

(2004) 12 CAL CK 0035

Calcutta High Court

Case No: C.R.A. No. 365 of 2001

Rafiqul Islam and Another

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: Dec. 22, 2004

Acts Referred:

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 21, 40(2), 42(2), 50

Citation: (2005) 1 CHN 428

Hon'ble Judges: Bhaskar Bhattacharya, J; Arun Kumar Bhattacharya, J

Bench: Division Bench

Advocate: Mrinmoy Bagchi and Anjali Agarwal, No. 1 and Partha Sarathi Bhattacharya and R.K. Sanyal, No. 2, for the Appellant; Biplab Mitra and Amajit De, for the Respondent

Final Decision: Allowed

Judgement

Bhaskar Bhattacharya, J.

This appeal is at the instance of two convicted persons and is directed against order dated 19th May, 2001 passed by the learned Judge, Special Court, NDPS Act, Murshidabad in NDPS Case No. 22 of 2000 u/s 21 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the NDPS Act) thereby convicting the appellants under the said provision and passing a sentence of 10 year's rigorous imprisonment and a further fine of Rs. 1,00,000/- each. In default of payment of fine of Rs. 1,00,000/-, the appellants were directed to suffer further rigorous imprisonment for two years.

2. The complaint on the basis of which the prosecution commenced was that the Investigating Officer along with Constable Saktipada Paul and N.V.F. persons namely, Ranjan Sarkar, Abdul Basar and Kazem Ali left for Nadaipur village to pursue information received from a source. They reached at the village at 12.35 hrs., and went to the rice mill of one Jalaluddin Sk. when they found that the accused

persons were in the mill. According to the complaint, the said two persons possessed heroin for sale. The complaint alleged that on being apprehended, they confessed possession of heroin and the complainant asked them whether search would be made in presence of Executive Magistrate or a Gazetted Officer. According to the complaint, the accused told him that they preferred Executive Magistrate. Accordingly, the complainant informed S.D.P.O. (2) over wireless to send an Executive Magistrate. Consequently, one Shri Amal Krishna Goldar, Executive Magistrate, Lalbagh, arrived at Nadaipur at 13.30 hrs. The complainant also called a Goldsmith, namely, Netai Paul who arrived at Nadaipur. In the presence of witnesses namely, (1) Md. Tahasen Ali and (2) Md. Mizanoor Rahaman and an Executive Magistrate, he searched them and recovered one polypack containing heroin from the possession of one of the accused namely, Rafiqul Islam, and another polypack containing the self-same materials from the possession of the other accused namely, Saudagar Sk. Both the polypacks were weighed by Nitai Pal, a Goldsmith and found to be 40 grams and 30 grams respectively which the complainant seized after preparing seizure list in presence of the above witnesses duly signed by the witnesses as well as the accused persons. The Executive Magistrate endorsed the above two polypacks containing heroin after preparation of the inventory lists.

3. On the basis of the aforesaid allegations, charge was framed against two appellants u/s 21 of the NDPS Act. The accused persons pleaded innocence.

4. At the time of hearing, the prosecution examined 10 different witnesses in support of the prosecution case. P.W. 1 and P.W. 2 are the local witnesses in whose presence the appellants were allegedly searched and incriminating articles were recovered. Both the aforesaid witnesses, however, became hostile?, P.W. 3 and P.W. 4 are the members of the raiding team and P.W. 5 and P.W. 6 are the members of N.V.P. Shri Amal Krishna Goldar, Executive Magistrate appeared as P.W. 7. Nitai Pal, the Goldsmith who allegedly weighed the articles figured at P.W. 8 but he also became hostile. The complainant is the P.W. 9 and the Investigating Officer appeared as P.W. 10.

5. P.W. 1, one of the alleged two public witnesses stated that on 7th March, 2000 at 12 noon he stood near the mill-room of Jalaluddin when Darogababu called him and asked him to sign on a paper and he complied with such direction. According to such witness the two appellants were taken by the Darogababu. He proved his signature on Ext. 1. At this stage, the witness was declared hostile by the prosecution. In cross-examination by the prosecution, he stated that he did not state before the police that he searched the two persons and recovered one polythene packet each from the possession of the two accused persons. He further stated that he did not state before the police that the packets contained heroin. He also denied the suggestion that he stated to the police that the weight of each packet was 70 gms. He further denied that he ever stated to the police that after

recovery of heroin the seizure Hat was prepared. He also denied that he stated to the police that the Goldsmith took out small packets from the two packets seized. In cross-examination on behalf of the appellant No. 2 he stated that the two accused persons were arrested on the previous day of the occurrence namely, 6th March, 2000.

6. P.W. 2, the other witness to the alleged recovery, stated that he knew the accused persons and on 6th March, 2000 while he was returning after day's works from the field, he found an assembly of some persons at a tea stall. He heard that these two accused persons were arrested by the police of Bhagabangola P. S. On the next day, namely, 7th March, 2000, he again went to his place of work at 2 or 3 p.m. when those two accused persons were inside the police van and police asked him to sign on two to three places on a plain paper and he complied with such demand. At this stage, the witness was declared hostile by the prosecution. He also specifically stated that he did not state before the police that they surrounded the mill of Jalaluddin. He also did not state that two packets had been recovered from the possession of the two accused persons after search. He asserted that he did not state before the police that the two packets contained heroin and that the Magistrate of Lalbagh was present at that time. He also denied having said that Nitai Pal, the Goldsmith, and many others were present. He denied the suggestion that entire occurrence took place on 7th March, 2000 and that he was deposing falsely that the occurrence had taken place on 6th March, 2000. In cross-examination on behalf of the accused, he stated that the accused persons were brought at the place of occurrence between 2 p.m. and 3 p.m. from Lalgola P. S.

7. P.W. 3 is a Constable attached to the Lalgola P. S. He stated that on 7th March, 2000 he accompanied the O. C. and had been on duty near the mill of Jalaluddin. According to him, they surrounded the said mill according to the direction of the O. C. Then, one Magistrate came and the O. C. and the Magistrate entered into the mill along with some other two persons. In cross-examination, he denied the suggestion that no Magistrate accompanied the O. C. at that time.

8. P.W. 4 is another Constable of the Lalgola P. S. who had allegedly accompanied the O. C. at the time of recovery. He also corroborated the statements of P.W. 3 and denied the suggestion that no Magistrate came at Nadaipur at that time.

9. P.W. 5 is a N.V.F. Constable. He merely stated that he went to Nadaipur along with the O. C. on 7th March, 2000. Similarly, P.W. 6 another Constable of N.V.F. simply stated that he had been to Nadaipur village along with the O. C. of Lalgola P. S. on 7th March, 2000.

10. Amal Krishna Goldar is a W.B.C.S. Officer who allegedly was present at the time of recovery of the heroin from the appellants. According to his statements, as per direction of the S.D.O., Lalbagh, he had been to a place in connection with seizure of heroin. He stated that at first, he went to the P. S. and then to village Nadaipur at

about 1 to 1.30 p.m. He found two persons were in the custody of police and identified the appellants. According to him, the police recovered two polythene packets from the possession of the two accused persons and the police seized those materials in his presence and weighment was made. He also proved his signature on the sample of heroin. In cross-examination he denied the suggestion that he did not go to village Nadaipur. He, however, admitted that he could not say the direction of the place by guess. According to him, he was guided by the police. He could not even remember on which side of the road the village Nadaipur situated. According to this witness, the weighment was taken at the P. S. and not at the place of occurrence and up to that period the seized materials were kept with the police. He further stated that he was not acquainted with the provisions of the NDPS Act and did not know the extent of his jurisdiction. He further stated that there was an endorsement of his requisition by the S.D.O. but he did not bring it nor did he hand over such order of requisition by the S.D.O. to the police.

11. P.W. 8 is Nitai Pal, the Goldsmith, who allegedly weighed the seized heroin. He has stated that he had not seen Mr. Goldar, the Deputy Magistrate on that day. The prosecution declared him hostile and cross-examined him. In cross-examination, he has stated that he did not tell police that he went to Nadaipur by his motorcycle. He did not also state before Darogababu that police searched two persons and recovered two packets in his presence at Nadaipur. He denied the suggestion that he weighed those two packets or that he signed those two packets. In cross-examination by defence, he has stated that when he signed on the paper, the same was not pasted with the packet marked material Ext. 1.

12. P.W. 9 is the O. C. Hariharpara P. S. and the then O. C. of Lalgola P. S. According to him on that day at 12.05 noon he received information through source in respect of heroin and accordingly he informed such fact to S.D.P.O., Lalgola over telephone and according to his direction, he along with the force proceeded towards the place of occurrence after making a G. D. bearing No. 263 dated 7th March, 2000. According to him, on arriving at the village Nadaipur in the mill of Jalaluddin, he noticed two persons there. He interrogated them and one person described himself to be Rafiqul and another as Fitu @ Chand Sawdagar. He interrogated them and they confessed their guilt that they possessed heroin. He informed the S.D.P.O., Lalgola over S.R.T. message with request to send one Magistrate, Shri Amal Krishna Goldar, the Magistrate, came there and an inventory was made in the presence of two persons. Before that, he called two persons as witnesses. He also called a Goldsmith, weighment was made and afterwards samples were taken. In cross-examination, he stated that he got the information at 12.05 noon and he received the information from a source that two persons carried heroin in the mill of Jalaluddin. According to him, he informed this fact to the superior officer over R. T. message and that was noted in the diary. He did not inform in writing. He did not make requisition of the Magistrate in writing. The S.D.P.O. Lalgola sent Mr. Goldar. He did not know if there was any intervention as to the sending of other officer. He

denied the suggestion that at 2 p.m. he brought the two persons from Lalgola P. S. to Nadaipur. After arrival of Mr. Goldar, according to him, heroin was seized, weighed, sealed, labelled etc. After arrival of Mr. Goldar, he interrogated the accused persons too, as to possession of heroin, and their names. According to him, they did not seize any copy relating to authorisation.

13. P.W. 10 is the Investigating Officer, He proved the materials allegedly recovered and proved all the documents. In cross-examination he particularly stated that he was not sure if he was empowered to investigate an offence like the present case. In cross-examination, he has admitted that he had not seen what materials were sent in the packets for expert's opinion.

14. The two accused persons were examined u/s 313 of the Code of Criminal Procedure. In such examination, they pleaded innocence.

15. The learned Trial Judge by the order impugned herein has found that the prosecution had been able to prove its case against the accused persons and accordingly convicted them as indicated earlier.

16. Being dissatisfied, the appellants have come up with the present appeal.

17. Mr. Bagchi, the learned Advocate appeared on behalf of the appellant No. 1 while Mr. Bhattacharya appeared on behalf of the appellant No. 2.

18. Both the learned Counsels appearing on behalf of the appellants have raised a number of pure questions of law in support of this appeal. According to them, it does not appear from the materials on record that before the alleged recovery of the articles from the appellants, they were informed of their right to be searched in the presence of either the Magistrate or any Gazetted Officer. According to them, in the absence of such information given to the appellants as provided in NDPS Act, the conviction inflicted upon the appellants should be set aside for non-compliance of the provisions contained in Section 50 of the NDPS Act. They further contend that there is no material to show that the concerned officer after getting information complied with the requirement of Section 42(2) of the Act by informing the superior officer in writing. In support of such contention the learned Counsel for the appellants placed strong reliance upon the decisions of Supreme Court in the cases of [State of Punjab Vs. Baldev Singh, etc. etc.](#), and the latter, in 2002 SCC (Cri) .1846.

19. The learned Counsel for the appellants also tried to convince this Court that in this case, the recovery of the articles was even not proved in accordance with law, inasmuch as, the alleged independent witnesses and the Goldsmith who allegedly weighed the seized materials became hostile. They contend that it is apparent that the appellants were arrested not on 7th March, 2000, but on the previous day, namely, March 6,2000. They, therefore, pray for setting aside the order of conviction and the sentence.

20. Mr. Mitra, the learned Counsel appearing on behalf of the State tried to impress upon this Court that compliance of Section 50 of the NDPS Act has been substantially made in this case, inasmuch as, the Executive Magistrate was himself present when the search was made. Mr Mitra submits that there is no reason of falsely implicating the appellants when no enmity against the police officer has been suggested by the appellants. He, thus, prays for dismissal of the appeal.

21. After hearing the learned counsel for the parties and after going through the aforesaid materials on record we find substance in the contentions of the learned counsel for the appellants that apart from the fact whether heroin was really seized from the appellants, the formalities required u/s 50 and Section 42(2) of the NDPS Act have not been complied with.

22. It is now settled law that if on the basis of source information, an accused is searched in person, in such a case, before giving option to him to be searched either before a Magistrate or before a Gazetted Officer, the accused must be informed of his right provided under the Act. In this case none of the prosecution witnesses has stated in evidence that before the appellants were searched, they were informed that they had a right under the NDPS Act to be searched either in the presence of a Magistrate or a Gazetted Officer, By making mere statement that he was given option either to be searched by a Gazetted Officer or by a Magistrate without informing him of his right created under the NDPS Act, if the prosecution tries to prove that pursuant to such search the offensive articles were recovered and consequently, the accused is convicted, the ultimate conviction must be held to be vitiated. [See Laleshwar Rajak Kalanand Dhobi v. State of Gujarat 2002 SCC (Cri) 1846]. Moreover, such right of the accused must be informed and option must be given in the presence of two independent witnesses. In this case, both the independent witnesses before whom the appellants were allegedly searched were declared hostile by the prosecution as they denied their roles alleged by the prosecution. Therefore, it is clear that prior to the alleged search before the Magistrate, the appellants were not apprised of their right conferred under the NDPS Act. Apart from the aforesaid fact, it appears that the provision contained in Section 42, sub-section (2) of the Act was also not complied with. The officer, who got such information, must prove that such information was communicated to his immediate superior officer in writing within the time mentioned therein. In this case, it is admitted that the alleged source information was communicated to the superior officer over telephone. Thus, the provision contained in Section 42(2) of the Act has also not been complied with.

23. Although, the aforesaid two irregularities are sufficient to set aside conviction, we find that in this case, the prosecution has not even been able to prove that there was really recovery of the forbidden articles from the appellant at the time mentioned therein. We are unable to place any reliance upon the evidence given by the members of the raiding party that the appellants were really arrested on 7th

March, 2000, Even the Goldsmith who allegedly weighed the articles was declared hostile.

24. On consideration of the entire materials on record, we find that the prosecution in this case has hopelessly failed to prove even the recovery of the illicit articles from the appellants and at the same time the provisions contained in Sections 50 and 42(2) of the NDPS Act have not been complied with.

25. The learned Trial Judge, it appears from the record, did not consider the aforesaid aspects of the matter and as such, we are left with no other alternative but to set aside the order of conviction and the consequent sentences imposed upon the appellants.

26. The appeal is, thus, allowed. Order of conviction and sentence are set aside. The appellants be set at liberty at once, if not wanted in any other case.

Arun Kumar Bhattacharya, J.

27. I agree.