

HIGH COURT OF ORISSA, CUTTACK

GOVERNMENT APPEAL No.87 OF 1997

From the judgment dated 27.04.1996 passed by Shri P.K. Patra, Sessions Judge, Ganjam-Gajapati, Berhampur in S.C. No. 17 of 1995(N).

State of Orissa

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Appellant

Versus

Purosottam Behera

.....

Respondent

For Appellant

:::

Mr. A.K. Mishra,
Standing Counsel.

For Respondent

:::

M/s. V. Narasingh &
L. Samantray, advocates

PRESENT :

THE HON'BLE MR. JUSTICE D.DASH

Date of hearing : 22.10.2014 : Date of judgment : 30 .10.2014

The State in this appeal has called in question the order of acquittal passed by the learned Special Sessions Judge, Ganjam-Gajapati, Berhampur in S.C. No. 17 of 1995 acquitting the respondent of the charge under section 20(b)(i) of the ND & PS Act 1985.

2. The case of the prosecution in short is that on 14.03.1995 morning around 6.30 am Mr. R.P. Behera, the then Officer-in-Charge, Nuagaon police station (P.W.1) received credible information about

illegal transportation of ganja by a person in a bus bearing registration No. OAG- 44 (locally known as Chapala). Therefore, he entered the said information in the station diary book of the police station and passing it over to the Circle Inspector of Police, Berhampur over telephone and then sending a report through Grama Rakhi, he with S.I. of police Mr. S. Satpathy (P.W.6) left for Dhanghar crossing in order to ascertain the truth behind said information. The bus arrived there around 7.30 am. P.W. 1 and 6 with two others who have been examined as P.W. 2 and 3 then entered into the bus and found the respondent traveling by sitting inside the bus in an assigned seat keeping a jari bag on his lap. P.W. 1 then disclosed his identity and asked the identity of the respondent. He also disclosed his intention to search the bag as he suspected the same to be containing ganja on account of peculiar smell. The respondent thereafter was asked whether he wanted that the search be conducted in presence of Magistrate or Gazetted Officer and when the respondent replied in the negative and opted that the bag be searched by P.W. 1, search was so carried out. The contents of the jari bag found to be 1 kg. 500 grams are said to be ganja by P.W. 1 and others. Thereafter, 100 grams of ganja was collected as sample therefrom which was kept in a packet and then sealed by P.W. 1 by using his brass seal. The jari bag containing the residue ganja was also sealed and the seal was given in zima of P.W. 3. The respondent therefore was arrested and P.W. 1 having drawn up plain paper F.I.R. Ext. 3 directed P.W. 6 to take up investigation which he did. On return to the police station in the

evening around 8.30 p.m., the case was registered and the respondent was forwarded to court in custody along with the sample packet etc. with prayer to the court to forward the same for chemical examination which was so done. On completion of investigation, charge-sheet being submitted, respondent faced the trial for commission of offence under section 20(b)(i) of ND & PS Act.

3. The respondent took the plea of denial and false implication in the case.

Prosecution during trial examined six witnesses out of whom; P.W. 1 is the informant, the then OIC of Nuagaon police station. The driver, conductor and attendant of the bus have been examined as P.W. 2, 3 and 4 respectively along with the helper of the bus as P.W. 5. The Investigating Officer has been examined at last as P.W. 6. From the side of the prosecution, besides oral evidence being led through above named witnesses a number of documents have been admitted in the evidence most importantly, the plain paper F.I.R. Ext. 3, chemical examination report Ext. 7, seizure list Ext. 2, true copy of the station diary entry Ext. 5, office copy of the forwarding letter of J.M.F.C. to the Chemical Examiner Ext. 5 etc.

4. The trial court on analysis of evidence of the official and other witnesses noticed some material discrepancies in their testimony. Non-examination of any of the passenger traveling in the bus at the relevant time as witness from the side of the prosecution has been adversely viewed to the prosecution case on the face of the materials

being available to show that the witnesses P.W. 3, 4 and 5 have been tutored deposing in a parrot like manner. With the aforesaid, the trial court has held lack of cogent, convincing and reliable evidence to establish the fact that the respondent was the owner of the said bag and was transporting the same at the relevant time, thereby going to show that said respondent was not in exclusive and conscious possession of the seized contraband.

5. Learned Standing Counsel submits that the appreciation of evidence as done by the trial court in arriving at a finding as above is not proper. According to him, there was no justification for the trial court to disbelieve the evidence of official witnesses coupled with the evidence of the employees of the bus who have not been shown to have any sort of animosity with the respondent, having tendency to falsely implicate him. He further submits that the overwhelming evidence on record with regard to exclusive and conscious possession of the seized contraband by the respondent at the relevant time being kept in a jari bag and carried on his lap while sitting in the bus have been thrown aside without any cogent and legally justifiable reason. Therefore, he urges that it is a fit case to set at naught, the said factual finding rendered against the prosecution and in favour of the respondent holding him not liable for the offence when other mandatory requirements of law have been duly complied with.

6. Learned counsel for the respondent on the other hand while

supporting the finding of the trial court has further gone to point out the evidence on record in the light. According to him, the finding that it has not been proved beyond reasonable doubt by clear, cogent and reliable evidence that the respondent was in exclusive and conscious possession of seized contraband ganja is based on proper appreciation of evidence and in view of proved circumstances. He further submits that even on re-appraisal of evidence, this Court can't cull out any such reason or provide justification to arrive at a finding contrary to the one that the trial court has given. So, he urges that that the appeal bears no merit.

7. On the above rival submission, this Court is now called upon to scan the prosecution evidence in order to judge the defensibility of the finding of the trial court as stated above. Before taking up that exercise, it is felt apposite to take note of the scope of this appeal and power of this Court to interfere with an order of acquittal in seisin of an appeal against the same.

It has been held in case of **Basappa Vrs. State of Karnataka**; (2014) 57 OCR 1044 that the High Court in an appeal under section 378 Cr.P.C. is entitled to reappraise the evidence and put the conclusions drawn by the trial court to test but the same is permissible only if the judgment of the trial court is perverse. Relying the case of **Gamini Bala Koteswara Rao and others – Vrs. State of Andhra Pradesh**; (2009) 10 SCC 639, it has been held that the word “perverse” in terms as understood in law has been defined to mean

‘against weight of evidence’. In ‘**K. Prakashan Vrs. P.K. Survenderan**; (2008) 1 SCC 258, it has also been held that the Appellate Court should not reverse the acquittal merely because another view is possible on evidence. It has been clarified that if two views are reasonably possible on the very same evidence, it cannot be said that prosecution has proved the case beyond reasonable doubt (Ref.: - **T. Subramaniam Vrs. State of Tamil Nadu**; (2006) 1 SCC 401). Further, the interference by appellate Court against an order of acquittal is held to be justified only if the view taken by the trial court is one which no reasonable person would in the given circumstances, take (Ref.: - **Bhima Singh Vrs. State of Haryana**; (2002) 10 SCC 461).

8. Keeping the above in mind, let’s examine the evidence of the two official witnesses who have been examined as P.W. 1 and 6. P.W. 1 was the then IIC, Nuagaon police station and having received credible information had proceeded to the spot for detection. He has proved station diary entry as Ext. 5 and has stated that when he and P.W. 6 entered into the bus, they recovered a jari bag containing ganja from the possession of the respondent by specifically stating that the respondent was holding jari bag. Thus, there remains the discrepancy with what has been noted in the F.I.R. lodged by P.W. 1 and marked as Ext. 3 that the packet was on the lap of the respondent. The evidence of P.W. 6 is of no significance in this connection as he has come to the picture later as the Investigating Officer after the lodging of the plain paper F.I.R. by P.W. 1. P.W. 2, the driver of the bus has stated that the

respondent was sitting on the right side seat on the last but one row. Next he states that the respondent was holding a jari bag of his lap. For a driver of a bus with the sitting capacity of 52 persons to mark a passenger sitting on the last but one row and to specifically state as to what he was holding and its manner appears to be not only improbable but also impossible more particularly in the facts and circumstances of this case that P.W. 1 when made an entry to the bus, he with others such as conductor, checker and cleaner must have proceeded to search inside the bus with anxiety of other passengers and then the driver being on his seat to mark all these details in a way go to show as to how falsehood has been resorted, when it is not stated by the driver-P.W. 2 as to how he went to that place, where he was then and what he saw.

9. Next comes the evidence of the conductor, P.W. 3 who has stated that the respondent was sitting on the last but one row carrying a jari bag on his lap. It is also his evidence there were 20 passengers in the bus at the relevant time. His evidence does not appear to be sequence wise. The evidence to P.W. 4 though is in a general manner, it is seen that he has not stated that the jari bag was on the lap of the respondent. P.W. 5 is stating that the respondent was holding it on his hand. Thus the evidence of witnesses are not found to be consistent with regard to the most important aspect of connecting the said jari bag with the respondent and those are irreconcilable. Therefore, the non-examination of any of the passengers of the bus certainly matters and the prosecution under the circumstances cannot escape from being

blamed for said non-examination so as to provide further corroboration, more so when it is there in the evidence of P.W. 2 that he and the conductor of the bus had been implicated in a case by Andhra Pradesh police for transportation of ganja for which their interestedness in the case is not totally ruled out.

In view of aforesaid discussion of evidence on record, this Court find no reason and justification to accord disagreement with the finding of the trial court as regards the failure of the charge against the respondent under section 20(b)(i) of ND & PS Act.

10. In the result, the appeal stands dismissed.

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D. Dash, J.

Orissa High Court, Cuttack
Date 30th October 2014/ Narayan.