

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.27 of 2013

Against the judgment of conviction, dated 10.12.2012, and order of sentence, dated 14.12.2012, passed by Mr. Bhubna Nand Jha, Additional Sessions Judge I-cum-Special Judge, West Champaran at Bettiah, in Trial No. 16 of 2009 arising out of Inarwa P.S. Case No. 8 of 2009

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Md. Nazarul Mian @ Nazarul Mian S/O Wakil Mian Resident Of Village- Jeetpur, Parswa, Police Station- Sherwa, District- Parsa (Nepal)

.... Appellant

Versus

The State Of Bihar

.... Respondent

With

Criminal Appeal (DB) No. 31 of 2013

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Kishna Paswan @ Krishna Paswan S/O Late Suresh Paswan Resident Of Village- Pasava, P.S.- Serwa, District- Parsha (Nepal)

.... Appellant

Versus

The State Of Bihar

.... Respondent

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Appearance :

(In CR. APP (DB) No. 27 of 2013)

For the Appellant :M/S Shri Prakash Tewari, Mahesh Kumar & Anand Tiwari, Adv.

For the Respondent : Mr. Ashwini Kumar Sinha, APP

(In CR. APP (DB) No. 31 of 2013)

For the Appellant :Mr. Bimlesh Kumar Pandey, Adv.

For the Respondent : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

and

HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE GOPAL PRASAD)

Date: 13-06-2016

Heard the learned counsel for the parties.

2. Both the appeals have been heard together and are being disposed off by this common judgment as both arise out of the judgment and order, dated 14.12.2012, passed by Mr. Bhubna Nand Jha, Additional Sessions Judge I-cum-Special Judge, West Champaran at Bettiah, in Trial No. 16 of 2009 arising out of Inarawa P.S. Case No. 8 of 2009 by which he has convicted both the appellants under Section 22-C of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as, 'the Act') and accused, Krishna Paswan, has

been sentenced to undergo rigorous imprisonment for ten years and accused, Nazrul Mian, has been sentenced to undergo rigorous imprisonment for twelve years and a fine of rupees one lakh each and in default of payment of fine to undergo imprisonment for one year each.

3. The prosecution case as alleged that on 20.04.2009 at about 12.30 P.M. the informant Sadhu Ram (P.W. 7) along with other personnel of Sashastra Seema Bal while on patrolling for checking vehicle reached at pillar no. 420 at 01.05 P.M. They saw two persons coming from Nepal. They were caught before two independent witnesses, namely, Motilal (P.W. 9) and Md. Qais (P.W. 12) and from personal search of Krishna Paswan 1½ Kg charas recovered from beneath the shirt concealed in jacket and from personal search of Nazrul Mian 2 Kg of alleged charas in four packets recovered from beneath the shirt concealed in jacket.

4. On the basis of the written report of the informant, the first information report lodged and investigation proceeded and during the investigation, the seizure list of the articles, seized, prepared, the place of occurrence was inspected, the statements of the accused persons were recorded and the seized articles were sent to Forensic Science Laboratory by the order of the Court. Forensic Science Laboratory report procured and charge sheet submitted and after submission of the charge, cognizance taken and trial proceeded after framing of the charge.

5. During the trial altogether 13 witnesses were examined and the prosecution also proved six documents, marked as Exhibits 1 to 6, Exhibits 1 and 1/1 are signature on the written report, Exhibit 2 is charge sheet, Exhibit 3 is signature on the seizure list, Exhibit 4 is the written report, Exhibit 5 is the signature on the seizure list and Exhibit 6 is Forensic Science Laboratory report. The trial Court, taking into consideration the evidence of the witnesses found that the accused were in the possession of the articles, seized, and taking into consideration the

Forensic Science Laboratory's report that the article, seized, was charas, convicted the appellants and sentenced as mentioned above.

6. The learned counsel for the appellants have challenged the order of conviction and sentence, recorded by the trial Court, on the ground that there is violation of Section 50 of the Act. It is submitted that though the accused persons were personally searched, but, they were not made aware of their right of being searched before a gazette officer or a Magistrate. It has, further, been contended that though it is alleged that seven packets, four from one appellant and three from other appellant, were seized, but, it has not been mentioned that from which packets sample were taken. It has, further, been contended that though the article, seized, on 20.04.2009 and the article was sent on 28.04.2009, however, there is no evidence where the articles, seized, were kept. It has, further, been contended that there is no mention that whether the articles, seized, were sealed nor the Malkhana register of Police Station has been produced nor there is any evidence that where the articles, seized, were kept. It has, further, been contended that neither the article, seized, has been produced in Court as an evidence of possession of article nor the sample of the article, seized, has ever been produced before the Court nor has been marked article neither the certification of the article, seized, has been proved nor the destruction of the article proved and there is neither compliance of Section 52A of the Act nor there is compliance of Sections 55 and 57 of the Act as there is no evidence to suggest that article ever produced before Magistrate nor proved that the article, seized, was sealed with the seal of the Officer-in-Charge of Police Station nor the information about the occurrence was reported to the senior officers.

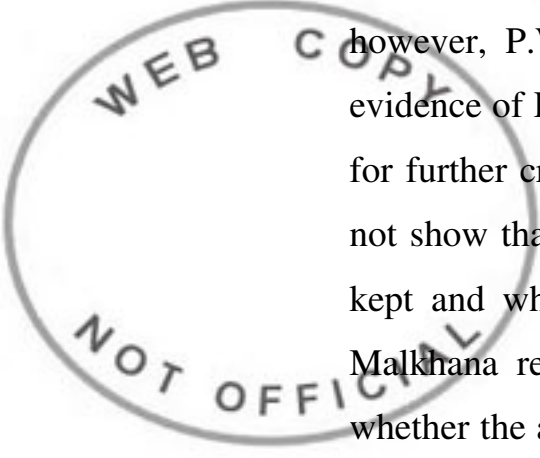
7. The learned counsel for the State, however, contends that there are evidence that the appellants were apprehended by the Sashastra Seema Bal force and the seizure of the alleged charas was made from the

possession of the appellants and, further, the article, seized, was sent to the Forensic Science Laboratory and the Forensic Science Laboratory report suggests that the sample of the article, seized, is charas.

8. However, we have gone through the entire records, the witnesses have supported the prosecution case regarding the apprehension of the two appellants at pillar no. 420 and they have also asserted that the personal search of the appellants has been made and from beneath of shirt, in a jacket, 3 and 4 packets of alleged charas respectively were recovered from the possession of the appellants. However, there is specific evidence that prosecution did not make aware of the of the appellants right of their right of being searched before a Magistrate or Gazetted officer, hence, it is apparent that there is violation of Section 50 of the Act as the authorities who apprehended the appellants were required to made aware of the right of the appellants of being searched before a Magistrate or Gazetted officer, but, the said provision has not been complied as it is well settled that said provision is mandatory, hence, there is violation of Section 50 of the Act.

9. P.W. 1 is the investigating officer though he has stated in his examination-in-chief in paragraph 7 that the seized charas was sent to Forensic Science Laboratory by the order of the Court, however, there is no mention of the date and time neither there is any mention that from which of the seven packets he took out the sample nor it is mentioned whether he took samples from each of the packets or not. Hence, the evidence of P.W. 1 regarding sending the sample is quite vague. There is no mention of P.W. 1 who happened to be the investigating officer that where the articles, seized, were kept and whether the articles, seized, were kept in seal cover with the seal of the Officer-in-Charge of the Police Station or not.

11. From perusal of record, it is apparent that P.W. 1 was examined and after examination he was discharged as no one appeared



to cross-examine the witness, however, subsequently by order, dated 10.01.2012, an order was passed for recalling the witness, P.W. 1, however, P.W. 1 has failed to appear, hence, it is apparent that the evidence of P.W. 1 is not required to be considered as he did not turn up for further cross-examination. More over, the evidence of P.W. 1 does not show that after the possession of the article where the articles were kept and whether the article kept in sealed cover or not, neither the Malkhana register has been produced nor there is any evidence that whether the articles were kept under seal of the Officer-in-Charge of the nearest Police Station. Further Section 52 of the Act provides (a) certifying the correctness of the inventory so prepared, (b) taking the photographs of such drugs or substance in presence of the Magistrate and certifying such photographs as true and (c) allowing to draw representative samples of such drugs or substance. However, it is apparent that neither the provision of Section 52A of the Act has been complied with nor the superior authority has been informed in compliance of Section 57 of the Act. Section 55 of the Act has also not been followed which provides that an Officer-in-Charge of a Police Station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that Police Station and which may be delivered to him, and shall allow any officer who may accompany such articles to the Police Station or who may be deputed for the purpose to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the Officer-in-Charge of the Police Station. Hence, there is no compliance of Sections 52A, 55 or 57 of the Act.

12. However, there is no evidence that the articles, seized, have been produced in Court nor even the sample of the article, seized, has been produced. That neither the certification of the Magistrate, as provided under Section 52(2) of the Act has been proved nor destruction

of the article under sub clause (4) of Section 52A of the Act have been proved nor even the sample of the articles has been produced nor proved, hence, best evidence of the possession has not been proved by the prosecution.

13. Hence, taking into consideration the entire facts and circumstances, since, neither the article, seized, has been produced in Court, which creates a doubt about the possession of the articles from the possession of the appellants nor it has been proved that the sample was taken from the article, seized, nor the copy of the representative sample has been produced, hence, the report of the Forensic Science Laboratory that the article, seized, was charas has not been confirmed and, further, there is violation of Section 50 of the Act that the appellants were not made aware of the right to their being searched before a Magistrate, hence, we find and hold that the prosecution has not been able to prove the charge levelled against the appellants.

14. Hence, the order of conviction and sentence, recorded by the trial Court is **set aside** and the both the appeals are **allowed**.

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

(Gopal Prasad, J)

(Aditya Kumar Trivedi, J)

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