

IN THE HIGH COURT AT CALCUTTA

(Criminal Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 470 of 1990

Sri Shyamdas Mondal

Vs.

The State of West Bengal.

For the Appellant : Mr. Saumik Ganguly,
Mr. Dilip Kumar Sadhu.

For the State : Mr. Subham Bhagat.

Heard on : 17.08.2022

Judgment on : 09.11.2022

Shampa Dutt (Paul), J.:

The appeal is against the judgment and order dated 18.08.1990, passed by the learned Judge, Special Court, Essential Commodities Act, Barasat, convicting the accused under Section 7(1) (a) (ii) of Act, 1955 for violation of para 3(7) of the West Bengal High Speed Diesel Oil (Licensing, Control and Maintenance of Supplies) Order, 1980 and sentenced to suffer rigorous imprisonment for four months and to pay a fine of Rs. 500/- in default to suffer further rigorous imprisonment for one month in Special Court Case No. 153 of 1988.

The prosecution case is that S.I. Dinabandhu Das, D.E.O., Bongaon lodged a written complaint with the O/C of Gaighata P.S. on 15.05.1988 to the effect that on that day he along with W/C Haripada Sharma, W/C Mihir Chakraborty, W/C Dinabandhu Chakraborty and others under the supervision of Inspector S. Chatterjee checked the kerosene oil retail dealer's shop of accused Shyamdas Mondal of village Angrail and found one Bimal Kr. Chakraborty, employee of the shop present. On checking the stock register of kerosene oil and after physical verification of stock of kerosene oil they found no defect. But during checking of the kerosene oil shop of the said kerosene oil dealer they found 175 litres of H.S.D. (High Speed Diesel) oil kept in a drum and exposed for sale. Being interrogated the employee of the shop failed to produce any licence or permit for carrying on H.S.D. oil business. The owner of the shop did not turn up. The accused shop owner violated the provision of para 3(7) of W.B. H.S.D. Oil (Licensing Control and Maintenance of Supplies)

Order, 1980. So they seized the said quantity of 175 litres of H.S.D. Oil along with measuring pots under a proper seizure list in presence of the witnesses.

Gaighata P.S. 12/88 was started and the case was endorsed to S.I. D.B. Das for investigation (Dinabandhu Das, the complainant), who submitted chargesheet. The appellant/accused pleaded “not guilty” and on completion of trial the appellant was convicted and sentenced as above.

Mr. Saumik Ganguly, learned Advocate for the appellant submitted that the H.S.D. Oil drum was kept not in his shop but in a nearby machine room (as held by the trial Judge). He admitted his ownership of the seized H.S.D. Oil but he contended that the said H.S.D. Oil was stored not in the shop room for the purpose of sale but it was stored in the shallow machine room for the purpose of agriculture.

It was further contended that the only supporting evidence was of the members of the raiding team and thus interested witnesses.

The complainant himself is the Investigating Officer, who submitted charge sheet on completion of investigation. This is also clearly against the principle of natural justice as the complainant will obviously be interested, in the conviction in a case, initiated by him.

The learned Judge erroneously relied upon the evidence of the interested witnesses (raiding team members and also subordinate to the

complainant/Investigating Officer) and overlooked the evidence of the independent witnesses, while convicting the appellant.

The learned Judge also ignored the evidence that the accused/appellant has agricultural lands and had 2/3 shallow machines for which N.S.D. Oil was required to run the same and that there is absolutely no evidence to prove that the N.S.D. Oil was for business purpose as alleged. And thus considering the said erroneous appreciation of evidence by the learned Trial Judge, the judgment/order under appeal is liable to be set aside.

Mr. Subham Bhagat, learned Advocate for the State, had submitted that the appellant is a Kerosene dealer and the HSD seized from his possession was meant for running his shallow pump to cultivate his land. The defence of the appellant is false, as the accused could not produce any documents in support of his possession of HSD. The judgment under appeal being in accordance with law, the appeal is liable to be dismissed.

Evidence on record

Prosecution witness no. 1 Sri Sanjay Chatterjee stated that he received a written complaint from PW 4, the complainant/Investigating Officer and started Gaighata Police Station, Case no. 12 dated 15.05.1988. In cross examination, he further stated that he has no knowledge about the alleged incident.

Prosecution witness no. 2 Sri Mihir Chakraborty and **prosecution witness no. 3 Sri Dinabandhu Chakraborty** are members of the raiding team led by PW 4 (the complainant and the Investigating Officer). All these witnesses have stated that at the time of the raid, the accused/appellant was not in the shop (place of occurrence).

Prosecution witness no. 4 Sri Binabandhu Das, the complainant/Investigating Officer admitted in his cross examination admitted that **“he did not see the employee of the shop to sell the oil to any customer”**. In his examination in chief he has stated that the shop raided was a kerosene oil shop.

Prosecution witness no. 5 Sri Dulal Sarker, Prosecution witness no. 6 Sri Bharat Mondal and Prosecution witness no. 7 Sri Haran Chandra Mondal are seizure witnesses. **PW 6 had deposed that he never found the appellant/accused to sell diesel.** PW 5 and 6 have no knowledge about the case and have signed as seizure witness on the saying of the Police (raiding team). **They have categorically stated that the accused/appellant has landed properties and shallow machines.** Both these witness did not see what was seized.

Analysis of evidence

The defence in this case are:-

- a) Independent witnesses have not supported the prosecution case but have supported the contention of the accused that he has landed property and shallow machines for agricultural purpose.
- b) Only the interested witnesses (Raiding team) evidence has been relied upon by Trial Judge.
- c) No enquiry or investigation (Admitted by P.W. 4) was done regarding the presence of shallow machines or agricultural lands of the accused/appellant for which the H.S.D. Oil was supposed to have been stored for which allegedly no supply card/documents could be produced.
- d) The complainant and the Investigating Officer (P.W. 4) are the same and has thus caused prejudice to the accused/appellant, who has thus not been given a fair trial and convicted against the principle of natural justice.

From the evidence as discussed it is before the Court that the independent (seizure) witnesses (PW 5 & 6) have not supported the prosecution case. **They did not see what was seized and signed as witnesses as they believed the police (raiding team). They have also deposed that they did not see the accused/appellant sell diesel and that he has landed property and also shallow machines.**

The members of the raiding team (PW 2 & 3) (Subordinate to P.W. 4) have corroborated the statements of the complainant/Investigating Officer (PW 4).

From the written complaint and the evidence of PW 4 the complainant and the Investigating Officer it is clear that PW 4 did not conduct any enquiry as to whether the accused had any land or any shallow machine.

The Trial Court relied upon para 9 of the directions under Notification no. 924 F.S./F.S./C.G./14R-1/80 dated 29th February, 1980 and further notification dated 4998/F.S./F.S./C.G/14R-1/80 dated 19th August, 1981, where in a supply card of registration is to be acquired by a person requiring high speed diesel for operating an agricultural pump set or machine from the concerned authority. And as the accused/appellant could not produce the relevant documents, he was convicted and sentenced. The Trial Judge questioned, whether any such supply card was issued by the concerned authority. The prosecution could not answer the said query of the court and thus could not prove that supply card was being issued by the concerned authority at all.

The documents exhibited are:-

Exhibit	Description
Exhibit 1	Formal FIR.
Exhibit 2	Endorsement on written complaint.
Exhibit 3 series	Seizure lists.
Exhibit 4 series	Copy of Zimanama.
Exhibit 5	Written complaint.
Exhibit 6	Report of the FSL.

The offence alleged in this case is for keeping high speed diesel (a petroleum product) allegedly for sale without proper licence (supply card). The investigating officer/complainant (P.W. 4) himself has deposed that he did not find the accused selling HSD. P.W. 5 & 6 (independent witnesses) have also stated the same.

Thus there is no proof/evidence of sale of HSD by the accused as stated by the prosecution witnesses including the complainant/I.O themselves. The complainant/Raiding Officer/Investigating Officer (all one and the same person) did not make any enquiry/investigation regarding the accuseds agricultural land or the shallow pumps and also any supply card in respect of the said possession. The trial Judge held that it was proved that the HSD oil drum was seized from the machine room (shallow pump). The independent witnesses (P.W. 5 & 6) for the prosecution have deposed in favour of the accuseds to the extent that the accused has landed properties for which he has shallow pumps and the HSD stored was for use of the pumps and not for sale. The onus shifted to the prosecution to prove that the accused had 'mensrea', which they failed as that there was neither proper enquiry nor investigation. Though the trial Judge held that that the HSD oil was stored and exposed for sale, there is absolutely no evidence regarding sale of oil. The Investigating Officer (P.W. 4) on being cross examined stated "He did not see the employee of the shop to sell the HSD oil to any customer".

He has admitted that “He did not ask employee of the owner whether the accused had any arable land or any shallow pump machine”.

Finally, the defence is that the complainant and the Investigating Officer being the same, there has been a miscarriage of justice (against the principle of natural justice).

The defence has relied upon the ruling of **the Three Judge Bench of the Supreme Court in Criminal Appeal no. 1032 of 2013 (*Rajesh Dhiman vs. The State of Himachal Pradesh*) (2005) 4 SCC 350**. The **Three Judge Bench of the Supreme Court on 26th October, 2020** relied upon the judgment dated 31st August, 2020 of the constitution Bench of the Court in Special Leave Petition (Criminal) Diary no. 39528/2018 (*Mukesh Singh vs. State (Narcotic Branch of Delhi)*).

In *Rajesh Dhiman vs. State of Himachal Pradesh*(*supra*) in paragraph 8, the court observed:-

“.....the Constitution Bench of this Court in Mukesh Singh vs. State (Narcotic Branch of Delhi), which has authoritatively settled the law on permissibility of the complainant also being the Investigating Officer in cases under the NDPS Act. The Court further held:-

“Suffice to say that the law on this point is no longer *res integra* and the controversy, if any, has been set at rest by the Constitutional Bench of this Court in Mukesh Singh (*supra*). The earlier position of law which allowed the solitary ground of the complainant also being the

investigating officer, to become a spring board for an accused to be catapulted to acquittal, has been reversed. Instead, it is now necessary to demonstrate that there has either been actual bias or there is real likelihood of bias, with no sweeping presumption being permissible.”

In ***Mukesh Singh vs. State (Narcotic Branch of Delhi) (Supra)*** the Constitution Bench while considering the reference, “whether in case the investigation is conducted by the informant/Police Officer who himself is the complainant, the trial is vitiated and in such a situation, the accused is entitled to acquittal?”, referred to and considered in detail a few earlier decisions of the Court on one side taking the view that in case the Investigating Officer in the compliant being the same person, trial is vitiated and the accused is entitled to acquittal and on the other side taking a contrary view.

The Bench then conducted and answered the reference as under:-

“From the above discussion and for the reasons stated above, we conclude and answer the reference as under:

I. That the observations of this Court in the cases of Bhagwan Singh v. State of Rajasthan (1976) 1 SCC 15; Megha Singh v. State of Haryana (1996) 11 SCC 709; and State by Inspector of Police, NIB, Tamil Nadu v. Rajangam (2010) 15 SCC 369 and the acquittal of the accused by this Court on the ground that as the informant and the investigator was the same, it has vitiated the trial and the accused is entitled to acquittal are to be

treated to be confined to their own facts. It cannot be said that in the aforesaid decisions, this Court laid down any general proposition of law that in each and every case where the informant is the investigator there is a bias caused to the accused and the entire prosecution case is to be disbelieved and the accused is entitled to acquittal;

II. In a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore on the sole ground that informant is the investigator, the accused is not entitled to acquittal. The matter has to be decided on a case to case basis. A contrary decision of this Court in the case of Mohan Lal v. State of Punjab (2018) 17 SCC 627 and any other decision taking a contrary view that the informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled.”

Conclusion

From the appreciation/analysis of evidence as done above, it is found by this Court that:-

- a) The Independent witnesses (seizure witnesses) did not see the seized articles. They also did not support the prosecution case against the appellant/accused.
- b) No enquiry/investigation was made regarding the land of the appellant/accused and the presence of shallow machine for the same for which the H.S.D. was allegedly stored. Though it is alleged by the complainant/Investigating Officer and also held by the Trial Court that the accused could not produce any supply card/document for possessing the same.
- c) And finally in keeping with the principles/guidelines as laid down by the Supreme Court in **Mukesh Singh vs. State (Narcotic Branch of Delhi)(supra)** and the findings and facts as stated above, clearly shows that the enquiry/investigation was not done in accordance with law and the investigation done by the complainant was biased and has thus vitiated the criminal proceedings as a whole but led to the conviction of the accused/appellant. The investigation against the accused/appellant was not fair and proper and thus there has been a serious miscarriage of justice in this case of 1988 (34 years old).

In addition the evidence on record also do not justify the order of conviction as the prosecution has clearly not proved, their charge against the

appellant by way of either oral or documentary evidence before the Trial Court and as such these facts do not justify the order of conviction and accordingly the impugned judgment is thus liable to be set aside.

The appeal being CRA 470 of 1990 thus stands allowed.

The appellant is accordingly acquitted of all charge and discharged/released from his Bail bond.

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

Urgent Photostat Certified copy of this Judgment, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

(Shampa Dutt (Paul), J.)