

**Criminal Appeal**  
**Present: The Hon'ble Mr. Justice Ashim Kumar Banerjee**  
**And**  
**The Hon'ble Mr. Justice Kishore Kumar Prasad**

**C.R.A. No.330 of 2004**

**Judgment on: April 20 2010.**

**Lal Deo**  
**-VS-**  
**State of West Bengal**

**POINTS:**

APPEAL, SEARCH-----Appellant intercepted by Intelligence Officers of Narcotic Control Bureau-----Search before Gazetted Officer-----310 grams of heroin found on person---- written consent given by appellant superfluous-----No independent witness examined----Learned Judge, whether correct in holding the appellant guilty of offence---- Narcotic Drugs and Psychotropic Substances Act, 1985, Ss. 21(C)/29/21(C), 67

**FACTS:**

Acting on specific information a batch of Intelligence Officers of Narcotic Control Bureau went in front of Mohamilon Math (Northern Gate) where they intercepted the appellant and one other. They disclosed their identity. The officers disclosed their purpose to them and wanted to search them. Before conducting the search, an offer in writing was given to them to be searched in person before a Magistrate or a Gazetted Officer who was already with them. The appellant gave their written consent to be searched in presence of the Gazetted Officer accompanying the raiding party. On a search being conducted 310 grams of heroin was found from a polythene bag being carried by the appellant. The officers prepared a seizure list in presence of on lookers. The officers gave both the accused a notice under Section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985, requiring them to attend the office of N.C.B. for further interrogation. The officers interrogated them at N.C.B. office. They made voluntary statement that the appellant wanted to

sell 310 grams of heroin and his accomplice arranged for a customer. They were waiting for the customer who did not turn up possibly being apprehensive of the raid. Both of them were arrested and charged for possessing, selling, transporting and abetting contraband articles. An Intelligence Officer filed a written complaint in the Court of Learned Special Judge, who thereafter framed charge. The accused were ultimately remanded to the judicial custody. They pleaded innocence and wanted to face the trial.

**HELD:**

The appellant was having a plastic bag with him the raiding party searched the bag and found 310 gms of heroin. In the considered view of the Court, the written offer made to the appellant or the written consent allegedly given by him was superfluous, as section 50 had no application. The Court, however, observes that the way the written offer was given, was not in strict compliance of section 50. However, since it was observed that it was superfluous, there is no wish to give any reliance on the same.

Para-22

No independent witness was examined. On examination of the records the Court found that two independent witnesses were present at the fateful time of search and seizure of the contraband article and they put their signature on the seizure lists. Summons was sent on three occasions asking them to appear before the Court to depose but such attempt was in vain. That cannot make the entire proceeding, ipso facto, bad. The contraband articles were duly examined. The chemical examination report, search and seizure was proved and corroborated. The learned Judge held the appellant guilty of offence and the Court does not find any scope of interference on that score.

Paras-23&24

**CASES CITED:**

For the Appellant : Mr. Rash Behari Mahato  
Mr. Kalyan Moitra

For the State : Mr. S.K. Mahato  
Mrs. S.Sultana

**THE COURT:**

1) Acting on specific information, a batch of Intelligence Officers of Narcotic Control Bureau under the leadership of Superintendent of N.C.B. (EZU) went in front of Mohamilon Math (Northern Gate), P.W.D. Road, Baranagar, Kolkata on August 8, 1998 at about 3.30p.m. They intercepted the appellant Lal Deo and one Gokul Pal there. They disclosed their identity. The officers disclosed their purpose to them and wanted to search them. Before conducting the search, an offer in writing was given to them to be searched in person before a Magistrate or a Gazetted Officer. They also informed that one Gazetted Officer was already with them. It was the case of the prosecution that the appellant and Gokul gave their written consent to be searched in presence of the Gazetted Officer being P.W.6, N.C. Patra accompanying the raiding party.

2) On a search being conducted 310 grams of heroin were found from a polythene bag being carried by Lal Deo. Nothing was recovered from Gokul. The officers prepared a seizure list in presence of on lookers, namely, Shibnath Sahoo and Susanta Saha. The officers gave both the accused a notice under Section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to N.D.P.S.) Act, 1985 requiring them to attend the office of N.C.B. for further interrogation. The officers interrogated them at N.C.B. office. They made voluntary statement that Lal Deo wanted to sell 310 grams of heroin and Gokul arranged for a customer. They were waiting for the customer, the customer did not turn up possibly being apprehensive of the raid. Both of

them were arrested. They were charged under Sections 21(C)/29 read with Section 21(C) of the N.D.P.S Act for possessing, selling, transporting and abetting contraband articles.

3) P.W. 1, Sri Nabani Dhar Paul, an Intelligence Officer, filed a written complaint in the Court of Learned Special Judge, Barasat, 24 Parganas (North) on December 08, 1998. The learned Judge thereafter framed charge. The accused were ultimately remanded to the judicial custody. They pleaded innocence and wanted to face the trial.

4) P.W. 1, Nabani Dhar Paul, deposed that he personally typed the complaint and filed the same in Court. He, however, did not have any occasion to examine any officer while filing the complaint. He had no personal knowledge about the case.

5) P.W. 2, Rabindranath Benerjee, seized the contraband goods found from the plastic bag being carried by Lal Deo. Before the search was conducted, written offer was given to the accused to be searched in presence of a Gazetted Officer or a Magistrate. They gave their written consent and thereafter the search was conducted in presence of Sri Patra P.W. 6 who happened to be a Gazetted Officer belonging to Narcotic Bureau and leader of the raiding party. Sample was drawn from the seized contraband articles. It was tested on the spot and after being satisfied the raiding party seized the entire assignment after two sample packets of 5 grams each. He arrested the accused after making voluntary statement made by them at the office of the Narcotic Bureau. The accused were produced in Court along with seized articles which was later on taken back and sent for chemical examination.

6) P.W.s 4, 5, 6, 7 and 8 were also members of the raiding team. They almost corroborated each other except for a few minor anomalies. Hence we do not intend to discuss in details the evidence of those officers.

7) P.W. 3 was the chemical examiner who certified that the contraband articles were heroin. In course of cross-examination he deposed that he received 4.7 grams heroin instead of 5 grams as stated by the prosecution.

8) Learned Judge of the Special Court upon appreciation of the evidence held that Lal Deo was guilty of the offence punishable under Section 21(C) and convicted him and sentenced him to suffer rigorous imprisonment for ten years coupled with a fine of rupees one lakh and in default, to suffer further rigorous imprisonment of one year. Learned Judge was of the view that there was no recovery in case of Gokul Pal and he was found not guilty of the offence punishable under Section 29 read with Section 21(C) and was acquitted from the charge framed against him.

9) Being aggrieved by the judgment and order of the Special Court dated March 10/11, 2004 Lal Deo preferred the instant appeal which was heard by us yesterday.

10) Mr. Rash Behari Mahato, learned counsel, appearing for the appellant, contended as follows:-

i) Since the appellant was searched by raiding party, it was incumbent upon the raiding party to make him aware to be searched in presence of either Gazetted Officer or a Magistrate under Section 50 of the N.D.P.S Act, 1985. Such provision was not complied with and as such the learned Trial Judge erred in law in convicting the appellant.

ii) There had been inordinate delay in examining P.W.2, Rabindranath Banerjee as adjournments were taken for months together while Sri Banerjee was being examined in chief.

iii) From the tenor of deposition it was clear that the accused were arrested after seizure of the contraband articles. Their arrest was made after the alleged voluntary statement made by them. Their arrest was improperly made and the proceeding was thus vitiated by such illegality.

iv) From the evidence of Sri Banerjee it was clear that after production of the contraband articles it was taken back from Court which was highly irregular and would vitiate the trial.

v) The officers being the prosecution witnesses consistently stated that the sample drawn was 5 grams. P.W.3, Chemical Examiner deposed that he received 4.7 grams of heroin instead of 5 grams.

vi) P.W. 6, the concerned officer could not identify Lal Deo in Court. Hence his evidence should be discarded.

vii) P.W. 1, Nabani Dhar Paul, was not a member of the raiding party. He was not informed about the incident. Hence he had no occasion to file the complaint. In any event, he was not authorised as such being ignorant about the incident.

11) To elaborate his argument, Mr. Mahato contended before us that the entire proceeding was vitiated by irregularity and/or illegality. The so-called compliance of the mandate of Section 50 was nothing but a mockery and immense prejudice was caused to the accused. They were arrested improperly. The contraband articles were illegally taken from the Court.

There had been anomalies galore in evidence which would question the trustworthiness of the prosecution witnesses. Mr. Mahato prayed for acquittal of the appellant.

12) Appearing for the State Mr. Sushil Kumar Mahato, learned Counsel contended as follows:

i) Both the accused were given written offer for being searched in the presence of the Gazetted Officer. They gave their written consent. One of them signed in Bengali and the other put in L.T.I. Neither the signature nor the LTI was questioned.

ii) The sample was drawn from the articles at the spot and it was tested by the Officers themselves. After being prima facie satisfied on such preliminary test, the Officers seized the articles and gave them notice under section 67 of the N.D.P.S. Act for interrogation. They were taken to the office of the of Narcotics Control Bureau where they made written confession. On that basis they were arrested. Hence, there was no illegality committed by the Officers in the matter of arrest.

iii) The discrepancy in weight was negligible. In any event, there might be some loss during transit or at the time of taking out the sample for the purpose of chemical test. Such minor discrepancy could not and would not vitiate the trial in any way.

v) The provisions of section 43 and 67 of the said Act were performed in accordance with law.

13) Mr. Mahato contended that on a specific information the raiding party intercepted the accused and on search being conducted in accordance with law, the contraband articles were found and the sample of the contraband was sent for chemical examination. Once the chemical report supported the fact that the appellant was in possession of heroin, he was liable for conviction. The learned Special Judge rightly held the appellant guilty of the offence and sentenced him accordingly. Mr. Mahato prayed for dismissal of the appeal.

14) Before considering the point in controversy, let us first discuss the various provisions of the N.D.P.S. Act, 1985. Sections 42, 43, 50, 57 and 67 being relevant herein, are discussed herein below:

a) Section 42 deals with power of entry, search, seizure and arrest without warrant or authorization. Several Officers have been mentioned in the said provision who are authorized to search or seize any narcotic drug or psychotropic substance or controlled substance within the meaning of the N.D.P.S. Act, 1985 after performing the mandatory requirement as provided in the said Act of 1985. A complete procedure has been prescribed therein.

b) Section 43 empowers those Officers to seize any contraband article and arrest the possessor in any public place.

c) Section 50 inter alia, provides that in case of any Officer performing his duty under section 41, 42 or 43, wants to search any person bodily, such Officer must inform the accused that he would be entitled to be searched in presence of a Gazetted Officer of any of the departments mentioned in section 42 or the nearest Magistrate.

d) Section 57 obligates an Officer to inform his superior within 48 hours in case he conducts search and seizure and arrests any person for that purpose.



e) Section 67 empowers the Officers referred to under section 42 to call any person for interrogation and compel him to produce or deliver any document useful or relevant for the purpose of enquiry.

15) On a combined reading of the aforesaid provisions we find that if an Officer prescribed under section 42 wants to search an accused bodily, he first must make the accused aware of his right to be searched in presence of a Gezzeted Officer or Magistrate. Such Gezzeted Officer, however, may be any one of those mentioned under section 42. However, such provision is not mandatory, in case there is any search or seizure or arrest conducted by the Officer without searching any person bodily; meaning thereby, if any accused is in possession of any contraband article on his person, the Officer is entitled to search him in presence of a Gezzeted Officer or Magistrate. Once such search, seizure and/or arrest is made, the Officer is duty bound to inform his superior within 48 hours under section 57 of the said Act of 1985.

16) Mr. R.B. Mahato, learned Counsel appearing for the appellant did not cite any authority. Mr. S.K. Mahato, learned Counsel for the State, however, cited two decisions, one of the Apex Court and the other of this court.

17) In the case of *State of Himachal Pradesh vs. Pawan Kumar* reported in *2005 Vol.II Calcutta Criminal Law Reporter (Supreme Court) page 41*, the Apex Court interpreted the 'person' in paragraph 9 of the said decision. According to the Apex Court, the appropriate meaning of the word person 'person' appears to be "the body of a human being as presented to public view usually with its appropriate coverings and clothings." In paragraph 10 of the said decision the Apex Court

observed that a bag or briefcase or any such article or container can '*under no circumstance*' be treated as part of the body of a human being and thus, would not come within the mischief of section 50 of the said Act of 1985.

18) In the case of *Mahammad Ismail –vs- State* reported in *2004 C Criminal Law Reporter (Cal)* **267** the Division Bench of our court reiterated what was observed by the Apex Court in the case of State of Himachal Pradesh (supra).

19) In the case of *Jadunandan Roy –vs- State of West Bengal* reported in *2000 Calcutta Weekly Notes page 373* the Special Bench of our court considered sections 41, 42, 50 of the NDPS Act of 1985 in detail. The Special Bench was of the opinion that when the requirement of section 50 is mandatory, the breach of such provision would make the conviction illegal. The Special Bench also observed that it was not necessary that the notice of option must be given in writing or that absence of any written option would nullify any evidence. What is required, is to make the accused aware of his right and offer him to be searched in presence of a Gazetted Officer or a Magistrate.

20) The Apex Court in the case of *Mahammad Hossain Farah vs. Union of India & Anr.* reported in *2000 volume-I Supreme Court Cases page 329* observed that the accused stayed in a hotel and from his room the contraband article was seized. The Apex Court upheld the conviction and negated the contention that section 42 had application.

21) On a combined reading of the above decisions and the ratio decided therein and the law discussed as above, we are of the view that whenever a person is searched bodily, meaning thereby

he is searched on his person, the requirement of section 50 is mandatory. Any breach on that count would amount to vitiating the entire proceeding and the conviction of any person would per se be liable to be set aside. However, when any Officer named under section 42, seizes any contraband article from different places and/or any bag or container or bag in possession of any person, section 50 would have no application.

22) In the case before us, Lal Deo was having a plastic bag with him, the raiding party searched the bag and found 310 grms of heroin. In our considered view, the written offer made to Lal Deo or the written consent allegedly given by him was superfluous, as section 50 had no application. We, however, observe that the way the written offer was given, was not in strict compliance of section 50. However, since we have observed that it was superfluous, we do not wish to give any reliance on the same.

23) Mr. Mahato stated that no independent witness was examined. On examination of the records we find that two independent witnesses were present at the fateful time of search and seizure of the contraband article and they put their signature on the seizure lists. Summons were sent on three occasions asking them to appear before the Court to depose but such attempt was in vain. That, in our view, cannot make the entire proceeding, ipso facto, bad.

24) The contraband articles were duly examined. The chemical examination report was proved by PW-3. Search and seizure was proved by PW-2 and corroborated by PW-2, 4, 5, 6,7 and 8. The learned Judge held Lal Deo guilty of offence and we do not find any scope of interference on that score.

25) Mr. R.B. Mahato, learned Counsel for the appellant contended that Narcotic Control Bureau was a necessary party. Notice must be given to them and in their absence the appeal should not be heard.

26) The appeal was appearing before us for a long time. Service was complete upon all concerned. The prosecution is represented by State Counsel. Hence, we do not wish to adjourn the matter any further.

27) The appeal fails and is hereby dismissed.

28) Lal Deo was given sentence for ten years coupled with a fine of Rs. 1,00,000/- and in default, to suffer rigorous imprisonment for one year more. Lal Deo was in custody for more than 11 years. We are not sure whether he has already been released after suffering of the full sentence. In case he has not been released, let him be released at once, if not wanted in connection with any other case.

29) Let lower Court records be sent down to the Court below along with a copy of this judgment at once for information and necessary action.

30) Urgent xerox certified copy of this judgment, if applied for, be given to the parties upon compliance of all formalities.

**Kishore Kumar Prasad, J:**

31) I agree.

**[ASHIM KUMAR BANERJEE,J.]**

**[KISHORE KUMAR PRASAD]**