

Special (NDPS) Case No. 01 of 2012**IN THE COURT OF ADDL. SESSIONS JUDGE:: SONITPUR,
TEZPUR:: ASSAM**

PRESENT:- N. AKHTAR, AJS
Addl. Sessions Judge,
Sonitpur::Tezpur.

Special (NDPS) Case No. 01 of 2012

U/s 20 (b) (ii) (B) of
Narcotic Drugs and Psychotropic Substances Act, 1985

State of Assam

-Vs-

Nipon Gohain

FOR THE PROSECUTION :-	Ms. R. Chakravarty, Addl. P.P.
FOR THE DEFENCE :-	Mrs. D. Sinha, Advocate.
EVIDENCE RECORDED ON :-	24.03.2015, 20.01.16, 29.02.16, 08.06.16, 04.10.16, 23.02.17, 10.01.19, 25.07.19 and 21.10.2019.
ARGUMENTS HEARD ON :-	29.04.2019.
JUDGMENT DELIVERED ON :-	13.05.2019.

JUDGMENT

1. Captain Naresh Kumar of 12 Assam Rifle, B Coy, Helem Camp got a secret information on 27.10.2012 at 4 pm that some ganja were kept in the house of one Sri Nipon Gohain of Village

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Amtola under Helem Police Station. He accordingly proceeded to the house of the accused along with his staff and UBC and upon search of the house, about 4 Kgs of Ganja were recovered from the house and the accused along with the seized Ganja were handed over to Helem Police Station.

2. Thereupon, Helem PS Case No. 39/2012 U/s 20 (B) of the NDPS Case has been registered and the investigation commenced. The accused was arrested and a sample was collected from the said seized Ganja and was sent for examination to FSL and later, report was collected to the effect that the Exhibit DN-287/2012 (The sample) gave positive test for Cannabis (Ganja). Upon completion of other steps of the investigation, the accused was charge-sheeted in the case.
3. In due course, the accused appeared and charge was framed against the accused U/s 20 (b) (ii) (B) of the NDPS Act, 1985 and read over and explained to the accused to which, he pleaded not guilty and claimed to be tried. During trial, the prosecution has examined as many as 11 (Eleven) witnesses. On closure of the prosecution evidence, the accused was examined u/ 313 CrPC. The defence adduced no evidence and the plea of the defence was that of total denial. At the end of the trial, arguments advanced by learned counsel for both the sides were heard at length.

POINT FOR DETERMINATION

➤ *Whether on 27.10.2012 at about 4 pm, the accused above-named was found in illegal possession of 3.5 Kgs of Ganja (Cannabis) in contravention of the provisions of NDPS Act, 1985 and thereby the accused had committed an offence U/s 20 (b) (ii) (B) of the NDPS Act, 1985? _*

DISCUSSIONS, DECISIONS AND REASON FOR DECISION

4. I have duly considered the arguments advanced by learned counsel for both the sides and have also gone through the evidence on record including the law relevant thereto.
5. It was argued by the learned Addl. P.P. that in the present case, there is clear evidence on record to show that the accused was found in conscious possession of 3.5 Kgs of Ganja in contravention of the provisions of NDPS Act. The seizure was duly proved by the prosecution and the report of FSL also indicates that the seized substance gave positive test for cannabis. It is therefore argued that the prosecution has duly proved this case and the accused ought to be adequately punished.
6. On the other hand, the learned defence counsel has strenuously argued that it is the conscious possession which is the key element as per the charge framed against the accused but there is not even an iota of convincing and sterling evidence on record to show that the seized Ganja was recovered from the conscious possession of the accused. It is further argued that the prosecution has led contradictory evidence as far as the place of seizure is concerned. While the FIR shows that the said Ganja was seized from the house of the accused, the evidence on record shows that it was seized from the motor cycle of the accused. It is therefore, argued that the evidence led by the prosecution is not convincing and cogent and as such, the accused cannot be convicted on the basis of such faulty evidence. It is further argued that not a single independent witness has supported the factum of seizure and also that some mandatory requirements of law are not complied with in this case for which, no conclusion regarding

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the guilt of the accused can be arrived at. It is further argued that the very motor cycle wherefrom the said Ganja was allegedly seized was neither seized during investigation of the case which itself casts a shadow of doubt on the veracity of the prosecution case. In support of her argument, reliance was placed on the case of **Manik Devnath and Another Vs State of Assam**, reported in **2008 (1) GLT 205**.

7. I have duly considered the evidence on record including the argument canvassed. PW8 (Sri Gajendra Nath Deka) has deposed in his evidence that on 29.10.2012, he was serving as Dy. Director, Drugs and Narcotics Divisions, Assam. On that day, he received a parcel in connection with Helem PS Case No. 39/2012 and the parcel consisted of one exhibit endorsed in a sealed cartoon with cloth cover. The facsimile of the seal was found to be SDPO, GRP. It contained 100 gm of dry plant materials and the sample was marked by him as DN-287/2012. He examined the sample as per United Nations Drug Testing Laboratory Manual and found that the aforesaid exhibits gave positive test for cannabis. He gave his report accordingly which was forwarded to SDPO, Gohpur. Ext-3 is the said report and Ext-3 (1) is his signature.
8. PW11 (Sri Bichitra Hazong) is the police officer who collected the FSL report and upon perusal of the case diary, he found sufficient materials against the accused and accordingly, he submitted chargesheet against the accused which is Ext-11 and Ext-11 (1) is his signature. These facts remain unchallenged.
9. PW9 (Sri Bhola Ram Borah) had deposed in his evidence that on 27.10.2012, he was serving as Officer-in-Charge at Helem PS and on that day, at 7 pm, one Naresh Kumar, the informant came along with the accused and 3.5 Kgs of Ganja and handed

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over to him and lodged an FIR stating that the said ganja was seized from the possession of the accused. He registered a case and took up the investigation of the case unto himself. The circle officer was informed about it who had authorized him to seize the said Ganja. PW9 then, called a fair price shop owner from near the PS along with his weighing apparatus and weighed the said seized Ganja and found that it was 3.5 Kgs. He then, seized the weighing apparatus vide seizure list which is Ext-2. Ext-1 is the seizure list by which the seized 3.5 Kgs of Ganja was seized. Ext-6 is the prayer made by him to SDO, Gohpur for sending the sample to FSL and Ext-6 (1) is his signature. He also recorded the statement of the witnesses. Ext-7 is the letter issued by the then SDPO, Gohpur sending the sample to FSL for examination. The weighing apparatus were given to the zimma of the owner vide Ext-9. Ext-10 is the Sketch map of the PO and Ext-10 (1) is his signature. Thereafter, he was transferred and so, he handed over the case diary. He had also stated that the subsequent investigating officer submitted the chargesheet in the case which is Ext-11.

10. PW9 had deposed in his cross-examination that he did not himself seize anything from the accused and he had seized the Ganja as produced by the informant. The seized Ganja was not in a sealed pack when it was produced by the informant. He seized the Ganja after registration of the case. He had also stated that he did not make any investigation to ascertain the person/persons residing in the house of the accused. He also did not seize any document to show that the house belonged to the accused. At the time of taking the sample of 100 gm out of the seized Ganja, I have not sealed the sample and no signature of any witness was taken on the sample. The sample was not taken to the court. At the time of production of the

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accused before the court, the seizure list and seized items were not produced before the court. He did not ask the accused whether he intends to be produced before any Gazetted Officer prior to seizure of the Ganja. The informant had not produced any seizure memo in respect of the said Ganja.

11. PW10 (Naresh Kumar) is the informant of this case. He had deposed in his evidence that on 27.10.2012, he was posted at Helem at Company of 12 Assam Rifle. On that day, he had an information that someone is coming and selling Ganja at Dufflagarh near Helem. He then proceeded to Dufflagarh along with his staff and caught the accused along with the Ganja which was carried in a bag in his motor cycle. On being interrogated, the accused told that he had some portion kept in his house and accordingly, his house was searched and some portion was recovered from his house and then, the accused and the seized Ganja were brought to police station. He had also deposed that police was also with them when the Ganja was recovered and then, the accused along with the Ganja was handed over to police. Ext-5 is the FIR and Ext-5 (1) is his signature.

12. In his cross-examination, PW10 has deposed that he did not inform his superior officer about receipt of the secret information from his source. The accused was caught while he was coming in his motor cycle. He had also stated that the source had also informed him the registration number of the motor cycle but he did not mention the registration number in his FIR. He had also admitted that he had not mentioned in his FIR that the accused was caught in Dufflagarh while he was coming in his motor cycle. He had also stated that at the time of apprehension of the accused, other people was also there as a "mela" was going on in Dufflagarh but PW10 did not call any

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public at the time of apprehension of the accused. PW10 had also stated in his cross-examination that there were other people in the house of the accused at the time of search of the house and other nearby people were also present at the time of recovery and they have seen the recovery. He had also stated that at the time of recovery of the Ganja at Dufflagarh, no seizure list was prepared. He had also stated that the Ganja was not in sealed condition when the same was handed over to police at Helem PS. He had also deposed that the Ganja seized at Dufflagarh and also in the house of the accused were together brought to the police station. He had denied the defence suggestion that no Ganja either at Dufflagarh or in the house of the accused was ever recovered.

13. PW7 (Sri Moneswar Deuri) had deposed in his evidence that on 27.10.2012, he along with other army personnel and police led by Captain Naresh Kumar were conducting Naka Checking at Dufflagarh. At that time, the accused was coming in his motor cycle and on checking, a plastic bag was found in his motor cycle which contained around 3 Kgs of suspected Ganja. The accused was then, brought to Helem PS and then, he was taken to his house and upon being searched, some amount of suspected Ganja was again recovered from his house. Then, he was handed over to Helem PS whereupon, the said Ganja was seized by police vide Ext-1 which is the seizure list.

14. In his cross-examination, PW7 has deposed that there were shops and other establishments around the place where the accused was apprehended and while the accused was apprehended, the people from those shops and other establishments arrived at the place and the bag containing the suspected Ganja was opened in their presence. The bike was red in color and it was a Hero Honda bike. One plastic bag was brought in hanging position in the bike and some small packets

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were found under the seat of the bike. He had further deposed that they proceeded to the house of accused in police vehicle keeping the bike of the accused in Helem PS. He had also stated that he did not enter the house of the accused at the time of the search and neighboring people were called at the time of the search. PW7 however, denied some of the suggestions put forward by the defence.

15. PW1 (Narayan Handique) is Secretary of VDP and as per his evidence, one day, the sister of the accused came to his house and informed him that her brother was detained in the police station. He then, came to the PS and saw the accused sitting in the PS. He asked the O/C why the accused was brought to PS and the O/C asked him in return whether the accused deals in Ganja and he pleaded his ignorance in the matter. The O/C then asked him to put his signature on the seizure list and he did so. Ext-1 is stated to be seizure list and Ext-1 (1) is his signature. This witness was declared hostile by the prosecution and his previous statement before the police was confronted to him but he denied having made any such statement.

16. PW2 (Simanta Das) is another witness who had only deposed that one day, he went to Helem PS and police asked him whether he knew the accused and he replied in positive and police then, asked him to put a signature and he did so. This witness was also declared hostile and his previous statement before police was confronted to him but he denied having made any such statement to the police.

17. PW3 (Ranjan Das) has deposed that he did not know the accused and sometime in 2012, one day, one guard from Helem police station came to him and told that the O/C of the PS has wanted his weighing apparatus and he handed over the same to the guard. After a while, police called him to the PS

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and he went there and police asked him to put a signature on a paper and he did so. This witness was also declared hostile but the prosecution and his previous statement before police was confronted to him but he denied having made any such statement to the police.

18.PW4 (Dudul Gohain) had deposed in his evidence that he knew the accused standing in the dock and the occurrence took place some years back. He heard that army personnel had picked up the accused. This witness was also declared hostile but the prosecution and his previous statement before police was confronted to him but he denied having made any such statement to the police.

19.PW5 (Lakhi Lahon) had also deposed in his evidence that he knew the accused standing in the dock and the occurrence took place some three years back. He came to know that the accused was arrested by police but he did not know why he was arrested. This witness was also declared hostile but the prosecution and his previous statement before police was confronted to him but he denied having made any such statement to the police.

20.PW6 (Utpal Gogoi) has deposed in his evidence that he did not know the accused standing in the dock. He had further deposed that at the relevant time, he was working as drier in the Department of Assam Rifles, Gohpur Sector. On the relevant day, he was driving the departmental vehicle with his officers to Dufflagarh area and on the way, a man was found and the officer took the man into the vehicle and went to the house of the man. The officer entered the house of the man and then, he was taken to Helem PS. This witness was also declared hostile but the prosecution and his previous

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statement before police was confronted to him but he denied having made any such statement to the police.

21. Before going further, it is important to point out here that the basis of the prosecution case is the **possession** of Ganja by the accused in contravention of the provisions of NDPS Act, 1985. Therefore, the factum of possession has to be clearly established by the prosecution. Moreover, it has to be clearly proved by the prosecution that the said Ganja was recovered and seized from the **exclusive and conscious** possession of the accused. It is true that the reverse onus is always on the accused as per provision of Sec. 35 of the Act but that is not to say that the prosecution is absolved from its responsibility to prove its case, at the first instance, beyond all reasonable doubts. The question of reverse onus u/s 35 of the NDPS Act comes into play only when the prosecution discharges its initial burden.

22. In the present case, it is very important to point out at the outset that the prosecution has led two inconsistent piece of evidence in respect of the place of recovery of the alleged Ganja from the possession of the accused. It would be seen from the FIR which is Ext-5 in this case, that PW10 had stated in the FIR that acting on a secret information, he conducted a search in the house of the accused and recovered about 4 Kgs of Ganja from his house. This is the only allegation which has surfaced on Ext-5. But while deposing before the court, PW10 has stated that the accused was apprehended on the basis of a secret information at Dufflagarh on the way while the accused was carrying a bag in his motor cycle containing the recovered Ganja. It is also in the evidence of PW10 that thereafter, as per the information given by the accused, his house was also searched and some portion of the seized Ganja was recovered from his house as well. However, the fact that some quantity of

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Ganja was also recovered from the house of the accused and some quantity was recovered from his motor cycle is not stated anywhere in the FIR which is Ext-1. Thus, the fact that some Ganja was recovered from the possession of the accused while he was coming in his motor cycle is a fact which was introduced only at the trial.

23. Now, coming to the fact of recovery of the Ganja from the house of the accused, it would be seen that PW10 has deposed in his evidence that at the time of recovery of the Ganja from the house of accused, the neighboring people were present but no such witness has supported the factum of recovery of Ganja from the house of accused. This apart, no recovery memo was prepared by PW10 at the house where the Ganja was allegedly recovered. Moreover, there is also no clinching evidence on record to show that the house wherefrom the Ganja was allegedly recovered in fact, belonged to the accused. PW9 who was the investigating officer of the case has himself deposed in his cross-examination that he did not seize any documents to show that the house in fact, belonged to the accused. He had also made it clear that he did not make any investigation to ascertain as to who were the persons who resided in that house whereas, it is very clear from the evidence of PW10 himself that other persons were also available in the house when the search was conducted. Thus, there cannot be any irresistible conclusion that the house was in exclusive and dominant possession of the accused alone. Moreover, from the evidence of PW10, it is also not clear as to from which part of the house, the said Ganja was recovered by PW10. This apart, there is no convincing evidence on record to show that the recovery was in fact, made from inside the house of the accused as PW7 who was a policeman had deposed in his evidence that he did not enter the house of the accused.

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24. Moreover, there is no independent witness examined by the prosecution to support the factum of recovery and seizure of the Ganja from the possession of the accused. PW1, PW2, PW3, PW4, PW5 and PW6 who were some independent witnesses have not supported the factum of recovery and seizure as they all turned hostile. It is true that all these witnesses have been confronted with their previous statements made before the police and the same was also confirmed from PW9 (The investigating officer) but for this reason alone, their statements made to the investigating officer do not turn into evidence in the eye of the law. It is also true that the evidence of a hostile witness cannot be thrown straightway thrown away. If the prosecution and the accused can elicit some material by way of cross-examination which supports their respective cases, then, benefit of such portion of evidence so elicited, must be accorded to the concerned party. But in the present case, the prosecution has failed to bring out any such material which would support the case of the prosecution. I am therefore, of the view that the factum of recovery of the Ganja from the house of the accused, cannot be said to have been conclusively and convincingly proved by the prosecution.

25. Now, coming to the factum of recovery of Ganja allegedly from the motor cycle of the accused, it would be firstly seen that the FIR itself is totally silent about any such recovery being made from the motor cycle of the accused. This apart, it is also in the evidence of PW10 that there were many people around the place where the accused was apprehended with his motor cycle but no such person could be examined by the prosecution to establish the factum of recovery of Ganja from the motor cycle. What is more important to note is that the said motor cycle was neither seized by the investigating officer nor is the detail of this motor cycle brought on record by the

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prosecution. It is no comprehensible as to why the said motor cycle was not seized by the investigating officer whereas the very allegation of the prosecution is that it was the motor cycle of the accused where he carried the bag containing the seized Ganja. In this connection, the learned defence counsel has relied on the case of **Manik Devnath and Another Vs State of Assam**, reported in **2008 (1) GLT 205**, wherein the **Hon'ble Gauhati High Court** had acquitted the appellant as the incriminating articles were seized from the bicycle of the appellant whereas the prosecution has failed to establish the ownership of the bicycle. In the present case, the allegation is that the accused carried the bag containing the Ganja in his motor cycle. Not to speak of establishing the ownership of the motor cycle, the prosecution has, in this case, failed to even seize the said motor cycle of the accused wherein, he allegedly carried the seized Ganja. Therefore, in my considered opinion, it cannot be concluded that any Ganja was seized from the motor cycle of the accused. Thus, the factum of possession by the accused itself becomes shaky.

26. The punishment for the offences under NDPS Act being serious and stringent in nature, the **Hon'ble Apex Court** in the case of **Noor Aga Vs State of Punjab and Another** reported in **(2010) 3 SCC (Cri) 748**, had categorically observed that the Court must always remind itself that it is well settled principle of criminal jurisprudence that more serious the offence, the stricter the degree of proof. A higher degree of assurance thus would be necessary to convict an accused. It is also necessary to bear in mind that superficially a case may have an ugly look and thereby prima facie shaking the conscience of any Court, but it well settled that suspicion however high may be, can under no circumstances be held to be a substitute for legal evidence.

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27. Thus, from the aforesaid discussions, it becomes clear that there is no clinching and convincing evidence on record to show that the accused was in exclusive and conscious possession of the Ganja which were allegedly seized from his possession. Rather, it appears from the evidence on record that the factum of possession could not be established by the prosecution by evidence of sterling nature.

28. In the result and for the reasons and discussions made herein above, I have no hesitation in my mind in holding that the prosecution has miserably failed to prove its case against the accused person beyond all reasonable doubts. He is hence, not found guilty of any offence as charged and as such, acquitted of the same and set at liberty forthwith.

29. The seized Ganja/articles, be destroyed/disposed of in due course of law.

30. Forward a copy of this judgment to the District Magistrate in compliance of Sec.365 CrPC.

Given under my hand and seal of this court on the 13th day of May/2019.

Typed and corrected by me:

Addl. Sessions Judge,
Sonitpur:: Tezpur.