

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION APPELLATE SIDE

Present :

The Hon'ble JUSTICE JOYMALYA BAGCHI

And

The Hon'ble JUSTICE BIVAS PATTANAYAK

C.R.A. 449 of 2016

With

CRAN 2 of 2018(Old CRAN 1847 of 2018)

BALKAR SINGH @BLKAR SINGH & ANR.

-Vs-

UNION OF INDIA.

For the Appellants: Mr. Shiladitya Banerjee, Adv.

Mr. Arnab Chatterjee, Adv.

For the Union of India: Mr. Kaushik Dey, Adv.

Mr. Amajit De, Adv.

Heard on: 26.04.2022.

Judgment on: 20.05.2022

BIVAS PATTANAYAK, J. : –

1. Present appeal is directed against the judgment and order dated 28.05.2014 and 29.05.2014 respectively passed by learned Judge, Special Court (under NDPS Act), Siliguri in CR(NDPS) no.4 of 2011 convicting the appellants for commission of offence punishable under Section 20(b)(ii)(C)

of the NDPS Act and sentencing them to suffer rigorous imprisonment for 14 years each and to pay fine of Rs.2 lakhs each, in default, to suffer further rigorous imprisonment for three years each for commission of the said offence.

2. The factual matrix of the prosecution case in nutshell is that the DRI Officers of Siliguri Regional Unit under the leadership of Deputy Director DRI, Siliguri, acting on a specific intelligence input had been to Ghoshpukur area on National Highway No.31 and kept surveillance over movement of vehicles on 17th/18th, February, 2011. On 18th February 2011 at about 4 hours the DRI Officers intercepted a ten-wheeler truck (TATA) bearing registration no. NL-02G-5421 at Ghoshpukur, District, Darjeeling coming from Fulbari side. The officers found two occupants in the said vehicle namely the driver and helper, that is the appellants herein. On query by the DRI Officers both the appellants stated that the truck was loaded with coal from Jogighopa, Assam and was destined to move to Punjab and the driver produced a bill in support of the goods. On further interrogation, the driver disclosed that Cannabis (hemp) was concealed in the truck. The truck was brought to the Central Godown of Siliguri Customs Division, at Babupara, Siliguri and searched in presence of the appellants being and independent witnesses. Upon search 128 packets were recovered containing suspected Cannabis (ganja) which was found wrapped in newspaper sheets and coloured plastic sheets. The packets were weighed individually and inventory was made. The net weight of the suspected 'ganja' was found to be 1821.28 Kg. Coal,

suspected contraband and documents of the vehicle were seized in presence of the appellants and independent witnesses under seizure list. Representative samples in duplicate each weighing 25 grams were drawn and four samples in duplicate weighing 200 grams in all vide sample no. S-1, S-2, S-3 and S-4 were also drawn from the recovered contraband suspected to be 'ganja'. Copy of seizure list and weighment sheet was handed over to both the appellants. Notice under Section 67 of the NDPS Act was served upon the appellants and their statements were recorded. They were arrested and produced before the learned NDPS Court, Siliguri on 19.02.2011 in connection with CR (NDPS) Case no. 4 of 2011. The seized goods, excepting documents and two mobile phones, were handed over to the Godown Officer for safe custody. The aforesaid samples were sent to the Chemical Examiner, Chemical Laboratory, Customs House, Kolkata for chemical examination. Prayer under Section 52A of the NDPS Act was filed and as per court's order the learned Magistrate on 05.08.2011 issued certification of correctness of inventory at the godown premises of Siliguri Customs. Warrant of arrest was issued against another accused namely Karnail Singh. Complain was registered under Section 20(b)(ii)(C) of the NDPS Act against the appellants and one Karnail Singh.

3. The Special Court took cognizance of the offence and upon consideration of the materials on record framed charge against both the accused under Section 20(b)(ii)(C) of the NDPS Act. Accused Karnail Singh

surrendered before the court and similar charge as above was also framed against him.

4. The prosecution in order to bring home the charge examined as many as 9 (nine) witnesses and exhibited number of documents. The defence did not adduce any evidence. The defence case is one of innocence and false implication.

5. Upon consideration of materials on record and the evidence adduced on behalf of the prosecution the learned Trial Judge convicted and sentenced the appellants as aforesaid. By the self-same judgement another accused Karnail Singh was acquitted from the case. Being aggrieved and dissatisfied with the aforesaid judgement and order the appellants have preferred the present appeal.

6. Mr. Arnab Chatterjee, along with Mr. Shiladitya Banerjee, learned advocates appearing on behalf of the appellants submitted as follows:-

Firstly, that the contraband goods which were alleged to have been seized from the possession of the appellants were never produced before the Court and the prosecution did not give any explanation for such failure. Mere oral evidence that materials were seized from the possession of the appellants would not be sufficient to make out an offence under NDPS Act. In support of his contention he relied on the following decisions of the Hon'ble Apex court viz

(i) Jitendra versus State of Madhya Pradesh reported in (2004) 10 SCC 562: 2004 SCC (Cri) 2028;

(ii) Ashok @ Dangra Jaiswal versus State of M.P reported in (2011) 5 SCC 123: (2011) 2 SCC (Cri) 547;

(iii) Vijay Jain versus State of Madhya Pradesh (2014) 4 SCC (Cri) 276: (2013) 14 SCC 527.

Secondly, as per evidence of PW2 (Seizing officer) though the alleged seizure of articles were made on 18.02.2011, but those were received by the Godown officer on 21.02.2011 vide G.D Entry no.703/2010-2011 i.e after lapse of 3(three) days. The prosecution is silent under whose custody those seized articles were kept during the said period. Neither the Godown register nor the Godown-in-charge was examined during trial, which raises a serious doubt in the prosecution case.

Thirdly, a rough seizure list was prepared by PW2 (Seizing officer) and thereafter a computerized seizure list was prepared at DRI office. However, the rough seizure list was never produced before the court and therefore, the computerized seizure list (**Exhibit 15**) cannot be considered to be a seizure in terms of Section 43 of the NDPS Act.

Fourthly, independent witnesses to the seizure namely PW8 & 9 are stock witnesses of the Customs department and as such cannot be relied upon to support the seizure of contraband substances.

Lastly, certificate of correctness of inventory of the alleged recovered contraband under section 52A of the NDPS Act has not been proved by the learned Magistrate who prepared the same and the said document was marked '**X**' for identification. The learned Trial Judge resorting to Section 66 of the NDPS Act relied on the aforesaid document. However, on plain reading of Section 66 of the Act the presumption of truthfulness of contents of a document can be drawn against the accused only if the

same is produced or furnished by the accused or seized from him. Certification of correctness of inventory of alleged contraband under section 52A of the Act is not a document falling within the category as above and as such no presumption with regard to the said certificate can be drawn against the appellants referring to section 66 of the Act.

In the light of their above submissions it is prayed that the appellants be acquitted from the case.

7. In reply to the contention raised on behalf of the appellants, Mr. Kaushik Dey along with Mr. Amajit De, learned Counsels appearing on behalf of Union of India submitted that huge quantity of 'ganja' was recovered, from a truck driven by appellant no.1 and appellant no.2 being its helper, in presence of two independent witnesses PW8 and PW9. There is no denial of recovery and seizure of huge quantity of narcotic substance from the possession of the appellants by the defence. Moreover, the seizure list (**Exhibit 15**) has been prepared following statutory procedure which has been duly acknowledged and signed by the appellants in presence of independent witnesses. The seizure list and weighment sheets clearly demonstrate the recovery of 'ganja' from the possession of the appellants. The chemical examiner report shows that the suspected contraband found from the possession of the appellants are narcotic substance. Inventory of the seized contraband were duly prepared in accordance with section 52A of the NDPS Act and certificate of its correctness was issued by the Magistrate in terms of the said provision. Moreover, during their examination under section 313 of the Criminal

Procedure Code none of the appellants challenged the recovery of such huge quantity of narcotic substance from their possession. In view of above submissions the prosecution prayed that the conviction and sentence of the appellants passed by the learned Trial court be upheld.

8. PW1, Debasish Acharjee, PW2, Somit Das, PW3, Surendra Paul Singh, PW4, Basudev Chakraborty, PW5, Dharmendra Thakur (Driver), PW6, Subir Kumar Jana and PW7, Pankaj Kumar are the members of the raiding party.

PW1 Debasish Acharjee, complainant, deposed that on 18.02.2011 he was posted as Senior Intelligence Officer, DRI, at Pradhannagar, Siliguri and was a Gazetted officer. On 17.02.2011 on the basis of specific intelligence input he along with other DRI Officers headed by Shri S.P Singh, Deputy Director of DRI had been to Ghoshpukur area on National Highway 31 and kept surveillance. In the morning at about 4 a.m on 18.02.2011, they intercepted a ten-wheeler (TATA) vehicle bearing registration no. NL-02G-5421 at Ghoshpukur More. On enquiry the driver identified himself as Balkar Singh and the helper disclosed his identity as Adhin Deb Barman and they further stated that the truck was loaded with coal. Upon further interrogation it was disclosed that 'ganja' was concealed under the coal in the said vehicle. The vehicle was driven by appellant no.1 to the godown, at Babupara, Siliguri. Two independent witnesses namely Paresh Chandra Mukherjee (PW8) and Uttam Thakur (PW9) were called upon to witness search, recovery and seizure. In presence of witnesses 128 packets were recovered from the said vehicle

suspected to be 'ganja' wrapped in newspaper and polythene. The documents of the vehicle were also seized. The packets were weighed and the net content of the suspected 'ganja' came to 1821.28 Kg. Those 128 packets containing suspected 'ganja', coal, and vehicle with documents were seized by the Seizing Officer Somit Das (PW2) under proper seizure list. Four representative samples in duplicate of 25 grams each were drawn by the Seizing Officer which were marked S-1, S-2, S-3 and S-4. The samples were sent to Chemical Examiner, Customs House, Kolkata-700 001 for examination. Copy of the seizure list was served on the appellants on acknowledgement. Chemical examiner report was received which confirmed presence of Cannabis (hemp) in the suspected contraband. Complaint was lodged against the appellants and one other before the Special Court under NDPS Act.

PW2, Somit Das, Seizing Officer, also deposed in the similar fashion and stated that on 17.02.2011 in the evening he was called by Deputy Director, DRI, Siliguri for working out a source information along with a team of officers. On 18.02.2011 at 4 a.m a ten-wheeler truck bearing registration no.NL-02G-5421 was intercepted. Upon interrogation the appellants stated that contraband namely 'ganja' were concealed under coal in the said vehicle. The said vehicle was brought to the godown of Siliguri Customs Division. There was recovery of 128 packets of 'ganja' from the said vehicle wrapped in newspaper and plastic sheets. The said contraband was seized and weighed. The total weight of recovered contraband was 1821.28 Kg. Seizure list and weighment sheets were

prepared in presence of two independent witnesses. Four samples in duplicate were prepared. Further the coal and vehicle along with documents were also seized.

PW3, Surendra Paul Singh, Deputy Director of DRI, Siliguri, led the team on the said date upon receipt of secret information. He deposed that they kept surveillance in Ghoshpukur area and intercepted the truck bearing registration no. NL-02G-5421 at 4 a.m on 18.02.2011. Upon interrogation it revealed that ganja was concealed underneath the coal and the truck was taken to the Customs Godown.

PW4 Basudev Chakraborty (Intelligence Officer of DRI Sliguri), PW6 Subir Kr. Jana (Senior Intelligence Officer of DRI Sliguri), PW7 Pankaj Kumar (Intelligence Officer) and PW5, Dharmendra Thakur (Driver) as well as independent witnesses PW8 & 9 corroborated the deposition and version of PW1, PW2 and PW3.

9. The prosecution case reveals that on the basis of an intelligence input the team of DRI officers intercepted a vehicle bearing no. NL-02G-5421 at Ghoshpukur area on National Highway 31 at 4 a.m on 18.02.2011 and thereafter the said vehicle was taken to the Customs Godown where the seizure was effected. Therefore at the outset it is to be assessed as to whether requirement of section 42 of the NDPS Act is complied with or its compliance is required in the facts of the case or not. Under section 42 of the NDPS Act the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. In the present case the evidence reveals that DRI officers acted on the basis of a

secret intelligence input. There are no evidence of taking down information in writing. From the evidence on record it is found that all the members of the raiding party are Intelligence Officers of DRI, Siliguri namely PW1, 2, 3, 4, 6 & 7 and PW1 (Complainant), who was the member of the team which conducted search and seizure, categorically stated that he is a Senior Intelligence Officer and Gazetted officer. PW6 is also a Senior Intelligence Officer. Now the question arises whether in the facts of the instant case it was imperative to take down such information in writing. It is trite law where search and seizure is conducted by a Gazetted officer himself acting under section 41 of NDPS Act, compliance with section 42 of NDPS Act is not necessary in such case.**[See *Sekhar Suman Verma versus Superintendent of Narcotics Control Bureau & Another reported in (2016) 11 SCC 368, paragraphs 12 and 13*].** Accordingly, in the facts of the present case as the search and seizure was conducted by Gazetted officers of the DRI, Siliguri the compliance of section 42 of the NDPS Act is not imperative.

10. Learned advocate for the appellants relying on the decision of Hon'ble Apex Court passed in ***Jitendra (supra)*, *Ashok (supra)* and *Vijay Jain (supra)*** has asserted mere oral evidence that the materials were seized from the possession of the appellants would not be sufficient to constitute an offence under NDPS Act, in the event of non-production of the seized materials.

The contraband substance seized was not produced in court. In such circumstances, what will be the consequence of such non-production of

the seized contraband substance? In the decision passed in ***State of Rajasthan versus Sahi Ram reported in (2019) 10 SCC 649*** the same issue fell for decision before the Hon'ble Apex Court. In the cited case only ground urged before the High Court was that the contraband material was not produced before the court. The High Court accepted the said ground and held as the prosecution failed to exhibit the contraband material in the court, entire evidence of the prosecution regarding alleged seizure has to be discarded. Negating the aforesaid view of the High Court, the Apex Court restored the conviction holding the conclusion drawn by High Court as unsustainable and further observed as follows:-

“ 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 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.”

PWs 1, 2, 4, 6 and 7 who are the members of the raiding party have consistently stated of seizure of the contraband from the vehicle bearing no. NL-02G-5421 of which the appellant no.1 was the driver and

appellant no.2 was the helper. The aforesaid versions of the witnesses have been corroborated by independent witnesses to seizure namely PWs 8 & 9. The seizure memo (**Exhibit 15**) and weighment sheets (**Exhibit 16**) reveal seizure of contraband substance amounting to 1821.28 Kg of 'ganja'. Though seized contraband had not been produced in court, contemporaneous documentary evidence e.g. seizure memo and weighment sheets corroborate the oral evidence of recovery of the contraband from the appellants. Admittedly, appellants have signed on these documents. There is no cross-examination on this score that the signatures of the appellants appearing in the inventory of goods seized namely **Exhibit 15** and weighment sheets, **Exhibit 16** were taken by fraud, coercion or misrepresentation or that the signatures were not of the appellants or that they did not understand the purport of the seizure memo, which clearly indicated that the appellants were aware of such seizure and had acknowledged the same. [**See Sahi Ram (supra) paragraph 17**]. Thus the prosecution case of recovery and seizure of contraband from the possession of the appellants does not hinge merely on the oral evidence of the officers but also on the seizure memo of seized contrabands signed by independent witnesses as well as the appellants showing seizure of contraband substance amounting to 1821.28 Kg of 'ganja'.

The decisions relied upon by the learned advocate for the appellants has also been dealt with in **Sahi Ram (supra)** at paragraph 15, which is reproduced as hereunder.

“ 15. It is true that in all the aforesaid cases submission was advanced on behalf of the accused that failure to produce contraband material before the court ought to result in acquittal of the accused. However in none of the aforesaid cases the said submission singularly weighed with this Court to extend benefit of acquittal only on that ground. As is clear from the decision of this Court in Jitendra, apart from the aforesaid submission other facets of the matter also weighed with the Court which is evident from paras 7 to 9 of the decision. Similarly in Ashok, the fact that there was no explanation where the seized substance was kept (para 11) and the further fact that there was no evidence to connect the forensic report with the substance that was seized (para 12) were also relied upon while extending benefit of doubt in favour of the accused. Similarly, in Vijay Jain, the fact that the evidence on record did not establish that the material was seized from the appellants, was one of relevant circumstances.....”

In view of the above discussion I hold in the facts of the present case non-production of the seized contraband substance in court does not create a dent in the prosecution case and is not at all fatal. Thus, the argument advanced on behalf of the appellants does not stand to reason.

11. It has been zealously argued on behalf of the appellants as per evidence of PW2 (Seizing officer) seizure of articles were made on 18.02.2011, but were received by the Godown officer on 21.02.2011 vide G.D Entry no.703/2010-2011 i.e after lapse of 3(three) days. The prosecution is silent about the custody of those seized articles during the intervening period. Neither the Godown register nor the Godown-in-charge was examined during trial, which raises a serious doubt in the

prosecution case of seizure of contraband substance. Upon going through the cross-examination of PW2 (Seizing officer) it is found that seized articles were received by the Godown officer on 21.02.2011 although the seizure was made on 18.02.2011. Be that as it may, he has clarified the situation by further stating before receiving, all the seized articles remained in the godown itself under the custody of the Godown officer and he himself deposited the seized articles to the officer of the godown. Therefore from his deposition it is quite apparent that the seized articles remained in the godown of the Customs for three days under the custody of Godown officer till it was received. Thus delay of three days in receiving by the Godown officer does not create any breach in the custody of the seized contraband. Under such circumstances, non-production of godown register or non-examination of godown officer *per se* does not cause a wedge in the prosecution case.

12. Further it has been strenuously argued on behalf of the appellants initially a rough seizure list was prepared by PW2 (Seizing officer) and thereafter a computerized seizure list was prepared at DRI office but the rough seizure list was never produced before the court and therefore, the computerized seizure list (**Exhibit 15**) cannot be considered to be a seizure in terms of Section 43 of the NDPS Act. PW2 (Seizing officer) in cross-examination has admitted that a draft copy of the seizure list was prepared and thereafter a fair copy was prepared. Save and except the aforesaid stray statement no other evidence has come up to doubt the seizure of contraband substance. There is no case that draft seizure list

was different from the subsequent fair computerized seizure list or that there was no seizure at all. Nonetheless the subsequent computerized seizure list has been acknowledged by the appellants by endorsing their respective signatures to the document. Accordingly the argument so advanced does not stand to reason.

13. The challenge to the seizure of contraband substance has also been thrown on behalf of the appellants on the count that the independent witnesses namely PWs8 & 9 are stock witnesses of the Customs and accordingly their evidence as to seizure of the contraband is to be taken with a pinch of salt. PW8 deposed that he went near the godown in the early morning for morning walk and was called by the DRI officers to remain present as an independent witness to the seizure to which he acceded. In cross-examination PW8 stated he is an auction purchaser from Customs Department since 1985 and well acquainted with DRI officers. As regards PW9 he happens to be a passer-by and a chance witness. He deposed that on 18.02.2011 he was going to the railway station by the side of DRI godown and at that time he was approached by the officers to remain present during search to which he agreed. In cross-examination he stated that previously he used to drive the vehicle of Customs office occasionally. Their evidence is consistent to one another and other evidence on record. Further, there is nothing on record to show witnesses were coerced or forced to sign on the seizure list. Only because PW8 is an auction purchaser of the Customs or other witness (PW9) was an occasional driver of Customs, it cannot be said they were under the

control of DRI officers and deposited as per their dictate. Thus the argument made on behalf of the appellants fall short of merit.

14. As per the evidence of PW1 as discussed above it is found that representative samples in duplicate weighing 25 gm each were drawn by the Seizing officer from the net quantity of suspected 'ganja' and altogether four representative samples in duplicate from each lot comprising 40 packets i.e 200 gm of suspected samples were drawn. The representative samples were inserted in envelopes marked S-1, S-2, S-3, S-4 respectively. One set of samples was sent to the chemical examiner for examination. The test memo (**Exhibit 12**) shows that total four numbers of samples marked S-1, S-2, S-3 and S-4 were sent to the Chemical Examiner, Kolkata Customs House for chemical examination. The report (**Exhibit 14**) shows that the samples marked S-1, S-2, S-3 and S-4 were received in sealed and intact condition and the affixed seals on the samples tallied with the facsimile of the seal given on the test memo. Further at the time of taking out, the said samples were found to be in sealed and intact condition with similar facsimile of seal given in the test memo. The report reveals that each of the four samples is in the form of flowering and fruiting consisting of seeds, leaves and stalks. Each responds to the test of cannabis, each has characteristic of 'ganja'.

15. In the light of aforesaid discussion it appears that prosecution has been able to establish through the evidence of Intelligence officers of DRI, Siliguri namely PW 1, 2, 4, 6 and 7 as well PW5 (driver) and independent witnesses namely PW8 & 9 and the contemporaneous document in the

form of seizure list (**Exhibit 15**) and weighment sheet (**Exhibit 16**), and Chemical Examiner report (**Exhibit 14**), the factum of seizure of cannabis i.e ganja weighing 1821.28 kg from the vehicle which was driven by appellant no.1 and appellant no.2 being its helper.

16. It has further been argued that the certification of correctness of inventory of the goods by the Magistrate under Section 52A of the NDPS Act has not been proved in court by adducing the evidence of the concerned magistrate and the document has been marked '**X**' for identification. It has been argued by the learned advocate for the appellants that resorting to Section 66 of the NDPS Act the learned Trial Judge erringly took into consideration the certification of correctness of inventory of goods by the Magistrate under Section 52A of the NDPS Act. It appears that the said certificate has not been proved by the concerned magistrate. Section 66 of the NDPS Act provides where any document is produced or furnished by any person or seized from any person and such document is tendered in any prosecution where a person is an accused in that event the court shall admit the said document in evidence against him and shall presume the truthfulness of such document as to its contents unless contrary is proved. In the present case in hand the document of certification of correctness of inventory by the Magistrate (**'X' for identification**) cannot be a document to be produced, furnished or seized from the custody of the appellants. Accordingly the presumption as to documents as provided under Section 66 of the NDPS Act does not apply to the certificate issued by the Magistrate. Be that as it may, even if

the said document is discounted, the consistent oral evidence of the prosecution witnesses as well as documentary evidence in the form of the seizure list and weighment sheet **Exhibit 15 & 16** respectively patently establishes the fact of seizure of contraband substance from the vehicle in which the appellants were present as driver and helper.

17. Accordingly, the Criminal appeal being no. 449 of 2016 is dismissed.

18. The conviction and sentence of the appellants is upheld. The period of detention undergone by the appellants during investigation, inquiry or trial of the case shall be set-off from the substantive sentence in terms of Section 428 of the Criminal Procedure Code.

19. CRAN 2 of 2018 (Old CRAN 1847 of 2018), accordingly, stands disposed of.

20. Copy of the judgement along with the lower court records be sent down to the learned trial court at once.

21. Urgent Photostat Certified copy of this judgment, if applied for, be supplied to the appellants expeditiously after complying with all necessary legal formalities.

I agree.

(Joymalya Bagchi,J)

(Bivas Pattanayak,J)

