

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.805 of 2010

Arising Out of PS.Case No. -25 Year- 2007 Thana -Kanglil District- WEST CHAMPARAN (BETTIAH)

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Pintu Bhagat, S/o Rajan Bhagat Chaurasiya, R/o Parharwa Tola, P.S.-Gopalpur,
District-West Champaran. Appellant

Versus

The State of Bihar Respondent

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Appearance :

For the Appellant/s : Mr. Bimlesh Kumar Pandey, Advocate

For the Respondent/s : Mr. Binod Bihari Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 27-07-2015

This appeal is directed against the judgment of conviction dated 15.06.2010 as also the order of sentence dated 23.06.2010 passed by the learned 4th Additional District & Sessions Judge, West Champaran at Bettiah in Sessions Trial No. 15 of 2008, arising out of Kangli P.S. Case No. 25 of 2007, whereby the sole appellant has been convicted for the offences punishable under Sections 20(b)(ii) (C), 22(b) and 23(b) of the Narcotic Drugs and Psychotropic Substances Act, 1989 (For short 'the NDPS Act') and sentenced to undergo R.I. for ten years and to pay a fine of Rs. 1 lakh for each of the offences and in default thereof to undergo simple imprisonment for two years for each of the offences.

However, the sentences awarded against the appellant have been ordered to run concurrently.

2. The aforesaid case was registered on 28.12.2007 in respect of an occurrence which took place in the night intervening between 27.12.2007 and 28.12.2007 on the basis of a written report submitted by one Raghunath Bori to the Officer-in-charge of Kangli Police Station. According to the prosecution case, while the informant Raghunath Bori (P.W.1), Head Constable of the Shastra Sima Bal (For short 'the SSB') along with his other associates of BOP Senuwariya, B Company, 27th Battallion SSB, namely Tolan Kumar Nath (not examined), Laboo Ram (P.W. 12), Bharat Bhai (P.W. 13) and Palash Chandra Nama (P.W. 3) was on *naka* duty in the night on 27.12.2007 at Sikta Indo-Nepal Border near the old canal, which is 1.5 km away from Border Pillar No. 407 of village-Kathiya Mathiya, at about 11 p.m. in the night, he saw seven persons coming from the Nepal side carrying hand bags. On suspicion, when he asked them to stop, they started running away. While running away, four of them fell down. It is further stated that the miscreants started firing on SSB Personnel. The SSB Personnel also took position and overpowered one of the miscreants, but other miscreants managed to escape taking advantage of dense fog and darkness of night. On inquiry, he disclosed his name as Pintu



Bhagat (appellant). It is further stated that on search of the bag recovered from the appellant, 25 packets of charas, each containing about 500 gm, wrapped in plastic covers, which were further kept in a gunny bag and further in a hand bag were recovered. The appellant was apprehended and was taken to the SSB Headquarter at Sikta. It is further stated that after taking instruction from the superior officers of the SSB, the matter was reported to the police and the seized articles and the apprehended accused were handed over to the SHO Kangli Police Station.

3. On receipt of the aforesaid written report of the informant, Kangli P.S. Case No. 25 of 2007 was registered on 28.12.2007 at 1.10 p.m. under Sections 21, 22, 23 of the NDPS Act and 27 of the Arms Act by the Station House Officer, Surendra Ram, who took up investigation of the case himself.

4. It would appear from the record that the B.O.P. Commander, 27th Battalion SSB 'B' Company, Senuwariya prepared an apprehension report which has been proved during trial. In the relevant column of apprehension report though the date of apprehension is mentioned as 27.12.2007, the time of apprehension has not been mentioned. It would further appear from the record that the seized articles and the appellant were handed over to the Station House Officer, Kangli Police Station, Surendra Ram (P.W. 9) on



28th December, 2007 at about 1.10 p.m. The proforma for seizure prepared under the signature of the BOP Commander has been proved and marked as Ext. 2. The signature of the SHO Kangli Police Station on the proforma for seizure has been proved and marked as Ext. 1/3. The S.H.O., Surendra Ram prepared a production-cum-seizure memo of the articles handed over to him on 28th December, 2007 at 1.00 p.m. The said production-cum-seizure memo has been marked as Ext. 5 during trial.

5. P.W. 9 Surendra Ram recorded statement of witnesses in course of investigation and submitted charge sheet before the court on 2.2.2008. Till submission of charge sheet, the Forensic Science Laboratory Report (For short 'the FSL') was not received. The FSL report (Ext. 6) dated 22.12.2009 was submitted in the court on 4.1.2010 and was taken into evidence under Section 293 of the Code of Criminal Procedure (For short 'the Code') vide order dated 08.02.2010.

6. On receipt of charge sheet, the trial court framed charges under Sections 20(b), 22(b) and 23(b) of the NDPS Act to which the appellant did not plead guilty and claimed to be tried. Accordingly, the trial commenced.

7. In course of trial, altogether 13 witnesses were examined on behalf of the prosecution. Out of them, P.W. 1,



Raghunath Bori (the informant), P.W. 2, Arun Chandra Deori, P.W. 3, Palash Chandra Nama, P.W. 10, Vijay Podey, P.W. 11, Mobin Ahmed, P.W. 12, Laboo Ram and P.W. 13, Bharat Bhai is SSB Personnel. They all have corroborated the prosecution case as narrated in the first information report. However, the independent witnesses, namely, P.W. 4, Sitaram Baitha, P.W. 5, Shiv Prasad Baitha and P.W. 7, Jeet Patel have not supported the prosecution case and they have been declared as hostile at the request of the prosecutor. The two independent seizure list witnesses, namely, Ramakant Tiwari (P.W. 6) and Ajit Kumar Singh (P.W. 8) have proved their signatures on the production-cum-seizure list (Ext. 5), which have been marked as Ext. 1/1 and Ext. 1/2 respectively, but they have completely denied production or seizure of contraband articles in their presence.

8. After closing the prosecution case, statement of the appellant was recorded under Section 313 of the Code in which he has pleaded innocence in the matter.

9. The defence has also examined two witnesses in order to prove innocence of the appellant. They are D.W. 1, Jagarnath Rai and D.W. 2, Tabrej Alam. They have stated that since SSB Personnel used to damage the paddy field of P.W. 2, the appellant protested against this, and that is why, he has been falsely

implicated in the case.

10. After holding the trial and hearing the parties, the trial Judge convicted and sentenced the appellant in the manner indicated hereinabove.

11. Learned counsel for the appellant submits that the trial Court did not appreciate the evidences led on behalf of the prosecution in correct perspective. The contraband articles seized in the case were never produced before the Court. Even the *Malkhana* register was not produced during trial in order to prove safe custody of the contraband alleged to have been seized from the possession of the appellant. The chemical examiner, who issued the FSL report, was not examined during trial. The seizure list was neither prepared at the spot nor the articles recovered were ever sealed in presence of the appellant.

12. He further submits that even according to the prosecution case, sample was taken from only from one packet out of the 25 packets of contraband said to have been seized from possession of the appellant. It is not known from which packet the sample was taken. Hence, it cannot be said what were the contents of the other 24 packets which were neither produced before the court during trial nor any sample was drawn from them. He further submits that there is no evidence that the contraband seized was

ever weighed. According to him, the trial of the appellant was vitiated for total non-compliance of Sections 42, 52-A, 55 and 57 of the Act.

13. On the other hand, learned Additional Public prosecutor for the State submits that the prosecution has led clear, cogent and convincing evidence in order to prove its case and the trial court has rightly convicted the appellant for the offences mentioned hereinabove. He contends that the provisions prescribed under Sections 52A, 55 and 57 of the NDPS Act are directory in nature and non-compliance of the same would not vitiate the trial. According to him, so far as Section 42 of the NDPS Act is concerned, the provisions prescribed therein would not be applicable to the facts of the present case, as the search and seizure were made without any prior information to the informant at public place.

14. I have heard respective counsel for the parties and carefully perused the record.

15. From the record, I find that the FIR would show that the appellant was apprehended on 27.12.2007 at 11 p.m. by the informant Raghunath Bori, a Havildar of 27th Battalion SSB near Border Pillar No. 407 along with 25 packets of charas, each containing about 25 gm, wrapped in plastic cover, which were



further kept in a gunny bag and further in a hand bag. It would further appear from the apprehension report as also the seizure memo prepared by the SSB personnel that the appellant was produced before the company Commander on 28th December, 2007, and after taking instruction of the company commander, the appellant along with seized contraband was handed over to the S.H.O. Kangli Police Station, namely, Surendra Ram (P.W.9). The S.H.O. Kangli Police Station prepared a production-cum-seizure memo of the 25 packets which are alleged to have been handed over to him by the informant Raghunath Bori. The production-cum-seizure memo was prepared at 1.00 p.m. on 28.12.2007 in the Kangli Police Station. As noted above, the two independent witnesses to the production-cum-seizure list, namely, Ramakant Tiwary (P.W. 6) and Ajit Kumar (P.W. 8) have not supported the prosecution case and at the request of the Public Prosecutor they were declared as hostile. They have categorically stated in their deposition that no contraband was ever seized or produced in their presence.

16. I find that the S.H.O. of Kangli Police Station has stated in his deposition that the seized contraband was kept by him in the *Malkhana* of the police station. According to him, the sample of the seized contraband was sent to the Regional Office of FSL,



Muzaffarpur for chemical analysis. He has stated that the sample was drawn from one of the packets and it was sent to the FSL under proper seal after obtaining order of the Court. He has admitted in cross-examination that the test report was not received by him during investigation, and, therefore, he cannot say whether the contraband seized was charas or not.

17. A perusal of the FSL report would show that a parcel containing a tin *dibba* enclosed within a cloth cover was received in the office of the Regional Director, FSL, Muzaffarpur on 31st January, 2008 through a Constable, namely, Rajdeo Ray. The aforesaid constable was not examined during trial. Mr. U.K. Sinha, the expert under whose signature the FSL report was prepared was not examined during trial.

18. From the record, it is clear that the seized articles were neither sealed nor sample was drawn on the date of seizure i.e. 27.12.2007. Even on 28.12.2007 when the seized articles were produced before the Surendra Ram, they were neither sealed nor were sample drawn in presence of the accused. The S.H.O., Surendra Ram (P.W. 9), has deposed that he kept the seized articles in the *Malkhana* of the police station but he has not stated that they were kept in the *Malkhana* in sealed condition. The *Malkhana* register was not produced in court in order to show the date of entry



of the seized contraband in the *Malkhana*. The S.H.O., Kangli deposed that sample was drawn from one of the packets and it was properly sealed before sending it to the Forensic Science Laboratory, but it would appear from the record that the production-cum-seizure memo did not carry any seal impression.

19. I further find that according to the prosecution case, 25 packets were recovered. It is an admitted case of prosecution that sample was taken from only one packet. Why the sample could not be taken from the other packets alleged to be seized has neither been stated nor been explained by the prosecution during trial.

20. I further find from perusal of the record that the charge sheet in the case was submitted on 25.02.2008 and the FSL report was received in the court almost two years thereafter on 08.02.2010. It was taken into evidence by the trial court under Section 293 of the Code. A copy of the FSL report was never supplied to the accused. A perusal of the report would demonstrate that the tin *dibba* sent to the FSL contained pieces of dark brown solid rectangular shaped substances. The dark brown solid rectangular substances contained in tin *dibba* were found to be charas containing Tetra Hydro Cannabin (T.H.C.). The report further describes that Tetra Hydro Cannabin is chief intoxicating

ingredient of charas.

21. There is no cogent evidence that the seized articles were ever weighed, as no balance and weight were used to weigh the articles. Even the weight of the sample sent to the FSL has not been disclosed by the informant in the deposition. The FSL report (Ext. 6) does not indicate the weight of the sample sent to the FSL. The remnants of the sample were not sent back. What happened to the 24 packets seized from the appellant is not known; what happened to the packet from which sample was drawn is also a mystery.

22. Another important aspect of the matter in the present case is that P.W. 2 Arun Chandra Deori has admitted in cross-examination that the seized articles were handed over to the S.H.O. of the police station on 28.12.2007 at 6 p.m., whereas the consistent case of the prosecution is that the seized articles were handed over by the informant to the S.H.O. of the Police Station on 28.12.2007 at 1.00 p.m. The production-cum-seizure memo was prepared at 1.00 p.m. on 28.12.2007. If P.W. 2 is to be believed, at the time of the institution of the first information report as also preparation of production-cum-seizure memo no contraband was handed over by the informant to the S.H.O. Kangli Police Station. The evidence adduced by P.W. 2 creates serious doubt about the

veracity of the prosecution case.

23. Coming back to the argument advanced by the learned counsel for the appellant that there was total non-compliance of the statutory provisions of Section 42 of the NDPS Act, I am of the opinion that in the given case there would be no application of Section 42 of the NDPS Act. The allegation made by the prosecution is that the seizure of the contraband was made in public place. There is distinction in Section 42 and 43 of the NDPS Act. If a search is made in a public place, the officer taking the search is not required to comply with sub-sections (1) & (2) of Section 42 of the NDPS Act. In the present case, as the place of seizure was a public place, hence, Section 43 comes into play and the question of non-compliance of Section 42 does not arise.

24. However, I find substance in the argument advanced by the learned counsel for the appellant that the provisions prescribed under Sections 52, 55 and 57 of the NDPS Act have not been followed by the investigating agency in the present case.

25. It would be evident from a reading of Section 55 of the NDPS Act together with Section 52(3) of the NDPS Act that it is the officer-in-charge of the police station who takes charge of the person arrested as also the article seized and supervise the proceedings. He has to seal the contraband articles with his own



seal, and then get them deposited at the police station for the safe custody either himself or through some officer, and in that event allow that officer to put his seal also on the packets sealed with his seal. There is no evidence that the S.H.O. of Kangli Police Station had ever put his seal on the seized articles or on the sample sent to the FSL. Though the S.H.O. has stated in his deposition that the same was sealed, there is no evidence whose seal was put on the sample. In my opinion, the legislature had never contemplated that articles or samples recovered under the provisions of the NDPS Act would be kept unsealed, or they would be sealed with general seal. It would be evident from the record that the sample alleged to have been sent to the FSL had not been sent with any special seal.

26. Section 52-A of the Act has been inserted by the Act of 2 of 1989 with effect from 29.05.1989. Section 52-A of the Act read as follows:-

“52-A. Disposal of seized narcotic drugs and psychotropic substances.- (1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs

or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purposes of-

- (a) certifying the correctness of the inventory so prepared; or
- (b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or
- (c) allowing to draw representative samples of such drugs or substances, in the presence of such

Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every Court trying an offence under this Act, shall treat an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”

27. Thus, it would be evident that Section 52-A of the Act comes into play after recovery of the contraband item. I find that photographs of the drugs or substances so seized were never taken. Even, the representative sample was not drawn in presence of any Magistrate. The seized charas was never produced in the court. There is no evidence to show that seized articles were kept in safe custody in the police station. In absence of any inventory, the photographs of the charas and any list of samples drawn under Sub-section (2) of Section 52-A and certified by the Magistrate, it would be difficult for the court to place reliance on the prosecution case regarding recovery of charas.

28. The entire action of the prosecution in conducting the search, seizure, sampling etc. is contrary to the mandate of law. What is curious to note in the present case is that the guidelines given in the Act under Sections 52(3), 52(4) and 55 of the NDPS Act have been given a complete go-bye by the investigating agency.

29. Further, Section 57 of the NDPS Act relates to reporting of arrest and seizure to immediate superior officer. The evidence shows that the same has not been done.

30. It is true that Sections 52, 55 and 57 of the NDPS Act are directory in nature and the provisions prescribed therein are not mandatory. However, keeping the seized article in an unsealed condition for over a month, taking substances out of it in absence of the accused or any independent witness for the purpose of sampling and the sample being sealed by a general seal give rise to a doubt that there might have been tampering with the seized article.

31. In the above circumstances, I am of the view that even if the provisions of Sections 52, 55 and 57 of the NDPS Act are directory, the same would be fatal to the prosecution.

32. Having regard to the facts and circumstances as noted above, I am constrained to say that the investigation in this case is perfunctory and on important aspects of the matter the evidence is highly discrepant and unconvincing. Therefore, the

evidence adduced is wholly insufficient to believe that any article was ever seized from the possession of the appellant and, if seized, the same were charas.

33. In the result, the appeal is allowed. The impugned judgment of conviction dated 15.06.2010 and the order of sentence dated 23.06.2010 passed by the learned 4th Additional District & Sessions Judge, West Champaran at Bettiah in Tr. No. 15 of 2008, arising out of Kangli P.S. Case No. 25 of 2007, are set aside. The appellant, who is in custody, is directed to be released forthwith, if not required in connection with any other case.

(Ashwani Kumar Singh, J.)

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