

CASE NO.:
Appeal (crl.) 181-182 of 1999

PETITIONER:
State of Orissa

RESPONDENT:
Rajendra Tripathy and Ors.

DATE OF JUDGMENT: 06/05/2004

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J.

The respondents faced trial for alleged commission of offences punishable under Sections 18 and 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short the 'Act') for alleged illegal possession of heroin. The trial court found the respondents guilty and sentenced each to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1,00,000/- each and in default to undergo rigorous imprisonment for two years. By the impugned judgment the High Court set aside the conviction and consequential sentence holding that the accusations have not been established.

The prosecution version in a nutshell is as follows:

On 6.8.1992 the then Sub-Inspector of Excise of Cuttack Sadar was patrolling with his staff at Balikuda and Kazipatna area under Cuttack Sadar Police Station. While patrolling he found accused Deba Prasad Barik who was proceeding towards Balikuda and Gopalpur near the other side of the Level crossing of Balikuda railway station. His movement was found to be suspicious. So the S.I. of Excise (P.W.5) along with his staff proceeded in a vehicle and detained him. P.W.5 in presence of the witnesses who were available at the spot, disclosed his identity and his intention to search accused Deba as he was suspected to have contraband articles in his possession. Thereafter P.W.5 gave option to him as to whether he wanted to go to a Magistrate or a Gazetted Officer for taking his personal search or he had no objection to be searched by him (P.W.5). As the accused Deba had no objection to be searched by P.W. 5, his personal search was taken in presence of the witnesses after observing all requisite formalities. During search, one polythin white coloured jari packet containing some powder was recovered from his right side pant pocket. P.W. 5 suspected the powder to be heroin. So he took 10 ml. of powder from the seized article and tested the same by means of Drug Testing kit which was carried with him. From the initial test as the colour of the powder turned to rose and thereafter violet and after doing some other chemical tests and from his service experience, he suspected the powder to be heroin. As possession of heroin powder was unlawful, the jari packet (M.O.I.)

was seized in presence of witnesses. Thereafter it was kept in an envelop with identification mark as 'A'. The envelop was sealed in presence of the witnesses by the personal seal of P.W.5 and by paper seal bearing the signature of the witnesses as well as of the accused. The same was seized under a seizure list in the presence of the witnesses also. A copy of the seizure list was handed over to accused Deba, who was arrested.

During interrogation of accused Deba, he disclosed the names of other accused Sitaram Tripathy of Balikuda to have supplied heroin to him. So P.W.5 immediately proceeded with accused Deba towards the village Balikuda in search of accused Sitaram Tripathy along with his staff. They reached near the rented house of accused Rajendra Tripathy who is the son of accused Sitaram Tripathy on the road close to the house. At the sight of the Excise staff, accused Rajendra started running towards his house, but he was chased and was apprehended in front of his house where the other accused Sitaram was also standing. The witnesses who had attested the search, seizure for accused Deba also came there. P.W.5 again disclosed his identity and intention to both accused Rajendra and Sitaram that they are suspected to be possessing contraband articles and asked them whether they wanted to be searched before a Gazetted Officer or a Magistrate or they had no objection if their personal search is taken by P.W.5 himself. Both accused Rajendra and Sitaram did not choose to go to the Magistrate or Gazetted Officer and consented for their personal search by P.W.5. Thereafter P.W.5 in presence of the witnesses, after observing all formalities of search, took the personal search of both accused Sitaram and Rajendra. During search one jari packet containing some powder was recovered from the right side pant pocket of accused Rajendra which he was wearing. On weighment it came to 5 grams. P.W.5 marked the said jari packet with identification mark as 'B'. Thereafter during personal search of accused Sitaram similarly one jari packet containing some powder was recovered from his right side pant pocket and after weighment it was found to be 11 grams. The said packets was marked with the identification marks as 'C'. P.W. 5 conducted similar tests which was conducted earlier in case of accused Deba, by taking 10 ml. from each packets and after tests he was confirmed that the contents of the jari packets i.e. powder was heroin. Both the jari packets were seized in presence of the witnesses and seizure list was prepared and the packets were seized by means of brass and paper seal. The house of the accused Sitaram was also searched and only one Balance scale was recovered and no contraband articles were found in the house. The Balance scale was also seized and thereafter both the accused persons Sitaram and Rajendra were arrested and forwarded to Court on 7.8.1992 along with other accused Deba. On that day a prayer was made to the Court for sending the seized articles for chemical analysis. As the Court was hard pressed for time and holidays intervened, the Court directed P.W.5 to preserve the seized articles in safe custody and he (P.W.5) as per the direction of his superior officer kept the same in safe custody in his office and thereafter by the order of the Court, it was

sent for chemical analysis and it was subsequently confirmed that the contents of the jari packets were heroin. The accused persons were prosecuted for having committed an offence punishable under Section 21 of the Act for unlawful possession of heroin.

The accused Sitaram took the plea that because he was an Inspector of Police and had taken objection to the unlawful dealing of illicit distilled liquor in the area under the control of main official witness, the investigating officer of the case i.e. P.W.5, he was falsely implicated. He was forcefully dragged from the house, put in a vehicle and when his son, accused Rajendra who is a college student protested, he was also forcibly taken to the vehicle. The other accused Deba took the plea that he had gone to the level crossing side to attend call of nature and while he was returning he was detained by P.W. 5 who wanted him to be a witness in the case against other two persons. Since he refused he was falsely implicated. To substantiate the accusations, six witnesses were examined by the prosecution in support of its case. P.W. 1 was the Assistant Sub-Inspector of Excise who was accompanied with P.W.5 who was the detaining officer. The accused persons examined three witnesses to substantiate their plea of innocence. The trial court found the evidence of P.Ws. 1 and 5 to be credible and held that the plea of accused persons regarding non-compliance of the provisions of Sections 41, 42 and 50 of the Act were without substance. It was held that there was compliance of the requirements in law. In appeal, the High Court observed that the alleged non-compliance of Sections 41,42 and 50 were really of no consequence, as the accused persons were entitled to acquittal because of two factors; firstly, there was correction in the search memo regarding the name of the persons from whose custody the contraband articles were found and secondly regarding the custody of these articles after seizure. Initially the name of one Kasinath Tripathy was written which was subsequently corrected to be Sitaram Tripathy. Further, though the seizure was purportedly made on 7.8.1992, till 10.8.1992 the samples of contraband articles had not been collected. It was not established that the articles were in safe custody during the intervening period. The order sheet of the concerned Court does not show that the seized articles were actually produced. With the aforesaid observation the conviction and consequential sentence was set aside as noted above.

In support of the appeal, learned counsel for the appellant-State submitted that after having found that the alleged contravention of provisions contained in Sections 42 and 50 were really of no consequence and in view of categorical finding that there was no contravention the High Court should not have interfered with the relevant conviction on untenable grounds. P.W.5 had clearly indicated as to why the name of Sitaram was required to be substituted in place of Kasinath Tripathy as was originally written. Further the evidence on record clearly shows that the contraband articles were produced before the Court alongwith the remand application. Forwarding report clearly indicates that the seized articles were produced along with accused persons. P.W. 5 had also categorically stated

that the articles were kept in the safe custody in the control room. The samples were drawn according to the directions of the concerned magistrate. That being so the conclusions of the High Court are clearly unsustainable.

In response learned counsel for the respondent Nos. 1 and 2 submitted that the High Court has analysed the factual position and found that the documents were manipulated and there was no proper explanation regarding the custody of the articles between 7.8.1992 till 10.8.1992. That being so, the conclusions of the High court cannot be faulted.

There was no appearance on behalf of the respondent No. 3 though he was represented by counsel in this Court.

It has to be noticed that before the trial Court and the High Court the stand was taken by the accused persons alleging non-compliance of Sections 42 and 50 of the Act. The same was given up by the respondents in this appeal and in our view rightly. Considering the time when search and seizure was done, and the undisputed position that the detection was made while the officers were on patrolling duty, Section 42 has no application. Additionally the evidence of PWs. 1 & 5 clearly shows that the accused persons were given the liberty to be searched in the presence of the prescribed officer and they did not choose to be searched by any person other than P.W.5. Therefore the plea related to non-compliance of Section 50 as raised during trial and before the High Court in addition to the concession, plea regarding non-applicability of Sections 42 and 50 of the Act is also without any substance. The residual question is regarding custody of the contraband articles and corrections in seizure memo. The evidence on record clearly shows that the forwarding report clearly indicated that the articles were being produced before the Magistrate. The order sheet of the Magistrate shows that because he was busy he directed that the articles should be produced on 10.8.1992 for the purpose of collecting samples.

Relevant portion of the order reads as follows:

"It is seen that the Investigating officer prays in his forwarding report to draw the sample and to send the same for chemical examination. No time today. However, put up on 10.8.1992 for the purpose. The Investigating Officer is directed to come ready for drawing of the sample and for sending the same to F.S.L., Bhubaneswar, for chemical examination."

The High Court seems to have proceeded on the basis that there is nothing in the order to show that the articles were really produced. The conclusion appears to have been arrived at without proper reading the order. In the order itself it has been clearly mentioned that in the forwarding report the investigating officer had requested to draw the sample for the same being sent for chemical examination. The

Court nowhere records that the articles were not produced and therefore samples could not be drawn. On the other hand due to paucity of time, the Court itself adjourned the matter and directed the case was to be taken up on 10.8.1992 for the purpose of drawing samples. The evidence of P.W.5 also shows that the articles were kept in the safe custody in the office of the Excise Department under lock and key till 10.8.1992. There was even no suggestion given to P.W.5 that the articles were not kept in safe or proper custody. That being so, the decision of the High Court doubting the safe custody is clearly unsustainable. In almost similar factual backdrop, this Court had held the High Court's view to be untenable. (See State of Orissa v. Kanduri Sahoo (2004 (1) SCC 337).

The other factor which has weighed with the High Court is that there was correction of name in the seizure memo. P.Ws. 1 & 5 have clarified this aspect. It has been categorically stated that initially the name given by accused no. 3 was Kasinath Tripathy. But on persistent questioning, it was subsequently stated that the real name was Sitaram Tripathy. That being so, the necessity for the correction has been clearly explained. The trial court accepted this explanation. But the High Court without any justifiable reason disbelieved the explanation offered by the witnesses regarding correction of name.

The factors which have weighed with the High Court for directing acquittal do not have any supportable basis. Inevitable conclusion is that the prosecution has established the accusation against the respondents, and the trial court had rightly convicted them. The High Court's judgment reversing the conviction is indefensible.

The appeals are allowed. The judgment of the High Court is set aside and that of the lower Court is restored. The bail bonds of the respondents-accused persons shall stand cancelled and they are directed to surrender to custody forthwith to serve remainder of sentences as imposed by the trial court.