

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 597 of 2008

**Sambhu Verna @ Sambhu Verma
-Vs-
The State of West Bengal**

For the Appellant : Mr. Suman De

For the State : Ms. Faria Hossain
Mr. Anand Keshari

Heard on : 01.03.2023, 03.04.2023, 05.04.2023, 08.08.2023.

Judgment on : 29.09.2023.

Ananya Bandyopadhyay, J.:-

1. The instant criminal appeal is preferred by the appellant against the judgment dated 19.08.2008 and order dated 31.08.2008 passed by the Learned Judge, NDPS Act, Howrah convicting the appellant under Section 20(b)(ii)(B) of the NDPS Act and sentencing him to suffer rigorous imprisonment for a period of one and half years and to pay a fine of Rs. 5,000/- in default to suffer rigorous imprisonment for six months more in connection with T.R. No. 21 of 2005.
2. The prosecution case in brief is that on 20.07.05 at 19.50 Hours in pursuance of a secret source information, I.C. Lilluah along with other

Officers raided the vicinity of Chamrail Service Station at N.H.-6 and caught red handed the accused while he was proceeding towards Kona through N.H.-6 by Cycle carrying a bag hanging on the handle of the Cycle. I.C. searched the said accused in presence of the witness after observing legal formalities and recovered 3 Kgs. of Ganja packed in 3 packets covered by old Hindi papers kept in the deep green coloured bag. The accused having failed to produce any valid paper for possessing the said ganja packets, I.C. seized the three packets from the possession of the accused under seizure list in presence of the witnesses duly signed, prepared proper label and 200 gms of ganja was taken from each of 3 packets as sample. I.C, lodged the complaint *suo moto* on the basis of which Liluah P.S. Case no. 138/05 dated 20.7.05 was initiated against the accused and during investigation the Investigating Officer took charge of the seized ganja and arrested the accused who confessed his guilt and he was forwarded to the Court on 21.7.2005.

3. The samples of ganja were sent for chemical examination and on 17.8.05 an opinion of the expert vide no. SDCRL/AR/589 was received that the samples were found to contain ganja.
4. After completion of investigation the I.O. submitted charge-sheet being no. 142 of 2005 dated 21.09.2005 under Section 20(b) of the Narcotic Drugs and Psychotropic Substances Act, against the accused.
5. The charge was framed against the accused under Section 20 (b) of the N.D.P.S. Act to which he pleaded not guilty and claimed to be tried.
6. To bring home the charge the prosecution has examined as many as the 7 witnesses and enlisted certain document.

7. Learned Advocate for the appellant submitted that –

- i. The impugned order of conviction and sentence suffered from serious infirmities and the Learned Trial Judge proceeded on the basis of conjecture and surmises.
- ii. It was the case of the prosecution that the articles (3 kg. of ganja) were seized from the accused while he was proceeding towards Kona through N.H.-6, PW-1 searched him and the bag and recovered ganja in the said bag, contained in three packets which were seized by the PW-1 under a seizure list in the presence of available witnesses including public witnesses who signed the seizure list. Only one public witness viz. PW-6 had been examined who was declared hostile and he deposed that he signed a blank paper at his shop room and therefore the entire seizure was doubtful.
- iii. The chemical examiner had not been examined in the case and therefore it could not be safely presumed that the samples which were sent to the chemical examiner were labelled and sealed properly and he received the said sample with seal intact.
- iv. It appeared from the report that the samples were found to contain ganja but purity of ganja had not been mentioned and therefore the examination report was bad in law as the quantity of neutral substance(s) was not to be taken into consideration which may be of small, intermediate or commercial quantity.
- v. The intention of the legislature was to levy punishment based on the content of the offending drug in the mixture and not on the weight of

the mixture as such. In the mixture of a narcotic drug or a psychotropic substance with one or more neutral substances, the quantity of the neutral substance was not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance. It was only the actual content by weight of the narcotic drug which was relevant for the purpose of determining whether it would constitute small, intermediate or commercial quantity.

- vi. During cross examination PW-2 deposed all the three packets bore G.D. No. and the P.S. Case Number on the label pasted on them and so also on the sample packets. However, the packets did not contain gala (red mark) seal and therefore the entire seizure, sealing of packets and examination of sample were not free from doubt and as such the accused would be given the benefit thereof.
- vii. The Malkhana register had not been produced before the Court.
- viii. The seized cycle had also not been produced before the Court and therefore the entire case of the prosecution that the accused carrying a bag hanging on the handle of the cycle was doubtful which nullified the prosecution case.
- ix. The impugned order of conviction and sentence must be set aside.

8. The Learned Advocate for the State submitted that the prosecution was able to prove its case based on corroborative evidence of the prosecution witnesses and the appeal shall be dismissed.

9. The prosecution had cited 7 witnesses.
10. PW-1, Ajoy Kumar Mukherjee, in his deposition stated that the complainant PW-1 on receiving a source information on 20.7.05 at about 6/6.15 p.m. as inspector-in-charge of Liluah Police Station informed the other officers of the said P.S. that a boy would be passing on a bicycle with a bag containing contraband ganja on N.H.-6 near Chamrail Service Station. PW-1 lodged a G.D. entry and reached near "Kona more" of the said Highway accompanied by PW-2, Sourav Chowdhury, PW-3, Parimal Ari, PW-4 Ranjit Kr. Singha, PW-5, Bikash Sarkar and other officers of the said P.S. and contacted the source who led them to the spot. At 6.45/7 p.m., PW-1 found a person with a bag on a bicycle. PW-1 and the officers surrounded the person and disclosed their identities. PW-1 issued a written notice under Section 50 of the NDPS Act to the appellant with regard to his willingness to be searched in presence of a gazetted officer or Executive Magistrate to which the appellant expressed his willingness to be searched by a gazetted officer. The copy of the notice and the reply of the appellant were marked as Exhibits 3 and 3(a) respectively. PW-1 disclosed to the appellant that he is a gazetted officer to which the appellant agreed to be searched by him. PW-1 searched the appellant in person. On searching the appellant bag, ganja which weighed 1 kg was recovered. The ganja was contained in 3 packets, which were seized under a seizure list marked Ext. 2. A sample of 600 grams ganja was segregated from the aforesaid recovered amount and the rest of the amount was duly packed, sealed and labeled under an inventory marked as Ext. 4, 4(a) and 4(b). The labels bearing the signatures of PW-1, the

witnesses and the accused were marked as Ext. 5, 5(a) and 5(b). The seized ganja was marked as Mat. Ext. 'I' and the sample ganja was marked as Mat. Ext. 'II'. Thereafter PW-1 filed a suo moto complaint against the appellant. The formal F.I.R. along with the complaint was marked as Ext. 1.

11. PW-1, Ajoy Kumar Mukherjee, in his cross-examination stated that the telephonic message book was not maintained by the P.S. but the messages, either telephonic or source used to be entered in G.D. of the P.S. PW-1 saw the accused approaching from Bally side towards "Kona more". PW-1 did not know the exact number of police officers gathered at the police station at that time. PW-1 did not mention any narcotics in the notice served upon the accused. PW-1 did not take any receipt from the accused against the notice served. The accused did not write anything but only signed Ext. 3(a). PW-1 could not recall the person who wrote Ext. 3(a). Ext. 3(a) did not mention whether it was read over to the accused and whether he admitted to it.
12. PW-2 in his deposition stated that PW-2 was posted at Liluah P.S. He was a witness during the seizure of the contraband. The signature of PW-2 on the seizure list was marked as Ext. 2/1. The signature of PW-2 on Mat. Ext. 'I' was marked as Ext. 4/a/1. PW-2 mentioned that the colour of the bag containing the contraband ganja was greenish. The bag was marked as Mat. Ext. 'III'.
13. PW-3 in his deposition stated PW- 3 was the witness during the seizure. The signature of PW-3 on the seizure list was marked as Ext.2/2. P.W.3. deposed that they had chased the accused for about 20/35 cubit distance.

14. PW-4 in his deposition stated that he was a witness during the seizure. The signature of PW-4 on the seizure list was marked as Ext.2/3. He deposed that he could not recall the accused but he could recall the incident.
15. PW-4 in his cross-examination stated that the alams were not in the same condition as it was during seizure. PW-4 stated that “the bag was not sealed at P.S.” He also stated “no villagers had come to the P.S. at the time of search and seizure. Manager, owner or the employee of Chamrail pump were not called. I can’t say if they came to P.S. or not.”
16. PW-5 in his deposition stated that he was posted as the A.S.I. of police on 20.07.05 in Liluah P.S. He was a witness during the seizure. The signature of PW- 5 on the seizure was marked as Ext. 3/4.
17. PW-5 in his cross-examination stated that S.I. Asit Dey was the duty officer on that day. He mentioned that he had not lodged the G.D. that day. He stated that the seizure list was prepared five minutes after the apprehension of the accused. He also stated that no local people were called to be witnesses to the seizure.
18. PW-6 in his deposition stated that he is a resident of Ramkrishna Pally, Chamrail, Howrah. He stated that he has a “... *at Chamrail opposite to Chamrail Service Stn. Petrol Pump. By the side of a hotel on N.H. Road 6 on western side.*” He stated in his deposition that he was not present at the N.H. Road at the time of the incident. The signature on the seizure list was marked as Ext.2/5.

19. PW-6 in his cross-examination stated that he could not recall the date on which he signed the seizure list. He deposed to have signed on a blank paper at the direction of police at his shop space room.
20. PW-7 in his deposition stated that he was the S.I. of Liluah P.S. He prepared the sketch map along with the index marked as Ext. 7 and 7/1. *"The samples were sent to FSL for expert report and finding challan of the court. This is the said finding order by the court in my hand writing. This is marked Ext.8. (objected to). The challan bears the signature of F.S.L. person on the challan marked Ext. 9/1. On the challan Ext.9. I collected the FSL report (illegible) identified (?) charge sheet (sic) against (sic) the accused."* He had examined P.W. 6.
21. PW-6 in his cross-examination stated that PW-7 investigated the F.I.R., seizure list and the seized alamats on 20.07.05 at 21.15 hours. He handed the alamats to Malkhana which were noted in the paper / register maintained by Liluah P.S. He did not keep any receipts or Malkhana receipts. *"Betel shop has not been shown in the sketch map of the P.O. Bally is turned north side and Uluberia side is (sic) on the south as per sketch map. There is no specific measuring of such distance in the sketch map. There is no plot nos maintained (sic) in the C.D."*
22. The prosecution failed to prove the records of the Malkhana register. The chemical examiner was not examined. PW-1 cannot be termed to be the competent gazetted officer in accordance to the statutory provisions to conduct the search of the appellant as well as his belongings. The seizure of

the contraband was not proper. There are inconsistencies in the testimony of the prosecution witnesses.

23. Under the facts and circumstances of the case any absence of proof of commission of the offence by the appellant beyond reasonable doubt, the prosecution has failed to prove its case and accordingly the appeal is allowed.

24. Accordingly, CRA 597 of 2008 is disposed of.

25. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

26. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)