

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 325 of 2021

With

CRAN 2 of 2022

Amit Dutta alias Rakesh

Vs.

The State of West Bengal

For the Appellant : Mr. Sudipto Moitra, Ld. Sr. Adv.
 Mr. Angshuman Chakraborty, Adv.
 Mr. Vijay Verma, Adv.
 Mr. S. S. Saha, Adv.
 Mr. Dwaipayan Biswas, Adv.

For the State : Mr. Sanjoy Bardhan, Adv.
 Mr. Ashok Das, Adv.
 Ms. Baishakhi Chatterjee, Adv.

Hearing Concluded on : September 20, 2022
 Judgement on : September 23, 2022

DEBANGSU BASAK, J.:-

1. The appellants have assailed the judgement of conviction dated August 24, 2021 and the order of sentence dated August 26, 2021 passed by the learned Additional District and Sessions Judge, 12 Court, Judge, Special Court under NDPS Act in Sessions Trial No. 09 (04) 2019 arising out

of Sessions Case No. 04 (12) 2018 convicting the appellants under section 21 (c)/29 of the Narcotics and Psychotic Substances Act, 1985.

2. According to the prosecution, the appellants had been found in front of a shop under the name and style of Laksmi Store at CZ-24, Metropolitan, under Pragati Maidan police station at the intervening hours of July 16, 2018 and July 17, 2018 in between 22:20 hours to 00:30 hours carrying and possessing heroin of about 255 grams in aggregate without any valid license or document in violation of the Act of 1985 with the common intention and in a criminal conspiracy with each other, thereby committing an offence punishable under Section 21 (c)/29 of the Act of 1985.

3. Learned senior advocate appearing for the appellants has contended that, the prosecution had failed to establish the case beyond reasonable doubt. The prosecution has not been able to establish the place of occurrence. He has drawn the attention of the Court to the evidence led by the prosecution at the trial. According to him, the prosecution has not been able to point out the exact location of the place of occurrence. The prosecution did not produce any rough

sketch map of the place of occurrence at the trial. He has referred to the statement of the appellants recorded under Section 313 of the Criminal Procedure Code and submitted that, the appellants had contended that, they were apprehended from different locations and were illegally framed. According to him, in absence of the prosecution establishing the place of occurrence with a reasonable degree of certainty, the appellants should be acquitted.

4. Learned senior advocate appearing for the appellants has submitted that, the prosecution did not comply with the provisions of Section 50 of the Act of 1985. In support of such contention, he has relied upon **2011 Volume 6 Supreme Court Cases 392 (Narcotics Control Bureau vs. Sukh Dev Raj Sodhi)** and **2011 Volume 1 Supreme Court Cases 609 (Vijaysingh Chandubha Jadeja vs. State of Gujarat).**

5. Learned senior advocate appearing for the appellants has referred to the evidence of the prosecution witnesses. He has contended that, PW-6 had stated that, he had taken out the samples from the Malkhana on July 20, 2018 for the purpose of sending the same to the forensic laboratory. Since he was late in arriving at the forensic laboratory, the samples

were not accepted. Since July 20, 2018 was a Friday and the next two days were holidays, he had visited the forensic laboratory on July 23, 2018 and deposited the same for chemical analysis and report.

6. Referring to such deposition of the PW-6, learned senior advocate appearing for the appellants has contended that, the samples were therefore with the investigating officer who was PW 6 for more than two days. Therefore, there was every possibility of the samples being tampered with. It would be incorrect to base an order of conviction on the basis of such evidence. In support of such contention, he has relied upon ***2018 Volume 18 Supreme Court Cases 355 (State of Uttar Pradesh vs. Hansraj alias Hansu)***.

7. Learned senior advocate appearing for the appellants has drawn the attention of the Court to the contents of the first information report. He has submitted that, the first information report speaks of brass seal. The presence of such brass seal has not been established at the trial by the prosecution, on the samples or the packets prepared.

8. Learned senior advocate appearing for the appellants has submitted that, the prosecution did not comply with the

provisions of section 52A of the act of 1985. In support of such contentions, he has relied upon **2008 Volume 16 Supreme Court Cases 417 (Noor Aga vs. State of Punjab and Another).**

9. Learned senior advocate appearing for the appellants has drawn the attention of the Court to the evidence of PW 5. He has submitted that, such witness was not declared to be hostile by the prosecution and as such, the prosecution is bound by the evidence of such witness. In support of such contention, he has relied upon **2005 Volume 5 Supreme Court Cases 272 (Raja Ram vs. State of Rajasthan).**

10. Learned Advocate appearing for the State has submitted that, the police had complied with Section 50 of the Act of 1985 in the present case. He has drawn the attention of the Court to the evidence led by the prosecution before the Trial Court. He has submitted that, the appellants had been searched in presence of a Gazetted Officer after an option being given to the appellants in terms of Section 50 of the Act of 1985 and after the appellants had exercised such option. He had relied upon **2018 Volume 9 Supreme Court Cases 708 (Sk. Raju alias Abdul Haque alias Jagga vs. State of**

West Bengal), 2016 Volume 13 Supreme Court Cases 119 (Jagat Singh vs. State of Uttarakhand) and 2004 Volume 13 Supreme Court Cases 99 (State vs. Dilbag) in support of his contention.

11. Learned advocate appearing for the State has contended that, the police had complied with Section 52 A of the Act of 1985. He has drawn the attention of the Court to the evidence led by the prosecution at the trial. He has submitted that, the Malkhana register had been produced and proved. The samples had reached the forensic laboratory in an intact manner. He has contended that, it is not necessary to produce the contraband at the time of the evidence before the court. In support of such contention, he has relied upon **2020 Volume 5 Supreme Court Cases 260 (Than Kunwar vs. State of Haryana).**

12. Learned advocate appearing for the State has contended that non-examination of one of the independent witnesses is not fatal to the case of the prosecution. In support of such contention, he has relied upon **2020 Volume 2 Supreme Court Cases 563 (Surinder Kumar vs. State of**

Punjab) and ***2020 SCC Online SC 738 (Gurmail Chand vs. State of West Bengal).***

13. Learned advocate appearing for the State has relied upon ***2020 Volume 10 Supreme Court Cases 740 (Rajesh Dhiman vs. State of Himachal Pradesh)*** and submitted that, the investigations were conducted correctly. He has contended that, the prosecution had proved the charge beyond reasonable doubt.

14. Police had registered a first information report against the appellants on July 17, 2018, inter alia, under the provisions of sections 21 (c)/29 of the Act of 1985. Charges as against the appellants had been drawn up on April 16, 2019 under Section 21 (c)/29 of the Act of 1985. The appellants, before the trial Court, had pleaded not guilty and claimed to be tried.

15. At the trial, the prosecution had examined six witnesses. Prosecution had tendered 21 documents which had been marked as exhibits 1 to 21 at the trial. The prosecution had tendered material exhibits which had been marked as Material Exhibits I to XXII at the trial. On conclusion of the evidence of the prosecution, the appellants had been

examined under Section 313 of the Criminal Procedure Code. The appellants had taken the defence of alibi and denial.

16. The prosecution had examined the sub- inspector of police who was posted at Pragati Maidan police station on July 17, 2018 as PW-1. He had stated that, the officer in charge of such police station had handed over to him one letter of complaint written by PW-2 along with seizure list and other documents, packed, labelled and sealed seized materials. He had stated that, on the instruction of the officer in charge, he had registered the first information report being Pragati Maidan Police Station Case No. 191 dated July 17, 2018. PW 2 had brought two arrested persons, namely the appellants herein. He had tendered the general diary which he had recorded as Exhibit 1. He had tendered the first information report as Exhibit 2. He had stated that, total of six packets of sealed, packed materials seized by the PW-2 had been handed over to him. He had taken custody of the seized materials and the appellants. He had kept the seized articles by making Malkhana entry number 139 dated July 17, 2018. He had tendered the certified copy of such entry as Exhibit 3. He had stated that, he arranged for medical

examination of the appellants and produced the appellants before the learned Court on July 17, 2018. He had also tendered the lock up register in respect of the appellants which was marked as exhibit 4.

17. At the trial, PW 2 had stated that, on July 16, 2018 at about 17:30 hours, he received source information that two persons were coming to supply heroin near Metropolitan under Pragati Maidan police station area. He had reduced such information in writing and forwarded the same to his immediate superior officer. He had tendered the document as Exhibit 6. He had stated that, his immediate superior officer ordered him to form a raiding team which he did. He had identified the members of the raiding team. He had sought written permission to conduct the raid from the Assistant Commissioner of Police, Narcotic Cell who permitted him to conduct the raid by putting an endorsement on such letter. He had tendered such letter as Exhibit 7. He had stated that about 18:45 hours, he along with the raiding team left Lalbazar with the source and necessary accessories.

18. PW-2 had stated that, the source had led the raiding team to Laksmi Store under Metropolitan area in the

jurisdiction of Pragati Maidan police station. He had described how he had apprehended the appellants. He had described the manner of seizure of the narcotics from the appellants, and their arrest, in presence of a gazetted officer.

19. PW-3 was a member of the raiding team and had corroborated the evidence of the prosecution witnesses with regard to the raids conducted. He had identified his signatures on the documents and material exhibits, which he had signed.

20. The gazetted officer who supervised the search and seizure had deposed as PW-4. He had then been posted at the Taratola police station as the officer in charge. He had described how, the search and seizure had been carried out.

21. One of the independent witnesses who had seen the search and seizure and was present at the place of occurrence on July 16, 2018, deposed as PW 5. The sub- inspector of police who had conducted the investigation had deposed as PW 6. He had described, how he had sent the samples to the forensic laboratory for testing. He had identified some of the material exhibits which were deposited at the Central Malkhana.

22. In the statement of the first appellant recorded under section 313 of the Criminal Procedure Code, he had claimed that he was picked up from his house and that, he had never been near Metropolitan area. He had claimed that he was picked up from the house on July 15, 2018. He had also claimed that, his signatures were taken in blank papers at the police station as well as at Lalbazar. He had claimed that he was not searched and that nothing was recovered from his possession.

23. The second appellant in his statement recorded under section 313 of the Criminal Procedure Code had stated that, he was forced to sign on blank papers at Lalbazar. He had claimed that he was picked from his office.

24. The prosecution had been able to establish the following, at the trial: –

- i. PW-2 had received source information with regard to supply of heroin near Metropolitan under Pragati Maidan police station on July 16, 2018 at about 17:30 hours. He had reduced such source information in writing being Exhibit 6. He had made a prayer before

the Assistant Commissioner of Police, Narcotic Cell for permission to conduct raid being Exhibit 7 which was granted. He had assembled a raiding team and conducted the raid.

- ii. PW-2 had left Lalbazar with the raiding team along with accessories at 18:45 hours on July 17, 2018. The raiding team had been led by the source to a place near Laksmi Stores under Metropolitan area in the jurisdiction of Pragati Maidan Police Station.
- iii. At about 20:00 hours the source had pointed out two males coming from metropolitan side from south to north direction. The raiding team had intercepted such two persons in front of Laksmi Stores. The raiding team had disclosed their identity before such two person who are the appellants before us. A crowd had gathered. Two persons of the crowd had agreed to be witnesses. In presence of

such witnesses the detainees had disclosed their identities as the appellants herein.

- iv. PW-2 had apprised the appellants of their legal rights to be searched either in presence of a Gazetted Officer or a Metropolitan Magistrate. PW-2 had explained the meaning of Gazetted Officer and Metropolitan Magistrate to them. The appellant had agreed to be searched at the place of occurrence in presence of a Gazetted Officer. The appellants had signed the two option forms in that regard which was tendered and marked as Exhibit 8 series.
- v. PW-2 had informed his superior about a Gazetted Officer. At about 21:30 hours a Gazetted Officer had arrived.
- vi. Search and seizure had been conducted on the appellants in presence of a Gazetted Officer. Various articles had been seized from the possession of the appellants. On being searched, a heat sealed transparent polythene

packet containing brown coloured powder/granule substance had been found in the right pocket of the appellant No. 1 amongst other articles. A heat sealed transparent polythene packet containing brown coloured powder/granule had been found in the right pocket of the appellant No. 2 which was seized along with other articles.

- vii. Both the heat sealed transparent polythene packets had been punctured and small quantity from both packets were tested by the PW-2 with the help of the testing-kit, whereupon the presence of heroin was found. Both the packets had been weighed separately. The packet which was recovered from the possession of the appellant No. 2 had weighed 130 grams while the packet which was recovered from the possession of the appellant No. 2 had weighed 125 grams.
- viii. From both the packets PW-2 had drawn a sample of 10 grams each and packed it in two

heat seal transparent packet marked as S-1 and S-2.

- ix. PW-2 had identified S-1 which was marked as Material Exhibit I and II. He had identified the powder from the packet to be the samples which he had taken from the mother packet.
- x. Similarly, PW-2 had identified S-2 at the trial and stated that, the brown colour powder/granules brought out from such packet was the sample which he had taken from the mother packet. PW-2 had identified the other articles which had been seized from the appellants.
- xi. PW-2 had arrested the two accused and prepared arrest memos with regard thereto which were tendered and marked as Exhibits at the trial.
- xii. The raiding team along with the appellants seized alamats and necessary documents had gone to the Pragati Maidan Police Station where PW-2 had lodged the formal complaint.

He had tendered such complaint which was marked as Exhibit 15. He had identified his signature on the formal First Information Report.

xiii. PW-2 had thereafter left Pragati Maidan Police Station about noon of July 17, 2018 and communicated the details of the arrest and seizure to his superior, Assistant commissioner of Police, Narcotic Cell. He has tendered such communication at Exhibit 16.

xiv. PW-1 had tendered the General Diary bearing No. 1136 dated July 17, 2018 entered at 03:05 hours with regard to the filing of the formal First Information Report. The same had been marked as Exhibit 1. He had stated that total six packets of seal packed materials seized by the PW-2 had been handed over to him which he had entered in the Malkhana entry No. 139 dated July 17, 2018 which was tendered and marked as Exhibit 3. He had put the appellants in the lock up and had

tendered the original lock up register along with certified copy thereof which was marked as Exhibit 4.

- xv. Search seizure had been tendered in presence of PW-4 who is the Gazetted Officer. PW-4 had served the option on the appellants. The appellants had opted to be searched by PW-2 in presence of PW-4. The option form had been marked as Exhibit 9.
- xvi. The recovered substance had been packed, sealed and labelled in presence of the witness. The search seizure have been prepared. All these have been done in presence of the Gazetted Officer being PW-4. The same had been marked as Exhibit 10.
- xvii. PW-6 had conducted the investigation. He had sent the samples for forensic examination.
- xviii. The Forensic Examination Reports have been marked as Exhibit 21 under Section 293 of the Criminal Procedure Code by the order

dated March 18, 2021. Exhibit 21 had established that, the samples were heroin.

25. The evidence led by the prosecution at the trial, had established offences to be committed by the appellants directing the provisions of Section 21 (c)/29 of the Act of 1985.

26. The First Information Report, being Exhibit 2 and the complaint being Exhibit 15 had stated that, the place of occurrence was on the footpath in front of a shop store as Laksmi Store situated at C-Z Police Station, Pragati Maidan, Kolkata, 105. The seizure had taken place on a public place on a footpath in front of a shop room. The shop room have been identified by its name. The postal address of the shop have also been identified both in the formal complaint in Exhibit 15 as well as the First Information Report being Exhibit 2. In the facts and circumstances of the present case, it cannot be said that, place of occurrence have not been established by the prosecution. The oral testimonies of the prosecution witnesses have also corroborated the fact that the place of occurrence was also footpath of the shop room named in the formal complaint as well as in the First Information

Report. Therefore, the contention on behalf of the appellants that, the prosecution has not been able to established the place of occurrence is without any foundational base or facts.

27. In the facts of the present case, during raid, when the appellants were detained, the police had sought for a Gazetted Officer. The PW-2 had given the option to the appellants, to be searched in presence of a Gazetted Officer or a Magistrate. The appellants had opted for search being in presence of the Gazetted Officer. Thereafter, search for a Gazetted Officer was made at the locale. Request had been made for seeking a Gazetted Officer to the spot whereupon PW-4 had arrived at the place of occurrence. The search and seizure thereafter being conducted in presence of PW-4. Therefore, on facts, we have no material on record to arrive at the finding that there was any infraction of Section 50 of the Act of 1985.

28. In ***Sukh Dev Raj Sodhi (supra)*** the Supreme Court has held that, provisions of Section 50 of the Act of 1985 is mandatory. It has held that such requirements is not complied with by merely providing the option of being searched either in presence of a Gazetted Officer or before a Magistrate. It continues even after that, and it is required that

the accused person is actually brought before the Gazetted Officer or the Magistrate. In the facts of that case, the accused was not produced before either a Gazetted Officer or a Magistrate and therefore, the order of acquittal was held to be justified. In the facts of the present case, the appellants had been searched and seized in presence of PW-4 who was a Gazetted Officer after the appellant had exercised the option to be searched in presence of a Gazetted Officer.

29. In ***Vijaysingh Chandubha Jadeja (supra)*** the Supreme Court has answered the reference as to whether Section 50 of the Act of 1985 cast a duty on the empowered officer to inform the suspect of his right to be searched in presence of a Gazetted Officer or a Magistrate, if he so desires or whether a mere enquiry by the said officer as to whether the suspect would like to be searched in presence of a Magistrate or Gazetted Officer can be said to be in compliance with the mandate of Section 50 of the Act of 1985 or not. It has held that, the requirement of informing the suspected person of his right, under Section 50 of the Act of 1985 and conducting the search of the suspected persons in presence of Gazetted Officer or Magistrate if so desired by the suspect, is

mandatory in nature. The doctrine of substantial compliance has no manner of applicability to the provisions of Section 50 of the Act of 1985.

30. *Dilbag (supra)* had been rendered prior to ***Vijaysingh Chandubha Jadeja (supra)***. ***Sk. Raju alias Abdul Haque alias Jagga (supra)*** has held that, strict compliance with Section 50 of the Act of 1985 is mandatory. However, Section 50 of the Act of 1985 has applications only in case of a search of a person. It has held that, as soon as search of a person takes place, requirement of mandatory compliance of Section 50 of the Act of 1985 is attracted, irrespective of whether contraband has been recovered from the person of the detainee or not.

31. 31. *Jagat Singh (supra)* has held that, compliance of Section 50 of the Act of 1985 is compulsory. In the facts of that case, a Gazetted Officer had been called to the place of occurrence and then in his presence, the recovery of the contraband had been made from the accused. Such course of action had been held to be in compliance with the letter and spirit of Section 50 of the Act of 1985.

32. In the facts of the present case, the appellants had been searched in presence of a Gazetted Officer after they exercised their option to be searched in presence of a Gazetted Officer.

33. It has been contended on behalf of the appellants, referring to the deposition of PW-6, that, PW-6 had taken the samples out from the Malkhana on July 20, 2018 and deposited the same in the Forensic Laboratory on July 23, 2018. According to the appellants, the samples had been outside the Malkhana between this period of three days of July 20, 2018 and July 23, 2018 and therefore, it raises reasonable doubt as to the authenticity of the test report.

34. Such a plea in our view has no basis. PW-6 had taken the samples out on July 20, 2018 for the purpose of submitting the same at the Forensic Laboratory. He had deposed by the Trial Court that July 20, 2018 was a Friday. He was late in arriving at the Forensic Laboratory and accordingly the samples were not accepted. Since the next two days had been Saturday and Sunday he visited the Forensic Laboratory on July 20, 2018 and deposited the samples for chemical analysis and report.

35. Exhibit 21 which is the Chemical Examination Report had stated that, the packets were received by the Forensic Science Laboratory in an intact position. Therefore, the contention of the appellants that there was reasonable doubt with regard to the veracity of the test report of the samples, in view of the samples being outside the Malkhana for three days, is without any basis.

36. In *Hansraj alias Hansu (supra)* the Supreme Court had found that the prosecution did not lead any evidence to say as to how and in what condition the articles were preserved at the police station and how safely they were taken from there to the respective chemical examiners by the carriers. In the facts of the present case, the prosecution had established due protection and preservation of the samples with the seals being intact till it reached the chemical examiner.

37. *Than Kunwar (supra)* has held that, if seizure of contraband is otherwise proved on record and is not even doubted or disputed, entire contraband material need not be placed before court. It has noticed that, at times, materials could be so bulky, that it may not be possible and feasible to

produce the entire bulk before court. It has held that, if seizure is otherwise proved, what is required to be proved is, fact, that samples taken from and out of the contraband material were kept intact, that when samples were submitted for forensic examination, seals were intact, that report of forensic experts show potency, nature and quality of contraband material, and that based on such material, essential ingredients constituting offence are made out.

38. The contention of the appellants that, the Brass sealed spoken of in the formal complaint being Exhibit 15 was not adduced in evidence, is without any basis. Exhibit 21 being the Chemical Examination Report of the samples sent for chemical examination contains a specimen of the seal on the samples which had been affixed by using the brass seal.

39. It has been contended on behalf of the appellants that the police did not comply with Section 52 A of the Act of 1985. In the facts of the present case, the prosecution has been able to establish the seizure of the narcotics up to the Chemical Examination Report of such narcotics by a chain of events which is impregnable. Section 52 A of the Act of 1985 has dealt with the disposal of seized narcotics drugs and

psychotropic substances. Seizure of the narcotics had been proved. The prosecution had also proved that samples had been taken out of the seized narcotics and that the test report of the samples is positive for narcotics. In view of the ratio of ***Than Kunwar (supra)*** it cannot be said that there been an infraction of Section 52A of the Act of 1985 or that the appellants cannot be convicted.

40. *Noor Aga (supra)* has dealt with an Afghan National who was arrested and later prosecuted for carrying heroin as a member of crew of a foreign airline. In the facts of that case, the Court had found that the order of conviction could not be sustained. The factual scenario of the present case is different.

41. *Mohanlal and Another (supra)* has dealt with issues relating to search and disposal of drugs. Nothing has been placed on record to suggest that, the prosecution has acted contrary to any of the guidelines of the law.

42. In *Raja Ram (supra)* it has been held that, when a prosecution witness turns hostile and is not declared to be so, the defence can rely upon such evidence and the same is binding on the prosecution.

43. *Surinder Kumar (supra)* has held that, merely because prosecution did not examine any independent witness, would not necessarily lead to the conclusion that the accused was falsely implicated. It has held that, the evidence of official witnesses cannot be distrusted and disbelieved, merely on account of their official status.

44. *Gurmail Chand (supra)* has held that, the mere fact that witness of seizure had appeared as defence witness does not lead to the conclusion that the entire prosecution story has to be disbelieved.

45. *Rajesh Dhiman (supra)* has held that, proof beyond reasonable doubt does not mean that proof be so clear that no possibility of error exist. It has held that, evidence must only be so conclusive that all reasonable doubts are removed from the mind of an ordinary person. It has also held that, where the informant himself is the investigator, by that itself cannot be said that investigation is vitiated on the ground of bias or like factor.

46. In the facts of the present case, it has been contended that, the independent witness, being prosecution witness No.

5 had failed to recollect the name of the appellants and also failed to identify them at the trial.

47. The records of the Trial Court demonstrate that, PW-5 had been allowed to be cross-examined by the prosecution. That apart the appellants had been identified by the other prosecution witnesses. PW-5 had tendered and marked Exhibits the signatures that he had put on various documents during the search and seizure. The appellants have not been able to draw the attention of the Court to any portion of the deposition of PW-5 which assists the appellants in any manner whatsoever.

48. In such circumstances, the prosecution having succeeded in establishing the offences that the appellants were charged with, we find no ground to interfere either with the judgement of conviction dated August 24, 2021 or the order of sentence dated August 26, 2021 passed by the learned Trial Judge.

49. CRA 325 of 2021 with CRAN 2 of 2022 is dismissed.

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

51. 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.]

52. I agree.

[MD. SHABBAR RASHIDI, J]