

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.593 of 2011

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Sujit Kumar son of late Nandan Choudhary resident of Village-Singhpur
 Mauzmaabag, PS. Bihpur, Distt-Bhagalpur.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Akhileshwar Pd. Singh, Sr. Advocate

Mr. Vikash Kumar, Advocate

For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 20-08-2015

This appeal has been has been filed against judgment dated 26.04.2011 convicting the sole appellant, Sujit Kumar for an offence punishable under Sections 20(b)(ii) as well as 23 of the NDPS Act and order of sentence dated 30.04.2011 whereby and whereunder he had been directed to undergo RI for ten years under Sections 20(b)(ii), R/I for ten years as well as fine of Rs. 1 Lakh in default thereof to undergo S/I for one year under Section 23 of the NDPS Act with a further direction to run the sentences concurrently by the Additional Sessions Judge-4th West Champaran at Bettiah in Special Case No. 1/2007, Tr. No. 1/2008.

2. Ruben Kujur (PW 11) filed a complaint/prosecution report on 24.12.2007 putting an allegation that he was informed by an informer on 16.10.2007 at about 23:00 hours that a vehicle loaded with Nepali Ganja is to cross near village-Gouripur and accordingly, a



Preventive Party under the leadership of Superintendent of Custom was constituted, proceeded towards the village-Gouripur and ambushed there awaiting for the concerned vehicle. On 17.10.2007 at about 5:00 a.m., one Sumo Tata Victa was seen which was signalled to stop. More than three persons were found inside the vehicle. On checking, nothing was found and then the vehicle was let off. 20 minutes thereafter another vehicle came which was signalled to stop but the driver sped away and on account thereof, was chased. To force the driver to stop the vehicle, custom officials also fired, subsequently thereof, they succeeded to intercept the vehicle in between Manjharpool road and Gopalpur PS. The driver was apprehended who happened to be none else than the sole appellant, Sujit Kumar. On physical verification nothing was found from the possession of driver. However, from the vehicle 28 big and small packets weighing 188 Kilograms of Ganja was seized. Registration Number of vehicle was also traced out as BR-10F-6800. It has further been disclosed that the narcotic substance were seized in pursuance of Section 43 of the NDPS Act along with arrest of the driver, who was produced before the Court.

3. Furthermore, on interrogation, the driver divulged his identity as Sujit Kumar son of Nandan Choudhary of Village-Singhpur Majama, P.O. Narayanpur, Distt-Bhagalpur whose address



is found correct as per verification cum follow up action by the Superintendent, Naugachia. Furthermore, the driver divulged Ravindra Singh of Mohalla Surkhi Kal, P.O. Bhagalpur, PS.Khanjharpur (Near Masjid), Distt-Bhagalpur to be owner of the seized Victa which has been found incorrect. To ascertain the identity of owner of the vehicle, D.T.O., Bhagalpur has been requested but positive response at his end is awaited. It has also been disclosed that one Pankaj Kumar Choudhary son of Sri Mod Narayan Choudhary, village-Majambad, PS.Bhawanipur, Narayanpur, Distt-Bhagalpur, at present C/O, Sri Pitambar Jha, ADM, Surbical Mitra (Road) Lane, PS. Bhagalpur claimed himself to be the owner of the vehicle and applied for release of the same and for that pleaded that his driver, Niraj Kumar Tiwari had taken the vehicle to M/s Shankar Motors Service Centra, Patna on 15.10.2007 on account of some sort of mechanical defect. However, the vehicle did not reach to its destination nor the whereabouts of the driver, Niraj Kumar Tiwari is known. The aforesaid Pankaj Choudhary had also informed that with regard thereto he had already lodged Sanha before Chief Judicial Magistrate, Bhagalpur on 17.02.2007 bearing Sanha No. 4213/2007.

4. Accordingly, the aforesaid Pankaj Choudhary was requisitioned by the Superintendent Custom (Preventive) Circle, Bettiah on 29.11.2007 whereupon he appeared, gave his statement,

submitted the relevant documents. However, driver could not appear. It has also been disclosed that during chemical examination, the report suggests that the contraband goods happened to be Ganja.

5. On the basis of the aforesaid prosecution report cognizance of an offence punishable under Sections 20(b)(ii), 23 NDPS Act against the accused was taken whereupon the sole appellant/accused was put on trial and after concluding the same, ultimately, resulted in conviction as well as sentence of the appellant named above, hence this appeal.

6. The defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 Cr.P.C. is of complete denial and of false implication on misrepresentation.

7. In order to substantiate its case, the prosecution had examined altogether 12 PWs out of whom, PW-1 Vimal Kumar Singh, sepoy, PW-2, Ashok Kumar Singh, Hawildar, PW-3, Krishna Kr. Sharma, Head Hawildar, PW-4, Dharam Nath, driver, PW-5, Ravi Prakash Suman, sepoy, PW-6, Hasan Imam, Doctor, PW-7, Sheikh Faiyaz, Taxi driver, PW-8, Krishna Kr. Upadhyaya, Superintendent, PW-9, Madan Mishra, Sepoy, PW-10, Triloki Nath Pandey, Inspector, PW-11, Ruben Kujur, Inquiry Officer and PW-12, Davil Luis, Inspector as well as also exhibited Ext-1 confessional statement of appellant/accused, Ext-2, interrogation, Ext-3, arrest, Ext-4,



measurement table, Ext-5, seizure list, Ext-6 series, signature of respective witness over relevant document, Ext-7, Chemical report, Ext-8, prosecution report, Ext-9, forwarding report, Ext-10, arrest memo, Ext-11, history sheet, Ext-12, proforma of seizure list. As stated above, the defence had neither produced oral nor documentary evidence.

8. In order to ascertain whether there happens to be proper compliance of mandatory provisions of the NDPS Act, the evidence of PW-11 who led the raiding party, who also became Inquiring Officer by whom, the prosecution report has been submitted, has been gone through. From his examination-in-chief, it is apparent that 188 Kilograms of Ganja having been kept in 28 packets were seized from the vehicle driven by the appellant and accordingly, seizure list was prepared. He had further disclosed that sample was taken out in presence of seizure list witness which was sent to Ghazipur for examination and the examination report suggest it to be a narcotic substance, Ganja. From his evidence, it is apparent that he had not disclosed that sample was taken out from all the 28 packets. He failed to disclose that sample was taken out from how many packets as is evident from para-6 & 7 of his cross-examination. It is also apparent from para-3 of his cross-examination that he had not informed the Superior Officer.

9. The remaining witnesses that means to say PWs, 1, 2, 3, 4, 5, 9, 10 and 12 have reiterated the version of the PW-11 with regard to apprehension of appellant on chase and then recovery of Ganja weighing 188 Kilograms kept in 28 packets from the back seat of the vehicle of which appellant happens to be driver. However, none of them had disclosed manner of sampling. Furthermore, it is apparent that aforesaid Ganja has not been produced in the court as a material exhibit nor the sample thereof.

10. In the case of *Ashok v. State of M.P.* reported in **(2011) 5 SCC 123** the Hon'ble Apex Court under para-12, 13 and 14 has held as follows:-

“12. Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused.

13. It may be noted here that in *Jitendra v. State of M.P.* (2004) 10 SCC 562, on similar facts this Court held that the material placed on record by the prosecution did not bring home the charge against the accused beyond reasonable doubt and it would be unsafe to maintain their conviction on that basis. In *Jitendra* (2004) 10 SCC 562, the Court observed and held as under: (SCC pp. 564-65, paras 5-6)

“5. The evidence to prove that *charas* and *ganja* were recovered from the possession of the accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW 7), Angad Singh (PW 8) and Sub-Inspector D.J. Rai (PW 6), there is no independent witness as to the recovery of the drugs from the possession of the accused. The *charas* and *ganja* alleged to have been seized from the possession of the accused were not even produced before the trial court, so as to connect them with the samples sent to the forensic science laboratory.



There is no material produced in the trial, apart from the interested testimony of the police officers, to show that the *charas* and *ganja* were seized from the possession of the accused or that the samples sent to the forensic science laboratory were taken from the drugs seized from the possession of the accused. Although the High Court noticed the fact that the *charas* and *ganja* alleged to have been seized from the custody of the accused had neither been produced in the court, nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the chemical examiner in a properly sealed condition and those were found to be *charas* and *ganja*. The High Court observed, 'non-production of these commodities before the court is not fatal to the prosecution. The defence also did not insist during the trial that these commodities should be produced'. The High Court relied on Section 465 CrPC to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.

6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of *charas* and *ganja* were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned. The suggestion made by the defence in the cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with the police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the investigating officer was also not examined. Against this background, to say that, despite the panch witnesses having turned hostile, the non-examination of the investigating officer and non-production of the seized drugs, the conviction under the NDPS Act can still be sustained, is far-fetched."

14. The decision in *Jitendra (1994) 2 SCC 568* applies to the facts of this case with full force. We, accordingly, hold that the appellant is entitled to the benefit of doubt and

acquit him of the charges and set aside the judgments and orders passed by the trial court and the High Court.”

11. That being so, the instant prosecution suffers from inherent flaws and on account thereof, the judgment of conviction and sentence recorded by learned lower court is, hereby, set aside. The appeal is allowed.

12. Since the appellant is under custody, he is directed to be released forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J)

Patna High Court
August 20th 2015
Perwez/AFR

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