

(2017) 03 CAL CK 0054
In the Calcutta High Court
Case No : 502 of 2011

Gouranga Mondal

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 16-03-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#), [Section 107](#), [Section 215](#), [Section 215](#), [Section 464](#), [Section 100](#)

Citation : (2017) 03 CAL CK 0054

Hon'ble Judges : Asha Arora

Bench : SINGLE BENCH

Advocate : Dipanjan Chatterjee, ?Sujit Kumar Ghosh, Sanjoy Bardhan

Judgement

1. This appeal is directed against the judgement and order dated 11th May, 2011 passed by the learned Judge, Special Court NDPS Act, Siliguri, Darjeeling in C.R. (NDPS Case) No. 8 of 2009 convicting the appellant for the offence punishable under section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and sentencing him to suffer rigorous imprisonment for a period of seven years and to pay a fine of Rs. 50,000/- in default, to suffer rigorous imprisonment for a further period of one year for the aforesaid offence.

2. Prosecution case, sans unnecessary details is as follows: On 10th March, 2009 at 19.10 hours Sub-Inspector of police Tapan Kumar Das of Pradhan Nagar Police Station received a secret information that two persons were standing at Darjeeling More in front of Labanya weigh bridge having in their possession huge quantity of ganja in two bags with a view to sell it at Darjeeling More and its adjoining area and they could be caught red-handed if apprehended immediately. The aforesaid matter was diarised vide Pradhan Nagar P.S G.D Entry No. 694 dated 10th March, 2009. As instructed by the Inspector-in-Charge of Pradhan Nagar P.S SI Tapan Kumar Das along with ASI S. Kar and a team of police

personnel left for the spot to work out the secret information. On the way two independent witnesses were called and informed about the secret information. They were requested to be witnesses to the search and seizure if necessary. At about 19.40 hours the team reached the spot and as identified by the source, they surrounded two persons standing at Darjeeling More in front of Labanya weigh bridge. On being interrogated the two persons disclosed their identity and stated that the bag carried by each of them contained ganja. Those two persons were then asked whether they wanted to be searched in presence of any Executive Magistrate or gazetted officer and they agreed. A notice was then served upon them. Since no Executive Magistrate was available in his office, Shri Swapan Kumar Ghosh, the Inspector-in-charge of Pradhan Nagar P.S was requested to come to the spot as gazetted officer for the purpose of conducting search and seizure. After the arrival of Inspector Swapan Kumar Ghosh, his identity was disclosed to the aforesaid persons whereafter their bag was searched in presence of the two independent witnesses and the gazetted officer. On search huge quantity of ganja was recovered from the two nylon bags. The two persons confessed that they procured the ganja for the purpose of selling and they failed to produce any document in support thereof. It was found that the ganja recovered from the possession of the appellant Gouranga Mondal weighed 6 kg 600 gms and the weight of the ganja recovered from the possession of the co-accused Sankar Mahanta weighed 6 kg 200 gms. S.I Tapan Kumar Das seized both the packets containing the ganja as mentioned and marked them as P-1 and P-2 respectively. He then drew two samples of 50 gms each from each of the aforesaid packets and packed, sealed and labelled them. He then packed, sealed and labelled the main packets and prepared seizure list in presence of the witnesses and the accused. Thereafter the accused persons were arrested after observing the required formalities.

3. On the basis of the FIR lodged by SI Tapan Kumar Das, Pradhan Nagar P.S Case No. 63 of 2009 dated 10/03/2009 under section 20(b)(ii) N.D.P.S Act was registered against the accused persons. Samples of the seized contraband were sent for chemical analysis. On conclusion of investigation, charge sheet was filed against the two accused persons under section 20(b)(ii) N.D.P.S Act. The learned trial court framed the charge for the offence punishable under section 20(b)(ii) (B) NDPS Act against the accused who pleaded not guilty to the arraignment and claimed to be tried.

4. Prosecution examined eight witnesses to substantiate its case. PW1 S.I Tapan Kumar Das, accompanied by PW2 A.S.I Shibu Kar, PW3 Constable Tapan Kumar Das and PW 5 Constable Niladri Sarkar went to Labanya weigh bridge to work out the secret information. PW4 Inspector Swapan Ghosh was called to the spot as the gazetted officer in whose presence the search and seizure was made. PW6 Tapas Sikdar and PW7 Ajay Singh have been examined as independent seizure witnesses. PW8 S.I Dipak Kumar Sen is the Investigating Officer. Apart from the witnesses referred, prosecution relied upon several documents including the report of chemical analysis of the samples of seized ganja which were tendered

in evidence.

5. Defence version is outright denial of the prosecution case and false implication. The accused took the plea that they were forcibly brought from their house and illegally detained at the police station for two days. The factum of search and seizure at Labanya weigh bridge on the date and time mentioned has been categorically denied. No evidence has been adduced in support of the defence plea.

6. The learned trial Judge, appreciating the evidence on record found both the accused guilty of the offence punishable under section 20(b)(ii)(B) of the NDPS Act and accordingly convicted and sentenced them as aforesaid. The present appeal is at the instance of the accused appellant Gouranga Mondal.

7. Castigating the charge framed against the accused as defective, Mr. Dipanjan Chatterjee, learned advocate appearing as amicus curiae sought to impress that the exact quantity of ganja alleged to have been recovered from the possession of each of the two accused has not been specifically mentioned therein and separate charge ought to have been framed against each of them. The relevant provisions in the Criminal Procedure Code dealing with the effect of any error, omission or irregularity in the charge are section 215 and section 464. Section 215 of the Code of Criminal Procedure provides as follows: "no errors in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice,". According to section 464 of the Criminal Procedure Code, "no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby". In the present case there is nothing on record to show that the accused/appellant was in fact misled or prejudiced by the charge framed against him which reads as follows: "I, Shri Rabindranath Samanta, Judge, Special Court (NDPS) Act, Siliguri, hereby charge you, 1. Gouranga Mondal 2. Shankar Mahanto as follows: That you, on or about the 10- 3-09 at about 21.15 hours at Darjeeling More, in front of Labanya weigh bridge under Pradhan Nagar PS were found in possession of 6.600 kgs & 6.200 kgs of ganja and on demand you could not give any satisfactory explanation and thereby committed an offence punishable under section 20(b)(ii)(B) of the NDPS Act and within the cognizance of this Court and I hereby direct that you be tried by said Court on the said charge. Charge is read over and explained to the accused persons to which they plead not guilty and claim to be tried."

The fact that the prosecution witnesses were cross-examined extensively on behalf of the accused goes to show that the accused/appellant was fully aware of the details of the charge against him. It is the case of prosecution that both the

accused were apprehended together from Darjeeling More in front of Labanya weigh bridge on the date and time mentioned. The charge framed clearly and specifically mentions the quantity of ganja found in possession of each of the accused. It could not be shown how the appellant has been prejudiced in his defence by the aforesaid charge. Therefore the argument in this regard is devoid of merit.

8. Referring to PW6 and PW7 as the pocket witnesses of the police, learned amicus curiae canvassed that their evidence is not worthy of credence since they are not the local independent witnesses. Therefore, the mandatory requirement of sub-section (4) of section 100 CrPC has not been complied. According to Mr. Chatterjee, since a false case has been foisted against the appellant, police did not venture to call any local witness. It has further been argued that there is nothing to show that the secret information was diarised as the G.D entry was not produced. Placing reliance on the case of Karnail Singh Versus State of Haryana reported in (2009)3 Supreme Court Cases (Cri) 887 Mr. Chatterjee contended that there was non compliance of the requirement of section 42 of the NDPS Act. Learned amicus curiae also sought to impress that discrepancies and inconsistencies in the evidence of the witnesses makes the prosecution case doubtful.

9. Mr. Sanjoy Bardhan, learned advocate appearing for the State countered that both PW6 and PW7 are the local witnesses as the distance between Darjeeling More and Labanya weigh bridge is less than one kilometer as has emerged in the cross examination of PW2 who stated therein that the distance is "about 1/4th km". Learned advocate for the State further submitted that non examination of independent witnesses cannot be the sole ground for rejecting the prosecution case when the evidence of the police witnesses is trustworthy. To fortify his submission Mr. Bardhan placed reliance on the decision in the case of Kulwinder Singh and Another versus State of Punjab reported in 2015 Supreme Appeals Reporter (criminal) 597 (Supreme Court). Reference has also been made to the case of Baldev Singh versus State of Haryana reported in 2015 Supreme Appeals Reporter (Criminal) 1218 (Supreme Court). It has further been contended that section 42 of the Act has no application to the fact situation of the present case as the said section applies when the contraband is recovered from an enclosed place. In the present case recovery is from a public place so section 43 applies. In support of such submission Mr. Bardhan referred to the case of Girish Raghunath Mehta Versus Inspector of Customs and Another reported in 2016 CRI.LJ 5075 (Supreme Court). It has also been argued on behalf of the state that even if there is any procedural illegality in conducting search and seizure, the evidence collected thereby will not become inadmissible and the Court would consider all the circumstances and find out whether any serious prejudice has been caused to the accused. To buttress his argument Mr. Bardhan placed reliance on the decision in the case of Khet Singh versus Union of India reported in (2002)4 Supreme Court Cases 380.

10. The factum of seizure and recovery of contraband from the possession of the appellant has been testified by PW1, PW2, PW3, PW4 and PW5. It is in the evidence that the accused were apprehended at Darjeeling More in front of Labanya weigh bridge where the search and seizure was made in presence of a gazetted officer (PW4) and two public witnesses (PW6 and PW7). The seizure list (exhibit 1) which was prepared on the spot contemporaneously lends credence to the evidence of the aforesaid witnesses. The appellant's plea of false implication could not be substantiated by any iota of evidence. In his statement under section 313 CrPC the appellant has not stated anything as to why the police would foist a false case against him. It has been proved by evidence that 6 kgs 600 grams of ganja was recovered from the possession of the appellant. Nothing could be elicited in the cross-examination of the prosecution witnesses to belie their evidence regarding recovery and seizure from the possession of the appellant. No motive could be attributed to the police witnesses for bringing a false case against the appellant. Nothing has surfaced in the cross-examination of these witnesses to doubt the creditworthiness of their evidence. Nothing could be placed on record by the appellant to show that the police had an axe to grind against him. No suggestion was given to any of the police witnesses in crossexamination that they had any previous enmity with the appellant which had prompted them to falsely implicate him in this case. Therefore the plea of false implication is not sustainable.

11. Coming to the discrepancies in the evidence as referred by the learned amicus curiae, it is well settled that while appreciating the evidence of witnesses, minor discrepancies on trivial matters not affecting the core of the prosecution case ought not to prompt the Court to reject the evidence in its entirety. We cannot lose sight of the fact that when a witness is examined in court after a lapse of time, it is quite natural that there would be some discrepancies or inconsistencies in his evidence. Regarding inconsistencies in the evidence of witnesses inter se, we must keep in mind the fact that powers of memorization, perception and narration differ from person to person. It is the totality of the evidence of witnesses that has to be taken into consideration. For the reasons aforesaid, the discrepancies in the evidence as pointed out in the case at hand are not fatal to the prosecution.

12. I am also not impressed with the argument that PW 6 and PW 7 are the stock witnesses of the police. From the evidence of PW 6 it transpires that he has fish business at Darjeeling More for the past 10/15 years. This witness testified regarding the factum of recovery and seizure of ganja in two nylon bags from the possession of two persons at Labanya weigh bridge. It has surfaced in the crossexamination of PW 6 that police came to him at 8.45 p.m. when he was at his place of business at Darjeeling More wherefrom he went to Labanya Kata. In course of his evidence PW 6 identified his signature on the seizure list as well as on the two seized nylon bags. PW 6 admitted truthfully in his evidence that he is unable to identify the two persons from whom recovery was made as the incident took place long ago at night. Nothing could be elicited in the cross-examination

of PW6 to render his evidence doubtful. He deposed spontaneously without any exaggeration. This fact coupled with the fact that PW 6 expressed his inability to identify the accused in court for the reasons assigned by him show that he is an independent witness and not a tutored stock witness of the police. Though the learned amicus curiae sought to impress that PW 6 and PW 7 are the pocket witnesses of the police, no such suggestion was given to any of them in cross-examination. PW7 is a resident of Darjeeling More where he had a mobile repairing shop at the time of the incident. He has testified regarding the recovery and seizure of ganja from the possession of two persons at Darjeeling More. Nothing could be extricated in the cross-examination of PW 7 to falsify the aforesaid evidence. PW 7 cannot be branded as an unreliable pocket witness of the police merely because he was arrested previously in connection with a case under section 34 of the Police Act and one under section 107 CrPC as has emerged in his cross-examination. Exhibit 1 is the seizure list which mentions the place of seizure as Darjeeling More. It has surfaced in the cross-examination of PW 2 that the distance between Darjeeling More and Labanya Kata is about 1/4 km. It is therefore evident that PW6 and PW7 are local witnesses whose evidence inspires confidence. The evidence of the police witnesses namely, PWs 1,2,3,4 and 5 corroborated by PW 6 and PW 7 the two independent local witnesses together with the chemical examination report (exhibit 10) convincingly prove recovery and seizure of ganja from the possession of the accused/appellant. Possession of the contraband by the accused having been proved by cogent, credible and unimpeachable evidence, section 35 of the NDPS Act comes into play and the burden shifts on the accused to prove that he was not in conscious possession thereof. This burden could not be discharged by the appellant in any manner.

13. The residual point that survives for consideration is whether section 42 or 43 of the Act applies to the fact situation of the present case. On a plain reading of the aforesaid provisions of the NDPS Act it is evident that section 42 applies when the contraband is recovered from a building, conveyance or enclosed place. Section 43 of the Act has application where recovery is from a public place. For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to the public. In the case at hand the appellant was standing at Darjeeling More in front of Labanya weigh bridge when recovery and seizure was effected from his possession. Therefore the present case is clearly governed by section 43 of the Act. Reference to the case of Karnail Singh versus State of Haryana (Supra) is of no help to the appellant since the said decision is distinguishable on facts from the case at hand. This apart, on the point of procedural illegality in conducting search and seizure, in the case of Khet Singh versus Union of India reported in (2002)4 Supreme Court Cases 380 the Apex Court held as follows in paragraph 16 of the Judgement: "16. Law on the point is very clear that even if there is any sort of procedural illegality in conducting the search and seizure, the evidence collected thereby will not become inadmissible and the court would consider all

the circumstances and find out whether any serious prejudice had been caused to the accused. If the search and seizure was in complete defiance of the law and procedure and there was any possibility of the evidence collected likely to have been tampered with or interpolated during the course of such search or seizure, then, it could be said that the evidence is not liable to be admissible in evidence."

In the case at hand nothing could be brought on record to show that prejudice has been caused to the appellant due to non compliance of section 42 of the Act.

14. Before parting with this matter, I record my appreciation for the able assistance rendered by Mr. Chatterjee as amicus curiae.

15. In the light of the evidence on record which remained unscathed and unrebutted, I am of the firm view that the learned trial court was justified in recording the finding of conviction against the appellant. No interference is warranted with the impugned judgement and order of conviction and sentence.

16. For the reasons aforesaid, I find no merit in the appeal which fails and is accordingly dismissed.

17. Lower court records along with a copy of this judgement be sent forthwith to the trial court.

18. Urgent photostat certified copy of the judgement, if applied for, shall be given to the parties upon compliance of requisite formalities.