SUPREME COURT OF INDIA

Harendra Nath Chakraborty

Vs.

State of West Bengal

Crl.A.No.2086 of 2008

(S.B. Sinha and Cyriac Joseph JJ.)

19.12.2008

JUDGMENT

S.B. Sinha, J.

1. Leave granted.

2. This appeal is directed against a judgment and order dated 29.2.2008 passed by a learned Single Judge of the High Court of Calcutta allowing the appeal in part preferred by the appellant herein from a judgment and order of conviction and sentence dated 16.3.1993 passed by the learned Judge, Special Court (E.C. Act), Hooghly, West Bengal in Special Court Case No. 12 of 1991 convicting him under Section 7(1)(a)(ii) of the Essential Commodities Act,1955 (hereinafter called and referred to, for the sake of brevity, as "the Act") reducing the sentence imposed on him from rigorous imprisonment for six months and to pay a fine of Rs. 2,000/- in default to suffer R.I. for another one month to suffer R.I. for three months and to pay fine of Rs.2000/- in default to suffer R.I. for 15 days.

3. Appellant was a dealer in kerosene oil having been granted licence in terms of the provisions of the West Bengal Kerosene Control Order, 1968 (for short, "the 1968 Order") made by the State of West Bengal in exercise of its powers conferred by sub-section (1) of Section 3 of the Act read with clauses (d), (e), (h) and (j) of sub-section (2) of that Section and Section 7 (1) thereof as also the Order No. 26(11)-Com.Genl/66, dated 18th June, 1966.

4. The State of West Bengal apart from the aforementioned 1968 Order made West Bengal Declaration of Stocks and Prices of Essential Commodities Order, 1977 (for short, "the 1977 Order")

5. Indisputably, kerosene is an essential commodity within the meaning of sub-section (1) of Section 2A of the Act. For dealing in the said commodity, a licence is required to be taken under the 1968 Order. Appellant was holder of a licence bearing No. DP/64 in terms whereof he was entitled to deal in the said commodity.

6. Section 7(1)(a)(ii) provides for imposition of a penalty on a person who contravenes any order made under Section 3 with imprisonment for a term which shall not be less than three months but which may extend to seven years and shall also be liable to fine. The proviso appended thereto postulates that the court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than three months.

7. Manik Lal Das, a Sub-Inspector of Police conducted a raid in the shop of the appellant on 28.1.1991. Several irregularities were found. A first information report was lodged inter alia alleging:

> "I started physical verification of stock cum rate board stock register, cash memo book in respect of dealing of K.Oil and found opening stock of K.Oil dated 27.01.1991 as 1500 liters. According to stock register he received 200 liters of K. Oil on the same date i.e. total 1700 liters of K. Oil on 27.01.1991. Out of 1700 liters he sold 1198 liter as per cash memo dated 27.01.1991. As such the opening balance should have been 502 liters on 28.01.1991. But the Harendranath Chakraborty did not put opening balance on 28.01.1991 though he received 1000 liters of K. Oil vide cash memo No. 767, 768 dt. 28.1.1991 from distributor. During physical verification in presence of witnesses (i) Sri Ashoke Kr. Mallick S/o Shri Hardhan Mallick of Alipore, P.S. Dadpur, Dist - Hooghly (ii) Sk. Kasem S/o Late Sk. Rabin of Alipore village, P.S. Dadpore. The total stock of Kerosene Oil was found as 450 excepting sale of K. Oil 257 liters dated 28.01.1991. According to stock register and cash memo book the total stock of K.Oil should have been 1502 liters. As such there is shortage of K. Oil 795 liters."

8. He did not, however, examine himself. He seized the following articles under a seizure list in the presence of witness as well as the appellant:

> "1.One K. Oil licence No. DP/64 in the name of Shri Harendra Nath Chakraborty S/o Dinabandhu Chakraborty of village Alipore, P.S. Dadpore, Dist. Hooghly, valid upto 31.12.1991.
>
> 2. One daily stock register in the name of Sri Harendra Nath Chakraborty for K. Oil duly certified by the Inspector Food & Supply Officer containing page No.1 to 46 in which page No. 1 to 44 have been return and showing opening balance in the said stock register dated 27.01.1991 1500 liters and showing received 200 liters on 27.01.1991 and 1000 (one thousand) liters on 28.01.1991.
>
> 3. One tin made stock board of K. Oil in the name of Sri Harendra Nath Chakraborty, nothing was written.
>
> 4. One cash memo book in the name of Sri Harendra Nath Chakraborty for K.Oil commencing from memo No.1 to 1000 in which memo 1 to 477 have been written.

5. Two barrels of Kerosene Oil 200 liter in each barrel.

6. 50 (fifty) liters of Kerosene oil found in an open small drum.

7. One polythene pipe measuring 7' feet.

8. One tin made measuring pot for 1 liter.

9. One tin made measuring pot for = liter.

10. One tin made funnel."

9. Two independent witnesses, namely, (i) Ashok Kumar Mullick (P.W.1) and (ii) Sk. Kashem (P.W.2) who were examined before the Court and proved the seizure of articles during the said raid, were declared hostile. Ravindra Nath Mondal (P.W.6), Investigating Officer, however, examined himself.

All the documents as also the material objects which were seized were duly approved.

10. The learned Trial Judge formulated the following points for his consideration:

"1. Whether the accused can be indicted for non-display of stock and price list as required under para 3(2) of W.B. Declaration of Stocks and Prices of E.C. Order, 1977.

2. Whether the accused has failed to comply with the terms and conditions of the licence for dealing in kerosene oil."

On point No. 1, it was held that the stock of kerosene was not displayed on the display board. Thus, the condition No. 6 of the licence issued to him under the 1968 Order was found to have been violated. The learned Judge held:

"Onus, thus, shifts upon the accused to discharge the burden lying upon him regarding display of stock and price board as required under para 3(2) of the Order. He failed to do so. Inference, as such, can rightly be drawn against him under Section 114(g) of the Evidence Act and to conclude that the material Ext. III is nothing but the stock and rate board intended to be displayed by the accused as required under para 3(2) of the Order. On scrutiny of the said board, as the indication of the opening being found conspicuous by its absence stock of kerosene oil as well as its wholesale or retail price on the relevant date, I am of the view that the allegation against the accused that he has violated the provision of para 3(2) of the Order is well founded."

So far as point No. 2 is concerned, the learned trial Judge opined:

"It is worthwhile to see, therefore, how far the prosecution has succeeded to bring home the said charge against the accused beyond reasonable doubt. Material Ext. II is the so-called stock register produced and identified by I.O. (PW.6) before the court in the absence of non-examination of the defacto complaint. On a look at the said document it appears that the opening stock of kerosene oil in col. No. 2 remained blank nor anything was mentioned in column No.6 on 27.01.1991 as to the actual sale of kerosene oil nor column No. 7 indicated shortage of said kerosene oil nor anything was pointed out in column No. 8 as to the balance of kerosene oil, which should be drawn as opening balance on 28.01.1991. Inference, as such, can be drawn against the accused for non-maintenance of the stock register as required by a licensee. It is not unlikely to mention in this connection that PWs 1 and 2 said to be the witnesses to seizure though declared hostile vouched for the stock of kerosene oil as 502 ltrs. of kerosene oil at the shop of the accused on the relevant date and thereby lends support to the case of the prosecution regarding opening balance of kerosene oil after taking into account the sale transaction on 27.01.1991 as 502 ltrs. According to the prosecution, accused received 1000 ltrs. of kerosene oil from his distributor on 28.01.1991. This fact is borne out from the entry made in column No. 4 of Daily Stock Register (Mat. Ext. II) and thereby belies the statement of P.W. 5 (who was rightly declared as hostile) that only 400 ltrs. of kerosene oil was received during business hours. Consequently, taking into account this 1000 ltrs. of kerosene oil together with 502 ltrs. of kerosene oil as opening balance on 28.01.1991 at the shop of the accused, the figure comes to 1502 ltrs. True of course, there is no ocular testimony from the side of the prosecution barring production of cash memo regarding sale of any kerosene oil by the accused on 28.01.1991 P.W. 6 (I.O.) having admitted that he did not verify the cash memo book for the purpose of ascertaining the sale transaction on 27.01.1991 and 28.01.1991, the court is left with no cogent material to subscribe to the view of the prosecution regarding sale of kerosene oil of 257 ltrs. of kerosene oil by the accused on 28.01.1991 and in that view of the matter, it is difficult to conceive that the physical stock of kerosene oil at the shop of the accused having taken into the aforesaid sale transaction would be 795 ltrs. As opposed 450 ltrs. found on measurement. Or, more precisely, in the absence of any legal unimpeachable evidence as to the expected physical stock of kerosene oil at the shop of the accused on 28.01.1991 having taken into account the sale transaction it is difficult to see eye to eye with the version of the prosecution that the physical stock of kerosene oil was not in consonance with the expected stock. But, the fact remains as has been already pointed out that the accused did not maintain the stock register showing the opening balance and the consequence sale from the said quantity to the consumers in breach of the mandatory provision of para 12 of the order and in that view of the matter, he comes under the mischief of the provision of the said para."

It was, however, held that having regard to the fact that the Investigating Officer did not verify the cash memos, the charges brought against the appellant that the actual quantity of kerosene was found to be short by 795 liters was not proved. On the aforementioned findings, a judgment of conviction and sentence as indicated hereinbefore was recorded.

11. An appeal preferred by the appellant before the High Court was admitted only on the question of sentence. Presumably, with a view to satisfy itself as to whether a case has been made out for invoking the proviso appended to Section 7(1)(a)(ii) of the Act, the High Court also went into the matter and ultimately reduced the quantum of sentence in the manner as noticed hereinbefore.

12. Mr. Rauf Rahim, learned counsel appearing on behalf of appellant in support of this appeal would raise the following contentions:

> "i. As P.Ws. 1 and 2 who were examined as independent witnesses in their depositions categorically stated that the stock of the kerosene oil was written on the display board, the learned trial judge as also the High Court committed a serious error of law in opining that appellant had contravened condition No. 6 of the licence.
>
> ii. That the prosecution case that the stock register did not contain any entry in respect of 502 liters of kerosene oil having not been put to appellant while he was examined under Section 313 of the Code of Criminal Procedure, the judgment of conviction recorded for non- maintenance of the stock register must be held to be erroneous.
>
> iii. The complainant as also S.I. N.K. Sikder who accompanied him having not been examined, the prosecution cannot be said to have proved its case."

13. Mr. Avijit Bhattacharjee, learned counsel appearing on behalf of the respondent, on the other hand, would support the impugned judgment.

14. The prosecution case as against appellant discloses three distinct offences. The opening balance of kerosene oil as on 28.1.1991 was not mentioned in the stock register. Admittedly, appellant received 1000 liters of kerosene oil from the distributor on the same day. However, on physical verification the total stock of kerosene oil was found as 450 liters only. On that date, kerosene oil to the extent of 257 liters had been sold. Thus, although the total stock of kerosene oil should have been 1502 liters but as only 450 liters were found, there is a shortage of 795 liters of kerosene oil.

15. The learned Special Judge, as noticed hereinbefore, although found that having regard to the fact that Investigating Officer did not verify the cash memo book for the purpose of ascertaining the sale transaction on 27.1.1991 and 28.1.1991, the prosecution case that the physical stock of kerosene did not tally with the expected stock has not been proved.

16. As no appeal was preferred by the State against the said finding, the same must be held to have attained finality. The fact, however, remains and as noticed by the learned Special Judge as also by the High Court the entire prosecution case was based on documentary evidence as also the material objects, which had been seized. The seizure witnesses, namely, P.Ws. 1 and 2 might have been declared hostile, but the seizure memos had duly been

proved. The seized documents had also been proved. Appellant having been maintaining the said documents, when discrepancies occurring therein were pointed out to him it was for him to explain the same.

17. Appellant did not adduce any evidence in defence. It has not been denied or disputed that the seized kerosene oil had been put in the custody of Tapan Chakraborty, son of the appellant. He was examined as a prosecution witness as P.W. 5. Appellant also accepted the said fact. Thus, the amount of kerosene which had been seized and kept in the custody of his son has not been denied or disputed. The fact that only 450 liters of kerosene oil was found in the shop has, thus, been proved.

18. Submission of Mr. Rauf Rahim that the learned Special Judge should have specifically put the prosecution case to appellant under Section 313 of the Code of Criminal Procedure that the stock register did not contain any entry of 502 liters, in our opinion, does not appear to be correct. The prosecution case based on the basic primary material which the prosecution had brought on record, namely, raid in the shop, the stock of kerosene oil found, the seizure of the display board, stock register, cash memo, etc., had been put to him. Apart from making a bald denial that measurement had not been taken or that no measurement chart had been prepared he had not explained the discrepancies in the stock or non-display thereof. We may notice the question Nos. 6, 7 and 8 in this behalf:

> "Q-6: It appears further from the statement made by the PW-4 that having examined the oil in stock the register and the stock register it was found that there was a discrepancy of 794 (sic) liters of kerosene oil and for that the officer-in-charge seized the kerosene oil found in the shop along with the registers stock and rate bound etc., and prepared a seizure list (Ext. 1/4). What do you say in this regard?
>
> Ans.: This is not true, I am innocent.
>
> Q-7: It appears further from the statement made by the PW Nos. 3 and 4 that the seized kerosene oil was put in the custody of Tapan Chakraborty, your son (PW-5) by way of a Zimmanama. What do you say in this regard?
>
> Ans. Yes, kept.
>
> Q-8. Having taken the charge to investigate this case the PW-6 perused(?) the said registers and identified the said cash memo book, stock register and stock board respectively as the Mat. Ext. Nos. I, II and III in the Court. What do you say in this regard?
>
> Ans: Everything is in order, Sir. The stock board has not been brought."
>
> As all the material evidences brought on record by the prosecution had been brought to his notice. It has not been shown before us as to how he was prejudiced, particularly when his son was examined as a witness. He could have given his side of

the story which, according to him, could have proved his defence, on the basis of material brought on record.

Submission of Mr. Rauf Rahim that the judgment of conviction and sentence stands vitiated by reason of non-compliance of the provisions of Section 313 of the Code of Criminal Procedure, thus, cannot be accepted.

In *State of Punjab vs. Swaran Singh*[1] this Court was dealing with a matter under NDPS Act. Therein, only general questions were put to the accused. Elaborating the purpose for which an accused is required to be examined under Section 313 of the Code, it was stated:

"Apart from all these, as part of fair trial the accused is given opportunity to give his explanation regarding the evidence adduced by the prosecution. However, it is not necessary that the entire prosecution evidence need be put to him and answers elicited from the accused. If there were circumstances in the evidence which are adverse to the accused and his explanation would help the court in evaluating the evidence properly, the court should bring the same to the notice of the accused to enable him to give any explanation or answers for such adverse circumstance in the evidence. Generally, composite questions shall not be asked to the accused bundling so many facts together. Questions must be such that any reasonable person in the position of the accused may be in a position to give rational explanation to the questions as had been asked. There shall not be failure of justice on account of an unfair trial."

19. Keeping in view the facts and circumstances of this case and the nature of allegations made against appellant, we are of the opinion that no failure of justice has occasioned nor the trial was in any way unfair.

20. Reliance has also been placed by Mr. Rauf Rahim on *Vikramjit Singh Alias Vicky vs. State of Punjab*[2] wherein this Court while dealing with a case under Section 302 of the Indian Penal Code totally based on circumstantial evidence, this Court held: "It is now a well-settled principle of law that the circumstances which according to the prosecution lead to proof of the guilt against the accused must be put to him in his examination under Section 313 of the Code of Criminal Procedure."

21. The prosecution case is purely based on the documentary evidence maintained by the accused himself. In our opinion, a case of this nature where the prosecution intends to bring home the charges on the basis of the documentary evidence maintained by the accused himself cannot be equated with a case where the accused is charged with commission of an offence, the proof whereof is based on circumstantial evidence alone.

22. Furthermore, as the appeal preferred by the appellant was admitted by the High Court only on the question of sentence, neither the High Court nor this Court was required to go into the merit of the matter. We have done so inter alia on the ground that the High Court has also entered into the merit thereof. That part of the order of the High Court whereby a limited

notice was issued is not in question. The High Court having taken into consideration the entire facts and circumstances of this case reduced the period of imprisonment from six months to three months.

> "Mr. Rauf Rahim would contend that we should invoke the proviso appended to Section 7(1)(a)(ii) of the Act.
>
> The said provision can be invoked provided the Court is in a position to assign special reasons therefor. Such a case, in our opinion, has not been made out. Appellant is found to have contravened both the 1968 Order as also the 1977 Order."

23. Our attention has been drawn to a decision of this Court in *Harivallabha & Anr. vs. State of M.P.*[3]. No reason has been assigned therein. What were the special facts and circumstances of their case which persuaded their Lordships to invoke the provisions of Section 360 of the Code had not been stated.

24. In the facts and circumstances of the case, we are of the opinion that no case has been made out to invoke the proviso appended to Section 7(1) (a)(ii) of the Act particularly in view of the fact that appellant was found to have violated the provisions of both the Orders.

> "Appellant was dealing with an essential commodity like kerosene.
>
> If the Parliament has provided for a minimum sentence, the same should ordinarily be imposed save and except some exceptional cases which may justify invocation of the proviso appended thereto."

25. In India, we do not have any statutory sentencing policy as has been noticed by this Court in *State of Punjab vs. Prem Sagar & Ors.*[4]. Ordinarily, the legislative sentencing policy as laid in some special Acts where the Parliamentary intent has been expressed in unequivocal terms should be applied. Sentence of less than the minimum period prescribed by the Parliament may be imposed only in exceptional cases. No such case has been made out herein.

26. For the reasons aforementioned, the appeal is dismissed. Appellant shall surrender before the learned Special Judge for serving out the remaining sentence.

[1]*(2005) 6 SCC 101*
[2]*(2006) 12 SCC 306*
[3]*(2005) 10 SCC 330*
[4]*2008 (9) SCALE 590*