

(1996) 07 CAL CK 0041

Calcutta High Court

Case No: Criminal Appeal No. 330 of 1991

Ajit Sinha Ray

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: July 26, 1996**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 100, 165, 313, 420
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 21, 50

Citation: (1997) 2 ILR (Cal) 564**Hon'ble Judges:** R. Bhattacharyya, J; D.P. Sircar, J**Bench:** Division Bench**Advocate:** Subrata Mookherjee and A.K. Ghosh, for the Appellant; Kazi Safiulla and Madhuri Ghosh, for the Respondent**Final Decision:** Allowed

Judgement

R. Bhattacharyya J.

1. This appeal is directed against the order of conviction and sentence passed by the learned 12th Court Additional Sessions Judge, Alipore, 24-Parganas (South) u/s 21 of the Narcotics Drugs & Psychotropic Substances Act, 1985.

2. The learned Court below upon assessment of evidence on record passed the order of conviction and sentence on July 30, 1991 convicting the accused under the aforesaid section and sentencing him to suffer R.I. for ten years coupled with a further sentence to pay a fine of Rs. 1,00,000.00 in default, further R.I. for two years. The period in custody if any, shall be set off u/s 420 of the Code of Criminal Procedure.

3. The accused, since aggrieved by and dissatisfied with the order of conviction and sentence, has approached this Court to set at naught the order of conviction and sentence.

4. In challenging the order of conviction and sentence, the learned Counsel for the Petitioner is vocal in his submission that the evidence had not at all been considered by the learned Court below. To add strength to his claim, he has made emphatic submission that miranda warning which flows from the decisions of the Supreme Court has been totally ignored and the learned Court below jumped to the conclusion founded on fragile evidence.

5. In refuting the claim of the Appellant, the learned Public Prosecutor has argued most strenuously that the authority had no prior information of the alleged act to be committed by the accused. The authority at the juncture of such evidence took possession of the contraband by way of search and seizure, which cannot vitiate on the plea of non-compliance of Section 50 of the Narcotic Drugs and Psychotropic Substances Act. The mandate of law may be adhered to by the authority effecting search and seizure when it had prior information of the offence alleged to have been committed by any of the accused. Any short of this thing takes the case out of the pale of Section 50 of the said Act.

6. It is, therefore, a far cry in wilderness of the Appellant to snatch the order of acquittal from the Court. It is nothing but a faint attempt to chase a wild goose when the evidence is tangible and legal which does not bear any scar not to speak of the rigour as unfurled by Section 50 of Act. Thus, the case of the Appellant as to search and seizure of the Appellant could be classified as one under the Code of Criminal Procedure, where compliance of Section 50 of the act is a distant claim.

7. These are the broad arguments advanced by the learned Counsel for both the parties. But the cream of the submission is about the legality or otherwise of the conviction which shows its head from all peak and angle of submissions.

8. To adjudge the viability of the claim of the Appellant, it is notorious to find from the record that the prosecution has examined as many as five witnesses to ground its claim and the Appellant did not examine any witness from his side. He was examined u/s 313 of the Coe of Criminal Procedure where he made the lone claim that he is immune. But this appeal can be disposed of on a single point as the claim of the Appellant is anchored at [State of Punjab Vs. Balbir Singh](#), where the Apex Court has consistently made a classification of two classes of cases. The first of such cases is governed by Sections 100 and 165 of the Code of Criminal Procedure 1973, where the investigation agency charges its investigation without having prior information and the contraband seized of having recourse to Code of Criminal Procedure. In such circumstances it is not vitiated or affected for the operation of Section 50 of the Narcotic Drugs and Psychotropic Substances Act.

9. The second class of cases comes within the realm of Section 50 when the investigating agency is activated by prior or earlier information of the offence likely to be committed by the accused and the contraband seized or taken possession of following such information. In the instant case, it is notorious to find from the

evidence that the Investigating Officer PW-4 Nitendra Kumar Bhattacharjee who has canvassed in his evidence that he "measured the weight of the seized article in the Thana. I have not mentioned in the CD. in what way I took the measurement. Not a fact that I did not take any measurement at all". The question of measurement is a misnomer. The question of measurement is paled into insignificance as the appropriate word would be weighing of the contraband seized.

10. It is significant to find from his evidence that the contraband when seized and taken possession of it was not weighed about which there is a complete black out in the evidence P.W.-4 is again emphatic claiming himself to be aware of Narcotic Drugs and Psychotropic Substances Act, 1985 and rules there under suggesting that he is well acquainted with the procedure. In the back train of the above, the procedure as laid down in Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 was completely sacrificed and the same was substituted by a convenient procedure invented by him which does not conform to the procedure prescribed by Section 50. P.W.-4 let the cat out of the bag when he said, "not a fact that I measured the weight of the seized article in the Thana". This is also an attempt which does not negate the fact that he tried to avoid the rigour of the Section 50 of the Narcotic Drugs and Psychotropic Substances Act.

11. Non-compliance of the procedure entails the right of the prosecuting agency to fix the Appellant with the crime. Section 50 of the Act cannot be relaxed as in the instant case by the reason of the prosecuting agency or the investigating agency as the case may be had prior information of the act. This fact alone is quite sufficient, since established by the weighty evidence on record which vitiated the trial. Now, it is too late in the day for the prosecution that the procedure has been complied with and the order of conviction and sentence is both water and air-tight. The contraband was definitely weighed in the PS which P.W.4 tried to suppress. It is but the truth which always prevails and falsehoods can never take the place of truth. We have considered the entire evidence on record and it is found from the evidence that the contraband seized was herein. It is also notorious to find from the evidence that the same was recovered from the tape-recorder. How did the investigating agency, unless buttressed by prior information, could find the contraband from the tape-recorder? It is an unholy attempt of the investigating agency to deny the liberty to him and to secure the order of conviction being blissfully ignorant of the embargo imposed by Section 50 of the Narcotic Drugs and Psychotropic Substances Act though claimed awareness of it. There could be no reason to hold back the truth. Here is a case where all that glitters is not gold.

12. Thus, upon considering the entire evidence on record and having been given our anxious consideration to the claim of the respective parties and after being inspired by law laid down by the Appeal Court, we have no other alternative, but to acquit him of the charge. His conviction u/s 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 is set aside and the accused should be set forth at liberty at

once unless wanted in connection with any other case, The appeal, is, accordingly, allowed.