(1992) 09 CAL CK 0030

Calcutta High Court

Case No: Criminal Appeal No. 261 of 1991

Ram Pher Jadav		APPELLANT
	Vs	
The State		RESPONDENT

Date of Decision: Sept. 16, 1992

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 162
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 21

Citation: 97 CWN 324

Hon'ble Judges: L.M. Ghosh, J; Amarabha Sengupta, J

Bench: Division Bench

Advocate: Amit Talukder, Abhijit Chatterjee and Amitabha Karmakar, for the Appellant;Subhan Lal Hazra and Swapan Kumar Mukherjee, for the Respondent

Final Decision: Allowed

Judgement

L.M. Ghosh, J.

The appellant, Ram Pher Jadav, was charged u/s 21 of the N.D.P.S. Act, 1985 and convicted thereunder by the Sessions Judge, Howrah. He was sentenced to R.I. for 12 years and to pay a fine of Rs. 1 lac, in default, to undergo further R.I. for three years. Ram Pher Jadav has appealed against that order of conviction and sentence. The prosecution made out a case that the appellant was carrying some quantity heroin on 10.9.89. The S.I., Sri Kalyan Kumar Maitra, was on patrol duty. His version is that on 10.9.89 in course of night patrol duty, he reached near Gate No. 2 of Shibpur B.E. College when he found the accused proceeding with a bag in hand. His movement appeared to Sri Kalyan Kumar Maitra (PW-1) as suspicious and his answer was unsatisfactory. PW-1 claims that the person was apprehended and then some substance in a cellophane paper was recovered, which was found out to be heroin. PW-1 prepared a seizure list at the spot, as he claims. We further get from PW-1 that two witnesses, Ibrahim Ansari (PW-3) and Gopal Banerjee (PW-4), were available. The prosecution case is that those two witnesses were having together

morning walk, when they were requested by the police officer to co-operate and sign the seizure list. The articles found including the cellophane paper containing the powder (Mat. Ext. IV) were seized as per claim of PW-1. Thereafter, the accused was taken to the Shibpur P.S. with the articles seized. In the police station, PW-1 lodged a complaint in writing. A formal fir was drawn up.Shibpur p.s Case No. 226 dated 10.9.89 u/s 21 of the NDPS Act was started against the appellant. The investigation of the case was taken up by PW-6 Sri Ranjit Kumar Das. The articles seized were sent to the Director (Drugs), Central Public Health And Drugs Laboratory. The expert report was that the Black lump was containing heroin. After completing investigation, PW-6 submitted charge sheet against the accused u/s 21 of the NDPS Act, 1985.

2. During trial, six witnesses were examined on behalf of the prosecution. The accused did not examine any witness.

3. On consideration of the materials on record, the learned Sessions Judge came to the finding that the accused was guilty. So he convicted the accused and passed sentence, as referred to before.

4. Mr. Talukdar, the learned advocate, has argued for the appellant. Mr. Hazra, the learned advocate, has argued for the State.

5. According to Mr. Talukdar, the learned advocate for the appellant, the story regarding seizure of the articles in the manner narrated by the prosecution is a myth. He has referred to various materials and evidence for that purpose.

6. Mr. Hazra, the learned advocate for the State, has argued that the prosecution has adduced sufficient evidence to prove the guilt of the accused.

7. This case is built up on the ground that the accused was in possession of the prohibited drugs. It is not so made out that he manufactured, sold, etc. So, the present case rests entirely on possession. As per account of the prosecution, the accused was found to be in possession of the prohibited drugs early in the morning on 10.9.89. This factum of possession must be proved. And, in that connection, it must be clearly established that there was seizure in due course. If we have any doubt about the manner in which the seizure list was prepared, then that will have a serious impact upon the question of possession of the drug.

8. We scrutinise the evidence relating to the seizure. PW-1 is the police officer who apprehended the accused early in the morning. According to him, two persons, who were on morning walk, were called and seizure was made in their presence. Then, as slated by PW-1, the prohibited articles, namely heroin, seized from the accused, were sealed properly and labels, etc., were pasted. PW-2 is the Director (Drugs), Central Public Health & Drugs Laboratory. According to him, the articles sent to him were containing heroin. Evidence has been led that the articles seized from the accused person by the police officer were those that were sent to the Drugs

Laboratory. If the seizure was properly made, no doubt the accused was in possession of heroin. But we must concentrate on whether really the seizure was made in that manner. PW-3 and PW-4 (Ibrahim Ansari and Gopal Banerjee respectively) have come to support the prosecution case that the accused. Ram Pher Jadav was apprehended by the police and that he was carrying some articles in a bag, believed to have contained heroin. They also signed on the seizure list. Ext. 1 is the seizure list and Exts. 1 /1 and 1/2 are the signatures of PW-3 and PW-4 i.e. Ibrahim Ansari and Gopal Banerjee respectively. We may recall that these witnesses claim that they were on a morning walk when PW-1 sought for their co-operation. It was early in the morning, i.e. at about 5.15 A.M., when Ram Pher Jadav was accosted by the police. Usually, witnesses are not likely to be available on the road at that hour, unless some persons were having their morning strolls and that exactly is the claim of PWs. 3 and 4. But from the I.O., PW-6, we have got that PWs. 3 and 4did not state before him that they were on morning walk on 10.9.89 at about 5 A.M. This ommission has some significance, because, as indicated earlier unless one is on a morning walk, he is not likely to be found at that hour. That is the first suspicion with regard to the seizure in that manner with the help of PWs. 3 and 4. But more serious thing is that in the seizure list. Ext. 1, there is reference to the Shibpur P.S. Case No. 226 dated 10.9.89. If the seizure was first made and then a complaint was lodged by PW-1 and on that basis, the P.S. Case No 226 dated 10.9.89 was started, it is beyond comprehension how the case number was available to PW-1 before lodging the complaint even. In Ext. 1 a matter is referred to which was not yet born. PW-6, the I.O., has perhaps become aware of that and has tried to salvage the position. He states that before registering the case at the P.S., the number of such case is obtained over RT. for mentioning the same on the label to be affixed on any alamat. He adds that he ascertained that PW-1. he complainant, had also obtained the particulars of the case for mentioning on the label. This part of his statement is inadmissible, because if he a certained something during the course of investigation, that is hit by Section 162 of the Cr.P.C. Moreover, it would also be a hear say. But the learned advocate for the State has argued that at least his evidence regarding the so call d general practise must be accepted. We are unable to accept that part of his evidence either. For it would have been for PW-1 to clarify the position. He does tot himself say that he obtained the P.S. Case No. 226 dated 10.9.89 over the R.T. So, PW-6 cannot improve upon PW-1, who claims to have conducted the search and the seizure. In the absence of any statement in the evidence of PW-1 that the P.S. Case number was obtained, we cannot proceed on the footing that the P.S. Case number was obtained over the R.T., even before the P.S. Case was started factually. The proseculion case is further damaged by the endorsement on the complaint. Ext. 3 is the complaint of PW-1. On the margin, there is an endorsement that the written complaint was received on 10.9.89 at 10. 40 hours at the P.S. and then Shibpur P.S. Case No. 226 dated 10.9.89 was staled. If the accused was apprehended at about 5.15 A.M., and if seizure was male within a short time thereafter, the complaint could not be lodged at 10.40 hours, when PW-1

was provided with a vehicle. PW-1 himself has given us during his cross examination that it would take about ten minutes to reach Gate No. 2 of the Shibpur B.E. College, coming from the P.S. by vehicle. If there was seizure shorty after 5.15 A.M., complaint could not have been lodged at 10.40 hours. That is yet another intrinsic infirmity disclosed by the materials on record. The seizure list and the Ext. 3 thus disclose that the said seizure could not be made in that manner and at that hour. It is revealed that everything is imaginary. There is yet another inconsistency in the prosecution evidence. PW-5 is a goldsmith and his evidence is that his services were requisitioned for weighing the contents of the articles, believed to be heroin. According to him, at about 500, A.M., the policeman came to his shop and brought him near Gate No. 2 of the B.E. College, Shibpur. There is no indication that any vehicle was sent to bring him down. And during cross examination, this PW-5 has stated that PW-1 might be the police officer who called him. PW-l''s evidence is completely different: he says. That he remained present on the spot and the vehicle was sent to bring down PW-5. PW-5 does not mention about any vehicle at all. The question of weighment is not very important by itself, but it is connected with the case of seizure of the articles. It is an integral case of the prosecution that some articles were seized and the goldsmith was brought to weigh the same. If there is discrepancy about the arrival of the goldsmith, that damages the prosecution case, although, the weight of the materials is not important.

9. These factors, specially Exts. 1 and 3, seriously damage the prosecution case. We cannot persuade ourselves to believe that there was seizure in that manner. We also cannot accept that the appellant was in possession of the prohibited articles. This case is based on possession, coming within Section 21 of the NDPS Act, 1985. If seizure is not believed, possession cannot also be believed. Thus the prosecution case is completely discredited. No doubt the offence u/s 21 of the NDPS Act is a serious thing and it concerns the society and the whole world. But the Court cannot be carried by social prejudice. There is much difference between an accused and an offender. If the guilty is not punished and instead an innocent is penalised, society will suffer even more. We find that the prosecution has not been able to prove the offence. The conviction of the appellant, Ram Pher Jadav, u/s 21 of NDPS Act cannot be sustained. We, therefore, allow the appeal. The judgment and order of the learned Sessions Judge, Howrah, convicting the accused appellant, Ram Pher Jadav, u/s 21 of the NDPS Act. 1985, and sentencing him to R.I. for twelve years and to pay a fine of Rs. 1 lac, in default, to undergo further R.I. for three years, are hereby set aside. The accused appellant is found not guilty of the offence u/s 21 of the NDPS Act and he is acquitted thereunder. He be set at liberty at once if not required to be detained in connection with any other offence.

Amarabha Sengupta, J.

I agree.