



APPEAL OF PRISONER

C.A. 481/03 (2)

No. 307/2003 Name मोला राम 481/03
Father's name नथुनी राम उशोव
Residence सा. शीतला वाडी अम्बिकापुर भा. अम्बिकापुर Age 45 वर्ष
Sentenced विशेष आप. प्र. 14/2001 On 29-3-2003
Under section धारा-22 N.D.P.S Act-10 वर्ष सशुभ by विशेष न्यायाधीश एन. डी. पाण्डे
अर्थदंड - रुक लाख रुपये या तीन वर्ष सशुभ अम्बिकापुर सरगुजा (दण्ड)

it is explained to the prisoner that if he states or wishes to be represented by legal practitioner the Appellate Court will not proceed with the case for seven days unless the legal practitioner appears. If the legal practitioner does not appear with-in seven days he may not heard at all. If the prisoner states that he does not wish to be represented by legal practitioner the court may proceed at once with the case and will not be obliged to give a hearing to any legal practitioner who should appear.

1. Date of Application for copy of Judgement 29-3-2003
2. Date of which copy received 09-4-2003
3. Date on which appeal sent 09-4-2003
4. Whether the prisoner wished to be represented or not-Yes/No.

No. 307/2003 Name मोला राम आठ-नथुनी राम उशोव
Continued in केन्द्रीय Jail अम्बिकापुर, सरगुजा (दण्ड)

No. 1670 Dated 9/4/03 199
Forward to the ~~CHIEF JUDICIAL MAGISTRATE~~ ^{रुडिजियल (उप) डिस्ट्रिक्ट जज, एन. डी. पाण्डे, अम्बिकापुर}

to gather which a copy of order passed in the case for favour of transmission to the proper Appellate Court.

सालान - 10 ग्र

Superintendent

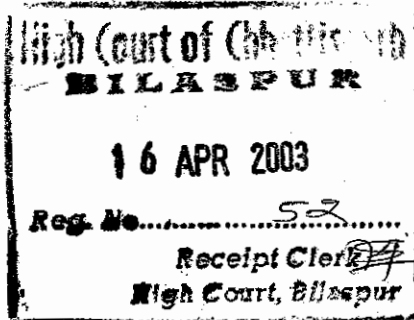
Signature
Superintendent
Central Jail, Ambikapur

Date of receipt in C.J.M.'s Office
Date of receipt record to accompany
Memo of Appeal of the Appellate Court
No. Dated 199
Forwarded to the

C.J. Magistrate

Date of receipt in Appellate Court

//SURGUJA TY.//



P.T. 0

(42) (57)

A.F.R.

28-4-06

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.481/2003

Single Bench: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Bhola Ram

Vs.

State of Chhattisgarh

Post for orders 28.4.06

Sd/-
Dilip Raosaheb Deshmukh
Judge

43 58
A.F.R.
28.4.06

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.481/2003

Single Bench: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Bhola Ram

Vs.

State of Chhattisgarh

PRESENT: -

Shri A. K. Shukla, learned counsel for the appellant.

Shri Ashish Shukla, Govt. Advocate with Ms. Sunita Jain, Panel lawyer for the State.

JUDGMENT

(Delivered on 28-04-2006)

This appeal is directed against the judgment dated 29-03-2003 delivered by Shri Raghubir Singh, Special Judge (N.D.P.S.), Ambikapur District-Sarguja in Special Criminal Case No.14/2001 whereby the appellant was convicted under Section-22 of the Narcotic Drugs and Psychotropic Substances Act. 1985 (hereinafter referred to as "the Act") and was sentenced to undergo R.I. for 10 years and to a fine of Rs.1,00,000/- and in default of payment of fine to undergo additional R.I. for three years.

2. The appellant was in jail during trial from 26-07-2001 and is undergoing sentence from the date of judgment.

3. Briefly stated the prosecution story is that on 25-07-2001 A.S.I. B.N. Singh PW-4 received secret information at 10 A.M. that the appellant Bholaram had some psychotropic substance in his possession for sale at Bus Stand, Ambikapur. After recording the aforesaid secret information and informing higher officials, he proceeded to Bus Stand, Ambikapur with Police staff and witnesses Santosh PW-1 & Sudama and apprehended the appellant. After serving

notice under Section-50 of the Act and the appellant having been consented to be searched by him, A.S.I. B.N. Singh PW-4 searched the appellant and found in his right full pant pocket brown sugar like substance kept in 3 plastic bags weighing approximately 15 grams. The brown sugar like substance was mixed on a plain paper and was weighed. It was found that the net weight of the substance seized was 12 Grams 800 Milligram while along with the plastic bags it weighed 14 Grams 170 Milligrams. The entire brown sugar like substance was kept in one small plastic bag and was sealed by A.S.I. B.N.Singh along with 3 empty plastic bags. The aforesaid sealed substance was handed over to Head Constable Mahesh Gupta No. 296, Malkhana Moharir of Police Station-Ambikapur for safe custody. On 27-07-2001 vide memo Ex.P-19 of Superintendent of Police, Sarguja at Ambikapur, the aforesaid sealed packet was sent to the Forensic Science Laboratory, Sagar for chemical examination. Vide report Ex.P-20 dated 09-10-2001 it was opined by the Forensic Science Laboratory that the substance sent for examination was Diacetylmorphine (Heroin). After completion of investigation, the appellant was prosecuted under Section-22 of the Act. The appellant abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined as many as 4 witnesses. Relying upon the testimony of A.S.I. B.N.Singh PW-4, Hemant Khare PW-3, S.H.O. Ambikapur and the F.S.L. report Ex.P-20, the trial Judge convicted and sentenced the appellant as aforesaid in para-1(Supra).

4. Shri A.K.Shukla, learned counsel for the appellant has assailed the conviction and sentence awarded to the appellant on the ground that the evidence led by the prosecution failed to establish the guilt of the appellant under Section-22 of the Act of 1985. It was contended that Heroin, a Drug commonly known as brown sugar was a Narcotic Drug and contravention in respect thereof was an offence

under Section-21 of the Act of 1985. The conviction of the appellant under Section-22 of the Act of 1985 was thus erroneous. It was also argued that independent witness Santosh PW-1 did not support the prosecution case and another independent witness Sudama was not examined by the prosecution, for which an adverse inference ought to have been drawn against the prosecution. Learned counsel also urged that non-compliance of Section-55 vitiates the whole prosecution since neither the *Malkhana Moharrir* Head Constable Mahesh Gupta PW-3 to whom the property was entrusted for safe custody, was examined nor was any evidence led by the prosecution to show that the Station House Officer of P.S. Ambikapur had affixed his seal on the seized and sealed substance handed over by A.S.I. B.N.Singh PW-4 for safe custody. Lastly, it was contended that the report of Forensic Science Laboratory did not show that the packet sent for chemical analysis contained 3 Plastic bags. Therefore, it could not be ruled out that the substance sent for chemical examination had been tampered with. On the other hand, Shri Ashish Shukla, learned Govt. Advocate with Ms. Sunita Jain, Panel Lawyer argued in support of the impugned judgment.

5. Having considered rival submissions, I have perused the record of Special Criminal case No.14/2001. The offence under Section-22 of the Act entails rigorous imprisonment for a term which shall not be less than 10 years but which may extend to 20 years and also to a minimum fine of Rs.1 Lakh which may extend to Rs.2 Lakhs. It was thus obligatory on the prosecution to prove beyond reasonable doubt that the substances alleged to have been seized from the possession of the appellant was the same which was received for chemical analysis at the Forensic Science Laboratory.

6. Section 55 of the Act lays down that before entrustment of the article seized and delivered at the *Malakhana*, the Officer-in-Charge of the Police Station is required to affix his seal on the samples seized and sealed by the Investigating Officer. In the present case, A.S.I. B.N. Singh P.W.4 has in paragraph 19 of his testimony stated that he had entrusted the sealed packets containing brown sugar like substance to *Malkhana Moharrir* Head Constable Mahesh Gupta (No.296) for safe custody. However, the prosecution has neither produced the *Malkhana* Register nor examined *Malkhana Moharrir* Head Constable Mahesh Gupta to prove the aforesaid fact. Station House Officer, Police Station Ambikapur Hemant Khare P.W.3 did not state that the articles entrusted by A.S.I. B. N.Singh P.W.4 to the *Malkhana Moharrir* were also sealed by him. Thus, in the present case, non-examination of *Malkhana Moharrir*, non-production of *Malkhana* Register and the fact that the Station House Officer did not affix his seal on the substance entrusted for safe custody by A.S.I. B.N.Singh P.W.4 shows total non-compliance of Section 55 of the Act.

7. A.S.I. B.N.Singh P.W.4 has testified that he had recorded the aforesaid secret information vide Ex.P.1 in the presence of witnesses Santosh P.W.1 & Sudama. It, thus, appears that these two witnesses were present with A.S.I. B.N.Singh P.W.4 right from the time when the secret information was received till the article seized from the possession of the appellant were sealed. However, Santosh P.W.1 did not support the prosecution story and stated that the police had taken his signatures on 8 - 10 papers. Nothing could be elicited in his testimony even after the witness was declared hostile and cross examined by the prosecutor. Another independent witness Sudama was not examined by the prosecution for which there is no explanation. It is settled law that when an independent witness though cited and

available is not examined by the prosecution without any rhyme or reason an adverse inference against the prosecution will have to be drawn.

8. The testimony of Station House Officer P.S. Ambikapur Hemant Khare P.W.3 does not show that he had accompanied A.S.I. B.N.Singh to the Bus-stand Ambikapur for intercepting the appellant. Navneet Singh who was called by Assistant Sub-Inspector B.N.Singh after effecting a seizure of the brown sugar like substance from the possession of the appellant for weighing the substance seized was also not examined by prosecution. It is in the weighment *Panchnama* Ex.P.10 that it appears for the first time that the seized substance was kept in a plastic bag and was sealed along with the three empty plastic bags in which the substance was found to have been kept in possession of the appellant. All other documents exhibited earlier i.e. seizure memo Ex.P.6 at 12.20 hours, homogenous sample *Panchnama* Ex.P.7 at 12.35 hours, identification *Panchnama* of brown sugar like substance Ex.P.8 at 12.50 hrs, the weighment verification *Panchnama* Ex.P.9 at 13.00 hours do not show that the substance seized from the appellant had been sealed. In this manner, Navneet Soni was also a material witness to prove the factum of sealing the substance alleged to have been seized from the appellant. Non-examination of Navneet Soni thus justifies an adverse inference against the prosecution.

9. Ex.P.1 is the *Panchnama* of the secret information received by Asst. Sub-Inspector at 9.50 A.M. at Police Station Ambikapur and shows the presence of both witnesses Sudama Prasad and Santosh Kumar. It is not clear whether these witnesses were present at the Police Station by chance or were called to be a witness of the secret information received by Asst. Sub-Inspector B.N.Singh. The fact that Santosh Kumar did not support the prosecution story and also

the fact that independent witness Sudama Prasad was not examined by the prosecution also justified an adverse inference against the prosecution.

10. The seized substance is alleged to have been entrusted to Head Constable Mahesh Gupta No.296 on 25.7.2001 by A.S.I. B.N.Singh. Non-production of the *Malkhana* register also creates a serious dent in the prosecution story. The memo of Superintendent of Police dated 27.7.2001 shows that the sealed substance was sent through Juhar Sai No.543 of Police Station Ambikapur. However, the report of Forensic Science Laboratory Ex.P.20 shows that the sample packet was received at F.S.L. Sagar on 30.7.2001. Constable Juhar Sai was also not examined by the prosecution would have thrown light as to in what condition the sample was kept during these 4 days by him. The *Panchnama* of the weighment and sealing articles Ex.P.10 clearly shows that the sealed packet contained one white-paper in which there were empty polythene packets and another polythene packet containing 12 grams 800 milligrams brown sugar. The report of the F.S.L. does not show that it contained a white-paper or three empty plastic bags inside the packet. Although A.S.I. Sub-Inspector B.N.Singh has stated that he had affixed the specimen impression of the seal on the *Panchnama* Ex.P-9, yet there is absolutely nothing on record to show that a specimen impression of the seal was deposited along with the sealed substance in the *Malkhana*. The report of the F.S.L. also does not show that a specimen impression of the seal was sent separately with the sample. The memo of Superintendent of Police Ex.P.19 also does not show that a specimen impression of the seal was also sent to the F.S.L. In view of the fact that independent witness Sudama Prasad, Goldsmith Navneet Soni, Constable Juhar Sai, *Malkhana Moharrir* Head Constable Mahesh Gupta were not examined by the

prosecution and also the fact that the seized substance entrusted for safe custody at the *Malkhana* did not bear the seal of the Station House Officer of P.S. Ambikapur, the substance which was sent for chemical examination could have been tampered with cannot be ruled out.

11. It is also to be noticed that in Ex.P.16-A, A.S.I. B.N.Singh P.W.4 was shown to have been accompanied by Head Constable No.06, Constable No.123, Constable No.227, Constable No.603, Constable Sanjay Singh and Constable No.622. However, none of these witnesses were examined by the prosecution for which there is no explanation. Their non-examination becomes important since Sudama Prasad, independent witness of the seizure, was also not examined by the prosecution. A.S.I. B.N.Singh P.W.4 has also admitted in paragraph 23 that at the time of effecting the seizure of the brown sugar like substance from the appellant vide Ex.P.6 he had not sealed the articles. He has also admitted in paragraph 24, that he did not separately weighed the quantity of brown sugar like substance in each plastic bag.

12. The seized articles were produced before the trial Judge who noted the details of its contents in paragraph 27 of the testimony of A.S.I. B.N.Singh. It does not find mention that there was a white paper inside the packet. It does not mention that it contained the wrapper of the packet containing the seal alleged to have been used by A.S.I. B.N.Singh for sealing the samples, as shown in Ex.P.10. Thus, this also creates a serious doubt that the samples sent for chemical analysis to the F.S.L. could have been tampered with.

13. It is also pertinent to note that the appellant was charged under Section 22 of the Act of 1985 for possessing brown sugar which is a narcotic drug and the conviction of the appellant by the

trial Judge is also under Section 22 of the Act. However, Section 22 of the Act of 1985 deals with punishment for contravention in relation to psychotropic substances. Schedule - I of the Rules framed under the Act of 1985 clearly shows that Diacetylmorphine (Heroin) is a narcotic drug and not a psychotropic substance. Therefore, the charge framed against the appellant under Section 22 of the Act 1985 and the conviction thereunder was wholly contrary to law. A charge under Section 21 of the Act 1985 ought to have been framed against the appellant.

14. Having thus considered the evidence led by the prosecution in its entirety, the following points emerge:-

- A. Sudama Prasad, independent witness of seizure was not examined by the prosecution for which there was no explanation.
- B. Another independent witness Santosh P.W.1 did not support the prosecution story.
- C. Head Constable Mahesh Gupta No.296 to whom the seized substance was alleged to have been delivered for safe-custody by A.S.I. B.N.Singh was also not examined for which no explanation was given.
- D. The *Malkhana* register was also not produced to prove the condition, date and time on which the sample was entrusted for safe custody and was taken out from the *Malkhana*.
- E. Constable Juhar Sai who was entrusted with the sample for being taken for chemical analysis to the F.S.L. was also not examined by the prosecution. There is no explanation for the custody of the sample from the time when it was taken out from the *Malkhana* up to the time when it reached the F.S.L.
- F. The specimen impression of the seal used by A.S.I. B.N.Singh was also not sent along with the memo of Superintendent of Police to the F.S.L.

- G. The property produced in the Court also did not show that it contained the wrapper bearing the seal of A.S.I. B.N.Singh in which the sample was alleged to have been sent to the F.S.L.
- H. There is total non-compliance of Section 55 of the Act since the Station House Officer of Police Station Ambikapur Shri Hemant Khare did not affix his seal on the substance alleged to have been deposited by A.S.I. B.N.Singh in the *Malkhana*.
- I. Charge framed against and conviction of the appellant under Section 22 of the Act 1985 was contrary to law since Diacetylmorphine (Heroin) is a narcotic drug covered under Section 21 of the Act.

15. In view of the above, conviction of the appellant under Section-22 of the Act of 1985 and the sentence awarded thereunder by the learned trial Judge are liable to be set aside.

16. In the result the appeal is allowed. The conviction of the appellant under Section 22 of the Act and the sentence awarded thereunder by the learned trial Judge are set aside. The appellant is acquitted and he shall be set at liberty forthwith, if not required in any other case. Fine, if paid, shall be refunded.

Sd/-
Dilip Raosaheb Deshmukh
Judge
