

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION**

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Suvra Ghosh

**D.R.6 of 2016
In C/W
C.R.A.440 of 2016**

**State of West Bengal
-Vs-
Ansar Rahman @ Ramesh Giri & Anr.**

**For the Appellants/
Convicts** : Mr. Jayanta Narayan Chatterjee,
Mr. Apalak Basu,
Ms. Moumita Pandit,
Mr. Indrajeet Dey,
Mr. Jaysree Patra.

For the UOI : Mr. Jiban Kumar Bhattacharyya,
Mr. Uttam Basak.

For the State : Mr. Arun Kr. Maity, Id. A.P.P.,
Mr. Sanjoy Bardhan.

Heard on : 26th November, 2019

Judgment on : 26th November, 2019

Joymalya Bagchi, J. :-

Criminal appeal and the death reference case are taken up for hearing analogously.

By judgment and order dated 7th and 8th April, 2016, the learned Additional District and Sessions Judge, 6th Court, Barasat, North 24-Paraganas in N. D. P. S. Case No.N-177/2002(505/2014) convicted the appellants for commission of offence punishable under Section 21(C) of N. D. P. S. Act and sentenced appellant Ansar Rahman @ Ramesh Giri to be hanged by neck till

death and appellant Dipak Giri to suffer rigorous imprisonment for 30 years and to pay a fine of Rs.3 lakhs in default to suffer rigorous imprisonment for one year more.

The prosecution case, as alleged against the appellants is as follows:-

Acting on specific information which was reduced into writing and upon intimation to superior officer, a batch of officers and staff attached to NCB EZU Kolkata on 3.10.2002 at 8.10 hours lay in ambush in front of SA-84, Sector-II, Salt Lake City. After sometime a person came out from the rented premises with a bag in his hand. Initially the person sought to camouflage his identity but on query disclosed his name as Ansar Rahman @ Ramesh Giri. Officers expressed their desire to search him and gave a written offer that he had right to be searched before a Magistrate or a Gazetted officer. Ansar Rahman agreed to be searched before a gazetted officer of the department. Accordingly, P.W.5, Assistant Director, N.C.B. was summoned to the spot and the suspect agreed to be searched in his presence. Relations of the landlady of S.A.84 Sector-II, Salt Lake City also came to the spot and were requested to witness the search. Secretary, P.W.10 of the local ward committee was also requested to be witness at the time of search. In the course of search 3.5 kgs. of brown coloured substance suspected to be heroin was recovered from the bag carried by the said person. The substance tested positive to heroin. Two mobile phones were recovered from his possession while Indian currency of Rs.16,000/- was recovered from the rented premises. A maruti 800 vehicle bearing Registration No.WB-20B-1032 was also seized as proceeds of crime. Upon interrogation appellant Ansar Rahman admitted that he was running the business in heroin from the rented premises which was tenanted in the name of Rupa Giri, wife of Dipak Giri, his associate. As a follow up action, officers of NCB also raided

another rented premises at AJ-181, Sector-II, Kolkata-91 which was under the possession and control of Dipak Giri. From the said room 50 kgs. of heroin in two separate nylon sacks and 24 different documents were seized. Two samples of 5 grams each in duplicate were drawn from both the sacks which were labelled and sealed. A scooter bearing Registration No.WB-01A-3317 was also seized. Pursuant to notice under Section 67 of the N.D.P.S. Act, Ansar Rahman admitted his guilt and also disclosed involvement of appellant Dipak Giri in the crime. It appears that Ansar Rahman and Dipak Giri had been convicted on earlier occasion with regard to possession of narcotic substance. In the course of investigation, statement of Rupa Giri was recorded under Section 67 of N.D.P.S. Act and she disclosed that Dipak Giri was admitted at CMRI, Kolkata. Officers of NCB along with Rupa Giri and Kanailal Dutta (PW 9), landlord of premises AJ-181, Sector-II, Salt Lake City, Kolkata went to the hospital and statement of Dipak Giri was recorded under Section 67 of the N.D.P.S. Act. In the said statement Dipak Giri admitted that he was a tenant in the aforesaid premises and was carrying on business in heroin along with Ansar Rahman. He also disclosed roles of Bhagwan Singh, Bhairo Singh and one Ashok of Rajasthan in the said activity. Investigation was conducted with regard to the roles of the said persons and upon receipt of chemical examiner's report, P.W.1, Hembrata Bose, Intelligence of NCB, EZU, Kolkata lodged petition of complaint, Ext.1 against the appellants and other accused persons. Charges were framed against the appellants and one Dilip Das, Ansar Rahman @ Ramesh Giri, Ahrul Sk. @ Ahu @ Yahoo and Dipak Giri under Section 29 read with Section 21(C) of the N.D.P.S. Act. The accused persons pleaded not guilty and claimed to be tried.

In course of trial, prosecution examined ten witnesses and exhibited a number of documents. In conclusion of trial, learned trial judge while acquitting the co-accused Dilip Das and Aharul Sk., convicted and sentenced the appellants, as aforesaid. As appellant Ansar Rahman @ Ramesh Giri had been sentenced to death, death reference No.6 of 2016 came to be instituted before this Court. The appellants have filed criminal appeal No.440 of 2016 against their conviction and sentence. The appellants being unrepresented in the aforesaid appeal, Mr. Jayanta Narayan Chatterjee, learned Counsel attached to West Bengal Legal Services Authority was requested to represent the appellants. Member Secretary, Legal Services Authority is requested to regularize his appointment.

Mr. Chatterjee, learned Counsel argued that the offer given to Ansar Rahman under Section 50 of the N.D.P.S. Act is not in accordance with law and, therefore, seizure of 3.5 kgs. of heroin from his possession is vitiated in law. No independent witness has been examined to prove the recovery. P.W.9, Kanailal Dutta did not identify the appellant Dipak Giri in Court and it cannot be said that Dipak Giri was in exclusive possession of the tenanted premises from which narcotic substance was recovered. Evidence has come on record that the tenanted portion was not under lock and key and thus exclusive possession of Dipak Giri who was at the material point of time was being treated in a hospital for serious ailments cannot be said to be proved beyond doubt. The appellants have denied making statements under Section 67 of the N.D.P.S. Act during their examination under Section 313 of the Code of Criminal Procedure and hence the said statements cannot be used as corroborative evidence to establish the crime. He accordingly prayed for acquittal of the appellants.

On the other hand, learned Counsel appearing for the NCB argued that search and seizure of 3.5 kgs. of heroin from Ansar Rahman and 50 kgs. of heroin from the rented house under the control and occupation of Dipak Giri have been proved beyond doubt. Heroin was recovered from Ansar Rahman from a bag carried by him in his hand and, therefore, search was conducted in terms of Section 43 of N.D.P.S. Act and did not attract the requirements of Section 50. Appellant Dilip Das admitted during his examination under Section 313 of the Code of Criminal Procedure that he was in control and occupation of the rented room from where 50 kgs. of heroin was recovered. Conviction of the appellants, therefore, does not call for interference. Ansar Rahman had been convicted for possession of narcotic substance above commercial quantity on two occasions. Death penalty imposed on him on earlier occasion had been commuted to 15 years of imprisonment. In spite of commutation, Ansar was unrepentant and was convicted for the third time. Hence, awarding of maximum penalty of death upon him is justified. He referred to ***Bachan Singh Vs. State of Punjab***, reported in ***1982 (3) SCC 24***, and argued that the conduct of the appellant clearly shows that there is no chance of his reformation and death penalty ought to be awarded in the facts of this case as a deterrent to prevent commission of similar offences involving trafficking in narcotic substance which has extremely deleterious impact on society particularly the youth.

Prior to dealing with evidence on record it may be apposite to refer the charge framed against the appellants. The charge reads as follows:-

“That you, on or about the 3rd day of October, 2002 at about 08.10hrs. the N.C.B. Officers recovered 3.5 kgs. of Heroin from the possession of one Anser Rahman and thereafter for the follow up-action the NCB officers further recovered 50kgs. of heroin from a rented house at A-J-181, Salt Lake which is under control of one Dipak Giri as Dipak Giri in connivance with Anser Rahman, co-accused of this case used to deal with those unauthorized heroin. It is

further alleged that you were well connected with the clandestine deal of heroin with those 2 persons, namely Anser Rahman and Dipak Giri as you used to purchase heroin from them illegally violating the provisions of Section 8 of the N.D.P.S. Act.”

Contents of the charge gives an impression that the prosecution case is based on recovery of heroin at two different places. Firstly, 3.5 kgs. of heroin was recovered from Ansar Rahman in front of premises no. SA 84, Salt Lake City, Sector-II, Kolkata and thereafter from the rented premises of Dipak Giri 50kgs. of heroin was recovered. The trial court has jumbled up both the recoveries which are clearly separate and distinct from one another although they may have occurred in the course of same transaction. Under such circumstances, it was incumbent on the Trial Judge to frame separate heads of charge with regard to each of the recovery indicating identity of the accused from which such recovery was made and the time and place of such recovery. Learned trial judge has singularly failed to do so and has framed a jumbled up charge combining both the recoveries together. A senior judicial officer conducting a criminal trial which culminated in awarding of death penalty on one of the convicts ought to be more circumspect and cautious in conducting trial particularly in the matter of framing of charge against the accuseds. Framing of charge is not an empty formality but a solemn act of the court to lay down the contours of the accusation to an accused so that he fully understand such accusation and is able to prepare his defence to the same. However, I am not unmindful of the fact that merely because the trial judge had prepared a jumbled up charge the accused persons cannot be given a reprieve unless it is shown that such exercise had prejudiced them and had occasioned a failure of justice. In this regard one may gainfully refer to Section 464 of the Code of Criminal Procedure.

Examining the proposition from that perspective, I conclude from an analysis of the extensive cross-examination resorted at the behest of the accused persons including their responses during examination under Section 313 of the Code of Criminal Procedure that notwithstanding the aforesaid irregularities in the framing of charge the accused persons were fully aware of the accusation levelled against them and had effectively defended themselves by cross-examining witnesses and replying to questions posed to them under Section 313 of the Code of Criminal Procedure. Hence, I hold that the aforesaid charge though framed in a jumbled up manner and not in a strict compliance of Section 218 of the Code of Criminal Procedure has neither caused prejudice to the appellants nor has occasioned any failure of justice. However, I hasten to add that in cases involving capital sentence, the trial judge conducting the trial ought to be most careful and cautious while framing charges so that it does not give an impression that he conducted the proceeding in a cavalier manner with scant regard to the cherished fair trial rights of the accused.

Now, I turn to the evidence recorded in support of the prosecution case.

PW 8 is the leader of the raiding party. On 02.10.2010 he received information that one Ansar Rahman of SA-84, Sector II, Salt lake, Kolkata was dealing in heroin. He also received information that Ansar Rahman stored heroin in another flat. Source informed him that on 03.02.2002 at around 8 am Ansar Rahman would deliver 3.5 kgs heroin to another customer. He recorded the information in writing (Ext. 45) and informed the Zonal Director over phone. On the next day, Zonal Director issued movement order with regard to the aforesaid information. He constituted a team of NCB officers with sepoy, driver and lady sepoy and at 7/7:30 am they left the office and reached SA-84, Sector II, Salt lake, Kolkata to work out the information. After sometime, a person

came out from the said premises with a side bag. They intercepted the said person who initially disclosed his name as Ramesh Giri. After further enquiry he admitted his name as Ansar Rahman. He also admitted that he was proceeding to supply heroin. He was given option to be searched in presence of a gazetted officer or a magistrate. He replied that he was willing to be searched before a gazetted officer of the department. A gazetted officer namely Amitabha Hore (PW 5), Assistant Director of NCB was summoned. He arrived at the spot at around 8.30 am. They requested brothers and sister of the landlady who had come to the spot to witness the search. Upon search a polythene bag containing some brown coloured powder like substance and two mobile phones were recovered from the bag. On searching the flat a sum of Rs.16,000/-, driving licence, credit card and other documents were recovered. Samples were taken from the seized contraband. The samples were properly sealed and labelled at the spot. Seizure list prepared with regard to the seizure was marked as exhibit 37. A Maruti Delux 800 vehicle bearing registration No.WB-02B/1032 was also seized. On interrogation Ansar Rahman disclosed that he had another flat at AJ-181, Sector II, Salt Lake. The said premises was under the possession of his associate Dipak Giri. Dipak Giri was a tenant in the first floor of the said premises under Kanai Lal Dutta (PW 9). They arrived at the said premises. Kanai Lal Dutta identified the flat which was under the occupation of Dipak Giri. Door of the flat was not locked. Ward Committee Member of the locality Nandadulal Barman (PW 10) also came to the spot. From the said premises 50 kgs of heroin was recovered in two bags. A scooter bearing registration No. WB01A3317 was also seized. Notice was issued under Section 67 of the NDPS Act upon Ansar Rahman. Pursuant to the notice he arrived at the NCB office and voluntarily confessed his guilt and involvement of Dipak Giri. He admitted

that he had been convicted for possession of 1 kg. of Heroin and 47 Kg. of ganja. Subsequently, he was again convicted along with Dipak Giri for possession of 2 kg. of heroin. Original agreement of leave and licence in respect of AJ-181, Sector II, Salt Lake was proved and marked as Exhibit 44. Voluntary statement of Rupa Giri, wife of Dipak Giri, was recorded on 08.10.2010. She disclosed Dipak Giri was admitted at CMRI Hospital, Kolkata in injured condition. PW. 8 along with Rupa and Kanai Lal Dutta (landlord of the premises no. AJ-181, Sector II, Salt Lake) went to the hospital and statement of Dipak Giri was recorded under Section 67 of the NDPS Act. Dipak Giri admitted his guilt. After release from hospital Dipak Giri was produced in Court. From the statement of Ansar Rahman role of other accused persons namely Bhagwan Singh, Bhairo Singh and one Ashok of Rajasthan transpired complicity of co-accused Dilip Das and Aharul Sk also transpired during investigation. Prayer for certification of alamat under Section 52A was allowed by Court.

P.W. 2 proved the seizure list relating to the seizure of 50 kgs of heroin at AJ, 181 Salt Lake City, Sector II. Ext 2, weighment chart Ext. A and rough sketch map Ext. 3 of the said place of occurrence.

Evidence of P.W 2 and 8 have been corroborated by other members of the raiding party namely P.W 3, 6 and 7.

PW 5 Amitava Hore, the then Assistant Director, NCB who was summoned at the spot as gazetted officer has also supported the prosecution case with regard to the recovery of 3.5 kgs of heroin from the bag carried by Ansar Rahman as well as the recovery of 50 kgs of heroin from the tenanted apartment of Dipak Giri at AJ, 181 Salt Lake City, Sector II. PW 9, Kanailal Dutta, landlord of 181 Salt Lake AJ Block has proved his signatures on the seizure list as well as on the agreement executed by him in favour of Dipak Giri.

Similarly, PW 10, Nandadulal Barman, Secretary of Ward Committee, who was present at the spot, has proved his signature on the seizure list with regard to the recovery of 50 kgs of heroin from the aforesaid tenanted apartment of Dipak Giri at premises AJ, 181 Salt Lake City, Sector II.

P.W.4 has proved the chemical report (Ext 30, 34 35 and 36 respectively) stating that samples examined by him contained heroin.

From the aforesaid evidence it appears pursuant to a source information which was diarised and exhibited as Ext 45. P.W 8 and his team held ambush in front of premises SA 84, Sector II, Salt Lake in the morning of 3.10.2002. After sometime, they intercepted appellant Ansar Rahman who came out of the said premises on the suspicion that he was carrying heroin. He was intimated of his right to be searched before a gazetted officer or a magistrate and he opted to be searched before a gazetted officer of the department. P.W 5 Amitava Hore, Assistant Director of NCB was requested to come to the spot. In his presence 3.5 kgs of heroin was recovered from a bag carried by the appellant. Subsequently, the appellant responded to notice under section 67 of the NDPS Act and his voluntary statement (Ext 58) was recorded wherein he admitted his guilt. He also disclosed the role of co-accused Dipak Giri in the crime. First floor of AJ, 181 Salt Lake City, Sector II which was under the tenancy of Dipak Giri was raided and 50 kgs heroin in two bags was recovered from the said premises. Tenancy agreement in favour of Dipak Giri was proved by the landlord P.W 8. Voluntary statement of Dipak Giri (Ext 10) was also recorded in the course of investigation. The aforesaid evidence on record of the prosecution witnesses have remained unshaken in cross-examination. It has been argued that recovery of 3.5 kgs of heroin from Ansar Rahman is not supported by independent witnesses. Although statements of independent witnesses namely

Barun Basak, Utpal Basak and Mina Basak were recorded under section 67 of the NDPS Act and were exhibited as Ext. 21, 22, 23 and 24, none of the witnesses were examined during trial. However, consistent version of the prosecution witnesses appear to find corroboration from the voluntary statement of the appellant Ansar Rahman (Ext. 58) in the present case. Ansar has not retracted his statement in the course of trial. Hence, I am of the considered opinion that non-examination of the independent witness in the factual matrix of the case does not affect its veracity. It has also been argued that seizure of 3.5 kgs of heroin from Ansar Rahman was not in terms of section 50 of N.D.P.S. Act. I am unable to accept such defence contention for the following reasons. Firstly, narcotic was recovered from a bag carried by the appellant in a public place under section 43 of N.D.P.S. Act and not pursuant to a search of his body in terms of section 50. Notwithstanding such fact by way of abundant caution offer was given to the appellant to be searched before a gazetted officer or magistrate and he agreed to be searched before a gazetted officer of the department. Accordingly, search was effected in presence of gazetted officer (PW 5).

Dipak Giri during his examination under section 313 Cr.P.C. admitted that he was a tenant under P.W 9. P.W 9 proved the tenancy agreement between himself and Dipak Giri in premises no. AJ-181, Sector II, Salt Lake where 50 kgs. of heroin was seized.

Although Dipak Giri made a desperate plea to resile away from his voluntary statement (Ext. 10) during his examination under section 313 Cr.P.C. I give little credence to such belated retraction and that too when the said accused had admitted during such examination his possession and control of

the rented apartment at AJ, 181 Salt Lake City, Sector II from where the recovery had been effected.

Hence, there is no doubt that Dipak Giri was a tenant of the apartment from where 50 kgs of heroin was recovered.

In the light of the aforesaid discussion, I hold possession of 3.5 kgs heroin from appellant Ansar Rahman and 50 kgs of heroin from the rented apartment of Dipak Giri have been proved beyond doubt. Accordingly, conviction of the appellants under section 21C) read with section 29 of the N.D.P.S. Act is upheld.

It has been argued that appellant Ansar Rahman was convicted for possession of heroin above commercial quantity on two occasions and therefore death sentence was rightly awarded upon his conviction in the present case. Deterrence is one of the avowed objects of penology and commutation of such sentence would defeat the legislative intent adumbrated in section 31A of N.D.P.S. Act.

Section 31A provides for awarding death penalty in certain cases.

The provision, inter alia, provides in the event an accused is convicted for possession of heroin involving commercial quantity, upon his subsequent conviction for possessing heroin weighing 1 kg or more, he shall be punished with punishment which shall not be less than the period specified in section 31 or death.

Section 31 of the Act provides for imposition of punishment for term which may be extended one and half times of the maximum term of rigorous imprisonment as well as fine which may be imposed for commission of an offence under the Act in case of second or successive conviction.

No doubt, appellant Ansar Rahman had been convicted for possession of heroin above commercial quantity on two occasions. On one occasion he was sentenced to death by the trial Court vide judgment and order dated 24.11.2005 (Exhibit-41). Upon appeal, the High Court commuted the death sentence and directed him to suffer rigorous imprisonment for 15 years. Prior to such conviction, he had been convicted in ST No. 3 (4) of 1988 for commission of similar offence. Hence, there is some substance in the argument of the learned counsel for NCB that the appellant Ansar Rahman @ Ramesh Giri has criminal antecedents and has a definite propensity to recidivism.

In **Bachan Singh (supra)** the Apex Court held that prior to awarding death sentence a balance sheet of aggravating and mitigating circumstances is to be made to come to a conclusion whether the possibility of rehabilitation and reformation of the convict is wholly foreclosed and there is no other alternative but to impose death sentence upon him.

I have sought to embark on such exercise in order to come to a conclusion whether all other alternative possibilities are foreclosed and the Court has no option but to impose death penalty.

Aggravating factors which are evident from the case are as follows:-

- (a) Ansar Rahman has been convicted on two occasions for possession of narcotic substance above commercial quantity.
- (b) In 2005 he was awarded death sentence under section 31A of NDPS Act which came to be commuted by the High Court and he was sentenced to suffer rigorous imprisonment for 15 years.
- (c) In spite of such reprieve, he has committed similar offence in the present case clearly disclosing his involvement as a member of an organized racket dealing in narcotic substance.

- (d) In view of his criminal antecedents, Ansar Rahman appears to have a pronounced propensity to recidivism and he does not appear to show any indication of reformation notwithstanding commutation of his earlier death penalty.

Mitigating factors on the other hand are as follows:-

- (a) Appellant Ansar Rahman is aged above 75 years.
- (b) Nature and circumstances in which the crime was committed completely rules out his possibility of committing similar offence if he is kept in correctional home for such period which would effectively rule out any possibility of release at a time when he may be active to commit similar offences.
- (c) No material has been led by prosecution to show that during his incarceration the appellant had indulged in any criminal or violent activities or had exhibited any potentiality to commit or abet commission similar offence from the correctional home.

Balancing the aforesaid aggravating and mitigating circumstances particularly the advanced age of the appellant, I am of the considered opinion imposing the alternate sentence to rigorous imprisonment upto 30 years would rule out any real possibility of the appellant indulging in similar offence upon his release from correctional home in future.

Imposition of death penalty on the appellant may or may not deter others from committing similar crimes in future. However, no statistical data or empirical study has been placed before me on behalf of the prosecution to conclusively establish that imposition of death penalty would definitely lead to reduction of crime committed by others in society. In the absence of clear and unequivocal evidence with regard to the deterrent impact of death penalty on

crime statistics, I am loath to impose the extreme penalty of death when the alternative sentence of rigorous imprisonment of 30 years and that too without any possibility of remission in the light of the bar engrafted in section 32-A of NDPS Act would serve the purpose of proportionate penology by eclipsing any real possibility of recidivism on the part of the convict.

In the light of the aforesaid discussion, I am inclined to modify the sentence imposed on appellant Ansar Rahman @ Ramesh Giri and direct that he shall suffer rigorous imprisonment for 30 years and pay a fine of Rs. 3,000,00/- (Rupees three lakh only) and in default to suffer rigorous imprisonment for three years more.

Sentence imposed on appellant Dipak Giri, however, is upheld.

With the aforesaid modification as to sentence appeal is disposed of.

Death reference is discharged.

Copy of the judgment along with L.C.R.s be sent down to the trial court at once.

Urgent Photostat Certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

I agree.

(Suvra Ghosh, J.)

(Joymalya Bagchi, J.)