

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 375 of 1989

**Sri Swapan Dasson
-Vs-
The State of West Bengal**

For the Appellant	: Mr. Biplab Mitra Mr. Swapan Kumar Mallick Ms. Sudeshna Das
For the State	: Ms. Faria Hossain Mr. Anand Keshari
Heard on	: 20.02.2024, 14.03.2024, 20.06.2024
Judgment on	: 25.09.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against judgment and order dated 28.08.1989 passed by the Learned Judge, Special Court (Essential Commodities Act), Alipore in Special Case No.19(4)87 (T.R. No.184/87) convicting thereby the appellant under Section 7(1)(a)(ii) of the Essential Commodities Act and sentencing him to suffer rigorous imprisonment for 3 months and to pay a fine of Rs.50/- in default to suffer rigorous imprisonment for 7 days more and a further penalty and/or punishment has been combined with the

aforesaid sentence by directing that the seized High Speed Diesel Oil be confiscated (should be read as forfeited) to State.

2. The prosecution case precisely stated on 25.04.87 at about 12:20 hours one Nripendra Nath Mukherjee, S.I. of Police attached D.E.B., South 24 Parganas, the complainant being accompanied by other police personnel raided the temporary oil godown of the appellant at Netaji Subhas Road, P.S. – Budge Budge and recovered two barrels of High Speed Diesel Oil measuring about 400 litres and it was further alleged that the appellant failed to produce any document and as such the complainant seized the said barrels and other articles and the appellant was arrested on the event date. On the basis of the said complaint a case was registered being Budge Budge P.S. Case No.70 dated 25.04.87 was initiated.
3. The prosecution cited 7 witnesses and exhibited certain documents.
4. Defence examined PW-1 proprietor of S.S. Enterprise, PW-2 Nirmal Dey (present in a tea stall near the petrol pump), PW-3 Amulya Adhikari (Constable attached to D.E.B), PW-4 Biswanath Das (at that time he was attached to Budge Budge P.S. as A.S.I. drew up formed F.I.R. (Exbt.-2)), PW-5 Sunil Saha, (Constable who accompanied the complainant), PW-6 Sri N.N. Mukherjee (complainant who made the complaint (Exbt.-3) to the O.C. Budge Budge), PW-7 Manick Lal Mukherjee (Investigating Officer), Gopal Ch. Halder figured as DW-1 (owner of M/s Shila Stores and Agency).
5. Learned Advocate for the appellant submitted that –
 - i. The evidence PW-1 and DW-1 revealed the appellant to be a carrier under valid authority without any liability.

- ii. The letter sent by J.R. Enterprise to M/s Shila Stores & Agency Exbt.-B if taken into consideration will lead to a conclusion that there was no violation of any order as such the order of conviction passed against the appellant was liable to set aside.
 - iii. From the cross-examination of PW-7 it appeared that there were some shops and residential house in the locality as such non-examining local independent witnesses the prosecution significantly failed to establish its case.
 - iv. The appellant purchased the High Speed Diesel Oil of two barrel on behalf of S.S. Enterprise for delivering the same to J.R. Enterprise which was corroborated by PW-1 and DW-1.
 - v. The letters marked Exbt.-A, Exbt.-B, Exbt.-C and cash memo Exbt.-F should have been considered.
 - vi. In the bail application before this Hon'ble High Court started the J.R. Enterprise was the owner of the said too learned and was purchased from M/s Shila Agency. The investigating agency should have examined the identity of J.R. Enterprise and M/s. Shila Agency.
 - vii. There had been contradictions in the evidence of prosecution witnesses.
8. Considered the submissions of the Learned Advocate for both the parties.
9. The Learned Trial Court in the impugned judgment, inter alia, observed as follows:-

“Now considering the testimony of Samar Adhikary the proprietor of S.S. Enterprise I think the argument advanced by the learned lawyer

for the defence cannot be accepted in as much as if the accused purchased the said quantum of diesel oil why no cash memo was issued then i.e. at the time of purchase.

Again, it is also not known why those two barrels were removed to the place which is bound by tin fencing. To my mind all these letters and cash memos have been subsequently manufactured for this case and as such I place no credence upon the testimony of P.W 1 and I am reluctant to accept the letters marked exbt. A, B and C and the cash memo marked exbt. F as genuine.

Admittedly, there being seizure of 400 litres of k. oil and admittedly there being no license or permit or authority with the accused Swapan Das for possession and-or dealing in, it should be held that the prosecution has been able to prove the charge levelled against the accused. Moreover it is also not known why there was a big funnel and other drums in the said place if it was not an unauthorised shed for dealing in diesel oil. Accordingly, I find the accused to be guilty of the charge.”

10. The Learned Trial Court, after reasonable assessment of evidence both oral and documentary, rightly passed the impugned judgment.

11. In the decision of **Tarak Nath Keshari Vs. State of West Bengal**¹, the Hon’ble Apex Court held as follows:-

“7. Heard learned counsel for the parties and perused the paper book. The fact that inspection of the shop of the appellant was carried out on

¹2023 SCC OnLine SC 605

20.8.1985, hence the incident had taken place more than 37 years back. As was pointed out at the time of hearing, the appellant throughout remained on bail. Section 7(1)(a)(ii) of the EC Act under which the appellant has been convicted, provides as under:—

“7. Penalties - (1) If any person contravenes any order made under Section 3,-

(a) he shall be punishable,-

(i)

(ii) in the case of any other order, with imprisonment for a term which shall not be less than three months but which may extend to seven years and shall also be liable to fine:

Provided that the court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than three months;”

8. A perusal of the aforesaid Section shows that the Court may, for adequate and special reasons, impose punishment less than the minimum prescribed in the Section. However, the fact remains that the offence in the case in hand was committed on 20.8.1985 and in terms of the Essential Commodities (Special Provisions) Amendment Act, 1981, the proviso was not in force on that date.

9. As far as the case of the appellant on merits is concerned, we do not find that any case is made out for interference in the concurrent findings of the facts recorded by all the courts below. It was found that the stock of mustard oil and vegetable oil found at the shop of the appellant was more than the permissible limit, hence, this was violative of para 3(1) of the West Bengal Pulses, Edible Oil (Dealers Licensing) Order, 1978.

10. However, still we find that a case is made out for grant of benefit of probation to the appellant for the reason that the offence was committed more than 37 years back and it was not pointed out at the time of hearing that the appellant was involved in any other offence. Before all the courts below, the appellant remained on bail. While entertaining his appeal, even this Court had granted him exemption from surrendering. Section 4 of the Probation of Offenders Act, 1958 has a non obstante clause. The same is extracted below:

“4. Power of court to release certain offenders on probation of good conduct.—(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by

which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under subsection (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under subsection (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned.”

11. *Even if there is minimum sentence provided in Section 7 of the EC Act, in our opinion, the appellant is entitled to the benefit of probation, the EC Act, being of the year 1955 and the Probation of Offenders Act, 1958 being*

later. Even if minimum sentence is provided in the EC Act, 1955 the same will not be a hurdle for invoking the applicability of provisions of the Probation of Offenders Act, 1958. Reference can be made to a judgment of this Court in Lakhvir Singh v. The State of Punjab.”

12. In view of the observations as cited above, the appellant can be released on probation since the incident related to the year 1987. The appellant to be taken into custody to serve out the sentence would not be expedient in the interest of justice after a lapse of nearly 37 years.
13. The appellant is directed to be released on probation under Section 4 of the Probation of Offenders Act, 1958 on entering into bond of Rs.5,000/- to ensure that he will maintain peace and good behaviour for the remaining part of his sentence, failing of which he can be called upon to serve the sentence. Fine to be paid of Rs.5,000/- within 06 (six) months from the date of this order failing which he shall be called to serve out the sentence.
14. Accordingly, the instant criminal appeal being CRA 375 of 1989 stands disposed of.
15. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
16. 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.)