

Manoj Kumar Basantray Vs. State of Orissa

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Court : Orissa

Decided On : Jul-31-2007

Reported in : 2007(II)OLR313

Judge : Pradip Mohanty, J.

Appellant : Manoj Kumar Basantray

Respondent : State of Orissa

Advocate for Pet/Ap. : Mr. B. S. Mishra

Disposition : Appeal allowed

Judgement :

Pradip Mohanty, J.

1. This appeal is directed against the judgment and order dated 21.01.1987 passed by the learned 1st Addl. Sessions Judge, Cuttack convicting the appellant and the co-accused under Section 21 of the N.D.P.S. Act and sentencing each of them to undergo rigorous imprisonment for ten years and to pay a fine of rupees one lakh in default to undergo further rigorous imprisonment for two years in G.R. Case No. 730 of 1998/22-T/98.

2. The case of the prosecution is that on 28.07.1998 P.W.5. Upendra Nath Sahoo, Inspector, C.I.D., C.B., received reliable information from his source that the

appellant and the co-accused were dealing in clandestine business of brown sugar at the homestead land of accused Sweta Kumar Swain. He reduced the information to writing and submitted the same to the S.P., C.I.D., C.B. On the orders of the S.P., P.W.5 along with S.I., Satyabadi Padhi (P.W.5) and other staff of C.B. went to Sadar P.S. and placed a requisition for assistance and proceeded to the spot along with two witnesses. On seeing the police personnel, the persons purchasing brown sugar from the accused persons fled away and could not be apprehended. Thereafter, P.W.5 explained the accused persons the ground of suspicion, gave them option, searched their person and recovered brown sugar along with other articles from each of the accused persons. He seized the same in presence of the witnesses, arrested the accused persons and returned to the Sadar police station where submitted the report and produced the seized articles along with the accused before the O.I.C. On receipt of the report, Sadar P.S. Case No. 180 of 1998 was registered and after due investigation charge sheet was submitted against the present appellant and another.

3. The plea of the accused persons was complete denial of the allegations.

4. In order to prove its case, the prosecution examined as many as nine witnesses including the I.O. and the seizure witnesses and proved 17 exhibits. The accused persons examined two witnesses in support of their plea.

5. The learned 1st Addl. Sessions Judge, who tried the case, on consideration of the evidence and other materials available on record, by his judgment dated 23.10.2000 convicted and sentenced the appellant and the co-accused as already mentioned hereinbefore.

6. Mr. B. S. Mishra, learned Counsel for the appellant submits that the impugned judgment is challenged on the following grounds:

(1) Charge is defective.

(2) As the brown sugar was scanty in quantity no sample could be collected.

(3) Independent witnesses did not support the prosecution case with regard to seizure.

- (4) No sample was collected in presence of the I.O.
- (5) P.Ws.2, 4 and 6 have not supported the prosecution case.
- (6) Provisions of Section 55 of the N.D.P.S. Act were not complied with.
- (7) Malkhana register was neither produced nor proved.
- (8) D.S.P., the gazetted officer, has been deliberately withheld by the prosecution.

7. Mr. Das, learned Addl. Government Advocate appearing for the State vehemently contended that the judgment and order of conviction is legal, and no infirmity has been committed by the trial Court. Moreover, seizure has been proved by the official witnesses and the chemical report reveals that the material object contains brown sugar.

8. Perused the LCR, more particularly, the statement of the witnesses and the exhibits and the head of charge. P.W.1 is the S.I. of Police who was present at the time of recovery of the articles from the possession of the accused persons. He specifically stated that he reached the spot along with the independent witnesses. Before searching the accused persons, the police officials gave their personal search to them. Thereafter, P.W.5 took the personal search of the appellant and the co-accused: The search was made in presence of a Gazetted Officer, i.e., D.S.P. During search, P.W.5 detected some Pudias and cash of Rs. 70/- from the left side shirt pocket of accused Sweta. During search of accused-appellant Manoj, P.W.5 detected some brown sugar Pudias and a cash of Rs. 930/- from his shirt pocket. He also seized one Bajaj Super Scooter, an old hero Royal Cycle and one Humber Cycle. P.W.1 further stated that P.W.5 weighed the brown sugar recovered from accused Sweta whose gross weight came to 2 grams 300 miligrams and net weight came to 1 gram and 950 miligram. During weighment of the brown sugar seized from the accused-appellant Manoj, its gross weight came to 1 gram 780 milligram and net weight 1 gram. P.W.1 stated in his examination-in-chief that no samples could be drawn, as the quantity of brown sugar was very small. The properties were sealed with the help of official seal in presence of the Gazetted Officer and the seal was handed over to a witness with proper

zimanama. He further stated that Ext.1 is the seizure list prepared in his presence and he put his signature. Both the accused persons also put their signature. P.W.2 is a seizure witness who turned hostile. He stated in his examination that he put his signature in three blank papers. P.W.3 is the Amin who prepared the spot map. P.W.4 is an independent witness who turned hostile. P.W.5 is the informant and Inspector, Crime Branch who received the preliminary information, reduced the information to writing, submitted the written report to the S.P., went to the local police station, i.e., Cuttack Sadar P.S., and proceeded to the spot along with the staff of the local P.S. He stated in his deposition that the accused were explained that they were at liberty to give their option if they wanted to be searched in presence of a Magistrate or Gazetted Officer. Thereafter, he intimated the S.P. and after arrival of the D.S.P., C.I.D., C.B. (the Gazetted Officer), the police personnel gave their personal search along with the independent witnesses to the accused persons. Thereafter, search of the accused persons was made in presence of the witnesses. Firstly, he took the search of accused Sweta and recovered a jerry packet containing some brown sugar whose gross weight came to 2 grams 300 milligram and net weight came to 1 gram and 950 milligram. Thereafter, he seized from the possession of the accused-appellant Manoj brown sugar whose gross weight came to 1 gram 780 milligram and net weight came to 1 gram. Since sample could not be drawn due to smallness in quantity, he seized the articles in presence of the witnesses and put his seal and handed over the brass seal to the witness Duryodhan Jena (P.W.2). The other witness (P.W.6) also put his signature. Thereafter, he came to the P.S. along with the accused persons and the seized articles and produced the same before the O.I.C. P.W.6 is another witness to the seizure who turned hostile and prosecution put some leading questions to him. P.W.7 is the Assistant Director of S.F.S.L. who in his report opined that the seized articles contained Heroine. He also proved Ext.14, the chemical examination report. P.W.8 is one of the I.Os., who submitted charge sheet after re-examination of some of the witnesses and receipt of chemical examination report (Ext.14) from the S.F.S.L., Rasulgarh. P.W.9 is the first I.O. who conducted the investigation and produced the articles before the Magistrate for drawal of sample and examined the witnesses. He has admitted in evidence that after drawal of sample he produced the brown sugar in the SFSL, Rasulgarh.

He followed all the formalities of search and seizure. He also stated that he kept the seized articles in the P.S. Malkhana and also entered the fact in the Malkhana register. The sample was produced by him before the S.D.J.M. He forwarded the articles along with the accused persons to the Court. He also stated that after sending the sample, rest of the seized articles were deposited in the Sessions Malkhana. In his cross-examination he specifically stated that the sample was not extracted in his presence. He also submitted in his cross-examination that the packets were sealed after extracting sample by the Magistrate, but he has not seized the specimen seal and also has not taken any impression of the seal. The seal was preserved and sent to the Court malkhana.

9. On consideration of the totality of the case, this Court after perusal of the records comes to a conclusion that no material objects were produced before the trial Court, no FIR has been proved, no charge-sheet has been proved. The Gazetted Officer has not been examined, but it has been stated by P.Ws.1, 5 and 9 that the Gazetted Officer was present and in his presence the search and seizure was made. Therefore, sufficient compliance has been made with regard to Section 50 of the Act. In the instant case, neither the seized articles were produced before the trial Court nor marked as material objects. Only oral evidence of the official witnesses is there with regard to seizure of articles. No independent witnesses have corroborated the said fact. Further, there is no evidence to show that seals of the packets containing contraband articles were intact. Seal if at all was used for sealing the packets, the same has neither been produced nor proved before the trial Court. Malkhana register of the sessions Court and also that of police malkhana have not been proved. That apart, samples were extracted by the SDJM in absence of the I.O.. In other words, no seal was put in presence of the I.O. The SDJM has also not been examined to prove the factum of drawal and sealing of samples. No other witness has also proved the extraction and sealing of samples. In view of the above, it cannot be said that the prosecution has been able to prove the case against the appellant beyond all reasonable doubt and the appellant is entitled to an order of acquittal.

For the above reasons, this Court does not want to discuss the other submissions made by the appellants.

In the result, the appeal is allowed and the impugned judgment of conviction and sentence is set aside. The appellant be set at liberty forthwith if his detention in jail custody is not required in connection with any other case.

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