

10 SCOB [2018] HCD**HIGH COURT DIVISION**

Criminal Revision No.2964 of 2017.

Mr. Amit Das Gupta, Advocate
...For the Convict-petitioner.**Md. Kawsar Shikder**

...Convict-petitioner-petitioner.

Mr. M.A. Mannan Mohan, D.A.G. with
Mr. Md. Sarwardhi, A.A.G**Vs.**

...For the State.

The State.

...Opposite party.

Heard on:17.05.2018.

Judgment on: 24.05.2018.

Present**Mr. Justice Abu Bakar Siddiquee.****Narcotics Control Act, 1990 (Report of Chemical Analyzer)**

There is no evidence on record to the effect that some portion of those incriminating article were being sent to the chemical analyzer for the purpose of obtaining a chemical report and no such report was marked as exhibit in such case. I have no option to hold that there is doubt so as to ascertain that those incriminating articles were Narcotics or not. ... (Para 22)

Narcotics Control Act, 1990 (Benefit of Doubt):

In the instant case I find that there are intrinsic weaknesses and blatant contradictions in the evidence of the P.Ws and the witnesses are partisans and interest witness. The learned Judge of the Trial Court has not considered the material discrepancies, contradictions and omissions of the witnesses for which an error has crept in the impugned judgment resulting in the conviction of petitioner. On consideration of the evidence on record, the convict-petitioner is held to be entitled to benefit of doubt and as such he is also entitled to be acquitted from the charge. ... (Para 25)

Judgment**Abu Bakar Siddiquee, J.**

1. The Rule under adjudication, issued on 14.11.2017, was in the following terms:
“Let a Rule be issued calling upon the opposite party to show cause as to why the judgment and order of conviction and sentence dated 08.08.2017 passed by the learned Sessions Judge, Chandpur in Criminal Appeal No.19 of 2017 allowing the appeal in part and thereby modified the judgment and order of conviction and sentence dated 14.12.2014 passed by the learned Senior Judicial Magistrate, Court No.1, Chandpur in Chandpur Sadar Model Police Station Case No.29 dated 24.07.2011 corresponding to G.R. Case No.317 of 2011 (Sadar Thana) under section 19(1) of Table 7(Ka) of the Narcotics Control Act, 1990 convicting the petitioner under the above Section and sentencing him to suffer rigorous imprisonment for a period of 01 year and to pay a fine of Tk.1,000/-should not be set aside and /or pass such other order or further order or orders as to this Court may seem fit and proper.”

2. The prosecution case may briefly be stated as follows:-

One Head Constable Md. Nazrul Islam Bhuiyan lodged the FIR with Chandpur Sadar Model Police Station as informant alleging *inter-alia* that on 23.07.2011 while he and his companion forces were on mobile duty around the Chandpur Launch Terminal Area beside the Chandpur Madrasha, they saw a person with a load of a shopping bag in his hand and being suspicious they caught hold the person and were able to recover 4 Kg ganja kept in 5 separate polythene bags within his shopping bag in presence of local witnesses. Thereafter it has been alleged that they informed the matter to the Chandpur Sadar Police Station wherefrom one S.I Sk. Salauddin rushed to the spot and prepared a seizure list in presence of local witnesses and lodged the FIR after being returned to the Police Station. Hence is this case.

3. One SI Jahir Uddin took over the task of investigation who visited the place of occurrence and prepared its sketch map along with its index. Thereafter he recorded 161 statements of the P.Ws. On completion of the investigation, he has submitted a charge sheet against the convict-petitioner for commission of offence punishable under 9(1) table 7(ga) of the Narcotics Control Act, 1990.

4. Thereafter the case record has been transmitted to the Chief Judicial Magistrate, Chandpur who after taking cognizance of the offence transfer the same to the Senior Judicial Magistrate, Court No.1, Chandpur for purpose of holding trial.

5. The learned Magistrate framed a formal charge against the convict-petitioner after observing all the formalities and read over the same to him whereupon he pleaded not guilty of the offence and claimed to be tried.

6. In course of trial the prosecution adduced as many as two witnesses. On the other hand the defence examined none.

7. The defence as it appears from the trend of the cross-examination that the convict-petitioner is innocent and he has been falsely implicated in this case and he is victim of police conspiracy.

8. On completion of evidence the convict-petitioner again examined under Section 342 of the Code of Criminal whereupon he abjured his guilt.

9. On conclusion of trial the learned Trial Judge attributed the order of conviction and sentence as stated above.

10. Being aggrieved by and dissatisfied with such order of conviction and sentence the convict-petitioner preferred an appeal before the Sessions Judge, Chandpur who after hearing of the appeal dismissed the same. The convict-petitioner thereafter moved before this court and obtained the present Rule.

11. Mr. Amit Das Gupta, learned Advocate appearing on behalf of the convict-petitioner strenuously argued that the order of conviction and sentence is neither proper nor in accordance with law and as such the impugned order of conviction is liable to be set aside. He further adds that it was the duty of the Investigating Officer to produce the chemical report before the Court but he has not been examined in this case. He further adds that

unfortunately prosecution withheld the Investigating Officer including the seizure list witnesses and non examination this vital witness renders the prosecution case doubtful. He further adds that both the witnesses have made inconsistent and contradictory statements and as a result of which it is a case of no evidence in spite of that learned Trial Judge attributed the order of conviction and sentence mere on surmise and conjecture.

12. On the other hand, M.A. Mannan Mohan, the learned Deputy Attorney General appearing on behalf of the state strenuously argued that all the P.Ws supported the prosecution case in a harmonious voice mentioning the time place and manner of occurrence and as such the impugned judgment and order of conviction is liable to be affirmed.

13. I have heard the learned Advocate for both the parties and perused materials available on record.

14. Let me proceed to examine the evidence and other materials of the case and see therefrom as to how far the prosecution proves its case beyond reasonable shadow of doubt.

15. The informant Md. Nazrul Islam while deposing as P.W.1 stated that on 23.07.2011, he was being attached as Head Constable in Chandpur Sadar Neval Police Fary and at the time of occurrence, he was being entrusted with the task of mobile duty around the Chandpur Launch Terminal Area along with his companion forces. He further deposed that at about 20.30, they saw a person to loiter beside the pontoon of the Launch Terminal with a load of a shopping bag in his hand and they became suspicious after seeing him. Thereafter he deposed that they apprehended the convict-petitioner and was able to recover 4 Kg of ganja kept in his shopping bags. Thereafter he deposed that he informed the matter to the Police Station wherefrom S.I Salah Uddin rushed to the spot and prepared a seizure list in presence of local witnesses and returned back to the Police Station along with the convict-petitioner. He also deposed that he lodged the FIR subsequently after arrival on the Police Station.

16. None cross-examined this witness. Since the convict-petitioner was being absconded.

17. P.W.2, Constable Rafiqul Islam deposed that on 23.07.2011 he was on duty under the leadership of P.W.1, around the Chandpur Launch Terminal Area beside the Chandpur Madrasha Road. Thereafter he deposed that they saw one person to loiter around the Terminal Area and they being suspicious was able to catch hold him with a load of a shopping bag in his hand. He further deposed that they recovered 4 Kg ganja from the shopping bag of the convict-petitioner. Thereafter he deposed that his team leader informed the matter to the Police Station wherefrom S.I Salauddin prepared a seizure list in respect of recovered incriminating articles. Thereafter he deposed that their team leader returned to the Police Station and lodged the FIR. He identified the convict-petitioner on dock and produced incriminating article before the trial court.

18. None cross-examined this witness. Since the convict-petitioner was not present.

19. On perusal of the charge sheet it appears that as many as 8 persons were being named in the witness column out of which only informant and P.W.2, Constable Rafiqul Islam was being examined in this case. It further appears that the prosecution withheld the Investigating Officer and so also the seizure list witness in this case. On further perusal of the seizure list it appears that two nonlocal persons were being implicated there as seizure list witnesses. On scrutiny such point the learned Advocate appearing on behalf of the convict-petitioner

submits that the prosecution hopelessly violated the provision of Section 103 of the Code of Criminal Procedure in preparing the seizure list. He further adds that only two constables were examined in this case who were partisan and interested witness in the sense of that they are concerned in the success of their raid. He took me to a decision enunciated in the case of one Jewel and another Vs. The State reported in 5 MLR (HC) 2000, 170 wherein it has been held that:

“The law of search and seizure requires mandatorily that it should be made in presence and in the witness of respectable persons of the locality where such search and seizure are made Non-compliance with these mandatory provisions of law renders the recovery and seizure doubtful resulting in the benefit in favour of the accused. Police personnel making the alleged recovery are interested witnesses. Unless the evidence of the interested witness are materially corroborated by the local disinterested and impartial witness, it is unsafe to place reliance on the interested witness while convicting the accused. Material contradictions and omissions in the evidence of the P.Ws and non-examination of seizure list witnesses in the facts and circumstances of the case make the prosecution case not only doubtful but also render the same not proved eventually leading to the acquittal of the accused.”

20. In the instant case it is seen that no neighbouring witness being examined and also that there is no corroboration of disinterested witness in the case. It is also seen that most of the cited witnesses were being withheld by the prosecution and none cross-examined those vital witness particularly the Investigating Officer and the seizure list witnesses raises a presumption against the prosecution to the effect that had they been examined in the case they would not have supported the prosecution case and the benefit of such defect will to the accused-person.

21. Learned DAG appearing on behalf of the State strenuously argued that all those local witnesses are interested witnesses and they made obliging statements in favour of the convict-appellants with a view to save him from punishment. He further argued that whenever the seizure list witnesses made obliging statement, the Court may convict an accused solely on the basis the unimpeachable evidence of the officer who made search and seizure. In this respect he took me to a decision enunciated in the case of S.M. Kamal Vs. State reported in 6 BLC 113 wherein it has been held that:

“All the public seizure list witnesses did not support the prosecution case but when the informant as police personnel prove the prosecution case corroborated by the other police personnel who were the member of the petrol party, there is no legal bar to convict the appellant on such unimpeachable evidence of the police”

22. Let me proceed to examine the testimonies of two witnesses and see therefrom as to how far they are able to advice unimpeachable evidence. The informant while deposing as P.W.1, deposed that some people were being present at the time of search and seizure but P.W.2, have not supported the P.Ws in toto. On further perusal of the record, it appears that the seizing officer was not present at the time of recovery and as such he has no personal knowledge about the search and he only seized the articles. Over and above there is no evidence on record to the effect that some portion of those incriminating article were being sent to the chemical analyzer for the purpose of obtaining a chemical report and no such report was marked as exhibit in such case. I have no option to hold that there is doubt so as to ascertain that those incriminating articles were Narcotics or not.

23. Having considered the facts, circumstances and evidence on record the facts circumstance and evidence or record I find that it is unsafe to attribute the order of conviction towards the convict-appellant since no report of chemical analyzer was being marked exhibit in this case. Learned DAG further argued that the convict-petitioner was being inabscontion during the course of trial and the fact of such abscontion furnish a strong corroboration to the prosecution case that he is the culprit. On the other hand learned advocate appearing on behalf of the convict-petitioner took me to a decision enunciation in the case of Abul Kashem and others Vs. State reported in 56 DLR (2004), 132 wherein it has been held that:-

“Absconsion itself is not an incriminating matter inasmuch as even an innocent person implicated in a serious crime sometimes absconds during the investigation to avoid repression by the police.”

24. Thus it appears to me that abscondence of an accused in some circumstances may not be an incriminating circumstances in respect of his guilt. Learned Advocate appearing on behalf of the convict-petitioner strenuously argued that if after an examination of the whole evidence it is seen that there is reasonable possibility that the defence put forward by the accused might be true, in such a view it react on the whole prosecution case and in this circumstances the accused is entitled to get benefit of doubt not as a matter of grass but as a matter of right.

25. In the instant case I find that there are intrinsic weaknesses and blatant contradictions in the evidence of the P.Ws and the witnesses are partisans and interest witness. The learned Judge of the Trial Court has not considered the material discrepancies, contradictions and omissions of the witnesses for which an error has crept in the impugned judgment resulting in the conviction of petitioner. On consideration of the evidence on record, the convict-petitioner is held to be entitled to benefit of doubt and as such he is also entitled to be acquitted from the charge.

26. In the result, the Rule is made absolute. The impugned Judgment and order of conviction and sentence dated 08.08.2017 passed by the learned Sessions Judge, Chandpur in Criminal Appeal No.19 of 2017 is hereby set aside.

27. The convict-petitioner is found not guilty of the charge levelled against him and he and his sureties are discharged from their respective bail bonds.

28. Let a copy of this judgment along with L.C.R. be sent to the concerned court at once.