

(2014) 08 CAL CK 0112

Calcutta High Court

Case No: CRA 24, 25 and 90 of 2008

Shyamal Barman

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: Aug. 21, 2014

Acts Referred:

- Evidence Act, 1872 - Section 125
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 20(b)(ii)(c), 42(2), 52A

Citation: (2014) 3 CALLT 591 : (2015) 3 CCR 47 : (2015) 1 Crimes 737 : (2014) 4 Crimes 108

Hon'ble Judges: S. Chatterjee, J; Nishita Mhatre, J

Bench: Division Bench

Advocate: Sekhar Kumar Basu, Senior Counsel, Tapan Deb Nandi and Saryati Datta, Advocate for the Appellant; Anusuya Sinha, Advocate for the Respondent

Final Decision: Allowed

Judgement

Nishita Mhatre, J.

The challenge in these appeals is to the decision of the Additional Sessions Judge-cum-Judge, Special Court under NDPS Act, Cooch Behar dated 29th November, 2007 in G.R. case No. 303 of 2006. The appellants have been convicted for having committed an offence punishable u/s 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act"). The appellants have each been sentenced to suffer rigorous imprisonment for 12 years and to pay fine of Rs. 1,00,000/- (Rupees one lac only) in default to suffer simple imprisonment for a period of 2 years.

2. Briefly stated the case of the prosecution is that information was received at the Border Security Force (hereinafter referred to as "BSF"), Head Quarters, that a consignment of ganja was likely to be transported from New Cooch Behar to Delhi. An ambush was planned on 22nd August, 2006 at 6.20 p.m. in the area of Mura

Torsa Bridge near the BSF campus, Roop Nagar which falls under the Kotwali Police Station, District-Cooch Behar. Govinda Rao, a BSF constable who is the appellant in CRA 25 of 2008, was found loitering near the bus stop in a suspicious manner although he had been granted leave up to 14th September, 2006. He was detained near Mura Torsa Bridge and on questioning he disclosed that a consignment of contraband articles would be transported in an Ambassador car bearing registration No. WMA 7400 and that he was involved in its transportation. PW 6, the Deputy Commandant and PW 8, the Inspector (G) intercepted the car at about 7 p.m. Ganja, wrapped in polythene sheets and placed in one black BSF steel box, a suitcase and one bed-roll was found in the boot of the car. The three persons, i.e., the appellants in CRA 24 of 2008, CRA 25 of 2008 and CRA 90 of 2008 sitting in the car were taken to the BSF Sonari campus for further action. They were searched in the presence of PW 6 who was a Gazetted Officer since no Magistrate was available in the area. The appellants could not produce any valid document to support their possession of the ganja. It was seized and the seizure memo was prepared in the BSF Head Quarters indicating that the total amount of ganja seized was approximately 63 kilos. The appellants were all apprehended. An FIR was lodged by PW 6 with the local police station, i.e., Kotwali police station. The case was registered and was tried as G.R. case No. 303 of 2006.

3. In order to establish the case against the appellants, the prosecution has relied on the evidence of 9 witnesses, most of whom were members of the raiding party. PW 6 was the Deputy Commandant of the 142 Battalion, BSF at Cooch Behar at the relevant time. He led the raiding team. He has deposed that he received information regarding the transportation of contraband articles. Thereafter he and PW 9 and other personnel from the BSF went to the Cooch Behar area to apprehend the appellants. He has stated that on the way PW 9 contacted their source and obtained information regarding the exact location of the appellants. At this point of time he was also informed that a member of the BSF was one of those involved in the transportation of the contraband articles. He has spoken about Govinda Rao being found loitering near the bus stand at the tri-junction of New Cooch Behar to Tufanganj Road and Khagrabari to Tufanganj Road near Mura Torsa Bridge. According to this witness Govinda Rao was not supposed to be present in Cooch Behar as he had obtained leave for 60 days. He was, therefore, apprehended and he confessed that he was involved in the transportation of the contraband. This witness has stated that the car was intercepted and three persons were found sitting in that car. Govinda Rao identified those persons to be involved with him in the transportation. One of those persons apprehended, Haridas Chakraborty, the driver of the vehicle, was an ex-army man. This witness has stated that after ascertaining from the appellants that they did not have any objection to be searched in the absence of the local Magistrate since he was a Gazetted Officer, the BSF personnel opened the boot of the ambassador car. They found the ganja packed in a suitcase, a steel trunk of the BSF and one bed-roll, each containing different quantities of

ganja. The total quantity was 63 kgs. 100 gms. of ganja. This witness has spoken about taking the appellants to the Head Quarters and preparing a seizure memo over there. In his cross-examination, the witness has admitted that he did not receive the information regarding the transportation of the contraband articles. He has also conceded that no G.D. entry was made in connection with that information as the custom followed by them did not require the inclusion of such information if it was received from any source. PW6 has also admitted that no information was given about the raid to be conducted either to his superior officer or to the Kotwali police station. He has also admitted that though there were superior officers posted in the Roop Nagar camp of the BSF, they did not inform anybody about the raid although it was in the vicinity of the Mura Torsa Bridge and the Intelligence Branch was also stationed at the Roop Nagar camp. According to the witness this was because PW 8 was an Inspector of the Intelligence Branch located at Roop Nagar. PW6 has stated that neither the suitcase nor the steel box was locked. He has conceded that the contraband was not weighed at the Mura Torsa Bridge, immediately after the car was intercepted. However, he has stated that the articles were labelled by him after weighing them. He has admitted that he did not obtain the signatures of the persons from whom he had seized the ganja. He has stated that the seized articles were kept in the BSF quarters though he could not remember whether it had been mentioned in the malkhana register. This witness could not recall whether the registration papers of the vehicle were seized.

4. PW 8, who was an Inspector with the Intelligence Branch of the BSF at the relevant time, has stated that he had received information that an employee of the BSF was involved in the trading of contraband articles. Their source had disclosed that the ganja would be despatched to various places. He claimed that he informed his superior DIG telephonically and the Deputy Commandant, i.e., PW 6. This witness has stated that according to the information received the articles were to be despatched by the Brahmaputra Mail. The witness has spoken about the interception of the ambassador car and the seizure of 63 kgs. of ganja and the apprehension of all the appellants. In his cross-examination the witness has admitted that the Investigating Officer in this case had not interrogated him. He stated that though he had received information that the articles would be sent from a region of Dinhata Police Station, he did not inform that police station nor did he inform the Kotwali Police Station which had jurisdiction over the area in which the car was ambushed. He stated that he arrested the appellants and then went to Sonari camp where he met PW 6.

5. PW 1 was a member of the raiding party. He claimed that the Deputy Commandant, i.e., PW 6 had informed the local police station about the incident. The bed-roll, the steel box and the suitcase were all produced in Court as material exhibits. Surprisingly this witness could not recall the vehicle in which the raiding party went to the police station although his evidence was recorded within less than six months of the incident. He has admitted that while leaving the office an entry

has to be made in the diary indicating the purpose for which the force was being deployed. This witness has admitted that no labelling was done in respect of the contraband recovered nor were the containers, i.e., the steel box, the suitcase and the bed-roll labelled. He has further admitted that a G.D. entry has to be made whenever a raid is conducted.

6. PW 2 was posted in the BSF camp at Sonari on 22nd August, 2006. He was a member of the team which ambushed the appellants. He has stated that the accused and the ganja which was found in the car were handed over to the local police station. He has further stated that he became aware of the fact that the material exhibits 1, 2 and 3, namely, the steel box, suitcase and bed holder contained ganja only after the team returned to the camp. This witness has denied the presence of Govinda Rao with them when they returned to the camp. He has stated that he had signed the seizure memo in the police station and that he was not required to sign any document at the Sonari camp when the accused and the seized articles were delivered there.

7. PW 3 was posted at Roop Nagar BSF camp at Cooch Behar. On 22nd August, 2006 he drove the vehicle with PWs 5, 8 and one Ramkumar towards New Cooch Behar railway station. He has deposed that when they reached near Torsa Bridge, the others in the car alighted and he was asked to drive on further. This witness has stated that he saw from a distance that the others had intercepted a car. He has also stated that he was not interrogated by the Investigating Officer. The witness has been declared hostile. In his cross-examination he has mentioned that the ambassador car was detained at Torsa Bridge when it was dark.

8. PW 4, a constable, was posted at the Sonari camp on the relevant date. He has stated that some officers of the BSF brought some persons to the unit, who were then taken to the local police station. He accompanied them as a guard. In his cross-examination he has stated that he found 4 persons in the ambassador car, but he was neither aware of the point from which they had started, nor the reason for their detention. According to him, the steel box, the suitcase and the bed-roll which were brought to the unit and opened, contained ganja.

9. PW 5 claims that he, Santosh, Ramkumar and others accompanied their officers who were in a different vehicle towards the bridge close by. He claims to have seen Govinda Rao loitering on the road and that he was detained him under suspicion by the officers. The witness has spoken about the officers intercepting the car and removing the bed-roll, the suitcase and the steel box from the boot of the car. These articles were opened in the Sonari camp. The witness has conceded in his cross-examination that he was not able to state as to who had arrested the appellants and the reason for the same. He has also contradicted himself in his cross-examination by stating that he was not able to speak about the contents of the containers, i.e., the bed-roll, the steel box and the suitcase.

10. PW 7 was posted at the BSF Head Quarters on the relevant date. He has spoken about his superior having received information about the transportation of ganja in a car. He was a member of the raiding team. He has spoken about the presence of Govinda Rao on the road and the fact that the ambassador car bearing No. WMA 7400 was detained. He has stated that the material exhibits were opened by an officer and found containing 63 kilos of ganja. He has identified the articles, namely, material exhibits 1, 2 and 3. The witness has stated that he was not interrogated by the Investigating Officer and therefore, did not tell him about the material exhibits being opened in his presence or that ganja was found in these articles. In his cross-examination he has stated that no diary is maintained by the BSF and that they moved out of the camp as directed by the seniors.

11. PW 9 is the Investigating Officer in this case. He has exhibited the seizure list bearing his signature and the signatures of the witnesses. According to this witness he collected samples in the presence of a Gazetted Officer, namely, PW 6 and that he had examined the witnesses to the seizure made by him again. This witness claims to have collected samples from the seized articles and sent the same for analysis to the Forensic Science Laboratory (hereinafter referred to as "FSL"). The report of the FSL was exhibited as Exhibit 6. He claims that PW 3 told him that the latter's superior officer had received information from a source that an ambassador car would be used for transporting ganja from Dinhata. PW 3 also informed him that a member of the BSF who was involved in the transaction was found loitering on the road. He has admitted in his cross-examination that there was no seal or label on the articles when he received them. He claims to have put a seal and label on the articles when they were re-seized by him. He has also admitted that the trunk, i.e., the steel box was not locked. He has conceded that no ambassador was present when the articles were re-seized by him. He claims to have examined PW 8. He has also admitted that he did not seize malkhana register from the BSF authorities nor the G.D. entry of the BSF authority. The Investigating Officer has admitted that he did not care to ascertain from where the ambassador vehicle commenced its journey for transportation of the ganja. He has also admitted that he did not determine the owner of the vehicle in which the offending articles were being transported. The Investigating Officer has stated that he did not care to find out who conducted the raid. He has also conceded that he did not bother to examine any of the locals who reside in the vicinity of the place of occurrence nor persons who are on duty at the Roop Nagar camp gate. The witness at first stated that the steel box bore the name of Govinda Rao. However, after checking it he stated that the box did not have his name engraved on it.

12. The investigation in this case, where 63 kilos of ganja was allegedly found being transported illegally, has been conducted in a slip shod and perfunctory manner. Both the officers of the BSF and the Investigating Officer have not bothered to adhere to the provisions of the NDPS Act and the Rules framed thereunder. The prosecution has examined only the personnel of the BSF. All the witnesses have

admitted in their depositions that the ambassador was intercepted in a busy area where there were plenty of shops. Not a single independent witness has been examined in the present case. The perfunctory nature of the investigation is evident from the fact that the seizure was not effected at the place where the ambassador car was intercepted and the ganja was allegedly recovered. Although the prosecution has mentioned that 63 kilos of ganja were recovered, there is no material to show that the ganja was weighed by anybody at the place where the ambassador car was stopped. None of the witnesses claim to have weighed the contents of the material exhibits 1, 2 and 3. The contents of the material exhibits were allegedly sent to the FSL for analysis. However there is no evidence of samples being drawn from each of these articles, nor is there any evidence of these samples being packed and labelled and then being sent to the FSL for analysis. The Investigating Officer has produced the FSL report which indicates that there were three samples which have been sent for analysis. But there is no evidence on record as to where and when the samples were drawn. Nor is there any material to prove which sample was drawn from which container. Moreover, the material which was allegedly seized and was found to be ganja was not produced in Court at all during the course of trial. These are grave lacunae in the prosecution's case. Besides the ownership of the vehicle which was being used for transportation of the ganja has not been established.

13. Mr. Sekhar Basu, the learned Senior Counsel appearing for the appellants submits that the entire procedure adopted by the State and the BSF personnel to seize the narcotic drugs and psychotropic substances is contrary to the provisions of Section 52A of the NDPS Act. He has drawn our attention to the provisions of the Act and submitted that there are certain safeguards provided under the Act which are to be observed mandatorily before any seizure can be made and persons can be arrested in respect of offences under the NDPS Act. Similarly, he pointed out that the procedure for seizure of the goods and the confiscation of such goods has to be followed scrupulously and non-compliance of these efforts would be fatal to the case of the prosecution. He has relied on the judgments of a Division Bench of this Court (to which one of us Mhatre, J., was a party) in the case of [Makhan Barman Vs. State of West Bengal](#). The Division Bench has observed that the provisions of Section 42(2) of the NDPS Act are mandatory requiring the information in respect of contraband goods to be recorded in the G.D. book of the police station. The Division Bench followed the judgments in the case of [Rajender Singh Vs. State of Haryana](#), [Sukhdev Singh Vs. State of Haryana](#), and [Kishan Chand Vs. State of Haryana](#), where the Supreme Court had held that the provisions of Section 42(2) of the NDPS Act are mandatory. Similarly, the Court has further concluded that the procedure stipulated u/s 52A of the NDPS Act for seizure of contraband and issuance of a certificate by a Magistrate are also procedures which are to be followed without any deviation. The inventory contemplated u/s 52A of the NDPS Act constitutes primary evidence.

14. In the present case, as we have already mentioned, neither the officers of the BSF nor the Investigating Officer who re-seized the goods, prepared an inventory of the goods seized. The seizure was made in the absence of a Magistrate by maintaining that PW 6, being a Gazetted Officer, was entitled to seize the goods in the absence of any Magistrate as the appellants had opted not to insist on in the presence of any Magistrate. There is no certification of the samples drawn under Sub-Section (2) of Section 52A of the NDPS Act by a Magistrate. The testimony of PW 6 who claims to be a Gazetted Officer does not inspire confidence nor does it indicate that the provisions of the Act were followed.

15. Mr. Basu has also criticised the prosecution by pointing out that the seized contraband was not produced in Court. He has relied on the judgment in the case of [Noor Aga Vs. State of Punjab and Another](#), The learned Counsel submitted that the seized articles which were allegedly contraband were first taken to the BSF Head Quarters and then to the Kotwali Police Station. He pointed out that the PW 6 has stated that the seized articles were placed in the malkhana, and the register of the malkhana was not produced in the Court nor was there any material on record to show that the seized goods were safe and could not have been tampered with. The evidence, in fact, supports the case of the appellants that the procedure adopted by the prosecution for seizure of the goods and keeping them in safe custody and disposing them later was not in consonance with the provisions of the NDPS Act, urged Mr. Basu.

16. The learned Senior Counsel has then relied on the judgment in the case of Tej Bahadur Singh & Anr. v. Narcotic Control Bureau & Anr. reported in 2000 (1) CHN 803 of the Division Bench to buttress his submission that the provisions of the NDPS Act have to be strictly followed in order to avoid the possibility of substitution of the articles seized.

17. The learned Counsel has also relied on the judgment of the Division Bench of this Court in the case of Munna Nai v. The State reported in 1997 Cri. L.J. 4553 to fortify his submission that the Magistrate is required to be present to duly certify the drawing of sample of the contraband seized before sending the same for analysis.

18. Mrs. Anusuya Sinha, the learned Counsel appearing for the State, submitted that Govinda Rao, one of the appellants here was a member of BSF. There was no evidence on record, according to the learned Counsel, as to why the BSF would unnecessarily implicate its own employee for the transportation of contraband. She drew our attention to the fact that there was no cross-examination of any of the prosecution witnesses on the point of the false implication of Govinda Rao. The learned Counsel then relied on the provisions of Section 125 of the Indian Evidence Act to submit that there was no need to enter the secret information received in the diary. She submitted that the non-examination of the members of the public as independent witnesses is not fatal in this case. She urged that there was sufficient evidence on record, albeit through officers of the BSF to establish that the

appellants were guilty of the offence with which they were charged. The learned Counsel then submitted that although PW 6 had conceded that he was not interrogated by the Investigating Officer, this has been contradicted by PW 9, the Investigating Officer. According to the learned Counsel, the source information was not required to be diarised especially in this case where one of the persons was involved was an employee of the BSF. She has relied on the judgment in the case of [Kashmiri Lal Vs. State of Haryana](#), in support of her submission that the non-examination of members of the public need not be fatal to the case of the prosecution. The learned Counsel then urged that merely because there was a perfunctory investigation in the present case this Court should not ignore the evidence on record which unmistakably proves that the appellants have committed the crime. The appellants ought not to be allowed to go scot free by giving unnecessary importance to the technicalities of law, submitted the learned Counsel. She has relied on the judgment in the case of [C. Muniappan and Others Vs. State of Tamil Nadu](#), where the Supreme Court has observed that there is a legal obligation on the part of the Court to examine the prosecution evidence carefully, de hors any lapses. In order to ascertain whether such lapses affect the object of finding out the truth, the Court has observed that the probity of the investigation cannot colour the conclusion of the trial.

19. As we have already stated the defects in the investigation are substantial and go to the root of the identity of the alleged contraband seized from the appellants. It is now well-settled that the procedure delineated under the NDPS Act for search and seizure must be scrupulously followed in order to obviate the substitution of any article seized, especially when the punishment under the Act is so severe. It is true as held in the case of C. Muniappan (supra) that the outcome of a trial cannot be solely dependent on the probity of the investigation. However, when there are basic and fundamental flaws in the investigation of the case it is difficult to ignore the same as that would result in the impairment of justice. As stated earlier, the entire investigation in this case has been conducted without having any regard for the mandatory provisions of the NDPS Act. The contraband was seized in the absence of a Magistrate. There is no material on record which proves that the appellants were informed of their right under the Act to be searched in the presence of a Magistrate or that a seizure under the Act can be made only after mandatorily following certain requisites stipulated therein. After the seizure was made by the BSF personnel the steel box, the suitcase and the bedroll were not locked while being transported to the BSF headquarters nor were they weighed at the spot where they were seized. The samples were drawn from each of the containers by the Investigating Officer after the contraband was kept in the malkhana for some time in an unlocked condition. Thus anybody could have had access to the containers and the contraband therein. These lapses in the investigation certainly affect its authenticity. The case of the prosecution is based only on the testimonies of the BSF employees were involved with the raid and the apprehension of the appellants. Though the

non-examination of the members of the public at the place where the seizure was made would not be fatal to the prosecution's case, had the prosecution examined some independent witnesses from that area it would certainly lent credence to their case. The credibility of the prosecution witnesses is also in doubt. There are several discrepancies in the evidence. The investigation officer has not corroborated the version of the other witnesses. All these factors lead us to believe that the appellants have been falsely implicated in this case.

20. The appeals are therefore allowed. The judgment and order of the Sessions Court is quashed and set aside. Consequently the conviction and the sentence imposed on each of the appellants is quashed and set aside. The appellants are acquitted of the offence u/s 20(b)(ii)(c) of the NDPS Act. They shall be set at liberty immediately if not required to be detained in any other case.

21. Urgent certified photocopies of this judgment, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.