

(2003) 11 CAL CK 0008

Calcutta High Court

Case No: Criminal A. No. 95 of 2002

Rash Mohan Saha

APPELLANT

Vs

Narcotic Control Bureau, Eastern
Zonal Unit

RESPONDENT

Date of Decision: Nov. 7, 2003

Acts Referred:

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 50

Citation: (2004) 4 CHN 80

Hon'ble Judges: Pravendu Narayan Sinha, J; Amit Talukdar, J

Bench: Division Bench

Advocate: Subhendu Sekhar Roy and Somnath Banerjee, for the Appellant; Balai Chandra Roy, Id. A.G. and Ashim Kumar Roy, Amicus Curiae, Malay Singh and Tirthankar Ghosh, for the Respondent

Final Decision: Dismissed

Judgement

Amit Talukdar, J.

Pursuant to a petition of complaint (Ext. 2) lodged by P.W. 2, Sankar Das Sinha the appellant hereinabove was arrayed before the learned Judge, Special Court (under the NDPS Act), Barasat 24-Parganas (North) in Case No. N-55 of 1997 to answer the following charge :

"That you, on 27.10.97 at about 15 hrs. at Guma Bus Stand, Chowmatha on Jessore Road under P.S. Habra, you found in possession of 2 Kgs. brown coloured powder (heroin) in contravention of Section 8 of the NDPS Act".

2. Since he pleaded not guilty he was placed on trial which ended in his conviction in respect of the charge framed against him and he was sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs. 1,00,000/- (Rupees one lakh only) in default, to suffer further rigorous imprisonment for six months by the judgment and order dated January 29, 2000.

3. Assailing the conviction recorded against him by the learned Trial Court the appellant has preferred this appeal on the ground that there was no compliance of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the said Act) and the offer for being searched by a Gazetted Officer or a Magistrate was not given in writing and as the Gazetted Officer was very much a member of the raiding party the provisions of Section 50 of the said Act were not adhered to by the complainant and as the voluntary statement (Ext. 1) recorded by P.W. 1, Rabindra Nath Banerjee was done without giving any caution which was inadmissible; and as P.W. 5, who enquired the case was also a seizing officer, was interested in the conviction and the judgment of the learned Trial Court based on such evidence was required to be set aside.

4. Learned Lawyer appearing in support of the appeal submitted that the article, in question was seized although from a side-bag hanging from his left shoulder the provisions of Section 50 of the said Act would be applicable. In this connection he referred to the decision of the Supreme Court in Namdi Francis Nwazor v. Union of India and Anr. 1998 SCC (Cri) 1516 and two other decisions of the Bombay High Court - (1) Dharmaveer Lekhram Sharma and Anr. v. State of Maharashtra and etc., 2001 Cr. LJ 4886 and (2) Ebanezer Adebaya alias Monday Obtor v. B.S. Rawat, Collector of Customs, R & I New Delhi and Anr. 1996 Cr. LJ 3210.

5. He further submitted by referring to the evidence of P.Ws. 3, 5, 6 and 7 that the appellant had a right to be searched in the presence of a Gazetted Officer was not stated to him. He referred to the decisions of K. Mohanan v. State of Kerala 2000 SCC (Cri) 1228 and Vinod v. State of Maharashtra 2003 SCC (Cri) 14 and as P.W. 7 was a Gazetted Officer belonging to the raiding party not an independent officer there was also non-compliance of the said provision. In this context he referred to the Supreme Court decision in Ahmed v. State of Gujarat n 2000 C Cr LR (SC) 449 and also to our Full Bench decision in Jadunandan Roy v. State of W. B. 1999(11) CHN 759. He also referred to a Division Bench decision of this Court in Ali Hossain @ Dulal v. State of West Bengal 1995(2) CHN 448 and a decision of the Rajasthan High Court in Nathiya and Anr. v. State of Rajasthan 1992 Cr. LJ 2342 in support of his contention that since the Investigation (read enquiry in this case) was conducted by P.W. 5, who was himself a member of the raiding party and was witnessed to the seizure and search. It was on the point vitiates the conviction in the absence of any independent officer conducting the investigation.

6. Lastly, with regard to the statement (Ext. 1) recorded by P.W. 5 without administering warning or caution within the import of Section 104(a) of the Code of Criminal Procedure makes it inadmissible and to illustrate his point he referred to the decision of the Andhra Pradesh High Court in N.S.R. Krishna Prasad and etc. v. Directorate of Enforcement Loknayak Bhawan Khan Market, New Delhi and Ors. 1992 Cr. LJ 1888.

7. The revenue disputed the stand taken by the defence. Since there was no search of person and the side-bag was only searched it was contended on behalf of the revenue that Section 50 of the said Act was not attracted. Reliance was placed by the revenue in the decision of Sarjudas and Anr. v. State of Gujarat 1999 SCC (Cri) 1501 and the decision of Kanhaiya Lal v. State of M. P. 2000 SCC (Cri) 1494 and also on the decision of Narayanaswamy Ravishankar v. Asstt. Director, Directorate of Revenue Intelligence 2002 SCC (Cri) 1865 and lastly the decision of Kalema Tumba v. State of Maharashtra and Anr. 1999 SCC (Cri) 1422.

8. To repel the contention of the defence on the question that the statement (Ext. 1) recorded by P.W. 5 was not voluntary; and obtained by duress, as such, the same had no admissibility. The revenue referred to the decision of Pon Adithan v. Deputy Director, Narcotics Control Bureau, Madras 1999 SCC (Cri) 1051 and it was showed that no complaint whatsoever was made by the accused/ appellant that either it was taken by force or it was involuntary. Reference was also made on this point by the revenue to the decision of A K. Mahaboob v. Intelligence Officer, Narcotics Control Bureau 2002 SCC (Cri) 1035 and also the decision of Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd. and Ors. 2000 SCC (Cri) 1275.

9. Revenue also placed the decision of the Constitution Bench in State of Punjab v. Baldev Singh 1999 SCC (Cri) 1080 and submitted that the provisions of Section 50 of the said Act can only be applied if the person of the accused is to be searched and not otherwise.

10. Further the revenue relied on the decision of Khet Singh v. Union of India, 2002 Supreme Appeals Reporter (Criminal) 328 SC and also the decision of Birakishore Kar Vs. State of Orissa, to demonstrate the fact that if the articles are not recovered from the person of the accused the provisions of Section 50 of the said Act would be inapplicable.

11. The revenue on the basis of the aforesaid position contended that as the article was seized from a side-bag and not from the person of the appellant the provisions of Section 50 of the said Act did not apply and as there was voluntary confession (Ext. 1) by him and the article so recovered proved positive to the test of heroin by the report (Ext. 3) prepared by P.W. 4, the conviction of the appellant was quite proper and the appeal deserved dismissed.

12. After having heard the submission made on behalf of the appellant and the revenue and perusing the decisions cited by them respectively we proceed to analyse the points raised during the argument in the light of the evidence and the materials on record.

13. After we had reserved the delivery of judgment we felt that further hearing in this matters necessary and accordingly we placed the matter for further hearing and heard the learned Counsels and took the assistance of the learned Advocate General as an Amicus Curiae.

14. The principal point involved in this appeal relates to the application of Section 50 of the said Act. We have to see whether the said provision would be applicable in the light of the objection raised by the revenue that the contraband article, in question was recovered from a sling bag carried by the appellant and not from his person and whether there has been proper compliance of the said Act.

15. The prosecution case as unfurled from the petition of complaint (Ext. 2) filed by P.W. 2 shows that:

"That, acting on a specific information on 27.10.97, a batch of Intelligence Officers and a lady sepoy led by a Gazetted Officer of N.C.B., E.Z.U., Calcutta-17 intercepted Shri Rashmohan Saha in front of Guma Chowmatha Bus Stand (left hand side towards Bongaon) on Jessore Road at about 15.00 hrs. While he was standing along with one light green coloured "Duckback" made waterproof side-bag hanging on his left shoulder. Then the officers disclosed their identity as NCB officers of Calcutta Zonal Unit.

3. Two independent witnesses were called on the spot from the ongoing people on Jessore Road and the officers intended to search him. Before conducting search, officers offered an option to the said person to be searched in person and his side-bag physically in presence of a Magistrate or Gazetted Officer. He was also informed that one Gazetted Officer was with the raiding party. If he desires he may be searched before the accompanying Gazetted Officer. Then the said person i.e. Shri Rashmohan Saha agreed to be searched in person and his side-bag physically in presence of participating Gazetted Officer of the raiding party and two independent witnesses. Hence, in presence of the participating Gazetted Officer and the two independent witnesses, the said person in person and his side-bag (light green coloured) physically were searched. As a result of search, one polythene packet containing brown coloured powdered substance was recovered from the aforesaid light green coloured side-bag".

16. Two things become very much apparent on the face of it. Firstly, there was a prior information which was reduced into writing (Ext. 7) by P.W. 7 and on the basis of the same a team of the said Bureau went to intercept the appellant and secondly, we find that prior to conducting the search "the officers offered an option" to the appellant "to be searched in person and his side-bag physically in presence of a Magistrate or Gazetted Officer. He was also informed that one Gazetted Officer was with the raiding party". The said search resulted in the recovery of a polythene bag containing contraband article from the "light green coloured side-bag".

17. Let us now see whether the search of the side-bag being carried by the appellant which was on his left shoulder would attract the provisions of Section 50 of the said Act which is quoted hereinbelow :

"50. Conditions under which search of persons shall be conducted.--

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

(2) 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).

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

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorized u/s 42 had reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided u/s 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under Sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior".

18. The revenue to dispel the stand taken by the defence that Section 50 of the said Act would have square application since the bag was carried by the appellant on his person and to illustrate its point that since it was not search of the person referred to the decision of Sarjudas and Anr. v. State of Gujarat (supra) that unless the person of the accused was searched and from his person articles are found the provisions of Section 50 of the said Act could not be applicable. We find from that decision the bag where contraband charas was kept was hanging on the scooter on which the accused persons were riding. As such, Their Lordships of the Supreme Court held since it was not a search of the person, provisions of Section 50 of the said Act would not apply.

19. The other decision referred to by the revenue in Kalema Tumba v. State of Maharashtra and Anr. (supra) shows that the baggage of the appellant was searched by the authorities which was identified by him after his arrival in the airport and since the person of the accused was not required to be searched, Section 50 of the said Act was not applicable. In Narayanaswamy Ravishankar v. Asstt. Director, Directorate of Revenue Intelligence (supra), the Supreme Court held Section 50 of the said Act would have no manner of application since the article of heroin was found concealed in the bottom of a suitcase belonging to the appellant

which was recovered when he was attempting to transport the same from the airport and as no search of the person was conducted, Section 50 of the said Act did not have any application.

20. In the decision of *Kanhaiya Lal v. State of M. P.* (supra) the Supreme Court also held likewise where contraband was recovered from a bag; as such, the compliance of Section 50 of the said Act was found to be non-applicable.

21. The decision cited on behalf of the defence in *Namdi Francis Nwazor v. Union of India* (supra) has to be seen from the angle whether the handbag carried by the appellant was "inextricably connected with the person of the appellant" as held in the decision of *Abdul Rashid Ibrahim Mansure v. State of Gujarat* 2002(2) SCC 513. The fact situation in which the recovery was made shows that the appellant was apprehended by the officers of the said Bureau with a side-bag hanging on his left shoulder; in our respectful view, the side-bag, which was hanging on his left shoulder, as we find from the evidence pertaining to the apprehension and seizure, cannot be said to be inextricably connected with the person and that the exploring the contents of the said side-bag would amount to a search of the person of the accused in the present case.

22. Not only we feel that the decisions of - *Sarjudas and Anr. v. State of Gujarat* (supra), *Kalema Tumba v. State of Maharashtra and Anr.*, (supra), *Narayanaswamy Ravishankar v. Asstt, Director, Directorate of Revenue Intelligence*, (supra) and *Kankaiya Lal v. State of M. P.*, (supra) are absolutely apposite, but, we feel very much tempted to refer to the latest decision of the Supreme Court in *Madan Lal and Anr. v. State of Himachal Pradesh* 2003 AIR SCW 3969 where Their Lordships had specifically held ;

"17. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises. [See [Kalema Tumba Vs. State of Maharashtra and Another, , State of Punjab Vs. Baldev Singh, etc. etc.](#), *Gurbax Singh v. State of Haryana* 2001(3) SCC 28.] The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in *Baldev Singh's* case (supra), Above being the position, the contention regarding non-compliance of Section 50 of the Act is also without any substance".

23. In view of the aforesaid position as emerging from the above discussion we are of the considered opinion that the provisions of Section 50 of the said Act will have no manner of application.

24. How, we take up two other points which become co-related in view of our discussion held with regard to the non-applicability of the provisions of Section 50 of the said Act.

25. The question whether the appellant was apprised of his right to be searched in the presence of a Gazetted Officer u/s 50 of the said Act and non-compliance thereof renders the conviction defective in the light of the decisions of *K. Mohanan v. State of Kerala* (supra) and *Vinod v. State of Maharashtra* (supra) and that P.W. 7 being a Gazetted Officer and the other points that the Gazetted Officer (P.W. 7) himself belonging to the raiding team and not being an independent officer has rendered the conviction as bad in law in the light of the Supreme Court decision in *Ahmed v. State of Gujarat*, (supra) and the Full BEnch decision in *Jadunandan Roy v. State of W. B.* (supra) pales into absolute insignificance and loses all impact as we have earlier held that in the present prosecution case there can be no manner of applicability of Section 50 of the said Act which by necessary implication means the two other questions just noted above, as has been raised by the defence cannot have any impact.

26. The next point that the enquiry was conducted by P.W. 5 was himself a member of the raiding party and was a witness to the search and seizure which affected the conviction in the light of the Division Bench decision of this Court in *Ali Hossain @ Dulal v. State of West Bengal* (supra), in our view, does not have any impact. In the said Division Bench decision it has been held that the investigation should be done by an independent agency and not by the person conducting search and seizure and nowhere it has been held in the said Division Bench decision that such investigation would render the entire conviction and sentence passed against the accused to be illegal. In the present case on the basis of a secret information which was taken down in writing (Ext. 7) by P.W. 7 himself who upon compliance of the provisions of Section 42 of the said Act arranged the team and proceeded to the probable place where the suspect was to be found. The team consisted of P.W. 3, P.W. 5 and P.W. 6 himself who were all Intelligence Officers attached to the said Bureau. P.W. 5 held the enquiry and while P.W. 1 recorded the statement (Ext. 1) of the appellant and P.W. 2 filed the petition of complaint (Ext. 2). The ratio of the Division Bench in *Ali Hossain @Dulal v. State of West Bengal* (supra) where Sub-Inspector of Police who effected the seizure from the accused on the basis of a source information himself took up the investigation and submitted the chargesheet; whereas the present case which results from an enquiry conducted by P.W. 5, who was a member of the team conducting the search and seizure being accompanied by P.W. 3, P.W. 6 and a Gazetted Officer (P.W. 7) and the petition of complaint (Ext. 2) was submitted by P.W. 2 the Intelligence Officer, also attached to the Bureau and the statement (Ext. 1) made by the appellant was recorded by P.W. 1 another Intelligence Officer none of whom was the member of the raiding team, cannot, in any manner, help the defence on this score and the Division Bench decision of *Ali Hossain v. State of West Bengal* (supra), does not have any bearing.

27. The decision of the Andhra Pradesh High Court in *N.S.R. Krishna Prasad and etc. v. Directorate of Enforcement Loknayak Bhawan Khan Market, New Delhi and Ors.*, (supra) on the point that the statement (Ext. 1) recorded by P.W. 1 without

administering warning and caution to the appellant makes it inadmissible is taken up for our consideration.

P.W. 1, who recorded the confession states :

"I did not state to the accused that he was not bound to make any statement at our office. I did not told the accused that any statement made by him might go against him".

28. This has to be understood in the light of the evidence vis-a-vis the decision cited by the defence based on a case under the Customs Act. This can be fully taken care of by the decision relied upon by the revenue in Port Adithan v. Deputy Director, Narcotics Control Bureau, Madras (supra) which is squarely applicable in the fact situation of the present case.

29. From a close look at the Trial Court records we do not find that any complaint was made by the appellant after his first production before the Court that the Statement (Ext.1) made by him was recorded forcibly. Neither was any grievance made by the appellant in this regard nor was any objection raised at the very first instance; although in cross-examination it was taken out from P.W.I who recorded the confession (Ext. 1) that he did not demonstrate any caution, can in any manner affect the veracity of the prosecution case.

30. The other two decisions referred to by the revenue in A.K. Mehaboob v. Intelligence Officer, Narcotic Control Bureau (supra) and Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd. and Ors., (supra) are also squarely applicable and the submission of the defence that the statement (Ext. 1) was not recorded voluntarily does not impress us in any manner and as the said statement and the procedure in which it was recorded inspires full confidence in our mind.

31. In the light of the discussions held hereinabove we find that the provisions of Section 50 of the said Act cannot be whatsoever applied and consequently the points arising for non-compliance thereof also cannot be said to have any impact and in view of the recovery of the articles which have been deposited to by P.Ws. 3, 5, 6 and 7 and the Report (Ext. 3) of the chemical examiner that the seized article was said to be heroin (Mat. Ext. I) and the voluntary statement (Ext. 1) made before P.W. 1 by the appellant just after the incident leaves no manner of doubt in our mind that the prosecution has been fully able to bring home the charge against the appellant and finding to merit we dismiss the appeal.

Pravendu Narayan Sinha, J.

I agree.