

**Prabhas Sarkar Vs. the State**

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**Court :** Kolkata

**Decided On :** Aug-12-2002

**Reported in :** (2003)2CALLT235(HC)

**Judge :** Pradip Kumar Biswas, J.

**Acts :** [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20, 41, 41(2), 42, 42(1), 43 and 50

**Appeal No. :** C.R.A. No. 025 of 2002

**Appellant :** Prabhas Sarkar

**Respondent :** The State

**Advocate for Def. :** R.S. Saroop, Adv.

**Advocate for Pet/Ap. :** C.S. Chouhan and ;A.S. Zinu, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**P.K. Biswas, J.**

1. This appeal is directed against the judgment and order of conviction passed by Mr. M.M. Sarkar, learned Sessions Judge, Andaman & Nicobar islands, Port Blair, on 26th February, 2002 in Sessions Case No. 1 of 2001 (Sessions Trial No. 17th

of December, 2001), whereby he has been pleased to pass an order of conviction upon the appellant, Shri Prabhas Sarkar, sentencing him to undergo rigorous imprisonment for one year and also to pay a fine of Rs. 5000/-, in default, to suffer rigorous imprisonment for a further period of three months under Section 20(b)(i) of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (hereinafter referred to as the 'NDPS Act)).

2. The short facts leading to the prosecution of the convict/appellant are as under:-

On 5.1.1997 ASI R.A. Prasad was placed in charge of the Hut Bay P.S. in the temporary absence of the Station House Officer of Hut Bay P.S. in Little Andaman. On that dated, being accompanied by HC 1172 D.N. Singh, HC 1166 C.D.P. Yadav, PC 1661 Hardeep Singh and PC 1693 K.C. Paul, he left the P.S. for patrolling duty, and in course of such patrolling duty having reached Ramkrishnapur, he got a secret information from source that one Shri Prabhas Sarkar was selling Ganja in puria or small packets from his shop at Ramkrishnapur, and on receipt of the said information, the said Police Officer reached the shop of Shri Prabhas Sarkar and posted police guards both in the front side and back side of the said shop. The said Police Officer sent PC 1661 Hardeep Singh to bring the Executive Magistrate of Hut Bay Tehsil, and subsequently, at 13-15 hours the Executive Magistrate, Shri B.B. Mitra, arrived at the place of occurrence. In the presence of the said Executive Magistrate and one Shri Motilal Sarkar, Sarpunch of Ramkrishnapur Gram Panchayat, the ASI R.A. Prasad conducted search in the double storied building of Prabhas Sarkar, firstly in the ground floor and subsequently in the first floor where Shri Prabhas Sarkar has his living accommodation.

3. In course of the said search in the first floor room, Ganja was recovered being mixed Bhang in small paper packets or purias and also inside a cotton pillow cover with plastic packets or pannis. Subsequently, the entire recovered Ganja was weighed and found to contain 4.5 kgs. and from the aforesaid seized article, 100 grams of Ganja was separated as a sample and the same was put in a separate packet, and rest packets and purias were put in a big plastic bag, and all those articles were duly sealed after formal seizure of the said recovered articles by

preparing the seizure list in presence of the said Executive Magistrate, Shri B.B. Mitra, Sarpunch, Shri Motilal Sarkar and the accused person himself, and as on demand, the accused Prabhas Sarkar failed to produce any authority of licence for his possession of Ganja.

4. Subsequently, after investigation, charge-sheet under Section 20(b)(i) of NDPS Act, 1985 was submitted against the convict/appellant and trial was started by framing charge under the said section against the convict/ appellant, who during his examination pleaded not guilty and claimed to be tried.

5. The prosecution in this case has examined in all 9 PWs and produced some documentary evidence to substantiate the allegations against the aforesaid convict/appellant.

6. From the side of the convict/appellant no witness was examined; but from his side some technical defence was taken with regard to the search and seizure conducted by ASI R.A. Prasad and also with regard to the non-compliance with the mandatory provisions of Section 42 as also Section 50 of the NDPS Act.

7. The learned Sessions Judge after conclusion of the trial and upon hearing the parties before him, and after rejecting the contention of the convict/appellant, was pleased to convict and sentence the convict/ appellant under Section 20(b)(i) of the NDPS Act, 1985 holding him guilty of the aforesaid offence.

8. In this appeal I have heard Mr. C.S. Chouhan, learned advocate, appearing for the convict/appellant and also Mr. R.S. Saroop, learned Public Prosecutor, appearing on behalf of the State-respondents, at length.

9. Mr. C.S. Chouhan, learned advocate appearing for the convict/ appellant, has contended mainly that in this case learned Sessions Judge has failed to appreciate the mandatory provisions of the NDPS Act, 1985. He has also contended further that here in this case the FIR was drawn, after search and seizure of articles were completed, and it has further been contended by him that there was non-compliance with the provisions of Sections 42 and 50 of the NDPS Act, and concerned ASI R.A. Prasad was also not authorised to conduct such

search and seizure in connection with the present case, in absence of express authorisation of his superior authority, and the notification, referred to in the judgment and order, has also not been produced at its appropriate stage in course of trial, and as such, defence was not given any appropriate opportunity to challenge the aforesaid notification, and so to say that in fact the aforesaid notification does not in any way authorizes the ASI R.A. Prasad to conduct such search and seizure in the instant case.

10. It has also been contended by Mr. C.S. Chouhan, learned advocate appearing for the convict/appellant that although, as per the prosecution version, the sample packet of 100 grams of Ganja was separated, yet from the report of the CFSL (Ext. 8). It has come put that only 2.0 grams were examined by the CFSL expert, Moreover, there was an inordinate delay in sending the sample to the chemical examiner, and in the absence of cogent evidence with regard to the fact that seal on the sample of 100 grams of seized. Ganja remained in tact till they reached the CFSL, no reliance can be placed on such report in coming to a conclusion that the article in question would be classified as Ganja under the NDPS Act.

11. Apart from taking the technical defence, it has also been contended by Mr. C.S. Chouhan, learned advocate, that there was a material contradiction in the evidence of the prosecution witnesses with regard to the place and the manner of seizure, and as such, no reliance can be placed on the evidence adduced by the prosecution in coming to a conclusion that this convict/appellant was really guilty of the offence under the aforesaid provision of the NDPS Act.

12. As against this, Mr. R.S. Saroop, learned Public Prosecutor, representing the State/Opposite parties, has contended that the learned Trial Judge has not overlooked the contention raised on behalf of the convict/ appellant and there is apparently no case to interfere the finding of the learned trial Judge.

13. In deciding the present matter, I shall now first deal with the technical objections raised by the convict/appellant in connection with the present case.

14. Here in this case, it has been contended forcefully from the side of the convict/appellant that ASI R.A. Prasad (PW 1) not being the Station House Officer

and also not being properly authorized to hold the charge of the Hut Bay Police Station, was not empowered to make search, seizure and arrest of the convict/appellant, and he has also failed to comply with the mandatory provisions under Sections 42 and 50 of the NDPS Act. In the deposition of ASI Prasad, it has been claimed by him as PW 1 that on that date he was placed in the charge of Hut Bay Police Station, as the regular Station House Officer, Shri Dev Das, was away to Port Blair in connection with his official duty. The same has been forcefully challenged from the side of the convict/appellant, contending that the aforesaid ASI R.A. Prasad was not in-charge of the Hut Bay Police Station on that date.

15. To prove the aforesaid contention, some amount of oral evidence was adduced from the side of the prosecution by examining the PW 1 R.A. Prasad, the PW 2 B.B. Mitra who was posted as Tahsildar-cum-Executive Magistrate with his office at Hut Bay, and the PW 4 D.P. Yadav, who was then posted at Hut Bay P.S. in the rank of Head Constable, and apart from placing reliance on the above evidence, the prosecution has also placed reliance on certain documentary evidence such as Ext. 2, Ext. 3, Ext. 4 (series) and Ext. 5, wherefrom it was shown that the ASI R.A. Prasad was holding the charge of Hut Bay Police Station at that relevant point of time.

16. Relying on the aforesaid documents, it has been contended that these documents clearly suggest that ASI R.A. Prasad on that date was holding the charge of Hut Bay P.S., and that being the position, as per the notification dated 20.9.1990, as discussed by the learned trial Judge in his judgment, the said ASI R.A. Prasad being placed in the charge of Hut Bay Police Station, was authorized to conduct search and seizure as per the provision of Section 42(1) of the NDPS Act.

17. Mr. Chouhan, learned advocate, drawing my attention to the aforesaid evidence, has, however, submitted before me that although some amount of evidence has been adduced from the side of the prosecution to prove the said fact the ASI R.A. Prasad was placed in the charge of Station House Officer, Hut Bay Police Station on the relevant date, yet for proving the aforesaid fact the prosecution has neither examined the concerned Station House Officer, Shri Dev

Das, nor produced any documentary evidence, i.e. G.D. Entry Book, which is maintained in the P.S. in regular course of the business to show that in fact who was holding the charge of P.S. at the relevant point of time, as it was quite mandatory according to the Police Regulation Book to make G.D. Entry by the concerned Police Officer at the time of taking departure or at the time of receiving charge of the Police Station.

18. True it is that some evidence has been adduced from the side of prosecution, showing that the relevant point of time, as per deposition before the learned trial Judge, Shri Dev Das, SI, was away from the Police Station and he, at the relevant point of time, was undergoing a training course at Hyderabad, but that alone cannot be a sufficient ground to accept that his evidence could not be made available to the Court, and apart from that, the prosecution did not take any steps to produce G.D. Entry Book so as to show the fact that at the relevant time R.A. Prasad, ASI, was placed in the charge of Hut Bay P.S. as the Station House Officer, in the absence of the regular Station House Officer, and for withholding of such vital documents like G.D. Entry, some adverse presumption has to be taken against the prosecution under Section 114(g) of the Evidence Act, and it is specially so when it has been seriously challenged from the side of the convict / appellant.

19. In the instant case, had there been production of the G.D. Entry, it could have been shown from the same whether or not the said ASI was in the charge of P.S. Hut Bay and for withholding of such vital document from the side of prosecution without proper explanation, I am entitled to draw and hold adverse presumption against the prosecution and accordingly, I hold that prosecution has failed to prove that the said ASI R.A. Prasad (PW 1) was then holding the charge of P.S. Hut Bay or was temporarily holding the charge of the said P.S. at the relevant time.

20. It is now an admitted position that the ASI, R.A. Prasad, has not been authorized by any Superior Officer to conduct search and seizure in respect of shop and residential premises of the convict/appellant. The claim has been made from the side of prosecution that, being placed in the charge of the P.S. as Station House Officer, under the provision of Section 42(i) of the NDPS Act, he himself

was competent to conduct search and seizure on the basis of the information received by him; but in view of the above finding, when I have come to a conclusion that the prosecution has failed to prove that the said ASI, R.A. Prasad was the Station House Officer by virtue of being in-charge of the said P.S. in the absence of Shri Dev Das, Station House Officer, it is very clear that the ASI, R.A. Prasad, was not authorized to function and carry out search and seizure under Section 42(i) of the NDPS Act without the proper authorization of his Superior Officer, and that being the position, there has been violation and/or contradiction of the mandatory provisions of the NDPS Act and the same would certainly affect the prosecution case and vitiate the trial.

21. I am fortified to hold so in view of the ratio of the decision reported in : 1994 CriLJ3702 in the case of State of Punjab v. Balbir Singh, wherein it has been laid down that 'under Section 41(i) of the NDPS Act only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc., when he has reason to believe that such offences have been committed or such substance are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Section 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.'

22. In another case of Gurdev Singh v. State of Rajasthan reported in 1996 Cr.LJ, it was held by a single Bench of Rajasthan High Court that the Sub-Inspector of Police can exercise power under Sections 42 and 43 of the NDPS Act only if he is posted as Station House Officer, and search and seizure by the officer who is not posted as such is without jurisdiction.

23. From the side of the defence, another objection has also been raised with regard to the search and seizure for non compliance with Section 50 of the NDPS Act, alleging that before conducting search, the ASI, R.A. Prasad, did not adhere to the provision of Section 50 of the Act, and as such, there has been non-

compliance of the mandatory provision, and as such, search and seizure have been vitiated, and in this connection the defence has placed a reliance on the decision in a case of Mohinder Kumar v. The State, Panaji, Goo, reported in : 1995 CriLJ2074 .

24. Mr. R.S. Saroop, learned Public Prosecutor, drawing my attention to the evidence of PW 1, has stated that PW 1 in his evidence has stated that before conducting search of the premises, he offered himself for search, and I find such evidence in the deposition of PW 1, yet, the same has been challenged during cross-examination by the defence. In such situation, it is for the prosecution to adduce some cogent evidence to show really that there has been such compliance with the provision of Section 50 of the Act; but from the evidence of other witness, namely, PW2, B.B. Mitra, Tehsildar-cum-Executive Magistrate, and PW 3, Motilal Sarkar, the then Surpunch of Gram Panchayat, in course of their evidence it appears that they did not support the version of the PW 1 with regard to the offer made by the PW 1 to the convict/appellant for search.

25. Furthermore, from the scrutiny of the evidence of PW 1 (ASI, Prasad) it is seen that nowhere in his evidence it has been indicated by him that before conducting search in the shop-cum-residential premises of the convict/appellant he was informed by him that if he so requires, he shall be produced before a gazetted officer or Magistrate or that such search shall be conducted in presence of Gazetted Officer or Magistrate.

26. In the written notice (Ext. 1), served on this accused also no such mention has been made although in the requisition (Ext. 2) such an intention for searching the shop in presence of Executive Magistrate was made. Shri B.B. Mitra, the then Tahsildar-cum-Executive Magistrate (PW 2) however in his evidence has stated that PW 1 expressed his desire to Prabhas Sarkar for conducting search in his shop room in their presence.

27. PW 4 C.D.P. Yadav and PW 8 D.N. Singh, the then H.C. 1172 attached to Hut Bay P.S. in course of their evidence also have supported the above evidence of the Executive Magistrate.

28. But PW 3 Motilal Sarkar local Surpanch in course of his evidence did not support the above evidence of PW 2 & PW 4 & PW 8.

29. In view of such contradictory nature of evidence, adduced by the witnesses named above and also in the context of evidence, tendered by PW 1 himself on this issue, I am rather prompted to hold that there has been non-compliance with mandatory provision of Section 50 of the NDPS Act.

30. Turning to the another important aspects of this case, I find that serious challenge has been made from the side of the convict/appellant alleging that there has been tempering with the sample, collected in connection with this case. It is the claim of the prosecution that 100 gram of the seized material were kept separated for the purpose of sample; but from the report of the CFSL (Ext. 8), I find that there is mention of only 2 grams. No explanation, however, has been offered from the side of prosecution in this regard. Moreover, from the evidence of PW 6, Madhu Mala Chattopadhyaya, and PW 7 C. George Kutty, it appears that there was an inordinate delay in sending the sample, collected, to the authority of CFSL, and it has come out in the evidence that although alleged seizure and taking of the sample were made on 5.1.1997, yet, the said sample was sent to the CFSL on 23.7.1997. Therefore, it is obvious that the aforesaid sample changed several hands before reaching to the authority of CFSL, and in the instant case, the persons in custody of the sample during the relevant period, being not examined, to prove the fact that the seal remained in that till it reached the CFSL, the inevitable effect will be that the prosecution has failed to rule out the possibility of tampering with the sample during the period in question. Since, in the instant case, the prosecution has not adduced any evidence whatsoever to show that the seal on the sample remained in fact till it reached the CFSL and has not also offered any explanation that why only 2 gram of sample was examined by the CFSL, although it was their claim that 100 gram of sample was collected on the date of seizure, I am rather prompted to hold in agreement with the views expressed by the learned advocate for the convict/appellant that possibility of tampering with the seal on the sample cannot be ruled out, and in that view of the fact, it is rather difficult to place any reliance on the aforesaid report of the CFSL, and in fact, no reliance can also be placed on such report and the conviction

based upon such alleged report cannot at all be sustained.

31. I am rather fortified to hold so in view of the ratio of decision reported in : 1994 CriLJ1 in the case of Valsala v. State of Kerala as also in the decision reported in 1996 Cr LJ 4059 In case of Ram Swaroop v. State of Rajasthan.

32. I have gone through the judgment and order of the learned Trial Judge, and going through the same, I find that the learned Trial Judge has failed to appreciate the provisions of Sections 42 and 50 of the NDPS Act in their true perspective, and regarding the report of the CFSL, no discussion with regard to the delay in sending the sample to the CFSL has been made, nor he has taken into account the fact that the prosecution in this case has failed to adduce any evidence that the sample remained in tact till it reached CFSL, and that being the position, the finding and ultimate conclusion of the learned Trial Judge holding the convict/appellant guilty of offence under Section 20(b)(i) of the NDPS Act, is not at all sustainable In law, and as such the same should be set aside.

33. In view of what has been discussed above, it is rather redundant to discuss about the merit of this case by way of sifting the evidence and other materials on records, and as such, I refrain myself from doing the same.

Now as a result of the foregoing discussions, there is no hesitation in holding that the conviction of the convict/appellant in the instant case, cannot be maintained. The appellant is, therefore, entitled to the order of acquittal. Consequently, I allow this appeal and acquit the appellant, Prabhas Sarkar, of the offence under Section 20(b)(i) of the NDPS Act. If he is in jail, he will be released forthwith, if not required in any other case.

Accordingly, the appeal be and the same is hereby disposed of.

Let the lower Court records be sent down to the learned Court below.