

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.286 of 2015

Arising Out of PS.Case No. -97 Year- 2009 Thana -BIRPUR District- SUPAUL

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Md. Kasim, son of late Md. Wali, Resident of village - Gadhuya, P.S. - Ratanpura,
District - Supaul. Appellant

Versus

The State of Bihar. Respondent

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Appearance :

For the Appellant/s : Mr. Radha Mohan Singh, Advocate

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

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 10-08-2015

This appeal on behalf of the appellant Md. Kasim is directed against the judgment of conviction dated 11.01.2012 and order of sentence dated 16.01.2012 passed by the learned 1st Additional Sessions Judge-cum-Special Judge, Saharsa in Special Case No. 07 of 2009 arising out of Birpur P.S. Case No. 97 of 2009, whereby and whereunder the appellant and nine others were convicted for the offences punishable under Sections 20-B and 23 of the Narcotic Drugs and Psychotropic Substances Act (For short 'the NDPS Act') and sentenced to undergo R.I. for ten years under Section 20-B and R.I. for ten years under Section 23 of the NDPS Act and to pay a fine of Rs. 1 lakh each for the offence under

Section 20-B, and Rs. 1 lakh each for the offence under Section 23 of the NDPS Act, and in case of default of payment of fine, to undergo R.I. for a further period of three years. The sentences, however, have been directed to run concurrently.

2. The prosecution case, in brief, is that on 16.10.2009, while the informant Dinesh Kumar, Assistant Commandant, A-Company of 18th Battalion Sashastra Seema Bal (For the 'the SSB'), Birpur, Bihar and other personnel of SSB were deputed to keep vigil on Indo-Nepal border, he received an intelligence input that preparation is afoot for bringing contraband substances from Haripur, a village in Nepal to the Indian territory. On such information, the informant along with his support team went to the place of occurrence. It has been stated that several persons were spotted carrying gunny bags on their head. Some of those persons were arrested who disclosed their names as (1) Bindeshwar Ram, (2) Pramod Kamat, (3) Ram Bali Ram, (4) Suraj Narayan Yadav, (5) Md. Iderish Bhand, (6) Ainul Mian, (7) Sanjeev Pathak, (8) Sachendra Persela @ Rajendra Persela & (9) Amresh Mehta. From their possession, ganja was found in nine bags (8 bags containing 32 kg and one bag 16 kg in 17 bundles), a mobile phone, Nepali and Indian currency and other items. The accused persons were arrested. A seizure list was prepared and the seized articles were handed over

to the Birpur Police Station where the fardbeyan of the informant was recorded and a case vide Birpur P.S. Case No. 97 of 2009 dated 17.10.2009 was registered for investigation under various sections of the NDPS Act.

3. The police after investigation, submitted charge sheet under Sections 20-B, 22 and 23 of the NDPS Act, whereafter, cognizance was taken and the case was committed to the Court of Sessions-cum-Special Judge for trial. The trial court framed charges against the accused persons to which they pleaded not guilty and claimed to be tried.

4. The prosecution examined ten witnesses in order to prove the charges, namely, P.W. 1 Dinesh Kumar, the informant, P.W. 2 Md. Nizamuddin, who has proved his signature on the seizure list (Ext. 4/1), P.W. 3 Bipin Kumar Katara, Sub-Inspector, SSB, P.W. 4 Maksood Alam Asharfi, Officer-in-charge, Birpur Police Station, P.W. 5 Rambir Singh, Constable, SSB, P.W. 6 Ramchandra Sah, seizure witness who has proved his signature on the seizure list (Ext. 2/2), P.W. 7 Subaul Singh, Assistant Commandant, SSB, P.W. 8 Krishana Lal, S.I of SSB, P.W. 9 Veer Singh, Havildar of SSB and P.W. 10 Rajeshwari Prasad Singh, the investigating officer of the case.

5. After the examination of prosecution witnesses,

statements of the accused persons were recorded by the trial court under Section 313 of the Code of Criminal Procedure (For short 'the Code') for enabling them personally to explain the circumstances appearing in evidence against them. The accused persons pleaded their innocence in the matter.

6. Thereafter, two witnesses were examined on behalf of the defence, namely, D.W. 1 Chandra Deo Yadav and D.W. 2 Deo Narayan Ram. The defence witnesses are labourers who have stated before the Court that the accused persons also worked along with them and that those witnesses were going home along with accused persons after unloading boulders on the date and time of occurrence when they were arrested by the personnel of the SSB.

7. The trial court after examining the witnesses on behalf of the defence, heard arguments advanced on behalf of the parties and found the accused persons guilty of the charges under Sections 20-B and 23 of the NDPS Act and sentenced them in the manner indicated hereinabove.

8. At this stage, let it be noted that out of the ten convicts, five, namely, Bindeshwar Ram, Pramod Kamat, Ram Bali Ram, Suraj Narayan Yadav and Md. Idrish Bhand challenged the impugned judgment of conviction and sentence in appeal vide Cr. Appeal (SJ) No. 68 of 2012, and the other four, namely, Ainul



Mian, Sanjeev Pathak, Sachendra Persela @ Rajendra Persela and Amresh Mehta challenged the impugned judgment in appeal vide Cr. Appeal (SJ) No. 147 of 2012 before this Court. The aforesaid two appeals were heard by a Bench of this Court analogously. By a common judgment dated 21.11.2014 passed by a Bench of this Court, both the appeals were allowed and the impugned judgment of conviction and order of sentence of the present appeal was set aside in respect of the appellants of those two appeals.

9. I have heard learned counsel for the appellant and learned APP for the State and perused the record carefully.

10. Learned counsel for the appellant contends that the trial court has failed to appreciate the evidence and the conclusion of guilt arrived at by the trial court is against the overwhelming evidence on record. According to him, the witnesses to the seizure have not supported the prosecution case and they were not even declared hostile. The other witnesses examined during trial are official witnesses. He submits that the trial court did not appreciate the fact that there was nothing on record to suggest as to who was carrying what and, therefore, a general approach has been adopted by the trial court. According to him, the trial court was wrong in holding that the appellants were found in possession of 272 kg ganja. He further submits that the statements under Section 313 of

the Code were recorded in perfunctory manner by the trial court and the mandatory provisions of the NDPS Act were flouted by the prosecuting agency.

11. Lastly, he submits that on the self-same evidence, nine other co-accused, who were tried together with the appellant and convicted by a common judgment by the trial court, have already been acquitted in appeals preferred by them before this Court.

12. On the other hand, learned APP for the State submits that the prosecution has adduced cogent and reliable evidence in order to prove the charges beyond reasonable doubt during trial. According to him, based on intelligence input, the accused persons were arrested by the SSB personnel while carrying 272 kg ganja kept in 17 packets, each of which was containing 16 kg. The witnesses are consistent and the sample of the seized ganja sent to the Forensic Science Laboratory (For short 'the FSL') confirms that the substances contained in the sealed sample was found to contain ganja containing Tetra Hydro Cannabinol as their chief intoxicating ingredients. He further submits that the FSL report was taken in evidence by the trial court under Section 293 of the Code and was marked as Ext. 5. He submits that it was a clear case of smuggling of Nepali ganja and on the basis of evidence led

before the trial court, it has rightly convicted the accused persons in the manner indicated hereinabove. Learned APP, however, fairly concedes that the case of the appellant stands on identical footing to that of the other convicted persons who were tried together with the appellant.

13. Coming to the evidence on record, it is noticeable that P.W. 1 Dinesh Kumar (informant) has reiterated the allegations made in the FIR in his examination-in-chief. He has proved his signature on the fardbeyan and seizure list which have been marked as Ext. 1 and 2 respectively. He has stated that a list of the articles seized was prepared in two pages in the writing of Inspector T.H. Supaul on which he has also put his signature. He has identified and proved the signature of Mr. T.H. Supaul which has been marked as Ext. 3. He proved his own signature on Ext. 3 which has been marked as Ext. 3/1. He has stated that in all 272 kg ganja was recovered from the possession of the accused person. In cross-examination, he has stated that out of the ten accused arrested at the place of occurrence, recoveries were made from nine of them. According to him, the arrested accused persons disclosed themselves to be porters. He admits that the seized ganja was not sealed at the place of occurrence. He further admits that there was no weighing machine available with SSB personnel at the time of



the seizure of the contraband. He admits that the seized articles were never weighed in his presence. According to him, the Headquarter of the battalion was at a distance of 10 km from the place of occurrence. In further cross-examination, he admits that all the seized articles were brought to the Battalion Headquarter in an official vehicle where the seizure list was prepared. He further disclosed that the production-cum-seizure list was prepared in the police station on which he had also put in his signature. He admits that the quantity of ganja seized is not mentioned in the seizure list prepared at the Battalion Headquarter. He categorically also admits that at the place of occurrence, no legal formality was conducted.

14. P.W. 4 Maksood Alam Asharfi, the Officer-in-charge of Birpur Police Station has stated in his examination-in-chief that on 17.10.2009 at 8.15 a.m., he recorded the fardbeyan of the informant at the police station. He has proved the fardbeyan, the endorsement made by him on the fardbeyan, the formal FIR and the production-cum-seizure list which have been marked as Exts. 1/1, 1/2, 1/3 and 2/1 respectively. In cross-examination, he states that the seized articles were kept in sealed condition. He further admits that he did not put his own seal on the seized articles. According to him, the ganja produced before him was in packets. He admits that he did not weigh the seized ganja.



15. P.W. 3 Bipin Kumar Katara, S.I., SSB has reiterated the allegations made in the FIR. He states that on the date of occurrence, he was on duty along with the informant of the case at Indo-Nepal border and had actively participated in arrest of the accused and seizure of the ganja. In cross-examination, he could not explain as to the quantity of ganja recovered from possession of each of the accused persons. He, however, states a different story from the informant. According to him, the ganja seized at the place of occurrence was weighed. He states that the ganja packets were sealed. On further query, he admits that he does not remember whether or not the signatures of the accused persons were obtained on the sealed packets of the ganja.

16. P.W. 5 Rambir Singh, P.W. 7 Subaul Singh, P.W. 8 Krishana Lal and P.W. 9 Veer Singh, personnel of the SSB, have reiterated the allegations made in the FIR. In cross-examination, they all admit as under: that no seizure list was prepared at the place of occurrence; that the packets of ganja recovered at the place of occurrence were not weighed; and, that the ganja packets were produced at the police station on 17th October, 2009 in the morning.

17. The two production-cum-seizure list witnesses, namely, P.W. 2 Md. Nizamuddin and P.W. 6 Ramchandra Sah have proved their signatures on the seizure list which have been marked



as Ext. 4/1 and Ext. 2/2 respectively. In cross-examination, they admit that their signatures were obtained by the Officer-in-charge of the police station on a blank sheet of paper. For the reasons best known to the prosecution, no request was made by the prosecutor to the court to declare the seizure witnesses as hostile. Under such circumstance, the evidence adduced by the two production-cum-seizure list witnesses would be binding on the prosecution.

18. The only other witness who has been examined on behalf of the prosecution in the present case is P.W. 10 Rajeshwari Prasad Singh, the investigating officer of the case. He states in his deposition that on 17th October, 2009 at 12.30 a.m., the investigation of the case was handed over to him. Thereafter, he perused the fardbeyan and the seizure list. He inspected the place of occurrence and recorded the statements of witnesses. He further states that he sent the sample of ganja to the FSL for chemical analysis and after completing the investigation submitted charge-sheet in this case. In cross-examination, he admits that nothing except the fardbeyan and the seizure list was handed over to him by the Officer-in-charge of the police station during investigation. He further admits that he collected sample of the seized ganja on 18.11.2009 from Birpur Police Station but he did not record the said fact in the case diary. He states that he does not remember whether or not the seized ganja

was sealed. In further cross-examination, he states that he had collected the sample of the seized ganja himself from the different packets kept in the *Malkhana* of the police station.

19. After examination of the witnesses on behalf of the prosecution, the trial court recorded the statement of the accused persons under Section 313 of the Code in question answer form. The statement of the appellant recorded by the trial court is as follows:-

“प्रश्न:- आपके बिरुद्ध साक्ष्य है कि दिनांक 16.10.2009 को नौ बजे रात्रि में आप अभियुक्तों के साथ नेपाल की तरफ से गठरी में अवैध गाँजा लेकर आ रहे थे, तो दिनेश कुमार सहायक समादेस्टा 18 बटैलियन एवं उसकी टीम द्वारा आप एवं अन्य अभियुक्तों को पकड़ा गया तथा कुल नौ बैग [272 किलो] अवैध गाँजा, मोबाइल, नेपाली नोट कुल 290 रुपया, लाल रंग का टॉर्च, छुरी, 30 रुपया भारतीय नोट बरामद किया गया, क्या कहना है?

उत्तर:- जी नहीं।

प्रश्न:- सफाई में क्या कहना है ?

उत्तर:- मैं निर्दोष हूँ।”

20. After having heard respective counsel for the parties and scrutinizing the evidence on record, I find that there is no evidence on behalf of the prosecution to show that the seized ganja was destroyed. The alleged recovered ganja was never produced in the court. The prosecution has not given any explanation with respect to the fact that what happened to the ganja in question. The prosecution has tried to prove its case merely on

the basis of oral testimonies of the witnesses and the documentary evidences like, the seizure list and the FSL report.

21. In the present case, the prosecution having not produced the seized ganja before the court and having not offered any explanation for its non-production mere oral evidence of the witnesses that ganja was seized would not be sufficient to prove the charges specially when the two production-cum-seizure witnesses have completely denied production and seizure of ganja as claimed by the prosecution.

22. There are other glaring defects in the prosecution case. Apparently, no seizure list was prepared at the place of occurrence. The seizure memo prepared at the Battalion Headquarter of 18th Battalion of SSB would make it evident that it was made on 17th October, 2009, whereas alleged seizure was made on 16th October, 2009. There is no evidence worth mentioning that the seized material were ever put in the *Malkhana* of the police station though the investigating officer has made a casual reference in his evidence while he was being cross-examined that he had collected sample of the seized ganja from the police station *Malkhana* but the *Malkhana* Incharge of the police station has not been examined during trial.

23. Further, the Officer-in-charge of the police station



has categorically admitted in his deposition that he had not put his seal on the seized ganja when it was handed over to him by the informant and the other SSB personnel. A perusal of the of the FSL report would make it evident that a parcel was received in the office of the Director, FSL, Bihar, Patna from the special messenger, Constable, Rajendra Singh on 24th November, 2009. The said constable has not been examined during trial. The FSL report dated 18.3.2011 was taken in evidence in exercise of power conferred under Section 293 of the Code by the trial Court. The author of the report has not been examined during trial. A copy of the FSL report was never handed over to the accused persons. A perusal of the FSL report would make it evident that the weight of the substances sent for chemical analysis to the FSL has not been mentioned. The remnants of the sample were not sent to the court along with the FSL report. What happened to the remnants of the sample is not known. It is not known who has put his signature on the sample sent to the FSL. Under these circumstances, the FSL report loses all its significance.

24. In **Noor Aga vs. State of Punjab & Anr. [(2008)**

16 SCC 417], the Supreme Court in para 96 observed under:-

“96. Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it

is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act.”

25. In **Jitendra and Anr. Vs. State of M.P. [(2004)**

10 SCC 562], the Supreme Court has taken a view that in the trial of the offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial the seized material as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act particularly, when the *Panch* witnesses have turned hostile.

26. In **Ashok alias Dangra Jaiswal vs. State of Madhya Pradesh [(2011) 5 SCC 123]**, the Supreme Court found that the alleged narcotic powder seized from the possession of the accused were not produced before the trial court as a material exhibit and there was no explanation for its non-production and,

therefore, the Supreme Court held that there was no evidence to connect the forensic expert report with the drug or the substance that was seized from the possession of the accused.

27. As noted above, at the cost of repetition, I repeat that in the present case the seized material was not produced during trial and the remnants of sample were also not sent back with the FSL report. In view of the decision of the Supreme Court; as discussed, hereinabove, there is no evidence to connect the forensic report with the ganja said to have been seized from the possession of the accused persons.

28. Having regard to the evidence adduced during trial, the entire action of the prosecution in conducting the search, seizure and sample etc. is contrary to the mandate of law. The guidelines given the NDPS Act under Section 52(3) and (4), 55 and 57 have been given a complete go-bye by the investigating agency. It is true that these provisions of the NDPS Act are directory in nature. However, complete non-compliance of these provisions would certainly make the case of the prosecution doubtful.

29. However, before I conclude, I must record my displeasure regarding the manner in which the trial court has recorded the statement of the accused under Section 313 of the Code.



30. The primary object of Section 313 of the Code is to inform the accused to explain any circumstance appearing against him in evidence personally, except where the statute provide otherwise. Two occasions are contemplated under the section for examination of the accused. The first relates to putting of questions at any stage of the trial or inquiry and the second when the prosecution evidence is over what accused is called upon to enter his defence. In the former case, there is no obligation on the part of the court to put any question but, it may do so to the extent it consider necessary. However, in the later case, it is imperative for the Court to question the accused generally on the circumstances appearing in evidence against accused.

31. In the present case, the accused-appellant was never informed by the trial court:-(a) that the articles recovered were ever seized; (b) that the seized articles were kept in proper condition in the *malkhana* of the police station; (c) that a sample of the article seized was drawn; (d) that the sample was sent to the FSL for test; and, (e) that the FSL report show that the substances sent to the FSL was found to be ganja.

32. Section 313 of the Act provides the accused a fair chance to explain his stand with regard to the circumstances in the evidence which have been collected against him and has come on



record during trial. If incriminating circumstances have not been explained by the trial court, then it is an illegality and amounts to an abuse of the process of court. Though the Supreme Court and this Court have been repeatedly impressing upon the trial court that questioning of accused under Section 313 of the Code should not be treated as an empty formality as it is an important facet of trial. Unfortunately, the trial courts are recording the statements of the accused in a perfunctory manner.

33. Though in order to convict the accused the trial court has placed reliance upon the seizure list and the chemical analysis report of the FSL, the circumstances mentioned hereinabove were never put to the accused during trial. If an opportunity would have been given to the accused appellant, he would have explained the circumstances regarding the said incriminating materials. In absence of the circumstances having been explained to the appellant appearing against him during trial, the appellant had no chance to explain them. In my opinion, the aforesaid circumstances which were never put to the accused during trial would not have been used against him for convicting and sentencing him.

34. In the result, the appeal succeeds. The impugned judgment and order of conviction and sentence dated

11.01.2012/16.01.2012 passed by the learned 1st Additional Sessions Judge-cum-Special Judge, Saharsa in Special Case No. 07 of 2009 arising out of Birpur P.S. Case No. 97 of 2009 are set aside. The appellant, who is in custody, is directed to be released forthwith, if not wanted in connection with any other case.

(Ashwani Kumar Singh, J.)

Sanjeet/-

AFR/-

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