
(1998) 02 CAL CK 0011
In the Calcutta High Court
Case No : Criminal Appeal No. 180 of 1992

Ajoy Srivastava and Another	Vs	APPELLANT
The State of West Bengal		RESPONDENT

Date of Decision : 13-02-1998

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 41, 42, 43, 50

Citation : (1998) 59 ECC 470

Hon'ble Judges : Surya Kumar Tiwari, J; Dibyendu Bhusan Dutta, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Dibyendu Bhusan Dutta, J.—The present two appeals arise out of the conviction and sentence passed on 2.6.92 in S.T. XLIV (7) 91 by the Id. Additional Sessions Judge, Fourth Court, Howrah.

2. The prosecution case, in brief, is that on 14.6.88, PW 11 Harisadhan Bhattacharjee, O.C., Narcotic Cell of CID, West Bengal along with PW 6 L.N. Hawladar, Assistant sub-Inspector of Police, Narcotic Cell, CID, West Bengal came to the office of DDI, Howrah and sought their assistance to work out a secret information. Accordingly, PW 3 Matilal Chackraborty, Inspector of Police, DDI, Howrah along with PW 4 B.D. Banerjee, another Inspector of Police attached to DDI, Howrah, PW 8 R. Pal, Sub-Inspector of Police attached to Howrah DDI and watcher constable joined them in conducting a raid in a narrow lane near the premises No. 333 N.S. Road near Kalibabur Bazar within P.S. Howrah at about 5 P.M. On being pointed out by the source, four persons namely Ajoy Srivastava, Sankar Mai, Mangal Bhuia and Suresh Sarkar who were found selling heroin were apprehended from that lane. A number of puriahs each containing 50 mgs. of heroin and some cash were recovered from the possession of each of them. In all 70 puriahs and a total sum of Rs. 1030/- were recovered from their possession. The puriahs were kept inside empty match boxes. The number of puriahs

recovered from the aforementioned four persons were 35, 10, 14 and 11 respectively, while the amounts of cash recovered from them were Rs. 910/-, 35/-, 40/- and 45/- respectively. So far as Ajoy Srivastava is concerned, the match boxes containing puriahs of heroin and the cash were recovered from inside an aluminium box which he was holding on the left hand. The other three persons were holding the match boxes of heroin and cash on their respective left hands. PW 8 seized all the 70 puriahs containing heroin, match boxes, cash and the aluminium box recovered from them under a seizure list (Ext. 1) in presence of two public witnesses namely PWs 1 and 5. The said puriahs were duly sealed and labelled in four envelopes as per the recoveries made from the four persons. Along with the seized alamats and the appellants, PW 8 went to Howrah P.S., produced them before the officer-in-charge and lodged a complaint (Ext. 4) which was treated as FIR (Ext. 5) on the basis of which Howrah P.S, Case No. 13 dated 14.6.88 was started u/s 21 of the NDPS Act. PW 12 took charge of the investigation of this case on 22.6.88. He visited the place of occurrence and prepared a sketch map (Ext. 6). He collected the samples of the seized heroin on 30.7.88 and after re-sealing the samples under a bigger cover, sent it to expert for chemical analysis under the challan (Ext. 7). The chemical analyst found the samples to contain heroin ranging from 82-92% approximately and gave his opinion in his report (Ext. 8). The remaining seized alamats were as usual kept in the malkhana of Howrah P.S. The seized cash was deposited with the Treasury as per order of the Court. After completion of the investigation, charge-sheet was submitted by PW 12 against the said four persons.

3. The accused were tried on a charge u/s 21 of the NDPS Act for their alleged illicit possession of heroin for sale in violation of Section 8 of the Act.

4. The prosecution examined 12 witnesses during the trial. PW 1 is the superior officer to whom the information of arrest and seizure is said to have been given as contemplated u/s 57 of the NDPS Act and PW 12 is the I.O. Three witnesses viz. PWs 7, 9 and 10 were simply tendered by the prosecution for cross-examination without being examined in chief and one witness viz. PW 11 did not give any evidence except to say that he was the then O.C., Narcotic Cell. Of the remaining six witnesses, PWs 3, 4, 6 and 8 are the police personnel who were members of the raiding party and PWs 2 and 5 are the two public witnesses of search, recovery and seizure. Of the two public witnesses, PW 5 was declared hostile by the prosecution and he claimed to have put his LTI in the seizure list when it was blank.

5. The defence case appears to be that one Bapi was a heroin dealer of the locality and that the appellants were falsely implicated by the police as they refused to comply with their requisition to locate the house of Bapi. A suggestion to this effect was given to PW 8 in his cross-examination but he denied the suggestion. It was also suggested to PW 3 on behalf of the defence during his cross-examination that the aluminium box and the match boxes and the cash which are said to have been recovered from the accused Ajay Srivastava were

recovered from his shop and PW 3, however, denied that suggestion. The defence examined two shop keepers of the locality as D.Ws. 1 and 2 to prove that there was a heroin dealer in the locality by the name of Bapi and that local business community removed him from the area and that the appellants did not belong to the group of heroin dealers. D.W. 1 claims to be the owner of Basu Shoe Shop at 333, N.S. Road near Kalibabur Bazar and D.W. 2 claims to be the partner of Atul Oil Mill at Kalibabur Bazar which is located on N.S. Road, opposite to the shop of D.W. 1. D. W. 1 is the Secretary of the local shopkeepers' Samity while D.W. 2 is the Assistant Secretary of that Samity. From their evidence, it transpires that the accused Ajay Srivastava was then running a pan-biri shop in a wooden goomty just opposite to the shop of D.W. 1 and in front of Atul Oil Mill of D.W. 2. It also transpires from the evidence of D.W. 2 that the business of the accused Ajay Srivastava was closed following a raid by the police and that during that raid, there was recovery and seizure of one aluminium box containing cash from his possession. It also transpired from their evidence that barring Ajay Srivastava, none of the other three accused was actually known to them.

6. Upon consideration of the evidence and other materials on record, the Id. Trial Judge was pleased to accept the prosecution story of recovery of heroin from the possession of each of the four accused and accordingly, he convicted and sentenced them u/s 21 of the NDPS Act to R.I, for 10 years each and also to pay a fine of Rs. 1,00,000/- each, in default, to further R.I. for 1 year each.

The convicts Ajoy Srivastava and Suresh Sarkar have preferred the appeal being Crl. Appeal No. 180 of 1992 while the convict Sankar Mal has preferred the Cr... Appeal No. 196 of 1992 but no appeal appears to have been preferred by the convict Mongal Bhuia.

7. The conviction was assailed on behalf of the appellants on the grounds of non-compliance with the requirements of Sections 50(1), 52 and 57 of the NDPS Act. It was also assailed on the ground of existence of reasonable doubt as to whether what was seized was the same as what was analysed by the chemist in as much as the evidence on record discloses a serious discrepancy between the quantity of the samples sent to the chemist for analysis and the quantity received and analysed by the chemist.

Reliance has been placed on several decisions reported in Gaunter Edwin Kircher Vs. State of Goa, Secretariat Panji, Goa, Mohinder Kumar Vs. The State, Panaji, Goa, : Mahinder Kumar v. The State, Panqji AIR 1995 SG 244: Alt Mustqffa Abdul Rahaman Moosa v. State of Kerala and 1996 Cri. LJ 3996: State of Punjab v. Labh Singh.

8. Sub-section (1) of Section 50 provides that when an officer is about to search any person under the provisions of Sections 41, 42, 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. It is already settled in view of the pronouncement of the Supreme

Court in *State of Punjab v. Balbir Singh* 1994 Cri. LJ 3702 (SC) and reiterated in the three subsequent decisions of the Supreme Court reported in *Ali Mustaffa Abdul Rahman Moosa Vs. State of Kerala*, , *Mohinder Kumar Vs. The State, Panaji, Goa*, and 1996 Cri. LJ 3996 which have been cited on behalf of the appellants that the provisions of Section 50 are mandatory and that non-compliance the requirements of Section 50 would affect the persecution case and vitiate the trial.

9. In the instant case, the search was conducted u/s 43 of the Act inasmuch as the search, seizure and arrest are said to have been made in a public place. As such, the conditions prescribed by Sub-section (1) of Section 50 are imperatively required to be fulfilled in relation to this search.

10. The question is whether there has been compliance with the requirements of Sub-section (1) of Section 50 in the instant case. What is mandated by Sub-section (1) of Section 50 is to inform the person to be searched of his statutory right to be searched in presence of either a gazetted officer or the nearest-available Magistrate. There is absolutely no iota of evidence to indicate that the appellants were, in fact, informed of such a statutory right. After all, it is not the duty of the Court to raise a presumption that the officer concerned had, in fact, done so. It was held in *Saiyad Mohd Saiyad Umar Saiyad v. State of Gujarat*, 1995 Cri. LJ 1062 (SC) that when the officer concerned has not deposed that he had followed the procedure mandated by Section 50, the court is duty bound to conclude that the accused had not had the benefit of the protection that Section 50 affords and that his illicit possession of the contraband substance under the NDPS Act is not established. We must not be oblivious of the fact that this is a valuable right given to a person to be searched since such a search would impart much more authenticity and creditworthiness to the proceedings while equally providing an important safeguard to the person to be searched. To afford such an opportunity to the person to be searched, it is obvious that he must be aware of his right and that can be done only by an authorised officer informing him.

11. Now, the question may arise as to whether the fact that at least two of the witnesses namely P.Ws. 3 and 4, who happened to be the members of the raiding party, were gazetted officers being Inspectors of Police at the material point of time, would constitute sufficient compliance with the requirements of Section 50(1).

12. What Section 50(1) does mandate is giving of an option to the accused as to whether he desires to be searched in presence of either a gazetted officer or a Magistrate. The presence of two gazetted officers as members of the raiding party may, at best, constitute partial compliance with Section 50(1) inasmuch as the option lies with the accused to require to be searched either before a gazetted officer or before a Magistrate. Incidentally, it may be pointed out that in *Gopal Ready v. State* (1995) 2 Crimes 155 (Orissa), the accused was asked merely whether he wishes to be taken before a Magistrate and nothing was said about his right to be taken to a Gazetted Officer and it was held that there was

only partial compliance with Section 50(1) and as such, the conviction cannot stand. In *Bijaya Kr. Subudhi v. State of Orissa* (1995) 2 Crimes 724 (Orissa), the option given to accused appellant was that he was to be searched in presence of a gazetted officer who was a member of the raiding party and it was held that Section 50 was not fully complied with. In *Manak Chand Jain Vs. State*, the accused was given the option only to be taken to a gazetted officer and no option was given to be taken to a Magistrate, and, it was held that there was no full compliance.

13. Now, the question whether there has been compliance with the requirements of Section 50(1) is a question of fact to be decided on the facts and circumstances of each case. A question came up for consideration in some High Courts as to whether the requirement of Section 50(1) is met if the officer conducting the raid is himself a gazetted officer. According to the Delhi and Orissa High Courts, it would be sufficient compliance. But the Karnataka High Court took a contrary view in *A.V. Dharmasingh and others Vs. The State of Karnataka*, suggesting that the gazetted officer should be independent and should not be a member of the raiding party. Having regard to the object of Section 50 vis-a-vis the stringent provisions of this Act, we are inclined to agree with the view of the Karnataka High Court on this point and hold that mere presence of two gazetted officers in the raiding party would not meet the requirements of Section 50(1) particularly when the option as required u/s 50(1) was not given to the appellants.

14. In 1996 Cri LJ 3996, the Supreme Court referred to its decision in *State of Punjab Vs. Jasbir Singh and Others*, wherein it was pointed out that it would be open to the search officer to inform the suspect, at the time of search, that he was entitled to be searched in the presence of a Gazetted Officer and also to take in writing from the accused that he has been so informed and that the accused has waived that right so that it may not be open to the accused to take the plea of non-compliance of Section 50. It was further observed in that case by the Supreme Court:

It would be for the Court to consider, at the trial, whether the officer who conducted the search, had as a fact, informed the accused of that right and whether the accused has waived that right of being searched only in the presence of a Gazetted Officer.

In the instant case, however, the prosecution has not led any evidence to suggest that as a matter of fact, the officer who conducted the search had at all informed the accused appellants of their right u/s 50(1). The question of waiver would not, accordingly, arise here.

15. Thus, upon anxious consideration of the entire law discussed above on the question of the scope and the effect of non-compliance of the provisions of Section 50(1) of the NDPS Act in the light of the facts and circumstances of the present case as revealed from the evidence and the other materials on record,

we are of the view that there has not been compliance with the provisions of Section 50(1) as a result of which the impugned conviction is not legally sustainable.

16. We now come to the question of compliance with the requirements of Section 52 and 57. It was submitted on behalf of the appellants that the appellants were not informed of the grounds of their arrest with the result that there was non-compliance of Sub-section (1) of Section 52. It was further submitted that a full report of all the particulars of arrest or seizure was not made by the arresting officer to his immediate official superior and as such, there has been non-compliance with Section 57 of the Act. It was contended that both the Sections 52(1) and 57 are mandatory and the conviction has been vitiated by their non-compliance.

17. As regards Section 52(1), there is no positive evidence to suggest that the appellants were apprised of the grounds of their arrest. In the FIR, of course, it is stated that the appellants were informed of the grounds of their arrest, But this statement of PW 8 is not substantive evidence, PW 8 has not specifically deposed to the effect that he had informed the appellants of the grounds of arrest. In the absence of any such evidence, it is difficult for us to hold that Section 52(1) was complied with. So far as the question of compliance of Section 57 is concerned, it was argued on behalf of the State that the evidence of PW 1 would show that there was sufficient compliance with the requirements of Section 57. PW 1 was at the material point of time posted as D.S.P., CID, Headquarters, Bhawani Bhawan. Section 57 requires the report to be submitted within 48 hours next. In the present case, the arrest and seizure were made on 14.6.88 and it transpires from the evidence of PW 1 that on 15.6.88 he received the information in his office that Narcotic Cell of Howrah and Narcotic Cell of CID Headquarters recovered certain quantities of heroin and sale proceeds following a raid in a small lane off N.S. Road of Howrah. The evidence of PW 1, in our view, would go to show that there was sufficient compliance with the requirements of Section 57 in the present case.

18. In Balbir Singfts case (Supra), the Supreme Court has examined the question as to whether Section 52 and 57 are mandatory or directory. The essence of the observations of the Supreme Court on this point is as under:

?the provisions of a statute creating public duties are generally speaking directory. The provisions of these two sections contain certain procedural instructions for strict compliance by the officers, But if there is no strict compliance of any of these instructions that by itself cannot render the acts done by these officers null and void and at the most it may affect the probative value of the evidence regarding arrest or search and in some cases it may invalidate such arrest or search. But such violation by itself does not invalidate the trial or the conviction if otherwise there is sufficient material. Therefore, it has to be shown that such noncompliance has caused prejudice and resulted in failure of justice. The officers, however, cannot totally ignore these provisions and if there

is no proper explanation for non-compliance or where the officers totally ignore the provisions then that will definitely have an adverse effect on the prosecution case and the courts have to appreciate the evidence and the merits of the case bearing these aspects in view. However, a mere non-compliance or failure to strictly comply by itself will not vitiate the prosecution.

19. The omission of PW 8 to give the substantive evidence on the point that he informed the appellants of the grounds of arrest may give rise to a doubt as to whether he had informed the appellants of the grounds of arrest. But having regard to the purport of the provisions of Section 52(1), in the facts and circumstances of this case, failure to strictly comply with the said provisions would not, in our view, vitiate the prosecution or the conviction.

20. Coming to the point that was canvassed on behalf of the appellants in regard to the discrepancy between the quantity seized and the quantity analysed, it is the positive evidence of PW 12, the I.O., during his examination-in-chief that he collected the sample of the seized heroin on 30.7.88, arranged to re-seal the sample under a bigger cover and sent it to expert for analysis under the challan (Ext. 7). It is also his positive evidence that the remaining seized alamats were kept as usual in the malkhana of Howrah P. S. If we go by this oral evidence of I.O. it would at once lead to the conclusion that what was sent by him for analysis was the sample and not the entire seized quantity of the substance. Now, in all 70 puriahs were seized and each puriah is said to contain 50 mgs. of the substance and as such the total quantity of the contents of the puriahs would work out to 3.5. gms. I.O. has not disclosed in his evidence the total quantity of the sample he collected and sent for chemical analysis. The challan (Ext. 7) does not at all corroborate his testimony and gives a different impression. It speaks of four sealed covers marked A, B, C, D containing all the 70 small paper packets each containing 50 mgs. of the contraband substance as the exhibits which were purported to have been sent by him to the expert. In other words, the challan suggests as if the entire quantity seized was sent for analysis, Then again, going by the evidence of the I. O. (PW 12) if he collected the sample of the seized heroin and arranged to reseal such sample under a bigger cover before sending that sealed cover to expert and kept the remaining seized alamats in the P. S. Malkhana, the total quantity of the substance sent for analysis must be falling far short of 3.5. gms. But the Analyst's report (Ext. 8) would show as if be samples marked Exts. A, B, C, D which he received from PW 12 in connection with this case weighed 12.6831 gms. in gross. Like the challan, this report also does not support the testimony of PW 12. Unlike the challan, this report does not refer to any small paper packet within the said exhibits. The report also does not disclose the total quantity of the substance received for analysis or the total weight of the paper packets in which the substance meant for analysis was contained. The challan also does not disclose any gross weight of the packets including their contents which were sent for analysis. The prosecution has not led any evidence to resolve the discrepancy/anomaly that have crept into the material on record, through the oral testimony of the I.O. (PW 12) and the documentary evidence

provided by the challan (Ext. 7) and the analyst's report (Ext. 8), with regard to the quantity sent and the quantity received for analysis.

In such state of evidence, the discrepancy/anomaly is material and cannot be ignored, It is of such a nature that it is bound to throw a reasonable doubt as to whether what was seized was the same as what was analysed. The benefit of this doubt must, accordingly, go to appellants.

21. In view of our findings recorded above, it would necessarily follow that the conviction and sentence cannot be upheld. We, accordingly, allow the appeal, set aside the conviction and the sentence and acquit the appellants as well as the convict Mangal Bhuia all of whom be set at liberty, if they are not wanted in connexion with any other case.