

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 518 of 2016

Liton Mondal @Litan Mondal
-Vs-
State of West Bengal

For the Appellant : Mr. Dhananjay Banerjee, Adv.
Mr. Agniswar Chowdhury, Adv.
Ms. Oindrila Ghosh, Adv.

For the State : Mr. Sanjay Bardhan, Adv.
Mr. Saryati Datta, Adv.

Heard on : 07.04.2022

Judgment on : 07.04.2022

Joymalya Bagchi, J. :-

The appeal is directed against judgment and order dated 17.06.2016 and 18.06.2016 passed by the learned Additional Sessions Judge, 6th Court, Barasat, North 24-Parganas in NDPS Case No. N-136/2014 (1040 of 2014) convicting the appellant for commission of offence punishable under Section 20(b)(ii)(c) of the NDPS Act and sentencing him to suffer rigorous imprisonment for twelve years and to

pay a fine of Rs. 1,00,000/-, in default, to suffer simple imprisonment for one year more.

The prosecution case as alleged against the appellant is to the effect that on 23.08.2014 at about 21:15 hrs. the appellant was intercepted by a group of police officers attached to Duttapukur Police Station under the leadership of SI Debnath Chakraborty (PW5) on the suspicion that he was carrying narcotic substance in a bag. Matter was intimated to IC, Duttapukur who came to the spot. Thereafter, IC, Duttapukur offered the appellant to search the members of the raiding party. Upon search a nil seizure list was prepared. Then IC, Duttapukur gave offer whether the accused was willing to be searched by a Gazetted Officer present at the spot or a Magistrate. The appellant expressed willingness to be searched in presence of IC, Duttapukur. Thereupon body of the appellant was searched and from a jute gunny bag 22.8 kgs. of *Ganja* was recovered. Samples were prepared from the seized consignment which were sealed and labelled. PW5 arrested the appellant and along with the articles produced him before the police station. He also lodged written complaint at the police station resulting in registration of Duttapukur Police Station Case No.656 dated 24.08.2014. Charge was framed under Section 20(b)(ii)(c) of the NDPS Act. Appellant pleaded not guilty and claimed to be tried. In course of trial, prosecution examined 8 witnesses. However, Gazetted Officer namely, IC, Duttapukur was not examined. In conclusion of trial, the learned trial

Judge by the judgment and order dated 17.06.2016 and 18.06.2016 convicted and sentenced the appellant, as aforesaid.

Mr. Dhananjay Banerjee, learned advocate appearing for the appellant challenged the conviction primarily on two grounds. Firstly, it is contended appellant had not been identified in court by most of the prosecution witnesses. Failure to identify the appellant casts serious doubt with regard to the truthfulness of the said witnesses and adversely affects the credibility of the prosecution case. Secondly, it is argued there was no compliance of Section 50 of the NDPS Act in the present case. Body of the appellant was searched prior to search of his bag resulting in recovery of narcotic substance. Right of the appellant to be searched before a Gazetted Officer or a Magistrate had not been communicated to him prior to his search. Hence, the search as well as the conviction is vitiated in view of the law declared in ***Vijaysinh Chandubha Jadeja Vs. State of Gujarat***¹.

In reply, Mr. Sanjay Bardhan, learned advocate along with Mr. Saryati Datta, appearing for the State submits appellant was arrested with narcotic substance from the spot. This fact has not been disputed by him in course of trial or during his examination under Section 313 of the Code of Criminal Procedure. Failure to identify the appellant by prosecution witnesses including independent witnesses may be due to loss of memory and imperfect recollection. Independent witnesses have supported the members of the raiding party with regard to recovery.

¹ (2011) 1 SCC 609

Chemical examiner's report shows that the seized consignment contained *Ganja*. As recovery had been made from a bag, there is no requirement of compliance of Section 50 of the NDPS Act. Without prejudice to the aforesaid submissions, it is argued offer was made to the appellant to be searched before a Gazetted Officer present at the spot or a Magistrate. Hence, the prosecution case is proved beyond doubt.

PWs.3 to 6 are members of the raiding party. They are police officers attached to Duttapukur Police Station.

PW5 (Debnath Chakraborty) is the leader of the raiding party. He deposed on 23.08.2014 a secret information was received at 21:35 hrs. that there was illegal trafficking of *Ganja* by one person at Parekcal, Bamungachi. The information was diarised. It was communicated to IC, Duttapukur and upon his direction PW5 with other officers left the police station to work out the information. On the way two independent witnesses were picked up to join the search. At 21:45 hrs. the appellant was intercepted and 22.8 kgs. of *Ganja* was recovered from a bag carried on the back of the appellant.

The aforesaid facts are corroborated by other members of the raiding party namely, PWs.3, 4 & 6.

PW1 (Monirul Islam) and PW2 (Imtaj Hosain), independent witnesses also have corroborated the recovery of *Ganja* from a bag carried by the appellant. However, apart from PW4 none of the witnesses could identify the appellant in court.

Referring to such infirmity, learned Advocate appearing for the appellant argued the prosecution witnesses are unreliable and the case has not been proved. I am unable to accept such contention of the appellant. Apprehension of the appellant at the place of occurrence has been proved beyond doubt. He did not dispute such fact during cross-examination of the witnesses or in course of examination under Section 313 of the Code of Criminal Procedure. Failure to identify the appellant by face in course of trial may be attributed to loss of memory and imperfect recollection of the witnesses. In the absence of any serious challenge thrown to the arrest of the appellant from the place of occurrence such human error does not render the prosecution case improbable.

However, a more fundamental breach in the prosecution case is argued with regard to non-compliance of Section 50 of the NDPS Act.

Section 50 of the NDPS Act, inter alia, provides prior to search of a body of an accused, he must be informed of his right to be searched before a Gazetted Officer or a Magistrate. Intimation of such a right may be oral or in writing. However, the same must be clear and unequivocal. Failure to communicate such a right to the accused prior to the search of his person/body would render the seizure invalid in law.

In ***State of Rajasthan Vs. Parmanand***², the Apex Court held if body of an accused is also searched though recovery is made from a bag carried by him, Section 50 of the NDPS Act would be attracted. This view

² (2014) 5 SCC 345

is reiterated in **Sk. Raju Alias Abdul Haque Alias Jagga Vs. State of West Bengal**³.

However, in the case of **Dayalu Kashyap**⁴, the Apex Court held recovery of narcotic substance from a vehicle would not be vitiated due to non-compliance of Section 50 of the NDPS Act even if the body of the accused is searched.

In the present case, PWs.4 & 6 stated the body of the appellant had been searched though recovery was made from the bag carried by him on his back. In view of such evidence and the ratio in **Paramanand** (supra), I am of the opinion search ought to have been conducted in compliance with Section 50 of the NDPS Act.

Hence, it is necessary to examine whether evidence on record proves due compliance of the requirements of Section 50 of the NDPS Act. On scanning the evidence I note apart from PW5, none of the witnesses stated appellant had been intimated of his right to be searched before a Magistrate or a Gazetted Officer. Even if one considers the version of PW5, it appears that the option was made to be searched in presence of a Gazetted Officer only.

In **Vijaysinh** (supra), the Apex Court held there must be strict compliance of Section 50 of the NDPS Act which requires communication of the right to be searched either before a Gazetted Officer or a Magistrate.

³ (2018) 9 SCC 708

⁴ 2022 SCC OnLine SC 334

In the instant case, deposition of PW5 shows option was given to be searched before a Gazetted Officer only which is not in consonance to the requirement of law.

Mr. Bardhan refers to the FIR wherein it is alleged IC, Duttapukur Police Station had offered the accused to be searched before a Magistrate present at the spot or Gazetted Officer. Unfortunately, Gazetted Officer i.e. IC, Duttapukur Police Station in whose presence the search was conducted has not been examined and the oral offer given by him is not proved. Even the consent form which is exhibited (Exhibit 3/2) does not speak of communication of his right to be searched by a Magistrate or a Gazetted Officer.

In the light of the aforesaid evidence on record, I am constrained to hold there is non-compliance of Section 50 of the NDPS Act with regard to the search and recovery of narcotic substance in the present case.

Conviction and sentence recorded against the appellant is accordingly, set aside.

The appeal is allowed.

The appellant namely, Liton Mondal @ Litan Mondal shall be released from custody forthwith, 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.

Lower court records along with a copy of this judgment be sent down at once to the learned trial Court for necessary action.

Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)

as/akd/sdas/PA (Sohel)