

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 115 of 2021

Md. Habibur Rahaman @ Habu

Vs.

The State of West Bengal

For the Appellant	: Mr. Sekhar Kr. Basu, Ld. Sr. Adv. Mr. Arnab Saha, Adv. Mr. Abhimannya Banerjee, Adv.
For the Appellant/ Amicus Curiae	: Mr. Angshuman Chakraborty, Adv.
For the State	: Mr. Sanjay Bardhan, Adv. Ms. Debjani Dasgupta, Adv. Ms. Manashi Roy, Adv.
Hearing Concluded on	: September 19, 2022
Judgement on	: September 23, 2022

DEBANGSU BASAK, J.:-

1. The appellant has assailed the judgement of conviction dated February 18, 2021 and the order of sentence dated February 19, 2021 passed by the learned Additional Sessions Judge cum Judge Special Court, NDPS Act, Berhampore, Murshidabad in N.D.P.S. Case No. 387 of 2017 convicting the appellant under Section 18 (b) of the Narcotics Drugs and

Psychotic Substances Act, 1985 and sentencing the appellant to 15 years simple imprisonment and a fine of Rs. 2 lakhs, in default to suffer simple imprisonment for six months.

2. The prosecution had brought three persons including the appellant to trial on the charges under Sections 18 (b), 21 (c), and 29 of the NDPS Act, 1985. According to the prosecution, the police had received credible information that smugglers were delivering narcotic goods to their agent. After receipt of such information, a raid had been conducted. They had apprehended the appellant and recovered heroin of 500 grams from him. The appellant had made a leading statement facilitating seizure of crude opium of 31.5 kg and cancelled currency notes. After completion of investigations, the police had submitted charge sheet on April 23, 2018 against the appellant and two others. Those two other accused had subsequently participated at the trial.

3. The learned Court had framed charges on October 6, 2018 under Section 21 (c) of the Act of 1985 against the appellant which was subsequently altered to Section 18 (b) of the Act of 1985 on February 17, 2021. The two other accused

had been charged under Section 29 of the Act of 1985 on October 6, 2018.

4. The appellant and the two other accused had pleaded not guilty and claimed to be tried. At the trial, the prosecution had examined nine witnesses. The prosecution had tendered 18 documents which were marked as exhibits. The prosecution had also tendered 11 material exhibits which were marked as such. On completion of the evidence of the prosecution the appellant along with the two other accused persons were questioned under Section 313 of the criminal procedure code on July 9, 2020 when they had denied the allegations. The appellant and the two other accused persons did not adduce any evidence at the trial.

5. The appellant had filed the present appeal through an advocate. Such advocate had been found not to be appearing in support of the appeal for a considerable period of time. Consequently, the Court had appointed an amicus curiae. The learned amicus curiae had made his submissions. The appellant had appointed a senior advocate to represent him who was also heard.

6. It has been contended on behalf of the appellant that, the police did not comply with the mandatory provisions under Section 42 of the Act of 1985. It has been contended on behalf of the appellant that, such compliance is mandatory. In support of such contention, reliance has been places on **2009 Volume 8 Supreme Court Cases 539 (Karnal Singh vs. State of Haryana).**

7. It has been contended on behalf of the appellant that, the police had made a General Diary on October 28, 2015 at 10:25 hours. The police had recovered 490 grams of Heroin from the appellant and seized 31.500 grams of crude Opium and 385 pieces of old Indian currency notes from the store room of the appellant on October 28, 2017 at about 16:35 hours. The police did not adduce any evidence with regard to report being sent by the Investigating Officer to his superior within 72 hours, in compliance with the mandate of Section 42(2) of the Act of 1985. Reliance has been made to the findings reported by the Learned Trial Judge on such issue. Reliance has been placed on **2016 Volume 11 Supreme Court Cases 687 (State of Rajasthan vs. Jag Raj Singh), 2011 Volume 8 Supreme Court Cases 130 (Rajender Singh**

vs. State of Haryana), 2016 Volume 14 Supreme Court Cases 358 (Darshan Singh vs. State of Harayana).

8. It has been contended on behalf of the appellant that Section 52 A of the Act of 1985 has not been complied with. No evidence had been led to establish that the samples which were despatched to the Forensic Science Laboratory were actually drawn/taken from the crude opium alleged to have seized from the store room of the accused. In support of such contention, reliance has been placed on ***2008 Volume 16 Supreme Court Cases 417 (Nor Aga vs. State of Punjab), 2004 Volume 10 Supreme Court Cases 562 (Jitendra and Ors. Vs. State of M.P)*** and ***2000 Volume 1 Calcutta High Court Notes 803 (Tej Bahadur Singh & Anr. vs. Narcotics Control Bureau & Anr.)***.

9. It has been contended that, the ownership of the house as well as the store room has not been established by the prosecution. Reliance has been placed on ***2020 Volume 9 Supreme Court Cases 202 (Gangadhar vs. State of Madhya Pradesh), 2002 Volume 9 Supreme Court Cases 595 (Gopal vs. State of Madhya Pradesh)***.

10. Referring to the Law of Burden of Proof and Reverse Burden it has been contended that, the prosecution did not prove the foundational fact of ownership of the house of the store room beyond reasonable doubt. Reliance has been placed on **2008 Volume 16 Supreme Court Cases 417 (Noor Aga vs. State of Punjab).**

11. It has been contended on behalf of the appellant that, the prosecution did not establish the contents of the materials of the samples and that signatures of the witnesses have not been established.

12. It has been contended on behalf of the appellant that the Malkhana register was not produced and exhibited in Court. Reliance has been placed on **2018 SCC Online SC 3658 (Baldev Singh vs. State of Haryana), MANU/SC/0952/2002 (State of Orissa vs. Sitansu Sekhar Kanungo),** and **2005 Volume 3 Supreme Court Cases 59 (State of Rajasthan vs. Gurmail Singh).**

13. Appellant has also relied upon **2013 Volume 14 Supreme Court Cases 527 (Vijay Jain vs. State of Madhya Pradesh), 2011 Volume 5 Supreme Court Cases 123 (Ashok vs. State of Madhya Pradesh), 2004 Volume 10**

Supreme Court Cases 562 (Jitendra and Ors. vs. Madhya Pradesh), 2019 Volume 18 Supreme Court Cases 215 (Vijay Pandey vs. State of Uttar Pradesh) in support of the contention that the prosecution did not prove the case beyond reasonable doubt.

14. Learned advocate appearing for the State has submitted that, the appellant did not suffer any prejudice by the alteration of the charge. In support of such contention, reliance has been placed on ***2020 Volume 12 Supreme Court Cases 467 (Dr. Nallapareddy Sridhar Reddy vs. State of Andhra Pradesh and Others), 2020 Supreme Court Cases Online SC 1014 (Rohtas and Another vs. State of Haryana)*** and ***2004 Volume 7 Supreme Court Cases 144 (Durgo Bai and Another vs. State of Punjab)***.

15. Learned advocate appearing for the State has submitted that, the public witnesses being PW-1, 2 and 3 signed the seizure list. Even if they did not support the prosecution case, at the trial, their entire deposition cannot be overlooked. The Joint Block Development Officer had acted as Magistrate. He had corroborated the case of the prosecution. Testimony of official witnesses cannot be discarded only on

the ground that they are official witnesses, if their testimonies are found to be trust worthy, credible, reliable and believable.

16. Learned advocate appearing for the State has submitted that, the provisions of Section 42 of the Act of 1985 had been complied with. He has contended that, on October 28, 2017 PW-4 had received credible information and reduced the same in writing by making a General Diary entry being No. 1700 dated October 28, 2017 which was tendered in evidence and marked as Exhibit 4. He had therefore, informed his superior officer and sent a requisition to the sub-Divisional Police Officer Lalbag and which was tendered as exhibit and marked as Exhibit 5. Therefore, according to him, there was substantial compliance with the provisions of Section 42 of the Act of 1985.

17. Learned advocate appearing for the State has submitted that, the appellant was duty bound to furnish explanation in his statement under Section 313 of the Criminal Procedure Code. The appellant had chosen the freedom to remain silent. In such situation the Court has rightly drawn adverse inference against the appellant.

18. In course of hearing, although the appellant had initially taken the point of alteration of the charge to the prejudice of the appellant, however, gave up such point in view of the contents of the charge framed against the appellant at the trial.

19. The prosecution had established the following at the trial :-

- i. PW-4, a sub-Inspector of police, then posted at Lalbag Police Station, had received source information that some persons would deal with narcotics at Mokimnagar. He had diarized such information being GDE entry No. 1700 dated October 28, 2017. (Exhibit 4)
- ii. PW-4 had informed officer-in-charge Lalbag Police Station and Sub-Divisional Police Officer, Lalbag, about such source information and sent requisition to Sub-Divisional Police Officer, Lalbag, through constable Khoka Ali seeking permission to conduct the raid. Khoka Ali had told PW-4 over telephone that SDPO

had granted police. Requisition sent to the SDPO had been marked as Exhibit 5.

- iii. PW-4 had gone to the Mokimnagar with the raiding party which they reached at about 12:15 P.M. When the raiding team had proceeded towards the area, some persons started to run away. The raiding team had managed to apprehend the appellant. The appellant had disclosed the names of the other two co-accuseds who had fled away.
- iv. Joint Block Development Officer and Disaster Management Officer, who are Gazetted Officers, had come to the spot on requisition. Joint BDO had served the notice on the appellant. The appellant had been searched and 500 grams of Heroin was seized from his possession. Two samples packets of 500 grams each had been prepared. A seizure list had been prepared. Seizure list has been marked as Exhibit 2.

- v. Thereafter, the raiding team went to the store room of the appellant. The raiding team had dug the floor of the store room. The raiding team had found old cancelled Indian Currency notes of the denomination of Rs. 1000/- and Rs. 500/-. They had also found Opium weighing 31.500 kgs. Two samples of 100 grams each had been prepared. The Opium had been tagged, sealed and labelled. The Seizure list of the crude Opium, currency notes and others containing seven pages had been prepared which was marked as Exhibit 3.
- vi. The appellant had been arrested. The seized articles had been handed over to the Malkhana officer and the accused person to the duty officer.
- vii. PW-4 had prepared the written complaint which had been marked as Exhibit 8. PW-4 had tendered the packets which were prepared out of the two narcotics seized.

Formal First Information Report had been registered which was tendered as Exhibit 10.

- viii. PW-9 had investigated the case. He had prepared the rough sketch map of the first place of occurrence which was marked as Exhibit 11. He had visited the second place of occurrence and prepared a rough sketch map thereof which was marked as Exhibit 11.
- ix. PW-9 had received the alamats from the Malkhana on October 13, 2011 and sent the same to the laboratory for testing through constable Khoka Ali. The challan had been tendered and marked as Exhibit 13.
- x. PW-9 had received the Chemical examination Report which had been marked as Exhibit 17. Since no opinion had been expressed in respect of sample 'C-1', he had sent sample 'C-2' to the Central Forensic Science Laboratory, Kolkata after the samples were authenticated from Court. He had received the

report to Central Forensic Science Laboratory, Kolkata which was marked as Exhibit 18.

xi. Exhibit 17 had stated that, Exhibit 'A-1' had tested positive for Heroin. Exhibit 18 had stated that, Exhibit 'C-2' had been identified as opium.

xii. The second seizure had taken place in presence of the Joint Block Development Officer.

20. The prosecution had therefore, been able to prove beyond reasonable doubt that, 31.500 kgs of Opium was seized from the store room of the appellant. The seizure had been made in presence of a gazetted officer.

21. *Karnal Singh (supra)* has held that, while total non-compliance of the requirements of Sub-Section (1) and (2) of Section 42 of the Act of 1985 is impermissible, delayed compliance with satisfactory explanation about delay is acceptable compliance of Section 42. It has also held that whether there is adequate or substantial compliance with Section 42 of the Act of 1985 or not is a question of fact to be decided in each case.

22. Jag Raj Singh (supra), Rajender Singh (supra), Darshan Singh (supra) have in the facts and circumstances of the individual cases, not find either adequate or substantial compliance with Section 42 of the Act of 1985. The factual scenarios in the present case that the prosecution had established at the trial are different.

23. Section 42 of the Act of 1985 requires the officer of the designated rank as prescribed therein, to enter into and search any building or conveyance or enclosed place, break open any door and remove any obstruction to any entry, seize any drug or substance and detain, search and arrest any person where such officer has reason to believe that offences punishable under the Act of 1985 have committed. Section 42 (2) requires the officer to reduce in writing the information received under Sub-section (1) of Section 42 or record the grounds for his belief under the proviso thereto, within 72 hours and sent a copy thereof to his immediate official superior officer. In the facts of the present case, PW-4 had received source information at about 10:25 A.M that some persons would be dealing in the narcotics at Mokimnagar. He had entered such information in the Lalbag Police Station

General Diary where he was posted as entry No. 1700 dated October 28, 2017. The certified copy of such General Diary entry had been tendered in evidence and marked as Exhibit 4. He had been posted as the sub-Inspector of police at Lalbag Police Station at that material point of time. His immediate superior officer would be the officer-in-charge of the Lalgola Police Station. Under Section 42 of the Act of 1985, he was required to inform his superior officer about such source information which he had done in the facts of the present case. He had informed the officer-in-charge, Lalgola Police Station as well as Sub-Divisional Police Officer, Lalbag about such source information and had sent requisition to the Sub-divisional Police Officer through constable Khoka Ali seeking permission to conduct the raid. He had tendered the requisition which he had made as Exhibit 5. In his testimony, PW-4 had stated that, Khoka Ali told him over telephone that the Sub-divisional Police Officer had granted the permission. Exhibit 5, which is the requisition, has a writing by the Sub-divisional Police Officer, Lalbag authorizing PW-4 to conduct the raid.

24. In the facts and circumstances of the present case, in our view, there has been adequate compliance with Section 42 of the Act of 1985. The contention, therefore, made on behalf of the appellant, that the prosecution had failed to substantiate compliance with Section 42 of the Act of 1985 has no merit.

25. In view of the discussions above, the findings returned by the Learned Trial Judge that no report was sent by PW-4 to his superior officer within 72 hours as mandated by Sub-section (2) of Section 42 of the Act of 1985 is, therefore, perverse and is set aside.

26. With regard to the compliance that Section 52 A of the Act of 1985, we have noticed from the evidence placed on record before the Trial Court that, PW-4 had seized the narcotics and had prepared seizure list in respect thereof which had been tendered and marked as Exhibit 3. Two samples each of 100 grams had been packed, labelled and sealed separately marked as Exhibit 'C-1' and 'C-2'. The net weight of the opium that had been seized had been recorded as 31.500 kgs. PW-4 had seized such narcotics from the possession of the appellant. The appellant had signed the

seizure list. Independent seizure list witnesses had signed such seizure list.

27. The independent witnesses who had witnessed the seizure of the opium as recorded in Exhibit 3, had deposed at the trial. PW-1 , PW-2 and PW-3 had identified their respective signatures on Exhibit 3. PW-1, 2 and 3 had claimed in their testimonies before the learned Trial Judge that their signatures were obtained on blank paper. The independent witnesses being PW-1, 2 and 3 had made such claim of their signature being obtained on blank paper at the trial. They had not produce any document establishing that they comply as to their signatures being obtained on blank papers contemporaneously. Such claims therefore has no basis and no reliance should be placed thereon.

28. In the facts and circumstances of the present case, the contention with regard to the non-compliance of Section 52 A of the Act of 1985 has no substance. The prosecution had proved by cogent evidence that, samples were taken at the time of seizure, and such samples had been sent for chemical examination and that the Chemical Examination Report had established the narcotics seized to be opium. Manner of

disposal of the seized narcotic drugs and psychotropic substances has been dealt with by Section 52 A of the Act of 1985. In the facts and circumstances of the present case, we have not been called upon to deal with the disposal of the narcotics. Therefore, the ratio of **Noor Aga (supra), Jitendra and Ors. (supra), Tej Bahadur Singh & Anr. (supra)**, has no manner of application.

29. The commercial quantity of crude opium had been seized in presence of the appellant. He had signed the seizure list. The seizure had been made subsequent to his statement made to the raiding party as to the location of the seized materials. The question of proving ownership of the property from which, the crude opium had been seized does not arise in the facts and circumstances of the present case. Therefore, the ratio laid down in **Gangadhar (supra)** and **Gopal (supra)** has no manner of application.

30. In the facts and circumstances of the present case, the prosecution had proved beyond reasonable doubt the seizure of commercial quantity of opium from the possession of the appellant. The appellant had failed to discharge the burden of rebuttal. The contentions with regard to reverse burden of

proof as has been sought to be raised on behalf of the appellant has no substance.

31. PW-9 in his deposition had stated that, on October 30, 2017, he had received the alamat 'C-1' from the Malkhana and sent the same to the State Drugs Control Research Laboratory Kolkata by the challan being Exhibit 13. He had also stated that, he received the report from the State Drugs Control Research Laboratory Kolkata on February 20, 2018 which had been marked as Exhibit 17. He had stated, since Exhibit 17 did not express any opinion with regard to the sample he had sent the sample 'C-2' to the Central Forensic Science Laboratory Kolkata after getting the sample authenticated from the Court.

32. During the evidence of PW-9, sealed packet of Central Forensic Science Laboratory Kolkata had been opened in Court and the report contained in such sealed packet was marked as Exhibit 18.

33. In Exhibit 8 being the complaint of which PW-4 is the author, he had stated that, he had prepared two samples separately packed, labelled and sealed and marked as Exhibit 'C-1' and 'C-2' out of the mother sample being marked as 'C'.

He had stated in his evidence, that, the mother sample was contained in a jute sack.

34. In the facts and circumstances of the present case, the prosecution had been able to establish the origin of the sample 'C-2' from the mother sample being 'C' which had been sent to the Central Forensic Science Laboratory Kolkata through PW-9. Therefore, it cannot be said that, the prosecution had failed to establish sample 'C-2' at the trial.

35. The facts of the present case are not the same as that which had been considered in **Baldev Singh (supra)**, **Sitansu Sekhar Kanungo (supra)**, **Gurmail Singh (supra)**. In **Baldev Singh (supra)** the Malkhana register have not been produced. The Prosecution Witness has admitted in cross-examination that he did not obtain the signature of the Malkhana register. Moreover, the Malkhana register did not indicate about the deposit of seized property. In fact, there was no entry to such effect in the Malkhana register.

36. In **Sitansu Sekhar Kanungo (supra)** the Court had found that although the seizure was made on January 31, 1993 the seized article was produced on April 15, 1993 before the learned Sub-Divisional Judicial Magistrate.

37. In ***Gurmail Singh (supra)*** the Court had found that the linked evidence adduced by the prosecution was not satisfactory.

38. In the facts and circumstances of the present case, the prosecution had been able to establish the link from the time of the seizure of the crude opium till the report of the Central Forensic Science Laboratory Kolkata, with regard to the nature of the seized narcotics. The appellant has not been able to demonstrate any breach of the link. In such view the ratios of ***Vijay Jain (supra)***, ***Baldev Singh (supra)***, ***Ashok (supra)***, ***Jitendra and Ors. (supra)***, ***Vijay Pandey (supra)***, have no manner of application in the facts and circumstances of the present case.

39. In view of the discussions above, we affirm the impugned judgement of conviction of the Trial Court save and except the finding of the Trial Court which has been set aside in paragraph 25 hereinbefore and the impugned order of sentences.

40. CRA 115 of 2021 is dismissed.

41. Trial court records along with the copies of this judgement be transmitted forthwith to the appropriate Court for necessary compliance.

42. Urgent Photostat certified copy of this judgement and order, if applied for, be given to the parties on compliance of all formalities.

[DEBANGSU BASAK, J.]

43. I agree.

[MD. SHABBAR RASHIDI, J]