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**(2012) 01 GAU CK 0051**

**Gauhati High Court**

**Case No:** Criminal Appeal No. 230 of 2007

Bhim Ram & Ors.

APPELLANT

Vs

State of Assam

RESPONDENT

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**Date of Decision:** Jan. 19, 2012

**Citation:** (2012) 4 GLR 573 : (2012) 1 GLT 416

**Hon'ble Judges:** P.K.Musahary, J

**Bench:** Single Bench

**Advocate:** Advocates appeared for the Appellants: Mr. Choudhury, Mr. R. Ali, Mr. P.K. Das & Mr. N.J. Das., Advocate appeared for the Respondents: Mr. B.S. Sinha, Addl. PP.,  
Advocates appearing for Parties

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### **Judgement**

P.K. Musahary.

1. The appellants were convicted under Section 20(b)(ii)(C) of the N.D.PS. Act, 1985 in Sessions (Special) Case No. 1/07 vide judgment and order dated 3.8.2007 passed by the learned Special (Sessions) Judge, Barpeta. By the said judgment and order the convict/appellant No. 1 ShriBhimRamwas sentenced to undergo R.I. for 15 years and fine of Rs. 3 lakhs and in default of payment of fine, further R.I. for 5 years and the convict/appellant No.2 Shri Sanjoy Ram and convict/appellant No. 3 Smt. IndraDevi were sentenced to undergo R.I. for 10 years each and fine of Rs. 1 lakh in default of fine, further R.I. for 2 years. This appeal is directed against the said conviction and sentence.

2. The prosecution story is that on 18.12.06 at about 12.43 P.M.(noon), 5636 Down Usha Express arrived at Barpeta Road Railway station at No.I Platform. The incharge of Barpeta Road Railway GRP outpost made the GD entry No. 343 dated 18.12.06 and proceeded alongwith his staff to check the suspected luggages in the said train. He asked his staff Shri Dilip Sarma, Hemanta Sarma and Lachit Hazarika to check from engine side. He along with staff Shri Bipin sarma and Shri Anil Gayari started to check from the middle of the train. While checking the luggages at about 1.10 P.M.

in sleeper Coach No.5.12 (6857) under the Berth No. 65 they found a black trunk, two V.I.P Suit cases and a bag. He interrogated the passengers who were found on berth No. 65. All the persons admitted that the said luggages belonged to them and when he wanted to check a person Bhim Ram by name delivered the keys and when he opened the trunks etc. he found them full of suspected ganja. In the mean time the train started to leave and so they brought down all the three passengers with luggages to the Platform. In presence of witnesses he took the weighment and found net 85 Kg.500 Grams of suspected ganja.He seized the articles in presence of witnesses. Samples were drawn and packed. The accused persons were forwarded under Section 42 of N.D.P.S. Act and the sample packets were sent to FSL for examination and report. As per FSL report the samples of seized articles tested positive that is cannabis (ganja). The outpost incharge lodged FIR on 12.1.07 with the OC, Rangia GRP PS and accordingly a case being Rangia GRPS. Case No. 4/07 was registered under Section 20(b) NDPS Act. The incharge of the Barpeta Road GRP out post who lodged the FIR was entrusted with the investigation of the case .He examined the seizure witnesses and other witnesses.The subsequent part of the investigation was made by one Trailokya Talukdar S.I. of police of Rangia G.R.P.S. who also examined the informant and one T.T.(E) and on completion of investigation submitted the charge sheet against all the convict appellants under Section 20(b) of the N.D.P.S. Act. On receipt of the case records and on consideration of the materials the learned trial court found prima facie case punishable under Section 20(ii)(b) N.D.P.S. Act read with Section 34 I.P.C. against all the three accused persons and accordingly a charge under Section 20(ii)(b) of N.D.P.S. Act read with Section 34 IPC was framed against all the three accused persons. The charge was read over and explained to the accused persons to which they pleaded not guilty and claimed to be tried.

3. In order to establish the case, the prosecution examined as many as 8 witnesses while the defence examined none although opportunity was provided as per the provision under the law. The learned trial Court on consideration of the materials and on appreciation of evidence on record and upon hearing the learned counsel for the parties, convicted and sentenced the appellants as mentioned earlier.

4. I have heard Mr. A. Choudhury, learned counsel for the convicts/appellants and Mr. B.S.Sinha, learned Addl. P.P, Assam

5. I have also gone through the records of the case particularly the FIR, seizure lists, charge sheet and the evidence of the prosecution witnesses.

6. Shri Bipin Sarmah, i/c, Barpeta Road G.R.P. outpost examined himself as PW5. He is the informant and I.O. of the case. He deposed that he led a team of the G.R.P. outpost and checked the down train Usha Express along with other police personnel P Ws 3, 4 and 6. He along with constable Shri Anil Goyari (PW3) checked the down train from the middle portion towards the end. One black colour trunk, two VIP suitcases and a blue colour bag were found under the seat. He enquired about the

owner of the articles and the persons admitted to be their articles. While PW5 wanted to check the articles one of them told that he was a CRPF personnel and he was not willing to allow the PW5 to check the trunk and the bags. However, the CRPF personnel after sometime brought out the keys from his pocket and opened the trunk and the suitcases. On opening the trunk, suitcases and the bag he found ganja like substances. They disclosed their identity to be Shri Bhim Ram, his wife with a baby daughter and his brother. After obtaining authority letter he took weighment at the scale of Railway platform, took signature of the accused and the seizure list witnesses. He further stated that his rank was S.I. of police which is not a gazetted rank. He lodged ejahar with Barpate Road GRP outpost, made G.D.Entry and forwarded the same to the O/C, Rangia GRP PS. His evidence is corroborated by PWs 3 and 4. The evidence of P.W6, constable Shri Lachit Hazarika is of no significance as he stated that he arrived after the seizure was made and he did not see from whose possession the articles were seized.

7. P.W2, Shri Girin Sarma is a seizure witness. He stated in his deposition that on the date of occurrence i.e. on 18.12.06 he was at Barpeta Road Railway Station platform No. 1 waiting for his friend who was scheduled to come in Up Kamrup Express at about 1.00/1.15 P.M. At that point of time Usha Down Express arrived and stopped at platform No. 1 for crossing. The Rail way policemen brought down from the said train, 2 male persons and one female with a child along with one black colour trunk, two VIP suitcases and a blue colour bag from Usha Down Express. On being interrogated, they replied that the said trunk, VIP suitcases and bag contained ganja. Police took the key of the trunk, VIPs etc. On opening the trunk, VIP suitcases and the bag, the police took out the articles and took weighment at the Railway platform scale. Police also seized Railway tickets from those persons. All the trunk, VIP suitcases and a bag along with the articles were seized by police and he put signature on the seizure list. He proved his signature. The said PW2 deposed that in his presence the police Officer made 8 packets in polythene bags containing 24 grams each which were put in the independent envelop on which his signature was obtained. In crossexamination he further deposed that he signed 2 seizure lists and 8 numbers of envelopes. He however stated that he did not read the seizure lists. He put signatures as per the direction of the S.I and by now, without opening, would not be able to say what was inside the trunk and the VIP suitcases.

8. I have carefully gone through the seizure list, particularly, Exhibit 4. The seizure of trunk, VIP Suitcases and bag containing suspected ganja, were made on 18.12.06 at 3 P.M. Two witnesses signed the said seizure list. They were Shri Girin Sarma, PW2 and Shri Ram Chandra Rai, son of Late Ram Deo Rai of Barpeta Road Railway Station. The second seizure witness was not examined by the prosecution. What is to be noted is that Shri Bipin Sarma, PW5, immediately after detection of all the suspected articles, informed the matter to the D.S.P. of Railway police, Rangia who in his turn issued authority letter, Exhibit 6 for taking immediate necessary action against the persons who were detected and apprehended under Section 42 of the NDPS Act. The said I/C

Shri Bipin Sarma did not produce the seized articles before the learned C.J.M, Barpeta or any Magistrate on 18.12.06 although seizure was made at 3 p.m. on 18.12.06. No permission was obtained from the learned C.J.M or any Magistrate for keeping the seized articles, particularly, the suspected ganja, in his safe custody till the samples were sent to the FSL for examination and report. The said i/c did not even inform the O/C, Rangia GRP police station about the seizure of the articles and keeping the same at the Barpeta Road GRP out post after the seizure was made.

9. From records it is found that all the 3 accused persons along with a child were produced before the learned C.J.M, Barpeta on 19.12.06. It is found from the deposition of PW5 that he sent the seizure list for perusal of the learned C.J.M without producing the seized articles. In the meantime, the samples of the seized ganja were sent to the FSL by a special messenger on 19.12.06 for examination and report. As per the evidence of I/O, PW5, he sent the samples to FSL for examination and report by a special messenger on 19.12.06 but due to holiday it was received on 21.12.06. There is nothing on record that the samples of seized articles were drawn, packeted and sealed without due permission from the learned C.J.M or any Magistrate. Nothing is found on record how the i/c of the police outpost, who himself was the I.O, could keep the seized ganja and the packets of sample thereof in the police outpost till the same were sent to the FSL. If it is to be accepted that the samples sent by him were received by the FSL on 21.12.06, the I.O. has to explain as to under whose custody the samples were kept in the night of 19.12.06 and the whole day and night of 20.12.06. The special messenger who carried the samples to FSL was not examined by the prosecution to give evidence to the effect that the samples were handed over to a responsible Officer/Official of the FSL to ensure safe custody thereof. It is not proved whether the sample packets of the seized articles were sent to the FSL on 19.12.06. What did the special messenger do when he could not deliver the samples packets of the seized articles to FSL on 19.12.06 at Guwahati. If he could not deliver, whether he stayed back at Guwahati with the sample packets or whether he returned to Barpeta Road and handed over the sample packets back to i/c P. W5. It may happen that the special messenger did not return to Barpeta Road on 19.12.06 and he might have stayed back at Guwahati till reopening of the office on 21.12.2006. It was quite risky and impermissible to leave the samples with the special messenger for a long gap. For lack of evidence it is not possible to take a definite view on the safe custody of the sample packets at the hands of the special messenger but one thing is clear that the i/c of the case took no measure to ensure safe custody of the sample packets till the same were received by the FSL. The whole process of sending the sample packets to FSL does not ensure protection against possibility of being tampered with.

10. In crossexamination, the I.O, PW5, stated that on 10.12.06 he produced the accused persons before the court and till delivery of the samples by special messenger, they were in the said custody of the outpost but he had made no G.D.Entry to that effect. From his evidence it is established that the seized ganja

were not forwarded to the O/C, Rangia GRP PS for taking necessary action and instead he kept the same at the outpost Barpeta Road. The i/c cum I.O. (P. W5) received the FSL report (Exhibit1) on 12.1.2007 and only after receiving positive report of cannabis (ganja), he lodged the FIR on 12.1.07 with the O/C, Rangia GRPS. A case was registered and the I/C Shri Bipin Sarma, PW5, was entrusted with the investigation of the case. It is to be noted that the Officer Incharge, Rangia GRPS officially had no knowledge about the seizure of ganja, drawing of samples, sending of samples to FSL and receipt of the report until the FIR was lodged with him by the out post incharge. In my considered view the incharge of police outpost is not authorised/permitted to take such action without giving intimation to the Officer Incharge of the Rangia G.R.P.S, I am also of the considered view that the power, function and duty regarding preparation of inventory of seized Narcotic Drugs or Psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars etc. are entrusted with the O/C of the nearest police station or Officer empowered under Section 53 of the NDPS Act. It is so evident from the provision under Section 55 of the NDPS Act, which is reproduced hereunder.

"55. Police to take charge of articles seized and delivered:

An officer in charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer, who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or take samples of and from them and all samples so taken shall also be sealed with a seal of the officer in charge of the police station."

11. The provision under Section 55 of the Act is not mandatory, rather directory but the Apex court in Gurbax Singh Vs. State of Haryana reported in AIR 2001 SC 1002, held that the I.O. cannot totally ignore the provision and failure in compliance with the same will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the articles. It needs no repetition that P. W5 as incharge of the police out post as well as the I.O. of the case initiated and completed the entire process of packeting the samples of seized ganja, sending them for chemical examination and collecting the FSL report but he failed to satisfy the court how he could take action which were otherwise to be taken by the O/C of the police station concerned. His failure in informing the O/C of the police station and taking action without his knowledge and authority has a serious bearing with the bonafide of his entire action. Had the P. W5 as i/c of the police outpost taken the aforesaid action with due permission/authority from the court, it would have been accepted as bonafide and legal. As already noted earlier, the sole independent seizure witness PW2 stated in his evidence that he signed the seizure list as per the direction of the S.I and he did not read the contents of the seizure list. The said witness did not say

that the samples were drawn from seized ganja at the Railway platform and he was a witness to the packeting of the samples and sealing of the sample packets. There is no evidence to the effect that the said independent witness, PW2, accompanied the police team to the police outpost and the seized ganja and the samples were put under safe custody of the incharge of the police outpost. The said independent witness never stated that PW5 put any seal on the sample packets and the samples of the seal was ever shown to him. There is no evidence that the seized articles were kept in the malkhana inasmuch as the prosecution never produced the malkhana register to prove that it was so kept in the malkhana till the sample packets were sent for chemical examination. It was, therefore, not proved that the seals found on the sample packets were the same with the sample seal. Here is a case where police officials who sent the sample packets for chemical examination, sent no sample seal. The default of the police outpost incharge in sending sample packets along with sample seal provided scope for tempering although there is no allegation from the defence to that effect. The Apex court had an occasion to deal with a similar case in State of Rajasthan Vs. Gurmail Singh, reported in (2005) 3 SCC 59, wherein it is held that if link evidence adduced by the prosecution is not satisfactory, accused is entitled to acquittal in view of the loopholes in the prosecution case. In the present case several loopholes have been found as discussed earlier.

12. As per the seizure list there is another independent witness namely Shri Ram Chandra Rai. He was not examined although he signed the seizure list as an independent witness. Why this important independent witness has been withheld by the prosecution is best known to the prosecution only. It was necessary to examine this independent seizure witness in view of the fact that the other independent witness, PW2, who did not fully support the case of the prosecution. The prosecution also failed to examine the persons who helped the police in bringing the trunk, suitcases, etc. down to the platform.

13. Offence committed under the NDPS Act is always treated as grievous and serious. In several judicial pronouncements emphasis has been given to providing procedural safeguards to the accused under the statute. Emphasis has also given to recovery of contraband in presence of independent person. As between recovery of contraband by the officials without independent witness and officials with independent witness, importance should be given to the recovery made in presence of the independent witnesses. If no independent witness is present at the time of recovery of the contraband, the prosecution case would become doubtful and unless the charge is proved otherwise by other cogent and reliable evidence, the accused shall be entitled to acquittal on benefit of doubt. In the instant case, as discussed earlier, one of the independent seizure witnesses refused to support the prosecution case while the other one was not produced by the prosecution itself. There is no evidence of other independent reliable witness supporting the prosecution case. PW1, Shri Gajendra Deka, as Senior Scientific Officer of FSL stated that he received a parcel consisting of 4 sealed envelopes having 4 closed polythene

packets containing 24 grams of dry plant materials from the Barpeta Road GRP outpost. He made no statement in his evidence that he received any sample seal from the police outpost concerned for making comparison with the seal affixed on the sample packets he received. The prosecution must be able to prove that it followed the procedure provided under the law and there is no loopholes in the matter of sending the sample packets to the FSL. In the present case, I am of the considered view that the prosecution failed to observe the said procedure and formalities emphasised by the Apex Court.

14. The evidence adduced by the prosecution is not only insufficient but also far from satisfaction for recording conviction against the accused under the NDPS Act which provide more stringent provision for conviction. This Principle of law is that more stringent is the provision of conviction more rigorous investigation and trial is necessary. Looking at the manner in which the investigation was conducted and the procedure followed by the I.O. in sending the samples of seized articles for chemical examination, there is no doubt that no such rigorous investigation has been made, rather it is found to be full of loopholes. The basic requirement is that the sample packets received by the FSL authority (PW1) are same to the contraband articles recovered and seized from the convict/appellants at the Railway platform, hi the instant case, it is not proved beyond reasonable doubt on the face of the admitted position that the seized articles were kept in police outpost from 18.12.06 till the same were sent to FSL on 19.12.2006 without any order from the court or higher authority. The prosecution, in my considered view, could not establish its case against the appellants beyond reasonable doubt and under such circumstances, the appellants are entitled to get the benefit of doubt and acquittal therein.

15. Consequently, the impugned judgment and order convicting and sentencing the convicts/appellants is liable to be set aside and quashed. It is ordered accordingly. The appeal succeeds. The convicts/appellants are acquitted on benefit of doubt. They be set at liberty forthwith if their further detention is not required in connection with any other case.

16. Bail bonds stand discharged.

17. Send down the L.C.Rs forthwith.