IN THE HIGH COURT OF JHARKHAND AT RANCHI

Cr. Rev. No. 979 of 2012

1. Bhushan Mahto S/o Arjun Mahto
2. Santosh Rajwar S/o Late Raghunath Rajwar
   Both resident of Korambey P.O. & P.S.- Gola, District-Ramgarh **... ... Petitioners**

Versus

The State of Jharkhand **... ... Opposite Party**

CORAM :HON'BLE MRS. JUSTICE ANUBHA RAWAT CHOUDHARY

For the Petitioners : Mr. Rahul Dev, Advocate
For the State : Mr. Bishwambhar Shastri, A.P.P.

Through Video Conferencing

11**/29.10.2021** Heard Mr. Rahul Dev, learned counsel appearing on behalf of the petitioners.

2. Heard Mr. Bishwambhar Shastri, learned A.P.P. appearing on behalf of the opposite party -State.

3. This criminal revision petition is directed against the judgement dated 15.09.2012 passed by the learned Sessions Judge, Bokaro Camp at Tenughat in Cr. Appeal No. 18 of 2011 whereby the conviction of the petitioners for offence under Section 47(a) of Excise Act has been sustained, but the sentence has been modified and reduced to three months simple imprisonment and fine of Rs. 500/- with default clause. The petitioners were convicted vide judgement of conviction and order of sentence both dated 10.02.2011 passed by learned A.C.J.M. Bermo at Tenughat in G.R. case No. 554 of 2007 corresponding to T.R. Case No. 145 of 2011 for offence under Section 47(a) of Excise Act.

4. The learned counsel for the petitioners has submitted that the impugned judgements passed by the learned courts below are perverse and cannot be sustained in the eyes of law. He further submits that out of 11 charge-sheeted witnesses, only five have deposed before the learned court below and out of

them, two seizure witnesses i.e. P.W. 1 and P.W. 3 have turned hostile, although they have identified their signature on the seizure list, which were marked as Exhibit- 1 and 1/1. P.W-2 was also declared hostile. The learned counsel also submitted that P.W. 4 was the informant of the case and was a police officer. He submits that neither the seized articles have been produced/exhibited nor the chemical examination report has been produced/exhibited before the learned court below. He submits that in such circumstances, neither the seizure has been proved nor the contents of the seized articles have been proved to be wine. The entire case rests on the evidence of two police officers i.e. P.W. 4 and P.W. 5. He submits that although the investigating officer has stated that the seized wine was tested after investigation, but the test report has not been exhibited.

5. The learned counsel for the petitioners submits that in such circumstances, the conviction and sentence of the petitioners be set-aside.

6. The learned counsel appearing on behalf of the opposite party- State, on the other hand, has opposed the prayer and has submitted that the learned courts below have scrutinized the materials on record and have recorded concurrent findings regarding the offence committed by the petitioners. He submits that the seizure witnesses who turned hostile, have not disputed their signature on the seizure list and the learned court below has considered this aspect of the matter and has recorded that generally the seizure witnesses become hostile because they do not want to take enmity with the accused persons of the locality and there is no evidence on record that the accused persons had any inimical relation with the informant and the police officers examined in the case as P.W. 4 and P.W. 5 who have fully supported the prosecution case regarding seizure of 10 cartoons of wine from the Maruti van in which they were travelling during the date and time of

occurrence. The learned counsel submits that in absence of any perversity and there being no material irregularity, the impugned judgements do not call for any interference in revisional jurisdiction.

7. After hearing the learned counsel for the parties, this Court finds that as per the prosecution case, on 10.07.2007 at about 8 pm, on the basis of secret information, the informant-sub-inspector of police along with armed forces went to NH 23 at Petarbar and checked a Maruti van and found total 10 cartoons of wine. There were two persons in the van who are the petitioners before this Court. Upon asking, they disclosed their name and on demanding paper, they could not show any document justifying the possession of 10 cartoons of wine. Wine was seized by the informant in presence of independent witnesses namely P.W. 1 and P.W. 3.

8. After investigation, charge-sheet was submitted against the petitioners for offence under Section 414 IPC and 47(a) of the Excise Act and cognizance of offence was also taken under the same sections. During trial, altogether five witnesses were examined. P.Ws. 1, 2 and 3 were declared hostile by the prosecution. However, P.W. 1 and 3 identified their signature on the seizure list which were marked as Exhibit- 1 and 1/1 respectively. So far as P.W. 4- the informant of the case is concerned, he has fully supported the prosecution case. He exhibited his written report as Exhibit 2. He also exhibited his signature and writing of the seizure list which were marked as Exhibit 3. During his cross-examination, he had stated that at the time of seizure, he handed over the seized material to the officer in-charge and had not inspected the materials kept inside the cartoons. He also stated that the seized materials were sealed at the time of their seizure.

9. P.W. 5 is the investigating officer of the case. He has also supported the prosecution case. He had submitted charge-sheet

on 31.08.2007 under Section 414 of Indian Penal Code and under Section 47(a) of the Excise Act. He has identified the place of occurrence and has also stated that he had recorded the statement of the seizure witnesses, who had supported the prosecution case. He has also deposed that upon seeing the police, the petitioners jumped and tried to run away from the vehicle and were arrested by the police and upon checking, 10 cartoons of wine were recovered. He has also stated that there were other witnesses who were police officials and who had given the statement in support of the prosecution case. However, these witnesses have not been examined by the prosecution before the learned court below. Although the investigating officer of the case has recorded that the seized wines were got tested and after investigation, he submitted the charge-sheet, but admittedly, neither the test report nor the seized materials have been exhibited before the learned court below.

10. The learned trial court considered the materials on record and recorded that the seizure list shows that wine was recovered from the vehicle and was seized. The learned trial court also noted that the seizure list contains the signature of the accused persons and the seizure witnesses have identified their signature. It further recorded that P.W. 3 had also stated that Maruti van was taken to the police station by the police. The trial court also recorded that generally in a case brought by police, witnesses become hostile because they do not want to take enmity of the accused persons of the locality and there is no evidence on record regarding any inimical relationship of the accused persons with the informant and police officers examined as P.W. 4 and 5. The learned trial court also recorded that there was no doubt that although the seized materials were not produced before the learned court, but the same *per se* is not fatal to the prosecution case as there was no occasion for the

police official witnesses to bring false case against the accused persons.

11. So far as the offence under Section 414 of Indian Penal Code was concerned, the learned trial court found that there was no material on record to show that the seized wine was stolen material and accordingly, offence under Section 414 of Indian Penal Code was not made out. The learned trial court convicted the petitioners only under Section 47(a) of the Excise Act.

12. So far as the learned appellate court is concerned, the appellate court also upheld the conviction for offence under Section 47(a) of the Excise Act and rejected the argument of the petitioners on the point that liquors seized were not chemically examined and accordingly, it was not proved to be wine, on the ground that P.Ws. 4 and 5 have consistently stated that the seized material was wine and the brand of the wine was also stated by them and that the accused persons have not denied in their statement under Section 313 that the seized material was liquor.

13. This Court is of the considered view that the reasoning given by the learned appellate court to uphold the conviction even when neither the chemical examination report of the liquor was proved nor the seized articles were exhibited, cannot be sustained merely on the oral evidence of P.Ws. 4 (informant) and 5 (investigating officer) and also on the ground that the petitioners have not denied in their statement under Section 313 of Code of Criminal Procedure that the seized material was liquor. This Court is of the considered view that it is for the prosecution to prove the seizure and also that the seized material was wine. Admittedly, the chemical examination report has not been exhibited in the present case. This Court has also gone through the lower court records and found that the chemical examination report is not even available in the record

except that the investigating officer of the case has recorded in the case-diary that the chemical examination report was received.

14. Considering the totality of the facts and circumstances of this case, this Court is of the considered view that the prosecution has not been able to prove the case beyond all reasonable doubt and merely because the accused have not stated in their statement under Section 313 of Code of Criminal Procedure that the seized material was something else, the same could not have been a ground to sustain the conviction of the petitioners, as has been done by the learned lower appellate court. The statement recorded under Section 313 of Code of Criminal Procedure is not evidence but is an explanation by the accused when the incriminating materials are put before him by the court and it is for the prosecution to prove the case beyond shadow of all reasonable doubts. This Court also finds that when the petitioners were produced before the learned court below on 11.07.2007 after their arrest, they were remanded on the basis of forwarding report, memo of arrest and seizure list and a prayer for sending the seized articles for verification by the Excise Inspector was made only on 23.08.2007 and the examination report is neither exhibited nor available in the record.

15. In view of the aforesaid facts and circumstances, the impugned judgements call for interference in revisional jurisdiction of this court in order to secure the ends of justice as the impugned judgements are perverse and suffer from material irregularity. Accordingly, the petitioners are entitled to benefit of doubt.

16. As a cumulative effect of the aforesaid findings, the impugned judgement of conviction and sentence dated 10.02.2011 passed by learned A.C.J.M. Bermo at Tenughat in G.R. case No. 554 of 2007 corresponding to T.R. Case No. 145 of

2011 as also the judgement dated 15.09.2012 passed by the learned Sessions Judge, Bokaro Camp at Tenughat in Cr. Appeal No. 18 of 2011 are hereby set-aside.

17. This Criminal revision petition is accordingly allowed.

18. The bailors are discharged of their liability under the bail bond.

19. Pending interlocutory applications, if any, are closed.

20. Let the lower court records be immediately sent back to the court concerned.

21. Let a copy of this order be communicated to the learned court below through 'FAX/Email'.

(Anubha Rawat Choudhary, J.)

Pankaj