
(2005) 02 CAL CK 0032
In the Calcutta High Court
Case No : C.R.A. No. 518 of 2003

Jamal Ali Mondal and Others

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 18-02-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 — Section 21, 21C, 27
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 21C, 27, 42, 50

Citation : (2005) 2 CHN 569 : (2006) CriLJ 1981

Hon'ble Judges : Sankar Prasad Mitra, J; Nure Alam Chowdhury, J

Bench : Division Bench

Advocate : Sekhar Basu, Jaymalya Bagchi and Soubhik Mitter, for the Appellant;
None, for the Respondent

Final Decision : Allowed

Judgement

Nure Alam Chowdhury, J.—This appeal on behalf of the four appellants, Jamal Ali Mondal (A-1), Jamat Ali Mondal (A-2), Asher Ali Mondal (A-3) and Brindaban Mondal (A-4) has been preferred against the judgment and order dated 23-09-2003 and 29.04.2003 respectively passed by the Id. Judge, Special Court under NDPS Act-cum-Additional District Judge, 6th Court, North 24-Parganas at Barasat convicting all the four appellants for commission of offence punishable u/s 21C of the NDPS Act (as amended in 2001) hereinafter referred to as "the said Act" and sentencing each of them to suffer R.I. for 17 (seventeen) years and also to pay a fine of Rs. 1.5 lakh, in default to suffer R.I. for 5(five) years.

2. Prosecution case, in brief, is that on 13.06.2002 at about 17.20 hrs., one Binode Sharma, a Sub-Inspector of BSF (P.W. 8) came to Bongaon P.S. and informed the Officer-in-Charge Tapan Kr. Mishra (PW 1) that on that day in between 18.00 hrs. and 19.00 hrs. a dealing of large quantity of heroin would take place in the house of Jamal Ali Mondal (A-1) at Petrapole and Jamal Ali

Mondal (A-1) and his two brothers, Jamat Ali Mondal (A-2) and Asher Ali Mondal (A-3) and other persons had brought heroin to their house at Petrapole, for selling the same. The aforesaid information was diarised and the SDPO, C.I. Anjan Ganguly (P.W. 2) and SDO, Bongaon were informed over telephone. Thereafter, a raiding party under the leadership of the Officer-in-Charge, Bongaon Police Station (P.W.1) alongwith the said Binode Sharma left for Petrapole village and reached there at about 17.50 hrs. and proceeded towards the house of appellant No. 1 on foot after leaving the vehicle on the road. Two public witnesses Sanjib Ghosh (P.W. 4) and Bapi Ray (P.W. 5) were requested to be present during the search and thereafter the raiding party alongwith the said witnesses P.W. 4 and P.W. 5 entered the house of appellant No. 1 Jamal Ali Mondal and all the four appellants were found in the courtyard of the same house and bags and other articles were also found in possession of the appellants. The Officer-in-Charge, Bongaon Police Station then told the appellants that he had information that the appellants were in possession of heroin and written notice was issued on the appellants as to whether they should be searched before any Gazetted Officer or Magistrate. The appellants signed the aforesaid notice and opted to be searched in presence of a Magistrate. Thereafter, written requisition was sent to the SDO, Bongaon for sending a Magistrate and at 19.20 hrs. Sri P.K. Dutta, Executive Magistrate, Bongaon (P.W. 3) arrived at the spot. The Assistant Commandant of B.S.F, A. Sinthel Kumar (P.W. 6) and Inspector, M. K. Tewari of BSF (P.W. 7) were also present there and P.W. 1 searched the appellants in presence of the Magistrate (P.W. 3) BSF personnel P.W. 6 and P.W. 7 and public witnesses P.W. 4 and P.W. 5.

3. It is the further prosecution case that on search of appellant No. 1, Jamal Ali Mondal (P.W. 1), one bag containing heroin in his right hand and a weighing machine and weights kept in a nylon bag in his left hand were recovered and the substance contained in the bag in his right hand responded positive to the taste of heroin and accordingly two samples of five grams each were taken therefrom and on search of appellant No. 2 Jamat Ali Mondal one cellophine packet was recovered from his right hand and one steel container containing Rs. 3,950/- was recovered from his left hand and the contents of the cellophine packet responded positive to the taste of heroin and accordingly two samples of 5 gms. each were taken therefrom. On search of appellant No. 3 Asher Ali Mondal one packet from his right hand and one cellophine from his left hand were recovered and the contents of the packet responded positive to the taste of heroin and accordingly two samples of 5 gms. each. On search of the appellant No. 4, Brindaban Pramanick one packet was recovered from his right hand and the contents of the packet responded positive to the taste of heroin and two samples of 5 gms. each were taken therefrom.

4. Thus, in total 2 kgs. of heroin, weighing machines weights, cellophine packets, cash of rupees 3950/- and a cellophine was recovered from the possession of the appellant and the seized articles were duly seized and labelled and signed by the Executive Magistrate, BSF personnel and the two independent witnesses

mentioned above. The appellants were arrested and brought to Bongaon P.S. and Bongaon P.S. Case No. 180 dated 13.06.2003 u/s 21/27 of the said Act was recorded and the investigation of the case was entrusted to P.W. 12 S.I. Manmatha Nath Mahanto and he submitted chargesheet for offences punishable u/s 21/27 of the said Act against all the aforesaid four appellants and the appellants were placed a trial ultimately on the charge punishable u/s 21C of the said Act and convicted and sentenced as above.

5. Prosecution examined twelve witnesses in support of the prosecution case. Among them P.W. 1 Sub-Inspector Tapan Kumar Mishra was the Officer-in-Charge of Bongaon Police Station and the Seizing Officer P.W. 2 Anjan Ganguly was the Circle Inspector, P.W. 3 Pijush Kanti Dutta was the Executive Magistrate, Bongaon in whose presence search and seizure was made as opted by the appellants. P.W. 4 Sanjib Ghosh and P.W. 5 Bapi Ray were the independent witnesses to the search and seizure but both of them were declared hostile by the prosecution. P.W.6 A. Sinthel Kumar and P.W. 7 M. K. Tewari were BSF personnel present at the time of seizure. PW 8 Binode Sharma was the informant regarding the information of dealing in heroin in the house of P.W. 1. P.W.9 Sujoy Banerjee was a Sub-Inspector of Police attached to Bongaon P.S. at the relevant time and was also a member of the raiding party. P.W. 10 Manindra Nath Chakraborty attached to the Bongaon P.S. and also a member of the raiding party. P.W. 11 Dr. Utpal Saha was the Senior Scientific Officer who proved his report of analysis (Ext. 6) of the samples sent to him with finding of 38.06% contents of heroin, P.W.12 S.I. Manmatha Nath Mahanto was the I/O of the case.

6. No witness was examined on behalf of the defence and the defence case as appears from the trend of cross-examination of the prosecution witnesses and the answers given by the appellants in their examination u/s 313 of the Code of Criminal Procedure is the plea of innocence and false implication.

7. Ld. Special Judge, considering the materials and evidence on record come to the findings that the prosecution has been able to prove the charges of commission of offence against the appellants beyond reasonable doubt as the appellants were given option with regard to their personal search as provided u/s 50 of N.D.P.S. Act and Ext. 2 shows the written requisition sent to SDO, Bongaon for deputing Executive Magistrate at the P.O. and the seizure-list marked Ext. 3 shows that the search of the appellants was held in presence of Executive Magistrate, independent witnesses and there is recovery of 500 gms. of heroin from each of the appellants and Ext.6 is the Chemical Examination Report of the samples drawn from the articles recovered on conducting the chemical test of the said samples establishing the presence of heroin and convicted and sentenced the appellants as above.

8. Mr. Sekhar Basu, Id. Counsel appearing on behalf of the appellants submitted that the registration of the First Information Report and the arrest of the appellants are so contradictory and manifest that the contradictions lead to reasonable conclusion that the prosecution case is concocted and fabricated from

the very beginning. Elaborating his submissions Mr. Basu contended that PW 1 who searched and seized the contraband articles, and arrested the appellants stated in his evidence-in-chief that S.I. Sujoy Banerjee (P.W. 9) prepared the memo of arrest in respect of arrest of all the four appellants. The time mentioned therein regarding the preparation of the memo shows 20.35 hrs. It appears that the FIR was drawn up at 21.20 hrs. and thus it shows that the memo of arrest was prepared prior to the drawing up of the FIR but it is surprising that the memos of arrest contain the particulars of the case for investigation and this discrepancy raises a grave suspicion regarding the prosecution case. It is further submitted that PW 1 also admitted that the reference to General Diary entry at the right hand top corner of the complaint and also on the body of the complaint bear overwriting and PW 1 also admitted that in the two pages of the seizure-list, there are overwritings regarding the General Diary entry and in the context that the memo of arrest was not produced in Court either on the initial production of the appellants or thereafter also in course of investigation and since the memo of arrest did not bear the endorsement made by the Court regarding their production it reasonably raises suspicion that those were fabricated and produced in Court and exhibited only at the time of trial.

9. Mr. Basu next contended that the provision of Section 42 of the N.D.P.S. Act has not been complied with in this case and accordingly the appellants have been seriously prejudiced and are entitled to be acquitted on the evidence and materials on record. It is submitted that all the prosecution witnesses including PW 1 who claimed to be members of the raiding party admitted in their evidence that search, seizure and arrest of all the appellants were made between sunset and sunrise. He also referred to the evidence of PW 1, stating that the Executive Magistrate came to the place of occurrence at 19.20 hrs. and thereafter, search, seizure and arrest followed and this evidence has been corroborated by all the other members of the raiding party. It is also submitted that it transpires from the evidence of PW 1 also that he did not record separately the grounds of his belief and he sent information to his superior within 72 hours from the date of starting of the case against the appellants and he did not send copy to his superior immediately after the receipt of information from BSF. It is also submitted that the General Diary entry had not been produced in Court although in the other documents, FIR, and seizure list there is overwriting with regard to the General Diary entry and accordingly on both aspects, namely recording of prior information and of the grounds of belief, the evidence led by the prosecution failed to comply with those procedures and as such the appellants are entitled to be acquitted.

10. In support of his submissions, Mr. Basu cited the decisions, reported in (i) 2004(6) Supreme 460 (State of West Bengal v. Babu Chakraborty) (paragraphs 16 to 29), (ii) 2000 SCC 496 (Abdul Rashid Ibrahim Mansuri v. State of Gujarat), (iii) J.T. 2002(4) S.C. 68 (paragraphs 3,4,5&6), (iv) 2004(1) CLJ 332 (Sandhya Das v. State of West Bengal) (paragraphs 8 to 16), (v) Sajahan Ali Vs. State of West Bengal, (paragraphs 7, 8, 9 and 10).

11. It is also submitted that the appellants have been seriously prejudiced for non-compliance of Section 52A(2) of the NDPS Act. In this connection Mr. Basu referred to the evidence of PW 1 stating that he did not make any inventory regarding the origin, mode of packing, colour etc. of the seized articles and he did not obtain any certificate from the Magistrate regarding the correctness of the seizure-list and the drawing of samples from the seized articles. He also referred to the evidence of the Magistrate (P.W. 3) stating that no inventory was prepared in his presence. He also referred to the evidence of P.W. 9 stating that photographs of the articles were duly taken before sealing of the articles and also after sealing of the articles but it is contended that those photographs were not produced during the investigation or at the trial which draw adverse presumption against the prosecution case.

12. Mr. Basu however laid great emphasis on non-compliance of the provisions of Section 50 of the N.D.P.S. Act. It is submitted that PW 1 admitted that in his FIR, it has not been mentioned that he had told the appellants about their rights to be searched in presence of Magistrate or Gazetted Officers and the BSF personnel P.W. 6, P.W. 7 and P.W. 8 who were allegedly present also did not state anything about informing the appellants of their right to be searched before a Magistrate or a Gazetted Officer and in view of such evidence on record the appellants are entitled to acquittal for non-compliance of the provisions of Section 50 of the N.D.P.S. Act.

13. Mr. Basu, Id. Counsel also has drawn the attention of this Court to the discrepancy regarding the place of seizure as PW 1 stated that search and seizure were made on the courtyard of the house but P.W. 2 stated that search and seizure took place from a room of the house and the other witnesses of search and seizure namely P.Ws. 3, 6, 7 and 8 also differed regarding the place of seizure. It is also submitted that no evidence has been given on behalf of the prosecution regarding the ownership of the house wherefrom the contraband articles were seized and recovered.

14. It is further submitted that both the independent witnesses P.W. 4 and P.W. 5 of search and seizure have been declared hostile by the prosecution. P.W.4 stated in his examination-in-chief that while he was sitting condition in front of one club police told him to sign and accordingly he put his signature on those papers and in cross-examination for the appellants he stated that the club is at a distance of 6 kms. from Petrapole and he found no person or article in front of him and police obtained his signatures on white papers and police did not show him any packet or any article. Regarding the evidence of P.W. 5 also declared hostile, it is submitted that in his examination-in-chief he stated that he is a resident of Motiganj and as per instruction of police officers of Bongaon P.S. he put his signatures on 7/8 papers out of which some were blank and some were stamped. In cross-examination on behalf of the prosecution he stated that he did not know any Jamal Ail, Jamat Ali, Asher Ali and Brindaban and it was not a fact that personal search of those four persons was held in his presence and heroin was

recovered from them. In cross-examination on behalf of the appellants he stated that police did not show those articles lying before the Court before him at any point of time and he did not see any person being arrested by police in his presence.

15. Regarding the chemical examination of the seized articles it is submitted that non-production of the receipt register of the seized articles in Court and non-mentioning of the weight of remnants of articles after examination in the report casts a doubt about the report of the Chemical Examiner (P.W. 11).

16. Mr. Basu submitted in view of the aforesaid infirmities in the prosecution case the appeal should be allowed and the conviction and sentence of the appellants are liable to be set aside.

17. We have considered the submissions on behalf of the appellants and the evidence and materials on record and we find that the Id. Judge has not considered the infirmities of the prosecution case as pointed out before this Court. We do not think it necessary to repeat all those infirmities extensively as in our opinion the appeal succeeds for non-compliance of the provisions of Sections 42 and 50 of the N.D.P.S. Act as established on the evidence and materials on record. In view of the ratio of the decisions of the Apex Court reported in 2000 SCC 496 (Abdul Rashid Ibrahim Ansari) (supra) and in 1999 SCC 1080 (State of Punjab v. Baldeb Singh), we allow this appeal and set aside the order on conviction and sentence of the Id. Judge, Special Court in Case No. N-48/2000 against nil the appellants and direct to release all of them from custody forthwith, unless their further custody is necessary in connection with any other case.

Sankar Prasad Mitra, J.

18. I agree.