

Form No. J(1)

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi
&
The Hon'ble Justice Suvra Ghosh

C.R.A. No.480 of 2019
CRAN No.2535 of 2020

Akbar Ali
-Vs-
The State of West Bengal

For the Appellants : Mr. Subrata Karmakar, Adv.

For the State : Mr. Prasun Kr. Dutta, Id. APP.
Mr. Sanjoy Bardhan, Adv.

Heard on : 04.09.2020

Judgment on : 04.09.2020

Joymalya Bagchi, J.:

The appeal is directed against the judgment and order dated 1.7.2019 and 2.7.2019 passed by the learned Judge, Special Court, NDPS Act, Berhampore, Murshidabad in NDPS Case NO.119/2012 convicting the appellant for commission of offence punishable under Sections 21(c) of the NDPS Act and sentencing him to suffer rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- in default to suffer rigorous imprisonment for six months more.

Prosecution case as alleged against the appellant is to the effect that on 6.12.2012 at 10 am while PW 1, Somnath Banerjee, was on law and order duty at Jotkamal High School, he received secret information that a 25-year old man carrying heroin in a black colour school bag was coming from Lalgola side in a bus bearing registration no.WB-57/6300. He communicated the information to S.D.P.O. Jangipur. He also requested duty officer to send the drug detection kit to Jotkamal bus stand and proceeded to the spot to work out the information. At 10.30 am the bus reached Jotkamal bus stand. He detained the bus and apprehended the appellant who was carrying a school bag. He gave offer to the appellant whether he would like to be searched before a gazetted officer or an executive magistrate. Appellant desired to be searched before executive magistrate. He sent requisition for an executive magistrate. He also requisitioned a local goldsmith to come to the spot with his weighing instrument. At 11.15 hours B.D.O. Partha Pratim Sandhu Khan, (P.W. 6) arrived at the spot. S.D.P.O., Jangipur (P.W. 7) also arrived at the spot. In the presence of the B.D.O., appellant was searched. Nine packets were recovered from the bag. The packets were kept in cellophane packet paper. He requested goldsmith to weigh the contraband suspected to be heroin. The weight of each packet was 100 gms. He drew two samples of 5 gms. each from each of the nine packets. He prepared seizure list which was signed by witnesses including bus conductor (P.W. 2), B.D.O. (P.W. 6). LTI of the appellant was also affixed. Appellant failed to give satisfactory explanation with regard to alleged possession of the narcotic. He arrested the appellant and lodged written complaint (Ext.1) which was treated as First Information Report. Upon registration of the criminal case P.W. 12 took up investigation. He dispatched

the samples for chemical examination. Subsequently, charge-sheet was filed against the appellant. Charge was framed under section 21(c) of the NDPS Act. Appellant pleaded not guilty and claimed to be tried. In the course of trial prosecution examined 12 witnesses and exhibited a number of documents. In conclusion of trial, the trial Judge by judgment and order convicted and sentenced the appellant, as aforesaid.

Mr. Subrata Karmakar appearing for the appellant argued that the prosecution has failed to prove the possession of narcotic substance in the custody of the appellant. P.W. 2 claimed that the bag was brought down from the bunk of the bus. It was not in the possession of the appellant. No evidence is forthcoming that the appellant had put the bag in the bunk. Hence, the factum of possession has not been proved beyond doubt. School bag has also not been produced in Court. There is no compliance of section 50 of the NDPS Act. Place of seizure and sampling of articles are also in dispute. While P.W. 1 and other witnesses claimed it was made at the bus stand, the goldsmith (P.W.4) deposed he weighed the samples in his shop. Chain of custody of the seizure articles has also not been established. Prosecution failed to adduce evidence with regard to custody and dispatch of the samples for chemical examination. Requisition to the goldsmith and other vital documents have also not been produced in Court. Hence, prosecution suffered from inherent defects and ought to have been disbelieved.

On the other hand, Mr. Sanjoy Bardhan appearing for the State argued that the seizure had been effected from a bag carried by the appellant. Hence, section 50 of the NDPS Act does not apply in the

present case. P.W. 1 and other witnesses clearly established that the appellant was holding the bag and version of P.W. 2 (a hostile witness) cannot be assessed in isolation and ought to be appreciated in the backdrop of the entire conspectus of the case. Seizure was done in the presence of an Executive Magistrate, P.W. 6, who was not a member of the raiding party. Other witnesses namely, P.W. 4 and P.W. 5, though declared hostile, supported the broad contours of the prosecution case. Chain of custody has also been duly established and the appeal is liable to be dismissed.

P.W. 1 is the de facto complainant and the leader of the raiding party. He deposed he was on law and order duty at Jotkamal High School when he received prior information with regard to transportation of narcotic by a 25-year-old man in a black coloured bag who was travelling in a vehicle named, Udayan. P.W. 1 immediately informed his superiors and proceeded to work out the information. At 10.30 a.m. the bus was stopped at Jotkamal bus stand. Appellant with his bag was brought down from the bus. He was offered to be searched before a Gazetted Officer or Magistrate. He expressed desire to be searched before a Magistrate. Accordingly, P.W. 6, BDO was requisitioned to the spot. P.W. 1 was also requisitioned a local goldsmith, P.W. 4 for weighment purpose. In the presence of BDO, P.W. 6 and the SDPO, P.W. 7 appellant was searched and contraband was recovered. Subsequently, contraband, that is, 9 packets of powder suspected to be heroin which weighed 100 grams each

was recovered. Two samples of 5 grams each were drawn from each packet. Mother packets as well as samples were sealed, labeled and signed by P.W. 2, conductor, P.W. 6, BDO and other witnesses. LTI of the appellant was also affixed.

Evidence of P.W. 1 finds corroboration not only from the members of the raiding party, namely P.Ws. 8 to 11 but also from BDO, Raghunathganj-II, P.W. 6 and SDPO (P.W. 7) who were summoned at the spot.

In the present case the appellant had also been subjected to a body search, although the recovery was effected from a bag carried by him. Hence, P.W. 1 by way of abundant caution had given an offer to the appellant whether he desired to be searched before a Gazetted Officer or Executive Magistrate. The appellant expressed desire to be searched before an Executive Magistrate. Accordingly, search was conducted in the presence of P.W. 6, BDO Raghunathganj – II.

In this backdrop, I am of the opinion search of the appellant had been conducted after complying with necessary formalities and no infraction under section 50 of the NDPS Act has been made out in the facts of the case.

Learned lawyer for the appellant has strenuously argued that recovery of the narcotic substance from the possession of the appellant has not been proved beyond doubt.

Relying on P.W. 2 he submitted that the bag was recovered from the bunk of the bus and the article was not in the possession of the appellant. There is no evidence to show that the appellant has put the bag on the bunk. The bag in question was also not produced in Court.

I have given anxious consideration to such submissions. P.W. 2, conductor of the bus deposed that the bus had been stopped at Jotkamal bus stand and a person along with a bag kept on the bunk of the bus was brought down by the police. The witness was declared hostile. During cross-examination, he was confronted with his prior statement to the police which exposed his inconsistent stance in Court.

On the other hand, evidence of P.W. 1 and other members of the raiding party unequivocally stated that the appellant who was carrying a bag had been brought down from the bus.

It is trite law that evidence of a hostile witness is to be subjected to greater scrutiny and only such portion of his evidence may be relied on which appears to be credible in the backdrop of the entire conspectus of the case.

Analyzing the evidence of P.W. 2 from such perspective it is clear upon detaining the bus, appellant along with his luggage, that is, bag containing contraband was brought down by police. It is common practice that luggage carried by a passenger is ordinarily stored in the bunk of a bus and is not in the actual physical possession of its owner. No evidence is forthcoming that the appellant at the earliest opportunity had claimed

that the bag brought down from the bunk did not belong to him. Even during trial and his examination under section 313 Cr.P.C. no such plea was raised.

Judged from such angle, I am of the opinion, there is no irreconcilable dichotomy in the evidence of the prosecution witnesses which clearly shows that the appellant along with his luggage i.e. bag was brought down from the bus and upon search narcotic substance was recovered from the bag. Hence, possession of narcotic substance in the custody of the appellant has been proved beyond doubt.

It has been argued that the independent witnesses have not supported the prosecution case. P.Ws. 3, 4 and 5 are the independent witnesses. P.W. 3 and 5 are the shop owners of the locality. P.W. 4 is a local goldsmith.

P.W 3 deposed that a person had been brought down from the bus on the allegation of possession of heroin and was apprehended. P.W. 4, goldsmith, admitted that police came to his shop and asked the weighing machine and weighing units. He complied with the order and police weighed articles and prepared papers to which he put his signature. P.W. 5 is a local shop owner who did not support the prosecution case. P.Ws. 4 and 5 were declared hostile and were extensively cross-examined with regard to their previous statements to the police. Though P.W.s 2, 4 and 5 have been declared hostile, their evidence taken as a whole in the backdrop of the other evidences support the broad contours of the prosecution case that on the fateful day police personnel had detained a bus named Udayan at the Jotkamal bus stand and brought down a person with his bag wherefrom certain articles were recovered and weighed with the weighing machine of P.W. 4. Fact that the witnesses failed to identify the appellant as the

said person is of little consequence as admittedly the appellant had been apprehended at the spot. Articles were seized from the appellant by P.W 1 in the presence of an independent Executive Magistrate, P.W 6, who signed on the labels on the seized articles alongwith other witnesses improbabilising any possibility of false implication.

Hence, I am of the opinion, there is substantial corroboration of the evidence of the police witnesses and prosecution case does not suffer an irreparable dent due to the evasive and prevaricating deposition of the hostile witnesses P.W.s 2, 4 and 5, as aforesaid.

Finally, coming to the issue of place of seizure and labelling of articles, I note that the samples of 5 grms. each were drawn from nine packets containing powder suspected to be heroin. All the packets were sealed and labelled. Labels were duly signed by P.W. 2 and P.W 6. Appellant put L.T.I. on the labels. Relying on evidence of P.W. 4 it is argued that labelling and preparation of other documents were at his shop and not at the place of occurrence. It has come from the mouth of the said witness that his goldsmith shop was adjacent to the place of occurrence, that is, Jotkamal bus stand where the articles were recovered. Hence, there is hardly any departure from the prosecution version with regard to place of seizure, sampling and labelling of articles. Chain of custody of articles has also been established through the evidence of P.W. 12, Investigating Officer and Chemical examiner's report shows that the articles sent for examination were sealed. Such seal on the articles tallied with the specimen seal. Hence, it cannot be said that there was any tampering or substitution of the contraband articles in question.

In the light of the aforesaid discussion, I uphold the conviction and sentence imposed on the appellant.

The appeal is, accordingly, dismissed.

The connected application being CRAN No.2535 of 2020 is disposed of.

The period of detention, if any, undergone by the appellant during the period of investigation, enquiry and trial shall be set off against the substantive sentence, as aforesaid, in terms of Section 428 of the Code of Criminal Procedure.

Copy of this judgment along with the lower court records be sent down to the trial court immediately.

I agree.

(Suvra Ghosh, J.)

(Joymalya Bagchi, J.)