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Court : Orissa

Decided On : Dec-12-2000

Reported in : 2001CriLJ900

Judge : P.K. Patra, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 2, 20, 50, 52, 55 and 57

Appeal No. : Cri. A. No. 363 of 1993

Appellant : Bhaskar Kumar Karan Alias Bhaskar Chandra Karana

Respondent : State

Advocate for Def. : S. Pradhan, Addl. Standing Counsel

Advocate for Pet/Ap. : Manas Chand, K.C. Mishra, S.K. Tripathy and P. Uttarkabat, Advs.

Disposition : Appeal allowed

Judgement :

P.K. Patra, J.

1. This appeal is preferred against the judgment dated 14-10-1993 passed by Shri B. Khadenga, Sessions Judge, Sambalpur in S.T.No. 126/93 convicting the

appellant under Section 20(b)(i) of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (for short 'the Act') and sentencing him to undergo rigorous imprisonment for four years and to pay a fine of Rs. 10,000/-, in default, to undergo rigorous imprisonment for a further period of another two years.

2. Briefly stated the prosecution case runs as follows :

On 12-2-1993 the Sub-Inspector of Excise, Belpahar (P.W. 4) was performing patrol duty with two Excise constables from Belpahar to Gumadera and getting reliable information that a person was moving with a green cycle having contraband ganja in a brown colour bag, he reached the Gumadera Weekly Market at 4.25 p.m. and found the appellant moving towards the Weekly market riding a green model 'Avon' cycle (M.O.III) and a brown colour bag (M.O.I.) was hanging on the handle of the cycle. Entertaining doubt, he detained the appellant and called two independent witnesses and disclosed the purpose of suspicion and wanted to take personal search of the appellant and the appellant when asked to exercise his option to be searched in presence of an Executive Magistrate or a Gazetted Officer, consented to be searched by P.W. 4 himself. Accordingly, P.W. 4 searched the person of the appellant and nothing could be recovered from his person, but the bag was containing 110 grams of ganja and the appellant could not show any authority to carry the same. Hence P.W. 4 seized the same and took out two samples each weighing 25 grams and sealed the two seized sample packets and the remaining quantity of 60 grams of ganja kept in another packet by affixing paper slips and using his personal seal for the purpose. M.O.IV is one of the two sample packets. The cycle of the appellant was also seized along with the ganja under the seizure list Ext. 1. When the appellant was further interrogated, he disclosed that he had kept some quantity of ganja in his rented house belonging to one Judhistir Seth of village Andhapara. Then the appellant was taken to the Excise office at Belpahar and was detained there during the night, since there was no time to proceed to village Andhapara. On the next morning (14-2-93) P.W. 4 accompanied by the accused and two independent witnesses, reached the village Andhapara at 7.45 p.m. and the rented room which was in occupation of the appellant was opened by the appellant himself and during search of that room 600 grams of ganja was recovered from a bag (M.O.II). In the same process two

samples, each weighing 25 grams; were drawn up. M.O.V is one of these two sample packets drawn up from 600 grams of ganja which was seized under the seizure list Ext. 2. The packets were sealed affixing paper slips and using the seal of P.W. 4. Thereafter the appellant was taken to Belpahar and in the afternoon he was produced before the S.D.J.M., Jharsuguda along with the seized materials and the appellant was remanded to jail custody. Since it was a holiday, the S.D.J.M. returned the seized materials with direction to produce the same on the next working day and on the next working day the said materials were produced in Court and two sample packets were sent for chemical examination on 19-2-93. P.W. 4 brought the fact of search, seizure and arrest to the notice of his immediate official superior. After receiving the chemical examination report (Ext. 7) confirming that the samples were ganja (Cannabis) as defined under Section 2(iii)(b) of the Act, P.W. 4 submitted prosecution report against the appellant who stood his trial.

3. The defence plea is one of denial and false implication. According to the accused the seized cycle had been left on the spot by an unknown culprit and it did not belong to him; but on suspicion he was called to the spot and his signatures were taken on blank papers and nothing had been seized from his possession or from his residential house.

4. Mr. Manas Chand, learned counsel for the appellant and Mr. S. Pradhan, learned Additional Standing Counsel were heard at length. While Mr. Chand contended that the impugned judgment is legally unsustainable and is liable to be set aside, Mr. Pradhan supported the impugned judgment.

5. In order to bring home the charge against the appellant, prosecution has examined four witnesses; of whom P.W. 4 is the Sub-Inspector of Excise who detected this case and P.W. 1 was an Excise constable who had accompanied P.W. 4 on patrol duty, as well as to village Andhapara. P.W. 2 is an independent witness to the seizure of ganja from the appellant on 13-2-93 and P.W. 3 is an independent witness to the seizure of ganja on 14-2-93. The defence has examined none.

6. The learned Sessions Judge placed reliance on the statements of both the official witnesses and found corroboration from the statements of the two

independent witnesses and held that the appellant was in illegal possession of contraband ganja and accordingly convicted him of the charge.

7. No doubt the learned Sessions Judge placed reliance on the statements of the two official witnesses; P.Ws. 1 and 4 holding that they have been corroborated by P.W. 2 regarding seizure effected on 13-2-93 and by P.W. 3 regarding seizure effected on 14-2-93, but he overlooked certain materials on record which would determine the result of the case. The presence of P.W. 2 at the spot at the time of seizure is doubtful, inasmuch as he is not a resident of the locality where the seizure was effected. He is a class-IV employee of the Workers Union and it was suggested to him by the defence that he was a smuggler in drugs for which he was deposing falsely against the appellant at the instance of the Excise officials and had put his signature on the seizure list (Ext. 1) at the excise office, Belpahar on 14-2-93 and not on 13-2-93, but P.W. 2 has denied the suggestion. In the seizure list Ext. 1, the signature of P.W. 2 has been marked as Ext. 1/3 and below his signature he had put the date '14-2-93' which has been interpolated as '13-2-93' which is apparent to the naked eye. Though P.W. 2 has stated that he put his signature on 13-2-93 and had put the date below his signature and that he did not interpolate in the date, the learned Sessions Judge has accepted the explanation of P.W. 4 that P.W. 2 put the date '13-2-93' below his signature in his presence and that there appears little overwriting in respect of the date put below the signature of P.W. 2, observing that P.W. 2 has stated regarding his presence at the time of seizure on 13-2-93. The finding on this score is found to be erroneous inasmuch as when the P.W. 2 has specifically denied to have made interpolation in the date below his signature, the interpolation found in the date, has not been explained either by P.W. 2 or by P.W. 4. That apart, as per the statements of P.Ws. 2 and 4 after detaining the appellant, called two witnesses, i.e. P.W. 2 and one Puran Singh (who has not been examined in this case), because they were present nearby. But as per statement of P.W. 2, the search was effected in front of the Bombay Dyeing Showroom which was open at that time. The reasons for not calling the nearby shopkeepers to be witnesses to the seizure and preferring to call two passers-by, has not been explained by P.W. 4. As per the statements of P.Ws. 1 and 4, the appellant was subjected to further interrogation after recovery of 110 grams of ganja from his bag, when he disclosed about: his possession of

some more quantity of ganja in his residential house at Andhapara, P.W. 2 has stated that P.W. 4 did not put any other question except asking about the avocation of the appellant. Withholding of the other independent witnesses to the seizure from the witness box, also raises doubt regarding the presence of the two seizure witnesses at the spot at the time of seizure.

8. P.W. 4 has stated that there was hardly any time to proceed to village Andhapara immediately after the seizure at Gunadera for which the appellant was detained in the Excise office during the night and on the following morning he was taken to village Andhapara where he opened the lock of his door with the key in his possession and the bag (M.O.II) containing 600 grams of ganja was recovered. This statement of P.W. 4 does not inspire confidence inasmuch as the seizure list Ext. 1 reveals that the seizure was effected at 4.25 p.m. on 13-2-93 and only two items, i.e., one bag containing 110 grams of ganja and one 'Avon' cycle were seized. There is no mention of the seizure of the key from the possession of the appellant. Apparently he was not having any key with him at the time of search on 13-2-93. P.W. 4 has stated that the appellant himself opened the lock which was put in front of his room. But he has not stated from where the appellant brought the key and he has also not seized the lock and key. P.W. 1 has stated that he did not mark from where the accused brought the key to open the lock of his room and he has categorically stated that no key was recovered from the possession of the appellant on 13-2-93. P.W. 3, an independent witness to the seizure on 14-2-93 vide Ext. 2, has stated that he was occupying one room, one Sudhir Kumar Misra (who is another witness to the seizure but not examined in this case) and the appellant were occupying one room each of the same house belonging to one Judhistir Seth of village Andhapara and the three rooms were adjoining each other and the rooms had no door leaves but had bamboo tatis without any provision for locking. He has not supported the prosecution case regarding the seizure of the bag containing ganja from the room in occupation of the appellant though he has stated that Excise staff along with the appellant had been to his house and one Excise officer named Pandey showed him a packet which was brought out from his shirt pocket, stated that the same contained ganja powder and leaves. In the seizure list, Ext. 2, the owner of the house-Judhistir Seth, has put his L.T.I. and the other tenant Sudhir Kumar Misra has put his signature but they have not been

examined in support of the prosecution case. According to P.W. 3, the appellant was absent from his room since three days prior to that date and he has denied the seizure of the bag (M.O.II) from the house of the appellant. The learned Sessions Judge has erroneously held that the statement of P.W. 3 corroborates the statements of P.Ws. 1 and 4 regarding the seizure effected on 14-2-93.

9. P.W. 4 has stated that the seal which he used for sealing the seized ganja and sample packets of both the dates, was retained by him, but he has not produced the same in Court. The seized ganja and samples had been kept in the Excise office in the night without producing the same before the officer-in-charge of the nearest police station and as such the chances of tampering with the sample packets cannot be overruled. The appellant has been searched by P.W. 4 himself who is a Sub-Inspector of Excise and there is no material on record to show that he is a Gazetted Officer. In view of the discussions made above, it is found that there has been non-compliance of the provisions under Sections 50, 52 and 55 of the Act and that the prosecution has not established beyond all reasonable doubt by cogent and reliable evidence that the appellant was in exclusive and conscious possession of the contraband articles.

10. In the case of *Krushna Dora v. State*, reported in (1994) 7 OCR 590, it was held that it was obligatory on the part of the prosecution to establish by cogent and reliable evidence that the accused was in exclusive and conscious possession of the contraband article and when the prosecution evidence on that score was found to be miserably lacking, the accused was entitled to acquittal.

In the case of *Jadumani Sahu v. State*, reported in 1997 (3) Crimes 486, it has been held that where there was recovery of opium from the house which was jointly recorded in the names of several persons, prosecution was required to adduce specific evidence about the actual possession of the house in question. In the case of *Thandi Ram v. State of Haryana*, reported in 1999 (3) JT (SC) 231 : (1999 AIR SCW 4609) the Apex Court, referring to two earlier decisions in *Mohinder Kumar v. State, Panaji, Goa*, reported in AIR 1995 SC 1157 : (1995 Cri LJ 2074) and *State of Punjab v. Balbir Singh*, reported in 1994 (2) JT(SC) 108 : (1994 Cri LJ 3702) have held that for non-compliance of mandatory provisions of

Sections 50, 52 and 57 of the Act conviction of the accused cannot be sustained and the accused will be entitled to acquittal.

11. Keeping in view the decisions referred to above, the conclusion of the learned Sessions Judge that the prosecution has been able to establish the charge against the appellant beyond all reasonable doubt, is found to be erroneous and unsustainable. He has not been able to properly appreciate the evidence on record. The appellant cannot be held guilty of the charge in the present case and he cannot be convicted and will be entitled to acquittal. The impugned judgment convicting the appellant and sentencing him as aforesaid, is, therefore, liable to be set aside.

12. In the result, the Criminal Appeal is allowed. The judgment dated 14-10-93 in S.T.No. 126/93 passed by the learned Sessions Judge, Sambalpur, convicting the appellant of the charge under Section 20(b)(i) of the Act and sentencing him to undergo rigorous imprisonment for four years and to pay a fine of Rs. 10,000/-, in default, to undergo rigorous imprisonment for a further period of two years, is set aside. The appellant is found not guilty and is acquitted of the charge. He be set at liberty forthwith, if his detention is otherwise not required in any other case.