

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 133 of 2021
CRAN 1 of 2021

Ganesh Das Bairagya
-Vs-
The Superintendent, Narcotics
Control Bureau (KZU)

For the Appellant : Mr. Uday Sankar Chattopadhyay, Adv.
Mr. Santanu Maji, Adv.
Ms. Trisha Rakshit, Adv.

For the NCB : Mr. Amajit De, Adv.

Heard on : 22.04.2022

Judgment on : 22.04.2022

Joymalya Bagchi, J. :-

Lower court records have been received. Defects in the lower court records are inconsequential. Hence, the defects may be ignored. With the consent of the parties, appeal is taken up for hearing today.

Appellant has assailed judgment and order dated 25.02.2021 and 26.02.2021 passed by the learned Judge, 3rd Special Court, Burdwan (NDPS) in Special (NDPS) Case No. 48 of 2014 convicting the appellant for commission of offence punishable under Section 15(c) of

the N.D.P.S. Act and sentencing him to suffer rigorous imprisonment for ten years and to pay fine of Rs. 1,00,000/-, in default, to suffer further rigorous imprisonment for two months more.

Prosecution case as alleged against the appellant is to the effect on 04.12.2014 at 20:00 hours pursuant to specific direction which was reduced into writing and intimated to superior and upon receipt of necessary movement order, a group of NCB Officers comprising of Ashok Kumar Prajapati, Intelligence Officer, NCB, Kolkata Zonal Unit, (P.W.2), Arnab Chakraborty, Intelligence Officer, NCB, Kolkata Zonal Unit, (P.W.3), Debashish Chaudhuri, Superintendent, NCB, Kolkata Zonal Unit (P.W.4) and one lady Habildar proceeded to work out the information. Two independent witnesses viz., Sk. Babar Ali and Palash Bala were requested to join the search. The team went to the residence of the appellant and knocked on the door. A person who introduced himself as the appellant opened the door. Thereafter, the appellant was communicated of his right under Section 50 of the N.D.P.S. Act to be searched before a Gazetted Officer or a Magistrate. The option was given in writing. Appellant declined the offer. Thereafter in the presence of Superintendent, NCB, Kolkata Zonal Unit viz., Debashish Chaudhuri (P.W.4), a Gazetted Officer, search was conducted at his residence. From a room in his house, 5 nylon sacks were recovered which were suspected to contain poppy straw. Appellant failed to produce any valid document with regard to possession of poppy straw. Upon weighment, it

was found 4 bags weighed 25 kgs. each while the other bag weighed 8 kgs. In all, 108 kgs. of poppy straw was recovered. The articles were seized and each bag was separately marked as G-1, G-2, G-3, G-4 and G-5. Samples as well as duplicate samples were drawn from each bag. Samples were kept in separate transparent polythene packets and these packets kept inside a cloth envelop. During search some documents, money and mobile phone were also recovered. A seizure list was prepared in connection with the seizure and signed by witnesses including the appellant. Statement of the appellant was recorded under Section 67 of the N.D.P.S. Act. Statements of independent witnesses were also recorded under Section 67 of the N.D.P.S. Act. Thereafter, the appellant was arrested. On the statement of the appellant, co-accused Bikash Ghosh was implicated. Raids were held but he was not found at his residence. Complaint was filed against the appellant and Bikash Ghosh showing the latter as an absconder. Subsequently, Bikash Ghosh appeared before the trial court and charges were framed under Section 15(c) of the N. D. P. S. Act against them. In course of trial, six witnesses were examined and number of documents were exhibited. Certificate of the Magistrate issued under Section 52A of the N. D. P. S. Act along with photographs were proved. Defence of the appellant was one of innocence and false implication. It was his specific defence he was arrested from the road. He, however, did not lead defence evidence to probabalise such fact.

In conclusion of trial, learned trial Judge by the impugned judgment and order dated 25.02.2021 and 26.02.2021 convicted and sentenced the appellant, as aforesaid.

Mr. Uday Sankar Chattopadhyay, learned Advocate appearing for the appellant has challenged the conviction essentially on two scores. Firstly, he argues ownership of the house where 108 kgs. of poppy straw was recovered has not been proved. He submits appellant was arrested from a road and falsely implicated. He is in no way connected with the said house. Secondly, he contends prosecution case is based on the evidence of official witnesses alone. Independent witnesses were not examined. Hence, the prosecution case ought to be disbelieved.

Nobody appears for the NCB. Mr. Amajit De, empanelled Advocate for NCB is requested to appear on behalf of NCB. His appointment may be regularised.

He argues P.Ws. 2, 3 and 4 are members of the raiding party. They have unequivocally stated appellant was in the house at the time of recovery. Five bags containing 108 kgs. of poppy straw were recovered. Appellant made voluntary statement under Section 67 of the N.D.P.S. Act and was arrested. Chemical examiner's report show samples drawn from the seized contraband show the presence of morphine and codeine. As the evidences of official witnesses are clear and convincing, non-examination of independent witnesses would not affect the credibility of the prosecution case. Thus, the appeal is liable to be dismissed.

P.Ws. 2 to 4 are members of the raiding party. The witnesses state upon receipt of secret information which was diarised and dispatched to superior authority and after obtaining movement order, they proceeded to work out the information. They reached the residence of the appellant. Appellant opened the door and he was informed of his right to be searched before a Gazetted Officer or a Magistrate. Such intimation was reduced into writing. Appellant declined the offer which was also endorsed in the said document and was proved as Exhibit-6 by Arnab Chakraborty (P.W.3). Thereafter, the house of the appellant was searched. In course of search, five bags suspected to contain poppy straw were recovered from a room. Appellant was unable to produce any valid document with regard to possession of poppy straw. The bags were weighed and four of them were found to be 25 kgs. each while one smaller bag weighed 8 kgs. Total weight was 108 kgs. Samples as well as duplicates were drawn from the bags and kept in separate polythene packets which were kept in a cloth bag. They were marked, labelled and sealed. Signatures were obtained on the seized items.

P.W. 3, Arnab Chakraborty prepared seizure list which was marked as Exhibit-7. Witnesses also proved their signatures on the seizure list. Statement of the appellant as well as independent witnesses were recorded under Section 67 of the N.D.P.S. Act. Thereafter, appellant was arrested. Samples were sent for chemical examination and after chemical examination the samples were received at NCB Office

which were produced in Court. An electric bill standing in the name of the appellant with regard to the premises in question was produced and marked Exhibit-13. Voters' identity card and bank passbook disclosing address of the appellant were also produced as material Exhibits-VIII and IX.

P.W. 5, Moloy Kanti Mondal deposed the seized alamats were destroyed in presence of Judicial Magistrate, 6th Court, Burdwan. He proved the certificate of the Magistrate and the photographs relating to the inventory which were marked as Exhibit-18 collectively. He also identified five representative samples drawn from the alamats in Court which were marked as Material Exhibit-XIII.

P.W. 6, Jyoti Prokash Bahinipati was the Assistant Chemical Engineer attached to Chemical Laboratory, Customs House, Kolkata. He proved the test memo as well as his signature and that of the Chemical Examiner on the said document. Test memo shows the samples contained morphine and codeine.

From the aforesaid evidence particularly that of P.Ws. 2 to 4 it appears that the raiding party had gone to the house of the appellant. He was available in the house and upon search five sacks containing poppy straw were recovered. On weighment it was found the seized articles weighed 108 kgs in all.

Plea of the appellant that he was arrested from the road is belatedly raised during his examination under Section 313 of the Code of Criminal Procedure.

In view of the clear and convincing evidence of the members of the raiding party which is corroborated by the signature of the appellant in the seizure memo and other documents prepared at the place of seizure as well as the arrest memo, I am of the opinion prosecution case with regard to the presence of the appellant at the house when the recovery was made has been proved beyond doubt.

It is further contended prosecution has not proved the ownership of the house. No document relating to title of the house has been proved. Ownership of the premises from where recovery is made is not essential to prove the ingredients of Section 15(c) of the N.D.P.S. Act. Prosecution is required to prove possession of the narcotic substance. Ample evidence has come on record appellant was present in the house and had control and dominion over the premises from where recovery of narcotics was made. Electric bill standing in the name of the appellant with regard to the premises in question has been proved. Voters' Identity card and bank pass book of the appellant also show his address at the same place. Oral evidence of the members of the raiding party and the aforesaid documents clearly show that the appellant was in control and possession of the premises from where narcotic substance was

recovered. Hence, the ingredients of the offence under Section 15(c) of the N.D.P.S. Act has been proved beyond doubt.

Evidence has also come on record to show that the inventory was made of the seized alamats in presence of Magistrate after representative samples had been drawn. Certificate of the Magistrate, photographs of the inventory as well as representative samples were produced and proved in Court in terms of Section 52A of the N.D.P.S. Act.

Chemical examiner's report proves the seized article contained morphine and codeine establishing the prosecution case.

Finally, it is argued independent witnesses were not examined. Evidence has come on record two independent witnesses viz., Sk. Babar Ali and Palash Bala had joined the search. Their signatures had been obtained on the seizure list and other documents. Statements of the said witnesses were also recorded under Section 67 of the N.D.P.S. Act. However, during trial the witnesses could not be traced and examined.

Mr. Uday Sankar Chattopadhyay argues witnesses are fictitious persons. Notices were sent upon the said witnesses but they returned 'unserved'. Mere non-service of notice on a witness cannot give rise to the conclusion that he is a fictitious person. Official witnesses have clearly proved the recovery of narcotic substance from the premises which was in the control and dominion of the appellant. It is trite law when official witnesses are reliable, mere non-examination of independent witnesses would not affect the credibility of the prosecution

case (see ***Surinder Kumar Vs. State of Punjab***¹). In course of lengthy cross-examination of the prosecution witnesses, I do not find that the credibility of the said witnesses had been seriously challenged.

Thus, I am inclined to rely on the version of the official witnesses and come to the conclusion that prosecution case has been proved beyond doubt.

Conviction and sentence of the appellant is accordingly, upheld.

The appeal is dismissed.

In view of dismissal of appeal, connected application being CRAN 1 of 2021 is also disposed of.

Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon the appellant in terms of Section 428 of the Code of Criminal Procedure.

Lower court records along with copies of this judgment be sent down at once to the learned trial Court for necessary compliance.

Photostat certified copy of this judgment, if applied for, shall be made available to the appellants upon completion of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)

as/akd/PA

¹ (2020) 2 SCC 563 (para 15 and 16)