

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Before:

The Hon'ble Mr. Justice Joymalya Bagchi

And

The Hon'ble Mr. Justice Ajay Kumar Gupta

C.R.A. No. 218 of 2017

Biswajit Mandal
Vs.
State of West Bengal

For the Appellant : Mr. Sachit Talukdar, Adv.
Mr. Monotosh Ghosh, Adv.

For the State : Mr. Sanjoy Bardhan, Adv.
Ms. Baishakhi Chatterjee, Adv.

Heard on : 28.04.2023

Judgment on : 28.04.2023

Joymalya Bagchi, J. :-

1. Appeal is directed against the judgment and order dated 09.01.2017 and 10.01.2017 passed by the learned Additional District & Sessions Judge, 6th Court, Barasat, North 24 Parganas convicting the appellant for commission of offence punishable under Section 20(b)(ii)(c) and to suffer rigorous imprisonment for fifteen years and to pay a fine

of Rs.1,50,000/-, in default to suffer further simple imprisonment for one year.

2. Prosecution case as alleged against the appellant is to the effect that on 11.03.2015 at 20:15 hours S.I. Duth Kumar Naskar (PW 1) attached to Baguiati Police Station received secret information that there was illegal trafficking of ganja by one person near Kestopur 7 No. Auto Stand. He reduced the information in writing and brought the matter to the notice of the superior officer. Under his instruction, P.W. 1 and others proceeded to the spot at 21:15 hours. He noticed a person proceeding with a bag. On identification by source he intercepted the appellant. He intimated IC, Baguiati to come to the spot as Gazetted Officer. In presence of IC, Baguiati (PW 7) the appellant was searched and 21.700 kgs. of Ganja was recovered in a white coloured nylon bag. Two samples of 100 grams each were drawn from the contraband. Appellant was arrested along with contraband and samples were brought to the police station.

3. On the written complaint of PW 1, Baguiati Police Station Case No. 169 of 2015 dated 11.03.2015 under Section 20(b)(ii)(C) of the NDPS Act was registered. Samples were sent for chemical examination and chemical examiner's report was received and marked as (Exbt. 13). Report showed the presence of ganja in the sample. In the course of trial prosecution examined eight witnesses and exhibited a number of documents.

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

5. Mr. Talukdar, learned Counsel for the appellant submits the prosecution has failed to prove its case. None of the witnesses identified the appellant. Alamats were not exhibited. Presence of independent witness (PW 4) at the spot is doubtful. Accordingly, he prays for acquittal.

6. Mr. Bardhan, learned Counsel for the State submits evidence of the members of the raiding party i.e. PWs. 1, 2, 3 and 6 are corroborated by the Gazetted Officer (PW 7) and the independent witness (PW 4). Alamats were produced in Court and learned trial Judge incorrectly refused to mark them as material exhibits. Chain of custody of the seized samples and the chemical examiner's report has been established. He prays for dismissal of the appeal.

7. PW 1 (Dudh Kumar Naskar) is the de facto complainant and the leader of the raiding party. He deposed he was attached to Baguiati Police Station. He received secret information that one person would come to Kestopur 7 No. Auto Stand with ganja. He diarised the information and with the permission of his superior he proceeded to the spot. He also requested disinterested persons to assist the raid. At 10:45 hours as per information he detained the appellant with a white coloured bag. He requisitioned IC, Baguiati to the spot. In the presence

of IC, he recovered 21.700 kgs of ganja from a white coloured bag. He took out sample from the bag. He prepared a seizure list. He arrested the appellant at the spot. Alamats were produced in Court but were not marked as exhibits.

8. PW 2 (Raju Dandapat) is a member of the raiding party. He proved his signatures on the seizure list. But he could not identify the appellant.

9. PW 3 (Pratapaditya Mondal) is another member of the raiding party. He corroborated PWs 1 and 2. He proved his signature on the seizure list.

10. PW 6 (Uttam Das), another member of the raiding party, proved the signature of the seizure list. He also proved his signature on the inventory and specimen seal impression.

11. PW 7 (Debabrata Ojha) is a Gazetted Officer. He deposed PW 1 requested him to come to the spot. He was present at the time of recovery. Recovery was made in the presence of independent persons. He signed on the seizure list, inventory list and sample sealed impression. He proved his signature. He, however, failed to identify the appellant.

12. PW 4 (Santu Naskar) is an independent witness. He deposed he had gone to the bazar around 9:00P.M. When he reached Kestopur he found a gathering. Police had detained a person with a white coloured bag. The bag was searched and 21.700 kgs. of ganja recovered. He

signed on the seizure list. He stated the name of the detained person was Biswajit Mondal.

13. In cross-examination he stated he had left the hotel around 8:30PM and went to his residence within 10 to 15 minutes and thereafter stayed at his residence.

14. PW 8 Pragati Ranjan Biswas, is the investigating officer. He deposed the alamats were kept in the Malkhana. He produced extract copy of the Malkhana Register (Ext 14). He collected the chemical examiner's report (Ext 13). He submitted charge sheet.

15. Mr. Talukdar has assailed the prosecution case primarily on the ground that the seized contraband were not produced in court. He relies on ***Bishnu Sarkar vs. State of West Bengal***¹. In the cited case, contraband had not been produced in Court. Present case is factually different.

16. As per PW1 and the records of the case it appears that the alamats were produced in Court. But they were not marked material Exhibits as labels were absent. Evidence of the members of the raiding party as well as Gazetted Officer PW7 shows that the contraband and samples were packed, sealed and labelled at the spot. PW2 ever stated he had signed on the labels. Investigating Officer PW8 deposed the alamats had been kept in the Malkhana of the police station. He

¹ 2017 SCC OnLine Cal 236

adduced the Malkhana Register. He proved the extract of the Malkhana Register (Ext 14).

17. In view of the aforesaid evidence on record, I am of the view the alamats had been produced in court but probably owing to mishandling the labels had come off. Hence, it cannot be said that the recovered contraband had not been produced in court at all. In **State of Rajasthan vs. Sahi Ram**² the Apex Court *inter alia* held mere non-production of contraband in all cases may not invariably lead to acquittal. The Court analysed prior authorities wherein acquittals had been recorded and held in none of the cases the benefit of acquittal had been extended on the singular ground of non-production of contraband.

18. The Court observed as follows:-

“15. It is true that in all the aforesaid cases submission was advanced on behalf of the accused that failure to produce contraband material before the Court ought to result in acquittal of the accused. However in none of the aforesaid cases the said submission singularly weighed with this Court to extend benefit of acquittal only on that ground. As is clear from the decision of this Court in Jitendra [Jitendra v. State of M.P., (2004) 10 SCC 562, apart from the aforesaid submission other facets of the matter also weighed with the Court which is evident from paras 7 to 9 of the decision. Similarly in Ashok [Ashok v. State of M.P., (2011) 5 SCC 123, the fact that there was no explanation where the seized substance was kept (para 11) and the further fact that there was no evidence to connect the forensic report with the substance that was seized, (para 12) were also relied upon while extending benefit of doubt in favour of the accused. Similarly, in Vijay Jain [Vijay Jain v. State of M.P., (2013) 14 SCC 527, the fact that the evidence on record did not establish that the material was seized from the appellants, was one of the relevant circumstances. In the latest decision of this Court in Vijay Pandey [Vijay Pandey v. State of U.P., (2019) 18 SCC 215, again the fact that there was no evidence to connect the forensic report with the

² (2019) 10 SCC 649

substance that was seized was also relied upon to extend the benefit of acquittal.

This extract is taken from State of Rajasthan v. Sahi Ram, (2019) 10 SCC 649 at page 658

16. It is thus clear that in none of the decisions of this Court, non-production of the contraband material before the court has singularly been found to be sufficient to grant the benefit of acquittal."

19. The Court further observed:-

"18. If the seizure of the material is otherwise proved on record and is not even doubted or disputed, the entire contraband material need not be placed before the court. If the seizure is otherwise not in doubt, there is no requirement that the entire material ought to be produced before the court. At times the material could be so bulky, for instance as in the present material when those 7 bags weighed 223 kg that it may not be possible and feasible to produce the entire bulk before the court. If the seizure is otherwise proved, what is required to be proved is the fact that the samples taken from and out of the contraband material were kept intact, that when the samples were submitted for forensic examination the seals were intact, that the report of the forensic experts shows the potency, nature and quality of the contraband material and that based on such material, the essential ingredients constituting an offence are made out."

20. PW1 has clearly proved recovery of 21.700 kgs of ganja from a white nylon bag carried by the appellant. His deposition is corroborated by other members of the raiding party as well as Gazetted Officer PW 7. Independent witness PW4 has also corroborated the official witnesses. It is argued presence of PW4 at the spot is doubtful. I do not accept this proposition. Mr. Talukdar refers to a portion of the cross examination of the witness where he claimed he had left the hotel at 8.30 p.m. and reached his house in 10/15 minutes. Thereafter he had not gone out of the house. Hence, PW4 could not be at the spot at 10:45 p.m. This line

cannot be taken out of context and read in isolation. In another part of his cross, the witness admitted that he had seen a gathering of people at around 10/10.30 p.m at the auto stand. This corroborates his presence at the auto stand at the time of recovery. He also deposed with regard to presence of the other independent witness Rajib Das at the spot. He proved his signature on the seizure list. In this backdrop it is clear that the independent witness PW 4 was present at the time of recovery and has corroborated the case.

21. It is also contended some of the witnesses could not identify the appellant. PW 1 identified the appellant. His presence at the spot is established through his signature on contemporaneous documents i.e memo of arrest and the seizure list. Other witnesses namely PWs 3 and 6 stated they could identify the appellant. Independent witness PW 4 disclosed the name of the appellant. These circumstances clearly establish the presence of the appellant at the place of occurrence.

22. Search and seizure of narcotics from the bag carried by the appellant is based on unimpeachable evidence and proved beyond doubt. Chain of custody of the sample drawn from the contraband and the one examined by the chemical examiner has also been established. PW 8 deposed the sample was kept in the Malkhana. The sample seal impression matched with the one that is noted in the chemical examiner's report (Ext 13). Chemical examiner's report proved presence of ganja in the sample. Prosecution case is proved beyond doubt.

23. Coming to the issue of sentence, I note that appellant does not have prior conviction. Weight of narcotics seized is barely above commercial quantity. Balancing the aggravating and mitigating factors I modify the substantive sentence imposed on the appellant and direct that he shall suffer rigorous imprisonment for ten (10) years and to pay a fine of Rs. 1,00,000/- in default to suffer rigorous imprisonment for one year more.

24. With the aforesaid modification as to sentence, appeal is disposed of.

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

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

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

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)