

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 247 of 2015

Gopal Teli & Anr.

Vs.

The State of West Bengal

With

C.R.A. 237 of 2015

Bapi Dey @ Buro

Vs.

The State of West Bengal

With

C.R.A. 238 of 2015

With

CRAN 2 of 2018 (Old No: CRAN 1103 of 2018)

CRAN 3 of 2019 (Old No: CRAN 103 of 2019)

CRAN 4 of 2020 (Old No: CRAN 1411 of 2020)

CRAN 5 of 2020

CRAN 6 of 2021

With

Biswanath Adhikary @ Bishu

Vs.

The State of West Bengal

With

C.R.A. 250 of 2015

With

CRAN 2 of 2021

Rabi Sekhar Pandey

Vs.

The State of West Bengal

For the Appellants In C.R.A. 247 of 2015	:	Mr. Partha Pratim Das, Adv.
For the Appellant In C.R.A. 237 of 2015	:	Mr. Sandipan Ganguly, Ld. Sr. Adv. Mr. Dipanjan Dutt, Adv.
For the Appellant In C.R.A. 238 of 2015	:	Mr. Sabyasachi Banerjee, Adv. Ms. S. Bhattacharjee, Adv.
For the Appellant In C.R.A. 250 of 2015	:	Mr. Manajit Singh, Adv. Mr. Atarul Hoque Molla, Adv. Mr. Biswajit Mal, Adv. Mr. Ganganjyot Singh, Adv.
For the U.O.I.	:	Mr. Kallol Kumar Basu, Adv. Mr. Rajesh Kumar Shah, Adv.
Heard on	:	18.05.2022, 21.06.2022, 22.06.2022, 27.06.2022, 04.07.2022
Judgment on	:	15.07.2022

Joymalya Bagchi, J. :-

Appeals are directed against judgment and order dated 27.03.2015 and 30.03.2015 convicting Rabi Sekhar Pandey (appellant in Criminal Appeal No. 250 of 2015), Gopal Teli and Shyam Lal (appellants in Criminal Appeal No. 247 of 2015) for commission of offence punishable under Section 21(c) of the Narcotic Drugs and Psychotropic Substances Act and appellant Biswanath Adhikary @ Bishu (appellant in Criminal Appeal No. 238 of 2015) and Bapi Dey @ Buro (appellant in Criminal Appeal No. 237 of 2015) for commission of offence punishable under Section 21(c) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act and sentencing all of them to suffer rigorous imprisonment for 18 years

each and to pay a fine of Rs.2 lakh each, in default, to suffer imprisonment for 12 months more.

Prosecution case as alleged against the appellants is to the effect that on 31.12.2008 at 4:00 p.m., Bibhas Mondal (P.W. 1) and Sankar Das Sinha (P.W. 8), Intelligence Officer attached to N.C.B., Kolkata received information and recorded that 36 kgs. of good quality of *heroin* would be transported in a vehicle which would reach Panagarh, Burdwan in the midnight at 31.12.2008 and thereafter, Gopalnagar, Bongaon in the early hours of 01.01.2009. Rabi Sekhar Pandey would board the vehicle at Panagarh and the contraband would be handed over to one Bishu who would pay the vehicle fare and commission to Rabi Sekhar Pandey. Pursuant to such information and after obtaining necessary movement order, N.C.B. officers proceeded to various places around Bongaon, North 24-Parnagas and Nadia district. A team of officers under the leadership of S.D. Sinha (P.W. 8) lay ambush at Gopalnagar near Kali Temple. At 6:00 a.m. on 01.01.2009, they noticed a truck bearing registration No. RG 27G 2106 coming from Chakdah side which stopped near Kali Temple. Two persons in a motor bike came from Bongaon side and stopped there. One person got down from the truck and started talking with the persons on the bike in a suspicious manner. At that moment, N.C.B. officers intercepted them. On interrogation, the persons disclosed their identities. Two independent witnesses, namely, Milan Das and Amit Pal were requested to join the search. In presence of the independent witnesses, N.C.B. officers searched the truck and from a hidden cavity found in the

backside of the driver's cabin 19 packets containing *brown coloured powder* like substance were recovered. The weight of 18 packets was found as 2 kgs. each while 1 packet weighed 1 kg, that is, 37 kgs. in all. On testing the *brown coloured substance* by drug detection kit, it responded to *heroin*.

On interrogation, Gopal Teli disclosed he was the driver of the truck while Shyam Lal stated he was the owner. They had collected *heroin* from Mandasaur, Madhya Pradesh and Bhilwara, Rajasthan to deliver the same to Biswanath Adhikary at Bongaon. Rabi Sekhar Pandey admitted he was entrusted to supply the consignment to Biswanath. Biswanath also admitted he came to the spot to collect *heroin* and Bapi was his assistant. On reasonable belief that the aforesaid persons were trafficking in *heroin*, the truck, motor cycle along with 37 kgs. of *brown coloured substance* suspected to be *heroin* were seized under a seizure list. Registration certificate of the truck was seized. Mobile phones of Rabi, Biswanath and Bapi were also seized. Biswanath handed over a sum of Rs. 1,40,000/- to the N.C.B. officers. The seized articles and the aforesaid individuals were taken to N.C.B. office. N.C.B. officers drew samples of 5 gms. in duplicate from each packet which were sent for chemical examination. Notices under section 67 of N.D.P.S. Act were issued to the aforesaid persons who admitted their guilt. On the basis of statement made by Rabi Sekhar Pandey that he had stored 10.5 kgs. of *heroin* at his residence at Panagarh, a follow up action was initiated and Girish Nandan Pandey (P.W. 7) recovered 9.225 kgs. *heroin* from the tenanted apartment of Rabi

at Panagarh in the presence of wife of the landlord, namely, Sushmita Bhadra and one Balai Saha. Seizure was effected in the presence of Sonu Pandey, brother-in-law of Rabi Sekhar Pandey. Statements of Sushmita Bhadra and Milan Das were also recorded under Section 67 of N.D.P.S. Act. During enquiry, Consumer Application Form (C.A.F.) of mobile No. 9614610665 (alleged to be of Biswanath) and 9635641678 (alleged to be of Rabi Sekhar Pandey) were obtained from the service provider, Aircell. Call detail records between 25.12.2008 to 02.02.2009 were also collected. Chemical examination report was received and complaint was filed by Asutosh Pahari (P.W. 2) against the appellants.

Charges were framed under Section 21(c) of N.D.P.S. Act against Gopal Teli, Rabi Sekhar Pandey and Shyam Lal and Section 21(c) read with Section 29 of N.D.P.S. Act against Biswanath Adhikary @ Bishu and Bapi Dey @ Buro. Appellants pleaded not guilty and claimed to be tried. In the course of trial, prosecution examined 15 witnesses and exhibited a number of documents.

Defence of the appellants was one of the innocence and false implication. Rabi Sekhar Pandey took a specific defence that on 30.12.2008, 4-5 persons came to his residence at Panagarh and abducted him and his brother-in-law, Sonu Pandey. They were made to sign documents relating to maruti vans which were also taken by them. Thereafter, he and his brother-in-law were released. He examined his brother-in-law Sonu Pandey as D.W. 1.

Upon assessing the prosecution evidence on record as well as the defence of the appellants, the trial Judge by the impugned judgment and order dated 27.03.2015 and 30.03.2015 convicted and sentenced the appellants, as aforesaid.

Mr. Manjit Singh appearing for Rabi Sekhar Pandey submitted his client was not present at Gopalnagar where alleged recovery of 37 kgs. *ganja* was made from the truck. He and his brother-in-law Sonu had been abducted from his residence on 30.12.2008 and they were made to sign blank documents. He examined his brother-in-law as D.W. 1 to prove his defence. Even co-accused Shyam Lal in his examination under Section 313 Cr.P.C. corroborated his defence and stated Rabi Sekhar Pandey was not present at the spot. Mr. Singh referred to the contradiction in the evidence of the official witnesses with regard to role of his client. While P.Ws. 4, 5 and 8 stated one person got down from the truck and talked with the motor cyclist in a suspicious manner, P.W. 9 deposed that the said person was talking with the motor cyclist while sitting inside the truck. Independent witnesses to the seizure, namely, Milan Das and Amit Pal were not examined. Notices issued to the said witnesses returned unserved with the endorsement "address insufficient". No effort was made by the prosecution to find the correct address and serve the notices upon the said witnesses. Non-examination of the independent witnesses renders the prosecution case improbable. With regard to the recovery of *heroin* from the residence of Rabi Sekhar Pandey, Mr. Singh contended the prosecution relied on the sole evidence of seizing officer, G.N. Pandey (P.W.

7). There was no compliance of Section 42(2) of N.D.P.S. Act. Identity of the superior officer who instructed P.W. 7 to conduct search has not been disclosed. Though it is contended search was conducted as a follow up action to the voluntary statements by G.S. Pandey (Exhibit-5), perusal of his statement would show recovery had already been made prior to the recording of such statement. Neither Sushmita Bhadra (wife of the landlord) nor Balai Saha (independent witness to seizure) were examined to prove the recovery. Statement of Rabi Sekhar recorded under Section 67 of N.D.P.S. Act is inadmissible in view of ***Tofan Singh vs. State of Tamil Nadu***¹. He also relied on other authorities in support of his submissions.

Mr. Sandipan Ganguly, Sr. Advocate and Sabyasachi Banerjee appearing for Bapi Dey @ Buro and Biswanath Adhikary @ Bishu respectively adopted the submissions of Mr. Singh. In addition, they submitted charge of conspiracy has not been proved. Trial Judge held Customer Application Forms (CAF) of the mobile phones (Exhibits-27 and 28) have not been proved in accordance with law. Call detail records were also not proved. Statements of the appellants recorded under Section 67 of N.D.P.S. Act are inadmissible in law. Recovery of cash from Biswanath has not been proved. Even if the recovery of cash from Biswanath is accepted, such recovery by itself would not establish the charge of conspiracy. Hence, their clients are entitled to an order of acquittal.

Mr. Das appearing for Gopal Teli and Shyam Lal also adopted submissions of Mr. Singh. He submits driving licence of Gopal was not

¹ (2021) 4 SCC 1

seized. There is no legally admissible evidence to prove he was driving the vehicle. Truck with its accessories had not been produced in Court. Accordingly, he also prayed for acquittal.

Mr. Kallol Basu appearing for N.C.B. submitted evidence of the N.C.B. officers particularly, P.Ws. 4, 5, 8 and 9 prove beyond doubt, 37 kgs. of *ganja* was recovered from a hidden cavity behind the driver's seat of the truck owned by Shyam and driven by Gopal. Rabi Sekhar Pandey was also present in the truck. N.C.B. officers saw him talking suspiciously with Biswanath and Bapi who had met them on a motor cycle at Gopalnagar near Kali Temple. A large amount of cash was found with Biswanath. No explanation has been offered by the said accused why he was carrying the cash. Recovery was made from a public vehicle at a public place under Section 43 of N.D.P.S. Act and not under Section 42 of the said Act. Pursuant to follow up action 9.225 kgs. of *herion* was recovered from the tenanted apartment of Rabi Sekhar. Notices were sent to two independent witnesses, namely, Milan Das and Amit Pal but they could not be examined as the notices were returned unserved. Hence, all efforts had been made to examine independent witnesses. No case of enmity against the appellants has been proved to justify their false implication. Plea of Rabi Sekhar Pandey that he and his brother-in-law, Sonu Pandey were abducted and made to sign blank documents on 30.12.2008 was belated and false one. Trial Judge rightly disbelieved D.W. 1 (Sonu Pandey) in this regard. Hence, prosecution case is proved beyond doubt.

P.Ws. 1 to 9 are officers of N.C.B.

P.W. 1, Bibhas Mondal deposed he and P.W. 8 had received information with regard to movement of 36 kgs. good quality *heroin* in a vehicle to Panagarh and, thereafter to Gopalnagar near Kali Temple. Information was recorded and communicated to the Zonal Director of N.C.B. who affixed his endorsement on the document. P.W. 8, S.D. Sinha proved the document as Exhibit-22.

Pursuant to movement order, officers of N.C.B. proceeded to various places including Gopalnagar to work out the information. P.W. 8, S.D. Sinha was the leader of the team which lay ambush at Gopalnagar. He deposed in the early hours of 01.01.2009, the source identified a mini truck coming from Chakdah to Bongaon. The truck stopped near Kali Temple. A pulsar motor cycle came from Bongaon side and stopped there. One of the persons got down from the truck and was discussing something with the motor cycle driver in a suspicious manner. At that juncture, they encircled the truck and on query, persons in the truck disclosed their identities as Rabi Sekhar, Gopal and Shyam while motor cycle riders disclosed their identities as Biswanath and Bapi. A search was conducted in the truck. A secret cavity was found behind the driver's cabin. The cavity was encased in a wooden wall fixed with nuts and bolts. Upon opening the nuts and bolts, 19 packets of *brown coloured substance* were recovered. 18 packet weighed 2 kgs. each while 1 packet weighed 1 kg, that is 37 kgs. in all. Upon testing, the *brown substance* tested positive to *heroin*. All the packets were numbered. The packets, motor cycle as well

as the truck were seized and taken to the N.C.B. office. Mobile phones of Biswanath, Rabi Sekhar and Bapi were seized. Biswanath handed over a sum of Rs. 1,40,000/- to N.C.B. officers. Inventory and weighment chart were prepared. Samples in duplicate of 5 gms. each were drawn from each packet and kept in separate envelope which was sealed and signed by the accused persons as well as witnesses. The entire search and seizure were conducted in the presence of two independent witnesses, namely, Milan Das and Amit Pal.

Evidence of P.W. 8 is corroborated by other members of the raiding party, namely, P.Ws. 4, 5 and 9. P.W. 4 corroborated the evidence of P.W. 8 in all material particulars. After the recovery, he issued notices under Section 67 of N.D.P.S. Act to Gopal Teli, Shyam Lal and Rabi Sekhar Pandey. P.W. 5, Lakshmi Kanta Dutta, also corroborated P.W. 8 with regard to the aforesaid recovery. He received the seized alamats from P.W. 8 as the godown in-charge and made necessary entries in the godown register. He produced the godown register (Exhibit-14). He deposed, as a follow up action he along with P.W. 8 and others went to the residence of Biswanath but nothing was recovered. P.W. 9, Chanchal Sarkar is another member of the raiding party. He has also corroborated the prosecution case regarding recovery of 37 kgs. of *heroin* from the truck bearing No. RG 27G 2106. He, however, stated that one person sitting in the truck was talking to one of the motor cyclists while other witnesses stated that the said person had got down from the truck to confer with the motor cyclists. This variation is a minor one and in my estimation does not water down

the consistent version of the N.C.B. officers with regard to the manner and circumstances in which the recovery of narcotics was made from the truck.

As the recovery had been made from a public vehicle at a public place, I am in agreement with the learned Counsel appearing for N.C.B. that the recovery was under Section 43 and not under Section 42 of N.D.P.S. Act. Reference in this regard may be made in ***State of Haryana vs. Jarnail Singh And Others***².

It has been contended by the appellants that independent witnesses have not been examined. I find little substance in such submission. After the search, notice under Section 67 of N.D.P.S. Act was served upon one of the independent witness, namely, Milan Das (Exhibit-18). Pursuant to the notice he appeared at N.C.B. office and his statement was recorded by P.W. 8 (Exhibit-19). During trial, summons were sent to the said witnesses as per the addresses disclosed by them and recorded in the contemporaneous documents. The notices returned unserved with the endorsement 'address insufficient'.

It is nobody's case that the notices were sent to the independent witnesses at addresses which varied from the one recorded in the contemporaneous documents. Prosecution had issued notices to the independent witnesses on the strength of the materials available to them. In this backdrop, it cannot be said that adequate efforts had not been taken by the prosecution to bring the independent witnesses to the

² (2004) 5 SCC 188

witness box. In light of the aforesaid factual matrix, reliance on ***Naresh Kumar Alias Nitu vs. State of Himachal Pradesh***³ is inapposite. In the present case, prosecution had not given up on the independent witnesses but summons could not be served upon them due to insufficient address.

Similarly, in ***Harun Rashid vs. State of West Bengal And Another***⁴ acquittal was recorded primarily on the ground of non-compliance of Section 50 of N.D.P.S. Act. In the cited case no explanation was given for non-examination of independent witnesses unlike the present one where reason for non-examination of the said witnesses is self-evident.

That apart, it is settled law if the version of official witnesses appeared to be truthful and convincing and no enmity between the accused and the officers can be demonstrated, non-examination of independent witnesses simplicitor would not render the prosecution case improbable. In this regard, reference may be made to ***Surinder vs. State of Punjab***⁵.

Thus, I am of the view, as evidence of the official witnesses particularly P.Ws. 4, 5, 8 and 9 are trustworthy and can be relied upon to establish recovery of 37 kgs. narcotic substance from the truck bearing No. RG 27G 2106.

Non-production of the truck, wooden partition as well as nuts and bolts secreting the cavity where narcotic substance were kept does not affect the prosecution case. Ocular and documentary evidence show

³ (2017) 15 SCC 684

⁴ (2005) 1 Cal LJ 473

⁵ (2020) 2 SCC 563 (para 15 and 16)

seizure of the truck in question which was kept at the Central Warehousing Corporation. Acknowledgment was issued by the said authority (Exhibit-15). These documents along with oral evidence on record clearly prove the seizure of the truck and its accessories beyond doubt.

Evidence has come on record Gopal Teli, Shyam Lal and Rabi Sekhar Pandey were in the truck when the vehicle was intercepted and narcotics was recovered. During his examination under Section 313 Cr.P.C. Shyam Lal admitted himself to be the owner of the vehicle. It is contended there is no evidence to show Gopal was the driver. Ample evidence has come on record that Gopal was present in the vehicle along with Shyam Lal and Rabi Sekhar Pandey at the time of recovery. Rabi Sekhar Pandey took a spirited defence that he was not in the truck. He claimed he and his brother-in-law, Sonu Pandey were abducted on 30.12.2008 by 4-5 persons from his tenanted apartment at Panagarh and made to sign blank document with regard to two maruti cars which had also been taken away by them. He was also made to record statement. Thereafter, his brother-in-law was released. He examined his brother-in-law, Sonu Pandey (D.W. 1) to probabalise his defence. Though Sonu deposed on 30.12.2008 officers of N.C.B. had come to their residence and had illegally abducted them, he is silent with regard to maruti cars being taken away as claimed by Rabi Sekhar Pandey during his examination under Section 313 Cr.P.C. His version was rightly disbelieved by the trial Judge. No contemporaneous complaint with regard to their alleged

abduction had been contemporaneously lodged at the local police station. Belatedly, during trial such defence has cropped up. There was no enmity between N.C.B officers and Rabi Sekhar Pandey which would probabilise his false implication in the case. Secret intelligence input with regard to involvement of Rabi Sekhar Pandey in trafficking of narcotics was received and recorded at N.C.B. office at 4:00 p.m. on 31.12.2008. Hence, there was no reason why N.C.B. officers would pick up Rabi Sekhar Pandey or his relation on 30.12.2008 and implicate him in the present case.

In the case of the consistent evidence of the prosecution witnesses particularly P.Ws. 4, 5, 8 and 9 with regard to the presence of Rabi Sekhar Pandey in the truck at the time of recovery, I am unwilling to accept his belated and desperate plea of illegal abduction and wrongful detention on and from 30.12.2008.

With regard to recovery of 9.225 kgs. of *heroin* from the tenanted apartment of Rabi Sekhar Pandey, I am unwilling to rely on the sole deposition of P.W. 7, G. N. Pandey. P.W. 7 deposed on 30.12.2008 he along with one officer had gone towards National Highway, Burdwan and was kept stand by for further orders. On 01.01.2009, a superior officer gave direction to them to go to Panagarh and search the house of Ganesh Bhadra under whom Rabi was a tenant. With the help of police officers attached to the Kanksa Police Station, they went to the house of Ganesh Bhadra. In the presence of the wife of Ganesh, namely, Sushmita and another independent witness, namely, Balai Saha he recovered 9 packets believed to be *heroin* of *brown coloured powder* substance believed to be

heroin weighing 9.225 kgs and 1.825 kgs. of *white coloured granules*. Sonu, brother-in-law of Rabi was present at the spot. He prepared seizure list which was signed by Sonu, Sushmita and Bapi. Seizure was said to be made between 17:00 hours to 17:45 hours. He brought the contraband to N.C.B. office which was kept in the custody of P.W. 6, godown in-charge and report of the seizure was made by P.W. 8 to Zonal Director, N.C.B. (Exhibit-24). Examination of Exhibit-24 show on the disclosure of Rabi Sekhar Pandey that he had kept 10.5 kgs. of *heroin* in his rented house at Panagarh, follow up action had been undertaken by P.W. 7. As per prosecution case, Rabi Sekhar Pandey had been apprehended at Gopalnagar in the truck carrying 37 kgs. *heroin*. Thereafter, notice under Section 67 of N.D.P.S. Act was issued upon him to attend N.C.B. office. Pursuant to the said notice, he came to the N.C.B. office at 12:30 hours. Thereafter, his statement was recorded under Section 67 of N.D.P.S. Act by P.W. 3, (Exhibit-5).

Perusal of the said statement (Exhibit-5) would show recovery of the contraband had already been made from the residence of Rabi Sekhar Pandey prior to the recording of the statement. If so, how could disclosure statement of Rabi Sekhar be the trigger for follow up action and recovery as claimed by prosecution? Furthermore, so-called recovery is completely shrouded in mystery. P.W. 7 claimed he was instructed by a superior officer to search the tenanted premises. Identity of the superior officer has also not been disclosed. Identity of the officer accompanying P.W. 7 in the search is also unknown. His signature is also not appearing from the

seizure list (Exhibit-16). Though it is claimed assistance of police of local Police Station was taken, no police officer is examined. Most importantly, no effort was made by the prosecution to examine Sushmita Bhadra, wife of the landlord, although her statement was recorded under Section 67 of N.D.P.S. Act. Other independent witness, Balai Saha was also not examined.

In view of the aforesaid lacunae in the prosecution case, I am hesitant to rely on the sole version of P.W. 7 to hold recovery of 9.225 kgs. of *heroin* from the tenanted premises of Rabi Sekhar Pandey has been proved beyond doubt.

However, prosecution case with regard to presence of Rabi Sekhar, Gopal Teli and Shyam Lal in the truck wherefrom 37 kgs. of *heroin* was recovered has been proved beyond doubt. They were in control of the vehicle which was used for transporting narcotics. 37 kgs. of *heroin* was kept concealed in a secret cavity behind the driver's cabin. These incriminating circumstances in light of the statutory presumptions under Section 35/54 of N.D.P.S. Act clearly establish their conscious position with regard to 37 kgs. of *heroin* carried in the aforesaid truck. In this regard, one may profitably rely on ***Gurvinder Singh vs. The State of West Bengal And Others***⁶.

Chain of custody of the samples drawn from the consignment of *heroin* seized from the truck and those examined by the chemical examiners is fully established. P.W. 8 deposed he drew samples in

⁶ (2017) 1 Cal LJ 413

duplicate 5 gms. each from 19 packets, that is 38 samples in all. They were kept in separate envelopes, sealed and signed by independent witnesses. Under cover of 19 test memos (Exhibit-25) collectively, the samples were sent to for chemical examination at Chemical Laboratory Customs House, Calcutta. P.Ws. 11 to 15 are Assistant Chemical Examiners, who tested the samples and prepared the test reports that the samples contained *heroin*. They deposed seals on the samples were intact. They proved their test reports (Exhibit- 32 collectively). Hence, the chain of custody is proved beyond doubt.

In light of the aforesaid discussion, conviction of Gopal Teli, Shyam Lal and Rabi Sekhar Pandey under Section 21(c) of N.D.P.S. Act is proved beyond doubt.

With regard to charge of conspiracy against Biswanath Adhikary and Bapi Dey, I find the prosecution had essentially relied on the statements of the appellants recorded under Section 67 of N.D.P.S. Act admitting their guilt. In addition thereto, Rabi Sekhar Pandey was seen talking suspiciously with Biswanath at the spot. Biswanath and Bapi had come to the spot in a motor cycle and handed over a sum of Rs. 1,40,000/- to the N.C.B. officers. He was unable to give explanation with regard to such large amount of cash on his person. There were conversations between Biswanath and Rabi Sekhar Pandey between 24.01.2008 to 01.01.2009.

The Apex Court by 2:1 majority in **Tofan Singh** (supra) held as follows:-

“158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are “police officers” within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.”

In view of the aforesaid ratio, none of the statements recorded under Section 67 of N.D.P.S. Act is inadmissible. It is apposite to note trial Court had also not relied on the Consumer Application Forms (CAF) in respect of mobile phone Nos. 9614610665 and 9635641678 (Exhibits-27 and 28) and their call detail records on the ground the service provider had not been examined. If the support from the aforesaid pieces of evidence, namely, statements under Section 67 of N.D.P.S. Act and the call detail records to the prosecution case are discounted, what remains is the evidence of official witnesses that Biswanath and Bapi came in a motor cycle and Rabi Sekhar Pandey came down from the truck and was seen talking suspiciously with Biswanath. What was the actual conversation between them is unknown. Ownership of the motor cycle has also not been ascertained.

Mr. Basu has strongly relied on the recovery of Rs. 1,40,000/- from Biswanath and his failure to explain why he was carrying a large amount of cash as a strong circumstance against him.

It is true conspiracies are not hatched in the open and hardly one would find direct evidence to prove conspiracy. It is ordinarily proved through circumstantial evidence like conduct of conspirators and other surrounding circumstances.

As per Section 10 of the Evidence Act in the event prima facie evidence is led to establish the existence of conspiracy, acts done by one conspirator would bind others and prove the charge of conspiracy against all the conspirators. [See. ***Bhagwan Swarup Lal Bhisn Lal and Others vs. State of Maharashtra***⁷] Existence of conspiracy in the present case is primarily based on statements of the appellants recorded under section 67 of the N.D.P.S. Act and CDRs of their mobile phones which are either inadmissible or have not been proved. Hence, there is no prima facie evidence to establish the existence of conspiracy between Gopal Teli, Shyam Lal and Rabi Sekhar Pandey and the appellants in CRA 238 of 2015 and CRA 237 of 2015, that is, Biswanath Adhikary and Bapi Dey. Under such circumstances, acts of co-conspirators, namely, Gopal Teli, Shyam Lal and Rabi Sekhar Pandey in transporting narcotics cannot bind others, i.e., Biswanath Adhikary and Bapi Dey and bring them within the dragnet of conspiracy. When incriminating circumstances proved do not form a complete chain, prosecution case cannot be salvaged on the weakness of the defence, that is, failure of Biswanath to explain why he was carrying a sum of Rs.1,40,000/-. It is trite law a prosecution case

⁷ AIR 1965 SC 682 (para 8)

must stand on its own legs and not on the weakness of defence⁸. When the chain of circumstance is complete the onus may shift on the accused to explain away an incriminating circumstance which is within his 'special knowledge' under section 106 of the Evidence Act. But if the chain is nebulous and not complete, the onus does not shift on the accused and his non-explanation of a circumstance within his 'special knowledge' would not subscribe an additional link to prove the case. Analyzing Section 106 of the Evidence Act in the backdrop of the initial burden on the prosecution to prove its case in ***Shivaji Chintappa Patil vs. State of Maharashtra***⁹, the Apex Court held as follows:-

“23. ... Section 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof would lie upon the accused.”

For the aforesaid reasons, I am inclined to extend the benefit of doubt to Biswanath and Bapi and acquit them of the charge under section 21(c) read with section 29 of the NDPS Act.

Conviction and sentence of Biswanath Adhikary @ Bishu and Bapi Dey @ Buro are set aside.

Appellants, namely, Biswanath Adhikary @ Bishu and Bapi Dey @ Buro shall be released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the trial Court which shall

⁸ Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116 (para 151 and 161)

⁹ (2021) 5 SCC 626

remain in force for a period of six months in term of section 437A of the Code of Criminal Procedure.

Appeals CRA 238 of 2015 and CRA 237 of 2015 are, accordingly, allowed.

Coming to the issue of sentence imposed on Gopal Teli, Shyam Lal, Rabi Sekhar Pandey, I note prosecution has proved beyond doubt they were transporting 37 kgs. of heroin in a truck. However, prosecution has failed to prove beyond doubt recovery of 9.225 kgs. of heroin from the residence of Rabi Sekhar Pandey. Facts of the case show the appellants were the driver, owner and transporter of the vehicle used for inter-state transportation of drugs. Kingpins of the drug racket who had hired them have not been brought on trial. The appellants are mere foot soldiers in the inter-state drug trade. They do not have any criminal antecedents.

In the view of the aforesaid facts and balancing the aggravating and mitigating circumstances of the case I consider it prudent to modify the sentence imposed on the appellants, namely, Gopal Teli, Shyam Lal and Rabi Sekhar Pandey direct them to suffer rigorous imprisonment for 15 years each and to pay a fine of Rs. 2 lakh each, in default, to suffer imprisonment for 12 months more.

Period of detention suffered by the appellants in C.R.A. 247 of 2015 and C.R.A. 250 of 2015 during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon them in terms of section 428 of the Code of Criminal Procedure.

With the aforesaid modification of sentences, criminal appeal Nos. CRA 247 of 2015, CRA 237 of 2015, CRA 238 of 2015 and CRA 250 of 2015 are disposed of.

In view of disposal of the appeals, connected application, if any, 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.

(Ananya Bandyopadhyay, J.)

(Joymalya Bagchi, J.)

PA (Sohel/Sourav)