

Ghuran Yadav

Vs

State of Bihar

Criminal Appeal No. 58 of 1967

(S. M. Sikri, I. D. Dua, P. Jagmohan Reddy JJ)

18.01.1971

JUDGMENT

DUA, J. -

1. This appeal by special leave is directed against the judgment and order of the Patna High Court, dated January 31, 1967, summarily rejecting the appellant's revision from the order of the Additional Sessions Judge, Monghyr, dated January 9, 1967, dismissing his appeal from the order of a Munsiff-Magistrate, Ist Class, Khagaria, dated June 2, 1966, convicting him of an offence under Section 47(a) of the Bihar and Orissa Excise Act 2 of 1915 (hereinafter called the Excise Act). The appellant was sentenced to rigorous imprisonment for one year and a fine of Rs. 1,000/- in default of payment of fine the appellant has to undergo further rigorous imprisonment for three months.

2. Accordingly to the prosecution story on October 9, 1963, a Sub-Inspector of Excise (Special) organised a raid party for going to Mathar village, Police Station Khagaria, District Monghyr. The raid party included a Magistrate and some members of the armed police force. In that village a house alleged to belong to the appellant is said to have been searched and six bags of non-duty paid Ganja recovered from one of the rooms. As a result the appellant was prosecuted for an offence under Section 47(a) of the Excise Act. The appellant denied that his house was searched or any non-duty paid Ganja was recovered from his house. According to him, the house alleged to have been searched from which the Ganja in dispute was recovered did not belong to him. The prosecution in support of its case examined in all eight witnesses out of whom four witnesses were non-official and the remaining four official witnesses were a Magistrate, a Sub-Inspector and an Assistant Sub-Inspector of Excise and a peon of the Excise Department. The Magistrate trying the case has observed in his order that all the non-official prosecution witnesses (Nos. 1, 2, 3 and 5) had tried to help the accused though they were not declared hostile. The official witnesses, according to the Magistrate, had deposed that the house of the accused was searched after observing all formalities and six bags of NDP Ganja were recovered from the room facing south. On the question of ownership of the house alleged to have been searched the trial Court relied on the testimony of the Magistrate (P.W. 8) and of Ram Krishan Yadav (P.W. 3) and convicted the appellant, as already mentioned. The Additional Sessions Judge, on appeal, has observed in his judgment that the accused had not specifically stated either in his examination under Section 342, Cr. P.C. or in his written statement that the house actually searched did not belong to him and that without evidence showing that the accused had some other house in the village it could not be held that the house searched did not belong to him. According to the Judge, to quote his own words : "The knowledge regarding residence of a person in a house must not necessarily be personal and in all cases that can be imagined such a knowledge is only derivative and not direct". On this view the evidence of the Magistrate (P.W. 8) and of the Sub-Inspector, Excise (P.W. 6) was held to establish that the house

from which non-duty paid Ganja was recovered belonged to the appellant and to none else. It was next argued there that the house searched was lying vacant and the appellant was not even present at the time of the search. On seeing the big raid party some of the villagers had started running away carrying with them some bags of Ganja, and it was suggested that some of such fleeing villagers might well have thrown some of those bags in the vacant house from where those bags are alleged to have been recovered during the search. The Appellate Court did not accept this contention as there was no evidence to support his theory. That Court, relying on the testimony of (P.W. 4) and (P.W. 6) felt that the recovery of the bags from a room inside the house and the fact that the house was closed on all sides, ruled out this possibility. After expressing this view the Court said :

"The appellant had evidently taken to his heels at the sight of the raiding party, but six bags of Ganja were found inside a room belonging to him, and as has been noted by the learned Court below, the very nature of the commodity itself is such that anyone having such a big quantity of Ganja with himself can (not) plead ignorance of its existence in his house, because evidently it gives not a very strong smell which cannot be lightly ignored by anyone residing hereby. The appellant cannot, therefore, be permitted to plead that if the six bags of Ganja be held to have been recovered from his house, he was not in the know of the affair and was ignorant about it."

On this reasoning the appellant's conviction was upheld by the Court of appeal. His revision having been dismissed in limine he has, as observed earlier, appealed by special leave. On behalf of the respondent the counsel prayed for condoning the delay in entering appearance which prayer was allowed.

3. According to Section 47(a) of the Excise Act if any person in contravention of the Act or of any rule imports, exports, transports, manufactures, possesses or sells any intoxicant he shall be liable to imprisonment for a term which may extend to one year and fine which may extend to Rs. 2,000 or to both. "Intoxicating" as defined in Section 2(12)(a) includes an intoxicating drug and "intoxicating drug" as defined in Section 2(13) (i) includes all forms of Ganga. It is not disputed that if possession of the six bags in dispute can be traced to the appellant then Section 47(a) would be attracted. The only question requiring determination by us is if there is evidence on the record establishing the appellant's possession of those bags. It is not controverted by the prosecution that there was no one in the house when it was searched and it is not the prosecution case that any one saw the appellant running away on seeing the raid party.

4. This position is also clear from Ex. 1/Kha, the memo of search. In this background we may now examine the record to see if there is any evidence on which the conclusions of the Trial Court and the Appellate Court can be founded. Rama Shanker Singh (P. W. 6), Sub-Inspector (Excise), in his examination-in-chief has not said anything as to who had identified the house, which was searched, to be that of the appellant. Indeed, he has not even given reasons which induced the raid party to search this particular house. It is not the prosecution case that all the houses in the village were searched indiscriminately. In cross-examination he has said that out of the raid party which consisted of about 40 or 50 persons only five or six persons were present when the house in question was searched. One of them was B.D.O (who has apparently not been produced as a witness) and two were employees of the Excise Department, the remaining two, according to him, were Ram Krishan Yadav (P.W. 3) and Unchit Paswan (P.W. 5). He has not specifically stated that the Magistrate (A. A. Akbari, P.W. 8), was present at the time of the search of this house, though he has undoubtedly added a little later that the bags recovered from the house were shown by him to the witnesses and to the Magistrate as containing Ganja. The bags, according to him were taken to Monghyr and on

the following day weighed in the presence of the Magistrate. Regarding the identity of the house he has deposed that Ram Krishan and Uchit Paswan had told him that the house belonged to the appellant. These two non-official witness (P.W. 3 and P.W. 5), it may be recalled, were held by the Trial Court to have come "to the witness-box well prepared to help the accused person" and were not declared hostile and not cross-examined by the prosecuting counsel. We may, however, now turn to their testimony to see if it corroborates P.W. 6 Ram Krishan Yadav (P.W. 3) is a teacher. According to him, on the morning of October 9, 1963, at about 6 or 6.30 a.m. while coming from Monghyr when he reached Chauraha (crossing) he saw men of the Excise Department and some armed policemen near a ditch at a distance of one or one and a half Rassis north-east from the appellant's house. He saw some bags there. On being called he went there but he has denied knowledge of the contents of those bags. He put his signature on Ex. 1/Kha, to quote his own words "after writing something". His attention was apparently drawn to that writing which showed that six bags containing Ganga had been recovered from the appellant's house. This, according to the witness, was written by him under pressure of the police. Although the witness had made this statement in examination-in-chief he was not declared hostile and the prosecution was apparently satisfied with this statement. In cross-examination he repeated that he had written on the document whatever the Sub-Inspector of Excise told him to write. On being questioned by the Court he admitted that he had done something illegal on this occasion. It is clear that this witness did not identify the house searched to be that of the appellant. Uchit Paswan (P.W. 5), when produced as a witness, stated that he knew nothing about this case. He was confronted with Ex. 1/Gha but he said that he could not read what was written there. He categorically denied the suggestion by the prosecuting counsel that he had been won over by the accused and that he was concealing the true facts. Even this witness was not declared hostile and was not cross-examined by the prosecuting counsel. In cross-examination by the defence counsel he stated that he had put his signature on Ex. 1/Gha and had written whatever he was told by the Sub-Inspector of Excise to write. It is obvious that these two witnesses do not support P.W. 6. Siya Sharan Roy (P.W. 4), A.S.I. Excise (Special) is witness on whom the learned Sessions Judge relied for convicting the appellant. We may, therefore, now appropriately turn to his testimony. According to him on October 9, 1963 at about 8 a.m. he, along with other excise officers, a Magistrate and members of armed police searched the appellant's house in village Mathar. In the course of the search six bags of Nepali Ganja were recovered from a room facing south which, according to him, was the residence of the appellant. Rama Shankar Singh, Sub-Inspector of Excise, prepared the search list in the presence of this witness whereon he also put his signatures (at Ex. 1/Ga). He admits that the accused was not present at the house at the time of the search. This is all that he has stated in his examination-in-chief and obviously he does not state as to who had identified the house which was searched as belonging to the appellant. In cross-examination again we do not find anything about the person who identified the house to be that of the appellant. P.W. 7, Jamuna Prasad Singh, Excise peon was also cross-examined about the ownership of the house searched and to quote his own words he learnt from Ram Krishan Yadav and Uchit Paswan about the location of the house of Churan". According to this witness, it is noteworthy, the appellant's house was found locked before it searched. The matter was, however, not pursued by the counsel for the defence nor was any question put by the prosecuting counsel in re-examination to clarify this matter. In the circumstances the question whether the house which was searched was locked and if so how the raid party entered it for carrying out the search, must, therefore, remain unanswered on the existing record. The last witness whose testimony requires to be noticed is the Magistrate A. A. Akbari (P.W. 8). According to him the raid party left for village Mathar on the night of October 8, 1963, under orders of the District Magistrate and it reached that village at 6 or 6.30 a.m. on the following morning. The order of the District Magistrate, it may be pointed out, was not produced in Court and is not on the record. As the party approached village

Mathar some villagers were seen running away with bags on their heads. They were chased and arrested and contraband Ganja was found in these bags. This witness also claims to be present at the time the appellant's house was searched and according to him, the search was effected "after observing the formalities of search". He has not specifically stated about the formalities except that "independent witnesses were present at the time of the search" without naming them. On every vital point his memory has failed him. He even admits that he had not entered the room from which the bags were recovered. In regard to the identity of the house all that he could say was that he had learnt from the villagers, whose names he could not remember, that the room searched belonged to Churan Yadav (appellant). As to why he has stated that the room and not the house belonged to the appellant is not clear. He does not even know if there is a Gram Panchayat or a Chowkidar in the village. It is thus obvious that his evidence is of little assistance on the question of ownership of the house searched as he has no personal knowledge and the names of the persons on whose information he depends for his testimony have not been disclosed. This witness has not stated if he had ordered the search of the house in question nor has he stated the reasons why it was considered necessary to search the house. Indeed, he neither remembers having signed the search list nor if he had put his seal anywhere. His evidence does not prove that the search was carried out with the requisite care and caution. The search, if any, which is said to have led to the recovery of the six bags in question appears to us on the existing record to have been effected in a manner which does not inspire confidence. But we need say nothing more on this point because the absence of evidence of ownership of the house is enough to determine the fate of the prosecution case.

5. On going through the record and examining the evidence which we have just discussed we are clear that there is no legal evidence on the record on which we can sustain the conclusions of the courts below that it was the appellant's house which was searched.

6. Normally this Court, of course, does not examine for appraisal under Article 136 of the Constitution the evidence on questions of fact decided by the courts below. But when there are reasons to think that the conclusions may be based on no evidence, then this Court is not only entitled but it has an obligation in the larger interests of justice to examine the evidence to see if there is legal evidence on which those conclusions can be sustained. In this case we find that there is no legal evidence on which the courts below could base their conclusions. The appeal accordingly succeeds and allowing the same we acquit the appellant.

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