
(2015) 07 CAL CK 0028
In the Calcutta High Court
Case No : CRA No. 453 of 2014

Laxmi Sardar and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 31-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 100, 161, 164, 313, 364
Evidence Act, 1872 — Section 45
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21(b),
21(c), 29, 41, 42

Citation : (2015) 3 CALLT 623

Hon'ble Judges : Debasish Kar Gupta, J;Md. Mumtaz Khan, J

Bench : Division Bench

Advocate : Jayanta Narayan Chatterjee, Apalak Basu, Dwaipayan Biswas and Amit Biswas, for the Appellant; Manjit Singh and Partha Pratim Das, Advocates for the Respondent

Final Decision : Allowed

Judgement

Debasish Kar Gupta, J.

1. This appeal is preferred by the appellants against the judgment and order of conviction dated June 16, 2014 and sentence dated June 17, 2014 passed by the learned Judge, Special Court under NDPS Act (Additional Sessions Judge, 12th Court), Alipore, South 24 Parganas in S.T. No. 01(09) 2013 arising out of S.C. No. 03(07) 2013. By the impugned judgment the appellants were convicted under Section 21(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and sentenced to suffer rigorous imprisonment for eight years each and to pay fine of Rs. 60,000/- each, in default to suffer further rigorous imprisonment for one year. The seized Alamat was directed to be destroyed on expiry of the period of appeal. The cash amount seized from the appellants were directed to be confiscated in favour of the State on expiry of the period of appeal.

2. Brief fact of this case is stated below:--

"One Prasanta Kumar Das, Sub-Inspector, posted at Narcotic Cell, Detective Department, Lalbazar (PW2) lodged a complain dated May 24, 2013 to the Officer-in-Charge, Beliaghata Police Station, Kolkata, containing that on May 23, 2013, he had received an information from the credible source that two female drug sellers would come to sell narcotic drugs in the vicinity of passenger shed of Deshbandhu School Bus stand on Beliaghata Main Road in the early morning on the next day, i.e. May 24, 2013. According to the information, the aforesaid ladies used to come jointly at the above spot to sell narcotic drugs in the early morning regularly."

3. After taking permission from Sri Dipak Kumar Dutta, Assistant Commissioner of Police, Detective Department, Narcotic Cell, on May 23, 2013, PW 2 formed a raiding team including a lady constable No. 168, Kuheli Sarkar (PW 4). On May 24, 2013, the raiding team left the office at about 04.10 hrs. together with source, weighing scale, testing kit, packing materials and other accessories.

4. On May 24, 2013, they reached the spot at about 04.30 hrs. At about 05.10 hrs. the source drew their attentions towards appellants who had been coming jointly along the northern side of footpath of Beliaghata Main Road from west to east direction. Both the appellants were carrying ladies side bags on their right shoulders. Intercepting them at the spot in front of P/No-18D, Beliaghata Main Road Kolkata-10, the de facto complainant (PW 2) disclosed his identity. According to the prosecution, the appellants were informed of the purpose of their detention in writing by the de facto complainant (PW2) and a notice was also served upon them to exercise their options regarding presence of a Magistrate or Gazetted Officer at the time of their search in person. The appellants refused to go anywhere else and agreed to be searched by lady police on spot in presence of a Gazetted Officer. PW 2 made an attempt to contact a Gazetted Officer in the locality but failed. He informed his superior officer of the above fact immediately.

5. At about 06.15 hrs. Inspector Syed Akbar Ali (PW5), Additional Officer-in-Charge, Entally Police Station came to the spot in uniform and disclosed his identity to the appellants as also to the persons namely, (1) Ganga Mallick and (2) Md. Wasim, who had expressed their willingness to be witnesses of above search and seizure. According to the prosecution, PW 2 also served a notice in writing upon the appellants for the purpose of enabling them to exercise options as indicated hereinabove for the second time. The appellants confirmed once again their willingness of searching them on spot by lady police in presence of the above Gazetted Officer.

6. The appellants, one by one, searched the lady member of the raiding police team (PW4). Nothing like narcotic substance was found from possession of the above lady police. After searching the appellants, one by one, the lady member of the raiding team found 646 pieces of purias (total weight being 95 gms. as per

seizure list May 24, 2013) and cash amount of Rs. 8,000/- from the bag which the appellant No. 1 had been carrying on her shoulder. Similarly, the lady member of the raiding team found 646 pieces of purias (total weight being 96 gms. as per seizure list dated May 24, 2013) and a sum of Rs. 4,000/- from the bag which the appellant No. 2 had been carrying. Those bags were handed over to PW2 by the lady member of the raiding team. After testing of the sticky substance, the raiding team found presence of "Heroin" in the above sticky substance. The aforesaid narcotic drugs as also the cash money recovered from the appellants were seized, packed, labelled and sealed, and marked them as "A", "B", "C", "D", "E", "F" and "G" (as mentioned in the seizure list dated May 24, 2013). The appellants were arrested. Arrest memos. were issued. On the basis of the above letter of complaint a formal First Information Report No. 170 dated May 24, 2013, Police Station-Beliaghata, Year 2013, (General Diary reference:-- Entry No. 1816 at 10.05 hrs.) was prepared initiating a proceeding under Sections 21(b)/29 of the NDPS Act against the appellants. On September 4, 2013, charge was framed by the learned Court below against the appellants under Section 21(c) read with Section 29 of the NDPS Act. Charge-sheet No. 178/13 dated July 18, 2013 was filed against the appellant. Charge was framed on September 4, 2013 against the appellants under the Sections 21(c) and 29 of the NDPS Act.

7. After considering the documentary evidences, depositions of 7 witnesses and the statements of the appellants recorded under Section 313 of the Code of Criminal Procedure, amongst other, the learned Court below passed the impugned judgment, order of conviction and sentence. Hence this appeal.

8. It is submitted by Mr. Jayanta Narayan Chatterjee, the learned Advocate appearing on behalf of the appellants, that the commission of offence under Section 21(b) of the NDPS Act, by the appellants was not proved beyond doubt for the following reasons: -

"The information received from the credible source regarding possibility of selling contraband article by the appellants on May 24, 2013 in the morning at the area under reference was not diarised by the PW 2 before proceeding toward the alleged spot in spite of getting enough time. The raiding team was formed by PW 2 without sending information to his immediate higher officer."

9. The information gathered from the above source was not sent to the local Police Station concerned. But material was available on record for losing faith and trust upon the local Police Station. So, there was violation of the provisions of Sub-section (5) of Section 50 of the NDPS Act read with the provisions of Section 100 of the Cr.P.C.

10. According to Mr. Chatterjee, no attempt was made by the PW 2 to conduct search in residential house of the appellants to prove the allegation of selling contraband articles by the appellants regularly. The allegation of selling contraband article at the place of occurrence at the time of raid was also not

proved. There was no evidence that the money recovered from the bags of the appellants had been received by them towards sale proceeds of the contraband articles.

11. According to Mr. Chatterjee, no sketch map of the place of occurrence was prepared by PW 2 as appeared from his deposition in course of cross-examination.

12. It is submitted by Mr. Chatterjee that no attempt was made by PW 2 to conduct the search and seizure in presence of a Gazetted Officer who was not connected with the police department.

13. With regard to search, it is submitted by Mr. Chatterjee that a joint notice was served upon the appellant and the appellants were not informed of their right of enjoying safeguards guaranteed under the above provision of law. Therefore, according to him, the provision of section 50 Of the NDPS Act, were not complied with.

14. According to him, the lady member of the raiding team was a Constable. The provision of Section 50 of the NDPS Act, permits searching of a lady accused only by a lady police officer and not by a lady constable. Drawing our attention to the evidence adduced by PW 2, it is submitted that there was no tag or emblem on the uniform of the PW 4 at the material point of time.

15. The search was not conducted in presence of independent/local witness. Independent witness (PW 7) had left the place of occurrence before the search was conducted. According to the deposition of PW 7 in course of cross-examination, he had put his LTI on the packet of the seized articles before anybody else put signature on the same. The PW 7 was not a resident of the locality. Further, on March 31, 2014, he deposed that "Charas" had been seized from the appellant. During his further examination on April 2, 2014, he deposed that " Heroin" had been seized from the appellants. There was similar contradiction with regard to the name of the PW 2 as deposed by the PW 7 on different dates. According to the deposition of PW 5, his statement was recorded by PW 2 under section 161 of Cr.P.C., who was not the investigating officer of the case. According to Mr. Chatterjee, another non-interested witness Sri Ganga Mallick was not examined as prosecution witness and as result the contradictions of the evidence of PW 7 with those of the other witnesses could not be verified. Further, no witness from the locality was present at the time of search and seizure.

16. It is also submitted by him that no time or place of seizure was mentioned on the labels on the material exhibits. Stamps were not affixed on the labels of material exhibits either by the officers attached to the Beliaghata Police Station or of the Narcotic Cell, Detective Department. Net weight of the seized article was not mentioned either on the labels of the seized article or in the seizure list.

17. It is further submitted by Mr. Chatterjee that after arresting the appellants,

no information was forwarded to their relation. The appellants were not examined by a doctor after their arrest.

18. Mr. Chatterjee relied upon the decisions in support of his above submission:--

Megha Singh Vs. State of Haryana, AIR 1995 SC 2339 : (1995) CriLJ 3988 : (1996) 11 SCC 709 , State of Delhi Vs. Ram Avtar @ Rama, AIR 2011 SC 2699 : (2011) 8 JT 464 : (2011) 4 RCR(Criminal) 191 : (2011) 7 SCALE 428 : (2011) 12 SCC 207 : (2011) 7 SCR 1129 , Sukhdev Singh Vs. State of Haryana, (2013) 1 AD 29 : AIR 2013 SC 953 : (2013) CriLJ 841 : (2013) 2 JCC 41 : (2013) 1 JT 212 : (2013) 2 RCR(Criminal) 232 : (2012) 12 SCALE 699 : (2013) 2 SCC 212 : (2013) AIRSCW 312 , State of Rajasthan Vs. Parmanand and Another, AIR 2014 SC 1384 : (2014) AIRSCW 1578 : (2014) CriLJ 1756 : (2014) 5 JT 271 : (2014) 3 SCALE 303 : (2014) 5 SCC 345 , Mainul Haque & Anr. v. The Union of India Represented by Narcotics Control Bureau and The State of West Bengal reported in (2014)3 C.Cr.L.R.(Cal)763."

19. On the other hand, it is submitted by the learned Public Prosecutor, appearing on behalf of the State respondents that the search and seizure, investigation of the case, filing of charge-sheet and production of documentary evidences and examination of necessary prosecution witnesses were done in accordance with law.

20. According to him, the information which had been received from the secret source, was communicated to the Assistant Commissioner of Police, Narcotic Cell, Detective Department Lal Bazar and the raiding team was also formed with his approval.

21. According to the learned Public Prosecutor, the charge of arriving at the place of occurrence with contraband articles was proved. The qualities of such article recovered from the appellants were beyond the permissible limit. Regular selling of the contraband articles by the appellants was an information gathered from the source. It was not a charge framed against any of the appellants.

22. It is also submitted by the learned Public Prosecutor that the search of the residence was not necessary to prove the charge which had been framed against the appellants. He repeated and reiterated his submission in connection with non-preparation of sketch map.

23. It is submitted by him that there was no provision in the law to send prior information to the local Police Station to conduct search and seizure by the raiding team headed by a competent Police Officer in presence of a Gazetted Officer.

24. According to him, the provisions of Section 43 of the NDPS Act were applicable in connection with the search and seizure in this case. Even then, obtaining of prior permission from the higher officer conducting of search and seizure with the help of a lady member of the raiding team informing the appellants of their rights to be searched in presence of Gazetted Officer and the

presence Gazetted Officer (PW 5) shows compliance of the provisions of Section 50(1) of the NDPS Act. According to him, attempt was made for the presence of nearest Gazetted Officer not being a police personnel.

25. With regard to service of joint notice to the appellants before searching them, it is submitted by him that even a notice would be given by the raiding team. More so, the appellants were searched after obtaining their consent.

26. It is also submitted by him that the mistake in mentioning the name of lady member of the raiding team by PW 7 was a minor mistake in nature. According to him, in view of corroboration of the evidences of PW 7 with other evidences, the commission of offence by the appellants was proved even in absence of one of the independent witnesses.

27. According to the learned Public Prosecutor, there was no violation of the provisions of Section 50 of the NDPS Act in searching the appellants by a lady constable on the instruction of a competent officer and in presence of a Gazetted Officer adhering to the provisions of NDPS Act. It is further repeated and reiterated by him that compliance of the provision of Section 50 of NDPS Act, 1985 was not at all necessary in this case.

28. It is submitted by him that conducting of further investigation recording of the statements of witnesses under the provisions of Section 161 of Cr.P.C. was within the discretion of the Investigating Officer. Our attention is drawn towards the provisions of Section 45 of the Indian Evidence Act in support of his above submission.

29. It is submitted by the learned Public Prosecutor with regard to presence of PW 7 at the time of occurrence of the incident at the place, that the discrepancy of time of his arrival and departure was minor in nature in view of his signature in the seizure list. According to him, the commission of offence by the appellants was proved beyond doubt though the other independent witness did not adduce his evidence in Court.

30. Finally it is submitted by him that the other discrepancies as alleged on behalf of the appellants were minor in nature and the charge on commission of offence was proved against the appellants beyond doubt having no adverse effect of such minor discrepancies on the appellants.

31. The learned Public Prosecutor relied upon the following decisions:--

"Kanhaiya Lal v. State of M.P. reported in 2000 SCC(Cri.) 1494 , Madan Lal and Another Vs. State of Himachal Pradesh, AIR 2003 SC 3642 : (2003) CriLJ 3868 : (2004) 1 CTC 381 : (2003) 89 ECC 241 : (2003) 6 SCALE 483 : (2003) 7 SCC 465 : (2003) 2 SCR 716 Supp , State rep. by Inspector of Police, Vigilance and Anti-Corruption, Tiruchirapalli, Tamil Nadu Vs. V. Jayapaul, (2004) CriLJ 1819 : (2004) 3 JT 633 : (2004) 3 SCALE 507 : (2004) 5 SCC 223 : (2004) 1 SCR 330 : (2004) AIRSCW 1762 : (2004) 3 Supreme 434 , S. Jeevanantham Vs. The State through Inspector of Police, TN, (2004) CriLJ 3834 : (2004) 94 ECC 130 : (2004)

5 SCALE 780 : (2004) 5 SCC 230 : (2004) 1 SCR 607 Supp : (2004) AIRSCW 4203 : (2004) 4 Supreme 245 , Babubhai Odhavji Patel, Vs. State of Gujarat, AIR 2006 SC 102 : (2005) 103 ECC 85 : (2005) 9 JT 410 : (2005) 8 SCC 725 : (2006) 1 UJ 20 : (2005) AIRSCW 5647 : (2005) 7 Supreme 691 , State of Himachal Pradesh v. Pawan Kumar reported in 2005 SCC(Cri) 943 , State of Haryana Vs. Ranbir @ Rana, AIR 2006 SC 1796 : (2006) 102 CLT 215 : (2006) CriLJ 2142 : (2006) 3 CTC 48 : (2006) 4 JT 350 : (2006) 4 SCALE 113 : (2006) 5 SCC 167 : (2006) SCC(L&S) 1012 : (2006) 1 UJ 515 : (2006) AIRSCW 2022 : (2006) 3 Supreme 358 , Hardip Singh Vs. State of Punjab, AIR 2009 SC 432 : (2008) 9 JT 328 : (2009) 153 PLR 138 : (2008) 11 SCALE 513 : (2008) 8 SCC 557 , Surjit Singh v. State of Punjab reported in (2011)15 SCC187 , Jarnail Singh Vs. State of Punjab, AIR 2011 SC 964 : (2011) CriLJ 1738 : (2011) 1 RCR(Criminal) 925 : (2011) 2 SCALE 401 : (2011) 1 SCC(Cri) 1191 : (2011) 2 SCR 888 : (2011) AIRSCW 1393 , Ram Swaroop Vs. State (Govt. NCT) of Delhi, (2013) 6 AD 228 : AIR 2013 SC 2068 : (2013) CriLJ 2997 : (2013) 3 JCC 129 : (2013) 3 RCR(Criminal) 946 : (2013) 7 SCALE 407 : (2013) 14 SCC 235 , Sumit Tomar Vs. The State of Punjab, (2013) 115 CLT 783 : (2013) 1 JCC 6 : (2012) 4 RCR(Criminal) 948 : (2012) 10 SCALE 507 : (2013) 1 SCC 395 , Navdeep Singh Vs. State of Haryana, (2013) 1 Crimes 213 : (2013) 3 RCR(Criminal) 929 : (2013) 2 SCC 584 ."

32. We have heard the learned Counsels appearing for the respective parties at length and we have considered the facts and circumstances of this case for the purpose of examining the decision making process of the learned Court below to arrive at a conclusion.

33. Under the provisions of Section 42 of the NDPS Act, it is imperative that in the event the officer has reason to believe from his personal knowledge or prior information received from any person that any narcotic drug or psychotropic substance is kept or concealed in any building, conveyance or enclosed place, the officer should take it down in writing and he should forthwith send a copy thereof to his immediate official superior. In the decision of Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, AIR 2000 SC 821 : (2000) CriLJ 1384 : (2000) 68 ECC 16 : (2000) 1 JT 471 : (2000) 1 SCALE 361 : (2000) 2 SCC 513 : (2000) 1 SCR 542 : (2000) 1 UJ 587 : (2000) AIRSCW 4802 : (2000) AIRSCW 375 : (2000) 1 Supreme 363 : (2000) 5 Supreme 415 , a three Judges Bench of the Hon"ble Supreme Court held that the inaction of the officer in taking down prior information in writing, which had been received from any person, would become suspect, though the trial may not vitiate on that ground alone. Nonetheless, the resultant position would be one of causing prejudice to the accused. The relevant provision of a judgment is quoted below:--

"18. When the same decision considered the impact of non-compliance with Section 50 it was held that "it would affect the prosecution case and vitiate the trial". But the Constitution Bench has settled the legal position concerning that aspect in State of Punjab v. Baldev Singh the relevant portion of which has been

extracted by us earlier. We do not think that a different approach is warranted regarding non-compliance with Section 42 also. If that be so, the position must be the following:

If the officer has reason to believe from personal knowledge or prior information received from any person that any narcotic drug or psychotropic substance (in respect of which an offence has been committed) is kept or concealed in any building, conveyance or enclosed place, it is imperative that the officer should take it down in writing and he shall forthwith send a copy thereof to his immediate official, who claims to have exercised it on the strength of such unrecorded information, would become suspect, though the trial may not vitiate on that score alone. Nonetheless the resultant position would be one of causing prejudice to the accused."

(Emphasis supplied)

34. In a subsequent decision, a three Judges Bench of the Hon'ble Supreme Court held in the matter of Sajan Abraham Vs. State of Kerala, AIR 2001 SC 3190 : (2001) CriLJ 4002 : (2001) 3 Crimes 377 : (2001) 77 ECC 469 : (2002) 139 ELT 241 : (2001) 6 JT 178 : (2001) 5 SCALE 91 : (2001) 6 SCC 692 : (2001) 2 UJ 1502 : (2001) AIRSCW 2970 : (2001) 5 Supreme 789 , that the law under the NDPS Act being stringent to the persons involved in the field of illicit drug traffic and drug abuse, the legislature time and again has made some of its provisions obligatory for the prosecution to comply with, which the courts have interpreted it to be mandatory. However, whether the prosecution has complied with the mandate of such provision, one has to examine facts of the case concerned a pragmatic approach. The relevant portion of the above judgment is quoted below:--

"6.... Submission is that PW 5 after receiving the said information had not communicated it to his immediate superior which constitutes violation of Section 42. In construing any facts to find, whether the prosecution has complied with the mandate of any provision which is mandatory, one has to examine it with a pragmatic approach. The law under the aforesaid Act being stringent to the persons involved in the field of illicit drug traffic and drug abuse, the legislature time and again has made some of its provisions obligatory for the prosecution to comply with, which the courts have interpreted it to be mandatory. This is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The stringency is because of the type of crime involved under it, so that no such person escapes from the clutches of the law. The court however while construing such provisions strictly should not interpret them so literally so as to render their compliance, impossible. However, before drawing such an inference, it should be examined with caution and circumspection. In other words, if in a case, the following of a mandate strictly, results in delay in trapping an accused, which may lead the accused to escape, then the prosecution case should not be thrown out."

(Emphasis supplied)

35. An appeal relating to ascertaining of scope and applicability of Section 42 of the NDPS Act, for conducting search, seizure and arrest was referred to a constitution Bench of the Hon"ble Supreme Court. The above matter of Karnail Singh Vs. State of Haryana, (2009) 108 CLT 681 : (2009) CriLJ 4299 : (2009) 10 JT 360 : (2009) 10 SCALE 255 : (2009) 8 SCC 539 : (2009) 11 SCR 470 , was decided with the following conclusion:--

"35. In conclusion, what is to be noticed is that Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decision was as follows:

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and

does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."

36. Taking into consideration of the above interpretation of Section 42 of the NDPS Act, 1985, in the matter of Sukhdev Singh Vs. State of Haryana, (2013) 1 AD 29 : AIR 2013 SC 953 : (2013) CriLJ 841 : (2013) 2 JCC 41 : (2013) 1 JT 212 : (2013) 2 RCR(Criminal) 232 : (2012) 12 SCALE 699 : (2013) 2 SCC 212 : (2013) AIRSCW 312 , the Hon"ble Supreme Court arrived at a conclusion that twin purposes of the provision of Section 42 could broadly be stated that: (a) it was mandatory provision it ought to be construed and complied with strictly; and (b) compliance of furnishing information to the superior officer should be forthwith or within a very short time thereafter and preferably post-recovery.

37. At the very outset, we make it clear that it is not in dispute that the appellants were searched in person apart from searching the bags they had been carrying on their shoulder. Therefore, the respondents were under obligation to abide by the provisions of Section 42 of the NDPS Act, on the basis of the settled principles of law as discussed hereinabove.

38. In order to ascertain the propriety of actions of the respondents in this case in the light of the settled principles of law as discussed hereinabove, the following time factors are to be taken into consideration:--

"(i) On May 23, 2013, during evening, the PW 2 received a source information.

(ii) On May 23, 2013, the PW 2 formed the raiding team obtaining prior permission from Dipak Kumar Dutta, Assistant Commissioner of Police, Detective Department, Narcotic Cell.

(iii) On May 24, 2013, at about 04.10 hrs., the PW 2 left his office with raiding team for reaching the place disclosed by the source.

(iv) On May 24, 2013, at about 04.30 hrs., the raiding team reached the spot.

(v) On May 24, 2013, the appellants were found by the raiding team at about 05.10 hrs.

(vi) On May 24, 2013, the PW 5 (Gazetted Officer) came to the spot at about 06.15 hrs.

(vii) On May 24, 2013 during the period from 06.30 hrs. to 08.30 hrs., the search was conducted.

(viii) On May 24, 2013, at 10.05 hrs. formal FIR No. 170 dated May 24, 2013, was lodged on the basis of the written complaint from the PW2.

(ix) Then, PW 2 submitted his report in writing to his higher officer."

39. Therefore, the PW 2 reduced the secret information in writing and sent the

same to his higher officer. He obtained permission from the higher officer on the basis thereof and raiding team was prepared to proceed towards the spot. He sent a report to the higher officer of his department after completing with the formalities as considered hereinabove after returning back to his office. Considering the aforesaid facts, we are of the opinion that there was substantial or adequate compliance of the provision of Section 42 of the NDPS Act, which did not cause any prejudice to the appellants. Therefore, the impugned judgment need not require our interference on the above ground.

40. It is revealed from the facts recorded hereinabove that the above raiding team did not inform the Beliaghata police station before initiating the raid. The PW 2 informed the above police station after apprehending the appellants. Our attention has not been drawn towards any provision of law providing for furnishing prior information to the local police station.

41. Taking into consideration the provision of Sub-section (5) of Section 50 of the NDPS Act, we are of the opinion that in an appropriate case when an officer duly authorised under Section 42 of the above Act has reason to believe that it is not possible/necessary to take the person to be searched to the nearest Gazetted Officer or Magistrate, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person at the place of occurrence of the incident in presence of a Gazetted Officer. The provision of Section 100 of Cr.P.C. deals with the person in charge of closed place to allow search. There is no provision to inform the local police station before conducting a search. Therefore, we do not find it necessary to interfere with the impugned judgment on the above ground.

42. Regarding the allegation of selling contraband articles by the appellants regularly and the necessity of searching their residential houses, we find substance in the submissions made on behalf of the State respondents that no charge was framed against the appellants with regard to the selling of contraband articles by the appellants regularly. It was an information received from the secret source that the appellants used to sell contraband articles regularly. But, we find that the charge of recovery of amount of Rs. 8000/- from the appellant No. 1 and Rs. 9000/- from the appellant No. 2, in course of search and seizure was shown as sale proceeds of the contraband articles in the charge framed against the appellants as also in the charge-sheet No. 178/13 dated July 18, 2013. The PW 2 deposed in course of his examination in chief that the appellants had disclosed on enquiry that they had sold some quantity of "heroin" and the money recovered from them was sale proceeds of those contraband articles. At the time of recording their statements of the appellants under Section 313 of Cr.P.C., the following question was asked:

"PW 2 has further deposed that on enquiry both of you had stated that you have sold some "heroin" and the cash is the sale proceeds. What do you like to say regarding this?"

43. Both of them answered "False statement". The Hon"ble Supreme Court dealt with similar situation in the decision of Parbin Ali and Another Vs. State of Assam, AIR 2013 SC 542 : (2013) 1 Crimes 152 : (2013) 1 JCC 560 : (2013) 1 JT 383 : (2013) 2 RCR(Criminal) 333 : (2013) 1 SCALE 113 : (2013) 2 SCC 81 : (2013) AIRSCW 4944 , and the relevant portions of the above judgment as follows:--

"4. The accused abjured their guilt and desired to face the trial. During the trial, the prosecution, in order to establish its case, examined nine witnesses and brought on exhibit number of documents. After completion of the prosecution evidence, the accused persons were examined under Section 313 Cr.P.C. They had not put forth any substantial plea except a bald denial and chose not to adduce any evidence

5. The learned trial Judge, considering the entire evidence, placing reliance on the oral dying declaration of the deceased and taking note of the weapon used and the nature of the injury caused, came to hold that the prosecution had been able to substantiate the charge beyond reasonable doubt and, accordingly, convicted them and imposed the sentence.

6. In appeal, the High Court took note of the fact that there was no direct evidence to implicate the accused and the minor omissions or contradictions and discrepancies which had been highlighted by the defence did not create any kind of dent in the prosecution version; that ample explanation had been offered by the prosecution for not getting the dying declaration recorded as the deceased was lying on the roadside and could not be taken to a hospital; and that there was no reason to disbelieve that oral dying declaration, and the same being absolutely credible, the judgment and conviction rendered by he learned trial Judge did not warrant any interference."

44. In view of the facts and circumstances of this case, there is no scope of interfering with the impugned judgment on the above ground taking into consideration the settled proposition of law as discussed hereinabove.

45. Since preparation of sketch map was not mandatory, we do not find any substance in the argument advanced by Mr. Chatterjee in this regard.

46. After considering the provision of Section 50 of the NDPS Act, we find that search of a person in presence of a Gazetted Officer or Magistrate by any Officer duly authorised under the provision of Section 41 (being an officer superior rank to a peon, sepoy or constable) of the departments of central excise, narcotic, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government is necessary. There is no bar or impediment to conduct such

search in presence of a Gazetted Officer of the police department of the State Government. Necessary to record that attempt was made by PW 2 to conduct Gazetted Officer in the locality. Due to non-availability of a Gazetted Officer in the locality the PW 5 was requested to be present at the time of search of the appellants. Therefore, the learned Court below was not in error to take into consideration the presence of PW 5 as Gazetted Officer during search and seizure.

47. It is the settled proposition of law that in a case where a duly authorised officer is about to search a person on the ground of carrying contraband articles, he must inform the person of his right under sub-section (1) of Section 50 of the NDPS Act of being taken to the nearest Gazetted Officer or nearest Magistrate for making search. Failure to inform the person concerned about the existence of his right before a Gazetted Officer or a Magistrate would cause prejudice to an accused. Such information may not necessarily be in writing.

48. It is also the settled proposition of law that in case of informing a person of his above right by virtue of a written communication each and every accused must be informed of his right to be searched before the nearest Gazetted Officer or before nearest Magistrate and a joint communication of the above right would frustrate the very purport of Section 50 of the NDPS Act. Reference may be made to the decision of State of Rajasthan Vs. Parmanand and Another, AIR 2014 SC 1384 : (2014) AIRSCW 1578 : (2014) CriLJ 1756 : (2014) 5 JT 271 : (2014) 3 SCALE 303 : (2014) 5 SCC 345 and the relevant portions of the decision are quoted below:--

"17. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear; unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before the nearest gazetted officer or before the nearest Magistrate. Similar view taken by the Punjab and Haryana High Court in Paramjit Singh and the Bombay High Court in Dharmaveer Lekhrum Sharma meets with our approval."

(Emphasis supplied)

49. In our case we find from the documentary evidence that two notices dated May 24, 2013 were served upon the accused. The first notice (Exbt.-3) was a

joint notice which was served by the PW 2 upon the accused and both the accused put their LTI on the same expressing their desire to be examined on spot in presence of a Gazetted Officer. The second notice (Exbt.-4) was served upon the appellants jointly by the PW 5, the Gazetted Officer concerned to ascertain their desire of being searched in presence of a Gazetted Officer. The signature/LTI of the appellant No. 2 was absent in the above notice. Therefore, we are of the opinion that the condition of communication of the right of the appellant prior to their search as conferred under the provision of Sub-section (1) of Section 50 of the NDPS Act, was not complied with. Service of a joint notice was not permissible in accordance with the above provision. Nor the second notice was served upon the appellant No. 2 or her consent was obtained. Necessary to mention that prior to searching the bags carried by the appellants on their shoulders, they were searched in person. In view of the above, the learned Court below was in error in considering those notices as valid in the eye of law.

50. Considering the provision of Sub-section (1) of Section 42 and Sub-section (1) of Section 50 of the NDPS Act, 1985, we find that a peon, sepoy or constable of the departments mentioned in the above provision is not entitled to conduct any search of a person in connection with any commission of offence under the above Act. Considering the facts and circumstances of this case, we find that the PW 4 was a lady constable. She was included a member of the raiding team. She conducted the search of the appellants on the basis of the instruction of PW 2 as also in presence of PW 5. The PW 2 was a Sub Inspector of police, Narcotic Cell, Detective Department, Lal Bazar and PW 5 was the Additional Officer-in-charge of Entally Police Station. PW 2 was entitled to conduct the search and seizure in presence of Gazetted Officer. PW 5 was entitled to perform the role of a Gazetted Officer. Therefore, we are not inclined to interfere with the impugned judgment on the above ground that the search of the appellants in person by the PW 4 (lady constable) as also seizure of two bags from them on the instruction of PW 2 and in presence of PW 5 was bad in law.

51. The recovery of contraband articles from a person cannot be considered as doubtful on the ground of non-examination of one independent witnesses. The evidence of witnesses cannot be discarded merely on the ground that they belong to the police force and are either interested in the investigating or prosecuting agency. As far as possible, the Court should take hereof corroboration of their evidence in material particulars. Reference may be made to the decision of M. Prabhulal Vs. The Assistant Director, Directorate of Revenue Intelligence, AIR 2003 SC 4311 : (2003) CriLJ 4996 : (2003) 89 ECC 697 : (2003) 2 JT 459 Supp : (2003) 7 SCALE 649 : (2003) 8 SCC 449 : (2003) 3 SCR 958 Supp : (2003) AIRSCW 4975 : (2003) 7 Supreme 61 and the relevant portion of the above decision are quoted below:--

"6. Next, the learned counsel contends that the independent witnesses of the recovery of the contraband having not been examined and only police witnesses

having been examined, the recovery becomes doubtful. Reliance is placed upon the decision in *Pradeep Narayan Madgaonkar v. State of Maharashtra*. In the decision relied upon while observing that prudence dictates that evidence of police witnesses needs to be subjected to strict scrutiny, it was also observed that their evidence cannot be discarded merely on the ground that they belong to the police force and are either interested in the investigating or prosecuting agency, but as far as possible, corroboration of their evidence in material particulars should be sought. In that case the observations were made in the light of the fact that the police officials made an attempt to create an impression on the court that the two witnesses were witnesses of the locality and were independent, knowing fully well that one of the witnesses was under the influence of the police and available to police as he had been joining the raids earlier also and the other witness was a close associate of the said already available witness. The friendship between the two witnesses developed during the days of gambling when the police had admittedly conducted a raid at their den. It was observed that the very fact that the police officer joined the said two witnesses creates a doubt about the fairness of investigation coupled with the manner in which the statements had been recorded in that case. The observations relied upon have no applicability to the facts and circumstances of the present case, particularly having regard to the confessional statements of the appellants which we have held were voluntary. On the facts of the case, recovery cannot be doubted for want of non-examination of independent witnesses."

(Emphasis supplied)

52. It has been held by the Hon"ble Supreme Court in the matter of *State of U.P. Vs. Krishna Master and Others*, AIR 2010 SC 3071 : (2010) CriLJ 3889 : (2010) 8 JT 240 : (2010) 7 SCALE 597 : (2010) 12 SCC 324 : (2011) 1 SCC(Cri) 381 : (2010) 9 SCR 563 : (2010) AIRSCW 4733 : (2010) 6 Supreme 193 , that reliance can be placed on the solitary witness, if the Court comes to the conclusion that the said statement is true and correct version of the case of prosecution. Relevant portion of the above decision is quoted below:--

"47. It is well-known principle of law that reliance can be placed on the solitary statement of a witness if the court comes to the conclusion that the said statement is the true and correct version of the case of the prosecution. The courts are concerned with the merit and the statement of a particular witness and not at all concerned with the number of witnesses examined by the prosecution. The time-honoured rule of appreciating evidence is that it has to be weighed and not counted. The law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, where the court finds that the testimony of the solitary witness is neither wholly reliable nor wholly unreliable, it may, in a given set of facts, seek corroboration, but to disbelieve reliable testimony of a solitary witness on the ground that others have not been examined is to do complete injustice to the prosecution."

(Emphasis supplied)

53. So, there is no scope of interfering with the impugned judgment on that ground.

54. With regard to the allegation of conducting the search and seizure in this case in absence of any local/independent witness, the above settled principle of law was repeated and reiterated time and again though the case of prosecution cannot be rejected on the ground that the independent witnesses had not been examined. In the event, appraisal of evidence on record the Court may find that the case of prosecution to be trustworthy mere absence of independent witness at the time of search and seizure will not render the case of the prosecution unreliable. Reference may be made to the decision of Dharampal Singh Vs. State of Punjab, (2010) 10 JT 513 : (2010) 10 SCALE 229 : (2010) 9 SCC 608 : (2010) 10 SCR 1160 : (2010) AIRSCW 6828 , and the relevant portion of the above decision is quoted below:

"28. The case of the prosecution cannot be rejected only on the ground that independent witnesses have not been examined, in case on appraisal of the evidence on record the court finds the case of the prosecution to be trustworthy. It has come in the evidence of the prosecution witnesses that an attempt was made to join person from public at the time of search but none was available. In the face of it mere absence of independent witness that the time of search and seizure will not render the case of the prosecution unreliable."

55. Therefore, we do not find any substance in the submissions of Mr. Chatterjee in this regard.

56. After further considering the evidence of PW 7 we are of the opinion that the search and seizure under reference was conducted in presence of PW 7. We further find substance in the submission made by the learned Public Prosecutor that the error relating to the name of the Investigating Officer and the lady constable was a minor mistake and the same was rectified by the PW 7 in course of his subsequent cross-examination. So, we do not want to interfere with the impugned judgment on the above ground.

57. With regard to the validity of seizure list dated May 24, 2013, we find after scrutiny of the same from the lower Court records that it was prepared on May 24, 2013 between 06.30 hrs. and 08.30 hrs. The place of the above seizure list was mentioned as "on the northern-side foot path of Beliaghata main road, just under the permanent passenger shade of Deshbandhu School Bus Stand in front of P/no.18-D, Beliaghata Main Road, Kolkata-10." But during examination-in-chief, the PW 2 identified his signature on loose label of Mat. Exbts.-ii/2, iii/3, v/1, vi/1 and vii/1. In course of the cross-examination, the PW 2 deposed that those labels had been prepared at the above place. Therefore, the seizure list of the contraband article contained in the aforesaid packets were not proved to be seized from the place of occurrence beyond doubt in view of the condition of the labels pasted thereon, the learned Court below did not take into consideration the above relevant facts in the impugned judgment.

58. With regard to the specific mentioning of the bag recovered from the appellants we are of the opinion that both the bags contained contraband articles. The fact of the seizure of their bags containing contraband articles were asked to both the appellant in course of recording their statements under Section 313 of Cr.P.C. There was bald denial in reply stating "false statement". In view of the above, a dispute cannot be raised on the basis of the settled principle of law as discussed hereinabove taking into consideration the decision of Parbin Ali (supra).

59. In order to examine the alleged violation of the provisions of the Cr.P.C., Section 41B of the Cr.P.C. are quoted below:--

"41B. Procedure of arrest and duties of officer making arrest.--Every police officer while making an arrest shall -

(a) bear an accurate, visible and clear identification of his name which will facilitate easy identification;

(b) prepare a memorandum of arrest which shall be -

(i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made;

(ii) countersigned by the person arrested; and

(c) inform the person arrested, unless the memorandum is attested by a member of his family, that he was a right to have a relative or a friend named by him to be informed of this arrest."

60. After considering the memorandums of arrests dated May 24, 2013, we find that (Exbt.6/2 collectively) find column No. 10 of both of the above memorandums in respect of signature of the witness (either a member of family or a respectable person of the locality) were kept blank. Both the above memorandums were signed by the PW 2 (S.I. Prosanta Kumar Das) and PW 4 (lady constable Kuheli Sarkar) and the respective appellants. However, the inspection memorandum dated May 24, 2013 (Exbt.-7/2) and treatment papers of Medical Collage and Hospital, Kolkata, supported the fact of medical examination of the appellants by medical officer of the above hospital. But the above treatment papers were not adequate to prove the arrests of the appellants from the place of occurrence on the above date in accordance with law that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and other methods are necessarily forbidden. Reference may be made to the decision of Taylor v. Taylor, reported in (1875) 1 Ch D 426 and Nazir Ahmad vs. Emperor AIR 1936 253 (Privy Council) . The above proposition of law has been adopted by the Hon''ble Supreme Court in the matter of State of Uttar Pradesh Vs. Singhara Singh and Others, AIR 1964 SC 358 : (1964) 4 SCR 485 and the relevant portion of the above judgment is quoted below:--

"7. In Nazir Ahmed case the Judicial Committee observed that the principle applied in Taylor v. Taylor to a court, namely, that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden, applied to judicial officers making a record under Section 164 and, therefore, held that the Magistrate could not give oral evidence of the confession made to him which he had purported to record under Section 164 of the Code. It was said that otherwise all the precautions and safeguards laid down in Sections 164 and 364, both of which had to be read together, would become of such trifling value as to be almost idle and that "it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves".

8. The rule adopted in Taylor v. Taylor is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A Magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in Section 164. The power to record the confession had obviously been given so that the confession might be proved by other means was permissible, the whole provision of Section 164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory. The section, therefore, by conferring on Magistrates the power to record statements or confessions, by necessary implication, prohibited a Magistrate from giving oral evidence of the statements or confessions made to him."

(Emphasis supplied)

61. We are of the view that the procedure to prepare memorandum of arrest had been provided under the provisions of Section 41B of Cr.P.C. so that the arrest of a person may be proved by the records of it made in manner laid down. Therefore, considering the facts relating to preparation of memorandum of arrest of the accused should not have been accepted by the learned Court below as a valid piece of documentary evidence.

62. In view of the discussion and observation made hereinabove, we are of the opinion that the right available to the appellants under Section 50(1) had not been extended to them. As a result the above right of the appellants was frustrated. Secondly, the memorandums of arrest of the appellants should not have been accepted as proof of arresting them from the place of occurrence beyond doubt.

63. The decisions of Kanhaiya Lal v. State of M.P. (supra), Madan Lal and Another v. State of Himachal Pradesh (supra), State rep. By Inspector of Police Vigilance and Anti Corruption v. V. Jaypal (supra), S. Jeevanantham v. State through

Inspector of Police TN (supra), Babubhai Odhavji Patel etc. etc. v. State of Gujarat (supra), State of Himachal Pradesh v. Pawan Kumar (supra), State of Haryana v. Ranbir alias Rana (supra), Hardip Singh v. State of Punjab (supra), Surjit Singh v. State of Punjab (supra), Jarnail Singh v. State of Punjab (supra), Ram Swaroop v. State (Govt. NCT) of Delhi (supra), Sumit Tomar v. State of Punjab (supra), Navdeep Singh v. State of Haryana (supra), are of no help to the respondents in view of the distinguished facts that the appellants were deprived of exercising their rights under sub-section (1) of Section 50 of NDPS Act due to the error on the part of the respondents and that the arrest of the appellants from the place of occurrence was not proved as evident from their arrest memorandums.

64. We have, therefore, no hesitation to hold that the conviction of the appellants cannot be sustained in law firstly, due to the reasons that the right available to the appellants under the provisions of sub-section (1) of Section 50 of NDPS Act, was not communicated to them clearly, individually in an unambiguous language; and secondly, the arrest of the appellants on the place of occurrence was not proved due to non-compliance of the provision of Clause (i) of sub-section (b) of Section 41B of the Cr.P.C.

65. The impugned judgment, order of conviction as also the sentence are quashed and set aside.

66. This appeal is allowed. The appellants are acquitted.

67. The appellants will be set at liberty forthwith, if they are not required to be detained in any other case.

68. Let the Lower Court's records be sent back to the learned Court below forthwith.

69. Urgent photostat certified copy of this judgment, if applied for, be given to the parties, on priority basis.

Md. Mumtaz Khan, J.

70. I agree.