

(2023) 01 GAU CK 0018
In the Gauhati High Court
Case No : Criminal Appeal No. 41 Of 2021

Malber Khan And Anr

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 10-01-2023

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 20(b), 20(b)(ii)(C),
29, 35, 42, 52, 52A, 54, 55, 57
Code Of Criminal Procedure, 1973 — Section 313

Citation : (2023) 01 GAU CK 0018

Hon'ble Judges : Suman Shyam, J; Parthivjyoti Saikia, J

Bench : Division Bench

Advocate : S. K. Nargis, S. Jahan

Final Decision : Allowed

Judgement

Suman Shyam, J

1. Heard Ms. S.K. Nargis, learned counsel appearing for the appellants. Also heard Ms. S. Jahan, learned APP, Assam, appearing for the State.

2. Assailing the judgement dated 11/12/2017 passed by the learned Additional Sessions Judge No.1, Kamrup (M), Guwahati, in connection with NDPS Case No. 07/2016 convicting both the appellants under section 20(b)(ii) (C) read with section 29 of the NDPS Act, 1985 and sentencing each of them to undergo rigorous imprisonment for 12 years and also to pay fine of Rs. 1,00,000/- each, the present appeal has been preferred.

3. The prosecution case, in a nut shell, is that on 29/11/2015, both the appellants were caught red-handed at around 5-45 a.m. by the GRPF personnel carrying 3 (three) bags containing 'Ganja' (Cannabis). The RPF personnel on duty at the Kamakhya Railway Station had apprehended the two accused persons along with three bags containing four packets of 'Ganja' like substance and handed them over to the Police. Nk 165 Noor Mohammad Ali informed the matter

to the Police, based on which Kamakhya GRP O.P. GDE No. 589 dated 29/11/2015 was made. On 29/11/2015, Sub-Inspector (SI) of Police Sri Mahesh Baishya had lodged an ejahar before the Officer In-Charge. Kamakhya GRP O.P reporting the incident, based on which Guwahati GRPS Case No. 204/2015 was registered under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (here-in-after referred to as the "NDPS Act"). The matter was then taken up for investigation by ASI Sri Dinesh Medhi. During the course of investigation, the statements of the witnesses were recorded and the samples drawn from the seized packets were sent for FSL examination. On conclusion of investigation, charge sheet was submitted against both the appellants/accused persons. After hearing the parties and on consideration of the materials available on record, the learned trial Court had framed charge under sections 20(b) (ii) (C)/29 of the NDPS Act, 1985 against both the accused persons. Since the accused persons /appellants had pleaded not guilty and claimed to be tried, the matter went up for trial.

4. During the course of trial, the prosecution side had examined five witnesses, all of whom are official witnesses. Thereafter, the statements of the accused persons were recorded under section 313 Cr.P.C. wherein, they had denied their involvement in the incident. On conclusion of trial, the learned Sessions Judge had delivered the impugned judgement dated 11/12/2017 convicting both the appellants and sentencing them, as aforesaid.

5. By referring to the impugned judgement, Ms. Nargis, learned counsel for the appellants, has argued that the prosecution has not only failed to prove conscious possession of the contraband but even the seizure of the materials is not in accordance with law. Ms. Nargis has further argued that there is no independent witness examined by the prosecution and there is also nothing on record to indicate as to how the seized articles have been kept during the course of investigation. Contending that the requirements of Sections 42, 52(A) 55 and 57 of the NDPS Act 1985 have been completely ignored by the Investigating Officer while carrying out investigation in this case the learned counsel submits that failure on the part of the I.O. to adhere to the provisions of the statute had resulted in serious prejudice being caused to her clients. Ms. Nargis has, therefore, prayed for setting aside the conviction of the appellants and for setting them at liberty by contending that the prosecution has failed to prove the charge brought against the appellants beyond reasonable doubt. In support of her above arguments, the learned counsel for the appellants has relied upon the following decisions of the Supreme Court:-

(i) Gurbax Singh Vs. State of Haryana reported in (2001) 3 SCC 28.

(ii) Noor Aga Vs. State of Punjab and another reported in (2008) 16 SCC 417.

(iii) Ashok alias Dangra Jaiswal Vs. State of Madhya Pradesh reported in (2011) 5 SCC 123.

(iv) Kamaljit Singh alias Pappu Vs. State of Punjab reported in (2010) 14 SCC 9.

(v) State of Rajasthan Vs. Tara Singh reported in (2011) 11 SCC 559.

(vi) Gangadhar alias Gangaram Vs. State of Madhya Pradesh reported in (2020) 9 SCC 202.

(vii) Ramesh Vs. The State of Himachal Pradesh [Crl.A. 218/2017]

6. Ms. S. Jahan, learned APP, Assam, on the other hand, has argued that it is not the requirement of law that charge framed under the NDPS Act, 1985 cannot be proved without the testimony of independent witness. In this case, submits Ms. Jahan, the official witnesses have adduced evidence narrating the sequence of events beginning from apprehension of the accused persons by the public in the BG express train, in the wee hours of 29/11/2015 till seizure of contraband and the arrest of the accused persons. Ms. Jahan has further argued that even the FSL report shows that the sample seized by the IO has tested positive for 'Canabis'. The accused persons have failed to offer reasonable explanation as regards the contraband in their possession. The learned APP submits that it is a case involving commercial quantity. Therefore, having regard to the evidence available on record, the learned trial Court has rightly convicted both the appellants under sections 20(b)(ii)(C)/29 of NDPS Act.

7. We have considered the submissions advanced by learned counsel for both the sides and have also gone through the materials available on record.

8. As noted above, five witnesses examined by the prosecution are official witnesses. The informant in this case is the Sub-Inspector of police on duty at the Kamakhya GRP O.P. It has been mentioned in the ejahar that on 29/11/2015 Noor Mohammad Ali had informed him over phone that at around 5-45 a.m. the train escort duty party of the RPF HC Narayan Das and his staff were on duty in the down BG express and they had handed over to him 3 (three) black bags containing the packets of 'ganja' like substance wrapped with polythene along with two persons who were carrying those substance in the train. According to the ejahar, three bags along with the suspected passengers were handed over by the RPF personal to Noor Mohammad Ali at the main entrance of platform no. 4 of the Kamakhya Station. On receipt of the information, he went to the place of occurrence and found 3 (three) black bags containing four packets having substances suspected to be 'Ganja'. One packet was found wrapped with black polythene whereas, the other three packets were wrapped in green polythene. Thereafter, the packets were weighed in presence of witnesses and the total weight of the packets were found to be 35 Kgs. He then seized each of those packets by preparing separate seizure list and taking samples from those packets for FSL examination after obtaining the signature of the witnesses. On interrogating the two suspects, who had been handed over to him by the RPF, he could know that their names were (1) Md. Malbar Khan and (2) Sri Ratan Ghosh. It was also mentioned in the ejahar that both the apprehended persons had confessed before him that they had carried the 'ganja' like substance from Dimapur for the purpose of selling them to 'ganja addicts'. Both the appellants

were then taken to the Out Post along with the three bags and handed over to the In-charge. The informant was examined as Prosecution Witness No 1.

9. In his deposition before the Court, PW-1 has stated that on 29/11/2015, he was on duty at the Kamakhya Out Post as Sub-Inspector of Police. On that day the in-charge of the Out Post, viz. S.I. Dinesh Medhi had received an information from Nk. Noor Mohammad Ali that some ganja had been found in possession of some persons/passengers coming in BG express from Dimapur. After receiving the said information, Inspector Dinesh Medhi asked him to go to Kamakhya Station. Accordingly, GD entry No. 589 dated 29/11/2015 was made by him and then he went to Kamakhya Railway Station at platform no. 4. This witness has exhibited the GD entry No. 589 dated 29/11/2015 as Ext. 1. He has also deposed that on reaching the platform no.4 of Kamakhya Railway Station, he could find Nk. Noor Mohammad Ali and Havildar (RPF) Narayan Das near the platform no. 4 and they had handed over the two accused persons, viz. Malbar Khan and Ratan Ghosh to him. Havildar Narayan Das told him that while he was on escort duty in the BG express, he had found two accused persons getting down from the train with the bags in their hand and on suspicion, both the accused persons were apprehended. After opening the bags, it was found that the same were containing 'ganja'. PW-1 has further deposed that after taking custody of the two accused persons, he had interrogated them and at that time, the accused persons had confessed that bags belonged to them. He had opened the bags and found that all the bags were containing 'ganja' in four packets. One bag was found containing two packets and other two bags were found containing one packet each. One packet was found being wrapped with green colour polythene and other three packets were found wrapped with black polythene. After that he had informed the matter to the Officer-in-Charge, GRPS, Guwahati through Sri Pradip Talukdar who had authorized him to take necessary step as per provisions of the NDPS Act. Thereafter, he had weighed the 'ganja' by taking a manual weighing balance/scale from a nearby scrap dealer, viz. Guddu Basfor. Ext. 3 is the seizure list by means of which the weighing balance/scale was seized. After weighing the entire quantity of ganja found in four packets from the possession of the accused persons in three bags, it was found to be weighing 35 Kgs, in total. Ext. 4 is the seizure list by means of which he had seized the 'ganja' along with the three bags. This witness has further stated that all the seized 'ganja' were deposited by him in the GRPS Malkhana vide MR 71/2015. Material Ext. 1, 2 and 3 are the three bags containing the packets of 'ganja' and Material Ext. 4 is the duplicate sample of 'ganja' which had been drawn by him.

10. During his cross examination, PW-1 had replied that the bags were handed over to him by GRP office staff Nayak Noor Mohammad Ali and RPF Havildar Narayan Das at about 4-45 a.m. As per Noor Mohammad Ali and Narayan Das, the bags were found inside the train and then no person was there in the train. Suspecting the bags to be containing 'ganja' the same were opened by Narayan Das. He did not remember the exact time when he was authorized by the Officer-in-Charge, GRPS, Guwahati. The seized 'ganja' were weighed four times as there

were four packets. The weight used to measure the 35 kgs of 'ganja' was 6 Kgs. The witness has further stated that one sample was drawn by him and each sample drawn was weighing 24 grams. The samples were weighed by Nayak Noor Mohammad Ali but he did not know where Ali had weighed the samples. He did not see the balance where the samples of 24 grams were weighed. PW-1 has admitted that he drew sample from one packet taken out from the bag marked as Material Ext-3 but he did not take any signature of the accused. PW-1 has also admitted that he also did not put his signature on the sample nor has he taken the signature of the concerned Officer-in-Charge. He had handed over the seized articles to the Officer-in-Charge, GRPS, Guwahati.

11. Nk Noor Mohammad Ali was examined as PW-3. This witness has deposed that on 28/11/2015, he was posted at the Kamakhya Police Out Post. On that day, he was on duty at night from 10 p.m. While he was performing his night duty at the Kamakhya Station, at about 4-30 a.m., the down BG express was standing at platform no. 4 of Kamakhya Raiwlay Station. At that time, RPF party had called him over phone saying that two persons with 'ganja' were apprehended by them. Accordingly, he went to platform no. 4 and found the accused persons caught by the RPF personnel along with bags. Thereafter, he had informed the matter to his in-charge at the Out Post. In the meantime, one RPF Inspector had arrived at the spot. The in-charge had deputed S.I. Baishya (PW-1) to look into the matter, who came there and took the accused persons along with the packets of 'ganja' to the Police Station.

12. During his cross examination, PW-3 has stated that on the date of the incident, the RPF personnel had handed over both the accused persons to him along with the three bags. He is not aware as to where from, the accused persons were apprehended by the RPF. The RPF Inspector had opened the bags in the Railway Platform and then he saw 'ganja' in the bags. He did not go to the 'thana' along with the RPF officials and the accused persons. This witness has also stated that he has not seen the seized articles in the Court.

13. PW-4 Sri Narayan Das, a RPF personnel, was also a part of the team on escort duty on the day of the incident. He was examined as PW-4. This witness has stated that on 28/11/2015, he was in the train escort party and was in BG express train coming from Dimapur to Kamakhya Railway Station. When the BG train reached Kamakhya Station, then about 12 passengers had caught the accused persons carrying three bags and called him as in-charge of the escort party. Accordingly, he had rushed to the spot along with the staff and found that the accused persons had been held by the public. He opened the three bags carried by the accused persons containing 'ganja' and thereafter, took the bags along with the accused persons and informed the GRPF. When the GRPF officials came, he handed over the accused persons along with the three bags. The GRPF officials had seized the 'ganja'. This witness has categorically deposed that the accused persons were found by the public at Kamakhya Railway Station. The GRP officials measured the weight of the ganja, which was found to be 35 Kgs. The

ganja was weighed in a manual balance. The PW-4 has proved Ext-4 seizure list by identifying his signature therein.

14. In his cross examination, PW-4 has stated that initially the public had apprehended the accused persons along with 3 bags at the Guwahati Station. His duty was to go to the Kamakhya Station. When he went there, he was not accompanied by any gazette officers. He handed over the accused persons along with the bags to the constable of GRPF. This witness has further clarified that he was not aware if the weight of the ganja was taken in presence of any Gazetted officer or not. He has not seen the seized 'ganja' and bags in the Court.

15. Sri Dinesh Medhi is the IO who had carried out the investigation in this case. He was examined as PW-5. This witness has stated that on 29/11/2015, when he was posted at the Kamakhya GRPS, on that day, the Officer-in-Charge Pradip Talukdar had entrusted him with the task of carrying out investigation in this case. During investigation, he had examined witnesses and the accused persons. PW-5 has stated that the accused persons had confessed before him that they had brought the contraband from Dimapur for the purpose of selling them. He sent contraband samples for FSL examination and also received FSL report which gave positive test for cannabis. On completion of investigation, he had informed the higher authorities and finally submitted charge sheet. Ext. 9 is the charge-sheet which carries his signature.

16. During his cross examination, PW-5 has stated that he had drawn up the facsimile of the sample. He could not, however, say as to how the sample was weighed by Mahesh Baishya (PW-1). He had received the sample packets from Mahesh Baishya (PW-1) and sent the same to the FSL without taking the weight of the sample again.

17. Sri Dhrubajyoti Hazarika was working as the Deputy Director in the Drugs and Narcotics Division, Directorate of Forensic Science, Assam on 01/12/2015 when the sample of the seized material was sent to the FSL for examination. He was examined as PW-2. This witness has stated that on 01/12/2015 he had received a parcel consisting of 1 (one) exhibit, enclosed in a sealed envelope. The facsimile of the seal was found to be "KYQ:GRP". The sealed envelope marked as "A" was having a closed polythene packet containing 24 grams of dried plant materials. On careful examination of the sample by United Drug Testing Laboratory, it was found that the sample gave positive test for 'cannabis'. Ext. 7 is the report containing his signature. His report was forwarded by the Director In-charge.

18. From a careful analysis of the evidence available on record, we find that two accused persons were apprehended by the GPPF personnel at the Kamakhya Station in the morning of 29/11/2015. However, it is not clear from their evidence as to under what circumstances and by whom the two accused persons were actually apprehended along with the three bags. In the ejahar nothing has been mentioned indicating as to who had initially detained the accused persons

and at which place. PW-1 i.e. the informant, has deposed that the PW-4 had told him that he had found the accused persons when they were trying to get down from the train with the bags in their hand. However, during his cross-examination PW-1 has stated that the bags were found inside the train when there was no person available inside. PW-4, on the other hand, has stated that the accused persons were apprehended by 12 passengers along with the three bags. But the statement of none of the 12 passengers have been recorded by the I.O. nor has any one been called as witness during the trial. PW-3 was the person to whom the RPF persons had handed over the accused persons along with the bags and he has clarified in his cross-examination that he was not aware as to from where the accused persons had been apprehended. Therefore, there is no clear evidence to indicate as to the circumstances under which the accused persons were allegedly apprehended with the bags in their hand. On the contrary, there are material contradictions in the testimonies of the prosecution witnesses as to the circumstances under which the accused persons were initially detained with the bags.

19. As noted above, the appellants/accused persons had been convicted under section 20(b)(ii) (C) of the Act of 1985. One of the essential ingredients of section 20(b) is that conscious possession of the contraband must be established. As per section 20(b)(ii) (C), the quantity involved must be commercial quantities. The schedule appended to the Act of 1985 provides that in case of 'canabis', commercial quantity would mean 20 Kg and above. Therefore, in order to sustain conviction of the accused persons for an offence committed under section 20(b)(ii) (C) of the NDPS Act, it would be incumbent upon to prosecution to prove that quatity in excess of 20 kg of 'ganja' was recovered from the possession of the accused persons. However, we find that the prosecution has failed to even prove the same. We say for the following reason.

20. As per the evidence of PW-1, Material Ext-1 is the bag containing one packet of 'ganja'; Material Ext.-2 is the bag containing two packets of 'ganja' and Material Ext-3 is the bag containing used packets of 'ganja'. PW-1 has categorically stated that the samples collected by him measuring 24 grams was drawn from Material Ext-3. There is no doubt or dispute about the fact that only one envelope containing sample of 24 grams was sent to the FSL and the FSL report available is also pertaining to that one sample only. From the above, it is evident that for reasons not discernible on the face of the record, the IO had not sent the samples from the other two bags for FSL examination. What would be significant to note herein that as per the evidence of PWs 1 and 4, the total weight of the packets was 35 Kgs. According to seizure list Ext-4, the three bags containing 4(four) packets of 'ganja' like substance were weighing (1) 7 Kgs, (2) 10 Kgs, (3) 10 Kgs and (4) 8 Kgs, measuring 39 Kgs in total. PW-4 is a seizure witness but he has deposed that packets were weighing 35 Kgs in total and not 39 Kgs.

21. We have also noticed that as per the evidence available on record, the seized

packets were measured by means of a manual scale with the help of weight measuring 6 Kgs. We, however, fail to understand as to how, the IO could have measured 4 (four) packets of contraband, in a manual balance measuring 35 Kgs in total, with the help of a weigh measuring 6 Kgs. What would also be significant to note herein that although the manual balance had been seized by the IO, yet, the same was not been produced before the Court. As a matter of fact, it appears from the evidence of PWs 3 and 4 that even the seized 'ganja' and the bags were not produced before the Court during trial. The prosecution has also not examined the person called Guddu Basfor, the scrap dealer, from whom the manual weigh balance was taken to measure the seized contraband.

22. Section 42 of the Act of 1985 deals with power of entry, search, seizure and arrest without warrant or authorization. Section 52 of the Act of 1985, lays down the procedure for disposal of persons arrested and articles seized. As per section 55 of the Act of 1985, police is required to take charge of the articles seized or delivered and keep in safe custody pending the order of the Magistrate. Section 57 provides that whenever any person makes any arrest or seizure under this Act, he shall within 48 hours next after such arrest or seizure make a full report of all the particulars of such arrest or seizure to his immediate official superior. On a careful reading of the materials on record, we do not find anything on record to show that the requirements of the aforementioned provisions of the NDPS Act had been complied in this case. PW-1 has stated that the seized articles were deposited by him in the GRPS Malkhana. However, the materials available on record are insufficient for this Court to draw a conclusion that the seized articles were kept in proper custody during the investigation.

23. Law is well settled that even in a case coming within the ambit of the NDPS Act, the prosecution would be duty bound to prove the charge beyond reasonable doubt. In the case of Noor Aga (supra) the Hon'ble Supreme Court has observed that the initial burden to prove the charge lies upon the prosecution and only when it stand satisfied that the legal burden under section 54 of the Act shift. With a view to bring within its purview the requirement of section 54 of the Act, the element of possession of the contraband has to be established so as to shift the burden on the accused. Similar view has been expressed in the case of Gangadhar @ Gangaram (supra) wherein it has been observed that the presumption against the accused of culpability under sections 35 and 54 of the Act to explain possession satisfactorily are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond reasonable doubt.

24. In the present case, as noted above, we find that there is no evidence on record which is indicative of the circumstances under which the accused persons were detained by the RPF authorities along with the bags. Not to speak of conscious possession of the contraband the prosecution has even failed to prove that the contraband were seized from the possession of the appellants/ accused persons.

25. According to the prosecution, the accused persons were travelling from

Dimapur to Kamakhya in BG express train as passengers. However, there is no journey tickets seized by the IO nor is there any other evidence to prove the said fact.

26. It is evident from the seizure list Ext-4 that none of the packets were containing more than 10 Kgs of ganja like substance and the sample of 24 grams in this case was evidently taken from one of the bags i.e. Material Ext-3. There is no material to indicate that samples collected from the other packets have also tested positive for cannabis. Therefore, even if the FSL report is taken on its face value, even then, it would be insufficient for the Court to presume that the seizure of the contraband was of commercial quantity i.e. in excess of 20kgs.

27. Law is no doubt settled that the provisions of sections 52 and 57 are directory in nature and therefore, violation of these provisions would not ipso-facto vitiate the trial or conviction. However, in the case of Gurbax Singh (Supra), relied upon by Ms. Nargis, the Supreme Court has held that the IO cannot totally ignore these provisions and such failure would have a bearing on appreciation of evidence regarding arrest of the accused and seizure of the articles.

28. We are no doubt in agreement with Ms. S. Jahan, learned APP, Assam, that independent witness is not a sine-a-qua-non for proving charge brought against the accused persons under the provisions of the NDPS Act, 1985. However, evidence adduced by the official witness must not only inspire the confidence of the Court but should also establish each link in the chain of circumstances to prove the charge brought against the accused beyond reasonable doubt. Once the prosecution succeeds in leading evidence to prima facie establish conscious possession of contraband, it is only then that the burden under sections 35 and 54 of the Act of 1985 would shift upon the accused persons.

29. In the present case, we find that there were serious lapses on the part of the IO while conducting investigation in this case and the learned trial Court has also made certain observations to that effect. Considering the facts and circumstances of the case, we are of the view that benefit of such lapses in investigation, giving rise to a serious doubt as regards the question of possession of the contraband by the accused must go in their favour. There is considerable doubt in our mind as to the real circumstances under which the two appellants/accused persons were actually detained with the three bags. Having regard to the facts and circumstances of the case, we are of the view that in all probability, the two accused persons/appellants were transporting contraband from Dimapur to Kamakhya by train and at time they were detained either by the public or the RPF personal. However, for the reasons indicated here-in-above, we are of the opinion that the prosecution has failed to prove conscious possession of the contraband of commercial quantity by the appellants/accused persons. Since possession of the contraband by the appellants could not be established by the prosecution hence, the allegation of abetment and criminal conspiracy would also have no legs to stand. Consequently, we hold that the charges framed under

section 20(b) (ii) (C) read with section 29 of the NDPS Act, 1985 brought against the appellants/ accused persons have not been established beyond reasonable doubt. Both the appellants deserve to be acquitted by giving them the benefit of doubt.

30. For the reasons stated herein above the impugned judgement dated 11/12/2017 is held to be unsustainable in the eye of law and the same is accordingly set aside. The appellants are hereby acquitted on benefit of doubt.

31. The appeal stands allowed.

32. We are informed that both the appellants are in custody since the date of the judgement i.e. since 11/12/2017. As such, we direct that the appellants, viz. Md. Malbar Khan and Sri. Ratan Ghosh be forthwith released from custody unless their custodial detention is found to be necessary in connection with any other case.

Send back the LCR.