

(2015) 10 CAL CK 0003
In the Calcutta High Court
Case No : C.R.A. 684 and 799 of 2013

Mustafa Mondal and Others

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 06-10-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 428, 446
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20 (b),
20(b), 20(b)(ii)(c), 20(c), 29

Citation : (2015) 10 CAL CK 0003

Hon'ble Judges : Indrajit Chatterjee, J

Bench : Single Bench

Advocate : Kushal Kumar Mukherjee, for the Appellant; Manjit Singh, Ld. P.P., Sanjay Bardhan and Anjan Dutta, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

Indrajit Chatterjee, J—Both these appeals are taken up together and a common judgement is being passed as this appeal arose out of a common judgement passed by the then Special Court, NDPS Act, Nadia at Krishnagar in NDPS Case No. 26 of 2011 wherein the present appellants, Mustafa Mondal, (Criminal Appeal No. 684 of 2013) and Jamela Bibi and Tinku Chowdhury, (Criminal Appeal No. 799 of 2013) were convicted in respect of the charge under Section 20(b) of the N.D.P.S. Act (hereinafter called as the Act). The fact of the case as went for trial before the Trial Court can be stated in brief thus:--

"That the FIR was filed by one S.I., Kanchan Roy Mukherjee (P.W.1), of Kotwali P.S. District: Nadia, to this effect that on receipt of a secret source information, he with force left for Krishnagar bus stand after lodging one G.D. Entry No. 1624 dated 30th March, 2011 at about 10-25 hours and apprehended four accused persons including two women namely, Jamela Bibi and Tinku Chowdhury, with four bags in their possession. The male accused persons from whose possession also such bags were recovered were Sukhen Biswas and Mustafa Mondal. It was

further case of the prosecution that one Manoj Biswas was there at the spot and seeing the police party, he fled away."

2. A common notice was issued to all the four accused persons as contemplated under Section 50 of the said Act (Ext.2). Out of four convicts these two appeals were preferred by three appellants. It may be noted that the 4th co-accused, Sukhen Biswas, did not prefer any appeal as against the order of conviction and in this regard the report dated 10-09-2015 of the department may be taken into consideration. All the four accused persons were searched at the spot in presence of Inspector of Police, Arun Kumar Das, who was a Gazetted Officer, and on completion of all formalities, the search and seizure of the four bags were made. 12 kgs. of Ganja was recovered from the possession of the Mustafa Mondal, 11 kgs. of Ganja was recovered from the possession of the accused, Sukhen Biswas (not appellant), 9 kgs. of Ganja was recovered from the possession of the accused, Jamela Bibi and 9 kgs. of Ganja was also recovered from the possession of the 4th accused-appellant, Tinku Chowdhury.

3. One common seizure list was prepared in presence of the witnesses like Rajesh Sarkar (P.W.3), Subrata Ghosh (P.W.7) and Madan Ghosh (P.W.4). Thereafter all the accused persons were arrested and taken to Kotwali Police Station, Krishnagar, District: Nadia and one F.I.R. was lodged Kanchan Roy Mukherjee (PW 1) of the said P.S. giving rise to Kotwali P.S. Case No. 1238 of 2011 dated 30-03-2011 under Section 20(b)/20(c)/29 and 30 of the said Act. The matter was diarised as per G.D. Entry No. 1659 of 2011 dated 30-03-2011. Thereafter, the investigation was taken up as per order of the Officer-in-Charge of that Police Station by the S.I., Tapan Chatterjee (P.W.10). During the course of investigation, this I.O. visited the place of occurrence, prepared a sketch map with index (marked as Ext.7), seized the G.D. Entry No. 1659 dated 30-03-2011 (certified copy of the G.D. Entry was marked as Ext.6), he examined the available witnesses, forwarded the sample of alleged Ganja to the State Drugs Control & Research Laboratory, Calcutta, under proper seal and collected the report. The report of the said Laboratory suggested that the 8 samples so forwarded contained Ganja. After receipt of this report, this I.O. submitted charge sheet against 5 accused persons including the present appellants in respect of the offence punishable under Sections 20(b)/20(c)/29 and 30 of the said Act. The case was tried by the learned Trial Court. Before the learned Trial Court, 10 witnesses were examined and several documents were marked as Exts., about which I have already stated. The learned Trial Court on scrutiny of the evidence both oral and documentary, considering the examination of the accused under Section 313 of Cr.P.C. and hearing the argument of the parties, came to the conclusion that the prosecution was able to prove the charge against these four accused-appellants in respect of the charge punishable under Section 20(b) of the said Act. However, accused, Manoj Biswas, was acquitted by the learned Trial Court. The learned Trial Court imposed sentence of 5 years rigorous imprisonment on all the present appellants and also sentenced them to pay fine of Rs. 20,000/- in default and to suffer simple imprisonment for further six

months for the said offence. The court further ordered that the period of detention undergone by the present accused-appellants during the investigation and trial stage be set off under Section 428 of the Cr.P.C.

4. It may be mentioned that before the learned Trial Court the defence preferred not to adduce any oral and documentary evidence. The defence also did not make out any specific case but alleged that they were implicated falsely in this case.

5. On behalf of the defence, it was submitted by Mr. Mukhrejee, learned Advocate, that admittedly, in this case there had been non-compliance of the vital sections of 42(2), 51A , and Section 57 of the said Act. To substantiate his argument regarding non-compliance of Section 42(2), he cited a decision of the Apex Court as reported in 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 wherein the Apex Court in paragraphs 14 and 15 held as such :

"14. In this case, P.W.2 admitted that he proceeded to one spot only on getting the information that somebody was trying to transport narcotic substance. When he was asked in cross-examination whether he has taken down the information in writing he had answered in the negative. Nor did he even apprise his superior officer of any such information either then or later, muchless sending of copy of the information to the superior officer. However, learned counsel for the respondent - State of Gujarat - contended that the action was taken by him not under Section 42 of the Act but it was under Section 43 as per which he was not obliged to take down the information. We are unable to appreciate the argument because, in this case, P.W.2 admitted that he proceeded on getting prior information from a constable and the information was precisely one falling within the purview of Section 42(1) of the Act. Hence P.W.2 cannot wriggle out of the conditions stipulated in the said sub-section. We, therefore, unhesitatingly hold that there was non-compliance with Section 42 of the said Act".

"15. Learned counsel for the State next contended that such non-compliance with Section 42 of the Act cannot be visited with greater consequences than what has been held by the Constitution Bench of this Court regarding non-compliance of the condition in Section 50 of the Act."

6. He submitted that in that case before the floor of the Apex Court one Auto Rickshaw driver was held in a public place and ten packets of Charas were found concealed in four gunny bags which was stored in that Auto Rickshaw and the driver in his statement under Section 313 Cr. P. C before the trial court admitted the recovery from his Auto Rickshaw but pleaded his unawareness of the contents of the gunny bags which, according to him, had been loaded by two persons with a direction to him to transport the same to the specified destination. He submitted that in the present case before the floor of this court

the alleged contrabands were seized also from a public place and naturally the decision of the Apex Court will apply in this case also.

7. He also cited a Division Bench decision of this Hon'ble court as reported in *Makhan Barman Vs. State of West Bengal* wherein in a case of house search this court held that there was violation of non-compliance of section 42(2) of the said Act as well as there was violation of Section 52A of the said Act and as such, the Division Bench was pleased to acquit the accused in respect of the charge under Section 20(b)(ii)(c) of the said Act.

8. Mr. Mukherjee also took me to Section 57 of the said Act which runs thus:--"Report of arrest and seizure:--Whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight 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". Thus, Mr. Mukherjee, learned Advocate, submitted that in the instant case, there were violations of Section 42(2), Section 52A and Section 57 of the said Act as I have just stated above. Let me now quote here Section 42 (2) to get a clear picture of this sub-section. We must also know the intention of the legislature contemplated in Section 43 of the said Act.

9. Section 42(2) runs thus : "Where an officer takes down any information in writing under Sub-Section(1) of records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior".

10. Section 43 runs thus, "Power of seizure and arrest in public place - Any officer of any of the departments mentioned in Section 42 may -

"(a) seize in any public place or in transit, any narcotic drugs or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drugs or substance, any animal or conveyance or article liable to confiscation under this Act any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act."

11. The relevant provision of Section 52A of the said Act to appreciate the present appeal can be quoted thus:--

"52A. Disposal of seize narcotic drugs and psychotropic substances - (1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances shall, as soon as may be after their seizure, be disposed

of by such officer of any such manner as that Government may, from time to time, determine after following the procedure hereinafter specified."

12. By way of alternative argument, it was submitted by Mr. Mukherjee that all the three accused appellants have suffered a considerable period of sentence and considering the small quantum of Ganja seized from each accused, the court may consider the reduction of sentence. He submitted that in these years all the appellants have suffered considerably, financially, physically and mentally and that may be kept in mind by this court while assessing the quantum of punishment to be inflicted on the accused persons. On behalf of the prosecution it was argued by Mr. Sanjay Bardhan, the learned prosecutor that considering the facts of this case neither Section 42(1) nor Section 42(2) of the said Act will apply in the instant case before the floor of this Court. He took me to both the Sections vis-?-vis the facts of this case to show that it is a clear case under Section 43 of the said Act for which no information is necessary.

13. He submitted that Section 43 relates to the power of seizure and arrest in public place, in transit and this Section also contemplates any animal or conveyance or article liable to be confiscated under the Act. He submitted that in the present case before this Court the seizure was made in public place but not from any conveyance. On this point he cited the following decisions of the Apex Court :

"1) State of Haryana Vs. Jarnail Singh and Others, (2004) CriLJ 2541 : (2004) 93 ECC 694 : (2004) 5 SCALE 245 : (2004) 5 SCC 188 : (2004) 1 SCR 864 Supp ;

2) 2015 Supreme Appeal Report Criminal Section page-770 : Mohan Lal Vs. State of Rajasthan(2015) 5 AD (SC) 581 : AIR 2015 SC 2098 : (2015) 2 ALD 185 : (2015) 89 ALLCC 959 : (2015) 3 BomCR(Cri) 67 : (2015) 2 CCR 216 : (2015) CriLJ 2811 : (2015) 2 JCC(Narcotics) 37 : (2015) 2 MLJ(Cri) 717 : (2015) 2 RCR(Criminal) 779 : (2015) 3 RLW 2664 : (2015) 5 SCALE 330 : (2015) 6 SCC 222 ;

3) Union of India (UOI) Vs. Satrohan, (2008) CLT 1080 : (2008) 8 JT 148 : (2008) 10 SCALE 138 : (2008) 8 SCC 313 : (2008) 2 UJ 936 : (2008) AIRSCW 619 ;

4) 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 "

14. In the case of Jarnail Singh (supra) wherein the Apex Court held that Sections 42 and 43 contemplates two different situations. Section 42 contemplates entry and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. It was held by the Apex Court in this case that Section 42 had no application in the fact of the case as it was before the Apex Court. In that case poppy husk was

recovered from a tanker which proceeding through the public highway.

15. In Mohan Lal (supra) it was held by the Apex Court that there is a distinction between 42(2) and 43 of the NDPS Act, if a search is made in a public place the officer making the search is not required to comply with sub-sections (1) and (2) of Section 42 of the Act and as the place is a public place Section 43 will come into play. It was further held in that decision that Section 57 is not mandatory in nature.

16. In the case of Satrohan (supra) wherein the Apex Court held that there is no statutory requirement that such a record (report of arrest and seizure) should be produced in Court as a matter of course and in the case before the Apex Court no evidence was led nor any question asked for about the absence of records and the Apex Court further held that records, if asked for, could have been produced.

17. In the case of M. Prabhulal (supra) the Apex Court held that Sections 42 and 43 of the said Act do not require an Officer to be a Gazetted Officer whereas Section 41(2) requires an Officer to be so. But at the same time, the Apex Court held that Section 42(2) is a mandatory provision. In this case the Apex Court further held that non-examination of independent witnesses of the recovery will not affect the prosecution case as the Apex Court was convinced in that particular case regarding the alleged evidence as proved against the accused. In this case also the Apex Court differentiated in between the power of an officer as contemplated under Sections 42 and 43 of the said Act and further held that it would be useful also to notice that Section 43 relates to power of seizure and arrest in public place whereas Section 42 empowers to seize contraband etc. and to search a person in any building, public place or in transit on existence of ingredients stated in Section 43.

18. As regards Section 52(A) it was submitted by Mr. Bradhan that this Section will not apply in the present case as Section 52(A) relates to disposal of seized narcotic drugs and psychotropic substances and he submitted that even though Section 52(A) of the said Act was not complied with, there is no question of vitiating the trial of this case. On this point he cited the decision of the Apex Court as reported in State of Punjab Vs. Makhan Chand, (2004) 92 CTR 564 : (2004) 92 ECC 564 : (2004) 3 JT 360 : (2004) 2 SCALE 778 : (2004) 3 SCC 453 : (2004) AIRSCW 1419 : (2004) 2 Supreme 497 . He also cited another decision of the Apex Court as reported in Ravindran @ John Vs. The Superintendent of Customs, (2007) CriLJ 3414 : (2007) 7 JT 47 : (2007) 7 SCALE 153 : (2007) 6 SCC 410 .

19. In the case of Makhan Chand (supra) it was held that non-compliance of Section 52(A)(1) of the said Act will not vitiate the trial. In that case the respondent accused relied on certain standing orders and standing instructions issued by the Central Government under that section of the said Act which requires a particular procedure to be followed for drawing of samples and contended that since the said procedure had not been followed, the trial was

vitiated. The Apex Court negated that point on the ground that such rules are merely intended to guide the officers to see that a fair procedure is adopted by the Officer-in-Charge of investigation. It was candidly held by the Apex Court that Section 52(a)(i) of the said Act does not empower the Central Government to lay down the procedure for search of an accused but only deals with disposal of seized narcotic drugs and psychotropic substances.

20. In the case of Rabindran @ John (supra) where the Apex Court was dealing with a fact in which the arrest and seizure was made at a Bus Stand and not from any building, conveyance of the enclosed place and it was held that Section 42 was not attracted in such a case and case was covered under Section 43 which does not require information of any person to be taken down in writing or that the officer concerned must send a copy thereof to his immediate official superior within seventy-two hours.

21. On my asking Mr. Bardhan submitted that in this case the seizure list witnesses were declared hostile and on this point he cited the decision of the Apex Court as reported in (2006) 7 page-439 (Khalek Sk. v. State of West Bengal).

22. In the case of Khalek Sekh (supra) wherein the Apex Court held in a case under Section 46-A(a)(i) and (ii) of Bengal Excise Act, 1909, there is no prohibition on a conviction being recorded on the basis of the testimony of official witnesses if they are found to be trustworthy

23. In reply to all these, it was submitted by Mr. Mukherjee, the learned Advocate representing the appellants that Section 42(2) of the said Act will squarely apply in this case as it was one alleged recovery as per source information. He reiterated the decision of the Apex Court as reported in 2000 SCC (CRI) page-495.

24. I have gone through the evidence of PWs. The main witnesses are the detecting officer that is PW 1 and the other members of the raiding party particularly when the seizure list witnesses PWs 3, 4 & 7 were declared hostile. The witnesses to the raiding party were PWs 2, 5, 6, 8, 9. The IO of this case is PW 10 Tapan Kumar Chatterjee.

25. On scrutiny of the oral and documentary evidence this Court is satisfied that the accused persons were duly apprehended by the raiding party and 41 Kgs. of ganja were seized as per seizure list dated 30.03.2011. The break up being 12 Kgs. from Mustafa Mondal, 11 Kgs. from Sukhen Biswas (not in this appeal) and 9 Kgs. each from Jamela Bibi and Tinku Choudhury. This Court is also satisfied that notice was duly issued to the accused persons before search which was marked as exhibit-2. It is true that the seizure list witnesses have not supported the prosecution case but there is nothing unusual in this attitude of the witnesses. In these days the witnesses are reluctant to support the case of the prosecution, if they have no interest in that criminal trial. Here witnesses had no interest in this crime, even though it is said that such type of crime is particularly

destroying our youth. We can cite here the decision of the Apex Court as reported in *Khalek Shaikh Vs. State of West Bengal*, (2006) 8 SCALE 742 : (2006) 7 SCC 439 : (2006) 5 SCR 665 Supp .

26. On scrutiny of the evidence of the police personnel this Court is of the opinion that the learned Trial Court did not err in believing those witnesses to be truthful witnesses. There is nothing to disbelieve these witnesses simply because they are police men and coming in uniform, unless it can be established that the accused persons had some animosity of those witnesses or those witnesses had some axe to grind against them. I can also rely upon the decision of the Apex Court as reported in *Aher Raja Khima Vs. The State of Saurashtra*, AIR 1956 SC 217 : (1956) CriLJ 426 : (1955) 2 SCR 1285 wherein the Apex Court held that evidence of a witness cannot be discarded simply because he is a police officer-in-charge of investigation. The police officers are not worse than ordinary human being. It cannot be said that all of them are liars just as it cannot be said that all of them are truthful. On this point I can also rely upon the decision of the Apex Court as reported in *Govindaraju @ Govinda Vs. State by Srirampuram P.S. and Another*, AIR 2012 SC 1292 : (2012) CriLJ 1991 : (2012) 3 JCC 1714 : (2012) 3 SCALE 414 : (2012) 4 SCC 722 : (2012) AIRSCW 1994 .

27. In the present case before the floor of this Court the accused persons even failed to make out any specific case. It has been claimed by the accused persons that they were falsely implicated in this case. I can cite here the decision of the Apex Court as reported in *Ruli Ram and Another Vs. State of Haryana*, AIR 2002 SC 3360 : (2002) CriLJ 4337 : (2002) 7 JT 267 : (2002) 6 SCALE 506 : (2002) 7 SCC 691 : (2002) 2 SCR 426 Supp where the Apex Court ruled that when the plea of false implication is raised then the foundation of it must be proved by the person who is raising the same. Unfortunately in the present case the accused persons have fail to prove for what reason they were falsely implicated.

28. So long I was in the midst of the factual aspect of the case. Now let me answer as to the legal points raised by the defence counsel. The main argument of the defence relying on the decision of *Abdul Rashid Ibrahim Mansuri* (supra) the defence claimed that this case is hit under Section 42 (2) of the Act. The fact before that court was that four packets of Charos were seized from one Auto rickshaw on the public road but the accused took a specific plea that two passengers boarded said auto rickshaw. Thus in that case the Apex Court held that Section 42 (2) of the said Act will apply considering the fact that auto rickshaw was a conveyance. I have already mentioned about Section 42(2) of the said Act. Section 42 (1) of the said Act relates to power of entry, search, seizure and arrest without warrant or authorization in any premises etc. 42(1)(a) of the said Act relates to entry, search such a building conveyance or place. It is true that in that case before the Apex Court in *Abdul Rashid Ibrahim Mansuri* (supra) the articles were seized from one conveyance that is one auto rickshaw but in the present case before the floor of this Court nothing was seized from any conveyance and as such the fact of that case before the Apex Court cannot

match with the case before this Court.

29. I have already stated the decisions of the Apex Court while noting the argument of the prosecution as relied upon by the learned state counsel. This Court prefers to rely upon the decisions of the Apex Court in Mohan Lal (supra), Jarnail Singh (supra), Satrohan (supra) and M. Prabhulal (supra) that in such a case only Section 43 of the said Act will apply where there is no prescription to inform the matter to the superior.

30. Regarding the Division Bench decision of this Court in Makhanlal (supra) this court can say that in that case it was not at all considered how Section 52(A) of the said Act was made applicable. This Court can rely upon the decision of the Apex Court as passed in Makhan Chand (supra) wherein the Apex Court held candidly that violation of Section 52(A) cannot be a ground for acquittal of one accused. In Makhanlal (supra) 14 packets of Ganja was recovered from the house and naturally the Division Bench held that compliance of Section 42(2) was required.

31. It is true that in the instant case before the floor of this court arose out of source information but that is not enough to go for compliance of Section 42 (2) of the said Act particularly when in the present case the contraband articles were not seized from any conveyance such as Auto rickshaw etc.. This Court considering the facts and circumstances of this case is of the opinion that here Section 43 of the said Act will apply and not Section 42 (2) of the Act. This being so practically there was no legal infirmity in the proceeding.

32. Thus, I have covered the argument put forward by the parties covering both the factual and legal aspect of this case. This Court is satisfied that the learned trial court was right in convicting the appellants in respect of the charge punishable under Section 20(b) of the NDPS Act. Now the question is as regards the quantum of the sentence. The learned trial court ordered substantive imprisonment for five years and to pay fine of Rs. 20,000/- (twenty thousand) only in default to suffer SI for further six months. The learned trial court was further pleased to allow set off as regards the substantive sentence as per the provision of Section 428 of the Cr.P.C.

33. The defence has prayed for reduction of the sentence. It is true that cumulatively 41 Kgs. of ganja was seized from the possession of four accused persons I have stated the break up in the body of the judgment. The maximum amount of such seizure was from the possession of the appellant No. 1 that is Mustafa Mondal that was 12 Kgs. This Court is not unmindful of the fact that the accused persons are facing the legal battle since 2011 and considering the quantity of seizure of contraband articles this Court prefers to reduce the substantive sentence of each appellants from five years to four ears affirming the conviction in respect of the charge punishable under Section 20 (b) of the N.D.P.S. Act and without touching the fine amount and sentence in default. Thus both the appeals are allowed in part with the only alteration made above.

34. The department is directed to transmit the lower court record to the learned trial court at one.

35. The accused appellants are on bail granted by this Court in CRAN No. 2717 of 2013 as per order dated 12.09.2013, such order of bail is hereby cancelled and so also the bail bonds.

36. The appellant convicts must surrender before the trial court within twenty one days from the communication of this order to them by the learned trial court through the Officer-in-Charge of concerned police station where the accused appellants are residing. The learned trial court may also take up the matter with the sureties of the accused who stood as sureties for them at the time of acceptance of the bail bond by him as per that CRAN.

37. If the accused fails to surrender within the stipulated time even after receipt of the notice then the trial court will be authorized to issue warrant of arrest against the said accused appellant to serve out the remaining portion of the sentence and to pay the fine amount. In case of failure to surrender will entitle the learned trial court to start proceeding against the sureties under Section 446 of the Cr.P.C. It may be noted that no mercy will be shown to the sureties in such a case while imposing the penalty amount.

38. Certified copy of this judgment be given to the parties as per rules.