

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No. 152 of 2011

Arising out of P.S. Case No. -10 Year- 2007 Thana-N.D.P.S.

District- EASTCHAMPARAN (MOTIHARI)

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1. Birendra Rai S/o Kodai Rai Resident of Village +Post Office- Bijdhari Diliya Chatti, Police Station- Keshariya, District- East Champaran.
 2. Rameshwar Mahto S/o Lal Babu Mahto Resident of Village +Post Office- Bijdhari Diliya Chatti, Police Station- Keshariya, District- East Champaran.
- Appellant/s

Versus

The State of Bihar. Respondent/s

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Appearance :

For the Appellant/s : Mr. Saghir Ahmad, Adv.

Mr. Shailendra Kumar Dwivedi, Adv.

For the Respondent/s: Mr. S.C. Mishra, APP.

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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: 13-01-2016

01. The Appellants have been convicted under Section 20(b)(ii)(c) and sentenced to RI for eleven years and a fine of Rs. 1,00,000/- in default of which further imprisonment for three months by the 1st Additional District and Sessions Judge-cum-Special Judge, East Champaran at Motihari in N.D.P.S. Case No. 10 of 2007 by a judgment and order dated 21/22.12.2010.

02. The case of the prosecution according to the Informant, Krishna Nand Jha, P.W. 3 is that while he was posted as Officer In-charge, Kesariya Police Station he received an information that two persons were coming on a Rajdoot Motorcycle towards Sahebganj at which he along with some other officials left for Lalla Chapra and camped there. At about 5.30 A.M. two persons were indeed seen coming on a Rajdoot Motorcycle going towards Sahebganj which was intercepted by them then the motorcycle stopped and two persons apprehended who disclosed their names

as the present Appellants. Allegedly, Appellant, Rameshwar Mahto was sitting at back whereas Appellant, Birendra Rai was driving the Motorcycle. In between them there was a bag which was searched in presence of independent witnesses, Mahesh Paswan and Bindeshwari Paswan P.W. 1 and P.W. 2. Both of them have been declared hostile.

03. During search four bundles in a green plastic were found in the packets which was smelling of "Ganja". In the presence of independent witnesses a weighing scale was brought article weighed and 30 Kgs. Ganja found. Since no Judicial Magistrate was present at the place of occurrence the Ganja was not sealed and instead it was taken to the Police Station. However, the seizure-list was prepared a copy of which was given to both the accused persons.

04. During Trial, the prosecution examined nine witnesses. P.W. 1, Mahesh Paswan and P.W. 2, Bindeshwari Paswan mentioned as seizure-list witnesses were declared hostile. P.W. 3, Krishna Nand Jha is the Informant who stated as in the Fardbeyan with regard to recording of Sanha and leaving with the rest of the persons for Lalla Chapra and intercepting a motor-cycle going towards Sahebganj. He confirms the arrest of the two Appellants with a bag which was smelling of Ganja. He further stated that the two packets of 10 Kgs. one of 8 Kgs. and the other one is of 2 Kgs "Ganja" was weighed totaling to 30Kgs. There were four packets in the bag. He also proves the seizure-list. He mentions that the seizure-list was prepared and a copy of same was given to the accused persons which was Exhibit-2. He proves his statement as Exhibit-3. He mentions that he then handed over the

investigation to P.W. 8, Ekramul Haque, Investigating Officer. He proves the First Information Report as Exhibit-4 and identifies the two Appellants in dock. In cross-examination, he conceded that he had kept the seized articles in a room at the Police Station but did not prepare any document in its regard nor forwarded it to the Court. He denied knowledge as till when the seized articles remained unsealed.

05. P.W. 4, Naresh Prasad Singh is a member of the raiding party who stated that on the date of occurrence he along with the Informant had gone to Lalla Chapra and apprehended the two Appellants along with the bag of which seizure-list was prepared. In cross-examination, he firstly stated that the Officer In-charge had opened the plastic bag which he had seen but the next moment he stated that the Ganja was wrapped in a paper and thereafter covered with the plastic which was not opened in front of him. He stated that the bag was made of jute.

06. P.W. 5, Hari Darshan Singh is the next raiding party member who also stated likewise. In cross-examination, he stated that three packets which were in a bag on motorcycle whereas one packet was with one of the apprehended accused. He stated that he did not know as to whether any documents were prepared with regard to the seized articles at the place of occurrence. He also did not seize the articles.

07. P.W. 6, Rajnikant Sharma has been tendered whereas P.W. 7, Bishambhar Ram is another member of the raiding party who has supported the narrative of P.W. 4 and P.W. 5 with regard to the apprehension of the two accused persons along with four packets which was kept in one bag and preparation of the seizure-

list. In cross-examination, he denied having knowledge with regard to the recovered articles.

08. P.W. 8, Ekramul Haque is the Investigating Officer who stated that on 05.02.2007 he took over investigation of the case and recorded the further statement of the Informant as also took charge of the motor-cycle of the apprehended accused and the seized articles. He stated that on the orders of the Special Judge, Motihari the article were sent for testing to the FSL. It was on his orders that the material was sealed. He proves the order of the Judge which is as Exhibit-5 on a typed proforma as also he proves the forwarding memo as Exhibit-6 on the signatures of the Special Judge, Motihari and the receipt of the forwarding memo as Exhibit-7. In cross-examination, he stated that he had brought the seized “Ganja” with the samples which was mentioned in Paragraph 25 of the case diary but there was some over-writing on the same. He also admitted that there was no special sign on the seized articles and it was on the orders of the Special Judge that the bag was sealed after the samples were drawn. He stated that he had brought the seized articles from the “Malkhana” of the Police Station and it was in the presence of Birendra Rai and the Judicial Magistrate that samples were drawn and “Ganja” sealed. He stated that the sample was taken from each of the packet. Some “Ganja” was extracted and put in a plastic bag but he does not remember the exact weight of the same. He stated that on 29.03.2007, the sample was deposited in the Police Station Malkhana. On 27.04.2007, the sample was sent for testing. In between, it had not been taken out.

09. P.W. 9, Shankar Singh is also one of the members of the raiding party who confirmed that P.W. 3, Krishna Nand Jha,

P.W. 4, Naresh Prasad Singh, P.W. 5, Hari Darshan Singh and P.W. 7, Bishambhar Ram have intercepted the two accused riding on the motorcycle, recovery from their possession and preparation of seizure-list. In cross-examination, he stated that the “Ganja” was kept in the Malkhana of the Police Station.

10. On going through the evidence of the witnesses, we find that admittedly the “Ganja” was seized on 05.02.2007 but that was not sealed as per the Fardbeyan and the seizure-list Exhibit-1. It appears from the evidence of P.W. 8, Ekramul Haque that he had given application to the Special Judge for sealing and sampling of Ganja. He proves the application as Exhibit-5. From the contents of the same, we find that it was only on 08.03.2007 i.e. more than one month later such an application had been filed by him before the Special Judge who had issued appropriate direction to him to produce the Exhibit in question before the said authority. He appointed a Magistrate and directed the Investigating Officer to produce the Exhibit in question before him. However, it was only on 29.03.2007 i.e. yet another 20 days later as is evident from Annexure-6 that the article was produced and sealed in his presence. There is no explanation for the delay. It also appears that the Ganja was left open between 05.02.2007 to 29.03.2007 i.e. almost two months. The Investigating Officer has not given any cogent evidence with regard to the alleged “Ganja” having been kept at any safe place or being locked in this intervening period, even if it was not sealed.

11. Also, we find that the article was sent for testing on 12.03.2007 itself as per Exhibit-8 i.e. before the Special Judge had appointed a Judicial Magistrate, 1st Class, Motihari on 29.03.2007

for certification of the narcotics seized and to take steps with regard to sealing of the narcotics (Ext.-6). This raises reasonable doubt about the sanctity of the procedure of drawing and sending the samples and also whether the samples were actually drawn from the bag allegedly seized from the possession of the Appellants.

12. We, also, find that the Report three years later i.e. 10.03.2010 confirms that the dry pressed brown flowering and fruiting vegetable substances found in the plastic bags was "Ganja". Whether the samples would have remained intact and not disintegrated in these three years is highly doubtful.

13. In the circumstances, as discussed above the Appeal is allowed and the judgment of conviction dated 21/22.12.2010 passed by the 1st Additional District and Sessions Judge-cum-Special Judge, East Champaran at Motihari in N.D.P.S. Case No. 10 of 2007 is, hereby, set aside. The Appellants, Birendra Rai and Rameshwar Mahto are discharged from the liabilities of their respective bail bonds. The Appellants, who are in custody, shall be released forthwith, if not wanted in any other case.

(Anjana Prakash, J.)

(Rajendra Kumar Mishra, J.)

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