IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.2258 of 2018

Arising Out of Excise Case No.-870 Year-2017 District- Bhojpur

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Awadhesh Rai S/o Chandravans Rai, R/o Vill.- Barka Chanda, P.S.- Koilwar, District- Bhojpur.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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Appearance :

For the Appellant/s : Mr. Arun Kumar, Advocate
Mr. Pramod Mishra, Advocate

For the Respondent/s : Mr. Sujeet Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date : 30-11-2018

Heard Mr. Arun Kumar, learned counsel for the appellant and Mr. Sujeet Kumar Singh, learned Additional Public Prosecutor for the State.

2. This appeal has been filed by the appellant challenging the judgment of conviction and order of sentence dated 29.05.2018 passed by the learned Additional District and Sessions Judge-IV-cum-Special Judge, Excise Act, Bhojpur, Ara in Excise Case No.870 of 2017 whereby the appellant has been held guilty for the offence under Section 30(a) of the Bihar Prohibition and Excise Act, 2016 (for short 'Excise Act, 2016') and sentenced

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to undergo rigorous imprisonment for ten years and fine of Rs.1 lakh and in default of payment of fine to further undergo rigorous imprisonment for six months.

3. The case of the prosecution is based on the basis of a written complaint filed by Md. Sagir Ansari, Sub Inspector of Excise, Bhojpur, Ara in the court on 18.05.2017. In the said complaint, he has alleged that on 17.05.2017 on the basis of confidential information he along with officials of the Excise Department, Officer-in-charge of Koilwar Police Station and armed forces proceeded towards Manachak village and by the bank of river sone, in presence of independent witnesses 26 liters of country-made liquor was recovered from a rubber tube. The appellant tried to flee away from the place but he was chased and caught and in that course, he sustained some injuries. He has stated that the seized article was sealed and sent to the office of the Assistant Commissioner, Excise for test and a seizure was prepared on which independent witnesses, namely, Rupa Bind, Bashisth Bind and a constable of the Excise Department, Bishwajeet Kumar Singh put their signature.

4. On the basis of the aforementioned written complaint, Excise Case No.870 of 2017 was registered under Section 30(a) of the Excise Act, 2016. Subsequently, on 10.10.2017, the charge

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under section 30(a) of the Excise Act, 2016 was explained to the appellant to which, he pleaded not guilty. Thereafter, the trial commenced.

5. In course of trial, three witnesses were examined on behalf of the prosecution. After the prosecution case was closed, statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure on 18th November, 2017. Thereafter, three witnesses were examined on behalf of the defence. After the defence case was closed, the trial court heard arguments on behalf of the parties and convicted and sentenced the appellant in the manner stated above.

6. Mr. Arun Kumar, learned counsel appearing for the appellant submitted that the judgment passed by the trial court is perverse. The trial court failed to appreciate the evidence on record and erroneously came to the finding of guilt against the appellant. He pleaded that though the complainant claimed to have seized the country-made liquor and sent the same to the office of the Assistant Commissioner for chemical examination, he himself conducted the test and submitted the test report. He contended that neither the seized liquor nor the container was ever produced before the court. He urged that no independent witness was examined on behalf of the prosecution and the entire case of the

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complainant rests on the evidence of three excise officials. He pleaded that even the Officer-in-charge of the Koilwar police station or the other constables of the armed forces were not examined by the prosecution in order to corroborate the case of the complainant. He argued that even the seizure list witnesses were given up by the prosecution and they were examined as defence witnesses.

7. *Per contra,* Mr. Sujeet Kumar Singh, learned Additional Public Prosecutor for the State submitted that the case of the prosecution is based on an official complaint filed by a Sub Inspector of the Excise Department. He argued that there is no law which mandates that the complainant himself cannot examine the density of the seized liquor and submit a report. He contended that all the three witnesses examined during trial on behalf of prosecution are consistent on all material points. He pleaded that merely because the seized liquor or the container was not produced before the court, the case of the prosecution cannot be doubted. According to him, when the prosecution came to know that independent seizure list witnesses were in collusion with the accused, they rightly did not examine them as prosecution witnesses. He urged that the appeal deserves to be dismissed, as no error is found in the findings of the trial court.

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8. I have heard learned counsel for the parties and carefully perused the record.

9. P.W.-2, Md. Sagir Ansari, S.I. Excise, Ara after corroborating the story narrated in the complaint stated in his deposition that he had himself tested the seized substance and found the same to be country-made liquor. He has proved his own signature on seizure list, which was marked as exhibit-3, his signature on the complaint, which was marked as exhibit-4, the test report of the seized substance, which was marked as exhibit-5 and the charge report, which was marked as exhibit-6.

10. In cross-examination, he has stated that the confidential information of the alleged offence was received from the office of the Assistant Commissioner and before proceeding for raid, intimation was sent to him. He further stated that the rubber tube, which was seized at the place of occurrence is kept in *malkhana*. He contended that the seized substance was tested by him on 19th May, 2017 through hydrometer in which the percentage of alcohol and water was 71% and 29% respectively. He stated that only on the basis of the reading of hydrometer, he has submitted his report.

11. As far as the other two witnesses are concerned, they are constables of Excise Department.

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12. PW-1, Sri Kumar Singh, apart from corroborating the contents of the complaint stated that at the time of raid, besides the Inspector of Excise Department and other constables, at least ten Home-guards were present at the place of occurrence.

13. In cross-examination, he admitted that when the raid was conducted, several persons were present near the place of occurrence. He further stated that during search, drum, utensils of plastic and several other materials were also found at the place of occurrence. He has identified the signature of the complainant and one seizure list witness Bishwajeet, which were marked as exhibits-1 and 2. He stated that the people who were grazing the buffalo were called and some of them had become seizure list witnesses.

14. PW-3, Bishwajeet Kumar Singh, stated in his examination-in-chief that apart from the Officer-in-charge of Koilwar Police Station, the complainant and the constables of the Excise Department and some Jawans of Special Auxiliary Force were also present at the time of raid conducted in village-Manachak. He has identified his own signature on the seizure list.

15. In cross-examination, he has stated that when they brought the seized liquor, the same was measured and the liquor was kept in the *malkhana*. He has stated that he cannot say

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whether any seal was put after the recovery of the seized article and before the same was deposited in the *malkhana*. He has stated that when the seized article was taken to *malkhana*, he was also present along with complainant.

16. In his statement recorded under Section 313 of the Code of Criminal Procedure, the appellant completely denied the factum of seizure of the illicit liquor from his possession.

17. DW-1 Bashisth Bind and DW-2 Rupa Bind, examined on behalf of the defence have stated in their deposition that on the relevant date and time of occurrence, no seizure of illicit liquor was made in their presence. They were called by the excise police. Their thumb impression was taken on blank sheet of paper. They put their thumb impression out of fear of the excise police. In cross-examination, nothing relevant could be taken out from them.

18. DW-3 Rajeshwar Rai stated in his deposition that on the date of seizure of the alleged illicit liquor, police came and took the appellant from his house on the pretext that they had to make certain inquiry from him. He has denied that he has falsely deposed before the court at the instance of the appellant.

19. Having seen the evidence on record, I find that in the complaint the case of the complainant is that 26 liters of illicit

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liquor was recovered from a container (rubber tube) by the bank of river sone and on seeing the raiding team, the appellant tried to flee away but was chased and apprehended. It is also the case of the prosecution that the container was sealed at the place of occurrence itself and was sent to the office of the Assistant Commissioner, Excise for chemical examination. However, no person from the office of the Assistant Commissioner, Excise has come forward to say that any seized article ever reached to the office of the Assistant Commissioner, Excise.

20. Further, though the case of the prosecution is that the container was sealed at the place of seizure itself, the official seal was never produced in the court.

21. Similarly, the seized liquor or the container was also never produced before the court.

22. It is not known as to how and by whom the measurement of the seized liquor was made when the admitted case of the complainant is that the seized substance was sealed at the place of occurrence. It is also not known as to how the sample of the seized liquor was drawn. No witness has come forward to say that any sample of the seized liquor was drawn at the place of occurrence.

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23. Apart from the above discrepancies, what I find from the evidence is that the complainant and PW-3 have stated in their deposition that the seized substance was kept in *malkhana* but neither the *malkhana* register nor the *malkhana* incharge was examined to corroborate the factum of recovery of illicit liquor or its safe custody.

24. To top it all, neither the seized substance nor the container (rubber tube) was produced in the court. What happened to the seized substance is also not known as there is no evidence that the same was destroyed.

25. Furthermore, the bonafide of the test report becomes doubtful in view of the fact that the complainant entrusted himself in the task of conducting the test and proving the test report of the seized substance.

26. I further find that though the case of the prosecution is that several persons were present near the place of occurrence when the search and seizure was conducted, no independent person came forward in support of the prosecution case. On the contrary, the two seizure list witnesses were examined by the defence and they categorically stated that no search and seizure was made in their presence and their thumb impression was taken on blank sheet of paper. The prosecution could not get anything in

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cross-examination from those two seizure list witnesses. The trial court has not discussed at all as to why their evidence was not found reliable.

27. I have also noticed that the case of the complainant is that at the time of raid, the Officer-in-charge of Koilwar police station and some other constables of armed forces were present, but none of them were examined in course of trial. There is no explanation as to why they were not made witnesses on behalf of the prosecution. It has rightly been argued by the defence that only the complainant and two constables of excise were examined.

28. The quality of evidence led before the court by the prosecution make the entire case of the prosecution doubtful.

29. Under such circumstance, in the opinion of this Court, the court below ought to have acquitted the appellant giving him benefit of doubt.

30 In that view of the matter, the impugned judgment of conviction and order of sentence cannot be sustained.

31. Accordingly, the judgment of conviction and order of sentence dated 29.05.2018 passed by the learned Additional District and Sessions Judge-IV-cum-Special Judge, Excise Act, Bhojpur, Ara in Excise Case No.870 of 2017 is set aside. The

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appellant is directed to be released forthwith, if not required in any other case.

32. The appeal stands allowed.

(Ashwani Kumar Singh, J.)

Sanjeet/-

AFR/NAFR	NAFR
CAV DATE	NA
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