

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.396 of 2013

Arising Out of PS.Case No. -100 Year- 2008 Thana -SIWAN MUFFASIL District- SIWAN

1. Dharmdas Rathor Son Of Vijay Rathor Resident Of Village- Shankarpur Police Station- Fijikala, District- Sheopuri (M.P.)

2. Dharmendra Jatwa Son Of Kamal Singh Resident Of Village- Shankarpur Police Station- Fijikala, District- Sheopuri (M.P.) Appellants

Versus

1. The State Of Bihar

.... Respondent

Appearance :

For the Appellants : Mr. Raghav Prasad, Adv.

For the Respondent : Mr. Binod Bihari Singh, APP

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

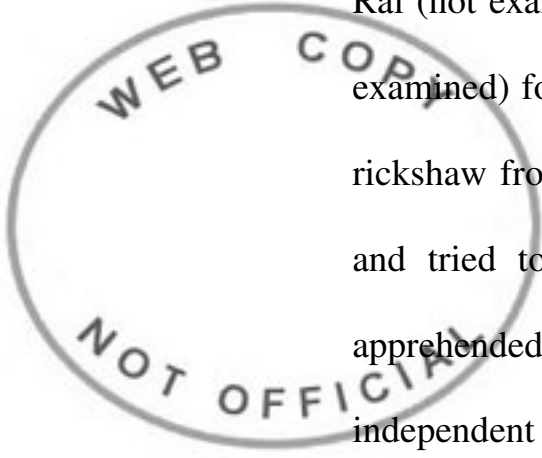
Date: 09-09-2015

Heard the learned counsel for the appellants and the State.

2. The appellants have been convicted under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985, (hereinafter referred to as, “the Act”) and sentenced to undergo rigorous imprisonment for ten years and a fine of rupees one lakh each and for non-submission of fine to undergo rigorous imprisonment for three years each.

3. The prosecution case, as alleged in the written report by the informant, Bijendra Kumar Shahi, P.W. 7, then, Officer-in-Charge, Muffasil Police Station, Siwan, in his self statement on 05.05.2008 at 18.50 hours on the pitch road in front of the Police Station that on 05.05.2008 while he was proceeding to arrest the criminals as well as for seizure of the arms along with Sub Inspector of Police, R.P. Singh (P.W.

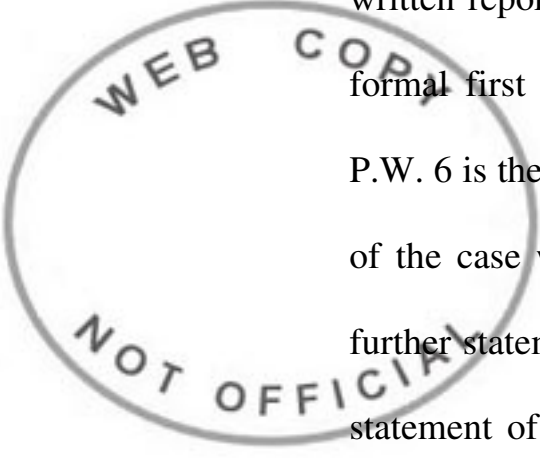
3) Havildar Bharat Singh (P.W. 4) Sachidanand Rai (P.W. 5) Shambhu Rai (not examined) and Constable No. 78, Aas Mohammad Ansari (not examined) for checking. In the meantime, two persons were coming on rickshaw from the side of Gopalganj. They jumped from the rickshaw and tried to flee away on seeing the police force, but, they were apprehended with the help of the police force. In presence of two independent witnesses, Mohan Kumar Gupta and Md. Guddu, the accused persons disclosed their names as Dharmdas Rathor and Dharmendra Jataw. On enquiry they disclosed the reason of fleeing away that they were taking ganja on rickshaw so on seeing police they flee away. Thereafter, in the presence of the two independent witnesses, above mentioned, the rickshaw was checked and then two gunny bags, one of plastic and other of jute were found having some material in it. The two bags were opened, each bag found to have containing 25 Kg of ganja wrapped in polythene bags and papers. Both were weighed and each bag found to have containing about 25 Kg ganja. The said articles were seized and seizure list was prepared on which both the witnesses signed and one copy of the said seizure list was also given to both the accused persons. On the basis of the written report in form of the self statement of the Officer-in-Charge of the Police Station, the first information report was lodged and investigation proceeded and after investigation the charge sheet was submitted, case committed to the



Court of session and during the trial, after framing of charge under Section 20(b)(ii)(c) of the Act, eight witnesses were examined by the prosecution case.

4. The witnesses examined are P.W. 1, Tara Husain, though has stated that no ganja recovered before him and has been declared hostile. P.W. 2 is Munna Ahmad Hussain. He has also not supported the prosecution case and has stated that no ganja was seized before him.

P.W. 3 is Ram Pravesh Singh, P.W. 4, Bharat Singh and P.W. 5, Sachidanand Rai are the members of the raiding party of the police and are the Sub Inspector of Police, Guard and Constable respectively, who supported the prosecution case regarding the fact, as mentioned above, while they were going for arrest of absconding criminals and checking of the vehicles and arms then saw two persons fleeing away from rickshaw and on suspicion they were caught and on enquiry they disclosed their names as well as the fact that they were carrying ganja on rickshaw. Two gunny bags were recovered from rickshaw containing ganja to the tune of 25 Kg each and, thereafter, they were taken into Police Station and seizure list was prepared at the Police Station. P.W. 7 is the informant and he has also supported the prosecution case to the effect, as stated in the self statement, on the basis of which first information report drawn regarding the apprehension of the accused persons while fleeing away and the recovery of ganja from rickshaw and 25 Kg each recovered



from two gunny bags and the seizure list prepared. He has proved his written report, which has been marked as Exhibit 2 and has proved the formal first information report, which has been marked as Exhibit 3. P.W. 6 is the investigating officer and he has stated that the investigation of the case was handed over to him on 05.05.2008. He recorded the further statement of the informant and during investigation recorded the statement of the witnesses, inspected the place of occurrence which is the road and its boundary as well as recorded the statement of the seizure list witnesses. He took the sample to the tune of 50 grams from each bag and sent it to Forensic Science Laboratory. The sample sent was returned by the Forensic Science Laboratory showing some defects. Thereafter, the sample was again sent by removing the defect, but, defect is not mentioned. However, P.W. 8 is Suresh Paswan, Assistant Director, Forensic Science Laboratory, Patna, who has come to depose that the sample received in the plastic packets were kept in clothes in sealed condition and on opening the seal the tin packets were found which was marked 'A' and 'B' and on examination of 'A' and 'B' the articles seized was found as ganja and has proved the report of the Forensic Science Laboratory, marked Exhibit 4.

5. Taking into consideration the evidence of the witnesses the trial Court convicted the appellants, as mentioned above, holding that the prosecution has been able to prove that two persons were apprehended

with 25 Kg of ganja in two gunny bags and the Forensic Science Laboratory report that sample received was reported to be ganja, hence, hold that the prosecution has been able to prove the charges for offence under Section 20(b)(ii)(c) of the Act and convicted and sentenced as mentioned above.

6. The learned counsel for the appellants, however, challenged the order of conviction and sentenced, recorded by the trial Court that the rickshaw on which the ganja was recovered was neither seized nor the rickshaw puller was made an accused nor even the statement of rickshaw puller was recorded or the rickshaw puller was made a witness. It has, further, been contended that P.Ws. 1 and 2 are two independent witnesses who have not supported the prosecution case. It has, further, been contended that two seizure list witnesses have not been examined in this case. It has, further, been contended that it has come in evidence of P.W. 6 that the packing in which the sample were sent were found defective by the Forensic Science Laboratory. It is, further, contended that though the ganja was seized on 05.05.2008, but, the sample was sent from the said ganja to the Forensic Science Laboratory on 12.06.2008 and the packing of the sample taken from ganja was defective. It has, further, been contended that there is no compliance of Section 52A of the Act nor there is compliance of Sections 42(2), 55 or 57 of the Act. There is no evidence that articles seized was ever sealed nor there is any

evidence that where the articles, seized, were kept, hence, order of conviction and sentenced, recorded by the trial Court, is not sustainable.

7. The learned counsel for the State, however, submits that the articles were seized, seizure list prepared and sample sent has been proved to be ganja as per the Forensic Science Laboratory report. He has also submitted that from the perusal of Forensic Science Laboratory report, itself, the sample as received were kept in sealed cover and the same was examined.

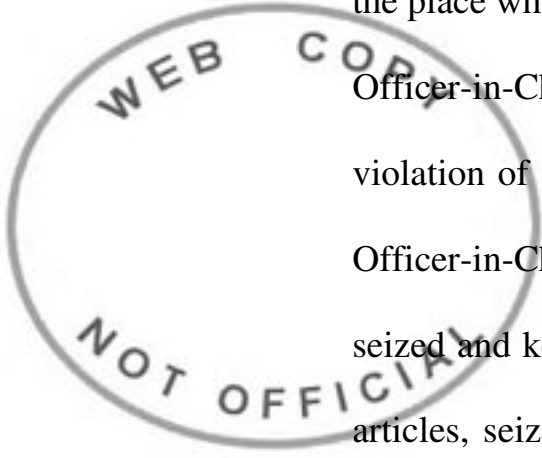
8. However, taking into consideration the respective submission in the light of the submissions made by the parties, having regard to the fact that the prosecution case while the police party proceeding for checking of the vehicles and arms, in the meantime, the informant, Officer-in-Charge of Muffasil Police Station, saw two persons fleeing away after jumping the rickshaw and having been suspicious of their activity they were apprehended and in presence of two witnesses their names were asked and they disclosed their names as Dharmdas Rathor and Dharmendra Jataw and on enquiry they disclosed that they were taking ganja in the rickshaw and seeing the police they were trying to flee away and from the rickshaw two gunny bags were recovered, each containing 25 Kg of ganja wrapped in plastic. However, P.Ws. 1 and 2 have not supported the prosecution case though they are independent witnesses, but, P.Ws. 3, 4, 5 and 7 have supported the

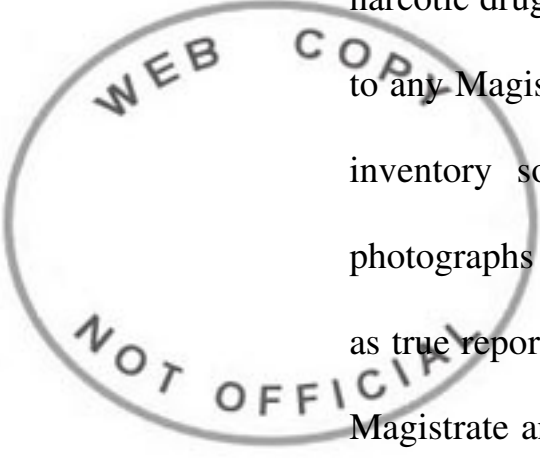
prosecution case and there is nothing in their evidence regarding the search, seizure and recovery of the ganja after they having been apprehended by the police. On their disclosure the ganja recovered, however, the submission regarding the violation of Section 42 of the Act is concerned, the said provision has no application under the facts and circumstances of the case as the recovery was made while the appellants were in transit and there was no prior information and place of seizure is rickshaw is public place and in the facts and circumstances of the case when the police during patrolling and was going for checking of the arms and vehicles and, however, the fact that the seizure and arrest of the appellants at public place while the appellants were in transit and going on rickshaw.

9. Hence, under the facts and circumstances, the case is not covered under Section 42 of the Act, but, under Section 43 of the Act, hence, Section 42 of the Act is not applicable in the facts and circumstances of the case.

10. However, having regard to the fact that after recovery of search and seizure as per evidence of P.W. 7, the informant, there is no mention in his entire evidence that after the search and seizure of the article whether the articles seized were sealed with the seal of the Officer-in-Charge of the Police Station and, further, there is no mention in the entire evidence that where the articles were kept. However, not

sealing the articles at the place of occurrence where the articles seized or the place where seizure list prepared at Police Station with the seal of the Officer-in-Charge of the Police Station after preparing the seizure list is violation of Section 55 of the Act. Section 55 of the Act provides that Officer-in-Charge of the Police Station shall take charge of the article seized and keep in safe custody obtaining the order of the Magistrate of articles, seized, under this Act within local area of that Police Station and which may be delivered to him and shall allow any officer who may accompany such article to the Police Station or who may be deputed that that purpose to fix his seal to such article or take sample of and from them and all sample so taken shall also seal with a seal of the Officer-in-Charge of the Police Station. However, there is no evidence where the articles were kept after it's seizure on 05.05.2008 though P.W. 6, the investigating officer, has stated that he took sample, 50 grams each from both the seized bags and sent it to the Forensic Science Laboratory, however, there is no compliance of Section 52A of the Act as Section 52A of the Act provides that when a narcotic drugs and psychotropic substance has been seized and forwarded to the Officer-in-Charge of the nearest Police Station he shall prepare an inventory of such narcotic drugs and psychotropic substance containing such details relating to their description, quality, quantity, mode of packing, marks, number of such other identifying particulars of the narcotic drugs and the packing in





which they are packed, country of origin as well as identity of the narcotic drugs and in any proceeding under this Act make an application to any Magistrate for the purpose of (a) certifying the correctness of the inventory so prepared taking in the presence of such Magistrate, photographs of such drugs or substance and certifying such photographs as true report sample as the drugs and the substance in presence of such Magistrate and certifying the correctness of any list of sample so taken, however, there is no evidence that there is any compliance of Section 52A of the Act. There is neither any certificate of the Magistrate nor the sample has been taken from any Magistrate. Section 57 of the Act, further, provides that when a person makes an arrest or seizure under this Act, he shall within 48 hours next after such arrest or seizure make a full report of the particular to his immediate officer, superior. There is no such compliance of Section 57 of the Act as per evidence of this witness. However, though it is stated that sample was sent to the Forensic Science Laboratory and the Forensic Science Laboratory report was received, which has been proved by P.W. 8.

11. Having regard to the fact that the articles were seized on 05.05.2008, the articles were not sealed, there is no mention where the articles were kept and the sample was said to have been taken on 12.06.2008, after more than a month and the sample taken was not taken before the Magistrate, there is no explanation about the place where the

articles kept without having been sealed and there is non-compliance of Section 52A of the Act as the articles were not taken out in presence of the Magistrate and, further, there is neither any certificate of the Magistrate that the articles were produced before him nor there is any order for destruction of the articles, seized, nor the articles, seized, has been produced before the Court, hence, there is apparently non-compliance of Sections 52A, 55 and 57 of the Act and the sample sent in such condition and the Forensic Science Laboratory received on the basis of evidence sample sent by the investigating officer can not be relied upon.

12. Hence, I find and hold that prosecution has not been able to prove the charges beyond reasonable doubt, hence, the order of conviction and sentence recorded by the trial Court is hereby **set aside** and the appeal is **allowed**. Since, the appellants are in jail, they are ordered to be released forthwith, if not required in any other case.

(Gopal Prasad, J)

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