

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 33 of 2019

MD. MADHU @ AHAMED HOSSAIN
VS.
THE STATE OF WEST BENGAL

For the Appellant	: Mr. Manjit Singh, Adv. Mr. Gaganjyot Singh, Adv. Mr. Biswajit Mal, Adv. Mr. Abhishek Bagal, Adv. Mr. Akabar Laskar, Adv.
For the Respondent	: Mr. Saswata Gopal Mukherjee, Adv. Mr. Saryati Datta, Adv.
Hearing concluded on	: 16 th January, 2023
Judgement on	: 2 nd February, 2023

Siddhartha Roy Chowdhury, J.:

1. Challenge in this appeal is to the judgement and order of conviction passed by learned 4th Additional District and Sessions Judge cum Special Judge N.D.P.S. Court, Alipore, passed in the case no. 7(4) 2017, S.T. No. 1 (4) 2018, on 28th September, 2018 whereby the learned Trial Court was pleased to hold the appellant guilty for committing offence punishable under Section 20 (b) (ii) (B) of the N.D.P.S. Act and sentenced him to suffer imprisonment for seven years and to pay a fine of Rs. 50,000/- with default clause subject to the provision of Section 428 of the Code of Criminal Procedure.

2. Briefly stated, S.I. Kalyan Biswas (N. Cell, D.D.) received source information on 12th November, 2016 and left the police station for Dakshinpara Purba Panchannagam, P.S. Anandapur. To work out such information around 15.10 hours his source indicated one person who was coming down the road from east to west. He was intercepted in front of premises no. 79 Dakshinpara, Purba Panchannagam, P.S. Anandapur, Kolkata-39. The man was carrying one white polythene packet in his hand. With the interception of the man some people assembled there. The informant requested the gathering to volunteer to witness the search of the said person, and two persons came forward voluntarily to witness the search and seizure. The informant and the other police personnel disclosed their identity to the detainee, Md. Madhu @ Ahamed Hossain of Uttar Panchannagam, P.S. Anandapur, Kolkata-39. He was given one written option and was apprised of his legal right to opt to be searched in presence of learned Magistrate or before a G.O. The detainee since opted to be searched in presence of G.O., the informant and the other team members made a futile attempt to find one and ultimately informed the superior police officer to send G.O. at the spot. At about 16.30 hours, Inspector Soumen Kr. Dey, Additional O.C. Anandapur Police Station came to the spot in uniform. He was introduced to the detainee and the witnesses and was told about the development. Thereafter, the Additional O.C. Soumen Kr. Dey disclosed his identity to the detainee as G.O. and served another written option to know when the detainee opted to be searched in presence of the said G.O.

3. The detainee searched the complainant but no narcotic drug was found. Thereafter, the informant caused search of the person of the detainee and one white polythene packet was found in the right hand of the detainee, containing 13 pieces of solid materials of cannabis raisin, commonly known as charas, weighing about 520 grams. A sum of Rs. 120/- was also recovered. Thereafter, the said recovered solid materials were tested with the help of testing kit and it was found that the materials recovered were charas, a contraband article.
4. Two sample packets were drawn, each weighing 28 grams out of the material seized. The sample packets were sealed, labeled and marked as S1 and S2. The remaining part of the charas and cash money were also packed, labeled and sealed by informant separately as mother packet marked as A and B. Seizure list was prepared on spot. Md. Madhuon on interrogation failed to explain his possession of contraband articles. The detainee was arrested at about 18.30 hours. Memo was prepared and served upon the accused person. The informant, thereafter, examined the witnesses present there as well as accused person and recorded their statements under Section 161 of the Criminal Procedure Code.
5. After coming back he lodged a complaint in writing and accordingly Anandapur P.S. case no. 173 dated 12th November, 2016 was registered under Section 20 (b) (ii) (B) of the N.D.P.S. Act. Police took up investigation which culminated into submission of charge sheet against the accused person.

6. On 9th April, 2018 trial commenced and accused stood trial, pleading his innocence. In course of trial, prosecution examined as many as 7 witnesses and learned Trial Court after considering the evidence on record both oral and documentary, was pleased to pass the judgement impugned.
7. Assailing the impugned judgement Mr. Manjit Singh, learned Counsel for the appellant submits that learned Trial Court failed to appreciate the fact of the case in its proper perspective which resulted into miscarriage of justice inasmuch as learned Trial Court overlooked the fact that prosecution at every stage of proceeding violated the standing instruction issued by Narcotic Control Bureau, being standing instruction 1/88 dated 15th March, 1988.
8. Drawing my attention to the testimony of prosecution witness no. 1, Kalyan Biswas, who set the criminal administration of justice into motion, Mr. Singh submits that admittedly the witness P.W. 1 had taken 2 blocks out of 13 blocks of substance allegedly found from the possession of the accused person as sample and marked the 2 packets as S1 and S2. The rest contraband substance weighing 464 grams was packed as mother packet and marked with Letter A. In course of cross-examination he further admitted that there were 13 solid substances and 2 were taken for samples. P.W. 2 who also stated that two sample packets each of 28 grams were taken for the purpose of sending the same to Drug Control Office for examination and opinion of expert. P.W. 2 reiterated the said fact in course of cross-examination. P.W. 3, Amal Kr. Dhar who was the Director of State Drug Control and

Research Laboratory, stated that on 17th November, 2016 the laboratory received one brown polythene packet marked as S1 duly sealed and signed by the authorized person. After receiving the sample, laboratory no. as 1835 (N)/2016 dated 17th November, 2016 was assigned. The envelope was opened. Sample was detected. The gross weight of the sample was found to be 54 grams. After testing, the remnant weight of the sample was 42 grams. The sample was tested both physically and chemically and it was found to be charas.

9. According to Mr. Singh, when the sample claimed to have been taken in two packets weighing 28 grams each and marked with the Letter S1 and S2 respectively, the sample packet sent for chemical examination marked as S1 should have contained 28 grams of substance and not 54 grams as was received by the office of P.W. 3. There is no explanation whatsoever as to how 28 grams of material transformed into substance weighing 54 grams. This fact indicates that the sample was either tampered with or whatever substance was recovered from the possession of the accused person, was not forwarded for chemical examination report, and it engulfs the case of prosecution with dense shadow of doubt.
10. It is further adverted by Mr. Singh that 13 blocks of substance were claimed to have been found from the possession of the accused person, but sample was not drawn from all the 13 blocks to be forwarded to the State Drug Control and Research Laboratory. Only 2 blocks were sent out of 13 blocks as stated by P.W. 1 and supported by P.W. 2 and P.W. 6. Therefore, with certainty it cannot be said that the

substance allegedly recovered from the possession of the accused person weighing about 520 grams was contraband substance. Benefit of doubt on that score ought to have been extended to the accused person by the learned Trial Judge. Drawing my attention to the standing instruction 1/88, Mr. Singh submits that Clause 1.6 of the said notification enunciates that quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic and psychotropic substance except ganja and charas/hashish where 24 grams in each case is required for chemical test. Seized drug in packets/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn which was not done in this case. To buttress his point, Mr. Singh relied upon the judgement of Hon'ble Supreme Court pronounced in the case of **GUNTER EDWIN KIRCHER VS. STATE OF GOA, SECRETARIAT PANJI** reported in **1993 AIR (SC) 1456**, Hon'ble Supreme Court held that:-

“If it is not practicable, in a given case, to send the entire quantity recovered should be sent for chemical examination under a regular panchanama and as per the provisions of law.”

In the said case it was not followed by the concerned authority. Two cylindrical pieces of charas were recovered from the possession of the accused, one of the pieces weighing less than 5 grams was sent for chemical analysis and the other piece weighing 7 grams was not sent nor part of it by way of sample was sent for chemical analysis and Hon'ble Supreme Court considered that only less than 5 grams of

charas should be considered to have been recovered from the possession of the accused and not 12 grams of charas.

11. Mr. Singh further relied upon the judgement of Hon'ble Apex Court pronounced in the case of **RAJESH JAGDAMBA AVASTHI VS. STATE OF GOA** reported in **2005 AIR (SC) 1389** wherein considering the discrepancy in weight of samples drawn and forwarded to the laboratory for chemical examination, the Hon'ble Apex Court held that:-

"..... There was every possibility of the seized substances being tampered with, and that is the only hypothesis on which the discrepancy in weight can be explained. The least that can be said in the facts of the case is that there is serious doubt about the truthfulness of the prosecution case."

12. Refuting such contention of Mr. Singh, Ms. Saryati Datta, learned Counsel representing the State submits that when sample was drawn from one packet though containing 13 blocks and the chemical examination report supports the case of prosecution that the sample was a contraband substance, it should be presumed that the remaining blocks are also of same nature. This cannot be treated as an infirmity in the prosecution case. In presence of the accused person the sample was drawn, sealed and even signed by the accused person. One of the two samples marked as S1 was sent for chemical examination. Possibility of error in weight because of faulty weighing machine cannot be ruled out. When commercial quantity of contraband substance like charas was recovered from the possession

of the accused person, learned Trial Court was absolutely justified in passing the impugned judgement.

13. It is really an enigma that sample drawn in presence of the accused person weighing about 28 grams, transformed into the substance weighing about 54 grams. This riddle ought to have been solved by the prosecution, giving plausible and sufficient explanation which was not done. This factum discrepancy in weight alone is sufficient to strike at the route of the case of prosecution. When 28 grams of substance became 54 grams before the chemical examiner, there can be no other option, in absence of any explanation, but to hold that prosecution does not have faith in truth and it gives rise to serious doubt about the truthfulness of prosecution case. As held by Hon'ble Apex Court in the case of **Gunter Edwin Kircher (supra)** sample since was not drawn from all the 13 blocks allegedly recovered from the possession of the accused person, it would lead the Court to hold that the remaining 11 blocks are not block of charas. On that score also benefit of doubt should be extended to the accused person.

14. Consequently it cannot be said that 52 grams charas was recovered from the possession of the accused person as held by learned Trial Court.

15. Under such facts and circumstances of the case, I do not find any reason to agree with the view expressed by learned Trial Court. In my humble opinion, the prosecution has failed to prove the charges beyond reasonable doubt. Accordingly the impugned judgement and order of conviction is set aside. The accused person is acquitted and be

released at once from the custody upon executing a bond under Section 437A Cr.P.C. for six months. Seized alat be destroyed according to law.

16. Let a copy of this judgement be sent down along with lower Court record to the learned Trial Court for information and necessary action.
17. Urgent photostat certified copy of this judgement, if applied therefor, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)