
(2015) 09 CAL CK 0045
In the Calcutta High Court
Case No : CRA No. 25 of 2014

Elai and Others

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 22-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 21(c)

Citation : (2015) 09 CAL CK 0045

Hon'ble Judges : Debasish Kar Gupta, J;Md. Mumtaz Khan, J

Bench : Division Bench

Advocate : Dipanjan Chatterjee, for the Appellant; Manjit Singh and Sanjoy Bardhan, Advocates for the Respondent

Final Decision : Allowed

Judgement

Debasish Kar Gupta, J—This appeal is preferred by the appellants assailing a judgment and order of conviction dated December 18, 2013 and sentence dated December 19, 2013, passed by the learned Judge, Special Court, N.D.P.S. Act, Nadia. By virtue of the impugned judgment the appellants have been found guilty of offence punishable under Section 21(c) of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act). By virtue of the sentence dated December 19, 2013, the appellants have been directed to suffer rigorous imprisonment for ten years each and to pay fine of Rs. 1 lakh only each, in default to suffer simple imprisonment for one year each. The detention undergone by the appellants during investigation and the trial of this case have been directed to set off against the substantive sentence.

2. The case of the prosecution is discussed in a nutshell as under:--

"Avijit Biswas, In-charge of Mira R.O.P., P.S. Kaliganj, District Nadia (PW 4), lodged a written complaint dated February 28, 2012, at about 19.45 hrs. According to the above complaint, the PW 4 received source information on February 28, 2012 at about 16.45 hrs. of transporting Heroin by one Elai @ Elahi

Sk (appellant No. 1) with his co-business partners Ansur Ali Sk. and Babar Ali Sk. (appellant Nos. 2 and 3 respectively). The above information was received by the PW 4 while he was performing patrolling duty on the date and time mentioned hereinabove. The PW 4 informed the Officer-in-charge, Kaliganj Police Station, District Nadia of the above information. PW 4 informed Avijit Bhattacharya, the Circle Inspector, Nakashipara to be present at the place of occurrence."

3. Then, the PW 4 along with Gobinda Sundar Halder, A.S.I. (PW 6), Ananda Gopal Dey, A.S.I., Parthsarathi Mondal, A.S.I. (PW 9), Milon Monal, Constable (PW 5) and Abdul Mannan, Constable (PW 2) reached Pachkhala bus stand. Avijit Bhattacharya, Circle Inspector, Nakashipara, District-Nadia had reached the spot at about 17.30 hrs., i.e. before the PW 4 and other members of his raiding team arrived at that place. At about 17.35 hrs. their source identified three persons on their arrival in the Pachkhala bus stand from Hatgobindapur side. One of them was carrying a shopping bag with him. The PW 4 disclosed their intention of searching the appellants as also asked them to express their desire with regard to presence of a Gazetted Officer at the time of such searching. In reply the appellants disclosed their names as stated hereinabove and said that in view of the presence of the PW 7 there was no need of presence of any other Gazetted Officer at the time of searching them. Thereafter, PW 4 requested two passerby Tanmoy Chatterjee (PW 1) and Nakatulla Sk. (PW 3), to be present as witnesses. They agreed to do so. The PW 1 and PW 3 searched the aforesaid members of the raiding team. No incriminating article was found. Then the raiding team started searching. In course of searching the shopping bag of the appellant No. 1 one small and two medium size polythene packets containing "Heroin" (450 gms), one big plastic packet containing 1 kg 624 gms. of Sodium Carbonate, one black glass bottle containing odourly solution (chemical) of 618 gms. (including bottle), one plastic bottle containing odourly solution of 905 gms. (including bottle) and 6 bra weight (batkhara) were also recovered. The appellants were arrested at 17.45 hrs. on February 28, 2012. They refused to be examined by doctor. The above articles were seized and labelled in presence of the witnesses mentioned hereinabove. The seizure list was prepared by the PW 4 under G.D. Entry No. 895 dated February 28, 2012 in respect of the articles seized during the period of search in between 17.45 hrs. to 18.25 hrs. The signatures of PWs 1, 3, 7 were obtained in the seizure list as also on the label of the packet containing the seized articles. According to the above letter of complaint, the appellants admitted the fact of carrying those articles for business.

4. On the basis of the above letter of complaint G.D. Entry No. 857 was recorded on February 28, 2012 at 19.45 hrs. by the PW 9. Formal FIR No. 92 dated February 28, 2012 was lodged on the basis of the above G.D. Entry No. 857 which had been recorded on the date and time mentioned hereinabove to initiate Kaliganj P.S., Sub-Division- Sadar, District-Nadia, for the year 2012 against the appellants for offence punishable under Section 21 of the NDPS Act.

5. The PW 8 was appointed as Investigating Officer. He conducted the

investigation. The chemical test of the seized article was done. Report was also collected.

6. After filing of the charge-sheet No. 282/12 dated June 17, 2012 against the appellants under Section 21 of the NDPS Act, charge was framed against the appellants on July 24, 2012 for committing offence punishable under Section 21(c) of NDPS Act. Nine prosecution witnesses were examined. The statements of the accused were recorded under Section 313 of Cr.P.C. on September 19, 2013. After considering the documentary and oral evidences as also the statements of the appellants recorded under Section 313 of Cr.P.C., the impugned judgment, order of conviction and sentence was passed.

7. According to Mr. Milon Mukherjee, learned Senior Advocate, appearing on behalf of the appellant Nos. 2 and 3, the commission of offence by the appellants for violation of the provision of Section 21(c) of the NDPS Act, was not proved beyond doubt for the following reasons:--

"(i) Formal FIR No. 92/12 was lodged on the basis of General Diary Entry No. 857 dated February 28, 2012 recorded at 19.45 hrs. by the PW 9 after conducting search and seizure within the period from 17.45 hrs. to 18.25 hrs. Surprisingly, another G.D. Entry was recorded by PW 4 bearing No. 895 in respect of the articles seized on the same date during the period of search in between 17.45 to 18.25 hrs at the place of occurrence at Pachkhala Bus Stand, P.S.-Kaliganj, Nadia for preparation of seizure list. In view of the above contradiction search and seizure were not proved beyond doubt.

(ii) According to the evidence of PW 4, two persons were apprehended on the date of commission of offence. According to his deposition, he could recollect the name of appellant No. 1 only. But, according to his letter of complaint dated February 28, 2012, formal FIR No. 92/2012 of the same date, evidence of PW 2, PW 5, PW 6, PW 7 and PW 9, three persons were apprehended at the place of occurrence on February 28, 2012. According to the order No. 1 dated February 29, 2012 passed by the learned Court below, all three appellants were produced before the Court on that date.

(iii) According to the prosecution case, two independent witnesses (PW 1 and PW 3) were present in the place of commission of offence. But according to the evidence of PW 1, the police had collected his signature on a blank paper. According to the evidence of PW 3, he put his signature on the seizure list on the request/direction of the Investigating Officer.

(iv) According to the evidence of PW 7, the test of contraband article (heroin) was conducted at the place of occurrence with the help of chemical examination test kit which had been brought by the PW 4. According to the PW 4, he had no chemical examination kit with him at the time of search and seizure.

(v) According to the evidence of PW 4, the total weight of the seized contraband article was 400 grms. According to the FIR, the total weight of the seized article

was recorded as 450 grms. According to the evidences of PW 2, PW 5 and PW 6, three packets of white powders, each containing 30 grm. of such article with a bottle containing liquid substance were recovered during search and seizure.

(vi) According to the report of the Assistant Director (Incharge of Narcotics Section) State Drugs Control & Research Laboratory, prepared under memo No. SDCRL/AR/582 dated May 9, 2012, the sample of the seized article was send to the laboratory through the learned Judge, Special Court, NDPS Act on February 28, 2012. According to order No. 1, passed by the learned Court below, the matter was taken up on February 29, 2012 for the first time when all the appellants, seizure list, amongst others, were produced before the Court.

(vii) Regarding the identification of the accused, PW 4 (member of raiding party) and PW 5 could not identify the appellants in Court on April 23, 2013. Similarly, PW 6 (a member of raiding party) could not identify the accused in Court. But, according to order Nos. 18 and 19 dated April 23, 2013 and dated April 24, 2013, respectively, passed by the learned Court below, all the accused were present in Court on those days."

8. The aforesaid arguments advanced on behalf of the appellants are adopted by Mr. Dipanjan Chatterjee, the learned Advocate of the appellant No. 1. It is further submitted by him that in view of order No. 19 dated April 24, 2013, passed by the learned Court below the appellants were present in Court on that date, but they could not be identified by the PW 6 on that date at the time of adducing evidence. It is also submitted by him that the contraband articles were not recovered from jute bags. But, according to the evidence of PW 4, the contraband articles were kept in a jute bag. It was not a minor discrepancy.

9. It is submitted by Mr. Sanjoy Bardhan, learned State Advocate, being led by Mr. Manjit Singh, learned Public Prosecutor, High Court, Calcutta that discrepancies with regard to entries in General Diary, non-corroboration of the evidence of PW 4 with documentary evidence or oral evidence of other prosecution witness, date of sending the sample of contraband articles to the State Drug Control and Research Laboratory, amongst others, were minor discrepancies in nature. Those discrepancies did not make the prosecution case doubtful.

10. According to Mr. Bardhan, the PW 1 and PW 3 were allowed to be cross-examined by the prosecution by virtue of the orders passed by the learned Court below. So, they were hostile witnesses and as a consequence thereupon the evidence adduced by them cannot be relied upon.

11. It is finally submitted by him that the learned Court below passed the impugned judgment, order of conviction and the sentence after due consideration of evidences (both documentary and oral) to arrive at the conclusion which does not require interference in this appeal.

12. We have heard the learned Counsel appearing for the respective parties

carefully and we have given our thoughtful consideration to the facts and circumstances of this case.

13. With regard to the evidentiary value of a documentary evidence, it is the cardinal rule of evidence that where written documents exist, they shall be produced as being the best evidence of their own contents. However, admission of documents amounts to admission of contents but not its truthfulness. The Hon"ble Supreme Court remarked in the case of Sait Tarajee Khimchand and Others Vs. Yelamarti Satyam alias Satteyya and Others, AIR 1971 SC 1865 : (1972) 4 SCC 562 : (1971) 3 UJ 644 , that making of a document as an exhibit does not dispense with its proof. The relevant portion of the above decision is quoted below:--

"15. The plaintiffs wanted to rely on Exs.A-12 and A-13, the day book and the ledger respectively. The plaintiffs did not prove these books. There is no reference to these books in the judgments. The mere marking of an exhibit does not dispense with the proof of documents. It is common place to say that the negative cannot be proved. the proof of the plaintiffs" books of account became important because the plaintiffs" accounts were impeached and falsified by the defendants" case of larger payments than those admitted by the plaintiffs. The irresistible inference arises that the plaintiffs" books would not have supported the plaintiffs."

14. The above proposition of law is also applicable in criminal jurisprudence.

15. In the case in hand we find that on the date of commission of offence two entries were made by the police authority in the General Case Diary bearing Nos. 857 and 895 respectively. But the time of making the former entry bearing No. 857 was 19.45 hrs. by the PW 9 while the latter one bearing No. 895 was incorporated therein within 17.45 to 18.25 hrs. The former one was the document on the basis of which FIR No. 92/12 was lodged. Considering the above facts, we are of the opinion that, the learned Trial Court should have come to the conclusion that the prosecution failed to prove the truthfulness of the concerned documents.

16. Regarding the question of discrepancy in oral evidence, it is well settled that there are bound to be some discrepancies between the depositions of different witnesses when they speak on details, and unless the contradictions are of material dimension, the same should not be used to jettison the evidence in its entirety. But it has to be distinguished from contradiction. While minor discrepancy or variation in evidence will not make the prosecutions case doubtful, contradiction in the statement of witness is fatal for the case. Reference may be made to the decision of State of Himachal Pradesh Vs. Lekh Raj and Another, AIR 1999 SC 3916 : (2000) CriLJ 44 : (1999) 4 Crimes 337 : (1999) 9 JT 43 : (1999) 7 SCALE 86 : (2000) 1 SCC 247 : (1999) 4 SCR 286 Supp : (1999) AIRSCW 4008 : (1999) 9 Supreme 155 and the relevant portion of the same is quoted below:--

"7. In support of the impugned judgment the learned counsel appearing for the respondents vainly attempted to point out some discrepancies in the statement of the prosecutrix and other witnesses for discrediting the prosecution version. Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. The normal course of the human conduct would be that while narrating a particular incident there may occur minor discrepancies, such discrepancies in law may render credential to the depositions. Parrot-like statements are disfavoured by the courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witness and environment in which such witness was making the statement. This Court in Ousu Varghese v. State of Kerala held that minor variations in the accounts of the witnesses are often the hallmark of the truth of their testimony. In Jagadish v. State of M.P. this Court held that when the discrepancies were comparatively of a minor character and did not go to the root of the prosecution story, they need not be given undue importance. Mere congruity or consistency is not the sole test of truth in the depositions. This Court again in State of Rajasthan v. Kalki held that in the depositions of witnesses there are always normal discrepancies, however, honest and truthful they may be. Such discrepancies are due to normal errors of observation, normal errors or memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence, and the like. Material discrepancies are those which are not normal and not expected of a normal person.

(Emphasis supplied)

17. In the instant case, according to the letter of complaint dated February 28, 2012, FIR No. 92/2012, evidence of PW 2, PW 5, PW 6, PW 7 and PW 9, three accused were arrested on the date of occurrence on February 28, 2012. According to the order No. 11 dated February 29, 2012 passed learned Court below three accused were produced in Court on the next date, i.e. February 29, 2012. Surprisingly, the PW 4 deposed in Court that two accused were apprehended on February 28, 2012. He could recollect the name of appellant No. 1 only. In our opinion there was contradiction which was fatal for the prosecution case.

18. Regarding next ground, the PW 1 and PW 3 were independent witnesses but on the prayer made by the prosecution, they were allowed to be cross-examined. Their evidence can be given weightage only up to such extent which is corroborated by other evidence on record. The above proposition of law has been decided by the Hon"ble Apex Court in the matter Periyasami Novanagar Vs. State, (2014) AIRSCW 2223 : (2014) CriLJ 2350 : (2014) 5 JT 7 : (2014) 4 SCALE 601 : (2014) 6 SCC 59 and the relevant portion of the above judgment is quoted below:--

"27. It was submitted that the evidence of PW 15 Periyasamy must be rejected because he turned hostile. It is trite that the evidence of a hostile witness need not be completely discarded. The prosecution can use that part of his evidence which is corroborated by other evidence on record (see Bhajju v. State of M.P.) Moreover, in this case, the facts are peculiar. From 13-9-1996 when PW 15 Sevi Periyasamy was first examined in the court till 25-9-1998, he supported the prosecution. When after five years he was recalled on 19-9-2001, he resiled from his previous statement only to some extent. On 28-9-2001, he confirmed some portion of his earlier statement but resiled to a large extent from his earlier statement. It is obvious that the recording of his evidence was not continuous. There was huge gap of five years between recording of his examination and re-examination. It is also pertinent to note that on 13-9-1996, 3-11-1997, 5-2-1998 and 25-9-1998, when he narrated the sequence of events and explained the role of the accused, he was not cross-examined at all. It is clear from this that recording of his evidence was unduly prolonged, and in that period, an effort was made to win him over. These facts will have to be taken into consideration while considering the evidentiary value of his evidence. We are of the opinion that it would be safe to rely on that part of the evidence of this witness, which is corroborated by other evidence on record."

(Emphasis supplied)

19. In view of the above, there was no infirmity in the decision making process of the learned Court below to take into consideration only such portion of evidence of PW 1 and PW 2 which had been corroborated with the other evidence. Therefore, in view of the settled proposition of law, there was no infirmity in the impugned judgment on this ground.

20. In view of the fact that the prosecution brought certificate of test or analysis by Government analyst under NDPS Act, bearing No. SDCRL/AR/582 dated May 9, 2012 in respect of the seized article on record, the fact that no test of seized article had been conducted at the time of seizure of the same, cannot be a ground for interfering with the impugned judgment. We do not find that the learned Court below failed to deal with the above aspect of the matter in deviation from the above proposition of law.

21. With regard to discrepancy in respect of the weight of the illicit article, mentioned FIR and the evidence of PW 4 was minor in nature. But the discrepancy of that weight with the evidence of PW 2, PW 5 and PW 6, the quantity of seized article was not proved beyond reasonable doubt. So, interference with the impugned judgment and conviction as also the sentence is necessary in view of the above contradiction according to the proposition of law settled in the matter of Lekh Raj (supra).

22. Regarding the identification of the appellants in Court by the prosecution witnesses, the learned Court below should have taken into consideration the evidence of the Investigating Officer for the purpose of corroboration of same

with the evidences of other prosecution witnesses. The above principle of law has been settled by the Hon''ble Supreme Court in the matter of C.M. Sharma Vs. State of A.P. Th. I.P., AIR 2011 SC 608 : (2011) CriLJ 975 : (2010) 12 JT 546 : (2011) 1 RCR(Criminal) 183 : (2010) 12 SCALE 381 : (2011) AIRSCW 297 and the relevant portion of the above decision is quoted below:--

"18. Further, corroboration of evidence of a witness is required when his evidence is not wholly reliable. On appreciation of evidence, witnesses can be broadly categorized in three categories viz. unreliable, partly reliable and wholly reliable. In case of a partly reliable witness, the court seeks corroboration in material particulars from other evidence. However in a case in which a witness is wholly reliable, no corroboration is necessary. Seeking corroboration in all circumstance of the evidence of a witness forced to give bribe may lead to absurd result. Bribe is not taken in public view and, therefore, there may not be any person who could see the giving and taking of bribe. As in the present case, a shadow witness did accompany the contractor but the appellant did not allow him to be present in the chamber. Acceptance of this submission in abstract will encourage the bribe-taker to receive illegal gratification in privacy and then insist for corroboration in case of prosecution. Law cannot countenance such a situation"

(Emphasis supplied)

23. Investigating Officer (PW 4), independent witness PW 5 and official witness PW 6 failed to identify the appellants in Court though according to the orders passed by the learned Court below, the appellants had been present in Court during adducing evidence of the above prosecution witnesses. The learned Court below was in error in ignoring the above aspect of the matter.

24. Therefore, due to the failure on the part of the prosecution to prove truthfulness of seizure of the illicit article from the appellants from the place of occurrence considering the number, date and time of recording General Diary Entry Nos. 857 and 895 both dated February 28, 2012, contradiction in respect of the weight of the seized article in consideration of the FIR and the evidence of PW 2, PW 5 and PW 6 as also failure of the Investigating Officer (PW 4), independent witness PW 5, official witness PW 6 to identify the appellants in Court, the impugned judgment, order of conviction and sentence are quashed and set aside.

25. The appeal is allowed. The appellants will be set at liberty, if they are not required to be detained in any other case.

26. Urgent photostat certified copy of this judgment, if applied for, be given to the parties, on priority basis.

Md. Mumtaz Khan, J.

27. I agree.