

IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 360 of 2021

With

CRAN 2 of 2022

Md. Mainul Hoque

Vs.

The State of West Bengal

For the Appellant : Mr. Niladri Sekhar Ghosh, Adv.
 Ms. Sompurna Chatterjee, Adv.
 Mr. Sourav Mondal, Adv.

For the NCB : Ms. Anamika Pandey, Adv.
 Ms. Mary Datta, Adv.

For the State : Mr. Sanjoy Bardhan, Adv.
 Ms. Baishakhi Chatterjee, Adv.

Hearing Concluded on : April 18, 2023
 Judgement on : May 1, 2023

DEBANGSU BASAK, J.:-

1. The appellant has assailed the judgement of conviction dated October 5, 2021 and the order of sentence dated October 7, 2021 passed by the learned Special Judge under Narcotic Drugs and Psychotropic Substances Act, 1985, Murshidabad at Berhampore (Additional District Judge and Sessions Judge, 5th Court) in NDPS Case No. 7 of 2017.

2. By the impugned judgement of conviction, the learned judge has convicted the appellant under Section 22 (c) of the Act of 1985. By the impugned order of conviction, the learned judge has sentenced the appellant to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 1 lakh and in default to suffer further imprisonment for 6 months. The sentences had been directed to run concurrently.

3. Learned Advocate appearing for the appellant has submitted that, the appellant was denied a fair trial. He has pointed out that, the prosecution examined only 2 witnesses who were official witnesses. Prosecution did not examine any independent witness at the trial.

4. Learned Advocate appearing for the appellant has submitted that, apparently, a team of Narcotics Control Bureau (NCB) had participated in the raid. Apart from 2 officials, no other members of the team had been examined. The composition of the team had not been disclosed. Consequently, the appellant had been denied a reasonable opportunity of cross-examining such persons if they had been cited and produced as witnesses.

5. Learned Advocate appearing for the appellant has submitted that, the prosecution failed to produce the best

witness at the trial. He has reiterated that, independent witnesses were not examined at the trial. He has referred to the list of witnesses submitted along with the complaint of NCB. He has contended that apart from 2 of the persons named in the list of witnesses, no other person was examined. The appellant therefore had been denied the opportunity to cross-examine the prosecution witnesses who were cited as witnesses and not produced at the trial.

6. Learned Advocate appearing for the appellant has submitted that, the officer lodging the complaint and the investigating officer were one and the same person. He has relied upon **2008 Volume 16 Supreme Court Cases 417 (Noor Aga vs. State of Punjab and Another)** in support of his contentions.

7. Relying upon **2021 Volume 4 Supreme Court Cases 1 (Tofan Singh vs. State of Tamil Nadu)** learned Advocate appearing for the appellant has submitted that, the statement recorded under Section 67 of the Act of 1985 cannot be taken into account for the purpose of convicting the appellant. The learned trial judge has acted in error of law in doing so.

8. Learned Advocate appearing for the appellant submitted that, prosecution witness (PW) 1 was authorised as the investigating officer as will appear from the endorsement in Exhibit 1. However, he was the seizing officer. PW 2 had claimed himself to be the investigating officer.

9. Learned Advocate appearing for the appellant has submitted that, PW 2 became the complainant on November 16, 2017 and the investigating officer on November 17, 2017. He has relied upon **2020 Volume 10 Supreme Court Cases 120 (Mukesh Singh Vs. State)** in this regard.

10. Learned Advocate appearing for the appellant has submitted that, PW 2 as the investigating officer admitted in cross-examination that he did not examine any witness. Therefore, according to him, no investigation had been carried out by the investigating officer. Therefore, the appellant had been denied not only a fair trial but also a fair investigation. Consequently the appellant should be acquitted.

11. The learned Advocate appearing for the NCB has submitted that, seizure of narcotics had been made and proved. The narcotics seized had been established to be of commercial quantity.

12. Learned Advocate appearing for NCB has submitted that, the appellant had signed the seizure list as also the label on the narcotics seized. NCB had complied with the provisions of Section 67 of the Act of 1985. Both the prosecution witnesses were responsible officers and their testimonies were reliable. Merely because the prosecution witnesses were officials of NCB, the same does not ipso facto vitiate their oral testimonies.

13. Learned Advocate appearing for the NCB has submitted that, apart from the commercial quantity of narcotics seized from the appellant, a sum of Rs. 24,000 was also seized.

14. Learned Advocate appearing for NCB has submitted that, the chemical examination report establishes that narcotics were seized from the possession of the appellant. According to her, non-presence of independent witnesses was not fatal to the prosecution.

15. Learned Advocate appearing for NCB has submitted that, the impugned judgement of conviction and the order of sentence should be upheld.

16. NCB through prosecution witness (PW) 1 had lodged a complaint with the jurisdictional court in respect of

commission of offence under Section 8 (c) read with Section 22 (c) of the Act of 1985 against the appellant. In the complaint, NCB had stated that, specific input was received on November 14, 2017 at 21:00 hours that the appellant who runs a business of illicit methamphetamine tablets will hand over huge quantity of such tablets to his associates at a specified place. Such input had been reduced in writing and after intimating the same to the superior officer and after obtaining permission, a team of NCB officers and staff moved from NCB Kolkata General unit, Newtown, Rajarhat, Kolkata with a government vehicle along with necessary equipment to be used during the search and seizure process. The team had reached Murshidabad and met with the informer on November 15, 2017 at 13:00 hours. After that, NCB team along with the informer had reached the specified spot at 13:30 hours on November 15, 2017 and kept surveillance at the specified spot. At 2000 hours the informer had told the team that the appellant would not be coming and that the appellant was expected in the early morning on November 16, 2017. Accordingly, the matter was conveyed to the superior officer and as per telephonic direction of the superior officer, the team had waited at Murshidabad. On November 16, 2017 at

05:30 hours the team had proceeded towards the specified spot along with the informer and reached the spot at 06:30 hours. After reaching the spot, the team had requested local people to be independent witnesses during the search and seizure operation when nobody initially agreed. Lastly 2 persons had agreed. On November 16, 2017 at 10:30 hours the appellant has started moving from the specified place and the NCB team intercepted him in presence of the witnesses. Thereafter, the appellant had been searched after compliance with the provisions of the Act of 1985. 1550 number of tablets had been seized from the appellant. Samples had been taken. Notice under Section 67 of the Act of 1985 had been issued. The appellant had made voluntary statement. On the basis of such voluntary statement, notices had been issued to different persons. Sample of the seized contraband had been forwarded to the Central forensic science laboratory for chemical examination on November 20, 2017.

17. Court had taken cognizance on the basis of such complaint. The court had framed charges against the appellant on July 12, 2018 under Section 22 (c) of the Act of 1985. The appellant had pleaded not guilty and came to be tried.

18. At the trial, the case of NCB was that, the appellant on November 16, 2017 at 10:30 hours at Umarpur Goshala More under Lal Gola police station district Murshidabad was found in conscious possession of 1550 number of pink colour Methamphetamine tablets (psychotropic substance) contained in transparent polyethylene pouch packet in commercial quantity in contravention of the Act of 1985 and thereby committed an offence under Section 22 (c) of the Act of 1985.

19. In order to establish the charge against the appellant, the prosecution had examined two witnesses. The prosecution had also relied upon documentary and material exhibits at the trial.

20. PW 1 had stated that, he was posted as an intelligence officer of NCB at Kolkata. On November 14, 2017 at 21:00 hours intelligence input had been received about the appellant. Such information had been reduced in writing which was tendered in evidence and marked as Exhibit 1. After obtaining permission, the team of NCB consisting of 5 members had left Kolkata zonal unit at 07:00 hours on November 15, 2017 and reached Lalgola at 13:00 hours and met the informer. Thereafter, NCB team along with the informer had reached the place. The informer had

subsequently informed the team that, the appellant would come on November 16, 2017 in the early morning. Such information had been intimated to the superior officer. The team had left the place. On the next morning on November 16, 2017, the team had reached the place at 06:30 hours. Thereafter, the team had requested local people to be independent witness during the search and seizure. 2 persons had agreed after putting much efforts. He had identified the 2 persons who agreed to be witnesses. Thereafter, NCB team along with the witnesses had kept surveillance at the specified area.

21. PW 1 had stated that, on November 16, 2017 around 10:30 hours, the appellant came at the specified spot. The appellant had been identified and intercepted. On asking the appellant had disclosed his name and address. The team had shared the input with the appellant. Thereafter, the team had explained the provisions of Section 50 of the Act of 1985 to the appellant. The appellant had been told that he has a legal right to be searched before any magistrate or gazetted officer and that he could search the NCB team as well as the independent witnesses before search of him. This had been written on a piece of paper and handed over to the appellant.

The appellant had replied that since he was not so educated and can only sign, he requested that he need not be searched before any gazetted officer or magistrate and neither he wants to search the NCB team. He had requested NCB officials to write his reply. After writing such a reply, it was read over to him and after his understanding, he had put his signature thereon.

22. PW 1 had tendered the writing in compliance with Section 50 of the Act of 1985 which was marked as Exhibit 2. His reply had been prepared by PW 1 and the same was tendered in evidence and marked as Exhibit 3.

23. PW 1 had stated that, thereafter, personal search of the appellant had started. During such search, appellant had handed over pink colour tablets kept in transparent packet believed to be methamphetamine. One of the tablets had been tested with the kit available and the same gave a positive result of test of methamphetamine. Thereafter, the total tablets had been counted and weighed. It had been found that there were 1550 tablets weighing 150 gms. On interrogation appellant had disclosed that he collected the tablets from Samjad Sk and the same was supposed to be delivered to Asiful Sk. and Samayan Sk. He had revealed that he was

supposed to get Rs. 1, 24, 000/- from those 2 persons. He had also disclosed that the amount he would get was Rs. 24,000/- in the remaining Rs. 1,00,000/- had to be handed over to Samjad Sk. Thereafter, one duplicate sample of 5 gms and another sample 5 g were drawn from hundred and 50 gms of pink colour tablets and kept in transparent polyethylene and further put into clothing envelope. The envelope had been affixed and sealed with NCB-7. The original sample had been marked as S1 and the duplicate sample marked as D1 and mother packet was marked as P1. He had tendered the original sample (S 1) and the duplicate sample (D1) which were marked as material exhibit I collectively. He had identified the mother packet (P1) and the envelope containing his signature, signature of the appellant and signature of 2 witnesses. The remaining tablets had been marked as material Exhibit II.

24. PW 1 had stated that, the search and seizure procedure had concluded at 13:00 hours. Then the paper of search and seizure had been prepared in which signature of the seizing officer, that is, him, signature of the appellant and witnesses were obtained and a copy of the seizure list was handed over to the appellant with proper receipt. Similarly,

triplicate test memo had been prepared in which he signed. Signatures of the appellant and witnesses had been obtained. He had tendered the search come seizure list comprising of 3 pages which was marked as Exhibit 4. The test memo prepared and signed by him had been tendered in evidence and marked as Exhibit 5.

25. PW 1 had stated that thereafter notice under Section 67 of the Act of 1985 was issued to the appellant to appear before him at 15:00 hours on November 16, 2017 at Prince Hotel, Lalgola. He had tendered the notice under Section 67 of the Act of 1985 and the same was marked as Exhibit 6. Then the appellant had informed that the appellant was not aware about the hotel and requested to accompany the team. Then on November 16, 2017, the voluntary statement made by the appellant had been recorded from 15:10 hours and concluded at 16:55 hours. The statement of the appellant had been tendered in evidence and marked as Exhibit 7.

26. PW 1 had stated that the appellant was arrested at 15:00 hours. He had tendered the arrest memo with the signature of the appellant and the same was marked as Exhibit 8. He had stated that since there was no establishment of NCB at Lalgola or at Murshidabad,

considering the safety and security of the alamats and the appellant, NCB team had proceeded with the alamats and the appellant to their office at Newtown, Kolkata. NCB team had reached there at 20:00 hours on November 16, 2017.

27. PW 1 had deposited the alamats to the godown of NCB and on the next morning the alamats had been withdrawn from the godown on November 17, 2017 at 08:00 hours. Medical checkup of the appellant had been done. Then, the team had proceeded for Berhampore Court for production of the appellant and the alamats.

28. PW 1 had stated that at the time of production of the appellant, he submitted medical papers, seizure list and other papers to the Court. After production, the team had reached the office and deposited all the alamats. Thereafter, the search and seizure procedure had been informed in writing under the provisions of Section 57 of the Act of 1985 to his next superior. He had intimated regarding the arrest of the appellant to the next of kin of the appellant, his relatives and local police. He had tendered the godown register of the Department which reflects the entry of the alamats. The same had been marked as Exhibit 9. The compliance under Section 57 of the Act of 1985 had been tendered in evidence and

marked as Exhibit 10. Movement register of the Department had been marked as Exhibit 11.

29. PW 1 had been cross-examined by the defence. In such cross-examination, he had stated that he was not interrogated by the investigating officer. The defence could not elicit anything favourable by such cross-examination.

30. PW 2 had stated that on November 17, 2017 he received the present case. He had corroborated PW 1 with regard to the receipt of information relating to the movement of the appellant with the psychotropic substance. He had corroborated PW 1 with regard to the search and seizure as also the conduct of the NCB team.

31. PW 2 had stated that, Samjad Sk was named by the appellant as one of the persons to receive the psychotropic substance was detected but no connection between the call details of such person and the appellant was found. Such person had declined to recognise the appellant. The 2nd person had also been called by service of notice. But no contact had developed between the 2nd person and the appellant. In course of investigation the name of 3 other persons had surfaced but no evidence was found against them. On completion of the investigation he had submitted

the complaint. He had tendered the written complaint which was marked as Exhibit 12.

32. In cross-examination PW 2 had stated that he was entrusted with the investigation and that he did the whole investigation. He had stated that since there was no independent witness, he did not interrogate them. He had also stated that he was on duty at Kolkata office on November 14, 15 and 16, 2017.

33. On completion of the evidence of the prosecution, the appellant had been examined under Section 313 of the criminal procedure code. In such examination, the appellant had claimed himself to be falsely implicated and innocent. He had declined to adduce evidence through any witness.

34. The prosecution had established at the trial that, NCB had received source information which was reduced in writing and the superior officer was informed. Superior officer had authorized taking of action as will appear from the contents of Exhibit 1.

35. NCB had arrived at the locale and apprehended the appellant. Appellant had been informed of his rights under Section 50 of the Act of 1985. Appellant had received such

information in writing as will appear from Exhibit 2. He had responded thereto in writing by way of Exhibit 3.

36. 1550 tablets of Methamphetamine weighing 150 grams along with a sum of Rs. 25,000 had been seized from the possession of the appellant in presence of two independent witnesses. Samples had been taken. Seizure list thereof had been prepared being Exhibit 4. A sample portion had been tested and on test as will appear from the test memo being Exhibit 5, it become positive for psychotropic substance.

37. Appellant had recorded a statement under Section 67 of the Act of 1985 pursuant to a notice thereunder. Notice had been marked as Exhibit 6 while his statement had been marked as Exhibit 7. Appellant had been arrested.

38. Samples had been sent for forensic examination. Movement of the samples have been duly established by Exhibit 11.

39. Sample seized had been sent for testing to the Central Forensic Examination Laboratory who submitted a report being Exhibit 14. The Chemical Examination Report dated May 18, 2018 which was sent under the covering dated November 20, 2017 had established that, Methamphetamine and caffeine were detected in the content of the exhibits.

40. Prosecution had established that, 1550 Methamphetamine tablets weighing 150 grams was seized from the possession of the appellant. Therefore, prosecution had established that, commercial quantity of psychotropic substance had been seized from the possession of the appellant.

41. ***Mukesh Singh (supra)*** has considered the issue as to whether the trial is vitiated and the accused is entitled to acquittal where the investigation was conducted by the police officer who himself was the complainant. It has answered such issue by holding as follows:-

“13. From the above discussion and for the reasons stated above, we conclude and answer the reference as under:

13.1. (I) That the observations of this Court in Bhagwan Singh v. State of Rajasthan [Bhagwan Singh v. State of Rajasthan, (1976) 1 SCC 15 : 1975 SCC (Cri) 737] , Megha Singh v. State of Haryana [Megha Singh v. State of Haryana, (1996) 11 SCC 709 : 1997 SCC (Cri) 267] and State v. Rajangam [State v. Rajangam, (2010) 15 SCC 369 : (2012) 4 SCC (Cri) 714] and the acquittal of the accused by this Court on the ground that as the informant and the investigator was the same, it has vitiated the trial and the accused is entitled to acquittal are to be treated to be confined to their own facts. It cannot be said that in the aforesaid decisions, this Court laid down any general proposition of law that in each and every case where the informant is the

investigator there is a bias caused to the accused and the entire prosecution case is to be disbelieved and the accused is entitled to acquittal.

13.2. (II) In a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore on the sole ground that informant is the investigator, the accused is not entitled to acquittal. The matter has to be decided on a case-to-case basis. A contrary decision of this Court in Mohan Lal v. State of Punjab [Mohan Lal v. State of Punjab, (2018) 17 SCC 627 : (2019) 4 SCC (Cri) 215] and any other decision taking a contrary view that the informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled.”

42. In the facts of the present case, the Investigating Officer being PW 2 had lodged the written complaint being Exhibit 12. Nothing has been placed before us to suggest let alone establish that PW 2 had acted in a manner which was biased or that the appellant had suffered any prejudice by the action of PW 2 being the complainant as well as the Investigating Officer. During his oral testimony PW 2 had tendered the written complaint, Exhibit 12 in evidence. He had been confronted with Exhibit A by the defence, relating to his authorisation to investigate the case.

43. *Noor Aga (supra)* has held that, examination of independent witnesses in all situations may not be imperative. It has noted Section 114 (e) of the Evidence Act 1872. In the facts of that case, a large number of discrepancies had been found which gravely prejudiced the accused. In the facts of the present case, the appellant has not been able to establish existence of any discrepancy in the case of the prosecution resulting in any prejudice being caused to the appellant due to non-examination of any independent witness.

44. It is trite law that, the evidence of official witness cannot be distrusted, disbelieved or discarded merely on account of their official status. Section 114 of the Evidence Act, 1872 illustration (e) allows a presumption to be drawn as to official work done in discharge of the official duties. PW 1 and PW 2 had acted in their official capacities and deposed as to the action they took in their official capacities.

45. *Tofan Singh (supra)* has considered the issue as to whether the officer investigating the matter under the Act of 1985 would qualify as police officer or not and whether the statement recorded by the Investigating Officer under Section 67 of the Act of 1985 can be treated as confessional statement or not. It has answered such reference as follows :-

“158. We answer the reference by stating:

158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are “police officers” within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.”

46. In the facts of the present case, the appellant had recorded a statement under Section 67 of the Act of 1985 which was marked as Exhibit 7. Independent of Exhibit 7, the prosecution had been able to establish the charge as against the appellant beyond all reasonable doubt.

47. In the facts and circumstances of the present case, it cannot be said that, the appellant had suffered any prejudice or was denied fair trial since only two official witnesses were examined at the trial.

48. In view of the discussions above, we affirm the judgement of conviction and the order of sentence impugned herein.

49. CRA 360 of 2021 is dismissed. In view of the dismissal of the appeal nothing survives in the interim application. CRAN 2 of 2022 is also dismissed.

50. Trial court records along with a copy of this judgement and order be transmitted to the appropriate Court forth with.

51. Urgent Photostat certified copy of this judgement and order be made available to the applying parties expeditiously, subject to compliance with all formalities.

[DEBANGSU BASAK, J.]

52. I agree.

[MD. SHABBAR RASHIDI, J]