
**(2016) 168 AIC 298 : (2016) 4 AICLR 526 : (2017) 1 CalCriLR 660 : (2017) 2
RCRCriminal 228**

CALCUTTA HIGH COURT

Case No: C.R.A. No. 506 of 2010

Dilip Das

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision: Sept. 16, 2016

Acts Referred:

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 20(b)(ii)(c), Section 42, Section 52, Section 67

Citation: (2016) 168 AIC 298 : (2016) 4 AICLR 526 : (2017) 1 CalCriLR 660 : (2017) 2
RCRCriminal 228

Hon'ble Judges: Nadira Patherya and Samapti Chatterjee, JJ.

Bench: Division Bench

Advocate: Mr. Arnab Chatterjee, Mr. Siladitya Sanyal, Mr. Soumya Basu Roychowdhury,
Advocates, for the Appellant; Mr. Samir Pal, Advocate, for the N.C.B.

Final Decision: Allowed

Judgement

Nadira Patherya, J. - This appeal has been filed by the appellant herein against the order of conviction and sentence dated 23rd June, 2010 and 24th June, 2010 respectively for the offence under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act 1985 (hereinafter referred to as the 1985 Act) whereby and where under the appellant was directed to suffer Rigorous Imprisonment for 11 years and to pay a fine of Rs.1,00,000/- (rupees one lakh) in default to suffer further R.I. for 6 months.

2. The case of NCB is that acting on a specific information which was reduced in writing and after giving intimation to the superior officer and obtaining movement order a group of NCB Officers and staff and a lady sepoy reached the residential premises of the appellant at B-1/666, Sukanta Nagar, P.S. Salt Lake, Kolkata at 7.30 hours on 21st December, 2005 and on specific identification the officers reached the unit of the accused appellant. The main gate was found to be open and upon the officers knocking the door of the third

room of the said premises a person opened the door of that room and introduced himself to be the appellant. The officers disclosed their identity and expressed their intention to search the room. Two independent witnesses from among the onlookers were called and after thorough search 29 rectangular shaped slabs covered with polythene sheets were found under the cot kept in the room. 7 slabs were tested and the same responded positive to the test of ganja. The said 29 slabs were weighed and aggregated to 168 kgs. The said contraband articles were seized and labelled. Signatures were taken and notice under Section 67 of the NDPS Act was issued to the appellant. A voluntary statement was made by the appellant on 21st December, 2005 at 13.30 hours wherein he admitted his guilt and implicated other co-accused too. The samples seized were sent for chemical analysis and the chemical examination report also confirmed the samples to be ganja. A complaint was filed under Section 20(b)(ii)(c) and 29 of the NDPS Act by Pradip Kumar Ghosh, Intelligence Officer of Narcotic Control Bureau, EZU, Kolkata. A special Judge thereafter took cognizance of the complaint filed and charges were framed under Section 20(b)(ii)(c) of the said 1985 Act. The said charges were read out to the accused appellant to which the accused appellant pleaded not guilty and claimed to be tried. In the course of trial, prosecution examined 7 witnesses and exhibited a number of documents. D.W was also adduced. The accused appellant was also examined under Section 313 Cr.P.C. and on consideration of oral and documentary evidence so also the evidence of D.Ws the Special Court under the 1985 Act, at Barasat, North 24 Parganas passed the order of conviction and sentence against the accused appellant. Being aggrieved by the said order of conviction and sentence this appeal has been filed by the accused appellant.

3. The case of the appellant is that, 168 kgs of ganja was allegedly seized from under the cot in a room occupied by him. The said 168 kgs of ganja was contained in 29 rectangular slabs. Therefore, each slab weighed approximately 5.79 kgs. Samples were only taken from 7 slabs and what was in the balance slabs is not known. Seizure was made on the basis of an apprehension and information received on 21st December, 2005.

4. There is discrepancy in the weight of the samples. While P.Ws. 4 and 5 have stated that samples of 25 grams were taken from 7 slabs, the chemical analyst (P.W.2) has stated that the samples weighed 31.6 grams, 34.1 grams and 32.5 grams. Therefore, the samples given to the chemical analyst weighed more than the 25 grams and were not the samples seized from the house of the accused, as the samples sent to the chemical analyst weighed 25 gms and was contrary to the goods seized. There has also been non-compliance of Section 42(2) of the NDPS Act, 1985 (1985 Act). P.Ws. 4, 5 and 6 have all deposed that on the basis of information which was received in writing and intimated to the superior officer on telephone, movement order was issued and on basis thereof the raiding party proceeded to Premises No.B-1/666, Sukanta Nagar, Salt Lake, Kolkata. The third door from the entrance was opened by a man who introduced himself as the accused appellant.

5. Section 42 of the 1985 Act permits the NCB officers to enter, search and make seizure in a premise without warrant or authorization. Section 42(2) of the 1985 Act requires that

any information received by an officer must be reduced in writing and within 72 hours a copy of such written information shall be mandatorily sent to the immediate superior officer.

6. P.W.6 has stated that he received the information and reduced it in writing and the said information was communicated to his higher officer over telephone and on obtaining movement order a raid was conducted. The said information though reduced in writing, was not communicated as is required under Section 42(2) of the 1985 Act to the Zonal Director within 72 hours. When the written communication was received is not known and was not within 72 hours. The communication relates to a despatch, made by the Zonal Director on 1st February, 2006 which is beyond 72 hours. Therefore, there has been non-compliance and violation of Section 42(2) of the 1985 Act.

7. P.W.6 was the seizing officer and the godown register (Exhibit ĩ½ 16) has been proved by P.W.7 which was not signed by the godown incharge who was the recipient of the said goods. The signature of P.W.6 the officer who seized the goods can only be found therein. Exhibit ĩ½ 10 is not the seizure list. P.W.5 has identified only the annexure enclosed with the seizure list and it is only the annexure which has been marked as Exhibit ĩ½ 10. The seizure list has not been marked. The said annexure to the seizure list was prepared by P.W.5 and in Exhibit ĩ½ 10 there is no mention of the time of seizure of the goods and from whom seized. P.W.6 did not prepare the seizure list. It was prepared by P.W.5 and only the annexure has been exhibited and proved. The seizure list cannot be relied on as it has not been proved.

If the seizure list is not proved, then the search or recovery also stands not proved.

P.W.3 is the person who filed the complaint, without looking into the seizure list which forms the basis of the complaint. He has no knowledge of the events that took place on the date of incident and, in fact, not having looked into the seizure list no complaint could have been filed. There has also not been compliance of Section 52 which contemplates disposal of the articles seized. Section 52 contemplates filing of an application before a Magistrate. No such application has been filed. Exhibit ĩ½ 15 is the certificate issued. Weight of the seized article will be found from Exhibit ĩ½ 10, but there is no evidence of where the weight was taken. The contraband goods were recovered from a residential area and the packets were not separately weighed. P.W.5 while being examined stated that nowhere in Exhibit ĩ½ 10 was it mentioned that it was prepared after being weighed. As the weighment is in doubt, preparation of the annexure being Exhibit ĩ½ 10 is also doubted. No document has been produced to prove that the appellant was the owner of the house. P.W.4 has in cross-examination stated that he did not get any document of ownership of the house of the accused appellant. He relied on the statement of persons who had taken rooms on rent and who disclosed that the accused appellant was the owner of the said house. P.W.5 has also stated that no document of the house was seized. P.W.6 has also stated that no attempt was made from the concerned authority to ascertain the ownership of the house of the accused appellant. In fact, contrary to what

has been stated by P.W.4, none of the D.Ws. have stated that the accused appellant was the owner of the house wherefrom recovery was made. There is no seal or label put to the contraband articles seized and, therefore, the seizure was not from the appellant's residence. 29 slabs though seized, samples were taken from 7 slabs randomly, 22 slabs remained not tested. D.Ws were not examined by the prosecution although their statement under Section 67 has been marked as an exhibit. The statements of D.W.1 and D.W.2 have been proved by P.W.4. D.W.2 did not see any of the articles. The statement of D.Ws under Section 67 was proved by P.W.6 and they have been marked as Exhibit ĩ½ 4 and 5. The D.Ws. have not proved their statement. Therefore, the statements of D.W.1 and D.W.2 Exhibits ĩ½ 4 and 5 cannot be relied on as it is in conflict with the provisions of the Evidence Act. As there has been violation of Sections 42(2) and 52A(2) of the NDPS Act, the seizure list not being proved, Exhibit ĩ½ 10 being annexure to the seizure list and the seizure list not proved, no evidence with regard to weightment being adduced, no seal and label attached to the samples, the difference in weight drawn and received by the analyst, puts the articles tested in doubt. The ownership of the house has not been proved and the statement under Section 67 being proved contrary to law is evidence enough of NCB failing to prove its case.

8. Reliance is placed on (2016) 3 SCC 379 and (2014) 2 Criminal Law Reporter (Cal) 288. Alternatively as the accused appellant has served a major part of sentence, the sentence be reduced and he be set free.

9. Counsel for NCB in opposing the said appeal has submitted that Exhibit ĩ½ 13 is in compliance with Section 42(2) of the 1985 Act though belated and such belated despatch of information is permitted as will appear from (2009) 8 SCC 539. Exhibit ĩ½ 10 has been proved by P.Ws.4 and 5. P.Ws. 4, 5 and 6 have all stated that the accused appellant introduced himself to them. Section 42 requires that on receipt of information an entry can be made into a premise, search can be conducted and the articles seized. On the basis of information received and on receipt of movement orders an entry was made by P.Ws. 4 and 5 under the leadership of P.W.6 into the premises of the accused appellant. The goods were seized and the samples sent for testing and tested positive to ganja. Thereafter weightment was done and 25 grams out of 7 slabs were sent to the chemical analyst. As regards weightment, no questions were put at the time of cross-examination. Therefore, the weightment is not in doubt. (2014) 2 Cr Rs. R (Cal) 288 is distinguishable on facts as in the reported decision the goods were not stored properly but such is not the case here as the goods were kept in the custody of the godown in-charge.

10. Having considered the submissions of the parties a search was undertaken by the officers of the Narcotics Control Bureau (NCB) based on information received, of Premises No.B-1/666 Sukanta Nagar, Salt Lake, Kolkata. On reaching the said premises and in particular Room ĩ½ 3 the accused appellant was found therein and 29 slabs of the contraband goods seized. Samples were taken from 7 slabs and sent for chemical analysis. P.W.1 and P.W.2 examined and prepared the Report. While P.W.1 is silent with

regard to the weight of the samples sent for examination, P.W.2 has stated that 31.6 gms, 34.1 gms and 32.5 gms was the weight of the sample given to him for testing. P.Ws. 4, 5 and 6 have each stated that samples weighing 25 gms each was taken from the 7 slabs and sent for testing. This, therefore, raises a doubt in respect of the 3 samples sent for testing and tested, benefit whereof will go in favour of the appellant.

11. Section 42 of the 1985 Act also contemplates that on receipt of specific information reduced in writing, an officer may enter into a premises and make search so also seize articles but as per Section 42(2) of the 1985 Act, he must send a copy of the written information to his immediate superior officer within 72 hours. From Exhibit 13 which is the document evidencing despatch of information to Delhi by the Zonal Director on 1st February, 2006 it is not known when the officer P.W.6 sent the written information to the Zonal Director.

12. P.W.6 has stated that he received information that huge quantity of contraband goods was in the possession of the appellant which information was reduced in writing and intimated to the higher official over telephone. He was given Movement Order and based thereon raid was conducted and goods seized. Section 42(2) of the 1985 Act requires that the information reduced in writing by the officer be communicated by him to his "immediate superior official within 72 hours".

13. Section 42(2) is set-out herein below:-

"Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within 72 hours send a copy thereof to his immediate official superior."

14. The word used is "shall" and as the 1985 Act for an offence committed under it warrants penal action and curtails the freedom of a person, "Shall" in Section 42(2) of the 1985 Act must be construed in the strictest sense and as a mandatory provision. Neither from the deposition of P.W.6 nor the Exhibits can the date or time of communication of the written information to his immediate superior official by him be found far less within 72 hours. Exhibit 13 evidences the recording of the information but there is no endorsement of the date and time when the written information was received by the Zonal Director, the immediate superior officer of P.W.6. Even if, 1st February, 2006 is taken as the date of receipt, the said is admittedly beyond 72 hours from 20th December, 2005. On a plain reading of the said exhibit, 1st February, 2006 is the date of despatch from the office of the Zonal Director to the Director General, NCB, New Delhi. As a doubt arises in respect of the written information sent to the Zonal Director by P.W.6, the benefit of such doubt will go in favour of the appellant.

15. The statement of D.Ws.1 and 2 recorded under Section 67 of the NDPS Act was proved not by the maker of the statements, i.e., D.W.1 and D.W.2 but by P.W.4 and when the statements were put to D.Ws.1 and 2, they have not only denied the statements made

under Section 67 of the 1985 Act, but D.W.1 has said that under fear he was forced to write at the dictate of the officer, whereas D.W.2 has said she is an illiterate person not knowing how to read or write and it was D.W.1 who wrote on her behalf at the dictate of the officer. All that she did was to put her signature. This evidence of both D.W.1 and D.W.2 has not been demolished in cross-examination.

16. Section 52 of the 1985 Act deals with disposal of articles seized with "convenient despatch". In the instant case, the contraband goods was seized in December 2005 and assuming step was taken to dispose the goods it was only in August 2007 that an order was passed and the goods were destroyed in March 2008. There is no reason forthcoming for the delay in destruction. "Convenient despatch" in the absence of any time limit set would mean a reasonable time and 2½ years from the date of seizure would not tantamount to "convenient despatch".

17. Counsel for NCB has relied on (2009) 8 SCC 539 for the proposition that in special and emergent situations the recording of information may be postponed and reasons for delay must be given. It has also held that non-compliance of Section 42(2) of the 1985 Act in not informing the official superior will be in clear violation of Section 42(2) of the 1985 Act. To this extent the cited decision aids the accused appellant.

As there has been non-compliance of Section 42(2) of the 1985 Act to the extent of not informing the superior officer either within the time specified or belatedly with reasons assigned, so also for the reasons mentioned above the order of conviction and sentence dated 23rd June, 2010 and 24th June, 2010 is set-aside and Appeal allowed. Let steps be taken to release the appellant from custody in accordance with law.

Let a certified copy of the said order be sent to the Court Below and to the Superintendent of the concerned Correctional Home and steps be taken in accordance with law.