

# **BEFORE THE SPECIAL JUDGE AT DHUBRI**

## **Special Case No.5/2011**

U/s. 22 (b) of N.D.P.S. Act,

**State of Assam**

**-Vs-**

**1. Md. Mozibar Rahman**

**2. Md. Nazmul Sheikh**

Present : Mr. A. Bhattacharyya, AJS  
Special Judge, Dhubri

Sri M. Zaman, Public Prosecutor for the State

Sri Mobinur Rahman & Abdul Baten, Advocates for the accuseds.

Evidence recorded : 09-08-2011, 28-09-2012, 18-07-2013 and  
12-11-2013,

Date of Argument : 13-11-2013

Date of Judgment : 13-11-2013

### **J U D G M E N T**

The S.I. Nizamuddin Ahmed of Dhubri Police Station vide an ejahar dated 09-04-2011 states that on 09-04-2011 at 05-00 am while he was conducting checking at AMCo. Road near C.R.P.F. Camp along with his staff the accuseds named above traveling in a rickshaw were intercepted and searched. During search 26 Nos. of Recodex Cough Syrup, 2376 Nos. of Spasmocip Plus Capsules and 01 (one) Phensedyl Cough Syrup were recovered and seized from the possession of the accused persons in presence of the local witnesses. During preliminary enquiry it is found that the seized medicines contains Psychotropic substances specified in the Narcotic Drug and Psychotropic Substances Act, 1985 and the accused persons could not produce any document in support of the possession of the medicines on demand. It is further found that the accused persons have been dealing in sale of such Psychotropic Substances illegally since a long day and they were carrying those medicines in order to sell illegally to the drug abusers. Therefore, the written F.I.R. in the above context is hereby lodged for registration of a case under proper section of law and causing it to be investigated into.

2. The Dhubri Police Station on registration of a case took up the investigation and at the conclusion of the investigation laid charge sheet under section 22 (b) of N.D.P.S. Act against the accuseds.

3. Thereafter, charge under the said Section of law is framed against the accused persons named above. The charge so framed is read over, explained and interpreted to the accuseds to which they plead not guilty.

4. During trial the prosecution side after examining as many as 6 (six) P.Ws closed their side. Statement of the accuseds are recorded. I heard the arguments of the case from both the parties.

5. Now, the point for determination in this case will be as to whether the materials surfaced in the testimonies of the P.Ws would warrant the conviction of the accused persons under Section 22 (b) of N.D.P.S. Act or not?

#### **DICISIONS AND REASONS THEREON.**

6. P.W-1 Md. Nizamuddin Ahmed the then T.S.I of Bilasipara states during trial that on 09-04-2011 at about 5 a.m. when he was busy in the duty along with his staff in the AMCo. Road of Dhubri, he found that one rickshaw was coming from Dhubri town wherein accused persons were the passengers. He got stopped the rickshaw, which carried a carton & the same was recovered. Some psychotropic substances were recovered therefrom. Those were Recodex Cough Syrup, Phensedyl Cough Syrup and 2376 Nos. of Spasmo Proxivon Capsules. The said articles were seized vide Ext-1 wherein Ext-1 (1) is his signature. The Material Ext-1 is the carton. Thereafter, he laid ejahar under Ext-2 wherein Ext-2 (1) is his signature.

During cross-examination the P.W-1 states that the place of occurrence is situated in the Ward No.12 of Dhubri Town having houses nearing to it and the same is at a distance of 100 gauges from the Bazar T.O.P. He took search of the neighbouring persons to witness the seizure but he did not find them. Further, he specifically stated that he did not call the neighbouring persons. Also, he admitted during cross-examination that he was not invested with the power as per Cr.P.C. to investigate into the case nor he prepared the list of seized articles in details. Also he did not take the accused persons to the Gazetted Officers for the purpose of search as per

N.D.P.S. Act. More than one hour was required to prepare the seizure-list. During that period some persons came to the place of occurrence but they were not cited as the witnesses.

7. P.W-2 Sri Romoni Mohan Ghoso during trial and in his examination is chief supported the story of P.W-1.

During cross-examination he admitted that he did not see the articles properly. Later on it was opened and his signature was not obtained.

8. P.W-3 Swami Guru Nath states during trial and in his examination-in-chief that on 09-04-2011, he was detailed at AMCO Road, Dhubri in the Naka duty in the capacity of Head Constable, 48 Bn. C.R.P.F. along with local police personnel. At that time they found one rickshaw was coming. There was no passenger on the rickshaw. They stopped the rickshaw and they found 26 Nos of Recodex Cough Syrup from the box of the rickshaw alongwith the 1440 Nos of Spasmocip Plus capsules. Thereafter, they informed the matter to the local police station. Police came and seized the aforesaid articles vide Ext-1 and obtained his signature. Ext-1 (4) is his signature. Ext-3 is the another seizure list whereby the rickshaw was seized and Ext-3 (1) is his signature therein. On demand the rickshaw puller could not submit any authentic document to carry the aforesaid articles.

During cross-examination the P.W-3 states that he cannot say who was the rickshaw puller and they did not enquire about his licence. He did not interrogate rickshaw puller as to wherefrom he carried the seized articles. Police made the seizure Memo and he put his signature.

9. P.W-4 Sri Gajendra Nath Deka, Deputy Director, Drugs & Narcotics Division, DFS, Assam states during trial that on 13-04-2011 while he was working as Deputy Director, Drugs and Narcotics Division, Directorate of Forensic Science, Assam received a parcel through their Director in connection with Dhubri P.S. Case No.188/11. The parcel consisted of 94 (ninety four) exhibits enclosed in a sealed envelope. The facsimile of the seal was found to be AKC.

Description of articles are as follows:

1. Two sealed envelopes, marked as "SP1" and "SP2" having two strips, each strip containing twenty four blue coloured capsules branded as "SPASMO PROXYVON". The samples were again marked by him as DN-78/2011 (a1) to DN-78/2011 a24) and DN-78/2011 (b1) to DN-78/2011 (b24) respectively.

2. Two sealed envelopes, marked as "SC1" and "SC2" each containing twenty blue coloured capsules branded as Spasmocip Plus" The samples were again marked by him as DN-78/2011 (c1) to DN-78/2011 c20) and DN-78/2011 (d1) to DN-78/2011 (d2o) respectively.

3. One sealed envelope marked as "R1" having a closed polythine packet containing six sealed plastic bottles (branded as "Recodex" each containing 100 ml orange coloured syrup liquid. The samples were again marked by him as DN-78/2011 (e1) to DN-78/2011 e6).

The result of the examination is as follows:

1. Exhibits – DN-78/2011 (a1) to DN-78/2011 (a24), DN-78/2011(b1) to DN-78/2011(b24), DN-78/2011 (c1) to DN-78/2011 (c20) and DN-78/2011 (d1) to DN-78/2011 (d20) gave positive test for propoxyphene.
2. Exhibits DN-78/2011(e1) to DN-78/2011 (e6) gave positive tests for Codeine.

This report was forwarded to the Dy. Superintendent of Police (HQ) by their Director I/c.. Exhibit 4 is his report wherein Ext-4 (1) is his signature. Ext-5 is the forwarding of his report wherein Ext-5 (1) is the signature of Director i/c.

During cross-examination the P.W-4 states that he cannot say as to whether the Exhibits, which he examined falls within the purview of the medicine or not. He did not mention as to the quantity of proxofine and codine in each exhibit. He examined as to the aforesaid amount in each exhibit but he cannot say right at this moment.

10. P.W-5 Md. Omed Ali states during trial and in his examination-in-chief that he is a rickshaw puller by profession. On the date of incident and at the relevant point of time accuseds came on his rickshaw as passenger from Bhushirmath to bus station. At bus station the accused persons carried a carton to his rickshaw and tried to keep at the beneath of seat. Then he raised objection. Then the accused persons intimidated him. Thereafter, accused person directed him to carry the carton without passenger and accused persons also followed rickshaw. Thereafter, police intercepted the rickshaw alongwith carton nearing to Match factory and also intercepted the accused persons. Thereafter, police brought him and the accused persons to the police station. However, police released him keeping the accused persons at police station. Police brought him to the police station due to the carton but he cannot say as to the contents of the carton.

During cross-examination the P.W-5 states that police opened the carton in their presence. At that time neither he himself nor the accused persons were informed that they had the right to be searched in the presence of Gazetted Officer or Magistrate. The place of occurrence is situated on the road side of the B.S.F. camp and Match factory, Dhubri. Police seized and searched the rickshaw at about 12 midnight. Police brought him to police station and also obtained his thumb impression at the Out Post. He cannot say as to the contents of the aforesaid papers wherein police obtained his thumb impression.

11. P.W-6 S.I. Rustom Raj Brahma states during trial and in his examination-in-chief that on 09-04-2011 he was posted at Dhubri Police Station in the capacity of S.I. of Police. On that day he was entrusted with the investigation of this case. Accordingly on being entrusted, he perused the C.D. of this case and found that the complainant of this case was remained to be examined and accordingly he examined the complainant Nizamuddin Ahmed as well as Ranimohan Ghosh. He examined the F.I.R. named accused persons and arrested them. Thereafter, he collected F.S.L. report and at the conclusion of the investigation he laid the charge sheet under Ext-6 wherein Ext-6 (1) is his signature.

During cross-examination the aforesaid P.W. states that in the F.I.R. the number of tables namely Spasmocip Plus Capsules were mentioned 2376 whereas in the seizure-list it was mentioned as 986 numbers. He did not seize the seizure list and the articles. He did not visit the place of occurrence in connection with the investigation of this case and he did not take the search of the accuseds. He took out the sample but at the time of drawing up of the sample, no Magistrate was present. He did not make inventory of this case during investigation. He did not examine the witnesses of the seizure-list namely Ietahas Ahmed, Swami Gurunath and Omed Ali Mondal. He had drawn up the sample on 12-04-2011 at Dhubri Police Station.

So these are all about the evidences on record.

12. I have carefully gone through the entire testimonies of the P.Ws as discussed herein above. On a minute perusal, it appears that in the case in hand, the P.W-1 being the S.I. of the Police while on duty and out of suspicion intercepted a rickshaw

which carried the carton alongwith the passenger. The aforesaid police officer took search of the said carton and found the Psychotropic Capsules and accordingly he seized the aforesaid articles vide Ext-1. The aforesaid police officer has admitted that he was not authorized to investigate the case as per the mandate of N.D.P.S. Act. This apart, the seizing officer is the complainant of this case. Being the police officer, he did not inform the accused persons about their right to be searched in the presence of Gazetted Officer or Magistrate. This apart, there are not materials to show that the seizing officer, who arrested the accused persons had informed his superior officer about the search and seizure and arrest in the written form. Neither the P.W-1 being the informant and the seizing officer nor the P.W-6 being the I.O. of this case have prepared the inventory of the seizure and took the step in the case in hand. This apart, according to the seizure-list and F.I.R. the incriminating articles were seized on 09-04-2011 and sample from the same was taken out on 12-04-2011 as per the evidence of P.W-6. Obviously during the aforesaid period, the incriminating articles were kept in the Malkhana of the Police Station but Mankhana register was not produced and exhibited during trial by the prosecution.

13. Referring the aforesaid circumstances, learned defence counsel has submitted during arguments that a numbers of mandatory requirements of the investigation of the N.D.P.S. Act have been violated in this case for which the entire trial is vitiated and as such according to the learned defence counsel, the accuseds can not be convicted basing on the evidences generated during the said investigation and are liable to be acquitted and set at liberty.

14. In support of the aforesaid submissions, learned defence counsel referred to the observations recorded in the following decided case laws:

1. *(2012) 5 Supreme Court Cases 226*
2. *1997 (2) Gauhati Law Journal 1*
3. *2001 Supreme Court Cases (Cri) 1048*
4. *(2002) 2 Gauhati Law Reports 78*
5. *(2011) 3 Supreme Court Cases (Cri) 366*
6. *(2010) 3 Supreme Court Cases (Cri) 1255*
7. *2011 (6) Gauhati Law Journal 319*
8. *(2012) 4 Gauhati Law Reports 573*
9. *2005 Supreme Court Cases (Cri) 541*
10. *1980 Supreme Court Cases (Cri) 683*

15. I have carefully considered the submission of the learned defence counsel in the light of the observations recorded in the judicial authorities as mentioned here in above. On a minute perusal, it appears that here in this case the investigation has not been carried out in compliance with the relevant provisions of the Sections 41, 42, 43, 50, 52-A and 57 of N.D.P.S. Act. The aforesaid provisions of the N.D.P.S. Act are the mandatory requirements of N.D.P.S. Act. so far investigation is concerned under N.D.P.S. Act.

16. Therefore, the evidences generated out of the aforesaid investigation cannot be based for the conviction of the accused persons as due to the non compliance of the aforesaid mandatory requirements, the entire trial is vitiated. Thus, it can be concluded that here in this case the evidences surfaced during trial are not at all sufficient to convict the accused persons under the offence alleged of. As such due to the insufficiency of evidences, the accuseds are entitled to get the benefit of doubt. Thus, the accuseds are acquitted to get the benefit of doubt and accordingly they are acquitted on benefit of doubt and set at liberty forthwith. Their bail bonds stands discharged. The seized articles shall be destroyed in due course of law. The P.I, Dhubri be accordingly informed. Judgment is delivered in open court.

Given under my hand and seal of the Court on this 13<sup>th</sup> day of November, 2013.

Dictated & Corrected by me

Special Judge, Dhubri

Special Judge, Dhubri.