(1995) 05 CAL CK 0046

Calcutta High Court

Case No: Criminal Appeal No. 60 of 1993

Safique Alam @ Safi	APPELLANT
Vs	
The State	RESPONDENT

Date of Decision: May 19, 1995

Acts Referred:

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 50

Citation: (1996) 63 ECR 537

Hon'ble Judges: Satya Narayan Chakraborty, J; Rabin Bhattacharyya, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Rabin Bhattacharyya, J.
This criminal appeal is directed against the order of conviction and sentence passed by the 5th Court of Additional Sessions Judge, Alipore in S.T. No. I(11)/1991 dated 16.1.1992.

2. Before addressing the point in issue, a brief outline of the case should be given to appreciate the points raised by the parties in the appeal.

3. The profile of the prosecution case is that on 7.3.1989 shortly after 3.30 p.m. a police officer entrusted with the round duty, in course of his strolling within the jurisdiction of Beniapukur P.S., surprisingly found one person standing the gave out his name as Safique Alam which roused suspicion suggesting commission of an offence.

4. On search 3 small cellophane paper packets allegedly containing heroin in presence of the witnesses were recovered from his possession under seizure list and duly attested by them. Subsequently, the packets seized, on analysis, were found to be herein.

5. A case was stated u/s 21 of the Narcotic Drugs and Psychotropic Substance; Act, 1985. The Police, in course of investigation, sent the packets to the Drug Expert of Central Public Health and Drug Laboratory, Government of West Bengal. It turned to be heroin on laboratory test. On completion of investigation, the police submitted charge-sheet against the accused.

6. The Court upon consideration of the materials and also upon hearing the parties framed charge u/s 21 of the Narcotic Drugs & Psychotropic Substances Act, 1985 which was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.

7. The defence of the accused, as revealed from the trend of the cross-examination and other materials on record is of bare innocence.

8. Upon conclusion of the evidence, and also after hearing the ld. Counsel for the parties, the ld. trial Court found the accused guilty for having committed an offence u/s 21 of the Narcotic Drugs & Psychotropic Substances Act. Accordingly, the accused was convicted and sentenced to suffer rigorous imprisonment for 10 years and also to pay a fine of Rs. 1,00,000/-, in default, to suffer rigorous imprisonment for 2 years u/s 21 of the Narcotic Drugs & Psychotropic Substances Act, 1985. The order of conviction and sentence has been challenged in the appeal before us on the ground that the accused has been convicted and sentenced contrary to the materials on record and law.

9. The determination of the point that fell for decision before the Court is as to whether the order of conviction and sentence is water and air proof.

10. To embark on a judicial scrutiny of a case of this nature the object being to ascertain the truth or otherwise of the allegations, the evidence of the parties is of material consequence in relation to law and fact.

11. The prosecution to establish the charge has examined as many as four witnesses. The defence has not examined any witness to rebut the evidence.

12. Upon close analysis of the evidence of P.W. 1, it is notorious that when the person was put on search by the police, three packets (purias) were recovered from him. There appears minor wear and tear in the evidence but the seizure of the packets in front of Bandar Patty is not tainted. It stands proved from the evidence of P.W. 1 and P.W. 2 that the accused has not disputed about the recovery of the packets which subsequently turned to be heroin. The defence only fixed P.W. 1 and P.W. 2 with some suggestions which are torn from the context. It is also glaring that these two witnesses were not known either to the police or the witnesses suggesting thereby they had any animus against the accused. The attestation of seizure by the witnesses does not stand to have been contradicted.

13. P.W. 3 is Dr. N.N. Chakraborty. It transpires from his evidence that he received sealed packet from Shri Tapas Bhattacharjee, Inspector of Drugs, W.B. under memo

No. 85 dated 7.3.1989. It stands out from his evidence that the content "a mixture of deep and light brown powder having its gross weight 1.0854 grams was containing Diamorphine i.e. heron". Such finding was admitted into the evince which bears the signature d P.W. 3 and formed an Ext. 2. The witness we subjected to a laconic but panted cross-examination who withstood it. It is significant to note from his evidence when said "shelf life of heroin is considerably high. The material from each of the purias was tested. I received the packet of heroin in proper order. I did not estimate the percentage of heroin. I received the alamat under reference from the Drug Inspector. The weight shown in my report is the gross weight which means weight of the brown powder along with the weight of the 3 cellophane papers". It will not be legitimate in absence of any other material to reject the testimony of P.W 3. In our view, the evidence is straightforward which is not unworthy of credit regarding the nature of the said packets sent for laboratory examination. A minor discrepancy in his evidence for not mentioning in his report about the gross weight of the cellophane packets does not prove for a moment that the truth has been polluted.

14. P.W. 4 is Shri Santosh Kumar Biswas, and S.I. of police who was attached to the police station at the material point of time. His evidence unhesitatingly and without any ambiguity proves the seizure of the article in front of Bastee at 26, North Range. The seizure was made when he called two persons who were then passing by the road. The packets were seized under a seizure which were kept in three cellophane paper packets. The evidence of P.W. 3 in the context shows that three purias having internal reference number were put to laboratory analysis. It is manifest from his evidence that he went out of P.S. after recording a GDE being GDE No. 765 dated 7.3.1989 where he had no prior information about the seized packets. The said entry Ext. 4 and the carbon copy of the GDE Book bearing No. 765 dated 7.3.1989 Ext. 5 never met any challenge. It was manufactured or prepared by the investigating agency to suit its ends does not find support from any tangible material. The evidence is absent that it was fabricated or planted to secure a conviction. In the background of the above evidence, an inference may be legitimately drawn since not disturbed by any other assembly of materials on record that the action of the investigating officer was immune and was not stricken with any motive or illegality. However, a controversy has been raised about the weight of the packet. It is also found from his evidence that the weight of article in each cellophane packet was 280 M.G. The gross weight of them, according to the P.W. 3 Dr. Chakraborty was 1.0854 G.M. Therefore, the packets seized, in absence of the evidence of implantation, do not prove to be an attempt of the prosecution to foist a false charge of the recovery of the packets from the accused, though much controversy has been raised about the weight of them. The packets seized, in absence of any other materials, do not prove that a further quantity was added to them seized by the police. It was a recovery on the spot attested by the independent and disinterested witnesses. The failure of P.W. 4 to obtain the signature of the accused on three purias does not

constitute, in our view, any illegality when the search and seizure have not been challenged.

15. The act complained of within the periphery of NDPS Act, if an offence, as to be examined within the provisions of the said Act. Section 2(xvi) of the NDPS Act of 1985 renders the definition of opium derivative as incisive definition of diamorphine or heroin u/s 2(xvi) Clause (a). In the light of the above, the seized packets were opium derivatives which in our view is an inclusive definition as it includes of coco diamorphine medicinal cannabis, opium derivative poppy straw concentrated. In the context, opinion is not divided, as found by us, that the manufactured drug was found in possession of the accused who could not produce any convincing evidence of his being in possession of the said drug. As the possession has been forbidden by operation of Section 21 of the NDPS Act, it goes without saying that the possession of any manufactured drug when coming within the fold of the definition, as envisaged in Section 2(xi), is a manufactured drug, for which, the possession, in absence of authority, can bring the act within the pale of Section 21 of the said Act.

16. A battle-line has been drawn about the compliance of Section 50 regarding search and seizure. The ld. Counsel for the defence has argued with such emphasis that Section 50 of the NDPS Act, had been completely overlooked in conducting search and seizure leading to recovery of the packets.

17. It has been debated at the bar that the object of the NDPS Act has been made stringent for control of drug menace. We were not unmindful that the Legislature while legislating the provisions under the NDPS Act, took into consideration the menace of illegal drug trafficking, for which, the corresponding rights of the accused were enshrined. The sole object being to check the indiscriminate misuse of power as there may be affection of right of an innocent individual. We may recall, in the background of the scheme and object of the NDPS Act, that the fouler the crime higher the proof. The embodiment of essential requirements in the temple of Section 50 of NDPS Act are for ensuring the right of the accused vis-a-vis the right of the Investigational Agency. It is a balancing factor for preservation of right and liberty. Therefore, there must be faithful adherence to the provisions of Section 50 of the NDPS Act, in default, the scope of harassing the innocent persons is more immediate than remote.

18. The search and seizure within the realm of Section 50, according to the ld. Counsel for the accused, is that the officers authorised under the Act is statutorily required to search a person either in presence of any Gazetted Officer or before any nearest Magistrate. The failure to comply with the aforesaid provisions makes the search and seizure a total illegality which is not curable by any provisions of Statute by which the investigating agency and the accused are governed.

19 & 20. On the proposition of law, it has been debated by the ld. Counsel for the State who is categoric in his contention that there was no scope for application of

Section 50 of the NDPS Act to the facts and circumstances of this case. He has laid much stress in his submission that Section 50 is very much attracted when the search and seizure are carried out on prior information. Had there been any information, as in the instant case is absent, the scope of compliance of Section 50 is a wishful thinking. The factual exposure of the case upon going through the pathology of the respective submissions proves that the search and seizure were carried out not in relation to Section 50 of the NDPS Act. It was not at all a case of normal investigation. It is a case where police officer entrusted with round duty suddenly grew suspicious. Suspicion ripens into belief on search when heroin was recovered which was attested by two public witnesses where the P.W. 4 had no opportunity to comply with the Section 50 of the NDPS Act. The search and seizure were not carried out in any premises but in front of a Bustee, a public place, as such, the question of having recourse to warrant is uncalled for, to effect search. We have already indicated that there was no evidence of planting or fabrication of the packets by the investigating agency. Had it been such, it would certainly find their way in the G.D. Entry Exts. 4 and 5. We are tempted to quote the law laid down by the Apex Court in State of Punjab Vs. Balbir Singh, where the Court:
The questions considered above arise frequently before the trial Courts. Therefore, we find it necessary to set out conclusions which are as follows:

If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offence as provided under the provisions of Cr.P.C. and when such search is contemplated at that stage, Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance of recovery of any narcotic drug or psychotropic substance then the police officer who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

21. In our view, the Supreme Court has made a classification about the search and seizure as to the applicability of Section 50. Firstly, when the search or arrest of a person takes place in the normal course of investigation provisions of the Cr.P.C. will apply and the same when complete at that stage Section 50 would not be attracted. But when during the search and arrest, there is a chance of recovery of any narcotic, the question of Section 50 may come into play as the officer conducting the search and arrest is not an empowered officer who is statutorily required to inform the above to the empowered officer whose duty will be to proceed in accordance with the provisions of Section 50. Therefore, the case at hand is distinguishable for which a line of distinction has already been made by the Apex Court.

22. In the light of the above, we cannot accept that the search and seizure of the packets were made at the material point of time contrary to the law. In our view, the search and seizure are perfectly legal and they do not suffer from any infirmity. A mere omission to write the name of the accused in the seizure list does not affect the search and seizure which attributes to an omission. More so, it is noticeable that it has not been challenged by the accused and now it cannot be urged that he has been prejudiced in any way.

23. The ld. Counsel for the defence has raised a tumult about the weight challenging the entire search and seizure. He is candid in his submission that the weight recorded by the witness P.W. 4 is absolutely imaginary as the weight of the packets was not made in presence of the accused. The evidence of P.W. 4, if appreciated in its proper perspective proves that he is a natural witness. We have already indicated that no suggestion was thrown to P.W. 1, P.W. 2 and P.W. 4 that the police added some other materials to the packets seized to inflate the weight. The analyst P.W. 4 indicated that the weight was 280 gms. which he found in each of the cellophane paper packet but not the gross weight of three cellophane packets as found by him in the seizure list. Therefore, this weight alone cannot project any shadow on the case in isolation of realities. Had the P.W. 4 any oblique motive he could make an exercise in his evidence to suit the ends of the prosecution. On the other hand, the evidence is plain and simple which does not prove to have been blended with falsehoods. Therefore, in the context of the aforesaid materials, we hold that the discrepancy in the weight which is sought to have been made by the defence as the springboard to succeed is a futile exercise to negate the offence. The absence of prayer for recording of any statement of the accused and the witnesses u/s 164 has not hit the case of the prosecution hard. It is an argument without any substance. We fully agree with the reasoning rendered by the learned Court below about the reference of the case in the analyst report Ext. 2 about which we have copiously dealt with, we do not find any pitfall in Ext. 2 as it is complete in all details.

24. When we return to examine the answers furnished by the accused in this examination u/s 313 Cr. P.C., it is manifest that the accused also refrained from urging his own case. It is not required in the province of criminal jurisprudence. He pleaded his innocence. But no material patent or latent could be elicited from the explanation of the accused furnished u/s 313 Cr. P.C. to discredit the overwhelming evidence on record as to search, recovery and arrest.

25. We cannot accept any of the contentions raised by the ld. Counsel for the convict, as they do not inspire any confidence either on the legal as well as on factual premises. The contention of the ld. Counsel for the State is in agreement consonant with the fact and law and we do not have any reason to reject such contention of the ld. Counsel for the State. The order of conviction and sentence as passed by the learned trial Court is based upon sound reasonings which do not call for any interference and, accordingly, it is confirmed.

26. Thus, after considering the facts and circumstances of the case, we cannot but agree with the order of conviction and sentence. In the result, the appeal stands dismissed.