

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 289 of 1989

Ashis Kumar Kulovi

-Vs-

The State of West Bengal

For the Appellant : Mr. Subhrajyoti Ghosh

For the State : Ms. Faria Hossain
Mr. Atulya Sinha

Judgment on : 24.02.2026

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against judgment and order dated 31.05.1989 passed by the Learned Judge, Special Court (Essential Commodities Act), Midnapore in D.E.B.G.R. Case No.39 of 1984, convicting the appellant under Section 7(1)(a)(ii) of the Essential Commodities Act, 1955 for violation of Para 3, 3(5), 3(7) of the West Bengal Motor Spirit & High Speed Diesel Oil (Licensing, Control & Maintenance of Supplies) Order, 1980 and Para 4 of the West Bengal Kerosene Control Order, 1968 and Para 21 of the Fertilizer Control Order, 1957 and sentencing him to suffer simple imprisonment for 1

year and to pay a fine of Rs.1000/- in default to suffer simple imprisonment for 1 month more.

2. The prosecution case precisely stated on 30.08.1984 from 11:15 hours to 02:45 hours the complainant (PW-7) under supervision of D.S.P. (D.E.B), Midnapore and others inspected the oil go-down of the appellant. The appellant was present at the relevant time of search. The complainant found 200 litres of 'High Speed Oil' (HSD oil) in one barrel and 2 barrels containing 100 litres each of Kerosene oil. On demand the appellant could not produce any document or paper or licence for dealing in Diesel oil and Kerosene oil. Accordingly, under direction of the complainant, S.I., G.C. Seal prepared the seizure list. The articles described in the complaint were seized. It was further alleged that the appellant had committed offence punishable under Section 7(1)(a)(ii) of Essential Commodities Act, 1955 for violating the provisions of para 3, 3(5) and 3(7) of West Bengal Motor Spirit and High Speed Diesel Oil (Licensing, Control and Maintenance of Supplies) Order, 1980 and Para 4 of West Bengal Kerosene Control Order, 1968. Being enquired by the complainant, the appellant opened one room wherein fertilizer was found. However the appellant failed to produce any document or licence or books of accounts for dealing in fertilizer. No stock cum rate board was found at the place of business. One cash memo book being no.101 to 200 in connection with dealing of fertilizer was produced by the appellant. Under direction of the complainant, S.I. G.C. Seal prepared the seizure list and accordingly the articles viz. 9 bags of *Uria*, 2 bags of *Patash*, 1 bag of *Uria*, 1 bag of *Patash*, 2 bags of *Phosphete* and other articles

described in the complaint were seized. The complainant had further alleged that the appellant had committed offence punishable under Section 7 (1)(a)(ii) of Essential Commodities Act, 1955 for violating the provisions of para 3, 3(a), 5 and 21 of Fertilizer Control Order, 1957 and hence, the case.

3. The prosecution cited 9 witnesses and exhibited certain documents.

4. Learned Advocate for the appellant submitted as follows:-

- i. The witnesses to the search and seizure like PW-1, PW-4, PW-5 and PW-7 never deposed there was ever any proof of sale or that the appellant was dealing the offending articles. In view of the fact that the appellant had been charged for violation of the West Bengal Kerosene Control Order, Fertilizer Control Order and the West Bengal Motor Spirit, High Speed Diesel Oil (Licensing etc.) order, 1980, there was no presumption in the said orders that mere storage would give rise to an inference for sale or as such storage by itself in the absence of evidence of sale or dealing therewith would not give rise to any culpability.
- ii. The seizure list (Exbt.-1) apparently disclosed the seizure was made from the room of the house of one Gopinath Das from whom it was alleged the appellant had taken it on rent, but no evidence to that effect was cited. PW-1 did not state to have seen the appellant dealing in the offending articles or/that he was a dealer.
- iii. In view of paragraph 15 of the West Bengal Kerosene Control Order, 1968, the search and seizure effected by PW-7 was not in accordance with law since he or any of the members of the inspecting team like

PW-1 or PW-5 were authorized by the District Magistrate to search and seize the offending articles as such the whole search and seizure was contrary to law and the trial culminating in the conviction of the appellant was vitiated.

- iv. Erroneously an inference was drawn against the appellant under Para 11(2) of the West Bengal Kerosene Control Order for storage of Kerosene Oil more than 10 litres losing sight of the fact that the amendment of para 11 of the said order came into effect from 07.01.1986 but the date of offence related to 30.08.1984 as such the said amendment of the West Bengal Kerosene Control Order would have no manner of application in the case of the appellant.
- v. Proper import of Section 10C and Section 14 of the Essential Commodities Act was not attributed in deciding the culpability of the appellant. Since Section 10C of the Essential Commodities Act raises a presumption of culpable mental state and Section 14 of the Essential Commodities Act enjoins that the burden of proof lies with the defence in proving its onus. The Learned Trial Judge should have appreciated that in defence to both the provisions of the said Act that proof of facts by preponderance of probabilities as in a civil case was not foreign to criminal jurisprudence because in cases where the Statute raised a presumption of guilt the defence was entitled to rebut the same presumption by proving his defence on balance of probabilities. He did not have to establish his case beyond a reasonable doubt. In the instant case, the appellant had amply

discharged his onus and also dispelled his culpability and washed the element of mens rea in his Section 313 of the Code of Criminal Procedure examination and the finding of the Learned Judge that he had failed to adduce any evidence was not tenable in view of the above.

5. Considered the submissions of the Learned Advocate for both the parties.
6. The appellant failed to produce necessary documents for utilization of the seized articles for agricultural purposes. The appellant failed to produce any legal document for stacking 200 litres of High Speed Oil (HSD Oil) and 200 litres of Kerosene Oil and different types of fertilizers.
7. The respondents complied with the provisions of Section 10C and 14 of the Essential Commodities Act.
8. Para 11(2) of the West Bengal Kerosene Control Order, 1968 (hereinafter referred to as the said order of 1968) enjoined no person other than an oil distributing company and agent and/or dealer should transport kerosene oil, store kerosene oil or should have in his possession kerosene oil exceeding 10 litres at a time except under and in accordance with the permit issued by the Director or the D.M. having jurisdiction. This new provision had been added by way of amendment under Order vide No.146-FS/FS/CG/14 R-4/81 dated 07th of January, 1986 by the Government of West Bengal. The accused did not produce any paper to show his *bona fide* possession of the kerosene oil seized. Furthermore he had not filed any document to show *prima facie* he had stored the same under any valid order of any appropriate authority.

9. The prosecution had been able to prove the fact of a seizure of the fertilizers described in the seizure list from the possession of the appellant and the appellant had not produced books of accounts and records and had not shown *prima facie* he had submitted returns as required under Para 21(a) and (b) of the Fertilizers (Control) Order, 1957 (hereinafter referred to as the said order of 1957) nor the appellant had assigned any reason for non-compliance of the said provisions it could safely be held that the appellant contravened the provisions of Para 21 of the said order of 1957 certainly with a culpable state of mind at the relevant point of time.
10. The Learned Trial Court in the impugned judgment dated 31.05.1989, *inter alia*, observed as follows:-
- “.....
- Hence,*
- Ordered*
- that the accused is convicted u/Section 7(i)(a)(ii) of Act 10 of 1955 and sentenced to S.I. for one year and further sentenced to a fine of Rs.1,000/-, in default, to S.I. for one month. The period in custody, if any, shall be set off u/Section 428 Cr.P.C. The seized property shall be disposed of according to law and subject to the result of appeal, if any. The surety is discharged from the bail bond. Supply free of cost, a copy of the judgement to the accused.”*
11. The Learned Trial Court, after reasonable assessment of evidence both oral and documentary, rightly passed the impugned judgment.

12. 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 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*

¹2023 SCC OnLine SC 605

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.”*

13. In view of the observations as cited above, the appellant can be released on probation since the incident related to the year 1984. 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 42 years.

14. 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.20,000/- with two sureties 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.20,000/- within 60 days from the date of this order failing which he shall be called to serve out the sentence.

15. In view of the aforesaid observations, the instant criminal appeal stands disposed of.

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

17. 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.)