

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.772 of 2015

Against the judgment of conviction and order of sentence, dated 01.12.2015, passed by Mr. Dayalal Prasad, Additional District and Sessions Judge, I, East Champaran at Motihari, in N.D.P.S. Case No.101 of 2011 arising out of Raxaul P.S. Case No. 83, dated 05.05.2011

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Hemant Kumar Singh, S/o Late Bipat Prasad Singh, resident of Village- Navatoliya,
P.S.- Gopalpur, Dist- Navgacchiya, Bhagalpur Appellant

Versus

The State of Bihar

.... Respondent

With

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Criminal Appeal (SJ) No. 26 of 2016

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Shankar Mandal, son of Sri Banarsi Mandal, Resident of village- Abhiya, P.S.
Gopalpur, District- Bhagalpur Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

(In CR. APP (SJ) No. 772 of 2015)

For the Appellant :M/S Shri PrakashTiwari, Anand Tiwari & Mahesh Prasad Advs.

For the Respondent :Mr. Abhay Kumar, APP

(In CR. APP (SJ) No. 26 of 2016)

For the Appellant : M/S Krishna Kant Singh & Anil Kumar Sinha, Advs.

For the Respondent : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

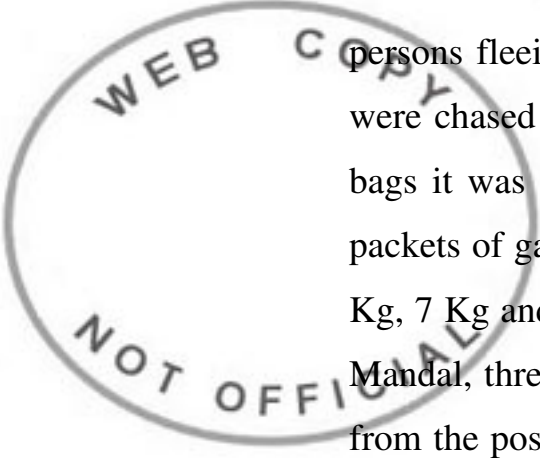
Date: 13-05-2016

Heard the learned counsel for the appellants and the State.

2. Both these appeals have been heard together and are being disposed off by this common judgment as they arise out of same judgment order of conviction and sentence, recorded by the Additional District and Sessions Judge, I, East Champaran at Motihari, in N.D.P.S. Case No.101 of 2011.

3. The appellants have been convicted under Section 20(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985, and sentenced to undergo rigorous imprisonment for ten years and a fine of rupees one lakh and for non-payment of fine to undergo rigorous imprisonment for one year.

4. The prosecution case, as alleged in the first information report by the informant, Assistant Sub Inspector of Police, Baleshwar Kisku, Officer-in-Charge of Raxaul Police Station that he got secret information on 05.05.2011 at 08.00 A.M. that some persons are



proceeding on foots with gunny bags like material on the head containing ganja. On the said information, the informant proceeded with the police force on jeep and reached at Mobile Tower, ahead Manokamna Mandir of Laxmipur village, on N.H. 28A, then, saw two persons fleeing away after seeing the police persons. The said persons were chased and caught by the police force and on checking the gunny bags it was found, from the possession of Heman Kumar Singh, three packets of ganja wrapped in plastic packets tied with rope containing 10 Kg, 7 Kg and 7 Kg respectively and from the possession of one Shanker Mandal, three packets containing 7 Kg, 8 Kg and 9 Kg of ganja, hence, from the possession of both the persons 24 Kg ganja in each possession were found, seizure list prepared and the same was handed over for further proceeding. On the basis of said written report by the informant Baleshwar Kisku, Assistant Sub Inspector of Police, an endorsement was made by the Station House Officer, Raxaul Police Station, to register Raxaul P.S. Case No. 83, dated 05.05.2011, under Sections 20, 22, 24 and 23 of the Narcotic Drugs and Psychotropic Substances Act, 1985, and Assistant Sub Inspector of Police, Dinesh Kumar Das was advised to investigate the case. On the said written report by the informant, first information report lodged and investigation proceeded. During the investigation, the investigating officer inspected the place of occurrence, recorded the description of the place of occurrence and it's boundary, recorded the statment of the witnesses, sent the sample of the ganja to the Forensic Science Laboratory, Patna, and after completing the investigation submitted charge sheet on which the cognizance taken and after framing of the charge, the trial Court proceeded.

5. During the trial five witnesses were examined by the prosecution. P.Ws. 1, 2, 3, and 4 are the police personnel. P.W. 1 is Baleshwar Kisku, Assistant Sub Inspector of Police, P.W. 2 is Brahmdeo Yadav, a Constable and member of the raiding party, P.W. 3 is Upendra Singh, again a Constable and member of the raiding party, P.W. 4 is Lal Babu Singh, a Constable, who is also a member of the raiding party, and they have supported the prosecution case regarding the seizure that they

were members of the raiding party and on the information proceeded and they have, at the place of occurrence, apprehended two persons with gunny bags and from the bags three packets of ganja were recovered from each and, thereafter, the seizure list prepared and the persons arrested were produced before the Officer-in-Charge. However, P.W. 5 is the investigating officer of the case and he has deposed that he conducted the investigation, recorded the statement of the witnesses and finally submitted the charge sheet. However, in his evidence he has stated that the seizure list was prepared with regard to the article, seized, and from the possession of one person in the gunny bags three packets recovered from each of them, hence, a total of six packets were recovered from both of the accused persons and he has deposed that the sample of the ganja, seized, was sent to the Forensic Science Laboratory, Patna.

6. The trial Court, taking into consideration the evidence of the witnesses convicted the appellants and sentenced as mentioned above.

7. The learned counsel for the appellants, however, has challenged the order of conviction and sentence recorded by the trial Court on the ground that the article seized has not been produced before the Court neither the sample taken has ever been produced in Court nor the seized ganja was ever produced before the Magistrate under Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985, and nor the sample was taken before a Magistrate nor there is either certification of the article, seized, by the Magistrate nor there is any destruction of the article before the Magistrate nor the said certification or destruction has ever been proved in the case and sent the article, seized, has been produced so has caused great prejudice to the appellants affecting the trial. It has, further, been contended that though it has been stated that the sample of ganja was sent to the Forensic Science Laboratory, but, the procedure for sending ganja has not been followed and, further, there is no evidence that where ganja was kept and, further, neither the malkhana register has been proved nor the malkhana moharrir

has been produced to find out that where the ganja, seized, was kept, hence, contended that the order of conviction and sentence is not sustainable.

8. The learned counsel for the State, however, contends that there is ample evidence that the article seized from the possession of the appellants, the sample sent and report received shows that the article, seized, was ganja.

9. However, taking into consideration, the respective submission there is much force in the argument of the learned counsel for the appellants. It is true that the prosecution case that on secret information the police proceeded with armed force team and apprehended the appellants and from the possession of each appellants, in gunny bags, three packets, from each of them, recovered, containing ganja, hence, in all six packets from two accused each having in possession of three packets. However, from the entire evidence, it is apparent that the article, seized, has not been produced in Court neither the malkhana register has been produced to suggest where the article, seized, was kept nor there is any certification of the Magistrate nor there is any evidence that the article, seized, was ever produced before the Magistrate nor there is any destruction of the article, seized. However, the investigating officer in the case, P.W. 5, has stated in his evidence in examination-in-chief that the sample of the seized article was sent to Forensic Science Laboratory. However, in his cross-examination he has stated that after the seizure of the article on 05.06.2011 the sample of the seized articles were produced before the Court. He has, further, stated that prior to it all the packets were kept in malkhana of the Police Station. However, he has, further, stated in cross-examination that there is no mention of keeping the article, seized, in malkhana nor there is any mention that they were ever taken out from malkhana. He has, further, deposed that he opened all the six packets, seized, but, he took sample from only one packet. He has, further, stated that the packet from which the sample was taken has not been mentioned. Hence, this evidence of the investigating officer, itself, gave a death blow to the prosecution

story that the investigating officer is unable to say that from which of the seized packets sample taken. Hence, it is difficult to locate whether the packets from which ganja was seized was seizure from which of the two appellants. Hence, it casts a doubt whether the article, seized, in six packets were all contain ganja as the sample has taken from only one packet and it is also not sure that whether the said packet from which the sample was taken was recovered from the possession of which appellant.

10. Hence, both the appellants get the benefit of doubt as whether the sample taken was from which of the packets. More over, having regard to the fact since the article, seized, has not been produced nor the independent witnesses have been examined nor the malkhana register has been proved nor there is certification of the register, hence, the article, seized, is one of the most important evidence regarding the possession of the appellants has not been proved and it casts a serious doubt about the prosecution case and, further, it has also not been proved that the sample taken from the packet in possession of which of the appellants, hence, appellants are entitled to benefit of doubt, hence, I give the benefit of doubt to the appellants and the prosecution has not been able to prove the charge beyond reasonable doubt.

11. The order of conviction and sentence, recorded by the trial Court, is **set aside** and the appeals are **allowed**.

12. Since, both the appellants are in jail, they are directed to be released on bail forthwith, if not wanted in any other case.

(Gopal Prasad, J)

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