

(1992) 12 CAL CK 0026
In the Calcutta High Court
Case No : Criminal Appeal No. 157 of 1991

T. Paul Kuki alias Pabul Youthhand alias T.P. Kuki APPELLANT
Vs
The State of West Bengal RESPONDENT

Date of Decision : 22-12-1992

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2, 21,
36A(1), 36A(C), 42

Citation : (1993) 1 CALLT 342

Hon'ble Judges : Shamsuddin Ahmed, J; Amal Kumar Chatterjee, J

Bench : Division Bench

Advocate : Arabinda Ghosh, for the Appellant; A.R. Saha and S. Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

Amal Kumar Chatterjee, J.—The appellant has been convicted by a learned Judge of City Sessions Court, Calcutta u/s 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act) and sentenced to suffer rigorous imprisonment for 10 years and also to pay a fine of Rs. 1,00,000/- in default to suffer simple imprisonment for three months for having a unauthorised possession of 100 gms of heroin in the circumstances as under.

2. Pursuant to a certain information, a team of Intelligence Officers of the Narcotic Control Bureau, Eastern Zonal Unit (Bureau for short) led by Sri Amitava Chatterjee, P.W. 2 mounted surveillance at the crossing of Park Street and Free School Street in Calcutta on the 26th August, 1989 at about 4 p.m. About an hour thereafter, the appellant, on being pointed out by the source accompanying the team, was intercepted. He had in his hand a packet wrapped in a newspaper which on being opened at the time of preliminary search after observing legal formalities was found to contain a polythene packet having some white powder in it, believed to be heroin. As a crowd gathered after interception of the appellant,

he and the witnesses were brought to the office of the Bureau with their consent where by perforating the polythene packet, a small quantity of white powder was taken out and on test it was found to be heroin. Thereafter a sample was drawn from the packet, seizure was completed and a seizure list prepared on which the witnesses and the appellant signed and a copy thereof was duly delivered to him. A certain room of Chowringhee Hotel where the appellant was said to be a boarder was also searched and some personal effects belonging to him were seized. Sri A. Dasgupta, P.W. A, an Intelligence Officer of the Bureau recorded a statement of the appellant u/s 67 of the Act on the same date while Shyamal Dey, P.W. 5, another Intelligence Officer of the Bureau arrested him on the following date at about 8 p.m. for which an arrest memo setting forth the grounds for arrest was prepared and a copy thereof was furnished to the appellant. Sri Ashoke Mukhopadhyaya, P.W. 1, another Intelligence Officer filed a complaint before the Chief Metropolitan Magistrate, Calcutta and ultimately on the 18th April, 1990 the learned Magistrate in terms of Section 36A(1)(b) read with Section 36A(c) and Section 36(d)(1) of the Act forwarded the case record to the Chief Judge of the City Sessions Court, Calcutta who in turn assigned the case to the trial Judge for disposal.

3. The appellant's defence appeared to be that he was not in possession of any narcotic substance at all and that he was apprehended while he was taking tea at a nearby hotel and he had no option but to append signature on certain papers etc., for fear of assault by the Officers.

4. The learned Judge on consideration of the evidence adduced before him has found the appellant guilty and convicted and sentenced him as already indicated.

5. The appellant appears to have been intercepted by a team of officers composed of Sri Amitava Chatterjee P.W. 2, Sri Chanchal Bhattacharja P.W. 3, Sri Shyamal Dey P.W. 5, Sri Sudip Kr. Datta Gupta P.W. 6 and Sri Harendra Kr. Pandey P.W. 11. It was their evidence that when the search of the person of the appellant was commenced at the crossing of Park Street and Free School Street, a crowd gathered and so for the safety of the contraband found as well as for a peaceful search operation, the appellant and also the witnesses who were called to see the search were taken to the office of the Bureau with their consent where the search was completed and the seizure list Ext. 2 was prepared by Sri Amitava Chatterjee P.W. 2 on which the appellant and the witnesses signed. A copy of this document was delivered to the appellant who again signed on the seizure list as a token of receipt of a copy thereof. The witnesses Ram Pal and Mati Singh were not examined on behalf of the prosecution and the record reveals that summons sent to them by registered post were returned unserved as they were not found. It has also been elicited in the cross-examination of Amitava Chatterjee P.W. 2 that an effort was made to procure witnesses of seizure from nearby shops but none of them agreed to it and the seizure was made in presence of two passers-by Ram Pal and Mati Singh who also disclosed their addresses where, however, according to the prosecution, they could not be

found when summons were sent. At any rate, since there is no law which says that a seizure shall not be held as proved unless witnesses thereto are examined in Court, the testimony of even the officials who made the seizure can well support a conclusion in favour of the prosecution if it is: found to be acceptable on scrutiny. The evidence of the Intelligence Officers who formed the intercepting party as noted above are consistent in all material particulars and substantially corroborate each other and could not in any way be broken in lengthy cross-examination. The inability of some of them to remember minute details such as the inability of Shyarnal Dey P.W. 5 to state wherefrom the witnesses were sought to be procured by Amitava Chatterjee o P.W. 2 or whether the newspaper with which the packet was wrapped was an English or a vernacular one or that of Sudip Datta Gupta P.W. 6 as to how many pages of the newspaper were used as wrapper are absolutely of no consequence and cannot touch the main fabric of the prosecution case in regard to the seizure. The learned Advocate for the appellant has, however, raised a couple of law points in a bid to show that the entire procedure of alleged seizure has been vitiated as the search was conducted by unauthorised officials and further for non-compliance of the provisions of Section 50(1) of the Act. Regarding the first point, it has been pointed out that Section 43 of the Act empowers only certain category of officers detailed in Section 42 to make seizure and it was contended that in the case on hand none of the officers of the Bureau who had intercepted and detained the appellant and also searched his person had the requisite qualification prescribed in Section 42 of the Act. This contention is without any merit as rightly held by the learned trial Judge who had referred to the relevant notifications of the Central Government by virtue of which the Intelligence Officers of the Narcotic Control Bureau who are equivalent in rank to the Inspector of Central Excise, as the unchallenged testimony of Shyamal Dey P.W. 5 proves, were vested with powers to detain, search, seize and arrest under the relevant provisions of the Act. Thus there is no substance in the contention that the search was conducted by unauthorised officials.

6. Section 50(1) of the Act lays down that when an officer duly authorised u/s 42, is about to search any person, he shall, if such person so requires take him without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 of the Act or to the nearest Magistrate. It has been contended on behalf of the appellant that this provision has not been complied with inasmuch as the appellant was not taken to any gazetted officer or to a Magistrate, nor he was asked if he wanted to be searched before any such authority. Some decisions of different High Courts were cited to show that this provision was not merely directory but it was incumbent upon the searching officer to inform the person about to be searched that he could insist upon the presence of a gazetted officer or a Magistrate at the time of search. There cannot be any controversy that this is a mandatory provision of law but in the facts of the present case, it cannot be successfully urged that there has been non-compliance with the provisions of Section 50(1) of the Act. Amitava Chatterjee,

P.W. 2 had deposed in his examination-in-chief that the search was made after observing all legal formalities, which was not even challenged in the cross-examination, except regarding the presence of the alleged witnesses Ram Pal and Mati Singh none of whom could however, be examined as a witness for reasons already indicated. An offer made to a person intercepted for his search in presence of any prescribed officials is a part of legal formality of seizure and purely a question of fact which must be held to be concluded by the unchallenged testimony of Amitava Chatterjee P.W. 2. Thus the legality of the search of the person of the appellant cannot also be questioned on the ground under consideration.

7. The testimony of the Intelligence Officer of the Bureau who had intercepted the appellant and witnessed the seizure is corroborated by the seizure list Ext. 2 prepared by Amitava Chatterjee P.W. 2 and signed, among others, by the appellant himself to whom a copy of the same was delivered and by way of acknowledgement, he again signed on it. It is interesting to note that while Amitava Chatterjee P.W. 2 who had deposed about obtaining the signature of the appellant on the seizure list and delivery of a copy thereof to him was not questioned at all on any of these matters in the cross-examination, it was suggested to Shyamal Dey P.W. 5, who has also spoken about preparation of the seizure list in his presence and delivery of a copy thereof to the appellant, that the signature of the witnesses were obtained on blank papers which were subsequently converted to documents of seizure. Thus-the evidence of Shyamal Dey P.W. 5 that the appellant had signed on the seizure list copy of which was delivered to him was hardly assailed. The appellant himself in his examination u/s 313 Cr. PC. gave out that no copy was furnished to him and uttered not a word that the signature on the seizure list was obtained by threat or coercion. The appellant also never ventilated any grievance in regard to the seizure list, such as his signature was obtained by threat or coercion or on blank papers, when he was produced before the Magistrate. In this state of evidence and record, it can be safely held without any fear of error that the seizure list Ext. 2 was duly prepared by Amitava Chatterjee P.W. 2 in presence of the appellant who not only signed on it but also received a copy thereof and by way of acknowledgement again signed on the seizure list. This is considered to be a satisfactory corroboration of the testimony of the Intelligence Officers who have given evidence about the seizure of the alleged contraband from the appellant.

8. Sudip Datta Gupta P.W. 6, another Intelligence Officer of the Bureau had recorded a statement of the appellant u/s 67 of the Act on the same date which has been tendered in evidence as Ext. 16. This statement was made not before a Police Officer and before the appellant was arrested and as such quite admissible in evidence and indeed, no objection was taken in the Court below on behalf of the appellant at the time of admission of this document into evidence. This statement is purported to be signed by the appellant. It was the evidence of the said witness and the statement Ext. 16 also bears an endorsement that it was explained to the appellant. However, this statement must be left out of

consideration as it appears that the learned Trial Judge apparently through inadvertence has not questioned the appellant regarding it during his examination u/s 313 Code of Criminal Procedure.

9. An endeavour was made on behalf of the appellant to establish that he was not intercepted at all at the crossing of Free School Street and Park Street as alleged by the prosecution but he was picked up by the Intelligence Officers when he was taking tea in a nearby hotel. This plea was taken only during the examination of the appellant u/s 313, Code of Criminal Procedure and even then he did not disclose the name of the hotel where he was said to have been taking tea at the time of interception. None of the Intelligence Officers who claimed to have intercepted the appellant at the crossing of Free School Street and Park Street was given any suggestion whatsoever during cross-examination, which was quite lengthy in case of some of them, that the appellant was picked up while he was taking tea in a hotel. Further, if really, the appellant was so picked up, the prosecution could very well come up with a suitable case and thus there could hardly be any motive for it to set up a false case regarding the place of interception. For all these reasons, this plea taken by the appellant though deserves consideration only merits rejection.

9a. It was urged on behalf of the appellant that the mandatory provisions of Section 52(1) of the Act which requires the arresting officer to inform the arrested person the grounds for arrest as soon as may be, has not been complied with. Now, it is in the evidence having been deposed by Shyamal Dey P.W. 5, an Intelligence Officer of the Bureau that he arrested the appellant on the 27th August, 1989 at about 8 p.m. and prepared an arrest memo Ext. 12 copy of which was served upon the appellant on the same date. This document shows that it bears an endorsement by the appellant by way of acknowledgement of receipt of a copy of the arrest memo. When the evidence regarding service of a copy of arrest memo upon the appellant was pointed out to him during his examination u/s 313 Cr. P.C., he hardly said anything to raise any suspicion about its non-service. In such circumstances, there cannot be any manner of doubt that the arrest memo Ext. 12 was duly served upon the appellant soon after his arrest on the 27th August, 1989. A reference to this document will reveal that it discloses the grounds for his arrest in all material particulars and therefore, non-compliance with the provisions of Section 52(1) of the Act is ruled out.

10. The learned Advocate for the appellant has urged with good deal of emphasis that after the alleged seizure of the contraband it was incumbent upon the Intelligence Officers of the Bureau to deposit the same with the officer-in-charge of the police station within whose local area it was seized for the purpose of safe custody. In the instant case, however, the narcotic substances said to have been recovered from the possession of the appellant was not so deposited. This argument was made on behalf of the appellant by looking to the provisions of Section 55 of the Act which reads as follows :-

"An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be Sealed with a seal of the officer-in-charge of the police station."

A careful persusal of the provisions of Section 55 of the Act reproduced above, will clearly show that it is only an enabling provision and gives an option to the officer making a seizure under the Act to deposit the seized articles in the local police station and by no means it contains any mandate for such deposit. It further provides that if such deposit is made, the officer-in-charge of the police station is bound to take charge of it for safe custody and also to allow the officer making the deposit to take sample etc. Such an interpretation is manifest from the words "may" regarding delivery of the seized articles and "shall" regarding taking charge of it by the officer-in-charge of the police station and allowing the Seizing Officer to take sample etc. But for this provision it would not be within the power of the officer making any seizure under the Act to keep seized article in police station for safe custody and even if he delivered it to the police station, the officer-in-charge would be in a position to refuse to take charge of it or even after taking charge thereof, refuse the Seizing Officer to take sample etc. It is clearly to save such a situation that this provision has been incorporated in the Act. Such an interpretation is not based on any undue emphasis on the words "may" and "shall" used in Section 55 of the Act but rather, the use of these words by the legislature in the same sentence unmistakeably suggest its intention that while an option is given to a Seizing Officer to deliver the seized articles to a police station, the officer-in-charge has no option but to take charge of it for safe custody and to allow the Seizing Officer to take sample etc,. The learned Advocate for the appellant has cited the decision of Guahati High Court in Md. Jainulabdin alias Nahamacha and etc. Vs. State of Manipur and etc., wherein it was held that provisions of Section 55 of the Act are mandatory and unless followed, it would go in favour of the accused. Their Lordships were of the opinion that while incorporating this section, the legislature had two intentions, viz. actual seized articles are produced at the time of trial and samples of the said articles are sent for analysis by expert and secondly, after the articles are produced before the officer-in-charge, these are not substituted by other articles. If really, it was the intention of the legislature that the samples should be drawn only in the presence of the officer-in-charge of a police station, then nothing prevented it to specifically make a provision to this effect. Indeed, Section 52 of the Act inter alia provides for forwarding seized articles without unnecessary delay to the officer-in-charge of the nearest police station or to an officer empowered u/s 53 of the Act. In case seized articles are forwarded to an officer empowered u/s 53 of the Act to investigate into an offence under the Act, it is quite within his power to draw sample and send it for analysis by an expert which

is a part of investigation. It is also pertinent to note in this connection that a contrary view has been taken by a Division Bench of Himachal Pradesh High Court in State of Himachal Pradesh Vs. Sudarshan Kumar and etc., wherein it was held that the provisions of Section 55 of the Act are merely directory in nature and violation thereof could not result in order of discharge.

11. A ground has been taken in the petition of appeal that there was non-compliance with the provisions of Section 57 of the Act which provides that whenever any person makes any arrest or seizure under the Act, he shall, within next 48 hours make a full report of all the particulars of such arrest or seizure to his immediate official superior. Now, it has already been pointed out that there is evidence, both, oral and documentary, that the appellant was arrested on the 27th August, 1989 and it was the further evidence of the Intelligence Officer Amitava Chatterjee P.W. 2 that the provisions of Section 57 of the Act was also complied with and a typewritten report bearing his signature was made to his superior official namely, the Dy. Director of the Bureau. This report is on the record as Ext. 3 and bears the date the 27th August, 1989. Thus it is found that the report was made well within 48 hours of arrest and seizure. Nothing has been elicited during examination to damage this part of the prosecution case and therefore, there is no substance in the contention that provisions of Section 57 of the Act were not complied with.

12. Considering the evidence and other materials on record in all its bearing, there is no room for any reasonable doubt that from the possession of the appellant at the place, date and hour alleged by the prosecution, a quantity of white powder was recovered which on test in the office of Bureau was found to be heroin. Now, it has been deposed by some of the Intelligence Officers such as Amitava Chatterjee P.W. 2 and Chanchal Bhattacharjee P.W. 3 that representative sample was drawn which was sent to the chemical examiner under a test memo which appears on the record as Ext. 5. The sample appears to have been received by the laboratory with the seals of the Bureau intact on it together with the test memo referred to above. Bijai Behari Dey P.W. 7. a Chemical Assistant of the laboratory has given evidence to this effect and he has also stated that he tested the powder in presence and under the supervision of the Assistant Chemical Examiner B. N. Roy, who has examined as P.W. 8. The result of the examination has been noted on the reverse of this memo Ext. 5 in the hand writing of Bijan Behari Dey P.W. 7 and under his signature and counter signed by the said Assistant Chemical Examiner. There is no missing link whatsoever to raise any doubt that the sample which was sent to and tested by the laboratory was not drawn from what was recovered from the possession of the appellant. There is also nothing on the record to suspect the finding or the result of the examination which revealed that the sample responded to the test for heroin. It has been noted in the laboratory report that to determine percentage of heroin in the sample it might be forwarded to the Central Revenue Control Laboratory, New Delhi. The sample however, was not sent to that laboratory but since an offence punishable under Section 21 of the Act for unauthorised possession of a

manufactured drug like heroin does not depend upon the percentage of heroin content the fact that the sample was not sent to the Central Revenue Control Laboratory, New Delhi, is of no consequence. It is the evidence of the Assistant Chemical Examiner that heroin is nothing but diacetyl morphine which is an opium derivative according to the definition given in Section 2(xvi) of the Act. Again an opium derivative is a manufactured drug according to its definition given in Section 2(xi) of the Act and all manufactured drugs are also narcotic drug in view of its definition in Section 2(xvi) of the Act. Thus the appellant was found in possession of narcotic drug possession of which is prohibited by Section 8 of the Act except for purposes specified therein. It is in the evidence that the appellant failed to account for his possession and indeed, he never took any plea that he was authorised to possess the contraband. Section 54 of the Act also permits a presumption that a person who possesses any narcotic drug has committed an offence under Chapter 4 of the Act if he fails to explain his possession satisfactorily. In such circumstances, the irresistible conclusion is that the appellant has committed an offence punishable u/s 21 of the Act for unauthorised possession of manufactured drug and he has rightly been convicted and sentenced by the learned Court below.

The appeal is, therefore, dismissed. The conviction and the sentence passed by the learned Trial Judge are affirmed.

S. Ahmed, J.

I agree.