

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 718 of 2019
CRAN 3 of 2022

Aminul Islam @ Manu & Anr.
Vs.
State of West Bengal

For the Appellant	:	Mr. Sabir Ahmed, Advocate, Adv. Mr. Tapodip Gupta, Advocate, Adv. Mr. Abdur Rakib, Adv. Mr. Meheboob Alam Biswas, Adv.
For the State	:	Mr. Saswata Gopal Mukherjee, Ld. P.P., Mr. Partha Pratim Das, Adv. Mrs. Manasi Roy, Adv.
Heard on	:	20.09.2022, 23.09.2022 and 28.09.2022
Judgment on	:	28.09.2022

Joymalya Bagchi, J. :-

Appeal is directed against the judgment and order dated 20.07.2017 and 24.07.2017 passed by learned Judge, Special Court under N.D.P.S. Act and Additional Sessions Judge, 4th Court, Alipore, 24-Paraganas, South in Sessions Trial No. 01(03)2010 arising out of Sessions Case No. 01(02)2010 convicting the appellants for commission of offence punishable under Sections 21(C)/29 of the N.D.P.S. Act and

sentencing them to suffer rigorous imprisonment of 20 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 on 27.9.2009 SI Tathagata Pandey (PW1) received source information that a drug peddler named Aminul Islam @ Manu was searching for customers to sell heroin. Information was brought to the notice of the superior officer. Pursuant to such information a meeting was arranged with the suspect, place and time of venue of delivery was settled. As per plan PW 1 and his team left in a government vehicle bearing no. WB 25B3189 driven by Badal Patra and vehicle no. WB 20G6560 driven by Sushil Kumar Shit and reached Kolkata. They laid an ambush beside the Science City Gate under PS Tiljala at 12.45 hrs. Around 12.20 hrs. Aminul reached the Science City Gate with a person who was later identified as Monirul Haque riding a black coloured motor cycle. Aminul was holding blue coloured rexin bag on his right hand and Monirul Haque was holding a blue coloured poly bag. Both of them were surrounded. PW1 disclosed his identity and offered the suspects to be searched before a gazetted officer. The detenues remained silent.

PW4, Abhas Nandi as SOG, CID, a gazetted officer was requested to come to the spot. PW4 came to the spot. In his presence the suspects i.e. the appellants were searched. During search of Monirul 12 packets containing 100 gms of brown coloured powder each

were recovered. Samples were taken from the packets. They tested positive for heroin. Two packets containing 500 gms each of brown coloured powder was recovered from the bag carried by Aminul Islam. Motor cycle was also seized. In conclusion of investigation, charge-sheet was filed and charges were framed under Sections 21(c)/29 of NDPS Act. Prosecution examined 13 witnesses and exhibited a number of documents.

In conclusion of trial, the trial Judge by the impugned judgment and order dated 20.7.2017 and 24.7.2017 convicted and sentenced the appellants, as aforesaid.

Mr. Ahmed challenged the conviction essentially on the ground that the mandatory provision under Section 50 of the NDPS Act had not been complied with. He submitted bodies of the appellants were searched prior to the alleged recovery from the bags carried by them. Appellants were offered to be searched before a gazetted officer. They were not informed of their right to be searched before a gazetted officer or a magistrate. Hence, there is non-compliance of Section 50 of the NDPS Act. He accordingly prays for acquittal.

Mr. Das for the State submits recovery was from bags of the appellants and not from their persons. Hence, Section 50 of the NDPS Act is not attracted.

The issues which fall for consideration are as follows:

- a) Whether Section 50 of the NDPS Act is attracted in the facts of the case?

b) If so, is there compliance of the said provision of law?

PW 1, Tathagata Pandey is the leader of the raiding party and the de-facto complainant.

PWs, 2, 3, 5, 6 and 7 are the members of the raiding party. All the witnesses had deposed they had laid an ambush at Science City on 30.9.2009 around 12.05 hours. Appellants came to the spot riding a black coloured motor cycle. They were carrying bags in their hands. The raiding party encircled them. PW1 offered the appellants to be searched in presence of a gazetted officer. He also issued notice in writing to the appellants. Thereafter, he contacted PW4, a gazetted officer to come to the spot. PW4 came to the spot. Thereafter, the appellants were searched one by one. A poly bag styled as 'Ansari Dresses' was recovered. Inside the poly bag 12 packets containing brown coloured powder weighing 100 gms each were recovered. The powder tested positive for heroin. Similarly, Aminul was also searched and from his blue coloured rexin bag, two packets of 500 gms. each were recovered. Pursuant to his personal search, a money bag containing 5 pieces of 100 rupee notes were also recovered.

PW2, a member of raiding party stated that Mr. Pandey had searched the bodies of both the accused persons prior to the recovery.

PW6 another member of raiding party stated that bodies of the accused persons were searched in presence of PW4.

PW4, a gazetted officer, who was present during search corroborated the aforesaid evidence of the member of the raiding party.

From the aforesaid evidence, it is clear bodies of the appellants were searched prior to the alleged recovery of 2.2 kgs. of heroin from the bags carried by them.

In ***State of Rajasthan Vs. Parmanand and Another***¹, the Apex Court held as follows:-

“15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, Respondent 1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of Respondent 2 Surajmal was also conducted. Therefore, in the light of the judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.”

Parmanand (supra) has been quoted with approval by a Three-Judge Bench of the Apex Court in ***Sk. Raju @ Abdul Haque @ Jagga vs. State of West Bengal***².

The ratio of the aforesaid decisions apply with full force to the present case. Evidence on record show bodies of the appellants were searched prior to the alleged recovery from the bags carried by them. This would, therefore, attract due compliance of Section 50 of the NDPS Act.

It may be relevant to note in ***Dayalu Kashyap Vs. The State of Chhattisgarh***³ a two Judge Bench of the Apex Court after considering ***Parmanand*** (supra) held as follows:-

¹ (2014) 5 SCC 345

² (2018) 9 SCC 708

³ 2022 SCC OnLine SC 334

“6. ... 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.”

The said ratio is distinguishable on facts. In ***Kashyap*** (supra), polythene bag containing narcotic substance was carried on a kanwad and not in the hand of the accused. That apart, the Bench had not taken into consideration the ratio in ***Raju*** (supra) (A three Judge Bench decision) approving the ratio in ***Parmanand*** (Supra).

Oral evidence with regard to search of the bodies of the appellants is corroborated by recovery of money bag from appellant No. 2 Aminul. This reinforces the view that the bodies of the appellants were searched prior to the recovery. Hence, I am inclined to follow the ratio in ***Parmanand*** (Supra) wherein the factual situation is exactly the same as in the present case.

Hence, I hold Section 50 of the NDPS Act was required to be complied with in the facts of the present case.

Issue no. (a) is accordingly answered in the affirmative.

Coming to the issue no. (b) i.e. whether there is compliance of Section 50 of the NDPS Act, I find from the evidence of the prosecution witnesses, particularly PW1 that he had offered the appellants to be searched only before a gazetted officer. Section 50 of the NDPS Act requires the searching officer to inform the accused of his right to be

searched before a gazetted officer or a Magistrate. The officer may give the information orally or in writing but it must be a clear and unequivocal one, communicating the suspect his right to decide whether he wishes to be searched in presence of a gazetted officer or a Magistrate.

In this regard reference may be made to ***Vijaysinh Chandubha Jadeja vs. State of Gujarat***⁴, a Constitution Bench of the Apex Court, which held requirements of Section 50 of the NDPS Act must be strictly complied with and there cannot be any substantial compliance of the aforesaid provision of law.

In view of the aforesaid discussion, I am of the opinion requirement of Section 50 of the NDPS Act had not been complied with in the facts of the case. This renders the recovery of narcotics from the appellants suspect and vitiates their conviction.

Accordingly, appellants are entitled to an order of acquittal.

The appellants shall be released from custody, 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.

The appeal is, accordingly, allowed.

In view of disposal of the appeals, connected application being CRAN 3 of 2022 is also disposed of.

⁴ (2005) 12 SCC 574

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 completion of all formalities.

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)