

Arjun Gochhayat Vs. State

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SooperKanoon Citation : sooperkanoon.com/535809

Court : Orissa

Decided On : May-12-2000

Reported in : 2000(72)ECC741

Judge : P.K. Patra, J.

Appeal No. : Criminal Appeal No. 27 of 1994

Appellant : Arjun Gochhayat

Respondent : State

Advocate for Pet/Ap. : Shri. B. Panda

Disposition : Appeal allowed

Judgement :
ORDER

P.K. Patra, J.

1. The appellant has challenged the judgment dated 4.12.1998 passed by Shri J.P. Misra, Additional Sessions Judge, Bhadrak in ST. Case No. 18/3 of 1993 convicting the appellant Under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') and sentencing him to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1,00,000.00, in default to undergo rigorous imprisonment for a further period of one year.

2. Prosecution case runs as follows:

On 30.8.1992 the S.I. of Excise, Chandbali (P.W. 4) was performing patrol duty at village Naikanidihi under Chandbali Police Station in the District of Bhadrak alongwith the Executive Magistrate (P.W. 3) and A.P.R. Force. At that time he got information that the appellant was possessing contraband articles in his house at Naikanidihi. Hence P.Ws. 3, 4 and the A.P.R. Force went to the house of the appellant and conducted search after observing the formalities of search in presence of the appellant who was alone present in the house. During the search, 35 grams of opium wrapped, in a polythene paper and two gunny bags one containing 18 kgs and the other 12 kgs of poppy capsules were found. After weighing of the articles in presence of the appellant and two witnesses, the same were seized under the seizure-list Ext. 1/2 and a copy of the seizure-list was handed over to the appellant. The articles were scaled separately affixing paper slips containing the signatures of the witnesses and the appellant. P.W. 4 also recorded the statements of the two seizure witnesses (Exts. 2/1 and 3/1). The appellant was arrested after informing him the grounds of his arrest. P.W. 4 forwarded the appellant and the seized articles to the court of the S.D.J.M. Bhadrak on 31.8.1992 and prayed before the S.D.J.M. to send the samples of the seized articles for chemical examination. As per direction of the S.D.J.M., the seized articles were produced before him on 14.9.1992 when 10 grams of opium was drawn as sample. The sample and the balance quantity of 25 grams of opium were duly sealed by the S.D.J.M. and paper slips were affixed to the same. M.O.I. is the packet containing 25 grams of opium. On the same day, 200 grams of poppy capsules were drawn as sample from each of the two gunny bags and the samples and the gunny bags were sealed in the same process. M.Os. II and III are the said samples and M.Os. IV and V are the gunny bags. The samples were sent to the chemical examiner, vide the forwarding report (Ext. 5) of the S.D.J.M. Ext. 6 is the report of the chemical examiner relating to poppy capsules and Ext. 6/1 is the report relating to opium which confirmed that the samples were poppy capsules and opium respectively. After completion of enquiry P.W. 4 submitted prosecution report against the appellant who stood his trial.

The plea of defence is one of denial.

3. In order to bring home the charge against the appellant, prosecution has examined four witnesses, of whom P.W. 4 is the S.I. of Excise who detected the case and P.W. 3 is the Executive Magistrate who was present at the time of search and seizure. P.Ws. 1 and 2 are two independent witnesses to the seizure who have not supported the prosecution case and have turned hostile. The defence has examined two witnesses in support of its case. They have stated that the appellant was not residing in the house in question, but was residing in a Government quarters at Naikanidhihi P.H.C. allotted in favour of his father who was serving as a sweeper in the said P.H.C.

4. Shri B. Panda, learned Counsel for the appellant and Shri R.K. Patnaik, learned Addl. Standing Counsel for the State were heard at length. Shri Panda assailed the impugned judgment contending that the learned Addl. Sessions Judge has failed to appreciate the evidence on record and has come to the erroneous conclusion that the contraband articles were seized from the exclusive and conscious possession of the appellant and that he should have held that there was non-compliance with the mandatory provisions of the Act entitling the appellant to acquittal. Shri Patnaik refuted the contention of Shri Panda contending that the findings of the learned trial Judge cannot be held to be unsustainable. The rival contentions require careful consideration.

5. Learned Additional Sessions Judge has convicted the appellant relying upon the statements of the two official witnesses (P.Ws. 3 and 4) and rejecting the contentions of the defence counsel. Therefore, the statements of the two official witnesses require careful scrutiny before placing reliance on them to base the conviction of the appellant, specially when the two independent witnesses examined in support of the prosecution case have turned hostile and have not supported the prosecution case relating to search and seizure in question and no other member of the raiding party has been examined in support of the prosecution case.

6. P.W. 4 has stated that the appellant was a resident of village Chandanpur, but at the time of detection he was residing at village Naikanidhihi and the distance between the two villages will be about 35 Kms. The house in which the appellant

was residing was at a distance of 300 to 400 cubits from the hospital at Naikanidhi. Further he has stated that the appellant did not show any document regarding ownership and title of the house in question and he also did not ascertain as to who were the neighbours of the appellant and that the appellant was alone found to be in possession of the contraband articles in that house. Further he has stated that he called the two seizure witnesses from amongst a group of spectators, but apparently he did not call any neighbour to witness the seizure. It appears from the statement of P.W. 4 that Naikanidhi P.S. is at distance of about 600 cubits from the house in question. P.W. 3 has stated that two gunny bags containing poppy capsules had been kept under the cot in the bedroom of the house which were visible to outside and the opium kept in a polythene paper was also in the bedroom, but he has not stated the exact place from where the opium was recovered. P.W. 3 has narrated that the house in question was situated at a distance of half kilometre from the hospital compound and he has not ascertained about the title and ownership of the house in question. In his statement in cross-examination P.W. 3 stated that he could not say whether the appellant was the owner of the house in question or not. The two seizure witnesses (P.Ws. 1 and 2) are not neighbours of the appellant and they have denied their knowledge regarding the search and seizure and denied their statement Exts. 2/1 and 3/1 and as such the said statements cannot be relied upon. D.Ws. 1 and 2 have stated, that the appellant was residing in the Government quarters allotted in favour of his father who was serving as a sweeper in the hospital and he was not residing in the house in question. P.W. 4 has failed to ascertain as to whom the house in question belonged and as to how the appellant was residing there. He has also failed to examine the immediate neighbours of that house. The appellant has stated in his statement Under Section 313 Cr. PC that he was residing separately from his father since about 7/8 years and at times he was coming to his father whenever he was in difficulty and that on the date of the alleged occurrence he had come to his father and his signatures were taken by the Excise people by force on four blank papers. In view of the perfunctory enquiry/investigation by P.W. 4 regarding the ownership and possession of the house in question, it will be quite unsafe to place reliance on the statements of P.Ws. 3 and 4 to hold that the appellant was in exclusive possession of the house in question and that the contraband articles

were seized from the exclusive and conscious possession of the appellant.

7. Learned Counsel for the appellant contended that failure of the prosecution to prove by cogent and convincing evidence that the appellant was in exclusive and conscious possession of the house in question will entitle the appellant to acquittal in the case. In support of his contention he placed reliance on the decision in *Krushna Dora v. State* 1994 (7) OCR 590 in which it has been held that prosecution is obliged to establish by cogent and reliance 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 contraband article and on failure of the prosecution to do so, the appellant will be entitled to acquittal.

In another case, *Jadumani Sahu v. State* 1997 (3) Crimes 486 it has been held that when there was recovery of opium from a house which was jointly recorded in the names of several persons, prosecution was required to adduce a specific evidence about the actual possession of the house in question.

8. Keeping in view the aforesaid decisions and on an anylysis of the evidence on record, it is found that prosecution has not been able to establish by cogent and convincing evidence that the opium and poppy capsules were seized from the exclusive and conscious possession of the appellant. Hence the impugned judgment convicting the appellant cannot be sustained and is liable to be set aside and the appellant will be entitled to acquittal.

9. Further, it is found from the statements of P.Ws. 3 and 4 that while they were on patrol duty they received information about illegal possession of contraband articles by the appellant, but the said information was not reduced to writing and they rushed to the house in question for search and seizure. It has been held in the case of *Jadumani Sahu* (supra) that when search was effected after receipt of information and opium was are covered, it was obligatory on the part of the defence to take down such information in writing before proceeding to search and that breach of the mandatory provisions Under Sections 42 (1) and (2) of the Act vitiated the trial and conviction was unsustainable. Further it transpires from the statement of P.W. 4 that he took back the seized articles and the samples from the

court on 31.8.1992 and again produced the same in court on 14.9.1992 for drawing up samples to be sent for chemical examination. In the case of Jadumani Sahu (supra) it has been held that when there was recovery of opium on house search and the sample alongwith seal remained with the seizing Excise Officer for two weeks when the sample was sent by him to the chemical analyst and the said article or sample was not produced before the Magistrate, when the seized article should have been kept in the custody of the Officer-incharge of the nearest police station as per the provisions of Section 55 of the Act, but the seized article and sample were kept with the seizing officer for a long period, the possibility of tampering with the sample could not be ruled out and that in such case it would be hazardous to convict the accused. P.W. 4 has also stated that the Inspector of Excise who was his immediate higher authority was with him when he was on patrol duty and as such he did not inform him in writing. But P.W. 3 has not stated that the Inspector of Excise was on patrol duty with them. The presence of the Excise Inspector at the time of search and seizure cannot be believed to be true since his name does not find place in the seizure list or in the prosecution report and also that has been frankly admitted by P.W. 4. Both P.Ws. 2 and 4 have not stated that the appellant was given option to be searched in presence of a Magistrate or a Gazetted Officer, and as such the provisions of Section 50 of the Act had not been complied with. In view of the decisions referred to above and on the evidence on record as discussed above, the learned Additional Sessions Judge has erred in holding that the trial was not vitiated due to non-compliance with the mandatory provisions of Sections 41, 42, 60, 55 and 57 of the Act.

10. For the reasons discussed above, the conviction of the appellant cannot be sustained and he will be entitled to acquittal.

11. In the result the Criminal Appeal is allowed. The impugned judgment dated 4.12.1993 in ST. Case No. 18/3 of 1993 is set aside. The appellant is found not guilty and is acquitted of the charge. Since he is on bail, his bail-bond be discharged.