

Jadumani Sahu Vs. State

Jadumani Sahu Vs. State

SooperKanoon Citation : sooperkanoon.com/531356

Court : Orissa

Decided On : Jun-27-1997

Reported in : 1997(II)OLR141

Judge : P.K. Misra, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 42(1), 42(2) and 55

Appeal No. : Criminal Appeal No. 376 of 1992

Appellant : Jadumani Sahu

Respondent : State

Advocate for Def. : Addl. Standing Counsel

Advocate for Pet/Ap. : B.K. Sahu, P.K. Sahu, G.R. Sahu and A. Jena

Disposition : Appeal allowed

Judgement :

P.K. Misra, J.

1. The appellant has been convicted under Section 18 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the 'N.D.P.S. Act') and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.

1,00,000/- in default, to undergo further rigorous imprisonment for five years.

2. As per the prosecution case on 9.8.1991 while P.W.5 the Sub-Inspector of Excise was patrolling along with other officials in village Iswarpur, he received information that accused Jadumani Sahu was in possession of huge quantity of opium. Immediately, thereafter, the excise staff searched the house of the accused and from the second bed room under the cot opium was seized. After weighing, samples were drawn and on completion of investigation prosecution report was submitted.

3. The plea of the accused was one of denial and it was stated that the house from which the contraband articles were seized belonged to Kulamani Sahu, an agnatic relation of the accused and not to the accused.

4. During the trial, six witnesses were examined on behalf of the prosecution, of whom P.Ws.3 and 5 are respectively the Asst. Sub-Inspector of Excise and Sub-Inspector of excise, who participated in the search and seizure whereas P.W.6 is an Inspector of Excise, who is a formal witness. P.W.4 is the Revenue Inspector who assessed and demarcated the land. P.Ws.1 and 2 are the two independent witnesses who had witnessed the search and seizure. However, both of them did not support the prosecution case and were permitted to be cross-examined by the prosecution. Relying upon the evidence of P.Ws.4, 5 and the seizure witnesses and the spot map prepared by P.W.4, the trial Court held that the case from which the opium was seized under the possession of the accused and, accordingly order of conviction was passed.

5. In this appeal it was first contended by the learned counsel for the appellant that there has been violation of Section 42(1) of the A.D.P.S. Act and in support of such contention the learned counsel for the appellant has relied upon a decision of the Supreme Court reported in (1994) 7 OCR (SC) 283 State of Punjab v. Balbir Singh and Ors., as followed by several decisions of Orissa High Court reported in (1996) 11 OCR 130 Surendranath Mohanty and Anr. v. State of Orissa and (1996) 11 OCR 487 Suresh Kumar Sahu v. State of Orissa. It is contended that as per the prosecution case, the Excise Inspector proceeded to search the house after receiving information that opium had been kept by the accused. As per Section

42(1) such information ought to have been taken down in writing and a copy should have been sent to the immediate superior forthwith, as envisaged under Section 42(2) of the N.D.P.S. Act. Both P.Ws.3 and 5 have stated that search was effected after information was received to the effect that the accused was dealing with narcotic drugs in the house and as such it was obligatory for the excise officials to take down such information in writing before proceeding to search the house and before effecting the seizure. As observed by the Supreme Court in the decision reported in (1994) 7 OCR (SC) 283 (supra) and as per a catena of decisions following the said Supreme Court decision, the provisions of Section 42 are mandatory. There is absolutely no material on record that the information received had been taken down in writing. In such view of the matter, in view of breach of the mandatory provisions of Sections 42(1) and 42(2) of the N.D.P.S. Act. I have no other alternative than to hold that the trial was vitiated and the applicant is entitled to be acquitted on this ground alone.

6. The appellant in his statement under Section 313, Cr.P.C. had categorically taken the plea that the house from which the contraband articles were seized did not belong to him P.W.1, a co-villager and seizure witness, has stated that excise staff and officials had gone inside the house of Kularnani Sahu, who is an agnatic relation of the accused. Of course, the said witness has been cross-examined by the prosecution. Evidently, P.Ws.3 and 5 do not have any personal knowledge regarding the ownership of the house from which the contraband articles had been seized. The Revenue Inspector along with the Amin had gone to the spot and prepared a map from which it appears that the disputed house in question stood on Plot No. 1103 which is jointly recorded in the names of Ramamani Sahu, Lokanath Sahu, Bhikari Sahu, Jadumani Sahu and Surendra Sahu. When the land was jointly recorded in the name of several persons, prosecution should have given specific evidence to indicate about the actual possession of the disputed house by examining the co-sharers and co-villagers of the accused. The doubt regarding possession over the disputed house becomes crystallised by the fact as per the evidence of P.W.4 there is a house adjacent plot No. 1104 belonging to the accused. From the state of evidence on record, it is not possible to come to a definite conclusion that, in fact, the present appellant was in exclusive possession of the house from which the recovery had been made. In such view of the matter,

it is difficult to hold that, in fact, the contraband articles had been seized from the exclusive possession of the present appellant so as to fasten the liability.

7. As per the evidence of P.W.3, after recovery of the articles he took two samples and kept them in sealed cover. One of the samples was subsequently sent by him to the Chemical Analyst. He has admitted in his evidence that the sample along with the seal remained with him for two weeks when he sent the samples to the Chemical Analyst. Neither the seized articles nor the samples had been produced before the Magistrate when the accused was produced. As per Section 55 of the Act, the seized articles should have been kept under the custody of the Officer-in-charge of the nearest police station. When the articles seized and the samples and the seal remained all through with P.W.3 and there was every possibility of tampering, it cannot be said that the sample which was sent for chemical analysis was, in fact, the sample drawn from the seized articles. As observed by the Supreme Court in the decision reported in A.I.R. 1994 S.C. 117 Valsala v. State of Kerala, which has been followed by several decisions of this Court reported in (1994) 7 OCR 108 Laxmidhar Mohapatra v. State of Orissa, (1994) 7 OCR 445 Ajay Kumar Naik v. State of Orissa and (1996) 11 OCR 487 (Supra.). In the absence of clear evidence regarding the safe custody of the articles seized and the samples it would be hazardous to convict the accused persons.

For all the aforesaid reasons, the appeal is allowed and the order of conviction and sentence is set aside.