

IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Subhendu Samanta

C.R.A. 14 of 2020

Jalil Ali

-Vs-

The State of West Bengal

For the Appellant	:	Mr. Sekhar Kumar Basu, Sr. Adv. Mr. Soubhik Mitter, Adv. Ms. Rajnandini Das, Adv. Ms. Arushi Rathore, Adv. Mr. Karan Bapuli, Adv.
For the State	:	Mr. Aditi Shankar Chakraborty, Id. APP Mr. Sourav Ganguly, Adv.
Heard on	:	02.03.2023, 06.03.2023 and 10.03.2023
Judgment on	:	22.03.2023

Joymalya Bagchi, J.:-

1. Appeal is directed against the judgment and order dated 17.02.2020 passed by learned Additional Sessions Judge, 1st Court, Cooch Behar (Special Court under NDPS Act) in NDPS Case No. 59 of 2018 arising out of Sahebganj Police Station Case No. 352/18 dated

31.07.2018 convicting the appellant for commission of offence punishable under section 20(b)(ii)(C) of the NDPS Act and sentenced him to suffer rigorous imprisonment for 15 years and to pay a fine of Rs. 1,50,000/-, in default, to suffer rigorous imprisonment for two years more.

2. Prosecution case levelled against the appellant is to the effect that on 31.07.2018 at 6:30 hours one Jay Prakash, Assistant Commandant of 38 BN BSF at BOP Gitaldah (P.W. 5) who was also in-charge of BOP Karala received information from unit 'G' (Intelligence Cell) that large quantity of ganja is stored in the house of one Jaidul Mia of Karala which was situated on the other side of the border fence. He informed his superior and as per their direction he directed Post Commander Inspector Bachhan Singh (P.W. 1) to reach the spot and cordon the house of Jaidul. At 7:30 hours Bachhan Singh and his force went out from the BOP Karala vide Karala BOP GD Entry No. 13 dated 31.08.2018 and reached the spot. They cordoned the house of one Jaidul Mia. At that time, two persons fled away from the house. Bachhan Singh requested Jay Prakash, Assistant Commandant to come to the spot and conducted the search. Jay Prakash tried to contact a Magistrate for conducting search but failed. He reached the spot at 8.30 hours along with stationery and weighing machine. In the presence of independent witnesses he knocked the door of the house.

Appellant opened the door. He was informed that the raiding party wished to search the house. Initially, appellant was non-cooperative. Jay Prakash served a notice upon the appellant under section 50 of the NDPS Act and informed him of his right to be searched before a Magistrate or gazetted officer. He refused the offer. Upon search a white coloured sack containing ganja was recovered. On weighment it was found the contraband weighed 68.5 kgs. The sack containing ganja was marked as 'Exhibit A'. Two samples weighing 100 grams each were drawn and marked as 'Exhibit A1' and 'Exhibit A2'. Seized items were packed, labelled and sealed. 'No damage certificate' (Exhibit 5) was issued. Appellant was arrested and brought to the police station along with the contraband. Jay Prakash lodged written complaint with the officer-in-charge of Sahebganj Police Station resulting in registration of Sahebganj P.S. Case no. 352 dated 31.07.2018 under section 20(b)(ii)(C) of the NDPS Act against the appellant and one Jaidul Mia.

3. In the course of investigation, the samples were sent for chemical examination. Chemical examiner's report (Exhibit 14) showed presence of ganja.

4. Charge-sheet was filed. Charges were framed against the appellant and Jaidul Mia under sections 20(b)(ii)(C)/ 29 of the NDPS Act. They pleaded not guilty and claimed to be tried.

5. Prosecution examined 14 witnesses and exhibited a number of documents. Defence of the appellant was one of innocence and false implication.

6. In conclusion of trial, the trial Judge by impugned judgment and order dated 17.02.2020 convicted and sentenced the appellant as aforesaid but by the self same judgment and order Jaidul Mia was acquitted.

7. Mr. Basu senior Counsel with Mr. Mitter argued the mandatory requirements of section 42(2) of NDPS Act have not been complied with. GD Entry No.2090 dated 31.07.2018 (Exhibit 15) does not record the prior information which led to the alleged recovery. No endorsement showing communication of the prior information to a superior officer has been proved. There is total non-compliance of the requirements of section 42(2) of NDPS Act. Secondly, he submitted no label and seal were found on the white sack containing the contraband. Identity of the contraband has not been established. Thirdly, he submitted there is non-compliance of section 52A of the NDPS Act as samples were not drawn in presence of a Magistrate. There is difference in weight between the sample drawn and the one which was examined at the laboratory. Malkhana register has not been produced. Chain of custody has not been established. Finally, it is argued presence of the appellant at the place of occurrence has not been proved. Independent witnesses

have not supported the prosecution case. He relied on various authorities and prayed for acquittal.

8. Learned Counsel for the State argued prior information was received by a gazetted officer. He conducted the search in terms of section 41(2) of the NDPS Act. Hence, there is no requirement of compliance of section 42(2) of the said Act. 68.5 kgs of ganja which was found in a white coloured sack. The sack containing the contraband was produced during trial. Owing to its heavy weight it could not be physically produced in the Courtroom which was situated on the first floor. Witnesses identified the white sack containing the contraband kept outside and the same was marked as 'Mat Exhibit I'. Hence, there was physical production of the contraband during trial. Due to movement of the contraband the seal and the label had come off. However, the adhesive with a part of the label attached to it was found on the sack. As the contraband was physically produced in Court, non-compliance of section 52A of the NDPS Act has not caused prejudice to the appellant. Samples drawn at the site were duly sealed and promptly sent for chemical examination. In view of the nature of the narcotics, that is, ganja plant with flowering tops, fungus developed which caused increase in weight. Chain of custody has been fully established. Hence, appeal is liable to be dismissed.

9. P.W. 5, Jay Prakash was posted as Assistant Commandant of 38 BN BSF at BOP Gitaldah. On 31.07.2018 he was also in-charge of BOP Karala. At 6/6.30 AM he received intelligence that a large quantity of ganja was stored in the house of Jaidul of Karala. His house was situated on the other side of the border fence. He directed the Post Commander Inspector, Bachhan Singh to proceed to the spot. Accordingly, Bachhan Singh proceeded to the spot with BSF personnel. Thereafter, Bachhan Singh informed Jay Prakash he had cordoned the house and requested him to come to the spot. Jay Prakash came to the spot at 8.30 AM. He requested two independent witnesses Nirmal Kumar Bagchi (P.W. 7) and Rafiqul Islam (P.W. 8) to join the search. Thereafter, he proceeded to enter the house. Appellant was found inside the house. He was served with a notice under section 50 of the NDPS Act intimating him of his right to be searched before a Magistrate or gazetted officer. He refused the offer. In the course of search a white coloured sack containing ganja like substance was recovered. Upon weighment, the ganja weighed 68.5 kgs. Two samples of 100 grams each were drawn from the contraband. Seizure memo was prepared (Exhibit 1). Appellant was arrested. He was brought to the police station. P.W. 5 lodged written complaint (Exhibit 6). He handed over the contraband as well as the samples to the police. In Court, he identified the two samples along with label and seal. He also identified the

signatures thereon. He went out of the courtroom and identified the contraband which was in a white coloured sack in the ground floor of the courthouse. It was marked as 'Mat. Exhibit I'.

10. P.W. 5 is corroborated by Inspector Bachhan Singh (P.W. 1). He identified the contraband kept in a white sack in the ground floor of the courthouse owing to the heavy weight of the contraband. He also identified the samples drawn from the mother packet.

11. P.W. 2, ASI Amar Singh, P.W. 3, Constable Shamsheer Singh, P.W. 4, Constable Kulson Khatun, P.W. 6, Constable Sonali Barua, Constable Ramanand Kumar P.W. 9, Constable Surjeet Singh P.W. 10, ASI Bijender Singh P.W. 11, Constable Bhoopendera Singh P.W. 13, are members of the raiding party. They have corroborated P.Ws. 1 and 5.

12. P.W. 7, Nirmal Kumar Bagchi, and P.W. 8, Rafiqul Islam are independent witnesses. P.W. 7 deposed he had signed the seizure memo at BSF camp. He proved his signatures on the seizure memo, notice under section 50 of the NDPS Act as well as sample packets. He was declared hostile and was confronted with his earlier statement to police.

13. P.W. 8 also deposed on similar lines and was declared hostile. He was also confronted with his earlier statement to police.

14. P.W. 14, S.I. Mritunjoy Chakraborty is the investigating officer. He proved the formal FIR. He also proved the arrest memo (Exhibit 9).

He re-seized the alamats from the BSF personnel. He deposed seized alamats were kept in P.S. malkhana vide P.R No.245/18. He stated he sent sample packets to laboratory on 01.08.2018 but due to some discrepancies they were returned. He again sent them with delay report on 04.08.2018. He seized the duty roster of BSF personnel. He recorded their statements. He seized the GD Entry No. 2090 dated 31.07.2018. He arrested Jaidul Mia. He submitted charge-sheet. He proved the chemical report along with the forwarding letter of the drug laboratory (Exhibits 14 and 14/1). He identified the contraband in white coloured sack (Mat Exhibit I) as well as the sample packets (Mat Exhibits II and III).

15. Evidence on record shows prior information was received by Assistant Commandant Jay Prakash (P.W. 5). Jay Prakash instructed post commander Inspector Bachhan Singh to proceed to the spot. Thereafter, he came to the spot and conducted the search and seizure.

16. As per rank structure in BSF, an Assistant Commandant is a gazetted officer¹. Admittedly, search and recovery were made in the presence of P.W. 5 who is a gazetted officer under section 41(2) of the NDPS Act. In such view of the matter, requirement of compliance of section 42(2) of the NDPS Act does not arise. Reference may be made to

¹ BSF Rank Wise Salary 2023,< <https://www.4ono.com/bsf-rank-wise-salary/>> accessed 18th March, 2023

State of Haryana v. Jarnail Singh And Others² wherein the Apex Court relying on prior authorities held as follows:-

“10. ... Moreover it cannot be lost sight of that the Superintendent of Police was also a member of the searching party. It has been held by this Court in M. Prabhulal v. Asstt. Director, Directorate of Revenue Intelligence [(2003) 8 SCC 449] that where a search is conducted by a gazetted officer himself acting under Section 41 of the NDPS Act, it was not necessary to comply with the requirement of Section 42. For this reason also, in the facts of this case, it was not necessary to comply with the requirement of the proviso to Section 42 of the NDPS Act.”

This view was reiterated in ***Sekhar Suman Verma vs. Superintendent of Narcotics Control Bureau And Another***³.

17. A faint plea was raised that the seizure memo (Exhibit 1) does not reflect recovery of narcotics. The argument is a fallacious one. ‘Exhibit 1’ comprises of two sheets. Recovery of narcotics is noted in Page 1 of the said document. Learned Senior Counsel may have been prompted to advance the argument as the department had not appended the first page of ‘Exhibit 1’ to the file containing exhibits (File II). The said page was incorrectly included in the file containing oral depositions of witnesses (File I).

18. This Court is also not impressed with the absence of label/seal on the white coloured sack containing the contraband. Contraband comprises of 68.5 kgs. of ganja. It was kept in a white coloured sack at

² (2004) 5 SCC 188

³ (2016) 11 SCC 368 [paras 12, 13]

the police station and thereafter moved to the court premises. Owing to its heavy weight it could not be physically produced inside the Court hall which was situated on the first floor. During trial, adhesive used to stick the label on the sack was found but the label was missing. It is possible due to callous handling during movement of the weighty contraband contained in the sack, the label had come off. The contraband as well as the white sack were identified by most of the members of the raiding party. Under such circumstances, I am of the opinion the physical evidence of the contraband has been produced and identified during trial. Samples drawn from the contraband were also produced and identified before the trial Court.

19. In the view of the production of the contraband as well as the samples drawn therefrom, non-compliance of section 52A of the NDPS Act has not prejudiced the appellant. From that perspective, reference to **Noor Aga vs. State of Punjab And Another**⁴ is inapposite. In **Noor Aga** (supra) the Apex Court was called upon to consider the impact of non-compliance of section 52A of the NDPS Act when the physical evidence of the bulk quantity had not been produced in Court and it was contended that it had been destroyed. The Apex Court held as follows:-

“92. Omission on the part of the prosecution to produce evidence in this behalf must be linked with a second important piece of physical evidence that the bulk quantity of heroin allegedly recovered indisputably has also not been produced in court. The

⁴ (2008) 16 SCC 417

respondents contended that the same had been destroyed. However, on what authority it was done is not clear. Law requires that such an authority must flow from an order passed by the Magistrate."

(emphasis supplied)

20. It further held:-

"94. ... authority for disposal would require a clear direction of the court in terms of Section 52-A of the Act. Fourthly, the High Court failed and/or neglected to consider that physical evidence being the property of the court and being central to the trial must be treated and disposed of in strict compliance with the law."

21. Even the samples drawn from the bulk quantity had not been produced in the Court. Accordingly, it was held as follows:-

"96. ... 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."

22. The situation in the present case is completely different. Not only the samples but the entire contraband was produced and identified by the witnesses during trial. No objection was raised on behalf of the defence in that regard. It was not the prosecution case that the bulk quantity had been destroyed without compliance to section 52A of the NDPS Act as in **Noor Aga** (supra). As the physical evidence was duly produced and identified during trial, non-compliance of section 52A of the NDPS Act did not affect the credibility of the prosecution case or prejudice the accused.

23. Referring to ***Union of India vs. Mohanlal and Another***⁵ it is contended samples have not been drawn in presence of Magistrate. It is true samples had been drawn at the spot. They were kept in envelopes which were sealed, labelled and duly signed by witnesses as well as the appellant. The samples containing the label, seal on the envelopes along with signatures of witnesses were produced in Court and marked as Mat Exhibits II and III. Drawing of the samples from the bulk quantity has been clearly established. They were labelled and sealed. Labels and seals were found intact during trial and rules out any possibility of tampering. Under such circumstances, deviation in the matter of drawing of samples at the spot cannot be said to have prejudiced the appellant.

24. The other contention with regard to difference in weight of the samples drawn and tested is also explained away in the facts of the case. Contraband seized were flowering and fruiting tops with seeds, leaves and stalks of ganja plants. They were prone to fungal contamination. Presence of fungus on the plants was noted in the FSL report. Absorption of moisture and fungus on the samples resulted in increase in weight. Seals on the envelopes containing the samples were found intact. They matched with the seals noted in the test report. This proves there was no tampering or substitution of samples.

⁵ (2016) 3 SCC 379

25. Investigating Officer (P.W. 14) stated that the bulk quantity and samples were re-seized and kept in the police malkhana. Particulars of the entry in the malkhana register were also disclosed. Within 24 hours of seizure the samples were sent. Due to technical discrepancy they were returned and re-sent within a couple of days i.e. 04.08.2018. There was no delay in dispatch of samples. Chain of custody has therefore been established beyond doubt and the chemical report (Exhibit 14) proves the presence of ganja in the seized contraband.

26. Authorities relied on behalf of defence are distinguishable ***State of Rajasthan vs. Gurmail Singh***⁶ there was a delay of over fortnight to send the sample and there is no evidence that the sample of seal on the bottle was sent to the laboratory. In the present case, the samples seals were sent to the laboratory and the dispatch of the samples was within a couple of days. Similarly in ***Ali Hossain @ Dulal vs. The State of West Bengal***⁷ the chain of custody has not been established and a delay of about 10 days in sending the sample remained unexplained.

27. In ***Md. Aslam Khan vs. State of West Bengal***⁸ there was doubt with regard to observation of section 50 of the NDPS Act and the chain of custody of the seized sample and the one sent for chemical examination had also not been proved. These factors in addition to

⁶ (2005) SCC (Cri) 641

⁷ 1995 SCC OnLine Cal 306

⁸ 1995 SCC OnLine Cal 259

non-compliance of section 52A of the NDPS Act prompted the Court to record an order of acquittal. In the present case, physical evidence of the seized narcotics and the samples were produced in Court. That apart, evidence on record clearly established the chain of custody between the samples drawn and the one examined at the laboratory.

28. It is contended independent witnesses did not support the recovery. Independent witnesses (P.Ws. 7 and 8) had been examined by the Investigating Officer during investigation. In Court, they resiled from their previous statements to police. But they admitted their signatures on the seizure memo and other documents. Their prevaricating stance shows they have been won over and are untruthful witnesses. On the other hand, evidence of the member of the raiding party are consistent and prove the recovery beyond doubt.

29. P.W. 5, leader of the raiding party deposed the independent witnesses had joined the search. His deposition is corroborated by other members of the raiding party. Signatures of the independent witnesses also appear on the seizure memorandum and other contemporaneous documents. There is no reason to disbelieve the evidence of the official witnesses by giving undue credence to the untruthful witnesses i.e. P.Ws. 7 and 8. It is trite that evidence of witnesses ought not be discarded on the ground they are police personnel. It has been held in ***Kulwinder Singh and Another vs. State of***

Punjab⁹ and **Surinder Kumar vs. State of Punjab**¹⁰ that prosecution is not duty bound to examine independent witnesses if they have been won over.

30. In this backdrop, I hold recovery of narcotics from the house has been proved beyond doubt on the strength of the official witnesses and the prosecution case ought not be disbelieved because the independent witnesses appear to have been won over.

31. Presence of the appellant in the house at the time of recovery has been proved beyond doubt. All the members of the raiding party stated the appellant was inside the house. Notice under section 50 of the NDPS Act was served upon him. Thereafter, 68.5 kgs. ganja kept in a white coloured sack was recovered from the house. The aforesaid circumstances clearly show that the appellant had conscious possession of the narcotics. The aforesaid factual matrix attract statutory presumptions under sections 35 and 54 of the NDPS Act and cast a reverse burden upon the appellant to explain away the circumstances in which he was present in the house with the narcotics. He has singularly failed to rebut the statutory presumptions.

32. In the light of the aforesaid discussion, conviction of the appellant is upheld.

⁹ (2015) 6 SCC 674 (para 23)

¹⁰ (2020) 2 SCC 563 [para 14 to 16]

33. Coming to the point of sentence, though a large quantity of narcotics i.e. 68.5 kgs. ganja was recovered, nothing is placed on record that the appellant has prior conviction. Apart from the quantum of narcotics seized none of the aggravating factors enumerated in section 32B of the NDPS Act are proved against the appellant.

34. Under such circumstances, I consider it prudent to modify the sentence imposed upon the appellant and I direct the appellant shall suffer rigorous imprisonment for 12 years and to pay a fine of Rs. 1,00,000/-, in default, to suffer rigorous imprisonment for two years more.

35. The appeal is, accordingly, disposed of.

36. Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of Section 428 of the Code of Criminal Procedure.

37. Lower court records along with a copy of this judgment be sent down at once to the learned trial Court for necessary action.

38. Photostat certified copy of this judgment, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Subhendu Samanta, J.)

(Joymalya Bagchi, J.)