before the court. If the seizure is otherwise not in doubt, there is no requirement that the entire material ought to be produced before the court. At times the material could be so bulky, for instance as in the present material when those 7 bags weighed 223 kg that it may not be possible and feasible to produce the entire bulk before the court. If the seizure is otherwise proved, what is required to be proved is the fact that the samples taken from and out of the contraband material were kept intact, that when the samples were submitted for forensic examination the seals were intact, that the report of the forensic experts shows the potency, nature and quality of the contraband material and that based on such material, the essential ingredients constituting an offence are made out."

21. Let me see whether the recovery of narcotics from the residence of the appellant has been proved beyond doubt.

⁴ (2019) 10 SCC 649

22. It is argued independent witnesses have not supported the recovery. It is also argued there are contradictions and/or inconsistencies in the versions of the official witnesses. They have given different versions with regard to the number of bags recovered from the spot. Time of recovery is also unclear.

23. I have considered the evidence of the witnesses in detail. There may be slight variation in the number of bags which were found at the spot. This may be attributed to the lack of recollective faculties of the witnesses. However, evidence on record of the official witnesses have been corroborated by entries made in a contemporaneous document i.e. seizure list (Ext 2). From the seizure list it appears that five bags (four gunny bags and one plastic bag) allegedly containing Ganja were recovered. Photographs were also taken of the said recovery by P.W. 10 and were exhibited. Independent witnesses who admitted their signatures on the seizure list resiled away from their earlier statement before police. As the ocular version of the official witnesses find corroboration from contemporaneous document, i.e seizure list and is supported by photographs taken at the spot, I am of the opinion the recovery from the residence of the appellant has been proved beyond doubt. It is possible that independent witnesses were won over and their prevaricating stance should not cause a dent in the credibility of the prosecution case.

24. But a more serious infirmity transpires in the matter of sampling. P.W. 1 admitted he had taken samples only from serial no. 1 of the seizure list, i.e., plastic bag but no samples were drawn from the other

four gunny bags. Though samples drawn from serial no. 1 tested positive for Ganja, in the absence of samples not being drawn from other bags it cannot be said that prosecution has proved the contents of the said bags contained Ganja. Hence, I am of the opinion recovery of 96.5 kgs of Ganja in five bags from the residence of the appellant has not been fully proved. It has only been able to prove recovery of 19.5 kgs of Ganja contained in one plastic bag wherefrom the samples had been drawn and tested.

25. With regard to subsequent recovery of 27.5 kgs of Ganja in two gunny bags in an open jute field, I am constrained to hold the prosecution has failed to prove its case. Physical evidence of recovery is not available. Like the earlier recovery, seized consignment has not been produced. Merely two empty gunny bags were produced in Court. Even the samples which are alleged to have been drawn from the seized consignment and sent for FSL examination were not produced in Court. Failure to produce the consignment or even the samples drawn therefrom in Court gives rise to a serious lacuna in the prosecution case. It remains a matter of conjecture whether samples were at all drawn at the spot and if those samples were sent for FSL examination. Non-production of the samples breaches the best link evidence between the samples drawn and those tested at the laboratory. Mere production of loose paper claiming to be labels on such samples cannot absolve the prosecution of such burden.

26. Even the ocular evidence with regard to subsequent recovery is sketchy and contradictory. P.W. 6, a member of the raiding party, did not

support the prosecution case. He did not speak of the presence of the appellant at the spot. Independent witnesses (P.W. 3) also had not seen the appellant at the spot. None of these witnesses deposed the recovery was made on the showing of the appellant. Recovery was from an open field which was accessible and visible to all. Unlike the earlier recovery, no photographs of the recovery have been produced in Court. I am constrained to hold the oral evidence on record does not prove beyond doubt that the appellant had constructive possession of the consignment recovered from the jute field or that such recovery had been made on the showing of the appellant. Appellant is, therefore, entitled to the benefit of doubt with regard to the subsequent recovery.

Conclusion:-

27. In the light of the aforesaid discussion, I am of the opinion prosecution has been able to prove recovery of 19.5 kgs. of Ganja from the residence of the appellant. In the absence of samples being drawn from the other four gunny bags, I am unable to come to a conclusive opinion that the contents therein were Ganja. Subsequent recovery from the jute field on the showing of the appellant is based on inconsistent versions and does not inspire confidence. Even best link evidence, i.e., samples said to be drawn from the consignment and tested in the laboratory were not produced.

28. Accordingly, I convert the conviction of the appellant from one under section 20(b)(ii)(C) to 20(b)(ii)(B) of the NDPS Act.

29. Appellant has already served nine and half years of actual imprisonment. Accordingly, I modify the substantive sentence imposed upon him to the period already undergone and direct that he shall pay a fine of Rs. 25,000/-, in default, to suffer imprisonment for four months more.

30. With the aforesaid modifications, appeal is disposed of.

31. Let a copy of this judgment along with the lower court records be forthwith sent down to the trial Court at once.

32. Photostat certified copy of this judgment, if applied for, shall be made available to the appellants upon completion of all formalities.

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)