

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

PRESENT:

**The Hon'ble Justice Nishita Mhatre
And
The Hon'ble Justice Tapash Mookherjee**

CRA 204 of 2010

with

CRAN 3261 of 2013

with

CRAN 964 of 2014

Sumer Agarwal @ Bikash

vs.

Union of India.

For the Appellant : *Mr. Pratik Kumar Bhattacharyya.*

For the Union of India : *Mr. B.R. Ghosal,
Mr. Sanjoy Bardhan.*

Heard on : 21.03.2014, 28.03.2014 & 08.05.2014.

Judgment on : 18.06.2014

Nishita Mhatre, J.:

1. The appeal is directed against the decision of the Special Court under the Narcotic Drugs and Psychotropic Substances Act, Murshidabad in NDPS Case No.29 of 2006. The appellant who was accused no.1 before the Special Court has been convicted under Section 21(c) of the NDPS Act. He has been sentenced to suffer rigorous imprisonment for 14 years and to pay a fine of Rs.1,50,000/- and in default of such payment of fine to suffer rigorous imprisonment for further period of six months.

2. The case of the prosecution in brief is that on obtaining specific information from a source regarding the appellant being in possession of narcotics, a group of officers and staff of the Narcotics Control Bureau, Eastern Zonal Unit, Kolkata (for short NCB) reached Lalgola, Marwari Patti. The informer identified the appellant who was then intercepted by the officers outside Arup Studio. The appellant was carrying a multi-coloured nylon bag in his right hand. The officers encircled him and disclosed their identity. The multi-coloured nylon bag was then searched by the officers as they had specific information that the narcotic substance would be carried in a bag by the appellant. A sample of the contents of the bag was tested on the spot and it was found that the brown coloured powder which was in the bag was heroin. The search resulted in a seizure of 2 kilograms of heroin from the appellant.

3. According to the prosecution, two independent witnesses were present when the seizure took place. Two polythene packets, containing 5 grams each of the substance recovered, were sealed and labelled and signed by the owner of the goods, the seizing officer and independent witnesses. These packets were then kept in a separate cloth envelope which was also sealed and labelled and signed again by all these persons. The remaining quantity of the heroin recovered and the used nylon bag were sealed and labelled and signed by all the aforesaid persons. A copy of the seizure report was furnished to the appellant. It is the case of the prosecution that the appellant was immediately served a notice under Section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985

(for short NDPS Act) to appear before the Intelligence Officer, Narcotics Control Bureau, Kolkata on 27th August, 2006 at 8:00 p.m. for further interrogation and investigation. According to the prosecution, the appellant then met the Intelligence Officer at 8:00 p.m. in Kolkata and furnished a voluntary statement, admitting his guilt. The appellant was then arrested on the same night at approximately 11:23 p.m. The charge was framed on 22nd May, 2007 against the appellant and one Samirul Seikh @ Babu who the appellant had named in the alleged confessional statement. The prosecution has relied on the evidence of the six Intelligence Officers, that is the complainant and those who had intercepted the appellant in Lalgola. No other witnesses were examined by the prosecution.

4. The P.W.1 is an intelligence officer of the NCB who has lodged the complaint before the Special Court on the basis of the record made available to him. He has stated that he filed the complaint only on the basis of the material placed before him and that he had no knowledge about the case prior to the filing of the complaint.

5. The P.W.2 is an Intelligence Officer of the NCB who was involved in the interception of the appellant. According to him, he was a member of the NCB team consisting of 4 other Intelligence Officers who have been named as prosecution witnesses in this case. He has stated in his deposition that he along with two other officers recorded the secret information received from their source. The information was that the

appellant would wait at Marwari Patti, Lalgola on 27th August, 2006 at about 12:30 p.m. with a large quantity of heroin. This information was recorded by P.W.2 in his own writing and sent to the Zonal Director, NCB, Kolkata. He has spoken about P.W.3 having weighed the substance which was seized and preparing a seizure list. The P.W.2 has claimed that he has present at the time of search and seizure. According to him, the appellant accompanied them to the Kolkata Office of the NCB where he made a statement under Section 67 of the NDPS Act. The witness has conceded that he was present when the appellant's statement was recorded by S.D. Sinha who has been examined as P.W.6. The witness has denied the suggestion of the defence that the statement was obtained by coercion. He has also denied the suggestion that the appellant did not know Bengali, despite which the confessional statement has been recorded in Bengali.

6. The P.W.3 is the investigating officer. He was present when the appellant was searched. He claims that on 26th August, 2006 P.W.2 received information which he shared with him and P.W.5 that the appellant would be in possession of heroin at a particular place. He has stated that the Zonal Director was informed about this information over the telephone after which the latter permitted them to act on the information. According to him, this information was also noted in the prescribed form by P.W.2 and was counter-signed by him. The witness has stated that the Intelligence Officers left Kolkata for Lalgola on 27th August, 2006 on 3:00 a.m. and reached there at noon. After contacting

the informer, they went to Marwari Patti at 12:45 p.m. They saw the appellant with a bag in his right hand when they stopped their vehicle outside Arup Studio. This witness claimed that the appellant was surrounded by the Intelligence Officers who disclosed their identity to him. The witness has stated that two persons were called from amongst many people who had assembled there to witness the search and the seizure. According to this witness the appellant did not insist on being searched in the presence of a Gazetted Officer or Magistrate, although he was made aware of this right. P.W.3 has stated that the polythene bag which the appellant produced from the multi-coloured nylon bag that he was carrying contained a brown coloured powdered substance. He conducted a field test of the powder and the presence of heroin was established. The appellant was unable to produce any valid document entitling him to be in possession of heroin. The witness has spoken about the samples of 5 grams each of the powder being drawn from the packet and being sealed and kept in a separate envelope. He has stated that all these procedures were completed between 1:00 p.m. and 2:00 p.m. He has mentioned that Swarup Roy, the owner of the shop in front of which the recovery was made, was interrogated. P.W.5 served notices under Section 67 of the NDPS Act to both the appellant as well as Swarup Roy. According to this witness, he arrested the appellant at 11:23 p.m. on 27th August, 2006 in the NCB office. The witness has also mentioned that he sent the samples of the substance recovered to the chemical analyser. In his cross-examination, the witness has conceded that the place of occurrence was within the commercial and residential

area of Lalgola Marwari Patti. He has admitted that he did not interrogate Swarup Roy, the owner of Arup Studio. According to him, Swarup Roy was released after his statement was recorded by another officer. The witness has also admitted that the search and seizure was conducted in the presence of Swarup Roy. He has further conceded that no statement of the seizure witness Debu Roy and Milan Sk. was recorded under Section 67.

7. P.W.4 is an Intelligence officer, who was also present in the team which apprehended the appellant on 27th August, 2006. He has corroborated the evidence of the other witnesses regarding the search and seizure. In his cross-examination, he has admitted that though the appellant was intercepted at Lalgola Marwari Patti, he was not arrested there. This witness has admitted that he had no knowledge about the secret information and that the team had no authorisation letter for undertaking the search. He has also agreed that no permission of any Magistrate was obtained for searching or arresting the appellant, despite the availability of a Magistrate Court at Lalbag which is near Lalgola.

8. The next witness examined as P.W.5 was in the team which conducted the raid at Marwari Patti, Lalgola. He has repeated the statements made by the other witnesses regarding the information received, search and seizure. The witness in his cross-examination has stated that he had asked the appellant to be present at 8:00 p.m. on 27th August, 2006 in the NCB Office at Kolkata. He has admitted that he did

not record the attendance of the appellant although the appellant was present as directed. The witness claims to have issued the notice under Section 67 to the appellant. He has, however, admitted that he has not mentioned the place at which the notice was served on the appellant in the case diary. The witness claims that the case diary had the voluntary statement of Swarup Roy. He has conceded that although he served the notice under Section 67 to the appellant, the time has not been mentioned in the notice. He has also admitted that despite the fact that a crowd of onlookers was present when the seizure was made none of them was either given notice under Section 67 nor was their statement recorded.

9. The last witness examined by the prosecution is the P.W.6 who claims to have recorded the statement of the appellant under Section 67 of the NDPS Act. In his examination-in-chief he has repeated the statements of the other witnesses regarding the search and seizure. He has then stated that after the notice under Section 67 of the NDPS Act was issued on the appellant, he accompanied the officers to the NCB Office, Kolkata. A voluntary statement of the appellant was recorded by this witness in the presence of the P.W.2. The statement has been marked as Exhibit 3 before the Special Court. According to this witness, he wrote the statement as dictated by the appellant because the appellant was unable to write for himself. He has further stated the statement was explained to the appellant in '*understandable language*'. In his cross-examination, he has contradicted himself by stating that he

did not know the reason for which the appellant requested him to record his statement. According to this witness, the appellant was arrested at Marwari Patti when it was found that the seized goods were contraband. The witness then volunteered that the appellant was detained till he was arrested. He has accepted that he did not ascertain whether the appellant knew the language in which his statement was recorded.

10. In his examination under Section 313 of the Cr.P.C., the appellant has denied the charges levelled against him. He has stated that he was sitting in his father's shop and that no material was recovered from his possession. He has further stated that some persons in plain clothes called him from his father's shop and whisked him to Kolkata where they tortured him and compelled him to sign on some papers.

11. Mr. Bhattacharyya, the learned Counsel appearing for the appellant has raised the following issues, namely:-

- i) The entire action of the prosecution is vitiated because the provisions of Section 50 of the NDPS Act had not been followed;
- ii) No independent witnesses were examined at the trial;
- iii) The seizure report was not proved by examining the seizure witnesses;
- iv) The provisions of Section 53 and consequently of Section 55 of the NDPS Act have not been complied; and

- v) The purported confessional statement was not made voluntarily and, in fact, had been retracted by the appellant.

12. The learned Counsel has placed reliance on the judgments in the case of ***The Assistant Director of Narcotics Control Bureau Eastern Zonal Unit, Calcutta v. Dipak Poddar*** reported in **2008(2) CLJ (Cal) 523**, ***Bir Singh & ors. v. The State of Uttar Pradesh*** reported in **AIR 1978 SC 59** and ***Sans Pal Singh v. State of Delhi*** reported in **AIR 1999 SC 49** to fortify his submissions.

13. Section 50 of the NDPS Act mandates that when a person is to be searched by an officer duly authorised under Section 42 of the Act, the search must be carried out in the presence of a Gazetted Officer of the Central Excise, Narcotics, Customs, Revenue Intelligence or any other departments of the Central Government including para-military forces or armed forces as empowered in that behalf or by nearest Magistrate. This section need not be complied with when it is not the person who is to be searched but any object that the suspect may be carrying. In the case of ***State of Haryana v. Suresh*** reported in **AIR 2007 SC 2245**, ***Ram Swaroop v. State (Govt. NCT) of Delhi*** reported in **2013 (4) Supreme 328**, ***Narayanaswamy Ravishankar v. Asst. Director, Directorate of Revenue Intelligence*** reported in **2003 Criminal Law Journal 27**, it has been held that the provisions of Section 50 of the NDPS Act are mandatory. However, they would be applicable only when the search is

carried out of an individual and not of any bag, brief case or any article container, etc.

14. The Constitution Bench in ***State of Punjab v. Balbir Singh*** reported in **1994 C Cr. LR (SC) 121** has observed in Para 12.

"12. On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted."

15. In the present case, the information received by the Narcotics Control Bureau was that the appellant would be carrying a polythene bag containing heroin. There was no need for a search to be conducted in the presence of a Gazetted Officer or Magistrate.

16. The submission of the learned Counsel for the appellant that Section 52(3) has been violated as the local police station had not been informed is also unacceptable. In the case of ***State of Punjab (supra)***, it

has been held that an Officer empowered to effect the search or arrest without a warrant as provided under Sections 41 & 42(1) of the NDPS Act has to carry out the search in accordance with Section 165 Cr.P.C. However, if he does not record reasons for such a failure, it will amount to an illegality, vitiating the trial. However, the failure must be kept in view while appreciating the evidence on record.

17. After perusing the evidence on record, we find that there is no independent witness who has been examined by the prosecution. Two witnesses were present when the search and seizure were made. They have signed the seizure report. However, they have not been examined before the Special Court. It appears from the record that the summonses were sought to be served on these two individuals and were returned unserved. Thus, it is difficult to accept the contention of the prosecution that the search and seizure were genuine and were caused in accordance with law. The procedures were purportedly initiated in the presence of an independent witness. It is difficult to believe that the prosecution was unable to secure the presence of these independent witnesses before the Special Court after the summonses were returned unserved. Apart from this, the evidence on record indicates that a large crowd had gathered when the search was being conducted. However, the prosecution has not examined any of these onlookers in support of its case. This leads to some suspicion about the legitimacy of the case of the prosecution. In the case of **Dipak Poddar** (*supra*), the Division Bench of this Court had criticised the prosecution for not examining two independent witnesses

who according to the prosecution were present at the time of interception of the suspect as also during the entire search, seizure and other formalities conducted by the Officers of the NCB on the spot.

18. Reliance has been placed by the learned Counsel for the prosecution on the judgment of this Court in the case of ***Subhas Chandra Jana v. Ajibar Mirdha*** reported in ***2011 Criminal Law Journal 257***. The Court has held that an adverse inference cannot be drawn merely because of the non-examination of the seizure witnesses when the case has been proved by other reliable evidence. This judgment has no application in the present case as the evidence on which the prosecution has relied on is of the Intelligence Officers or members of the raiding team. From their evidence, it is apparent that each of the witnesses has parroted the testimony of P.W.2 in an attempt to build a watertight case against the appellant. However, all of them have referred more specifically to the confessional statement made by the appellant in order to lend credence to their testimony.

19. We have perused this alleged confessional statement which has been translated from Bengali into English for the benefit of this Court. This statement has been purportedly recorded under Section 67 of the NDPS Act. It is manifest that the statement is not one which the appellant could have dictated to the P.W.6 who claims to have recorded the statement as per dictation of the appellant. The statement is couched with legalese which no lay person would be aware of. It has been

recorded, as is apparent from the testimonies of P.W.2 and P.W.6, in the presence of P.W.2. It is not clear as to why it was necessary for two Intelligence Officers to be present when the statement was being recorded. It is evident from this supposed confessional statement that it is the creation of the Intelligence Officers rather than being authored by the appellant. It is impossible to believe that a person would comment on the conduct of the officers in his confessional statement by mentioning "*the officers behaved nicely with me in the office*". The recording of the statement commenced at 9pm and finished at 11pm on 27th August, 2006. It is highly improbable that a suspect would give such a certificate to the Intelligence Officers who had allegedly searched and seized heroin from him. Moreover, this statement contains great details about the manner in which the search was conducted, the seizure was made, and the manner in which the samples were drawn for chemical analysis and the labelling was carried out. This statement, ostensibly recorded under Section 67 of the NDPS Act cannot be considered to be that of the appellant. In his examination under Section 313 of the Cr.P.C., the appellant has stated that he was forced to sign blank papers by the Intelligence Officers after he was tortured.

20. Another aspect of the matter to be noted is that all the prosecution witnesses have stated that the appellant was allegedly carrying a bag containing a brown powder. However, the report of the chemical analyser indicates that the sample which was received by the laboratory in a polypack packet was in the form of a dark brown coloured pasty material

which responded positively to the test for heroin (diacetyl morphine). There is no explanation as to how the powder which was seized transformed into a pasty substance.

21. A significant feature of this case is that although Swarup Roy, the owner of Arup Studio, had accompanied the Intelligence Officers to Kolkata, after he was issued a notice under Section 67 of the Act he was not examined as a witness in this case. There is no explanation as to why he was not cited as a witness when he could have been examined as an independent witness in order to lend credence to the case of the prosecution. It is true that there is no absolute rule that police officers cannot be cited as witness in a case or that their depositions should be treated with suspicion as held in **Ram Swaroop** (supra). However, the testimony of the Intelligence Officers who have been examined in this case has to be treated with circumspection. Their evidence does not inspire confidence. As mentioned earlier, each of them has recounted the prosecution's version of the incident by rote. The narrative is far from plausible.

22. Considering all the material on record, in our opinion, the prosecution has failed to prove to the hilt that the appellant is guilty of the offence for which he is charged. In his examination under Section 313, while denying the charges the appellant has stated that he was sitting inside his father's shop when he was called out by the Intelligence Officers and whisked away to Kolkata.

23. In our opinion, therefore, the prosecution has failed to establish its case. The appellant is, therefore, acquitted. The judgment of the Special Court is set aside.

24. The appellant shall be set at liberty forthwith unless required for any other case.

25. The seized alamats to be destroyed in accordance with law.

26. In view of the appeal being allowed, the applications being number CRAN 3261 of 2013 and CRAN 964 of 2014 are infructuous and are dismissed as such.

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

(Tapash Mookherjee, J.)

(Nishita Mhatre, J.)