

**Deepa Ghosh Vs. State**

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**Court :** Chennai

**Decided On :** Mar-18-1996

**Reported in :** 1996CriLJ3810

**Judge :** M. Karpagavinayagam, J.

**Acts :** Code of Criminal Procedure (CrPC) - Sections 313; Narcotic drugs psycho. Sub. Act - Sections 8, 21, 29, 41, 41(2), 42, 43, 44, 50, 52 and 57

**Appeal No. :** Criminal Appeal No. 736 of 1989

**Appellant :** Deepa Ghosh

**Respondent :** State

**Advocate for Def. :** P. Rajamanickam, Special Public Prosecutor

**Advocate for Pet/Ap. :** K.J. Ayyappan, Adv.

**Judgement :**

1. This appeal is directed against the judgment in Sessions Case No. 49 of 1989 on the file of IXth Additional Sessions Judge, Madras, convicting the appellant/accused No. 1 for the offence under Section 8 read with Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act) and sentencing her to undergo R.I. for 10 years and to pay a fine of Rs. 1 lakh in default to undergo R.I. for two years.

2. Originally there were two accused in this case. The appellant is A.1, A.2 her husband. A.2 was charged along with the appellant/A1 besides the offences under Sec. 8 read with S. 21 of the Act, for the offence under Section 29 of the Act for having committed criminal conspiracy along with A.1. However, A2 Mohammed Ameen was acquitted by the trial Court on the ground that there was no sufficient evidence to establish that A2 had involved in the offence referred to above.

3. The charge against A.1/appellant Deepa Ghosh is that on 7-9-1988 at about 7.30 a.m. at Saidapet, Madras-600015 near bus route No. 19 stopping, she was found in possession of a Narcotic Drug, Brown Sugar, commonly known as heroin, weighing about 250 grams, in contravention of the provisions of Section 8 of the Act and thereby she committed an offence punishable under Section 21 of the Act.

4. On behalf of the prosecution, P.W. 1 to 4 were examined. Ex. P.1 to P.22 were filed. M.Os. 1 to 18 were marked. The case of the prosecution is as follows :

P.W. 1 a Lady Intelligence Officer working in Narcotics Control Bureau, Madras on 7-9-1988 at about 7.30 a.m. on a routine check up went to Saidapet bus stand. She entertained suspicion on the appellant named Deepa Ghosh aged about 20 years standing in the bus stop along with one suit case M.O. 1. and two plastic bags (not marked) On suspicion P.W. 1 in the presence of P.W. 2 Gopi, who is an independent witness searched the plastic bags. Before the search, she was interrogated by P.W. 1. The appellant stated that she was waiting for the bus proceeding to Tiruvanmaiur and that she was having no residential address at that time. P.W. 1 asked her to open the suit case (MO 1) Then the appellant said that it belonged to her husband Mohammed Ameen, A. 2 and that she was instructed by the said Ameen not to open the suit case. Then in the presence of witness P.W. 2 and another, P.W. 1 broke open the suit case and found M.Os.2 to 10, pant, shirt, lungi jatti, belt and other clothes. When they were removed, underneath the shirt, there was a white polythene bag which contained powder. On interrogation, the appellant admitted that it is heroin and herein business was being done by A.2 Ameen. On the basis of the statement, the heroin weighing about 250 grams was recovered by P.W. 1 through Ex. P.5 mahazar. Two packets of sample were taken in a separate cover and the signature of the appellant was

also obtained. The remaining portion was taken separately and the same was sealed and in that cover also. P.W. 1 obtained the signature of the appellant. Regarding this also, a mahazar was prepared and the signature was obtained from the independent witness P.W. 2 and another. Mahazar copy was also given to the appellant and for that the signature of the appellant was obtained. Then all these were taken along with the appellant to the office of P.W. 1 at 10.30 a.m. There Ex. P.7, report was prepared and she entrusted it along with all these M.Os. to the godown officer. The appellant as well gave a statement in the presence of P.W. 3, who translated the same in English which was reduced in writing in the handwriting of P.W. 1. Then this was read over, translated and explained to the appellant who admitted the same to be correct. This confession statement is Ex. P. 10. Her statement was that she knew that it was brown Sugar which belonged to A 2 who was conducting regular business on that, then she was arrested under arrest memo Ex. P.11 and sent for remand.

5. On 27-9-1988 on getting information that A 2 was available in his house, P.W. 1 took P.W. 2 and another, and searched the premises of A. 2 in his presence. From the house M.O. 16 diary and M.O. 17 identity certificate were recovered mahazar Ex. P.13 was prepared, a copy of which was given to A.2.

6. At 1.00 p.m. A.2 gave a statement stating that he was doing business of brown sugar and that appellant brought the same from Bombay for the purpose of selling it here and that with the full knowledge, when brown sugar (heroin) of 250 grams was kept in the suit case, the appellant without his knowledge took away the suit case and went away. Ex. P.15, is the statement of A.2. Ex. P.16 is the signature of A 2 for having received a copy of Ex. P.15. A 2 was then arrested on the strength of Ex. P.17 and sent for remand. In the meantime, the samples were sent for analysis and the analyst report is Ex. P.18. As per this, the sample was found to be heroin powder. P.W. 3 who is an officer working along with P.W. 1 was present at the time of the arrest of A. 2.

7. After the evidence adduced by prosecution was over, A.1 was questioned under Section 313 Cr.P.C. to explain the incriminating circumstances found available against her in the record, and she denied her complicity in the crime. She went on

to add that a false complaint was filed against her and she was innocent. A.2 also said the same.

8. After considering the evidence on record, the learned trial court convicted the appellant/A1 for the offence under Section 8 read with Section 21 of the Act and sentenced her as referred earlier and acquitted A2 since there was no sufficient evidence against him.

9. Mr. Ayyappan, learned counsel appearing for the appellant/A1 took me through the entire evidence and raised the following two points. Firstly, P.W. 1 an Intelligence Officer attached to the Narcotic Control, Bureau, Madras has failed to comply with Section 50 of the Act and infact she herself admits that she has not complied with Section 50, since narcotic article was not recovered from the appellant's possession viz., body and it was only recovered from the suit case (M O 1). The Apex Court in various decisions held that if recovery of any narcotic article from the suit case or bag in the possession of the accused was made that also would attract Section 50. So, in that view, this is a clear case of non-compliance of Section 50 of the Act which would be fatal to the prosecution case. Secondly, under Section 52 of the Act the grounds of arrest must be communicated to the appellant/accused. Even according to the prosecution as admitted P.W. 1 and P.W. 3, the appellant was not well versed in Tamil or in English and as such, the mahazar written in Tamil and then translated into English would make it clear, that the grounds of arrest were not communicated in the language known to appellant, thereby Section 52 of the Act was not complied with. In support of these submissions, he cited the decision : 1994 CriLJ3702 - State of Punjab v. Balbir Singh, to show that Section 50 is a mandatory provision and that though Section 52 is directory, it is mandatory when there is prejudice caused to the accused by non-compliance of the same.

10. On the contrary, Mr. Prakash, learned counsel for the respondent contends that the trial Court has elaborately considered all these things and gave a correct verdict in favour of the prosecution that Section 50 is not applicable to the facts of the present case, and that Section 52 also, as per Supreme Court decision is not mandatory, and however. The evidence of P.W. 1 and P.W. 3 coupled with Ex. P-

10 and mahazar Ex. P-4 would clearly show that the ground of arrest was communicated to the accused.

11. Let me first analyse the facts in this case. P.W. 1 on 7-9-1988 at about 7.30 a.m. went along with other officials including P.W. 3 Pratap for a routine check up to Saidapet bus stop, on suspicion the appellant - Deppa Ghosh was enquired and when the suit case which was in her possession was checked, it was found to contain heroin powder and the same was recovered under the mahazar. Though the appellant was not well versed in Tamil, she spoke broken Tamil and P.W. 3 Pratap who knows Hindi was able to explain the contents in the mahazar to the appellant in 'Hindi, the language well known to her, who in turn admitted that heroin powder which was contained in the suit case belonged to her husband A-2. Then along with M.Os. she was taken to the office where P.W. 1 obtained the confession statement Ex. P-10 from the appellant. P.W. 3 on narration by the appellant in Hindi translated the same in English to P.W. 1 who reduced the same into writing which is Ex. P-10.

12. After a few days, on receipt of information that the Appellant's husband A-2 was available at his residence. P.W. 1 along with P.W. 2, a mahazar witness, searched the premises of A-2 and recovered M.Os. 16 and M.O. 17 the diary and the identity/certificate. A-2 also gave a confession statement (Ex. P-15) stating that he was involved in the heroin business and the heroin which was contained in the suit case belonged to him only and that the appellant/A1 took away the suit case knowing fully well that it contained brown sugar in order to sell it to others. The heroin powder recovered from the suit case, which was in possession of the appellant was sent for analysis. P.W. 4 on the analysis found that powder to be a narcotic drug viz., brown sugar or heroin. The report is Ex. P-18. So, on the basis of this evidence, it is quite clear that the appellant was found in possession of the suit case which contained brown sugar which is a narcotic drug, and that the same was recovered from her by P.W. 1 in the presence of P.W. 2 and P.W. 3 to corroborate the evidence adduced by P.W. 1 to P.W. 4 on the side of the prosecution several documents have been filed. Ex. P-5 is the first mahazar written in Tamil at the bus stop and the accused/appellant signed in English in that. The same was attested by P.W. 2 and another. A copy of the same was also

given to the appellant. Appellant's signature was also obtained for receipt of the copy of the same by the appellant. Ex. P-10 is the confession statement of the appellant. Ex. P-15 is statement of A-2 implicating the appellant. Ex. P-8 is the Chemical Analyst's report. So, in the light of the above materials, I have no hesitation to conclude that the prosecution has been able to prove the above offence by the appellant beyond reasonable doubt.

13. Mr. Ayyappan counsel for the appellant submits that as per the decision of the Supreme Court reported in : 1994 CriLJ3702 State of Punjab v. Balbir Singh Section 50 of the Act was not complied with, especially when P.W. 1 herself admits in her cross examination that she did not comply with the said provisions since she recovered the drug not from the body of the appellant but from the suit case. He strenuously contended that the Supreme Court on several occasions held that possession means not only from the body but also from any container which the accused possessed Section 50 of the Act provides the conditions under which search of persons shall be conducted.

(1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate;

(2) If such requisition is made, the Officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by any one excepting a female.'

As per this section, any officer duly authorised under Section 42 is to search the person only in the presence of Gazetted Officer after informing the concerned accused about the right of his being searched in the presence of a Gazetted

Officer. In this case, admittedly P.W. 1 neither informed the appellant about her right nor made any attempt to search the appellant in the presence of a Gazetted Officer. Of course, P.W. 1 says that since the body was not searched, she thought it fit that the search of the suit case in the presence of a Gazetted Officer was not necessary.

14. Section 42 is applicable to the officer viz., P.W. 1 under Section 42 which relates to the power of entry, search-seizure and arrest without warrant or authorisation, any Officer of the Department of Narcotics, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug in respect of which an offence punishable under the Act has been committed between sun rise and sunset, that officer can seize any drug from any person and detain him and effect his arrest. A conjoint reading of Sections 42 and 50 would make it clear that when the person on prior information that the offence has been committed by a person in a particular area, the officer attached to Narcotic Bureau should comply with the condition contemplated under Section 50 of the Act by taking him to the Gazetted Officer in whose presence search could be effected, if he so required. This Court has to see whether this section would be applicable to the facts of the present case. P.W. 1 specifically stated that he along with others went on a routine check up and not on any prior information P.W. 3 Mr. Pratap who accompanied the officer also says that on 7-9-1988 at 7.30 a.m. he along with P.W. 1 were on routine check up at the Saidapet bus stop and that at that time A-1 was found standing in the opposite side having a suit case M.O. 1 which created suspicion in the mind of O.W. 1 and P.W. 3. To substantiate this aspect, the prosecution relied upon Ex. P-5 mahazar in which it has been stated that search was conducted only on suspicion but not on any prior information. So in the light of these particulars, there is no difficulty in coming to the conclusion that Section 50 will not be applicable to the present case where the person accused of an offence was searched only on suspicion. As such, the decision cited by the learned counsel appearing for the appellant viz., : 1994 CriLJ3702 State of Punjab v. Balbir Singh will not help the counsel for the appellant in any way.

15. The second ground of the appellant's counsel is that the first mahazar was prepared in Tamil and the confession was prepared in English and as such, the grounds of arrest as contemplated under Section 52 of the Act were not informed to the appellant in the language known to the appellant and as such, Section 52 of the Act was not complied with. Section 52 of the Act provides disposal of persons arrested and articles seized. Under this Section any officer arresting a person under Section 41, Section 42, Section 43, or Section 44 shall as soon as may be, inform him of the grounds for such arrest. P.W. 1 arrested the accused only at 5.00 p.m. on 7-9-1988. Though the first mahazar was prepared at 11.30 a.m. and the confession statement was recorded at 11.30 a.m. at the office, the arrest was effected only at 5.00 p.m. It is the specific case of P.W. 1 that :

There was no suggestion to the effect that the grounds of arrest were not communicated to the appellant in the language known to her. Apart from this, to substantiate this evidence there are other materials in the form of Ex. P-11 arrest memo in which it is stated that the grounds of arrest were informed to the appellant on 7-9-1988 at 5.00 p.m. She also put her signature in English for having received the copy of the same. So, these materials would clinchingly show that the grounds of arrest were conveyed to the appellant/accused through P.W. 3 who translated the same in Hindi and therefore copy of Ex. P-11 was given to the appellant which was acknowledged by the appellant. As such, Section 52 has also been complied with.

16. In : 1994 CriLJ3702 State of Punjab v. Balbir Singh by way of conclusion the Supreme Court has held thus (Para 26) :

'If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offence as provided under the provisions of Cr.P.C. and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance (of) recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who

should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.'

This Section relates to the police officer who has been empowered or not empowered to comply with the condition under Section 50 that too on any prior information, so, this decision as referred earlier will not in any way be helpful to the point raised by the appellant's counsel. On the contrary, the counsel for the respondent submits that conclusions in paras. 5 and 6 in the citation, would indicate that Sections 42 and 50 would be applicable only in the case where search was conducted on prior information.

17. It is also pointed out by the counsel for the respondent that under conclusion in para. 6, Section 52 is not mandatory and it is only directory and as such, non-compliance of Section 52 would not affect the case of the prosecution. Conclusions in paras. 5 and 6 are as follows :-

'(5) On prior information, the empowered officer or authorised officer while acting under Section 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the

case.'

As stated earlier, I am of the view that the materials available in this case would show that there is compliance of Section 52. For the reasons stated above, I find that there is no illegality in the verdict of conviction by the trial Court and the sentence imposed on the appellant/A-1. As such, the appeal which has no merits deserves to be dismissed. Accordingly, the Criminal Appeal No. 736 of 1989 is dismissed, confirming the conviction and sentence imposed on the Appellant/A-1 by the trial Court.

18. Appeal dismissed.

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