

Gautam Kumar @ Lai Vs. State

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Court : Kolkata

Decided On : Feb-27-2004

Reported in : 2004(2)CHN205

Judge : G.C. De and ;Sankar Prasad Mitra, JJ.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 18, 35, 41, 42, 50, 52, 54, 55 and 67; ;[Code of Criminal Procedure \(CrPC\) , 1973](#) - Section 313

Appeal No. : C.R.A. No. 251 of 1997

Appellant : Gautam Kumar @ Lai

Respondent : State

Advocate for Def. : Kazi Safiullah, P.P.

Advocate for Pet/Ap. : Y.R. Dastoor and ;Rupa Bandyopadhyay, Advs.

Disposition : Appeal allowed

Judgement :

G.C. De, J.

1. This appeal is directed against the judgment, and order of conviction dated July 31, 1997 and sentence dated August 1, 1997 passed by the learned Judge,

Special Court of the N.D.P.S. Act, Howrah in T. R. Case No. 38 of 1995. By the said judgment, the learned Judge found the present appellant Gautam Kumar @ Lai guilty for an offence punishable under Section 18 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (hereinafter referred to as N.D.P.S. Act, for brevity) and sentenced him to suffer rigorous imprisonment for a period of ten years and also to pay fine of Rs. 1,00,000/- in default to suffer imprisonment for a further period of two years.

2. The case in brief is that Nabani Dhar Paul, Intelligence Officer of the Narcotic Control Bureau (hereinafter referred to as N.C.B., for brevity), Eastern Zonal Unit, filed a complaint before the learned Additional District Judge, 3rd. Court at Howrah on 21.12.1995 alleging that acting on intelligence, a batch of officers including a lady officer of N.C.B., led by a Gazetted Officer visited the Opium and Bhang Shop at 18, Satyanarayan Temple Road, P.O. Salkia, P.S. Malipanchghara, District-Howrah on 18.10.1995 at 12.05 hours where they found the said Gautam Kumar @ Lai, the only occupant of the shop, as its registered salesman. On disclosing their identities, officers expressed their desire -to search the shop which the said Gautam Kumar @ Lai acquiesced. The officers of the N.C.B. thereafter entered into the shop with two independent witnesses, called upon from amongst on lookers, and searched the said shop in presence of Gautam Kumar @ Lai and the said two witnesses. As a result of the search, a lump of dark brown sticky resinous substance was recovered from inside an iron box of the shop and two more such lumps were recovered from inside an old used yellow colour nylon bazar bag lying on a wooden cot in the shop ; a little quantity of each of the said three lumps was tested by the officers with the help of their Field Test Kit and each of them was found to respond positive to the test of opium. Three lumps were weighed and it was found that the lump recovered from the iron box weighed 1.140 kg. and other two lumps recovered from the nylon bazar bag kept on the wooden cot weighed 3.090 kg. and 3.475 kgs. respectively.

3. On examination of the daily opium stock register of the shop, it was found that the day's opening balance of opium was 1.1402 kg. and thus excess quantity of 6.565 kgs, was not indicated in the book balance of the shop. On demand by the officers, the said Gautam Kumar @ Lai failed to produce any valid document either

for licit acquisition/possession of the said excess opium of 6.565 kgs. or for its licit transaction of purchase and sale. On reasonable belief that offence was committed and that all of the said substances were liable to be confiscated under Sections 60 and 61 of the N.D.P.S. Act in respect of the excess quantity of 6.565 kgs. of opium, and the said 1.140 kg. of opium, claimed to be licit Treasury Opium, was to be sold or intended to be sold to unauthorised persons without sale voucher solely as well as in admixture with illicitly acquired opium in concealment of the later. Those three lumps of opium along with stock register and other documents with the yellow nylon bag were inventorised and seized under Section 42 of the N.D.P.S. Act in presence of the said Gautam Kumar @ Lai and two local witnesses. Three representatives samples each in duplicate of 25 gms. were drawn from the said three seized lumps of substances for chemical test and the said six samples and the remaining part of the said three lumps were secured and sealed following all formalities.

4. Notice under Section 67 of the N.D.P.S. Act, was served on Gautam Kumar @ Lai requiring him to accompany the officers to N.C.B. Office at Calcutta. Since the shop was licensed in the name of Smt. Ashalata Kumar, mother of Gautam Kumar @ Lai, the officers visited the house of Smt. Ashalata Kumar at 101/3, Bhairab Ghatak Lane, P.O. Salkia. P.S. Malipanchghara at 15.00 hours on the same day and on consent of Smt. Ashalata Kumar, the officers entered her house with two independent witnesses and search was conducted but, anything contraband or incriminating articles could not be recovered, for which a nil search list was prepared. Notice under Section 67 of N.D.P.S. Act, was also served on Smt. Ashalata Kumar with request to attend N.C.B. Office at Calcutta on the very day for examination. In N.C.B. Office at Calcutta, the said Smt. Ashalata Kumar in her voluntary written statement stated that though the licence of the shop was in her name but, her son Gautam Kumar @ Lai, registered salesman of the shop, actually managed all the affairs of the shop. She also claimed that her son could not do anything illegal. Gautam Kumar @ Lai also made a voluntary written statement before the N.C.B. Officers on 18.10.95 and 19.10.95 alleging that the excess quantity of opium did not belong to him, it belonged to an outsider who kept that in his shop for sometime. However, Gautam Kumar @ Lai admitted his guilt and pleaded for mercy. On reasonable belief, the said Gautam Kumar @ Lai

was liable to be prosecuted under Section 18 of the N.D.P.S. Act for storing the huge quantity of illicit opium in his shop in contravention of the provision imposed under Section 8 of the N.D.P.S. Act, he was arrested under Section 42 of the Act on 19.10.95 at 15.30 hours and was produced before the learned Vacation Judge, Howrah on 20.10.95 for remand to jail custody. On receipt of the chemical test report which confirmed that each of the samples satisfied the definition of opium, the complaint was filed against Gautam Kumar @ Lai.

5. After taking of cognizance, the case was fixed for consideration of charge and on 15.2.96, a charge under Section 18 of the N.D.P.S. Act, was framed against the said Gautam Kumar @ Lai. The accused pleaded not guilty to the charge and accordingly six witnesses were examined on behalf of the prosecution.

6. No defence witness was adduced and the defence case as can be ascertained from the trend of cross-examination as well as from the answers given in course of examination under Section 313 of Cr.P.C. is that he was falsely implicated in this case and that no illicit opium was ever recovered from his shop. It is also claimed that he did not make any voluntary statement and his signature was taken on blank-papers. It is further stated that on 18.10.95, few persons in plain cloths took him to the N.C.B. Office where his signature was taken on few white papers and they kept him detained in that office upto 20.10.95.

7. After considering the evidence adduced in this case and the arguments made by the learned counsel, the learned Judge came to the conclusion that the prosecution was able to prove the charge against the accused person and accordingly, found him guilty, convicted him thereunder and sentenced him in the manner indicated hereinabove.

8. In course of hearing of this appeal, the learned counsel appearing on behalf of the present appellant made a forceful argument alleging that the recovery of licit opium from the licensed shop along with the stock register is sufficient to show that nothing was recovered from that shop violating the provisions of the Act. Scanning the evidences of the witnesses as well as the documents, the learned counsel contended that the case was illegally planted for not yielding to the proposal of gratification of the searching officer. It is also argued that though the

statement of Smt. Ashalata Kumar was recorded in her house in presence of P.K. Sil (P.W.2.), the Gazetted Officer N.C. Patra (P.W.6), who never visited the place of occurrence at the time of search and seizure, claimed that the statement of Smt. Ashalata Kumar was recorded in his presence in the N.C.B. Office at Calcutta by one Samir Majumdar, It is also pointed out that the said Gazetted Officer, N.C. Patra had no knowledge about the alleged search and seizure and as such, no reliance should be placed on his evidence.

9. It is also argued that though the prior information was reduced into writing and it was sent to the superior officer, as claimed by P.W. 2 P.K. Sil, it was never produced in Court thereby indicating that the mandatory provision of Section 42 of the Act was never complied with. It is also argued that the seized articles were never kept in the custody of the police officer under the provision of Section 55 of the Act nor the provision of Section 52 of the Act was taken care of for dealing with the arrested person. It is also argued that the sketch map indicating the location wherefrom contraband opium was recovered having not been prepared and produced before the Court, it is not at all possible to come to the conclusion that the said opium was recovered from the shop of the accused person. It is finally argued that the present accused was a registered salesman of the shop though the owner of the shop was his mother Smt. Ashalata Kumar. So the case was required to be started against the licensed owner of the shop and not against the registered salesman. Accordingly, the learned counsel for the appellant contended that the charge against the accused having not been proved beyond all reasonable doubt and the alleged seizure having not been made complying with the provision contained in Section 42 of the Act, the entire prosecution case falls to the ground and as such, conviction and sentence is liable to be set aside,

10. The learned Public Prosecutor, however, placing reliance on the provisions of Sections 35, 41, 53, 53A and 54 of the Act and also placing reliance on the judgment of the Apex Court in the case of M. Prabhulal v. Assistant Director of Revenue Intelligence, reported in : 2003 CriLJ4996 and Madanlal and Ors. v. State of H.P., reported in : 2003 CriLJ3868 , contended that since the search and seizure was conducted by a Gazetted Officer under Section 41 of the Act, it was not necessary to follow the provision contained in Section 42 of the Act. Conscious

possession of the contraband articles having been established, the accused was rightly found guilty for which the conviction is required to be upheld. It is also contended that since the prosecution proved the case beyond all reasonable doubt and no defence evidence was adduced, the presumption of Section 35 of the Act came into play along with the provision under Section 54 of the Act. So, on this score also, it is to be found that there is no merit in the present appeal.

11. At the very outset it is to be pointed out that the Constitution Bench in the case of State of Punjab v. Baldev Singh, reported in 1999(3) All India Cri. Law Reporter 1, while considering the Act and the procedure required to be followed, viewed, 'It must be borne in mind that severe the punishment, greater has to be care taken to see that all the safeguards provided in a statute are scrupulously followed.'

12. This comment is applicable in all the cases under the N.D.P.S. Act inasmuch as the punishment is severe in such cases and there is no scope for the Appellate Court either to remit or to suspend the sentence within the meaning of Section 32A of the N.D.P.S. Act. So, it is required to be considered whether all the requirements provided in the statute with regard to search and seizure were complied with scrupulously or not.

13. Sri Nabani Dhar Paul (P.W.1) is the Intelligence Officer of N.C.B. and he filed the complaint claiming that he derived his knowledge from the available documents before him. He also claimed that before drafting of the complaint, he went through the recorded statement of the witnesses and the accused persons and also through the seizure list. P.W.1 has no personal knowledge excepting the materials on record.

14. Sri Pradip Kumar Sil (P W. 2) is another Intelligence Officer of N.C.B. and his evidence is that in October, 1985, he had intelligence information that excess opium was being possessed by the licensed shop at Howrah. On receipt of such information, he informed their head of office i.e. the Zonal Director and sought for movement order from him. He received movement order from him and all the officers involved in the movement also signed the movement order which was dated 17.10.1995. It is claimed by him that on 18.10.95 the entire team left the N.C.B. office at about 8.30 a.m. along with Sri N.C. Patra, Sr. Intelligence Officer

of N.C.B. who was also a Gazetted Officer. The raiding party arrived at the licensed shop of the accused and found that the accused Gautam Kumar @ Lai was conducting sale. After disclosing identities by the raiding party, they expressed their desire to search the shop on suspicion that there was some excess opium in the shop. Two witnesses from public on lookers came forward and the party entered inside the shop. One iron box in the shop was opened by the accused Gautam Kumar @ Lai and he brought out one polythene packet and disclosed that it was licensed opium. On demand, stock register was also produced and stock tallied with the register. On being asked the accused Gautam Kumar @ Lai replied that there was no other opium in the shop but, he also stated that a man had kept one bazar bag on the cot inside the shop which he wanted to sell to the accused but on his refusal, that man kept the bag there and went out in search of other customers. Two polythene packets were brought out from that bag and from inside those packets 3.090 kgs and 3.475 kgs. of opium were found. Total weight was 6.565 kgs. in excess. The P.W.I thereafter reiterated the facts stated in the complaint on the point of seizure of those licit and illicit opium stock register and other documents from the shop in presence of the witnesses.

15. The P.W.2 claimed that he seized the said articles under Section 42 of the N.D.P.S, Act and that Shri N.C. Patra (P.W.6) supervised the operation. The P.W.2 also claimed that he did not do all the acts under the direction of anybody, thereby meaning that search and seizure was not done at the direction of N.C. Patra (P.W.6). It also transpires from the evidence of P.W. 2 that notice under Section 67 of the N.D.P.S. Act was issued on Smt. Ashalata Kumar, mother of the accused Gautam Kumar @ Lai at her residence at 101/3, Bhairab Ghatak Lane, Howrah. After searching the said premises, no contraband article was found. Thereafter, Smt, Ashalata Kumar made a voluntary statement which was recorded by P.W.2 at her residence. It is also stated that the seizure list witness Samir Majumdar also made a statement on receipt of a notice under Section 67 of the Act. Surprisingly enough, it is claimed that the statement of Smt. Ashalata Kumar was recorded by P. W, 2 himself. He however corrected it of course on objection by the defence, by telling that the statement was recorded by one Samir Majumdar. P.W. 2 further claimed that Gautam Kumar @ Lai was served with notice under Section 67 of the Act and he was taken to N.C. B. Office where he

gave a written statement written by himself and also signed by him in presence of the officers of the N.C.B. Since the accused wanted to make more statement, another notice under Section 67 of the Act was issued requiring him to appear before him on 19.10.95 and on 19.10.95 when the accused Gautam Kumar @ Lai appeared before him, another written statement was written and signed by him in his presence.

16. In his cross-examination, P.W. 2 admitted that they were fortified with search warrant. He also claimed that confirmation of the information was not reduced in writing but, on getting the information, he sought for permission from the superior officer to work out the information and that was in writing.

17. P. W. 3, Sri Gouri Sankar Mukherjee, another Intelligence Officer of N.C.B. claimed that the raiding party along with a Gazetted Officer, meaning P.W.6, reached the place at about 12-05 p.m. He also claimed that three lumps of opium were found inside the shop. The accused Gautam Kumar @ Lai could not explain how two lumps were kept on the cot of the shop. P.W. 3 also claimed that he went to the shop for working out an intelligence. In cross-examination, however, he could not say as to how many vehicles were deployed for carrying the raiding party.

18. P.W. 4, Sri Radha Gobinda Paul is another Intelligence Officer of N.C.B. and his evidence is that at 12.00 hours on 18.10.95, the raiding party went to the licensed Bhang and Opium Shop of the accused Gautam Kumar @ Lai. He also claimed that P.W. 2 made a search and seizure and recovered the licit and illicit opium but, had no knowledge about the talks between the accused and P.W.2 as he was at the gate of the shop.

19. P.W. 5, Sri Ashim Kumar Bandopadhyay is an Assistant Chemical Examiner who on examination of the samples sent to him claimed that samples contained opium.

20. P.W. 6, Sri N. C. Patra is the Gazetted Officer and his evidence is that on 18.10.95, he attended his office of N.C.B. at Calcutta at 10.00 a.m. As there was an intelligence that illegal opium was being sold in a opium shop at Bandhaghat-

more at Salkia, Howrah, he along with Sri P.K Sil and others set out from their office to work out the intelligence and came near the shop. He also claimed that he disclosed his identity as a Gazetted Officer before the accused Gautam Kumar @ Lai, who was found selling opium inside the shop, and expressed his desire to search in presence of witnesses to which the accused Gautam Kumar @ Lai agreed. So as per provision of Section 50, P.W. 6 offered him that he could be searched in presence of a Gazetted Officer or before a Magistrate to which the accused agreed to be searched by him. P.W. 6 then asked two local witnesses and accused Gautam Kumar @ Lai to search the raiding party, if they like. Thereafter, the said three packets of opium were recovered. Those were seized, a sample was taken and subsequent actions were taken. He also claimed that the house of Smt. Ashalata Kumar, owner of the shop, was searched but nothing could be recovered. Then a notice under Section 67 of the Act was served on Smt. Ashalata Kumar as well as on the accused to accompany P.W.6 and the raiding party to their office. Both of them when interrogated made voluntary statement which was recorded by a person accompanied them on behalf of the accused person and wrote the statement of Smt. Ashalata Kumar. The person recording the statement of Smt. Ashalata Kumar disclosed his name as Samir Majumdar. Gautam Kumar @ Lai also gave statement on 18.10.95. Considering the old age of Smt. Ashalata Kumar and as per her claim that her son Gautam Kumar @ Lai was doing everything in respect of the shop as a registered salesman, she was allowed to go. P.W. 6 also claimed that on 19.10.95 Gautam Kumar @ Lai made another statement in writing. In cross-examination, P.W. 6 reaffirmed that Smt. Ashalata Kumar was examined in his presence in their office at Calcutta and her statements were recorded in that office. He also claimed that the witness Samir Majumdar on 19.10.95 again came to N.C.B. Office at Calcutta for recording the statement of Gautam Kumar @ Lai. However, it was clarified by P.W.6 that Samir Majumdar was not attached to N.C.B. Office, and denied the suggestion that Samir Majumdar was their pocket-man.

21. So, from the evidence of all the six witnesses, it is clear that the information received was sent in writing to the superior officer and a movement order in writing was received which was signed by all the members of the raiding party and that the party was fortified with the search warrant. It is also claimed that search and

seizure were done under the provision of Section 42 of the N.D.P.S. Act. So it is clear that the raiding party were conscious about the provision of Sections 41 and 42 of the Act for which they tried to say that they got authorisation from the Gazetted Officer earlier within the meaning of Section 41(2) of the Act and at the same time they also alleged compliance with the provision of Section 42 as regards communication of the information to the superior officer before proceeding to conduct search and seizure. That apart, it is also claimed that they were fortified with the search warrant within the meaning of Section 41(1) of the N.D.P.S. Act. Surprisingly enough, none of these documents has been produced in Court . Excepting P.W. 2 who was the main person involved in search and seizure, no other witness claimed that the party was fortified with all such documents like search warrant, authorisation or communication of the information to the superior officer.

22. It is argued on behalf of the prosecution that as P.W.6 was personally present in the search and seizure, there was no necessity of compliance with the provision of Section 41 of the Act in view of the principle enunciated by the Apex Court in the case of M. Prabhulal (supra). But from the evidence of P.W.2, it transpires that the raiding party arrived at the shop of the accused at 8.30 a.m. on 18.10.95 whereas it is claimed by P.W.6 that he started from his Calcutta office after 10 a.m. to conduct the raid in that shop. Two other witnesses i.e. P.W.3 and P.W.4 claimed that the raiding party arrived at the shop after 12 noon. So the presence of P.W.6 at the time of actual search and seizure by P.W.2 at 8.30 a.m. is belied by the evidence adduced by P.W. 6 and other witnesses.

23. It is also to be noted from the materials on record that the statement of Smt. Ashalata Kumar was recorded in her residence at Howrah after service of notice under Section 67 of the Act in her said residence. But the evidence of P.W.6 is that the said written statement of Smt. Ashalata Kumar was recorded in his presence in Calcutta Office of N.C.B. The statement as well as service of notice under Section 67 of the Act as produced in this case proved that the statement was recorded in the residence of Smt. Ashalata Kumar at Howrah and not in the Calcutta Office of N.C.B. None of the witnesses claimed that Smt. Ashalata Kumar was taken to the N.C.B. Office at Calcutta. So, this evidence of P.W.6 proved

beyond all reasonable doubt that P.W.6 was not present at the time of search and seizure and recording of voluntary statement of Smt. Ashalata Kumar. P.W.2 himself claimed that the entire search and seizure was conducted by himself independently without the direction of anybody else. This claim of P.W. 2 is sufficient to indicate that the search and seizure and subsequent actions were not done at the supervision and direction of P.W.6, Sri N.C. Patra who is claimed to be a Gazetted Officer. So, it is rightly argued by the learned counsel for the appellant that the Gazetted Officer was not present at the time of search and seizure and that search and seizure was not conducted under the provision of Section 41 of the Act so as to bring the case within the domain of the principles enunciated in the case of M. Prabhulal (supra). On the other hand, it is specifically clarified by P.W. 2 that he conducted the search and seizure after following the provision of Section 42 of the Act. Since the requirements of Section 42 of the Act as regards writing down the information received and its communication to the immediate superior officer have not been complied with by production of other materials and written up papers, as claimed by P.W, 2, we disbelieve the claim that there was compliance of provision of Section 42 of the Act. Or in the other words, we come to the conclusion from the materials on record that the provision of Section 42 of the Act was not complied with in this case.

24. It is also pertinent to mention that the search warrant within the meaning of Section 41(1) of the Act having not been produced, it could not be construed that the search and seizure was conducted under the provision of Section 41 of the Act. It is also indicated hereinabove that the search and seizure having not been conducted by the Gazetted Officer himself, there was no compliance of provision of Section 41(2) of the Act.

25. Accordingly, we take the view that the alleged search and seizure was not only illegal, but also opposed to the express provision of law, and the principle of M. Prabhulal (supra) is not applicable in this case.

26. In view of the above discussions we come to the conclusion that the provision of Sections 41 and 42 of the Act as regards search and seizure having not been complied with scrupulously, it cannot be said that there is any scope to draw

presumption relating to conscious possession of the accused as regards illicit opium. Considering the illegality of search and seizure it cannot be said that the Court shall presume the existence of any culpable mental state of the accused as regards possession of the alleged illicit opium within the meaning of Section 35 of the N.D.P.S. Act. There is no material in support of the prosecution case about possession of illicit articles within the meaning of Section 64 of the Act. Accordingly, the accused was not required to account for his possession of illicit opium within the meaning of that section.

27. Finally, it is rightly argued by the defence that Samir Majumdar, the alleged independent witness, having not been examined in this case and no attempt was made to produce him in Court, the statement recorded by him on behalf of Smt. Ashalata Kumar or the accused Gautam Kumar @ Lai cannot be relied upon. The prosecution at the time of search and seizure wrote the names of two persons with their addresses. The addresses were given in such a manner that they could not be found out in future. Even then the summons were sent by the Court in their names. It appears that the summons in the name of Samir Majumdar was sent and it was returned with the postal mark 'not known', thereby indicating that the name of a nonest person was included in the seizure list with the knowledge that there would be no possibility to produce him in Court. The argument of the appellant that the said witness is none but an officer of the department of N.C.B. in disguise cannot be ruled out. An attempt was made on behalf of the prosecution to show that the said witness was a man of the accused person. Such claim is not only absurd but it is also without any basis whatsoever. The fact remains that the said witness Samir Majumdar is not known either to the N.C.B. Officers or to anybody else. So, the voluntary statements written by him on behalf of the accused person or his mother are not proved beyond reasonable doubt. The principle enunciated in the case of Madanlal & Ors. (supra) is not applicable in the present fact situation of the case.

28. So, we are of the view that the prosecution has not been able to prove that the statements made by the accused person and his mother are voluntary statements on the basis of which conviction can be upheld.

29. After careful scrutiny of the materials on records and the discussions hereinabove made, we hold and conclude that the Trial Court did not consider all these aspects and come to a wrong decision for which interference of this Court is necessary. We are also of the view that the prosecution has not been able to prove its case beyond reasonable doubt against the accused person and as such, his conviction is liable to be set aside.

30. Accordingly, we allow this appeal and set aside the impugned judgment of conviction and sentence. The appellant is found not guilty to the charge and he is acquitted. So, we direct that the appellant be set at liberty forthwith.

Sankar Prasad Mitra, J.

I agree.

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