
(1997) 10 CAL CK 0005
In the Calcutta High Court
Case No : Criminal Appeal No. 461 of 1990

Babu Chakraborty (in Jail)

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 03-10-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 100(4), 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 42(1),
42(2), 49, 50

Citation : (1997) 2 CALLT 437

Hon'ble Judges : Surya Kumar Tiwari, J; Sudhendu Nath Mallick, J

Bench : Division Bench

Advocate : Himangshu Kumar De, Arunabha Jana and Sandip Kundu, for the Appellant; Sudipto Moitra, Assistant Public Prosecutor and Krishna Ghosh, for the Respondent

Judgement

Sudhendu Nath Mallick, J.—The instant appeal has been preferred by the appellant convict Babu Chakraborty (in Jail) against the Judgment, order of conviction and sentence dated 14.9.90/15.9.90 passed by the learned Additional Sessions Judge, First Court, Burdwan in Sessions Trial No. 29 of 1990 Sessions case No. 16 of 1990 thereby convicting the appellant u/s 21 of Narcotic Drugs and Psychotropic Substances Act, 1985 and sentencing him to suffer rigorous imprisonment for 10 (ten) years and also to pay a fine of Rs. 1,00,000/- in default to suffer rigorous imprisonment for 2-1/2(two and half) years. The grounds taken on the memo of appeal are that the findings of the trial court regarding the guilt of the appellant are based on conjectures and surmises, that the trial court has not taken into consideration the major contradictions and inconsistencies in the evidence on the side of the prosecution regarding the search and seizure of the contravened articles, that the mandatory provisions of Section 100(4) of the Code of Criminal Procedure and of Section 49 and 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act) relating to search and seizure have not been complied with, that the

order of conviction is based on the highly interested and contradictory evidence of P.W.4 K.L. Mina and that the appellant has not been examined u/s 313 of the Code in conformity with the provisions contained therein. It has been contended by Mr. De the learned counsel appearing for the appellant that the impugned Judgment, Order of conviction and sentence passed by the learned trial judge is not supported by the evidence on record. It has been emphatically contended by Mr. De that had the learned trial judge applied his Judicial mind to the contradictory and inconsistent evidence on the side of the prosecution and had taken into consideration the fact that the mandatory provisions of the Act have not been at all complied with regarding search and seizure, he would not have arrived at a conclusion that an offence u/s 21 of the Act has been proved against the appellant beyond all reasonable doubt and accordingly would not have convicted and sentenced him.

2. Before considering the submissions of Mr. De it would be helpful to have an idea of the prosecution case against the present appellant. On the basis of a secret information, Shri K.L. Mina (P.W.4), the then Additional Superintendent of Police, Burdwan accompanied by P.W.2 Shyamal Kumar Dutta and some other Police Officers held a raid on 5.5.89 at 21.45 hours in the house of the appellant at Rasulpur within P.S. Memari in the presence of two local witnesses and in course of such search in all 13 (thirteen) small packets containing in all 5.050 grams heroin were recovered along with one brass scale and three cigarette "Rangta" (wrapping paper) and two pipes. It is the prosecution case that these articles were seized from the house of the appellant being produced by him in presence of the witnesses from his bed room. These articles were seized under a seizure list (Ext. 7) prepared at the spot which was signed by the witnesses. The seized articles were sealed and labelled and the appellant was then arrested and produced before P.W. 1 Sankar Mukherjee, O.C., Memari P.S. at 11-30 p.m. along with the seized articles. The fact was then entered in the general diary under Entry No. 275 dated 5.5.89 (Ext. 1). The O.C. Memari P.S. took the appellant into custody and put him in thana hajat and informed the local O.C. Excise P.W.3. This was also entered in the General Diary under Entry No. 276 dated 5.5.89 (Ext.2). On the next day the O.C. Excise Department took charge of the accused which was also noted in the G.D. Entry No. 296 dated 6.5.89 (Ext.3). Thereafter, the Excise Department took up the case and started investigation and the appellant was forwarded to the local Magistrate and the seized *alamat* i.e. the heroin was sent to the Central Public Health and Drug Laboratory for chemical analysis on 12.5.89. The Chemical analyst's report was received on 28.7.89 (Ext. 9) along with the memo (Ext. 10). It was reported that the seized substances contained heroin. Accordingly complaint was lodged against the accused u/s 21 of the N.D.P.S. Act, by P.W.3 on which cognizance was taken and the appellant was tried by the court below after framing charge under the aforesaid section ending in his conviction and sentence as challenged in this appeal.

3. In order to come to a decision as to whether the impugned order of conviction and sentence passed by the trial court is according to law or not it is necessary

to look into the special provisions contained in the relevant sections of the said Act and the evidence on record. The preamble to the said Act as amended subsequently emphasises the legislative purpose to make the law more harsh particularly for the illegal traffickers of Narcotic Drugs and Psychotropic Substances while implementing the provisions of the international conventions on Narcotic Drugs and Psychotropic Substances. Section 35 of the said Act lays down that in any prosecution for an offence under this Act, which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the Act charged as an offence in that prosecution. It has been explained there that the phrase "culpable mental state" includes intension, motive, knowledge of a fact and believe in or reason to believe a fact. It has also been provided in Sub-section 2 to the aforesaid Section 35 that for the purpose of the said section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability. u/s 37 under the non obstante clauses of Section 37 every offence punishable under the said Act is cognizable and non-bailable.

4. Next relevant section is Section 41 which deals with the power to issue warrant and authorisation. It makes provision for the power in relation to the issue of warrant for the arrest of the person against whom there is reason to believe that he has committed an offence punishable under Chapter IV, of the Act or for the search whether by day or night of any premises conveyance etc. when such authorised officer has reason to believe inter alia that any Narcotic Drug or Psychotropic substance in respect of which any offence punishable under Chapter IV has been committed has been kept or concealed in any building conveyance or place. Sub-section 1 to Section 41 is not applicable to the present case. The provisions of Sub-section 2 to Section 41 is however, material. According to the provisions of Sub-section 2 any gazetted officer of the Central Excise, Narcotics, Customs, Revenue, Intelligence or any other department of the Central Government or of the Border Security Force may be empowered by general or any special order to direct his subordinate officer above rank of Peon, Sepoy, or Constable to arrest such person or make a search of premises, conveyance etc. by day or night or himself arrest a person or search a building conveyance or place. Under the aforesaid Sub-section 2 the State Government may also make such authorisation in respect of any such officer of the revenue. Drugs control, Excise, Police or any other department of the State Government by general or special order. Officers so authorised by the Central Government or by the State Government as the case may be, will have the powers of an officer acting u/s 42 of this Act. By Notification No. 1572 Ex dated 5th November, 1985 published in the Calcutta Gazette extraordinary part 1 No. 401 dated 16.11.85 the West Bengal Government has empowered the Collector of Excise, the Collectors/ Additional District Magistrates of the districts, the Deputy Commissioner of Excise, and all Superintendents of Excise to exercise powers under Sub-section 2

of Section 41 of the Act and this notification has come into effect on and from 14th November, 1985 (vide Current Indian Statutes, 1986 West Bengal Government notifications at page 40). Section 42 deals with the powers of entry, search, seizure and arrest without warrant or authorisation. Under Sub-section 1 to Section 42 such officer being so authorised either by the Central Government or by the State Government in the manner as provided therein shall have the right of entry, search, seizure and arrest between sunrise and sunset provided, however, such officer may, however, enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief. It is also provided in Sub-section 1 that such officer empowered in this behalf by the State Government or the Central Government can make such entry, search, seizure etc. If he has reason to believe from his personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place. It is further provided in Sub-section 2 that where an officer takes down any information in writing under Sub-section 1 or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior. By notification No. 1573 Ex dated 5th November, 1985 the Government of West Bengal in exercise of the power conferred by Sub-section 1 of Section 42 of the Act has empowered all officers of the department of Excise and the Home (police department) not below the rank of the Sub-Inspectors and all officers of the drug control directorate of the Department of Health and Family Welfare not below the rank of Inspectors of drugs to exercise powers mentioned in the said sub-section subject to general control and direction of the State Government. This notification is effective on and from 14th November, 1985 and was published in the same official gazette as noted above. By notification No. 1574 Ex dated 5.11.85 effective from 14.11.85 the State Government in exercise of the powers conferred by sub-section (2) of Section 53 of the Act has vested all officers of the Department of Excise, not below the rank of the sub-inspectors and all officers of the drug control directorate of the department of the Health and Family Welfare, not below the rank of the Inspectors of drugs with the powers of the officers in-charge of a police station for the investigation of the offence under said Act (vide Current Indian Statutes, 1986, West Bengal notifications at page 41). Section 50 of the Act lays down the conditions under which search of any person shall have to be conducted. This section is, however, not relevant to our present case as admittedly the person of the appellant was not searched. Section 51 of the Act lays down that the provisions of the Code of Criminal Procedure, 1973 shall apply, in so far as they are not inconsistent with the provisions of this Act to all warrants issue of arrests, searches and seizures made under this Act. Section 52 of the Act is one of the most important sections which gives some statutory rights to the accused arrested and which contains some mandatory provisions. It would be helpful to quote Section 52 below:-

"Disposal of persons arrested and articles seized. (1) Any officer arresting a person u/s 41, Section 42, Section 43 or Section 44 shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested and article seized under warrant issued under sub-section (1) of Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.

(3) Every person arrested and article seized under sub-section (2) of Section 41, Section 42, Section 43 or Section 44 shall be forwarded without unnecessary delay to-

(a) the officer-in-charge of the nearest Police Station, or

(b) the officer empowered u/s 53.

(4) The authority or officer to whom any person or article is forwarded under sub-section (2) or sub-section (3) shall, with all convenient dispatch, take such measure as may be necessary for the disposal according to law of such person or article".

It is well settled in law that the provisions of Section 52 are mandatory any violation of the same would be certainly prejudicial to the defence. It is, however, the consistent judicial view that the provisions of a statute creating public duties are, generally speaking directory. It is to be borne in mind that considering the purpose of a statute, procedural instructions contained therein are to be interpreted. If in order to safeguard the legal-rights of an accused or a person sought to be apprehended, such statutory instructions are given to be complied with by the public functionaries, any violation of the same on their part would be prejudicial to the interest of the accused or such person sought to be arrested or actually arrested and in that view of the matter such provisions would pertain to the nature of being mandatory, because in that case such non-compliance would cause prejudice and failure of justice to the accused. Accordingly, we are of the view that provision of Section 52 (1), (2) and (3) are mandatory in nature. If it appears from the evidence on record that a person arrested under Sections 41 to 44 of the Act has not been informed of the grounds for such arrest by the arresting officer this would certainly prejudice his defence. A person duly informed of the grounds of his arrest at the very outset he is made aware of his position enabling him to take appropriate legal help or assistance to meet his defence.

5. Section 52A of the Act relates to disposal of seized Narcotic Drugs and Psychotropic Substances. This section is not however, relevant to the present case as this was inserted by amendment Act No. 2 of 1988 taking effect on and from 25.5.89 after the initiation of the case against the present appellant on 5.5.89.

6. Section 54 of the Act provides for presumption in respect of possession of the illicit articles which is quoted below:-

"Presumption from possession of illicit articles. In trials under this Act, it may be presumed, unless and until the contrary is proved that the accused has committed an offence under Chapter IV in respect of-

- (a) any narcotic drug or psychotropic substance;
- (b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;
- (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance; or
- (d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance, or any residue left of the materials from which any narcotic drug or psychotropic substance has been manufactured, for the possession of which he fails to account satisfactorily."

Section 55 is another important section containing provisions regarding actions to be taken by the officer-in-charge of the Police Station in respect of articles seized and delivered. This is a mandatory section and will have to refer to the said section in reference to the evidence on record as such we think it necessary to quote the aforesaid section:

"Police to take charge of article seized and delivered-An officer-in-charge of a Police Station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the Police Station or who may be deputed for the purpose, to affix his seal to such articles to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station".

It is clear from the above provisions that under the aforesaid section it is compulsory on the part of the officer-in-charge of the Police Station to allow the officer bringing the seized articles to the Police Station to affix his seal. The officer-in-charge of the Police Station is under statutory obligation to allow such officer to take a quantity of the sample as a safeguard against tampering with the article seized and deposited. The officer-in-charge is also duty bound to affix his own seal. The clear purpose of such provisions of Section 55 is to ensure that the sample of the case property are not tampered with at any stage. In the case of *Sunil Kumar v. State* reported in 1990 Criminal Law Journal page 414 it has been found that the mandate of Section 55 is fulfilled when the officer-in-charge of the Police Station allows the investigating officer to affix his own seal of such article and the said officer-in-charge also affixes his seal thereafter. The provisions of Section 55 and Section 52(3) of the Act cannot be treated as empty formalities but are substantive provisions to ensure authenticity of recovery by making senior officers responsible for the proceedings of sampling, sealing and deposit in the malkhana. Any violation of such provisions would vitiate the

investigation and consequentially the prosecution.

7. Section 57 of the Act provides that whenever any person makes any arrest or seizure under this Act, he shall, within 48 hours next after such arrest or seizure make a full report of all the particulars of such arrest or seizure to his immediate official superior. Violation of such provision does not, however, vitiate the prosecution. It has been held in *Usman Haidarkhan Shaikh Vs. The State of Maharashtra*, that non-compliance of these provisions would make the evidence of the Police Officer concerned unreliable to convince the accused. The general view is that the provisions of Section 57 being directory any deviation from the same may only affect the reliability of the prosecution but in a case, *State of Himachal Pradesh Vs. Sudarshan Kumar and etc.*, which has been held that the provisions of Section 57 are mandatory and confers valuable right to the accused. Making of full report to the immediate superior officer within 48 hours brings into existence a document which can be used for the purpose of cross-examination. It has been observed there by the High Court of Himachal Pradesh that making of such a report within 48 hours will also bring to an end the possibility of improving upon the prosecution version.

8. Now keeping in mind the above provisions of law we proceed to consider the evidence on record. It appears from the lower court's record that charge u/s 21 of the Act was framed against the appellant by the learned trial Judge on 16.6.90 for possession 3 grams and 25 miligrams of diactyl morphine, commonly known as Heroin which was produced by him from his bed room on 5.5.89 in contravention of Section 8(c) of the said Act to which the appellant pleaded not guilty. It further appears that the prosecution in course of the trial has examined 4 witnesses who are as follows:- P.W. 1 Umasankar Mukherjee is a Sub-Inspector of police who has the O.C. Memari P.S. on 5.5.89. P.W.2 Shyamal Kumar Dutta is also a Sub-Inspector of police attached to Burdwan P.S. on 5.5.89 on which date at about 6-25 P.M. he was on patrol duty near Curzon gate in the town of Burdwan. P.W.3 is Malay Kumar Mazumder who at the material time was the O.C. Memari excise circle. He submitted the prosecution report against the accused u/s 21 of the Act. P.W.4 is Krishan Lal Mina who was the additional S.P. headquarters, Burdwan on the date of incident i.e. 5.5.89. Ext. 1 is the G.D. entry bearing No. 275 dated 5.5.89 recorded by the P.W. 1, at 23.30 hours. Ext. 2 is also another G.D. entry made by the said P.W.I being No. 276 of the same date at 23.55 hours. Ext. 3 is another G.D. entry made by P.W.I being No. 296 dated 6.5.89. Ext. 4 is a label allegedly covering a polythene packet containing Heroin. It purports to be signed by the appellant and one witness. Ext. 5 is also a label allegedly covering a polythene packet containing Heroin. Ext. 6 is also another label allegedly covering 3 polythene packets containing Heroin. Both Ext. 5 & 6 are purported to bear the signature of the appellant and another witness who has signed in Hindi. Ext. 7 is the seizure list dated 5.5.89 giving the time as 21.45 hours prepared by P.W.I and signed by the appellant and two witnesses namely Swapan Samanta and one Ramkaran Prasad who has signed in Hindi. Ext. 8 is a memo bearing No. 1 (M)/Ex dated 11.5.89 purported to show that one

sealed cover containing two levelled paper packets, S/C (presumably standing for suspected to contain) Heroin was sent by the Inspector of Excise Kalna Katwa/ officer-in-charge Excise Memari Circle Burdwan to the Assistant Director Central public Health and Drug Laboratory (drug wing) Calcutta for opinion whether the samples taken on 5.5.89 contained Heroin or diatyl-morphine. In Ext. 8 it is stated against serial No. 2 regarding description of seal wax as West Bengal Excise seal No. Ex 23 in red sealing wax. But curiously enough on the left hand margin of Ext. 8 a plain rubber stamp impression is seen. There is no such seal in red sealing wax as noted in Ext. 8 at serial No. 2. Ext. 9 is the government analyst's report dated 27.7.89 stating that the sample sent under the above memo was found to contain Heroin. Ext. 10 is a letter bearing No. 6 (M)/ Ex dated 12.8.89 to the Director (Drugs) Central Public Health and Drug Laboratory, West Bengal, Calcutta from the Inspector of Excise Kalna Katwa range Burdwan requesting him to return certain papers and articles including one sealed cover containing two labelled paper packets. On the said letter there is an endorsement of the Director (Drugs) dated 23.8.89 that the samples were returned. We shall take up the reliability of the above documentary evidence at appropriate stage while considering the oral evidence on record.

9. P.W. 1 Umasankar Mukherjee the O.C. of Memari P.S. on the relevant date says that at 11.30 P.M. on 5.5.89 P.W.I, Shyamal Kumar Dutta S.I. of Police attached to Burdwan P.S. and Sri K.L. Mina Additional S.P. Burdwan came to Memari P.S. and produced one arrested person namely Babu Chakraborty, the present appellant. According to him he took him into custody. He further says that S.K. Dutta (P.W. 2) produced before him some polythene packets allegedly containing Heroin and accordingly he took charge of those packets, one brass scale, three Rangta of cigarette packets and two paper packets and one seizure list also produced by P.W.2 and entered the said facts in G.D. entry No. 275 dated 5.5.89 (Ext. 1). He further says that he then contacted the local O.C. Excise who came to the P.S. to whom he handed over the arrested accused and alamats noted in G.D. entry No. 276 dated 5.5.89 (Ext 2). The said G.D. entry is signed by the O.C. excise P.W. 3. He further says that the arrested accused was detained in the thana lock up on that night and the O.C. Excise took charge of the accused on 6.5.89 as noted in the G.D. entry bearing No. 296 by him which is Ext. 3. In his cross-examination he admits that he has no personal knowledge about the raid in Rasulpur by the Additional S.P. Burdwan P.W.4 on 5.5.89. It appears from his evidence that whatever was stated to him by P.W.2 S.K. Dutta and P.W.4 K.L. Mina was recorded by him in the G.D. entry No. 275 as per Ext. 1. He also admits that P.W.4 K.L. Mina being his superior officer he was under his administrative control. It appears from his evidence that the P.W.I being under the control of P.W.4 did whatever he was dictated to do. Ext. 1 records that S.I. Shyamal Kumar Dutta of Burdwan P.S. and the Additional S.P. K.L. Mina attached to head quarters Burdwan along with some police officials came to Memari P.S. at 11-30 p.m and produced the accused Babu Chakraborty along with certain seized articles and seizure list. Three label packets were stated to contain the following

articles:-

- (1) 7 polythene packets owing 3 grams and 25 miligrams containing Heroin.
- (2) 6 small thin tressing paper packets containing Heroin weighing 2 grams and 25 millgrams.
- (3) One small brass scale.
- (4) 3 pieces cigarette Rangta (a type of silvery wrappers).
- (5) 2 paper pipes.

The items of 3, 4, and 5 were put in a big label packet. It is further noted in Ext. 1 that in pursuance of a secret information a raid was held at Rasulpur Bazar P.S. Memari under the direct supervision of the Additional S.P. headquarters, Burdwan in the house of the present appellant on 5.5.89 at 21.45 hours and the aforesaid articles were recovered from his possession and that the said were recovered in pursuance of the appellant statement from his bed room and that the accused failed to give any satisfactory account for such possession of the seized Heroin. The Ext. 1 further records that the P.W. 1 put the accused in the thana lock up and left for the Excise office to inform the O.C. Excise Memari for taking necessary action. Ext. 2 records that at 23.55 hours P.W. M.K. Mazumder O.C. Excise came to Memari P.S. to whom the accused person along with seized articles was made over. The accused was, however, detained in the thana lock up for the night at request of P.W.3. Ext. 3 the G.D. entry bearing No. 296 dated 6.5.89 records that the O.C. Excise Memari Circle took the accused in his custody from Memari P.S. Next witness is P.W.2 Shyamal Kumar Dutta. This witness says that on 5.5.89 at about 6.25 P.M. he was engaged on patrol duty near Curzon gate in the town of Burdwan. He further says that Mr. Mina the Additional S.P. P.W.4 came and asked him to accompany him in his Jeep. It is his evidence that he had no idea about the destination. He further says that they left the Jeep at Rasulpur market and proceeded on foot being led by Mina Saheb. On the way he called two local persons under the direction of Mina Saheb i.e. P.W.2 Public witnesses of seizure who are Swapan Samanta and Ramprasad being the neighbours of the accused. It may be noted here that none of the above search and seizure witnesses have been examined. There is no reasonable explanation as to why they could not be examined. The lower court's order No. 16 dated 8.9.90 shown that the prosecution closed its case and the trial judge fixed on 10.9.90 for examination of the accused u/s 313 Cr.P.C. By order No. 15 dated 17.8.90 the trial judge directed the prosecution to take steps for production of remaining witnesses. On 8.9.90 only P.W.4 was examined and cross-examined and there after the prosecution closed its evidence without any prayer for issue of process to compel the attendance of the above two search and seizure witnesses namely Swapan Samanta and Ramkaran Prasad. So, undlsputedly there were unexplained latches on the part of the prosecution to examine the above two witnesses by making suitable prayer before the trial court u/s 230 Cr PC Mr. De has rightly submitted that in view of the non-examination of the two

material witnesses of search and seizure the evidence given by the police officials does not only become weak but also unreliable in view of gross inconsistencies, contradictions and suspicious anomalies. I will come to this aspect of the matter at appropriate stage.

10. Now, P.W.2 further says that thereafter they went to the house of the accused led by P.W.4 and focussing a torch he found the accused sitting on the varandah who disclosed his name as Babu Chakraborty. P.W.2 further says that they disclosed their identity and expressed their intention to search the house of the accused. It is his further evidence that "the accused in pursuance of his talk to Mina Saheb brought out 13 packets (polythene bag) containing one rose colour powder substance" along with some "Rangta" of cigarette packets and one scale and some white packets. He further says that these articles were seized by him under a seizure list as per direction of Mina Saheb which was signed by the witnesses. He also says that he affixed labels to these seized articles which were also signed by the witnesses. This witness opened a seal packet in court containing 6 small packets and he stated that these packets containing gray powder were produced by the accused and these packets were signed by the witnesses. This witness also opened another sealed packet in court and brought out 7 small packets containing gray powder substance. P.W.2 further says that those 7 packets were also seized by him on being produced by the accused. He has further proved the labels allegedly covering the seized articles being marked Ext. 4, 5 and 6. He further says that these labels were signed by Ramprasad one of the search and seizure witnesses. There is no explanation why the other search list witness namely Swapna Samanta did not sign those labels. It is curious to note that the trial Judge has observed while recording the deposition of P.W.2 that the seals on the seal packet were found intact, but while going through the Ext. 4, 5 and 6 we do not find any such seal. Be that as it may, it appears that PW2 is a wholly incompetent and unreliable witness regarding the search and seizure. Although he says at the beginning that in pursuance of his talk with PW 4 the accused brought out 13 polythene bags but at subsequent stage he says that the accused produced all these 13 packets in two phases, firstly 6 and then 7. In his cross-examination he has admitted he conducted the search as per direction of PW4 however, without preparing any search memo. He also admits that the house was searched and then the contraband articles were seized. But PW 4 himself says that after the seizure, the house of the accused was searched but nothing incriminating was found. PW 2 further admits that he did not search the persons of search witnesses, PW 4 Mr. Mina and also did not offer himself to be searched by the accused and by the witnesses. According to him so also was the conduct of Mina Saheb. He further admits in his cross-examination that the statement of the accused was not recorded by anybody on behalf of the search party and that he reported the matter to Memari P.S. as per direction of the PW 4. He has denied the defence suggestion that the house of the accused was not at all searched and that nothing was recovered from his house and that all papers were prepared at Memari P.S. Before coming to the

evidence of PW 3 it would be helpful to come to the evidence of PW 4 Mr. K.L. Mina. He says that on 5.5.89 at about 8/9 p.m. he went to the house of the accused being accompanied by PW 2 and some other members of the police staff and found the accused in his house. In his chief he further says that he disclosed his identity to the accused and also of the accompanying officers and expressed his intention to search the house. He further says that the accused produced one tin box containing some polythene packets allegedly containing Heroin. He further says that public witnesses were called before hand and that the accused produced those packets. It is his evidence that one scale was also recovered and some papers were also seized. He does not explain what are those papers. In the seizure list as per Ext. 7 and in the evidence of PW 2 there is no mention of any other paper and the PW 4 does not say anything about the arrest of the accused. PW 2 has said after the seizure the accused was arrested. PW4 says that thereafter the raiding party including himself came to Memari P.S. along with the seized alamat and the accused. According to him, S.I. S. K. Dutta informed the O.C. Memari P.S. about the incident. It must be noted here that the evidence of this witness PW 4 in cross-examination is most revealing. He says in his cross-examination that before 5.5.89 he did not go to the house of the accused on any occasion but he had been to that locality on previous occasion about 10/15 days prior to the date of the raid to locate the house of the accused. Here printed in italics. There is no explanation what promoted him to locate the house of the accused 10/15 days prior to 5.5.89 which is the date of the raid. If he was already in possession of a secret information as alleged in his chief what prevented from raiding the house of the accused immediately. There is no answer to such pertinent question. There is no reason why did he wait for 10/15 days although in his chief he confidently says that he has jurisdiction over all police stations under Burdwan sub-division. The secret information as referred to by him has not been recorded in writing as required u/s 41(2) and u/s 41(1) of the Act. It has been, however, argued by the learned counsel appearing for the State that such requirement u/s 41(1) or u/s 42(2) of the Act to take down the secret information in writing by the Police Officer concerned is only directory and not mandatory. He has referred to a Single Bench decision of the Delhi High Court reported in Nathu Ram Vs. State, Even if such violation of statutory directions may not vitiate the investigation but, in our view in the present circumstances of the case it shatters the credibility of the prosecution witness and the truth of the prosecution case to a great extent and its foundation. Mr. De the learned counsel appearing for the appellant has rightly argued that such conduct on the part of the PW4 who is the Additional S.P. taking the leader's role in the matter of prosecution of the appellant must be branded as malajlde, malicious and motivated in the absence of explaining circumstances to the satisfaction of the court. Furthermore, from the evidence it appears that the alleged raid was held at night. Such raid at night can only be held under special authorisation u/s 41(2) or under the proviso to sub-section (2) of Section 42 which has already been referred to in the foregoing paragraph. The West Bengal Government notifications as referred to in the earlier paragraphs of this

judgment do not show that PW 2 or PW 4 was so authorised by the State Government u/s 41(2) of the Act. It is the law that invalidity of a preceding investigation or illegality of a search or seizure does not vitiate the conviction of an accused unless such invalidity or illegality has caused prejudice to him. In the instant case in view of the circumstances discussed above we are of the view that at least the non-compliance of the proviso to Section 42(1) and of the provision of sub-section (2) of the aforesaid Section 42 has caused great prejudice to the accused, specially in view of the fact that there is no evidence to show that the accused was informed of the grounds of his arrest by PW 2 or by PW 4 as required u/s 52(1) of the Act. This is important in view of the glaring inconsistencies and contradictions in the evidence of PW 2 and PW4 vis-a-vis the seizure list as per Ext.7 and the relevant G.D. entry as per Ext. 1 regarding the search and seizure of the contraband articles from the possession of the accused. PW 4 says In his cross-examination that on 5.5.89 he straight away went to the house of the accused, interrogated him and asked him to bring out the incriminating article if any. Here printed in Italics. PW 4 does not corroborate PW 2 when he says on oath that the accused produced one tin box containing some polythene packets allegedly containing Heroin. Further more, there is no answer to the question who stated that the said polythene packets contained Heroin. If it is the statement of the accused before PW 4 or PW 2 who are Police Officers such confession is inadmissible. PW2 does not say anything about a tin box containing polythene packets. There is no mention of seizure of the tin box in the seizure list as per Ext.7. PW 4 says in his evidence that the accused brought out the incriminating article and kept on the ground. This is not supported by evidence of PW 2 furthermore, in the seizure list itself it is stated that the polythene packets were seized from the house of the appellant being produced by him from his bed room. In Ext. 1 it is recorded by PW1 that as per statement of PW 2 and PW 4 the seized articles were recovered from the possession of the accused in pursuance of his statement from his bed room. In view of these circumstances it would be wholly unfair and illegal to rely upon the contradictory evidence of PW 2, PW 4 and the inconsistent documents namely the seizure list as per Ext.7 and the G.D. entry made by the PW1 as per Ext. 1. Coupled with this must be taken into consideration the fact that none of the seizure list witnesses who are alleged to be independent local witnesses being the neighbour of the accused has been examined. In such circumstances it would be wholly improper to place reliance upon such inconsistent and contradictory evidence on the side of the prosecution as noted above. In this connection we must also refer to Section 102 of the Criminal Procedure Code which runs as follows:-

"Power of public officer to seize certain property-(1) Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

(2) Such Police Officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.

(3) Every Police Officer acting under Sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the court, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the court as and when required and to give effect to the further orders of the court as to the disposal of the same".

Along with Section 102 Cr.PC reference must be made to the provision of Section 55 of the Act which has already been quoted. Section 55 requires that an officer-in-charge of a Police Station shall take charge of and keep in safe custody, pending the orders of the Magistrate all articles seized under this Act within the local area of that Police Station and may be delivered to him and it further requires that such officer-in-charge shall allow any officer who may accompany such articles to the Police Station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station. Nowhere from the evidence on record it appears that PW1 the O.C. Memari P.S. complied with the mandatory provisions of Section 55 or for that matter PW2 or PW4 affixed their seals on the seized articles as per Ext.7 given in custody of PW1 as recorded in the G.D. entry as per Ext. 1. It is needless to say that such violation of the mandatory provision of Section 55 by Police Officer concerned have caused great prejudice to the accused and has vitiated the entire prosecution and consequently the order of conviction passed by the trial judge against the accused should not be allowed to stand. From the lower court's record it appears that the seized articles were never forwarded to the Magistrate having jurisdiction for orders regarding custody etc. There was no affixation of seal of the officer-in-charge of the Police Station or of PW 2 or PW4 on the labels as per Ext.4, 5 and 6 to ensure the authenticity of the alleged seizure. It is also curious to note that although about 5.50 grms. of Heroin were allegedly recovered and seized no sample was taken by PW 2, PW 3 or PW 4 for the purpose of getting the opinion of chemical analyst. On the other hand, the prosecution case is that the entire seized articles were sent to the Central Public Health and Drug Laboratory, Calcutta for analysis and report. From above evidence on record it cannot be said to have been proved beyond all reasonable doubt that the samples examined by the Government analyst as per report marked Ext.9 were the same articles sent to the analyst as per Ext.8 and that the articles noted in Ext. 8 are the same articles of seizure as per seizure list Ext.7 and that the same were deposited with the O.C. Memari P.S. as diarised in Ext. 1. In the letter as per Ext. 8 addressed to the Central Public Health and Drug Laboratory there is no mention of how many packets suspected to contain Heroin were sent to the analyst for examination. It is only stated that one sealed covered containing two labelled paper packets suspected to contain Heroin was sent along with Ext. 8 for examination and report. I have already noted that there is no specimen seal of the O.C. Excise being seal No. 23 in red sealing wax, as allegedly accompanying the above memo. There is only a rubber stamp on

Ext.8. It cannot be treated as a specimen seal in red sealing wax. Furthermore, in the analyst report as Ext.9 there is no mention about how many packets containing suspected Heroin were sent to the laboratory for examination and report. It is stated that the condition of the seals on the packets were intact. It appears from Ext. 10 that the sealed covered containing two labelled paper packets were received back from the laboratory on 3.8.89 by the Inspector of Excise Kalna Katwa range Burdwan. But this sealed covered has not been produced before the trial court to establish the identity of the sample seized by the police, sent to the laboratory and examined by the laboratory and sent back. As I have already noted, the labels as per Ext.4, 5 and 6 do not bear any seal by the police officers concerned as required under law.

11. It has been submitted by Mr. Moitra that there was no necessity to comply with provision contained in the proviso to Section 42(1) and in subsection (2) of the aforesaid section in as much as PW 2's immediate superior was PW 4 who was present at the time of search and seizure. But it must be borne in mind that the active role was taken by PW 4 and not by PW 2 in working out the secret information even at the night. Under the circumstances, PW 4 should have recorded the grounds of his belief for the purpose of trading the house of the accused after sunset and should have been communicated the same to his immediate superior who is S.P. Burdwan district or the D.I.G. of Police having jurisdiction. It needs hardly to be over emphasised that non-compliance of mandatory, statutory provisions vitiates the prosecution and, therefore, the order of conviction and sentence is liable to be set aside. In the present case illegality causing prejudice to defence in the matter of non-compliance of mandatory provisions is manifest on record. Non-compliance of directory provisions which are meant for public functionaries in the matter of investigation Including search, seizure and arrest, although, may not vitiate the prosecution, but such non-compliance tends to shake the very foundation of the prosecution when the supporting evidence adduced by the prosecution is wholly unreliable due to inconsistencies and contradictions interest. Accordingly, the order of conviction becomes unsustainable. So, in any event we get the same result due to non-compliance of statutory requirements whether the same are directory or mandatory. In cases of non-compliance of directory provisions on behalf of the prosecuting or investigating agency the court must look for an answer why the simple statutory directions were not fulfilled. If there is no reasonable answer the court would be free to draw an adverse inference if not presumption from such conduct on the part of the officer's concerned. The requirements whether mandatory or directory, are to be fulfilled to leave no scope for any reasonable doubt in assessing the prosecution evidence. In the present case the materials on record indicate that the PW 2 and PW 4 did not act in good faith so as to make the accused liable to be prosecuted u/s 21 of the Act. The entire prosecution story of search and seizure has the look of a cooked up one and such evidence becomes unreliable not only for want of corroboration but also for glaring inconsistencies and contradictions as already pointed out.

12. Now I come to the evidence of PW3 who is the I.O. of this case duly authorised by the State Government as per notification already referred to. He has submitted the prosecution report and has the authority to do so. He did not, however, take any part in connection with the search and seizure of the contraband articles and arrest of the accused effected by PW 2 and PW 4. In that view of the matter his evidence is not of much importance. He says that he sent the entire seized materials to the Central Public Health and Drug Laboratory for Chemical analysis on 12.5.89 as per memo marked Ext.8 without, however, taking any sample thereof. He has proved the Chemical analyst's report as per Ext.9 and he has also proved the Ext. 10. I have already discussed all these exhibits in the foregoing paragraphs and have pointed out the evidentiary infirmity of the same. From the above facts and circumstances and the evidence on record even if it is accepted that the samples examined by the Government analyst as per Ext.9 contained Heroin, there is hardly any proof that the subject matter of the analysis and report was seized from the possession of the appellant and was kept in the custody of the O.C. Memari P.S. and subsequently taken over by the I.O. PW 3 who in turn sent the same to the Government analyst for examination and report. The accused in course of his examination u/s 313 Cr.PC has denied everything and has pleaded innocence. In view of such evidence on record this court is of opinion that the entire prosecution evidence is wholly unreliable and tainted and the procedure adopted by the prosecuting agencies is wholly illegal and in that view of the matter no presumption u/s 35 and u/s 54 of the Act can be legally drawn against the accused the present appellant. It has been rightly submitted by Mr. De that the learned trial Judge has most perfunctorily dealt with the above case and has not considered the evidence on record from a judicial approach. We must also note our view that although in this case PW 2 is the Police Officer who allegedly arrested the accused and seized articles as per Ext.7, the real person behind such arrest and seizure is PW 4 K.L. Mina the Additional S.P. Burdwan head-quarters. PW2 and for that matter PW 1 acted as tools under the control of PW 4 as it appears from their evidence on record. Under the circumstance we are of the view that there was gross violation of Section 57 as the PW 4 did not make a full report of all the particulars of such arrest or seizure to his immediate official superior. In view of the evidence on record, we are of the opinion he should have done it and for such non-compliance his evidence becomes totally unreliable. In view of the above facts and circumstances, the materials on record and the provisions of law in this regard we are unable to accept the findings of the learned trial Judge against the accused and as such the order of conviction and sentence passed by him must be set aside. This court is of the view that charge u/s 21 of the N.D.P.S. Act has not been proved against the appellant beyond all reasonable doubt. Mr. De, has also submitted that examination of the accused u/s 313 Cr.PC has not been properly done by the trial court. Mr. De may be correct but we do not go into that aspect thread bare as the whole prosecution case falls on other grounds as discussed above.

13. Now, we come to another important aspect of the matter, the appellant was in Jail since his arrest till 11.8.89. He was taken into custody and sent to Jail as per impugned order of conviction dated 15.9.90. Since then he is in Jail. In view of the above evidence on record and the surrounding circumstances as noted above and considering the position of law in this regard as discussed above this court is of the view that the order of conviction and sentence passed by the trial Judge is wholly unjust and unwarranted by law. From the evidence on record this court is of the view that the arrest of the appellant was wholly illegal and unwarranted. The evidence on record gives impression that the appellant who is a book dealer as alleged in the memo of appeal had been falsely implicated in this case accusing him of a heinous offence committed against the society. The conduct of and the action taken by PW 4 who is a Police Officer of a very senior and high rank do not inspire any confidence and rather deserve to be condemned. It is beyond the scope of the present appeal to go for the reasons how this poor appellant incurred the wrath of PW 4 so as to be implicated in such a serious case. But this court is of the view that there are prima facie reasons to hold that the PW 2 and PW 4 have without reasonable ground of suspicion entered and searched the house of the appellant and have vexatiously and unnecessarily arrested him so as to proceed against u/s 58 of the Act. The appellant in our view not only deserves an acquittal but also this court should pass appropriate orders so as to compensate him at least to some extent for the loss of his liberty and livelihood for more than 7 years. u/s 482 of the Code of Criminal Procedure this court has inherent powers to make such orders as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any court or otherwise to secure the ends of Justice. The court cannot remain blind to the hapless condition of a common ordinary man who has unnecessarily been arrested and detained in custody and has suffered imprisonment for so many years. The court must be form when an offence is proved against a person beyond all reasonable doubt but at the same time the court must take some remedial measures to compensate a person against whom the offence has not been proved beyond all reasonable doubt and who has been unnecessarily and unreasonably arrested, detained and sentenced to imprisonment and fine, specially when it appears to the court that the State or the investigating and prosecuting machinery of the State have acted in a way which is neither legal nor bona fide. There are circumstances, when a mere order of acquittal or setting aside an order of conviction and sentence is not enough to vindicate the right of an innocent person. The High Court in exercise of its inherent powers is expected if not required, to do something more, in due discharge of its powers to give effect to its order and also to secure the ends of Justice. In our view the present case is one of such cases.

14. In view of the circumstances of the present case we are of the view that the State of West Bengal should be directed to pay a compensation of Rs. 1,00,000/- to the appellant to meet the ends of Justice. Accordingly, we allow the appeal and set aside the impugned order of conviction and sentence along with the

findings of the trial court made against the appellant and the appellant is acquitted and be set at liberty at once. The State of West Bengal is directed to pay compensation of Rs. 1,00,000/- (Rs. one lakh) to the appellant within six weeks for this date in terms of this Judgment. We however, make it clear that the State Government will be at liberty to realise or to recover the whole of such compensation money or any part thereof from PW 4 K.L. Mina a member of the Indian Police Service serving as Additional S.P. Burdwan at the material time. We further direct the trial court to lodge a complaint to the Magistrate having Jurisdiction for prosecuting PW 2 Shymal Kumar Dutta S.I. of Police attached to Burdwan P.S. at the material time and PW 4 K.L. Mina Additional S.P. attached to Burdwan district headquarters at the material time for having committed an offence u/s 58 of the Narcotic Drugs and Psychotropic Substances Act, 1985 read with Section 166/167 of the Indian Penal Code within 4(four) weeks from the communication of this order. It is also made clear that this order will not prejudice the rights of the appellant to proceed against that police officials concerned for other remedies to which he may be entitled according to law through civil or criminal forum.

S.K. Tiwari, J.

15. I agree