

**Subash Suna Vs. the State**

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**Court :** Orissa

**Decided On :** Sep-19-1996

**Reported in :** 1997CriLJ1324

**Judge :** Dipak Misra, J.

**Acts :** [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20, 50 and 52A(1); Bihar and Orissa Excise Act, 1915

**Appeal No. :** Criminal Appeal No. 355 of 1992

**Appellant :** Subash Suna

**Respondent :** The State

**Advocate for Def. :** N. Prusty, Addl. Govt. Adv.

**Advocate for Pet/Ap. :** S.K. Pradhan and ;K.C. Dash, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**Dipak Misra, J.**

1. In this appease appellant calls' in question the legality of the judgment of conviction and order of sentence passed by the learned Sessions Judge, Koraput in Sessions Case No. 12 of 1991, convicting him for an offence punishable under

Section 20(b)(i) of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (in short, 'the Act') and sentencing to undergo R.I. for two years and to pay a fine of Rs. 1,000/- and in default for such payment, to undergo R.I. for a further period of two months.

2. The prosecution case is as follows :--

On 12-12-1990 the Executive Magistrate, Koraput along with the Sub-Inspector of Excise had been to village Pattel for conducting excise raid. At about 2. p.m. they detected that the accused-appellant was in possession of full gunny bag. Suspecting that the gunny bag containing some illegal articles they searched the gunny bag and recovered 21 Kgs. 250 Gms. of 'Ganja' from the said bag. As the appellant has no authority to possess the same the contraband article was seized and a seizure list was prepared, and ultimately on completion of investigation, prosecution report was submitted against him to the Court.

3. The appellant denied the charge in entirety.

4. To substantiate the charges against the accused, the prosecution examined four witnesses. P.Ws. 1 and 2 are independent witnesses; P.W. 3 is the Land Acquisition Officer-cum-Executive Magistrate, Koraput; and P.W. 4 is the Excise Sub-Inspector, District Flying Squad, Koraput. On behalf of defence, one witness was examined.

5. On consideration of the evidence on record, the learned trial Judge found the accused guilty and convicted and sentenced him as aforesaid.

6. Shri S.K. Pradhan, the learned counsel appearing for the appellant contended that the learned trial Judge should not have believed the search and seizure as P.Ws. 1 and 2 the independent witnesses did not support the prosecution version and they were declared hostile and in cross-examination nothing significant was elicited from them. He has urged that the seized Ganja had not been sent for chemical examination and that being the mandatory requirement of law, the judgment of conviction is vitiated. The learned counsel for the appellant has submitted with vehemence that the learned trial Judge has relied on the principles

decided under the Bihar and Orissa Excise Act, 1915, and has totally ignored the mandatory provisions of the Act, and the whole approach being erroneous the judgment is vulnerable.

6. Sri N. Prusty, the learned Addl. Government Advocate supports the judgment of conviction. It is contended that the analysis made by the trial Court with regard to the seized material as 'Ganja' cannot be regarded as illegal or perverse and the same being based on proper material evidence does not call for interference in the present appeal. He has highlighted that though P.Ws. 1 and 2 do not support the prosecution case yet, there is unimpeachable testimony of P.Ws. 3 and 4 which the learned trial Judge has accepted as credible, there is no infirmity in the impugned judgment. With regard to compliance of provisions of Section 50, submission of Sri Prusty is that the learned Executive Magistrate had accompanied the raiding party and the seizure having taken place in his presence the said provision is deemed to have been complied with. In regard to the absence of any chemical report, the learned counsel only reiterates the view taken by the trial Judge that the Investigating Officer out of his experience has stated that the seized article was Ganja and, therefore, the same has to be accepted.

7. On perusal of the judgment of the learned Sessions Judge, I find that the sample Ganja had not been sent for chemical examination. The factual position is also admitted before me. She has accepted the evidence of P.W. 4 the Excise Sub-Inspector who has stated that from the colour and flavour of the seized articles, and from his departmental experience, he could know that the seized article was Ganja. The question that arises for consideration is whether in absence of any chemical examination, merely on the basis of oral evidence, the seized articles can be held to be 'Ganja' and whether on that basis criminal liability can be fastened on the appellant. This Court in the case of Pilli Dilli Dora v. State of Orissa; 1994 (7) OCR 674 : (1995 Cri LJ 1758), referred to the relevant standing instruction/orders issued from time to time by the Narcotic Control Bureau, New Delhi to find out the real effect of absence of chemical examination. In the said decision, reference was made to standing instruction No. 1 of 1988 issued by Narcotic Control Bureau. In paragraph 1.6 of the aforesaid instruction, it has been provided as follows:-

'1.6. Quantity of different drugs required in the sameple.

The quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the cases of opium, Ganja and charas/hashish where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.'

Reference has also been made to the Standing Order No. 1 of 1989 dated 13-6-1989, issued by the Central Government in the Ministry of Finance (Department of Revenue) in exercise of powers conferred by Sub-section (1) of Section 52A of the Act. In paragraph 2.3 of Section 11 of the aforesaid Standing Order, reads as follows :-

'The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn.'

9. On consideration of the relevant instructions, Sri R. K. Patra, J. arrived at the following conclusion:-

'The aforesaid instructions and/or Standing Orders unmistakably and beyond any pale of doubt require that chemical examination was necessary to determine whether the seized article was ganja. In the instant case for successful prosecution of the case it was necessary to establish the primary evidence, i.e. the seized article was ganja. In absence of chemical examination and merely on the basis of the oral statement fo P.W. 3. it cannot be held that what was seized from the appellant was ganja....'

The ratio of the aforesaid decision applies in full force to the facts of the case in hand.

10. In view of my preceding analysis I do not find it necessary to address myself to the other contentions raised by the learned counsel for the accused-appellant.

11. For the aforesaid reasons the conviction and sentence of the appellant cannot be sustained in law which are hereby set aside. The appellant is acquitted of the charge. He may be set at liberty forthwith if his detention is not required in connection with any other case.

12. Resultantly, the Criminal Appeal succeeds and is hereby allowed.

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