

GAHC010029402021



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

Case No. : Crl.A./53/2021

VIKKY PACHAURI @ VIKASH PACHAURI AND ANR.
S/O- SHRI BASU RAM PACHAURI, R/O- SHRI SANJAY YADAV, VILL.-
DHOOPCHANDI, NATI-IMLI, P.O. VESESHWARGANJ, P.S. JETHPURA, DIST.-
VANARASI, UTTAR PRADESH. ADDRESS PROVIDED BY SERVICE
PROVIDER- SHRI VIKASH PACHAURI, S/O- BASU RAM PACHAURI, R/O- J-
11/43, A-17 VIJAY GRAM COLONY, NAI BASTI NEAR LABOUR COURT,
VARANASI, UTTAR PRADESH, PIN- 221002.

2: ANAND PATEL
S/O- LATE BABULAL PATEL
VILLAGE- J-13/42
CHAUKAGHAT
P.O. VISESHWARGANJ
P.S. JATIPURA
DIST.- VANARASI
UTTAR PRADESH- 221002

VERSUS

UNION OF INDIA
REP. BY KSH, ROJIKANTA SINGH, INSPECTOR, ANTI-SMUGGLING UNIT,
CUSTOM DIVISION, GUWAHATI.

Advocate for the Petitioner : MR. N AHMED
Advocate for the Respondent : SC, CUSTOMS

**BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI**

Date : -03.04.2024

JUDGMENT & ORDER (CAV)

Heard Mr. N. Ahmed, learned counsel for the appellant. Also heard Mr.

S. C. Keyal, learned standing counsel, Custom.

2. Both the accused appellants have preferred this Criminal Appeal under Section 374(2) of the Cr.P.C., 1973 against the judgment and order dated 22.12.2020 passed by the learned Additional Sessions Judge, No.1, Kamrup(M), Guwahati in NDPS Case No. 62/2015 (arising out of Custom Case No. 01/CL/NARC/AS/GAU/2015-16) whereby the appellants have been convicted under Section 20(C) read with Section 29 of NDPS Act and sentenced them to undergo rigorous imprisonment for 10 (ten) years each and to pay a fine of Rs.1,00,000/- (Rupees one lakh) each and in default of payment of fine, to undergo simple imprisonment for 6 (six) months each.
3. The brief facts of the case is that the Inspector of Custom, Guwahati lodged a complaint stating *inter alia* that on 15.06.2015 they received an information that a twelve wheeler truck bearing No.UP-65-CT/0717 loaded with ganja proceeded outside the State through Baihata Chariali area on 16.06.2015 and accordingly the vehicle was intercepted with the help of other officials near Baihata Chariali police point. Two persons were found inside the truck, the driver introduced himself as one of the appellant Vikky Pachouri and another appellant Anand Patel introduced as helper of the driver. On being asked, they informed that they were transporting a consignment of coal from Guwahati to Kharioni, Uttar Pradesh. On further inquiry, both the persons confessed that in fact they proceeded to Routa for unloading ganja which was concealed under the consignment of coal and thereafter, the vehicle was taken to Customs office at Christian Basti, Guwahati for recovery of ganja. After removing the tarpolin cover from the truck, eight packets packed with HDPE materials found dry plant materials believed to be ganja which were weighing about 213 kg. Then the said

suspected ganja was seized and the case was registered accordingly and the two appellants were arrested. After receipt of the report from the FSL, charge-sheet was submitted against both the appellants under Section 20(C)/29 of NDPS Act.

4. During trial, charge was framed under Section 20(b)(ii)(C)/29 of NDPS Act against both the accused appellants which was read over and explained to the appellants to which they pleaded not guilty and claimed to be tried. To substantiate the case, prosecution has examined twelve witnesses and exhibited some documents. After closure of the trial, the statements of the accused appellants were recorded under Section 313 Cr.P.C. to which they denied their involvement in the case and stated that they have been falsely implicated in this case. After hearing the argument advanced by learned counsel for the parties, the trial court has convicted the appellants as aforesaid. Hence, this appeal has been preferred.
5. Learned counsel for the appellant has argued that both the appellants have been convicted and sentenced to undergo rigorous imprisonment for ten years and they have been detained in custody for about nine years. There is gross violation of Section 52 and Section 52A of NDPS Act. As per evidence of PW 11 and PW 12, the inventory was not prepared which is mandatory as per provision of law.
6. Learned counsel for the appellant has further submitted that as per Section 52A(2) of NDPS Act as and when any narcotic drug or substance has been seized and forwarded to the officer in charge of the nearest police station, as per provision of Sub Section (2), he shall prepare an inventory of such narcotic drug or substance containing such details relating to their description, quality, quantity, way of packing, marked,

number or such other identifying particulars of such substance and make an application to the Magistrate for the purpose of certifying correctness of the inventory so prepared or taking photographs in presence of the Magistrate or allowing to draw a reprehensive sample of such drug or substance in presence of the Magistrate.

7. According to learned counsel for the appellant, PW-11 and PW 12 both the witnesses have nowhere stated that any such inventory was prepared. It is also submitted that even in the documents enclosed in the case, no detail of batch number, manufacturing date or manufacturer's detail, as required under Section 52A(2) of the NDPS Act for the purpose of identifying the particulars of recovery, is reflected. In support of his submission learned counsel has placed reliance on the following case laws:

- (i) *2023 Live law (SC) 549 (Mangilal vs the State of Madhya Pradesh).*
- (ii) *Crl. A. No. 3191 of 2023 (Yusuf @ Asif vs State.*
- (iii) *Crl. A. No. 1610/2023 (Md.Khalid and another vs State of Telengana).*

8. On the other hand, Mr. S. C. Keyal, learned standing counsel, Custom has referred the case of *Union of India vs Mohanlal and another* reported in (2016) 3 SCC 379 and has pointed out that it has been reflected in the said judgment that Section 52A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of the psychotropic substances. The Central Government in exercise of that power issued standing order No.1/89 which prescribed the procedure to be followed by conducting

seizure of the contraband. Two subsequent standing orders dated 10.05.2007 and 16.01.2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of the standing order of 1/89 states that samples must be taken from the seized contraband on the spot at the time of recovery itself which reads as follows:

“2.2. All the packages/containers shall be serially numbered and kept in lots for sampling.

Samples from the narcotic drugs and psychotropic substances seized shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchanama drawn on the spot.”

9. It is also submitted by the learned standing counsel, Custom that prior to the judgment of Mohanlal (*supra*), the procedure of sampling was followed as per Central Government's standing order issued in the year 2007. The present case happens to be in the year of 2015 and as such the Custom Officer has followed the procedure of sampling by following the Central Government's standing order. Under such backdrop, the question of violating the provision of Section 52 and 52A of NDPS Act does not arise.

10. Learned Standing counsel also submitted that the appellants were apprehended by the Customs officials and recovery of contraband was made from their conscious possession. They were travelling in the alleged vehicle from which the commercial quantity of ganja was recovered. It is also submitted that samples/parcels were sent to the chemical examiner with seal and tags and he prayed for dismissal of the present appeal.

11. I have considered the submissions of learned counsel for the parties. I have also perused the judgment of the trial court as well as the evidence of the witnesses and the documents available in the trial court record.

12. After hearing learned counsel for the parties, I find merit in the present appeal. Admittedly, from the statements of witnesses particularly, PW 11 and 12, it is not proved on record that any inventory was prepared after the recovery and arrest of the appellants when they were produced before the Officer in-charge of the nearest police station. A perusal of the statement of both the witnesses clearly shows that neither any inventory was prepared nor the same was produced before the jurisdictional Magistrate on the next date. This fact is also clear from the order passed by the learned Magistrate where there is no mention of production of the inventory before him. Thus, there is a clear violation of Section 52A of the NDPS Act. Therefore, in view of the judgment in *Mohanlal's* (supra) the prosecution has failed to prove that it adhered to the provision of Section 52A of the NDPS Act and an important right of the appellant has been taken away by the Custom officials as no inventory was otherwise exhibited on record.

13. A plain reading of Section 52A of the NDPS Act shows that the manner and procedure of sample is not specifically provided in it and rather by sub Section (1), the Central Government has been empowered to prescribe by the notification, the procedure to be followed for seizure, search and disposal of drugs and psychotropic substances. The Central Government has in exercise of that power, issued standing order bearing No.1/1989 which prescribes the procedure to be followed while conducting seizure of the contraband. Said order no 1/1989 supersedes the previous standing

order no 1/1988. What quantity of sample to be drawn is provided under Clause 1.6 of the said standing order which reads thus:

“ 1.6 quantity of different drugs required in the sample- the quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the case of Opium, ganja and charas/hashish where a quantity of 24 grams in each case is required for chemical test. The same quantity should be taken for the duplicate sample also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.”

14. Number of samples to be drawn in its seizure case has been provided in clause 1.7 which reads thus:

“1.7 Number of samples to be drawn in each seizure case - (a) In the case of seizure of single package/container one sample in duplicate is to be drawn. Normally it is advisable to draw one sample in duplicate from each package/container, in case of seizure of more than one package/container.

(b) However, when the package/container seized together are of identical size and weight, bearing identical markings and the contents of each package give identical results on colour test by U.N. kit, conclusively indicating that the packages are identical in all respect/the packages/container may be carefully bunched in lots of 10 packages/containers may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample in duplicate may be drawn.

(c) Where after making such lots, in the case of Hashish and Ganja, less than 20 packages/containers remains, and in case of other drugs less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

(d) If it is 5 or more in case of other drugs and substances and 20 or more in case of Ganja and Hashish, one more sample in duplicate may be drawn for such remainder package /containers.

(e) While drawing one sample in duplicate from a particular lot, it

must be ensured that representative drug in equal quantity is taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot."

Custody of duplicate sample is provided in clause 1.21 which reads thus:

"1.21. Custody of duplicate sample: Duplicate sample of all seized narcotic drugs and psychotropic substances must be preserved and kept safely in the custody of the investigating officer along with the case property. Normally duplicate sample may not be used but in case of loss of original sample in transit or otherwise or on account of trial court passing an order for a second test, the duplicate sample will be utilized."

15. In pari materia with the standing order No.1/1988 is the standing order No. 1/1989 dated 13.06.1989 issued under sub-section (1) of Section 52-A of the NDPS Act by the Department of Revenue, Ministry of Finance, Government of India. Section (II) of the said order of 1989 provides for the general procedure for sampling and storage. Relevant provisions reads thus:

"2.2. All the packages/containers shall be serially numbered and kept in lots for sampling.

Samples from the narcotic drugs and psychotropic substances seized shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchanama drawn on the spot.

2.3. The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn.

2.4. In the case of seizure of a single package/container, one sample in duplicate shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than one package/container.

2.9. The sample in duplicate should be kept in heat-sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelopes should also bear the No. of the package(s)/container(s) from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope along with test memos should be kept in another envelope which should also be sealed and marked "Secret - Drug sample/Test memo", to be sent to the chemical laboratory concerned."

16. On a conjoint reading of both the standing order Nos. 1/1988 and 1/1989, in case of Ganja, quantity of sample to be taken is 24 gms for chemical testing. The said sample is to be drawn in duplicate. Said duplicate sample must be preserved and kept in safe custody of the Investigating Officer along with the case property. The Hon'ble Apex Court in the case of Simarnjit Singh Vs. State of Punjab, reported in 2023 SCC Online SC 906 has held that procedure for sampling prescribed under the standing orders must be substantially complied with.

17. In the case in hand, there is no application made by the Customs officials for disposal of the seized contraband under Section 52A(2) of the NDPS Act to the jurisdictional Magistrate. No any application has been filed by the Investigating Agency for certification of correctness of inventory, photographs and samples of the seized contraband and issue of certificate under Section 52A of the Act and thereafter, for destruction of the seized contraband.

18. Though it reflects from the standing order of 1/1988 and 1/1989, in case of ganja, quantity of sample to be taken is 24 grams for chemical testing, but none of the witnesses in this case has stated that 24 grams of ganja were taken for sending it for chemical examination.

19. According to PW-3, who is one of the seizure witness has deposed that he did not remember what was the exact weight of each packet of ganja. He did not know in panchanama it was written that he opened eight packets of ganja.

20. PW-5, who is the then Superintendent of Custom, deposed that the sample in duplicate was drawn from each packet weighing 30 gram each and forwarded by him after production to the court and he proved the inventory vide ext-3, prepared by him.

21. PW-11, who is another custom officer, deposed in his evidence that he was also present during the production of the accused and they have not made any prayer before the Magistrate to keep the seized truck. During production before the Magistrate the truck was not produced. At the very point of time, he could not go through the Section 52 of the NDPS Act. Subsequently, when he had gone through the Section 52 of the NDPS Act, he was very well aware that inventory has to be prepared under Section 52 of the NDPS Act. One of the witnesses also stated that one Satyen Roy was the Officer in-charge of police station at that time.

22. PW 11 also admitted that the inventory he had exhibited before the court was not prepared under Section 52 of the NDPS Act. He had sent the samples to the FSL. In the panchnama, he had not taken the signature of the accused persons. Although, he had prepared the

panchnama, on 16.06.2015 but the same was not produced during the production of the accused persons. PW 11 also admitted that he had not given the description of the seal put in the packets of the samples without any variations of any number and date of the seal. They used the same seal in other cases also. He had not furnished any documents from whose custody the seized articles were taken for production before the Magistrate. The samples did not contain any seal or signature from whose custody they were brought in the Court. Though he had taken photographs of the truck along with the coal and contraband but not produced before the court. In his documents he had not mentioned where and under what condition, the samples were kept.

23. PW-12 is the Investigating Officer of the case who filed the final complaint against the two appellants vide Ext-16. According to PW-12, he stated in his final complaint petition that the seized ganja were loaded at Rowta. He neither visited Rowta nor Baihata Charilai during the period of investigation. As per receipt seal, eight numbers of packets were received by the godown but the Ext-3 did not reveal whether the samples in original or duplicate were received by the godown authority. As per para 36 of his complaint, the whole of 213 kgs of ganja was deposited in the godown. He did not mention that samples were also deposited in the godown. He did not mention any reason in his complaint as to why the accused persons were not produced before the court on 16.06.2015. He did not know the fate of the seized ganja as he was transferred in the year 2017 and until his transfer, it was not destroyed.

24. From the evidence of PW 12, it also discloses that he did not mention in his final compliant as to where and in what condition the samples were

kept from 16.06.2015 to 18.06.2015. As per the final complaint, 24 grams of samples collected but he did not give any explanation as to how 24 grams turned into 30 grams. He did not mention in his complaint regarding impression of the seal used in the case and where the seal was kept. What seal impression was used and how and with what material sealing was done and about taking signatures of the accused persons and seizing officer, were not mentioned in his complaint petition.

25. Considering the above aspect, it can be said that the seizure of the contraband from the possession of the appellants is doubtful. Admittedly, there is no compliance of Section 52A of the NDPS Act.

26. In view of the above discussion, on a proper analysis of the evidence of the witnesses as well as the documents available on the record, I have no hesitation in holding that the impugned judgment is liable to be set aside and the appellants are to be acquitted by rendering the benefit of doubt. In the absence of any material on record to establish that the samples of the seized contraband were drawn in presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial.

27. In the result, the appeal is allowed. Both the accused appellants are acquitted and set at liberty forthwith. They are in jail hazot. Release them forthwith if not wanted in any other case.

28. Return the trial court record.

JUDGE

Comparing Assistant