
(1998) 07 GAU CK 0041
In the Gauhati High Court
Case No : Criminal Appeal No. 361 of 1997

Lal Prasad Karki and Others	Vs	APPELLANT
State of Assam		RESPONDENT

Date of Decision : 28-07-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 293, 313, 540
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2, 20, 3(9), 4(1), 41(1)

Citation : (1998) 3 GLT 4

Hon'ble Judges : V.D. Gyani, Acting C.J.

Bench : Single Bench

Advocate : A.S. Choudhury, R. Majumdar and A.R. Sikdar, for the Appellant; N. Mohammad, Public Prosecutor, for the Respondent

Judgement

V.D. Gyani, Actg. C.J.

1. The accused Appellants stand convicted u/s 20(b)(i) of the NDPS Act and sentenced to undergo rigorous imprisonment for 5 years with fine of Rs. 10,000/- each or in default of payment of fine to suffer one year's RI.
2. Learned Special Judge, Barpeta, charged and tried the accused Appellants for the above offence and by his judgment dated 11.11.97 found them guilty of the charge and sentenced them as aforesaid. Hence this appeal.
3. Prosecution case briefly stated was that on 7th November, 1996 the accused Appellant were on their way to Siliguri from Dimapur by road in a jeep bearing registration No. ASE-6214 and stayed at Prasad hotel at Barpeta Road for the night.
4. It is claimed by the Officer-in-charge of Barpeta Road PS examined as PW.2 that he received reliable information on 8.11.96 around 2.50 a.m. that the accused persons were carrying ganja in a jeep. This information was recorded as G.D. Entry No. 295. It is further claimed by PW.2 that since there was likelihood

of the accused escaping, he searched the accused and the vehicle without making any effort or attempt at obtaining a search warrant as contemplated by Section 41(1) of the NDPS Act, for short "the Act". It was around 2.50 a.m. that the jeep which was parked about 50 to 60 feet away from the hotel was searched by PW.2 in presence of the accused as well as other witnesses. 87 packets and some loose quantity of ganja were found. The accused were arrested for offence punishable u/s 20(b)(i) of the Act.

5. Prosecution examined as many as 6 witnesses, four of them, namely, PWs 1, 3, 4 and 5 are witnesses of seizure, PW.6 is a witness regarding seizure of the weighing scales and instruments and PW.2 is the Officer-in-Charge of Barpeta Road Police Station who conducted the search and effected the seizure. The seized articles were sent for chemical analysis to the State Forensic Laboratory (SFL). The SFL report has also been placed on record.

6. Heard Mr. A.S. Choudhury, learned Counsel appearing for the Appellants and Mr. N. Mohammad, learned PP for the Respondent State.

7. Criticising the approach of the learned trial Judge it was submitted that the impugned judgment is a unique piece of perversity in appreciation of evidence in reasoning as well as application of law. The very approach of the learned trial Judge is contrary to all known canons of criminal jurisprudence. The whole burden of proving their innocence has been shifted on the accused Appellant and all possible assumption and presumptions have been drawn in support of the prosecution.

8. It was urged and stressed that considering the nature of offence and the extent of punishment, which can be imposed the trial Court ought to have insisted strict proof of the prosecution case. Instead of doing so learned Special Judge has made very convenient promise and concession in favour of the prosecution at every possible stage right from the search, arrest, seizure and even the statements of the accused recorded u/s 313 Code of Criminal Procedure

9. Mr. N. Mohammad, learned PP appearing for the Respondent State, on the other hand, maintained that considering the huge quantity of ganja that was recovered from the jeep in question and the admission made by the accused in their statement recorded u/s 313 Code of Criminal Procedure the prosecution has proved beyond any doubt its case, the conviction as recorded by the trial Court is proper and does not want any interference.

10. A few passages from the impugned judgment to illustrate queer approach of the learned trial Judge may now be seen. In paragraph 5 of the impugned judgment the learned Judge has proceeded with certain so called admission made by the accused which is quoted below:

All the 4 accused persons have categorically admitted that they were travelling in a jeep No. ASE-6214 and about their temporary halt at Barpeta Road in the night of 7.11.96. The accused persons have further admitted that they had taken two

rooms at "Prasad Hotel" for their stay and also about their apprehension by police in the night. One of the accused, namely, Arjun Thapa has admitted the fact that the Ganja was recovered from the Jeep in their presence.

11. Noting this admission now as it were, the learned trial Judge appears to be labouring under an utter misconception of law that as if it was for the accused to prove their case instead of approaching the prosecution case from the angle as to what the prosecution has proved by evidence. Curiously enough the learned trial Judge starts with the so called admission made by the accused. This approach itself is not only erroneous but also contrary to the canons of criminal jurisprudence. Paragraph 9 contains yet Anr. observation made by the learned Judge where the articles have been taken for granted as a contraband drug within the meaning of Section 2(iii) of the Act. That what ought to be proved by the prosecution is assumed to have been proved. In this connection, the learned Judge has also referred to Exhibit 6, the FSL report. While it is true that this report is admissible u/s 293 Code of Criminal Procedure but this admissibility by itself does not prove the prosecution case, something more is required. It has been pointed out by the Supreme Court in *State of Andhra Pradesh Vs. Madiga Boosena and Others*,

In our opinion, in the circumstances of this case, the High Court was perfectly justified in holding that the prosecution has not established that the Respondents are guilty of an offence, u/s 4(1)(a) of the Act. It is needless to state that, in this case, unless the prosecution proves the contravention of the provisions of the Act, in question, it cannot succeed in establishing the guilt of the accused. For that purpose, the prosecution will have to establish two things: (i) that the article seized from the accused is "liquor" u/s 3(9) of the Act; and (ii) that the accused "transported" the same.

Before we close the discussion, it is necessary to refer to a recent decision of this Court in *Baidyanath Mishra v. State of Orissa* Cri. App. No. 270 of 1964 D/17.4.1964 (SC). In that case, the question was to whether the Appellants therein were in possession of opium, so as to make them liable for an offence. The Opium Act of 1878 defines the expression "opium". The applicants contended that the article seized from them was not opium, as defined in that Act, and pointed out that the only evidence relied on by the prosecution, to establish that the article recovered from them was opium, was the evidence of the Prohibition staff and that the article has not been subjected to any chemical analysis. This Court rejected that contention in the particular circumstances of the case and stated:

It is true that opium is a substance which once seen and smelt can never be forgotten because opium possesses a characteristic appearance and very strong and characteristic scent. It is possible for people to identify opium without having to subject the product to a chemical analysis. It is only when opium is in a mixture so diluted that its essential characteristics are not easily visible or capable of being apprehended by the senses that a chemical analysis may be

necessary. Two other witnesses who were cultivators and who knew what they were talking about said that it was opium. If the Appellants, who themselves were licensed vendors of opium had the slightest doubt about the correctness of these statements they could have challenged them either by cross-examination or by suggesting to the Court that the substance be analysed to determine whether it was opium or not. These observations will clearly show as to why this Court in past case has expressed the view that there is no infirmity in the prosecution case, simply because there has been no chemical analysis made of the commodity, which according to the prosecution was opium. The facts in the instant case before us are entirely different and the observations, extracted above, do not apply.

12. This initial burden which lies on the prosecution never shifts picking up a sentence from the statement u/s 313 Code of Criminal Procedure and that too an admission of guilt made by the accused. Admission of an incriminating fact pointing to the commission of offence is to be deprecated in no uncertain term. Even in a case of pleading guilty the law expects the Court to proceed with the evidence rather basing the conviction on the basis of pleading guilt. But here is a case where the learned trial Judge starts enumerating the admission made by the accused in respect of search for proving of guilt of the accused as sought to be made out by the prosecution. The learned Judge addresses himself to the statement of the accused and takes some stray sentences from here and there to jump to the conclusion that the accused have admitted that the articles seized were ganja which have been defined under the Act. Again on the point of possession the learned Judge has going by admission made by the accused concluded that the articles were seized from a jeep which was in possession of the accused.

13. The learned Judge has observed that in his view it was not necessary that the prosecution, must establish only physical possession of contraband drug. Actual physical possession may not be established, but conscious physical possession of the contraband article has to be established by the prosecution before an accused can be convicted of the offence charged and this conscious possession is not established even if actual physical possession is established in a given case. For example, a porter on the platform carrying contraband ganja even if found to be in actual physical possession cannot be held liable for such possession if he has been hired for carrying the suitcase from one end to Anr. . The conscious possession continues with the owner of the suitcase although the physical possession lies with the porter. The learned Judge totally missed this point while dealing with the question of physical possession of the contraband articles by the accused Appellants. The reasoning to say the least perilously bordering on perversity.

14. It has come in the evidence of PW. 3 that the jeep in question was parked at a distance of about 50 to 60 feet from the hotel. The learned trial Judge has further noted that the accused persons were standing near the hotel at the time

of recovery. Now this standing near the hotel by itself cannot be an incriminating circumstance. Even a spectator out of curiosity to see what was going on, why the police had come may stand at a safe distance or even closeby.

15. Going through the whole discussion nowhere does the learned trial Judge appears to have addressed himself to the crucial question whether the Appellants were in conscious possession of the contraband articles. That is the initial burden of the prosecution. The seizure witnesses PWs. 4 and 5 who were summoned by the D.S.P. afford corroborative evidence as regards search and recovery from the jeep. According to these witnesses as well the accused Appellants were standing near the vehicle at the time of recovery. What is significant to be noted that as per FSL's report, Exts. 6, 7 sealed packets of ganja containing about 24 g. dried plant were received by the Laboratory. Even the Officer-in-charge of the PS, PW.2 does not in his evidence state that while seizing the articles whether he had sealed the same on the spot or for that matter anywhere else later on. The sealing part has not been deposed to by the star witness let alone other attesting witnesses like PWs. 4 and 5. In this state of evidence it is an extremely suspicious circumstance as to when how and by whom the packets were sealed. If at all these were sealed what was the seal impression, whether the same were sent to the laboratory, whether other was any comparison done by anyone of the seal on the packets, whether the same were found to be intact, whether the sample was prepared on the spot and sealed on the spot so as to avoid any possibility of the same being tampered with. The sealing part has not been adumbrated in the statement of any of the witnesses. All these evidence is totally missing in the instant case.

16. This Court in *Union of India v. Lalit Baruah and Ors.* 1997 (2) GLT 618 has highlighted this aspect of the matter and held:

There is absolutely no evidence to show that under what condition and by whom the seized articles were kept. The Supreme Court in dealing with a similar question in *State of Rajasthan Vs. Daulat Ram*, observed as follows:

It is the admitted case of the prosecution that the samples changed several hands before reaching the public analyst. In other words, the samples remained in the custody of S.I. Addanram, P.S. Udai Mandir, Nathu Singh, Gajraj Singh, Jawan Singh and the Assistant Public Analyst and yet none of these witnesses were examined by the prosecution to prove that while in their custody the seals were not tampered with. The inevitable effect of this omission is that the prosecution failed to rule out the possibility of the samples being changed or tampered with during this period - a fact which had to be proved affirmatively by the prosecution. This is main infirmity which has been relied upon by the High Court in holding that the prosecution has not proved that right from the stage of the seizure of the opium upto the time when the samples were handed over to the public analyst the seals remained intact. The prosecution has not taken the Court into confidence in disclosing as to the reasons why the office of the Superintendent of Police refused to take the samples. Even though the labels

were not in order it was for the prosecution affirmatively to prove that the seals were still intact. It is true that Harak Chand and Jabbar Singh have stated that the seals of the samples were in tact so long as they were in their custody. But then as pointed out above, neither Jawan, Nathu, Gajraj, Aidanram and Assistant Public Analyst were examined hence it cannot be said that the prosecution has proved all the links starting from the seizure of the samples till the same reached the hands of the Public analyst so that the Court could conclude that the seals remained intact throughout. The High Court in view of this serious lacuna was of the opinion that the prosecution has not proved beyond reasonable doubt that the opium seized was the opium which was sent to the public analyst. In fact, the prosecution realised its mistake and at the fag end of the trial an application was made u/s 540 Code of Criminal Procedure to examine Nathu Singh, Gajraj Singh and Jawan Singh. This application was rejected by the learned Magistrate. Even before the High Court the stand taken by the counsel for the State was extremely vacillating and at one time he filed an application for additional evidence and some time later chose to withdraw it. It is obvious that the onus is on the prosecution to prove the entire case at trial and the prosecution could not be allowed to fill up the gap or lacuna left at the trial, at the appellate or revisional stage.

17. Coming to the question of violation of statutory provision held to be mandatory on the part of the investigating agency as propounded by the Supreme Court in *State of Punjab Vs. Balbir Singh*, same view has been expressed by the Supreme Court in *Ali Mustaffa Abdul Rahman Moosa Vs. State of Kerala*, which incidentally deals with the question of illegality in search and seizure and holds the view that if the contraband is seized in illegal manner in absence of proof in full possession of the contravene, an accused cannot be held guilty under the Act. In *Mohinder Kumar Vs. The State, Panaji, Goa*, following the *Balbir Singh*'s case (*supra*) the Supreme Court held that where the police officer accidentally reached the house of accused while on patrolling duty and effected search and seizure of charas from accused without recording the grounds of his belief at any stage of the investigation subsequent to his realising that the accused persons were in possession of charas and did not forward a copy of the grounds to his superior officer, as required by Section 42(2) of the Act and also did not adhere to the provisions of Section 50 of the Act in that he did not inform the person to be searched that if he would like to be taken to a Gazetted Officer or a Magistrate, the mandatory provisions of Sections 42 and 50 of the Act were not complied with. Section 50 has again been held mandatory in *T.R. Rajjaque v. State of Kerala* 1995 Supp. (4) 256 and in the *State of Punjab v. J. Singh* (1996) 1 SCC 288. The precaution required to be exercised by the police or other authorities has been explained by the Supreme Court in *Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat* (1996) 3 SCC 610, wherein the Supreme Court has quoted the miranda of rule with approval in the following words:

7. Having regard to the object for which the provisions of Section 50 have been introduced into the NDPS Act and when the language thereof obliges the officer

concerned to inform the person to be searched of his right to be searched in the presence of a Gazetted Officer or a Magistrate, there is no room for drawing a presumption u/s 114. Illustration(e) of the Evidence Act, 1872. By reason of Section 114 a Court "may presume the existence of any fact which it things likely to have happened, regard being had to be common course of natural events, human conduct and public and private business, in their relation to facts of the particular case". It may presume "(e) that judicial and official acts have been regularly performed". There is no room for such presumption because the possession of illicit articles under the NDPS Act has to be satisfactorily established before the Court. The fact of seizure thereof after a search has. to be proved. When evidence of the search is given all the transpired in is connection must be stated. Very relevant in this behalf is the testimony of the officer conducting the search that he had informed the person to be searched that he was entitled to demand that the search be carried out in the presence of a Gazetted Officer or a Magistrate and that the person had not chosen to so demand. If no evidence to this effect is given the Court must assume that the person to be searched was not informed of the protection the law gave him and must find that the possession of illicit articles under the NDPS Act was not established.

18. In the instant case, even if the prosecution evidence is taken on its face value, yet no safeguard as provided under the NDPS Act can be said to have been complied with. The view taken by the trial Court in face of the evidence, cannot be legitimately faulted with. As has held by the Supreme Court in umpteen of case, a merely taking a different view of the evidence available on record would not offer any justifiable ground for interference with an order of acquittal as indeed in the instant case, there is no possibility of taking a different view, rather there is other material to strengthen the order of acquittal.

19. In view of the foregoing discussions, the mandatory provisions as contained in Sections 42 and 50 of the NDPS Act having not been followed, the conviction and sentence as recorded by the trial Court cannot be sustained in law, it is liable to be quashed and accordingly quashed. The accused Appellant be set at liberty forthwith.