

CAUSE TITLE**Special (NDPS Act) Case No.3/2016.**

Informant : Sri Dip Kumar Boruah.

Accused : Sri Prabin Konch.

ADVOCATES :

For the State : Mr. J. Saikia, learned Special Public Prosecutor.

For the Defence : Mr. B. Buragohain, learned Advocate.

**IN THE COURT OF SPECIAL JUDGE : LAKHIMPUR :
AT NORTH LAKHIMPUR.**

P R E S E N T - S.P. Khaund, (MA Economics, LLB),
Special Judge,
Lakhimpur, North Lakhimpur.

Special (NDPS Act) Case No.3/2016.

State of Assam.

-versus-

Sri Prabin Konch.

Charges : Under Section 20 of the NDPS Act.

Date of evidence. : 27/09/2016, 31/10/2016, 19/12/2016,
27/02/2017,04/07/2017,21/08/2017,
13/03/2019 and 29/07/2019.

Date of argument. : 04/02/2021.

Date of Judgment. : 16/03/2021.

J U D G M E N T

1) The prosecution case in a nutshell is that on a secret information, SI Dip Kumar Boruah (hereinafter the informant), along with O/C and SI Deep Jyoti Bharali, WPC Nabanita Chetia and other police personnel went for a search operation in the house of Prabin Konch (hereinafter the accused) and recovered 2.5 kilograms of 'ganjaa' from his house. The accused person has been involved in such activities in a clandestine manner.

2) A ejahar regarding this incident was lodged by the informant

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which was registered as Dhakuakhana PS Case No.9/2016 under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act for short) and SI Deep Jyoti Bharali was endorsed with the investigation.

3) The Investigating Officer (I/O in short) embarked upon the investigation. The contraband was seized and samples were prepared for forensic examination. The statements of the witnesses were recorded and sketch map was prepared. On finding a prima facie case against the accused, charge-sheet was laid against him under Section 20 of the NDPS Act.

4) On appearance of the accused, copies were furnished and after hearing both sides, a formal charge under Section 20 of the NDPS Act was framed by my learned Predecessor and particulars of the offence was read over and explained to the accused. The accused abjured his guilt and claimed innocence.

5) To substantiate its stance, the prosecution adduced the evidence of 9 witnesses and exhibited various documents. The defence cross-examined the witnesses to refute the charges. The accused also adduced the evidence of two witnesses in defence. On the incriminating circumstances appearing against him, the tone and tenor of the answers of the accused person to the questions under Section 313 of the Code of Criminal Procedure (CrPC for short) depicts a plea of total denial.

SUBMISSIONS :

6) The learned P.P. laid stress in his argument that this is an open and shut case and the accused deserves an exemplary punishment.

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7) The learned defence counsel laid stress in his argument that the witnesses turned hostile which clearly depicts that the accused is innocent. The I/O has not properly mentioned from whose possession the articles were seized. The accused cannot be held guilty with such stray statements. The accused was not present in the house when the police raided his house.

POINTS FOR DETERMINATION :

8) On the back drop of the rival contentions urged at the bar, the following points are apposite for proper adjudication of this case.

i) Whether on 16/01/2016, at about 9 PM, the accused was found in possession of 2.5 kilograms of 'ganjaa' in his house in contravention of the provisions of the NDPS Act?

DECISION THEREON AND THE REASONS FOR THE DECISION :

9) There are two sets of witnesses in this case. PW-1, PW-2, PW-3, PW-4 and PW-5 are independent witnesses. The other witnesses are official witnesses. Sri Nipen Saikia testified as PW-1 that the accused is not known to him. On the night of the incident, the police came to his house and asked him to affix his signature on a piece of blank paper, and so he did. Ext.1 is the seizure list and Ext.1(1) is his signature.

10) This witness was declared as a hostile witness. Although the prosecution cross-examined the witness after he was declared as

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hostile, the statement made by PW-1 was not affirmed by the prosecution by examination of the I/O. Similarly, PW-2 was also declared as a hostile witness and the statement made by PW-2 under Section 161 CrPC was also not affirmed by the prosecution by examination of the I/O. Sri Biman Hazarika is PW-2 and he testified that the accused is a co-villager. On 16/01/2016, the police went to their village. Later he came to know that the police entered into the accused person's house, but he did not know what was recovered from the accused person's house. On 22/01/2016, the police came to his house with intent to record his statement in connection with a case of 'bhang' involving the accused person. Ext.1 is seizure list and Ext.1(2) is his signature. A careful perusal of the seizure list Ext.1 depicts that 2.5 kilograms of suspected 'bhang' was recovered from the accused person's house in presence of PW-1 and PW-2. However, PW-1 testified that his signature was taken on a piece of blank paper. PW-4 also did not know about the seizure of any narcotics. Sri Nabin Konch testified as PW-4 that he came to know from the police that some 'ganjaa' was recovered from the accused. After about a week of the date of the incident, the police obtained his signature on a piece of paper. Ext.1(3) is his signature. The police obtained his signature on another piece of paper Ext.2, wherein Ext.2(2) is his signature. In his cross-examination, he testified that he did not know what was seized by the police from the accused person because he affixed his signatures on a piece of blank paper.

11) Similarly, Sri Chintu Saikia testified as PW-3 that at the time of the incident, he was in the Dolohat market. After about one week of the date of the incident, the police came to his house and asked him to affix his signature on a piece of paper. Initially he refused to affix his signature on a paper, but on request of the

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police he affixed his signature on a paper. Ext.2 is the seizure list and Ext.2(1) is his signature. Ext.3 is 'zimma nama' and Ext.3(1) is his signature. In his cross-examination PW-3 testified that he did not know anything about the incident. He did not know what was written on the papers where he affixed his signatures.

12) A closer look on Ext.2 and Ext.3 depicts that one weighing scale, one kilogram weight, 5 grams weight were seized and given in 'zimma' to the owner of the weighing scale. Although the witnesses testified that their signatures were taken a week after the incident, the date and time on Ext.1, Ext.2 and Ext.3 was noted as 16/01/2016, at about 8 PM, which depicts the date and time of the search operation conducted in the accused person's house.

13) Smt Dhanaprova Konch was also declared as a hostile witness. She denied any knowledge about the incident as PW-5. She testified that the police obtained her signature forcibly on a piece of paper. She was declared as a hostile witness and she was cross-examined by the prosecution, but the prosecution failed to examine the I/O regarding the statement of PW-5 under Section 161 CrPC.

14) Sri Deep Jyoti Bharali testified as PW-6 that on 16/01/2016, he was posted at Dhakuakhana PS as Attached Officer and on that day, at about 7/7.30 PM, he along with the O/C of Dhakuakhana PS went to Roha village and raided the house of Prabin Konch. They were accompanied by Inspector Sadananda Kalita, SI Dip Kumar Boruah and the staff. The Gaonburah of the same village was also present. As per instruction of the O/C, they recovered a gunny bag containing 'bhang', which was kept under a bed in the accused person's house. The 'bhang' was weighed.

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The VDP persons brought a measuring balance and stones. 2.5 kilograms of 'bhang' were recovered and the seized 'bhang' was brought to the police station. He recorded the statements of the witnesses. The accused managed to escape under the cover of the night, and so they could not apprehend him at that time. On the next day, a portion of the seized 'bhang' was sent for forensic examination in sealed packets. In the meantime, he was under the order of transfer. Thereafter he handed over the case diary to the O/C Dhakuakhana PS. He prepared the sketch map Ext.5, wherein Ext.5(1) is his signature. Ext.1 is the seizure list and Ext.1(4) is his signature.

15) PW-6 identified the 'bhang', which was exhibited as Material Ext.A. The evidence of PW-6 further proceeds that they seized a measuring balance and weights. Ext.2 is the seizure list and Ext.2(3) is his signature. The seized measuring balance and weights were given in 'zimma' to its owner, vide Ext.3, and Ext.3(1) is his signature and Ext.3(2) is the signature of Nabin Konch. Ext.6 is another seizure list through which the measuring balance and weights were seized and Ext.6(1) is his signature. Ext.4 is the house search report and Ext.4(1) is his signature.

16) In his cross-examination, he testified that the time of the search operation is not mentioned in the ejahar. They first prepared the seizure list at the place of occurrence and the subsequent seizure list was prepared in the Dhakuakhana PS. He recorded the statements of the witnesses at the place where they prepared the seizure list.

17) The evidence of PW-6 is corroborated and supported by the evidence of PW-7. Sri Dip Kumar Boruah is the informant and he testified as PW-7 that on 16/01/2016, while working as Attached

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Officer at Dhakuakhana PS, they received a secret information and accordingly he, along with O/C of Dhakuakhana PS went to Roha village. The villagers of Roha village informed them that that the accused used to deal in 'ganjaa' and they were scared to lodge any case against the accused because he is their co-villager. PW-7 further testified that he along with the VDP Secretary and the Gaonburah went to the accused person's house and searched his house and recovered a gunny bag containing 'ganjaa' which was kept under a bed. On opening the gunny bag, they found 'ganjaa' kept in some packets. The Second Officer Deep Jyoti Bharali seized the ganja in their presence and in the presence of the VDP Secretary and the Gaonburh and at that time, the accused escaped, taking the cover of the night. They came to know from the villagers that the accused used to deal in 'ganjaa' in his shop, which is situated in front of his house. Ext.7 is the ejahar lodged by him and Ext.7(1) is his signature and Ext.7(2) is the signature of Sadananda Kalita, the then O/C of Dhakuakhana PS. The O/C entrusted Deep Jyoti Bharali to investigate the case.

18) Although PW-6 and PW-7 mentioned in their cross-examination that the time when the search operation was conducted is not mentioned in the FIR, yet it can be safely held that the search operation was conducted at night. The accused cannot be exonerated only because all the independent witnesses turned hostile. It is apparent from the evidence of PW-6 and PW-7 that the search operation was conducted at night and the accused escaped taking the cover of night. The seizure list cannot be discarded in toto. The witnesses who affixed their signatures on the seizure list may have turned hostile, but the seizure list cannot be discarded in toto, just because the witnesses turned hostile. It is clear from the seizure list that the search operation was conducted at night, at about 8 PM.

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19) SI Prakash Nath testified as PW-8 that on 16/01/2016, SI Dip Kumar Boruah was serving at Dhakuakhana PS and on that day, an ejahar was lodged and accordingly SI was entrusted to investigate the case. During investigation the seized 'ganjaa' was sent for forensic examination after receipt of the expert opinion. Deep Jyoti Bharali was transferred and then he was entrusted to investigate the case on 14/06/2016. During his investigation, on 19/07/2016, accused surrendered before the Court and he was sent to jail. He made a prayer before the Sessions Judge at Lakhimpur to allow him to record the statement of the accused and accordingly he recorded the statement of the accused in the jail. On finding prima facie materials against the accused, he submitted charge-sheet against him under Section 20 of the NDPS Act. Ext.8 is the charge-sheet and Ext.8(1) is his signature. In his cross-examination, PW-8 testified that Dip Kumar Boruah lodged the ejahar and conducted the preliminary investigation, while Deep Jyoti Bharali subsequently conducted the investigation. He was entrusted to complete the investigation and finally his part of the duty was that he only submitted the charge-sheet.

20) It is true that 'bhang' was discovered from the accused person's house, but the independent witnesses turned hostile and they tried to screen the accused from punishment. In Court they forgot why their signatures were taken on the seizure lists and 'zimma nama' Ext.1, Ext.2 and Ext.3. Two of the witnesses claimed that their signatures were taken on blank papers. The failure to mention the time in the FIR also casts a shadow of doubt over the veracity of evidence. The investigation was conducted in a slip shod manner and so was the prosecution.

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The investigation was defective and so was the prosecution. The accused person is a suspect, but he cannot be saddled with guilt on the basis of conjunctures and surmises. The 'ganjaa' was recovered in his house. So, strong suspicion arises against him. The 'ganjaa' was not recovered from his possession. It is not clear under whose bed the 'ganjaa' was kept. It is not clear from the evidence how many family members reside in the accused person's house. Not a single villager came forward to substantiate the evidence of PW-7 that the accused person clandestinely deals in 'ganjaa'.

21) The evidence of PW-9 clearly depicts that the psychotropic substance recovered from the accused person's house is nothing, but 'ganjaa'. Sri Gagendra Nath Deka testified as PW-9 that on 09/01/2016, while working as Deputy Director, Drugs and Narcotics Division, Directorate of Forensic Science, he received a sealed parcel from the then Director, Directorate of Forensic Science, Assam in connection with this case. The parcel consisted of one exhibit :-

Description of Article:-

One sealed envelope marked as Ext.A having a closed polythene packet containing 20 grams dry plant material. This sample was again marked by him as DN-08/2016.

Result of Examination:-

He examined the sample as per United Nations Drug Testing Laboratory Manual and his report is as follows:-

The exhibit DN-08/2016 tested positive for cannabis (ganja).

This report was forwarded to the S.D.P.O., Dhakuakhana by the Director, Directorate of Forensic Science, Assam, I/C Mr Bhupen Borah. Ext.9 is his report and Ext.9(1) is his signature. Ext.10 is

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the forwarding report and Ext.10(1) is the signature of the Director, Directorate of Forensic Science, Assam, I/C Mr Bhupen Borah.

22) There is no dispute that 'ganjaa' was recovered from the accused person's house, but it cannot be held that the 'ganjaa' was recovered from the accused person's possession. The accused person cannot be made liable.

23) The defence witness, Sri Minaram Konch testified as DW-1 that the accused person is from the same village. The accused had a grocery shop near his house. He does not deal in 'ganjaa'. The accused is an honest person. There are some persons in the village, who are against the accused because they deal in 'ganjaa' and the accused tries to resist. Similarly, Sri Gobin Konch testified as DW-2 that the accused has a grocery shop in his house. The accused person has a good reputation in the village. He never witnessed the accused person indulging in illegal activities. Some villagers are against the accused person because they deal in 'ganjaa' and the accused tries to resist them. The defence evidence appears to be too far fetched and sketchy. The accused person gets the benefit of doubt only because the 'ganjaa' was recovered in his house and not from his possession. The investigation agency failed to project if the accused was the only member dealing in 'ganjaa' in his house as 'ganjaa' was recovered under a bed in the accused person's house.

24) In view of my foregoing discussions, it is thereby held that the prosecution failed to prove beyond a reasonable doubt that the accused person sells cannabis (ganjaa) or sold cannabis

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(ganjaa) and acted in contravention of the provisions of the NDPS Act. Although 'ganjaa' was recovered from his house, the accused gets the benefit of doubt.

25) The accused Sri Prabin Konch is hereby acquitted from the charges under Section 20(b) of the NDPS Act, and is set at liberty forthwith.

Judgment is signed, sealed and delivered in the open Court on the 16th day of March, 2021.

(S.P. Khaund)
Special Judge,
Lakhimpur, North Lakhimpur.

Certified that the Judgment is typed to my dictation and corrected by me and each page bears my signature.

(S.P. Khaund)
Special Judge,
Lakhimpur, North Lakhimpur.

APPENDIX**Special (NDPS Act) Case No.3/2016.****LIST OF WITNESSES FOR PROSECUTION :**

1. PW.1 - Sri Nipen Saikia.
2. PW.2 - Sri Biman Hazarika.
3. PW.3 - Sri Chintu Saikia.
4. PW.4 - Sri Nabin Konch.
5. PW.5 - Smt Dhanaprova Konch.
6. PW.6 - Sri Deepjyoti Bharali.
7. PW.7 - Sri Dip Kumar Boruah.
8. PW.8 - Sri Prakash Nath.
9. PW.9 - Sri Gagendra Nath Deka.

LIST OF COURT WITNESS :

Nil.

LIST OF EXHIBITS FOR PROSECUTION :

1. Ext.1 - Seizure List.
2. Ext.2 - Seizure List.
3. Ext.3 - 'Zimma Nama'.
4. Ext.4 - House search report.
5. Ext.5 - Sketch Map.
6. Ext.6 - Seizure List.
7. Ext.7 - Ejahar.
8. Ext.8 - Charge-sheet.
9. Ext.9 - FSL Report.
10. Ext.10 - Forwarding Letter.

LIST OF MATERIAL EXHIBITS FOR PROSECUTION :

Nil.

LIST OF WITNESSES FOR DEFENCE :

1. DW.1 - Sri Minaram Konch.
2. DW.2 - Sri Gobin Konch.

LIST OF EXHIBITS FOR DEFENCE :

Nil.

(S.P. Khaund)
Special Judge,
Lakhimpur, North Lakhimpur.