

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Mr. Justice Joymalya Bagchi

And

The Hon'ble Mr. Justice Bivas Pattanayak

C.R.A. No. 53 of 2019
with
CRAN 1 of 2019 (Old No. CRAN 1431 of 2019)

Panchu Bhawal
Vs.
State of West Bengal & Anr.

For the Appellant : Mr. Prabir Majumder, Adv.
Mr. Snehansu Majumder, Adv.

For the NCB : Mr. Amajit De, Adv.

Heard on : 26.04.2022

Judgment on : 26.04.2022

Joymalya Bagchi, J. :-

Nobody appears for the NCB. Mr. De, learned Counsel is requested to appear on behalf of NCB. His appointment may be regularised.

With the consent of the parties the appeal is taken up for hearing today.

Appellant has been convicted for commission of offence punishable under Section 20(b)(ii)(c) of the NDPS Act and sentenced him to suffer

rigorous imprisonment for ten years and to pay a fine of Rs. 1,00,000/-, in default, to suffer simple imprisonment for six months more.

Prosecution case as alleged against the appellant is to the effect that on 29.10.2013 at 18:00 hours a group of NCB officers under the leadership of one Debashis Chowdhury (P.W. 1) raided a premises owned by one Marjnina Bibi which was let out to the appellant. The party was accompanied by two independent witnesses namely Md. Kalam and Altaf Seikh who confirmed that the appellant was residing as a paying guest in the said premises. Raiding party knocked the door of the premises. Appellant opened the door. Marjnina Bibi was not present at the residence. In the course of search, two multi-coloured nylon sacks were found in the second room to the right side of the main entrance on the first floor of the house. On opening the sacks brownish materials suspected to be Cannabis i.e. Ganja was noticed. Sacks were weighed and 50kgs. of Ganja in all i.e. 25 kgs. of Ganja in each bag was recovered. Samples were drawn from the said bags. In the course of search, PAN Card, Ration Card, Trade Certificate, LIC Policy and Debit Cards standing in the name of the appellant and a mobile phone were recovered. Upon notice to the appellant, he made voluntary statement under Section 67 of the NDPS Act. Samples were sent for chemical examination and the report of the chemical examiner showed the presence of Cannabis i.e. Ganja in the samples. Complaint was filed against the appellant and charge was framed under Section 20(b)(ii)(c) of the NDPS Act. Prosecution examined six witnesses and exhibited a number of documents. Defence of the appellant

was one of innocence and false implication. It was the specific defence that he was neither the owner nor a tenant of the premises in question. In conclusion of trial, learned trial Judge, upon analysis of the evidence on record, came to a finding that the search had not been conducted in terms of Section 42 of the NDPS Act. He also held in the absence of examination of the owner of the premises, Marjinina Bibi, two independent witnesses namely Md. Kalam and Altaf Seikh or production of rent agreement, it would be unsafe to come to a finding that the appellant had exclusive possession of the premises where recovery of narcotic substance was made. However, as the appellant had admitted the tenancy in his voluntary statement recorded under Section 67 of the NDPS Act, learned trial Judge relying on such statement recorded a finding of guilt against him.

Mr. Majumder, learned Counsel appearing for the appellant submits statement of the appellant under Section 67 of the NDPS Act is inadmissible in the light of the law declared in ***Tofan Singh vs. State of Tamil Nadu***¹. He, accordingly, prayed for acquittal.

Mr. De, learned Counsel appearing for the NCB, submits the appellant was found at the place of occurrence and various personal belongings of the appellant had also been seized from the premises. Hence, his possession of the premises where recovery was made had been proved beyond doubt. He, however, did not dispute the statement of the appellant

¹ (2021) 4 SCC 1

under Section 67 of the NDPS Act is not admissible in view of the law in **Tofan Singh** (supra).

I have considered the evidence on record.

P.Ws. 1, 3, 4 and 6 were the members of the raiding party.

P.W. 5 is the chemical examiner.

P.W. 1 (Debashis Chowdhury) deposed with regard to receipt of specific information which was reduced in writing and intimated to Zonal Director, NCB. Zonal Director endorsed the document which has been marked as Exhibit 1. P.Ws. 4 and 6 have corroborated P.W. 1 on such score. Trial Court held there was complete non-compliance of Section 42(2) of NDPS as the endorsement of Zonal Director was bereft of date and time of such endorsement.

Section 42 of the NDPS Act, inter alia, provides upon receipt of secret information that narcotic substance is kept or concealed in a building, conveyance or enclosed space, the officer shall reduce such information in writing before proceeding to undertake a search. If the search is undertaken between sunset and sunrise, the officer must record grounds of his belief such search is necessary to prevent concealment of evidence or escape of offender. A copy of the information or reasonable belief reduced in writing must be sent to the immediate superior within 72 hours. On examining Exhibit 1, I note the requisite information was reduced into writing by P.W. 1 prior to the search. It had also been sent to the superior officer, that is, Zonal Director, NCB who had put his

endorsement thereon. However, no date and time was appended by the Zonal Director to his endorsement. In this backdrop, trial Court came up to a finding there is non-compliance of section 42(2) of the NDPS Act. I am unable to accept this view of the trial Judge. Exhibit 1 shows the secret information was reduced into writing prior to the raid. It has also been intimated to the superior officer. Failure of the superior officer to ascribe date and time of receipt of information cannot lead to conclusion of total non-compliance of section 42(2) of the NDPS Act. From the deposition of P.Ws. 1, 4 and 6 it appears Exhibit 1 was sent to the Zonal Director prior to the search and movement order was obtained. Thus, there is due compliance of section 42(2) of the NDPS Act in the facts of the case. In this regard, it may be profitable to refer to the observations of the Constitution Bench in ***Karnail Singh vs. State of Haryana***² held as follows:

“35. ... where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act.”

Trial Judge incorrectly relied on ***Kisan Chand vs. State of Haryana***³ and ***Sukhdev Singh vs. State of Haryana***⁴. Both these cases dealt with complete non-compliance of section 42 of the NDPS Act. Secret information had not been recorded or intimated to the superior officer at all in those cases. They are factually distinguishable from the present case.

² (2009) 8 SCC 539

³ (2013) 2 SCC 502

⁴ (2013) 2 SCC 212

With regard to exclusive possession of the appellant of the premises in question, the trial Court observed no independent evidence had been led by the prosecution to prove such fact. Neither owner of the premises Marjnina Bibi nor the independent witness namely Md. Kalam and Altab Seikh have been examined. In this backdrop, the Court had relied on the voluntary statement of the appellant under section 67 of the NDPS Act (Exhibit 6/1) to come to a finding that he had admitted to be a tenant under Marjnina Bibi.

In **Tofan Singh** (supra) a Constitution Bench of the Supreme Court has held statement made by an accused under section 67 of the NDPS Act is inadmissible in law. In view of the ratio in **Tofan Singh** (supra) no reliance can be placed on the admission of the appellant in the aforesaid statement.

Under such circumstances Mr. De relies on the arrest of the appellant at the place of occurrence and recovery of personal materials of the appellant at the place of occurrence to prove he was in possession of the premises. Mere arrest of the appellant at the place of occurrence along with personal documents may prove his presence at the time of search but would constitute scanty material and may not qualify as proof beyond doubt with regard to exclusive possession of the premises.

I am further persuaded to come to such conclusion as the best evidence being that of the owner of the premises Marjnina Bibi and other independent witnesses were withheld from the Court.

In view of the aforesaid discussion, I am of the opinion conviction of the appellant which was solely based on his statement recorded under section 67 of the NDPS Act is inadmissible in law and is liable to be set aside.

Conviction and sentence of the appellant is set aside.

The appellant shall be released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the trial court which shall remain in force for a period of six months in terms of section 437A of the Code of Criminal Procedure.

The appeal is, accordingly, allowed.

In view of disposal of the appeal, connected application being CRAN 1 of 2019 (Old CRAN 1431 of 2019) is also disposed of.

Let a copy of this judgment along with the lower court records be forthwith sent down to the trial Court at once.

Photostat certified copy of this judgment, if applied for, shall be made available to the appellant upon completion of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)