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Gaur Moni Singha Vs State of Assam

Criminal Appeal No. 131 of 1995

Court: Gauhati High Court

Date of Decision: April 21, 2004

Acts Referred:
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€" Section 41, 42, 52, 55, 57

Citation: (2005) CriLJ 519 : (2005) 1 GLR 135 : (2004) 2 GLT 1665

Hon'ble Judges: P.G. Agarwal, J

Bench: Single Bench

Advocate: HRA Choudhury, for the Appellant; P.C. Gayan, for the Respondent

Final Decision: Dismissed

Judgement

P.G. Agarwal, J.
The appellant Sri Gaur Moni Singha is a constable in the Central Military Police and he was tried by the Coxirt of the

Special Judge, Barpeta in Special (N.D.P.S.) Case No. 1/94 and on conclusion of the trail vide impugned judgment dated 12.6.1995 the accused

appellant was convicted u/s 20(b)(i) of the NDPS Act (for short the Act) and he was sentenced to rigorous imprisonment for five years and to pay

a fine of Rs. 10,000/- in default further imprisonment for three months. Hence the present appeal.

2. The prosecution case in brief, is that in between the night of 8th and 9th February, 1994 while the GRPF personnel were making a regular

search/checking of the railway bogies, the accused person was travelling in the Kunchanjanga Express and they asked the accused to allow search

of his baggages, the accused resisted the same for giving privilege for being a military personnel whereupon the accused was forced to detained at

Barpeta Road railway platform along the baggages. There were three pieces of baggage, which included one trunk, one aristocrat suitcase and one

carry bag. On opening of the baggages 20 kgs of ganja were found in the steel trunk and 20 kgs were found in the aristocrat suitcase and another

2 kgs were found in the carry bag. The contraband ganja along with the railway tickets, identity cards and blue book were seized by seizure list 2

and 3. Samples of the seized articles were sent to the Forensic Science Laboratory, Assam who submitted the report Ext.5 to the effect that the

sample gave positive test for cannabis (ganja).

3. During trial, prosecution examined as many as four witnesses. In the present case, report of the Forensic Science Laboratory, Ext.5 has not

been challenged and it is not disputed that the seized article is contraband ganja. The prosecution witnesses have deposed that the accused was

travelling in the Kanchanjanga Express and he was detrained at Barpeta Road railway platform and was searched. The fact that he was

apprehended at Barpeta Road Railway station at the midnight of 8.2.1994 and 9.2.1994 and his railway ticket, identity card and blue book etc.,

were seized, is admitted by the accused in his statement u/s 313 Cr.P.C. as regards the seizure of three baggages, the prosecution witnesses have

categorically stated that the accused was carrying three baggages and on being asked, he identified his baggages and when he was asked to get

down from the train he did so by carrying those three baggages. The accused person had denied that the steel trunk and the briefcase belonged to

him. So far the carry bag is concerned he admits the same.

4. PW-1 is Chakra Deka who was the in-charge of the Barpeta Road GRP Station. He has deposed that the excise constable Biswajit Nath, PW

4 who was with him on the checking duty at that time entered into the compartment of Kanchanjanga Express and saw the accused sitting therein.

The accused person is known to the said constable from before and he suspected after weighing the steel trunk etc. and when he wanted to check

the same, the accused claimed that he cannot check the luggage as it belonged to a military personnel and the constable has to take prior

permission from the Commandant of the Military Police. PW 4 reported the matter to PW 1 whereupon the accused was forcibly detrained at the

said railway station along with his baggages. The evidence of PW 1 has been fully supported by the two constables Biswajit Nath PW 4 and

Madan Ch. Roy PW 3. Bhulan Roy PW 2 is a railway potter who helped unloading the baggages from the train. The baggages were opened at the

railway platform itself and it contained ganja.

5. There is no dispute at the Bar that the initial burden is on the prosecution to establish that the accused was in conscious possession of the

contraband articles but once the possession is established, in view of the provisions of Sections 35 and 54 of the NDPS Act, the burden is placed

on the accused to prove that he had no culpable mental state. The accused is required to satisfactorily explain for possession of the articles.

6. In the present case when the accused was examined u/s 313 Cr.P.C, he had this to say about the search and seizure.

I was on leave for 2 (two) months since January. Before that I was posted in Srinagar. On 7.2.1994 I started for Calcutta to meet my one known

person by Kanchanjanga Express. I was carrying my civilian dress only in a plastic carry bag. However, I was travelling in military dress. While my

train arrived at Barpeta Road my co-passenger (a civilian) got down from the bogie for a while with a request to look after his luggage.

Immediately thereafter G.R.P.F. personnel entered in the bogie and wanted to search the trunk which belong to the civilian person. I denied that

the trunk belong to me. I also raised question to search me without the permission from the C.M.P. In the air bag the police found one diary and

civil dress which belonged to the other passenger.

7. The trial court has rejected this cock and bull story of the accused appellant that the baggage belonged to some unknown passenger. If the

baggages belonged to other there was no need on the part of this accused to claim the same to be his before the police constables and resist

checking of those baggages. Rather one carry bag was found with the accused and in the said carry bag used clothes of the accused the

toothbrush, chappals etc. were found along with two green polythene bag containing two kgs of ganja. So far the carry bag is concerned the

accused has admitted the same to be his and the recovery of two kgs of ganja from the said carry bag links up the possibility of the other two

baggages which contained 20 kgs of ganja to be his baggages. The accused has not alleged any animus with the prosecution witnesses and as such

there is no reason to disbelieve the testimony of these witnesses. The trial court for the reasons mentioned in the judgment has relied on the

prosecution evidence of these two witnesses and we fully agree with the same and hold that 42 kgs of contraband ganja was found in the exclusive

and conscious possession of the accused. The facts and circumstances of the present case is not at all a probable one and accordingly stand

rejected.

8. The learned counsel for the appellant referring to the evidence of PW 1, has submitted that no gazetted officer or Magistrate was present at the

time of search and seizure and the option was not given to the accused. This is not a case of search of the accused appellant. The provisions of

Section 50 of the NDPS Act are not applicable.

9. The learned counsel has alleged violation of the provisions of Sections 41 and 42 of the Act and has placed reliance on a decision of this court in

the case of Kailash Chowdhury v. State of Assam, 2001 (3) GLT 184. This court held, as below :-

There is nothing on record to show that the officer concerned has been authorised to exercise the powers Under Sub-section (2) of Section 41.

No notification could be produced, even at the stage of argument before this court, by the Public Prosecutor to show that the officer concerned

has been empowered by the State Government to exercise the powers Under the Act. It, therefore, appears that the search, seizure, arrest of the

appellant and even the investigation stand vitiated for lack of sanction of law. This view is drawn on the law as in force today. The Hon"ble

Supreme Court in AIR 2000 SCW 4005 held as follows :

Now, it is plain that no officer other than an empowered officer can resort to Section 41(2) or exercise powers u/s 41(1) of the NDPS Act or

make a complaint Under Clause (d) of Sub-section (1) of Section 36-A of the NDPS Act. It follows that any collection of material, detention or

arrest of a person or search of a building or conveyance or seizure effected by an officer not being an empowered officer or an authorised officer

u/s 41(2) of the NDPS Act, lacs sanction of law and is inherently illegal and as such the same cannot form the basis of a proceeding in respect of

offences Under Chapter IV of the NDPS Act and use of such a material by the prosecution vitiates the trial. To the same effect is the view

expressed by the Court in State of Punjab Vs. Balbir Singh, In para 13 Jayachandra Reddy, J. speaking for the Court observed thus (para 14 of

AIR) :

Therefore, if an arrest or search contemplated Under Sections 41 and 42 is made Under a warrant issued by any other Magistrate or is made by

an officer not empowered or authorised, it would per se be illegal and would affect the prosecution case and consequently vitiate the trial.

10. In the present case we have perused the evidence of PW 1 and find that not a single question was asked or any suggestions were given that

PW 1 is not empowered to make seizure or investigation in this case. Moreover, this is not a case where any prior knowledge or information was

available to PW 1 for applicability of Section 41 and 42 of the Act. The search was conducted by the GRPF personnel in the regular course of

duty and by chance the contraband ganja was recovered in the police search. The search party had no prior information in the matter and hence

we hold that the procedure of informing a superior officer provided u/s 41 and 42 of the Act is not applicable.

11. Now coming to the question of alleged violation of the provisions of Sections 52, 55 and 57 of the Act, the trial court considered the

submission and held that the accused has failed to establish that he has been prejudice in any manner for the alleged non-compliance of the above

provisions. The law was laid down by the Apex Court in the case of State of Punjab Vs. Balbir Singh, that the provisions are directory in nature

and in order to get the benefit, the accused must show that prejudice has been caused to him. The appellant has failed to show any prejudice

caused to him before this court even.

12. In view of what has been stated above, we hold that 42 kgs of contraband ganja was found in the exclusive and conscious possession of the

accused appellant and hence the conviction of the appellant u/s 20(b)(i) of the Act needs no interference.

13. We find no merit in the appeal and the appeal is accordingly dismissed. The accused, is directed to surrender forthwith and serve out the

sentence. Send down the records to the Special Judge, Barpeta for taking the follow up action in the matter.