

Crl.A. 216/2006

BEFORE

HON'BLE MRS. JUSTICE ANIMA HAZARIKA

The judgment and order dated 21.8.06 passed by the learned Special Judge , Kokrajhar in Special Case No. 12/2005 is under challenge in this appeal whereby and whereunder the accused appellants were convicted under Section 20 (b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act for short) and sentenced to undergo rigorous imprisonment(R.I.for short) for six years each and to pay a fine of Rs.50,000/- each in default R.I. for six months each.

2. The prosecution case in brief, is that on 14.8.05 at about 10-15 AM S.I Sri Ranjeet Basumatary of Simultapu Police Out Post detected Truck No. BR-17G-2021 when the Truck was trying to cross Sales Tax gate at Srirampur . The S.I. brought the Truck to Simultapu Police Out post compound and having searched the same recovered 44 packets of Ganja concealed under the front side hood of the truck totaling four quintals eighty Kgs eight hundred grams contraband Ganja which were seized alongwith the truck. A case was registered under Section 20(b) of the Act. After completion of the investigation police submitted charge sheet against the present appellants alongwith one Manik Das under Section 20 (b) of the NDPS Act.

3. The learned trial court on the basis of the material made available framed charge under Section 20(b) of the NDPS Act. The charges so framed being read over and explained to the accused persons, they pleaded not guilty and claimed to be tried.

4. During the trial the prosecution examined as many as 8 witnesses including the investigating Officer(I.O. for short) and an expert of Forensic Science Laboratory(FSL for short). However, the accused persons declined to adduce any defence evidence.

5. PW-1 Dilip Kr.Pathak, PW-2 Md.Abdus Sabur and PW-3 Sunil Kr.Das are Police constables. PW-4 is a businessman of that locality, PW-5 Jayanta Roy, Form writer, PW-6 Abul Kalam Azad was working as Counter holder in Srirampur gate, PW-7 Scientific Officer, FSL, PW-8 Ranjit Kr Basumatary Sub-Inspector of Police who was the Investigating Officer of the case.

6. PWs-1,2 and 3 the police constables in unison have deposed that on 14.8.05 they were attached to Simultapu O.P. On that day at about 10-30 a.m. when they were on patrolling duty with PW-8, In-charge, Ranjit Basumatary they saw a truck in front of Sales Tax gate of Simultapu and on suspicion PW-8 brought the truck being registration No. BR-17G-2021 to police out post. After bringing the truck to out post,PW-8 directed the driver of the truck Bira Rai to untie the rope of the truck. Then the driver Bira Rai and handyman Bikhari Rai untied the truck. Thereafter PW-8 found the Ganjas in the hood of the truck and some planks were fixed. When they brought out the planks, they found 44 packets of Ganjas inside the hood of the truck. PW-8 brought the Magistrate to the spot and weighed the Ganjas. On weighing the quantity of Ganja was found to be 4 quintals 80 Kgs and 800 grams. PW-8 then seized the Ganjas and planks by seizure list vide Material Ext.1. Material Ext.2 is the seized five planks by which ganjas were concealed in the truck. PW-1 further deposed that he knows the accused Bira Rai and Bikhari Rai but he does not know the name of the 'dalal'. The 'dalal' used to write documents of vehicle and pass the vehicle in the gate.

During cross-examination PW-1 stated that he was present at the time of seizing and weighing of Ganjas. The police took the sample in his presence. The accused, driver Bira Rai brought the truck to out post from infront of Sales Tax gate. It has been further stated that, while recording statement PW-1 told the name of the dalal before the police as Manik Das. The suggestion put to him that truck was not in a running condition and they did not stop the truck has been denied. PW-2 during cross-examination stated that he cannot identify the driver and hand

yman as he was not present at that time. He further stated that the truck was seized in the National Highway and the ganjas were seized and weighed there. Cross-examination on behalf of Manik Das was declined.

7. PW-4 is the businessman. He has a grocery shop near the Srirampur Check gate. PW-4 deposed that on the day of occurrence he was in the grocery shop and then the police came to the shop and took his measuring scale whereby the police measured the Ganjas in front of Simultapu police out post. He went to the police out post and saw police unloaded 44 packets of ganjas from the cabin of the truck. However he could not remember the number of the truck. Material Ext.1 are the packets of ganjas seized by the police. Police also seized his measuring scale and 'dagas' vide Ext.3, the seizure list wherein he had put his thumb impression. He identified the two accused persons on the dock of the court, present on the day of his deposition being the driver and khalasi of the truck. However he does not know the third accused person.

During cross-examination PW-4 stated that he does not know the police person who took the measuring scale. On the day of occurrence seeing the gathering of the people he came to the place of occurrence when the police unloaded the packets of ganjas. Many people were present at the place of occurrence. The accused persons were near the truck.

8. PW-5 is the Form writer. PW-5 deposed that he has a counter near Srirampur Check gate. On the day of occurrence he saw that the police on suspicion stopped one vehicle in front of Sales Tax gate at Srirampur. Then he went near the truck and saw after searching the truck police recovered some packets from the hood of the truck. The truck was loaded with coal. After opening the packets police found ganjas inside the packets. Then the police took the truck near the gate of police out post and unloaded the packets. In total, police unloaded 44 packets of ganjas alongwith truck and documents of truck and five numbers planks found in the truck and prepared the seizure list. Police then prepared seizure list wherein Ext.2(1) is the signature. Material Ext.1 are the packets of seized ganjas. He could identify the accused persons on the dock.

During cross examination he has stated that the police cited the persons as witnesses who were present at the time of occurrence and has seen the occurrence. He saw the ganjas were unloaded in the side of high way near the gate of police out post. However he was not present when the police took the sample of the ganjas. He saw the seized plank in the court.

9. PW-6 is a counter holder at Srirampur gate. He deposed that he has a counter at Srirampur gate. On the day of occurrence he was in his counter and he saw the police stopped one truck in front of check gate of Sales tax. Thereafter when the police searched the vehicle, found 44 packets of ganjas from the hood of the truck. The police unloaded the truck near gate of police out post and measured the ganjas then and there. However he could not say about the weight of the total ganjas. Material Ext.1 are the packets of ganjas seized by the police and M.Ext.2 is the seized planks. The police also seized the truck and documents of the truck and prepared the seizure list. He has put his signature in the seizure list vide Ext.-1(3). He saw police brought measuring scale and 'daga' from one Majibar to weigh the ganjas and seized the same vide seizure list, Ext.-3. Material Ext.4 is the seized truck. He could identify the accused persons as Bira Roy and Bikhari Roy in the dock.

During cross-examination PW-6 stated that his counter is situated at the eastern side of the Sales tax gate. He saw the accused persons taken away by police to the out post for interrogation. He further deposed that police cited as witness those persons who were present at the place of occurrence and who had seen the occurrence. The police showed the ganjas by opening the packets and took sample of the ganjas and packed the ganjas in polythin packets.

10. PW-7 Dr.Dhrubajyoti Hazarika is the Senior Scientific Officer, F.S.L. He deposed that he had received a parcel from the Director in connection with Simultapu out post G.D.E. No 279 dated 14.8.05. The parcel consisted of three exhibits enclosed with cartoon box with cloth cover, which was sealed with the impression of seal corresponding with the seal impression forwarded. On examination of the packets containing about 10 gm. dry plant material in each marked as A,B and C respectively, it gave positive test for cannabis(ganja).Material Ext.5,6 and 7 are the samples which he examined.

During cross-examination he has stated that he had received a parcel in sealed cover condition on 17.8.05 itself and completed the investigation on 29.8.05.The sample gave positive test of cannabis(ganja). He has further deposed that there is no possibility of mixing sample of the case with the sample of another case. The sample was sent to them by messenger.

11. PW-8 Ranjit Kr Basumatary is the Investigating Officer of the case. On 14.8.2005 he was serving as In-charge at Simultapu Out post. On that day at about 10-15 a.m. he came to know from secret source that one vehicle No.BR.17 G/2021 was trying to cross Sales Tax gate at Srirampur saying that the truck was loaded with coal. But as per secret information the truck was actually loaded with ganja. He therefore apprehended the truck and brought the truck to Simultapu out post compound. Thereafter he searched the truck and found 4 quintals 80 Kgs 800 grams contraband ganjas kept in 44 packets which was kept concealed under the front side hood of the truck. The name of the driver is Bira Rai and Bhikhari Rai was the Khalasi. After receiving the secret information he made G.D.entry dated 14.8.05 and informed the C.I. and SDPO of Gossaigaon. Both of them came to the place of occurrence. Then C.I. entrusted him to investigate the case. Ext.6 is the extract copy of G.D.Entry No. 279. Ext.6 is certified by him and Ext.6(1) is the signature. Ext.7 is authority letter issued by C.I. Then he called one Executive Magistrate from Gosaigaon and in his presence the search of the truck was conducted wherein they recovered 44 packets of ganja which was concealed under the hood of the truck. Thereafter he brought measuring scale and daga from one Majibur Rahman of Srirampur and weighed the packets of ganjas and found 4 quintals 80 kgs. 800 grams and took the sample in three packets weighing 50 grams each. He informed about the occurrence to the S.P., Kokrajhar. The sample was sent to FSL and after examining the samples, the FSL gave report stating that the seized goods are contraband ganja(cannabis). He submitted charge sheet against the accused persons namely Bira Rai, Bhikari Ray and Manik Das under Section 20(b) of the NDPS Act. Ext.1 is the seizure list by which ganjas were seized. Ext.1(4) is his signature. He took thumb impression of accused Bira Rai and signature of accused Bhikari Ray and Ext.1(5) is the signature of accused Bhikari Rai. PW-8 has seized the measuring scale and weighing stones vide Ext.3. Ext. 3(2) is his signature. He also filed FIR at Tamarhat P.S. Ext. 8 is the FIR and Ext.8(1) is his signature. Ext.9 is the charge-sheet and Ext.9(1) is his signature. Material Ext.1 is the seized ganjas. Material Ext. 2 is the seized five planks by which ganjas were concealed in the truck. Ext. 2 is the relevant documents of the seized vehicle including Driving License of driver.

During cross-examination he has deposed that on 8.9.2005 he lodged FIR at the Police Station after receiving the report of the expert. He had recorded in writing in the GD entry that he had received secret information and that has been informed to the senior officer in writing. The extract copy of the G.D.Entry was written and certified by him. The sample was sent to FSL expert on 15.8.05 by a messenger. The messenger is not cited as witness in the case. He has further deposed that though the C.I, SDPO and Executive Magistrate were present at the time of search, the witnesses did not state while deposing in the court about their presence. He also deposed that the accused Bira Rai stated in his statement that he did not know that there is ganja in the truck and one Dayandnda Saraswati engaged him to drive the alleged vehicle from Guwahati to Jogighopa and Jogighopa to Matihari.

12. During recording of statement of the accused under Section 313 Cr.P.C., they simply denied their involvement in the case.

13. On the basis of the evidence as well as materials available on record the learned trial court passed the judgment of conviction and sentenced the accused as stated herein above. Hence the present appeal.

14. Heard Mr.A.S.Choudhury learned senior counsel assisted by Mr Iqbal Hussain Saikia appearing for the appellants. Also heard Mr.D.Das learned Addl. P.P., Assam.

15. The judgment of conviction has been challenged on the ground that alleged search and seizure were not made in presence of any gazetted officer. To prove the presence of the officers, the prosecution did not examine the Gazetted officers in whose presence allegedly the seizure was made thereby violating the mandatory requirement as provided under Section 50 of the NDPS Act. The other ground of attack by the prosecution is regarding arrest of the appellants on 14.8.05 after getting a secret information, which was not recorded as required under the provision of NDPS Act. It has further been urged that the Investigating Officer has failed to comply with the statutory provisions and procedural safeguards as provided under Section 42 and 50 of the NDPS Act and therefore the impugned judgment and order of conviction is liable to be interfered with.

16. In the present case in hand, we have found that PWs 1, 2, 3 and 8 have deposed about the seizure of four quintals 80 kgs 800 grams of ganja from the possession of the accused persons. All the prosecution witnesses have been examined and cross-examined. It is found that there is no meaningful cross-examination and evidence has remained intact. The defence has failed to dislodge the testimony of the prosecution witnesses with regard to the seizure of the ganjas from the accused persons. Further the quantity of the ganjas seized categorically rules out the possibility of planting. Regarding compliance of mandatory provisions of Section 50 of the NDPS Act regarding the search and seizure, in my considered opinion the provisions of Section 50 of the NDPS Act implicitly makes it imperative and obligatory and cast a duty on the Investigating Officer (Empowered Officer) to ensure that search of the person (suspect) concerned is conducted in the manner prescribed by Section 50 of the NDPS Act by intimating to the persons concerned about the existence of his right, if he so requires, he shall be searched before a Gazetted officer or a Magistrate and in case he so opts failure to conduct his search before a Gazetted Officer or a Magistrate would cause prejudice to the accused and render the recovery of the illicit articles suspect and vitiate the conviction and sentence of the accused, whether the conviction has been recorded only on the basis of the possession of the illicit article, recovered during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The protection provided in the Section to an accused to be intimated that he has a right to have his personal search conducted before a Gazetted officer or a Magistrate if he so requires, is sacrosanct and indefeasible and it cannot be disregarded by the prosecution except at its own peril.

In the present case in hand, no search was carried out in person of the accused appellants. The provision under Section 50 of the NDPS Act comes into play only in case of search of a person. In the present case there is no search in the body of the person i.e. accused appellants, but in the conveyance i.e. the truck and therefore compliance of provision of Section 50 of the NDPS Act will not be applicable in this case.

17. With regard to the allegation of non-compliance of mandatory provision of Section 42 of the NDPS Act the concerned Police Officer being empowered under Section 42 of the NDPS Act, there is no violation as alleged. We find from the deposition of Investigating Officer that he has reduced in writing in G.D. Entry that he received secret information and he informed the SDPO in writing forthwith. On perusal of Ext.6 it reveals that after receipt of the secret information,

PW-8 has informed the SDPO and C.I , Gosaigaon and after receipt of the information they immediately came to the place of occurrence. Therefore there was no violation of mandatory provisions of Section 42 of the NDPS Act as alleged.

18. The third limb of argument of Mr Choudhury is to the effect that the learned trial court committed grave error in convicting the accused appellants on the basis of unreliable evidence on record.

19. Per contra Mr.Das, the learned Addl.P.P.,Assam has submitted that the prosecution has proved the case beyond all reasonable doubt that the appellants were illegally trafficking ganja and the learned trial court has rightly convicted the accused appellants under Section 20(b) of the NDPS Act. Moreover they were caught red handed by the police officers. The secret information was found to be true. There is no infirmity in the findings of the learned trial court in holding that the accused appellants are guilty of offence punishable under Section 20(b) of the NDPS Act and hence they have been rightly convicted by the learned trial Court for committing offence under the aforesaid Section of law.

20. Upon perusal of the evidence of PWs 1,2 and 3, I have no reason to disbelieve the depositions of the prosecution witnesses, more so, the defence has totally failed to bring any contradiction during their cross examination. The prosecution witnesses rather corroborate each other. Moreover, in the present case in hand there is nothing on record to show that the police constable /officer had any animosity with the accused appellants and as a matter of fact, after receipt of the secret information only, the truck, on which they were traveling was intercepted and on search, found the contraband ganja.

21. In the facts and circumstances of the case and on consideration of the evidence on record, I hold that the guilt of the accused appellants is fully established. The appeal has no merit and is dismissed accordingly.

22. Send down the records.