

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

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Gaurang Kanth

C.R.A. 358 of 2018

Balbir Singh & Anr.

-Vs-

The State of West Bengal

For the Appellants : Mr. Ayan Bhattacharjee, Adv.
Ms. Ritu Das, Adv.

For the State : Mr. Sanjay Bardhan, Adv.
Mr. Suman De, Adv.

Heard on : 23.04.2024, 01.05.2024 & 06.05.2024

Judgment on : 06.05.2024

Joymalya Bagchi, J. :-

1. Appeal is directed against judgment and order dated 04.05.2018 & 08.05.2018 passed by learned Additional Sessions Judge, 12th Court, Alipore, South 24-Parganas in Sessions Case No.04 (02) of 2016 (Sessions Trial No.03 (04) of 2016) convicting the appellants for commission of offence punishable under Sections 17(c)/18(c)/29 of the NDPS Act and sentencing them to suffer rigorous imprisonment for 15

years each and to pay a fine of Rs.1, 50,000/- each, in default, to suffer rigorous imprisonment for one year each.

Prosecution case:-

2. Genesis of the case as narrated in the FIR is as follows :-

On 10.10.2015 at about 9.00 hrs. SI Shyama Prasad Biswas (PW 1) received credible information from source that two drug dealers would come to Ekbalpore area to sell narcotics in the afternoon. Accordingly, PW 1 formed a raiding party comprising of PW 3 and others. The party lay in ambush near the spot i.e. 55/1 Diamond Harbour Road, P.S. Ekbalpur, Kolkata – 700027 (near Relax Beer Bar). At about 12:50 P.M. source pointed out two persons coming to the spot. PW 1 detained the suspects and gave them offer to be searched before a Gazetted officer or Magistrate. The suspects agreed to be searched before a Gazetted officer. Accordingly, intimation was given to PW 6, a Gazetted officer to be present at the spot. PW 6 came to the spot and the suspects i.e. the appellants herein were searched.

3. From appellant no.1 one black coloured rexine bag was recovered. There were three polythene packets in the bag containing black sticky substance weighing 2.6 kgs. which was suspected to be *opium*. From appellant no.2 another bag was recovered. The bag contained one black coloured polythene and two transparent polythene packets containing black sticky substance weighing 2.240 kgs. suspected to be *opium*. PW 1 took 50 gms. of *opium* from each of these packets. Remainder consignment was kept in a separate packet.

4. Appellants were arrested. Mother consignment along with the samples was brought to the police station.

5. Written complaint (Exhibit – 7) was lodged by PW 1 which was treated as FIR being Ekbalpore Police Station Case No.446 of 2015 dated 10.10.2015 under Sections 17(c)/18(c)/29 of the NDPS Act.

6. In course of trial, prosecution examined 8 witnesses and exhibited a number of documents. Defence of the appellants was one of innocence and false implication.

7. In conclusion of trial, trial Judge by the impugned judgment and order dated 04.05.2018 & 08.05.2018 convicted and sentenced the appellants, as aforesaid.

Arguments at the Bar:-

8. Mr. Ayan Bhattacharjee, learned Advocate for the appellants submits Section 52A of the NDPS Act was not complied. He elaborates samples were drawn at the spot instead of being drawn in presence of Magistrate as per sub-section (2) of Section 52A of the NDPS Act. As the sampling was contrary to law, the report of the chemical examiner is of no value. Accordingly, he prays for acquittal of the appellants.

9. Learned Advocate for the State contends samples were drawn in presence of independent witness. *Malkhana* registers were also produced. Chemical examiner (PW 4) found the seals of the samples intact. Chain of custody has been established. Chemical examiner's report showed presence of opium alkaloids. Hence, prosecution case is proved beyond doubt. Accordingly, the appeal is liable to be dismissed.

Evidence on record:-

10. PW 1 (SI Shyama Prasad Biswas) lodged written complaint (Ext.7) which was treated as FIR. He proved the recovery of black sticky substance suspected to be opium from the bags carried by the appellants. He proved the seizure list. He drew samples at the spot. He prepared an inventory list as per the direction of the Officer-in-charge, Ekbalpore Police Station.

11. PW 3 (Raj Kumar Some) is a member of the raiding party. He has corroborated PW 1 and supported the prosecution case.

12. PW 5 (Bimalendu Dutta) is an independent witness. He supported the recovery of consignment suspected to be *opium* from the appellants. He has proved his signature on the seizure list as well as the samples.

13. PW 6 (Inspector Monotosh Chakraborty) is the Gazetted officer who was present at the time of recovery. He has supported the prosecution case.

14. PW 2 (SI Amar Santra) is the first Investigating Officer. He deposed the samples and the mother consignment were kept in the *Malkhana*. He produced the copy of the *Malkhana* register. Pursuant to direction from the Detective Department, Narcotics Cell he handed over the case docket, seized articles and the accused persons to SI Sadhan Mondal (PW 7), the second Investigating Officer.

15. PW 7 deposed he kept the seized alamats in D.D. *Malkhana* vide D.D. M.K. No. 2156. He proved the signature on the *Malkhana* register. He deposed he received chemical report from CFSL on 25.12.2015.

16. PW 8 (SI Siladitya Sharma) is the third Investigating Officer. He submitted charge sheet.

17. PW 4 (Sanjeet Kumar) is the chemical examiner. He deposed he was a scientist attached to CFSL, Kolkata. He received two sealed paper envelopes in connection with the case through messenger on 13.10.2015. The seals were intact. Test was conducted between 27.11.2015 to 30.11.2015. He proved the chemical examiner's report (Ext.15 & 15/1). As per report *opium alkaloids viz. morphine, codeine, thebaine, papaverine & noskapine* were detected along with *diazepam* in the samples.

Analysis and findings:-

18. The principle plank on which the prosecution case is assailed is that there was non-compliance of Section 52A(2)(c) of the NDPS Act in the matter of drawing samples in presence of Magistrate for chemical examination.

19. In *Union of India vs. Mohanlal & Anr.*¹ the Apex Court, inter alia, held compliance of Section 52A is mandatory. Samples are to be drawn in presence of Magistrate and duly certified by him. Certified samples are to be sent for chemical examination. No sample shall be drawn at the spot.

20. Relying on *Mohanlal* (supra) the Apex Court in *Simarnjit Singh vs. State of Punjab*² held as follows :-

“9. In paragraphs 15 to 17 of the decision of this Court in *Mohanlal's case*¹, it was held thus:

“15. It is manifest from Section 52-A(2) include (supra) that upon seizure of the contraband the

¹ (2016) 3 SCC 379

² 2023 SCC OnLine SC 906

same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with subsections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure."

10. Hence, the act of PW-7 of drawing samples from all the packets at the time seizure is not in conformity with the law laid down by this Court in the case of Mohanlal¹. This creates a serious doubt about the prosecution's case that substance recovered was a contraband."

21. Similar view was taken in *Yusuf @ Asif vs. State*³ and *Bothilal vs. The Intelligence Officer, Narcotics Control Bureau*⁴.

22. In *Mohammed Khalid & Anr. vs. The State of Telangana*⁵, the Apex Court held as follows :-

“22. Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the Investigating Officer PW-5 for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate. In this view of the matter, the FSL report (Exhibit P-11) is nothing but a waste paper and cannot be read in evidence...”

[Emphasis supplied]

23. In *Login Das vs. State of West Bengal*⁶, this Court had the occasion of interpreting Section 52A of the NDPS Act. The factual matrix was different. Section 52A had been complied with regard to the mother consignment seized but not the samples. Mother consignment duly inventorised and certified was sent for chemical examination prior to its destruction. In these circumstances the Court held there was compliance of Section 52A of the NDPS Act and no prejudice was suffered by the convict.

24. In rebuttal, learned Advocate for the State submits evidence on record shows the samples drawn at the spot were sealed and labelled in presence of independent witness (PW 5). He also argues chain of custody is established. He relies on *Balwinder Singh (Binda) vs. The Narcotics*

³ 2023 SCC OnLine SC 1328 (para 13 to 16)

⁴ 2023 SCC OnLine SC 498 (para 15 and 16)

⁵ 2024 SCC OnLine SC 213

⁶ 2024 SCC OnLine Cal 3431

*Control Bureau*⁷. In *Balwinder Singh (Binda)* (supra), the issue of non-compliance of Section 52A in sampling and its impact on the prosecution case did not fall for decision. A judgment cannot be treated as a binding precedent on an issue which was neither raised nor argued in the case⁸. In view of the aforesaid, this Court is unable to concur with the learned Counsel for the State that a contrary view had been taken in *Balwinder Singh (Binda)* (supra) with regard to the mandatory nature of Section 52A of the NDPS Act or the impact of its non-compliance on the prosecution case as laid down in the above quoted decisions.

25. NDPS Act provides for a strict procedure in the matter of search, seizure, sampling and examination of samples. The law provides for severe punishments. It is trite, graver the offence stricter is the proof. Procedural safeguards in the Act relating to search, seizure and sampling etc. have been engrafted to protect individuals from false implication and ought not to be ignored.

26. In the matter of sampling the Apex Court in the aforesaid decisions has held as per section 52A(2) the samples are to be drawn in presence of the Magistrate and duly certified by him. No sample is to be drawn at the spot. The purpose of mandating drawing of samples before Magistrate is to ensure sanctity and purity in drawing samples thereby ruling out any possibility of substitution. A Magistrate is an independent official who is not under the control and dominion of the Investigating

⁷ 2023 SCC OnLine SC 1213

⁸ *Mangat Rai And Anr. vs. Kidar Nath And Ors.*, AIR 1980 SC 1709

Agency. His presence and due certification of the samples drawn give an imprimatur of sanctity and insulates the process. This vital right of the accused cannot be whittled away by arguing that the chain of custody of the samples at the spot has been established. If this logic is accepted the mandatory character of Section 52A would stand diluted in contravention to the ratio in *Mohanlal* (supra) which has been followed in subsequent decisions.

27. It is argued in *Bothilal* (supra), *Yusuf @ Asif* (supra) and *Mohammad Khalid* (supra) the Apex Court had pointed out other irregularities in the prosecution case.

28. Be that as it may in *Simarnjit Singh* (supra) the principal ground on which the conviction was upturned was non-compliance of section 52A which casts serious doubt that the substance recovered was narcotics.

29. Ratio reiterated in the abovenoted authorities is clear and unambiguous. If the samples sent for chemical analysis were not collected through the mandatory rigors of Section 52A of the NDPS Act, the chemical examiner's report is nothing but a '*waste paper*' [see *Mohammad Khalid* (supra)].

30. Chemical examiner's report is the primary forensic evidence with regard to the nature of the substance recovered. When doubt is cast on the report due to illegality in sampling the prosecution is rendered vulnerable and the conviction cannot be sustained.

Conclusion:-

31. Accordingly, I set aside the conviction and sentence imposed upon the appellants by the trial Judge.

32. Appeal is accordingly allowed.

33. The appellants, namely, Balbir Singh and Jitendar Shaw shall be forthwith 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.

34. Lower court records along with a copy of this judgment be sent down at once to the learned trial Court for necessary action.

35. Photostat certified copy of this judgment, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)