

GAHC010013122022



2024:GAU-AS:9683

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

Case No. : Crl.A./16/2022

BENJAMIN BASUMATARY @ BINJAMIN BASUMATARY
S/O BERNUT BASUMATARY @ BERANATH BASUMATARY
RESIDENT OF VILLAGE KALAMANI PATH,
PO PATHAKPUR, PS MAZBAT, DIST UDALGURI, BTAD

VERSUS

THE STATE OF ASSAM.
REPRESENTED BY PP, ASSAM.

Advocate for the Petitioner : MR S BORTHAKUR, MS. P BORAH

Advocate for the Respondent : PP, ASSAM,

Linked Case : Crl.A./14/2022

MONI BASUMATARY
W/O SRI JUNG MANGA BASUMATARY
C/O SRI DAM CHERANG NARZARY

VILLAGE BATASIPUR
PS DHEKIAJULI
DIST SONITPUR
ASSAM

VERSUS

THE STATE OF ASSAM .
NOTICE THROUGH PP ASSAM

Advocate for : MR. A SARMAH
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM .

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

JUDGMENT & ORDER (ORAL)

Date : 19-09-2024

Heard Mr. S. Borthakur, learned counsel for the appellant Benjamin Basumatary @ Binjamin Basumatary and Mr. R. Baruah, learned counsel for the appellant Smt. Moni Basumatary as well as Ms. S. Jahan, learned Additional Public Prosecutor, Assam for the respondent State.

2. The appellant Smt. Moni Basumatary has brought up this Criminal Appeal No. 14/2022 and the appellant Sri Benjamin Basumatary @ Binjamin Basumatary has brought up the Criminal Appeal No. 16/2022 as they are aggrieved by the judgment dated 15.12.2021 passed by the learned Sessions Judge, Sonitpur, Tezpur in connection with Special NDPS Case No. 02 of 2018 convicting the appellants under Section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act for short) and sentencing them to undergo rigorous imprisonment for a period of 8 (Eight) years each and to pay a fine of Rs.1,00,000/- (Rupees One Lac) each with default stipulation.

3. The genesis of the case was that on a tip off, a search operation was conducted under the name and style of "Operation Dekargaon" under the leadership of Subedar A. Kipgen along with civilian police force at about 09.15 hours on 01.06.2018 and at about 10.55 hours, the investigating team apprehended the appellants Smt. Moni Basumatary and Sri Benjamin Basumatary @ Binjamin Basumatary (hereinafter also referred to as A-1 and A-2 respectively or as the appellants), along with 10 kgs of contraband. On being confronted, the appellants revealed that it was handed over to them by an unknown individual at Majbat Udaguri and they were directed to deliver the item at Dekargaon Railway Station to another person. The contraband was weighed and seized. The contraband weighed around 10 kgs.

4. The police registered Tezpur PS Case No. 1128/2018 under Section 20(b) of NDPS Act and embarked upon the investigation. During investigation, the earlier seizure memo was also seized along with two white coloured polythene packets containing 5 kgs each of suspected ganja, one black coloured bag, a pair of weights and measuring equipment, one pocket diary from Alam Kipgen. The sketch map was prepared and the samples which were drawn were forwarded for forensic examination. On receipt of the forensic report and on completion of investigation, charge sheet was laid against the appellants. At the commencement of trial, a formal charge under Section 20(b) of the NDPS Act was read over and explained to the appellants, to which the appellants pleaded not guilty and claimed to be tried. Thereafter, an opportunity was accorded to the appellants to be heard at the time of framing of charge and later, charge was altered and framed under Section 20(b)(ii)(B) of NDPS Act. The appellants abjured their guilt and claimed innocence.

5. To substantiate its stance, the prosecution adduced the evidence of 7 (Seven) witnesses and exhibited as many as 8 (Eight) documents.

6. On the incriminating evidence projected by the prosecution witnesses, several questions were asked to the appellants under Section 313 of the Code of Criminal Procedure, 1973 (CrPC for short). The tenor of the answers of the appellants reveals a plea of total denial.

7. Learned counsel for the appellants Mr. S. Borthakur and Mr. R. Baruah laid stress in their argument that only one bag was recovered. Both the appellants are strangers to each other. The Investigation Officer (IO for short) could not specifically point out from whose possession the bag was recovered nor could the other witnesses. The army personnel who initially apprehended the appellants could not specifically point out from whose possession the bag was recovered. Two packets of ganja were found inside one bag. No independent witnesses were examined. One independent witness who was present at the time of seizure was not produced as a witness in the Court. It was further argued that the evidence of PW-1 clearly reveals that Section 52-A of NDPS Act was not complied with and on that ground alone the appellants deserve acquittal.

8. It is further submitted that it has surfaced through the evidence that the articles were seized on 01.06.2018 whereas the samples were forwarded for forensic examination on 04.06.2018. It is unclear where the samples were kept during the interregnum before the same were forwarded for forensic examination. No Malkhana Register was exhibited in support of the fact that the articles were kept in the Malkhana. Despite the fact that the articles were seized in a public place, not a single independent witness was produced to substantiate

the prosecution case. The female appellant was not examined by a lady police personnel. The remaining part of argument of the learned counsel for the appellants will be discussed at the appropriate stage.

9. Learned Additional Public Prosecutor Ms. S. Jahan laid stress in her argument that the recovery of the contraband was a chance recovery. PW-3's evidence reveals that on a tip off about movement of arms and ammunition, an operation was conducted and contraband was recovered. In fact PW-3, PW-4 and PW-5 witnessed the appellants alighting from the train with one bag. Two packets containing ganja weighing 5 kgs each were found in the bag. The evidence of PW-3 contradicts the averments of the learned counsel for the appellants because his evidence reveals that a female police officer was present. It is submitted by the learned Additional Public Prosecutor that compliance of Section 50 of NDPS Act is not mandatory when it relates to seizure of a bag and the learned Additional Public Prosecutor has relied on the decision of the Hon'ble Supreme Court in *Mandalal and Anr. vs. State of Himachal Pradesh reported in (2003) 7 SCC 465* wherein it has been held and observed that :-

"Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record is that all the accused persons were traveling in a vehicle and as noted by the Trial Court they were known to each other and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.

Section 20(b) makes possession of contraband articles an offence. Section 20 appears in chapter IV of the Act which relates to offence for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession. It is highlighted that unless the possession was coupled with requisite mental element, i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible,

as was observed in *Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors.* (AIR 1980 SC 52), to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended. As noted in *Gunwantlal v. The State of M.P.* (AIR 1972 SC 1756) possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control."

10. Learned Additional Public Prosecutor has submitted that both the appellants were apprehended as they got down from the train together.

11. In reply to the submissions of the learned Additional Public Prosecutor, learned counsel for the appellants emphasized in their argument that in the instant case the vehicle was a train and not a private vehicle and the appellants are strangers to each other. The remaining part of argument of the learned Additional Public Prosecutor will be discussed at the appropriate stage.

12. Now the question that arises for consideration is whether the learned Trial Court has erred in convicting the appellants. To decide this case in its proper perspective the evidence is re-appreciated.

13. PW-1 Ahmad Ansari is the salesman of the Hardware Store from which the police personnel seized the electronic weighing machine to weigh the contraband seized in connection with this case. The evidence of PW-2 Jintu Das, a Home Guard at Salonibari Outpost is not noteworthy as he had no knowledge from whose possession the contraband was seized. However, he had identified the appellants as the persons who were brought to Salonibari Outpost along with bags of ganja.

14. Alun Kibgn deposed as PW-3 that on 01.06.2018 while serving as JCO at 20 Assam Rifles, C/O 99 APO, Bihaguri, he received an information that some

persons with arms and ammunition were travelling by train. They launched a joint operation at Dekargaon Railway Station. They met both the appellants and after checking and searching, they found suspected ganja in their possession. They seized the suspected ganja and handed over the appellants and the ganja to Salonibari Police. He lodged the FIR (Exhibit-1) and he has proved his signatures on the FIR as Exhibit-1(1). He further deposed that the police seized one original seizure memo, two white coloured polythene packets containing suspected ganja weighing 5 kgs each, one black coloured bag, one weight and measuring scale and one pocket diary. He has proved his signature on this particular seizure list as Exhibit-2(1). He has proved the seizure memo as Exhibit-3 and Exhibit-3(1) as his signature. He has proved Material Exhibit-1 as the seized polythene bag containing ganja and Material Exhibit-2 as another polythene bag containing suspected ganja and Material Exhibit-3 as the seized black coloured bag.

15. It is pertinent to mention at this juncture that the cross-examination of PW-1, PW-2 and PW-3 indeed reflects that one lady police personnel was present at the time of joint operation. It is also pertinent to mention that evidence of PW-3 does not at all reflect that both the appellants together alighted from the train. PW-1 has testified that their team met the appellants in the railway station. He has admitted in his cross-examination that he has not mentioned in his FIR whether they met the appellants inside or outside the Dekargaon Railway Station. He has also admitted that he has not mentioned specifically in the FIR from whose possession the ganja was recovered and the two polythene packets containing ganja were found inside one black bag. Thus, I find force in the argument of the learned counsel for the appellants that the appellants were not together and there is no specific allegation from whose

possession or conscious possession, the ganja was recovered. The ganja was in one bag and there is no direct allegation against any one of the two appellants as to who was carrying the black bag containing the polythene packets loaded with ganja.

17. The argument of the learned Additional Public Prosecutor that PW-4 in his cross-examination has reiterated that ganja was found in possession of the appellants can thus be safely brushed aside. The argument of the learned Additional Public Prosecutor that cross- examination of PW-4 could not be demolished thus holds no water. Learned Additional Public Prosecutor has relied on the decision of the Hon'ble Supreme Court in *Union of India vs. Mohanlal and another reported in (2016) 3 SCC 379* wherein it has been held and observed that :-

“12. Section 52-A(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 drugs and psychotropic substances. The Central Government has in exercise of that power issued Standing Order No. 1/89 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10-05-2007 and the other dated 16-1-2015 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 No. 1 od 1989 states that samples must be taken from the seized contrabands on the spot at the time of recovery itself. It reads:

“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 (panchayat) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchayat drawn on the spot.”

13. Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the States or the Central agencies in the matter of drawing of samples. This is, therefore, an area that needs to be suitably addressed in the light of the statutory provisions which ought to be strictly observed given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to

remove the confusion that prevails regarding the true position as regards drawing of samples.”

18. By relying on the decision of the Hon'ble Supreme Court in Mohanlal's case (*supra*), learned Additional Public Prosecutor tried to refute the argument of the learned counsel for the appellants that Section 52-A of NDPS Act was not complied with. Learned Additional Public Prosecutor has also submitted that no contradictions could be elicited as per Section 145 of the Indian Evidence Act, 1872 (Evidence Act for short) *qua* Section 162 of CrPC.

19. On the contrary, learned counsel for the appellants relied on the same decision of the Hon'ble Supreme Court in Mohanlal's case (*supra*) and has drawn the attention of this Court towards paragraph Nos. 15, 16, 17 and 19 of the judgment wherein it has been held and observed that :-

*“15. It is manifest from Section 52-A(2)(c) (*supra*) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.*

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-section (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.”

“19. Mr. Sinha, learned Amicus, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and *Section 52-A* in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of *Section 52A* (*supra*). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions.”

20. In the instant case, there is no instance that the samples were drawn as per proper procedure and the same were forwarded to the Officer-In-Charge of the nearest Police Station or to any Officer empowered under Section 53 of the NDPS Act.

It is also submitted by the learned counsel for the appellants that the appellants deserve acquittal as Section 52-A of NDPS Act was not complied with.

21. I find substance in the argument submitted the learned counsel for the appellants. The prosecution has failed to prove that inventory was prepared as per Section 52-A of NDPS Act.

22. Reverting back to the evidence, another army personnel of 20 Assam Rifles Sri S.R. Singh deposed as PW-4 that on 01.06.2018 he was working as

Rifleman. On that day on receipt of secret information, he along with Alun Kibgn (PW-3) and other staff conducted search operation at Dekargaon Railway Station and found a bag containing two plastic packets from the appellants Bejamin Basumatary and Smt. Moni Basumatary. Each packet weighed around 5 kgs. They brought the appellants to Salonibari Outpost and handed them over to Police along with the bag containing contraband. Police seized one black bag containing two plastic packets, one pocket diary vide Exhibit-2. He has proved his signature as Exhibit-2(2). He has proved the seized polythene bag containing suspected ganja as Material Exhibit-1, another polythene packet containing suspected ganja as Material Exhibit-2 and Material Exhibit-3 as the seized black colouerd bag. The evidence of this witness also does not clearly implicate from whose possession the bag containing the plastic packets were seized. It is not clear from his evidence if both the appellants were apprehended together while they were carrying ganja in one bag. He has also further testified in his cross-examination that the police did not record his statement. They did not inform the police about transportation of the contraband.

23. Another witness who was present at the time of the search operation, Sri Angajala Naresh deposed as PW-5 that he went to the Railway Station to conduct a search operation and at that time when the train reached the station, both the appellants got down from the train. They apprehended the appellants and found a bag in their possession. There was ganja in the bag and two white polythene bags containing ganja weighing 5 kgs each were found inside the bag. They also found a pocket diary in the bag. Ganja and other articles were seized vide Exhibit-2. He has proved his signature as Exhibit-2(3). He has identified the seized white polythene packets as Material Exhibit-1 and Material Exhibit-2 and the seized black coloured bag as Material Exhibit-3. His cross-

examination relating to his initial statement is not noteworthy as it has not been affirmed by the cross-examination of the Investigating Officer (IO for short).

24. The IO SI Labnya Bezbaruah deposed as PW-7 that on 01.06.2018 he was posted In-Charge of Salonibari Outpost. On that day, during checking duty at Dekargaon Railway Station, the Assam Rifles Team found 9 ½ kgs of ganja from the possession of appellants and handed them over along with the ganja to Salonibari Police. He registered the Salonibari Outpost GD Entry No. 4 dated 01.06.2018. The FIR was lodged by Alum Kibgn and Tezpur Police Station Case No. 1128/2018 was registered and he was entrusted with investigation. He has identified the GD Entry as Exhibit-6 and has proved his signature as Exhibit-6(1). He seized

One original seizure memo prepared by ASI Assam Rifles,

Two white coloured polythene packets weighing ganja 5 kgs each,

One black coloured bag,

A pair of weights and weighing scale and,

One pocket diary at the Police Station vide seizure list Exhibit-2.

He has proved his signature as Exhibit-2(4). He has weighed the seized ganja and collected the samples in two packets containing 2 grams each. He prepared the sketch map of the PO and seized ganja in the thana premises. He has proved the sketch map as Exhibit-7.

25. The IO PW-7 further testified that he forwarded the ganja for forensic examination and recorded the statements of the witnesses and arrested the

appellants. He obtained the FSL report and finally submitted charge sheet against the appellants. He has proved the charge sheet as Exhibit-8 and his signature on the charge sheet as Exhibit-8(1). He has proved the seized polythene bags containing ganja as Material Exhibits-1 and 2, and Material Exhibit-3 as the black coloured bag. The cross-examination of IO is not noteworthy.

26. Except PW-5, the other witnesses have not stated that the appellants were caught while they were alighting from train when the train reached the railway station. PW-5 has also failed to specifically implicate from whose possession the bag was recovered. It has also not been proved by the prosecution whether the appellants are known to each other or whether the appellants are total strangers.

27. Learned counsel for the appellants highlighted the cross-examination of IO that the IO has clearly testified in his cross-examination that he did not know from whose possession the bag was recovered. This deposition of IO extends a benefit of doubt to the appellants.

28. Recapitulating the entire evidence, it can be safely held that the prosecution has failed to prove beyond a reasonable doubt that the appellants were travelling together in the same train. The prosecution has failed to prove from whose possession the ganja was recovered. Section 52-A of NDPS Act has not been strictly complied with. No inventory was prepared after drawing the samples. The samples were not drawn properly. Only 2 (Two) grams were drawn from the bulk of the contraband. Despite the fact that the evidence of Scientific Officer Sri Gajendra Nath Deka reveals that the samples forwarded for chemical examination in connection with this case, gave a positive test for ganja

yet the discrepancies and the contradictions in the evidence extend a benefit of doubt to the appellants. It has to be borne in mind that evidence of PW-1 clearly reveals that ganja was seized on 01.06.2018 and the sample was forwarded for forensic examination after 4 (Four) days.

29. There is no evidence if the ganja was kept in safe custody to avoid manipulation. The Malkhana Register was also not exhibited in the Court.

30. In the wake of the foregoing discussions, it is held that the prosecution has failed to prove beyond a reasonable doubt that the appellants were carrying 10 kgs of ganja in one bag and they have committed an offence under Section 20(b)(ii)(B) of NDPS Act. The judgment dated 15.12.2021 in connection with Special NDPS Case No. 02/2018 is hereby set aside.

31. Both the appellants are acquitted from the charges under Section 20(b)(ii)(B) of the NDPS Act on benefit of doubt and set at liberty forthwith.

32. However, keeping in view the provisions of Section 437-A CrPC/481 BNSS, the appellants Smt. Moni Basumatary and Sri Benjamin Basumatary @ Binjamin Basumatary are directed to furnish personal bond in sum of Rs.30,000/- (Rupees Thirty Thousand) each and assure the bond in the like amount before the learned Trial Court which shall be effective for a period of six months.

33. In terms of the above observations, both the Criminal Appeals stand disposed of.

34. Send back the Trial Court Records along with a copy of this judgment and order.

JUDGE

Comparing Assistant