

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.104 of 2011

[Against the Judgment of conviction and order of sentence dated 30.11.2010/7.12.2010 passed by the Additional Sessions Judge-VII, Patna, in Special Case No. 35 of 2007]

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1. Shanti Devi, w/o Shri Shankar Sah
 2. Kalawati Devi, w/o Shri Prabhu Sah

Both resident of village Rani Ghat, P.S. + Distt. Veerganj (Nepal).

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Bidhanesh Mishra, Adv.

Mr. Taniya Mishra, Adv.

For the State : Mr. S.N. Prasad, A.P.P.

For the Union of India : Mr. Sanjay Kumar, ASG

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CORAM: HONOURABLE JUSTICE SMT. ANJANA PRAKASH

and

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

(Per: HONOURABLE JUSTICE SMT. ANJANA PRAKASH)

Date: 13-05-2016

Heard learned counsel for the Appellant and learned counsel appearing on behalf of the Public Prosecutor.

2. Both the Appellants have been convicted under Sections 20(b)(ii)(c) of the NDPS Act and sentenced to undergo rigorous imprisonment of 10 years and a fine of Rs.1,00,000/- in default of which further imprisonment of two years rigorous imprisonment by a Judgment dated 30th day of November, 2010 and order of sentence dated 7th December, 2010 in connection with Special Case no. 35 of 2007.

3 The case of the Complainant PW 1 (Santosh



Kumar) Inspector (Seizing Officer) Customs Headquarter, Patna, is that on 9.6.2007, he filed a First Information Report by way of a Complaint instituted by him. He stated that on information that some persons were indulging an illicit trafficking of Narcotic substance (*Charas*), he constituted a Police team and rushed to Mithapur Bus Stand at 5:00 P.M. on 9.6.2007 where he found Shrimati Sheela Devi, Sipoy, Custom Preventive Division, Motihari who informed that two women travelling by bus from Raxaul to Patna were suspected of carrying illegal substance having either concealed in their body or in their personal belonging. Two persons were requested to become Panchnama witnesses. Firstly, the women were asked as to whether they prefer their search before a Judicial Magistrate or before the Superintendent of Customs (Gazetted Officer) upon which they agreed to go before the Gazetted Officer. On personal search conducted by Shrimati Sheela Devi (PW-3), 20 transparent thin packets of *Charas* concealed in a tailor-made specially designed cloth bag from the personal possession of Shrimati Shanti Devi and five packets/bundles each containing four transparent thin packets of *Charas* concealed in one white gunny bag from the personal possession of Appellant Kalawati Devi were recovered. The goods along with two accused persons were taken to the Customs office at Birchand Patel Marg, Patna. The articles recovered were found to be *Charas* and each packet contained 250 Grams and the total weight was



10 Kg. i.e. 5 Kg. from possession of each of the Appellant. Both the Appellants admitted that they were carriers of the Narcotic Substance so their interrogatory statements were recorded and sent along with the First Information Report on 9.6.2007 itself. Three representative samples of the alleged *Charas* were drawn, packed in envelopes and sealed under the signature of the Panches as well as the accused and then they were arrested and produced before the Special Judge. The samples were forwarded to the Govt. Opium and Alkaloid Works, Gazipur (U.P.) for chemical analysis and test confirmed by report received on 25.9.2007, that it was *Charas*. It was under these circumstances that the present Complaint was filed under Sections 20, 23 and 29 of the NDPS Act, 1985 with a request that the articles be confiscated.

4. During Trial, the Prosecution examined six witnesses out of whom PW 1 (Santosh Kumar) is the Informant who stated that on 9.6.2007, he received information that some suspicious women were travelling on the bus, so, he reached the Mithapur Bus Stand along with the rest of the Custom Officials. They met Sheela Devi (PW 3) who told them that the activities of the two women were suspicious. An offer was made to them in respect to search before the Magistrate of Gazetted Officer, they chose the latter. Sheela Devi then searched the ladies inside the bus and found 5 Kgs *Charas* in 20 packets each from the possession of the Appellants total weight of 10



Kg. were recovered. He then stated that they were brought to the Customs Office where samples were drawn and their voluntary statements were recorded as also seizure memo was prepared. He proves the seizure memo with thumb prints of the two Appellants as Ext. 1, the Panchnama which was in the handwriting of one Balram Kumar as Ext. 2 and the voluntary statement as Ext. 3 and 3/1. The certification was marked 'X' for identification, the interrogatory statement of Shanti Devi as Ext. 4, the interrogatory statement of Balram Kumar as Ext. 3/1 and the Seizure Memo as Ext. 5. The Complaint petition was proved as Ext. 6 and FSL Report as Ext. 7.

In cross-examination he stated that he did not remember the number of Bus on which the two Appellants were travelling and he did not know as to why Sheela Devi (PW 3) Constable in the Custom Department had taken the same bus. He further stated that there was no documentary proof to show the Appellants were travelling from Raxaul to Patna and it was only on the statement of the Bus Conductor that he deduced such a thing. He asserted that two women were searched by Sheela Devi (PW 3) inside the Bus and the rest of the formalities had taken place at the Customs Headquarter. He clarified that the seized *Charas* was sealed after samples were drawn. A reply to the question as to whether the samples were separately drawn from the packets recovered from the two Appellants, he stated that one sample was drawn from the seized articles and kept in a

single envelope because the case was one under the same. He could also not to say as to the exact quantity drawn from the articles recovered from each of the accused persons.

5. PW 2 (Hargovind Lashkar) was one of the Parties of the raiding team who supported PW-1 and that raiding party of the Customs Department had gone to Mithapur Bus Stand from which Sheela Devi (PW 3) a Constable of the Department had also alighted. Sheela Devi had suspected that two ladies seated in the bus were engaged in some illegal activity. After an offer was made to them in respect to search, they were both searched by PW3 (Sheela Devi) and 20 Packets of 250 Grams each *Charas* were recovered from the person of the Appellants. Both the Appellants were reportedly carrying 5 Kg. each of Charas on their person. He further stated that the statement of the two Appellants were recorded by way of an interrogatory in his presence as also the sample of the *Charas* was drawn and sent to Gazipur for chemical analysis from where it was reported in positive. He proves the Interrogatory statement of Shanti Devi (Ext. 4). He proves his signature on the same which is marked as Ext. 8 and 8/1. He also identified the signature of some other Customs Officials on the Certification document as Ext. 9.

In cross examination, he stated that PW 3 belonged to the same department, was also travelling to Patna by the same Bus and that both the Appellants were illiterate.

6. PW 3 (Sheela Devi) stated that on 9.6.2007, she was posted in the Customs Department, Motihari, and coming to Patna by Bus. When she reached, she found Custom Officials waiting at Mithapur Bus Stand. PW 2 told her to stop and that she would have to conduct a search of the two women to see as to what they were carrying. On search of the Appellant Kalawati Devi, 20 packets of *Charas* were recovered whereas from Appellant Shanti Devi five packets of *Charas* were recovered. Thereafter, they all came to the Customs Office where the articles were weighed and found to be 10 Kg. She identified the two Appellants in Court.

In cross-examination, she asserted that she had been detained by the Officers to conduct a search of the two Appellants.

7. PW 4 (Satyadeo Rai) who was also one of the raiding Parties confirmed that he had gone to Mithapur Bus Stand along with rest of the persons on information that two women were travelling with drugs on the bus. Sheela Devi (PW 3) who was found to be travelling on the same Bus, was requested by PW 2 to conduct a search of the two ladies and from their possession *Charas* were recovered packed in polythene packet in specially designed bags. Thereafter, they were taken to the Customs Office where the *Charas* was weighed and packets were found to be 10 Kg in all. He stated that the samples were recovered in his presence and thereafter sealed.

8. PW 5 (Surendra Choudhary) is also a member of



the raiding team. He stated that he was posted at the Customs Headquarter on the said date and he received information early in the morning. On the date of occurrence, he was summoned at 5:30 A.M. to the Head Office where he reached and found PW 6, PW 2 and PW 1 going to Mithapur Bus Stand on a car. He stayed at the Head Office and later saw the two Appellants having been brought to the Head Office. He learnt that 5 Kg each of Charas were recovered from their person.

In cross examination, he stated that no search or a sampling procedure took place in his presence.

9. PW 5 (Salimullah) also supported the factum of occurrence as narrated by PW 1, PW 2 and PW 3. He stated that on the date of occurrence, PW 2 informed them that they were to go to Mithapur Bus Stand at which he along with the rest left for the Bus Stop and as soon as they reached the Bus Stop, the Bus reached and Sheela Devi (PW 3) also alighted from the same Bus. The Superintendent told her to search the two ladies at which they were searched and 5 Kg. from each of the Appellants was recovered. Thereafter, they were all taken to the Head Office where a Seizure list was prepared and the articles were weighed and found to be 10 Kg. Samples were also drawn from the packet upon which the witnesses signed and it was sent to the FSL Gazipur. He identified both the Appellants in Court.

In cross examination, he stated that the Appellants had been searched inside the Bus whereas they were all outside. It was Sheela Devi (PW 3) who had stated as to how *Charas* was recovered from each of the persons. He did not sign on any of the document which had been prepared.

10. In the statements recorded under Section 313 Cr. P.C., the two Appellants merely denied their complicity.

11. On going through the evidence of the witnesses, we find certain notable points which are elucidated as below:

i) The Prosecution has succeeded in proving the factum of recovery of *Charas* from the possession of the Appellants.

ii) However, neither PW 1 nor PW-2 state about the exact procedure in which the sample was drawn. Despite an opportunity afforded to PW 1 the Informant, he did not explain the procedure. Hence it is difficult to conclude that the Appellants were in possession of commercial quantity of *Charas*.

iii) The case of the Prosecution being that each of the packets contained 250 Grams, one packet would come within the meaning of medium quantity specified in the schedule and punishable under Section 20(i)(ii)(B) N.D.P.S. Act.

12. In such circumstances, conviction of the Appellants under Sections 20(i)(ii)(C) is converted to one under Section 20(i)(ii)(B) for which maximum sentence prescribed is up to

ten years is prescribed. We find that the Appellants have remained in custody for about nine years and, hence, the sentence is reduced to the period already undergone. Further, the payment of fine is also waived in circumstances of the case.

12. In the result, the Appeal is dismissed with modification in conviction and sentence.

(Anjana Prakash, J)

S.Ali/-

(Rajendra Kumar Mishra, J)

AFR/NAFR	NAFR
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