

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. 731 of 2019
CRAN 1 of 2020 (Old CRAN 416 of 2020)

Md. Anikul Islam
Vs.
State of West Bengal

For the Appellant	:	Mr. Milon Mukherjee, Sr. Adv. Ms. Sreyashee Biswas, Adv. Mrs. Benajir Hasna, Adv.
For the State	:	Mr. Abhra Mukherjee, Adv. Mr. Dipankar Mahata, Adv.
Heard on	:	25.08.2022, 07.11.2022 and 15.11.2022
Judgment on	:	22.11.2022

Joymalya Bagchi, J. :-

Appeal is directed against the judgment and order dated 18.11.2019 and 19.11.2019 passed by learned Judge, Special Court under N.D.P.S. Act and Additional Sessions Judge, Berhampore, Murshidabad in NDPS case no 309 of 2016 arising out of Lalgola P.S Case No. 144 of 2016 dated 7.11.2016 convicting the appellant for commission of offence punishable under Sections 21(C) of the N.D.P.S. Act and sentencing him to suffer rigorous imprisonment of 10 years and

to pay a fine of Rs. 1,00,000/- in default, to suffer further rigorous imprisonment for six months more.

Prosecution case, as alleged against the appellant, is to the effect that on 7.11.2016 at 1.25 p.m., SI Rajat Subhra Hazra (PW9) while on RT-I mobile duty received source information that one person was coming from Raghunathganj side to Panditpur Farm More. He intimated the matter to the O.C Lalgola P.S and proceeded to Panditpur Form more to work out the information. He reached the spot at 1.45 pm. Soon thereafter, he saw the appellant alighting from a Toto. PW9 and his force detained the appellant. Appellant was communicated his right to be searched before a magistrate or before a Gazetted Officer. Appellant opted to be searched before a Gazetted Officer. Intimation was given to BDO Lalgola Block to come to the spot but BDO unavailable. Thereafter, CI, Lalbagh Circle was called to the spot. CI, Lalbagh Circle came to the spot and he disclosed his identity as Gazetted Officer to the appellant. Thereafter, appellant was searched in his presence. Upon search, one plastic packet containing 300 gms powder suspected to be heroin was recovered. Two samples of 5 gm. each were drawn from the packet. They were sealed and labelled in presence of Gazetted Officer and the independent witnesses. Seizure list was prepared. Thereafter, appellant along with the seized consignment and samples were brought to the police station. PW 9 lodged written complaint at the police station resulting in registration of Lalgola PS case no 444 of 2016 dated 7.11.2016 under section 21(c) of the NDPS Act. Samples were sent for

chemical examination. Report of SDCRI, Kolkata (Ext 7) was collected and charge sheet was filed against the appellant.

Charge was framed under section 21(c) of NDPS Act.

Appellant pleaded not guilty and claimed to be tried. Prosecution examined 9 witnesses and exhibited a number of documents. Documents including the written offer under section 50 of the NDPS Act (Ext 8) and the report of the chemical examiner (Ext 7) were exhibited in court.

In conclusion of trial, the trial Judge by the impugned judgment and order dated 18.11.2019 and 19.11.2019 convicted and sentenced the appellant, as aforesaid.

Mr. Mukherjee, learned senior Counsel with Ms. Sreyashee Biswas and Mrs. Benajir Hasna has assailed the conviction essentially on the following grounds. Firstly, it is contended CI, Lalbagh Circle (PW7) was a member of the raiding party. Hence, there is no compliance of section 50 of the NDPS Act. Secondly, it is argued independent witnesses have not supported the case. It is contended no inventory of the seized article was prepared before the Magistrate and samples were drawn at the spot and not in presence of the magistrate as required under section 52-A of NDPS Act. Hence, there is no compliance of section 52-A of NDPS Act in view of ***Union of India vs. Mohanlal And Another***¹

In reply, Mr. Mukherjee with Mr. Mahata submits Gazetted Officer was not a member of the raiding party. There is compliance of section 50 of the NDPS Act. With regard to non-compliance of section 52A of the

¹ (2016) 3 SCC 379

NDPS Act, it is contended the seized article was produced in court and no prejudice has been caused to the appellant on such score.

I have gone through the evidence on record. With regard to compliance of section 50 of the NDPS Act, it appears from the evidence of PW 9, leader of the raiding party that offer was made to the appellant to be searched in presence of a Gazetted Officer or before a magistrate. He proved the written notice (Ext 8). PW 9 sent requisition to the BDO to come to the spot but the said officer was unavailable. Subsequently, CI Lalbagh Circle (PW7) was called to the spot. He arrived at the spot and in his presence search commenced. His deposition is corroborated by the members of the raiding party namely PWs1, 2 and 3. Referring to the cross examination of PW2, Mr. Mukherjee argued CI, Lalbagh Circle (PW7) was a member of the raiding party. I am unable to accept such submission. The said witness in chief stated that CI, Lalbagh Circle (PW7) came to the spot along with constable Sunil Ghosh (PW4) after appellant had been detained. His evidence during cross that the Circle Inspector was present at the time of raid must be read in the light of his evidence in chief to mean that CI, Lalbagh Circle (PW7) had been summoned after the appellant was detained and was present when he was searched. Hence, I do not find the deposition of PW2 is at variance with that of other witnesses that the CI, Lalbagh Circle (PW7) was not a member of the raiding party and was subsequently summoned to the spot as a Gazetted Officer.

It is also contended that the independent witnesses have not supported the prosecution case. I have gone through the evidence of independent witnesses PW 5 and 6. They deposed that they were present at the spot. They admitted their signatures on the seizure list as well as on the packet and the labels of the samples drawn therefrom. They have been extensively cross examined with regard to the previous statements before the police. In this backdrop, I am unwilling to give credence to such prevaricating witnesses and disbelieve the credible evidence of the official witnesses with regard to recovery.

It is argued section 52-A of the NDPS Act has not been complied with. No inventory of seized article was prepared and certified by the Magistrate. Samples were drawn at the spot and not drawn in presence of Magistrate. In ***Union of India vs. Mohanlal And Another*** (supra) the Apex Court held compliance of section 52A of NDPS Act is mandatory. There is no provision in the law to draw samples at the time of seizure.

The seized article i.e. brown colour powder in cellophane packet was produced in Court during trial, Mat Ext 1/3. The mother packet marked A was also produced in Court. Two samples of 5 gm each drawn from the seized consignment have also been produced as Mat Ext II/4 and Mat Ext III/3 respectively. The sample packets as well as the labels thereon have also been produced in Court.

It is true as per the ratio in ***Mohanlal*** (supra), the samples were required to be drawn in presence of magistrate and not at the spot. In the

present case, the samples have been drawn at the spot. But, this issue had not been raised by the appellant in the course of trial.

As noted above, the seized consignment had not been destroyed but produced during trial. Had the appellant raised this issue, the trial Court could have directed compliance of section 52-A of the NDPS Act and directed samples to be drawn in presence of a Magistrate for examination. When the seized article as well as the samples had been produced in Court and signatures on them not only by the official witness but by independent witness have also been proved, I have no doubt in my mind that the chain of custody in the present case is with regard to samples drawn from the seized article and those examination of the chemical examiner has been proved beyond doubt.

In **Noor Aga vs. State of Punjab And Another**² the Apex Court, inter alia, held non-compliance of section 52-A of the NDPS Act had prejudiced the accused as seized articles had been destroyed. In the present case, seized article was produced in Court and marked as Ext 1/iii. Hence, no prejudice is suffered by the appellant in the facts of the present case.

For the aforesaid reasons, I uphold the conviction and sentence of the appellant.

Appeal is accordingly dismissed.

In view of disposal of the appeals, connected application being CRAN 1 of 2020 (Old CRAN 416 of 2020) is also disposed of.

² (2008) 16 SCC 417

Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of Section 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 completion of all formalities.

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)