

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.263 of 2015

Arising Out of PS.Case No. -56 Year- 2013 Thana -GOVERNMENT OFFICIAL COMP. District-
PATNA

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Md. Ishrafil @ Tulana @ Tunna, son of Md. Sariful Rahman, R/O Village-
Krishnapur (74) Paro, Moh-Manikchak, P.O. & P.S-Lal Gola, Distt-Murshidabad,
West Bengal. Appellant/s

Versus

The Union of India Through N.C.B., Patna Respondent/s
with

Criminal Appeal (SJ) No. 271 of 2015

Arising Out of PS.Case No. -56 Year- 2013 Thana -GOVERNMENT OFFICIAL COMP. District-
PATNA

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1. Marjem Sheikh Son of Late Shamshuddin Mistry, Resident of Latibelpara, Ward
Dakhin Latibelpara, P.O. Basgara, P.S. Lalgola, District - Murshidabad, West
Bengal. Appellant/s

Versus

1. The Union of India through N.C.B., Patna Respondent/s

Appearance :

(In CR. APP (SJ) No.263+271 of 2015)

For the Appellant/s : Mr. Brahamdeo Prasad, Advocate

For the Union of India : Mr. Manoj Kumar Singh, CGC

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 20-06-2017

Cr. Appeal (SJ) No. 263 of 2015 wherein Md. Ishrafil @
Tulana @ Tunna is the appellant, Cr. Appeal (SJ) No. 271 of 2015
wherein Marjem Sheikh happens to be appellant commonly originate
against judgment of conviction dated 31.03.2015 and order of
sentence dated 06.04.2015 passed by Additional Sessions Judge-7th –
cum-Special Judge, NDPS, Patna in connection with Special Case No.
56/2013 leading to Trial No. 09/2014 whereby and whereunder both
the appellants have been found guilty for an offence punishable under
Sections 21(C) as well as 29 of the NDPS Act and each one has been
directed to undergo RI for 10 years as well as to pay fine of Rs. 1



Lakh in default thereof , to undergo RI for six months additionally, independently under each head with a further direction to run the sentences concurrently with a further provision of set off against custodial period already undergone during course of trial in terms of Section 428 CrPC, on account thereof, have been heard together and are being disposed of by a common judgment.

2. On getting confidential information by Vikas Kumar,(PW 4) Superintendent, Narcotic Control Bureau, Patna a raiding party was constituted comprising of Rohit Srivastava (PW3), Vijay Bahadur (PW7), Gyan Prakash (PW1), Vikas Kumar (PW6), Ravi Ranjan Kumar (PW2), M. K. Yadav (not examined), Anil Kumar Ghosh (not examined) to apprehend a carrier carrying Narcotic Substance through Ananya Express (12316 DN) from Rajasthan to Bardawan having his location at Coach No.S1, Seat No.55. They had gone to Patna Junction on the scheduled time where they were informed that the train was running late for so many hours. Subsequently thereof, they again visited Platform No.1 of Patna Junction on 27.08.2013 at about 8:20 hours and, after stoppage of the train, they boarded in the bogie and found one person sleeping over the berth who was intercepted and further, he was properly introduced by them being the officials of Narcotic Bureau and the purpose, to search out, as they have received confidential information regarding carriage of Narcotic Substance. Furthermore, it has also been



disclosed that for effective legal compliance, two witnesses Santosh Kumar (not examined) as well as Anil Paswan (not examined) were associated with the aforesaid exercise. After interception of the aforesaid person, he was also acknowledged with the mandatory provisions of law requiring personal search to be conducted in presence of Gazetted Officer under Section 50 of the Act and getting nod from the delinquent that he would allow search in presence of Gazetted Officer of the institution, they shifted the person before Vikash Kumar, (PW 4) Superintendent where he was searched. Nothing was found from his personal search but from a bag which he was carrying, apart from clothes having kept inside 460 Grams (Gross weight) of Heroin was found. Two samples were prepared at the spot (S1, S2) and sealed. The apprehended person disclosed his identity as Marjem Sheikh. During course of completing other paraphernalia, his statement was also recorded in accordance with Section 67 of the Act whereunder, it has also been disclosed apart from accepting his liability that the aforesaid activity was being carried at his end at the instance of Md. Ishrafil @ Tulana @ Tunna who had promised to pay a hefty sum against the aforesaid activity. Marjem Sheikh was sent to judicial custody on 28.08.2013 having relevant documentation in support thereof.

3. On the other hand, preliminary investigation was taken up by the authorities concerned during course of which after obtaining



permission, sample was sent for chemical examination, a team was constituted for apprehension of Md. Ishrafil @ Tulana @ Tunna and was accordingly, apprehended and then thereafter, having armed with all the requisite documents, lastly complaint petition was filed whereupon, cognizance was taken and accordingly, trial commenced which met with ultimate result, subject matter of the instant appeals.

4. The defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial at the end of both the appellants. Furthermore, it has also been pleaded that appellant, Marjem Sheikh has fallen victim of circumstance. However, no DW has been examined, nor any chit of paper has been exhibited in their support.

5. In order to substantiate its case, the prosecution had examined altogether 7 PWs out of whom PW-1 Gyan Prakash, PW-2 Ravi Ranjan Kumar, PW-3 Rohit Srivastava, PW-4 Vikas Kumar, PW-5 Balwant Rai, PW-6 Bikash Kumar and PW-7 Vijay Bahadur Singh. Side by side had also exhibited Ext-1, signature of Gyan Prakash on search and seizure list, Ext-2, statement of accused (Marjem Sheikh) recorded under Section 67 of the NDPS Act, Ext-3 is signature of Ravi Ranjan Kumar on recovery memo, Ext-4, notice under Section 50 of NDPS Act, Ext-5, Search-cum-Seizure list, Ext-6, Test Memo, Ext-7, notice under Section 67 of the NDPS Act, Ext-8, signature of Rohit Srivastava on the statement of Marjem Sheikh, Ext-



9, ticket from Chittorgarh to Bardawan, Ext-10, Arrest Memo, Ext-11, signature of Balwant Rai (PW-5) over notice under Section 67 of the Act, Ext-12, signature of Balwant Rai on the statement of Tulna and Ext-13, signature of Balwant Rai on the Arrest Memo of Tulna.

6. While assailing the judgment of conviction and sentence recorded by the learned lower court, it has been submitted on behalf of appellants that there happens to be gross miscarriage of justice in the background of the fact that appellant, Marjem Sheikh was not at all conversant with any other language than Bangla. Therefore, he was completely ignorant with the activity taken up by the prosecution party as well as by the court itself and further, remained as mute spectator of whole event jeopardizing his interest. In the aforesaid background, it has also been pleaded that, that happens to be reason behind that some of the prosecution witnesses during course of their evidence have stated that appellant was known to the language Bangla. Because of the fact that there was no appointment of interpreter to defend his fundamental right, on account thereof, the whole trial vitiated, consequent thereupon, the appellants are entitled for acquittal.

7. Coming to the other aspect, it has been submitted that prosecution had perceived their mistake by way of apprehending the appellant, Marjem Sheikh instead of others who slipped leaving behind a bag from which allegedly heroin was recovered and so, none of the seizure list witnesses has been examined nor there happens to be an



explanation at their end. That means to say, none of the independent witnesses has been examined supporting the factum of recovery.

8. Now coming to the merit of the case, it has been submitted that prosecution had failed to substantiate the same against appellants and to substantiate the same, it has been submitted that at least, the ticket collector of the S-1 bogie should have been examined in order to affix source that appellant was coming from Chittorgarh to Bardawan as, the ticket did not specify presence of the appellant, Marjem Sheikh over the same. On account of non examination of the ticket Collector and further, non examination of independent witnesses, it could not be said that ticket though has been made Exhibit of the record, was found from the possession of the appellant.

9. It has also been pleaded that there happens to be Circular No. 1/88 and 1/89 whereunder, apart from others, the mode of sampling has also been properly laid down. From the evidence of the witnesses, it is evident that the aforesaid guidelines had not been properly followed during course of preparation of samples from the seized heroin.

10. It has also been submitted that the prosecution case appears to be farce on account of inconsistency prevailing amongst the evidence of the PWs on all material aspects as well as with regard to compliance of mandatory provisions of law. Furthermore, it has also been submitted that during course of evidence



the seized article though has been produced but there happens to be absence of relevant document to connect the same with the instant case and on account thereof, appellants are found entitled for benefit of doubt. So, in sum and substance, it has been submitted that the judgment of conviction and sentence recorded by the learned lower court happens to be perverse, cryptic, on account of non appreciation of inconsistency as well as non consideration of deficiency in the prosecution case due to non execution of the relevant mandatory provisions of law.

11. Learned counsel representing Narcotic Control Bureau has submitted that the judgment impugned speaks a lot over its authentication as, the same has been recorded on due appreciation of law as well as evidence. Prosecution had properly substantiated the allegation levelled against the appellants on account thereof, the judgment impugned does not warrant any interference.

12. PW-1, Gyan Prakash had stated that on 26.08.2013, Superintendent, (PW-4) Vikas Kumar received a confidential information which was noted down and in pursuance thereof, a raiding team was constituted consisting he himself along with Rohit Srivastava, Vijay Bahadur, Vikas Kumar, Ravi Ranjan and N.K. Yadav who had visited platform no.1 and conducted raid over Ananya Express and during course thereof, found one person sleeping over berth no.55 of Coach S-1 who was apprehended and further, on search



from a bag 460 Gms of Heroin was seized. It has also been disclosed that aforesaid accused, was served notice in terms of Section 50 of the NDPS Act and in pursuance thereof, search was conducted in presence of Gazetted Officer where sample was prepared, sealed, recovery memo was prepared, test memo was prepared. Statement of the apprehended accused, Marjem Sheikh was recorded in accordance with Section 67 of the NDPS Act whereunder he had confessed and further disclosed that he was mere a carrier from Rajasthan to Kolkata where he was to hand over the article to one Md. Ishrafil @ Tulana @ Tunna. On the basis thereof, he had gone to Kolkata, traced out, apprehended Md. Ishrafil @ Tulana @ Tunna. During cross-examination at para-6, had deposed that recovery of Heroin was made at the station from the possession of accused, Marjem Sheikh. Notice under Section 50 of the Act was served. He had further stated that search and seizure was prepared at the station in presence of independent witnesses but again corrected that seizure list was not prepared in his presence. He had further stated that Rohit Srivastava happens to be seizing authority whereupon he had prepared search-cum-seizure list. Rohit had prepared arrest memo. He had further stated that at the instance of Assistant Director, a raiding party was constituted. He had further stated that he had not received copy of the order.

13. PW-2, another member of raiding team, had stated that



on the basis of confidential information regarding transportation of Narcotic Substance through Ananya Express, a raiding team was constituted. Then thereafter, they had gone to station where raid was conducted in presence of independent witnesses. Accused was apprehended. Notice under Section 50 of the NDPS Act was served upon him. Whereupon, the accused disclosed that he is ready to be searched in presence of a Gazetted Officer of the department whereupon they came to NCB, Patna. During course of personal search, nothing was found but from a bag 460 Gms of Heroin was found and with regard thereto, sample was prepared. Then the article weighed was 450 Gms. He had recorded statement under Section 67 of the NDPS Act. He had also exhibited the same along with signature over recovery memo.

14. During cross-examination, he had admitted that he was knowing that accused, Marjem Sheikh happens to be illiterate. He had further disclosed that accused was not knowing the legal procedure which was disclosed by him. On query, Marjem Sheikh had disclosed that he is not aware as to what happens to be in the bundle. He had further deposed that the raiding party was constituted at the instance of Assistant Director but, no order was issued. Vijay Bahadur was the senior most member of the team but Rohit Srivastava was made leader of the team. Rohit accordingly, conducted the whole paraphernalia. He had further stated that they have taken the accused to the office



where they came to know that recovered article happens to be Heroin. The accused was not arrested at that very moment. The accused was served notice under Section 50 of the Act at the station. No search was made at the station.

15. PW-3 is Rohit Srivastava who had deposed that a raiding party was constituted on a confidential information received by Superintendent, Vikas Kumar of which he was a leader. Accordingly, raiding party had gone to platform no.1 where after arrival of Ananya Express entered into Coach No.S1, gone to Seat No.55, and intercepted a person lying thereupon who on query, disclosed his name as Marjem Sheikh. Then thereafter, they have disclosed their identity and served with notice under Section 50 of the Act whereupon, the accused consented to be searched in presence of Gazetted Officer of the department. Then thereafter, they went to the NCB office where search was conducted and during course thereof, 460 Gms of Heroin was seized from a bag possessed by him. With regard thereto, two samples S1 and S2 each containing 5 Gms was prepared and sealed. Ticket, bag, Sari etc were also sealed. He along with accused and others have also put their signatures over the seizure list. Then had exhibited the relevant documents including that of ticket which was found in possession of the accused. During cross-examination, he had admitted that he was the person who prepared search-cum-seizure list, arrest memo, remand petition. Then had



stated that raiding party was constituted on an order of Zonal Director which, he is ready to file. He had further admitted that sampling was not done in presence of Magistrate and in likewise manner, had not obtained certificate from the Magistrate for getting the same examined by the FSL. He had further stated that search and seizure was prepared at the NCB office in presence of independent witnesses but, there happens to be no signature over the same. He had further disclosed that for the purpose of security, accused, Marjem Sheikh was taken to office.

16. PW-4 is Vikas Kumar, Superintendent who had deposed that on getting confidential information regarding transportation of Narcotic Substance (Heroin) through Ananya Express, he informed the Superior Officers whereupon, a raiding party was constituted under the leadership of Rohit Srivastava. A raid was conducted and then, he reiterated the evidence having made by the other witnesses. It has also been disclosed that nothing was recovered from person of the accused, but from a bag possessed by him, 460 Gms of Heroin was seized whereupon necessary legal formalities were performed. During cross-examination, he had stated that he had forwarded the complaint which bears his signature. He had further disclosed that personal search of accused, Marjem Sheikh was done in his presence but he is unable to say as to whether signature of independent witnesses happens to be over search-cum-seizure list. He



had further admitted that 460 Gms of Heroin was seized but in a petition placed before District & Sessions Judge, it has been incorporated as 400 Gms and for that, has submitted that it happens to be mere clerical mistake. On re-examination, he had produced the seized Heroin, the case property as well as the sample S2 and accordingly, marked material Exhibit. During cross-examination, he had admitted that over sample S2, signature of only Seizing authority is present. He had further stated that he is unable to say as to whether his signature happens to be over search-cum-seizure list.

17. PW-5 Balwant Rai is the Investigating Officer who during course thereof, had led the team who had gone to Kolkata to search out Md. Ishrafil @ Tulana @ Tunna whose name cropped up in a statement recorded under Section 67 of the NDPS Act of the accused, Marjem Sheikh. He had gone there, took assistance of NCB, Kolkata Team as well as police officials of Talgola PS, arrested Md. Ishrafil @ Tulana @ Tunna, recorded his statement, searched him and then brought him under transit order. During cross-examination, he had further stated that nothing was found from the house of Md. Ishrafil @ Tulana @ Tunna as well as that of accused, Marjem Sheikh.

18. PW-6 is Bikash Kumar, another member of the raiding party who had reiterated the same version and further, took Marjem Sheikh to NCB Office as he shown inclination to be searched before a



Gazetted Officer of the department in pursuance of notice served to him under Section 50 of the NDPS Act. Accordingly, he was searched. At his personal search, nothing was found while from a bag possessed by him 460 Gms of Heroin was seized. Whereupon, two samples were prepared each containing 5 Gms which were sealed. Remaining Heroin weighing 450 Gms was also sealed. He had identified his signature on seizure list. During cross-examination, he had admitted that he had filed charge-sheet. His signature along with four others is over search-cum-seizure list. All happen to be that of department. No signature of independent witness is available on the search-cum-seizure list. He had further admitted that in search-cum-seizure list there happens to be disclosure of 460 Gms of Heroin while in the remand petition, there happens to be disclosure of 400 Gms. He had further admitted that there happens to be overwriting over search-cum-seizure list concerning weight of the seized article. He had further admitted that sampling was not done in presence of Magistrate. He had further disclosed that the driver Sanjiv Kumar Ghosh, who knew Bangla acted as an interpreter during whole episode. He had further disclosed that Sanjiv Kumar had also got alias name as Anil Kumar. He had further admitted that the statement which happens to be in "roman script" containing seven pages of search-cum-seizure list was also placed before the accused but, who acted as interpreter, he is unable to say. He had further disclosed that



on 28.08.2013, prayer was made before the District & Sessions Judge for storage of the article but he is unable to say in whose possession the article were from 27.08.2013 to 28.08.2013.

19. PW-7, Vijay Bahadur Singh is also one of the members of raiding party which was constituted at the instance of Zonal Director. He had narrated the version as deposed by other witnesses and further, substantiated the factum of recovery of 460 Gms of Heroin from the bag possessed by the accused, Marjem Sheikh at NCB Office. He also reiterated thereof, sampling each containing 5 Gms which was sealed. He also identified his signature over search-cum-seizure list. During cross-examination, he had admitted that there happens to be absence of signature of independent witnesses over the search-cum-seizure list. Furthermore, he shown his inability to say whether non presence of independent witnesses before search-cum-seizure list was disclosed to accused or not. He had further deposed that raiding party was authorized to conduct raid in terms of Section 41 (2) of the NDPS Act. He had further admitted the difference of weight shown as 460 Gms as well as 400 Gms, of the recovered Heroin in the search-cum-seizure list, remand petition placed before the Sessions judge-cum-Special Judge.

20. From the evidence of PW-4 as discussed above, it is apparent that remaining Heroin weighing 450 Gms along with sample S2 was produced and admitted as material exhibit. However,



from the evidence of PW-4, it is evident that nothing has been said at his end with regarding to having the property duly sealed nor there happens to be any kind of finding recorded by the court itself whether it was produced in sealed condition though, had deposed that signature of seizing authority, independent witnesses as well as LTI of accused Marjem Sheikh were there. In likewise manner, during cross-examination, he had further stated that S2, duplicate sample contains only signature of seizing authority. Furthermore, the aforesaid conduct of the prosecution is found suspicious in the background of the fact that none of the witnesses have stated that signature of independent witnesses have been taken over the search cum seizure list or over sample. The situation is found worsen in the background of non examination of aforesaid two independent witnesses, namely, Santosh Kumar as well as Anil Paswan. The prosecution is also silent whether one bundle was found or more than one.

21. How the sampling is to be carried out, is duly, acknowledged by the department by way of issuance of Order No. 1/88 as well as 1/89 and for better appreciation, the same is quoted below.

“1.5. Place and time of drawal of sample.

Samples from Narcotic Drugs and Psychotropic Substances seized, must be drawn on the post of recovery, in duplicate, in the presence of search (Panch) witnesses and the persons from whose possession the drug is recovered, and mention to this effect should invariably be made in the panchnama drawn on the spot.

1.6 Quantity of different drugs required in the sample. *The quantity to be drawn in each sample for chemical*



test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the cases of Opium, Ganja and Charas/ Hashish where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also. The seized drugs in the packages/ containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn."

"1.7 Number of samples to be drawn in each seizure case. (a) *In the case of seizure of single package/container one sample in duplicate is to be drawn. Normally it is advisable to draw one sample in duplicate from each package/container in case of seizure of more than one package/container. (b) However, when the package/ container seized together are of identical size and weight, bearing identical markings and the contents of each package give identical results on colour test by U.N. kit, conclusively indicating that the packages are identical in all respect/ the packages/ container may be carefully bunched in lots of 10 packages/ containers may be bunched in lots of 40 such packages such packages/ containers. For each such lot of packages/ containers, one sample in duplicate may be drawn.*

(c) Where after making such lots, in the case of Hashish and Ganja, less than 20 packages/containers remains, and in case of other drugs less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn. (d) If it is 5 or more in case of other drugs and substances and 20 or more in case of Ganja and Hashish, one more sample in duplicate may be drawn for such remainder package/containers. (e) While drawing one sample in duplicate from a particular lot, it must be ensured that representative drug in equal quantity is taken from each package/ container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot."

22. Now coming to the other aspect, it is evident that though orally all the witnesses have stated that confidential information was received by PW-4, Vikas Kumar which was noted



down and then passed over to Zonal Director at whose instance raiding party was constituted and further as per evidence of PW-7, they were authorized in accordance with Section 41(2) of the NDPS Act. Neither the confidential information received by PW-4 and was noted down has been brought up on record nor the order of Zonal Director as claimed by the PW-7, in pursuance of Section 41(2) of the NDPS Act has been made an exhibit. Therefore, the source is found lacking and that being so, the authorization to conduct raid is found missing. In the aforesaid background, propriety of prosecution case came under precautionous behaviour.

23. Section 41(3) empowers exercise of powers so envisaged under Section 42 and as per Section 42(2) of the NDPS Act, it is obligatory on the part of the officer to communicate the information in writing in terms of Sub-section 1 and be communicated to the superior officials within 72 hours. In likewise manner, Section 57 of the Act requires obligation on the part of authority who had seized the narcotic substance as well as arrested the accused to communicate such seizure as well as arrest within 48 hours to his immediate superior official. From the evidence on record, it is evident that for the purpose of compliance of Section 50 of the Act, the accused was taken before the Vikash Kumar, Superintendent (PW 4), a Gazetted Officer but none of the witnesses at their own had disclosed regarding compliance of Section 42(2) as well as 57 of the Act which



found to play pivotal role in absence of order having on the record, as the passing of said order speaks about status of raiding party, not competent to conduct raid on their own.

24. As per Section 51 of the Act, it is apparent that during course of search and seizure, the procedure prescribed for search and seizure under the Code is to be followed. Section 100 of the CrPC governs the mode of search and seizure whereunder two independent respectable witnesses of the locality is found necessary before whom search and seizure is to be carried out unless they disown. So far present case is concerned, there happens to be complete silence at the end of the prosecution that the aforesaid two independent witnesses, namely, Santosh Kumar and Anil Paswan have declined to become witness of search and seizure and further, on account of their non examination, it looks difficult to accept the evidence of PW-4 that on remaining part of seized Heroin, contained their signature. Although, there happens to be complete silence at the end of the learned lower court whether the appellant, Marjem Sheikh was competent enough to understand the proceedings, however, is found duly represented by his counsel and so, for the present purpose, the aforesaid deficiency is not at all found sever to adjudicate upon the court proceeding but it has got a bearing when the evidence of PW-6, Bikash Kumar (para 9) is taken into consideration. None of the PWs have had deposed that accused was knowing Hindi or English and further, he was made to



understand in Hindi or English. However, from the evidence of PW-6 (para 9), it is found that the accused Marjem Sheikh was not at all conversant with the Hindi or English language and on account thereof, as has been disclosed by him (PW 6) with the help of driver, namely, Sanjiv Kumar Ghosh @ Anil Kumar who discharged the function as an interpreter and through whom the accused Marjem Sheikh was known to the activity being taken at their end. But, none of the witnesses have identified presence of Sanjiv Kumar Ghosh @ Anil Kumar during whole exercise. Aforesaid Sanjiv Kumar Ghosh @ Anil Kumar has not been examined to substantiate the same. Apart from this, from perusal of all the relevant documents including that of Vakalatnama, it is evident that signature of appellant, Marjem Sheikh is found in Bangla.

25. The conduct of the prosecution is also to be perceived in broad spectrum. It is needless to say that protection of Section 50 of the NDPS Act is always available with regard to personal search. Had there been positive evidence regarding carrying of narcotic substance by a carrier then in the circumstance, the bag which was possessed by the accused, Marjem Sheikh would have been searched in the bogie itself to trace out whether the bag was containing the narcotic substance for which, the raiding party was constituted. Had there been such kind of activity, then at least, presence of independent seizure list witnesses or at least, occupants of the other berths of bogie no. S1 of



Ananya Express would have been seizure list witnesses, or the witnesses so named Santosh Kumar and Anil Paswan, reserving the subsequent activity regarding personal search in accordance with Section 50 of the NDPS Act. That happens to be the reason behind that after examination of PW-1, Gyan Prakash, one of the raiding members, the prosecution only to fill up the lacunae, developed the version trying to patch up the weakness having been exposed by PW-1 during course of his evidence, in examination-in-chief alone whereunder at para-2 had stated that “ *when Ananya Express, Train No. 12316 came from Rajasthan to Sealdah stopped at platform no.1, then in presence of witnesses a person sleeping over berth no.55 of Coach No. S1 was awoken and from his possession one bag was searched whereunder 460 Gms of Heroin was found wrapped in green coloured Sari*”. That means to say, from the evidence of PW-1 (para 2) the seizure of 460 Gms of Heroin had already effected on berth No.55 of Coach No. S1 of Ananya Express, then in that event, the evidence of remaining witnesses on that very score became doubtful, more particularly, in the background of absence of signature of independent search and seizure witness. Apart from this, as indicated above, the sample was to be prepared at the spot having signature of accused Marjem Sheikh, seizure list witnesses and the authority who prepared the same and again the same is found lacking corroborated by the evidence of PWs-4, Para 12 and 15. It is not the rule that the evidence



of officials should be disregarded, but when there happens to be inconsistency amongst them coupled with non performance of mandatory provision of law, as well as some sort of unwarranted activities, then in that event, their evidences must to be seen with suspicious eye, and unless and until properly explained, must dent upon genuineness of the prosecution version.

26. In *State of Rajasthan v. Jag Raj Singh @ Hansa*, as reported in **2016 CrLJ 3336** it has been observed as under:-

“9. The NDPS Act was enacted to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances. This Court had occasion to consider the provisions of NDPS Act in large number of cases. This Court has noted that the object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. This Court in *State Of Punjab vs Balbir Singh, 1994 (3) SCC 299*, in paragraph 15 has made the following observations:

“15.The object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1). To that extent they are mandatory. Consequently the failure to comply with these requirements thus affects the prosecution case and therefore vitiates the trial.”

10. To the similar effect are the observations of this Court in *Saiyad Mohd. Saiyad Umar Saiyed & others*



vs. The Page 10 10 State Of Gujarat, (1995) 3 SCC 610. Following was stated in paragraph 6 of the said judgment:

“6. It is to be noted that under the NDPS Act punishment for contravention of its provisions can extend to rigorous imprisonment for a term which shall not be less than 10 years but which May extend to 20 years and also to fine which shall not be less than Rupees one lakh but which may extend to Rupees two lakhs, and the court is empowered to impose a fine exceeding Rupees two lakhs for reasons to be recorded in its judgment. Section 54 of the NDPS Act shifts the onus of proving his innocence upon the accused; it states that in trials under the NDPS Act it may be presumed, unless and until the contrary is Proved, that an accused has committed an offence under it in respect of the articles covered by it "for the possession of which he fails to account satisfactorily". Having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act, namely, the shifting of the onus to the accused and the severe punishment to which he becomes liable, the legislature has enacted the safeguard contained in Section 50. To obviate any doubt as to the possession by the accused of illicit articles under the NDPS Act, the accused is authorised to require the search for such possession to be conducted in the presence of a Gazetted Officer or a Magistrate.”

27. From the evidences of the respective PWs, as referred above there happens to be inconsistency over place where search and seizure was made, as it has been shifted from train to office keeping in dilemma over application of Section 42 or 43 of the NDPS Act, however, the same has properly been considered in **Jag Raj Singh @ Hansa's case** (supra) under the following paragraphs which are as under:-

15. In this context, it is relevant to note that before the Special Judge also the breach of Section 42(1) and 42(2) was contended on behalf of the defence. In paragraph 12 of the judgment Special Judge noted the above arguments of defence. However, the arguments based



on non-compliance of Section 42 (2) were brushed aside by observing that discrepancy in Exh. P-14 and Exh. P-15 is totally due to clerical mistake and there was compliance of Section 42(2). Special Judge coming to compliance of proviso to Section 42(1) held that vehicle searched was being used to transport passengers as has been clearly stated by its owner Veera Ram, hence, as per the explanation to Section 43 of the Act, the vehicle was a public transport vehicle and there was no need of any warrant or authority to search such a vehicle. The High Court has reversed the above findings of the Special Judge. We thus, proceed to examine as to whether Section 43 was attracted in the present case which obviated the requirement of Section 42(1) proviso. Section 43 of the Act is as follows:

“43. Power of seizure and arrest in public place.- Any officer of any of the departments mentioned in section 42 may (a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V A of this Act; (b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company. Explanation.- For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public”

16. xxx

17. xxx

18. There is one more aspect which needs to be noted. The present is a case where prosecution himself has come with case that secret information was received from informer which information was recorded in Exh. P-14 and Exh. P-21 Roznamacha and thereafter the Station House



Officer with police party proceeded towards the scene. The present is not a case where the Station House Officer suddenly carried out search at a public place. The Station House Officer in his statement has also come up with the facts and case to prove compliance of Section 42. When search is conducted after recording information under Section 42(1), the provisions of Section 42 has to be complied with. This Court in **Directorate Of Revenue & Another vs Mohammed Nisar Holia, (2008) 2 SCC 370**, had occasion to consider Sections 41,42 and 43 explanation. Following was stated in paragraph 14:

“14. Section 43, on plain reading of the Act, may not attract the rigours of Section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of Section 42, need not be complied with, only because the place whereat search is to be made is a public place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with. An interpretation which strikes a balance between the enforcement of law and protection of the valuable human right of an accused must be resorted to. A declaration to the effect that the minimum requirement, namely, compliance of Section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as non-compliance of the said provision would not render the search a nullity. A distinction therefor must be borne in mind that a search conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance.....”

19. Thus the present is not a case where Section 43 can be said to have been attracted, hence, non-compliance of Section 42(1) proviso and Section 42(2) had seriously prejudiced the accused. This Court had occasion in large number of cases to consider the consequence of noncompliance of provisions of Section 42(1) and 42(2), whether the entire trial stand vitiated due to above non compliance or conviction can be set aside. In this context reference is made to the judgment of this Court in **State of Punjab Vs. Balbir Singh (1994) 3 SCC 299**. In the above batch of cases, the High Court has acquitted accused on the ground that search was conducted without conforming to the provisions of the NDPS Act. Sections 41,42 43 and other relevant provisions came for consideration before this Court, referring to the provisions of Chapter IV following was stated in paragraph 8:



“8. But if on a prior information leading to a reasonable belief that an offence under Chapter IV of the Act has been committed, then in such a case, the Magistrate or the officer empowered have to proceed and act under the provisions of Sections 41 and 42. Under Section 42, the empowered officer even without a warrant issued as provided under Section 41 will have the power to enter, search, seize and arrest between sunrise and sunset if he has reason to believe from personal knowledge or information given by any other person and taken down in writing that an offence under Chapter IV has been committed or any document or other article which may furnish the evidence of the commission of such offence is kept or concealed in any building or in any place. Under the proviso if such officer has reason to believe that search warrant or authorisation cannot be obtained without affording opportunity for the concealment of the evidence or facility for the escape of the offender, he can carry out the arrest or search between sunset and sunrise also after recording the grounds of his belief. Sub-section (2) of 8 1990 Cri LJ 414 (Del) Section 42 further lays down that when such officer takes down any information in writing or records grounds for this belief under the proviso, he shall forthwith send a copy thereof to his immediate official superior.”

20. After referring large number of cases, this Court recorded conclusion in paragraph 25 which is to the following effect:

“25. The question considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows : (1) 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 offences as provided under the provisions of CrPC and when such search is completed 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 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. (2-



A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal. (2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate Page 23 23 officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction. (2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief. To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial. (3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case. (4-A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions 'of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity.



(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.”

28. The cumulative effect, on account of aforesaid deficiency would not justify conviction and sentence recorded against both the appellants and consequent thereupon, the same is set aside.

29. Both the appeals are allowed. Both the appellants are under custody, hence are directed to be released forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J)

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