
(2004) 07 CAL CK 0049
In the Calcutta High Court
Case No : C.R.A. No. 371 of 2001

Panjabi @ Susanta Mondal

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 05-07-2004

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 42, 50, 57

Citation : (2004) 4 CHN 648

Hon'ble Judges : Pranab Kumar Deb, J; Amit Talukdar, J

Bench : Division Bench

Advocate : Sudipto Moitra, Ranjit Kumar Ghosal, Idris Ali and Aparna Samanta, for the Appellant; Rash Behari Mahato and Kallol Mondal, for the Respondent

Final Decision : Dismissed

Judgement

Pranab Kumar Deb, J.—This instant appeal has been directed against the conviction and sentence passed by the learned Judge, Special Court, under the N.D.P.S. Act, 6th Court, Barasat in connection with the Case being No. 79 of 2000.

2. The incident leading to the institution of the case took place on 7.9.2000. On that date round about 12.10 hrs. the then I.C. of Barasat P.S. received an information over the phone that a person called Punjabi Mondal was selling heroin at Jagdighata, Kajipara. The matter was reported to S.D.O. & S.D.P.O., Barasat. Acting on the tip-off and the information so received over the phone, I.C, Barasat headed for the place of occurrence with some other police personnel. They reached Jagdighata, Kajipara within half an hour. There they found a tall person selling articles to another one. Seeing the police personnel approaching, the person purchasing the article took to his heels, However, the person selling the articles was cornered by the police personnel. He was found in possession of some materials. Having been convinced that the person so detained had been dealing in heroin, the police personnel apprised him of his

right to be searched in presence of a Magistrate. The offer so made by the police personnel was accepted by him. Accordingly, I. C, Barasat P.S. sent a requisition to the S.D.O. with a request to depute a Magistrate for the purpose of conducting the search in his presence. Under the direction of the S.D.O., Barasat, Sri Sanjib Chatterjee, B.D.O. came to the spot to oversee the search. The accused disclosed his identity in presence of Sri Sanjib Chatterjee. The accused was given the option to have the police personnel searched by the local witnesses. Save and except the wearing apparels, nothing was found in their possession. Thereafter the search of the accused was conducted. On search, a polythene paper covering a carry pack containing some amount of stickly substance of snuff colour could be recovered from the possession of the accused. A goldsmith was called to weigh the incriminating heroin. It was at that stage the seizure was effected in presence of independent local witnesses and the B.D.O. The sealed container containing the heroin was sent to the Chemical Analyst for his examination and report. On receipt of the report of the Chemical Analyst and after examination of the witnesses, the I.O. submitted chargesheet against the accused.

3. On perusal of the materials on record, the learned Special Judge was pleased to frame charge u/s 21/27 of the N.D.P.S. Act. The accused, however, pleaded not guilty to the accusation levelled against him. Accordingly, the trial commenced against him. As many as twelve witnesses including the informant, the Chemical Analyst, the Investigating Officer and the B.D.O., in whose presence such search was conducted, were examined.

4. Scanning the statements of the witnesses and relying on the report of the Chemical Analyst, the learned Judge of the Special Court was pleased to convict and sentence the accused for his alleged commission of offence u/s 21 of the N.D.P.S. Act.

5. Aggrieved by, and dissatisfied with, the finding of conviction and sentence, the accused has preferred this appeal.

6. Challenging the finding of the Court below, the learned Defence Counsel has submitted that the appellant should have been acquitted by the Trial Judge in view of the glaring defects discernible on the face of the record and non-compliance of the mandatory provisions of Sections 42A, 50 & 57 of the N.D.P.S. Act. It is argued that in the absence of clear evidence of compliance of section 50 of the N.D.P.S. Act, conviction and sentence u/s 21 of the N.D.P.S. Act would not be justified. What is required is strict compliance of the provision of section 50 of the N.D.P.S. Act and partial option would not meet the requirement of possession of section 50 of the N.D.P.S. Act.

7. Referring the case of the State of Punjab v. Baldeu Singh, reported in 1999(3) All India Criminal Law Reporter 1, it is submitted that while interpreting the provision of section 50 of the N.D.P.S. Act, the Apex Court has emphasized that to be searched before a Gazetted Officer or a Magistrate, if the suspect so

requires, is an extremely valuable right which the legislature has given to the concerned person, having regard to the grave consequences that may entail the possession of illicit articles under the N.D.P.S. Act. The provision has been incorporated in the Act, keeping in view the severity of the punishment. The severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed. The safeguards contained in section 50 are intended to serve dual purpose of protecting a person against false accusation and frivolous charges as well as to lend credibility to the search and seizure conducted by the empowered officer. If the empowered officer fails to comply with the requirements of section 50 and consequently an order of acquittal is recorded on that ground, the prosecution must thank itself for its lapses. It is argued that the legitimacy of the judicial process, as highlighted by Apex Court, may come under cloud if such lapses in conducting search are condoned by the Court. Drawing the attention of the Court to the statements of P.W.I Sri S. K. Ghosh, the then I.C. of Barasat P.S. P.W.5 S. I. Jayanta Chatterjee, P.W.6 A. Singha Roy and P.W.10 Sri Sanjib Ch. Chattopadhyay, the then B.D.O. Barasat I, it is submitted that at no point of time the appellant was intimated of his right to be searched before a Magistrate or a Gazetted Officer. Failure to inform the person of his right to be searched tantamounts to violation of the provision of section 50 of the N.D.P.S. Act. Partial option would be negation of the spirit enshrined in the provision. It is further submitted that since the accused had accepted the offer of being searched before a Magistrate, it was obligatory on the part of the officers to conduct such search in presence of the Magistrate. The officers having decided on search being conducted in presence of a Magistrate, that procedure at least could have been adhered to. What they did was to conduct the search in presence of an officer of their choice. In doing so, they took the wind out of the sails of the appellant. This is utter violation of the provision of section 50 of the N.D.P.S. Act.

8. The learned Defence Counsel has submitted that the Investigating Officer receiving the information regarding the illegal possession of contraband heroin by the appellant was required to reduce that fact in writing. Any omission would be an instance of non-compliance of provision of Sections 41 and 42 of the N.D.P.S. Act. Furthermore, his immediate official superior was not informed either. The officer went on conducting the search, ignoring the mandatory provision of Sections 41(1) and 42(2) of the N.D.P.S. Act. The learned Counsel has also referred to the case of Koluttumottil Razak Vs. State of Kerala, , in support of his contention that non-compliance with the requirement of Sections 42(1) and 42(2) would render the resultant seizure suspect particularly when it was conducted in presence of their stock witnesses.

9. It is contended on behalf of the defence that the seized articles were kept uncared for after seizure. Drawing the attention of the Court to the statement of P.W. 12 Sankar Sen, it is submitted that I.O. sent the sealed packet to the Chemical Analyst on the following date after taking custody of the sealed packet containing alleged heroin from P.W.I on the previous day. It is submitted that

P.W. 12 had not disclosed as to what arrangement he had made for proper preservation of the articles in the police station. It is argued that in view of the non-production of the Malkhana Register, it can not be assumed that articles were duly preserved and protected for a whole day in the police station. It is contended that in the absence of proof of contraband heroin being properly preserved in the Malkhana, the possibility of tampering of the seized articles cannot be ruled out. Citing the case of *Kanduri Sakoo v. State of Orissa*, reported in 1997(1) Crimes 331, it is submitted that in view of the non-production of the Malkhana Register, it would not be a prudent act to believe that the contraband article had been kept in proper custody in the interregnum period. It is argued that since the prosecution side has failed to prove by cogent and reliable evidence that seized article had been properly preserved in the intervening period, the Court should not bank on the report of the Chemical Analyst.

10. The learned Counsel representing the State has argued that since the seizure was made in a public place, there was no earthly reason to follow the procedure as provided in section 42 of the Act. It is argued that for application of section 42 it must be shown that the officer had information from personal knowledge or had received information given by others and such information had been taken down in writing. The other ingredient of section 42 is that information must relate to commission of offence punishable under Chapter VI and/or keeping or concealment of document or article in any building, conveyance or enclosed place which may furnish evidence of commission of such offence. Citing the case of *Rajendra and Anr. v. State of Madhya Pradesh*, reported in 2003(8) Supreme 786, it is argued that unless both the components exist, section 42 will have no application.

11. It is contended by the learned Counsel for the State that the Act has reposed more trust in a Gazetted Officer, as evidenced by the provision of section 50 of the Act. It is argued that since the search and seizure had been made in presence of available Gazetted Officer, it would be in conformity of the provision of section 50 of the Act. It is contended that the appellant was also apprised of his right to be searched in presence of a Magistrate. In doing so, fairplay and transparency in the search were ensured. There was, according to learned Counsel for the State, sufficient compliance of section 50 of the Act.

12. Consumption of drug and narcotic substance has posed a real threat to the society. To combat the deadly threat, the Act has provided stringent measures against person manufacturing, selling or dealing in brown sugar. At the same time to eliminate the possibility of innocent person being entangled in the N.D.P.S. Act, certain safeguards have been provided in the Act. Under the provision of section 50 of the Act, it is now mandatory for the officer conducting search and seizure to inform the accused of his right to be searched in presence of a Magistrate or a Gazetted Officer. In case the accused so opts, failure to conduct the search before a Gazetted Officer or a Magistrate may render the recovery of illicit article being subject to suspicion. As observed by the Apex

Court in the State of Punjab v. Baldev Singh (supra) the protection provided in section 50 to an accused to be intimated that he has right to have his personal search conducted before a Gazetted Officer or a Magistrate, if so requires, is sacrosanct and indivisible.

13. The search before a Gazetted Officer or a Magistrate imparts much more authenticity and credibility. In the instant case, the appellant was duly informed that he had the right to be searched in presence of a Magistrate, as borne out by the statements of P.W. 1 S. K. Ghosh, I.C., Barasat P.S., P.W. 5 S.I. Jayanta Chatterjee, P.W. 6 S.I. A. Singha Roy, P.W. 8 K. K. Dutta and P.W. 10 S.I. S.C. Chattopadhyay, B.D.O. Barasat-I. That the accused exercised his right of option to be searched before a Magistrate is evidenced by the statements of P.W.I S. K. Ghosh, P.W.5 S. I. Jayanta Chatterjee, P.W.6 A. Singha Roy, P.W. 8 K. K. Dutta and P.W. 10 S.C. Chattopadhyay. It has also been corroborated by the independent witness viz, P.W. 4 Md. Kenamullah. The fact that the person was apprised of his right to be searched before a Gazetted Officer or a Magistrate need not be reduced to writing. Acting on the option exercised by the appellant, requisition was sent to the S.D.O. for deputing a Magistrate. An official in the rank of B.D.O. was deputed by the S.D.O. to oversee the search. It is now mandatory for the prosecution to conduct the search, if the persons so desires, in presence of a Magistrate or a Gazetted Officer; subject to the availability of the officers. The person to be searched cannot insist on search being conducted before a particular officer. In fact, in Manohar Lal Vs. State of Rajasthan, , the Apex Court has observed that choice of the nearest Gazetted Officer or the nearest Magistrate has to be exercised by the officer making the search and not by the accused. The accused was initially apprised of his right to be searched before a Magistrate. Eventually, the search was conducted in presence of the available Gazetted Officer. It is not that the execution of the search is to be carried out with painstaking attention to minute details. In apprising the appellant of his right to be searched before a Magistrate and finally conducting the search in presence of the Gazetted Officer, the person so conducting the search had substantially complied with the provision of section 50 of the Act. The spirit of neutrality and fairness as enshrined in section 50 has been duly protected.

14. It has been raised by the defence that since the Malkhana Register was not produced, there is every possibility of the seized article being tampered with. Here at this juncture, we would like to mention that production of the Malkhana Register is not mandatory. What the prosecution is required to establish is that the seized articles were properly preserved and protected in between the seizure and examination of the articles by the analyst. As per statements of P.W. 1 I.C. S. K. Ghosh, the alamats were duly sealed at the spot. His claim finds corroboration from P.W. 7 Asit Kumar Sinha, P.W. 12. S. I. Sankar Sen has confirmed that he took delivery of the sealed packet and seizure list from I.C., Barasat P.S. He has averred that the seized alamats were sent by him to the chemical laboratory through the learned Court by forwarding memo. P.W. 11 Dr.

Utpal Saha, Senior Scientific Officer, State Drug Control, examined the sample. He claims to have received white envelope with the seals lying intact in connection with Barasat P.S. Case No. 551 dated 17.9.2000. It was after the opening of the seal that he found deep brown substance inside a synthetic packet covered in brown envelope which in turn was enclosed in a white envelope. The seal, as it appears from the statement of the witnesses, was embossed on the seized envelope right at the spot, the report rules out the possibility of tampering of the seized substance. The Chemical Analyst found contents of heroin to the extent of 45 per cent in the substance which made him conclude that it was positive. The report was prepared after observing all formalities and test. The Chemical Examiner's report not being cryptic, it must not be viewed with suspicion. There is nothing on record which gives the slightest indication that the contraband sample was not properly analysed. The learned Trial Judge was quite justified in banking on the report of the Chemical Analyst to base his conviction and sentence u/s 21 of the N.D.P.S. Act.

15. When an officer empowered to search, seize and arrest without warrant under the Act receives an information or has reason to believe from personal knowledge or information that an offence with regard to narcotic drug and psychotropic substance or control substance has been committed or any document or other article furnishing evidence of such offence or any illegal property furnishing evidence of holding any illegal acquired property is kept or concealed in any building or conveyance or enclosed place, such officer in between sunrise and sunset may enter into any such building or conveyance or place and seize such drug or substance and material used in the manufacture thereof and, if he thinks proper, arrest any person whom he has reason to believe to have committed an offence punishable under the Act. The information so received by him is required to be reduced to writing before further step with regard to search and seizure is undertaken. The immediate official superior is also required to be intimated by sending a copy thereof. In case of urgency, deviation from the normal process is permissible. As highlighted by the Apex Court in *State of Punjab Vs. Balbir Singh*, non-compliance of the provisions contained in section 42 or section 57 of the Act would not invalidate the trial or conviction if otherwise there is sufficient material. It has to be shown that the accused has been prejudiced and resulted in failure of justice by such non-compliance. Here in the instant case, there was no procedural lapse either. It has been elicited from the statement of P.W. 1 that the information so received by him was reduced to writing in a general diary. His immediate superior officials viz. S.D.P.O. and S.D.O. were duly intimated of the information so received by him. Every possible steps were taken to guarantee trustworthiness and fairness in search and seizure. The appellant cannot be said to have been prejudiced in any way. Viewed from these aspects, it cannot be said that appellant is entitled to be acquitted for non-compliance of some of the provisions of the Act.

16. The Court below in its reasoned judgment has covered of the important aspects of the case. There is no reason to interfere with the finding so made by

the Court below. The appeal is devoid of merit and, as such, it is liable to be dismissed. Accordingly, the sentence and conviction passed in N-79 of 2000 u/s 21 of the N.D.P.S. Act are affirmed and the appeal is dismissed. Since everything was covered u/s 21 of the NDPS Act, the Court below rightly did not pass any conviction and sentence u/s 27 of the N.D.P.S. Act.

Amit Talukdar, J.

17. I agree.