

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.446 of 2012

Against the judgment of conviction, dated 26.04.2012, and order of sentenced dated 01.05.2012, passed by Mr. Jagannath Rai, Additional District and Sessions Judge I-cum-Special Judge, Sitamarhi, in G.R. No. 2145 of 2010, Majorganj P.S. Case No. 126 of 2010, Trial No. 14 of 2012

1. Ramesh Sahani S/O Ramakant Sahani Resident Of Village- Madhubani, Police Station- Pokharia, District- Parsa (Nepal) Appellant

Versus

1. The State Of Bihar Respondent

Appearance :

For the Appellant : M/S Bashishth Narain Mishra, B.K. Mishra & S.N. Rai, Advs.

For the Respondent : Mr. Binod Bihari Singh, APP

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

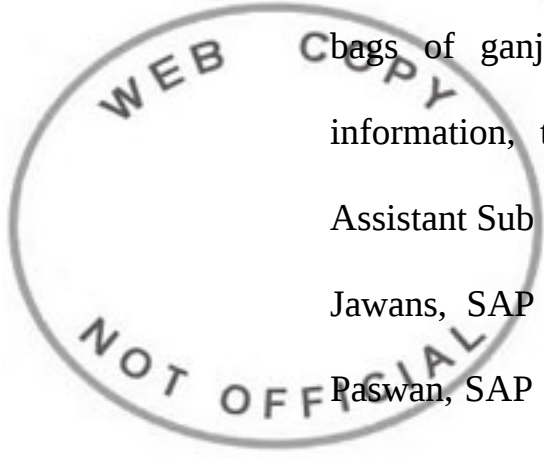
Date: 22-09-2015

Heard the learned counsel for the petitioner and the State.

2. The appellant has been convicted under Sections 20(b)(ii)(c) and 22(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 for each offence and a fine of rupees one lakh. However, it has been ordered that both the sentences shall run concurrently.

3. The prosecution case, as alleged in the self statement of the informant (P.W. 5) Abdul Gaffar, the Officer-in-Charge of Majorganj P.S. Case No. 126 of 2010 recorded on 13.08.2011 at 11.00 P.M. that on 13.08.2010 at 06.15 A.M. he proceeded for inspection of poling booth in Dheng/Riga/Bargainia Road along with Block Development Officer under the Supti Block of Majorganj Police Station. During the inspection, at

about 10.00 A.M. while he was in village Dheng he received secret information that one person at Bargainia Jeep Stand has loaded two gunny bags of ganja on seat for going towards Sitamarhi. On the said information, the informant informed the patrolling party heading by Assistant Sub Inspector of Police, Vakil Singh and Special Auxiliary Police Jawans, SAP No. 4023 Ram Kishore Sharma, SAP No.2303 Shri Rai Paswan, SAP No. 4536 Ratan Singh, SAP No. 910 Munna Singh. On the said information the said police patrolling force reached the place of occurrence, i.e., Bargania Jeep Stand at about 10.30 A.M. and started checking in village Dheng at Riga-Bargainia main road in village Dheng. In the meantime, three jeeps were seen coming from the side of Bargainia and the said jeeps were stopped and search made. In the meantime, one person from the last jeep, bearing registration no. BR-05P-0763, tried to start fleeing away. He was chased by Special Auxiliary Police and Ramesh Prasad, Chowkidar no. 3, and Presh Kumar Singh, Chowkidar no. 3/11 also came. The person, who was caught, disclosed his name as Ramesh Sahni, the appellant, and on enquiry he disclosed that he has purchased ganja to the tune of 55 Kg from Melahi village under Raxaul Police Station and kept it in two gunny bags and loaded on the passenger carrier of the jeep and was taking it to Sitamarhi. About 10-12 persons were sitting in the jeep. The two gunny bags found on the jeep were unloaded which smelled like ganja, was seized by the informant. Since, none come forward to be the witness so Ramesh Prasad and Paresh Kumar Singh, the Chowkidars,



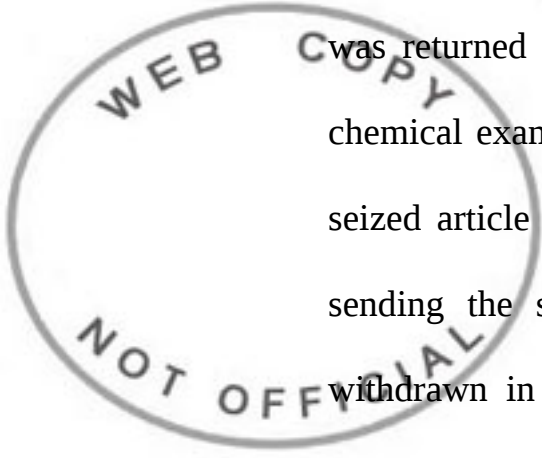
were made witnesses on seizure. The appellant who was caught hold did not produce any paper.

4. On the written report, the first information report was lodged, the investigation proceeded. The informant (P.W. 5) after search seized the ganja in two gunny bags recovered from the carrier of the jeep bearing registration no. BR-05P-0763 and seizure list prepared was signed by the Chowkidars as the local people not come forward to be the witness on seizure and the confessional statement of the appellant was recorded by the informant.

5. The seizure list proved as Exhibit 1 series on the basis of the written report, first information report was marked as Exhibit 2 and the formal first information report marked as Exhibit 3. The gunny bags seized were not sealed at the place of occurrence nor the sample was taken out at the place of occurrence.

6. The investigation was handed over to P.W. 8 and he assumed the investigation. He recorded the statement of the witnesses as well as the seizure list witnesses. He also took the charge of ganja which was seized. At the time he took the charge of investigation ganja was not sealed and so ganja was sealed at the Police Station. He has stated that it was not measured before him and he also did not produce the appellant for statement. However, the said ganja was produced before the Special Judge on 14.08.2010 and, thereafter, the order sheet shows that Ramesh Sahni, accused, after having been arrested was forwarded along with the

ganja and the seized material was about 55 Kg kept in bigger gunny bag, which contains six packets tied by sutli was also produced and the same was returned with a direction for taking steps for sending the same for chemical examination of seized article and, thereafter, on 18.08.2010, the seized article was produced before the Special Judge with a petition for sending the sample to Forensic Science Laboratory and sample was withdrawn in three sets of packets separately and one set was sent to Forensic Science Laboratory and two sets kept in Malkhana. He has stated that the seized article has been kept secured in Malkhana. He has, further, stated that he did not correctly remember Malkhana register number. P.W. 9 is Assistant Sub Inspector of Police. He received wireless message from the Superintendent of Police, Sitamarhi, Malkhana register which finds mention about the seized article. He has stated that the articles kept in Malkhana was got wet and the seal has also been torn and damaged by mouse and has proved supplementary Malkhana register, Exhibits 6 and 7. The Sanha regarding the receipt of the information being no. 2008, dated 16.10.2011, and has also proved. Malkhana register entry no. 3, dated 13.08.2011, with regard to the seized article is in connection with Majorganj P.S. Case No. 126 of 2010 that is the present case. However, this witness has stated that seized article was sealed before him on 16.10.2011, but, the said seal has been destroyed by rain water and damaged by rats. However, it has been stated that there was no signature of the Officer-in-Charge of the concerned Police Station on the said sealed



ganja.

7. The police, after investigation, submitted charge sheet, cognizance taken, case committed to the Court of sessions and during the trial nine witnesses were examined. P.W. 1 is Paresh Kumar Singh Chowkidar no. 3/11. P.W. 2 is Ramesh Prasad Singh Chowkidar no. 3. Both are also witnesses to the seizure list and supported prosecution case that while checking the vehicles three jeeps were apprehended and one person was seen fleeing away from last jeep was apprehended and two gunny bags were recovered from the jeep. P.W. 3 Ram Kishore Sharma is Havildar. However, his evidence is that he saw the people having kept a person after catching hold of him. P.W. 4 is Ram Paswan, who has stated that he met with Pareth and he disclosed that he was going along with ganja and he was being taken. P.W. 5 is the informant. P.W. 6 is Vakil Singh, Assistant Sub Inspector of Police, who was leading the patrolling party. P.W. 7 is Ratan Singh. P.W. 8 is Baidyanath Acharya, the investigating officer of the case. P.W. 9 is Jitendra Kumar, Sub Inspector of Police, who has come to prove the Malkhana register. The documentary evidences proved is Exhibit 1 series is seizure list, signature on the seizure list is Exhibit 2 which is the self statement, Exhibit 3 is the formal first information report, Exhibit 4 is the confessional statement of the accused, Ramesh Sahni, Exhibit 5 is the writing and signature on the charge sheet, Exhibit 6 is the certified copy of the Sahna, Exhibit 7 is the supplementary Malkhana register and Exhibit 8 is the Forensic Science Laboratory report.

The trial Court, after taking into consideration the evidence, both oral and documentary and considering the submissions of the parties, passed the judgment and convicted and sentenced the appellant as mentioned above.

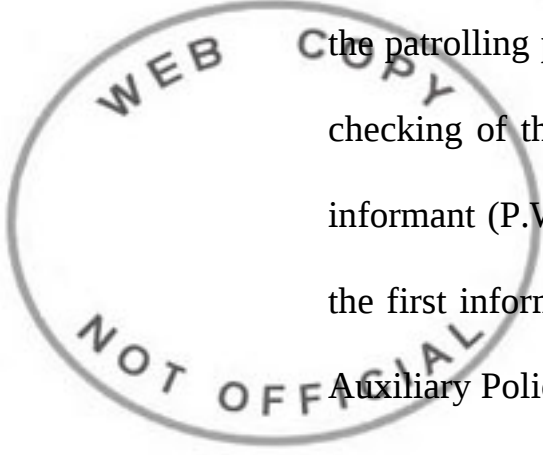
8. The learned counsel for the appellant has challenged the order of conviction and sentence, recorded by the trial Court, on the ground that the appellant was caught from the jeep. However, the ganja in gunny bags was recovered from the carrier of the jeep and there is contradiction in the evidence of the witnesses and the confession about disclosure of the gunny bags from which the ganja recovered is not admissible. It has, further, been submitted that the ganja has not been recovered from the conscious possession of the appellant. It is submitted that the possession was not from the conscious possession as neither any one has come to depose that appellant had kept the ganja on the jeep neither the khalasi (cleaner) nor the driver of the jeep examined or deposed nor any one has seen the appellant with gunny bags and merely because the gunny bags recovered from the carrier of the jeep on which the appellant was sitting no reliance can be placed on the evidence to hold conviction, possession and placed reliance on decisions reported in **2011(XI) SCC, 347 (Ram Singh Vrs Central Bureau of Narcotics), 2006(2) P.L.J.R., 544 (Mr. Moquim & Ors. The State of Bihar), 2012(4) P.L.J.R., 531 (Ajay Kumar Saini @ Ajay Saini Vrs. The State of Bihar) and 2007(2) P.C.C.R., 79 (Nathe Rai Vrs. The State of Bihar).**

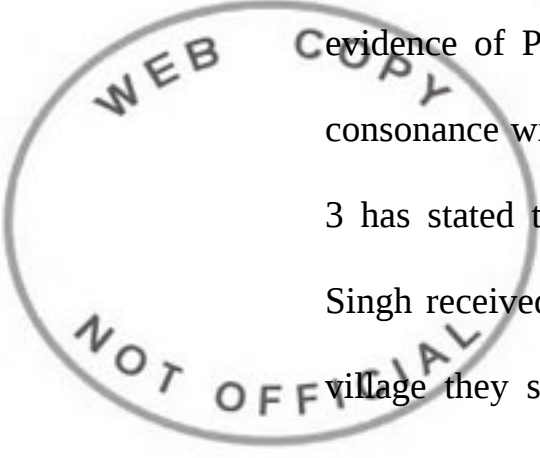
9. It is further contended that the article recovered at the place

of occurrence was not sealed at the place of occurrence and the seized article brought before the Court is not properly sealed and the supplementary Malkhana register has been proved, but, no the original, hence, appellant is entitled for benefit of doubt. It is, further, contended that there is non-compliance of Section 52A of the Act as there is neither certificate nor photograph taken nor there is compliance of the provision.

10 The learned counsel for the State, however, contends that it is well proved case as the occurrence took place on 13.08.2010 and when the jeep was apprehended on secret information, but, seeing the police, the appellant started fleeing away and when he was apprehended and he disclosed about the ganja in the gunny bags and on his disclosure two gunny bags were recovered from the carrier of the jeep in which the ganja was kept and having regard to the fact that the appellant flee away on seeing the appellants, itself, indicates that the appellant was conscious of his possession. It has, further, been contended that on enquiry, the ganja seized was sealed and placed before the Court of Special Judge in sealed cover on the very date and the Court also took cognizance and, thereafter, on the next day, i.e., on 18.08.2010, itself, the sample was taken out in sealed cover and sent for chemical examination and Malkhana register also shows the entry of the article of this case, which has duly been proved as Exhibit 7, hence, there is substance and compliance and there is nothing to prejudice regarding the report of the Forensic Science Laboratory showing the representative sample taken out.

11. In the representative submissions, I proceed to consider that as per the prosecution case that the informant on secret information asked the patrolling party to reach the place of occurrence and, thereafter, started checking of the vehicles and, then, three jeeps were apprehended and the informant (P.W. 5), in his evidence, has supported the prosecution case in the first information report that the informant was caught hold by Special Auxiliary Police jawan when they were checking the front jeep and, then, it was found that the person sitting on the last of the jeep started fleeing away and he was caught hold and, then, he disclosed that he has kept ganja in two gunny bags. There is nothing in the evidence of this witness regarding the manner of raid and apprehension of the accused and arrest and seizure of two gunny bags. However, P.W. 6 is Vakil Singh, he is Assistant Sub Inspector of Police leading the patrolling party. As per the prosecution case in the fardbeyan though on secret information the patrolling party were informed to search place of occurrence and then the checking was made and during the checking three jeeps were apprehended and from the last jeep out of three one person tried to flee away who was caught hold and who disclosed his name as Ramesh Sahni and during the search two gunny bags recovered from the carrier of the said jeep and seizure list prepared. P.Ws. 1 and 2 have also supported the prosecution case who was the seizure list witness and he has also supported that three jeeps came which was apprehended and out of the last jeep a person tried to flee away who was caught by Special Auxiliary Police jawan disclosed his name as

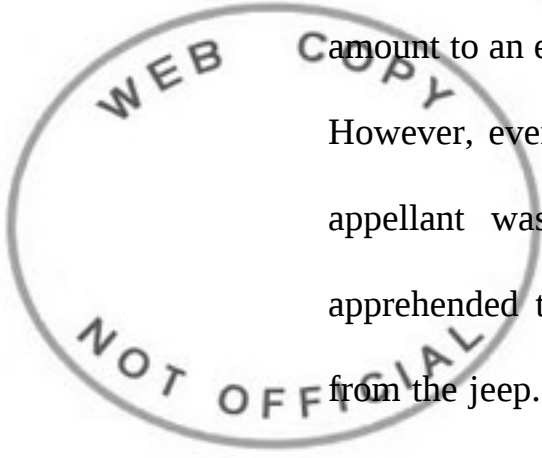




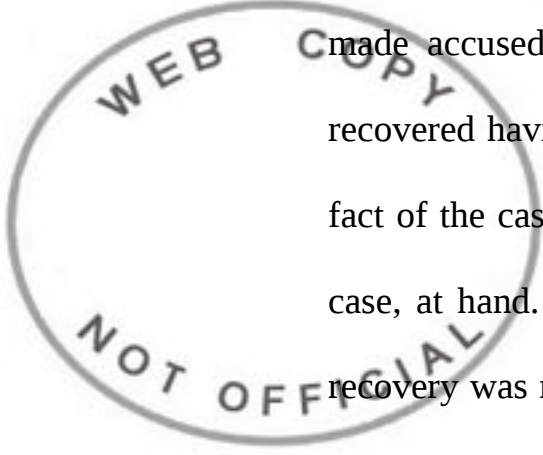
Ramesh Sahni and from the jeep two gunny bags ganja recovered and the person apprehended disclosed that the same belonged to him. So far the evidence of P.Ws. 3, 4 and 5 are concerned, their evidences are not in consonance with the prosecution case as alleged in the fardbeyan, as P.W. 3 has stated that they were under Vakil Singh for patrolling and Vakil Singh received a telephone and in consonance when they reached Dheng village they saw that one person has been caught there and they were telling that his article is coming from another vehicle. P.Ws. 3, 4 and 7 have not supported the prosecution case whereas P.W. 7 has been declared hostile. However, the competition is between two sets of evidences, one is that the evidences of P.Ws. 1, 2, 5 and 6 are in consonance with the prosecution case as alleged in the first information report. However, the second set of evidence of P.Ws. 3, 4 and 7. There is nothing in the evidences of P.Ws. 1, 2, 4 and 6 who have come to support the prosecution case, who are none else than the informant P.W. 5 and Vakil Singh and the persons leading the patrolling party and the evidences of P.Ws. 1 and 2 are Chowkidars, hence, there is no reason to disbelieve the evidence in contrast of the evidences of P.Ws. 3 and 4.

12. Hence, the fact having been remained established that the appellant was coming on jeep and while the jeep was apprehended the appellant started fleeing away and then he was caught and then disclosed, however, any disclosure or any statement before the police is not admissible in evidence under Sections 25 and 26 of the Evidence Act.

However, disclosure about the fact that ganja in two gunny bags are established and recovery of two gunny bags from the jeep, itself, may amount to an evidence as admissible under Section 27 of the Evidence Act. However, even if it is not admitted in evidence the fact remains that the appellant was apprehended from the jeep and while the jeep was apprehended the appellant started fleeing away and the ganja recovered from the jeep. It is true that there is no eye witness to the occurrence that who kept the ganja and whether the appellant has kept it on the jeep, however, the conduct of the appellant that he started fleeing away, itself, indicates about his consciousness of the fact that the ganja was kept in the jeep and he was aware of the fact. The learned counsel for the appellant, however, placed reliance upon a decision reported in **2011(XI) SCC, 347** (supra), however, it was a case in which ganja was recovered from a hotel and the servant of the hotel was apprehended and there in facts and circumstances it was held that the possession was not in conscious possession as the servant can not have the possession over the goods as the servant has neither owner of the vehicle nor has been proved that he has knowledge of the facts. Hence, under the circumstances has been held that the servant of hotel can not be said to be in possession of contraband belonging to his master unless it is proved that it was left in his custody over which he has absolute control. However, the fact of the case, at hand, is otherwise and not applicable to the facts and circumstances of the case relied upon. In decision reported in **2012(4) P.L.J.R., 531** (supra), the fact



that two trucks were apprehended and Nepali ganja to the tune of 407 Kg was recovered, however, neither the driver nor the khalasi (cleaner) was made accused and, further, in that case in view of number of packets recovered having not stated in written report or seizure list. However, the fact of the case is not in consonance to the facts and circumstances of the case, at hand. In decision reported in **2006(2) P.L.J.R., 544** (supra) the recovery was made from the house and it was not proved who had kept or under control of the ganja or had kept ganja as the house was being used by all the appellants so the benefit of doubt was given to the appellant. Hence, the facts and circumstances are not applicable to this case. In decision reported in **2007(2) P.C.C.R., 79** (supra), in this case the fact remain that the custom authority apprehended a jeep and arrested with ganja which is being imported from Nepal. On apprehending the jeep, the driver of the jeep, seeing the jeep of the Custom Department, turned his jeep and the custom officials chased the jeep, but, the driver of the jeep fled away, however, one person in a saffron colour dress was found sitting in the jeep, he did not try to flee away, on enquiry he disclosed his name and told that he was a sadhu and was coming from Janakpur and he took a lift in the jeep at Maheshpur. The question for consideration remained whether the ganja recovered from the secret chambers of the jeep was in conscious possession of the person sitting idle in the jeep intervened by the authority ? It has been held that mere possession is not a conscious possession, but the knowledge is an essential ingredient in case where the possession, itself, is



an offence, hence, the possession with knowledge is an offence. However, taking into consideration the fact that since the jeep which was apprehended even on interception the person on jeep did not try to escape or flee away and remained sitting there whereas the driver of the said jeep seeing the custom officials turned his jeep tried to flee away and, thereafter, stopped the jeep and flee away shows the driver had knowledge which compelled him to flee whereas person on jeep remained idle had no knowledge so remained idle and did not made any attempt to flee away, hence, he was not conscious of the fact that any contraband is being taken away in the jeep so was not held guilty.

13. However, the case relied upon by the learned counsel for the appellant is not supporting the appellant of the case. Here, the fact at hand that when the jeep was apprehended by the police officials and checking started, the appellant started fleeing away and he was caught hold and the ganja in gunny bags was recovered from jeep, itself, indicates that the appellant has got the knowledge of ganja and he was fleeing away having been conscious of the fact that the ganja is in gunny bags kept by him, hence, it can safely be held that the appellant was in conscious possession of the ganja, hence, the issue decided against the appellant that he was in conscious possession of ganja. However, subsequently the article, seized, was taken to the Police Station where the ganja was sealed and evidence is that it was produced before the Court on the very next day, i.e., 14.08.2010 and then with the direction of the Court to take steps for sending the

sample and then again the article, seized, was produced before the Court in sealed cover and three sets of representative samples taken out from six packets of ganja, seized, in two gunny bags and sent to Forensic Science Laboratory and the report received showing ganja. The Malkhana register has also been proved and marked as Exhibit 7. However, the criticism that the article seized has been produced was torn and the same did not bear the seal and signature of the Officer-in-Charge of the concerned Police Station. However, explanation has been given that the said article was kept in Malkhana having been damaged by rain water as the area is flood prone area and produced in separate seal. However, the Malakhana register has been proved and marked as Exhibit 7 shows that the article kept in Malkhana which bearing the case number.

14. I do not find any prejudice caused to the appellant. The prosecution has been able to prove the case, hence, I do not find any merit in this appeal.

15. This appeal is **dismissed**.

(Gopal Prasad, J)

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