

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

PRESENT:

**The Hon'ble Justice Nishita Mhatre  
And  
The Hon'ble Justice Samapti Chatterjee**

**CRA 513 of 2009**

***Makhan Thakur***

***... Appellant***

***vs.***

***The State of West Bengal***

***... Respondent***

For the Appellant : Mr. Kazi Safiullah  
Ms. Madhuri Das

For the N.C.B. : Mr. B. R. Ghosal  
Ms. Saswati Ghosh Singha  
Mr. Himangshu Ghosh

Heard on : 30.10.2014, 07.10.2014

Judgment on : 02.12.2014

**Nishita Mhatre, J.:**

1. Aggrieved by the decision dated 8<sup>th</sup> July, 2009 in Narcotic Drugs and Psychotropic Substances case No. 4 of 2006, the Special Court (E.C. Court)-cum-Additional Sessions Judge, Hooghly, convicting and sentencing him, the appellant has filed the present appeal. The appellant has been found guilty of the offence punishable under Section 21(c) of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as 'NDPS Act'). He has been sentenced to suffer rigorous imprisonment

for 10 years and directed to pay a fine of ₹1 lac; in default of payment of fine he is to suffer simple imprisonment for a further period of 10 months.

2. The appellant was intercepted by officers of the Narcotics Control Bureau, Eastern Zonal Unit, Kolkata (hereinafter referred to as “NCB, EZU”) at Dumurdaha Station bus stand in front of the Shani Mandir at about 3.15 p.m. on 6<sup>th</sup> September, 2006. He was holding a multicoloured nylon bazaar bag in his right hand. The officers expressed their intention to search the bag as they had specific information that he was carrying heroin. According to the prosecution the officers informed the appellant that he had right to be searched in the presence of a Magistrate or any Gazetted Officer. However, he declined to accept that option. The officers of the Narcotics Control Bureau (hereinafter referred to as “NCB”) also offered to be searched by the appellant but he chose not do so. According to the prosecution the appellant took out a polythene packet from the bazaar bag that he was holding and voluntarily handed over the same to the officers. This polythene packet contained a brown coloured powder which the officers believed to be heroin. A small quantity of that powder was tested with the field test kit and it responded positively to the test for heroin. The packet weighed 500 grams. This entire procedure was conducted in the presence of two independent witnesses, the NCB officers and the appellant. The multi-coloured nylon bazaar bag, the packet containing 500 grams of a brown coloured substance believed to be heroin were all seized by the officers of the NCB. A sample in duplicate of 5 grams was drawn from the packet and was sealed, labelled and signed by the seizing officer and the independent witnesses. The rest of the

quantity of the brown powder was sealed and also labelled. This procedure carried out for the seizure of multi-coloured nylon bazaar bag as well. According to the prosecution the appellant revealed that he had received the contraband from one Ashoke Baruri of Dumurdaha. A notice under Section 67 of the NDPS Act was served on the appellant directing him to appear before the NCB, EZU office at Kolkata on 6<sup>th</sup> September, 2006 at 8 p.m. for further interrogation and investigation. The prosecution claims that he voluntarily accompanied the NCB officers to their office and submitted his statement admitting his guilt. He was arrested under Section 43 of the NDPS Act on 6<sup>th</sup> September, 2006 at 11.30 p.m. and charged for having committed an offence punishable under Section 21(c) of that Act. Ashoke Kumar Baruri, Salim Sk. and Jiban Baruri who were named by the appellant were issued notices under Section 67 of the NDPS Act with a direction to appear before the investigating officer. However, they did not comply with the notice.

3. The complaint was filed by the intelligence officer, NCB, EZU, Kolkata on 2<sup>nd</sup> March, 2007 against the appellant as well as the aforesaid three persons. The prosecution relied on the 5 witnesses in support of its case. The appellant has been convicted and sentenced as aforesaid while the others have been acquitted.

4. PW 1 has filed the complaint in this case. He has categorically stated that except for filing the complaint as directed by his superior officers, he was not aware of the facts in the case.

5. PW 2 has stated that while posted as an intelligence officer in the NCB, EZU on 6<sup>th</sup> September, 2006, he received specific information about heroin being carried by some persons near Dumurdaha Railway Station bus stand. He reduced this information in writing and intimated his superior officer. After obtaining a proper movement order he and the other officers of the NCB reached Dumurdaha under Balagarh Police Station, District-Hooghly. On reaching the aforesaid bus stand at 3 p.m. their informant identified a person who was standing in front of Shani Mandir near the bus stand. The NCB officers disclosed their identity to this person and expressed their desire to search his bag as they had specific information that he was carrying a huge quantity of heroin. On enquiry the person disclosed his name. He was the appellant herein. Two persons out of the onlookers were requested to be witnesses to the seizure. According to PW 2, the appellant was given the option of being searched by a Gazetted Officer or a Magistrate. He was also informed that he could search the NCB officers. He declined to avail of these options. According to PW 2, the appellant voluntarily took out a polythene packet containing a brown powder from his nylon bag and handed over the same to one of the NCB officers - A. K. Paul. The witness has spoken about a field test showing that the nature of the substance seized, and about the sealing and labelling of the samples drawn. The samples were signed by the appellant as well as NCB officers and the independent witnesses. A seizure list was prepared and a copy of the same was furnished to the appellant. He was also issued a notice under Section 67 of the NDPS Act directing him to appear before the officers on 6<sup>th</sup> September, 2006 at 8

p.m. The witness has stated that thereafter NCB officers left the spot along with the seized articles, and the appellant voluntarily accompanied them. The appellant was interrogated by the seizing officer A. K. Paul and the intelligence officer G. Jana. According to PW 2, the appellant tendered his voluntary statement which was recorded by G. Jana, confessing his guilt. He was arrested under Section 43 of the NDPS Act. This witness has conceded that though the movement register is maintained in the office of the NCB, no entries were made after the team returned to the office on 6<sup>th</sup> September, 2006. He has also conceded that the Balagarh Police Station was not intimated about the raid nor was the Superintendent of Police, Hooghly, informed of the same.

6. PW 3, who was then the Chemical Assistant in the Chemical Laboratory, conducted the test of the sample. It was found that the sample contained 31 per cent of heroin by weight. After analysing the same with the necessary amount of substance, the remaining portion of the sample was resealed and handed over for disposal.

7. PW 4 was a member of the team which seized the heroin from the appellant. He recorded the appellant's statement after the appellant stated that he was unable to write the same himself. According to this witness, after recording the statement he read over the same and explained it to the appellant. This statement was recorded under Section 67 of the Act.

8. PW 5 was also a member of the NCB team which carried out the raid. He has corroborated the testimony of PW 2. According to this witness the seizure was conducted in the presence of two independent witnesses – Saral Das and Madan Roy. These persons had signed the seizure list as well as labels after the samples were drawn. PW 5 was the godown officer and claims that he made the necessary entries in the godown register before keeping the seized contraband in the godown. This witness prepared the arrest memo. The witness has admitted in his cross-examination that he had no document to show that the appellant was apprised of his rights regarding the search in the presence of a Magistrate or a Gazetted Officer.

9. Before we proceed any further in this matter, we must record that this appeal was adjourned on several occasions because nobody was present to represent the NCB. Ultimately, left with no alternative, we commenced hearing the matter in the absence of the advocate for the NCB. Later, an adjournment was prayed for on behalf of the NCB. As the matter was part heard we granted the matter subject to payment of costs. The costs have been paid after several objections were raised by Mr. B. R. Ghosal, learned Counsel appearing for the NCB, regarding imposition of costs for an adjournment.

10. Mr. Kazi Safiullah, the learned Counsel for the appellant, has raised four main grievances, namely, (i) that there was a breach of Sections 42, 55 and 57 of the NDPS Act; (ii) the confessional statement under Section 67 was not admissible as it had been recorded by a Revenue Intelligence

Officer designating as a police officer under Section 53 of the Act in view of Sections 24 and 25 of the Evidence Act; (iii) no independent witnesses were examined; and (iv) even if the offence was proved to have been committed, the punishment imposed was excessive as the seized quantity of heroin was 31 per cent by weight and therefore less than commercial quantity.

11. Mr. Ghosal representing the NCB submitted that the complainant is not a party to this appeal and therefore, the appeal must be dismissed. According to him, under Section 114(e) of the Indian Evidence Act, a presumption must be drawn that all the acts undertaken by the NCB in exercise of its powers under the NDPS Act had been conducted fairly and in accordance with the provisions of the Act. He submitted that the officers of the NCB are not police officers as envisaged under Section 25 of the Act. Therefore, according to him the statement of the appellant recorded under Section 67 of the NDPS Act is admissible. Besides this, he argued that the statement had been exhibited without any objection during the trial and therefore, the appellant cannot be heard to say that the statement was inadmissible. The learned Counsel further submitted that the NCB had apprehended the appellant and had carried out the procedures of search, seizure and arrest in accordance with the provisions of law. He urged that the Trial Court has come to a correct conclusion by convicting and sentencing the appellant and therefore the appeal should be dismissed.

12. Learned Counsel for the parties have placed reliance on several judgments which we will refer to presently. The first question which is required to be determined is whether the provisions of Section 43 of the NDPS Act have been complied. There is no dispute that the alleged seizure was made at a public place near a bus stand in front of a Shani Mandir. A seizure in a public place is to be effected by any officer mentioned in Section 42 of the Act, namely, any officer who is superior in rank to a sepoy or constable of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered by the Central Government, or any such officer of the revenue, drugs control, excise, police or any other department of the State Government as is empowered by the State Government in that behalf. In the present case the seizure was effected by intelligence officers of the Narcotics Control Bureau. Such an officer is empowered under Section 43(a) to seize in any public place or in transit, any narcotic or psychotropic substance or controlled substance when he has reason to believe that a person has committed an offence which is punishable under the Act. Such a person may be detained and searched. The officer is empowered to arrest him and any other person in his company.

13. In the case of ***Kishan Chand v. State of Haryana*** reported in ***(2013) 2 SCC (Cri) 807*** the Supreme Court has observed that the provisions of Section 42 of the Act are mandatory and must be complied with strictly. An officer empowered under Section 42 is required to take down in writing any information received from any source if a narcotic

drug or psychotropic substance or controlled substance is being illegally carried by a person. Thus, the prerequisite is that information received by an officer who carries out the raid must be noted in writing. The officer is expected to inform his superior officer about this information before proceeding to take action in terms of the provisions of Sections 42(1)(a), 41(2) or 43. In the present case there is evidence on record that the information was gathered by PW 2 from a source. He informed his superior officer about this information and left along with a team of officers to conduct the raid. Thus, there is no doubt that there is oral evidence on record to show that the PW 2 had received information and had recorded the same in writing informing his superior officer.

14. In the case of ***Karnail Singh v. State of Haryana*** reported in **(2009) 8 SCC 539** the Supreme Court has held that when information is received by a police officer about contraband being in possession of a person and he had sufficient time to take action against that person, the police officer must record such information in writing. If the police officer fails to send a copy thereof to his superior officer then it would be suspicious circumstance being a clear violation of Section 42 of the Act. Following this judgement, in ***State of Karnataka v. Dondusa Namasa Baddi*** i.e. Criminal Appeal No.123 of 1997 decided on August 5, 2010, the Supreme Court observed that mere oral evidence regarding the information and the intimation to the superior officer would not be sufficient compliance of Section 42 of the Act. The Court held that the Department would have to produce documentary evidence before the trial court to show that the superior officer of the person who received the

secret information had been intimated about such information. From the evidence on record it is apparent that the information has been recorded and marked as Ext. 5. Thus, the provisions of Sections 42 and 43 of the Act have been complied in this case.

15. The next judgment referred to by Mr. Safiullah is ***Thandi Ram v. State of Haryana*** reported in ***(2000) 1 SCC 318*** where the Supreme Court has observed after referring to its earlier judgments that in the case of breach of the provisions of Sections 55 and 57 of the Act the conviction would be bad. It is submitted by the learned Counsel that there is no evidence on record to indicate that all the articles seized were kept in safe custody within the local area of the police station. The requirement is that the officer at the police station must affix a seal to such articles; samples drawn from the contraband seized must also bear the seal of the Officer-in-Charge of the police station. According to the learned Counsel these provisions have not been complied and therefore, the conviction is bad.

16. Mr. B. R. Ghosal, the learned Counsel for the NCB, has relied on the judgment in the case of ***State of Punjab v. Balbir Singh*** reported in ***1994 (3) SCC 299*** to submit that Sections 52 and 57 are not mandatory. The Supreme Court in its judgment has opined that these Sections contain certain procedural instructions for strict compliance by the officers. However, if there is failure to comply with these instructions that by itself cannot render the acts done by these officers null and void. The probative value of such arrest or search could be affected and in some

cases may invalidate the arrest or search. However, such violation by itself cannot invalidate the trial or the conviction if otherwise there is sufficient material on record, urged the learned Counsel.

17. From the evidence on record we do not find that the submission of Mr. Safiullah is correct. A sample from seized substance was sent to the chemical analyser. The rest of the substance was packed, sealed and labelled and kept in the godown after making the necessary entry in the godown register. Therefore, there is no breach of Section 52A or Section 55 of the NDPS Act.

18. Mr. Safiullah, the learned Counsel for the appellant has then argued that the statement recorded under Section 67 of the Act is akin to a confessional statement. He pointed out that in the present case PW 4 who recorded the confessional statement of the appellant was a Revenue Intelligence Officer. Such an officer has been designated under Section 53 of the Act as a police officer and therefore, any statement made to him by the accused in custody is inadmissible under Section 24 and 25 of the Indian Evidence Act. The learned Counsel submitted that although there was no formal arrest of the appellant when the statement under Section 67 of the NDPS Act was recorded, he had been detained by the intelligence officers. Therefore, such a statement is inadmissible. He has relied on the judgment in the case of ***Nirmal Singh Pehlwan @ Nimma v. Inspector, Customs, Customs House, Punjab*** reported in ***(2012) 1 SCC (Cri) 555***.

19. In support of the argument that the statement recorded under Section 67 of the NDPS Act was voluntary in nature and that it should be accepted by the Court, the prosecution has relied on the judgment in the case of **Kanhaiyalal v. Union of India** reported in **(2008) 4 SCC 668**. The Bench of two learned Judges of the Supreme Court has observed after considering the provisions of Section 67 of the NDPS Act that an Officer-in-Charge of a police station under Section 53 is not a police officer within the provision of Section 25 of the Evidence Act. Therefore, a statement made under Section 67 of the NDPS Act is not the same as a statement made under Section 161 of the Cr.P.C. unless it is made under threat or coercion.

20. In **Nirmal Singh Pehlwan's** case (supra) the argument advanced on behalf of the appellant was based on an earlier decision of the Supreme Court in the case of **Noor Aga v. State of Punjab & Anr.** reported in **(2010) 3 SCC (Cri) 748** where the Supreme Court has held that a confession made by an accused to a customs officer who exercised police powers was hit by the embargo placed by Section 25 of the Evidence Act and therefore, not admissible. The Department had raised the same argument as is advanced by it in the present case that officers of the revenue intelligence of the Customs Department could not be said to be police officers *ipso facto* and, therefore, Section 25 of the Evidence Act would not be applicable. The Supreme Court has observed after discussing various judgments that the revenue officers or customs officers who have been empowered under Section 50 of the Act to conduct search

are police officers and therefore, any confessional statement made to them was not admissible under Section 25 of the Act.

21. It has been argued by the learned Counsel for the NCB that if indeed the statement of the appellant recorded under Section 67 was made under coercion, duress or threat this fact should have been put to the prosecution witnesses in cross-examination. Reliance has been placed by Mr, Ghosal on the judgment in the case of **A. E. G. Carapiet v. A. Y. Derderian** reported in **AIR 1961 Calcutta 359**. This was the case under the Succession Act where the Division Bench of this Court has observed that wherever an opponent has declined to avail of the opportunity to put his essential and material case to the plaintiff while cross-examining him, it must follow that he believed that the testimony given could not be disputed at all. There can be no quarrel with this proposition. The aforesaid case decided by the Calcutta High Court in a civil litigation would have no application in the present case. However, we are dealing with a criminal appeal involving a stringent law under which harsh punishment is meted out to the offender.

22. Section 67 of the NDPS Act empowers an officer referred to in Section 42 to call for information from any person to satisfy himself whether there has been any contravention of the provisions of the Act or rules framed thereunder, or require a person to produce any document or no useful and relevant for the inquiry or to examine any person acquainted with the facts and circumstances of the case. We have perused the statement and it is not mere information being provided to

the police officer. It is a confessional statement. Therefore, it would naturally be hit by Section 25 of the Evidence Act. Merely because this document had been exhibited without any objection by the Trial Court it would not necessarily mean that the document must be accepted at its face value. The so called confessional statement does not indicate that the appellant has been warned about the consequences of making such statement. He has not been informed of his rights under the NDPS Act. The statement does not disclose the same. It is true that the appellant was not arrested when he made the statement. But he was not free or at liberty to leave the NCB office. In his examination under section 313 Cr.P.C. the appellant has stated that his signature was taken on a white paper after he was beaten. Therefore, the learned Counsel is right in his submission that the statement is hit by Section 25 of the Evidence Act.

23. The learned Counsel has relied on the judgment in the case of ***Ritesh Chakravarty v. State of Madhya Pradesh*** reported in ***JT 2006 (12) Supreme Court 416*** in support of his submission that independent witnesses who were present when the seizure was made must be examined before the court. The Supreme Court has observed that when independent witnesses have not been examined, an adverse inference may be drawn as they are material witnesses. In the present case, there is no doubt that the seizure was carried out in the presence of Saral Das and Madan Roy. However, they have not been examined before the Court. There is no material on record to suggest that any efforts were made by the prosecution to produce them in Court as witnesses. Therefore, this casts a shadow of suspicion on the case of the prosecution.

24. In the case of ***Brijesh Kumar Gupta v. Narcotics Control Bureau*** reported in **2014 Cri.L.J. 4203**, the Delhi High Court has observed that presuming no public witness was present when the seizure was made, it would not render the seizure invalid. In the present case, the independent witnesses from the onlookers were made to sign the seizure list and the labels after the sample was drawn from the bag and sealed. However, no efforts were made by the prosecution to examine those witnesses. There is no document on record indicating that any application was made by the prosecution to issue summons to these witnesses. Therefore, reliance placed on the aforesaid judgment is of no avail to the prosecution.

25. Mr. Kazi Safiullah, the learned Counsel for the appellant, then submitted that in any event assuming of the aforesaid provisions of the NDPS Act do not apply the Trial Court had not considered the fact that the report of the Chemical Analyser indicated that the heroin contained in the 5 grams of brown powder which was sent for testing was only 31 per cent, less than the commercial quantity of heroin. A mathematical calculation would indicate that 31 per cent by weight would mean 155 grams of heroin as the seized powder weighed 500 grams. In the case of ***E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau*** reported in **(2008) 2 SCC (Cri) 558** the Supreme Court has referred to its previous judgements and has held that when a narcotic drug or psychotropic substance is found mixed with one or more neutral substances, it is the content of narcotic drug or psychotropic substance in

that substance which must be taken into consideration for imposition of punishment. This would be relevant for determining whether the accused was in possession of contraband which was a 'small quantity' or 'commercial quantity' as defined under the Act. The punishment would therefore be commensurate with the quantity seized. We have been informed that after the aforesaid decision, a notification was issued by the Government of India stipulating that the entire weight of the material seized must be considered while ascertaining whether the contraband was more or less than the commercial quantity. However this notification would not apply to the present case as it does not specify that it would operate retrospectively or in pending cases. Thus, it is evident that the Trial Court has lost sight of the judgment in the case of **E. Micheal Raj** (supra) which postulates that only the exact content of the narcotic or psychotropic substance in a seized quantity of material must be taken into account for imposing punishment.

26. The learned Counsel for the NCB referred to the judgments in the case of **State of Punjab v. Baldev Singh** reported in **AIR 1999 SC 2378**, **Subhas Chandra Jana v. Ajibar Mirdha** reported in **2011 Cri.L.J. 257** in support of his submission that the seizure made in the present case was not invalid. These judgments relate to a seizure made under Section 50 of the Act. They have no relevance in the facts of the present case as the seizure was allegedly made from a bag held by the appellant.

27. The learned Counsel for the NCB then submitted that even if there was any failure on the part of the investigation agency, the accused

cannot be acquitted due to any defects in the investigation. He has relied on the judgments of the Supreme Court in the case of ***Hema v. State, through Inspector of Police, Madras*** reported in ***2013 (1) Supreme 627, State of U. P. v. Hari Mohan & Ors.*** reported in ***AIR 2001 SC 142.***

28. These judgements do not aid the prosecution. The present case is a prosecution under the NDPS Act. Considering the object of the Act extremely stringent provisions are provided to control and regulate operations relating to narcotic drugs and psychotropic substances. The punishments specified in the Act are extremely harsh. Therefore the provisions of the Act must be strictly adhered to. There cannot be substantive compliance with regard to the provisions of search and seizure. Defects in these procedures cannot be overlooked or brushed aside.

29. On appreciating the evidence in the present case, without considering the contents of the statement made under section 67, we find that the appellant was obviously a carrier of the contraband. The 'small quantity' which is stipulated under the Act is 5 grams while the commercial quantity is 250 grams. The appellant was found to be in possession of 31% by weight of heroin which is more than the small quantity but less than the commercial quantity. Thus the appellant has not committed an offence which is punishable under section 21(c) of the NDPS Act but under 21(b) of the Act. Although the seizure has not been effected beyond reproach the non-examination of the seizure witnesses

cannot lead to the appellants acquittal. However the appellant has been in custody since 6<sup>th</sup> September 2006. Considering the amount of heroin seized from his possession we are of the opinion that the jail term undergone by him so far of eight years of rigorous imprisonment is sufficient. The fine payable by him is reduced to ₹ 20,000 and in default of payment of such fine the appellant shall undergo simple imprisonment of six months.

30. The appeal is partly allowed accordingly.

31. Urgent certified photocopies of this judgment, if applied for, be given to the learned Advocates for the parties upon compliance of all formalities.

**(Samapti Chatterjee, J.)**

**(Nishita Mhatre, J.)**