Criminal Appeal

Present :

The Hon'ble Mr. Justice Ashim Kumar Banerjee

And

The Hon'ble Mr. Justice Raghunath Ray

Judgment on 02.09.2010

C.R.A. No.446 of 2008

Kurban Ansari

-VS

The State of West Bengal & Others

Points:

Trial-Non examination of chemical analyst and/or the arms expert, per se, whether vitiate the trial- In the absence of proper weighment of the goods ceased whether court can held it is of commercial quantity- N.D.P.S. Act, 1985 S. 20(b)- Indian Evidence Act, 1872 S. 74

Facts:

Officer in-charge, Raghunathpur Police Station lodged a suo moto complaint against one Kurban Ansary, alleging that Kurban was carrying 3 kgs. of Ganja and one improvised double barrel country made pipe gun loaded with two numbers of 303 cartridges and three extra catridges apart from other articles noted in the FIR. The goods were initially weighed with the help of the weighing instrument taken from a road side shop. The Ganja was in a plastic packet wrapped with newspaper. Sample of 200 grams was drawn and sent for chemical examination.

Held:

Little inconsistency with regard to requisition of service of the learned Magistrate or putting of the seal on the packets would not vitiate the

concrete evidence consistently corroborated by each one of the eye-witnesses. Para 7(iv)

It would have been nice in case the chemical analyst and/or the arms expert could come to support their report, admittedly they did not. Both the reports were placed by PW-9, the Investigating Officer. That would not, per se, vitiate the trial. On reading Section 74 of the Indian Evidence Act, 1872 court find that the documents of official bodies or of public officers are called as public documents and the formal proof thereof is not necessary in terms of Section 74 read with Section 79 of the said Act of 1872. In the instant case, the chemical analyst as well as the arms expert both being public authority discharging public duty conducted necessary tests and/or examination and issued necessary certificate therefor. Such certificates were received by the Investigating Officer in usual course of business. During trial he produced those documents which were tendered in evidence subject to objection. There is no definite assertion on the part of the defence denying the veracity of those certificates. It was not the case of the defence that those certificates were fake or forged. In absence of such definite assertion the learned Judge was right in relying upon the same discarding the objection raised by the defence mechanically. Para 7(vi)

The weight was not proved. The provisions of the said Act of 1985 are stringent. Hence, Court of law must take due care and caution before applying its force. In our view in absence of the proper proof of weight the accused should be treated as an offender for the smallest quantity. The conviction under Section 2(b)(ii)C cannot be sustained. The sample drawn by the Police and sent for chemical examination was two hundred grams. Hence, it was admittedly above the small quantity. Whether it was a commercial quantity or not could only be determined on a proper

weighment. Hence, Court can safely treat the confiscated item in between small quantity and commercial quantity being the category of 100 grams to 1 kg. In such situation Sub-section (b)(ii)(B) would apply where a punishment up to the period of ten years coupled with a fine up to rupees one lakh was prescribed. Para 7(vii)

Cases cited:

State of Maharashtra –VS- Jagdish B. Shah, 1992 Criminal Law Journal Page-2394

For the Appellant : Mr. Sabyasachi Banerjee

Mr. Nigom Ashish Chakrabarty

For the State : Mr. Ranjit Kumar Ghosal

ASHIM KUMAR BANERJEE.J:

1.FACTS :-

Bikash Chandra Kundu, Officer in-charge, Raghunathpur Police Station lodged a suo moto complaint against one Kurban Ansary, aged about 26 years

alleging that Kurban was carrying 3 kgs. of Ganja and one improvised double

barrel country made pipe gun loaded with two numbers of 303 cartridges and

three extra catridges apart from other articles noted in the FIR. The Officer in-charge, based on a source information, arrested Kurban while he was getting down from Burdwan-Purulia Passenger at Joychandi Pahar Railway station at about 11.50 hrs. On December 22, 2006 at about 12.20 hrs. the Police Force found one person coming towards metal road through Kachha

road from village side with a jute hand bag in his hand who was identified as Kurban Ansary by the source. Moment he came near the Force, he was overpowered and the Force managed to apprehend him. Initially he was detained as he opted for being searched in presence of a gazetted officer or a Magistrate. Accordingly, the Circle Inspector and the S.D.P.O. were contacted. Ultimately, PW-2, an Executive Magistrate arrived at the spot. In his presence, the contraband goods were seized. The goods were initially weighed with the help of the weighing instrument taken from a road side shop. The Ganja was in a plastic packet wrapped with newspaper. Sample of 200 grams was drawn and sent for chemical examination. The seizure was conducted in presence of Chatu Mahato and Kartik Mahato being PW-3 and 5. Ansary was charged under Section 20(b) of N.D.P.S. Act and 25 (i) (a) /27

of the Arms Act.

Kurban denied the charge and opted to be tried.

2. PROSECUTION WITNESS :-

PW-1 (Bikash Chandra Kundu) :-

The witness was the then officer in-charge of Raghunathpur Police Station. He lodged the suo moto complaint. He narrated in detail the incident which was consistent with his FIR. In cross-examination he pleaded his ignorance about the political affiliation of the accused and/or the seizure witnesses. With regard to weighment, the witness deposed that scale produced at the scene of occurrence for weighing was having units of 2 kgs. to 100 grams. Weighment was done at a time. He admitted that there was no seal on the cover. He however categorically stated that the learned Magistrate was all through out present at the time of seizure. The seizure was done in his presence.

PW-2 (Achchutananda Majumdar) :-

The witness was the Deputy Magistrate working at Raghunathpur Subdivision.

On December 22, 2006 he was also through out present during search and seizure. He deposed that three packets were shown to him by the Police. He did not open the same and he was told that it contained Ganja. He put his signature on the seizure list. On being asked by the S.D.O. he went to the spot and assisted the Police Force. He visited the place of occurrence on being accompanied by the vehicle belonged to S.D.P.O.

PW-3 (Chatu Mahato) :-

This witness was a resident of Chunabhati, Adra. He was going to Raghunathpur from Adra when he found two motor bikes standing on the kachcha road by the side of village Joychandi. He also noticed five persons who, all on a sudden, tried to flee away, one of them could be apprehended. His elder brother Kartick Mahato accompanied him and told him that the person apprehended was Kurban Ansari. He identified the appellant on the dock. His brother Kartick had acquaintance with the Officer in-charge of Raghunathpur Police Station. He found a gunny bag in the hand of Kurban. Gunny bag was opened in presence of Police Personnel as well as "Magistrate Saheb". On opening the bag Ganja was found covered with a newspaper along with one two barrel-gun loaded with ammunitions as also live cartridges. He identified the material exhibits. The Ganja was weighed as three kgs. The Police prepared the seizure list and he became a witness thereof. In cross-examination he admitted having a criminal case pending against him at Raghunathpur Court.

PW-4 (Basudev Ghosh) :-

The witness was the Sub-inspector posted at Raghunathpur Police Station. On December 22, 2006 he was a member of the raiding party. He narrated in detail about the incident consistent with Shri Bikash Chandra Kundu, the Officer in-charge as well as PW-2 and PW-3 being the learned Magistrate and
the seizure witness.

PW-5 (Kartik Mahato) :-

Kartik also corroborated the other witnesses including his brother being PW-3. He also admitted having a criminal case against him.

PW-6 (Madhu Sudhan Mondal) :-

The witness was tendered for cross-examination.

PW-7 (Joynal Molla) :_

The witness was another constable and was a member of the raiding party. He corroborated the other eye-witnesses. Cross-examination was declined.

PW-8 (Prabodh Kumar Mondal) :-

The witness was Assistant Sub-Inspector of Police attached to Raghunathpur Police Station. He was also a member of the raiding party. He prepared the seizure list. He deposed that the Police Force arranged weighment instrument from a nearby shop belonging to one Madan Nag. According to him, the weighment units were from two killo grams to fifty grams. He also deposed having weighed the Ganja on two occasions.

PW-9 (Navayan Chandra Mahato) :-

Shri Mahato was the Sub-inspector of Police attached to Raghunathpur Police
Station. he was the Investigating Officer. He recorded the statement of the witnesses under Section 101 of the Criminal Procedure Code. He sent the sample for chemical examination. He also sent the arms for examination by

the arms expert. He collected report of the experts which were tendered in evidence through him subject to objection.

3. EXAMINATION OF THE ACCUSED :-

The appellant was placed with all incriminating evidence that came out during trial. He denied the charges and pleaded innocence.

4. JUDGMENT :-

The learned Judge, 1st Special Court in his judgment and order dated June 10,

2008 under the N.D.P.S. Act, Purulia held the accused guilty of the offence. The charge was framed under Section 20(b) of the N.D.P.S. Act read with Section 25/27 as Arms Act. However the learned Judge modified the charge and held the accused guilty of the offence under Section 20(b)(ii)(C) of the N.D.P.S. Act and Section 25(1-B) of the Arms Act. The accused was imposed

a rigorous imprisonment punishment for ten years together with a fine of rupees one lakh and in default to suffer rigorous imprisonment for two years more. He was also sentenced for rigorous imprisonment for six months for the offence punishable under Section 25(1-B) of the Arms Act.

5. THIS APPEAL :-

Being aggrieved by and dissatisfied with the judgment and order of the learned Judge, Special Court, Purulia the appellant preferred the instant appeal which we heard on the above mentioned dates.

6. CONTENTION OF THE APPELLANT :-

Mr. Sabyasachi Banerjee, learned counsel appearing for the appellant being ably assisted by Mr. Nigom Ashish Chakrabarty raised the following contentions :-

i) Prosecution relied on a source information. However the source was

not disclosed. Source was also not produced in evidence.

ii) No Test Identification Parade was conducted to identify the accused.

iii) The alleged recovery and the mode applied therefor were vitiated by illegality and irregularity. The seizure witnesses had a criminal background and they were stock witness of the police and, hence, not trustworthy.

iv) The prosecution asserted that the Ganja was weighed 3 kgs. whereas neither the weighing instruments were produced during trial nor the person being the grocery shop owner from whom the weighing instrument was borrowed, was produced as prosecution witness.

v) There had been material inconsistency in evidence of three witnesses being the Officer in-charge, Magistrate and the Investigating Officer.

vi) With regard to sealing of the confiscated goods there was material inconsistency in the evidence of the prosecution witnesses particularly the members of the Police Force and the learned Magistrate.

vii) The analysis report of the contraband goods as well as the arms expert report were attempted to be proved through the Investigating Officer. Neither the chemical analyst nor the arms expert appeared at the trial to support there report.

Elaborating his argument Mr. Banerjee contended that when the police relied on a source information they were duty bound to disclose the source at the trial. The source should have been produced as witness so that the accused could get the benefit of cross-examining him. Such opportunity was not given to the defence.

The weighing instruments were said to be borrowed from one Madan Nag, a nearby grocery shop owner. PW-8 contended that he weighed the Ganja on two occasions whereas PW-1 asserted that it was weighed on one occasion.

Madan Nag was not tendered in evidence. No opportunity could be availed by the defence to cross-examine him.

With regard to availing of the service of the learned Magistrate Mr. Banerjee highlighted the inconsistencies. According to the learned Magistrate he came by a vehicle belonging to S.D.P.O. whereas PW-1 contended that he requisitioned the service of the Magistrate from the office of the Subdivisional

officer. The Magistrate however did not speak about any formal

order passed by the Sub-divisional Officer. On the issue of the expert report Mr. Banerjee contended that neither the chemical analyst nor the arms expert came forward to support their report. Those two reports were tendered as exhibits subject to objections raised by the defence. Hence, it was incumbent upon the prosecution to produce those two witnesses so that the defence could cross-examine them. In this regard Mr. Banerjee relied on a Single Bench decision of Bombay High Court in the case of the State of Maharashtra –VS- Jagdish B. Shah reported in 1992 Criminal Law

Journal Page-2394.

Opposing the appeal Mr. Ranjit Kumar Ghosal contended that from the evidence so came out during trial the seizure of the contraband goods was proved beyond doubt. Hence, minor irregularity in the procedure or insignificant anomaly in evidence would not vitiate the trial. Mr. Ghosal however contended that it would have been proper to have the weighing instruments and the weighment units seized and produced during trial. It would have been also proper for the concerned grocery shop owner being tendered during trial for being cross-examined. However, such mistake and/or irregularity would not demolish the concrete evidence with regard to confiscation of the contraband goods. Mr. Ghosal also contended that once

the arms expert report and the chemical analyst report were received by the Police in usual course of business being duly certified by the appropriate authority under the Government no formal proof was required to be made by producing the chemical analyst or the Arms Expert, as the case may be. Mr. Ghosal prayed for confirmation of the conviction as well as the sentence imposed upon the appellants.

7. OUR VIEW :-

Let us first deal with the seven issues raised by Mr. Banerjee, before we proceed further to give our final opinion.

i) SOURCE :-

It is well established that prosecution must have a free hand at the trial. Once they discharge their onus by proving the charges brought against the accused the onus automatically shifts to the defence to prove their alibi and rebut the presumption which arises in the mind of the Court on perusal of the evidence.

How the prosecutor would prosecute, whom to be tendered in evidence, what

material exhibits they would produce, are within the exclusive domain of the prosecutor. They were not bound to disclose the source. If they could apprehend the accused and prove the offence committed by the accused the consequence would automatically follow. The consequence could not be resisted on the plea that the source was not disclosed.

The contention of Mr. Banerjee on that score is thus rejected.

ii) TEST IDENTIFICATION PARADE :-

The accused was caught red handed by the Police team. The learned Magistrate and the seizure witnesses were present. We are unable to appreciate as to how a test identification parade would be necessary in the

facts and circumstances of the present case. In case the accused could manage to flee away from the scene of occurrence and subsequently apprehended the question of test identification might have been necessary. Such is not the case here.

The contention fails.

iii) RECOVERY :-

Lot was said on the mode of recovery. Emphasis was put on the credential of the seizure witnesses. It is true, both the seizure witnesses deposed that they had pending criminal cases. There is no law which prohibits any citizen having a criminal background or having criminal cases pending against him to witness a seizure. The Apex Court on the issue cautioned the Courts of law

to be cautious while examining stock witnesses and relying on their evidence.

In the instant case, even if one says that PW-3 and PW-5 were the stock witnesses of the Police we cannot brush aside the evidence of the learned Magistrate who acted as a third witness to the seizure.

Contention has no basis.

iv) INCONSISTENCY :-

The evidence of the Officer in-charge, learned Magistrate and the Investigating Officer faced strong criticism pointing out the inconsistency. We have carefully examined the evidence. We feel, the seizure was proved as

the evidence of the learned Magistrate was enough to prove the seizure. Little

inconsistency with regard to requisition of service of the learned Magistrate or putting of the seal on the packets would not vitiate the concrete evidence

consistently corroborated by each one of the eye-witnesses.

The contention is without any force.

v) SEAL :-

We have dealt with the issue in reply to issue no.(iv) hereinbefore.

vi) EXPERT EVIDENCE :-

We fully agree with Mr. Banerjee and Mr. Ghosal that it would have been nice

in case the chemical analyst and/or the arms expert could come to support their report, admittedly they did not. Both the reports were placed by PW-9, the Investigating Officer. That would not, per se, vitiate the trial. If we look at Section 74 of the Indian Evidence Act, 1872 we would find that the documents of official bodies or of public officers are called as public documents and the formal proof thereof is not necessary in terms of Section 74 read with Section 79 of the said Act of 1872. In the instant case, the chemical analyst as well as the arms expert both being public authority discharging public duty conducted necessary tests and/or examination and issued necessary certificate therefor. Such certificates were received by the Investigating Officer in usual course of business. During trial he produced those documents which were tendered in evidence subject to objection. We do not find any definite assertion on the part of the defence denying the veracity of those certificates. It was not the case of the defence that those certificates were fake or forged.

In absence of such definite assertion the learned Judge was right in relying upon the same discarding the objection raised by the defence mechanically. We also do not find any reason to discard the same. In this regard we respectfully disagree with My Lord M.F. Saldanha,J. in the case of State of Maharashtra (Supra)

vii) WEIGHMENT :-

This point possibly has a force. The seizure was proved, not the weighment. The prosecution witnesses consistently stated that it was 3 kgs. PW-8 stated that he personally weighed it by taking help of the weighing scale taken from

a nearby shop belonging to one Modan Nag. Modan Nag was admittedly not called during trial. The weighment scale was not produced. The weighment units (Batkara) were also not seized and produced. It would not be safe to rely upon such statement of the witnesses with regard to the weight of the confiscated goods.

If we look at the chargesheet we find that a charge was framed under Section 20(b) of the N.D.P.S. Act, 1985. The learned Judge however at the final trial modified the charge and held the accused guilty of the offence under Section 20(b)(ii) C. If we consider Section 20(b) we would find that the offence has been divided into three categories based upon the weight of the contraband goods. If one cultivates any Cannabis plant the imprisonment would be up to ten years and the maximum fine would be rupees one lakh. If one produces, manufactures, possesses, sales, purchases, transports, imports inter-state, exports inter-state the punishment would be for rigorous imprisonment up to six months coupled with a fine of rupees ten thousand in case of small quantity, rigorous imprisonment up to ten years together with a fine of rupees one lakh in case of medium quantity (between small and commercial) and the punishment of ten to twenty years coupled with a fine of rupees one lakh to two lakhs in case of commercial quantity. In the chargesheet, the category was not mentioned. It was simply under Section 20(b) which means it would cover either a small or medium or commercial quantity. As per the notification, small quantity of Cannabis up to 100 grams denotes small

quantity whereas quantity of 1 kg. and above makes it commercial. In our view, once the weighment is not properly proved it would not be proper to apply Sub-section (ii) C.

Hence we find justification in such contention of the defence.

As we have observed hereinbefore, on a sum total of the evidence the seizure

was proved. The nature of the confiscated goods was proved. The arms expert report proved the offence committed under the Arms Act. we do not find any scope of disagreement as to what had been held by the learned Judge

of the Court below. We only note our dissent on the quantity of the confiscated goods in absence of proper proof of the weight so claimed by the prosecution. In our view, the weight was not proved. The provisions of the said Act of 1985 are stringent. Hence, Court of law must take due care and caution before applying its force. In our view in absence of the proper proof of weight the accused should be treated as an offender for the smallest quantity. The conviction under Section 2(b)(ii)C in our view cannot be sustained.

We however find from the chemical analysis report that the sample drawn by

the Police and sent for chemical examination was two hundred grams. Hence, it was admittedly above the small quantity. Whether it was a commercial quantity or not could only be determined on a proper weighment.

We have already observed that weight was not proved, at the same time we cannot brush aside the fact that the confiscated goods said to be weighed at 3

kgs. could not be in no stretch of imagination less than 100 grams. Hence, we
can safely treat the confiscated item in between small quantity and commercial quantity being the category of 100 grams to 1 kg. In such situation Sub-section (b)(ii)(B) would apply where a punishment up to the period of ten years coupled with a fine up to rupees one lakh was prescribed.

8 RESULT :-

The appeal fails and is hereby dismissed.

The conviction of the appellant under the Arms Act is confirmed. Conviction
of the appellant under Section 20(b) of the N.D.P.S. Act, 1985 is also confirmed. The punishment given by the learned Judge under Section 25(I)(B) of the Arms Act is confirmed. The punishment given under the N.D.P.S. Act, 1985 is however modified to the extent that the appellant would
be sentenced under Section 20(b)(ii)B in stead of 20b(ii)(C) of the said Act of
1985. However, we do not wish to interfere with the actual sentence imposed
by the Court below.

9. DIRECTION :-

The incident occurred on December 22, 2006 when the accused was apprehended. Since then he is in jail. He is directed to serve out the remaining part of his sentence as awarded by the learned Trial Judge.

A copy of this judgment be sent to the correctional home, where the appellant
is suffering his sentence, for his information.

Let a copy of this judgment along with Lower Court Records be sent to the Court of learned Trial Judge for information and necessary action.

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

Raghunath Ray, J:

I agree.

[ASHIM KUMAR BANERJEE,J.]

[RAGHUNATH RAY,J]