
(2019) 01 CAL CK 0011
In the Calcutta High Court
Case No : Criminal Appeal No. 543 Of 2008

Nirmal Kumar Jana @ Nirmal Jana

APPELLANT

Vs

State Of West Bengal

RESPONDENT

Date of Decision : 03-01-2019

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 20, 20(b)(ii)(B), 42, 52A

Citation : (2019) 01 CAL CK 0011

Hon'ble Judges : Rajasekhar Mantha, J

Bench : Single Bench

Advocate : Soumya Nag

Final Decision : Allowed

Judgement

The instant appeal is directed against the judgement and order dated 29th July, 2008 and 30th July, 2008 passed by the learned Additional Sessions Judge, Special Court under N. D. P. S. Act, 1985 Cooch Behar in G. R. Case No. 45 of 2003.

The appellant was convicted under Section 20(b)(ii)(B) of the N. D. P. S. Act, 1985. The appellant was sentenced to six years rigorous imprisonment and also ordered to pay a fine of Rs.60,000/-. In default whereof he was to suffer further one year of rigorous imprisonment.

The prosecution case in brief is that Officer-in-Charge of Kotwali Police Station at Cooch Behar had received information on 24th of January, 2003 that the appellant/accused was found loitering suspiciously on a busy area close to a National Highway called 'Khagrabari Chowpathi'. On receipt of such information he formed a raid party and confronted the accused. The accused was stated to have been carrying a suit case (aristocrat brand). The bag was seized and opened when it was found that it contained a narcotic drug called "Ganja". The weight of the drug was subsequently found to be 10 kgs. The appellant had

disclosed that he was from the district of Midnapore in South Bengal. The appellant could not account for such illegal possession of contraband drug. A complaint came to be lodged and a G. D. E. was registered with Kotwali Police Station, Cooch Behar by one Anil Kumar Ghosh (PW 6), who was the Sub-Inspector of Police. The said document was neither named in the charge sheet nor produced in evidence in the trial. There is no evidence on record that the appellant was searched in person, while the same should have followed naturally.

The seized contraband drug was stated to have been kept at the police mal-khana. The appellant was arrested on the same day. The seized drugs were sent for chemical examination to a forensic laboratory after a shocking and surprising delay of three months. The F. S. L. report of a Government analyst is available on record. Thereafter a F. I. R. came to be lodged on 24th January, 2003 under Section 20 of the N. D. P. S. Act of 1985. A charge sheet was thereafter filed with the A. C. J. M., Cooch Behar on 11th September, 2007.

The trial started sometime in December, 2007 before the Additional Sessions Judge, Cooch Behar. Seven witnesses were examined by the prosecution, although ten witnesses were named in the charge sheet. The charge sheet also disclosed that eleven documents were brought in evidence. The following were witnesses who deposed on behalf of the prosecution :-

PW1, Nandalal Gupta, tea vendor (independent seizure witness);

PW2, Dhirendranath Barman (raiding team constable);

PW3, Jiten Barman (another raiding constable);

PW4, Samsul Mia (allegedly ticket vendor-independent witness); PW5, Paresh Roy, tea vendor (independent witness);

PW6, Anil Kumar Ghosh (author of the FIR & member of the raiding team) and PW7, Joydeep Bose (investigating officer).

Out of the aforesaid witnesses, PW1, 4 & 5 turned hostile. It is interesting to note that both PW1 and PW5 are tea vendors who served tea to the same Kotwali police station and its members. One Inspector, Jogen Dey, also member of the raiding party who was named by PW3 was not examined as a witness by the prosecution nor was J. B. Dey, the scribe of the FIR brought as a witness by the prosecution.

PW1, the first independent witness, tea vendor turned hostile and stated that was not present at the time of the incident and admitted so.

PW2 was a member of the raiding party. Very strangely he could not find any seal or signature on the briefcase containing narcotic substance.

PW3 was also a member of the raiding party but could not identify the accused-appellant in course of the trial. He, who ought to have mentioned PW2's presence, does not bother to do so.

The prosecution did not even question him in that regard as already stated herein above.

PW4 has no recollection of the incident and not surprisingly so and was declared hostile.

PW5, another independent tea vendor deposed in evidence that he came to deliver tea at the police station and was asked to sign on some blank documents.

The only possible witness of some substance that the court could have relied upon was

PW6, the author of the FIR. He was also a member of the raiding party. The minor discrepancy in his evidence of the exact amount of the seized narcotic substance (about 10 kgs.) has to be discounted.

The evidence of PW6 which found favour with the court below to arrive at a finding of guilt and conviction must be tested now in the context of the mandatory strict provision of the draconian NDPS Act, 1985.

There are two sections that are required to be observed strictly. The first of which is Section 42 of the said Act of 1985. A police officer and the like are required to either inform in writing to their superior officer, prior to conduct of any raid or in the event of such information and writing letting the accused free, subsequently. It is now well settled in the following decisions of the Hon'ble Supreme Court the importance of such information to the superior.

In the case of Karnail Singh Versus State of Haryana reported in (2009) 3 SCC (Cri.) 887 a five-Judge Bench of the Hon'ble Supreme Court at paragraph 35 and particularly sub-para (d) thereof had held as follows :-

"(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".

Compliance of Section 42 therefore, is mandatory for any process of investigation

and prosecution under the NDPS Act. It is emphasized therein that while provision is not aimed at slowing the process of investigation, it is important to follow to prevent abuse of the Act. In substance it is being treated as mandatory. The dictum of the Hon'ble Supreme Court in Karnail Singh (Supra) was followed and exemplified relevant to the context in the case of State of Karnataka vs. Dondusa Namasa Baddi reported in (2011) 1 SCC (Cri) 576. In paragraph 5, the Hon'ble Supreme Court observed as follows :-

"5. Concededly in the present matter, no information was taken down in writing by the police officer or conveyed to the immediate police officer. Shri A. K. Mishra, the learned State counsel has, however, forcefully argued that there was evidence in the oral evidence of PW 10, the investigating officer, that he had complied with the formalities enjoined by Section 42(2). It is not the case of the prosecution that sufficient time was not available to record the information in writing and send it to the superior officer and in the face of it, we are of the opinion that any oral evidence of the police officer will not be in compliance with the provisions of Section 42(2) of the Act."

It therefore, follows that even at the case of a report post a raid and investigation, the information to the superior officer in writing has been deemed vital to an investigation under the N. D. P. S. Act. The powers under the NDPS Act for investigation and prosecution are permitted only with sufficient checks and balances to ensure probity in the prosecution case.

The said provision was reiterated again in the case of Kishan Chand Versus State of Haryana reported in (2013) 1 C Cr LR (SC) 528 [(2013) 2 SCC 502] at paragraph 16, 21, 22 which is as follows:

"16. We are unable to contribute to this interpretation and approach of the trial Court and the High Court in relation to the provisions of sub-sections (1) and (2) of Section 42 of the Act. The language of Section 42 does not admit of any ambiguity. These are penal provisions and prescribe very harsh punishments for the offender. The question of substantial compliance with these provisions would amount to misconstruction of these relevant provisions. It is a settled canon of interpretation that the penal provisions, particularly with harsher punishments and with clear intendment of the legislature for definite compliance, ought to be construed strictly. The doctrine of substantial compliance cannot be called in aid to answer such interpretations. The principle of substantial compliance would be applicable in the case where the language of the provisions strictly or by necessary implication admits of such compliance.

21. When there is total and definite non-compliance with such statutory provisions, the question of prejudice loses its significance. It will per se amount to prejudice. These are inalienable, protective rights vested in a suspect and are incapable of being shadowed on the strength of substantial compliance.

22. The purpose of these provisions is to provide due protection to a suspect against false implication and ensure that these provisions are strictly complied

with to further the legislative mandate of fair investigation and trial. It will be opposed to the very essence of criminal jurisprudence, if upon apparent and admitted non-compliance with these provisions in their entirety, the Court has to examine the element of prejudice. The element of prejudice is of some significance where provisions are directory or are of the nature admitting substantial compliance, where the duty is absolute, the element of prejudice would be of least relevance. Absolute duty couple with strict compliance would rule out the element of prejudice where there is total non-compliance with the provision."

The importance of compliance of Section 42 also stood once again reiterated. In the case of *Rajinder Singh vs. State of Haryana* reported in (2011) 8 SCC 130 at paragraph 9 & 11 the Hon'ble Supreme Court observed as under :

"9. A reading of the above said provision presupposes that if an authorised officer has reason to believe from personal knowledge or information received by him that some person is dealing in a narcotic drug or a psychotropic substance, he should ordinarily take down the information in writing except in cases of urgency which are set out in the section itself. Section 42(2), however, which calls for interpretation in the matter before us, is however categorical that the information if taken down in writing shall be sent to the superior officer forthwith.

11. It is therefore clear that the total non-compliance with the provisions sub-sections (1) and (2) of Section 42 is impermissible but delayed compliance with a satisfactory explanation for the delay can, however, be countenanced. We have gone through the evidence of PW 6 Kuldeep Singh. He clearly admitted in his cross-examination that he had not prepared any record about the secret information received by him in writing and had not sent any such information to the higher authorities. Likewise, PW 5 DSP Charanjit Singh did not utter a single word about the receipt of any written information from his junior officer, Inspector Kuldeep Singh. It is, therefore, clear that there has been complete non-compliance with the provisions of Section 42(2) of the Act which vitiates the conviction."

In the instant case I find that with far from even a pre or post dated report to the superior officer, there has infact been no compliance whatsoever of Section 42. Although PW6 in oral evidence has stated that the superior officer was informed the same cannot be in countenance since no document whatsoever in that regard was produced. The prosecution has therefore, shot down its own case by reason of the aforesaid, lapse.

Let us now examine as to whether the next and equally important limb of the NDPS Act, 1985 of Section 52A has been complied with or not.

What has shocked the conscience of the court is that the seized drug was supposed to have been kept in the police malkhana and retrieved therefrom for being sent to the forensic laboratory. PW6 & 7 in their evidence do not indicate in their evidence whether the malkhana and register book were inspected, seized and produced in court and as to how and infact more importantly what in fact

was sent to the forensic laboratory. This has remained a complete mystery.

If that was not enough, the samples were sent to the Forensic Laboratory after a period of three months of the seizure of the drugs. The method and manner of taking samples, the quantity of the samples and the packaging details etc. for the purpose of sampling as mandated under Section 52A of the NDPS Act have not seen the light of the day. There is no evidence in that regard. The importance of the same has been discussed albeit briefly in a judgment rendered by a Division Bench of this court in the case of *Tej Bahadur Singh & Anr. Vs. Narcotic Control Bureau* and another reported in 2000 (1) CHN page 803. At paragraph 16 the Division Bench has discussed as follows :

"16. In view of the discussions made above we are of the view that the provision of Section 52A of the N. D. P. S. Act is mandatory provision inasmuch as the said provision was inserted in the Act with a definite purpose, i.e., to prevent substitution of articles seized by the concerned officer or the department. We are also of the opinion that non-compliance of the provision of Section 52A makes the entire search and seizure vitiated. The prosecution has failed to prove as to how the sample packets, which were admittedly in the custody of the N. C. B. officers till 13.7.95, when the same was produced before the court and permission was granted by the court for sending the same for chemical analysis, could be received by the office of the P. W. 1 on 12.7.95. In such circumstances, there is every doubt as to whether the sample prepared by P. W. 2 at the time of seizure in respect of which he prepared the Test Memo was received by P. W. 1. P. W. 1 might have received some other packet other than the sample packet prepared by P. W. 2 and P. W. 1's test report/finding relates to articles which were not seized from the appellants. In our opinion such benefit of doubt must go in favor of the accused appellants."

The reference to a small discussion in the aforesaid paragraph is made only for the reason that in the instant case there is a direct and flagrant violation of a vital provision of the 1985 Act being Section 52A. Volumes of dicta have been laid down by the Hon'ble Supreme Court in this regard which need not be referred to at this stage.

In the light of the above and the analysis of the facts that have emerged in the instant case one must invariably come to the conclusion that by reason of a failure a compliance of Section 42 the prosecution crippled its case and the non compliance observed of Section 52A has completely demolished it.

This Court is therefore in complete disagreement with the conclusion arrived by the court below in the impugned judgment and order and sentence.

In the facts and circumstance related herein above the judgement and order dated 29th July, 2008 and sentence dated 30th July, 2008 is set aside. The appellant is entitled to and is granted the benefit of doubt.

The appeal is allowed.

It is evident from the bar that the appellant is on bail. Bail bond shall stand discharged.

The appellant is set free.

Urgent photostat certified copy of this order be given to the parties, if applied for, upon compliance of necessary formalities.