

CRA 10 of 1995

In the matter of : **Dilip Koley & Anr.**

....Appellants

Mr. Suranjan Mandal (Id. *Amicus Curiae*)

...For the Appellants

Mr. Avishek Sinha,

Mr. Rajashree Tah

...For the State

(Dictated in Court)

1. This instant appeal is preferred at the behest of the appellants challenging the impugned judgment and order of conviction dated 04.01.1995 passed by the learned Judge, Special Court (Under the Essential Commodities Act) Hooghly in Special Case No. 42/1992 arisen out of Chanditala Police Station Case No. 31 dated 22.5.1992.
2. By passing the impugned judgment this appellant No.1 along with the other accused was convicted under Section 7(1)(a)(ii) of the Essential Commodities Act, 1985 for violation of paragraph 3(7) of the West Bengal Motor Spirit and High Speed Diesel Oil (Licensing Control and Maintenance of Supplies) Order, 1980 and was sentenced to suffer simple imprisonment for a period of six months along with a fine of Rs. 1000/- each and in default of payment of fine to undergo further simple imprisonment for three months each.
3. Being aggrieved by and dissatisfied with the said impugned judgment and order of conviction, the present appeal is filed at the behest of the appellant.

4. During pendency of this appeal the appellant no. 2, Ganesh Chandra Mudi died and the instant appeal stood abated against him.
5. The instant case was started on the basis of a complaint lodged by the *de facto* complainant stating interalia that on 22.05.1992 he along with the member of the raiding team conducted raid at the house of the deceased accused Ganesh Chandra Mudi at Mudipara, village Ramanathpore and during such raid 460 liters of diesel oil was recovered from their possession but the accused persons failed to produce any valid document for keeping such oil at the place of occurrence. The case was started on the strength of the said complaint. The seizure list and weighment chart was prepared in the presence of the witnesses and seized diesel oil was kept in zimma.
6. In this case, three witnesses were adduced by the side of the prosecution and the documents as well as seized articles were marked as exhibited on its behalf. Neither any oral nor any documentary evidence was adduced on behalf of the appellant/ accused persons.
7. The learned advocate for the appellant said that there are apparent contradictions and omissions in the depositions of the witnesses in the case and as such the impugned judgment and order of conviction against this appellant is not sustainable under the law.
8. The attention of this Court drawn to the evidences of the witnesses and it is said that there is no material in the record for which it can be said that this appellant was

dealing with the said seized diesel oil. Moreover, P.W. 2 the witness to the seizure did not say anything involving the appellant with the alleged offence. Although, there are two witnesses in the seizure, one of the witnesses was not examined by the side of the prosecution and no explanation was given for the prosecution for non-examination of the said witness to the seizure. Beside P.W. 1 and PW3 who are the police personnel, no witness to the locality was cited by the side of the prosecution to prove the case which creates doubts regarding its genuineness.

9. It is further contended by the learned Advocate that the provision as enumerated in Section 6A of the Essential Commodities Act, 1955 regarding confiscation of the seized article was not duly followed up. As per submission of the learned Advocate that the entire proceeding of the case was vitiated for non-compliance of the relevant provision of law. As such it is prayed that the impugned judgment and order of conviction is not sustainable and it may be set aside outright.

10. Learned Advocate for the State has said that the prosecution has proved its case beyond doubt. All the witnesses cited by the prosecution at the time of giving deposition have supported the case of the prosecution. It is further contended that 460 liters of diesel oil was seized and recovered from the possession of the appellant but they failed to produce any scrap of paper regarding dealing with the said quantity of diesel oil. The seizure list which is mark as exhibited in this case also supports the case of the

prosecution. As per submission of the learned Advocate that there is no material in the record for which the impugned judgment and order of conviction passed by the learned Trial Court may be interfered with.

11. I have considered the rival submissions advanced by both the parties and have gone through all the materials on record.
12. P.W. 3, K.C. Banerjee, Inspector of Police has stated in his evidence that on the relevant date raid was conducted at the house of the accused Ganesh Chandra Mudi and 460 liters diesel oil was seized under the seizure list in presence of the accused and the witnesses. It is said by this witness that no document was collected by him regarding ownership of the house from which said alleged diesel oil was seized. Moreover, there is no such evidence in the record that this appellant no.1 along with the other deceased appellant were dealing with the said diesel oil at the relevant point of time.
13. A close scrutiny of the evidence on record reveals further infirmities in the prosecution case. P.W. 1, Nilratan Mondal, who was one of the members of the raiding party, did not depose anything during the course of his evidence with regard to the appellant's involvement in any business relating to diesel oil. His testimony, though important being that of a raiding party member, remained silent as to whether the appellant was in fact conducting any trade or sale of diesel oil on the relevant date and time. The absence of such statement from an official witness who was expected

to speak on the core allegation renders the prosecution version doubtful.

14. Likewise, P.W. 2, Bijay Mudi, who was projected as the only independent witness to the alleged seizure, also did not attribute any role or participation of the appellant in the alleged illegal business. On the contrary, in his deposition he stated that on the relevant date, he was called by the raiding party inside the house of the accused Ganesh Chandra Mudi by the D.E.B. Officers. His testimony makes it clear that his presence was secured only after the raid had already been conducted, and he himself was not in a position to verify or vouchsafe the authenticity of the seizure. More importantly, he categorically admitted that he was not sure about the contents of the seizure list, thereby making his evidence unreliable for proving the prosecution case.

15. When the only independent seizure witness fails to connect the appellant with the incriminating articles, and the official witness of the raiding party does not state anything about the alleged business of the appellant, the substratum of the prosecution story becomes shaky. In criminal jurisprudence, where liberty of a person is at stake, such doubtful and uncorroborated testimony cannot be made the foundation of conviction. The uncertain testimony of P.W. 3, thus, demolishes the prosecution's attempt to establish that the seized diesel oil was kept or stored by the appellant for the purpose of sale.

16. On a further careful analysis of the evidences, it is revealed that P.W. 2, who was cited as one of the seizure witnesses, did not depose anything in his testimony which could connect the present appellant with the alleged offence. His evidence remained completely silent with regard to the appellant's involvement, thereby failing to advance the prosecution's case in any manner. It is also noteworthy that although the seizure list purportedly bore the signatures of two witnesses, the prosecution examined only one of them. The other seizure witness was withheld from the witness box without any explanation whatsoever. Such unexplained non-examination of a material witness gives rise to an adverse inference against the prosecution, as it suggests that the said witness, if examined, might not have supported the prosecution version.

17. Moreover, the witnesses relied upon by the prosecution, namely P.W. 1 and P.W. 3, are police personnel belonging to the raiding party itself. Their testimony, though admissible, cannot be treated as wholly free from doubt in the absence of corroboration from independent persons. In the present case, the prosecution failed to cite or examine any witness from the locality where the alleged seizure was effected, though such witnesses were naturally available. This omission is fatal, because when a seizure is claimed to have been made from a shop or residential premises situated in a populated area, independent witnesses from the locality are the best persons to vouchsafe the credibility of the recovery.

18. The combined effect of (i) the silence of P.W. 2 regarding the appellant's involvement, (ii) the withholding of the second seizure witness without any explanation, and (iii) the failure to examine any local independent witness, casts a serious shadow of doubt on the genuineness and truthfulness of the prosecution story.
19. It is evident from the records that P.W.2, who was cited by the prosecution as a seizure witness, had signed both the weighment chart as well as the seizure list. However, on careful scrutiny of his deposition, it transpires that in his cross-examination this witness categorically admitted that he could not say from where the oil in question was recovered. This admission creates a serious dent in the prosecution case, because the very purpose of examining a seizure witness is to establish, beyond doubt, that the alleged articles were actually recovered from the possession or premises of the accused. When P.W.2 himself disowns knowledge of the source of recovery, his testimony becomes shaky and unreliable.
20. This contradiction becomes even more material when juxtaposed with the testimony of P.W.1. When one witness (P.W.1) seeks to support the recovery from the shop room of the accused, while the other seizure witness (P.W.2) openly admits in cross-examination that he cannot say from where the oil was recovered, the evidentiary value of such seizure is substantially weakened. Such a discrepancy is not a mere trivial or minor contradiction, but one that strikes at the very root of the prosecution story. The credibility and

trustworthiness of P.W.2 as an independent seizure witness stands eroded, and consequently, the corroboration expected from him to the evidence of P.W.1 is lost. The settled position of law is that when the seizure witnesses are not consistent and when their evidence does not inspire confidence, reliance cannot be safely placed upon such evidence to hold the recovery to be proved.

21. Therefore, in the present case, the conflicting statements of P.W.1 and P.W.2 create a serious doubt about the prosecution version of recovery of 460 liters of diesel oil. In absence of reliable, cogent and trustworthy evidence regarding the place and manner of seizure, it would not be safe to sustain the conviction on the basis of such discrepant testimony.

22. It further appears from the record that the prosecution has not been able to place before the Court any document or reliable evidence to establish that on the relevant date and time, the present appellant along with the other deceased co-accused persons were engaged in dealing with diesel oil. Except for the seizure of the alleged quantity of diesel oil from the shop room, no other material has been produced to indicate that the said oil was actually being traded. No seizure of any cash amount, sale register, stock register, ledger, invoice, bill or receipt has been proved so as to connect the appellant with any business transaction relating to diesel oil. It is also significant that no customer or independent witness has come forward to depose that at the time of the raid any act of sale and purchase of diesel oil

was going on inside or outside the premises. In the absence of such cogent materials, it cannot be presumed that the appellant was storing the seized diesel oil with the intention of sale. The law is well-settled that suspicion, however strong, cannot substitute proof, and mere recovery of articles by itself does not automatically lead to the conclusion that it was kept for commercial sale unless supported by surrounding circumstances such as evidence of actual transaction, demand, or readiness of the accused to sell the same. In the present case, there is a complete vacuum of such corroborative evidence. It thus becomes difficult to hold that the prosecution has been able to prove beyond reasonable doubt that the seized diesel oil was in any manner connected with the business or possession of the appellant.

23. Accordingly, the prosecution case suffers from a fundamental lacuna. Without proving that the appellant and the other co-accused person were actively dealing in diesel oil on the relevant date, no inference can legitimately be drawn that the seized oil was meant for sale to the customers. Such deficiency in evidence necessarily creates a reasonable doubt which must enure to the benefit of the accused.

24. In view of the facts and circumstances and discussion made above, I am of the view that the prosecution has failed to prove the offence against this appellant beyond reasonable doubt.

25. Thus, the criminal appeal be and the same is hereby **allowed.**
26. The impugned judgment and order of conviction passed by the learned Trial Court dated 04.01.1995 is hereby set aside.
27. The appellant is on bail. He is to be released from the bail bond, if not wanted in connection with other case.
28. In view of the provisions contained in Section 437A of the Code of Criminal Procedure, 1973, it is incumbent upon the appellate court, while disposing of an appeal, to require the accused person to execute bail bond with sureties. The legislative intent behind Section 437A is to ensure the presence of the accused before the higher court in the event the State prefers an appeal against the judgment of acquittal or modification of sentence.
29. Accordingly, even though the present appeal is being disposed of, the appellant is directed to execute bail bond of Rs.2,000/- (Rupees Two Thousand) with two sureties of like amount each to the satisfaction of the learned Trial Court. Such bail bonds shall remain in force for a period of six months from today. This direction is mandatory in nature, and is intended to safeguard the interest of justice by securing the attendance of the appellants before the higher forum, if required.
30. Let a copy of this order along with the Trial Court Records be sent down to the Trial Court immediately for necessary compliance.

31. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Prasenjit Biswas, J.)