

**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. 602 of 2019
With
CRAN 3 of 2024**

***Aizul Seikh @ Ajijul Sk & Anr.
-Vs-
The State of West Bengal***

For the Appellants : Mr. Kusal Kumar Mukherjee, Adv.
Mr. Narattam Acharyya, Adv.

For the State : Mr. Anirban Mitra, Adv.
Mr. Amal Kumar Datta, Adv.

Heard on : 06.05.2024

Judgment on : 06.05.2024

Joymalya Bagchi, J. :-

1. Appeal is directed against judgment and order dated 06.08.2019 & 07.08.2019 passed by learned Additional Sessions Judge-Cum-Judge Special Court, NDPS Act, Berhampore, Murshidabad in NDPS Case No.05 of 2016 arising out of NCB Crime No.22/NCB/KOL/2015 and a complaint filed by Malay Kanti Mondal, Intelligence Officer, NCB, Kolkata

Zonal Unit convicting the appellants for commission of offence punishable under Sections 21(c)/ 29 of the NDPS Act and sentencing them to suffer rigorous imprisonment for 10 years each and to pay a fine of Rs.1, 00,000/- each, in default, to suffer simple imprisonment for six months for the offence punishable under Section 21(c) of the NDPS Act. The appellants were further sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.1,00,000/- each and in default to suffer simple imprisonment for six months for the offence punishable under Section 29 of the NDPS Act; both the sentences are to run concurrently.

Prosecution case:-

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

Prosecution case as alleged against the appellant is to the effect that on 23.12.2015, PW 3 (Subhas Chandra Singh) a Constable attached to 20th Battalion, BSF received secret information and a patrol party went to Nurpur B.O.P. near Gangin village. He was a member of the patrol party. They detained two persons i.e. the appellants and two plastic packets were recovered from them. Thereafter, they were brought to BOP Nurpur. Information was given to NCB Kolkata about the incident. PW1 (Sumit Kr. Singh), an Intelligence Officer attached to NCB Kolkata after receiving the information went to BSF outpost. He found the appellants were detained and two packets had been recovered. Upon weighing 475 gms. of light brown coloured powder was found from each packet i.e. 950

gms. in all. Suspecting the powder to be heroin the consignment was seized and two samples of 5 gms. each was recovered from each packet and marked AS, AS1, NS and NS1. The remainder of the consignment was kept in an envelop marked NCB-I. The samples were sent for chemical examination and tested positive to heroin. PW 2 (Malay Kanti Mandal) filed complaint against the appellants and cognizance was taken.

3. During trial prosecution examined seven witnesses and exhibited a number of documents. Defence of the appellants was one of innocence and false implication.

4. In conclusion of trial, trial Judge by the impugned judgment and order dated 06.08.2019 & 07.08.2019 convicted and sentenced the appellants, as aforesaid.

Arguments at the Bar:-

5. Mr. Kusal Kumar Mukherjee, 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.

6. 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:-

7. PW 3, Constable Subhas Chandra Singh deposed on 23.12.2015 he was posted at BOP, Nurpur, Aurangabad, West Bengal. Around 4:15 p.m. he received secret information and the patrolling party proceeded to Nurpur BOP near Gangin village. At the spot patrolling party found two persons were detained. Two plastic packets were recovered. Detained persons along with the plastic packets were brought to BOP, Nurpur. On the next day, i.e. 24.12.2015 information was given to NCB, Kolkata. Officers of NCB came to Nurpur at 3:00 p.m. The detained persons and plastic packets were handed over to NCB officers who seized the packets containing powder weighing 450 gms. each (900 gms. in all) suspected to be heroin.

8. PW 4, SI Sankar Bhattacharjee deposed on similar lines and corroborated PW 3, Constable Subhas Chandra Singh.

9. PW 1, Sumit Kumar Singh deposed on 24.12.2015 he was posted as Intelligence Officer at Kolkata Zonal Unit of NCB. He deposed at 8:00 p.m. they received a call from BSF, 20 Battalion, BOP, Nurpur, Murshidabad stating on the previous day while patrolling the border, BSF officials had detained two persons containing suspicious substance believed to be heroin. He reduced the information in writing and with the permission of Zonal Director proceeded to the spot. He reached Nurpur

BOP, Murshidabad and found two persons were detained. He seized the packets containing light brown coloured substance believed to be heroin weighing 475 gms. each (950 gms. in all). He tested the samples with drug detection kit which tested positive to heroin. He prepared two samples of 500 gms. each from the mother packet and marked them as AS, AS1 and NS, NS1. He identified the mother consignment and the samples in Court.

10. PW 5, Swarup Samanta was also posted as Intelligence Officer at NCB, Kolkata Zonal Unit. He corroborated PW 1.

11. PW 6, Shantanu Aich was the Superintendent at NCB, Kolkata Zonal Unit. He deposed PW 1 submitted compliance report with regard to recovery of 950 gms. of light brown coloured powder believed to be heroin from the appellants (Exhibit – 8). He received the seized alamat. He proved the entry in the Godown Register (Exhibit – 9).

12. PW 7, Sanjeet Kumar is a scientist attached to CFSL, Kolkata. He deposed he received the samples marked AS, AS1 and NS, NS1. The samples tested positive to *morphine, codeine, thebaine and papaverine*. He proved the chemical examiner's report.

13. PW 2, Malay Kanti Mandal is the complainant in the case.

Analysis and findings:-

14. 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.

15. 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.

16. Relying on *Union of India vs. 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 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

¹ (2016) 3 SCC 379

² 2023 SCC OnLine SC 906

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.”

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

18. 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]

19. 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

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

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.

20. 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 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.

21. 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.

⁷ 2023 SCC OnLine SC 1213

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

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.

22. 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 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.

23. 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.

24. 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.

25. 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)].

Chemical examiner's report is the primary forensic evidence with regard to the nature of the substance recovered. Drug detection kit used by PW 1 during recovery is a tool which maybe used for arriving at reasonable belief for seizure but cannot be a surrogate for an expert's report to prove the nature of the contraband during trial in these circumstances, when doubt is cast on the chemical examiner's report due to illegality in sampling the prosecution is rendered vulnerable and the conviction cannot be sustained.

Conclusion:-

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

27. Appeal is accordingly allowed.

28. The appellants, namely, Aizul Seikh @ Ajijul Sk and Mohammed Nasiruddin Seikh 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.

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

30. 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.)

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