

HON'BLE SMT JUSTICE ANIS
CRIMINAL REVISION CASE No.567 OF 2008

ORDER:

This Criminal Revision Case under Sections 397 and 401 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C') is filed by the revision petitioner herein challenging the judgment dated 08.04.2008, passed by the IV Additional Sessions Judge, (Fast Track Court), Mahabubnagar, in Criminal Appeal No.84 of 2004, whereunder and whereby the conviction and sentence passed against the revision petitioner herein for the offence punishable under Section 34(a) of the Andhra Pradesh Excise Act, 1968, (for short 'the Act'), vide the judgment dated 03.09.2004 in C.C.No.123 of 2003 by the Judicial Magistrate of First Class, Kodangal, was confirmed.

2. The revision petitioner herein is the accused and respondent herein is the complainant in C.C.No.123 of 2003 before the trial Court. For the sake of convenience, the parties hereinafter will be referred to as they are arrayed in the C.C. before the trial Court.

3. The brief facts of the case are that on 22.02.2003 at 2:15 p.m, upon a reliable information of possession of Chloral Hyderate by the accused in his house at Lingampally, PW.4-Sub-Inspector of Prohibition & Excise, secured the presence of Polepally Sailoo and PW.1 as mediators and visited the house of the accused along with PW.2-Prohibition & Excise Inspector, Enforcement, Mahabubnagar and PW.3-Prohibition & Excise Sub Inspector, Enforcement, Mahabubnagar. On their visit, one person was available in the house and on enquiry he revealed his name and address. Thereafter, a memo was issued and Polepally Saioloo and PWs.1 to 3 searched the house and found one plastic bag with raw-material. On opening the said bag, they found Chloral Hyderate weighing 2 Kgs in it. The officers informed to Polepally Sailoo and PW.1 that it is Chloro

Hyderate and it is in the illegal possession of the accused for sale. The House bearing No.1-49 situated at Lingampally belongs to the accused. The officers drawn two samples containing 150 gms each from the contraband and sealed as per the procedure. The samples and remaining contraband was seized under the cover of panchanama Ex.P1, and the seal and signature of Polepally Sailoo and PWs.1 to 3 were obtained. Thereafter, the accused and the case property was handedover to PW.4 by PWs.2 & 3 for taking further legal Action. On receipt of the same, the case was registered in P.C.O.R.No.533 of 2002-2003 for the offence punishable under Section 34(a) of the Act and accused was produced before the Court with a request to send the accused for judicial custody. The samples were deposited in the Court with a request to send one of the samples for analysis. The remaining contraband was deposited in the office of the Deputy Commissioner, Excise, Mahabubnagar, for confiscation. After receiving the chemical examiner's report-Ex.P4, it is opined that the sample is Chloral Hyderate. Thus, during the course of investigation, it is established that the accused has committed an offence punishable under Section 34(a) of the Act.

4. The learned Judicial Magistrate of First Class, Kodangal, took cognizance of the case and framed a charge for the offence punishable under Section 34(a) of the Act against the accused. During trial, to prove the case of prosecution, PWs.1 to 4 were examined and Exs.P1 to P4 were got marked.

5. After closure of the prosecution evidence, accused was examined under Section 313 Cr.P.C putting all incriminating material available against him. Accused denied the material evidence and reported no oral or documentary evidence on his behalf.

6. The trial Court, after hearing the arguments and after perusing the record, convicted the accused for the offence punishable under Section 34(a) of the Act and sentenced him to undergo Rigorous

Imprisonment for a period of one year and to pay a fine of Rs.5,000/-, and in default of payment to undergo Simple Imprisonment for a period of three months.

7. Aggrieved by the conviction and sentence passed by the trial Court, accused preferred Criminal Appeal No.84 of 2004 before the IV Additional Sessions Judge, (Fast Track Court), Mahabubnagar, where the Appellate Court after considering the evidence on record confirmed the conviction and sentence and dismissed the appeal.

8. Being aggrieved by the judgment of the Appellate Court passed in Criminal Appeal No.84 of 2004, the accused preferred the present revision case.

9. The learned counsel appearing for the revision petitioner/ accused argued that the prosecution has not produced any independent evidence as the mediator-PW.1 has not supported the case and remaining witnesses are official witnesses; that the prosecution also has not examined the neighbours of the accused as witnesses to know that the house, in which Chloral Hyderate was seized, belongs to the accused; that non-examination of the independent witnesses is fatal to the prosecution case and the Appellate Court has not taken into consideration about the said fact; that the prosecution also failed to prove the search and seizure made by PWs.2 to 4; that the judgment of the Appellate Court is based on surmises and conjectures and came to a wrong conclusion without appreciation of evidence and relied upon the case law reported in **T.**

Subbanna v. State of Andhra Pradesh^[1], wherein it is held at para 10 as follows:

“10. The evidence of PWs. 3 and 5 discloses that the search was made in violation of mandatory provisions of Section 55 of the Andhra Pradesh Excise Act. Therefore, the entire search is illegal. Further, they did not follow the mandatory provisions of Section 100(4), Cr.P.C. No local residents were called and the

so-called independent witnesses who were examined as PWs 1 and 2 turned hostile. Neither the Village Officers nor the neighbours of the locality were examined to prove the ownership of the hayrick.”

He also relied on the case law reported in **Karolla Chinnaiah and another v. State of Andhra Pradesh**^[2], wherein it is held at para 6 as follows:

“.... Now except the evidence of P.W. 1, there is no other witness to support the prosecution case as the mediator examined has not supported the prosecution case. As seen from the mediators' report, two mediators were taken along with P.W. 1, the other mediator is not examined by prosecution. When one mediator has not supported the prosecution case, non-examination of other mediator is fatal to the prosecution case, particularly when the other two witnesses are only official witnesses. Here this P.W. 1 is the complainant himself and also investigating officer. P.W. 3 has not conducted any investigation, he simply filed charge sheet, after receipt of analyst report.”

and prayed the Court to allow the revision case.

10. On the other hand, the learned Public Prosecutor appearing for the State argued that the evidence of PWs.2 to 4 clearly established that on 22.02.2003, they searched the house of the accused and found Chloral Hyderate and the same was seized under the cover of panchanama in the presence of PW.1; that when the samples were sent to analyst and after receiving the report, it is found that the sample sent is a Chloral Hyderate, and therefore, both the Courts rightly convicted the accused for the offence punishable under Section 34(a) of the Act and non-examination of the independent witnesses is not fatal and prosecution proved the case beyond reasonable doubt and the findings of the trial Court and Appellate Court needs no interference and prayed the Court to dismiss the revision case.

11. Now, the point for determination is --

Whether the prosecution could bring home the guilt of the accused for the offence punishable under Section 34(a) of the Act, with which he is charged?

12. **P O I N T**: According to the prosecution, on 22.02.2003 at about 2:15 p.m, PWs.1 to 4 visited the house of the accused by relying on the information that the accused was in possession of Chloral Hyderate in his house. After serving the search memo, PWs.1 to 4 searched the house and found one plastic bag with a raw material and on opening the said bag, they found Chloral Hyderate weighing 2 Kgs in it. After drawing two samples, they seized the remaining contraband under the cover of panchanama Ex.P1 and affixed the seal and signature of PWs.1 to 4 on it. Accused and the case property were taken into possession by PW.4 and thereafter, a case was registered against the accused for the offence punishable under Section 34(a) of the Act, and accused was produced before the Court.

13. During the course of trial, prosecution examined four witnesses. PW.1 is the independent witness, who according to the prosecution acted as mediator to the panchanama. He has not supported the prosecution case. He clearly stated that he do not know anything about the case and further denied the signature on the seizure panchanama ExP1. PWs.2 to 4 are the official witnesses, who were present when the search and seizure were conducted. The learned counsel for the revision petitioner argued that the prosecution failed to prove that the accused is the resident of house bearing No.1-49, and no independent witnesses were examined to prove the search and seizure of the property from the accused. The learned counsel also argued that when one mediator has not supported the prosecution case, non-examination of the other mediator is fatal to the prosecution case.

14. In the case law reported in ***T. Subbamma's case*** (first cited supra) relied upon by the counsel for revision petitioner, this Court held that "the provisions of Sec.55 of the Act is mandatory. No local residents were called and no independent witnesses were examined to

prove the ownership of the hayrick, and therefore the entire search is illegal". In the present case also, the prosecution failed to examine the independent witnesses and when PW.1 turned hostile, the prosecution should have been examined another mediator, who acted at the time of search and seizure of Chloral Hyderate. The prosecution in this case has not produced any evidence to show that the accused is the owner of the house bearing No.1-49, and further prosecution also has not examined the neighbouring witnesses of the accused. Further, in another case reported in ***Korolla Chinnaiah's case*** (second cited supra), this Court held that "PW.1 being the complainant and investigating officer is naturally interested in getting a conviction. He cannot be treated as an independent witness and he cannot be compared on par with a prosecutrix in a rape case or a victim for the offence of outraging the modesty of a woman."

15. In the present case also, PWs.2 to 4 are the investigating officers and officials of Prohibition and Excise Department, and their evidence is naturally interested in getting the conviction of the accused and prosecution failed to follow the mandatory provisions of Sec.55 of the Act. Therefore, following the ratio laid down in the case laws cited supra, prosecution failed to prove the search and seizure made on 22.02.2003 under Ex.P1 and it cannot be accepted and further, non-examination of the independent witnesses and independent mediator is also fatal to the prosecution case. Therefore, I am of the view that the accused is entitled for benefit of doubt and the trial Court as well as the Appellate Court committed error by relying on the evidence of PWs.2 to 4, who are the investigating officers for convicting the accused, and therefore the Judgments of the trial Court and the Appellate Court are liable to be set aside.

16. Accordingly, the Criminal Revision Case is allowed. Conviction and sentence passed in C.C.No.123 of 2003 as confirmed in Criminal Appeal No.84 of 2004 on the file of the IV Additional Sessions Judge,

(Fast Track Court), Mahabubnagar, is set aside and the bail bond of the accused shall be cancelled. The revision petitioner herein is also entitled for the refund of the fine amount.

17. Miscellaneous petitions pending, if any, in this Criminal Revision Case shall stand closed.

ANIS, J

Date: .01.2015
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[\[1\]](#) 2003 (2) ALT (Cri.) 190 (A.P.)

[\[2\]](#) 2014 Law Suit (AP) 500 = 2014 (2) ALD (Cri) 641