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Basantha Kumar Parida Vs. State of Orissa

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Court : Orissa

Decided On : Oct-08-1996

Reported in : 1997CriLJ2762

Judge : C.R. Pal, J.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 20; Code of Criminal Procedure (CrPC) , 1973 - Sections 351(A), 372(2), 374(2), 401 and 482; Indian Penal Code (IPC) - Sections 120 and 366

Appeal No. : Jail Criminal Appeal No. 350 of 1992

Appellant : Basantha Kumar Parida

Respondent : State of Orissa

Advocate for Def. : Addl. Standing Counsel

Advocate for Pet/Ap. : S.K. Sahbo, Adv.

Disposition : Appeal allowed

Judgement :

C.R. Pal, J.

1. The appellant who is convicted and sentenced Under Section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the act') has

preferred this appeal assailing the order of conviction and sentence passed by the learned Sessions Judge, Koraput, Jaypore in Sessions Case No. 327 of 1991.

2. The case against the appellant is that on 2-9-1991 at about 12.30 P.M. while the officer-in-charge of Boiperiguda Police Station (P.W. 5) was performing patrol duty along with his staff at Boiperiguda Bus Stand, Bajangowada-Jaypore Bus bearing Registration No. (sic) 4417 reached there and the appellant along with one Suresh Chand Pradhan, the co-accused alighted from the bus. At that time the appellant was holding a tin box (M.O. 11) and the other co-accused was holding an attache (M.O. 1). P.W. 5 suspecting their movement wanted to search the tin box and the attache and asked them to open the same. When they did not open the tin box and the attache, he searched the appellant and his companion and recovered the keys of the tin box and the attache respectively from the pockets of the appellant and his companion. With the help of the keys he opened the tin box and the attache and found that the tin box contained 11 kgs. of Ganja and the attache contained 5 kgs. of Ganja, Neither the appellant nor his companion produced any authority for possessing the said Ganja. So he collected samples from the tin box and the attache separately and kept them in two separate packets and sealed them in presence of the witnesses. He also sealed the tin box and the attache in presence of the witnesses and seized all those articles under the seizure lists, Exts. 1 to 4. Later the appellant and his companion were forwarded to the court subsequent to which the seized articles were also produced before the Court with a prayer to send the samples for chemical examination. The Court forwarded the seized samples vide its forwarding letter, Ext. 6 and also received the Chemical Examiner's report, Ext. 7 which reveals that the samples were Ganja. On the above allegation the appellant along with his companion were charged for an offence Under Section 20(b)(i) of the Act to which they pleaded not guilty and claimed trial. Their case is a complete denial of the allegations levelled against them. According to them, nothing was seized from their possession and they have been falsely implicated in this case. Further case of the appellant is that the police detained the bus at Boipariguda and recovered the unclaimed box and the attache which contained Ganja and took 10 to 12 passengers of the bus to the police station whereafter the appellant and his companion were detained there.

3-4. To prove its case against the appellant and his companion, the prosecution examined five witnesses out of whom P.W. 1 is the Conductor of the bus in which the appellant and his companion were travelling, P. Ws. 2 and 3 are the two passengers of that bus who witnessed the search and seizure etc. P.W.4 is a constable and P.W. 5 is the Officer-in-charge who investigated into the case. In course of hearing prosecution also exhibited the seizure lists, Exts. 1 and 2 under which M. Os. I and II were seized, seizure lists Exts. 3 and 4 under which the sample packets ware seized, the plain paper F.I.R., Ext. 5, the office copy of the forwarding letter of the S.D.J.M., Jaypore, Ext. 6 and the report of the Chemical Examiner, Ext. 7. The trial court believing the evidence adduced by the prosecution convicted and sentenced the appellant and his companion as mentioned earlier.

5. The learned counsel appearing for the appellant contended that in absence of reliable evidence to come to a definite conclusion that the contraband article produced before the learned Magistrate and the article sent for chemical examination were the articles seized from the possession of the appellant and his companion, the conviction and sentence is improper. The learned Addl. Standing Counsel, however submits that there are ample evidence on record to show that the article produced before the Magistrate-and sent for chemical examination were the articles seized from the possession of the appellant and his companion. In the above context, it is noticed that the tin box and the attache containing Ganja were seized under the seizure list, Exts. 1 and 2 respectively and the sample collected therefrom were seized under the seizure lists, Exts. 4 and 3. The P.Ws. 4 and 5 have deposed that the M.O. II and M.O. I were seized respectively from the possession of the appellant and his companion and samples were collected and were seized under the seizure list, Ext. 4 and 3. P.Ws. 2 and 3 have deposed about the recovery of the tin box and the attache from the possession of the appellant and his companion. P.W. 3 has also deposed that at Boipariguda bus stand the police seized the tin box (M.O. II) from the appellant under Ext. 1 and the attache from his companion under Ext. 2. On opening the said tin box and the attache Ganja was found inside the tin box and the attache. On weighment the Ganja found in the tin box came to 11 kgs. and that of the attache to 5 kgs. The P. W.4, a Constable of police has also deposed about the seizure of the tin box and

attache containing Ganja from the possession of the appellant and his companion at Boipariguda on 2-9-1991 under Ext. 1. He has also deposed that the Ganja found in the tin box and the attache were weighed separately. It was found that the tin box contained 11 Kgs. and the attache contained 5 kgs. of Ganja. This witness has further deposed that the P.W. 4 collected samples from the Ganja recovered from the tin box and the attache. But the P.W. 3 an independent witness has not whispered a word about collection of any sample from the contents of the tin box or the attache.Though the P.Ws. 4 and 5 say that the seized tin box, the attache and the packets containing samples were sealed in presence of the witnesses, none of the independent witnesses has supported the same. Conspicuously there is also no mention either in the F.I.R. or in, the seizure list to show that the seized tin box, the attache and the samples collected therefrom were sealed. The testimony of P.W. 5 shows that he sealed the seized tin box, attache and the sample packets with his brass-seal and handed over that seal to Somanath Songrabi (P.W. 3). But the P.W. 3 has neither slated to have received the brass seal from P.W. 5 nor has stated that the seized tin box, attache and sample packets were sealed. The alleged contraband article was seized on 2-9-91. The appellant and his companion were forwarded to the court on the next day i.e. on 3-9-91 but neither the seized tin box, the attache nor the samples said to have been collected therefrom were sent to the court on that day. The P.W. 5 in this connection has deposed 'I have not mentioned anywhere that I have sealed the sample packets.' From his evidence, it appears that he produced the seized sample packets before the court on 7-9-91 for forwarding the same to the Chemical Examiner. There is no explanation as to why the seized tin box and the attache containing the contraband article and the sample packets were not forwarded to the court along with the accused. There is no evidence on record to show where and under whose custody the seized tin box, attache and the sample packets were kept till the same were produced before the court. It may be mentioned here that there is no evidence at all to show when the seized tin box and attache were produced before the court. Though the evidence shows that the same were in the court by the time of recording of evidence of the witnesses. From the order dated 7-9-91 passed by the learned Magistrate it appears that P.W. 5 moved the court to send the sample packets to the Chief Chemical Examiner,

State Drugs Control and Research Laboratory, Bhubaneswar for chemical examination. The forwarding letter of the court copy of which has been marked as Ext. 6 in this case shows that the sample packets were sent to the Chemical Examiner under the seal or the court. The Chemical Examiner's report shows that he received the sample packets bearing the seal impression identical to the specimen seal i.e. the seal of the Court. There is no evidence to show what happened to the seal affixed by the I.O. (P.W. 5) on the sample packets at the time of seizure. The order passed by the learned Magistrate pursuant to which the sample packets were sent for chemical examination does not show that the seal put by the I.O. was removed and the sample was resealed with the seal of the court. The evidence of P.W. 5 is also silent as to what happened to the seal put by him. In the above circumstances, it is difficult to accept the evidence of P.Ws. 4 and 5 who are official witnesses in absence of any corroboration from any independent witness that the seized article and the sample collected therefrom were sealed immediately after the seizure and were kept in sealed condition under proper custody till the date of their production before the court and that the sample sent to the Chemical Examiner was the sample collected from the contents of the tin box (M.O. II) as the circumstances do not rule out the possibility of implantation and for this the appellant is entitled to the benefit of doubt.

6. Before parting with the case it is deemed proper to mention here that this appeal has been preferred by one of the accused persons out of the two convicted by the learned Sessions Judge, Koraput in the same trial for the same offence. The evidence adduced by the prosecution against both the accused persons are same. So now a question arises as to whether in the view 1 have taken the order of conviction and sentence passed against the other accused (non-appellant) who has not appealed against the same can also be set aside. In this context, it may be stated that while dealing with a Criminal Appeal filed by only one of the convicted accused persons, if the court finds thai there is no evidence worth the name to sustain the convictions of not only the accused who has appealed but also the other accused who has not appealed, the court can acting Under Sections 401 and 482 of the Code of Criminal Procedure, 1973 also set aside the conviction and sentence passed on the other accused who has not appealed. Such a course can be adopted as the provision of Code of Criminal Procedure including those

contained in Sub-section (2) of Section 374 do not contemplate to restrict the revisionary powers of High Court Under Section 401 while dealing with the criminal matters including an appeal Under Section 372 Sub-section (2). 1 have come to the conclusion that the evidence on record is not sufficient to hold that the samples sent for chemical examination as well as the contraband articles produced before the court were recovered from the possession of the appellant and his companion, the non-appellant. Therefore, it now becomes the duty of the court to exercise jurisdiction Under Section 482 of the Code of Criminal Procedure in a mannerto prevent perpetration of manifest injustice to the non-appellant who has not appealed against the order of conviction and sentence. My above view gets support from the decision in Parbati Devi v. The State AIR 1952 Cal 835 : 1952 Cri LJ 1672. In the said case two persons were convicted Under Section 120B read with Section 366 of the I.P.C. One of them appealed against the order of conviction and sentence. A Bench of the Calcutta High Court came to the conclusion that there was absolutely no evidence to sustain the conviction of the appellant or the other co-accused. Since the other co-accused had not appealed the question that arose for consideration was whether the conviction and sentence passed on him can also be set aside even though he had not appealed. While dealing with that question their Lordships observed 'When we were considering the appeal by Parbati Devi we came to the definite conclusion that there was no evidence on the record which would justify a conviction for conspiracy as between Parbati Devi and Shew Nath. It is not only in the exercise of the inherent power, but we consider it to be the duty of the court to exercise jurisdiction in such a manner that manifest injustice may not be continued to be perpetrated. It does not matter that Shew Nath has not appealed. This matter having come to the notice of the Court, we think that we have got sufficient jurisdiction under the inherent powers of the court under Section 351A, Cr. P.C. to pass appropriate orders in the case of Shew Nath also. In Hari Nath v. State of U.P. AIR 1988 SC 345 : 1988 Cri LJ 422 the apex court has also observed that the conviction and sentence of the non-appealing accused cannot also be sustained consistent with the findings in and the result of the appeals as the findings are interdependent and inextricably integrated. In view of the above position of law in the instant case the conviction and sentence passed against the non-appellant is also liable to be set aside.

7. In the result, the appeal is allowed. The conviction and sentence passed by the appellant Basanta Kumar Parida and the non-appellant S.uresh Chandra Pradhan is set aside and they are acquitted of the charge Under Section 20(b)(i) of the N.D.P.S. Act. The appellant Basanta Kumar Parida as well as non-appellant Suresh Chandra Pradhan be set at liberty forthwith if their detention is not required in connection with any other case.

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