(1994) 05 GAU CK 0015

Gauhati High Court

Case No: Criminal (Jail) Appeal No. 2 of 1990

Beikhokim @ Veikhokim @ Mayami Kukini		APPELLANT
	Vs	
State of Manipur		RESPONDENT

Date of Decision: May 16, 1994

Acts Referred:

- Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 42(1)
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 42(1)

Citation: (1994) 2 GLJ 457

Hon'ble Judges: H.K.Sema, J and N.G.Das, J

Bench: Division Bench

Advocate: R.K.Sanajaoba Singh , Jagat Chandra Singh, Advocates appearing for Parties

Judgement

NG Das, J.

Smti Beikhokim alias Veikhokim Kukini alias Mayama Kukini, a lady is the sole appellant herein. She was found guilty under section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act) by Mr. HJ Singh, Sessions Judge, Manipur East for possessing certain quantity of heroin which is said to have been seized from her bed room at Zomi Villa, North AOC, Imphal on 3.3 87around 3 PM.

2. The story of the prosecution case is as follows : On 3.3.87 around 2.50 PM when Heikrujam Ibomcha Meitei (PW 2), Reader SI to SP/BA Manipur, Imphal along with some women police constables was performing some specific task at North AOC, he got an information from some reliable source that one Smti Beikhokim alias Veikhokim Kukini alias Mayami Kukini of Zomi Villa, North AOC Imphal, who is the appellant before us, stored No.4 heroin powder in huge quantity for selling the same either to mobile agents or consumers.

3. On receipt of this information Heikrujam Ibomcha Meitei along with some women constables rushed to the house of the aforesaid woman and during search he recovered, (i) one plastic packet containing about 1 gram of No.4 heroin powder, (ii) one big paper packet containing about 1 gram of No.4 heroin powder, (iii) one small packet containing about 20 grams of No. 4 heroin powder, (iv) currency notes of Rs. 695, and (v) one empty packet for using as container from the beneath the mattress of the bed of the appellant in the southern room of the first floor of her house. After recovery of the aforesaid heroin and articles, SI Heikrujam Ibomcha Meitei (PW 2) seized the aforesaid heroin drugs and articles from the possession of the appellant in presence of witnesses, namely, Chongtham Ingo Singh (PW 7), Chabungbam Joykumar Singh (PW 4), Anang Kukini and Suwanpao Kuki on that very date at 2.50 PM and after seizure he also arrested the appellant.

4. After the aforesaid seizure and arrest, Heikrujam Ibomcha Meitei took the accused and the seized articles to their office of the Border Affairs inside the complex of CID Office at Imphal where he drew up an ejahar narrating the above facts and addressed it to OC, Imphal Police Station for taking necessary action. He also handed over the accused to OC, Imphal PS and handed over the seized articles to SI Meibam Rameswar Singh (PW 8) to whom the case was endorsed by OC for investigation.

5. On receipt of the aforesaid written complaint (Ext.P3), OC Imphal Police Station treated it as FIR and registered Imphal PS Case No. 159 (3)/87 under section 22 of Act the and endorsed it to SI Meibam Rameswar Singh (PW 8) for investigation. Accordingly SI Meibam Rameswar Singh took up investigation of the case and in course of his investigation he forwarded the appellant to the Court of learned Chief Judicial Magistrate, Imphal along with a forwarding report dated 4.3.87 wherein it was stated that during investigation he recorded the statements of a number of witnesses, seized the heroin and materials in question and it was also stated in the forwarding report that the evidence so collected during investigation established a prima facie caie under section 22 of the Act against the appellant. He, therefore, made a prayer for remanding the accused to judicial custody but the learned Chief Judicial Magistrate granted bail to the accused for a sum of Rs.3,000/ only. However, after completing investigation SI Rameswar Singh submitted charge sheet for prosecution of the appellant under section 22 of the Act through Additional Superintendent of Police.

6. The case being exclusively friable by the Court of Sessions, learned Chief Judicial Magistrate by his order dated 22.12.88 committed the case to the Court of Sessions after furnishing copies of the prosecution documents to the learned counsel of the appellant. Learned Chief Judicial Magistrate also directed the appellant to appear before the Court of learned Sessions Judge, Manipur.

7. Accordingly the appellant appeared before the learned Sessions Judge who after perusal of the materials produced before him framed a charge under section 22 of

the Act. The charge was read over and explained to the appellant In the language she understands. The appellant, however, pleaded not guilty and claimed to be tried.

8. In order to bring home the charge the prosecution examined 9 witnesses in all and also exhibited the documents marked as Ext. Pl to Ext. P8 including the report (Ext. P4) of Assistant Director of the Forensic Science Laboratory, Assam. The sample parcels were sent to the Forensic Laboratory, Assam whereupon PW 6 Mr. SK Dutta after examination and analysis reported that the samples gave positive test for heroin. The accused led no evidence in support of her defence. However, her evidence as would appear from the trend of crossexamination as well as the statement she gave at the time of examination under section 313 of CrPC is that she has been falsely implicated in this case. She straightway denied having any knowledge about the seized heroin.

9. We have heard arguments advanced by learned counsel of the parties and have given our careful consideration to the evidence of the PWs examined in the case and we have also quite carefully perused the judgment recorded by the learned Sessions Judge. Mr. RK Sanajaoba Singh, the learned counsel for the appellant has, at the very outset, contended that the police failed to comply with the certain mandatory provisions of the Act and on this ground the appellant is entitled to be acquitted. Mr. Sanajaoba Singh has, at first, drawn our attention to section 42(1) of the Act which provides that when any officer being superior in rank to a peon, sepoy or constables of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force is empowered in this behalf by general or special order by the Central Government or any such officer of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug or psychotropic substance in respect of which an offence punishable under Chapter IV has been committed then only he has the power to enter into and search any such building, conveyance or place. Laying emphasis on the words "and taken down in writing" Mr. Sanajaoba Singh has argued that the Legislature has made it incumbent upon a police officer to record in writing the reasons of his belief that an offence punishable under Chapter IV has been committed. In the instant case it is an admitted fact that the police officer (PW 2) who searched the house of the appellant did not record the information which he received through secret source and that he went to search the house of the appellant without obtaining any search warrant.

10. Therefore, the question which posses for consideration is whether the requirements under section 42 of the Act for reducing the information in writing can be said to be mandatory or only directory. To put it differently it is upon the Court to

examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of subsection. But the learned counsel for the appellant has quite vehemently contended that since police did not record the information as required under section 42 (1) of the Act it must be held that the police received no information and as such this mandatory requirement of law was not complied with. In support of his contention Mr. Sanajaoba Singh has referred to the decision in the case of Md. Jainul Abdin alias Nabamacha vs. State of Manipur, 1990 (2) GLJ 309 wherein it has been observed by a Division Bench of this Court that recording of the grounds of his belief under the above proviso to section 42 (1) and sending of the report are also mandatory for the reasons that if the information is not reduced into writing result may be (i) the prosecution may subsequently improve the story, and (ii) officer may be exposed to vexatious prosecution under section 58 of the Act.

11. But Mr. Jagat Chandra Singh, the learned Public Prosecutor has submitted in his reply that although it is correct that when a police officer or any of the officers mentioned in section 41 (2) or section 42 (1) of the Act gets information on the basis of which he acts and conducts a search, he is bound to record in writing that information and to report it his superiors, the fact remains that it is not necessary at all for the prosecution to prove that theseprovisions of law had been complied with. It is argued by Mr. Jagat Chandra Singh that it is incumbent upon the accused to show that for non compliance of the said provisions, she was prejudiced. That apart, according to learned Public Prosecutor Mr. Jagat Chandra Singh these provisions are mainly to the benefit of the officers concerned and to provide a safeguard to them. His submission is that in case such a search is conducted and nothing is recovered then a complaint may be filed under section 58 of the Act against the concerned officers. According to him sections 41 (2) and 42 (1) merely provide for a safeguard to such officers. So, according to him if there is any procedural omission, such omission does not vitiate the proceedings. In support of his contention learned Public Prosecutor has placed reliance on a decision in the case of Santokh Singh vs. State, 1991 Crl LJ 147 where the learned Judge of Delhi High Court held that non compliance of section 42 of the Act does not vitiate the investigation. Similar view has also been taken in the case of Nathu Ram vs. State, 1990 Crl LJ 806.

12. In the case of Ismail and etc. vs. State of Kerala, 1991 Crl LJ 2945 it has been held under para 7 of the judgment that the provisions of section 42, 50 (1), 52 (1) and 57 of the Act are not intended as technical defence on which the prosecution must fail for that reason alone. It is stated that in view of the stringency of the punishments, the provisions are intended only as safeguards to protect the interest of the accused from unmerited prosecution and the question to be considered in only prejudice or failure of justice. It has been observed that an irregularity or illegality in the collection of materials cannot affect the trial and conviction unless prejudice or failure of justice is the result.

13. In the case of RS Seth Gopikisan AgarwaJ vs. SR Sen, Assistant Collector of Customs and Central Excise, Raipur & others reported in AIR 1967 SC 1298 an information was received to the effect that the appellant was in possession of a large quantity of undeclared gold. Pursuant to that information Assistant Collector of Customs and Central Excise made an authorisation for searching the premises of the appellant. The appellant''s premises were searched and as a result of the search gold and other articles, foreign currency and other documents were seized. The appellant filed a writ petition challenging the validity of the said search and seizure. The contention was that the Assistant Collector and the officer authorised by him to make the search acted with malafide. The High Court rejected that. It was contended therein that the Assistant Collector of Customs should not only give reasons for his belief but also the particulars of the nature of the goods and of the documents but the Supreme Court after examination of the scope of section 105 (2) of the Customs Act and section 165 (1) of the Code of Criminal Procedure held that recording of reasons by the Assistant Collector in writing is not necessary. In this context it may be stated that section 125 of the Evidence Act envisages that no Magistrate or Police Officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue Officer shall be compelled to say whenee he got any information as to the commission of any offence against the public revenue.

14. So, in view of the decisions, particularly the decision of the Supreme Court we are of the opinion that once prosecution succeeds in proving beyond reasonable doubt that the seizure of the articles was made from the possession of the accused and once such burden is discharged, even if there is any procedural omission such omission docs not vitiate the proceedings. Accordingly we are of the opinion that reducing of the information in writing as required under section 42(1) and sending of report thereof are not mandatory. This view of ours is, however, confined only to the question whether reducing of the information in writing as required under section 42 (1) of the Act and lending report thereof are mandatory or not. We are also of the view that the requirements of section 42 of the Act under the expression "taken down in writing" are intended to safeguard the interest of the officer and not the accused because under subsection 1 of section 58 of the Act any person empowered under section 42, 43 and 44 of the Act are liable to be prosecuted if the entry, search, seizure or are vexatious.

15. We accordingly formulate the following question and refer it for decision by a larger Bench. The question is :

"Whether recording of the information as required under section 42(1) of the Act is mandatory in a case where no prejudice was caused to the accused at the time of search and seizure of the contravened goods ?"