IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLREV No. 48 of 2006

An application under Section 401 Cr.P.C. 1973 arising out of the judgment and order dated 19.07.2005 passed by the learned 2nd Adhoc Addl. Sessions Judge, Sundargarh in Criminal Appeal No. 6/48 of 2005 and the judgment and order dated 21.02.2005 passed by the learned J.M.F.C., Sundargarh in 2(a) C.C. No. 333 of 2003 (Trial No. 109 of 2004).

Upendra Kumar @ Kumar ***…..*** ***Petitioner***

-versus-

State of Orissa ***……*** ***Opp. Party***

For Petitioner : Mr. G.N. Sahoo, Adv. on behalf of Mr. Ajaya Kumar Nanda, Adv.

For Opp. Party : Mr. Manoranjan Mishra, A.S.C.

CORAM:
HONOURABLE MISS JUSTICE SAVITRI RATHO

JUDGMENT
30.05.2025

Savitri Ratho, J. This application under Section 401 of the Code of Criminal Procedure has been filed challenging the judgment dated 19.07.2005 passed by the learned 2nd Adhoc Addl. Sessions Judge, Sundargarh in Criminal Appeal No. 6/48 of 2005, confirming the conviction of the petitioner for commission of offence under

Section 47(a) of the Bihar and Orissa Excise Act and sentenced to undergo simple imprisonment for a period of two years and to pay a fine of Rs.5000/-, in default to undergo further simple imprisonment for a period of three months by the judgment and order dated 21.02.2005 passed by the learned J.M.F.C., Sundargarh in 2(a) C.C. No. 333 of 2003 (Trial No. 109 of 2004).

PROSECUTION CASE

2. The prosecution allegation in brief is that on 08.08.2003 at about 3.00 p.m. the Sub-Inspector of Excise in course of patrolling along with staff, conducted a raid in the residential house of the petitioner and on search recovered one plastic jerrycan containing 10 liters of O.S. liquor (mohuli). The Sub-Inspector tested the seized liquor by blue litmus paper which turned red and from his departmental experience and training he came to a conclusion that the recovered substance was O.S. liquor. As the petitioner failed to produce any authority in support of his possession of the seized liquor and for which the sub-Inspector prepared a seizure list wherein he obtained signature of the witnesses and the petitioner and submitted prosecution report against the petitioner to face the trial under Section 47(a) of Bihar and Orissa Excise Act.

DEFENCE PLEA

3. The defence plea was one of complete denial and false implication.

WITNESSES

4. During course of trial, in order to prove its case, the prosecution examined two witnesses. P.W.1, Rahas Bihari Patra, is the S.I. of Excise and P.W.2, Babulu Das, is the excise constable.

P.W.1 the S.I. of Excise along with P.W.2 Excise Constable, searched the house of accused on 08.08.2003 and recovered one plastic jerry bag containing 10 litres of O.S. liquor vide seizure list Ext.1. P.W.1 proved the seizure list and his signature vide Ext.1/1. It is forthcoming from the evidence of P.W.1` that he tested the liquor by blue litmus paper which turned red and from his departmental experience and distillery training, he came to know that the same was O.S. liquor. The evidence of P.Ws. 1 and 2, it is clear that on 08.08.2003, they searched the house of petitioner and recovered some liquor.

5. The prosecution exhibited one exhibit. Ext.1 is the seizure list.

6. No witnesses have been examined on behalf of the defence.

JUDGMENT OF TRIAL COURT

7. The learned Trial Court held his opinion that the liquor in question is O.S. liquor and it was under the occupation of other adult members, the said liquor cannot be said as recovered from the exclusive possession of the petitioner. In this context, P.Ws. 1 and 2 have categorically stated that the liquor was recovered from the possession of the petitioner. In cross-examination P.W.2 has stated that the father of petitioner was absent at the time of search and seizure. So when the petitioner was alone in the house under search, he is answerable as to how could be come to possess such liquor which was kept in his house. The accused has not shifted his burden. There is no evidence on record as to why the official witnesses would depose falsehood against the petitioner when there is no animosity with them. It can be conclusively held that the liquor was recovered and seized from the exclusive conscious possession of the petitioner.

JUDGMENT OF APPELLATE COURT

8. The learned Appellate Court stated that law is also fairly well settled that the opinion of any person specially skilled in the relevant science or art, it acceptable as expert evidence. As P.W.1 has deposed that from his departmental experience and distillery

training, he could know that the liquid substance recovered from the house of the petitioner was O.S. liquor and no questions having been put to P.W.1 during his cross-examination, regarding his departmental experience and expertise in the field. The opinion of P.W.1 that the recovered liquid substance was O.S. liquor can be accepted as expert evidence, which is admissible under Section 45 of the Indian Evidence Act. Non-examination of the recovered/seized substance by a chemical examiner, does not vitiate the finding of the learned Court below on this score. So far as the applicability of the provisions of the Probation of Offenders Act is concerned, as such, offence is rampant in that part of the State and consumption of country made liquor on many occasions has given rise to more serious offences like death and the social life and economic condition of the local people who mostly belong to scheduled tribes have been adversely affected due to the unauthorized preparation and sale of country liquor, so no leniency should be shown to the persons involved in the offence of the present nature as that would send a wrong signal to the society and encourage others to indulge in similar unlawful activities. The learned trial Court has not committed any illegality by adopting the deterrent theory of penology and declining to extend the

benevolent provisions of the Probation of Offenders Act based on the reformative theory in favour of the appellant and the sentence imposed by the learned trial Court appears to be just and proportionate to the offence committed by the petitioner.

SUBMISSIONS

9. Mr. G.N. Sahoo, learned counsel appearing on behalf of the petitioner has submitted that after the judgment was delivered in the criminal appeal, the petitioner was arrested on 03.01.2006 and remained in custody till he was released on bail pursuant to order dated 04.05.2006 passed by this Court in this Criminal Revision.

Mr. Sahoo, learned counsel submitted that the impugned judgments of the Courts below convicting the petitioner solely on the basis of evidence of the official witnesses i.e. P.Ws. 1 and 2, without examining any independent witnesses and without assigning any reason for not examining any independent witnesses, are liable to be set aside. He further submits that there is no evidence as to the basis of the information to conduct the raid in the house of the petitioner nor has the personal diary of P.W.1 entering any such information or clue regarding illegal manufacture or of possession of O.S. liquor by the petitioner in his

house, the action of the prosecution is completely illegal and malafide and done in order to rope in the petitioner in a false case when there is no support of any independent witnesses to such action of the prosecution, and when the alleged recovery was made from a house in occupation of a joint family and involved other adult members, the findings of the Courts below that the alleged recovery was made that from the conscious and exclusive possession of the petitioner, is completely illegal and unsustainable. He has submitted that the alleged seized substance is O.S. liquor has not been sent for chemical examination. P.W.1, the sub-inspector of Excise having not proved his departmental training and experience certificate, his evidence could not have been relied upon to come for conclusion that the seized substance was O.S. liquor. So the impugned judgments of conviction and sentence basing on such inadmissible evidence, are liable for interfere. He also submits that the alleged recovery and seizure having not been proved by the prosecution, the learned Courts below ought to have discarded the prosecution case more so when the seized substance was not produced in the Court. He submitted that the learned Courts below have gone wrong in not appreciating the fact that the prosecution has to prove its case beyond all

reasonable doubt against the petitioner and in the instant case the prosecution having failed to examine the independent eye witnesses, not having sent the seized substance for chemical examination, not proving the departmental training of the S.I. of Excise (P.W.1), not producing the seized materials in Court, not establishing that the seized substance was O.S. liquor and not proving the ownership of the house which was in joint possession of other adult members, the impugned judgments of conviction and sentence of the Courts below are liable to be set aside. He relied on the following decisions in support of his submission :-

(i) ***Aparti Sahu & Another vs. State of Orissa,*** reported in ***2002 (II) OLR 148***.

(ii) Jhadia Naik vs. The State reported in ***(2010) II OCR 572.***

10. Mr. Manoranjan Mishra, learned Addl. Standing Counsel submitted that no interference is required in the two judgments as the evidence of the S.I. of Excise that he had requisite qualification and has not been challenged. A conviction can be based on the testimony of the official witness as they have no axe to grant with the accused so as to falsely accuse him. He relies on the decision of

the Supreme Court in the case of ***G. Sahukar vs. State of Orissa*** reported in ***(2000) 19 OCR (SC) 688***.

JUDICIAL PRONOUNCEMENT

11. In the case of ***Aparti Sahu*** (supra), this Court has held that where prosecution case is based on official and seizure witnesses, the factum of recovery is not corroborated by independent witnesses, recovery of I.D. liquor from conscious possession of petitioner is doubtful.

In the case of ***Jhadia Naik*** (supra), this Court has held as follows:-

> *"4. P.W 2 has not supported the prosecution. He testified that nothing was seized from the petitioner in his presence by the excise officials. The conviction of the petitioner is based solely on the evidence of the two officials witnesses, P.Ws 1 and 3. Law is well settled that conviction can be based on the evidence of official witnesses, if the same is found to be consistent and credible. Even if independence witnesses do not support the prosecution the evidence of official witnesses can be assessed and accepted.*
>
> *5. However, it appears from the evidence of P.Ws 1 and 2 that P.W 1 conducted blue litmus test paper and hydrometer test of the contents of the jerrican recovered from the possession of the petitioner. Neither the seized*

jerrican containing liquor nor blue litmus used and hydrometer chart was prepared by P.W 1 were produced in the Court. Therefore, the entire case of the prosecution depends upon oral testimonies of P.Ws 1 and 2. P.W 1 deposed in cross-examination that hydrometer chart was not submitted with the P.R and that he did not produce the seized article in Court. P.W 3 testified that he cannot say what happened to the blue litmus paper. Therefore, obviously, the prosecution has conducted the enquiry in a most perfunctory manner. Prosecution has not come up with any explanation or justification for non-production of the seized article. Also blue litmus paper and hydrometer chart have been withheld from Court without any explanation.

6. In ***Chandramani Sabar v. State (1998) 14 OCR 265*** *and* ***S. Dasarathi Reddy v. State, 1998 (1) OLR 315 : (1998) 14 OCR 442****, it has been observed that in case of this nature, where substantive sentence of imprisonment is compulsory after conviction, a heavy duty is cast upon the prosecution to establish the case beyond any reasonable doubt. In both the decisions it was held that non-examination of seized article by Chemical Analyst affects prosecution case to have been recovered I.D liquor. In* ***Kunjabehari Behera v. State of Orissa (1960) 10 OCR 525****, it was held that in absence of hydrometer chart it would be unsafe to rely on the testimony of the witness to conclude that it was illicit liquor which was seized from the possession of the accused. It has further*

been held in the aforesaid decision upon reference to the decision in ***Suma Das v. State of Orissa : 1993 (2) OLR 392 : 1993 (2) OLR 392*** *that blue litmus test only shows that liquid to be acidic and no more. So far as the hydrometer test is concerned, it is a test only to show the density of the liquid, the technical excise manual of J.S Pillary shows that the strength of diluted liquor raised from 75 degree to 73 degree up and the average may be taken at about 85 degree. While illicitly liquor may have a particular density or may have a range of density, a mere fact that the seized article when put to hydrometer answers the density of illicitly distilled liquor or fits into the range of density of illicitly distilled liquor, would by itself not unmistakably show that the liquid is illicitly distilled liquor. It is possible to conceive that other liquid may have also the same density. In Suman Das (supra) it was held that combined effect of blue litmus and hydrometer tests would show that the liquid is acidic in nature and the density is similar to that of illicitly distilled liquor.*

7. In the present case, though P.W 1 stated to have undertaken blue litmus as well as hydrometer tests, his evidence to that effect is not supported by production of blue litmus and hydrometer chart. The seized article has also not been produced. There is no evidence on record to show that P.W 1 had experience or expertise to find out whether any liquid was I.D liquor or not. In view of principles laid down in the aforesaid decisions it is found

that evidence adduced by the prosecution does not constitute a firm basis to sustain the conviction of the petitioner under section 47(a) of the Bihar & Orissa Excise Act."

This Court in the case of ***S. Dasarathi Reddy vs. State : 1998 (II) OLR 315 : 2000 (19) OCR 688*** (supra) has held as follows *:*

...."5. Here in this case, it is not disputed that no chemical analysis was done. What was done by the Excise Sub- Inspector was litmus paper test and hydrometer test. It is not explained as to why the seized liquor was not sent to the Chemical Examiner for examination. He, however, claims that he had training in distillery and he had 11 years experience at his credit in the Department. Besides this bald statement there is nothing to show that he had actually received training in a Branch of the Excise Department which is directly connected with the testing of liquor. Such a bald statement without any particulars of training or type of service does not make him an expert witness. It may be observed that in case of this nature, where substantive sentence of imprisonment is compulsory after conviction, a heavy duty is cast upon the prosecution to establish beyond any reasonable doubt that what was recovered from the accused was illicit liquor. Here in this case, the evidence is lacking with regard to it. This being the position, it seems that the order of conviction and

sentence passed by the trial Court and affirmed by the superior Court cannot be sustained."…

In the case of ***Simanchal Choudhury*** **vs. State of Orissa : 2005 (II)OLR 401** (supra), this Court has held as follows :-

…"*5. I have perused the judgments of both the Courts below and the evidence adduced by the prosecution witnesses. I find that even though the prosecution has alleged that the petitioner was selling I.D. liquor when the seizure was effected, strangely, no independent witnesses to the search and seizure have been produced by the prosecution. If the allegation of the prosecution regarding the act of selling I.D. liquor is accepted, the same would presuppose that some person or persons was/were either purchasing or purchasing and consuming the liquor sold by the accused. But, neither statement of any such person has been recorded nor any such person has been produced as prosecution witness. It is no doubt true that the evidence of official witness can be relied upon in a given case.*

As because P.W.1 was working as a constable in the Excise Department, the same is not a ground to disbelieve his testimony. It is revealed from the record that the liquid seized was never subjected to chemical test. Except the bare statement of P.W.2 that he tested the seized liquid by litmus paper which turned red and also measured the density of the said liquid by hydrometer

test, that does not prove conclusively that the liquid seized was I.D. liquor. Blue litmus turning red on being introduced to a liquid only goes to show that the nature of liquid is acidic and no more. So far as the hydrometer test is concerned, it is a test to measure the density of liquid and possibility of any other liquid (solution) having the same density cannot be ruled out. The evidence of P.W.2 that by his experience of long twenty years of service in the department, he has acquired an expert knowledge in identifying liquor, is of no help to the prosecution. As already held by this Court in various decisions, an Excise Officer bearing some experience due to his long service cannot be termed as an expert in terms of Section 45 of the Evidence Act. Further, in the instant case, identification of the liquid seized by P.W.2 as I.D. liquor does not confirm to the test as required to be proved to bring a case under Section 47(a) of the Bihar and Orissa Excise Act, 1915. (See ***Suma Das v. State of Orissa, 1993 (II) OLR 392 : 1993 (6) OCR 612, Bisam Harijan v. State of Orissa, 1994 (I) OLR 516 : 77 (1994) CLT 944 and Biswanath Sahoo v. State, 2002 (I) OLR 316 : 93 (2002) CLT 327****), I find, in the present case that the seized liquor was never produced before the trial Court which is another aspect, which goes against the case of the prosecution."...*

In the case of ***G. Sahukar*** (supra), this Court has held as follows:-

"2. The Counsel for the appellant, however, wanted to raise a contention that the entire proceeding is vitiated as the officer, who investigated into the offence, did not have the authority in question. This point has not been urged in the forums below and we find that under Section 77(2) of the Act, the State Government is empowered to issue notification authorising different categories of officers for conducting investigation in respect of different offences. Since the point in question had not been raised in forums below, we cannot entertain and decide as to whether a particular officer who has investigated into an offence, did have the authority to investigate or not. The learned Counsel for the appellant also raised a contention that the possession of the accused is not one of conscious possession. The question whether the intoxicant was recovered from the possession of the accused is a question of fact and when all the forums below have concurrently recorded a finding that the accused was in possession of the same, it would not be appropriate for this Court to interfere with the same. Another contention that had been raised by the learned Counsel for the appellant is that there had been no proper chemical test to identify the substance to be an I.D. liquor. This is factually incorrect, inasmuch as several tests had been held and that apart, even the Excise Authority by mere smell would be competent to decide whether the article is a liquor or not."

ANALYSIS AND CONCLUSION

12. No documents or details of the departmental training of the S.I. of Excise (P.W.1) has not been proved. The alleged O.S. liquor has not been sent for chemical examination.

13. I am not inclined to accept the submission of the learned counsel for the petitioner that false allegations have made against the petitioner as the seized materials have not been produced in Court, the seized substance has not been sent for chemical examination and the independent witness has not supported the prosecution case.

14. But in view of the above discussion, decisions and the facts of the case, I am inclined to set aside the conviction of the petitioner by giving him the benefit of doubt as in the absence of a chemical test, in my considered it would be unsafe to convict the petitioner by relying on the opinion of P.W.1 which is on the basis of blue litmus paper and his departmental and distillery training, that the substance seized was O.S. Liquor.

15. The conviction of the petitioner under Section 47(a) of the Bihar and Orissa Excise Act by the learned J.M.F.C. Sundargarh in 2(a) C.C. No 333 of 2003 (Trial No. 109 of 2004), confirmed by the learned 2nd Adhoc Additional Sessions Judge,

Sundargarh in Criminal Appeal No. 6/48 of 2005 is therefore set aside.

16. The Criminal Revision is accordingly allowed.

17. As the petitioner is stated to be on bail, his bail bonds are discharged.

18. The trial Court records be returned forthwith to the learned trial court with a copy of this judgment.

.....
(Savitri Ratho)
Judge

Orissa High Court, Cuttack.
Dated, the 30th May, 2025.
S.K. Behera, Sr. Stenographer.