
(2016) 02 CAL CK 0078
In the Calcutta High Court
Case No : C.R.A. No. 590 of 2014

Sk. Raju @ Abdul Haque @ Jagga

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 19-02-2016

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20(b)(ii)(c), 35, 42(1)(2), 50, 57

Citation : (2016) 2 CalHCN 625

Hon'ble Judges : Rajiv Sharma and Shivakant Prasad, JJ.

Bench : Division Bench

Advocate : Mr. Anand Keshri, Advocate, for the Appellant; Mr. Manjit Singh and Mr. Sanjoy Bardhan, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Shivakant Prasad, J.—The judgment and order dated February 15, 2014 and dated February 17, 2014 passed by the learned Additional Sessions Judge, 12th Court, Alipore, 24-Parganas (South) - cum-learned Judge, Special Court under Narcotic Drugs and Psychotropic Substances Act, in S.T. No. 01(10) of 2012 [S.C. No. 09(05) 2012] thereby convicting the appellant for the offence punishable under Section 20(b)(ii)(c) of Narcotic Drugs and Psychotropic Substances Act and sentencing him to suffer rigorous imprisonment for fourteen (14) years and to pay a fine of Rs. 1,40,000/- in default to undergo rigorous imprisonment for two years are appealed against in the present appeal.

2. Brief facts leading to the instant appeal is that on 15.11.2011 the S.I. Narcotic Cell, DD on receipt of a credible source information that one narcotic drug dealer would be coming in the vicinity of Tiljala Phalguni Club to supply huge quantity of charas to some miscreants, that after obtaining permission from his superior A.C. Narcotic Cell, DD formed a team and reached the spot with necessary accessories at about 12.50 hours and at about 13.40 hours the source pointed out that a middle aged person was coming along Picnic Garden Road from West

to East direction who was immediately detained and intercepted by the team members in front of Falguni Club at 138B/1, Picnic Garden Road, Kolkata -39 two onlookers, namely, Rahul Dutta and Md. Rehan on being requested to be witnesses to the search, to which they agreed. The complainant and the members of the raiding party disclosed their identity and also informed him about the reason for detention of him and thereafter the said person disclosed his identity as Sk. Raju @ Abdul Haque @ Jagga, the present appellant. The appellant was searched in presence of a Gazetted Officer on the option for search executed by the appellant. On opening the bag on search, some blackish deep brown colour rectangular shaped broken small sheets were found which were tested separately on the spot in presence of Gazetted Officer and witnesses and found positive for presence of charas. There were total 19 pcs. of sheets and on weighment of the same 1kg. 500 grams of charas in the said bag and Rs. 2400/- as sale proceeds were recovered from Sk. Raju @ Abdul Haque @ Jagga, for which he failed to offer any plausible explanation. The articles were seized, packed, labelled and sealed in three envelopes marked as 'A?', 'B?' and 'C?'. Seizure list and Inventory list dated 15.11.2011 were prepared and the appellant, thereafter, was arrested and a specific case was registered against him being Tiljala Police Station Case No. 426 of 2011 dated 15.11.2011 under Section 20(b)(ii)(c) of the NDPS Act.

3. On completion of investigation the Investigating Officer submitted charge-sheet under Section 20(b)(ii)(c) of the NDPS Act.

4. The learned Trial Judge framed charge under Section 20(b)(ii)(c) of the NDPS Act to which the appellant pleaded not guilty and claimed to be tried.

5. To substantiate the charge, the prosecution examined as many as six witnesses and adduced documentary exhibits during the course of the trial.

6. The defence of the appellant is one of denial of charge levelled against him which emerges from the trend of cross-examination of prosecution witnesses and from the statement of the appellant recorded under Section 313 Cr.P.C. to which he did not adduce any defence evidence.

7. On conclusion of the trial, the appellant accused was convicted on the charge under Section 20(b)(ii)(c) of Narcotic Drugs and Psychotropic Substances Act and sentenced him to suffer rigorous imprisonment for 14(fourteen) years and to pay a fine of Rs. 1,40,000/- in default to undergo rigorous imprisonment for two years by the judgment and orders dated 15.02.2014 and 17.02.2014.

8. Being aggrieved by and dissatisfied with the said impugned judgment, the appellant preferred this appeal inter alia on the grounds and with the submission that the object of NDPS act is to make stringent conditions for control and regulations of operations relating the drugs and substances. At the same time, to avoid harm to innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. One such provision relates to taking down of the information

and the provisions make it very clear that any receipt of credible information should be reduced into writing and to that extent the same is mandatory and consequently failure to comply with these requirements affects the prosecution case and vitiates the trial. Learned Counsel for the appellant Mr. Anand Keshri further contended that provision of Section 42 of the Act has not been complied with inasmuch as P.W.-2 has deposed that he received a credible information on the date of the alleged incident and sought for permission from his superior but it has not been categorically stated whether on receipt of such information he had diarised the same in the form of a general diary after reducing it into writing.

9. It is further submitted that the provision of Section 50 has also not been complied with, although it is elicited from the depositions that the appellant was given an option to be searched by a Gazetted Officer or a Magistrate, as the independent witness P.W.-5 does not support such search.

10. We fully agree with the principle underlying the provisions of Section 42 and Section 50 of the NDPS Act, 1985 which are to be interpreted in the light of Article 21 of the Constitution as valuable right of a person apprehended, the legislature has clothed an accused with and has incorporated in the said Act.

11. The provision of Section 50 of the Act necessarily implies that the officer making search must inform the person to be searched of his right to be taken to the nearest Gazetted Officer mentioned in Section 42 or to the nearest Magistrate without any delay. Section 50 is not a ritual or idle formality to be performed or to append a note at the end of the search memo, but we are unable to agree with the contention that in the instant case, the investigating agency has deliberately failed to comply with certain salutary provisions of Section 42 and Section 50 of the Act, because in this case quantum of 1 kg. 500 grams of charas was recovered from the bag carried by the accused appellant.

12. It would be apt to reproduce the mandatory provision of Section 50 of NDPS Act, 1985 which reads as under:

"50. Conditions under which search of persons shall be conducted. - (1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to nearest Magistrate.

If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

The Gazetted Officer or the Magistrate before whom any such person is brought shall if he sees no reasonable ground but search, forthwith discharge the person but otherwise shall direct that search be made.

No female shall be searched by anyone excepting a female."

13. On behalf of State respondent, case of State of Himachal Pradesh v. Pawan Kumar has been relied on inviting our attention to the observation that a bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension of weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. The common parlance it would be that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act.

14. Mr. Manjit Singh learned Counsel for the State has thus referred to series of decisions to support his contention that Section 50 is not applicable in the cases of search of some baggage or article etc. being carried by the accused.

15. Our attention is invited to paragraph 14 of the case of Pawan Kumar (Supra) wherein reference have been made to the following decisions thus -

"I. Abdul Rashid Ibrahim Mansuri v. State of Gujarat, (2000 (2) SCC 513) - This is a decision by a Three Judge Bench presided over by Dr. A.S. Anand, C.J., who wrote the opinion of the Court in the Constitution Bench decision in State of Punjab v. Baldev Singh. In this case four gunny bags were found in an auto rickshaw which the accused was driving and there was no other person present. The argument based on non-compliance of Section 50 as explained in the case of Baldev Singh was rejected on the ground that the gunny bags were not inextricably connected with the person of the accused.

II. Madan Lal v. State of H.P. 2003 (7) SCC 465 (para 16) - It was held that Section 50 would apply in the case of search of a person as contrasted to search of vehicles, premises or articles.

III. Gurbax Singh v. State of Haryana (2001(3) SCC 28) - Accused got down from a train carrying a Katta (gunny bag) on his shoulder. Held that Section 50 was not applicable.

IV. State of Punjab v. Makhan Singh (2004 (3) SCC 453) - The accused was apprehended while alighting from a bus with a tin box in his hand in which contraband was found. The High Court acquitted the accused on account of non-compliance of Section 50. On the finding that Section will not apply, the judgment of the High Court was reversed and the accused was convicted.

V. Kanhaiya Lal v. State of M.P. 2000(10) SCC 380 - One kg. of opium was found in a bag which was being carried by the accused. The argument based on Section

50 was rejected on the ground that it was not a case of search of the person of the accused.

VI. *Birakishore Kar v. State of Orissa* 2000(9) SCC 541 - Accused was found lying on a plastic bag in a train compartment. Argument based on Section 50 was rejected on the ground that the accused was sitting on the plastic bag and it was not a case of the search of the person of the accused.

VII. *Krishna Kanwar v. State of Rajasthan* 2004(2) SCC 608 (para 19) - Held, Section 50 applies where search has to be in relation to a person as contrasted to search of premises, vehicles, articles or bag.

VIII. *Sarjudas v. State of Gujarat*, (1999 (8) SCC 508) - The accused were riding a scooter on which a bag was hanging in which charas was found Section 50 was held not applicable as it was not a case where the person of the accused was searched.

IX. *Saikou Jabbi v. State of Maharashtra*, JT 2003 (9) SC 609) - Heroine was found in a bag. It was held that Section 50 was not applicable as it applies to search of a person."

16. In *State of Rajasthan v. Ramchandra* (2005) CRI. L. J. 2201, it has been held that question whether requirement of Section 50 was complied with is to be decided on facts of each case. There cannot be any sweeping generalisation and/or strait-jacket formula.

17. In *Vijaysinh Chandubha Jadeja v. State of Gujarat* (2011) CRI. L.J. 680, it has been observed that though Section 50 gives an option to the empowered officer to take suspect either before the nearest Gazetted Officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other office. It would not only add legitimacy to search proceedings, it may verily strengthen the prosecution as well.

18. In *Yasihey Yohin v. Department of Customs, Shillong* Hon'ble Apex Court has observed in paragraph 10 thus -

"10. This position in law is settled by the Constitution Bench in the case of *State of Punjab v. Baldev Singh* , AIR 1999 SC 2378 : (1999 AIR SCW 2494) and in *Megh Singh v. State of Punjab*, 2003 8 SCC 666: (AIR 2003 SC 3184: 2003 AIR SCW 4536), where application of Section 50 is only in case of search of a person as contrasted to search of premises, vehicles or articles. But in cases where the line of separation is thin and fine between search of a person and an artificial object, the test of inextricable connection is to be applied and then conclusion is to be reached as to whether the search was that of a person or not. The above test has been noticed in the case of *Namdi Francis Nwazor v. Union of India and Anr.*, (1998) 8 SCC 534, wherein it is held that if the search is of a bag which is

inextricably connected with the person, Section 50 of the Act will apply, and if it is not so connected the provisions will not apply. It is when an article is lying elsewhere and is not on the person of the accused and is brought to a place where the accused is found, and on search, incriminating articles are found therefrom it cannot attract the requirements of Section 50 of the Act for the simple reason that the bag was not found on the accused person. In the instant case, the bag is brought by A2 and the contents of the bag are taken out by him and given for search which is thereafter seized by the officials after having found contraband substance. In such a case the inextricable connection between the search of a person and the bag cannot be established but rather it is only the search of the bag and therefore, the search and seizure conducted by the gazetted officer need not comply with the requirements under Section 50 of the Act."

19. In *Krishan Kuamar v. State of Haryana* reported in 2014 CRI. L. J. 3147, the appellant was stopped by the police party headed by Sub-Inspector at bus stand having a plastic bag in his hand. On seeing the police party, appellant had tried to conceal his presence by sitting near water tank on the pretext of passing urine. The appellant was apprehended on suspicion and notice under Section 50 of the Act was served seeking his consent as to whether he wanted his search to be made in the presence of a Gazetted Officer or a Magistrate.

20. In the above set of fact the Hon'ble Apex Court held that provision of Section 50 is applicable only where search of a person is involved. It is not made applicable in those cases where no search of a person is to be conducted.

21. In case of *Kulwinder Singh & Anr. v. State of Punjab* (2015) SAR (Criminal) 597 as regards compliance of Section 50 of the said Act is concerned, the Hon'ble Apex Court held that Section 50 only applies in case of personal search of a person but it is not extended to a search of a final or a pensive or a bag or premises and plea of non-compliance of Section 50 of the Act has no force in the facts of the case where the appellant accused was found in possession of 110 bags of contraband carrying in a truck and each bag contained 38 kgs. poppy husk.

22. In the above decision the Hon'ble Court further observed that the case of prosecution cannot be rejected solely on the ground that the independent witnesses have not been examined when on the perusal of the evidence on record the Court finds that the case put forth by the prosecution is trustworthy.

23. In a case of *State Government NCT of Delhi v. Sunil* (2001)(1) SCC 652, it has been observed that it is not a legally approvable procedure to presume the police action as an unreliable to start with, nor to jettison such action merely for the reason that the police did not collect signatures of independent persons in the documents made contemporaneous with such action.

24. We have respectfully gone through the decisions cited above which are well-nigh within the facts and circumstances of the instant case and lending the words

from the cited decision, we observe that even if we proceed on the basis that Section 50 applies, we find that requirement of Section 50 was fulfilled inasmuch as the notice under Section 50 giving option has been complied with by the officer, by giving first and second option vide Exbt. 3 and Exbt. 4 to the person apprehended, the appellant herein inferring his legal right of being searched in presence of a Gazetted Officer and appellant accused opted for being searched before the Gazetted Officer, nevertheless, in the instant case, there has been recovery of 1 kg. 500 grams of charas kept in the bag, carried by the accused appellant.

25. In the second fold argument, Mr. Keshri has argued that there has been non-compliance of the safeguard as provided under Section 42(1)(2) of the Act when on receipt of secret information, the prosecuting agency had not recorded the G.D.E. reducing the information into writing.

26. We are not approving such plea of non-compliance of Section 42 of the Act. on being persuaded by the principle laid in case of Mohan Lal v. State of Rajasthan 2015 SAR (Criminal) 770, wherein it has been held that in case the place is a public place provision of Section 43 of the Act comes into play, question of non-compliance of Section 42(2) would not arise.

27. Section 43 of the NDPS Act contemplates seizure made in the public place. There is a distinction between Section 42 and Section 43 of the NDPS Act. If a search is made in a public place the officer taking the search is not required to comply with sub-section (1) and (2) of Section 42 of NDPS Act. In this case, we have found that seizure was in a public place, i.e. in front of Falguni Club situated at 138B/1, Picnic Garden Road within Tiljala P.S., ergo, the plea of non-compliance of Section 42 alleged by the Counsel for the appellant cannot be accepted.

28. As regards Section 57 of the Act it relates to report of arrest and seizure providing that whenever any person makes any arrest or seizure under the Act he shall, within 42 hours next after such arrest or seizure make a full report of all the particulars of such report or seizure to his immediate official superior. It has been held that provisions of Section 57 are not mandatory in nature and when substantial compliance was made it would not vitiate the prosecution case and the question of prejudice would not arise.

29. In the case in hand, we have found from the documents on Exbts. and the evidence on record that Prasanta Kumar Das, S.I. Narcotic Cell, DD, took permission to conduct raid/search/seizure under NDPS Act from Assistant Commissioner of Police giving information to the effect that he had receipt from a reliable source that one drug seller/supplier would come to sale/supply narcotic drug in the vicinity of Tiljala Falguni Club on 15.11.2011 in the afternoon vide Exbt.-2. First option and second option Exbt. 3 and Exbt. 4 reflect that notice within the meaning of Section 50 of the Act was given to the apprehended person to which he had exercised his right of being searched in presence of a

Gazetted Office. The search cum seizure list Ext. 5/3 shows that search was conducted and contrabands being 19 pcs. of small sheets of cannabis resin commonly called 'charas' weighing about net 1 kg. 500 grams in all and cash of Rs. 2,400/- were seized from the possession of the appellant, morefully, the contraband were found inside one biscuit colour small size jute carry bag fitted with two handles in presence of witnesses. Inventory list Exbt.-7 was also prepared and entire facts relating to apprehension of the appellant search and seizure after compliance of legal formalities were well reduced in writing and FIR was lodged to the Officer-in-charge, Tiljala P.S. on the basis of which the FIR being Tiljala P.S. case No. 426/11 dated 15.11.2011 under Section 20(b)(ii)(c) of NDPS Act was started. The Exbts. being the seized articles were handed over to S.I. Amit Kumar Chatterjee, Narcotic Cell, DD, as per order of DCDD (Special) after legal formalities as depicted from Exbt.-11. It further appears from Exbt.12 that a telephonic message was given to the O.C., Tiljala P.S. by DCDD (Spl.), Lalbazar for sending malkhana register of 2011 with a competent person for production before ADJ, Alipore Court which was complied with as per Exbt.-13 and the G.D. Entry No. 881 at 18.15 hours dated 15.11.2011 (Exbt.-15) goes to show that J. Mukherjee, Addl. O.C., Tiljala P.S. had been to the spot and in his presence being a Gazetted Officer, search was conducted. Extract of Malkhana Register, Exbt.-18 reflects that the seized alamats were kept in the Malkhana. It also appears from Exbt.-16 that A.K. Chatterjee, S.I. Narcotic Cell, DD, gave special report to Narcotic Cell, DD, about the arrest of the appellant after search and seizure of 19 pcs. rectangular shape blackish deep brown coloured thin solid sheets of cannabis resin commonly known as Charas weighing about 1 kg. 500 grams in all for which he could not render any explanation and seized cash of Rs. 2,400/-. It appears from the Expert Report of Government Analysis of State Drugs Control & Research Laboratory, Exbt.-1 that laboratory had received 19 pcs. of deep brown rectangular shaped bars with characteristic odour kept in a black synthetic packet enclosed in a brown envelop in intact and identical with the specimen impression of the seal which weighted 1 kg. 485 grams. As such, the entire contrabands articles as per seizure was sent for chemical analysis.

30. Therefore, the defence submission that samples were drawn in triplicate yet the evidence of the chemical analyst shows that the sample packets had different weights cannot be accepted by us and adhering to the settled principle of law that once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 of the Act where also presumption is available to be drawn from possession of illicit articles.

31. It has been observed in *State of Punjab v. Baldev Singh*, drug abuse is a social malady. While drug addiction eats into the vitals of the society, drug trafficking not only eats into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including

encouragement of terrorism. It has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. Reference in the said decision has also been made to some United Nation Conventions which the Government of India has ratified. It is, therefore, absolutely imperative that those who indulge in this kind of nefarious activities should not go scot-free on technical pleas which come handy to their advantage in a fraction of second by slight movement of the baggage, being placed to any part of their body, which baggage may contain the incriminating article.

32. Accordingly, we do not accept the submission of Mr. Keshir that the judgment portrays that important pieces of evidence have been left aside and that learned Judge proceeded more on a hypothetical basis rather than on facts available to the Court and that such impugned judgment is bereft of legal and factual materials unworthy of acceptance.

33. Mr. Keshri has further addressed us on the quantum of sentence which in our opinion, has been suitable awarded on the accused appellant in terms of law and the nature of contraband recovered from the possession of the appellant.

34. Now, giving and anxious consideration to the facts and circumstances of the case and regard being had to the discussion in the forgoing paragraph we do not find any ground to interfere into the findings in the judgment impugned and the appeal is devoid of merit.

35. Accordingly, we dismiss the appeal.

36. Let the Lower Court Record together with a copy of this Judgment be sent down to the learned Trial Court forthwith.

37. Urgent certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

38. Rajiv Sharma, J.—I agree.