

GAHC010276782019



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

Case No. : CrI.A./51/2020

SRI BISWANATH PRATAP SINGH AND ANR
S/O- SRI GOVIND PRAKASH SINGH @ GOVINDA PRASAD SINGH, R/O-
VILL.- MONDERI, P.S. MANPUR, DIST.- SITAPUR (UP).

2: ASHOK BHAGAT
S/O- LATE BAHADUR BHAGAT
R/O- VILL.- PADUM NAGAR
2 NO. PUBLIC SCHOOL
BAIRAGI ROAD
P.S. AND DIST.- DIBRUGARH
ASSA

VERSUS

THE STATE OF ASSAM AND ANR
REP. BY P.P., ASSAM

2:SHRI GIRINDRA NATH HALOI
S/O- LATE CHENI RAM HALOI

SI OF POLICE
GUWAHATI GRPS

Advocate for the Petitioner : MS. S K NARGIS

Advocate for the Respondent : ADDL. PP, ASSAM

BEFORE
THE HON'BLE MR JUSTICE SUMAN SHYAM
THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Appellant : Ms. S. K. Nargis.
Advocate.

For the Respondents : Ms. N. Das.
Addl. P. P. Assam.

Date of Hearing : 03.12.2021

Date of Judgement : 13.12.2021

JUDGEMENT & ORDER (CAV)

(A. D. Choudhury. J)

Heard Ms. S.K. Nargis, learned counsel appearing for the appellants. We have also heard Ms.N. Das, learned APP, Assam, appearing for the State.

1. This appeal is directed against the judgment and order dated 12/09/2019 passed by the learned Sessions Judge, Kamrup(M), in NDPS Case No. 58/2018, finding the appellants guilty of committing offences under Sections 20(b)(ii)(c) and 29 of the NDPS Act'1985 and sentencing them to undergo RI for 14 years and also to pay fine of Rs.200000/- (rupees two lacs) each, in default to undergo rigorous imprisonment for another 6(six) months each.
2. The facts of the case, briefly stated, are that on 10/04/2018, one Girindra Nath Haloi, S.I. of Guwahati GRPS, Assam, had lodged an ejahar before the In-Charge, Guwahati GRPS, informing that on 10/04/2018, at 7.30 a.m., the train checking party, ASI Dinesh Deka, along with staff conducted checking inside the train No.12435DN Rajdhani

Express, while it was standing at Platform No.1, in Guwahati Railway station, had detected that the Bedroll staff of Coach No.4A and Coach No.B3 were carrying suspected Ganja in bags kept inside the bedroll cabin of the Coach. Immediately, the checking party deboarded the bedroll staff along with the three Bags containing Ganja from the coach and detained them with the bags at Plat Form No.1. On getting information from the Checking party, O.C., GRPS issued authority letter under section 41(2) of the NDPs Act, to the informant and the informant visited the place of occurrence, examined the checking party, detained the bedroll staffs who on being asked, disclosed their names, to be Ashok Bhagat and Viswanath Pratap singh. During their bag checking, total five packets of suspected Ganja weighting 38 kgs wrapped in black polythene were recovered from the two black colored bags alleged to be of Ashok Bhagat. Also recovered one alleged ID card allegedly kept in one of the bags. A total of 27 KGs of suspected Ganja, wrapped in three black polythene bags, were recovered from a red colored bag allegedly belonging to Sri Viswanath Pratap Singh and also recovered one ID card and two numbers of mobile handset. Accordingly, Guwahati GRPS Case No. 85/2018 was registered under Section 20(C)/29 NDPS Act and the Officer-in-Charge of Guwahati GRPS Police Station took up the matter for investigation and one Sri Mahesh Baishya, Sub Inspector, Guwahati GRPS was appointed as Investigating Officer.

3. During the course of investigation, the I.O. had recorded the statements of the witnesses, statement of the informant, drew sketch map and took custody of the seized Ganja. The original samples of the seized Ganja was sent to Forensic Science Laboratory for examination. Upon completion of investigation, the I.O. had laid charge

sheet against the two accused under Section 20(C)/29 of the NDPS Act.

4. Thereafter, charge under section 20(b)(ii)(C) and under Section 29 of the NDPS act was framed against the accused persons and the same was read over and explained to them. However, since the accused had pleaded not guilty and claimed to be tried, the matter went up for trial.
5. During the course of trial, the prosecution side had examined as many as 6 (six) witnesses, including the IO and the Deputy Director, Drugs and Narcotic Division, Directorate of Forensic Sciences, Assam, who had conducted examination of the samples of the suspected Ganja and submitted his Report. After conclusion of recording of evidence of the prosecution witnesses, the accused were examined under Section 313 of the Cr.P.C., wherein, they denied their involvement in the matter and had taken the plea of false accusation.
6. Upon conclusion of trial, the learned Sessions Judge, Kamrup (Metro), had held that the PW5, who examined the samples of the seized ganja, gave positive tests for Cannabis (Ganja) and the defense failed to shake his evidence. The PW1, PW2 and PW3 have deposed that during the routine checking, they first recovered the Ganja from the possession of Sri Ashok Bhagat and thereafter, on information provided by the accused Ashok Bhagat, the PW1, PW2 and PW3 went to Coach B3, recovered 27 KGs of Ganja from the accused Viswanath Pratap Singh. It was also held that the prosecution witnesses have identified the bags containing suspected Cannabis recovered from the possession of both the accused. It was held by the Learned Sessions Judge that the defense has failed to challenge the deposition of the PW4

regarding the fact of seizure of the ID Cards, Adhar Card and Mobile Phones from the possession of the accused persons and has also failed to put suggestion that the material exhibit VI and VII envelopes did not contain the IDs, Adhar and Mobile Handsets. Therefore, the learned Court below held that the prosecution had succeeded in bringing home the charges under Sections 20(b)(ii)(C) and 29 of the NDPS Act beyond all reasonable doubt. Accordingly, the accused were convicted sentenced as indicated above.

7. By referring to the materials available on record, Ms.S.K. Nargis, learned counsel appearing for the appellants submits that the prosecution has failed to establish the conscious possession of the suspected Cannabis by the appellants, inasmuch as, there are no evidence on record to show that the two accused persons were Bedroll employees and that the bags from which the contraband was recovered belonged to the accused persons or that they had control over the Almirahs from which, the bags containing suspected cannabis were recovered. Such failure on the part of the prosecution, according to Ms. Nargis would have fatal consequences on the prosecution case. Ms. Nargis, further submits that the presumption of culpability against the accused under the NDPS Act is rebuttable and the same does not dispense with the obligation of the prosecution to prove the charge beyond reasonable doubt. According to her, the learned Trial Court had convicted her clients on the basis of preponderance of probability and not beyond reasonable doubt. To buttress her aforesaid argument, Ms. Nargis, has relied upon the decisions rendered in the case of Gangadha alias Gangadhar Vs. State of Madhya Pradesh reported in 2020 (9) SCC 202 and Karnail Singh Vs. State of Haryana reported in (2009) 8 SCC 539.

8. The learned counsel for the appellant further submits that though the IO did not exhibit ID cards and, Adhar Card allegedly belonged to the accused persons and therefore, there is no evidence in the case to implicate her clients for committing any offences under section 20(b)(ii)(c) and 29 of the NDPS Act
9. Ms. N. Das, learned APP, Assam, appearing for the State, on the other hand, has argued that in this case, the prosecution has succeeded in establishing that the victim was in control of the contraband and the same has been recovered from their possession. According to Ms. Das, the statements of PW1, PW2 and PW3 clearly establishes that the accused themselves have opened the locked Almirahs with the keys, which were under their possession. The cannabis concealed in the bags were found inside such Almirahs. According to Learned A.P.P., the Identity Cards of the Accused persons were also found inside the bags. Therefore, Learned A.P.P. submits, it cannot be said that evidence is not sufficient in the case to implicate the appellants.
By referring to Section 35 and 54 of the NDPS Act, the learned A.P.P., further submits that in a case where the accused is prosecuted for offence committed under sections 20(b)(ii)(c) and 29 of the NDPS Act, the court is empowered to draw presumption of guilt of the accused. Therefore, having regard to the facts and circumstances of the case as well as the evidence brought on record, the learned Sessions Judge has rightly held that the accused were guilty and sentenced them under sections 20(b)(ii)(c) and 29 of the NDPS Act. In such view of the matter, no interference with the impugned judgment and order dated 12/09/2019 by this Court is called for.
10. We have taken note of the submissions advanced by the learned counsel representing for both the parties and have also carefully gone through the materials available on

record.

11. The PW-1 has deposed that when, he along with other staffs of GRPF was in routine train checking, he had noticed a bedroll employee i.e. accused No.1 visibly nervous and the train checking constables on suspicion asked him what is inside the bedroll almirah. During checking, two trolley bags were found and when it was opened by accused No.1, the checking party found the suspected 5 packets of Ganja inside both the trolley bags, wrapped in polythin papers. PW1 further deposed that on interrogation, accused No.1 admitted that accused No.2 is also accompanying him. The accused No.1 led the checking party to Coach No.B3, identified the accused No.2 and three packets of suspected Ganja were recovered from one trolley bag found with the accused No.2. Thereafter OC, GRPS sent PW4 with weighting apparatus. PW4 brought out the packets of the contraband. Two ID cards and one Mobile handset were also recovered. He was the seizure witness of the contraband. This witness had also exhibited the Seizure list Ext.I and Ext.II the seizure list of the Contraband.

During his cross- examination, the PW-1 stated that he had not seized any document to show that the two accused were in Bedroll duty. PW-1 has also deposed during cross examination that the respective almirahs were under lock and key and were opened by the accused persons but the keys were not seized.

12. The PW-2 was one of GRP Personnels engaged on checking duty on the date of occurrence. He deposed that after entering into the train along with PW1 and PW3, they asked Incharge of the Coach A4, namely, Ashok Bhagat to open the almirah, who in turn opened the lock and two bags inside the almirah were found. On being asked

the accused No.1 opened the bag and the suspected ganja was found. On interrogation, the accused No.1, disclosed about the accused No.2, who was in Coach B3. Then they went to coach No.B3, searched the almirah, found one bag inside the Almirah, where suspected ganja were found. They brought down the accused from the train, PW1 informed the OC, GRPS. PW4 was sent to the platform by the OC GRPS. Thereafter PW4 seized the suspected Ganja. The PW2 was the seizure witness.

During cross examination, he stated that they have not examined any Incharge of the accused No.1 and 2. He also stated that he has not seen any ID cards of the two accused. He denied the suggestion of the prosecution that nothing was recovered from the possession of the accused.

13. The PW3 was also a member of the GRPS checking party and is a seizure witness. He deposed that after entering into the train along with PW1 and PW2, they asked Incharge of the Coach A4, namely, Ashok Bhagat, as to who was the Incharge of the almirah, to which said accused No.1 told that he was the Incharge and on being asked, he had opened the almirah, inside which two bags were found. On asking whether anybody else was with him, the accused No.1, told about the accused No.2, who was in Coach B3. Then they went to coach No.B3, searched the almirah, found one red bag inside the Almirah, where suspected ganja were found. As the train was departing, they brought down the accused from the train. The suspected ganja was seized by the PW4 before him and put his signature in the seizure list i.e. Exts.I and II. During cross examination, PW3 stated that PW4 did not seize duty allotment document relating to the accused persons. They did not examine any Incharge of the two

accused persons nor did they seize the keys of the Almirahs. This witness has denied the suggestion of the prosecution that nothing was recovered from the possession of the accused.

14. PW-R Girindra Nath Haloi was ASI, GRPS, Guwahati, the informant in the case, who was authorized under section 42 (1) of the NDPS Act, by the OC, GRPS, Guwahati to take necessary action regarding the recovered Ganja. He deposed that after reaching the Platform No.1 of Guwahati Railway station, found the checking party led by PW2 with two persons and three bags. He interrogated the said two persons, searched the bags in presence of witnesses and found five packets of Ganja from the bag of accused No.1 and 3 packets of ganja from the bag of accused No.2. He weighted the contraband and seized the same. He exhibited Material Ext.VI, the envelope containing the seized mobile phones, identity cards and Adhar Card.

During Cross examination, he had stated that he found the accused in the platform and not inside the train. He did not personally know from where the checking party brought the accused persons. He cannot say under whom the accused were working. He did not seize any key of the almirahs. The material exhibit VI did not contain his signature, signature of the accused or of any witness. He denied the suggestion of the defense that accused had no connection with material Ext.I, II and III.

15. PW-6 is the IO of the case. He deposed that he recorded the statement of PW4 and thereafter, visited the place of occurrence, sent the original Sample to FSL.

During his cross examination he stated that he did not examine any witness after visiting the place of occurrence, he did not enquire about whether the accused were

working as bedroll staff under any contractor, he did not examine the Incharge of the bedroll staff, he did not collect any certificate to travel in the train issued to the accused as bedroll staff. He denied the suggestion given by defense that accused had no connection with the seized articles.

16. Now the question of determination is whether the appellants are right in contending that there was no conscious possession and that no presumption could be raised under Section 35/54 of the NDPS Act, on the basis of evidence available on record?

17. For a proper appreciation of the factum of conscious possession of the contraband, it is inevitable to consider the foundational facts which led to the seizure of the contraband article as per Ext.I and II seizure list, allegedly from the accused persons. To bring home the charge of conscious possession of the contraband, the prosecution relied on deposition of PW1, PW2, PW3, PW4 and PW6. Their evidence in chief and cross examination can be summarized as follows:

- I. During a routine checking in the Coach A4, on suspicion, the Checking party, consisting of PW1, PW2 and PW3, asked the accused No.1 to open the lock of the Bedroll almirah, wherein two bags containing suspected ganja were found and the bags were opened by the accused No.1.
- II. On interrogation, the accused No.1 disclosed that accused No.2, who was in Coach B3 was also possessing ganja.
- III. Accordingly, the accused No.2 was asked to open lock of the bedroll almirah of Coach B3, which he opened and one bag containing ganja was recovered.
- IV. As the train was about to leave the station, they brought down the two

accused persons along with the seized Ganja and the bags belonging to the accused persons to the Platform No.1.

- v. The PW1 informed the OC, GRPS, Guwahati regarding the recovery of the suspected Ganja, who in turn authorized PW4 to do the needfull.
- vi. After reaching the Platform No.1, PW4, (the informant) found PW1, PW2 and PW3 along with the two accused persons and the three bags containing the Contraband.
- vii. PW4 interrogated the accused persons, searched the begs in presence of the witnesses and found the three packets from the bags of accused No.1 and 2 packets from accused No.2, which he seized.
- viii. The PW1, PW2 and Pw3 were the witnesses to the seizure.

In their cross examination, the following statements were made:

- i. PW1, PW2 and Pw3, stated that no document was seized to show that the accused are Bedroll employees.
- ii. No duty allotment document relating to the accused persons were seized
- iii. No Incharge of the accused persons were interrogated.
- iv. The two Almirahs from which the suspected ganja were recovered, were under lock and key and was opened by the accused persons but such keys were not seized.
- v. PW4 found the accused persons in the platform not inside the train.

vi. PW4 did not personally know, from where the checking party (PW1, PW2, PW3) brought the accused.

vii. He was not aware under whom, the accused were working and that he did not seize the keys.

viii. The PW6, the IO of the case, did not examine any witness after visiting the place of occurrence, did not enquire whether the accused were working as bedroll staff under any contractor and did not examine any Bed roll in charge and did not collect any certificate of travel as bedroll employee relating to the accused persons.

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. Section 35 of the NDPS Act provides for presumption of culpable mental state. It provides that in any prosecution for an offence under this Act, which requires culpable mental state of the accused, the Court shall presume the existence of such mental state.

20. Before that presumption could be raised, prosecution is obliged to establish based on the principle of preponderance of probability, that the appellant was in exclusive and conscious possession of the contraband in order to sustain the conviction for illegal possession of the contraband.

21. While dealing with challenge made to the validity of section 35 and 54 of the NDPS, in so far as it imposes reverse burden upon the accused, the Apex Court has observed in the case of Noor Aga Vs State of Punjab reported in (2008) 16 SCC 417, as follows :-

"58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required proving the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is 'preponderance of probability' on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigors of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established."

While upholding the constitutional validity of sections 35 and 54 of the NDPS Act, the Apex Court has, however, reiterated that more serious the offence, the stricter would

be the degree of proof to convict the accused. It was also observed that an initial burden would lie upon the prosecution and only when it stands satisfied, the legal burden would shift upon the accused. What follows from the above decision is that notwithstanding the concept of reverse burden envisaged by section 35 and 54 of the NDPS Act, the burden upon the prosecution to prove the foundational fact would still exist.

22. In the back drop of the aforesaid legal provision and from a close scrutiny of the materials available on record, the following conclusion can be drawn:

- A. The prosecution has failed to prove that the two accused persons were bedroll employees on duty in the Rajdhani Express train in coaches 4A & B3 and that they were having control over the two bedroll almirahs wherefrom, the bags containing the contraband were recovered.
- B. No material has been brought on record to prove that the bags belonged to the accused appellants. The prosecution has therefore, failed to prove the conscious possession of contraband of the accused beyond reasonable doubt.
- C. The PW1, PW2 and PW3, have deposed that recovery is from inside the train. The informant PW4, who had allegedly seized the contrabands, has deposed that the recovery was from the Bags found with the accused in the Railway Platform. An overall analysis of the evidence on record shows that there is a reasonable doubt as to the actual place and circumstance of recovery of the contraband.
- D. Clear proof as regard the link between the accused persons and the seized bags was required to be brought to show the conscious possession of the contraband by the

accused persons, more so, since the contraband was apparently seized from a public place viz. railway platform, which was accessible by a large number of passengers.

E. For the above reasons, we are of the view that the prosecution has not been able to prove the foundational facts of the offence based on preponderance of probability and therefore, the presumption under Section 35/ 54 of the Act cannot also be drawn against the accused persons in the case. Rather, the involvement of accused/appellant is doubtful and hence, they are entitled to the benefit of doubt.

23. In view of the foregoing discussions, we hold that the impugned judgment dated 18.09.2019 passed by the learned Sessions Judge, Kamrup (Metro) in NDPS Case No.58/2018 of 2018 is unsustainable in law. The same is accordingly set aside.

24. The appeal stands allowed.

25. The appellants/ accused are hereby acquitted by giving them the benefit of doubt.

26. The Appellants Viz. Viswanath Pratap Singh and Ashok Bhagat, shall be forthwith released from jail, if their custody in connection with any other proceeding is not required.

27. Send back the LCR.

JUDGE

JUDGE

Comparing Assistant