

Md. Habib Vs. the State

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Court : Kolkata

Decided On : Feb-14-1997

Reported in : 1997CriLJ1734

Judge : Nisith Kumar Batabyal and ;Nure Alam Chowdhury, JJ.

Acts : Narcotic Drugs and Psychotropic Substance Act, 1985 - Section 21, 42 and 50; ;[Evidence Act, 1872](#) - Section 114; ;Code of Criminal Procedure (CrPC) - Section 313

Appeal No. : Criminal Appeal No. 85 of 1991

Appellant : Md. Habib

Respondent : The State

Disposition : Appeal allowed

Judgement :

Nure Alam Chowdhury, J

1. This appeal is directed against the Judgment and order, dated 10th January, 1991, passed by the Ld. Additional Sessions Judge, 4th Court at Alipore, 24 Parganas (South) in S. T. Case No. 2(11) 90, convicting the appellant Under Section 21 of the Narcotic Drugs and Psychotropic Substance Act, 1985, hereinafter referred to as N.D.P.S. Act, for short, and sentencing him to R. I. for 10

years and also to pay a fine of Rs. 1 lakh only i.d. to further R. I. for 10 years.

2. Prosecution case, in brief is that on 28-5-88 at about 11.30 hrs. while Sub-Inspector Ratan Lal Mukherjee (P.W.4), attached to Garden Reach Police station (Port Division), Calcutta at the relevant time, who is also the first Investigating Officer of the case, was on his round duty in the Meher Manzil Lane area, he received secret information from source that the appellant was selling 'Brown Sugar' clandestinely to the public, arrested the appellant, on the identification of the source from Meher Manzil Lane, Calcutta - 24, near premises No. G339/2 and on search of the person of the appellant, one bulb match-box was found in the right side pocket of his wearing shirt. On opening the match-box, ten small butter paper packets were found containing brown-sugar, which weighed two gms. (nett) on weighment. The match-box containing the brown sugar packets was seized under a seizure-list (Ext. 4) in presence of witnesses P.W. 1 (declared hostile) and P.W.2, whose signatures were taken on the seizure list beside the signature of the appellant. On arrival at the police station Section X Case No. 170 dated 28-5-88 Under Section 21 of the N.D.P.S. Act was started against the appellant and P.W.4 himself took up the investigation of the case and on his transfer one H. P. Ghosh was entrusted with the investigation of the case but Mr. Ghosh did not do any act of investigation and thereafter P. W.5 took up the investigation, collected the report of the public analyst (Ext. 2) and submitted charge-sheet against the appellant Under Section 21 of the N.D.P.S. Act and ultimately the appellant was placed on trial and convicted and sentenced as above.

3. Prosecution examined five witnesses in support of the prosecution case. Among them P.W.1 and P.W.2 are the alleged witnesses of seizure of brown sugar from the appellant. P.W.3 is the Director (Drugs) Central Public Health and Drugs laboratory Calcutta under the Govt. of West Bengal, who subjected the (sic) material sent to him to chemical analysis and submitted his report P.W.4 and P.W.5 are the two Investigating Officers amongst whom P.W.4 performed the major part of the investigation and P.W.5 only collected the report of the chemical analyst and submitted the charge-sheet.

4. No witness was examined on behalf of the defence and the defence case as can be understood from the trend of cross-examination and the examination of the appellant Under Section 313 of the Code of Criminal Procedure is of innocence and denial of the prosecution case.

5. P.W.1, a signatory to the seizure-list of the aforesaid seizure was declared hostile by the prosecution as he stated in his evidence that he did not know anything about the case and he signed on the seizure list (Ext. 1/2) under threat of arrest by police. He proved his signature (Ext. 1) on the seizure list. He also stated that he was not interrogated by the police. In cross-examination by the prosecution he stated that he did not know the appellant and police obtained his signature on blank paper. In cross-examination on behalf of the appellant he stated that by white paper he meant blank paper.

6. P.W.2 is the other witness to the alleged seizure. In his evidence he proved his signature (Ext. 1/1) on the seizure list but he stated that he was standing by the side of a betel-nut shop when the appellant was arrested by the police and police obtained his signature on the seizure list at the P. S. and he did not know anything about the case and he did not know the appellant. He was not declared hostile by the prosecution and in cross-examination he stated that he signed on a blank paper.

7. P.W.3 is the Director (Drugs), Central Public Health and Drugs laboratory, Calcutta under the Govt. of West Bengal. He deposed that he received a sealed packet from the Deputy Commissioner Calcutta, on 13-6-88, for chemical analysis of its contents in connection with Garden Reach P. S. Case No. 170 dated 28-5-88 and he found that the content, a black dumpy material having its gross weight 6.2660 gms. containing heroin to the extent of 67.76%. He proved his report (Ext. 2). He also stated that by the term 'gross weight' he meant to say the weight of the material with its cellophane paper which contained the material and the actual weight of the heroin in question was not determined by him.

8. In cross-examination, P.W.3 stated that the date of examination is not mentioned in his report and the nature and number of packets were not noted in the report. He also stated that there is nothing in the report as to whether the

purias were inside a match box and there is no note as to how the gross-weight was determined on the weight including the cellophane paper and there is also no note as to how much material was taken from how many purias for examination and he had no knowledge as to who carried the material to A. Rakshit of his Office and the internal numbers of his office had not been mentioned in his report. He also stated that the match box also did not contain his seal or his signature. He also deposed that 'Brown Sugar' and 'Black Dump' apparently look different but both are same and 'Brown Sugar' is a brown powder and 'Black dump' is a black sticky material from which heroin is also obtainable, it may be the percentage of heroin is different between the two.

9. P.W.4 is the first I/O, who also conducted the search and seizure and the complainant in the F.I.R. He stated that on search of the appellant one bulb match box was found in his right side pocket of his wearing shirt and on opening the match box ten small butter paper packets containing brown sugar weighing 2 gms. (net) was found and those were seized in presence of witnesses and duly scaled and packed and deposited at the P. S. Malkhana and informed the D. C. over phone about it and prayed before the Court for retaining the seized alamats for chemical examination. In cross-examination he stated that the net weight of the seized heroin was obtained excluding the papers from the matter and thereafter the matter was packed and the weighment was made at the spot and the scale of weighment was obtained from the shop of a goldsmith but the fact of repacking and weighment is not mentioned in C. D. and there is also no note that a scale for weighment was obtained from a goldsmith. He also stated that the match box and the purias Mat Ext. II did neither contain his signature nor the signatures of the witnesses or the accused person.

10. P.W.5 is the last I/O who collected the report of the chemical Analyst and submitted the charge-sheet.

11. Ld. Trial Judge held that the seizure of the heroin from the Appellant has been proved beyond reasonable doubt from the evidence of P.W.4 and the signatures of the witnesses P.W. 1 & P.W.2 and the accused person on the seizure list and the report of the chemical analyst proves that the seized matter was heroin and

Sections 42 and 50 of the N.D.P.S. Act was duly complied with and convicted and sentenced the Appellant as above.

12. Mr. Dipak Sengupta Ld. Senior Advocate appearing on behalf of the Appellant submitted that from the evidence of P. Ws. 1 &.2 who are the only two witnesses to the seizure reasonable doubt arises regarding the alleged seizure of heroin from the Appellant. He also submitted that from the evidence of P.W.4, it appears that he seized brown sugar but from the evidence of P.W.3 the chemical analyst, it appears that he analysed a dumpy sticky material and as such there cannot be any doubt that the alleged seized matter was interfered with, and such doubt is strengthened from the evidence of P.W.3 and P.W.4 from the missing links of absence of requisite signature and seals on the alleged seized heroin.

13. However, Mr. Sengupta strongly emphasised that the Appellant is entitled to acquittal for non-compliance of Sections 42 and 50 of the N.D.P.S. Act in the case.

14. In support of his submissions Mr. Sengupta cited the Judgments reported in 1994 Cal Cri LR (SC) 4 : (1994 Cri LJ 1) (Valsale v. State of Kerala) in which the accused was acquitted as the seized article appeared to have not been kept in proper custody and proper form so that the Court could be sure that what was seized only was sent to the chemical Examiner and there was a big gap and an important missing link.

15. Mr. Sengupta next cited the Judgment reported in : AIR 1995 SC244 (Ali Mustaffa Abdul Rahman Moosa v. State of Kerala) in which it has been held that 'where a police officer on receiving an information that a person is in possession of contraband (charas) wants to subject him to search, it is the duty of the police officers to give option to the person as to whether he desired to be searched in the presence of a Gazetted Officer or a Magistrate and envisaged by Section 50. The failure to provide that option to the accused vitiates the conviction. The provisions of Section 50 is mandatory the non-compliance whereof vitiates the conviction. It is not necessary that the person who is about to be searched should be himself make a request.'

16. Mr. Sengupta Ld. Senior Advocate also cited the Judgment reported in 1995 Cal Cri LR (SC) 346 : (1995 Cri LJ 2662) (Saiyad Mohd. Saiyad Umar Saiyed v. State of Gujarat) in which it has been held that 'Having regard to the object for which the provisions of Section 50 have been introduced into the N.D.P.S. Act and when the language thereof obliges the officer concerned to inform the person to be searched of his right to be searched in the presence of a Gazetted Officer or a Magistrate there is no room for drawing a presumption under Section 114 illustration (e) of the Indian [Evidence Act, 1872](#)'.

17. Another Judgment of this Hon'ble High Court reported in (1995) 2 Cal HN. 448 is also cited by Mr. Sengupta in which the aforesaid decisions have been followed. We have carefully gone through the evidence and materials on record and we have no hesitation to hold that the provisions of Section 50 of the N.D.P.S. Act have not been complied with in this case and accordingly the Appellant is entitled to be acquitted.

18. Mr. A. R. Saha, Id. Advocate, on behalf of the State could not point out any evidence or material showing compliance of the provisions of: Section 50 of the N.D.P.S. Act in this case.

19. Since the submission of Mr. Sengupta regarding non-compliance of the provisions of Section 50 of the N.D.P.S. succeeds, we do not think it necessary to dilate on the other submissions made on behalf of the Appellant.

20. The Appeal is, therefore, allowed and the conviction and sentence on the Appellant by the Ld. Additional Sessions Judge, 4th Court at Alippre, 24 Parganas (South) by Judgment dated 10th January, 1991 in S. T. No. 2(ii) 90 are set aside and the Appellant is directed to be released from custody forthwith if his futher custody is not required in connection with any other case. The seized alamats shall be destroyed in accordance with law.

Nisith Kumar Batabyal, J.

21. I agree.

