

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. No. 201 of 2021
with
CRAN 1 of 2021

Milan Mondal
Vs.
State of West Bengal

For the Appellant	:	Mr. Soubhik Mitter, Adv. Mr. Ranadeb Sengupta, Adv. Mr. Sachit Talukder, Adv.
For the State	:	Mr. Sanjoy Bardhan, Adv. Mr. Pratick Bose, Adv. Ms. Baishakhi Chatterjee, Adv.
Heard on	:	28.02.2022, 05.04.2022, 19.04.2022 & 26.04.2022
Judgment on	:	26.04.2022

Joymalya Bagchi, J. :-

Order of confiscation of vehicle dated 10.03.2021 is the subject matter of challenge in the appeal.

Short factual compass giving rise to the appeal is to the effect that a purported seizure of narcotic substance i.e. 24 kgs. of Ganja was made from a white colour Hyundai car bearing registration No. WB 30S

9966. The search had been conducted on 19.06.2019 between 20 hours to 22 hours. The appellant who is the owner of the vehicle was arrested and prosecuted for possession of the aforesaid narcotic substance under Section 20(b)(ii)(c) of the NDPS Act.

Prosecution examined eight witnesses. Upon analysis of the evidence on record the trial Court by the impugned judgment and order dated 10.03.2021 recorded an order of acquittal against the appellant, inter alia, on the following grounds :

- (a) non-compliance of Section 42 and 50 of the NDPS Act;
- (b) sample sent for chemical examination did not match with the sample which was drawn from the seized consignment;

However, by the selfsame judgment and order, without giving an opportunity of hearing to the appellant, the trial Court proceeded to confiscate the vehicle in question under Section 60(3) of the NDPS Act.

Mr. Mitter, learned Counsel with Mr. Sengupta, learned Counsel appearing for the appellant submit no opportunity was given to the appellant in terms of proviso of sub section (2) of Section 63 of the NDPS Act prior to confiscation. It is also argued in view of the reasons recorded in the order of acquittal, it cannot be said that the seized consignment contained narcotic substance i.e. Ganja. Hence, order of confiscation is liable to be set aside.

In reply, Mr. Bardhan, learned Counsel appearing for the State submits that the appellant had sufficient notice with regard to

confiscation as charge under Section 20(b)(ii)(c) of the NDPS Act had been framed against him. It is further argued acquittal of the appellant was on technical grounds, i.e. non-compliance of procedures relating to seizure and not an honourable one. Hence, confiscation proceeding was justified and order of confiscation ought not to be interfered with.

For better appreciation of the aforesaid submissions Sections 60 and 63 of the NDPS Act require to be considered :

“60. Liability of illicit drugs, substances, plants, articles and conveyances to confiscation – (1) Whenever any offence punishable under this Act has been committed, the narcotic drug, psychotropic substance, controlled substance, opium poppy, coca plant, cannabis plant, materials, apparatus and utensils in respect of which or by means of which such offence has been committed, shall be liable to confiscation.

(2) Any narcotic drug or psychotropic substance or controlled substances lawfully produced, imported interstate, exported interstate, imported into India, transported, manufactured, possessed, used, purchased or sold along with, or in addition to, any narcotic drug or psychotropic substance or controlled substances which is liable to confiscation under sub-section (1) and the receptacles, packages and coverings in which any narcotic drug or psychotropic substance or controlled substances, materials, apparatus or utensils liable to confiscation under sub-section (1) is found, and the other contents, if any, of such receptacles or packages shall likewise be liable to confiscation

(3) Any animal or conveyance used in carrying any narcotic drug or psychotropic substance or controlled substances, or any article liable to confiscation under sub-section (1) or sub-section (2) shall be liable to confiscation, unless the owner of the animal or conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the animal or conveyance and that each of them had taken all reasonable precautions against such use.”

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63. Procedure in making confiscation – (1) In the trial of offences under this Act, whether the accused is convicted or acquitted or discharged the court shall decide whether any article or thing seized under this Act is liable to confiscation under Section 60 or Section 61

or Section 62 and, if it decides that the article is so liable, it may order confiscation accordingly.

(2) Where any article or thing seized under this Act appears to be liable to confiscation under Section 60 or Section 61 or Section 62, but the person who committed the offence in connection therewith is not known or cannot be found, the court may inquire into and decide such liability, and may order confiscation accordingly :

Provided that no order of confiscation of an article or thing shall be made until the expiry of one month from the date of seizure, or without hearing any person who may claim any right thereto and the evidence, if any, which he produces in respect of his claim :

Provided further that if any such article or thing, other than a narcotic drug, psychotropic substance controlled substance the opium poppy, coca plant or cannabis plant is liable to speedy and natural decay, or if the court is of opinion that it sale would be for the benefit of its owner, it may at any time direct it to be sold; and he provisions of this sub-section shall, as nearly as may be practicable, apply to the net proceeds of the sale.”

A conjoint reading of the aforesaid provisions would show that a court upon passing an order of conviction or acquittal or discharge is empowered to take appropriate decision whether any conveyance used for carrying narcotic substance and seized under the provisions of the Act is liable to be confiscated or not. Sub section (2) of the Section 63 lays down the procedure for confiscation. In the event the person who has committed the offence is not known or cannot be found, the Court may enter into an ex-parte enquiry and decide the issue of confiscation. However, if the person who has any right in respect of the vehicle/article which is liable to be confiscated is known, he must be given an opportunity of hearing in the matter including leading evidence in support of his claim. In the course of such enquiry the owner is entitled to establish (particularly in a case of acquittal) the vehicle was

not used to carry narcotic drugs or its usage was without his knowledge or connivance. In the present case, appellant is the owner of the vehicle and has been acquitted of the charge under section 20(b)(ii)(c) of the NDPS Act regarding possession/transportation of narcotic in the said vehicle. However, no notice was given to the appellant calling upon him to show cause why the vehicle would not be confiscated.

Framing of charge against the appellant cannot be treated to be sufficient notice with regard to confiscation when he has been acquitted of such charge. No doubt, in spite of acquittal, Court has power in apposite to confiscate vehicle/conveyance used for transportation of narcotic substance. But in such cases a duty is cast upon the Court to issue notice upon the appellant (if he is the owner/ person in charge of the vehicle) to show cause why the vehicle would not be confiscated. In the present case, no notice was issued upon the appellant who is the owner of the vehicle to show cause why his vehicle shall not be confiscated. Failure to issue notice upon the appellant and give him an opportunity of hearing prior to passing the impugned order of confiscation is a partial breach of principles of natural justice which vitiates the order of confiscation. Ordinarily, under such circumstances, this Court would have been inclined to remand the matter for fresh consideration on merits. However, upon examining the grounds of acquittal, we note there is a clear snap in the link between the sample which was collected from the seized consignment and one which had

been sent for examination by chemical examiner. It may be apposite to refer the finding of the learned trial Judge in that regard which reads as follows :

“Admittedly, from Exhibit-A, 100 grams of sample was taken from 24 kilograms of ganja for chemical examination as Exhibit-A1 but Chemical examiner report reveals that there was Exhibit-A2 instead of A1.”

From the aforesaid finding it is clear while Exhibit-A1 was drawn as a sample from the seized consignment, i.e. Exhibit-A, another sample being Exhibit-A2 was sent for chemical examination. Nothing is forthcoming to show that the sample which had been sent for chemical examination, i.e., Exhibit-A2 had been drawn from the mother consignment. This breach in the link between the sample drawn from the seized consignment and the sample which was sent for chemical examination strikes a death blow to the prosecution case that the consignment seized from the vehicle contained narcotic substance, i.e., ganja.

As the evidence on record is not sufficient to establish the consignment carried in the vehicle contained ganja, I am of the view no case for confiscation of the vehicle in question is made out.

For the aforesaid reasons, I am of the opinion the order of confiscation not only suffers from breach of principles of natural justice but also is not sustainable on merits.

Hence, the impugned order is set aside.

The vehicle bearing No. WB 30S 9966 shall be handed over to the appellant within a month from date.

The appeal is, accordingly, allowed.

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

Let a copy of this judgment along with the lower Court records be forthwith sent down to the trial Court at once.

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.)