

GAHC010051812023



AS:11261-DB

2024:GAU-

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

Case No. : Crl.A./97/2023

DEBESWAR BASUMATARY
S/O SRI ANANTA BASUMATARY VILLAGE KACHARISON, PS ORANG, DIST
UDALGURI, ASSAM

VERSUS

UNION OF INDIA AND ANR.
REPRESENTED BY NCB, ZONAL UNIT, GUWAHATI, ASSAM

2:LHUNKHOLAL
INTELLIGENCE OFFICER
NCB IMPHAL. SUB ZONE
S/O SEISEKHOBEN
RESIDENT OF IMPHAL PS IMPHAL WEST
MANIPUR

Advocate for the Petitioner : MR. M BISWAS, S K DAS,MR M BASUMATARI,MS M DAS

Advocate for the Respondent : S C KEYAL, SC, NCB,

Linked Case : CRL.A(J)/91/2022

SHAJAN KARKI
S/O. SITARAM KARKI
VILL. LOKHRA
P.S. CHARDUAR
DIST. SONITPUR.

VERSUS

THE STATE OF ASSAM
REP. BY PP
ASSAM

Advocate for : MR. ASHIM CHAMUAH
(LEGAL AID COUNSEL)
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM

:::BEFORE:::

**HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI
HON'BLE MRS. JUSTICE MITALI THAKURIA**

Date of hearing : 30.10.2024

Date of Judgment & Order : 19.11.2024

JUDGMENT & ORDER (CAV)

(M. Thakuria, J)

By this common judgment and order, it is proposed to dispose of two Criminal Appeals, being Crl. A. No. 97/2023, preferred by appellant- Debeswar Basumatary, & Crl. A.(J) No. 91/2022, preferred by appellant- Shajan Karki, as

both have arisen out of a common judgment and order dated 08.07.2022, passed by the learned Special Judge, Udaguri in Special (NDPS) Case No. 06/2019, whereby both the accused/appellants have been convicted under Section 20(b)(ii)(c) of NDPS Act and sentenced to undergo Rigorous Imprisonment for a period of 12 (twelve) years and a fine of Rs. 1,00,000/- (Rupees one lakh) only, in default S.I. for another 6 (six) months for the offence.

2. Heard Mr. M. Biswas, learned counsel for the appellant in Crl. A. No. 97/2023 and Mr A. Chamuah, learned Legal Aid Counsel for the appellant in Crl. A.(J) No. 91/2022. Also heard Mr. S. C. Keyal, learned Special Public Prosecutor, NCB for the respondents.

3. The prosecution case, in brief, is that on 13.09.2018, at about 9.30 a.m., an information was received by one Phani Narzary, Intelligence Officer, NCB Guwahati from one Santosh Kumar, DC, SSB, 61 BN SSB Bhairabkunda, District Udaguri, Assam that 900 Chain BOP, SSB had intercepted 102.500 kg ganja in 17 packets along with two persons, namely Debeswar Basumatary and Shajan Karki, with two vehicles bearing Registration No. AS-12AC-4091 Mahindra (Bolero Pickup 2WD) and AS-01BU-0537 Maruti Suzuki (Swift Dzire VZI). Upon receipt of the said information, on 13.09.2018 at about 11:30 am, a team of NCB, Guwahati moved for Bhairabkunda and on reaching the said place, they seized Ganja from the possession of said two suspected persons namely, Debeswar Basumatary and Shajan Karki, along with two vehicles. Thereafter, one Shri Ulunkholal, Intelligence Officer, NCB Guwahati submitted written

compliant before the Court for initiation of trial against the two accused persons. Accordingly, the learned Court below took cognizance of the case and framed charges under Section 20(b)(ii)(C)/29 of NDPS Act, 1985 and the contents of the charge were read over and explained to the accused, to which they pleaded not guilty and claimed to be tried.

4. During trial, the prosecution examined as many as 7(seven) numbers of witnesses including the Investigating Officers and the initial informer- Santosh Kumar, DC, SSB. However, the defence did not examine any witnesses. The accused were also examined under Section 313 Cr.P.C.

5. Thereafter, the learned Special Judge, Udaguri, after hearing the parties and on perusal of records vide judgment and order dated 08.07.2022, passed in Special (NDPS) Case No. 06/2019, found the accused/appellants guilty and convicted them under Section 20(b)(ii)(c) of NDPS Act and sentenced them as aforesaid.

6. On being highly aggrieved and dissatisfied with the aforesaid judgment and order dated 08.07.2022, passed by the learned Special Judge, Udaguri in Special (NDPS) Case No. 06/2019, the present appeals have been preferred by the accused/appellants.

7. Mr. M. Biswas, learned counsel for the appellant in Crl. A. No. 97/2023, and Mr A. Chamuah, learned Legal Aid Counsel for the appellant in Crl. A.(J) No. 91/2022, submitted that the learned Trial Court below miserably failed to appreciate the evidence of prosecution witnesses in its true perspective and

thus arrived at a wrong decision convicting the accused/appellants. The PW-1, in his deposition before the learned Trial Court below, has stated that the seized vehicles along with the suspected contrabands were taken to main camp of SSB Headquarter at Bhairabkunda and thereafter the seized contrabands were weighed and seizure list was prepared.

8. They further raised the following issues during the course of hearing:

- (i) It is not proved that the contraband which was alleged to have been seized from the possession of the accused/appellants was ganja.**

In this context, Mr. Biswas submitted that though the PW-4, i.e. the FSL Expert, stated that Exhibit DN-246/2014 (a) to DN-246/2014 (c) gave positive test of cannabis (ganja), but as per his own statement, the samples received in the instant case by the FSL were DN 488/2018 (a1) to DN 488/2018 (a17), respectively. Further, none of the prosecution witnesses had exhibited the FSL Report. Though the PW-4 stated that the Exhibit-4 is the FSL Report, but the same is a Forwarding Report of the contraband to FSL. Though the FSL Report was marked as Exhibit-3, but the same has not been exhibited by any witnesses. Mr. Biswas further submitted that as per the so called Exhibit-3, the Report of Forensic Expert, it speaks that the parcel was received through speed post, but as per the PW-4, the FSL Expert, he received the parcel through the messenger which also contradicts the own statement of PW-4 regarding receiving of samples of the contrabands.

(ii) The evidence of one Santosh Kumar (PW-2) has to be discarded, who was discharging his duty as Deputy Commandant, SSB.

Mr. Biswas submitted in this regard that the evidence of PW-2 has to be discarded as the deposition made by PW-2 is not signed by him and same has signed by one Dhani Ram Ghosh, whose name does not figure out in the records of the case and thus, the evidence of the PW-2, who was considered to be the vital witness of the prosecution, has to be totally discarded as no signature was put by him in his so-called deposition.

(iii) There is total non-compliance of Section 52 A of NDPS Act.

It is submitted by the learned counsels for the appellants that the samples, which were alleged to have been sent to FSL, were not drawn before the Magistrate. No list of samples or photographs of contrabands were prepared nor there is any certification of Magistrate, which is necessary for compliance of Section 52A NDPS Act. In this context, Mr. Biswas relied on following decisions:

(i) Union of India Vs. Mohan Lal & Ors [(2016) 3 SCC 379] (paras- 15 to 18 & 31.1)

(ii) Mangilal Vs. State of M.P. [2023 SCC OnLine SC 862] (paras-

3, 5, 6 & 14)

(iii) **Simarnjit Singh Vs. State of Punjab [2023 LiveLaw (SC) 570]**

(iv) **Mohammed Khalid & Anr. Vs. State of Telangana [(2024) 5 SCC 393] (para-26)**

In the case of **Mangilal** (supra), the Hon'ble Apex Court has expressed the view that when there is non-compliance of Section 52A NDPS Act, where a certification of a Magistrate is lacking, any inventory, photograph or list of samples would not constitute primary evidence.

As per the guideline of the Hon'ble Apex Court in case of **Mohanlal & Anr. (supra)**, as relied by the learned counsel for the appellants, it is observed that the officer concerned should approach the Magistrate with an application under Section 52-A (2) of the Act which shall be allowed by the Magistrate which may be required under Section 52-A (3) of the NDPS Act. It is also provided that the sampling should be done in presence of Magistrate and it should immediately be brought before the Magistrate for sampling.

In the case of **Mohammed Khalid** (supra), in paragraph No. 26 of the judgment as relied by the learned counsels for the appellants, the Hon'ble Apex Court 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. The accused A-3 and A-4 were not arrested at the spot.

(iv) Seized Ganjas were never produced before the Court during Trial.

In this regard, the learned counsels for the appellants submitted that the seized ganjas, which were the most vital piece of evidence, were not produced before the Court during trial. The prosecution failed to produce either the contraband or the duplicate samples or the remnants of the original samples before the learned Trial Court below during the trial of the case. Thus, it is argued that it cannot be said as to whether any ganja was at all seized from the possession of the accused/appellants. The learned counsels also placed reliance on the following judgments in this regard:

- (i) **Vijay Jain Vs. State of Madhya Pradesh [(2013) 14 SCC 527] (Para-12)**

- (ii) **Jitendra & Anr. Vs. State of Madhya Pradesh [(2004) 10 SCC 562] (Para-6)**

(iii) Noor Aga Vs. State of Punjab [(2008) 16 SCC 417] (para-86)

Citing those judgments, it is submitted by the learned counsel for the appellants that it is necessary to produce the seized contraband before the Court and mere oral evidence as to their features and production of Panchnama will not discharge the heavy burden which lies on the prosecution.

Para-86 of the judgment passed in **Noor Aga** (supra), as relied by the learned counsel for the appellants, reads as under:

"86. Indisputably, the cardboard carton was not produced in court being allegedly missing. No convincing explanation was rendered in that behalf. The High Court, in its judgment, stated:

"The case set up by the prosecution is that the appellant being a member of a crew party, was in possession of his luggage, which included the cardboard carton, from which the recovery of heroin was allegedly effected. The appellant himself had presented the said carton along with the other luggage for custom clearance. From these facts, at least one thing is clear that the carton which was carrying the contraband, was under his immediate control. The argument advanced by Mr. Guglani is that the luggage which was being carried by the crew members, had no specific identification slips as in the case of an ordinary passenger travelling in an aircraft. So what was being carried in the carton was within the knowledge of the appellant alone and, therefore, the element of possession and control of the contraband qua the appellant is writ large and the presumption of culpable mental state under Section 35 and 54 of the Act has to be drawn against him."

The inference was drawn only on the basis of a mere assertion of the witness that the cardboard carton wherefrom the contraband was allegedly recovered as the one which had been in possession of the appellant without any corroboration as regards the purported "apparent practice of crew members carrying their own luggage" and there being no identification marks on the same. No material in this behalf has been produced by the respondent. No witness has spoken of the purported practice. For all intent and purport another presumption has been raised by the High Court wherefor no material had been brought on record. No explanation has been given as to what happened to the

container. Its absence significantly undermines the case of the prosecution. It reduces the evidentiary value of the statements made by the witnesses referring the fact of recovery of the contraband therefrom."

(v) The prosecution failed to relate the seized samples sent to FSL with the contraband allegedly seized from the accused.

Mr. Biswas the learned counsel submitted in this regard that according to the prosecution story, the samples were drawn on 13.09.2018 and the same was received by the FSL on 15.09.2018. But from the records and orders passed by the learned Trial Court below, it is seen that vide order dated 26.10.2018 & 30.10.2018, i.e. after 43 days from the date of seizure and after 41 days from the samples received by the FSL, the prayer was made before the learned Trial Court to allow them to draw samples in the presence of the Court and to certify the correctness of the list of samples so drawn to facilitate disposal of the seized drugs by retaining the certificate. The learned Trial Court vide order dated 30.10.2018 also allowed destruction of the contrabands. Thus, the samples which were received by the FSL on 15.09.2018 does not relate to the instant case as the prayer for drawing samples in the instant case was made only after 41 days from the date it was received in FSL. In this context also, Mr. Biswas the learned counsel has relied on the following 2 (two) decisions:

(i) **Vijay Pandey Vs. State of Uttar Pradesh [(2019) 18 SCC 215**

(ii) **State of Gujurat Vs. Ismail U Haji Patel & Anr. [(2003) 12 SCC**

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(vi) No witness deposed to have seen the appellant carrying the contraband.

Raising this issue, it is submitted by Mr. Biswas, learned counsel for the appellant in Crl. A. No. 97/2023, that no one was present at the time of alleged interception and the PW-1 himself stated before the learned Trial Court that he could not recognize the accused person in the dock and no other witness from the intercepting team was also examined by the prosecution.

(vii) Non-compliance of Section 55 of the NDPS Act.

It is submitted by the learned counsels for the appellants that Section 55 of the NDPS Act provides for the manner in which the seized contrabands/samples were to be kept/stored and further, that the Officer-In-Charge of the Police Station shall *inter alia* take charge and keep in safe custody all the articles seized within his local jurisdiction and shall also affix the seal in such articles/samples. But, here in the instant case, the search cum seizure procedure was started at 7.30 p.m. on 13.09.2018, but the PW-5, in his cross-examination, has stated that he handed over the seized articles to Udaguri P.S. Godown only on 14.09.2018. As per PW-7, the Superintendent of NCB, he received the articles in the NCB Godown only on 14.09.2018 at 11.00 p.m. and there is no explanation made by the PW-5 as to why he kept the contrabands in his personal custody from 9.30

p.m. of 13.09.2018 till 11.00 p.m. of 14.09.2018.

In this context, the learned counsels for the appellants also relied on 3 Judge Bench decision of Hon'ble Supreme Court rendered in case of **Mohan Lal Vs. State of Punjab [(2018) 17 SCC 627]**.

The learned counsels further submitted that there is also contradictions in the statement made by the prosecution witnesses and the exhibits, as the Forwarding Report (Exhibit 3) says that the samples were forwarded to FSL on 13.09.2018, whereas as per PW-5, the sample packets were sent for FSL examination on 15.09.2018.

In this regard, Mr. Biswas also placed reliance on the following decisions:

- (i) **State of Gujrat Vs. Ismail U Haji Patel & Anr. [(2003) 12 SCC 291]**
 - (ii) **State of Rajasthan Vs. Tara Singh [(2011) 11 SCC 559]**
 - (iii) **State of Rajasthan Vs. Gurmail Singh [(2005) 3 SCC 59]**
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- (viii) No independent witnesses were examined.**

In this context, it is submitted by the learned counsels for the appellants that the prosecution did not make any attempt to record the evidence of any independent witnesses at the time of search and seizure.

9. Mr. Biswas, learned counsel for the appellant in Crl. A. No. 97/2023, also submitted that though the conviction was made under Section 20(b)(ii)(C) of the NDPS Act, but there is no mention about the detail of amount of ganja recovered from each of the vehicle and also not properly mentioned about the amount of contraband seized individually from the possession of the accused/appellants and both the accused/appellants were also not charged under Section 29 of the NDPS Act to convict both the accused/appellants in a case under the commercial quantity.

10. Mr. S. C. Keyal, learned Special Public Prosecutor, NCB submitted in this regard that the Panchnama was prepared by the Investigating Agency which is also exhibited as Exhibit-2 during trial wherein every detail of the seized articles as well as the investigation have been mentioned as to how and on what basis the investigation was carried out and the accused/ appellants were intercepted and the contraband was accordingly recovered from the possession of the accused/appellants. Further he submitted that some time might have been required for production of the seized articles before the police station at Udaguri as the search and seizure was made at Bhairabkunda and the place of interception was at Anglingmore, which is about 47 KM from Bhairabkunda. Further he submitted that the application was made before the learned Special

Judge regarding pre-trial disposal of the articles on 26.10.2019, which was allowed only on 30.10.2019.

11. Mr. Keyal further submitted that the Exhibit-3 is the FSL Expert Report and Exhibit-4 is the Forwarding Report, but inadvertently the Exhibit-3 was not exhibited through the FSL Expert which may be an inadvertent mistake during the trial of the case. He further submitted that there may be some discrepancy in description of samples which were received for FSL Examination, but the FSL Report speaks about the correct description of the articles which was sent for examination to FSL. However, he admitted that there is a discrepancy of the articles described by the FSL Expert while adducing the evidence before the Court. He further submitted that though there may be some discrepancies in the description of the articles mentioned by the PW-4, but the facts remain same that both the accused /appellants were intercepted at Anglingmore with two vehicles loaded with cannabis/ganja and after observing all formalities, they were produced before the Court and the articles were also produced before the Malkahana and after observing all necessary/required formalities, the Charge-Sheet was filed by the prosecution. Accordingly, he submitted that the learned Trial Court below rightly passed the judgment and order convicting the accused/appellants.

12. The submissions made by the learned counsels for both sides have been duly considered and we have also perused the case records as well as the exhibits along with the record.

13. Without going by the detail discussion of the prosecution witnesses, it is the admitted position that the description made by the PW-4 in his deposition does not tally with the description made in the FSL Report (Exhibit-3). At the same time, it is also surprising that the FSL Expert did not exhibit the FSL Report, rather he exhibited only the Forwarding Report as Exhibit-4. Moreover, the FSL Report, which is the most vital evidence of the prosecution case, is also not been exhibited by any of the prosecution witnesses, though it is seems to be marked as Exhibit-3 and the signature of the learned Special Judge is also reflected in the same. Thus, it is seen that the most vital documents and the most vital evidence of the FSL Expert cannot be relied on due to the discrepancies of description of the articles as well as non-exhibition of the FSL Report by the FSL Expert. In absence of any such report, it cannot be held that the contraband, which was alleged to have been recovered from the possession of the accused/appellants, gave the positive test for cannabis.

14. Further it is seen that the PW-2, who is one of the most vital witnesses of the prosecution as well as the informant of this case, did not put his signature in his Deposition Form, rather it is seen that it was signed by one Dhani Ram Ghosh, who is no way related to the case of the prosecution nor his evidence has been recorded as a witness by the prosecution. Thus, in absence of the signature of PW-2 in his deposition sheet, it cannot be held that he adduced his evidence before the Court as PW-2, who is stated to be the informant of this case and also considered to be one of the vital witnesses of the entire prosecution case. Thus, there is no alternative but to expunge the evidence of PW-2. At the same time, it is also surprising that the learned Trial Court below had passed the judgment and order without even proper perusal of the

deposition which is stated to be made by the PW-2, one Santosh Kumar, who is the informant of this case.

15. On perusal of the entire record and the exhibits, we have also seen that there is no compliance of Section 52 A of the NDPS Act. There is no inventory prepared by the Investigating Officer to use the same as primary evidence and thus, the question of certification of the inventory does not arise which is mandatorily required under Section 52 A of NDPS Act. It is admitted that the entire seized contrabands, which is of huge quantity, cannot be produced before the Court at the time of trial, but the prosecution failed to prepare any inventory or to take any photographs so that those can be used as primary evidence at the time of trial after pre-trial disposal of the contraband.

16. Further from the record, it is also seen that after drawl of the samples on 13.09.2018, it was sent for FSL examination, which was stated to be received by the FSL on 15.09.2018. But, after more than 40 days, a formal prayer was made before the learned Trial Court below for drawl of samples from the original and also prayed for certification of the same as well as for disposal of the contraband. After 43 days, the order was passed by the learned Special Judge whereby the order for disposal of the seized contraband was only allowed, but there is no mention about the prayer for drawing of samples in presence of Magistrate or for certification of the inventory etc. Moreover, even after obtaining such order, the Investigation Agency did not approach the Court with another application praying for certification of correctness of inventory or another prayer for drawing of samples from the original. Thus, in spite of a

petition filed by the Investigating Agency, there was no order for preparation of inventory or the certifying or correctness of the same and to draw the samples etc. in presence of Magistrate and without obtaining the order from the learned Special Judge, the Investigating Agency filed the Charge-Sheet and the case proceeded accordingly, is the result of the perfunctory investigation on the part of the Investigating Agency and without proper compliance of Section 52A(2), the Charge-Sheet was filed.

17. Section 52A (2) 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 drawl 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 the Magistrate 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. **[Criminal Appeal No. 1651 of 2023 (Mangilal Vs. the State of Madhya Pradesh)]**

18. As per the guidelines of the Hon'ble Apex Court in case of **Union of India Vs. Mohanlal & Anr.**, reported in **(2016) 3 SCC 379**, it is observed that the

officer concerned should approach the Magistrate with an application under Section 52-A (2) of the Act which shall be allowed by the Magistrate as soon as may be required under Section 52-A (3) of the NDPS Act. It is also provided that the sampling should be done in presence of Magistrate and it should immediately be brought before the Magistrate for sampling.

19. As per Section 54 of the NDPS Act, presumption can be taken that the accused has committed the offence under this Act unless and until the contrary is proved and provides a reverse burden to prove upon the accused. The Hon'ble Supreme Court in **Gorakh Nath Prasad Vs. State of Bihar, (2018) 2 SCC 305**, has held that reverse burden of proof lies upon the accused, contrary to the normal rule of criminal jurisprudence for presumption of innocence unless proved guilty. However, this rule shall not dispense with the requirement of the prosecution to having first establish a prima facie case, only whereafter the burden will shift to the accused.

20. But, here in the instant case, it is seen that the prosecution has totally failed to established the case against the accused/ appellants in regards to the commission of the offence to shift the burden of the accused to prove their innocence.

21. So, considering the entire discussions made above, it is seen that the prosecution case suffers from material and procedural irregularity and there is total non-compliance of Section 52A of the NDPS Act. Further, from the discussion made above, the informant/PW-2, who was one of the vital witnesses of the prosecution, cannot be relied upon and his entire evidence has to be

expunged due to non-availability of his signature on his deposition sheet. At the same time, the prosecution also failed to establish the fact that the samples which were sent or received by the FSL are the contraband which were seized from the possession of the accused/appellants due to the discrepancies of description of the articles made in the Exhibit-3 with the deposition made by the FSL Expert (PW-4). Thus, the prosecution failed to prove the fact that the contrabands which were seized from the possession of the accused/appellants gave positive test of cannabis.

22. In view of above, we find sufficient merit in these appeals and therefore the same stand allowed. Accordingly, the judgment and order dated 08.07.2022, passed by the learned Special Judge, Udaguri in Special (NDPS) Case No. 06/2019, convicting the accused/appellants under Section 20(b)(ii)(c) of NDPS Act, stands set aside. The appellants are acquitted of all the charges. Bond, if any, shall stand discharged. The appellants be released from jail forthwith if not required in connection with other case.

23. Send back the case record along with a copy of this judgment and order.

24. A copy of this judgment and order may also be sent to the concerned jail authorities for necessary compliance.

25. Before parting, we put on record the appreciation for the valuable assistance rendered by Mr. A. Chamuah, learned Legal Aid Counsel for the

appellant in Crl. A.(J) No. 91/2022, and we recommend that the prescribed fee, as per the notified rate, be paid by the State Legal Services Authority.

26. In terms of above, these criminal appeals stand disposed of.

JUDGE

JUDGE

Comparing Assistant