

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION**

Before:

The Hon'ble Justice Ananda Kumar Mukherjee

C.R.A. No. 697 of 2004

Namita Valla

Vs.

The State of West Bengal

For the Appellant:

Md. Mokaram Hossain, Adv.
Mr. K.P. Mukhopadhyay, Adv.
Mr. Saumen Gayen, Adv.
Mr. Sandipan Maity, Adv.

For the State:

Mr. Binay Kumar Panda, Adv.
Mr. Pravash Bhattacharya, Adv.
Mr. Pratick Bose, Adv

Heard on :

05.04.2022.

Judgment on:

19.05.2022.

Ananda Kumar Mukherjee, J. :-

1. This appeal has been preferred by the convict appellant under section 374 (2) of the Code of Criminal Procedure, 1973, assailing judgment and order of conviction dated 15.9.2003 and sentence dated 16.9.2003 passed by learned Judge Special Court under NDPS Act Birbhum, Suri, in connection with C-Case no. 10 of 1996 whereby the appellant was convicted for the offence punishable under section 20(b) of the NDPS Act and sentenced to suffer

rigorous imprisonment for 5 years and to pay a fine of Rs.20,000/- in default to suffer rigorous imprisonment for six months.

2. The impugned judgment has been assailed on the grounds that the conviction and sentence passed against the appellants is bad in law and due to failure on the part of the Learned Trial Court in appreciating the evidence in its true perspective. It is case of appellant that prosecution has failed to prove the charge against the appellant under section 20(b) of the NDPS Act beyond reasonable doubt and that no independent witness has been examined on behalf of the prosecution and further more prosecution has not been able to establish that the mandatory provisions of section 50 of the NDPS was complied with at the time of alleged search of the female accused and seizure of the contraband substance.

3. Mr. Hossain, learned advocate argued on behalf of the appellant that prosecution has miserably failed to establish the charge but learned trial judge without considering the non-compliance of the mandatory provisions of the NDPS Act has convicted and sentenced the appellant which, is liable to be set aside.

4. Learned advocate for the State/respondent submitted that admittedly the appellant is a female accused but the contraband substance consisting of 8 Kgs. of Ganja (cannabis) was seized from her possession while she was carrying it in a suitcase and had entered the house of co-accused Benarasi Das alias Bona Das at Choto line para. It is argued that a Gazetted Officer was present at the time search and seizure was carried out and the provisions under section

50(2) of the NDPS Act was complied. Learned prosecutor further argued that the evidence adduced by the prosecution witnesses is cogent and consistent in nature and the charge has been proved against the accused person beyond shadow of doubt. It is urged that there is no infirmity in the impugned judgment of conviction and sentence passed against the appellant.

5. I have considered the arguments advanced by the learned advocates for the appellant and the respondent/ State. The fact of the case, in brief, is that on 5.8.1996 at 3:15 P.M. police from Ahamedpur Fari, under Sainthia P.S along with Circle Inspector and O.C Ahamedpur Fari proceeded to Choto line para Rail quarters to work out a secret information that a woman having Narcotic substance in her possession was proceeding to the house of accused Benarasi Das at Choto line para. The appellant was found entering the house of Benarasi Das with a suitcase in her hand. On interrogation she disclosed her name as Namita Valla the police thereafter asked the appellant/accused to open the suitcase and it was found that she was carrying 8 Kgs of Ganja wrapped in green polythene packets inside the suitcase. The ganja was seized and weighed in presence of witnesses and samples were collected in small packets which was sealed and labelled. The contraband substance appearing to be ganja was seized under a seizure list. Both Namita Valla and Benarasi Das were arrested and were taken to Ahamedpur police outpost (Fari) with the seized material.

6. A.S Mondal, Sub-Inspector of police lodged a written complaint at Ahamedpur police outpost. S.I Deb Narayan Datta (PW-8) took up investigation

as endorsed by the officer-in-charge of Sainthia Police Station. The samples were sent for forensic examination. After completion of investigation and collection of forensic report, charge sheet was submitted under section 20 (b) and section 25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 for unlawful possession of ganja and transporting of the same to the house of accused Benarasi Das. Charge was framed against two accused persons under section 20 (b) for possession of ganja without valid authority and in contravention of NDPS Act and under section 25 of the NDPS Act against Benarasi Das for allowing Namita Valla to bring the contraband substance to his premises.

7. In order to substantiate the charge prosecution has examined eight witnesses. S.I A.Kashem of Sainthia P.S who received the written complaint and registered the formal FIR has been examined as PW-1. He deposed that S.I A.S. Mondal has lodged a written compliant in this case on the basis of which Sainthia P.S Case No. 86 of 1996 dated 5.8.1996 was started. The written complaint has been marked as Exhibit 1 and the formal FIR has been marked ad Exhibit 1(b). The de-facto complainant S.I Ardhendu Sekhar Mondal, has been examined as PW-2. He has deposed that on 5.8.1996 he was attached to Ahamedpur outpost as S.I of police. After receiving a secret information that a female person was carrying huge quantity of ganja in her possession, he recorded GD Entry no. 130 dated 5.8.1996. The GD has been produced as Exhibit 2. PW-2 further deposed that he informed about the secret information to Mr. Samiran Rai, the Circle Inspector of Bolpur over telephone. PW-8 was

accompanied by the circle inspector from the police outpost to Choto line para along with other police personnel. Their departure was recorded in GD No. 132 dated 5.8.1996 which has been marked as Exhibit 3. It appears from the evidence of PW-2 that on reaching Choto line para at about 3:35 P.M. They found the appellant with one suitcase in her possession and she entered the house as Benarasi Das. On interrogation the appellant disclosed her name as Nomita Valla. On being ordered by police personnel the appellant opened the suitcase and it was found to contain 8 kgs. of ganja wrapped in green colour polythene packet. PW-2 seized samples from the packets in presence of Sheikh Sanaullah (PW4) and Sabdul Mia (PW 3) who were present as public witnesses. The quantity of ganja was weighed, sealed and labelled. A seizure list was prepared by PW-2 in presence of the witnesses which has been marked as Exhibit 4 and the signature of the appellant has been marked as Exhibit 4(a). Accused Benarasi Das has also put his LTI on the seizure list. In course of trial the suitcase was produced as MAT Exhibit I. The witness deposed that at the time of search no female was present. In cross-examination PW-2 denied that the accused persons have been falsely implicated in this case.

8. Sabdul Mia, the seizure witnesses has been examined as PW-3. The witness was declared hostile and he deposed that he did not accompany Daroga Babu to the place of occurrence and that he went to Ahamedpur outpost on that date to settle a dispute and put a signature as per direction of police. The witness denied that any seizure of suitcase containing ganja was made in his presence.

9. PW-4, Sheikh Sanaulla, another seizure witness who also turned hostile to prosecution, deposed that he did not accompany police on 5.8.1996. The witness deposed that he put his signature on some blank paper and identified his signature as Exhibit 4.

10. PW-5 S.I, Basudeb Kundu, deposed that on 5.8.1996 he accompanied A.N Dutta and other police personal from Ahamedpur Fari to Choto line para for conducting raid. He also deposed that one woman, Nomita Valla was apprehended while she entered a house with a 'attache case' containing ganja. The witness further deposed that materials were seized from the accused persons. They were arrested and brought to the Fari where ganja was weighed and sample was collected, sealed and labelled. It is evident from his deposition that the material was brought to the police outpost at first and thereafter weighing was done. Therefore, the description of the contraband substance made in the seizure list was done at the police station and not at the alleged place of occurrence.

11. PW-6 constable Md. Asad Nabi deposed that on 5.8.1996 he accompanied the Circle Inspector of police, officer-in-charge of Ahamedpur police outpost and others to Choto line para at about 3:15 P.M and detained a woman in front of the house of Banarasi Das and on opening of the Brief Case in possession of the woman 8 kgs. of ganja was recovered which was wrapped in green colour polythene packets and tied with thread. The witness further deposed that ganja was weighed in presence of local public and was seized and

samples collected. According to him seizure was made outside the house of Banarasi Das.

12. PW-7 Sailen Thakur, a police constable deposed that he was posted at Ahamedpur police outpost on 5.8.1996 and on that date he accompanied the officer-in-charge, Chotobabu and police other constables to Choto line para for conducting the raid. They found one women with 'attachi case' in her hand entered into the house of Benarasi Das at Railway quarters, Ahamedpur. Police surrounded the house and entered the house the women Nomita Valla and Benarasi Das were arrested and one suitcase was recovered. The witness further deposed that 8kgs. of ganja was seized from the attache under a seizure list. In cross examination the witness deposed that no local people were with them at the time of seizure but some persons from the railway quarters were present. Witness further stated that seal, lebel and papers were prepared at the police outpost. It is clear that actual seize was made at the police outpost.

13. PW- 8 S.I Deb Narayan Dutta, the Investigating Officer has deposed that he recorded the statement of the witnesses and after investigation submitted charge sheet. It appears from the evidence on PW-8 that PW-4 Sanaullah stated before him that while a female accused handed over a suitcase to Benarasi Das they caught hold of them and on search 8 kgs. of ganja was found in the same suitcase.

14. Learned Judge, Special Court under the NDPS Act on considering the evidence on record was pleased to acquit accused Benarasi Das but found

Namita Valla guilty of offence under section 20 (b) of NDPS Act and convicted her under section 235(2) of Cr. P.C.

15. It has been argued on behalf of the appellant that the mandatory provisions relating to search and seizure under the NDPS Act has not been complied rendering the prosecution case doubtful. Having considered the materials on record it appears to me that the alleged occurrence took place inside house of Benarasi Das and the alleged seizure was made from the possession of the appellant in the railway quarters of Benarasi Das at Choto line para, Ahamedpur.

16. Section 42(2) of the NDPS Act provides that where an officer takes down any information in writing under sub section (1) or records grounds for his belief under proviso thereto, he shall within seventy two (72) hours send a copy thereof to his immediate superior. In the instant case PW-2 S.I A.S Mondal, deposed that on receiving a secret information that huge quantity of ganja was in the possession of a female accused, he recorded a G.D no.130 dated 05.08.1996. However, no such information was sent to the superior police officer, that is by O.C of the Police Station to the Circle Inspector of Bolpur. Therefore, it is clear that the mandatory provisions under section 42(2) have not been complied in the instant case.

17. PW-2 and PW-7 deposed that the alleged seizure has been made from the appellant/accused from the house of Benarasi Das which is a closed premises. Under such circumstances Section 50(4) of NDPS Act should have been complied. The mandatory provisions under section 50(4) of the Act lays down

that no female shall be searched by any one excepting a female. Non-compliance of this provision is also fatal to prosecution.

18. Learned advocate for the respondent/state has argued that the search and seizure was conducted in presence of a Gazetted Officer who is the Circle Inspector of Bolpur. On close consideration of the evidence on record I find that the Circle Inspector Bolpur has not been examined in this case and his signature in the seizure list has not been proved. Section 50(2) of the NDPS Act provides that where any officer duly authorized under Section 42 is about to search any person under the provision of Sections 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer or any of the departments mentioned in Section 42 or to the nearest Magistrate. In the instant case the evidence of the prosecution witnesses who are all police personnel, reveal that no such clear option was given to the appellant as to whether she wanted to be searched in presence of a Gazetted Officer or a Magistrate. Thereby, the mandatory provision has not been complied with.

19. I find that the safeguards which have been provided under NDPS Act have not been followed by the Investigating Agency thereby rendering the prosecution story doubtful.

20. Learned advocate for the appellant relying upon the decision in the case of **Beckodan Abdul Rahiman Vs. State of Kerela; (2002) 4 SCC 229** argued that under Section 50 of the NDPS Act it is mandatory to give an option to the accused to search him in presence of a gazetted officer or the Magistrate. If the

accused has not been apprised of his right nor any option offered to him for search being conducted in presence of the Magistrate, then such violation would entitle the accused to be acquitted. Reliance is also placed upon the case of **State of Punjab Vs. Baldev Singh; (1999) 6 SCC 172**, where it was held, “it is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has the right to require his search being conducted in presence of a Gazetted Officer or a Magistrate. The failure to so inform the suspect of his right would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in section 50. Similarly, if the person concerned requires, on being so informed by the empowered officer or otherwise, that his search be conducted in the presence of a Gazetted Officer or a Magistrate, the empowered officer is obliged to do so and failure on his part to do so would cause prejudice to the accused and also render the search illegal and the conviction and sentenced of the accused based solely on recovery made during that search bad.”

21. Considering the facts and circumstances of the case and the materials on record coupled with non-compliance of the mandatory provisions of NDPS Act under Section 42(2) and Section 50(1) and 50(4), I find and hold that the impugned judgment of conviction passed against the appellant suffers from materials illegality. The alleged search and seizure of the contraband substance from the accused person could only be relied on if the mandatory provisions of the Act was followed in course of such procedure. In the present case no

independent witness has been cited. The alleged occurrence took place in broad day light but there is dearth of independent evidence. Even the safe guards provided under the Act at the time of making search and seizure have not been taken care of by police personnel. PW-2 has deposed that the female accused Namita Valla entered into the house of Benarasi Das where she was interrogated and police made seizure of a suitcase from her possession. PW-2 prepared seizure list in this case. PW-5 S.I Basudev Kundu, deposed that seizure was made inside the house and the contraband substance was weighed, and the sample was collected and sealed and labelled at the police station. PW-6, Constable No.855, Md. Asad Nabi to the contrary deposed that the lady accused was intercepted in front of the house of Benarasi Das and on opening the attaché in her possession 8kg of ganja was recovered. Therefore, the evidence of all three witnesses are contradictory to each other regarding place, time and seizure.

22. From my above discussion I hold that the charge under section 20(b) of NDPS Act could not be proved against the accused/appellant beyond reasonable doubt. The conviction and sentence passed by learned Trial Judge therefore cannot be sustained and the impugned judgment is set aside. The appellant is acquitted from the charge and is discharged from her bail bond. Appeal is accordingly allowed.

23. Let the LCR along with copy of the judgment be sent to Learned Judge,

Special Court under NDPS Act, Suri, Birbhum for information.

(Ananda Kumar Mukherjee, J.)