

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.245 of 2012

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BHAIRAV PRASAD MAHTO S/O SUKAL PRASAD MAHTO R/O BALUAN,
POLICE STATION - BAIRIYA, DISTRICT - WEST CHAMPARAN.

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

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Appearance:

For the Appellant/s : Mr. Ranbir Singh, Amicus Curiae.

For the State : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 20-08-2015

Sole appellant, Bhairav Prasad Mahto has been found guilty for an offence punishable under Section 20(b)(ii)(c) as well as 22(c) of the NDPS Act vide judgment of conviction dated 15.02.2012 and sentenced to undergo R.I. for ten years as well as fined rupees one lac in default thereof, to undergo R.I. for two years under both counts with a further direction to run the sentences concurrently vide order of sentence dated 23.02.2012 by Additional Sessions Judge, IIIrd-cum-Special Judge, NDPS, West Champaran at Bettiah in connection with Sikta P.S. Case No.24 of 2009, hence this appeal.

2. Bhuwan Chandra Joshi (PW.1), Assistant Commandant of SSB, 27th Battalion had filed written report on 15.06.2009 at about 06:15 PM disclosing therein that while the



sepoys were on patrolling in the night, at about 00:30 hours they found so many persons having crossed the border containing goods who were challenged and on account thereof, they, after throwing the articles, began to flee who were chased out of whom Bhairav Prasad Mahto, sole appellant was apprehended. The constable collected the articles having spread over on account of throwing and it weighed 190 Kg. Furthermore, it happens to be a Nepali Ganja. Seizure memo, arrest memo was prepared and the articles along with accused were produced before the police.

3. On the basis of the aforesaid written report, Sikta P.S. Case No.24 of 2009 was registered under Section 20, 22 of the NDPS act and investigation was taken up during course of which, witnesses were examined, the seized article was sent to Forensic Science Laboratory for chemical examination and subsequently thereof, after concluding the investigation, charge sheet was submitted which ultimately led conduction of trial which resulted in conviction and sentence in a manner indicated above against which the appellant has preferred instant appeal.

4. Defence case, as is evident from mode of cross-examination as well as from the statement recorded under Section 313 Cr.P.C. is of complete denial as well as of false implication. However, neither any DW nor any kind of document has been exhibited on behalf of appellant.

5. In order to substantiate its case prosecution had examined altogether eight PWs out of whom PW.1 is Bhuwan

Chandra Joshi, PW.2 is Manmohan Singh, PW.3 is Dayanand Singh, PW.4 is Srichandra Thakur, PW.5 is Md. Islam, PW.6 is Tapan Sutradhar, PW.7 is Karendra Basumati, PW.8 is Nawchetiya Patra as well as had also exhibited Ext.1 Seizure list, Ext.2 Written Report, Ext.3 Formal FIR, Ext.4 FSL Report.

6. Because of the fact that Learned counsel for the appellant remained absent on account thereof, Shri Ranbir Singh learned counsel has volunteered to act as an amicus curiae who, during course of argument vehemently challenged the finding recorded by the learned lower court on factual as well as legal aspect. It has been submitted on behalf of learned amicus curiae that from the initial version, written report, it is apparent that nothing was recovered from possession of the appellant however, during course of trial the witnesses developed their initial version in order to implicate the appellant stating that one packet of ganja was recovered from his possession. Therefore, such material development which happens to be an admission on the part of the witnesses themselves is bound to affect credibility of the evidence of the witnesses. It has further been submitted that although neither the written report nor the seizure list speaks regarding status of the seized ganja however during course of evidence, the witnesses have deposed that nine packets of ganja was seized. Then in that event, there should have been preparation of Production cum Seizure List at the end of the PW.3, the Investigating Officer which is found complete lacking. It

has also been submitted that there happens to be perfunctory investigation in the background of the fact that neither sampling was properly made nor the other mandatory provisions of law were followed. So submitted that the judgment of conviction and sentence recorded by the learned lower court is fit to be set aside.

7. At the other end the learned Additional Public Prosecutor supported the finding recorded by the learned lower court and submitted that even excluding the evidence of the PW relating to recovery of one packet of ganja from the possession of the appellant, it is apparent that 190 Kg of ganja was seized which was thrown away by the smugglers of which, the appellant was one of the member and on account thereof, the conviction and sentence recorded by the learned lower court happens to be just, legal and proper.

8. Gone through the record. From perusal of the record, it is apparent from Ext.2 that prosecution happens to be silent with regard to recovery of one packet of ganja which they deposed subsequently, from the possession of appellant. Because of the fact that witnesses have stated that one packet of ganja was seized from physical possession of the appellant, in the aforesaid facts and circumstances of the case, Section 50 of the NDPS act would come into play requiring the search and seizure to be affected in presence of Gazetted Officer. From the evidence of the PW.1, PW.2, PW.6, PW.7 and PW.8 that none of them instructed the appellant to have his physical search in presence of Gazetted

Officer. That being so, the recovery of one packet of ganja from physical possession of appellant, though the evidence happens to be sketchy, bound to dent upon the prosecution version.

9. In likewise manner, none of the witnesses including PW.3, the Investigating Officer had stated that they have informed the superior officials regarding search seizure as well as apprehension of the accused in terms of Section 42(2) of the N.D.P.S. Act. Furthermore, from the evidence of remaining witnesses, it is apparent that they have not prepared sample after seizure of the contraband goods nor PW.3, the Investigating Officer had deposed that on being produced, he had prepared the sample independently connected with all the nine packets. Moreover, the aforesaid article along with sample also not been produced as a material exhibit during course of trial nor there happens to be any sort of explanation on this score.

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. Accordingly, the judgment of conviction and sentence recorded by the learned lower court is set aside. Appeal is allowed. Appellant is under custody hence is directed to be released forthwith, if not wanted in any other case. First page and last page of the judgment should be given to the learned amicus curiae for the needful.

(Aditya Kumar Trivedi, J.)

Patna High Court
Dated 20th day of Aug., 2015
Prakash Narayan

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