

GAHC010301402019



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

Case No. : CrI.A./66/2020

THOUNAOJAM PUNIMA SINGH
S/O- LT. TH. BINO SINGH
R/O- VILLAGE NARANKONJIN MAMANG LEIKAI,
P.O. LILONG, P.S.- KAWA, DISTRICT- IMPHAL WEST, MANIPUR.

VERSUS

UNION OF INDIA AND ANR
REPRESENTED BY THE CUSTOMS HEADQUARTER PREVENTIVE UNIT,
NARCOTIC CELL, GUWAHATI.

2:MANINDRA SARANIA
S/O- LATE U.C. SARANIA

SUPERINTENDENT HEADQUARTER CUSTOMS PREVENTIVE UNIT
NARCOTICS CELL
GUWAHATI

Advocate for the Appellant : MR. M BISWAS

Advocate for the Respondent : SC, CENTRAL EXCISE CUSTOMS, MR. B SARMA

BEFORE
HONOURABLE MR. JUSTICE MIR ALFAZ ALI

JUDGMENT & ORDER (CAV)

Date : 20-01-2021

This appeal is directed against the judgment and order dated 15.11.2018 passed by the Special Judge, Kamrup in NDPS Case No. 52/2016, whereby the appellant was convicted

u/s 17 (C) of the NDPS Act and sentenced to rigorous imprisonment for 10 years and fine of Rs. 4 lakh, in default to rigorous imprisonment for six months.

2. As per prosecution case, Superintendent, Headquarter, Customs Preventive Unit, Narcotic Cell received a secret information on 02-08-2016 at 8 am, that a person from Manipur would come to Gauhati Medical College Hospital with opium in order to sell the same to his customers. The said informant was reduced to writing and a team of customs officials was constituted to pursue the said information. Accordingly, the team of customs officials led by the PW-3 along with two independent witnesses were keeping surveillance in front of the Gauhati Medical College Hospital. At 2 pm, the customs official located the appellant, who was carrying a black bag. On being asked by them, the appellant introduced himself and on search of the bag, they found six packets containing suspected drugs inside the bag. On enquiry the appellant told that the said bag contained opium. Thereafter, the customs officials apprehended the appellant and took him to the Divisional Office of the Customs at Christian Basti along with the contraband. The independent witness also accompanied them to the customs office, where the contraband was seized and sample was taken in presence of the independent witnesses. The sample was sent for chemical examination and the chemical examination report gave positive test for opium. Upon receipt of the FSL report, a final complaint was lodged, on the basis of which, the learned Special Judge took cognizance against the accused appellant.

3. Learned Special Judge framed charge against the appellant u/s 17 (C) of the NDPS Act, which was abjured by the accused/appellant. Six witnesses were examined by the prosecution in order to bring home the charge. Upon completion of the prosecution evidence the accused persons was examined u/s 313 CrPC, wherein the appellant took the plea of innocence. Upon appreciation of evidence, learned Special Judge convicted the appellant u/s 17 (C) of the NDPS Act and awarded sentence as indicated above.

4. Aggrieved, the appellant preferred the instant appeal.

5. Learned counsel for the appellant Mr. M. Biswas and the learned Standing Counsel for the State respondents were heard.

6. Learned counsel for the appellant, Mr. M. Biswas submitted with vehemence that the

trial stood vitiated for violation of the provision of Section 52-A of the NDPS Act in respect seizure and taking of sample of the contraband, inasmuch as, the sample was neither taken at the place of recovery nor under supervision of the Magistrate. Mr. Biswas further contended that no independent witnesses was present at the time of taking sample. Though prosecution has projected two independent witnesses in the seizure list, one of the witness has not been examined. One of the so-called independent witnesses examined by the prosecution as PW-1, was in fact, a pocket witness of the investigating agency, and as such, no reliance can be placed on the evidence of such witness (PW-1), submits Mr. Biswas. It was also submitted, that though the learned trial court has relied upon the confessional statement of the appellant recorded u/s 67 of the NDPS Act, such statement could not have been considered in view of the judgment of the Apex Court rendered in Tofan Singh Vs. State of Tamil Nadu (Crl. Appeal No. 152/2013). Further contention of the appellant was that the identity of the seized article was also not proved beyond doubt, inasmuch as, the malkana register was not proved in the court. In support of his contention, Mr. Biswas placed reliance on the following decisions :

1. Joginder Singh Vs. Union of India, 2018 (2) GLT 402.
2. State of Gujarat Vs. Ismail Vs. Haji Patel and Anr. (2003) 12 SCC 291
3. Krichand Vs. State of Himachal Pradesh (2018) 1 SCC 222.
4. S.H. Lalthawama Vs. State of Mizoram, 2019 (3) GLT 337.
5. Goraknath Prasad Vs. State of Bihar, (2008) 2 SCC 305.
6. Union of India Vs. Mohanlal, (2016) 3 SCC 379.
7. Gangadhal @ Gangaram Vs. State of Madhya Pradesh, (Criminal Appeal No. 504 of 2020 decided on 5.8.20.)

7. Per contra, learned counsel for the respondent would submit that examination of independent witness or presence of independent witness during the search and seizure is not an indispensable requirement, nor the prosecution case can be thrown away only for the reason of absence of any independent witness at the time of search and seizure. In support of his submission, learned counsel placed reliance on the following decisions : -

- (i) Gyan Chand and Ors. Vs. State of Haryana, (2013) 14 SCC 420.
- (ii) Appalbhai Vs. State of Gujarat, (1988) Suppl. SCC 241.

- (iii) Baldev Singh Vs. State of Haryana, (2015) 17 SCC 54.
- (iv) State of Himachal Pradesh Vs. Pradip Kumar and Ors. (2018) 13 SCC 808.
- (v) Ajmer Singh Vs. State of Haryana, (2010) 3SCC 746.

8. I have considered the submission made by learned counsel for both the sides and also perused the evidence and materials brought on record.

9. PW-5 stated in his evidence that he was a member of the team headed by Inspector, Narcotic Cell, Guwahati. According to him, at about 11 am, they proceeded towards the GMCH and remained waiting in search of the person as per the secret information. He further stated that two witnesses were requested at the place of recovery to remain present for witnessing the search and seizure. At about 2 pm, they spotted the appellant, who was found carrying a bag of brown colour. During search of the bag, they found six packets of suspected contraband drugs in the bag. As the place was crowded, the accused as well as the contraband were taken to the office of the Customs Divisions along with the witnesses, where the bag was opened and sample was drawn from each packets. He further stated that after taking the samples, the entire contraband was seized vide Ext. -16, seizure list. During cross-examination, this witness stated that at the time of search and seizure, two persons were called, who were found near the place of recovery. He also stated during cross-examination, that the independent witnesses, who witnessed the search and seizure were also present at the time of arrest of the accused.

10. PW-6, the investigating officer deposed that he was also a member of the team of custom official and supported the version of PW5, who conducted the search and seizure and took sample.

11. PW-1, Dhiren Singh, who claimed to have witnessed the search and seizure, deposed that on 02-08-2016, while he was chewing pan in a pan shop outside the campus of the GMCH, the customs officials went to him and informed that a person is likely to come there with the contraband article and requested him to be witness to the search and seizure. He further stated, that he was waiting with the customs officials and at about 2 O' Clock, the accused came there and the custom official apprehended him with a bag. Upon opening the bag carried by the accused six packets were found, which were kept under the clothes.

Thereafter, the customs officials took the accused along with the bag containing suspected contraband drugs to their office, the customs officials asked him to put his signature on various papers and accordingly he put his signature on Ext.-1. According to PW-1, 5 kg of opium was found in six packets kept inside the bag. During cross-examination, he stated that he was with the customs officials in front of the Gauhati Medical College Hospital for about an hour. He also admitted that he was in the customs office for about 3 hrs.

12. The "panchnama" proved as Ext. 2 shows that on being called by the custom officials he and the other witness Anand Narzary came in front of the Gauhati Medical College Hospital at about 11 am. It is also mentioned in the panchnama prepared by the panch witnesses themselves that upon recovery of the contraband in the bag carried by the accused, the customs officials immediately took possession of the contraband and also apprehended the accused and brought him to the custom office along with the contraband and they were also requested to proceed to the custom office. What is therefore apparent from the above evidence is that though, the accused person was allegedly apprehended in front of the GMCH along with the bag containing 5 kg of suspected opium, the customs officials, neither seized the contraband nor took any sample at the place of recovery. Rather sample was drawn by PW-5 at the office of the custom office. Therefore, admittedly no seizure was made at the place of recovery, nor any sample was taken there. Sample was taken at the customs office and thereafter the contraband was seized.

13. Sub-Section (2) of Section 51(A) of the NDPS Act provides that after seizure of the narcotic drugs or psychotropic substances, the same shall be forwarded to the Officer-In-Charge of the nearest police station or to the officer empowered u/s 53 of the NDPS Act and such officer as referred to in Sub-section (2) of Section 52-A shall prepare an inventory of the narcotic drugs or psychotropic substance and shall make an application to the Magistrate for the purpose of –

- (a) certifying the correctness of the inventory so prepared; or
- (b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or
- (c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

14. Sub-Section (3) of Section 52A provides that where an application is made under Sub-section (2), the Magistrate shall as soon as may allow the application. Thus, Section 52A of the Act envisages that samples shall be taken in presence of the Magistrate. It may be mentioned herein, that as per the Standing Order 1 of 1989 (paragraph 2.2), sample must be taken from the seized contraband on the spot at the time of recovery itself. However, noticing the conflict between the said provision in para 2.2 of the standing order of 1989 as well as the provision of Section 52-A of the NDPS Act, the Apex Court in Union of India Vs. Mohanlal, (2016) 3 SCC 379, clearly mandated that the sample shall be drawn under the supervision of the Magistrate as envisaged in Section 52-A of the NDPS Act. The Apex Court held as under :-

“15. It is manifest from Section 52A (2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn. Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application.

16. Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

18. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above

direction.

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

31.1 . No sooner the seizure of any Narcotic Drugs and Psychotropic and controlled Substances and Conveyances is effected, the same shall be forwarded to the officer in-charge of the nearest police station or to the officer empowered under [Section 53](#) of the Act. The officer concerned shall then approach the Magistrate with an application under [Section 52A\(ii\)](#) of the Act, which shall be allowed by the Magistrate as soon as may be required under Sub- Section 3 of Section 52A, as discussed by us in the body of this judgment under the heading 'seizure and sampling'. The sampling shall be done under the supervision of the magistrate as discussed in paras 13 and 14 of this order."

15. From the mandate of the Apex Court in Mohanlal's case(supra), it is abundantly clear that sample must be taken under the direct supervision of the Magistrate, which was not done in the instant case. Even the Standing Order 1 of 1989 was also not complied with in respect of taking sample. Therefore, the violation of Section 52A of the NDPS Act as well as the mandate of the Supreme Court in Mohanlal's case in respect of taking sample of the contraband is apparent in the instant case.

16. Section 51 of the NDPS Act provides that provision of the Code of Criminal Procedure 1973 (2) of 1974 shall apply in so far as they are not inconsistent with the provision of this Act, to all warrant issued and arrest, search and seizures made under this Act.

17. Sub-Section (4) of Section 100 CrPC provides that before making a search under this Chapter, the officer or other persons about to make it shall call upon two independent and

respectable inhabitants of the locality, in which the place to be searched is situated, or of any other locality, if no such inhabitants of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them to do so. Sub-section (5) of Section 100 CrPC provides that the search shall be made in their presence. Therefore, as per requirement of Sub-section (4) and (5) of Section 100 read with Section 51 of the NDPS Act, the officer making search is under obligation to make an endeavor to call upon independent and respectable persons of the locality, where the search is conducted or from any other locality and the search shall be conducted in their presence.

18. The contention of the learned counsel for the respondent on the basis of various judgment of the Supreme Court, viz., Gyan Chand and Ors. –Vs. State of Haryana (supra), Apalbhai Vs. State of Gujarat (supra) and Baldev Singh Vs. State of Haryana (supra), Ajmer Singh-Vs. State of Haryana (supra) and State of Himachal Pradesh Vs. Pradip Kumar (supra) is that presence of independent witness at the time of search and seizure is not an indispensable requirement, nor the absence of independent witness vitiates the trial. There is no dispute as to the above legal proposition that the absence of independent witness at the time of search and seizure per se, does not vitiate the trial. But the question remains is whether the officer conducting search and seizure made an effort to avail any independent and respectable witness to see the search and seizure. Because the intendment of the legislature requiring the presence of independent and respectable witness at the time of seizure is amply clear, inasmuch as, such provision are intended to provide transparency and credibility to the search and seizure. There is no difficulty in understanding that there may be circumstances, when it may not be possible to have any independent and respectable witness at the time of search and seizure but the crucial question is whether any endeavor is made to call upon any independent and respectable witness at the time of search. If the search and seizing officer does not make any endeavor to call upon the independent and respectable witness to witness the search and seizure, the proceeding may not be vitiated for such lapses. But certainly the probative value or the credibility of the search and seizure shall be affected, if the statutory provisions are not complied with (see Joginder Singh Vs. Union of India (2018) 2 GLT 402.

19. In the instant case, it appears from the "panchanama" (Ext-2) that there were two independent witnesses, one of whom, has been examined as pW-1 and the other was not examined in the case. Learned counsel for the appellant heavily came on the said witness (PW-1) and contended that said witness, who has been examined as PW-1, was a pocket witness of the investigating agency and not an independent witness or a respectable person of the locality as envisaged in Section 100(4) of the CrPC. PW-5 and PW-6, though stated that two persons were present at the time of recovery, search and seizure, whom they found at the place of recovery, it is in the evidence of PW-5 and PW-6 that they arrived at the place of recovery at about 11 O'Clock and the appellant was apprehended at about 2 O'Clock. However, during cross-examination of PW-1, the so-called independent witness deposed, that he was there for about 1 hour only in front of the GMCH at the place of recovery. The panchanama (Ext.-2) shows that PW-1 and the other witness Anand Narzary made themselves available in front of the GMCH on being called by the customs officials. Therefore, the statement made in the "panchnama" (Ext-2) belies the oral testimony of the PW-5, that the PW-5 met the PW-1 at the place of recovery, where he was requested to be witness. If the averment in Ext.-2, that PW-1 made himself available in front of the GMCH at about 11 AM on being called by the customs officials, is believed, then such statement belies the oral testimony of PW-1, PW-5 & PW-6 that PW-1 was found at the place of recovery by the investigating agency and requested him to be witness. The deposition of the PW-1 during cross-examination, that he remained for about 1 hour in front of the GMCH also goes to show that PW-1 was not telling the truth, inasmuch, as per his own admission, he was there at the place of recovery from 11 AM to 2 PM, i.e., for three hours and thereafter, he was in the office for three hours. The PW-1 nowhere stated that sample was taken in his presence or the contraband was seized in his presence. He only deposed that he was taken to the Sub-Divisional Office of the Customs, where his signature was obtained on certain papers including the Ext. -1. Learned counsel for the appellant pointed out that statement of the PW-1 that he was in custom office for three hours was not correct, inasmuch as, he was present at the custom office at least upto 8 pm and he also put his signature in the arrest memo of the accused and admittedly he went to custom office at about 2 pm. The arrest memo (Ext.16) also supports the contention of the learned counsel.

20. Thus, dispassionate scrutiny of the oral testimony of the PW-1, PW-5 and PW-6, coupled with the "panchanama" (Ext. -2) clearly suggests that PW-1 is not a trustworthy witness and in the facts and circumstance, as indicated above, the claim of the prosecution regarding PW-1 being an independent witness is also cannot be said to be above board.

21. This Court in S.H. Lalthawama Vs. State of Mizoram (supra) also held that "it is mandatory that the seized contraband should be produced before the Magistrate 1st Class and then with the order of the Magistrate, the samples taken from the seized contraband to be sent to the Forensic Science Laboratory for examination. The law in this regard is well settled by the Apex court in Mohanlal and Ors. (supra)". It is the settled proposition that when the offence is serious providing stringent punishment, provision of law is required to be scrupulously followed. The failure of the investigating agency to comply with the statutory requirement as to search and seizure in the facts and circumstances of the case, seriously affected the credibility of the prosecution case and the benefit for such defects would certainly go to the accused. In the present case, it is evident that the contraband was recovered in front of the GMCH and the investigating agency took possession of the contraband. Neither the contraband was seized at the place of recovery, nor sample was taken at the place of recovery. Rather, the contraband along with the accused was taken to the office, where, after taking sample, the contraband was seized. Admittedly sample was taken at the custom office in total disregard to the provision of law and the mandate of the Apex Court in Mohanlal's case. Evidently presence of any independent and respectable witness at the time of recovery was also doubtful. All these facts and circumstances, in my considered opinion, rendered the entire process of search, seizure and taking sample highly doubtful.

22. The Apex Court in Kishan Chand Vs. State of Himachal Pradesh, (2018) 1 SCC 222 observed that "..... Harsher is the punishment , more is the strictness of proof required from the prosecution and that failing to associate independent witness at the time of recovery created a dent in the case of prosecution."In Gorakh Nath Prasad Vs. State of Bihar (supra), the Apex Court observed that the NDPS Act having provided for reverse burden of proof upon the accused, contrary to normal rule of criminal jurisprudence, compliance with statutory requirement and procedures shall have to be strict and the scrutiny stringent. If there is any

iota of doubt, the benefit shall have to be given to the accused. in Gangadhar @ Gangaram Vs. State of Madhya Pradesh in Criminal Appeal No. 404/2020 (decided on 05-08-2020), the Apex Court observed, referring to the reverse burden upon the accused in case of offence under the NDPS Act, because the presumption against the accused, that gravity of the sentence and stringency of the provisions will therefore call for a heightened scrutiny of the evidence for establishment of the fundamental facts by the prosecution. In the attending facts and circumstances, as discussed here-in-before, the prosecution cannot be held to have established the fundamental facts, viz., the possession of the contraband by the appellant beyond all reasonable doubt, benefit of which will certainly go to the accused.

23. It is apparent from the impugned judgment that learned trial court along with other materials also relied on the confessional statement of the accused recorded u/s 67 of the NDPS Act. The Apex Court in Tofan Singh Vs. State of Tamil Nadu (supra) held as under –

“155. We answer the reference by stating :

(i) That the officers who are invested with powers under section 53 of the NDPS Act are “police officers” within the meaning of section 25 of the Evidence Act, as a result of which, any confessional statement made to them would be barred under the provisions of section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

(ii) That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.”

24. In view of the above decision of the Supreme Court, the confessional statement of the accused recorded u/s 67 of the NDPS Act has to be excluded from consideration.

25. Learned counsel for the appellant also contended, placing reliance on State of Gujrat Vs. Ismail U. Haji Patel and Anr. (supra) that, no malkana register or any other document was produced to establish the safe custody of the seized contraband. I have considered the evidence brought on record. In view of the facts, that the process of search and seizure and taking sample of contraband was doubtful for non-compliance with the statutory requirement and procedures and that the fundamental facts have not been established beyond reasonable doubt, therefore, the question of safe custody of the contraband becomes merely academic. Be that as it may, what is apparent from the evidence and materials brought on record is that the prosecution has failed to establish the fundamental facts of search, seizure and taking

sample beyond all reasonable doubt, and as such, the accused/appellant was at least entitled to benefit of doubt. Therefore, in my considered view, the appeal deserves to be allowed.

26. Accordingly, the appeal is allowed and the conviction and sentence of the appellant is set aside. The appellant, be released, forthwith, if not required in any other case.

27. Send down the record.

JUDGE

Comparing Assistant