

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Gaurang Kanth

C.R.A. 383 of 2018
With
C.R.A.N.2 of 2018 (Old CRAN 3531 of 2018)
With
CRAN 3 of 2021

Tinku Das
Vs.
The State of West Bengal

For the Appellant : Mr. Sabir Ahmed, Adv.,
Mr. Dhiman Banerjee, Adv.

For the State : Mr. Debasish Roy, Ld. P.P.
Ms. Amita Gaur, Sr. Govt. Adv.

Heard on : 08.01.2025

Judgment on : 08.01.2025.

Joymalya Bagchi, J. :-

1. Appeal is directed against judgment and order dated 12.04.2018 and 16.04.2018 passed by the learned Additional Sessions Judge, 1st Court, Cooch Behar (NDPS) in NDPS Case No.22 of 2016 convicting the appellant for commission of offence punishable under Section 21(C) of the NDPS Act and sentencing him to suffer rigorous imprisonment for

ten years and to pay fine of Rs.1,00,000/-, in default, to suffer rigorous imprisonment for a year more.

Prosecution case:

2. Prosecution case as alleged against the appellant is as follows:-

On 09.03.2016 at 10.05 AM, PW 1 received information that one empty truck bearing registration No.NL-01N-0394 carrying huge quantity of contraband of cough syrup was moving towards Assam from Alipurduar and the same would pass through NH-31 over Sankosh bridge. The information was diarized as Boxirhat P.S. G. D. Entry No.69 of 2016 dated 09.03.2016 under Sections 21(c) / 22(c) of the NDPS Act.

3. PW 1 intimated ASI, Gouranga Roy (PW 8) to detain the truck. Thereafter, PW 1 accompanied by PWs 3 and 4, Constables Ashim Das and Bimal Kumar Dey left for Sankosh bridge to work out the information. At 11.05 hours they reached Sankosh bridge and started checking vehicles. Around 11.30 hours a truck bearing registration No.NL-01N-0394 was seen coming from Alipurduar side.

4. The truck was intercepted. The appellant was identified as the driver of the truck. On interrogation he confessed he was carrying phensedyl syrup. As the place was highly congested and there was no place for checking the truck, it was brought in front of the garage of Nur Islam Mohammad near the Police Station for search. Requisition was made to SDO, Tufanganj to depute an Executive Magistrate for search. At 5.15 hours, Sri Manish Verma, SDO, Tufanganj (PW 7) and Sri Mathias Lepcha, BDO, Tufanganj-II (PW 9) came to the spot. In their

presence the vehicle was searched and 5662 bottles of phensedyl syrup in 224 non transparent white polythene bags and 62 bottles in loose condition were found concealed under the extra wooden chamber of the floor of the truck. No document justifying licit possession of the cough syrup was produced. The cough syrup was seized in presence of independent witnesses viz., Dilip Barman (PW 5) and Soumallya Barman (PW 6) and samples were taken from the bottles, properly sealed and labelled in the presence of BDO.

5. On the written complaint of PW 1, Boxirhat P.S. Case No.69 of 2016 dated 09.03.2016 under Sections 21(C)/22(C) of the NDPS Act was registered against the appellant and one Gopal Debnath, owner of the truck.

6. In conclusion of investigation, charge sheet was filed against the appellant and one Gopal Debnath, owner of the vehicle. However, Gopal Debnath could not be arrested and was declared as a proclaimed offender. Charge was framed against the appellant under Sections 21(C)/22(C) of the NDPS Act. Appellant pleaded not guilty and claimed to be tried.

7. In course of trial prosecution examined 10 witnesses and exhibited a number of documents including the chemical examiner's report. Defence of the appellant was one of innocence and false implication.

8. In conclusion of trial, the trial Judge by the impugned judgment and order dated 12.04.2018 and 16.04.2018 convicted and sentenced the appellant, as aforesaid.

Arguments at the Bar:-

9. Mr. Sabir Ahmed, learned Advocate for the appellant contends there is no compliance of Section 42(2) of the NDPS Act. PW 1 is the seizing officer. He had not given intimation to the superior police officer within 72 hours of recovery. He also contends presence of independent witnesses (PWs. 2, 5 and 6) is doubtful. PW 1 claimed they accompanied the raiding party from NH 31 to the spot where recovery was made whereas the witnesses did not corroborate this fact. He also submits Sub-Divisional Officer (PW 7) and Block Development Officer (PW 9) were not interrogated during investigation. Accordingly, he prays for acquittal of the appellant.

10. Learned Advocate for the State submits recovery was made in presence of the Sub-Divisional Officer (PW 7) and Block Development Officer (PW 9). As a Gazetted Officer was the member of the raiding party when the recovery was made, the said recovery is under Section 41(2) of the NDPS Act and Section 42(2) of the NDPS Act does not get attracted. Independent witnesses viz. PWs. 2, 5 and 6 corroborate the official witnesses with regard to recovery. Chain of custody with regard to samples drawn in presence of Block Development Officer and those examined by the State Drug Control Laboratory has been established. Chemical examiner's report (Ext. 20) shows presence of codeine

phosphate in the seized consignment. No document was submitted on behalf of the appellant to show licit possession of cough syrup for medicinal purposes. Accordingly, the appeal is liable to be dismissed.

Evidence on record:-

11. Fulen Roy (PW 1) is the complainant. He deposed he was attached as SI of Boxirhat Police Station. At 10.05 hours he received source information that an empty truck bearing registration No.NL-01N-0394 carrying huge quantity of phensedyl surup would pass through Sankosh bridge on NH 31. He diarised the information and intimated ASI Gouranga Roy of Sankosh Bridge Guard Camp to keep a watch. At 11.05 hours he reached the spot. At 11.25 hours a truck was seen coming from Alipurduar side. He detained the truck. The driver i.e. the appellant confessed he was carrying phensedyl syrup in a secret chamber under the floor of the truck. As the place was on NH 31 and there was not sufficient place to search the vehicle, he informed the Officer-in-charge, Boxirhat Police Station and C.I Sadar Tufangang over telephone and they instructed him to take the detained vehicle to a place near Boxirhat Police Station. Accordingly, he took the truck near the *Asirbad* Auto Mobiles in the vicinity of the police station. He took two persons from the place of occurrence. He made requisition to SDO Tufanganj to provide Magistrate for search and seizure. In presence of SDO Tufanganj, Manish Verma (PW 7) and Sri Mathias Lepcha, BDO, Tufanganj-II (PW 9) the search commenced.

12. Secret chamber of the truck was opened and 5662 bottles of phensedyl syrup kept in 224 plastic cartoons containing 25 bottles each and loose 62 bottles were recovered. The bottles were seized. He prepared the seizure list (Ext.3). He prepared an inventory list. He seized the registration certificate and other documents pertaining to the truck. He took samples of 15 bottles in presence of BDO. He duly sealed and labelled them. The entire consignment was kept in a sack for safety and security. He arrested the appellant and took the seized articles to the police station. He lodged written complaint (Ext.16). On the strength of his complaint, FIR was registered.

13. Ashim Das (PW 3) and Bimal Kr. Dey (PW 4) accompanied PW 1 to the spot. They have corroborated his deposition in court.

14. Gouranga Roy (PW 8), ASI was posted at Sankosh bridge as armed bridge guard. He deposed he received telephonic communication from PW 1 that an empty truck bearing registration No.NL-01N-0394 would cross the area towards Assam from Bengal side. At 11.05 hours PW 1 and other Constables arrived at the spot and they started checking the vehicles. They intercepted the truck in question and upon interrogation the driver disclosed he was carrying phensedyl syrup in a secret chamber. Detained vehicle was taken near Boxirhat Police Station. BDO and SDO came to the spot and 5662 bottles of phensedyl syrup were recovered from the secret chamber of the truck.

15. PW 7 (Manish Verma) is the Sub-Divisional Officer, Tufanganj. He deposed he received telephonic information that a truck carrying

contraband was detained by police. He came to the spot at 3.00 P.M. and witnessed the recovery.

16. PW 9 (Mathias Lepcha) is the Block Development Officer, Tufanganj Block-II. He was also intimated by Officer-in-charge, Boxirhat Police Station to come to the spot. He along with Sub-Divisional Officer, Tufanganj were present at the time of recovery. He proved his signatures on the seizure list.

17. PW 2 (Premchand Rabidas), PW 5 (Dilip Barman) and PW 6 (Soumallya Barman) are the local witnesses. They deposed they assisted the police in unloading the vehicle and were present at the time of recovery of 5662 bottles of phensedyl syrup under the secret chamber of the truck.

18. PW 10 (Sougata Das) is the Investigating Officer. He deposed he went to the place of occurrence. He prepared rough sketch map. He forwarded the accused for remand. He sent samples to State Drug Control Laboratory. He submitted charge sheet. He identified the samples in Court.

Analysis and findings:-

(i) Whether recovery is under Section 41(2) of the NDPS Act or Section 42 of the NDPS Act?

19. PW 1 is the SI of Police attached to Boxirhat Police Station. He received secret information with regard to illicit transportation of cough syrup in a truck. He diarised the information and intimated the ASI of Police (PW 8) at Sankosh bridge. Thereafter PW 1 along with PWs.3 and

4 went to the spot to work out the secret information. At around 11.30 hours they detained the truck along with the driver i.e. the appellant. Appellant admitted he was carrying phensedyl syrup in a secret chamber. The matter was intimated to the Officer-in-charge, Boxirhat Police Station and on the instruction the truck was brought to a spot near the police station. Thereafter, Gazetted officers i.e. Sub-Divisional Officer (PW 7) and Block Development Officer (PW 9) were intimated. They arrived at the spot and the search commenced around 3.00 P.M. 5662 bottles of phensedyl syrup were recovered concealed under the secret chamber of the truck. Signatures of the seizing officers including that of the Block Development Officer (PW 9) were exhibited in the seizure list as well as in the inventory list prepared by PW 1. The aforesaid evidence unequivocally shows search and recovery of illicit drug was made in presence of the Gazetted Officers i.e. SDO (PW 7) and BDO (PW 9).

20. Sections 41 and 42 of the NDPS Act lay down the procedure for search in any building, conveyance or place where the officer has reason to believe narcotic drugs is kept.

21. Section 41 sub-section (1) provides for search pursuant to warrant or authorization issued by a Magistrate while sub-section (2) thereof speaks of search by a Gazetted Officer.

22. Section 42 provides for search by officers superior in rank to a sepoy, constable or peon of various departments of Central and State Government authorized by the Government concerned. In case of search

of a building, conveyance or place by officers authorized under Section 42 of the NDPS Act, prior information recorded by the said officer under sub-section (1) or the reason to believe that a search must be immediately undertaken between sunrise and sunset in order to avoid concealment of evidence or escape of offender is required to be communicated to a superior officer within 72 hours of the search as per Section 42(2) of the NDPS Act. No such mandate is prescribed when such search is done by a Gazetted Officer under Section 41(2) of the NDPS Act.

23. From the evidence on record it is evident search and recovery in the present case were done in presence of Gazetted Officers viz. PWs. 7 and 9 and would be governed by Section 41(2) and not Section 42 of the NDPS Act. (*See Sekhar Suman Verma vs. Superintendent of Narcotics Control Bureau & Anr.*¹; *State of Haryana vs. Jarnail Singh & Ors.*²; *M Prabhulal vs. Asst. Director, Directorate of Revenue Intelligence*³).

24. Without prejudice to the aforesaid, it is also apposite to bear in mind search commenced around 3.00/4.00 P.M. prior to sunset and therefore, the same shall not attract Section 42 sub-section (2) of the NDPS Act. In light of the aforesaid, Mr. Ahmed's argument that prior intimation or reasonable belief to conduct immediate search before sunset to avoid concealment under Section 42 sub-section (2) is inapplicable to the search and recovery in the instant case.

¹ (2016) 11 SCC 368

² (2004) 5 SCC 188 [Para 10]

³ (2003) 8 SCC 449

(ii) Recovery of contraband from the appellant :-

25. Official witnesses viz. PWs. 1, 3, 4 and 8 unequivocally proved the circumstances in which the truck was detained at NH31. As the vehicle was detained on a busy thoroughfare, the same was taken to a spot near the police station. Thereafter, search was undertaken in presence of Gazetted officers viz. PWs. 7 and 9.

26. It is contended PWs. 7 and 9 were not interrogated during investigation. These witnesses are superior officers and their signatures find place on the seizure list as well as on the inventory list contemporaneously prepared at the spot. Their oral version is corroborated by the documentary evidence establishing their presence at the place of seizure and recovery.

27. Independent witnesses viz. PWs. 2, 5 and 6 also corroborate the official witnesses. Mr. Ahmed contends their presence is doubtful. PW 1 claimed they accompanied him from the spot where the vehicle was detained to the place of seizure but the witnesses have not corroborated this fact.

28. This deviation, in my estimation, is a minor one. Independent witnesses have deposed they were intimated by police to come to the spot and were present at the time of recovery. Their evidence corroborates the official witnesses and proves the prosecution case beyond doubt.

(iii) Chain of custody :-

29. The consignment comprising of 5662 bottles of phensedyl syrup was concealed under a secret cavity below the floor of the truck. Entire consignment was seized by the raiding party. Seizure list and inventory list were prepared corroborating this fact. Samples were taken from the consignment in presence of Block Development Officer and the Investigating Officer (PW 10) sent them for chemical examination at State Drug Control Laboratory. State Drug Control Laboratory report (Ext. 20) shows presence of codeine phosphate in the samples. The samples were also produced in court. Chain of custody with regard to the samples seized and those examined at the laboratory had been established.

(iv) Appellant failed to explain licit possession :-

30. Recovery of 5662 bottles of phensedyl syrup containing *codeine phosphate* from a concealed space in the truck has been established. Appellant was the driver of the truck and was apprehended at the spot. Manner and circumstance in which the contraband was being carried i.e. in a concealed space clearly show the intention of the appellant to use them for non-medicinal purposes. No document with regard to his licit possession and use was adduced on behalf of the defence.

Conclusion:-

31. In light of the aforesaid discussion, I am of the opinion prosecution has been able to prove its case beyond reasonable doubt.

32. Accordingly, conviction and sentence of the appellant are upheld.

33. Appeal is dismissed.

34. In view of dismissal of the appeal, connected applications being CRAN 2 of 2018 (*Old No. CRAN 3531 of 2018*) and CRAN 3 of 2021 are also disposed of.

35. 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 468 of BNSS.

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

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

I agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)