

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.935 of 2009

Arising Out of PS.Case No. -144 Year- 2005 Thana –Mohania District- BHABHUA (KAIMUR)

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Baban Sah, S/O Chakauri Sah, resident of village - Danba Mohania, P.S.- Mohania,
Distt- Kaimur at Bhabua

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Shri Vikramdeo Singh, Advocate

For the Respondent : Susri Shashi Bala Verma, A.P.P.

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CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE AMARESH KUMAR LAL

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 20-04-2015

Solitary appellant Baban Sah was tried by the learned Special Judge, Kaimur at Bhabua for Narcotic Drugs and Psychotropic Substances Cases in Trial No.102 of 2005 after being charged with committing offence under Sections 20 (b) (II) (c) read with Section 8 of the Narcotic Drugs and Psychotropic Substances Act (‘NDPS Act’ for short). He was also charged with committing an offence under Section 47 (a) of the Excise Act and by judgment dated 19.08.2009 was held guilty for committing offence, he had been charged with. The appellant was heard on sentence on 26.08.2009 and was directed to suffer rigorous imprisonment for 15 years as also to pay a fine of Rs.1,50,000/- else to suffer rigorous imprisonment for

further period of two years. So far as the conviction of the appellant under Section 47 (a) of the Excise Act is concerned, he was directed to suffer rigorous imprisonment for one year and to pay a fine of Rs.1,000/- else to suffer rigorous imprisonment for one month. The substantive sentences of the imprisonment were directed to run concurrently.

2. As appears from the written report of P.W.1 Ranjeet Kumar Singh, who happened to be the Officer-in-charge of Mohania police station in the district of Kaimur that there was a secret information received by the police station at 10:00 A.M. on 24.06.2005 that in the western room of the three storied building of the appellant on its third floor country made liquor as also *Ganja* had been stored. The informant P.W.1 taking with him A.S.I. Shambhu Nath Jha (P.W.2) and constables Sudama Singh (not examined), Bhagwan Singh (not examined), Deo Narayan Pandey (not examined), Shiv Parsan Pandey (not examined), Gorakh Nath Pandey (not examined), all constables of the Home Guards as also driver constable Vijay Kumar Singh (not examined) and the local Chaukidar Akhilesh Roy (P.W.3) came to the house of the appellant. Two persons, namely, Dharamdeo Prasad Chaurasiya (P.W.4) and Munna Jaiswal (P.W.5) were requested to associate themselves with the search of the premises and, accordingly, the search was made of the

premises of the appellant. During the course of the search, the western room on the third floor of the house was found storing 1600 pouches each of 200 ml. capacity kept in gunny bags and two gunny bags containing 20 Kg of *Ganja*.

3. P.W.1 seized the articles in presence of P.Ws. 4 and 5 and prepared the seizure memo and made over a copy of this document to appellant Baban Sah and obtained his signature on his copy in token of the receipt of the document. The appellant was arrested and his person was searched and the written report was drawn up by P.W.1, on the basis of which, the FIR of the case (Ext.3) was drawn up. The investigation of the case was handed over to P.W.2, ASI Shambhu Nath Jha.

4. On perusal of evidence of P.Ws. 1, 2 and 3, i.e., the informant, the investigating officer as also Chaukidar Akhilesh Roy as also that of P.W.4 Dharamdeo Prasad Chaurasia, what we find is that the house belonging to the appellant was searched and as per the witnesses, from the western room located at the third floor of the house, the contraband liquor as also *Ganja* was recovered in huge quantity as stated by the informant. P.W.4 had stated that while passing by the road, he was requested by P.W.1 to associate him with the search of the house and he, accordingly, witnessed the search and seizure of the articles and duly signed the seizure memo (Ext.1).

However, P.W.5 Munna Jaiswal did not support the story that any search or seizure had been made from the house of the appellant, rather he stated that he was asked to put his signature to the document and he did that without knowing the implication or reasons for the same.

5. It also appears from the perusal of the trial record that the seized *Ganja* was sent for chemical analysis to the Forensic Science Laboratory, Patna and the laboratory had furnished its report which had been marked Ext.5. The F.S.L. report indicated that the dry pressed brownish flowering and fruiting vegetable substances which were received by the Laboratory was *Ganja* containing Tetra Hydro Cannabinol as its chief intoxicating ingredient and it was further indicated that *Ganja* was the flowering and fruiting tops of the female plant of *Cannabis-Sativa*. Thus, there was no doubt that whatever was analyzed by the F.S.L. did contain the organic compound which could be extracted on analysis of *Ganja*.

6. Sri Vikramdeo Singh, learned counsel appearing on behalf of the appellant was drawing the attention of the Court to some of the salient features of the evidence which was available to the trial Court. It was contended that there might be evidence on the seizure of 1600 pouches of country made liquor, each pouch containing 200ml of liquor and the evidence of seizure of 20 Kg. of *ganja* as well. But



when the evidence was tested on the mandatory provision of NDPS Act, one may find that the Police simply revelled in non-compliance with the mandatory provisions of law and were packing up the appellant by arresting him for being tried by the learned Special Judge. Submission was that there was no evidence that after the Ganja was seized where it was taken to and in whose custody, it was put in and whether the provisions of Sections 52 and 55 of the NDPS Act were complied with. Likewise, the other provisions of NDPS Act regarding making entries into the *Malkhana* register about the receipt of the substance on delivery of the same to the Officer-in-charge and thereafter, requesting the Magistrate through an application to certify the entries made in the *Malkhana* register and the Magistrate having certified the same also appears not complied with. It was also submitted by making reference to a judgment of this Court in ***Dipak Kumar Vs. State of Bihar reported in 2011 (3) PLJR 494*** that the article was seized on 24.06.2005 and as may appear from the Ext.5, the report furnished by the F.S.L., the sample was taken and the same was despatched by special messenger constable 473 Sudheshwar Singh from Mohania on 21.07.2005, but curiously enough the said constable reached Forensic Science Laboratory, Patna on 17.08.2005, i.e., after about 27 days and the sample was lying in the FSL till 28.11.2006, i.e., for about one and a half years of the seizure of the

articles and thus, dates and events clearly castes a serious doubt on the veracity of the report.

7. Sushri Shashi Bala Verma, learned counsel appearing on behalf of the State was drawing the attention of the Court to Ext.5, the report of the FSL and submitted that the report itself is testimony to the finding that the appellant was found in possession of Ganja and the official witnesses, like, P.Ws. 1 and 2 and the seizure witness P.W.4 have supported the seizure of substance from the house of the appellant. It was also submitted that the charges framed against the appellant were proved to the hilt.

8. Before we advert to the evidence adduced by the prosecution in the case, we may point out that the provisions under the NDPS Act are stringent on any aspect of the scheme of the NDPS Act. There is presumption against the accused that he was bearing necessary mens rea and even an act which could be towards the preparation in commission of the offence had been made punishable as may appear from Section 30 of the NDPS Act. If the Court has to presume the presence of the mens rea and it is the accused who has to explain that he was not having necessary mens rea to commit the offence. The above presumption of culpable mental state is enshrined in Section 35 of the Act and the ordinary rules of Criminal Jurisprudence also appears given a goby memory as appears from



Section 2 to Section 35 besides the above presumptive provision had been formulated under the NDPS Act. If one could have the glance of Sections 19, 20 and 21 of the Act, one may find that the minimum sentence could be somewhere in the range of rigorous imprisonment for ten years which in some of the cases may be up to 20 years and the minimum sentence of fine which could be planted with the substantive sentence of imprisonment could not be less than rupees one lac which may be enhanced as per the gravity or repetition of the offence if the accused is found committing. Some of the rules of evidence appears also suspect because recording confessional statement of the co-accused or an accused have been made admissible and as we may know the provisions of Section 432 or 433 of the Code of Criminal Procedure on remission or suspension of sentence have also been done away with. Besides the above, if the Court was inclined to impose less than the substantive sentence as proposed by Sections 19, 20 and 21 it was required to assign reason as to why it was departed from passing a stringent sentence then an order taking a lenient view.

9. The reasons for formulating the above stringent provision as regards the stringent and somewhat draconian provision were pointed out by this Court in *Dipak Kumar (supra)* when it was pointed out that “the offence is likely to affect the financial set up of

the country as also the same could be running a parallel economy affecting the financial health of the country”. In yet another decision in the case of ***Ram Singh Vs. State of Bihar reported in 2011 (1) PLJR 195***, this Court was again highlighting the purpose of formulating the stringent provisions of Section 13 of the report which runs as under :

“13. The law is stringent as regards the punishment. The minimum punishment is ten years, which may extend to life in some cases and the fine, in most of the cases, could not be more than one lac rupees. Confessional statement before the police or confession of a co-accused, if it has been reduced into writing, has been made admissible by raising presumption of guilt against the accused, which presumption is required to be displaced by the accused. These are some of the legal impediments which have been created in spite of the normal principles of criminal jurisprudence being a contrary to them, considering that the offence which are defined and which are made punishable under the NDPS Act, are not only to destroy the fabric of society but, are also to take a heavy toll of our national economy. Thus, the legislation was attempting to device ways and means so as to tackling the menace of drug traffickling. But, when it comes to judging, the courts have also to balance the interest of justice and the national interest with the liberties of a person



besides keeping in view that the check and balance which have been created by the provisions of the NDPS Act are strictly complied with. This is the reason that courts are very slow in acting on evidence, which indicate non-compliance of the provisions of the aforesaid Act. Besides, if they find that there is any loopholes in compliance with the provision as rigors and strict as Section 52-A or 55 of the NDPS Act, then it has always to extend the benefit of doubt to the accused.”

10. As may appear from the above observations of the Court in ***Ram Singh (supra)*** while formulating the stringent provisions on sentencing or otherwise of the investigation or trial part of a case, the legislature appears creating checks and balances which are required to be strictly complied so that no person is made a prey to the whims and capricious of the Investigating agency and any such authority could be involved with the prosecution of an accused. This also got highlighted in the above observation of the Court made in ***Ram Singh (supra)***.

11. Coming to the evidence of the case, the witnesses did state that the house of the appellant was searched and 1600 pouches contained in gunny bags were recovered besides the recovery of 20 Kg of ganja from two gunny bags. But when we were examining the evidence in the case so as to finding out as to who was handed over



the custody of the recovered articles especially 20 Kg. of ganja, we could not find a single word on that part of the investigation. We refer to the provisions of Section 55 of the NDPS Act which requires that the Officer-in-Charge of the police station has to take in his charge and keep in safe custody pending the orders of the Magistrate, i.e., an order passed under Section 52 A of the Act, all articles seized under this Act within his local jurisdiction and it might have been delivered to him. Not only that as soon as such an article is seized and delivered to him, he has to allow any Officer who may be accompanying such article to the police station or to whom, who may have been deputed for the purpose to affix seal to such article or to take samples on or from them and all samples so taken has to bear the seal firstly of the Officer-in-Charge as also that of the Officer who had brought the article to the police station for being put into the safe custody of the Officer-in-Charge of the police station. As regards sampling the very provision notes that the sampling has to be done by the officer who has brought or might have been deputed for the purpose and as soon as that officer or the deputed officer arrives at the police station or taking out some part of the articles for sampling the sample part of the articles has to be sealed and that sample part has also to bear the signatures both of the officer-in-Charge and the Officer who had taken out a sample. Section 52A of the NDPS Act directs that as soon as the



article has been delivered to the Officer-in-Charge of the police station the receipt thereof and details thereof has to be mentioned in the *Malkhana* register and no sooner the entries had been made then an application has to be made to the Magistrate to certify the entries which necessarily required the physical verification of the storage of the articles and then to issue a certificate about the storage and the entries as regards the delivery and storage of the articles as per the details in the *Malkhana* register. If one could peruse the provisions of Section 52A (4) of the NDPS Act, the provision has been made to waive the examination of the Magistrate on these aspects of delivery and storage in safe custody of the articles and mere production of the certificate issued by the Magistrate has to be treated as an evidence on all these aspects of delivery and storage etc. of the article to the Officer-in-Charge.

12. Here in the present case, we in spite of our serious attempt could not find out a single line that as to what happened the seized articles, we also could not find any evidence that any attempt was made to seal any part of the seized contraband Ganja as per the provisions of Section 55 of the NDPS Act and another mandatory provision as contained in section 52 A of the Act was complied with. The non-compliance of these mandatory provisions of the NDPS Act itself vitiates the very judgment of conviction and order of sentence.



13. However, what we find while perusing the report of the Forensic Science Laboratory, Patna upon which Sushri Shashi Bala Verma has placed a heavy stress as a conclusive piece of evidence to sustain the conviction, we find that the special constable 473 Sudheshwar Singh was deputed for carrying the sample articles contained in a Tin Dabba (Ext.S-1) and he was carrying the articles with the letter no.395 dated 21.07.2005 of the District and Sessions Judge, Kaimur at Bhabua addressed to the Director of Forensic Science Laboratory, Patna. The said constable as may appear from the very report reached Forensic Science Laboratory, Patna on 17.08.2005, i.e., after 26 days of leaving Kaimur for Patna. The said constable was not examined. None of the witnesses, like, P.W.1 informant of the case who was also Officer-in-Charge of the police station and whom we could safely presume to have deputed the said constable or the Investigating Officer P.W.2 gave any evidence on the long journey which was taken up by the constable of 26 days in traversing the few 195 Km of good road lying connecting Bhabua and Patna, it could be a travel of few hours especially when as we have just noted the places are connected with National Highway. That was the end of the matter on receipt of the sample articles on 17.08.2005. The Forensic Science Laboratory, Patna went into a slumber and it could awake on 21.11.2006 to analyze the sample and to submit the

report. Again the delay of about one year and two months in not submitting the report, again creates quite some doubt in our mind especially when, we do not have any evidence as to what was the circumstances as regards the safety and security of the seized articles. These are some of the circumstances which appear tallying with those considered by the Hon’ble Supreme Court in *Valsala Vs. State of Kerala reported in 1994 Cri.L.J. 1*. This Court had also considered these aspects in both the cases of Ram Singh and Dipak Kumar and had taken a view that the circumstances which have been discussed by us were enough to vitiate the judgment of conviction and orders of sentence.

14. In the result, we find merit in the appeal and the same is allowed by setting aside the judgment of conviction and order of sentence passed upon the appellant. Appellant Baban Sah, who is in custody, shall be released forthwith, if not wanted in any other case.

(Dharnidhar Jha, J)

(Amaresh Kumar Lal, J)

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