
(2014) 01 OHC CK 0070

In the Orissa High Court

Case No : Criminal Appeal Nos. 385 and 447 of 2006

Padi @ Pradeepta Rout and Deba @ Debendranath Mishra

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 22-01-2014

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 22

Citation : (2014) 1 OLR 620

Hon'ble Judges : S.K. Mishra, J

Bench : Single Bench

Judgement

S.K. Mishra, J.—In these two appeals, the convicts in G.R. Case No. 1320 of 2002 of the Court of Additional District Judge-cum-Special Judge, Jajpur have assailed the judgment of conviction and order of sentence passed by the said Court on 01.08.2006. The appellants have been convicted u/s 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the N.D.P.S. Act") and sentenced to undergo rigorous imprisonment for 12 years each and pay fine of Rs. 1,00,000/- each, in default to undergo R.I. for two years each.

2. In short, the case of the prosecution is that on 12.12.2002, at about 5 A.M., the S.I. of Police, Sri S.K. Mallik attached to Byree out post got reliable information about the accused persons transporting brown sugar from village Koitha towards Puri via Chhatia by bus. He made entry in the information in the station diary and intimated the same to the IIC of Barachana Police Station. Thereafter, he proceeded to Chhatia Bus stand along with police constables K.K. Mohapatra and N.C. Mohanty and one Gramarakhi.

3. While proceeding ahead, he found that two accused persons coming to the bus stand holding a bag each. The police personnel rounded the two accused persons. They found that the bag held by accused Debendra contained one packet and the bag held by the accused Pradipta contained one big and one small packets suspected to have contained brown sugar. Thereafter, the police called for the witnesses Harekrushna Pradhan and Sankar Samantaray, who were

present at the spot. By then, the IIC of Barachana Police Station arrived at the spot. At the instance of the accused persons, requisition for deputation of Executive Magistrate was sent. The accused persons and the witnesses were brought to Chhatia Police check post for safety.

4. After arrival of Sri Udaya Chandra Patra, Executive Magistrate-cum-Addl. Tahasildar of Darpan Tahasil, the bags of the accused persons were searched by following the procedure established. On search, in the bag of the accused Pradipta two packets suspecting to have been contained brown sugar of yellowish colour were recovered. The bag held by accused Debendra one packet containing brown sugar was recovered. The goldsmith was called for, who took weighment and found two packets recovered from the bag of accused Pradipta contained 910 grams and 30 grams respectively of brown sugar and the packet recovered from the bag of Debendra contained 1010 grams of brown sugar. He drew four sample powders of five grams each of three packets and packed them separately, which were marked for identification. The remaining bulk powders of the three packets were kept separately. The packets were closed by heat process being wrapped with white cloth, stitched and sealed. The police Officer, Executive Magistrate, accused persons and the goldsmith had signed in the sealed packets. The impression of the brass seal of the police officer was affixed on the sealed packets. Specimen impression of the brass seal were taken on two white papers and kept separately in two paper packets, closed and sealed, which were marked for identification.

5. The police officer then gave the brass seal in zima of the witness, Ananta Kishore Sendha, who executed a zimanama, thereafter, the police officer seized the sealed packets under two seizure lists and served the copy of the same to each of the accused. The accused were arrested. The police officer drew up plain paper FIR and submitted report before the IIC of Barachana Police Station. Later, the police officer treated the same as FIR and took up investigation pending registration of the case. The I.O. examined the witnesses including the informant. Thereafter, he returned to the police station along with the accused and the seized articles. He registered the case making endorsement in the FIR. Observing all the formalities, he kept the accused persons in lock up. He handed over the seized packets to Sri A.K. Behera, S.I. in charge of Police Station Malkhana, who kept the seized packets in the iron chest of the said police station under proper lock and key making entry to the Malkhana register. Thereafter, the I.O. made station diary about the same. He went to the spot and prepared the spot map, examined the witnesses and the Executive Magistrate-cum-Addl. Tahasildar. On the same day, he sent the statutory information giving details of the search, seizure and recovery of brown sugar from the two accused persons and their arrest to S.P., Jajpur. He also forwarded the detailed report submitted by the informant to S.P., Jajpur through special messenger.

6. On 13.12.2002 at 10 A.M., he produced the accused and seized packets before the Court. On his prayer, the sample packets and the packets containing

specimen impression of the brass seal were sent to State Forensic Science Laboratory, Bhubaneswar and Central Forensic Science Laboratory, Calcutta by the Special Court. On the direction of the Court he kept the forwarded sample packets with the forwarding letters in custody till 15.12.2002. The rest of the sealed packets were kept in the Court Malkhana.

7. On his return to the police station, the I.O. made station diary keeping forwarded sample packets along with forwarding letters of the Court in custody under lock and key, in the iron chest of the Malkhana. Thereafter, the I.O. seized the command certificate etc. On 16.12.2002, the police constable, Lambodar Jena was deputed to S.F.S.L., Bhubaneswar carrying the sample packets and the forwarding letter and handed over the articles there and returned with the deposit receipt. The I.O. sent the police constable. Subash Chandra Das to C.F.S.L., Kolkata, who carried the sample packets and the forwarding letter and on 18.12.2002 he returned with the same sealed packets with an endorsement of the Scientific officer, C.F.S.L., Calcutta for compliance of the defects by the Special Court. The police constable again went to the C.F.S.L., Kolkata and delivered the sealed packet and the forwarding letter and obtained receipt station diary.

8. After receipt of the chemical report and completion of investigation, the I.O. placed charge sheet against the appellants for the offence under Sections 21 and 22 of the N.D.P.S. Act.

9. The plea of the defence was of plain denial and false implication.

10. In order to prove its case, the prosecution examined 14 witnesses and led into evidence a number of documents. The defence, on the other hand, examined two witnesses, D.W. No. 1, Assistant Director of S.F.S.L., Bhubaneswar and D.W. 2, Junior Scientific Officer, C.F.S.L., Calcutta. The defence also exhibited the documents relied upon by the prosecution, i.e., G.C.M.S. test reports, which have been marked as Ext. A to A/11.

11. After analysis of the evidence, the learned Addl. District Judge-cum-Special Judge, Jajpur came to the conclusion that the prosecution has brought home the charge beyond all reasonable doubts and so holding he convicted both the appellants for the offence u/s 21 of the N.D.P.S. Act but acquitted them for the offence u/s 22 of the said Act. For the offence u/s 21 of the N.D.P.S. Act, the learned Judge passed an order of sentence as described above.

12. In course of hearing, the learned counsel for the appellants urges only one point. It is submitted by him that the chemical examination report of S.F.S.L., Bhubaneswar, which is marked as Ext. 75, reveals that the sample sent for chemical examination contained Diacetyl Morphine (heroin), whereas the report submitted by the C.F.S.L., Calcutta, which is marked as Ext. 76, reveals that Caffeine, Acetaminophen (paracetamol) were detected in the contents of the exhibits marked. Thus, it is contended by learned counsel for the appellants that the prosecution has failed to establish by clear and cogent evidence that the

powders seized from the possession of the accused were, in fact, heroin. He also relied upon the reported case of *Ratan Kumar v. State of Orissa*, >79 (2005) CLT 893 and contended that whenever two opinions are forthcoming the Court should accept the opinion, i.e. favourable to the accused.

13. The learned Standing Counsel, on the other hand, drew attention of the Court to paragraph-12 of the judgment and contended that since the report submitted by SFSL, Bhubaneswar is signed by the Assistant Director and test has been conducted in a more scientific manner, the report submitted by the S.F.S.L. should be given weight to and the report submitted by the CFSL, Calcutta should be ignored.

14. In this connection, this Court takes note of the reported judgment of *Bishnu Charan Singh v. State of Orissa*, >(2011) 49 OCR 624 : >2011 (11) OLR 28, wherein it has held as follows:

8. x x x Having given anxious thought to the problem at hand, this Court comes to the conclusion that the whole approach adopted by the learned Special Judge is erroneous. Moreover, it is not understood why the investigating Officer sent the sample packets to two separate laboratories on the same day. The accused can only be convicted for the offence which he alleged to have committed in case of unimpeachable proof of his conscious and exclusive possession of the contraband articles. Such prove inherently have two components. Firstly, it must be proved by the prosecution that such contraband articles were seized from his exclusive and conscious possession and secondly, the substance which have been seized from his possession were narcotic drugs or psychotropic substance as alleged by the prosecution. In this case, the prosecution has tried to establish that the substances were heroin by relying upon two exhibits i.e. Ext 12 and 32. Ext 12 shows that Monoacetyl-Morphine and Acetaminophen (paracetamol) were detected in the contents of two packets of the exhibits marked as 503/2001/3 and 503/2001/4. No narcotic drugs were detected in the contents of the other two packets. However, the report of the State Forensic Science Laboratory shows that "heroin" could be detected in all the packets. This raises a reasonable doubt regarding the nature and character of the substance recovered from the alleged possession of the appellant, it casts a doubt on the prosecution case. Further, it is settled principle of law that whenever there were two views, the view favouring the defence should be adopted or accepted by Court as the accused is presumed to be innocent till his guilt is established by cogent evidence.

15. Applying the aforesaid ratio to the case at hand, this Court comes to the conclusion that the prosecution can succeed only if two factual aspects are proved. Firstly, it has to be proved by the prosecution that the contraband articles were seized from their exclusive and conscious possession and secondly, it has to be proved beyond reasonable that the seized articles were narcotic drugs or psychotropic substance as alleged by the prosecution in the present case. As far as the second requirement is concerned, there is conflicting opinion

of two Scientific Laboratories, which renders case of the prosecution suspicious and there is a reasonable doubt in the mind of the Court regarding the same. In that view of the matter, this Court comes to the conclusion that the judgment of conviction and sentence passed by the learned Addl. District Judge-cum-Special Judge, Jajpur in the aforesaid case cannot be sustained and, therefore, the same are set aside.

In the result, the Criminal Appeal is allowed. The appellants be released forthwith, unless their detention is required in any other case.