

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.2372 of 2019**

Arising Out of PS. Case No.-89 Year-2018 Thana- GOVERNMENT OFFICIAL COMP.
District- Madhubani

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TEJ NARAYAN SAHNI Son of Late Basudeo Sahni Resident of Village -
Kateya Mallah Toli, Ward No. 10, P.S.- Benipatti, District - Madhubani.

... .. Appellant/s

Versus

The State of Bihar Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr.Mahasweta Chatterjee
For the Respondent/s : Mr.Abhay Kumar

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**CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR
ORAL JUDGMENT**

Date : 27-11-2024

Heard learned counsel for the petitioner and
learned APP for the State Shri Shyam Kr. Singh.

2. The present appeal has been filed against the
Judgment dated 16.03.2019 passed by the Additional Sessions
Judge-II-cum Special Judge, Excise Act, Madhubani in GO No.
89 of 2018 / Tr. No. 3251 of 2017 by which the learned
Additional Sessions Judge, Madhubani has convicted the
appellant for the offence under Section 30 (a) of Bihar
Prohibition and Excise Act, 2016 and sentenced him to undergo



10 years RI and a fine of Rs. 1,00,000/-and in default of payment of fine, he would undergo six month imprisonment.

3. The prosecution case was instituted on the basis of the information given by one Pramod Kumar Mandal SI, Excise against the appellant and one Md. Chunnu under Section 30 (a) of Excise Act which was registered as GO No. 89 of 2018.

4. The prosecution case in brief is that on 13.05.2018. on secret information of Excise Superintendent of Madhubani, Pramod Kumar Mandal SI, Excise Sadar, (Informant) along with Excise Constables raided poultry farm of Tej Narayan Sahani at village Kateya. It is alleged that during search, the raiding party found that a man was sleeping outside the poultry farm whereas another person was sleeping inside the room. On being asked about their names and address, the person who was sleeping inside the room disclosed his name as Tej Narayan Sahani whereas another person disclosed his name as Md. Ismail. It is alleged that in their presence the raiding party searched the poultry farm and found a room locked and after taking the key from Tej Narayan Sahani, the raiding party unlocked the room and found that many cartons of Royal Stag Whisky were kept in that room. After taking Tej Narayan Sahani



in their custody, the raiding party counted the cartons, which were 240 in number. It is alleged that the informant prepared the seizure list at the place of occurrence and took signature of the villager on the seizure list. Thereafter arrested the appellant under Section 30 (a) of Excise Act. After arrest, it has further been stated by Tej Narayan Sahani that he has engaged Md. Ismail for feeding the chicken.

5. The police submitted the charge-sheet and on the basis of the same, cognizance was taken against the appellant and Md. Chunnu and thereafter Charge was framed against both the accused Under Section 30(a) of Bihar Prohibition and Excise Act, 2016.

6. The prosecution examined six witnesses, out of which four are the member of raiding party including the informant and PW 5 is villager and seizure list witness who has stated in his cross-examination that he put his signature on plain paper. PW 6 is an Advocate clerk who has identified the signature of the chemical analyst.

7. The defence has examined two witnesses DW 1 namely Lal Bachan Saday, who has categorically stated that the appellant is engaged in fish business and the DW 2 is villager who has also categorically stated that there is no poultry farm in



the village and the appellant is engaged in Fish business. The Chemical Analyst has not been examined.

8. PW 2 namely Santosh Kumar Jha, Police Constable has stated in his cross-examination that out of total 240 cartons only 10 cartons were opened which were neither sealed nor any parcha was prepared and in paragraph no. 11 of cross-examination of PW 2 has stated that there is no verification of the fact that as to whether the poultry farm belongs to Tej Narayan Sahani or not.

9. PW 4, being informant has also stated that there is no document to prove that Tej Narayan Sahani is owner of the poultry farm and also, there is contradiction in the statement given by the PWs in the Court regarding number of cartons opened and sealing of these cartons and issuance of Parcha. PW 2 stated in his cross-examination that seal of 10 cartons were opened whereas PW 3 in his cross-examination has stated that seal of one or two cartons were opened. PW 2 and PW 3 in their cross-examination have stated that the cartons were not sealed after those were broken and no parcha was issued whereas PW 4 the informant has stated that 10 cartons of Royal Stag were opened which were sealed with Lah and parcha was also issued

10. None of the PWs have corroborated the



statement of the appellant allegedly given before the informant which was reduced in writing by the informant.

11. After, trial the learned Additional District and Sessions Judge-II-cum Special Judge, Excise Act found the appellant guilty of offence under Section 30 (a) of Bihar Prohibition Excise Act 2016 and convicted him to undergo ten years rigorous imprisonment and fine of Rs. 1,00,000/-, in default, to undergo six month and accused Md. Chunnu was acquitted.

12. The submission of the learned counsel for the petitioner is as follows:-

I. Non-examination of Md. Ismail, who was a seizure list witness and as per prosecution's case. He was found sleeping outside the poultry farm, and thus was the most natural and important witness, and the prosecution has purposely withheld him.

II. Independent seizure list witness and arrest memo witness Dharmendra Kumar Mukhiya, P. W. 5, has stated in his cross examination in paragraph 4 that he signed on blank documents and he knows the appellant as he is his co-villager. This witness has not supported the prosecution's case and has neither been declared hostile,



and thus his evidence is binding on the prosecution, and it can be inferred that absolutely nothing incriminating was seized from the alleged place of occurrence.

i. Following Judgments of The Hon'ble Supreme Court relied upon by the learned counsel for the appellant on evidence of prosecution witness binding if he has not been declared hostile and has not supported prosecution case:-

Raja Ram vs State of Rajasthan reported in (2005) 5 SCC 272.

Javed Masood vs State of Rajasthan reported in (2010) 3 SCC 538.

Veerendra vs State of M.P. reported in (2022) 8 SCC 668.

III. No proof of proper sealing and sampling:-

a. P.W. 1 Rupesh Kumar who is a member of raiding team says that seizure list was prepared at the place of occurrence and during cross examination he has stated in paragraph 10 that liquor was in cartons which were sealed. He does not remember how many cartons were opened. They had sealed the cartons.

b. P.W. 2 Santosh Kumar is also a member of raiding team and in paragraph 15 he has stated that all



cartons were not opened. Some cartons like 10 cartons were opened. They had not sealed the cartons. They had not placed any mark on the cartons. No parchi was stuck.

c. P.W. 3 Dharmendra Kumar is a member of raiding team and he has stated in paragraph 19 that 1-2 cartons were opened and others were sealed. In paragraph 20 he has stated that sealed cartons were not opened. Cartons were again sealed by Pramod Kumar Mandal using tape. No mark (mohar) was given. In paragraph 21 he has stated that no parchi was made.

d. P.W. 4 Pramod Kumar Mandal is the informant of the case and in paragraph 14 he has stated that 10 cartons were opened and rest 230 were closed. He had opened all cartons. He sealed the cartons using lah (lacquer) and fixed parchi. No mohar was fixed.

IV. Chemical Report not proved

a. None of the witnesses have stated that where, when and how much quantity was drawn from the seized liquor as sample, and where and how the same was sent for examination.

b. Exhibit 6 has been marked by P.W. 6 who is an advocate clerk and he has stated in paragraph 1 that he knows the Excise Chemical Examiner, but in paragraph 3 he has stated that he did not see him signing the report. Neither the chemical



examiner who issued the test report has been examined nor his subordinate or colleague has been examined to prove the said test report.

V. Neither material exhibit has been produced in court nor the destruction report has been filed

a. In absence of both the material exhibit and destruction report it cannot be said that the so-called test report pertains to the allegedly seized liquor.

VI. No proper identification of appellant or verification of P.O.

a. All witnesses (members of raiding team) have stated that they were not knowing the appellant from before nor they verified whether the person apprehended was Tej Narayan Sahni or not.

b. All the witnesses have stated that no investigation was done to verify whether the poultry farm belongs to the appellant or not.

VII. Defence witnesses have clearly stated that there is no poultry farm of the appellant in the village and appellant runs a fishery and evidence of defence witness is as important as that of prosecution witnesses, and the prosecution has miserably failed to prove the place of occurrence.



VIII. Contradictions in deposition of prosecution witnesses.

a. P.W. 2 and 3 do not say that the key of the room was taken from the appellant in order to unlock the same.

b. P.W. 1 in paragraph 5 says about presence of one stranger at the time of alleged raid, while P.W. 2 has stated in paragraph 12 that no outsider was present. P. W. 3 has stated in paragraph 18 that he cannot say how many people were present while opening of lock.

IX. Large number of witnesses have been withheld in the present case, including many members of raiding team.

13. Learned APP for the State Shri Shyam Kr. Singh has submitted that a huge recovery of illicit liquor has been made from the poultry farm of the appellant and the witnesses have supported the prosecution case. It has further been submitted by the learned APP for the State that minor contradiction will not be fatal to the prosecution case. He also submits that chemical examination report of the excise officer has found the seized material to be liquor and therefore the appeal is fit to be dismissed.

14. I have heard and considered the submissions of the parties.



15. There is no doubt that there is huge recovery of 240 cartoons of illicit from the room of the poultry farm of the appellant but in the present case, the independent seizure list witness Dharmendra Kr. Mukhiya (PW 5), in his deposition has said that he had signed on blank paper document. This witness has not supported the prosecution case and has not supported the fact of seizure of any illicit liquor from the poultry farm of the appellant in his presence and this witness has not been declared hostile.

16. The Hon'ble Supreme Court in the case of ***Raja Ram vs State of Rajasthan (Supra)*** has held as follows:-

9. But the testimony of PW 8 Dr. Sukhdev Singh, who is another neighbour, cannot easily be surmounted by the prosecution. He has testified in very clear terms that he saw PW 5 making the deceased believe that unless she puts the blame on the appellant and his parents she would have to face the consequences like prosecution proceedings. It did not occur to the Public Prosecutor in the trial court to seek permission of the court to heard (sic declare) PW 8 as a hostile witness for reasons only known to him. Now, as it is, the evidence of PW 8 is binding on the prosecution. Absolutely no reason, much less any good reason, has been stated by the Division Bench of the High Court as to how PW 8's testimony can be sidelined.

17. The Hon'ble Supreme Court in paragraph 13-16 of the case of ***Javed Masood vs State of Rajasthan (Supra)***



has held as follows:-

13. PW 6 also stated in his evidence that he has not given the names of any individuals to the police inasmuch as he had not seen the actual occurrence of the incident. It is also in his evidence that immediately after the incident he telephoned to one Habib with a request to communicate the message to Chuttu about the occurrence. He repeatedly stated that Chuttu (PW 5), Noor (PW 13), Saleem (PW 7) and Rayees (PW 14) were not present when the police kept the dead body of Mullaji (the deceased) in gypsy. He also explained that there was no need for him to send any telephonic message had they been present at the scene of occurrence. This witness did not support the prosecution case. He was not subjected to any cross-examination by the prosecution. His evidence remained unimpeached.

14. The evidence of Noor (PW 13) and Rayees (PW 14) is more or less the same as of PW 5 and therefore no detailed discussion is required about their evidence.

15. Suresh Kumar (PW 18) is a Police Constable who along with driver Ranjit Singh (PW 30) went in the gypsy to the spot and lifted the injured person into gypsy to take him to the hospital. He stated in his evidence that at that time except himself, driver Ranjit Singh (PW 30) and the Circle Inspector nobody else was present. He specifically stated that Chuttu (PW 5), Rayees (PW 14) and Noor (PW 13) were not present at the place of occurrence at the time when he reached the scene of offence.

16. Laxmi Narayan (PW 29) is another policeman who corroborated the evidence of Constable Suresh Kumar (PW 18) stating that he and Constable Suresh Kumar and driver Ranjit Singh (PW 30) kept the body of the injured (the



deceased) in the gypsy and went to Sahadat Hospital. There was crowd near the injured person but no relative of the deceased was present.

18. Once the seizure list witness has said that the seizure was not done in his presence and his signature was obtained on a blank paper and he has not been declared hostile the seizure of the illicit liquor becomes doubtful.

19. In view of the aforesaid judgments of the Hon'ble Supreme Court, when the seizure list witness has not been declared hostile, his evidence is binding upon the prosecution and therefore the seizure of illicit liquor become doubtful.

20. Moreover, Md. Ismail, the most important witness, who was present at the time of the seizure of the illicit liquor and who was made a witness of the prosecution, has been withheld by the prosecution. In the opinion of this Court, he would have been the best witness of the prosecution but as the prosecution has withheld him, an adverse inference has to be drawn i.e. if he would have deposed he would not have supported the prosecution.

21. So far as the sealing and sampling of the seized liquor is concerned, from the evidence of PW 1, 2, 3 and 4 it appears that seized liquor was not properly seized as PW 1 says



that liquor, which was in cartons, were sealed. He does not remember, as to how many cartons were there and he has not said as to when the cartons were sealed and how and when the samples were drawn from the cartons.

22. Similarly, PW 2, on the point of sealing and taking out the sample has said that all cartons were not opened and some of the cartons were opened. The cartons were not sealed and no mark was put on the seized cartons or the cartons were not properly seized by attaching any parchi/paper on the cartons.

23. PW 3 again has said in his deposition that one or two cartons were open and others were sealed. He has also said that the sealed cartons were not opened and the opened cartons were sealed by affixing a tape and no mark was given on the cartons which were sealed and similarly no paper was fixed on the cartons.

24. PW 4 on the point of sealing and taking out the sample has said that 10 cartons were opened and rest 230 cartons were remained packed. He has opened all the cartons and sealed the cartons using Lah (lacquer) and fixing a paper on the same and there was no stamp fixed on the carton.

25. From the aforesaid discussions, it appears that



there was no proper sealing of the seized materials and whether the samples were taken out or not has also not been properly been explained by the witnesses.

26. The witnesses are the official witnesses and from the statement of the witnesses, it appears that though they were part of the raiding team but nothing was done in their presence and the seizure of the illicit liquor becomes doubtful because of the evidence adduced by the witnesses.

27. The witnesses have not said that where the samples were sent for examination.

28. PW 6, who is an advocate clerk and formal witness has proved the chemical report of the excise officer. In his deposition, he says that he knows the excise officer, who is the excise chemical examiner. He has not seen the excise chemical examiner signing the report. The excise chemical examiner who has done the examination of the seized liquor has not been examined and the test report has not been properly proved.

29. The material exhibits have not been produced in the Court during trial. There destruction report has not been produced in the trial. The production of the sample report without the material exhibits and the destruction report cannot



be relied upon by the prosecution.

30. In view of the above, I am of the view that prosecution has not been able to prove the prosecution case beyond the reasonable doubt.

31. In view of the discussions above, this application is allowed.

32. Accordingly, the judgment dated 16.03.2019 passed by the Additional Sessions Judge-II-cum Special Judge, Excise Act, Madhubani in GO No. 89 of 2018 / Tr. No. 3251 of 2017 is hereby set aside.

33. The records of the case be returned to the Trial Court forthwith.

34. Interlocutory Application, if any, shall be treated to be disposed of.

(Sandeep Kumar, J)

Vikas/-

AFR/NAFR	N.A.F.R.
CAV DATE	N.A.
Uploading Date	02.12.2024.
Transmission Date	02.12.2024.

