

GAHC010087082021



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

Case No. : CrI.A./119/2021

ABDUL HAI

VERSUS

THE STATE OF ASSAM AND 2 ORS
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

2:ANTI SMUGGLING UNIT
GUWAHATI
CUSTOMS DIVISION
GUWAHATI

3:THE UNION OF INDIA
REPRESENTED BY RESPONDENT NO.

Advocate for the Petitioner : MR. M A SHEIKH

Advocate for the Respondent : PP, ASSAM

:: PRESENT ::

HON'BLE MR. JUSTICE PARTHIVJYOTI SAIKIA

For the Appellant : Mr. A. Ahmed,
Advocate.

For the Respondents : Mr. S.C. Keyal,
S.C., Customs.
Mr. B. Sarma,
Addl. Public Prosecutor, Assam.

Date of Hearing : 28.04.2023.
Date of Judgment : 09.05.2023.

JUDGMENT AND ORDER (CAV)

Heard Mr. A. Ahmed, learned counsel appearing for the appellant. Also heard Mr. S.C. Keyal, learned Standing Counsel, Customs. Mr. B. Sarma, learned Addl. Public Prosecutor, Assam appears for the State respondents.

2. Challenge in this appeal is to the judgment and order dated 27.04.2021 passed by the learned Special Judge, Nalbari in NDPS Case No.4/2011 under Sections 20(b)(ii)(B) of the NDPS Act. By the impugned judgment, the trial court has convicted the appellant and sentenced him to undergo imprisonment for 7(seven) years and to pay a fine of Rs.70,000/-, in default of payment of fine, he was sentenced to undergo simple imprisonment for one year.

3. On 29.08.2011 at about 9.45 A.M., the appellant (Abdul Hai) and Salim Miya were searched near Daulasal Natun Chowk Bazar and recovered 190 grams of brown sugar from their possession. The other person Salim Miya was a juvenile. Therefore, his case was referred to appropriate authority.

4. In order to prove the offence against the appellant, the prosecution side has examined 12(twelve) witnesses. The appellant did not examine any witnesses.

5. On the basis of the evidence on record, the trial court passed the impugned judgment.

- 6.** I have carefully gone through the prosecution evidence.
- 7.** The first witness to be examined is J.K. Saikia. He was the Superintendent of Customs. He has stated in his evidence that on 29.08.2011, Inspector Ridip Hazarika (PW-2) had seized 190 grams of brown sugar from the possession of the appellant and another person called Salim Miya at Daulasal Natun Chowk Bazar. The witness has stated that two packets containing 5 grams each were prepared as samples. Both the appellant and Salim Miya were brought to Guwahati and their statements were recorded. The witness has further stated that the chemical report in respect of the samples was found positive for heroine.
- 8.** In his cross-examination, J.K. Saikia has stated that he lodged the FIR against the appellant and the Salim Miya. He has further stated that at the relevant time of occurrence, he was standing at a distance of about 100 meters and therefore, he was not sure as to from whose possession the narcotic drugs was seized.
- 9.** The second witness is Ridip Hazarika. He has stated that on 29.08.2011 at about 9.45 A.M., he noticed that two persons were walking by the side of the road at Daulasal Natun Chowk Bazar. Ridip Hazarika has stated that both the persons were searched and from their possession, one black colour polythene bag containing narcotic drugs was seized from the present appellant.
- 10.** Ridip Hazarika has stated in his cross-examination that though the narcotic drugs was recovered at Daulasal Natun Chowk Bazar, it was not formally seized there.
- 11.** The third witness is Pradip Kr. Dey. He is an Inspector of Customs. He

has stated in his evidence that on 29.08.2011, he was at Daulasal Natun Chowk Bazar. He has disclosed that he noticed a huge public gathering and thought that something must have happened to his colleague officers. This witness has stated that he subsequently learnt that his colleague officers recovered brown sugar from the appellant and Salim Miya.

12. Pradip Kr. Dey has stated in his cross-examination that at the time of seizure of narcotic drugs, his team was not present at the place of occurrence and therefore, he was not sure exactly from whom the narcotic drugs was seized.

13. The fourth prosecution witness is Alok Kr. Singh. He is an Inspector of Customs Department. He has stated in his evidence that on 29.08.2011, he accompanied PW-1 J.K. Saikia and PW-3 Pradip Kr. Dey. The witness has stated that on that day, Ridip Hazarika had informed J.K. Saikia over phone that he has recovered suspected brown sugar from two persons. On hearing that news, this witness along with J.K. Saikia came to Daulasal Police Out Post. The witness Alok Kr. Singh has stated that on reaching there, he came to know that 190 grams of suspected narcotic brown sugar were seized from two persons.

14. In his cross-examination, Alok Kr. Singh has stated that he has no knowledge whether the seizure list was prepared. He further stated that he never took samples from the seized narcotic drugs.

15. The fifth prosecution witness is Gajendra Nath Deka, the Deputy Director, Drugs and Narcotic Division, Directorate of Forensic Science, Assam. His evidence relates to his findings.

16. The sixth prosecution witness is Kalyan Baishya, a businessman by profession. He has stated that from his shop at Daulasal Natun Chowk Bazar, police had seized one electronic weighing scale, which was subsequently returned by police.

17. The seventh prosecution witness is Arup Kr. Nath, a businessman by profession. He has stated that on the day of occurrence, he has seen a huge gathering at Daulasal Natun Chowk Bazar. He came to know that police recovered drugs from two persons.

18. In his cross-examination, this witness has stated that he knew the appellant Abdul Hai and the other person Salim Miya. This witness further stated that he never saw the materials seized by police.

19. The eighth prosecution witness is Dwipen Ch. Bania, the Superintendent of Customs. He has stated in his evidence that on 29.08.2011, he never accompanied the witness J.K. Saikia. This witness was in contact with his colleagues.

20. The ninth prosecution witness is Sanjay Das, a businessman. He has stated in his evidence that on 29.08.2011, he was present at Daulasal Natun Chowk Bazar. Sanjay Das has stated that he noticed that some persons disembarked from a Maruti Van and apprehended one boy. From whom, powder like substances was recovered. The witness Sanjay Das further stated that at that time, the appellant arrived there and he was also apprehended.

21. In his cross-examination, Sanjay Das has stated that nothing was recovered from the possession of the appellant.

22. The tenth prosecution witness is Swagat Kr. Das, the Superintendent of Customs. He has stated in his evidence that on 29.08.2011 at Daulasal Natun Chowk Bazar, he and his colleagues noticed that two persons were coming on foot. While one of them, was carrying a plastic bag. Swagat Kr. Das has further stated that both the persons were stopped and from the said plastic bag, narcotic drugs was recovered.

23. Swagat Kr. Das has stated that the plastic bag containing narcotic drugs was recovered from the present appellant Abdul Hail while the other person Salim Miya just accompanied him.

24. The eleventh prosecution witness is the Intelligence Officer Arup Bhattacharyya. On 29.08.2011, he was working as Inspector of Customs at Guwahati. On that day, he was at Daulasal Natun Chowk Bazar along with his colleagues. Arup Bhattacharyya has stated that there was a public gathering at that place and then he came to know that customs officials had detained two persons and had taken them to Daulasal O.P. The witness also got the information that those two persons were carrying narcotic drugs.

25. During his cross-examination, Arup Bhattacharyya has stated that he was a member of the back-up team on that day and therefore, he has no personal knowledge as to from whom the narcotic drugs was seized.

26. The twelfth prosecution witness is a police officer, called Ratna Kanta Sarma. On 29.08.2011, he was working as the In-charge of Daulasal O.P. He spoke about whatever he had learnt from the customs officials.

27. On perusal of the prosecution evidence, two questions have arisen. The questions are –

- (i) Whether narcotic drugs was recovered from the possession of the present appellant Abdul Hai? and
- (ii) Whether Section 50 of the NDPS Act was complied with while searching Abdul Hai?

28. The witnesses J.K. Saikia, Ridip Hazarika and Pradip Kr. Dey were present at the place of occurrence. They supported the prosecution case that narcotic drugs was recovered from the appellant Abdul Hai. On the other hand, PW-9 Sanjay Das has stated that the narcotic drugs was actually recovered from the possession of Salim Miya, not from the appellant Abdul Hai. Even the witness Pradip Kr. Dey has stated in his evidence that he did not know exactly from whose possession the narcotic drugs was recovered.

29. Regarding the compliance of Section 50 of the NDPS Act, it lays down that an accused should be made aware of his right to be brought before a Magistrate or a Gazetted Officer prior to a personal search. In *Vijaysinh Chandubha Jadeja vs. State of Gujarat*, reported in (2011) 1 SCC 609, the Supreme Court has held—

“29. We have no hesitation to hold that in so far as the obligation of the authorized officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and required strict compliance. Failure to comply with the provision would render the recovery of illicit articles suspect and vitiate the conviction if the same is recorded only on the basis of recovery of illicit article from the person of the accused during such search.”

30. Recovery of narcotic drugs from a bag carried by a person would attract Section 50 of the NDPS Act, if, in course of such search, the body

of the suspect is also searched. In the case in hand, there is ample evidence that body search of the appellant was undertaken. Therefore, failure to comply Section 50 of the NDPS Act in course of search, vitiates the seizure and the consequent conviction.

31. Under the aforesaid circumstances, this Court is of the opinion that the prosecution evidence, regarding recovery of narcotic drugs from the appellant Abdul Hai, failed to inspire confidence. Furthermore, the non-compliance of Section 50 of the NDPS Act has vitiated the search and subsequent conviction.

32. This Court hereby holds that the impugned judgment is not sustainable in law. The appeal is allowed. The impugned judgment is set aside. The appellant Abdul Hail is found not guilty and he is acquitted from this case. If the appellant is in judicial custody, he shall be set at liberty forthwith, if not required in any other case.

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JUDGE

Comparing Assistant