GAHC010160002022

undefined

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.A(J)/90/2022

KENDARNATH CHETRY @ KHEM
S/O. LT. RUDRA BAHADUR CHETRY, VILL. NO. 2 NAHARBARI, P.S. MAZBAT, DIST. UDALGURI, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MS. ARFINA BEGUM (LEGAL AID COUNSEL),

Advocate for the Respondent : PP, ASSAM,

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

Date of Judgment/ Order : **24.10.2024**

JUDGMENT & ORDER (CAV)

Heard Ms. A. Begum, learned legal aid counsel, representing the appellant. Also heard Mr. B. Sharma, learned Additional P.P. for the state respondent.

2. This appeal is directed against the Judgment and Order dated 02/07/2022, passed by the learned Special Judge, Udalguri, in Special (NDPS) case No. 11/2021, whereby the accused/ appellant was convicted u/s 20(b)(ii)(c) of NDPS Act and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1,00,000/- in default SI for six months.

3. The case of the prosecution is that an FIR has been lodged on 09/03/2020, alleging inter alia that on 08/03/2020, on receipt of a specific information regarding transportation of Narcotic Drugs in a white colour Maruti Car from Mazbat towards Orang, a naka checking was conducted at Mazbat new market area. Accordingly, during naka checking one white colour Maruti Car bearing No. ML-05D-0175 was intercepted at Habigaon area. Thereafter, the car was thoroughly checked and during search the accused appellant was found in the car along with three bags containing 22 kgs of Cannabis, which were seized in presence of the witnesses. A case was registered vide Mazbat PS case No. 19/2020 and subsequently the accused/appellant was arrested.

4. During trial, charge was framed u/s 20(b)(ii)(c) of NDPS Act, which was read over and explained to the appellant to which he pleaded not guilty and claimed to be tried. To prove the guilt of the accused/ appellant, six witnesses were examined by the prosecution. On the other hand, the accused did not adduce any evidence. After completion of trial, the statement of the accused/ appellant was recorded u/s 313 Cr.PC, wherein the incriminating material found in the evidence of the witnesses were put to the appellant to which he denied the same. The appellant specifically stated that he has been falsely implicated in this case. After hearing the arguments advanced by the learned counsel for both sides, the trial court convicted the appellant as aforesaid.

5. Learned legal Aid counsel for the appellant has argued before this court that though it was alleged that the contraband items were seized from the conscious possession of the accused/ appellant, but the seizure witnesses i.e., PW-1, 3 and 4 did not support the prosecution case. Hence, the entire seizure is doubtful, as no independent witness was present at the time of seizure of the contraband. It is specifically stated that none of the witnesses were present at the place of seizure i.e. at Habigaon and as such, there is a violation of section 49 and 53 of NDPS Act.

6. It is also the submission of learned counsel for the appellant that source information regarding transportation of Bhang like substance was received by PW-6. Accordingly, Mazbat PS GDE No. 149 dated 08/03/2020 was recorded. However, PW-6 has admitted that he has not reported the matter to his immediate superior authority. Hence, there is total violation of non-compliance of mandatory provision of Section 42 NDPS Act. It is also pointed out that from the statement of PW-5 and 6, it is clear that the place of seizure is not a public place and as such Section 43 is also not attracted.

7. In support of her submission, learned legal aid counsel has referred a case law vide ***Boota Singh vs. State of Haryana*** (Criminal Appeal No. 421 of 2021)

8. Learned counsel for the appellant has further argued that the accused/ appellant was a driver and not the owner of the vehicle from which contraband items were recovered. The appellant was not aware of the fact what articles were kept inside the vehicle. Further, in view of doubtful seizure without following prescribed procedure, it is not possible to draw presumption of section 54 of NDPS Act.

9. A further submission of the learned legal aid counsel is that no inventory was prepared and referred to the magistrate for certification. The seizure list was prepared in doubtful manner and goods are kept in the Malkhana, which is a serious lapse on the part of the prosecution by violating the provisions of Section 52A of NDPS Act. Accordingly, the accused/ appellant be acquitted on benefit of doubt.

10. *Per contra*, learned Additional P.P. has submitted that once the possession of the contraband by the accused has been established, it is for the accused to discharge the onus of proof that he is not in conscious possession. Burden of proof casts on accused u/s 35 of NDPS Act.

11. Learned Additional P.P. also has pointed out that an accused can be convicted solely on the testimonies of official witnesses. Simply because the officer who detected the commission of offence was the one who filed the report or investigated the matter, such investigation cannot be said to be bad in law. Conviction based solely on the evidence of police official is proper, if such evidence is reliable and trustworthy.

12. Learned Additional P.P. has placed reliance on the following case laws –

a. (2015) 17 SCC 554 (Baldev Singh vs. State of Haryana)

b. AIR Online 2023 SC 628 (Sathyan vs. State of Kerela)

13. I have considered the submissions of learned counsel for the parties. I have also perused the trial court record including the Judgement.

14. Admittedly, the seizure witnesses i.e., PW-1, PW-3 and PW-4 did not support the prosecution case though they put their signatures in the seizure list.

According to PW-1, on 09/03/2020 in the morning hours, police of Mazbat PS came to his shop and took away his measuring scale. He could not say why the measuring scale was taken away by the police. Police seized the measuring scale and his signature was also obtained in the seizure list. Police also seized the alleged Maruti car along with cannabis vide Exhibit 1, wherein he put his signature vide Exhibit 1(1). This witness also proved the Exhibit 2 which is the seizure list of sample packet of cannabis.

In his cross examination, PW-1 replied that he could not say why his weighing scale was taken away. Though his signature was taken in seizure list but seized articles were not shown to him. On that day, he did not notice the accused inside the police station.

15. PW-3 deposed in his evidence that on the date of incident, the officer-in-charge of Mazbat PS called him to the police station at about 8/9 am. Then his signature was taken in the seizure list. At that time, police disclosed that ganja was seized from the possession of the accused.

In his cross examination, PW-3 stated that he knew the accused as driver as he belongs to his same village. He (PW-3) used to write petition by sitting in a tea stall in front of Mazbat PS. Ganja and sample packets were not shown to him at the time of obtaining his signature in the seizure list.

16. PW-4 another seizure witness, deposed in his evidence that about two years back, one day the officer-in-charge of Mazbat PS called him to the police station. Then police disclosed that they seized ganja. Police obtained the signature in the seizure list. Accused was the driver at that time. Police also

obtained his signatures on two other seizure lists by which the police seized the sample packets and weighing machine.

> In his cross examination, PW-4 replied that police did not explain the content of seizure lists before obtaining his signatures. The ganja was not shown to him at that time. The vehicle and measuring scale were also not shown to him. His residence is about 3 km away from the police Station.

17. From the evidence of PW-1, 3 and 4, it is abundantly clear that though they put their signatures in the seizure lists vide Exhibit 1, 2 and 3 but the seized items were not shown to them at the time of obtaining their signatures. Now the question comes as the witnesses proved their signatures in the seizure lists but denying to show the seized items before obtaining their signatures in the seizure list can be taken into consideration to maintain the conviction against the accused/ appellant.

18. PW-5 is the ASI of police posted at Mazbat police station at the relevant time. He deposed in his evidence that on 08/03/2020, he received an information from officer-in-charge of Mazbat PS regarding transportation of ganja by a vehicle from Arunachal towards Orang. After getting information, the officer-in-charge had prepared the GD entry vide 149 dated 08/03/2020. Then he along with officer-in-charge of Majbat PS, UBC Bogadhar Das, Nipen Daimari and the battalion staff went to Mazbat town new market and started to check the vehicle. At about 8 AM, they found one white colour Maruti vehicle was coming and they tried to stop the vehicle by giving signal but the driver did not stop the vehicle and fled away. They chased the vehicle and could intercept the vehicle at Habigaon. They searched the vehicle and during search, they found

three packets covered with white polythene. The accused/ appellant was driving the vehicle. The accused himself disclosed before them that the packets contained ganja. The ganja was weighed as 22 kgs, and then the ganja along with the vehicle was brought to the police station. He seized the recovered contrabands and prepared the seizure list at the place of intercepting the vehicle. Thereafter, he lodged the FIR and handed over all the seized materials along with accused to the police station.

19. In his cross examination, PW-5 replied that the place where the accused was intercepted was a lonely place. There was no residence of people or any business establishment near the spot. Though the people were moving through the road at the time of intercepting the vehicle but they did not call them. He recorded the statement of the seizure witnesses at Habigaon. At the time of preparing the seizure list, the officer-in-charge was present. Accused was asked before conducting search of the vehicle but no written notice was served on him. No written authorization was given on 08/03/2020. The authorization was received by him on 12/03/2020.

20. PW-6 is another Investigating officer. According, to him on 08/03/2020, while he was working as officer-in-charge, Mazbat PS, on that day he received an FIR from the informant and accordingly he registered a case vide Mazbat PS case No. 19/2020. Before receiving the FIR, he received a source information regarding transportation of ganja from Mazbat to Orang in a white colour Maruti vehicle. Then a GD entry was recorded vide GD Entry No. 149 dated 08/03.2020 and directed ASI Jitumoni Kalita to accompany him to the spot. ASI Jitumoni Kalita had completed one part of investigation including search and seizure and apprehension of accused. He (PW-6) examined the complainant and recorded

the Statement. He visited the place of occurrence and prepared the sketch map. He arrested the accused and forwarded him before the court. Thereafter, he produced the seizure list and seized articles before the Magistrate to be seen. He also forwarded the sample packets for FSL examination. Subsequently, on receipt of FSL report, he submitted charge sheet against the accused/ appellant vide Exhibit P10.

21. In his cross examination, PW-6 replied that after preparing the GD entry at about 12:10 midnight, he did not inform the matter to his senior authority. He had gone to the place of occurrence with informant for intercepting the vehicle. The place where the vehicle was intercepted is the residential area. He only recorded the statement of the informant Jitumoni Kalita as witness. No written information was given to the accused before conducting search.

22. Having heard the learned counsel for the parties and the materials available in the trial court record, it is true that the accused/ appellant was driving the alleged vehicle from which commercial quantity of ganja was recovered. But the admitted position is that on receipt of the information regarding transportation of the said ganja in the intercepted Maruti vehicle, neither PW-5 nor PW-6 did inform the matter immediately to their senior authority as per section 42 of the NDPS Act. On the point of violation of section 42 of NDPS Act, the learned trial Judge in his judgement observed as follows –

> "……*..Though the learned defence counsel has placed his reliance on the plea that the investigating officer while conducting the search and seizure did not comply with the provision of section 42(2) and 52 and the investigating officer also failed to comply with the provision of section 52 of the NDPS Act but on scrutiny of the*

evidence on record, my considered view is that there is no any material to show that the police did not comply any necessary provision of the Act relating to the search and seizure. Hence, the submissions made by the defence counsel in regards to the non compliance of the necessary provisions of the NDPS Act is found having no merit…."

23. Apparently, the trial court did not discuss anything regarding violation of section 42 and 52A of NDPS Act in his judgment. Regarding violation of Section 52A, PW-5 did not say anything in his evidence before the trial court whether inventory was prepared or not. PW-6 only stated in his deposition that he produced the seizure list and the seized articles before the Magistrate to be seen. It is no where stated by PW-5 and PW-6 that any petition was filed before the magistrate regarding disposal of seized contraband items by following the provision of section 52A of NDPS Act.

24. Section 52A of NDPS Act is reproduced as follows –

[52A. Disposal of seized narcotic drugs and psychotropic substances.*-- [(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may,*

from time to time, determine after following the procedure hereinafter specified.]

---

(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances] or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of--

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of [4][such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

---

(3) Where an application is made under sub-section (2), the Magistrate

shall, as soon as may be, allow the application.

---

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the innventory, the photographs of [5][narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.]

25. Sub-section (1) of Section 52A of the NDPS Act facilitates the Central Government a mode to be prescribed to dispose of the seized narcotic substance. The idea is to create a clear mechanism for such disposal both for the purpose of dealing with the particular case and to safeguard the contraband being used for any illegal purpose thereafter.

26. Sub-section (2) of Section 52A of the NDPS Act mandates a competent officer to prepare an inventory of such narcotic drugs with adequate particulars. This has to be followed through an appropriate application to the Magistrate concerned for the purpose of certifying the correctness of inventory, taking relevant photographs in his presence and certifying them as true or taking drawal of samples in his presence with due certification. Such an application can be filed for anyone of the aforesaid three purposes. The objective behind this provision is to have an element of supervision by the magistrate over the disposal of seized contraband. Such inventories, photographs and list of samples drawn with certification by Magistrates would constitute as a primary evidence. Therefore, when there is non-compliance of Section 52A of the NDPS Act, where

a certification of a magistrate is lacking, any inventory, photograph or list of samples would not constitute primary evidence.

27. Before any proposed disposal/destruction mandate of Section 52A of the NPDS Act requires to be duly complied with starting with an application to that effect. A Court should be satisfied with such compliance while deciding the case. The onus is entirely on the prosecution in a given case to satisfy the Court when such an issue arises for consideration. Production of seized material is a factor to establish seizure followed by recovery. One has to remember that the provisions of the NDPS Act are both stringent and rigorous and therefore the burden heavily lies on the prosecution. Non-production of a physical evidence would lead to a negative inference within the meaning of Section 114(g) of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act'). The procedure contemplated through the notification has an element of fair play such as the deposit of the seal, numbering the containers in seriatimwise and keeping them in lots preceded by compliance of the procedure for drawing samples. The afore-stated principles of law are dealt with in ***extenso in Noor Aga v. State of Punjab***, (2008) 16 SCC 417:

> "*89. Guidelines issued should not only be substantially complied with, but also in a case involving penal proceedings, vis-à-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.*
>
> *90. Recently, this Court in* ***State of Kerala v. Kurian Abraham (P)***

Ltd. *[(2008) 3 SCC 582] , following the earlier decision of this Court in* ***Union of India v. Azadi Bachao Andolan*** *[(2004) 10 SCC 1] held that statutory instructions are mandatory in nature.*

91. The logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance with these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.

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 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. Such an order whereupon reliance has been placed is Exhibit PJ; on a bare perusal whereof, it is apparent that at no point of time had any prayer been made for destruction of the said goods or disposal thereof otherwise. What was necessary was a certificate envisaged under Section 110(1-B) of the 1962 Act. An order was required to be passed under the aforementioned provision providing for authentication, inventory, etc. The same does not contain within its mandate any direction as regards destruction.

XXX XXX XXX

95. The High Court proceeded on the basis that non-production of physical evidence is not fatal to the prosecution case but the fact remains that a cumulative view with respect to the discrepancies in physical evidence creates an overarching inference which dents the credibility of the prosecution. Even for the said purpose the retracted confession on the part of the accused could not have been taken recourse to.

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.

XXX XXX XXX

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 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. This aspect of the matter has been considered by this Court in ***Jitendra v. State of M.P.*** *[(2004) 10 SCC 562 : 2004 SCC (Cri) 2028] in the following terms: (SCC p. 565, para 6) "6. … In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the*

seized materials which ought to have been produced during the trial and marked as material objects.

There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act."

28. On the issue of seizure in the presence of Magistrate, Hon'ble Supreme Court in the case of ***Union of India v. Mohanlal,*** (2016) 3 SCC 379 held as follows:

"*16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.*

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act

that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

> *18. Be that as it may, a conflict between the statutory provision governing taking of samples and the Standing Order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction."*

29. On perusal of the trial court records, it reveals that though PW-5 and 6 categorically stated that 22 Kgs of ganja were recovered from the vehicle which was driven by the accused/appellant. But no inventory was prepared by any magistrate as per provision of section 52A of NDPS Act and the seized materials were also not produced before the trial court during trial and marked as material objects. There is no explanation from the side of the prosecution for this failure to produce the same. It is pertinent to say here that the seizure witnesses i.e., PW-1, PW-3 and PW-4 did not support the case of the prosecution that the alleged ganja was seized from the vehicle which was driven by the accused/ appellant at the relevant time.

30. Another disturbing feature noticed in this case is that the seized articles were kept in Malkhana of police station. According to PW-5, the sample was sent for FSL examination by officer-in-charge. The officer-in-charge only knew

whether the entry was made in Malkhana register regarding keeping the seized articles in Malkhana. Usually various articles were kept in Malkhana including the seized ganja. He did not obtain the signatures of police personnel on seizure list. PW-6 also admitted that the seized articles were kept in the Malkhana of police station. While depositing in Malkhana, it was made entry in the register. He did not obtain permission from the court for keeping the seized articles (contraband) at Malkhana of Police Station. Six nos. of samples were drawn and handed over to him for sending the same to FSL. The sample was kept in Malkhana till 10/03/2020 and on 10/03/2020, it was sent to FSL through SP. Sample packets were sealed on 10/03/2020 though those were handed over to him on 09/03/2020. As per exhibit, 6 nos. of sample packets were drawn but they forwarded 3 packets of sample to FSL. It was suggested that no contraband was seized and the samples which were sent to FSL were not collected from the accused and the sample packets were tampered at the police station.

31. Hon'ble Supreme Court in the case of ***Mohammad Kahlid vs. State of Telangana,*** reported in Criminal Appeal No. 1610 of 2023, has held that – " *Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the investigating Officer PW-5 for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate. In this view of the matter, the FSL report (Exhibit P-11) is nothing but a waste paper and cannot be read in evidence".*

32. In the case in hand, there is no denial of the fact that the prosecution has not filed any such application for disposal/ destruction of the allegedly seized bulk quantity of material, nor was any such order passed by the magistrate. It is pertinent to mention here that the trial court appears to have believed the

prosecution story in a haste and awarded conviction to the appellant without warranting the production of huge quantity of contraband. It is manifest from the record that the seizure witnesses have simply put their signatures at the whims of the investigating agency. All the seizure witnesses i.e., PW-1, 3 and 4, categorically stated that the seized contrabands were not produced before them while taking their signatures on a piece of paper.

33. In view of the above discussion, this court is of the opinion that there is a serious doubt with respect to the seizure. From the evidence of PW-5 and 6, it is crystal clear that the seized contraband were not produced before the trial court during trial and were not exhibited as material exhibits and no inventory was prepared by the magistrate. On a proper analysis, this court has no hesitation in holding that the impugned Judgment is liable to be set aside and the appellant is to be acquitted by rendering the benefit of doubt.

34. In the result, the appeal is allowed. The conviction dated 02/07/2022, passed by the learned Special Judge, Udalguri, in Special (NDPS) case No. 11/2021, hereby set aside. The appellant is in jail, he be released forthwith if not wanted in any other case.

35. The appeal is disposed of accordingly.

The trial court records be returned back.

JUDGE

Comparing Assistant