

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

Present: - Hon'ble Mr. Justice Subhendu Samanta.

**CRA 483 of 1988
Gour Chandra Das
Vs.
State of West Bengal**

**For the appellant : Mr. Achin Jana,
Mr. Prosenjit Ghosh**

**For the State : Mr. Ranabir Roy Choudhury,
Ms. Manisha Sharma,**

Judgment on : 04-11-2022

Subhendu Samanta, J.

The instant appeal has been preferred under Section 374(2) of the Code of Criminal Procedure against the judgement and order of conviction and sentence dated 24.9.1988 passed by the Learned Judge Special Court(E.C. Act)Nadia, Krishnagar in connection with E.C. case No.38 of 1988 (T.R. No.44 of 1988) finding the accused/appellant guilty under Section 7(1)(a)(ii) of E.C. Act for alleged violation of provisions of para 4 of West Bengal Kerosene control Order, 1968 and convicting the appellant to suffer rigorous imprisonment for one year and to pay a fine or Rs.1,000/- i.d. to suffer further rigorous imprisonment for three months.

The brief fact of the prosecution case is that on 23.7.1988 at about 2.30 p.m. the complainant, D.E.B. Ranaghat along with others found the

accused/appellant to get down from a Bus with two full tins of kerosene oil while the Bus reached the Ranaghat Thana More. The accused was challenged but he could not produce any licence or permit or any document for possession of such kerosene oil. Accordingly, the accused was arrested and produced before the Thana.

The complainant lodged a written complaint on the self-same date and seized the two tins of kerosene oil by preparing a proper seizure list.

After competition of investigation, the Investigating Officer submitted charge-sheet and the accused was placed for trial. During the course of trial five witnesses were examined on behalf of the prosecution and after competition of the trial and after hearing the prosecution and defence the Learned Court below had sentenced the present appellant; against which the instant criminal appeal has been preferred.

Let it be considered whether the order of conviction passed by the Learned Court Below suffers any illegality.

Learned advocate appearing on behalf of the appellant submitted before this Court that the order of conviction passed by the Learned Court below is contrary to the evidence on record and the facts and circumstances as mentioned in the prosecution case has not at all been proved.

He further pointed out that the prosecution has adduced the evidences, which are in admissible in the eye of law. He also pointed out that the investigation conducted by the prosecution is not at all fair investigation as the complainant himself took up the investigation of this case.

He further argued that the statement of public witnesses were not all considered by the Learned Court below, rather he only believed the evidence of Investigating Officer which is not permissible in the eye of law and on the basis of

which no order of conviction can be sustained. Another point which was raised by the learned advocate for the appellant is that, the accused/appellant was not enquired during recording of statement under Section 313 of the Code of Criminal Procedure regarding the particular of offences against which he has been charged and what materials were revealed during the course of trials.

Learned advocate appearing on behalf of the State submitted that the impugned order of conviction passed by the Learned Court below suffers no illegality and the Learned Court below has come to a reasonable finding in passing the impugned order. The finding of Learned Court below regarding the believability of P.W. 4 i.e. the Investigating Officer cannot be questioned at this appellate stage.

Heard the learned advocates perused the materials on record, it appears that the prosecution case has suggested that on 23.7.1988 at about 14.30 hours the accused/appellant found in possession of two tins of kerosene oil at Ranaghat Thana More Bus Stand. The seizure list was prepared. There were two witnesses in the seizure list namely, Gopal Halder and Mantu Singh. The seizure list also depicted the articles seized to be two tins of kerosene oil having eighteen litres of kerosene oil each total measuring 36 litres of kerosene oil. The seizure list also appears to contain LTI of Gopal Hander and signature of Mantu Singh. During the course of trial, the five witnesses were examined by the prosecution among them P.W.1 is the Gopal Hander i.e. the seizure witnesses. The P.W.1 turned hostile. It appears from the evidence of P.W. 1 that he had been told by the DEB to put his LTI over a paper. Surprisingly, the P.W. 1 did not identify the accused on dock. The prosecution also did not tender the seizure list to P.W.1 to identify his LTI or to identify the particular paper wherein P.W. 1 had put his signature. It is quite difficult to hold that if at all the P.W.1 has put his signature over a

paper; or whether the seizure list is the said paper or not.

The other seizure witness did not appear as P.W. The other private witnesses i.e. P.W.2 and P.W.3 turned hostile and they stated nothing regarding the prosecution case. P.W. 4 is the Sub-Inspector of Police who filled up formal portion of the First Information Report and he is technical witness.

P.W. 5 is that Investigation Officer.

It is true that the Investigating Officer is the complainant of this case. During cross-examination the Investigation Officer i.e. P.W.5 stated that the kerosene oil was not measured during the course of investigation of this case. He also failed to establish any circumstances as to why the Driver, Conductor or any passenger of the bus was not made witness.

In considering the entire circumstances, it appears to me that the prosecution has failed to prove the seizure list during course of trial before the Learned Court below.

The seizure witnesses never identified the seizure list. They never uttered before the Trial Court that they put their signature or LTI before the seizure list. The P.W. 1 also did not identify the accused on dock. Consequently at this circumstances of this particular case, the factum and occurrence of seizure became doubtful and it cannot be said that the seizure list has been proved accordingly. The signature of P.W. 5 over the seizure list can only prove the content of writing over the seizure list but the factum of seizure can only be proved by the seizure witnesses which is very well missing in this particular case. Thus, I am of a reasoned opinion that the seizure list has not been proved before the learned Court below beyond reasonable doubt.

In perusing the impugned judgement it appears that learned Court below is of opinion that no reliance can be placed upon oral evidence of P.W.1, P.W.2,

P.W.3 and P.W.4. But he only placed his reliance upon the P.W.5 who is the complainant cum Investigating Officer of this case. Learned Court below is of the view that evidence of P.W. 5 is believable though he may be a police officer.

Learned advocate appearing on behalf of the appellant cited two decision reported in *(1996) 11 SCC 709* and *(2018) 17 SCC 627*. I have perused the citations. Hon'ble Supreme Court is of the view that for the purpose of right of accused to fair investigation and trial, it has to be look into that the informant may not be the Investigating Officer of that case. When the investigation of a criminal case is conducted by the complainant/police officer the fair and impartial investigation cannot be possible.

In this particular case, it appears that the complainant has took up the investigation of this case and there are no witnesses to support the prosecution case except the complainant cum Investigating Officer himself. The circumstances of this case suggested that Learned Court below should have more cautious in believing P.W. 5, particularly when there were no supporting independent witness. Thus, I am of the opinion, the right of accused for fair and impartial investigation and trial has not followed in this particular case.

Learned advocate appearing on behalf of the appellant also pointed out that during the course of recording of statement of the accused under Section 313 of the Code of Criminal Procedure he was not enquired about the allegation which was placed against him during trial and he was not also enquired about the offence.

In support of his contention, leaned advocate for the appellant cited two decisions of this Hon'ble Court passed in CRA 6 of 1989 and CRA 467 of 1987.

On perusing the statement of the accused recording under Section 313 of the Code of Criminal Procedure it appears that the accused was not enquired

regarding the allegation against him for violation of para 4 of the West Bengal Kerosene Control Order, 1968.

The sole purpose for the examination of the accused under Section 313 of the Code of Criminal Procedure is to citing allegation and circumstances against the accused revealed in trial and requires his explanation to that effect. Though the accused is not bound to answer these questions but he may have the right to know the accusation against him in the trial. In this case, there is lacuna on part of the prosecution to put forward the question to the accused in his examination under Section 313 of the Code of Criminal Procedure regarding his alleged violation under para 4 of the Kerosene Control Order, 1968.

After considering the entire facts and circumstances of this case, it appears to me that the impugned order and conviction passed by the Learned Court below only on the basis of P.W.5 is not at all sustainable. The seizure list and the factum of seizure have not been proved. The other available private witnesses had also not supported the prosecution case. The believability of evidence of P.W. 5 (complainant cum Investigating Officer) in this particular case is not fair and impartial. The trial conducted by the Learned Court below is also vitiated when the particular accusation against accused/appellant was not put to him during his examination under Section 313 of the Code of Criminal Procedure.

Considering the above circumstances and considering the above grounds, I find there are materials to entertain the instant criminal appeal and the appeal is meritorious one. The impugned order passed by the Learned Court below appears to be perverse and suffers illegality. The order of conviction was passed on the basis of evidences which were not admissible in the eye of law. The prosecution has failed to bring home the charge against the accused beyond reasonable doubt. Thus, the accused/appellant is liable to be acquitted.

In result thereof, the instant criminal appeal is allowed.

The impugned judgement of conviction passed by the Learned Judge, Special Court(E.C. Act) Nadia, Krishnagar in connection with E.C. Case No.38 of 1988(T.R. No. 44/88) is hereby set aside.

The appellant/accused is hereby acquitted from this case.

The appellant is on bail, he is set at liberty at once.

The appellant is released from his bail bonds.

The sureties standing in favour of the accused/appellant are also discharged.

Thus, the instant appeal being CRA 483 of 1988 along with connected applications, if any, are disposed of.

Any order of stay, passed by this Court is hereby vacated.

Let of this order be sent down to the Learned Court for his information and necessary action.

Urgent Photostat certified copy of this order, if applied for, be given to the parties, upon compliance of necessary formalities.

(Subhendu Samanta, J.)