

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

Present:

**The Hon'ble Justice Debangsu Basak
And**

The Hon'ble Justice Md. Shabbar Rashidi

C.R.A. 280 OF 2020

Bablu Ali

VS.

Union of India

For the Appellant : Mr. Uday Sankar Chattopadhyay
Mr. Suman Sankar Chatterjee
Mr. Santanu Maji
Mr. Subhayu Das
Ms. Rajashree Tah
Ms. Trisha Rakshit
Mr. Debdipto Banerjee

For the Union of India: Mr. Rajashri Venket Kundalia
Ms. Aishwarya Rajyashree
Ms. Simran More
Mr. Chandragupta Kamal

Heard on : February 7, 2023

Judgment on : February 7, 2023

DEBANGSU BASAK, J.:-

1. The appeal is directed against the judgment of conviction dated October 15, 2020 and order of conviction dated October 16, 2020 passed by the 3rd Special Court at Burdwan (NDPS) in Special Case No. 13 of 2016.

2. By the impugned order of conviction, the learned Judge convicted the appellant under Section 21(c)/29 of the Narcotic Drugs & Psychotropic Substances Act, 1985(NDPS). By the

impugned order of sentence dated October 16, 2020 the learned Judge awarded rigorous imprisonment for 10 years and to pay a fine of Rs. 1 Lakh and in default to pay the fine amount, to suffer further imprisonment for six months.

3. Learned advocate appearing for the appellant submits that, a vehicle was intercepted on March 14, 2016. The appellant was neither the owner of the vehicle nor the driver of the vehicle. The appellant was sitting on the seat of the helper of the vehicle when he was detained by the Customs Authorities. The appellant is no way connected with the recovered commercial quantity of Narcotics.

4. Learned advocate appearing for the appellant submits that, although, Customs Authorities claimed to proceed against the owner and the driver of the vehicle, such proceedings were perfunctory in nature. Ultimately the owner and the driver of the vehicle did not stand trial in the present police case.

5. Learned advocate appearing for the appellant submits that, going by the oral testimonies and the documents marked as Exhibit 1 it appears that the vehicle was intercepted in the

night of March 14, 2016 near Panagarh and the alleged seizure was made on the next day on March 15, 2016 at the Burdwan Office of the Customs Authorities. He contends that, there is a possibility of false implication of the appellant which cannot be overlooked by the Court. The involvement of the appellant could not be established beyond reasonable doubt by the prosecution.

6. Learned advocate appearing for the appellant submits that independent witnesses who allegedly witnessed the alleged seizure did not depose at the trial. Their absence at the trial casts reasonable doubt about the veracity of the seizure made and the case of the prosecution.

7. Learned advocate appearing for the appellant submits that, non examination of independent witnesses caused serious prejudice to the appellant. The best evidence was withheld by the prosecution. In view of such prejudice being caused to the appellant, he should not be convicted.

8. Learned advocate appearing for the appellant refers to Exhibit 1 and the oral testimony of P.W.1. He submits that there are huge discrepancies between the documents specified

in Exhibit 1 and the time that the P.W.1 claims to seize the alleged narcotics. In such view, he submits that, the allegation against the appellant cannot be sustained.

9. Learned advocate appearing for the Customs Authorities draws attention of the Court to the materials on record. She submits that, conscious and constructive possession of the appellant in respect of the seized commercial quantity of narcotic cannot be overlooked. She refers to the various documents marked as Exhibits at the trial. She submits that, commercial quantity of Narcotic was seized from the vehicle in which, the appellant was found seating. The appellant was detained at the spot. The fact that the materials seized were narcotics was established at the trial. Therefore, if not conscious possession, then at least constructive possession of the appellant in respect of the seized commercial quantity of narcotic was established.

10. Learned advocate appearing for the Custom Authorities refers to Exhibit 4 and submits that there are materials on record to establish that, the case of the prosecution was established beyond reasonable doubt. She refers to the

deposition of P.W.1. She submits that P.W.1 was not particularly conversant with the provisions of the Narcotic Drugs & Psychotropic Substances Act, 1985.

11. Learned advocate appearing for the Customs Authorities submits that in the conspectus of the facts proved at the trial, the impugned judgment and order be upheld. The appellant did not make out any ground for interference by the appeal Court.

12. The case of the prosecution at the trial in brief was that, Customs Officers, Burdwan Customs Preventive Unit on receipt of specific information moved to Raniganj Punjabi More on NH-2 on March 14, 2016 at about 18.00 hrs. The Officers intercepted a vehicle. The appellant was detained with the vehicle. The vehicle was removed to the Burdwan Customs Preventive Unit Premises and was examined at such unit on March 15, 2016 in between 6 and 10.30 hours. On such search being conducted, 19,800 pieces of Phensedyl Cough Linctus Syrup bottles were found. Samples were taken randomly. Samples were sent for examination. The Chemical Examiner of Chemical Laboratory, Customs House, Kolkata,

by a report dated May 31, 2016 stated that the samples contained Chlorpheniramine Maleate and Codeine Phosphate.

13. Notices were issued to the owner of the vehicle and another person. However, they did not participate either in the investigations or at the trial.

14. Prosecution submitted a complaint with the jurisdictional Court. The jurisdictional Court framed charge against the appellant on February 7, 2018 under Section 20(b)(ii)(c) of the NDPS Act, 1985. Such charge was altered on July 3, 2020 to be under Sections 21(c)/29 of the NDPS Act, 1985.

15. The appellant pleaded not guilty and claimed to be tried. At the trial, the prosecution relied upon three witnesses and various documentary and material exhibits to bring home the charge against the appellant.

16. P.W. 1 is the complainant of the case as also the seizing officer. He stated that, on March 14, 2016, a secret information was received with regard to a vehicle coming loaded with 'phensedyl'. On the basis of such information, he and another superintendent went to Asansol. They were waiting at Raniganj Chowrangee More. The source informed

the vehicle number. After they identified the vehicle, they reached the vehicle when one person jumped from the vehicle and fled away. It was 7 p.m. at that point of time. They could detain one person from the vehicle. They called two independent witnesses. Thereafter, they returned to the Burdwan Customs office with the vehicle, the detained person and the local witnesses. They reached the Burdwan office at 9 p.m. On March 14, 2016, they kept the vehicle and the detained person at the office. On the next date, i.e. on March 15, 2016 at 9.30 a.m. they searched the vehicle and recovered 19,800 bottles of 'phensedyls' each containing 100 ml and 114 bundles of bails length cloths.

17. P.W. 1 stated that he made the inventory list and seized the goods in presence of the two independent witnesses and the accused persons. Statement under Section 67 of the NDPS Act, 1985 was recorded. The appellant confessed to the crime. The appellant was arrested. The appellant was produced before the Court on March 16, 2016.

18. P.W. 1 tendered the inventory list, which was marked as Exhibit 1. He identified the appellant in Court. He identified

the two notices, which were served on the appellant. He stated that the appellant wrote the statement in his own handwriting. The statement of the appellant was tendered in evidence and marked as Exhibit 3. He stated that, he filed a written complaint, which was tendered in evidence and marked as Exhibit 4.

19. P.W. 1 was cross-examined at length. At the hearing of the appeal, reliance was placed on behalf of the appellant on the recording of the cross-examination of P.W. 1.

20. It is contended on behalf of the appellant that, P.W. 1 in cross-examination stated various facts and in fact admitted to such facts which exonerates the appellant. It is contended on behalf of the Customs that, the recording of the cross-examination was incorrect. In fact, P.W. 1 denied suggestions put to him which went down in the recording of the cross-examination as an admission.

21. P.W. 2 is a customs officer who was posted at Burdwan Customs Preventive Unit in the year 2016. He stated that, he received secret information from his source on March 14, 2016. He took part in the raid. He corroborated the evidence

of P.W. 1. He tendered the movement register, which was marked as Exhibit 6. He identified the appellant in Court. P.W. 2 was cross-examined on behalf of the defence.

22. The chemical examiner deposed as P.W. 3. He tendered his report, which was marked as Exhibit 5. He also tendered the two samples, which were marked as Material Exhibit II. He was cross-examined at length. P.W. 3 stated that, the sample was found positive towards the presence of contraband narcotic drug codeine phosphate and chlorpheniramine maleate.

23. The appellant was examined under Section 313 of the Code of Criminal Procedure, on conclusion of the evidence of the prosecution. In his examination, he claimed that the case was totally false and that he was innocent. He claimed that he was no way involved with the vehicle or the offence connected with the vehicle. He declined to adduce any defence witness.

24. Apart from the appellant being found inside the vehicle at the time of the raid and detained with the vehicle, there is no material placed on record by the prosecution to establish any nexus of the appellant with the vehicle. There is no material

on record to establish any nexus between the appellant and the seized goods.

25. According to the prosecutions, on the raid conducted by customs officers on March 14, 2016 at about 9 p.m., the vehicle was detained along with the appellant. The versions of the prosecution, thereafter, with regard to the dealing with the vehicle varies from the statement of complaint and the depositions at the trial as well as the documents marked as exhibits. The goods were seized from the vehicle detained.

26. Seizure list was prepared, which was tendered in evidence and marked as exhibit 1. Such seizure list specifies a date and time of seizure as March 15, 2016 from 06.00 hours to 10.30 hours. P.W. 1 in his evidence stated in examination in chief that, the search was conducted at 9.30 a.m. on March 15, 2016. In cross-examination, he reiterated that the commencement of the search operation was at 9.30 hours on March 15, 2016. He stated in cross-examination that it is not mentioned in the seizure list that the seizure was made between 06.00 hours to 10.30 hours on March 15, 2016.

He stated that, the actual time of seizure is not mentioned in the seizure list.

27. As noted above, various portions of the recording of the cross-examination of the P.W. 1 was debated during the hearing. On one part of the spectrum was the contention of the appellant that, P.W. 1 in his cross-examination exonerated the appellant in view of the various material discrepancies elucidated with regard to the seizure and its process during such cross examination and on the other part of the spectrum was the contention of the customs that, the recording of the cross-examination was incorrect and that the same was contrary to the documentary evidence marked as exhibit.

28. True, there are contradictions between the documents, which were marked exhibits at the trial with that of the recording of the cross-examination of P.W. 1. For example, while Exhibit 1 is a seizure list, which specifies the date and time of seizure to be March 15, 2016 from 06.00 hours to 10.30 hours, in cross-examination P.W. 1 stated that, it was not mentioned in the seizure list that the seizure was made in between 06.00 hours to 10.30 hours on March 15, 2016. He

goes on to say that it is a fact that actual time of seizure is not mentioned in the seizure list.

29. These contradictions justifiably raises doubts as to the veracity of the seizure and its process.

30. The vehicle was detained on the national highway on March 14, 2016 at 7 p.m. as appears from the deposition of P.W. 1 in examination in chief. In examination in chief, P.W. 1 stated that, the complainant was taken to the Burdwan office at 9 p.m. and the vehicle were kept thereat. The search and seizure took place on March 15, 2016 at 9.30 a.m. at the Burdwan office again on the version of the examination in chief of P.W. 1.

31. This version of P.W. 1 does not tally with the version that P.W. 1 stated in his cross examination. These two versions are again not corroborative or conform with the version appearing from Exhibit 1.

32. There remains a doubt as to the time when the vehicle reached the Burdwan unit and when the same was searched.

33. P.W. 3 is the chemical examiner. In cross-examination, he stated that, there was no endorsement on the Test Memo as

to who received the alamat from the customs unit. He also acknowledged in cross-examination that the label of the sample does not bear his signature or the signature of an identified customs officer or any endorsement when the chemical examiner broke open the seal for examination of the same.

34. Therefore, the chain between the seizure of the narcotics, samples being sent for testing to the forensic laboratory and the ultimate report thereof were not completed. In other words they failed to complete the chain of circumstances leading to irresistible conclusion of the seized goods being narcotics. Reasonable doubts exists as to the veracity of the seized alamat being narcotics and the appellant being concerned with the same.

35. Under such circumstances, we are unable to affirm the impugned judgment of conviction and the order of sentence. We set aside the same. We acquit the appellant on the ground of benefit of doubt.

36. Consequently, the impugned judgment of conviction and the order of sentence cannot be sustained. The same are

hereby set aside. The appellant is acquitted of the charges. The appellant if in custody, be released forthwith if not required in connection with any other case. The appellant shall, however, furnish a bail bond to the satisfaction of the trial Court which shall continue for six months from date in terms of Section 437A of the Criminal Procedure Code.

37. CRA 280 of 2020 is disposed of accordingly.

38. Trial Court records along with a copy of this judgement and order be sent down at once to the appropriate Court for necessary action.

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

(Debangsu Basak,J.)

40. I Agree.

(Md. Shabbar Rashidi, J.)