

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 316 of 2014

Nimai Malo

-Vs-

The State of West Bengal

For the Appellant	: Mr. Ramashis Mukherjee (Amicus Curiae) Ms. Debanjana Sen
For the State	: Mr. Avishek Sinha Mr. Asif Dewan
Heard on	: 18.12.2023, 19.01.2024, 22.05.2024, 13.11.2024
Judgment on	: 14.05.2025

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the order of conviction dated 30.03.2014 passed by the Learned Special Judge (NDPS Act), 1st Court, Raiganj, Uttar Dinajpur in Special (NDPS)-2(A)/1997 and convicted the appellant and sentenced him to suffer rigorous imprisonment for a period of three (03) years and to pay a fine of Rs.10,000/-, in default, to suffer rigorous imprisonment for a further period of six (06) months for the commission of offence under Section 20(b)(i) of the N.D.P.S. Act dated 05.07.2003 under Section 20(b) of the N.D.P.S. Act.

2. The prosecution case precisely stated on 10.09.1997 after receiving a source information, the complainant along with other officers reached at Purnia More near Dalkhola, and found a truck on move being loaded with jute, approaching from Ghoshpukur, Darjeeling on its way to Kolkata which was intercepted at Purnia More. After completion of formalities, they searched the truck and detected 'ganja' and fabrics were concealed by ginger in two gunny bags. The appellant could not produce any valid documents in support of carrying 'ganja', which was seized under proper seizure list.
3. Based on the aforesaid complaint, Islampur P.S. Case Special (NDPS)-2(A)/1997 dated 05.07.2009 under Section 20(b) N.D.P.S. Act was initiated.
4. The charge was framed under Section 20(b)(i) of the N.D.P.S. Act, 1985 against the appellant. The charge was read over and explained to the appellant but the appellant pleaded not guilty and claimed to be tried.
5. The prosecution examined as many as 7 witnesses including the de facto complainant to prove the case against the appellant.
6. After examination of all witnesses and all documents and hearing both the parties the Learned Judge had been pleased to convict the appellant under Section 20(b)(i) of the N.D.P.S. Act and sentenced him to suffer rigorous imprisonment for a period of three (03) years and to pay a fine of Rs.10,000/-, in default, to suffer rigorous imprisonment for further period of six (06) months.
7. The Learned *Amicus Curiae* representing the appellant submitted as follows:-

- i. PW-1 stated in his examination that the truck was taken inside the custom office for search with a chance to implicate the appellant. The warehouse could not be termed as a public place.
 - ii. Out of 7 witnesses, 5 persons were customs employees and the remaining two were shop owners of medicine and tea stall who were known to the customs officers and under their control.
 - iii. The apprehended truck was taken inside the customs office for search and it was not possible for the appellant to ask for presence of a Magistrate to search the vehicle and out of pressure and fear of the customs officer the appellant agreed to such search by the customs officers and signed all the papers produced by the Custom Officers.
 - iv. PW-3 stated in his examination that all the PWs- 5, 6 and 7 were known to him and PW-1 called them to be witnesses of the case and he also stated that he prepared the seizure list at the direction of PW-1.
8. The Learned Advocate representing the State submitted that the prosecution was able to prove its case based on corroborative evidence of the prosecution witnesses and the appeal shall be dismissed.
9. A circumspection of evidence of the prosecution witnesses revealed as follows:-
- i. PW-1 deposed in his examination-in-chief that they took the truck to a vacant place within the office complex in order to avoid unnecessary crowd and to avoid jam on the road. They also called two independent witnesses namely Siraj Alam and Ram Prakash

Chowdhury for their evidence to be recorded in connection with such search and seizure. There were four occupants in the truck including the driver and khalasi. They informed the aforesaid persons that they had information about concealment of '*ganja*' in the said truck and they also offered them to exercise their option in writing as to whether they wanted to be searched in presence of a Gazetted Officer or a Magistrate. The said persons called one Samar Saha from Purnia More through whom the accused persons exercised their option to be searched by the customs officers. They did not want to be searched before Magistrate or Gazetted Officer. They had reasonable belief that the articles were '*ganja*' and fabrics of foreign origin. On interrogation, the accused could not produce any valid document or authority for possession of the articles. They had reasonable belief that the accused persons violated the provisions of Section 8 of the N.D.P.S. Act and Section 11 of the Customs Act and as such they seized those articles under a seizure list prepared by A. K. Gupta duly signed by the witnesses and accused persons. One of the copies was duly served upon the accused persons. The seizure list written and signed by A. K. Gupta in the present of PW-1 was marked as Exhibit-3. The signatures of witnesses Firoj Alam, Ramprakash Chowdhury and the accused were marked Exhibit-3/1, Exhibit-3/2, Exhibit-3/3 and Exhibit-3/4 respectively. Other accused persons put their L.T.I. A. K. Gupta drew up three sample packets of '*ganja*' containing 25 gms. in presence of PW-1 and accused and witnesss. The sample packets

were sealed and labeled. One of the sample packets was sent for chemical examination and other two were kept in their safe custody. The remaining portion of the contraband goods and the sample packets were also kept under sealed condition in the custody of the customs go-down officer. A. K. Gupta was the go-down in-charge at the relevant time. PW-1 identified the two seized gunny bags under sealed condition. One of the gunny bags was opened in presence of the Learned Counsel for the accused persons who also inspected the contents of it marked Mat Exhibit-1 collectively. In course of interrogation, all four accused persons made voluntary statements and at their request, said Samar Saha reduced their statements in writing in Bengali. PW-1 sent information of the entire process of search and seizure to their superior authority, i.e. Superintendent, Customs, Raiganj Circle and A.C. Customs, Siliguri and A.C. Customs Malda. Superintendent, Customs, Siliguri visited the office of PW-1 in connection with the case and thereafter the accused persons were forwarded to Court. During investigation, PW-1 helped the Inspector A. K. Gupta. On 12.09.1997 they sent the sample packet for chemical examination under a memo dated 12.09.1997. The original forwarding letter was marked Exhibit-12. Report of chemical examiner was received that was recorded on the back of letter. The chemical report marked as Exhibit-13. According to chemical report, the seized articles were confirmed as '*ganja*'. Sri P. K. Sherpa, Superintendent of Customs, Dalkhola, prepared the petition of complaint which was submitted in Court. The complaint

typed in PW-1's office and duly signed by Superintendent whose signature was known to PW-1 marked Exhibit-14. Sri Sherpa was ill due to cerebral attack and unable to move and depose in Court.

- ii. During cross-examination, PW-1 deposed synthetic fabrics were produced in our country. There was no marking of Thailand in the seized synthetics. PW-1 took no expert opinion regarding the seized synthetic. The seizure case number was not written in the inner packet of '*ganja*' but the number was written in the outer packet. The polythene bag used by them for safety of articles and that was old and used and kept in their office. There was no special mark of identification on the seized gunny bags.
- iii. PW-2, PW-3 and PW-4 reiterated the evidence of PW-1 being members of the raiding party.
- iv. PW-5 stated that he had been the owner of motor garage at Purnia More, Dalkhola. On 10.09.1997 at about 8 P.M., PW-5 was at Purnia More and at that time customs officer intercepted a truck bearing No. WB 71/0449 and the said truck was taken to the customs office compound nearby. Customs officers called other witness Ramprabesh to be witness for the checking and search. The cover of the truck was opened by the staff of the truck and the customs officers. Two gunny bags were recovered from the bells of jutes and those were opened and found ginger therein. Two packets in two bags containing '*ganja*' in one packet and synthetic packet in other. The four occupants, i.e. driver, khalasi and other two persons were present at the time of search. The sample of '*ganja*' was taken in 3

packets. They also signed in the sample packets. Seizure list was also prepared which bore their signatures. Signatures of PW-1 on the sample packet was marked Mat Exbt.-(ii)/(i) and his signature on the other sample packet was marked Mat. Exbt.-(iii)/(i).

- v. PW-6 deposed in his examination that the customs officer held him from his shop and he went to the customs office and found that they held one truck bearing No. WB 71/0449. There were found occupants driver, khalasi and other two whom the customs officer asked to unload the truck. The search was made in presence of PW-6 and two gunny bags were recovered from the hips of jute and polythene packets were recovered from the gunny bags containing ginger. One polythene packet contained '*ganja*' and other poly pack contained synthetic fabrics. On weightment 10 kgs of '*ganja*' was found and on measurement about 19.5 metres of fabrics were found. Officers took sample from the '*ganja*' in 3 packets. PW-6 signed the sample packets. His signatures on sample packets and seizure list were marked Mat Exbt.-(iii)/(ii), Mat Exbt.-(ii)/(iii) and Exhibit-3/2 respectively. PW-6 was in his medicine shop during the business hour. He signed the seizure list at the instance of the Customs Inspector at his office.

10. The evidence of the aforesaid prosecution witnesses revealed the search and seizure to have taken place within the precincts of the customs office calling two witnesses being PW-5 and PW-6 from their respective places directing them to sign the seizure list at the instance of the raiding party obfuscated the procedure of such seizure. Moreover, the search was not conducted in

the presence of the Magistrate or any Gazetted Officer as mandated under the N.D.P.S. Act. The search and seizure were not conducted conforming to the legal provisions. The accused persons were not explained and disclosed of their rights to search merely stating that the accused persons stated to be searched by the raiding party is contrary to the mandated provision of search under the N.D.P.S. Act.

11. The prosecution did not place any document regarding the version of the accused persons to have been explained of their rights and the legal implications under the law whereby they had consented to be searched by the members of the raiding party. PW-1, PW-2, PW-3 and PW-4 submitted that the accused persons confessed their guilt of carrying the contraband articles based on which the entire prosecution rest and such confession before the raiding party by the appellants cannot be sustained in law. The Chemical Examiner who prepared the report marked Exbt.-13 did not appear to adduce evidence before the Court due to his illness. Apart from assumption that the synthetic fabrics were marketed from Thailand the Investigating Agency did not verify to authenticate the same since such synthetic fabrics were easily available in our country. No such mark of identification existed on the seized gunny bags to endorse the seizure of the same.

12. Under such facts and circumstances, the lapses on the part of the prosecution to produce credible witnesses and a flawless process of search and seizure, the order of conviction dated 30.03.2014 passed by the Learned Special Judge (N.D.P.S.) Act, 1st Court, Raiganj, Uttar Dinajpur in Special (N.D.P.S.)-2A/1997 is set aside.

13. Accordingly, the prosecution cannot be said to have proved its case beyond reasonable doubt and as such the instant criminal appeal being CRA 316 of 2014 is allowed.
14. Accordingly, the instant criminal appeal being CRA 316 of 2014 is disposed of.
15. There is no order as to costs.
16. I record my appreciation for the able assistance rendered by Learned Advocate Mr. Ramashis Mukherjee as *Amicus Curiae* representing the appellant in disposing of this appeal.
17. Trial court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
18. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)