

(2023) 02 CAL CK 0071
In the Calcutta High Court
Case No : Criminal Appeal No. 285 Of 1989

Nur Islam Mondal & Anr.

APPELLANT

Vs

State Of West Bengal & Anr.

RESPONDENT

Date of Decision : 20-02-2023

Acts Referred:

Essential Commodities Act, 1955 — Section 7(1)(a)(ii)
Code Of Criminal Procedure, 1973 — Section 154, 313

Citation : (2023) 02 CAL CK 0071

Hon'ble Judges : Subhendu Samanta, J

Bench : Single Bench

Advocate : Kollol Mondal, Soubik Das, B.K. Roy, Sima Biswas

Judgement

Subhendu Samanta, J

The instant appeal has been preferred against the Judgment and order dated 17.6.1989 passed by the Learned Judge, Special Court, E.C. Act Nadia, Krishnanagar in E.C. case No. 6 of 1989 convicting the present appellants under Section 7(1) (a)(ii) of E. C. Act for violation of the provisions of para 12(2) of the West Bengal Kerosene Control Order 1968 sentencing the appellants to suffer R.I. for one year each and to pay fine of Rs.2,000/- each in default to suffer further R.I. for six months each.

The brief fact of the prosecution case is that on 7.2.1989 in between 10.30 A.M. to 11.30 A.M. the complainant(D.E.B), Karimpur, along with others went and inspected the Kerosene Oil Shop of the appellants. The appellant no. 1 namely, Nur Islam was the dealer of the Kerosene Oil and the appellant no.2, namely, Dulal Biswas was an employee of the shop. At the time of inspection the appellant no.2 Dulal Biswas was present in the shop. On physical verification 38 barrels in full Kerosene Oil were found in the godown of the accused. Appellant no.2 could not produce any licence for dealing with Kerosene Oil but appellant no.1 produced one purchase Cash Memo of Kerosene Oil and the Registers for running the business. On scrutiny of the log book, it was found that on 7.2.1989,

40 barrels of Kerosene Oil was received by the appellant but no entry was made in the stock registrar to that effect. On physical verification, it was further revealed that 2 barrels of Kerosene Oil was found short to which the accused/appellant no.2 Dulal Biswas failed to give any satisfactory account. No rate-cum-stock Board was also found displayed in the shop of the appellants. Accordingly, the appellant no.2 was arrested and the Kerosene Oil found in the godown of the appellant was seized under a seizure list. After investigation charge sheet was submitted against the appellants under Section 7(1)(a)(ii) of the E. C. Act for violation of para 4,6 and 12(2) of kerosene Control Order, 1968. During the course of the trial 4(four) P.Ws were examined. Both the appellants were appeared before the learned Special court and their examination was recorded under Section 313 of the Code of Criminal Procedure. After hearing the prosecution and defence learned Special Judge passed the impugned order. Hence this appeal.

Learned advocate for the appellants submitted before this Court that the impugned order passed by the learned Special Judge is illegal and perverse in the eye of law. He further submitted before this Court that the learned Special Judge has failed to appreciate the facts and circumstances of this case and came to an erroneous finding. He further pointed out that the judgment on the basis of the prosecution witnesses is actually out of legal parlance.

Learned advocate for the appellants further submitted before this Court that the case against the present appellants is entirely false. The appellant has valid licence to run kerosene oil shop. At the time of inspection the licence was deposited to the licencing authority at Krishnanagore for renewal. At the time of inspection he showed the token for such deposit but it was not considered. He further argued that at the time temporary absence of the appellant no.1 in the shop room. The inspection was purportedly and purposefully conducted by the complainant. He further argued that there were no shortage of two barrel of Kerosene Oil. On 7.2.1989, Adhikary Agency supplied 40 barrels of Kerosene Oil along with Cash Memo to the appellant but due to shortage of two empty barrels 38 barrels were procured out of from the said agency and were kept in the godown. The appellant no.1 went to the Adhikary Agency to bring the remaining empty two barrels. On that very date as and when the remaining two barrels on the way to the shop; the complainant inspected the stock and found shortage of 2 barrels of Kerosene.

Learned advocate for the appellants further argued that the P.W. 1 is an independent witnesses who has given the proper explanation with regard to the reason of the alleged discrepancy of quantum of Kerosene Oil. But the learned Special Judge did not consider his statement. He further argued that actually there is not witness to prove the prosecution case.

Thus, the impugned judgment passed by the learned Special Judge is bad in the eye of law.

Learned advocate appearing on behalf of the State submitted that the impugned order passed by the learned Special Judge suffers no illegality. He further argued that the order of conviction passed by the learned Sessions Judge is well founded on the basis of P.Ws. On verification and inspection the 2 barrels of Kerosene Oil found to be missing for which the appellants have actually violated the kerosene Control Order, 1968. He further argued that the impugned order passed by the learned Special Judge is a speaking order and it is not liable to be set aside.

Heard the learned advocate perused the LCR along with depositions of P.Ws. During the course of argument, learned advocate for the appellants cited a decisions reported in (1976) 4 SCC 233 (Sri Rabindra Kumar Dey Vs. State of Orissa) regarding the principle of believability of hostile witnesses. Hon'ble Supreme Court in the cited decision has held as follows:

"Section 154 confers a judicial discretion on the court to permit cross-examination and does not contain any conditions or principles which may govern the exercise of such discretion. The discretion must be judiciously and properly exercised in the interests of justice. The law on the subject is well-settled that a party will not normally be allowed to cross-examine its own witness and declare the same hostile, unless the court is satisfied that the statement of the witness exhibits an element of hostility or that he has resiled from a materials statement which he made before an earlier authority or where the court is satisfied that the witness is not speaking the truth and it may be necessary to cross-examine him to get out the truth. One such instance is where the witness resiles from a very material statement regarding the manner in which the accused committed the offence. Merely because a witness in an unguarded moment speaks the truth which may not suit the prosecution or which may be favourable to the accused, the discretion to allow the party concerned to cross-examine its own witnesses cannot be allowed.

In other words a witness should be regarded as adverse and liable to be cross-examined by the party calling him only when the court is satisfied that the witness bears hostile animus against the party for whom he is deposing or that he does not appear to be willing to tell the truth. In order to ascertain the intention of the witness or his conduct, the judge concerned may look into the statements made by the witness before the Investigating Officer or the previous authorities to find out as to whether or not there is any indication of the witness making a statement inconsistent on the most material point with the one which he gave before the previous authorities.

The court must, however, distinguish between a statement made by the witness by way of an unfriendly act and one which lets out the truth without any hostile intention. Hence the court must scan and weigh the circumstances properly and should not exercise its discretion in a casual or routine manner. The matter will largely depend on the facts and circumstances of each case and on the satisfaction of the court on the basis of those circumstances.

Held:

The mere fact that a witness is declared hostile by the party calling him and allowed to the cross-examined does not make him an unreliable witness so as to exclude his evidence from consideration altogether.”

I have gone through the citation. The Hon’ble Supreme Court has formulated that credibility of a witness cannot be put into question merely on the basis of that he has been declared hostile.

In this case the P.W.1 produced before the learned Special Judge by the prosecution to be a private seizure witness who during course of examination-in-chief admitted that he was present at the time of inspection and he put his signature over the seizure list. During the cross-examination he stated that there were only 38 numbers of empty Kerosene barrel in the godown. After poring the 38 barrels from the tanker the appellant went to the dealer for collection of rest two empty barrels; at the time police made inspection. During his examination P.W. 1 also pointed out that the arrested appellant no.2 has stated the fact to the police but it was not considered by the investigating officer. It appears that after the completion of cross-examination the prosecution submitted a prayer for declaring the P.W. 1 as hostile. After such prayer was allowed a denial on the part of the prosecution was taken that the appellant Dulal Biswas did not give any satisfactory account for the shortage of the Kerosene Oil.

On careful scrutiny of the impugned judgment it appears that learned Special Judge did not place his reliance upon the evidence of P.W. 1 as he declared hostile. On the principle of Hon’ble Supreme Court in the cited judgment it is crystal clear that merely declaring a witness to be hostile does not negate his credit to be an independent witness. In this case, after declaring the P.W. 1 as hostile only one question was asked to him that means the other statements of P.W. 1 is held to be good regarding the explanation of rest 2 barrels of Kerosene Oil which was missing at the time of inspection.

During the examination of the appellants under Section 313 of the Code of Criminal Procedure the appellants also stated the same explanation but that was not considered by the learned Special Judge.

It further appears to me that the complainant himself took out the charge of investigation of this case and deposed before the Special Judge as P.W. 4. In the formal portion of the FIR as well as the charge-sheet there is no endorsement of the Officer-in-charge of the police station or order of any Superior Officer to engage the complainant to investigate the case.

Merely, investigating criminal case by the complainant/police officer is not fatal but there must have same engagement to that effect. In this case, there are reasonable doubt to the fact that why the fact of the appellants regarding the missing of 2 barrels of Kerosene Oil were not considered. Moreover, why the inspection was made at the appellants’ shop room when appellant no.1 was not

there. It is surprising that the inspection was conducted in between 10.30 A.M to 11.30 A.M on 7.2.1989 that is the very early day of business of the shop and it is further found that the kerosene was poured from the tanker on the same day. It is reasonably believe that the conduct of the business of a shop is only calculated and made in entry in the registers at the end of the day of the business. But in this case, the complainant made hasty step to inspect the shop room, the reason best known to him.

Considering the entire circumstances it appears to me that the complainant himself took up the investigation. In this case without any proper authority, which appears to be fatal in this case. It further appears that the impugned order passed by the learned Special Judge is not based on proper appreciation of facts for not placed his reliance upon the evidence of P.W. 1.

Thus, in my view the prosecution has miserably failed to proof the case beyond reasonable doubt against the appellant.

I find merit to entertain the criminal appeal for setting aside the impugned order.

In result thereof the impugned order passed by the learned Special Judge E.C. Act Nadia, Krishnanagar in E.C. case No. 6 of 1989 corresponding the T.R. no.31 of 1989 convicting the present appellants under Section 7(1) (a)(ii) of E. C. Act is hereby set aside.

The appellants are hereby acquitted from the case.

The appellant no.2 died during the course of hearing of this appeal.

Appellant no.1 is on bail he be set at liberty at once.

The sureties standing in favour of appellant no.1 are also released. Any order of stay or suspension of sentence passed by this Court during the pendency of the instant criminal application is hereby also vacated.

Urgent Photostat certified copy of this order, if applied for, be given to the parties, upon compliance of necessary formalities.