

Form No.J(1)

**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**

**C.R.A 601 of 2011**

**Mainul Haque & Another .....Appellants  
Versus  
The Union of India represented  
By Narcotics Control Bureau and  
The State of West Bengal.....Respondent**

For the Appellants : Mr. P.S. Bhattacharya  
Ms. Sukla Das Chandra

For the N.C.B./State : Mr. Tushar Kanti Mukherjee  
Heard on : 19.09.2014, 22.09.2014  
Judgment on : 7<sup>th</sup> day of November, 2014.

**Samapti Chatterjee, J.**

1. The instant appeal is directed against the Judgment and Order of conviction passed in N.D.P.S. Case No.70 of 2007 by the learned Judge Special Court under N.D.P.S. Act, Murshidabad at Berhampore on 23<sup>rd</sup> September, 2011 convicting the appellants under Section 21 ( c ) of the N.D.P.S. Act. They are also sentenced to suffer Rigorous

Imprisonment for 10 (ten) years each and to pay a fine of Rs.1,00,000/- (one lakh) each in default to suffer further Rigorous Imprisonment for one year each.

2. Put in a short frame, the prosecution case is as follows:-

On 31.08.2007 at about 6:00 hours the team of N.C.B. , Eastern Zonal Unit moved towards Paharpur Ghoshpara area and ambushed on Lalgola-Jangipur Road which is about two kilometers from the New Bus Stand, Lalgola. At about 8:30 hours as per the indication of informer the said team intercepted two persons who were coming from Lalgola side on foot. on interception the Officer disclosed their identity as Officers of N.C.B. , Eastern Zonal Unit, Kolkata. The Officers further revealed the intention to search their person as they had information that they were carrying good quantity of heroin with them. On asking the aforesaid persons they disclosed their names as Mainul Haque and Jamirul Sk. Both the accused persons voluntarily took out one packet each from inside their underwears which were kept secreted at pubis of both the them. A small quantity of recovered brown coloured substance believed to be heroin (from both the packets) was tested by the field test-kit and which responded positive to the test of heroin. Both the recovered packets were weighed separately and it was found 500 gms (gross) each, in total it is 1000 (gms). Thereafter , police arrested the appellants /accused persons and after completion of investigation the Intelligence Officer of N.C.B. filed the complaint on 22.02.2008 in final form against

the accused persons. Charge was framed against both the accused persons namely 1. Mainul Haque and 2. Jamirul Sk @ Jamirul Haque under Section 21 ( c ) read with Section 29 the N.D.P.S. Act. Accordingly trial started and after completion of trial learned Judge, Special Court under N.D.P.S. Act held the appellants guilty and convicted them as aforesaid.

3. P.W.1 is the Intelligence Officer at Narcotics Control Bureau who was the informer/complainant. In his evidence he stated that the petition of complaint was lodged exclusively on the basis of documentary evidence on the instructions of the Zonal Director, N.C.B, Eastern Region. He agreed that contraband articles were not in the Court room. He also stated that he could not say in which godown they were kept. He further deposed that he could not say the date and time when the alleged contraband articles were kept in the godown before filing petition of complaint. He deposed that name of the gazetted officer who was allegedly present at the time of incident was not mentioned in the petition of complaint. He had no personal knowledge about the case.

4. P.W.2, Officer of the N.C.B. Kolkata. He in his evidence stated that on 29<sup>th</sup> August 2007 they got information and Monotosh Sarkar recorded that information. They, four persons, were present there including him namely P.W.2 Monotosh Sarkar, Rajib Kumar and G. Jana. All of them signed on the information writing on 20.08.2007. In

the morning they started for Berhampore to Kolkata to work out the information. On 30<sup>th</sup> August, 2007 they stayed at Berhampore in the night and the morning on 31<sup>st</sup> August , 2007 at about 6 a.m, they started for their camp office at Berhampore. D.K. Ghosh Superintendent, P.W.2 Monotosh Sarkar, Rajib Kumar, Ganesh Jana and one sepoy Biswas and one lady sepoy Kalpona Ghosh and other were in that raiding team. They proceeded towards Lalgola. Thereafter they came to Ghoshpara at a distance of 2 k.m. from Lalgola. At about 8 a.m. in the morning they arrived on the spot. Their informer communicated them that 2 persons were coming with heroin. Then they encircled those two persons and they asked their name. The said two persons stated that their names as Mainul Haque and Jamirul Sk. The raiding team disclosed them that they are coming from N.C.B office and they had information that they were carrying huge quantity of heroine in their possession and so they wanted to search them. Thereafter, P.W.2, informed the accused persons in writing that they had right to search in presence of a Magistrate or a gazetted officer. They also informed them (accused persons) that they had no gazetted officer with them and if the accused persons would like they could be searched in his presence. Thereafter at the instance of the accused persons the P.W.2 wrote letter of acceptance for appellant no.2 Jamirul Sk. and P.W.6 wrote letter of acceptance for appellant no.1 accused Moinul Haque. (Exbt.2 and Exbt.3) and offer letters are Exbt.4 and Exbt.5. Some persons gathered there. Two of them were called by the P.W.1 as witnesses for search.

Thereafter accused Jamirul brought out a packet of heroin containing 500 gms of heroin from his underwear as he was wearing a pant at that time and other accused Mainul was wearing Loongi and he brought out a packet weighting 500 gms heroin from underwear. Those two packets were taken by them and those were tested by the P.W.2 by taking some small quantity from the packets. Test result shown positive. Rest articles were taken in other two packets in paper envelop. Those were 4 sample packets marked as Mat. Exbt.I series and mother packet marked as Mat. Exbt.II. Thereafter Rajib Kumar gave a notice to the accused persons under Section 67 of the N.D.P.S. Act and asked the accused persons to accompany them to Berhampore camp office. They took the accused persons in their vehicle at Berhampore. There they were examined and they gave statements. The P.W.2 further stated that accused persons informed them that they could not write properly so at the request of Jamirul Sk. P.W.1 recorded his statement in verbatim way. Thereafter he put his signature in each and other page marked Exbt.6. Monotosh Sarkar recorded the statement of other accused person. They gave their statements voluntarily and not under pressure, compulsion and they admitted their guilt. Thereafter Monotosh Sarkar prepared arrest memo. The accused persons told that they got the articles from Najai Mondal of Kharer Mathpara, Nadia. On that date they produced them in Court after arrest. In his cross examination P.W.2 stated that he did not put his signature on the sample packet and mother packet. The source information paper was also not in Court record. He also stated

that he and other officers in the raiding team did not prepare any sketch map of the place of occurrence. He also admitted that they did not go to any respectable person of that locale to request them to become witness. He further stated that at the scene of occurrence the accused persons did not try to flee away. At about 12 noon he started to write down voluntary statement of the accused persons. Though their camp at Berhampore was situated in dense locality but he did not call for any private person there to become witness. The accused persons told that their handwriting was illegible and they could not write properly. The accused persons told them to write their statement. He further stated that no separate inventory was made. He did not seize the undergarments of the accused persons. He further deposed that voluntary statement of the accused persons did not show that their Superintendent gave him permission to write down the voluntary statement. He further deposed that there was no admission of the accused persons regarding the contents of the voluntary statements and no time was mentioned in the voluntary statement.

5. P.W.3 is the gazetted officer of NCB who accompanied the raiding team. He deposed that he could not identify the accused persons. He further stated that the accused persons told them that they have no heroin with them but on interrogation the accused persons took out one packet each which were kept concealed in their undergarments. He further stated in his cross examination that he could not say what

was the conversation between the team members and the accused persons before his arrival there. He also could not say who formed the alleged raiding team and that he was not the leader of the raiding team. He just accompanied them as gazetted officer. He did not recover any fire arm, bomb, cash money and illegal instrument from the accused persons. He further deposed that he did not explain the accused persons regarding the notice under Section 67 of the said Act.

6. P.W.4, is a member of the raiding party and officer of NCB. He gave written option to the accused persons whether they would like to be searched in presence of Magistrate or other officers. The accused persons gave written reply that they would like to be searched in presence of gazetted officer who was with them. He further deposed that he did not personally search the accused persons. He further stated that he did not ask the accused persons to go to their house and to come back on 31<sup>st</sup> August, 2007 at their office. They did not leave the accused persons at the scene of offence.

7. P.W.5, is an officer of the N.C.B and member of the raiding party. He stated in his evidence that on 31<sup>st</sup> August 2007 they moved towards Lalgola and on the way Lalgola to Jangipur near Paharpur, Ghoshpapra. At about 8:30 hours one indication was given by the informer, then the team encircled the two accused persons who were coming from Lalgola side towards Jangipur on foot. They were carrying

the good quantity of heroin. In presence of independent witnesses the officers asked the accused persons that they want to search the accused persons personally and they had the liberty to search in front of a gazetted officer or a Magistrate if they wish to. In that regard the raiding team gave in writing option to both the accused persons. Both the accused persons stated that they need not be searched in front of any gazetted officer or Magistrate and if required the officers who were present there they can search them. Both the accused persons gave in writing that they need not be searched in front of the gazetted officer or Magistrate. After that they voluntarily took out two packets of brown coloured powder substance believed to be heroin, one packet each, which was hidden at the back portion of their undergarments. Thereafter the accused persons were given notice under Section 67 of the N.D.P.S. Act and were asked to be present in front of NCB Officers camp at Berhampore. There the officers recorded the voluntary statements of the accused persons in front of NCB Officers and then they were arrested as per N.D.P.S Act under Section 43 and produced before the learned Court along with the seized articles. He further deposed that he could not say their age. He personally did not see the result of testing of the goods. When the P.W.5 went there he did not see those two accused persons who were coming from south to north.

8. P.W.6 is an Officer of the NCB and one of the members of the raiding team. He stated in his evidence that at the scene of offence they

called two independent witnesses and cited them in seizure list as witnesses. They also offered written options to the accused persons that they have their right to get them searched in presence of Executive Magistrate or any gazetted officer. But in writing the accused persons declined to be searched by the Executive Magistrate or any gazetted officer. On the other hand in writing they allowed the raiding party to search them bodily. Thereafter the accused persons brought two polythene packets which were kept in their undergarments and those polythene packets were transparent containing brown coloured power substance believed to be heroin. Thereafter Rajib Kumar one of the members of the raiding party served notice under Section 67 of the NDPS Act to the accused persons asking them to appear NCB Camp Office at Berhampore and the accused persons came to the camp office in their vehicle and after reaching there the accused persons made statement voluntarily and the P.W.6 recorded the statement of Mainul and Arup Pal (P.W.2) recorded the statement of Jamirul Sk. The accused persons told them that they are illiterate and they could not read and write. P.W.6 further stated that he did not ask any adjacent house owners, shop keepers to be a witness to the act of search and seizure. The accused persons in writing refused to be searched by learned Executive Magistrate or any gazetted officer. They in writing stated that the officers are sufficient to search them. Mr. D.K. Ghosh, Superintendent of NCB supervised the entire process of search and he led the raiding party all through and he allotted the duty of the members of the raiding team. He

did not seize any undergarments of the accused persons. He further deposed that knowing fully well the offence was cognizable offence in spite of that they did not arrest them immediately for the sake of investigation as it was not completed. He further deposed that accused persons voluntarily handed over the contraband articles to them.

9. P.W.7, is one of the independent witnesses who stated that he was returning home from Cebhaga Hat and when he reached near the petrol pump at that time some persons got down from a vehicle and asked him to sign on a paper and he had put his signature accordingly. From that place Paharpur Ghoshpara was at a distance of about 1 km. He further deposed that the papers were blank when he put his signature. Besides putting his signature he did not know anything else.

10. Mr. P.S. Bhattacharyya, learned Advocate appearing for the appellants submitted that offer letter (Exbt.2), acceptance letter (Exbt.3) also written by the P.W.2, Arup Kumar Pal without mentioning any time. The alleged voluntarily statement of the accused persons under Section 67 were submitted at the NCB Camp but no time was mentioned there.

11. He further contended that after seizure of heroin where those sample packet and mother packet were kept was also not mentioned. No sketch map of the place of occurrence was prepared by the NCB.

He further contended that Section 52(1) and Section 52 (A) (1) (2) were not complied with by the NCB. The Officer was not aware for what purpose investigation was made.

He further contended that the whole case was based on non-compliance of Section 50 of the NDPS Act as the appellants were not personally searched in presence of Magistrate or any gazetted officer which is mandatory as per Section 50 of the said Act.

He further contended that it cannot be accepted that the appellants voluntarily handed over the heroin to the raiding team and they voluntarily accepted that they could be searched by the officers of the raiding team.

He further contended that the appellants were not taken to the nearest police station from the scene of offence.

Mr. Bhattacharyya further pointed out that the letter of offer, acceptance and also the statement under Section 67 of the said Act all were written by Arup Kumar Pal (P.W.2) for accused Jamirul Sk. Furthermore, on those documents no time was mentioned. No time was recorded in offer letter, acceptance letter and also in the statement under Section 67 of the said Act only date was mentioned.

He further pointed out that after recording alleged statement under Section 67 of the said act the appellants were arrested at 2 P.M.

Mr. Bhattacharyya further contended that it transpires from the questions put under Section 313 Cr.P.C examination the accused stated

that they were asked to sign on a blank paper and they never gave consent that they should be searched by the officer of the raiding team.

12. Mr. Bhattacharyya further contended that the alleged letter of offer, acceptance and statement under Section 67 were all written by the P.W.2 in respect of accused Jamirul Sk and P.W.6 in respect of Mainul Haque and those were not read over to the accused persons and the accused persons had no idea as to what were written by the officers in those letters and as well as the statement under Section 67 of the NDPS Act. In support of his contention Mr. Bhattacharyya relied on a Full Bench decision reported in **2000 CWN Page 373 Para 27, 47 and 57 (Jadunandan Roy Vs State of West Bengal and Others)** where it is held interalia that compliance of Section 50 of the NDPS Act is mandatory. He also relied on a Division bench Judgment of this Court reported in **(2005) 2 CLT LT 262 (HC) (Harun Rasid Vs State of West Bengal & Another) (2007) 1 SCC 450 (Dilip and Another Vs State of M.P.)**.

Mr. Bhattacharyya also relied on a Supreme Court decision reported in **(2009) 12 SCC Page 161 Para-24 (Union of India Vs. Bal Mukund and Others)** where it is held that :-

***“Para-24- The situation in which such purported statements have been made cannot also be lost sight of. The purported raid was conducted early in the morning. A large number of police officers including high ranking officers were present. Search and seizure had been effected. According to the prosecution, each of Respondents 1 and 2 were found to be in possession of 10 kg of***

***narcotics. No information was sought for from them. It is doubtful whether they had made such statements on the road itself. Exhibits 20 and 21 categorically show that they were interrogated. If they were interrogated while they were in custody, it cannot be said that they had made a voluntary statement which satisfies the conditions precedent laid down under Section 67 of the Act.”***

13. He also relied on another Supreme Court decision reported in **(2011) 2 SCC Page 207 (State of Delhi vs. Ram Avtar @ Rama)** and also one Division Bench Judgment of our High Court reported in **(2014) 2 C. Cr. LR (Cal) Page 515 (Sumer Agarwal @ Bikash vs. Union of India)** where it is held inter alia that if option is given that should be clear and without any ambiguities. Safeguard granted under the statute cannot be treated as a formality but should be done very carefully by the authority which in the present case is missing. But in this Judgment we find no manner of application there.

14. Mr. Tushar Kanti Mukherjee on the other hand appearing for the Narcotics Control Bureau submits that no search of the accused was conducted by the NCB. Accused voluntarily submitted the articles. It is evident from the evidence of P.W.3 that on interrogation the accused handed over the articles to the police personnel.

He further submitted that both the accused persons were identified by the witnesses.

15. It is also submitted by Mr. Tushar Kanti Mukherjee that unless the persons were bodily searched Section 50 does not apply. In

support of his contention Mr. Mukherjee relied on a Supreme Court decision reported in **(2002) C. Cr. LR (SC) Page-597 (Khet Singh Vs. Union of India) and (2005) 2 C. Cr. LR (SC) Page-41 (State of Himachal Pradesh Vs. Pawan Kumar)** . In the present case the accused persons were not searched personally. They voluntarily handed over the articles.

16. It is also submitted by Mr. Mukherjee that the statement under Section 313 Cr.P.C should not be relied upon by the Court as it is not done after taking oath. In support of his submission he relied on a judgment reported in **2011 CRI. L.J. Page 2047 Para-19 (P. Muthunachi Vs State )** .

17. Mr. Mukherjee further submitted that prosecution case should not fail on the ground that independent witnesses were not produced. In the present case one independent witness was present though the other was not present. In support of his contention Mr. Mukherjee relied on a judgment reported in **2011 CRI. L. J Page 257 Para 9 (Subhas Chandra Jana Vs Ajibar Mirdha)**.

18. Mr. Mukherjee further submitted that voluntarily statement made by the accused if not taken under threat or pressure that should be considered and recorded by the Court. In support of his submission he relied on a Supreme Court decision reported in **1999 Supreme Court Cases (Cri) Page 1051 (Pon Adithan Vs Deputy Director, NCB, Madras)**.

19. On a close and critical analysis of the evidence both oral as well as documentary with meticulous care we find that Section 67 of the Narcotics Act was not properly followed. The statement of accused Jamirul Sk under Section 67 was written by the NCB Officer, the P.W.2 namely Arup Kumar Pal and the Statement of accused Mainul Haque under Section 67 was written by the NCB Officer PW6, namely Manotosh Sarkar. In the statement under Section 67 of the said Act only date was mentioned and no time was recorded.

20. It is crystal clear that the offer letter and acceptance letter of the accused persons were written by the raiding officer. Thereafter search took place. Therefore, compliance of Section 50 is very much required. It cannot be accepted that the accused voluntarily handed over the heroin. Therefore as per Section 50 of the NDPS Act it is mandatory 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 Exise, 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. There are catena of Hon'ble Supreme Court Judgments where 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 individual.

21. The submission of Mr. Tushar Kanti Mukherjee that a Gazetted Officer or a Magistrate was not required to be present when the

appellants were searched because they voluntarily produced the contraband, is untenable. When the raiding party set out to intercept the appellants and to seize the heroin on the receipt of the information, the officers could not have been aware that the appellants would voluntarily produce the heroin from their possession. Obviously therefore, the search was required to be conducted in accordance with Section 50 of the NDPS Act. A Gazetted Officer or a Magistrate should have been present. P.W.3, a Gazetted Officer of the NCB, accompanied the raiding team. But his presence would not be in compliance of Section 50 of the Act. In the case of ***State of Rajasthan v. Paramanand*** reported in ***(2014) 5 SCC 345***. The communication of the right of a person who is about to be searched under Section 50 of the NDPS Act is not an empty formality. Moreover, the mere presence of a Gazetted Officer in the raiding party would not be sufficient compliance of Section 50 of the Act. The provision under Section 50 of the Act, mandating the presence of either a Gazetted Officer or Magistrate when a body search is conducted, has been incorporated in order to ensure that an independent Gazetted Officer or Magistrate is available so that the raid, the search and the seizure are done in a completely transparent manner and to avoid the possibility of false implication. The evidence on record establishes that there is a breach of Section 50 of the Act in this case.

22. We further find that there were two independent witnesses but only one was examined and other was not examined by the prosecution.

But the P.W.7 in his evidence stated that the papers were blank when he put his signature. Besides putting his signature he did not know anything else. Thus, it is difficult to accept the contention of the prosecution that the search and seizure were genuine and were done in accordance with law.

23. It is found from the evidence of P.W.2 that he did not put his signature on the sample packet and mother packet. The source of information paper was also not lying in the Court record. It is also evident from the evidence of P.W.2 that he and the other officer of the raiding team did not prepare any sketch map of the place of occurrence. It was submitted by the P.W.2 that voluntarily statement of the accused was written by the P.W.2. No admission was made by the accused person regarding contents of the voluntary statement. It is submitted by the P.W.3 in his evidence that the accused were not explained regarding notice under Section 67 of the said Act.

24. It is also apparent that each of the witnesses has adopted the testimony of P.W.2 in an attempt to create a case against the accused persons.

25. Therefore after perusing the alleged statement recorded under Section 67 of the NDPS Act it is crystal clear that everything was written by the Raiding Officer, the P.W.2, namely Arup Kumar Pal for accused Jamirul Sk. without explaining the contents of the alleged confessional statement. Thus, it is evident from this alleged confessional statement that it is the creation of the Intelligence Officers rather than being

dictated by the appellant and more so, no time was recorded in the alleged confessional statement. On the contrary, the appellant in his examination under Section 313 of the Cr.P.C has stated that they did not ask him regarding searching of his person. He also submitted that he was brought to the office and forced to sign on a blank paper by the Intelligence Officer and he saw nothing.

26. Considering all the materials on record, in our opinion the prosecution has miserably failed to prove to the hilt that the appellant is guilty of the offence for which he is charged. In our opinion, the appellant is therefore, acquitted.

27. The Judgment of the Special Court is set aside.

28. The appellant shall be set at liberty forthwith unless require for any other cases.

29. The seized alamats will not be destroyed since other accused there.

30. Urgent certified photostat copy of the Judgment, if applied for, be supplied to the learned Advocate for the parties upon compliance of all formalities.

**(Samapti Chatterjee, J)**

**(Nishita Mhatre, J)**