



GAHC010009032011

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

Case No. : CrI.A./183/2011

RAJ NARAYAN DAS,
S/O LATE UMA RAM DAS, R/O MALIGAON, P.O. JALUKBARI, P.S.
JALUKBARI, DIST. KAMRUP, ASSAM.

VERSUS

THE STATE OF ASSAM,

Advocate for the Petitioner : Mr. N. Mahajan, Advocate
Advocate for the Respondent : Mr. P. S. Lahkar, Additional Public Prosecutor,
Assam
Date of Judgment : 05.12.2023

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA
JUDGMENT

Date : 15.12.2023

1. Heard Mr. N. Mahajan, learned counsel for the appellant. Also heard Mr. P. S. Lahkar, learned Additional Public Prosecutor for the State of Assam.

2. This Appeal has been preferred under Section 374 (2) of the Code of Criminal Procedure, 1973, by the appellant Sri Raj Narayan Das, impugning the judgment and order dated 14.10.2011, passed by the Court of the learned Additional learned Sessions Judge, Kamrup, Guwahati in Sessions Case No. 159(K)/2009, whereby the present appellant was convicted under Section 22(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and was sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs. 25,000/-, and in default of payment of fine to undergo further rigorous imprisonment for a period of another three months.

3. The facts relevant for adjudication of this instant Criminal Appeal, in brief, are as follows:

- (i)** That on 08.05.2009, one Sri Kalyan Kumar Gogoi, lodged an FIR before the Officer-in-Charge of C.I.D Police Station, Ulubari, Guwahati, *inter-alia*, alleging that on 07.05.2009 at about 4.10 P.M., the first informant along with a team of police personnel under the supervision of Inspector K. K. Ahmed apprehended the present appellant at Durga Medicos located near Maligaon Railway Gate No. 3 while he was delivering 88 Nos. of Spasmo Proxyvon Capsules, 30 Nos. of Nitrosan 10 tablets to an addict at that place. It is also stated in the FIR that later on the said pharmacy was also searched and 72 Nos. of Spasmo Proxyvon capsules in 9 strips and loose 24 nos. of Corax cough syrup, 59 bottles and 360 bottles of Tyrex cough syrup were also seized from the said pharmacy. On interrogation of the appellant, he failed to produce any document with regard to the seized contraband.

(ii) On receipt of the said FIR, C. I. D. P. S. Case No.08/2009 under Section 22(a) of the NDPS Act, 1985 read with Section 27 of the Drugs and Cosmetics Act, 1940 was registered and investigation was initiated. On completion of the investigation, charge-sheet was laid against the present appellant under Section 22(a) of the NDPS Act, 1985.

4. Though the appellant was arrested during the course of investigation, he was later on released on bail and he faced the trial remaining on bail. During trial, on 15.09.2009, learned Additional Sessions Judge, Kamrup, Guwahati after perusing the materials on record and after hearing both sides, framed charge under Section 22(b) of the NDPS Act, 1985 and against the present appellant and when the said charge was read over and explained to the present appellant he pleaded not guilty to the said charge and claimed to be tried. During the course of the trial, five witnesses were examined by the prosecution side.

5. The appellant was also examined under Section 313 of the Code of Criminal Procedure, 1973 during which he pleaded his innocence and denied the prosecution evidence adduced by the prosecution witnesses against him.

6. However, after culmination of the trial, the learned Trial Court convicted the present appellant and sentenced him in the manner as already described in paragraph no. 2 hereinabove.

7. Before considering the rival submissions of the learned counsel for both sides, let me go through the evidence of the prosecution witnesses which is available on record.

8. PW-1, Sri Dilip Khan has deposed that the appellant had a pharmacy, namely, Durga pharmacy at 4 No. Railway Gate, Maligaon and in the pharmacy

of the appellant cough syrup, corex, phensydin etc, are sold. PW-1 has stated that about six months prior to his deposing before the Court he went to purchase one cough syrup from the pharmacy of the appellant and at that time people from CID came and seized certain medicines. He has also deposed that he went to purchase cough syrup, Nitrosan and Spasmo Proxyvon from the pharmacy and when the people from CID came, he paid Rs. 300/- to the owner of the pharmacy. He has also deposed that the people from CID seized 3 to 4 numbers of cartons containing cough syrup from there and he signed on the seizure list. He also exhibited the seized cartons and tablets which is exhibited as Material Exhibit-1 and the cartons of cough syrup were exhibited as Material Exhibit nos. 2, 3 & 4.

8.1 During cross-examination, PW-1 has stated that the pharmacy belongs to the brother of the appellant whose name is Gugu. He also stated that he used to purchase the said medicines for addiction purpose and he also used to consume the same. He has also deposed that on the day of the incident he went to purchase cough syrup and Spasmo Proxyvon. He purchased two strips of Spasmo Proxyvon for which he had no prescription from doctor. He has also deposed that the appellant owns a PCO.

9. PW-2 Sri Gajendra Nath Deka has deposed that on 8th May 2009 he was working as Deputy Director of Drugs and Narcotics Division Forensic Sciences Laboratory Assam, Guwahati and on that day he received a parcel through the Director In-charge in connection with CID P. S. Case No. 8/2009. The parcel consisted of 8 (eight) exhibits enclosed with an envelope which was sealed. The descriptions of the articles were as follows:



DESCRIPTION OF ARTICLES

- i. 2(two) sealed envelopes marked as " Ex-A and Ex-C" having 2 paper packers (one in each) each containing a strip of 2 blue colored capsules. Marked here as DN-139/2009 (a1),DN-159/2009 (a2) DN-159/2009 (e1) an DN-159/2009 (c2) respectively.
- ii. 1(one) sealed envelope marked as "Ex-B" having a paper packet containing a strip of 2 tablets. Marked here as DN-159/2009 (61) and DN-159/2009 (62) accordingly.
- iii. 2(two) sealed envelopes marked as "Ex-D and Ex-E" having 2 sealed bottles containing 100 ml oily liquid in each. Marked here as DN-159/2009 (d) and DN-159/2009 (e) respectively.

RESULT OF EXAMINATION

- i. The exhibits DN-159/2009 (a1),DN-159/2009 (a2) DN-159/2009 (c1) and DN-159/2009 (c2) gave positive tests for propoxyphene and amount of propoxyphene were found to be 59.71 mg, 59.60 mg 58.98 mg, and 59.15 mg respectively.
- ii. The exhibits DN-159/2009 (61) and DN-159/2009 (b2) gave positive tests for nitrazepam and amount of nitrazepam were fund to be 9.92 mg, and 9.90 mg respectively.
- iii. The exhibits DN-159/2009 (d) and DN-159/2009 (e) gave positive tests for Codeine and amount of Codeine in each 5 ml were found to be 7.60 mg, and 7.71 mg respectively.

9.1 During cross examination, PW-2 has deposed that he does not know whether the aforementioned drugs are used for different disease as medicine.

10. PW-3 Rubul Kalita has deposed that he knows about the Durga Medicos which is the pharmacy situated in front of railway Gate No.3 at Maligaon. PW-3 has also deposed that the said pharmacy belongs to the brother of the appellant and the appellant had an ice cream parlour adjacent to the said pharmacy. He has deposed that on the day of the incident, he was having cold drinks at the ice cream parlour and was speaking to the appellant and at that time one boy came to Durga Medico for purchasing some medicines and the said boy was speaking to the appellant and later on they entered the pharmacy. He has also deposed that after that some more people entered the pharmacy. He has also deposed that the boy who came to the pharmacy was carrying one bottle and Rs.300/-. He has also stated that he was asked to sign on some paper as a witness of seizure of Rs.300/- and the bottle from the possession of that boy. Later on, he came to know that the people who asked him to sign on the paper were from CID. He exhibited the seizure list as Exhibit-4. He has also deposed that the CID people took away the present appellant. His cross examination was declined.

11. PW-4 Sri Kalyan Kumar Gogoi has deposed that on 07.05.2009 he was posted as Sub-Inspector at CID Head Quarter and on that day the DSP, CID informed him that he came to know confidentially that the owner of Durga Medicos located near Maligaon Gate No. 3 is involved in illegal sale of psychotropic substance and cough syrup and he was asked to take the necessary information in that regard.

12. PW-4 has also deposed that the DSP, CID informed about the said facts through a letter which he had exhibited as Exhibit-5. After receipt of the said letter, he made GD entry No. 47 dated 07.05.2009 and the extract copy of the

said GD Entry is exhibited as Exhibit-6. Thereafter, PW-4 has further deposed that he along with Inspector D. Dutta, Inspector K. K. Ahmed, Sub-Inspector S. C. Chakraborty, Constable D. Sarma, Constable K. Debnath, and constable Manoj Singh went to Maligaon Gate No. 3 and waited near Durga Medicos and they found that one person came to purchase medicine from the said pharmacy and when the person in the pharmacy was delivering medicine without prescription, he was caught red handed. It is stated that the purchaser could not show the prescription of the medicine. PW-4 has further deposed that they seized the medicine from the hands of the purchaser and prepared one seizure list which is exhibited as Exhibit-4. It is also stated that the seller introduced himself as Raj Narayana Das (present appellant) and thereafter, PW-4 and others made search in the pharmacy and found following articles without having any documents:

- i.** Spasmo Proxyvon Capsules 9 strips (8 capsules in each strip)= 72 nos.
- ii.** 24 numbers of Spasmo Proxyvon capsules.
- iii.** 59 bottles of Corex Cough Syrup.
- iv.** 3 case (120 bottles in each case) of Xyrex cough syrup, total 360 bottles.
- v.** 11 strips (8 capsules in each strips) total 88 numbers of S. capsules
- vi.** 3 strips (10 tablets in each strip) Netrosan-10 tablets.
- vii.** Cash Rs. 300/- from the accused person.

12.1 PW-4 also exhibited the seizure list of the aforesaid seized articles as Exhibit-1. He has further deposed that the seized articles of Exhibit-4 were kept

in CID Malkhana vide MR No. 31/2009 and seized articles of Exhibit-1 were kept in CID Malkhana vide MR No. 32/2009. He has also exhibited the seized tablets and capsules as Material Exhibit-1 and the cough syrup as Material Exhibit No.2 and Material Exhibit No.4. PW-4 has further deposed that thereafter he lodged the FIR before the Officer-in-Charge of CID Police Station which is exhibited as Exhibit-7.

12.2 During cross-examination, PW-4 has deposed that at the time of entering the pharmacy on the day of the incident he found 3 to 4 person inside the pharmacy and at the time of delivery of goods to the addict who purchased the medicine he was caught. PW-4 has also deposed that he knows the owner of the pharmacy and he has not registered any case against the owner of the pharmacy. He has also deposed that all the goods have been seized from inside of the pharmacy of Maligaon Gate No. 3. He has also deposed that the money found inside the pocket of Raj Narayan and the cost of the medicine delivered by him as alleged were different. He has also deposed that the copy of the seizure list was neither delivered to the owner of the pharmacy nor to the appellant.

13. PW-5 Sri Putul Baishya has deposed that on 08.05.2009 he was working at CID Head Quarter as Inspector of Police and on that day the Officer In-Charge handed over the Case No. 8/2009 under Section 22(a) NDPS Act, 1985, read with Section 27 of the Drugs and Cosmetics Act, 1940 for conducting the investigation. He has deposed that during investigation, he examined the accused (present appellant) who was already apprehended by S.I. Kalyan Kumar Gogoi of CID Police Station on 07.05.2009. He has also deposed that he sent the sample of the seized article to the Director of the FSL Kahilipara through Constable P. Gogoi F.S.L. and it gave positive result for codeine and narcotics

substance. He has also deposed that after receipt of the F.S.L. examination report and after completion of the investigation, he laid the charge-sheet against the present appellant under Section 22(a) of the NDPS Act, 1985 and read with Section 27 of the Drugs and Cosmetics Act, 1940.

14. During his examination under Section 313 of the Code of Criminal Procedure, 1973, the present appellant has denied his involvement in the offence which is alleged against him and has pleaded his innocence. He has stated that the pharmacy does not belong to him. He also stated in his answer to question no. 13 posed to him during his examination under Section 313 of the Code of Criminal Procedure, 1973, that he has one ice-cream parlor beside the pharmacy Durga Medicos which is owned by his brother and at the time of the incident his brother had gone to take lunch in his house and he was asked to look after the pharmacy during that time. He has further stated that one Rubul (PW-3) came there and thereafter one Dilip Khan (PW-1 and 2) came there and asked him to give Spasmo Proxyvon Tablet to which the present appellant answered that he does not know about the medicine and asked them to wait till the arrival of his brother, but the said Dilip Khan entered his shop and thereafter, the appellant also entered and at that point of time, CID police came there and recovered some tablets from the possession of Dilip Khan PW-1. He has also stated that the police also took Rs. 300/- from his pocket and have falsely implicated him in this case alleging that he has sold the drugs to the said Dilip Khan.

15. Mr. N. Mahajan, learned counsel for the appellant, has submitted that the seizure witnesses have not supported the prosecution story. He has also submitted that the main seizure witness i.e. PW-1 Dilip Khan ought to have been made an accused in this case, however, he has been made a prosecution



witnesses. He has also submitted that PW-1 has himself stated that he went to purchase one cough syrup from the Durga Medicos Pharmacy and he paid Rs.300/- to the owner of the pharmacy. However, learned counsel for the appellant submitted that the present appellant is not the owner of the pharmacy and the pharmacy belongs to the brother of the appellant which according to the submission of the learned counsel for the appellant is apparent from the testimony of PW-4 who has stated in his testimony that he knows the owner of the pharmacy and he has not lodged any case against the owner of the pharmacy.

16. Learned counsel for the appellant has also submitted that though in the FIR, it is alleged that 88 Nos. of Spasmo Proxyvon capsule and Nitrosan tablets were found from the possession of the present appellant, however, the first informant in his testimony has deposed that the medicines which were delivered to the person who came to purchase the same from the pharmacy were seized from the hands of the purchaser and not from the appellant.

17. Learned counsel for the appellant has also submitted that the rest of the seized contraband was found from inside the pharmacy though it has been mentioned that the same were found from the possession from the testimony of PW-4. It is clear that the rest of the seizure was made from inside the pharmacy when they conducted a search inside the pharmacy. Hence, learned counsel for the appellant has submitted that the seized contraband was not found from the conscious possession of the present appellant.

18. In support of his contention, learned counsel for the appellant has cited a ruling of this Court in "**Biswanath Pratap Singh and Another Vs. and State of Assam and Another**" reported in "**2021 SCC online Gauhati 2336**" wherein it was observed as follows:

“18. Section 20(b)(i) of the NDPS Act provides punishment for possession or transportation contraband. Possession is made up of two elements, firstly corpus - the element of physical control and secondly the animus or intent with which such control is exercised. It is conscious possession, which is contemplated by penal statute, which provides and penalises possession of any contraband article or thing. Possession for the purpose of NDPS Act must not be in the sense of physical control over the article but the second element of animus or intent to possession must also be there. Only conscious possession invites penal consequences. Thus, possession means conscious possession and not mere custody without awareness of such possession.”

19. Learned counsel for the appellant has also submitted that in the instant case prosecution side has failed to show that there was compliance to the procedure prescribed under section 52A of the NDPS Act, 1985, which as per submission of the learned counsel for the appellant are mandatory provision and non-compliance of the same vitiates the trial. In support of his submission, he has cited a ruling of Hon’ble Apex Court in **“Simranjeet Singh Vs. State of Punjab”** (In Criminal Appeal No. 1443/2023) judgment delivered on 09.05.2023, wherein it was observed as follows:

“8. In paragraphs 15 to 17 of the decision of this Court in Mohanlal's case¹, it was held thus:

“15. It is manifest from Section 52-A(2)include (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.

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 subsections (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."

20. Learned counsel for the appellant has also raised the contention that in the instant case, the learned Trial Court has not even considered the plea taken by the appellant during his examination under Section 313 of the Code of Criminal Procedure, 1973, and he submits that as there was no consideration of the defence plea taken by the appellant under Section 313 of the Code of Criminal Procedure, 1973, it vitiates the conviction. In support of his submissions, learned counsel for the appellant has cited a ruling of Hon'ble



Supreme Court in "**Reena Hazarika Vs. State of Assam**" reported in "**(2019) 13 SCC 289**" wherein it was observed as follows:

"19. Section 313, Cr.P.C. cannot be seen simply as a part of audi alteram partem. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2), Cr.P.C. The importance of this right has been considered time and again by this court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. If the accused takes a defence after the prosecution evidence is closed, under Section 313(1)(b) Cr.P.C. the Court is duty bound under Section 313(4) Cr.P.C. to consider the same. The mere use of the word 'may' cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available is an entirely different matter. If there has been no consideration at all of the defence taken under Section 313 Cr.P.C., in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 Cr.P.C. and to either accept or reject the same for reasons specified in writing.

20. Unfortunately neither Trial Court nor the High Court considered it necessary to take notice of, much less discuss or observe with regard to the aforesaid defence by the appellant under Section 313 Cr.P.C. to either accept or reject it. The defence taken cannot be said to be irrelevant, illogical or fanciful in the entirety of the facts and the nature of other evidence available as discussed hereinbefore. The complete non-consideration thereof has clearly caused prejudice to the appellant. Unlike the prosecution, the accused is not required to

establish the defence beyond all reasonable doubt. The accused has only to raise doubts on a preponderance of probability as observed in Hate Singh Bhagat Singh vs. State of Madhya Bharat, AIR 1953 SC 468 observing as follows :

26. We have examined the evidence at length in this case, not because it is our desire to depart from our usual practice of declining to assess, the evidence in an appeal here, but because there has been in this case a departure from the rule that when an accused person but for the word a reasonable defence which is likely to be true,..... then the burden on the other side becomes all the heavier because a reasonable and probable story likely to be true friend pitted against AV and vacillating case is bound to raise a reasonable doubts of which the accused must get the benefit...."

21. In view of the above, learned counsel for the appellant has submitted that the conviction and sentence of the present appellant by the impugned judgement is liable to be set aside and has prayed for setting the same.

22. On the other hand, Mr. P. S. Lahkar, learned Additional Public Prosecutor submits that the evidence of seizure witness shows that the contraband which was seized by seizure list which was exhibited as Exhibit-4 in the trial was seized from the possession of the present appellant. Learned Additional Public Prosecutor for the State has also submitted that the testimony of PW-4 and PW-5, implicate the present appellant and he also submit that if the implication against the present appellant is on the basis of the testimony of the Investigating Officer, the same needs no corroboration. He has also submitted that compliance of provisions of the Section 52A and 57 of the NDPS Act, 1985 are not mandatory and non-compliance would not vitiate the trial. In support of his submission, he has cited a ruling of Hon'ble Supreme Court of India in "***Gurbaksh Singh Vs. State of Haryana***" reported in "***(2001) 3 SCC 28***". Learned Additional Public Prosecutor for the State also submits that the testimony of



PW-1 and PW-3 proves the fact that the seized contraband was possessed consciously by the present appellant as he had the knowledge as to where the seized contraband was kept and from that place the contraband was handed over to PW-1 by the appellant.

23. I have considered the submission of the learned counsel for both sides and have perused the evidence on record meticulously.

24. Though in paragraph No. 20 of the impugned judgment, the learned Trial Court has observed that there is no discrepancy in sending the samples of the seized contraband to the FSL Laboratory, however, on perusal of the materials available in the case record of Sessions (Special) Case No. 159(K) of 2009, it appears that the procedure prescribed in Section 52A of the NDPS Act, 1985 was not at all followed in this case and no inventory was prepared, neither any photographs of seized contraband was taken nor representative sample was drawn in presence of the Magistrate and no certificate of correctness of such samples etc. was obtained from the Magistrate. Total non-compliance of the provisions of Section 52A of the NDPS Act, 1985 may lead to a presumption that the appellant has been prejudiced due to such total non-compliance. It is more so in the instant case as two separate seizure list were prepared, that is, Exhibit 1 which is regarding the contraband seized from the pharmacy and Exhibit-4 which is regarding the contraband allegedly seized from the appellant. There is nothing to show that separate sampling was done in respect of both the seizures before any Magistrate.

25. Further, though in the seizure list which is exhibited as Exhibit-4, it is shown that the said contraband was seized from the possession of the appellant, however, the testimony of PWs 3 and 4 indicates that the said contraband was seized from the possession of PW-1 and not from the appellant.



It also appears that the contraband seized by Exhibit 1 were seized from the pharmacy which belonged to the brother of the appellant, however, neither the brother of the appellant nor the PW-1 was made accused in this case. It appears that the seized contraband, in this case, was not found from the conscious possession of the appellant and as we have seen hereinbefore in “**Biswanath Pratap Singh and Another Vs. and State of Assam and Another**”(supra) that the provisions of NDPS Act, 1985 contemplates punishment only in case of conscious possession of prohibited contraband and in this case the prosecution side has failed to prove the conscious possession of the seized contraband with the appellant, beyond all reasonable doubt.

26. The appellant has also narrated his case during his examination under Section 313 of the Code of Criminal Procedure, 1973 however, the same was not at all discussed by the learned Trial Court. As observed in “**Reena Hazarika Vs. State of Assam**”(supra), if there is no consideration at all, by the Trial Court, of the defence taken by the accused under Section 313 of the Code of Criminal Procedure, 1973, in the given facts of the case, the conviction may well stand vitiated. In the instant case also, there is evidence on record to show that the pharmacy from where the contraband was seized does not belong to the present appellant, moreover, the evidence of PWs 3 & 4 also shows that the contraband shown to have been seized in Exhibit-4, was seized from the possession of the purchaser, i.e., PW-1 and under such circumstances, total non consideration of the defence taken by the appellant under Section 313 of the Code of Criminal Procedure, 1973 by the learned trial court does vitiate the conviction of the appellant.

27. For the reason stated hereinabove, this Court is constrained to hold that the charge against the present appellant under Section 22(b) of the NDPS Act,



1985 could not be proved beyond all reasonable doubt and the appellant is entitled to get benefit of doubt in this case. The conviction and sentence imposed, by the impugned judgement, on the appellant is, therefore, set aside.

28. Send back the LCR with a copy of this judgement to the learned Trial Court.

JUDGE

Comparing Assistant