

Manoj Kumar Sahu Vs. State of Orissa

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Court : Orissa

Decided On : Jun-19-2000

Reported in : 2000CriLJ5075

Judge : P.K. Patra, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20, 42, 50, 52, 55 and 57

Appeal No. : Jail Criminal Appeal No. 297 of 1997

Appellant : Manoj Kumar Sahu

Respondent : State of Orissa

Advocate for Def. : Addl. Govt. Adv.

Advocate for Pet/Ap. : Bijayalaxmi Tripathy, Adv.

Disposition : Appeal allowed

Judgement :

P.K. Patra, J.

1. The appellant has challenged the judgment dated 19-11-97 passed by Shri U. S. Mishra, Sessions Judge, Sambalpur in Sessions Trial Case No. 197 of 1995 convicting the appellant under Section 20(b)(i) of the [Narcotic Drugs and](#)

[Psychotropic Substances Act, 1985](#) (in short 'the Act') and sentencing him to undergo rigorous imprisonment for five years and to pay a fine of Rs. 50,000/-, in default, to undergo rigorous imprisonment for a further period of one year.

2. The prosecution case runs as follows :

On 3-9-95 at about 5.30 a.m. P.W. 4, the Sub-Inspector of Police, Jharsuguda Police Station got reliable information that a person of Bihar State had got down from the Tata-Nagpur passenger train at Jharsuguda railway station with a bag containing 'ganja' and was proceeding towards the village Dalki for disposal of the said 'ganja'. P.W. 4 entered the said fact in the Station Diary Entry No. 49 dated 3-9-95, informed the Circle Inspector of Police as well as the Superintendent of Police and proceeded to the railway station accompanied by P.W. 3, the Assistant Sub-Inspector of the said P. S. They arrived at the railway station crossing at about 6.15 a.m. and found the appellant there and detained him, called the local witnesses, gave option to the appellant to be searched before a Magistrate or a Gazetted Officer; but the appellant did not exercise his option to be searched before a Magistrate or a Gazetted Officer and opted to be searched by the police officer. So P.W. 4, after observing formalities of search, conducted search of the appellant and recovered a fertiliser bag containing 'ganja'. On weighment it came to 8 kgs. and 800 grams from which two samples containing 25 grams each were drawn up and two packets were made and the remaining quantity of 'ganja' kept in fertiliser gunny bag was separately sealed and the 'ganja' was seized under the seizure list Ext. I. M.O.I is one of the sample packets containing 'ganja' and M.O.II is the fertiliser gunny bag containing the balance quantity of 'ganja'. The seal used for the purpose of sealing the packets was left in zima of P.W. 6. The appellant was arrested as he could not produce any authority to possess or transport the 'ganja'. P.W. 4 submitted the plain paper First Information Report (Ext. 3) before the Officer-in-charge of the P. S. (P.W. 5) who registered the case and directed P.W. 4 to continue investigation. P.W. 4 produced the appellant in Court of Sub Divisional Judicial Magistrate, Jharsuguda and prayed to forward the sample 'ganja' to the R.F.S.L., Sambalpur for chemical examination and the sample was forwarded to the R.F.S.L., Sambalpur under the forwarding letter, Ext. 5. Ext. 6 is the chemical examiner's report confirming that the sample consisted of flowering

and fruiting tops of the Cannabis Plant i.e. Ganja. On 15-10-95, P.W. 5, the Officer-in-charge, Jharsuguda Police Station took over charge of investigation from P.W. 4 and after completion of investigation he submitted charge-sheet against the appellant who stood his trial, for the offence under Section 20(b)(1) of the Act.

3. The plea of the defence is one of complete denial and false implication.

4. In order to bring home the charge against the appellant, prosecution has examined as many as six witnesses, of whom P.W. 4 is the S. I. of police who detected the case and P.W. 3 is the A.S.I, of police who had accompanied P.W. 4 to the spot. P.Ws. 1, 2 & 6 are the independent witnesses who have turned hostile and have not supported the prosecution case. P.W. 5 is the Officer-in-charge of the police station who completed investigation and submitted the charge-sheet in this case. Defence has examined none.

5. Miss Bijalaxmi Tripathy, learned counsel for the appellant and the learned Additional Government Advocate appearing for the State were heard at length. The learned counsel for the appellant assailed the judgment of the learned Sessions Judge contending that he has failed to properly appreciate the evidence on record and has come to the erroneous conclusion that the contraband 'ganja' was seized from the exclusive and conscious possession of the appellant and that he has erred in law in rejecting the contention of the defence counsel regarding non-compliance of the mandatory provisions under the Act. Learned Additional Government Advocate supported the impugned judgment as unassailable refuting the contentions of the learned counsel for the appellant. The rival contentions require careful scrutiny.

6. The learned Sessions Judge relied on the statements of P.Ws. 3 & 4 and held that the contraband 'ganja' was seized from the possession of the appellant in presence of P.Ws. 1, 2 & 6 and rejected the contention of the defence counsel that non-compliance of the mandatory provisions under Sections 42, 50 and 57 of the Act would entitle the appellant to an acquittal, observing that there was compliance of Section 42 of the Act and compliance of provisions of Section 50 of the Act was not necessary in a case of personal search and non-compliance of the provisions under Section 57 of the Act was not fatal for the prosecution since no prejudice

was caused to the appellant in view of the Station Diary Entry made at the P. S. after search, seizure and arrest.

7. Learned Sessions Judge has observed that P.W. 4 made Station Diary Entry No. 49 dated 3-9-95 after receiving information regarding the illegal possession of 'ganja' by the appellant. Ext. 2/1 is a copy of the said S.D.E. Ext. 2 is the copy of the letter addressed to the Superintendent of Police, Jharsuguda with copy of the same to the Circle Inspector of Police, Jharsuguda informing them about the facts noted in the S.D.E. (Ext. 2/1). Thus, according to the learned Sessions Judge there has been compliance of Section 42 of the Act. But P.W. 4 has admitted that he did not send any information to his higher official superior regarding the seizure and arrest. So evidently there was non-compliance of the provisions under Section 57 of the Act and the finding of the learned Sessions Judge that it was not fatal to the prosecution since no prejudice was caused to the appellant, cannot be legally sustained so also the finding of the learned Sessions Judge that compliance of the provisions under Section 50 of the Act was not necessary in a case of personal search of the accused-appellant, is unsustainable in law in view of the provisions contained in the said Section and the judicial pronouncement to be referred to later.

8. Regarding the seizure of the contraband 'ganja' from the possession of the appellant, three independent witnesses, P.Ws. 1, 2 and 6, have not supported the prosecution case. Even P.W. 6 has denied that he was given zima of the seal which was used for the purpose of sealing the packets, though he has stated that his signature was taken in the zimanama. He has categorically stated that nothing was recovered and seized from the appellant. P.W.1 who is a shopkeeper at Jharsuguda railway station has stated that P.W. 4 went to his shop and wanted the bag to be weighed and he weighed the same. He has stated that the gunny bag contained 'ganja' and some quantity was brought out from the bag and kept in a separate polythene packet. He has denied to have seen the appellant with P.W. 4. P.W.2 has denied to have witnessed the seizure of 'ganja' though he has admitted to have signed in the seizure list. P.W. 3 has stated that P.W. 1 was called to the spot who came with his weighing scale and weights for weighment of the 'ganja'. P.W. 3 has further stated that after the seizure of the 'ganja' and sealing of the

packets, the brass seal used for the purpose of sealing the packets was handed over to P.W. 1. But P.W. 4 has stated that he used a key of the drawer of his table as the seal to seal the seized packet of the 'ganja' and sample packets and kept the key in zima of P.W. 6 who executed the zimanama, Ext. 4. But as stated earlier, P.W. 6 has denied that he has given zima of any seal though he admitted his signature in the zimanama, Ext. 4 and the said zimanama, Ext. 4 reveals that the seal, in the middle of which 'Rajdoot' was written, was given in zima of P.W. 6. The specimen impression of the seal used for sealing the seized sample for chemical examination and put in the copy of the forwarding letter, Ext. 5 and in the seizure list, Ext. 1 is not clearly visible. Thus the statements of P.Ws. 3 & 4 regarding the seal used for sealing the packet of 'ganja' and the two sample packets is not consistent with each other and the process of sealing is shrouded with doubt, reinforced by the interpolations in the seizure list, Ext. 1 changing the date from '2-9-95' to '3-9-95' at six places. The contradictory statements of P.Ws. 3 and 4 regarding the seal used for the purpose of sealing the seized article and the samples were not noticed by the learned Sessions Judge and the interpolations in the seizure list regarding the date of seizure has been lightly brushed aside, observing the same to be minor in nature which is found to be erroneous inasmuch as at six places the date '2-9-95' has been changed to '3-9-95' which indicates that the seizure was effected on the date '2-9-95' and subsequently the same has been changed. The non-production of the original station Diary Entry No. 49 dated 3-9-95 deprived the learned Sessions Judge to find out interpolations, if any, in the said S.D.E. That apart, in the F.I.R. (Ext. 3) it has been stated by P.W. 4 that he arrested the appellant at 9.30 a.m. after seizure of the contraband 'ganja' and explaining the grounds of arrest; but he has stated that the appellant was forwarded to the Court in custody on the next date. There is no reason as to why the appellant was detained at the P. C. for the entire day on the date of his arrest since the Court of S.D.J.M., Jharsuguda is situated at Jharsuguda itself and the appellant could have been easily produced in the Court on the said date. This raises further doubt in the prosecution case regarding the seizure of 'ganja' and arrest of the appellant, as alleged by the prosecution. For the reasons discussed above, it will not be safe to place reliance on the statements of the P.Ws. 3 & 4 to base a conviction of the appellant, holding that

the contraband 'ganja' was seized from the exclusive and conscious possession of the appellant.

9. In the case of *Krushna Dora v. State* (1994) 2 Orissa 590, it has been held that the prosecution is obliged to establish by cogent and reliable evidence that the appellant was in exclusive and conscious possession of the contraband article in order to sustain conviction for the offence of illegal possession of the contraband 'ganja' under Section 20(b)(i) of the Act and when the prosecution lacks in that respect, the conviction of the appellant cannot be sustained and the appellant will be entitled to an acquittal. In the case of *Jadumani Sahu v. State* (1997) 3 Crimes 486, it has been held that when the sample of opium along with seal remained with the seizing officer of excise staff for two weeks and he sent the sample to the chemical analysts, without producing the same before the Magistrate and without keeping the same under the custody of the Officer in charge of nearest police station, the possibility of tampering with the seal could not be ruled out and conviction cannot be sustained. In the case of *Raghu Sahu v. State* (1996) 11 OCR 472, it has been held that there will be non-compliance of mandatory provision under Section 50 of the Act when the prosecution fails to produce any contemporaneous document to show that offer to be searched before a Gazetted Officer or a Magistrate had been made to the accused to exercise his right and that he waived his right. In the case of *Thandi Ram v. State of Haryana* (1999) 3 JT (SC) 231 : 2000 Cri LJ 588, the Apex Court referred to earlier decisions in *Mahinder Kumar v. State, Panaji, Goa* AIR 1995 SC 1157 : 1995 Cri LJ 2074 and *State of Punjab v. Balbir Singh* (1994) 2 JT (SC) 108 : 1994 Cri LJ 3702 and held that for non-compliance of the provisions under Sections 50, 52, 55 and 57 of the Act, conviction of the appellant was bad in law and cannot be sustained and the appellant will be entitled to an acquittal.

10. In the present case, as discussed earlier, there has been non-compliance of the provisions under Section 50 and 57 of the Act and the prosecution has failed to establish by cogent and convincing evidence that the contraband 'ganja' was seized from the exclusive and conscious possession of the appellant. Therefore, in view of the decisions referred to above and the reasons stated earlier, the conviction of the appellant cannot be sustained and the same is liable to be set

aside and the appellant will be entitled to an acquittal and the impugned judgment is liable to be set aside.

11. In the result, the Jail Criminal Appeal is allowed and the conviction of the appellant under Section 20(b)(i) of the Act and the sentence passed thereunder by the learned Sessions Judge, Sambalpur in the impugned judgment dated 19-11-97 in S.T. Case No. 197 of 1995 are set aside. The appellant is found not guilty of the charge and is acquitted. He be released from custody forthwith if his detention is otherwise not required in any other case.

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