

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. 559 of 2015

Abhijit Das

Vs.

State of West Bengal

With

CRA 715 of 2015

In

CRAN 3 of 2019 (Old CRAN No. 2303 of 2019)

Nil Kamal Gon

-Vs-

State of West Bengal

For the Appellant In CRA 559 of 2015	:	Mr. Fazlur Rahaman, Advocate, Ms. Krishna Yadav, Advocate.
In CRA 715 of 2015	:	Navanil De, Advocate (Amicus Curiae)
For the State In CRA 559 of 2015	:	Mr. Swapan Banerjee, Ld. A.P.P., Mr. Suman De, Advocate.
For the State In CRA 715 of 2015	:	Mr. Nequive Ahmed, Ld. A.P.P., Mr. Sanjay Bardhan, Advocate, Ms. Amita Gaur, Advocate.
Heard on	:	11 th March, 2022
Judgment on	:	11 th March, 2022

Joymalya Bagchi, J. :-

Appeals are directed against the judgment and order dated 29.06.2015 and 30.06.2015 passed by learned Judge, Special Court under N.D.P.S. Act and Additional Sessions Judge, 12th Court, Alipore,

24-Paraganas, South in Sessions Trial No. 02(08)2013 arising out of Sessions Case No. 01(07)2013 convicting the appellants for commission of offence punishable under Sections 20(b)(ii)(C) read with Section 29 of the N.D.P.S. Act and sentencing them to suffer rigorous imprisonment of 12 years each and to pay a fine of Rs. 2,00,000/- each in default, to suffer further rigorous imprisonment for two years more.

Prosecution case, as alleged against the appellants, is to the effect that P.W.2 Priyanka Mondal who was attached as S.I. Thakurpukur police station received credible information on 10.04.2013 around 12.10 p.m. that suppliers of ganja from Nungi Batanagar would be coming in a Mahindra Maxim car bearing No. WB 41F 7383 and would be passing through Bagpota main road. She reduced such information into writing and sought permission from the Deputy Commissioner of Police, South West Division, Behala, Kolkata to conduct raid. Upon receipt of permission, P.W. 1 diarised such information at the police station as GDE No. 1058 and proceeded for raid with a team of police personnel including one S.I. Arijit Chattopadhyay, P.W. 6. At 2.00 p.m. they reached Keyatala Math at Bagpota main road. At 2.30 p.m. they found the aforesaid vehicle approaching towards north. They apprehend the vehicle beside Keyatala more at Bagpota Road. They found two persons in the vehicle. They disclosed to the said persons that they had an information that the vehicle was transporting huge quantity of ganja through Bagpota Main Road to Behala. In the meantime, a number of people arrived at the spot. Raiding party requested two of them viz., Bapi

Biswas (P.W. 4) and Biswajit Dey (P.W. 5) to join the search. The said persons agreed to do so. Thereafter, P.W. 2 made oral offer to the aforesaid persons that they were legally entitled to be searched in presence of Gazetted Officer or Magistrate. The option was also given in writing and the aforesaid persons i.e. the driver and assistant of the vehicle who disclosed their names as Abhijit Das and Nil Kamal Gon respectively and expressed their desire to be searched before a Gazetted Officer. They affixed their signatures to the consent endorsed in the aforesaid document. P.W. 2 searched for a Gazetted Officer in the locality but could not find one. She informed her superiors to arrange to send a Gazetted Officer to the post. After some time, a Gazetted Officer namely, Inspector Swapan Kr. Mondal (P.W. 3), the then Additional Officer-in-charge of Parnasree Police Station arrived at the spot. Additional Officer-in-charge informed the aforesaid persons that he was a Gazetted Officer and had come to the post as they had requested to be searched in the presence of a Gazetted Officer. Thereafter, Additional Officer-in-charge informed detained persons that they were legally entitled to search P.W. 2. Thereupon both the persons searched P.W. 2 but nothing could be recovered. The option given by P.W. 3 was written down and the signatures of the accused persons and S.I. Arijit Chattopadhyay were endorsed thereon. Thereafter, P.W. 2 searched the vehicle. In course of search, 46 rectangular boxes of different colours wrapped in a black polythene packet was recovered from the vehicle. The packets weighed 468 kgs in all. The packets were opened and it was suspected that they

contained ganja. Samples were taken from each of the packets and put into a brown packet which weighed around 900 grms. Thereafter, all the 46 packets as well as the sample packet were sealed, labelled and signed by P.W. 2, Gazetted Officer, independent witnesses and the accused persons. Vehicle was also seized. P.W. 2 brought the seized articles along with the vehicle and the detained persons to Thakurpukur Police Station and handed them over to the Officer-in-charge of Thakurpukur Police Station along with the seized articles and vehicle upon preparing an inventory. She also submitted first information report at the police station. The Officer-in-charge handed over the investigation of the case to P.W. 7, S.I., Manasi Patra. He handed over all documents, seized alamats as well as the accused persons to the Investigating Officer. Investigating Officer filled up the formal first information report and also recorded G.D.E. No. 1099. Seized alamats were deposited in Malkhana Entry No. 67 (Exhibit-14). She sent the sample to State Drug Control Research Laboratory for chemical analysis. She examined witnesses. She collected chemical analysis report and submitted charge sheet. Charge was framed under Sections 20(b)(ii)(C) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act against the appellants. They pleaded not guilty and claimed to be tried.

In course of trial, prosecution examined 7 witnesses and exhibited number of documents including the chemical examiner's report, Exhibit-1.

In conclusion of trial, the trial Judge by the impugned judgment and order dated 29.06.2015 and 30.06.2015 convicted and sentenced the appellants, as aforesaid.

Mr. Rahaman, learned Advocate appearing for the appellant in CRA 559 of 2015 argues that the mandatory requirements under Section 42 of the N.D.P.S. Act have not been complied with at the time of search. It is also submitted a joint option was given to the appellants under Section 50 of the N.D.P.S. Act which is contrary to law in view of ***State of Rajasthan Vs. Parmanand***¹. One of the independent witnesses to the seizure, i.e., P.W. 5 was carrying on business without licence and, therefore, is an obliging witness to the police. Chemical Examiner's report does not establish beyond doubt the seized consignment was ganja. Hence, the appeal is liable to be allowed.

Nobody appears for the appellant in CRA 715 of 2015. Mr. Navanil De is requested to appear and assist this Court as Amicus Curiae. Mr. De adopted the submissions of Mr. Rahaman. In addition thereto, he submits that the General Diary Entry, Exhibit-10 recorded by P.W. 2 does not disclose the number of the vehicle. It is also argued Deputy Commissioner of Police, South West Division, Kolkata who gave permission for the search has not been examined. Hence, the appeal may be allowed.

Mr. Banerjee and Mr. Ahmed submit P.W. 2 had recorded the prior information which was communicated to her superior Deputy

¹ (2014) 5 SCC 345

Commissioner of Police and permission was obtained from the latter to conduct the raid. Hence, requirements of section 42 of N.D.P.S. Act has been satisfied. They further submit search had been conducted in a truck and recovery was made therefrom. Hence, section 50 of the N.D.P.S. Act is not attracted and the ratio in **Parmanand** (supra) is distinguishable on facts. They pray the appeal may be dismissed.

P.Ws. 2 and 6 are the members of the raiding party. P.W. 2 stated upon receiving credible information that a person would be coming in a white Mahindra Maxim car bearing No. WB 41F 7383 having the word 'Maa' written in the front wind screen, she conveyed the information to the Officer-in-charge of the Police Station. Thereafter she sought permission for raid from Deputy Commissioner of Police, South West Division. She proved the permission granted by Deputy Commissioner of Police, South West Division, Exhibit-2. After receiving the permission, she recorded General Diary Entry No. 1058 and proceeded with a team of Officers including S.I., Arijit Chattopadhyay (P.W. 6) to the spot.

Let me examine in the light of the aforesaid evidence of P.W. 2 whether requirements of Section 42 of the N.D.P.S. Act are satisfied or not. Section 42 of the Act, inter alia, provides that any empowered Officer of the Central Government or the State Government being superior to a Peon, Sepoy or Constable (who is not a gazetted officer) upon entertaining reasonable belief from personal knowledge or information which is taken out in writing that any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under

this Act is being committed is kept or concealed in any building, conveyance or enclosed place may between sunrise and sunset enter into and search such building, conveyance or place and seize such drug or substance. In the event, he has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity of concealment of evidence or escape of the offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of such belief.

Sub-Section (2) of the said Section provides a copy of the information taken down by the Officer in writing or the grounds for his belief that search without authorization requires to be conducted between sunset and sunrise shall be sent to his immediate official superior.

In the present case, P.W. 2 had received credible information with regard to transportation of cannabis, i.e., Ganja in a Mahindra Maxima vehicle and had reduced the same into writing. Written information was communicated to the Deputy Commissioner of Police, South West Division, Behala, Kolkata, and permission was sought for conducting the raid. Deputy Commissioner of Police, South West Division, Behala, Kolkata, endorsed his consent on the said document which was exhibited as Exhibit-2. Thereafter, P.W. 2 recorded this information in general Diary Book as General Diary Entry No. 1058 and left for the raid. It is argued P.W. 2 had not communicated the information to his immediate superior, namely, Officer-in-Charge and that her reasonable belief that a

warrant could not be procured from a Magistrate is not reflected in the aforesaid documents.

I am unable to accept either of the arguments. P.W. 2 had received the credible information from a source in the afternoon around 12.30 p.m. Thereafter she reduced the same into writing. She sent the written communication to the Deputy Commissioner of Police, who is an officer superior in rank to her immediate superior i.e. Officer-in-Charge. Hence, there is substantial compliance of Section 42 of the N.D.P.S. Act. From the evidence of P.W. 2 it appears that the vehicle had been apprehended at 2.30 p.m. and search commenced at 4.05 p.m. after the Gazetted Officer had arrived at the spot. Search, however, was concluded at 18.10 hours. From the aforesaid evidence it is clear that the raid had commenced prior to sunset but concluded at 18.10 hours after sunset. Under such circumstances, P.W. 2 was not required to record reasons for conducting search without authorization/search warrant as the operation had commenced around 2 p.m. much prior to sunset.

In ***Karnail Singh Vs. State of Haryana***², a Constitution Bench of the Apex Court was called upon to decide the impact of breach of Section 42 of the N.D.P.S. Act. Upon analysing the law, the Bench held as follows:

- (a) The officer on receiving the information [of the nature referred to in sub-section(1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).
- (b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol

² (2009) 8 SCC 539

duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

- (c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.
- (d) While total non-compliance with requirements of Sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstances being a clear violation of Section 42 of the Act. Similarly, 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. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case, the above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

The ratio of the aforesaid judgment shows substantial compliance of Section 42 of the N.D.P.S. Act without prejudice being demonstrated to the accused would not vitiate the prosecution case. As discussed above, evidence on record particularly that of P.W. 2 including the documentary evidence namely Exhibits- 2 and 10 unequivocally show that the secret information received by P.W. 2 was reduced into the writing and

communicated to a superior officer, Deputy Commissioner of Police, South West Division, Behala, Kolkata. Communication of an officer which is superior in hierarchy, than one who is immediately above P.W 2, in my estimation, is due compliance of the law and does not cause prejudice to the accused persons.

It has been argued Deputy Commissioner of Police was not examined. I am of the opinion that non-examination of the superior officer does not affect the prosecution case as P.W. 2 who was subordinate to the Deputy Commissioner and was aware of his handwriting has proved the entire document namely Exhibit-2 including his endorsement thereon. That apart, the entire fact was contemporaneously recorded in the General Diary Book as G.D. Entry No. 1058 marked as Exhibit-10. These evidence unequivocally establish due compliance of Section 42 of the N.D.P.S. Act in the present case.

The other issue which is agitated before this Court is non-compliance of Section 50 of the N.D.P.S. Act. In the present case, recovery has not been made either from the person of the appellants or from a bag or receptacle physically carried by them. On the other hand, recovery of a large quantity of Ganja weighing to 468 kgs. was made from a vehicle. Recovery from a vehicle, by no stretch of imagination, could fall within the ambit of search of a person to which Section 50 applies. Mr. Rahaman and Mr. De refer to **Parmanand** (supra) to strenuously argue in the event police officer had searched the body of the accused even recovery from a bag would attract Section 50 of the Act. Relying on

the said report it was contended a joint offer made to accused persons would not meet strict compliance of Section 50 of the Act. In support of their arguments, learned Counsels took this Court through the evidence of P.W. 2 as well as the Gazetted Officer, P.W. 3, to demonstrate that the witnesses have stated that the offer had been made jointly. Prosecution case relates to recovery of 468 kgs. of Ganja from a vehicle which was driven by the appellant, Abhijit Das and Nil Kamal Gon, who was his assistant. It is nobody's case that the recovery had been effected either from the person of the appellants or from any bag or receptacle physically carried by them. In **Parmanand** (supra) recovery was effected from a bag which was carried by the accused. In a subsequent report³ Apex Court had the occasion of dealing with the ratio of **Parmanand** (supra) and held when Ganja was transported in a green polythene bag on a wooden Kanwad, the ratio in **Parmanand** (supra) would not apply. The Court held as follows :

“..... We find the recovery was in a polythene bag which was being carried on a Kanwad. The recovery was not in person. Learned counsel seeks to expand the scope of the observations made by seeking to contend that if the personal search is vitiated by violation of Section 50 of the NDPS Act, the recovery made otherwise also would stand vitiated and thus, cannot be relied upon. We cannot give such an extended view as is sought to be contended by learned counsel for the appellant.”

Even otherwise, unlike **Parmanand** (supra) in the present case evidence of P.W. 2 show simultaneous oral offers had been given to the accused persons with regard to their legal right to be searched before a

³ Dayalu Kashyap Vs. The State of Chhattisgarh [MANU/SC/0139/2022]

Gazetted Officer or Magistrate. Both of them opted to be searched before a Gazetted Officer. Thereafter, the offer and their consent was reduced into a single document marked as Exhibit-3 wherein both the accused persons separately affixed their signature to the consent. The facts of the present case show that the consent to the offer had been endorsed individually by each of the accused persons unlike **Parmanand** (supra) where the consent had been endorsed by one of the accused persons on behalf of both of them. Be that as it may, as in the present case recovery was not made in the course of search of the person of the appellants or from any object which was physically carried by them but from a vehicle, I am of the opinion in the light of the ratio in **Dayalu Kashyap** (supra) Section 50 of the N.D.P.S. Act does not apply to the facts of the case.

Evidence of the official witnesses relating to recovery has been substantially corroborated by the independent witnesses P.Ws. 4 and 5. A faint argument was raised that P.W. 5 was carrying on business without licence. Hence, he deposed to oblige to the police. I have gone through the consistent depositions of the independent witnesses. They have supported the recovery of ganja from the vehicle. They affirmed their signatures to all contemporaneous documents, i.e., seizure list, seals and labels on the seized articles/sample. They remain unshaken during their lengthy cross-examination. The presence of the independent witnesses at the place of occurrence has also been explained and appears to be most probable. Mere suggestion to P.W. 5 that he was carrying on business

without licence does not tarnish P.W. 5. Even so, nothing is placed on record to show there was any case pending against P.W. 5.

In view of the aforesaid, I am of the opinion search and seizure of ganja from a vehicle in the control and custody of the appellants is clearly proved.

Investigating officer, P.W. 7, deposed she took custody of the seized articles as well as the sample from the Officer-in-Charge. She kept it in malkhana. He proved the malkhana entry marked as Exhibit-14. She sent the sample to State Drug Research Laboratory for chemical analysis. She collected the report. P.W. 1, Senior Scientific Officer of the State Drug Laboratory stated he found flowering tops, seeds and stalks having smell of Ganja in the sample. He proved the report marked as Exhibit-1 which states the sample contains Ganja.

In the aforesaid discussion, I hold that the prosecution case against the appellants is proved beyond reasonable doubt.

Conviction and sentence of the appellants is, accordingly, upheld.

Hence, the appeals being CRA 559 of 2015 and CRA 715 of 2015 are hereby dismissed.

Connected application being CRAN 3 of 2019 (Old No. CRAN 2303 of 2019) is also dismissed.

Period of detention suffered by the appellants during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon them in terms of 428 of the Code of Criminal Procedure.

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 appellants upon compliance of necessary formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)

as/cm/sdas/PA (Sohel)