

Criminal Appeal

**Present :The Hon'ble Mr. Justice Ashim Kumar Banerjee
And
The Hon'ble Mr. Justice Kalidas Mukherjee**

Judgment on : June 17, 2010.

C.R.A. No.365 of 2006

Mukesh Ali @ Bapi Khan & Another
-VS-
The State of West Bengal

POINTS

BENEFIT OF DOUBT – Police initiated case against Mamun on being named by accused, Mukesh.- No confessional statement under Section 164 was made by Mukesh involving Mamun - Mamun was not known to the police-None of the witnesses stated that they knew Mamun beforehand- After apprehension of Mamun the test identification parade was not done- Whether Mamun is entitled to the benefit of doubt– Indian Evidence Act 1872, S 9 – Code of Criminal Procedure 1973, S 164.

FACTS

Two persons riding on a motor cycle came to Rasulpur Ghat at 11.40 a.m. on April 20, 1996. The police searched the booty of the bike wherefrom the rexine bag was recovered. The person driving the motor cycle was Mukesh Khan alias Bapi whereas the pillion rider Mamun managed to escape, was not identified at that stage. The substance was tested positive as prohibited substance under the N.D.P.S. Act being Lorazepam as proved by PW-11, the Chemical Analyst. Both of them were charged under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 .They pleaded not guilty of the offence and faced trial.

HELD

The police initiated the case as against Accused, Mamun on being named by Accused, Mukesh. Apart from the said fact there was no evidence to involve Mamun in the instant case. None of the police witnesses named Mamun. PW-1 and 2 stated that one of the two accused managed to escape despite being chased by Madhu Sikdar. It is not the case of the prosecution that they knew the names of the persons beforehand or that they had information as to the identity of the two accused beforehand. PW-7 being the leader of the raiding team could not identify Mamun. In such circumstance it would be difficult to approve the conviction of Mamun merely based upon the statement of the co-accused which also did not have any corroboration. Pertinent to note, no confessional statement under Section 164 was made by Mukesh involving Mamun which could be used against Mamun to some extent.

Para 12

Accused, Mamun was not known to the police. None of the witnesses stated that they knew Mamun beforehand. Hence, after apprehension of Mamun the test identification parade was a must. It was not done. Madhu Sikdar was neither brought to identify Mamun before the Magistrate nor called to depose before the learned Judge to prove Mamun's involvement in the matter. Mamun is entitled to have a benefit of doubt.

Para 13

CASES CITED

- i) *1979, Supreme Court Cases (Criminal), Page-621 (Kanan –VS- State of Kerala)*
- ii) *1979, Supreme Court Cases (Criminal), Page-1029 (Chonampara Chellappan –VS- State of Kerala)*

- iii) *1982, Supreme Court Cases (Criminal), Page-334 (Mohanlal Gangaram Gehani –VS- State of Maharashtra)*
- iv) *1983, Supreme Court Cases (Criminal), Page-139 (Mohd. Abdul Hafeez –VS- State of Andhra Pradesh)*
- v) *Judgment Today, 1999, Volume-IX, Supreme Court, Page-43 (State of Himachal Pradesh –VS- Lekh Raj & Another)*

For the Appellant No.1 : Mr. Ashis Kumar Sanyal
Mr. Tushar Kanti Har

For the Appellant No.2 : Mr. Jayanta Narayan Chatterjee

For the State : Mr. Debabrata Roy

ASHIM KUMAR BANERJEE.J:

1. FACTS OF THE CASE :-

1. Police got an information that two persons would be trafficking heroin by crossing Rasulpur Ghat in the District of Purba Midnapur. Relying on the said information, the police went to Rasulpur Ghat at about 11.05 a.m. on April 20, 2004. They also asked Shri Subimal Makur and Shri Swadesh Show being PW-3 and 4 to assist them by remaining as witness in case of apprehension of the accused. At about 11.40 a.m. two persons sitting on a Hero Honda motorcycle reached the spot. The police team chased them when unfortunately one of them managed to escape. One Madhu Sikdar chased him but in vain.

The driver of the motor cycle Mukesh alias Bapi Khan was arrested. From the booty of his motor bike one brown colour rexine bag wrapped with a newspaper was found after opening a chocolate box kept in a polythene bag. The brown powder as found in the bag was tested positive as heroin. The police party arrested Bapi and seized the substance. One Swapan Kamilla, a local Gold Smith being PW-9 was called, so was the local Block Development Officer being PW-8. Swapan weighed the substance in presence of Block Development Officer. Weight was found to be 467 grams along with packet. The net weight was 429 grams out of which two sample packets were prepared having 5 grams each. One sample of 5 grams was sent for chemical examination. On chemical examination the substance was found to be Lorazepam. Subsequently, the pillion rider of the motor cycle, Mamun was arrested. Both of them were charged under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the N.D.P.S. Act). They pleaded not guilty of the offence and faced trial.

2. EVIDENCE :-

2.PW-1, 2, 7, 10 and 12 were the police officers. PW-1 (Asish Roy) narrated the incident in detail including the process of seizure of the substance. PW-1 also stated that one Sikdar chased the other accused for about five minutes but in vain. PW-2 (Pravat Sarkar) corroborated PW-1. He also stated that Madhu Sikdar tried to apprehend the other accused but in vain. PW-7 (Mahammad Rafik Khan) was the officer in charge of the Khejuri Police Station at the relevant date. He led the raiding team. He corroborated PW-1 and 2. He however could not identify the second accused being Mamun. PW-10 (Bikash Shaw) was the Sub-inspector who assisted the PW-7 at the time of raid. He also corroborated PW-1, 2 and 7. In addition he said that Rafique Khan and Pravat Sarkar

chased the second accused Mamun but in vain. PW-12 (Raghu Nath Kundu) was the investigating officer. He also corroborated the other police witnesses. He also admitted that the motor cycle was not examined in detail.

3.PW-3, 4, 5 and 6 were the local witnesses. All of them were declared hostile as they failed to prove the prosecution case. PW-3 (Subimal Makur) and PW-4 (Swadesh Show) were seizure witnesses. They admitted their signatures. Subimal stated that he did not know when the incident took place but signed the seizure list. He signed on papers shown by the police sitting at the police station. he was not aware why those signatures were taken. PW-4 also deposed in the same line.

4.PW-5 (Pranabesh Maity) feigned ignorance about the incident. PW-6 (Manik Das) being an employee of the Rasulpur Ferry Service also feigned ignorance about the incident. All the four witnesses were declared hostile.

PW-9 (Swapan Kumar Kamila) also denied of his involvement in the incident save and except that he identified his signatures on the material exhibits which according to him were signed at the police station.

5.Then remains PW-8 (Mahammad Golam Asraf), the Block Development Officer, Khejuri-II who all along witnessed the incident. He narrated in detail the incident which corroborated the evidence of the police officials being PW-1, 2, 7, 8 and 12. This witness being a Government official did not have any direct connection with the case. He was not

interested in the case and as such could safely be described as an independent witness who corroborated the prosecution case.

6. On analysis of the evidence, as discussed above, the following facts are proved.

- i) Two persons riding on a motor cycle came to Rasulpur Ghat at 11.40 a.m. on April 20, 1996. The police searched the booty of the bike wherefrom the rexine bag was recovered.
- ii) The person driving the motor cycle was Mukesh Khan alias Bapi whereas the pillion rider managed to escape, was not identified at that stage.
- iii) The substance was tested positive as prohibited substance under the N.D.P.S. Act being Lorazepam as proved by PW-11, the Chemical Analyst.

7. From the aforesaid admitted events it is conclusively proved that Mukesh alias Bapi was arrested while riding a bicycle containing a rexine bag having Lorazepam prohibited under the provisions of N.D.P.S. Act. Hence, the offence committed by Mukesh was proved and Mukesh was liable for punishment under Section 21 of the said N.D.P.S. Act.

8. Mr. Asish Sanyal, learned counsel appearing for the Mukesh contended that the motor cycle was not examined. The independent witnesses were declared hostile as they miserably failed to prove the seizure. The ownership of the motor cycle was not proved. He further contended that assuming the facts as stated above were proved that would not constitute an offence as there was no proof that Mukesh was in conscious possession of Lorazepam within the booty of the motor bike. More over the percentage of Lorazepam as

contained in the seized substance did not come up in evidence. Mr. Sanyal contended that no test identification parade was held. As and by way of an alternative submission, Mr. Sanyal contended that Mukesh was in custody for seven and half years. Considering the fact and circumstance a lesser punishment should be imposed and Mukesh should be released after having suffered seven and half years of rigorous imprisonment.

9. None of the submissions of Mr. Sanyal did impress us. Mukesh was riding the motor cycle. Motor cycle was seized. He did not disown the bag found in the booty of the motor bike. Moreover when he was riding on the motor bike containing prohibited substance he was liable for the offence unless he could give a concrete explanation to rebut the presumption. Such attempt was never made. The learned Judge, in our view, was right in holding Mukesh guilty of the offence.

10. With regard to lesser punishment we are of the view that Section 22 inter alia provides that in case of a commercial quantity the punishment should not be less than ten years and could be extended to twenty years. It is also provided that in addition to such imprisonment minimum fine should be imposed to the extent of rupees one lakh which could be enhanced to rupees two lakhs. In the instant case, Mukesh was convicted for ten years rigorous imprisonment together with a fine of rupees one lakh and in default to suffer rigorous imprisonment for two years more which was the minimum punishment. We do not find any scope to lessen the same. It is true that the charge was framed under Section 21 whereas the punishment was imposed under Section 22. We do not find anything wrong. The initial charge was for trafficking heroin. On a detailed chemical

analysis the substance was found to be Lorazepam, a psychotropic substance and as such the learned Judge imposed the punishment under Section 22 instead of Section 21.

11. Arguing on behalf of Mamun, Mr. Jayanta Narayan Chatterjee, learned counsel contended that the evidence so far as it came out in evidence was not safe to convict Mamun. In support of his contention he relied on the following decisions :-

- vi) 1979, Supreme Court Cases (Criminal), Page-621 (Kanan –VS- State of Kerala)**
- vii) 1979, Supreme Court Cases (Criminal), Page-1029 (Chonampara Chellappan –VS- State of Kerala)**
- viii) 1982, Supreme Court Cases (Criminal), Page-334 (Mohanlal Gangaram Gehani –VS- State of Maharashtra)**
- ix) 1983, Supreme Court Cases (Criminal), Page-139 (Mohd. Abdul Hafeez –VS- State of Andhra Pradesh)**
- x) Judgment Today, 1999, Volume-IX, Supreme Court, Page-43 (State of Himachal Pradesh –VS- Lekh Raj & Another)**

12. We could not persuade ourselves to agree with the conviction of Mamun. If we take the evidence as a whole as discussed above we would find that Madhu Sikdar chased the pillion rider but in vain. Madhu Sikdar was not examined. He did not come to the box to support the case of prosecution. The police initiated the case as against Mamun on being named by Mukesh. Apart from the said fact there was no evidence to involve Mamun in the instant case. None of the police witnesses named Mamun. PW-1 and 2 stated that one

of the two accused managed to escape despite being chased by Madhu Sikdar. It is not the case of the prosecution that they knew the names of the persons beforehand or that they had information as to the identity of the two accused beforehand. PW-7 being the leader of the raiding team could not identify Mamun. In such circumstance it would be difficult to approve the conviction of Mamun merely based upon the statement of the co-accused which also did not have any corroboration. Pertinent to note, no confessional statement under Section 164 was made by Mukesh involving Mamun which could be used against Mamun to some extent.

13. There is one more salient feature which was perhaps overlooked by the learned Judge. Mamun was not known to the police. None of the witnesses stated that they knew Mamun beforehand. Hence, after apprehension of Mamun the test identification parade was a must. It was not done. Madhu Sikdar was neither brought to identify Mamun before the Magistrate nor called to depose before the learned Judge to prove Mamun's involvement in the matter.

In our considered view, Mamun is entitled to have a benefit of doubt.

14. The conviction of Mamun is set aside. Let him be set at liberty at once, if not wanted in any other case.

15. The conviction and sentence imposed upon Mukesh is upheld whereas the conviction and sentence of Mamun is set aside.

16. The judgment and order of the Court below stand modified accordingly.

17. Appeal is disposed of accordingly.

18. Let a copy of this judgment be sent to the correctional home where the accused are suffering their sentence.

19. The Lower Court Records be sent down along with a copy of this judgment.

20. Urgent xerox certified copy will be given to the parties, if applied for.

Kalidas Mukherjee, J:

I agree.

[ASHIM KUMAR BANERJEE, J.]

[KALIDAS MUKHERJEE, J.]