

(2018) 05 GAU CK 0179
In the Gauhati High Court
Case No : Crl.A. 154 of 2017

Shri Ashik Yadav

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 25-05-2018

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 20(b)(ii)(C), 29, 36A, 42, 43, 50, 52, 67
Code Of Criminal Procedure, 1973 — Section 207

Citation : (2018) 05 GAU CK 0179

Hon'ble Judges : RUMI KUMARI PHUKAN, J

Bench : Single Bench

Advocate : Alhajj Inam Uddin

Final Decision : Dismissed

Judgement

1. Heard Mr. A. I. Uddin, learned counsel for appellant and Mr. B. Sarma, learned SC, Central Excise.

2. The genesis of the prosecution case is that acting on specific information received by Sri Ridip Hazarika (Inspector Custom Division), a team of

Officers of Anti-Smuggling Unit, Custom Division, Guwahati, on 18.06.2014, led by Sri D. C. Bania, the Superintendent, Dr. S. Roy, Superintendent of

Anti-Smuggling Unit, and Sri. Ridip Hazarika (Inspector), S. S. Basumatary (Inspector), Ramesh Singh (Inspector), M. I. Singh (Inspector), P. K.

Deka (Inspector) and other two sepoy's of Custom Division at the wee hour on 19.06.2014, seized 36 package of Ganja concealed in a secret chamber

of a Truck bearing registration no. UP-70-DT-3635, following the procedure as per Narcotic Drugs and Psychotropic Substances (NDPS) Act. The

appellant being the driver of the Truck and one another Pinto Kumar, the Assistant of the Truck was apprehended. Accordingly, a case being

Customs Case No. 03/CL/NARC/AS/GAU/2014-15 was registered under Sections 20 (b) (ii) (C) of Narcotic Drugs and Psychotropic Substances

(NDPS) Act, 1985. The said Ganja were seized from the body of the truck which was driven by the appellant at the relevant point of time, after

observing necessary formalities. The sample of the alleged seized Ganja was sent to the FSL for examination.

3. The seized article with inventory was forwarded to the Court of Chief Judicial Magistrate, Kamrup (Metro) on 20.06.2014. The case was further

investigated by the authority and after completion of investigation of the case, submitted final report under Sections 20 (b) (ii) (C), 36A of Narcotic

Drugs and Psychotropic Substances (NDPS) Act, 1985, against the present appellant and another Pintoo Kumar on 15.12.2014. Both the accused

stood the trial.

4. The necessary copies under Section 207 Cr.P.C. were furnished to the accused persons. The learned Trial Court framed charge under Sections

20(b) (ii) (C) of the NDPS Act read with Section 29 of the NDPS Act against both accused persons to which they pleaded not guilty. During the

course of trial, in order to bring home the charge, the prosecution examined 10 witnesses including the official witnesses. Defence adduced no

evidence in its defence and taken the plea of total denial.

5. The learned Trial Court at the conclusion of trial convicted and sentenced the present appellant under Section 20 (b) (ii) (C) of the NDPS Act and

sentenced him to undergo R.I. for 10 (ten) years and a fine of Rs. 1 lakhs i/d R.I. for 3 months by impugned judgment and order dated 10.03.2017,

however, the learned Trial Court accused Pinto Kumar from the charges.

6. Being highly aggrieved by and dissatisfied with the impugned judgment and order, dated 10.03.2017, passed by the learned Trial Court, the instant

appeal has been preferred on the following grounds, that, â?

(i) The learned Trial Court failed to shift the evidence on record in its proper perspective while convicting and sentencing the appellant.

(ii) There is no any evidence to show that the alleged seized Ganja was either produced, manufactured, possessed, sold, purchased, transported,

imported or used by the appellant. The prosecution case is also silent about the intention of the accused. The appellant was driving the truck from

which secret chamber, the Ganja was seized. That very fact clearly established

that the seizure was not made from the direct possession of the appellant. The owner of the vehicle also had not put to trial by the prosecution. The prosecution case is totally silent as to why the owner of the vehicle was not put to trial.

(iii) None of the prosecution witnesses stated that the alleged Ganja were recovered from the active possession of the appellant inasmuch as the independent witness P.W. 9 and P.W. 10 did not support the prosecution case. The other witnesses are official witnesses and thus they are partisan in nature their evidence in the backdrop of the present case is not admissible so far criminal jurisprudence is concerned.

(iv) Prosecution witnesses are interested and exhortation in nature which is weak type of evidence in law and under such circumstances the learned Court should have given weight to the independent witnesses but it failed to do so.

(v) Independent witness that was examined by the prosecution did not support its case, directly pointing the guilt of the appellant, the learned Court below ought to have acquitted the appellant but it failed to exercise its jurisdiction vested in it by law.

(vi) Mandatory requirements as provided under Section 42/43/50 and 52 of the NDPS Act has not been complied with by the authority while arresting the appellant and making search of his body and property therefore the very acts on the parts of the prosecution caused prejudices to the appellant but the learned Trial Court ignored the vital aspect of the matter in convicting and sentencing the appellant.

(vii) The appellant is an illiterate person somehow can put his signature. He does not have any knowledge of English language. The investigating agency put the appellant various questions of English and also recorded his so-called statement in English according to their own aspiration to make out a case against the appellant thereby the Miranda right of the appellant has been grossly violated by compelling him to incriminate himself but the learned Trial Court ignored the vital aspect of the matter.

7. I have heard the argument advanced by the learned counsel for the petitioner which is basically around the ground of appeal as mentioned above. It

has been contended that the case is bad for violation of the mandatory provision under Sections 42/43/50 and 52 of the NDPS Act and for non-

examination of the independent witness. Whereas, according to the learned counsel for the respondent that the prosecution has been able to prove the case beyond all the reasonable doubt and there is no such violation of the provision as has been contended. It has also been contended that in the given background of the case, non-examination of independent witness is quite natural and there is nothing to disbelieve and discard the evidence of official witnesses.

8. Evidence on record - On 18.06.2014, Sri Ridip Hazarik (PW-4) the then Inspector Anti-Smuggling Unit of Custom Division, Guwahati received a specific information at about 1900 hours that the huge quantity of ganza will be loaded in a secret chamber specially built in a truck bearing No. UP-

70-DT-3635 near Udalguri area and accordingly, he reduce the information into writing and forwarded the same to the Superintendent of Customs, Sri

D. C. Bania (PW-8). After getting the same information Sri D. C. Bania formed a team comprising himself and Superintendent, S. Roy (PW-5) and

other five Inspectors, namely, Sri S. S. Basumatary (PW-6), P. K. Deka (PW-1), K. I. Singh (PW-3), Ridip Hazarika (PW-4), and along with two

Sepoys, namely, M. Mondol and Sri T. Kamraju and all of them proceeded to the Baihata Chariali and on reaching there, kept surveillance of all

closed body container truck coming from Tezpur side.

9. It may be noted here that the aforesaid team of officials, namely, P. K. Deka, Inspector, Anti-Smuggling Unit, Customs Division, as PW-1; K. R.

Singh, Inspector, Custom Department, as PW-3; Ridip Hazarika, Superintendent of Customs, as PW-4; S. Roy, Superintendent of Customs, Anti-

Smuggling Unit, as PW-5; S. S. Basumatary, Inspector, Customs and Central Excise, as PW-6 and D. C. Bania, Superintendent of Customs, Anti-

Smuggling Unit, as PW-8, have given exactly similar evidence so the same can be discussed together. Ext. 18 is the information reduced to writing by

said Ridip Hazarika which he forward to the Superintendent Anti Smuggling Unit, Custom Division (PW-8). In the said information, dated 18.06.2014,

PW-4 has intimated to the higher authority that he has received a specific information that huge quantity of ganza will be loaded in the secret chamber

especially made in the front portion of the container of a six wheeler full body container truck bearing registration No. UP-70BT-3635 and the said

truck will move out of the region after loading of the ganza in the early hours of

19.06.2014 and the same will be loaded somewhere in Udalguri area and expected to cross the Baihata Charilai in between 3 to 4 a.m. on 19.06.2014. The Superintendent of Excise, D. C. Bania received the same at 19.30 pm on 18.06.2014 and said Ridip Hazarika (PW-4) was authorized to take immediate action by forming a team of officers.

10. As has been mentioned above all the officers who formed the team has appeared before the Court and all of them have given similar evidence supporting each other on all the material aspect. All the above witnesses after forming of the team immediately rushed to the place of information at about 10.30 p.m., Baihata Charili and kept surveillance on all the closed body container truck coming from Tezpur side. Before doing the naka, the officer approached several persons and told them about the information and requested them to be witness of the whole operation but all of them refused and left the area without disclosing their name and address. Thereafter, the officers continued keeping surveillance of the area and in course of such surveillance at around 04.30 hours on 19.06.2014, a six wheeler closed body container truck found coming from Tezpur side which matches with the information received regarding the registration number of the vehicle. Accordingly, the officers signaled the truck to stop and after the truck being stopped, the officers introducing themselves enquired to the driver whether there is anything so that in the container and its destination.

At the time of such intersection, there were only two occupants inside the truck, i.e., the driver who introduced himself as Ashik Yadav and the assistant Pintoo Kumar. The accused persons replied that the vehicle was empty. Then the said driver (accused appellant herein) was asked to bring the truck to the Custom Officer located at Christian Basti, Guwahati 5. Accordingly, the said vehicle was brought to the Custom Office escorted by the witnesses. At the Custom Office on being asked, accused appellant showed the above witnesses as to where the secret chamber was located.

Then only on close observation, it was found that the chamber is closed by a vent which is hold together by four nuts. The driver (appellant herein) open the thin covering by removing the four nuts in presence of witnesses with the help of wrench which was in his cabin. On removing the covering, all the witnesses saw that there was a secret chamber and there were several packed rectangular SDPE and gunny bag packages concealed inside

the secret chamber. One of such packet was removed in presence of the driver and the assistant and in presence of the witnesses and on examination

of the package, it was found containing ganja. Thereafter, all the 36 packets containing ganja was removed. The length of secret chamber was found

to be 8â?? 2â?? breadth and height 8â??.

11. It is the evidence on record that packages were weighted in presence of driver and assistant and the witnesses which is found to be 1065 kg of

ganja valued about Rs. 67,26,500/-. The above drugs of 36 packets were seized from the accused persons and 24 grams of samples were taken from

each packet in presence of accused persons and the given witness. After taking the samples, goods were deposited in godown on 19.06.2014, and one

of the samples in sealed conditions sent to the Deputy Director FSL, Assam on 20.06.2014 for examination along with forwarding letter. The accused

also made their statement vide Ext. 19 and Ext. 20. It has also been mentioned by the witnesses that Ext. 6 inventory was prepared at the time of

seizure of contraband.

12. The PW-9, Sri Dibyojyoti Rabha is a correspondent of Assamese Daily Newspaper and PW-10, Sri Pallav Kumar Bora, who is a journalist by

profession, working as a staff reporter of Ananda Bazar Patrika, happens to arrive at the Custom Office on getting the information about the

interception of truck with drugs. The PW-9 in his evidence has stated that on 19.06.2014, at about 5.30 a.m. on receipt of the information he rushed to

the Customs Office and found that one truck was brought to the office and he found the truck empty. The Custom Officer, D. C. Bania/ PW-8,

informed that ganja were carried in a secret chamber of the truck and at that time, PW-10 was also present there. Thereafter, in their presence the

secret chamber of the truck was opened which was made of steel plate and some packets 36 in numbers wrapped with polythene were found in the

secret chamber of the truck, when one of the packets was opened it was found ganja like substance. The Custom Officers made weight of the

recovered ganja and found total 1056.50 kg. It is stated by both the witnesses that the Custom Officer collected samples out of the recovered

suspected ganja of each packet. They signed Ext. 1, the panchanama, Ext. 5, weightment sheet and Ext. 6, inventory of the goods. Both the witnesses

have denied the suggestion of the defence side that they have given false

evidence as tutored by the official witnesses.

13. Dr. Dhribajyoti Hazarika, the Deputy Director Drugs and Narcotic Division, Directorate of Forensic Science as PW-1 testified the facts that he

received 36 numbers of samples in connection with the aforementioned case containing 24 grams dry plant material each and the examination gave

positive test for cannabis vide Ext. 2 is the report given by him. He has also stated that Exhibits were found with proper seal and sign and there is no

such tamperment in the articles. His evidence could not be rebutted by the defence side.

14. On careful evidence on record, it is found that all the official witnesses happened to be present at the place of occurrence and their evidence is

consistant and corroborating each other on every material aspect. Virtually there is no such contradiction of any witnesses. On the other hand, except

taking the plea of denial, defence could not brought anything to discredit the case of the prosecution. Certain suggestion was given that at the time of

preparation of inventory with all details like colour of the bag, specific mark etc. not mentioned, which is admitted by the witnesses but for not

mentioning all such pretty matter will not invalidate the inventory prepared by the witnesses.

15. As per the evidence on record, apart from the drugs, the offended vehicle, the truck bearing No. UP-70-DT-3635 was also seized along with three

numbers of mobile phone. That apart, personal search of both the accused persons were conducted u/s 50 of the NDPS Act after giving them the

opportunity to give their option for conducting personal search in presence of the gazetted officers or a Magistrate and recovered some amount of

money only. Both of them opted for the search in presence of gazetted officer and accordingly body search was made in presence of Superintendent,

Dr. S. Roy who put his signature in Ext. 8 and Ext. 9, option letter, u/s 50 of the NDPS Act. So there is a total compliance of provision under Section

50 of the NDPS Act.

16. In the given case, the witnesses examined by the prosecution are all high ranking officers of the Custom Department and they have intercepted

the vehicle driven by the present accused appellant on the specific information. The vehicle was intercepted in the wee hours at 4.30 a.m. on the

public road for which non having of independent witness at that point of time is

natural and the inventory list was produced before the concerned

Magistrate for verification of the same and the Magistrate also noted about the same. Now as regard the statement of the accused appellant made u/s

67 of NDPS Act vide Ext. 19, it reflects that although it was written in English but there was an endorsement/certificate by the officer who recorded

the statement, in the last column that the statement was read over and explained to the accused and he signed the same after understanding all about.

In such eventuality the plea of the appellant that he did not understand what was written in the said statement cannot prevail. In his statement the

accused appellant admitted about carrying such drugs in the secret chamber of the truck as sent by the owner of the vehicle and he was paid Rs.

50,000/- for carrying such drugs and it was the second trip to Assam.

17. As regard the non-compliance of Section 52 NDPS Act, it is to be noted that the PW-3 made an application before the learned CJM for

certification of correctness of inventory, permit him to take the photograph of samples in presence of Magistrate etc. and the learned Magistrate

allowed the same. The learned Trial Court after going through all the evidence and documents on record, found and hold that there is total compliance

of Section 52 of the Act, which is also found to be proper.

18. As is evident from the long and detail examination of evidence by the learned Trial Court, that the learned Court has appreciated all the oral and

documentary evidence in proper perspective of law and facts. The challenge that the seized article was not recovered from the conscious possession

of accused is also not proper. The evidence of official witnesses is also supported by the independent witnesses PW-9 and PW-10 that the seized

drugs were recovered from the secret chamber of the truck driven by the accused appellant on their presence. The appellant nowhere disputed about

the driving of the vehicle and about the related documents seized from him. The evidence on record does not suffer from any sort of ambiguity or any

sort of omission or contradiction so as to discredit the credibility of the witnesses. Only because the witnesses were belongs to the Custom

Department, cannot be a ground to discard the evidence, there being no occasion on their part for false implication of the accused.

19. As regards the challenge about non-compliance of Section 42, it has been contended by the learned counsel for the appellant that the PW-4 has

not mentioned the time in Ext. 18 when the matter of information was received and reduced to writing and other witnesses also could not verify as to the time of receipt of such information, so the same piece of evidence/Ext. 18 is doubtful.

20. Let us take up the question of non-compliance of Section 42 of the Act. It is admittedly a case where Customs Officials on receipt of prior information proceeded to intercept the vehicle in question and they were successful in intercepting the vehicle and arresting the accused appellant.

Now, all the witnesses, i.e., the Customs Officials has unanimously mentioned that the specific information has been received by Ridip Hazarika (PW-

4) in the evening of 18.06.2014 about the carrying of ganja loaded in a secret chamber of a truck bearing No. UP-70-DT-3635. All the witnesses by

forming a team rushed to the place of information at about 10.30 p.m. and apprehended the said vehicle along with the drugs as per information in the

morning at 04.30 a.m. of 19.06.2014.

The said witness Ridip Hazarika (PW-4) in his evidence has specifically mentioned that at about 1900 hours, the said information was received. So he

is the best person to say about the receipt of the information and he says so. Similarly, the PW-5 supported the version of the PW-4 that he received

the information at 1900 hours and PW-4 immediately apprised the matter to the PW-8 being the superior officer about the receipt of the information,

vide Ext. 18. Further, bare perusal of Ext. 18 reveals that same was written on 18.06.2014 itself by PW-4 and it was received by the PW-8 at 19.30

p.m. of the same day and he made an endorsement in the Ext. 18 authorizing PW-4 to take immediate action by forming a team of officers.

Therefore, there was substantial compliance of the provision of Section 42 of the Act inasmuch as the superior officer was informed by the PW-4

and PW-5 was personally present at the place of occurrence being the member of the team.

21. In the given case, there is no dispute that the vehicle in question was intercepted by Customs Officials at Biswanath Chariali, National Highway in

the early morning about 4.30 a.m. and the same was not seized on the spot. The appellant brought the vehicle to the Customs Office Complex situated

at Nilamoni Phukan Path, Christian Basti, Guwahati at 5.30 a.m. and the witnesses PW-9 and PW-10 (related to press) also arrived in their office at

6.30 a.m. and in their presence the search and seizure of the vehicle was made which reflect on the Ext. 1 panchnama, Ext. 5 weightment sheet and

Ext. 6 inventory deed. In the given circumstances, while the vehicle was intercepted on the national highway at early morning hours, there appears no

any illegality in bringing the vehicle to the Customs Office and making seizure thereafter in presence of independent witnesses. The conduct of the

officials do not offend the provision of Section 43 of the Act as has been contended by the appellant. For better appreciation of the provision of

Section 43 of the Act is quoted below-

43. Power of seizure and arrest in public place- Any officer of any of the departments mentioned in Section 42 may-

(a) Seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to

believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to

confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence

punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for

seizure or freezing or forfeiture under Chapter V A of this Act;

(b) Detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any

narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and

any other person in his company.

Explanation - "For the purposes of this Section, the expression "public place" includes any public conveyance, hotel, shop, or other place

intended for use by, or accessible to, the public."

The above provision nowhere mentioned that the search and seizure is to be made at the place of occurrence but it is an enabling provision to the

officer concerned to make search and seizure at the public place also. The contention raised by the appellant is answered accordingly.

22. So far as the violation of Section 50 of the Act, it may be mentioned here that the case is not based upon the body search of the accused appellant

but relates to recovery from the vehicle driven by the accused. The compliance of

mandatory provision under Section 50 of the Act is necessary only when a search of a person is going to take place. In the given case, although the body search of the appellant was also made, but from the evidence on record, it is discernible that the accused appellant was duly apprised about his right to be searched in presence of Magistrate or public servant by serving notice, vide Ext. 8 and Ext. 9, under Section 50 of the NDPS Act and then the accused appellants express their desire in written that they would like to be searched in presence of gazetted officer vide Ext. 8 (1) is the signature of the appellant duly proved. After such declaration made by the appellant, his body search was made by the PW-3 in presence of gazetted officer/PW-5. There is sufficient compliance of the Section 50 of the Act.

23. As regard the non-compliance of the Section 52 of the Act, it is to be noted that the provision has mandated that soon after arrest of a person or seizure of articles, the accused should be informed about the ground of arrest and the article seized should be forwarded without unnecessary delay to the officer-in-charge to the nearest police station or the officer empowered. From the documents of the Ext. 6, inventory of the goods, it reflects that the same was produced before Inspector (disposal), Custom Department, immediately after seizure and same was also shown to the Magistrate concerned on the next very day and the aforesaid officer and the Magistrate has certified the correctness of the same. Therefore, there was no total violation of the Section 52 of the Act and cannot be treated as a serious violation of the provision that may affect the veracity of prosecution case.

Since the provision of Section 52 is directory in nature, therefore, non-compliance of the same would not ipso facto vitiate the trial.

In view of the aforesaid findings and discussions, it can be arrived that there is no any error in the impugned judgment and order and it call for no interference. The learned Trial Court has also imposed the statutory punishment under the law. Resultantly, the appeal stand dismissed. Return the LCR.