
(1998) 06 GAU CK 0001

Gauhati High Court

Case No: Criminal Appeal No. 72 of 1998

Sanjib Gupta and Another

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: June 10, 1998

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 374(2), 382
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 18, 20, 42, 42(2), 50

Hon'ble Judges: B.N. Singh, J

Bench: Single Bench

Judgement

B.N. Singh, J.

This Criminal Appeal is so preferred Under Sections 374(2) and 382 of the Code of Criminal Procedure, 1973, against the judgment and order dated 26.3.1998 passed by the learned Sessions Judge, Tinsukia in N.D.P.S. Case No. 1 (T) 95, convicting the accused-Appellants, Shri Sanjib Gupta and Smt. Jasoda Devi u/s 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the N.D.P.S. Act) and sentencing them to undergo rigorous imprisonment for a period of ten years each and also to pay a fine of Rs. 1 lakh each, in default, to undergo rigorous imprisonment for a period of years each.

2. The prosecution case giving rise to Tinsukia P.S. Case No. 96 of 1995, so registered u/s 20 of the N.D.P.S. Act, in short, is that on 24.2.1995 in the evening hours on a secret information. Tinsukia Police searched the shopcum-residence of the accused Sanjib Kumar Gupta, Appellant No. 1, and his mother, Jasoda Devi, Appellant No. 2 and found two packets of opium weighing 98 grams and 82 grams respectively, (in total 180 grams), which are said to have been kept by them illegally and the said sample so seized gave positive test of opium. After the search, they were apprehended and charge-sheet was so submitted against them u/s 18 of the N.D.P.S. Act and after examining six of the prosecution witnesses, no defence

witness being examined, the learned Court below came to the conclusion of prosecution establishing the guilt of the accused-Appellants up to the hilt and hence they got convicted and sentenced as detailed above.

3. Out of the six witnesses so examined on behalf of the prosecution in the course of trial, it comes in light that P.W. 1 is Prabin Barkataky, who is a seizure list witness. So is the case with P.W. 2 Shri Ballabh Pal. P.W. 3 is Shri Swapan Kumar Dutta, Deputy Director (Chemistry), (Drugs and Narcotics), Forensic Science Laboratory, Guwahati, who after test opined the seized material to be opium. P.W. 4 is a Constable, who was also present at the time of the arrest of these accused-Appellants being made by P.W. 6 on the date of occurrence. According to him, the opium packets were concealed under a refrigerator of the said shop. This witness on the date of occurrence happened to be the P.S.O. of the Additional S.P. Tinsukia. P.W. 5 is Syed Abdul Rashid Ahmed. He was also Inspector of Police, Guwahati. He was the Officer-in-charge of Tinsukia P.S. at that time. He in clear words stated in his examination-in-chief of his not being present at the time of search. Ejahar so lodged by Shri Jyotirmoy Senapati (P.W. 5) is marked as Ex. 5. The last witness, P.W. 6 is Shri Jyotirmoy Senapati who on the relevant date, that is, 24.2.1995 was the 2nd Officer at Tinsukia P.S. who is said to have rushed to the said shop after making the G.D. entry, which is marked as Ext.7 and after search found those two packets said to have been concealed beneath the refrigerator kept in the said shop, seizure list being prepared, the accused-Appellants being apprehended.

4. Mr. A.K. Bhattacharyya, learned senior counsel, assisted by Mr. K. Agarwal, learned Counsel, submitted on behalf of the accused/ Appellants that out of the six witnesses so examined, by going through the evidence of P. Ws. 1 and 2, it will transpire that they have denied of any packets being recovered in their presence and that after the said search said to have been made, because of being asked by the police as to put signature on the seizure list, the same were so put by them. It is also pointed out by particularly referring to the evidence of P.W. 4, the P.S.O. of the Addl. S.P., Tinsukia that at the time of search/seizure or arrest of the accused-Appellants being made, definitely the Addl. S.P. Tinsukia was not present at the place of occurrence, which would be so apparent by going through the evidence of his P.S.O., P.W. 4. It is also pointed out that taking into consideration the evidence of P. Ws. 5 and 6 together, it will transpire that in the instant case the mandatory provisions of Sections 42 and 50 of the N.D.P.S. Act, have not been complied with and thus the whole trial is vitiated and that in that background the -accused-Appellants deserve acquittal. First of all, it is pointed out that P.W. 6 on no account can be said to be the officer empowered as to make such search. Secondly, if P.W. 6 had some secret information with regard to the Appellants-accused possessing opium and had reason to believe the same, it was necessary for him as to put the said source of information so received also in writing which in the instant case has not been done, the G.D. entry being vague, and furthermore, it is not that P.W. 6 was only expected to inform his senior officer on telephone, rather as per the

provisions of the Act, he was duty bound as to give such information in writing to his superior officer, which also had not been done in the instant case contravening the provisions of Section 42 of the N.D.P.S. Act. It is emphatically argued that not only this, in the Instant case the informant-cum-investigating Officer, P.W. 6, has also given goodbye to the provisions so contained u/s 50 of the N.D.P.S. Act, which is held to be mandatory and to be strictly followed and observed in such cases and In that light it was the duty of the officer intending to search under the N.D.P.S. Act as to inform the person concerned and to give an option so provided under the law that such search could also be made in presence of a Gazetted Officer of any of the Departments mentioned in Section 42, or before the nearest Magistrate, if he so desired. Because of the accused-Appellant not being acquainted and informed of this privilege and the search being made by the 2nd Officer of Tinsukia P.S., it can safely be argued that the mandatory provisions so contained u/s 50 of the N.D.P.S. Act, have not at all been followed in the instant case, which also makes the accused-Appellants liable to be acquitted. As regards the evidence of the Deputy Director, Forensic Science Laboratory, P.W. 3, though the said packets are said to have contained opium, it will in no way improve the case of the prosecution as far as the present case is concerned when the mandatory provisions of law contained u/s 42/50 of the N.D.P.S. Act, are not followed/ observed.

5. In support of the contentions so made above by the learned senior counsel appearing for the accused-Appellants, over and above reading the provisions of Section 42/50 of the N.D.P.S. Act, he has also banked upon some of the reported cases and they are:

[Saiyad Mohd. Saiyad Umar Saiyad and Others Vs. State of Gujarat](#), . In the background of this reported case, particularly, by referring to paragraphs 8 and 10 of the judgment, it is submitted that the officer concerned is obliged to inform the accused of his right to be searched in presence of a Gazetted Officer or Magistrate, the compliance of which is mandatory and if the same has not been complied with, the accused persons are entitled to be acquitted. It further pointed out that ; the accused must be made aware of his this right of prosecution granted by the statute which, in the instant case, by the plain reading of the evidence, oral and documentary, available has not at all been complied with.

On the same point that is, noncompliance of the provisions of Section 50 of the N.D.P.S. Act which is mandatory which vitiates the whole criminal trial the learned senior counsel for the Appellants also referred to Anr. reported case [Ali Mustaffa Abdul Rahman Moosa Vs. State of Kerala](#), and by particularly referring to its paragraph 9 that any seizure, in the instant case of the opium, which is the result of illegal search and seizure, cannot be used to fasten the liability of unlawful possession of opium by the accused. Furthermore, when the Police Officer, in the instant case, has also not given the option to the accused as to whether he desired to be searched in presence of Gazetted Officer or Magistrate as envisaged u/s 50 of

the N.D.P.S. Act, the provisions so contained Under Sections 42 and 50 of the N.D.P.S. Act, being held mandatory.

The learned senior counsel for the Appellants has referred to a reported case [Mohinder Kumar Vs. The State, Panaji, Goa](#), .

In support of his this contention, the learned senior counsel, Mr. Bhattacharyya, has also referred to Anr. reported case [State of Punjab Vs. Balbir Singh](#), , and has particularly referred to paragraphs 15 and 25 of the judgment of this case so cited.

Union of India v. Lalit Baruah and Ors. 1997 (II) GLT 617, is also referred on behalf of the Appellants in support of the stand so taken with, regard to non-compliance of the mandatory provisions of Section 42(2) and Section 50 of the N.D.P.S. Act.

Omission on the part of the searching officer to inform the accused of his right to be searched in presence of a Magistrate or Gazetted Officer, makes the accused liable to be acquitted and in support of his this contention, one more case is cited, i.e., Abdul Rahman v. State of Kerala (1997) 2 SCC 93 and it is pointed out that on the single score of illegality in search and seizure, the accused-Appellants are entitled to get an order of acquittal.

Md. Ayub v. State of Assam. 1998 (I) GLT 65, is also referred to in support of his stand that non-compliance of the provisions of Section 50 of the N.D.P.S. Act, vitiates the whole trial and the conviction by the trial court is thus liable to be set aside.

Lastly, Anr. reported case Bajrangi Singh v. State of Assam 1996 (2) GU 63, is also referred, in which this Court, as submitted, was pleased as to set aside the judgment of conviction under the N.D.P.S. Act, because of the non-compliance of the mandatory provisions of Section 42 and Section 50 of the Act.

6. Furthermore, it is pointed out that over and above the non compliance of the mandatory provisions of Sections 42(2) and 50 of the N.D.P.S. Act, in the instant case it can also not be said that the said seizure was from the conscious possession of the accused persons. The seizure is said to have been made of the two packets being found beneath the refrigerator kept in the shop-cum residence and that being the position, it can safely be said that the Ors. persons/inmates of the house had also access to the place where the refrigerator was kept. In support of his contention that in this background also it cannot be said that the seizure was from the conscious possession of the accused- Appellants. Mr. Bhattacharyya, learned" Senior Counsel representing the Appellants has referred to some of the reported cases:

Dulal Kumar v. State of Assam AIR 1952 Ass. 26; Khages Saudi v. State of Assam 1986 (2) GLR 39 and [Ram Rattan Vs. State of Punjab](#), .

7. Mrs.K. Deka the learned Public Prosecutor representing the State, on the Ors. hand, had submitted that there is nothing wrong in the impugned order/judgment of conviction and sentence so passed by the learned Court below. On secret

information P.W. 6 did visit the shop- cum-residence complex of the Appellant who are closely related, being the mother and the son, and the two packets of opium were thrown in the refrigerator side, which were so recovered from beneath the refrigerator kept in the said shop, seizure list was prepared, even the Addl. S.P., Tinsukia arrived at the spot and the accused-Appellants got apprehended. Furthermore, the Forensic Science Laboratory report supported the prosecution case, Mrs. Deka, the learned Public Prosecutor has further submitted that on secret information, when the P.W. 6 had reason to believe of the accused-Appellants possessing incriminating article, first of all took all the precautions by making the G.D. entry and even informing his superior officer on telephone before proceeding to the place of occurrence and thus there is compliance of the provisions of the N.D.P.S. Act. By referring to the evidence available on the record she has further pointed out that seizure list witnesses were examined, they have supported with regard to the seizure list being prepared in their presence on which their signature/signatures find place and taking into consideration the evidence of the witnesses as a whole it will also transpire this at the place of occurrence the Addl. S.P. had also arrived and it was not that such seizure or apprehension of the accused was so made only in presence of the 2nd officer, Tinsukia P.S. According to the learned Public Prosecutor, since there is no merit in this Criminal Appeal, the appeal be dismissed.

8. After hearing both the sides' lawyers, particularly, taking into consideration the provisions so contained u/s 42/50 of the N.D.P.S. Act, 1985, which need not be reproduced, also after going through the evidence available on the record, oral and documentary, keeping into consideration the reported cases also so cited on behalf of the accused-Appellants in support of their case claiming acquittal by setting aside the impugned judgment of conviction and sentence so passed, as vehemently argued by Shri Bhattacharyya, learned senior counsel representing them, I find that there is much substance in the argument so advanced by Mr. Bhattacharyya, the learned senior counsel for the Appellants. In the instant case the prosecution has rather failed to establish with regard to P.W. 6, the 2nd Officer of Tinsukia P.S., at that time being empowered as to make such search/seizure/arrest and furthermore if the informant-cum-investigating Officer had reason to believe of the accused persons possessing illegally opium in the instant case, he was duty bound as to put the information (secret) so received in writing also mentioning the source of information in writing to his superior officer, which also in the instant case has not been done. As regard the Addl. S.P. said to have been arriving at the place of occurrence, by going through the evidence of the P.S.O., P.W. 4, attached to the said Addl. S.P., who was examined in course of the trial, with that of the evidence of the P.W. 6, it will transpire that if at all the said Addl. S.P., a superior Police Officer, arrived at the spot, he arrived in the said shop after the said search, seizure and arrest. If the prosecution wanted to take advantage of the presence of the Addl. S.P. claiming him to be present throughout, the onus was heavily upon the prosecution

as to produce him as a witness, which has also not been done in the instant case. There is also no evidence to show that prior to entering into the search operation, P.W. 6 had intimated the accused of their privilege of search being made if the accused so opts, in presence of a Gazetted Officer or Magistrate. So, there is clearly non-compliance of the mandatory provisions of Section 50 of the N.D.P.S. Act, also in the present case, over and above the noncompliance of the mandatory provisions of Section 42(2) of the N.D.P.S. Act. It has been repeatedly held by the Apex Court also being followed by the High Courts that those provisions of Section 42/50 of the N.D.P.S. Act, are mandatory ; but in spite of that while making entry, search, seizure and arrest, it is really a disquieting feature that the officers so empowered as to make such entry, search, seizure or arrest under Chapter v. of the N.D.P.S. Act, 1985, do not comply the mandatory provisions of the Act, which ultimately, even after the accused being convicted and sentenced are finally acquitted by the appellate courts because of such noncompliance of the mandatory provisions, particularly of Section 42/50 of the N.D.P.S. Act. This is for the Central Government/State Government to see that the officers so empowered to act under Chapter v. of the N.D.P.S. Act, are well acquainted with its provisions to be complied with strictly and if, after being trained on that line, there is non-compliance of the mandatory provisions of the Act as to take Departmental action against such erring officers.

9. Consequently, in the background of the facts and circumstances discussed, I hold the view that this is a fit case in which the judgment of conviction and sentence so passed by the learned Court below as detailed above requires interference as to meet the ends of justice, particularly on the ground that the Police Officers while making entry, search, seizure and arrest of these accused-Appellants did not specifically comply with the mandatory provisions of Section 42/50 of the N.D.P.S. Act, 1985.

10. For the foregoing reasons, this Criminal Appeal succeeds and the judgment of conviction and sentence under challenge are liable to be set aside. It is hereby accordingly set aside. The accused-Appellants named above are acquitted of the charge framed against them. Fine so imposed, if paid by them, be refunded to the accused-Appellants. They be set at liberty forthwith, if not wanted in connection with any Ors. case.

11. As prayed for on behalf of the State being represented by the learned Public Prosecutor, Mrs. K. Deka, let a copy of this judgment be also sent to the Chief Secretary, Government of Assam, Dispur/ Commissioner of Customs at Shillong.