

**HIGH COURT OF TRIPURA
AGARTALA**

Crl. A(J) No.51 of 2023

Saha Alam S/O. Mantaj Mia Of Mathurapur,
P.S. South Sadar, P.O. Dhanpur,
Dist. Comilla, Bangladesh.

..... Appellant(s).

Versus

The State Of Tripura

.....Respondent(s).

For Appellant(s) : Mr. S. Battacharjee, Advocate.

For Respondent(s) : Mr. S. Ghosh, Addl. P.P.

Date of Hearing : **3rd May, 2024.**

Date of Judgment : **31st July, 2024**

Whether fit for reporting :

YES	NO
√	

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HON'BLE MR. JUSTICE S. DATTA PURKAYASTHA

_J_U_D_G_M_E_N_T_

The appeal arises out of the judgment dated 20.5.2023 passed by Ld. Special Judge Sepahijala, Sonamura, Tripura in Special (NDPS) Case No.76 of 2022 whereby the appellant was convicted under Section 20(b)(ii)(B) of NDPS Act, 1985 and also under Section 3 of the Passport (Entry into India) Act, 1920 read with Rule 6 of the Passport (Entry into India) Rules, 1950, and was sentenced to suffer rigorous imprisonment for 4 years and to pay fine of Rs. 20,000/- only and in default to pay the fine to suffer further simple imprisonment for 6 months under Section 20(b)(ii)(B) of NDPS Act and also to suffer rigorous imprisonment for 6 months and to pay fine of Rs. 5,000/- and in default to pay

the fine to suffer further simple imprisonment for 15 days for commission of offence punishable under Section 3 of the Passport (Entry into India) Act, 1920 read with Rule 6 of the Passport (Entry into India) Rules, 1950. Both the sentences were directed to run concurrently.

[2] Charge against the appellant was framed with the allegations that 10.9.2022 at about 2350 hours, he was found approaching Indo-Bangla border fencing with 4 packets of dry Ganja of weight 7.5 kg near BP No.2091/15S under Shalpukur BOP and accordingly, he was tried under Section 20(b)(ii)(B) of NDPS Act and also under Section 3 of Passport (Entry into India) Act, 1920 as he denied the charges.

[3] During trial, prosecution examined total of 8 witnesses and finally, the Ld. Trial Court found the appellant guilty of above said offences.

[4] Mr. S. Bhattacharjee, learned counsel for the appellant mainly argued on the following points:

(i) The provision of Section 42 of NDPS Act was not complied with, especially when seizure was effected after the sunset.

(ii) The inventory was not certified by the Judicial Magistrate and sample was not sent for chemical examination within 72 hours of seizure. In this regard Ld. Counsel also relied on a decision of Hon'ble Supreme Court in case of **Mohan Lal v. State of Punjab, 2018 AIR (SC)3853; 2018 Legal Eagle (SC) 673**, wherein reference was made by the Apex Court to the

Standing Order No. 1 of 88 issued by the Narcotics Control Bureau which prescribes that the sample should be dispatched to the laboratory within 72 hours of seizure to avoid any legal objection.

(iii) There was no convincing evidence that before sending the sample to the State Forensic Science Laboratory (SFSL), it was kept in safe custody in the police Malkhana inasmuch as Malkhana Register was not produced in the Court during trial and the store keeper was also not examined.

(iv) As per site map, there was one house of a private person near the place of occurrence but said person was not examined.

(v) No pre-search memo was prepared before search and recovery of contraband items.

(vi) According to PW-4, he got secret information from Unit-G of BSF about trafficking of such contraband articles through Indo-Bangla border but no person from said Unit-G was examined.

(vii) PW-3 stated that place of seizure was at Salpukur and as per PW-4, it was at Birampur and, therefore, there was serious doubt about the seizure as the place of occurrence was shifted.

Mr. Bhattacharjee, learned counsel relied on some decisions of the Hon'ble Supreme Court which will be discussed in relevant paragraph(s).

[5] (i) Mr. Ghosh, learned Addl. P.P. referring to sub-para (ii) of paragraph 12 of the impugned judgment submitted that Ld. Trial Court elaborately discussed about so called discrepancy as to

the change of place of occurrence and came to a conclusive finding that it was at "Shalpokur-Birampur" located near BP No.2091/15S and therefore, there was no confusion that place of seizure was located in that particular point.

(ii) Mr. Ghosh, learned Addl. P.P. also argued that the inventory prepared by the I/O was duly proved in the evidence and seizure of said Ganja from the appellant was satisfactorily proved by examining the relevant witnesses of the prosecution and forensic report also corroborated that said seized item was dry Ganja. Therefore, according to Ld. Addl. P.P., the charges were duly proved against the appellant.

(iii) Mr. Ghosh, learned Addl. P.P. also refuted the contention of Mr. Bhattacharjee, learned counsel submitting that as per PW-3 and PW-8 seized items were kept in police station and there was no cross-examination or suggestion from the side of defence to indicate that seized item was mutilated. Therefore, according to Mr. Ghosh, no material was there to create any doubt about the safe custody of the seized contrabands. Finally he urged for upholding the impugned judgment passed by the Ld. Trial Court.

[6] Inspector, Sri Nandan Das (PW-3), who was the O/C of Jatrapur PS at that time, lodged the FIR alleging, inter alia, that on 09.09.2022 on the basis of a secret information received through Assistant Commandant, Ram Kumar Sah, Company Commander of Shalpokur BOP 133 BN. BSF that some Ganja smugglers would be crossing the Indo-Bangla border fence nearby BP No.2091/15S

towards Bangladesh, he along with his police team and BSF personnel set on a joint operation after obtaining permission from SDPO Sonamura. After about 45 minutes they found one unknown miscreant approaching Indo-Bangla border fencing with 4 nos of sacks suspected to be of contraband items, and on chasing, said person tried to cross the fencing by climbing towards Bangladesh side. After he was detained, he disclosed his name to be Saha Alam, having his residence at Comilla, Bangladesh and from those 4 sacks, total 7.5 kg suspected dry Ganja with 2 mobile handsets containing 4 nos of SIM cards, one Indian Airtel SIM and 3 nos of Bangladeshi SIM were recovered and seized.

[7] In his evidence, said inspector, Sri Nandan Das (PW-3) stated in similar way what was described by him in his FIR. He also stated that those 4 packets of Ganjas and 2 mobile handsets with said SIM cards were seized on the spot in presence of witnesses. The seizure list was marked as Exhibit-1. According to him, after returning to the police station with the appellant and those seized items, he lodged the FIR and endorsed the case to SI Shri H. Darlong (PW-8) for investigation. In his evidence, he specified that the place of occurrence was near gate No.2091/15S. In his cross-examination, he admitted that there were some houses situated near to the alleged place of occurrence.

[8] PW-4, Mr. Ram Kumar Sah, Company Commander of 133 BN. BSF posted at Shalpukur BOP also deposed in the same manner and according to him, they set in ambush with the police at Birampur area near said BP No.2091/15S. He also stated about

seizure of those items from the appellant. He identified his signature in the seizure list. In his cross-examination, he stated that the place of occurrence was at Birampur and in the said joint ambush, 2/3 nos. of TSR personnel and 4 nos. of police personnel were also present.

[9] PW-5, another BSF officer namely, Mr. U.D. Bhatt, SI of said 133 BN. BSF, also deposed in the same way about detention of appellant with above said items and he also identified his signature in the seizure list. He in his cross-examination confirmed that seizure list was prepared at Birampur i.e. at the place of occurrence and at that time both TSR and police personnel were also present there.

[10] PW-1, Chiddik Miah, a police constable is a seizure witness who also similarly deposed about said joint operation with BSF personnel at Birampur area near BP No.2091/15S and recovery of said suspected contraband items and mobile handsets from the appellant. He also identified his signature in the related seizure list. In his cross examination, he further confirmed that 4 nos. of packets tied up with rope were found in the possession of the appellant.

[11] The seizure list dated 9.9.2022 of 2350 hours was proved into evidence as Exhibit-1 which also corroborates about seizure of said suspected Ganja and mobile handsets from the appellant at Shalpokur area near Indo-Bangla border fencing at BP No.2091/15S.

[12] Through above said evidence, it is satisfactorily established by the prosecution that some suspected contraband items were seized on the alleged date and time near said gate No.2091/15S situated at Birampur area which was within the jurisdiction of Shalpur BOP. Therefore, there is no confusion about the place of occurrence and hence argument of Ld. Counsel, Mr. Bhattacharjee about shifting of place of occurrence is not convincing. The recovery and seizure of said suspected contraband items and mobile handsets from the appellant were also established by above said evidences.

[13] From the evidence, it is also established that O/C of Jatrapur PS namely Sri Nandan Das, was present during search and in fact, he himself seized those items on recovery from the appellant. Said Sri Nandan Das was at that time a Gazetted officer holding the post of Inspector of police.

[14] The prosecution also proved some documents under Exhibit MO-(ii) which contain certified copies of GD entry Nos. 33 to 36 dated 9.9.2022 regarding receiving of informations through mobile phone about crossing of Indo-Bangla border fence by smugglers dealing with Ganja, sending of such information by him to SDPO, Sonamura for obtaining permission and leaving of O.C. from the police station for such raid after obtaining permission of said SDPO. Said MO-(ii) also contains the communication dated 11.9.2022 addressed to SP, Sepahijala by said O.C. giving details of such incident and recovery of such items to show compliance of Section 42 of the NDPS Act. Seizure of said documents under MO-

(ii) by the investigating officer from the police station was also corroborated by Smt. Rumi Begam (PW-2), constable of Jatrapur PS and SPO Bidya Dhar Datta (PW-6). Anyway when said inspector Nandan Das (PW-3), himself being a Gazetted officer was present during search and seizure, compliance of Section 42 was not necessary.

[15] In ***State of Haryana v. Jarnail Singh, (2004) 5 SCC 188***, the Apex Court observed that when a gazetted officer like Superintendent of Police was a member of the search party and was exercising his authority under Section 41 of the NDPS Act, the proviso to Section 42 was not attracted. Lateron, in ***G. Srinivas Goud v. State of A.P., (2005) 8 SCC 183***, again same principle was reiterated that the requirement under Section 42(2) need not be extended to cases of arrest, search and seizure effected by officers of gazetted rank. According to the Apex Court, the officer of gazetted rank while authorising junior officers under Section 41(2) knows what he is requiring them to do and, therefore, there is no need for reporting. For this reason Section 41 does not contain any such requirement. The need for reporting under Section 42(2) arises because the officer proceeds without authorisation in terms of Section 41(1) or 41(2). The requirement of informing the immediate official superior under Section 42(2), has to be confined to cases where the action is taken by officers below the rank of gazetted officers without authorisation. In view of above, the argument as placed by Mr. Bhattacharjee, Ld. Counsel regarding infraction of provisions of Section 42 of the Act is not acceptable.

[16] Mr. Suman Kumar Chakraborty (PW-7), the Deputy Director of State Forensic Science laboratory Narsingarh, stated that on 22.9.2022 they received one sealed packet from SDPO Sonamura, with memo bearing No. 107 dated 21.9.2022 through one constable and inside that packet there were 4 nos. of yellow coloured envelopes with seal of Sonamura Police court under marking A-1 to D-1 along with sample drawing certificate by Judicial Magistrate First Class, Court No.2, Sonamura. According to him, inside said each packet there were sealed transparent poly packets containing some greenish brown plant and on examination, same were found positive for presence of Ganja(Cannabis). The remnants of those Exhibits were, thereafter, returned separately under sealed cover. He also proved his certificate marked as Exhibit-5.

[17] The investigating officer, Shri H. Darlong (PW-8), deposed that on 13.9.2022, he prepared inventory of seized articles and drew representative samples in presence of Judicial Magistrate First Class, Court No.2, Sonamura and he proved that inventory marked as Exhibit-9. As per said inventory, 2 samples were drawn from each sack with marking A-1 & A-2 from one sack, B-1 & B-2 from another sack, C-1 & C-2 and D-1 & D-2 from 2 other two sacks respectively and 60 gram from each sack was taken out for such samples.

[18] On consideration of the evidence of PW-7 and PW-8 and also on consideration of the proved documents in that contexts, some gross lapses are also noticed in the record in proving the charge under NDPS Act against the appellant by the prosecution.

[19] The suspected contrabands were recovered and seized on 9.9.2022 and according to I/O, inventory was prepared and samples were collected on 13.9.2022. Both the O/C of the police station (PW-3) and investigating officer (PW-8) are silent as to where those seized items were kept from the time of seizure till 13.9.2022. There is also no evidence that during such period those seized items were kept in any safe custody. According to the investigating officer, the samples were drawn in presence of said Magistrate on 13.9.2022 whereas, those samples were sent to SFSL only on 21.9.2022 and there is also no evidence as to where those items were kept during said period and why there was so much delay in sending those samples to the SFSL. Nothing is also shown that the samples and rest quantity of seized materials were kept in safe custody.

[20] No certificate issued by said Judicial Magistrate regarding the list of samples and photographs of such seized contraband items as required under section 52A of NDPS Act were also proved into evidence. Said Judicial Magistrate was neither cited as witness of the case nor he was examined in the case. Neither the prosecutor or the Court felt it necessary to summon the Magistrate to prove such certificates though same were available in the record. Even the rest part of seized contraband

items or the rest part of samples which, as per the inventory, were marked under A-2 to D-2, were also not produced before the Court during trial. There is also no evidence that such seized items were destructed meanwhile. As a consequence thereof, there is no primary evidence available about seizure of such contraband items.

[21] All these lapses in the evidence fails to connect the alleged seized items recovered from the appellant with the samples as were sent to the Forensic Laboratory and resultantly the continuity of the entire chain of events to establish the charge framed under the provision of NDPS Act has broken.

[22] In such factual milieu, reference to a decision of Apex Court in the case of **Ashok Alias Dangra Jaiswal v. State of Madhya Pradesh, (2011) 5 SCC 123** appears to be noteworthy and the relevant part of the observations of the Apex Court are as follows:

“10. The seizure of the alleged narcotic substance is shown to have been made on 8-3-2005, at 11:45 in the evening. The samples taken from the seized substance were sent to the FSL on 10-3-2005, along with the draft, Ext. P-31. The samples sent for forensic examination were, however, not deposited at the FSL on that date but those came back to the police station on 12-3-2005 due to some mistake in the draft or with some query in respect of the draft. The samples were sent back to the FSL on 14-3-2005, after necessary corrections in the draft and/or giving reply to the query and on that date the samples were accepted at the FSL. From the time of the seizure in the late evening of 8-3-2005, till their deposit in the FSL on 14-3-2005, it is not clear where the samples were laid or were handled by how many people and in what ways.

11. The FSL report came on 21-3-2005, and on that basis the police submitted charge-sheet against the accused on 31-3-2005, but the alleged narcotic substance that was seized from the accused, including the appellant was deposited in the malkhana about two months later on 28-

5-2005. There is no explanation where the seized substance was kept in the meanwhile.

12. Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused."

[23] Further, in ***Vijay Jain v. State of Madhya Pradesh, (2013) 14 SCC 527*** also, it was observed by the Apex Court that in the trial for an offence under the NDPS Act, the prosecution is under legal responsibility to establish by cogent evidences that the contraband items were seized from the possession of the accused and the best evidence to prove the same is required to be produced during trial. In said case also the contraband materials were not produced in the Court during trial and, therefore, it was observed by the Apex Court that mere oral evidence that materials were seized from the accused would not be sufficient to make out a case under the provision of NDPS Act against the accused.

[24] Having reference to both the above said decisions, the Apex Court later on in ***Hanif Khan Alias Annu Khan v. Central Bureau of Narcotics, (2020) 16 SCC 709***, as referred by Mr. Bhattacharjee, learned counsel, observed that on the single premise of a doubtful identity with regard to the sample seized from the accused and that produced in the Court, the SFSL report loses much of its significance entitling the accused to get benefit of doubt.

[25] In view of above discussions, the Court has no hesitation to conclude that the prosecution failed to prove the

charge under Section 20(b)(ii)(B) of NDPS Act, 1985 against the appellant and he is entitled to get acquittal from the said charge.

[26] So far the conviction under Section 3 of Passport (Entry into India) Act, 1920 read with Rule 6 of the Passport (Entry into India) Rules, 1950 is concerned, no challenge in this regard has been put forward from the side of the appellant during oral submission. Anyway, it is also not disputed that the appellant being a Bangladeshi National has entered into India without valid Passport. During examination under section 313 Cr.P.C, the appellant himself has given his home address at Bangladesh and simultaneously has also failed to produce any evidence to prove his such entry into India as lawful and valid. Considering thus, the conviction under above said provision is upheld.

[27] However, the Court also by the same time expresses its disquiet without any quandary about the way asto how a serious case of cross-border drug trafficking was flippantly dealt with by the major stakeholders like police authority, prosecutor as well as by the Court. Earlier, the Division Bench of this Court in the case of **Member Secretary, Teliamura Nagar Panchayet & anr. v. Samar Bhusan Sarkar & anr. (Criminal Appeal No. 08 of 2012 decided on 21.2.2017)** directed that all the trial judges to remain alive at the time of recording of evidence and to actively participate in the process and to control the criminal trial by such active participation to find out the truth and to ensure justice. It was also observed therein that the trial judge should be very sensitive from the stage of framing of charge and must have an

idea about the materials on record. Though he should not take the role of a public prosecutor but he should ensure that the materials on the basis of which charges have been framed are properly and legally proved. Said judgment was also circulated to all the judicial officers of the state.

[28] Far way back in 2004 AD, Hon'ble Supreme Court in case of **Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158** reminded the trial judges about their solemn duty of administering justice in accordance with law in the following language:

"43. The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence-collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court as reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness."

Said principle has again been reiterated by 3-Judge Bench of the Apex Court recently in the case of **Anees v. State Govt. of NCT, 2024 SCC OnLine SC 757**. Therefore, there is no gainsay that the trial Judges are required to be always alert and active in the pursuit of truth while recording the evidence, especially in criminal trial and are expected to act in a more sensible manner to render justice to the parties. They are not only to conduct the proceeding but also to control the proceeding.

[29] In view of above, the appeal is partly-allowed. The appellant is acquitted from the charge framed under Section 20(b)(ii)(B) of NDPS Act, 1985, but his conviction and sentence under the Passport (Entry into India) Act, 1920 and related Rules thereof are affirmed.

[30] He has already suffered the sentence imposed under above said provision of Section 3 of Passport (Entry into India) Act, 1920. Therefore, the Registry is directed to immediately issue release warrant of the appellant, Saha Alam in connection with the present case. The concerned Superintendent of Sonamura Sub-Jail will take necessary step immediately for repatriation of the appellant to Bangladesh in accordance with the procedure of law as ordered by the Ld. Special Judge.

The Registry will also circulate the copy of this judgment to all the Judicial Officers of the State.

The Director, Tripura Judicial Academy will organise a refresher programme on investigation and trial under NDPS Act, 1985 involving the Special Judges, Prosecutors of the Trial Courts and Police Officers dealing with cases under said Act, on any suitable date.

Similar programme may also be organised by L.R. & Secretary, Law Department, Govt. of Tripura in Law Training Institute & Research Centre, Agartala comprising of such Prosecutors and Police Officers.

All concerned be informed accordingly.

[31] With the above said observations, decisions and in above said terms, the appeal is disposed of.

Return LC Records with a copy of this judgment.

Pending application(s), if any, shall also stand disposed of.

HIGH COURT OF TRIPURA

JUDGE



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