

Biswanath Sahoo Vs. State

Biswanath Sahoo Vs. State

SooperKanoon Citation : sooperkanoon.com/526328

Court : Orissa

Decided On : Jan-10-2002

Reported in : 93(2002)CLT327; 2002CriLJ2254; 2002(I)OLR316

Judge : B. Panigrahi, J.

Acts : Bihar and Orissa Excise Act, 1915 - Sections 45 and 47; [Code of Criminal Procedure \(CrPC\), 1973](#) - Sections 401

Appeal No. : Criminal Revision No. 151 of 1996

Appellant : Biswanath Sahoo

Respondent : State

Advocate for Def. : G.K. Mohanty, Addl. Govt. Adv.

Advocate for Pet/Ap. : B. Senapati, Adv.

Disposition : Application allowed

Judgement :

B. Panigrahi, J.

1. In this revision petition, the petitioner has assailed the order of conviction and sentence passed by both the courts below in a case registered under Section 47(a) of the Bihar & Orissa Excise Act;

2. The short history of the prosecution case is as follows :

That on 30th May, 1993 at about 4.00 P.M. while the Sub-Inspector of Excise (E.E. & E.B.), Berhampur along with his staff was performing patrol duty at village Luchapada, they saw the appellant selling i.d. liquor in an one-roomed house. The petitioner had bolted the house from inside and through the widow he was selling the i.d. liquor. At that juncture the Excise staff conducted a raid to the premises in presence of the witnesses. The S.I. of Excise searched the house and recovered two plastic jerricans - one containing 20 litres and the other containing 17 litres of i.d. liquor. They also seized a glass-tumbler smelling liquor and cash of Rs. 32/- collected as the sale proceeds of the liquor. The S.I. of Excise tested the contents of the plastic jerricans by litmus paper and hydrometer instrument. Since the petitioner was in illegal possession of the i.d. liquor, the S.I. of Excise accordingly filed a prosecution against the petitioner and the proceeding started against him ultimately culminated with his conviction and the learned J.M.F.C., Berhampur sentenced him to undergo R.I. for 8 months and to pay a fine of Rs. 500/-, in default to undergo R.I. for one month. The petitioner having been aggrieved with the affected by the order of conviction and sentence preferred an appeal before the learned Sessions Judge, Berhampur which was registered as Criminal Appeal No. 185/93 and it was eventually transferred to the Court of 2nd Addl. Sessions Judge, Berhampur and renumbered as Criminal Appeal No. 78/94. The findings of the learned appellate court did not yield any other result than confirming the order of the learned trial court. Therefore, the petitioner being undeterred by the conviction and sentence passed by both the Courts below has filed this case.

3. Mr. Senapati, learned Advocate appearing for the petitioner has raised the following points in support of his argument.

(i) The prosecution has miserably failed to prove that the alleged i.d. liquor has been recovered from the possession of the petitioner;

(ii) The S.I. of Excise did not have requisite and essential qualification to conduct the test of i.d. liquor and, therefore, the observation made by him should not have been accepted by both the courts below :

(iii) Independent witnesses although available have not been examined by the prosecution, therefore, the trial court should not have believed the seizure of i.d. liquor from the possession of the petitioner.

4. Mr. Mohanty, learned Addl. Govt. Advocate while supporting the judgment has advanced the following contentions :

(i) The prosecuting agency is not obliged to produce all the witnesses to the seizure. In case it has proved the seizure from the possession of the accused through the evidence of official witnesses and their evidence is credible and trustworthy, in such backdrop it is not obligatory on the prosecution to multiply the number of witnesses by producing the so-called seizure witnesses; and

(ii) The Excise officer in this particular case had varied, expansive and sufficient experience in the field. Even a lay man can know the object to be an i.d. liquor from the smell itself. In that event the S.I. of Excise, who have had experience for past several years can better opine whether the material seized could be i.d. liquor or not. In this particular case both the courts below having found that the material seized from the possession of the petitioner was i.d. liquor, it would be futile on the part of the petitioner to raise the question at this revisional stage that the said material was not i.d. liquor having been recovered from his possession.

5. While examining the submissions and counter submissions as advanced by the learned counsel for both parties, I have gone through the judgments of both the courts below. In this particular case apart from the evidence of the official witnesses, namely, P.Ws. 1 and 2, no other witness had been examined nor any other explanation had been offered by the prosecution as to why they failed to produce the independent witness. The place wherefrom the seizure was made was very close to the road and possibly there must be many passers-by crossing the village road. P.W. 1, who carried on the seizure, also deposed about presence of one independent witness. In such background I am at a loss to understand as to why the prosecution did not choose to examine him.

6. It is true that P.W. 1 had gained some experience as an Excise Officer, but that would not be sufficient to come to the conclusion whether the seized material was-

an i.d. liquor or not. It does not conform to the test as prescribed under Section 47(a) of the Bihar & Orissa Excise Act read with Section 45 of the Evidence Act. For getting expertise knowledge one has to have sufficient special training, then only, one can opine whether the material seized was an i.d. liquor or not. In this connection there are several decisions of this Court in one of which I was a party which is reported in 77 (1994) CLT 944 (Bisam Harijan V. State of Orissa) basing on the judgment previously held by this Court in the case of Suma Das v. State of Orissa : 1993 (6) OCR 612. In Bisam Harijan's case it has been held:

'The reason by the evidence of such experienced and specially trained officer should have far reaching effect, is that he is an expert on the subject. His testimony gains importance as that of an expert evidence under Section 45 of the Evidence Act. The section requires, inter alia, that the opinion of only person specially skilled in the relevant science or art is acceptable as expert evidence. Therefore, it is the duty of the prosecution to establish that the Excise official has had special skill which may be resultant upon specially trained in the line. Mere statement of an officer that he has put in service for number of years would not ipso facto qualify him as an expert unless it is further shown that he has been specially trained for this purpose or has acquired skill in the matter so that he would be rightfully called an expert.'

Therefore, it is no longer res Integra. Since this aspect of the case has not been considered by both the courts below, although in exceptional circumstances this court should interfere in the case of conviction, yet I feel it obligatory on my part to go into the details of the facts of the case and upset the findings of both the courts below.

7. Accordingly, I allow the revisional application and set aside the orders of conviction and sentence passed by both the courts below under Section 47(a) of the Bihar & Orissa Excise Act. The bail bond furnished be treated as cancelled.