

**(2000) 07 CAL CK 0056**

**In the Calcutta High Court**

**Case No :** Criminal Appellate Jurisdiction C.R.A. No. 75 of 2000

Samir Ghosh

APPELLANT

Vs

State of West Bengal

RESPONDENT

**Date of Decision :** 27-07-2000

**Acts Referred:**

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 50, 52A, 53

**Citation :** (2000) 3 CALLT 566 : (2000) 2 CHN 583

**Hon'ble Judges :** Debiprasad Sengupta, J

**Bench :** Single Bench

**Advocate :** Mr. Sekhar Basu, Mr. Debasish Roy and Mr. Souvik Mitra, for the Appellant; Mr. R.K. Ghoshal, for the Respondent

## Judgement

D.P. Sengupta, J.—This is an appeal against an order of conviction and sentence dated 25.2.2000 passed by the learned Judge, Special Court, N.D.P.S. Act, Howrah in T.R. case No. 137/92 thereby convicting the appellant u/s 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentencing him to suffer rigorous imprisonment for 3 years and to pay a fine of Rs. 2000/- in default to suffer rigorous imprisonment for a term of one year.

2. The prosecution case is that on 10.8.92 at about 18.30 hours PW 1 along with his Immediate superior, namely, Shri D.B. Dasgupta, Deputy Excise Collector, Narcotic Cell being accompanied by others held a raid at Oriopara within the jurisdiction of Golabari Police Station in the District of Howrah on the basis of a secret-information received by Shri D.B. Dasgupta. The present appellant was found standing in front of his house. On being asked he disclosed his identity as that of the appellant. He was informed by the PW 1 that they had information that the appellant was selling Ganja and they wanted to search him. The appellant was also given the option of being searched in presence of any Magistrate or any Gazetted Officer. He was also informed that one gazetted officer was present with the raiding party. The appellant, however, denied and

allowed PW1 to search him. PW1 accordingly after observing all formalities searched the appellant in presence of Srt Dasgupta and public witnesses. On search one polythene packet containing 196 small purious of Ganja each weighing 1 gram, 13 purlas of Ganja each weighing 2 grams and two purlas of Ganja each weighing 5 grams--in total 232 Grams of Ganja were recovered from the possession of the appellant. The appellant thereafter led the raiding party to his bed room wherefrom two cakes of Ganja each weighing one kg were recovered and one Jute bag containing 1 kg of Ganja was also recovered from the said room. The aforesaid goods were seized under a seizure list, a copy of which was handed over to the appellant. Samples were taken of the articles which were sealed and levelled and the appellant was arrested after being Informed about the grounds of arrest. Subsequently the samples were sent to the Analyst for examination and after obtaining such report of Analyst (PW 5), the prosecution report was filed by the PW1 before the Court of the learned Judge on 4.8.94.

3. To prove its case the prosecution examined as many as 5 witnesses while none was examined on behalf of the defence PW1, Saroj Kumar Mondal is the complainant and also the Investigating Officer of the case. He is a member of the raiding party. PW2 Samir Goswami, Constable of the Narcotic Cell, Excise Directorate, West Bengal and he is also a member of the raiding party. PW3 Nagendranath Dhali is a constable of Narcotic Cell and is also a member of the raiding team. PW4, Basudev Adhikary is attached to the Narcotic Cell, Excise Directorate, Government of West Bengal. PW5, Dilip Kr. Seth, Assistant Chemical Examiner, Government of West Bengal. The learned Judge after assessment of all the materials on record held the appellant guilty of committing of an offence punishable u/s 20(b)(i) of the Act of 1985 and sentenced him to suffer rigorous imprisonment for 3 years and to pay a fine of Rs. 2000/-.

4. Mr. Sekhar Basu, the learned Advocate appearing for the appellant submits that the provision of section 52A of the Act, 1985 is mandatory in nature and non-compliance with the provision of this section has rendered the order of conviction sentence unsustainable in law. According to him in the present case PW1 did not follow any of the conditions mentioned in section 52A(2) of the Act of 1985. The failure to do so is a failure to comply with strict procedural requirements and the same rendered the order of conviction and sentence bad in law. Mr. Bose submits that in the present case it appears from the evidence on records that the samples were taken out and sent for chemical examination without complying with the provision of section 52A of the NDPS Act Mr. Basu draws the attention of the Court to the provision of section 52A(2) of the said Act which runs as follows :-

"Where any narcotic drug or psychotropic substance has been seized and forwarded to the Officer-in-Charge of the nearest police station or to the officer empowered u/s 53 the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such

details relating to their description, quality, quantity, mode of packing, marks, number or such other indentifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the Identity of the narcotic drugs or psychotropic substances in any proceedings under tills Act and make an application to any Magistrate for the purpose of-

- (a) certifying the correctness of the inventory prepared; or
- (b) taking. In the presence of such Magistrate photographs of such drugs or substances and certifying such photographs as true; or
- (c) allowing to draw representative samples of such drugs or substances, in the presence of Magistrate and certifying the correctness of a list of samples so drawn.

(1) Where an application is made under sub-section;

(2) the Magistrate shall, as soon as may allow the application."

5. Mr. Basu submits that in exercise of the power conferred by section 52A(2) of the NDPS Act, 1985, which was Incorporated in the principal Act on 29th May, 1989, the Government of India, Ministry of Finance (Depart ment of Revenue) by Standing Order No. 1/89 dated 13th June, 1989 laid down elaborate guidelines for effectuation of the provisions of section 52A of the NDPS Act. Mr. Basu draws my attention to the different sections (sections I, II, III and IV) of the said standing orders dated 13th June, 1989, Attention was specially drawn to section IV of the said order and different paragraphs and statutory directions contained therein. I have carefully gone through the same and I find that section IV of the said standing order is virtually a replica of the provision of section 52A(2) of the NDPS Act. Mr. Basu submits that paragraph 4.1 of section IV of the said standing order is of utmost importance with regard to preparation of Inventory and making application to the Magistrate for certifying the correctness of the Inventory and compliance with other procedures. I have gone through the said paragraph 4.0 of section IV of the standing order which runs as follows :--

"Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered u/s 53, the officer, referred to in paragraph 3.3 ..... of the order shall prepare an Inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and such other particulars as may be considered ..... relevant to the identity of the aforesaid drugs in any proceedings under the Act and make an application to any Magistrate for the purpose of-

- (a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn."

6. According to Mr. Basu the samples were taken out and were sent for chemical analysis by the Officer of the Narcotic Control Bureau in violation of the mandatory provision of section 52A of the NDPS Act. Mr. Basu points out that on 10.8.92 seized article was kept in narcotic cell, Malkhana. But there is no document to show such receipt of articles by Narcotic Cell, Malkhana. There is nothing in evidence to indicate when the articles were taken out from the Malkhana and sent for chemical examination. PW1 in his evidence says that he cannot say through whom the samples were sent to chemical examiner. PW2 stated in his evidence that after seizure OC kept the Alamat in his custody and at the Barrack OC entered the Alamat in the Malkhana registered and put the same in Malkhana. But there is absolutely no evidence when the article was taken out from Malkhana and sent for chemical examination.

7. From the evidence of record it is evident that there is a total non-compliance of the provisions of section 52A of the NDPS Act, which is a mandatory provision. The prosecution has failed to prove when such articles were received by Narcotic Cell, Malkhana or when the article was taken out from the Malkhana and sent for chemical examination. One should keep in mind that one of the objects sought to be achieved by the legislature for introduction of section 52A in the principal Act of 1985 is to prevent "substitution" of articles. Articles after seizure can only be substituted when it is in the custody of the officer and/or department which seized the same. If these procedures are not followed, the possibility of "substitution" of articles cannot be ruled out.

8. It is significant to note that seizure was made in presence of two witnesses but those two witnesses were not examined in this case and prosecution has not given any explanation for non-examination of such seizure witnesses.

9. Mr. Basu next submits that there is a total non-compliance of section 50 of the NDPS Act in the present case. u/s 50 it is imperative on the part of the officer Intending to search a person, to inform the person that he has got a valuable right to be searched in presence of a Magistrate or a Gazetted Officer. This provision is mandatory. Mr. Basu submits that cogent evidence has to be produced to show that the said person was made aware of such right The law relating to NDPS Act and its application has been laid down by the Hon'ble Supreme Court in the case of State of Punjab v. Balbir Singh, reported in 1994 Calcutta Criminal Law Reporter (SC) at page 121.

10. It has been stated that to avoid harm and also to avoid abuse of the principles of the Act, certain safeguards have been provided in the Act itself which are to be observed strictly. In the present case as it appears from the

evidence on record that PW1 asked the accused at the time of search whether he required any Magistrate or any Gazetted Officer for the purpose of search. He also disclosed that one Gazetted Officer of the same department was present with the raiding party. It does not appear from the evidence on record that the accused was ever told by any officer that he has got valuable rights to be searched in presence of a Magistrate or a Gazetted Officer. Apart from that there is no cogent evidence that such offer was actually given to the accused by PW1. Mr. Basu relies on a Judgment reported in 2000, Calcutta Criminal Law Reporter (SC) 44. In paragraph 9 of the said judgment it was observed by the Hon'ble apex Court as follows:--

"On a bare reading of the provision it is clear that the statute provides a reasonable safeguard to the accused before a search of his person is made by an officer authorised u/s 42 to make it. The provision is also intended to avoid criticism of arbitrary and high handed action against authorised officers. The legislature in its wisdom considered it necessary to provide such a statutory safeguard to lend credibility to the procedure keeping in view the severe punishment prescribed in the statute. Various questions relating to interpretation of section 50, obligatory character of the provisions therein and the consequence of non-compliance with the requirements have been considered by a Constitution Bench of this Court in the case of State of Punjab Vs. Baldev Singh, etc. etc., . On a detailed discussion of the various contentions raised and the previous decisions of the Court in the matter this Court held as follows :--

"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 NDPS Act. It appears to have been incorporated in the Act keeping in view the severity of the punishment. The search before a Gazetted Officer or a Magistrate would impart much more authenticity and credit-worthiness to the search and seizure proceeding. It would also verily strengthen the prosecution case. There is, thus, no justification for the empowered officer, who goes to search the person, on prior information, to effect the search, of not informing the concerned person of the existence of his right to have his search conducted before a Gazetted Officer or a Magistrate, so as to enable him to avail of that right. It is, however, not necessary to give the information to the person to be searched about his right in writing. It is sufficient if such information is communicated to the concerned person orally and as far as possible in presence of respectable persons witnessing the arrest and search. The prosecution must, however, at the trial, establish that the empowered officer had conveyed the information to the concerned person of his right of being searched in the presence of the Magistrate or a Gazetted Officer, at the time of the intended search. Courts have to be satisfied at the trial of the case about due compliance with the requirements provided in section 50- No presumption u/s 54 of the Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the Court that the requirements

of section 50 were duly complied with."

11. From the Judgment referred to above it becomes clear that in view of the mandatory provisions of section 50 of the NDPS Act, the accused is to be informed that he has got a valuable right to be searched in presence of a Gazetted Officer or a Magistrate. Such offer should be given as far as possible in presence of respectable persons witnessing the arrest and search. During trial the prosecution must establish that the empowered officer conveyed the information to the accused about the valuable right to be searched in presence of the Magistrate or a Gazetted Officer. Mr. Basu next relies on a judgment reported in 1999 2 CHN 759 (Full Bench). It has been held in the said decision that taking a gazetted officer with the raiding party makes such officer indirectly interested in the success of the raid and such an officer can never be said to be an independent person. It was further held in the said decision that mere presence of a Gazetted Officer of the same department to which the searching officer belongs, is not an adequate compliance of section 50 of the NDPS Act. For strict compliance of section 50 of the Act a search must be conducted in presence of a Magistrate or a Gazetted Officer who is totally independent and is not in any way Interested in the success of the raid.

12. Mr. Basu next submits that investigation of a case under the NDPS Act should be done by an independent agency and not by the person conducting search and seizure. He points out that in the present case the PW1, who is an officer of the raiding party and conducted search and seizure, is also the Investigating Officer of the case. In support of his contention Mr. Basu relies on a Judgment reported in 1995 2 CHN 448 . In paragraph 24 of the said judgment it has been held by the Division Bench of this Court as follows :--

"Some principle has also been enunciated in another case reported in Nathiya and Another Vs. State of Rajasthan, , where it has been laid down that in case of an offence under N.D.P.S. Act the investigation should be done by an independent agency and not by the person conducting search and seizure."

13. Mr. R.K. Ghoshal, learned Advocate appearing for the State submits that the order of conviction and sentence does not suffer from any illegality. He submits that the provision of section 50 was fully complied with in the instant case as the accused was given an option to be searched in presence of a Gazetted Officer or a Magistrate. Mr. Ghoshal submits that from the evidence of PW1 and 2 it becomes clear that the accused was given the option to be searched in presence of a Gazetted Officer and/or a Magistrate. But the accused denied and allowed them to search. After observing all formalities the PW1 conducted the search in presence of the Deputy Collector of Excise and public witnesses and there is no illegality in the search and seizure. Mr. Ghoshal admits that PW1, who conducted the search and seizure, is the Investigating Officer of the case. But simply because of this reason the trial cannot be vitiated and the order of conviction and sentence cannot be held bad in law. I am unable to accept such submission made by the learned Advocate appearing for the State in view of the discussion made

above and in view of the Judgment referred to above.

I find sufficient merit in the submission of Mr. Basu and I am of the opinion that the order of conviction and sentence cannot be sustained. Accordingly the appeal is allowed. The order of conviction and sentence passed by the learned trial Judge is set aside. The accused appellant be set at liberty forthwith if not wanted in any other case. Seized articles be destroyed in accordance with law.

14. Appeal allowed