

(2008) 07 CAL CK 0042
Calcutta High Court
Case No: Criminal A. No. 17 of 2002

Assistant Director of
Narcotics Control
Bureau Eastern Zonal
Unit

APPELLANT

Vs

Dipak Poddar

RESPONDENT

Date of Decision: July 25, 2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 114
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 20, 42, 42(2), 43, 50

Citation: (2008) 4 CALLT 360 : (2008) CriLJ 4520 : (2008) 2 ILR (Cal) 885

Hon'ble Judges: Kishore Kumar Prasad, J; Girish Chandra Gupta, J

Bench: Division Bench

Advocate: Himanshu De, G.S. Makkar and Sanjoy Bardhan, for the Appellant; Joy Sengupta and Soubhik Mitter, for the Respondent

Final Decision: Dismissed

Judgement

Kishore Kumar Prasad, J.

This appeal, by special leave of a Division Bench of this Court is by the Assistant Director of Narcotics Control Bureau, Eastern Zonal Unit, Calcutta against the judgment dated 4th April, 2001 passed by the learned Judge, Special Court under NDPS Act, 6th Court, Barasat in NDPS case No. 68/1997 whereby he had acquitted the respondent herein of having committed an offence punishable u/s 20(b)(ii) of the NDPS Act.

2. The prosecution case is based on a complaint lodged by Radha Govind Pal (P. W. 1), Intelligence Officer (EZU), Calcutta and the case made out in the said complaint

may be summarised thus:

(a) Acting on an intelligence, a batch of Officers of Narcotic Control Bureau, Calcutta led by a Gazetted Officer had been to the spot at Bangur Avenue Bus Stand, V.I.P. Road on 18-12-1997 at 17.15 hours and found the respondent standing therein with a small black coloured old and used clothing bag in his right hand. The Officers introduced themselves to him and informed of their intention to search him on suspicion that he was carrying narcotic drugs for delivery to a party. On being asked, the respondent replied in the negative.

(b) Giving no reliance upon such statement, the Officers called upon two independent witnesses from the on lookers and offered him an opportunity to be searched personally before a Magistrate or a Gazetted officer. He was also informed that one Gazetted Officer was accompanying the raiding party. The respondent opted to be searched before the accompanying Gazetted Officer.

(c) On search in presence of two independent witnesses 280 grams of solid black substance in the form of sticks believed to be Hashish/Charash wrapped in a black coloured polythene packet were recovered inside an old clothing packet carried by the respondent in his right hand.

(d) Upon interrogation on the spot the respondent admitted that he was carrying the contraband substance to deliver a party.

(e) A small quantity from the said recovered substance was tested with the field test kit and it responded positive to the test of Hashish / Charash.

(f) The recovered quantum of contraband substance along with its container polythene packet and clothing bag were seized in presence of witnesses under seizure list.

(g) Thereafter, samples of 25 grams each in duplicate were drawn from the recovered contraband substance and the same were kept in separate packets which were duly sealed and signed by the independent witnesses, the respondent and the Seizing Officer. The rest quantum of substance was kept in a separate packet and the same was also duly sealed and signed by the independent witnesses, the respondent and the Seizing Officer.

(h) The appellant then served notice u/s 67 of NDPS Act in pursuance whereof the respondent made statement at NCB Office on 18-12-1997 at 23.00 hours wherein he admitted the fact of his carrying the contraband substance for sale.

(i) Thereafter, the sample drawn from the recovered and seized contraband substance was sent to the chemical examiner, Chemical Laboratory, Customs House, Calcutta and the chemical examiner (P.W.5) submitted his report certifying the existence of Charash/Hashish in the sample.

3. On the basis of aforesaid complaint and on consideration of the materials on record, charge was framed against the respondent u/s 20(b)(ii) of the NDPS Act. The respondent denied the charge and claimed to be tried.
4. To substantiate its version, the prosecution examined as many as six witnesses of whom P.Ws. 1, 2, 3, 4 and 6 are all Officers of NCB (EZU), Calcutta and P.W. 5 is the Assistant Chemical Examiner, Chemical Laboratory Customs House, Calcutta who on 13-1-1998 had submitted report in connection with this case. Apart from leading oral evidence, the prosecution also tendered and proved large number of Exhibits.
5. The defence case as it appears from the trend of cross examination of P.Ws. and from the answer given by the respondent in reply to his examination u/s 313 of the Cr.P.C. was one of absolute innocence and denial of the prosecution case. The positive defence was that the respondent was falsely implicated; that he was arrested from Burrabazar when he had gone there to purchase cloth along with elder brother and from Burrabazar he was taken to the office of NCB where his signature was obtained on blank papers forcibly. However, no evidence was adduced in defence.
6. The learned Trial Judge after considering the evidence as well as the submissions made on behalf of the parties acquitted the respondent by the impugned judgment on the ground of non compliance of the mandatory provisions regarding search and seizure as also for withholding the two independent witnesses who according to prosecution version were present at the place in question during the entire period of alleged search and seizure and other formalities conducted by the NCB Officers.
7. We have heard the learned Counsel appearing for the parties. We have been taken through the judgment passed by the learned Trial Court and the material including the documents filed therein.
8. The learned Counsel appearing on behalf of the appellant submitted that the Trial Court's approach is palpably wrong as there is evidence on record to implicate the respondent for the offence complained of. Even if there is any procedural illegality in conducting the search and seizure then also the evidence collected thereby is admissible if no serious prejudice is caused to the respondent. The learned Counsel also contended that Section 42(2) of the NDPS Act is not applicable where search and seizure is conducted in presence of a Gazetted officer. Learned Counsel further submitted that the accused did not make any complaint before the Special Judge before whom he was produced complaining of any torture or harassment and it is only when his statement u/s 313 of the Cr.P.C. was recorded by the Trial Court that a vague stand was taken and under these circumstances the confessional statement cannot be held to be involuntary and can thus be made the basis of conviction. Lastly the learned Counsel urged that Section 50 of the NDPS Act is applicable in respect of search of person and the same is not applicable where recovery is made from the bag carried by the accused. The judgments of the Hon'ble Apex Court in

the case of [Khet Singh Vs. Union of India \(UOI\),](#) ; [M. Prabhulal Vs. The Assistant Director, Directorate of Revenue Intelligence,](#) , State by CBI v. Dilbabh (2006) 1 SCC 304 and [State of Himachal Pradesh Vs. Pawan Kumar,](#) were cited by the learned Counsel in support of his above contentions.

9. Learned Counsel for the respondent vehemently opposed the aforesaid contentions raised by the learned Counsel for the appellant and supported the impugned judgment and finding arrived at by the learned Trial Court. The learned Counsel contended that non-compliance of Section 42 of the NDPS Act with the requirement of Section 50 of the NDPS Act would render the resultant search and seizure suspect and in such a situation evidence of NCB Officers requires to be corroborated by independent evidence which in the present case was not done. Learned Counsel also submitted that since the evidence led by prosecution was contradictory and unreliable, the respondent could not be convicted on the basis of such evidence. He further contended that there were two independent witnesses in this case namely Sunil Biswas and Tapan Das and both were not produced before the Court, therefore, the learned Trial Court had rightly recorded the order of acquittal when there are material discrepancies in the testimony of the official witnesses. The judgments of the Hon"ble Apex Court in the case of Koluttumottil Rajak v. State of Kerala 2000 SCC 829 and [Bhola Ram Kushwaha Vs. The State of Madhya Pradesh,](#) were cited by the learned Counsel for the respondent.

10. In view of the rival submission advanced by the learned Counsel for the parties, we think it proper to consider and clarify the legal position first.

There is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. (See [Bhagwan Singh and Others Vs. State of M.P.,](#)). The principle to be followed by the appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. These aspects were highlighted by the Hon"ble Apex Court in [Shivaji Sahabrao Bobade and](#)

[Another Vs. State of Maharashtra, ; Ramesh Babulal Doshi Vs. State of Gujarat, ; Jaswant Singh Vs. State of Haryana, ; Raj Kishore Jha Vs. State of Bihar and Others, ; State of Punjab Vs. Karnail Singh, ; State of Punjab Vs. Pohla Singh and Another, ; Suchand Pal Vs. Phani Pal and Another, and Dilip Vs. State of Maharashtra,](#)

11. Bearing in mind these principles and the parameters laid down by the Apex Court, we shall consider the evidence in this case.

12. P.W. 1, Radha Gobinda Pal is an Intelligence Officer, NCB, Calcutta who besides lodging the complaint (Ext. 1) before Court has got knowledge about the alleged raid, search and seizure. His admitted evidence during the course of cross examination goes to show that he instead of perusal of the documents and the papers in connection with this case and without applying his mind to the reality of the case had filed complaint before Court in a cavalier fashion. His admitted evidence in course of cross examination also goes to show that he did neither furnish seizure list along with the complaint nor did he even bring the seizure list before Court on the date of his adducing evidence that is on 15-6-1998. That apart, there is nothing on record to show that that P.W. 1 at the time of lodging the complaint before Court was the Officer above the rank of Inspector in the Department of NCB for filing complaints relating to an offence under the NDPS Act before Special Courts vide notification No. S.O. 763(E) dated 27-9-1989.

13. P.W. 3, Ranjit Kumar Dutta is also an Officer of NCB. In his evidence in chief he claims himself as one of the officers of the raiding party. But his said claim has been clearly falsified by his own admitted evidence during his cross examination. He in is cross-examination deposed as follows : "I did not draw the sample packet. I did not sign on the sample packets. I cannot remember as to whether weighment chart was prepared. I cannot say the name of the concern Officer who took the weighment. Excepting the quantity found in weighment, I have got no other knowledge about facts and circumstances of the case. I cannot say the names of the independent witnesses. I cannot say their whereabouts. I cannot say as to who called the local witnesses.

14. P.W. 2, R.N. Banerjee and P.W. 4, Pradip Kumar Ghosh are also Intelligence Officers of NCB, Calcutta. They claim themselves as the members of the raiding party. According to them they were present at the time of alleged search and recovery of contraband substance from the bag allegedly carried by the respondent. Their evidence is not consistent. They have made prevaricating statement with regard to the substratum of the prosecution case in material particulars from stage to stage. It appears from the testimony of these witnesses that the personal search on the person of the respondent was made first and no incriminating material was however, recovered from the person of the respondent. It does not appear from the evidence of these witnesses that prior to the alleged search of the respondent in person, he was informed about his legal right to be searched either in presence of a Magistrate or a Gazetted Officer. Merely because an oral option was given either to

be searched in the presence of Gazetted officer or a Magistrate without disclosing the right conferred upon the accused, in our opinion, such offer is no compliance of the provision of the Section 50 of the NDPS Act as pointed out by a three Judges Bench of the Apex Court in the case of Laleshwar Rajak Kalanand Dhobi v. State of Gujarat, 2002 (7) SCC 704 . According to the testimony of these witnesses what had been done in this case was to seek the opinion of the respondent whether he wanted to be searched in the presence of Gazetted officer of the raiding party or the Magistrate.

15. In [Namdi Francis Nwazor Vs. Union of India \(UOI\) and Another](#), corresponding to 1988 SCC (Cri) 1516 which is a decision by Bench of three Judges, the Apex Court held that on plain reading of Sub-section (1) of Section 50 of the NDPS Act, it applies to cases of search of a person and not to the search of any article in the sense that the article is at a distant place from where the offender is actually searched. After arriving at the above finding, the Apex Court also observed : (SCC page 537 Para 3).

We must hasten to clarify if that person is carrying a hand bag or the like and the incriminating article is found therefrom, it would still be a search of the person of the accused requiring compliance with Section 50 of the NDPS Act. However, 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 it was not found on the accused person.

16. P.W. 5, Ashim Kumar Bhattacharjee is the Assistant Chemical Examiner attached to chemical laboratory, Customs House, Calcutta. He has proved the report of examination of sample materials (Ext. 8) alleged to have been recovered from the bag carried by the respondent. According to his testimony the sample weighing 24 grams was in the form of grayish brown colour cylindrical rod like mass and it responded to the test for resinous extract from plant cannabis sativa (Charash/Hashish). But on the question of quantum of sample allegedly taken after seizure as also on the colour of the recovered contraband substance, we find material discrepancies in the testimony of P.Ws. 2, 4 & 6. According to P.W. 2 polythene packet containing some substance weighing 280 grams were recovered from the cloth bag carried by the respondent and two samples were drawn weighing 25 grams each. But there is nothing in the testimony of P.W. 4 about quantum of sample taken from the recovered contraband substance, and according to him solid sticky black substance weighing 280 grams were recovered. The testimony of P.W. 6 claiming himself as the accompanying raiding Gazetted Officer is otherwise on the quantum of sample taken. His evidence before Court that two samples weighing 23 grams each were taken and on search one black sticky substance was recovered from the bag. Thus, there was difference of weight as also the colour of the contraband substance allegedly recovered. Accordingly, there is doubt that what was received by the chemical analyser was not the same which had been

recovered.

17. There is another aspect of the matter which requires consideration. The witnesses namely P.W. 2 and 4 have nowhere whispered about the P.W. 6 in their evidence. That apart, the name of P.W. 6, Nemaï Chandra Patra has not been mentioned either in the complaint filed before Court or in the list of witnesses appended to the said complaint. No explanation has been forthcoming from the prosecution regarding the aforesaid anomalies. These are the striking features in this case.

18. For the reasons aforesaid, the testimony of these witnesses has suffered from many infirmities and it would not be safe to rely upon their testimony to hold the respondent guilty.

19. The another regrettable feature of the case which creates another dent in the prosecution case is that the prosecution case has not dared to bring the two independent witnesses who according to prosecution were present at the time of interception of the respondent as also during the entire period of search, seizure and other formalities conducted by the Officers of NCB on the spot. In view of the contradictory statement of the material witnesses of the prosecution pointed out earlier, absence of the said two independent witnesses namely Sunil Biswas and Tapan Das of Bangur Avenue, Calcutta 55 who are the best persons to enlighten the Court as to whether any recovery of contraband substance was made from the bag carried by the respondent at the time and place as alleged by the prosecution. For reasons best known to the prosecution the said independent witnesses have been withheld. The prosecution has offered no explanation for non-examination of anyone of the said witnesses. It is not the case of prosecution that the said independent witnesses had been won over by the respondent. In fact, what appears from the record is that no effort was made by the prosecution to bring the said witnesses. The evidence of the said witnesses in the totality of the facts and circumstances of the case is considered very much material for the purpose of the instant case. A material witness who did not go to the witness box would be the strongest possible circumstance going to discredit the truth. Besides, the Court is entitled to draw an adverse inference as provided in illustration (g) to Section 114 of the Evidence Act and come to the conclusion that the evidence of anyone of the said witnesses has been purposely withheld because if produced it would have been wholly unfavourable to the prosecution version.

20. In the instant case, Section 42 of the NDPS Act would not be attracted because the respondent was apprehended at Bangur Avenue Bus Stand on V.I.P. Road. It was a public place for which Section 43 of the NDPS Act will apply, which does not require the information of any person to be taken out in writing. Section 43 of the Act is meant for seizure and arrest of the accused in public place. Section 42 of the Act is applicable to a case where the concerned Officer on information received or having reason to believe from personal knowledge that any offence has been

committed in relation to any drug or psychotropic substance etc. and which is kept or concealed in any building, conveyance or enclosed place may between sunrise and sunset searched the building or conveyance of places. This aspect has been dealt in detail by the Apex Court in the case of [Ravindran @ John Vs. The Superintendent of Customs](#), . The learned Trial Court in the impugned judgment has not at all discussed the evidence for attracting Section 42 of the Act and has given flying remark that the mandatory provision of the Act has not been complied with by the prosecution which is clearly erroneous. The learned Trial Court before holding non-compliance of Section 42 of the Act should have dealt with the evidence adduced by the prosecution in this regard.

21. We shall now deal with the so-called statement that is exhibit 6 allegedly made by the respondent. We have read and reread the statement. The so-called voluntary statement contains an account of the entire proceedings allegedly held on 18-12-1997 coupled with a positive assertion that the statement was made in pursuance of a notice u/s 67 of the NDPS Act. The said statement according to prosecution case was recorded at NCB Office at 23.00 hours that is 6.00 hours after the proceeding of search and seizure without any legal assistance. The manner in which the so-called statement was taken goes to show that it is not a statement of the respondent but the statement of Officer of NCB. Apart from the aforesaid consideration, we find nothing in the alleged statement that the respondent was warned that the statement in question was liable to be used against him.

22. In the case of [N.S.R. Krishna Prasad and Vs. Directorate of Enforcement Loknayak Bhawan Khan Market, New Delhi and Others](#), wherein the Division Bench of A. P. High Court had occasion to hold that it is a requirement of law when the statements are recorded by the customs authority that the accused be warned that the statement in question is liable to be used against him and that he should be put on notice. Similar was the view of the Bombay High Court in the case of [State of Maharashtra Vs. Hasmukh Hargovind Shah](#), .

23. In the case of [Haroon Haji Abdulla Vs. State of Maharashtra](#), wherein the Hon"ble Supreme Court had occasion to observe that the Court should be put on caution while dealing with a statement recorded by the customs authority in so far as these statements are distinguishable from the confession recorded by the Magistrate who is a Judicial Authority and who observes the requisite precaution while recording such statements.

24. Judging the case in hand on the principles noted above, the so-called statement (Exhibit 6) retracted by the respondent on 3-1-1998 that is on the second date of his production before the Special Judge and before the complaint was actually lodged on 27-1-1998, cannot be looked into for any purpose.

25. There are many other infirmities in the prosecution case. It is not necessary to burden this judgment by dealing with all of them.

26. In view of the foregoing legal and factual discussion, we are satisfied that the prosecution has failed to prove the case against the respondent beyond all reasonable doubts and therefore, the benefit of doubt was deservedly extended to the respondent by the learned Trial Court.

27. The conclusion which we have arrived at on the reappraisal of evidence is that the prosecution evidence is discrepant, contradictory and untrustworthy of credence to convert the acquittal into conviction. For the aforesaid reasons the finding of acquittal recorded by the learned Trial Court is upheld.

28. The appeal is as such dismissed. The impugned judgment of acquittal is hereby affirmed.

Lower Court Records with a copy of this judgment to go down forthwith to the learned Special Judge, under NDPS Act, 6th Court, Barasat for information and necessary action.

Urgent xerox certified copy of this judgment, if applied for, be supplied to the learned Counsel for the parties upon compliance of all formalities.

Girish Chandra Gupta, J.

29. I agree.