

(2019) 02 GAU CK 0065
In the Gauhati High Court
Case No : Criminal Appeal No. 59 Of 2014

Mohammad Kadar Ali @ Kader Ali

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 20-02-2019

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 2(iii)(b), 8(c), 20(b)(ii)(C), 41(2), 42(1)(2), 52A, 52A(2), 53, 53(1), 53(2), 54, 55, 67
Code Of Criminal Procedure, 1973 — Section 313
Evidence Act, 1872 — Section 25

Citation : (2019) 02 GAU CK 0065

Hon'ble Judges : Rumi Kumari Phukan, J

Bench : Single Bench

Advocate : HRA Choudhury, BK Mahajan, PK Das, A. Choudhury, A. Ahmed, R. Ali, SC Keyal

Final Decision : Partly Allowed

Judgement

1. Heard Mr. HRA Choudhury, learned senior counsel appearing for and on behalf of the appellant as well as Mr. S.C. Keyal, learned counsel representing the Narcotics Control Bureau (NCB).

2. This appeal is directed against the judgment and order dated 26.09.2013, passed by the learned Addl. Sessions Judge (FTC) No.3, Kamrup at Guwahati, in Sessions Special Case No.52 (K)/2012, under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short the NDPS Act), sentencing the accused/appellant to undergo rigorous imprisonment for 12 (twelve) years and also to pay a fine of Rs. 1,00,000/- (Rupees One Lakh). In default of payment of the said fine, the accused shall undergo further rigorous imprisonment for two years.

3. The case of the complainant Union of Indian in brief is that, on specific intelligence input which was reduced into writing and intimated to the immediate superior officer Mohd. Nawab, Superintendent and after obtaining necessary

permission from the superior, on 19.08.2011, at about 7 P.M., a group of officers and staff led by the Superintendent of the Guwahati Zonal Unit of NCB reached in front of Godown-4, Western Carriers, Lokhra Chariali, Jail Road, Guwahati-34 and found a standing truck bearing Regn. No.WB-25 B-3950. On asking about the owner of the truck, a person named Md. Kadar Ali (the accused) came forward and told that the said truck belongs to him. Thereafter the officers of the NCB disclosed their identity and showed him the authority of search given to them by their superior and asked the accused to extend cooperation in their proposed search. Before beginning search they called two independent witnesses namely, Sri Shivram Prasad Mishra and Shri Ramesh Singh from amongst the onlookers and thereafter they began their search in the truck bearing Regn. No.WB-25 B-3950. On search they found one gunny bag concealed below the long seat behind the driver's seat. The gunny bag was taken out and opened in presence of the accused and the two independent witnesses, wherein they found two packages containing flowering tops of cannabis plant believed to be Ganja which were wrapped in newspapers and further wrapped in transparent polythene and tied with plastic string. The gunny bag weighed 42.6 kg (gross) which was ascertained by way of a weighing machine carried by the team. Some part of the flowering plant so recovered was tested on the spot with the Narcotic Drug Detection Kit and gave positive result for Ganja.

4. One sample of 25 gms. in duplicate was drawn from the homogenous mixture from the two packets and sealed with the NCB Seal No.1, duly labeled and signed by the accused, the two independent witnesses and the seizing officer in accordance with the relevant Rules. This entire exercise was done at the place of recovery in presence of the accused, two independent witnesses and the seizing officer. The gunny bag was also similarly packed and sealed with the NCB Seal No.1 and put signatures by the afore-named persons including the accused. One dual SIM and dual battery of mobile phone of accused were also seized and kept in sealed envelope. The truck was also seized along with relevant papers and a proper search-cum-seizure list was prepared in front of the Godown-4, Western Carriers, Lokhra Chariali, Jail Road, Guwahati-34. An inventory of the seized articles/goods was also prepared on the spot in accordance with law.

5. Thereafter, the complainant served the accused a notice under Section 67 of the NDPS Act, asking him to appear at the Basistha Police Station, Guwahati at 10 P.M., on the same day i.e. 19.08.2011 for recording his statement. It is the case of the complainant that as the accused did not know the location of the said Police Station, he accompanied the NCB officials. The Intelligence Officer (who is also the seizing officer) recorded the statement of the accused at the said Police Station, which according to the complainant is voluntary. In his statement, the accused stated to have confessed that he knowingly brought the seized Ganja from one Babu Bhai of Coochbehar, West Bengal for delivering the same to one of his (Babu Bhai's) associates in Guwahati and that he had concealed the same below the long seat of the cabin of the truck behind the driver's seat. The accused also stated in his statement that he used to do such activities often to

earn money and that in the last one year prior to his arrest, he had done so many times and also that on 01.08.2011, he had delivered 30 Kg. of Ganja to Babu Bhai who was introduced by one Ratan Das. The said statement was written by the accused himself in his mother tongue Bengali. The accused was thereafter formally arrested by the NCB.

6. The seized samples of the Ganja were sent to the Forensic Science Laboratory (FSL) by special messenger for chemical examination, which have given positive test for Cannabis (Ganja). Enquiries about Babu Bhai and the owners of the truck Shri Ashok Ghosh were made but Babu Bhai could not be traced out due to insufficient information about him and no-evidence of involvement of the owner of the truck was found by the NCB officials. The above chain of event led to the accused being booked under Section 20(b)(ii)(C) read with Section 8(c) of the NDPS Act and filed the offence report against the accused after completion of the investigation and since then the accused in the judicial custody.

7. The learned trial Court, upon finding prima facie materials against the accused, framed charge under Section 20(b)(ii)(C) of the NDPS Act and the charge was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.

8. To substantiate the charge, prosecution examined as many as 8 witnesses which were duly cross examined by the defence side. After evidence of the complainant's side was over, the accused was examined under Section 313 of the CrPC and the incriminating materials which were brought on record by way of evidence brought to the notice of the accused for enabling him to give explanation with regard to the same. The accused denied all the allegations and stated that statement u/s 67 NDPS Act was made on assault made by NCB officials. The accused was given the opportunity to adduce evidence in his defence but he did not avail the same.

9. The learned trial Court formulated the following points for determination:

- i) Whether the article seized from the truck bearing Regn. No.WB-25 B-3950 was cannabis (ganja) and whether it was of commercial quantity?
- ii) Whether the accused Mohammad Kadar Ali was found in conscious possession of or otherwise trafficking in 42.6 kilogram of Cannabis (Ganja) on 19.08.2011, so as to constitute an offence under Section 20(b)(ii)(C) of the Act?
- iii) Whether the NCB officials extracted the confessional statement from the accused by use of force or coercion or the said confessional statement is voluntary and whether on account of the said statement having been recorded in the police station, the same is inadmissible?
- iv) Whether the search and seizures made in the case was in accordance with law and if not, whether the said violation has resulted in vitiation of the proceeding entitling the accused to an acquittal?

v) What has to be the quantum of punishment to be awarded to the accused, if at all?

10. On the basis of evidence on record, the learned trial Court held the accused guilty and convicted him as aforesaid, hence the appeal.

11. Heard the submission of learned counsel for the appellant and the learned counsel for the respondent.

12. Highlighting the evidence on record, it is contended by the learned counsel for the appellant that the case of the prosecution suffers from various infirmities, due to which it cannot be held that the charge has been proved against the accused beyond all reasonable doubt. The basic challenges against the prosecution case is on following counts:

- * The prosecution although stated to have made search and seizure of drugs from the possession of the accused but the same is not proved in proper manner as the weighing machine was not seized and exhibited in the present case. Further as against the claim that the accused/appellant is the driver of the offending vehicle from which the article was seized, the prosecution has not produced the driving licence although it is stated to have seized from him. Moreover, there is no evidence that the accused was seen driving the vehicle and he was only found at the back side door of the truck after unloading, so it cannot be conclusively proved that the accused was the driver of the said vehicle and the drugs were recovered from his conscious possession.

- * That seized Ganja were not kept in the custody of concerned police station pending the order of the Magistrate and inventory was not prepared as per provision, which is violative of Section 52A(2) and Section 55 of the NDPS Act. (referred to the decision 2010 (3) GLT 361 S.H Chanam Ranjit Meitei Vs. Union of India) The independent witnesses did not state anything about the preparation of sample which raised doubt about the process of taking sample.

- * As per report of the FSL, seized article is 25 gm. dry plant was examined but it does not come within the purview of definition of Ganja as provided u/s 2(III)(b) of the NDPS Act, according to which only the flowering or fruiting tops of cannabis plant comes within the definition of Ganja.

- * The search and seizure is stated to be violative of provision of Section 42(1)(2) of the NDPS Act as the search was made after sunset at 7 pm without exhibiting any grounds by prosecution.

- * The learned trial Court has erred in law by relying upon the statement of the accused recorded u/s 67 of the Act, as the accused in his statement u/s 313 CrPC has retracted such statement/confession. As, such statement was recorded at the police station and same is hit by Section 25 of the Evidence Act and neither supported by the independent witnesses (referred to the decision 2018 (4) GLT 128 Dipak Kumar Singh and Anr. Vs. State of Assam)

* Another serious infirmity that has been raised in this case is that the complainant himself investigated the major portion of the case by taking seizure and sample etc so the entire proceeding has been vitiated (reliance has been placed in AIR 2018 SC 3853 Mohan Lal Vs. State of Punjab).

* Referring to the decision 2018 (4) GLT 448 Swapan Mazumdar Vs. The State of Assam it has been submitted that due to the serious infirmities mentioned above there is a serious doubt regarding recovery of article from the accused/appellant, whereas strict compliance of procedure is not adhered to by the prosecution and the accused/appellant deserved benefit for all the lapse of prosecution case and liable to be acquitted.

13. Refuting the contention raised by the appellant side, the learned counsel for the NCB in vehemence has submitted that there is no any infirmity in the prosecution case as has been contended by the appellant side. Search and seizure in the present case is undisputed and only the plea of the appellant is that he was not the driver of the aforesaid vehicle and was simply found back side of the vehicle. It is submitted that there is no legal requirement of seizure of weighing machine and production of the same before the Court. So far as the seizure of other articles including the driving licence, the same is duly reflected in the Ext-5 (page-75 of paper book) which was shown to the Court and bears the signature of the concern officer, the learned Magistrate, the witnesses as well as the accused. The seizure list contained all details of the matter and as those matters were shown to the Court and the Court has signed the same as "seen", and the same can be held as sufficient compliance of Section 52A of NDPS Act. The accused/appellant being aware about such seizure has not challenged the same at any point of time but has denied the seizure of driving licence in course of his statement u/s 313 of CrPC hold no good.

14. Further, contention that seized articles were not kept in proper custody is also stated to be reflected in Ext-13 (page -102 of the paper book) which is the godown receipt issued by the Superintendent, NCB and it was also shown to the Court immediately after the seizure. Thus, it has been contended that there is sufficient compliance of provision of Section 52 A (2) and Section 55 of the NDPS Act in view of preparation of long detail of such search and seizure vide Ext-5 (page-79 to 85 of the paper book), bearing the signature of all persons including the accused and the witnesses. Further, there being no challenge to the findings of the FSL expert (PW-7) who has certified that the sample was sent to him in connection with the present case and there being no any temperament of the seal and sign etc. of the article sent for examination, there cannot be any challenge that the same was not Ganja, as opined by the PW-7. No any cross-examination was done of PW-7 to challenge the findings.

15. So far as regards the contention about non-compliance of Section 41 (2) of the NDPS Act and the retracted confession of the accused, it is submitted by the learned counsel for the respondent that the documentary evidence on record coupled with oral evidence is sufficiently proved that the source information was

reduced to writing vide Ext-3 and the CW-1 Raj Kumar shaw was duly authorized by the Superintendent of NCB u/s 41 (2) NDPS to conduct search and seizure in connection with the case dated 19.08.2011 vide Ext.-1. Similarly, referring to the Ext-2, it has been contended that in the present case the informant and I/O is not the same person so as to vitiate the investigation in terms of the decision rendered in Mohan Lal (supra).

16. As regards the retracted confession of the accused, same stated to have no consequence in view of long gap between the period when it was retracted after making the same. It has been urged before this Court that such a statement u/s 67 of the Act was recorded after furnishing him notice so as to affording him an opportunity to make his statement or not and only thereafter the accused has given statement u/s 67 of the Act voluntarily in his own language (Bengali) on 19.08.2011 and he has not denied such statement during the course of trial and only on the day of recording statement u/s 313 of CrPC as on 06.12.2012.

17. Further it contends that there is no reason to discard and disbelieve the testimony of two independent witnesses (PW-4 & PW-5) who have fully supported the search and seizure which has also proved the presence of the accused person along with the vehicle as a driver, although they have not stated all about the taking of sample from the seized articles. Thus, according to the learned Standing Counsel Mr. Keyal, irrespective of statement u/s 67 of the Act the charges have been proved as against the accused person beyond all reasonable doubt and there is no reason to interfere into the order of the learned trial Court.

18. Having regard to the above rival contention of the parties and the decision referred into, this Court has carefully gone through the evidence on record both oral and documentary.

19. From the evidence of CW-1 R.K Shaw it would go to show that on the day of occurrence i.e. on 19.08.2011 he received the information only in the evening at 6 pm about the truck with the drugs and the said information was reduced to writing vide Ext-3 by him and immediately informed to the Superintendent, NCB (CW-8), who in turn vide Ext-1 authorized him to proceed and to make necessary search and seizure. Thereafter the CW-1 along with CW-3 Shantanu Aich, CW-6 Smti Tulika Morang (comprising a team) leaded by CW-8 Md. Nabab (and some others not examined as witness) proceed to the place as per source information and all of them given similar statement corroborating each other (for the sake of brevity, all details not discussed) that they trace the vehicle WB-25/B-3950 as per source information which was parked at Godown No. 4 Western Carrier Lokhra, Chariali near jail Road. After tracing the vehicle, they enquired about the driver of the vehicle and then the present accused person Kader Ali come forward indentified himself to be the driver of the truck. Thereafter, they called for two independent witnesses and in presence of the accused and the witnesses, they made a search in the entire vehicle in the light of the torch and they recovered a Gunny bag kept concealed behind the driver's seat. Upon asking the accused, he

admitted that the gunny bag belongs to him. The said bag was brought outside of the vehicle and upon weighing with their weighing machine, which was carried in their official vehicle, 42.6 kg Ganja was found inside the gunny bag. The said articles were kept into separate packets, wrapped in newspaper and plastic polythene. All witnesses have stated about the taking sample from the packages after making the same homogenous. Even they also tested the same in their Drug Detection Kit, which gave positive test for cannabis. However, they took a sample in duplicate of 25 gm each and same was sealed properly with signature of the accused and the witnesses.

20. All those witnesses have also stated that certain other articles were also recovered from the possession of accused like mobile phone, driving licence etc and the same was seized through Ext-5 which contains the signature of the accused as well as the witnesses. The statement of accused person was also recorded u/s 67 of the NDPS Act vide Ext-4 after giving him due notice. The sample of the seized articles were sent for examination and upon examination the CW-7 Dr. G.N Deka has opined that he received sample from NCB containing dry plant materials and on examination, the sample gave positive test for cannabis Ganja vide Ext-11 is his report. Section 2 (IV) provides that cannabis plant means plant of genus cannabis and if we read the same in conjunction with Sec. 2(III) (b) it will indicate cannabis plant also treated as Ganja and in the present case the CW-7 found the cannabis plant and same has been held as Ganja. The findings of the expert (CW-7) was not challenged.

21. In their lengthy cross examination, these witnesses denying the suggestion of the defence side, have re-affirmed that present accused/appellant himself identified to be the driver of the said vehicle and the accused himself has written the statement u/s 67 NDPS Act vide Ext-4 in Bengali. In further cross-examination, it has been stated that the truck was found in the parking area before the godown and when the driver of other vehicle parked near the truck was asked as to who is the driver of the alleged truck then it was told that accused Kader Ali is the driver of the said truck and there are as many as 10 trucks parked in the area. It is stated that till the sample of the article was sent to FSL, the same was kept in the custody of their Superintendent.

22. The CW-2 Shukanta Halder stated that he was entrusted with the investigation of the case through Ext-2 dated 19.08.2011 after recovery of 42.6 kg Ganja by the officers of Guwhati Zonal Unit. He examined all the documents by which the article was seized and other related document including the statement of accused u/s 67 of the NDPS Act. He also examined the owner of the vehicle Ashok Ghosh after serving him a notice and he disclosed that Kader Ali was the driver of the said vehicle vide Ext-9 is the statement of Ashok Ghosh and the vehicle was given on zimma to the owner. After receipt of the FSL Report, he filed the complaint vide Ext-12 against the accused. He has denied the suggestion that he has falsely implicated the accused only on the statement of the owner of the vehicle.

23. The two independent witnesses CW-4 Ram Prasad Mishra, who is the godown in-charge of Western Carrier where the articles were loaded and unloaded and the CW-5 Ramesh Singh, who is the employee under the CW-4 have supported the evidence of the above officials concerns that on 19.08.2011 the NCB officials reached in their godown after the said vehicle unloaded the articles and moved for the parking area by showing their identity card they checked the vehicle in presence of the driver/the accused and both of them. It is stated that it was the accused/appellant himself come forward to say that he is the driver of the vehicle. Both the witnesses have stated that upon checking the vehicle by NCB officials they found a gunny bag kept in the cabin near the driver's seat and while the gunny bag was opened two packets were found inside and on examination by the weighting machine 42.6 kg Ganja was found in the gunny bag. Both the witnesses have signed the Ext-5 is the seizure list and Ext-6 is the inventory. Defence failed to exploit their evidence to dispel the presence of the accused at the place of occurrence as driver of the said vehicle despite their effort in their cross- examination. Their evidence remained unshaken regarding the recovery of the contrabands from the vehicle driven by the accused/appellant. They have also stated that the articles were weight by NCB with their own weighing machine.

24. So far as the evidence of CW-1, CW-3, CW-6 and CW-8 are concerned, they are all Intelligence Officers of NCB and it is the CW-1 who received the secret information at 6 pm about the truck containing drugs and he reduced the said information into writing and also informed his higher officials Superintendent (PW-8) and he immediately authorized PW-1 to proceed with the matter. Even the said PW-8 accompanied the team towards recovery of the articles and was present at the time of search and seizure, which has been discussed above. Their oral evidence is supported by documentary evidence regarding the authorization, in view of the same there is sufficient compliance of the Section 42(1)(2) of the NDPS Act. The information itself was received in the evening and the officer being empowered conducted the search immediately thereafter so there cannot be any illegality in making the search and seizure at night (after sunset) as has been contended by the appellant side.

25. A contention has been raised about violation of Section 52A(2) and Section 55 of the Act that the seized articles were not kept in the custody of Officer-in-Charge of the concerned police station. In this context, the evidence on record reflects that the seized articles were kept under the custody of Superintendent, NCB immediately after seizure and he has issued the certificate Ext-13 in this regard and admittedly it was not in the custody of Officer-in-Charge of concerned police station. In this context, the provision of Section 52A(2) of the Act would have a bearing on the issue which provides where any drugs have been seized and forwarded to the Officer-in-Charge of the nearest police station or the officer empowered u/s 53 of the Act , the officer referred, shall prepare and inventory of drugs with all details and thereafter will produce before the concerned Magistrate for certifying the correctness. The above provision itself indicates that after

seizure of drugs the same can be forwarded to the O/C police station concerned or to officer empowered u/s 53 of the Act. In the present case, although, it is not specifically brought on record that the Superintendent, NCB is empowered officer or not but the drugs were produced before the said authority and they have issued the certificate regarding such depositing the seized articles and has also narrated all details of seizure in the relevant documents (Exhibited herein) and same also produced and shown to the Magistrate. Section 53(1) and (2) of the Act provides that the Central Govt. as well as the State Govt. with due consultation may issue notification empowering any officer of the department of Central Exercise, Narcotics, Customs, Revenue Intelligence or any class of such officers with the powers of an Officer-in-Charge of police station to investigate the offences under the Act. That being the position producing the seized articles before the officers of the NCB cannot be held to be illegal that can vitiate the trial.

26. The CW-2 by producing the relevant order of the higher officials has submitted that he was entrusted with the investigation of the case after the CW-1 performed the initial investigation. That being the position, it cannot be stated that informant/complainant and the investigating officer are the same person and hence the investigation in the present case is not vitiated as has been held in Mohan Lal (*supra*).

27. Similarly, there is no substance in the contention that the accused was not the driver of the vehicle nor involved with the offence as the CW-4 and CW-5, who were independent witnesses have sufficiently corroborated the version of the official witnesses regarding the presence of the accused at the place of occurrence who introduced himself as a driver of the vehicle and also admitted about the ownership of the bag that was found inside the vehicle. The seizure list Ext-5 indicates that the driving licence of the present accused petitioner was seized from his possession and in such eventuality mere denial on the part of the accused/appellant is inconsequential, on the face of the positive evidence on record. The evidence of CW-4 & CW-5 can't be discarded as in their godown premises said vehicle of accused was parked and there appears no any occasion on their part to falsely implicate the accused.

28. The provision incorporated u/s 54 of the Act created a statutory presumption about the commission of offence on the part of the accused which is as below:

Section 54- Presumption from possession of illicit articles- in trial under this Act it may presume unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of-

- (a) any Narcotic Drugs or Psychotropic Substance or Controlled Substance,
- (b) any opium, cannabis plant or coca plant growing on any land which he has cultivated
- (c)
- (d),

For the possession of which he fails to account satisfactorily.

This Clause extend the presumption of guilt in a certain circumstances in respect of controlled substance also.

29. In the given case obviously the accused/appellant has failed to rebut the statutory presumption u/s 54 of the NDPS Act.

30. Lastly, as regards the challenge to the statement made by the accused/appellant u/s 67 of the Act before the NCB officers that he made no such confessional statement before the officers, it is to be noted that the act itself has provide for recording of statement of accused and whether it partakes the character of confession is still debated as has been held in Tofan Singh Vs. State of Tamilnadu (2013) 12 SCALE 552 and the same is subjudice before a larger bench.

31. In the present case the accused appellant has given his statement u/s 67 of the Act written by himself in Bengali language with a declaration that the same has been given voluntarily where he admitted about the carrying of drugs in the vehicle. In the circumstances, even same is not treated as confession but the same stand corroborated by the other evidence on record. Leaving apart the statement of the accused u/s 67 of the Act the prosecution has been able to prove beyond all reasonable doubt that the alleged contraband which is commercial quantity was recovered from the conscious possession of the accused appellant who is the driver of the vehicle wherein the article was carried. The accused/appellant failed to demolish the evidence led by prosecution and also failed to rebut the legal presumption.

32. The offence related to drugs menace is a serious offence having bad impact in the society and even endanger the safety and health hazard of the young generation for which the law has provide stringent punishment to the offender involved in such offence. The evidence led by prosecution does not suffer from any serious infirmities to disbelieve the same. A large amount of commercial quantity of drugs was recovered from the accused/appellant and he failed to give account for carrying the same which has renders in liable for the offence.

33. In view of the findings and discussions above, it can be held that the learned trial Court has rightly convicted the accused/appellant under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985. Accordingly, while maintaining the conviction, the sentence is reduced to R/I for 10 (ten) years and to fine of Rs. 1,00,000 (one lacs), in default, RI for 2(two) months, considering the young age of the accused/appellant (25 years) as well as the fact that he is facing the trial behind the bar since the day of his arrest on 19.08.2011.

34. Appeal is partly allowed with modification, as regards the sentence indicated above. Return the LCR along with the copy of judgment.