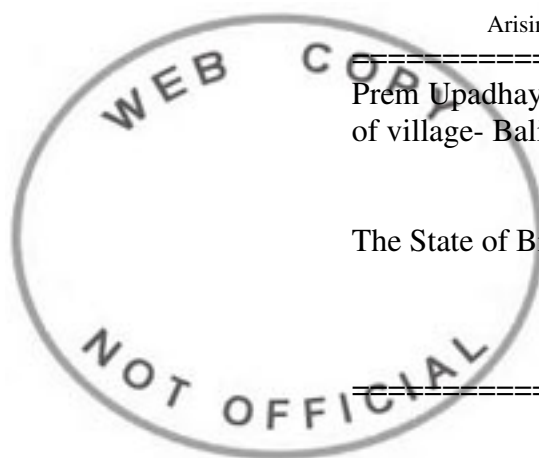




IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.737 of 2014

Arising Out of P.S. Case No. -53 Year- 2007 Thana -BUXAR INDUSTRIAL District- Buxar.

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Prem Upadhayay @ Prem Shankar Upadhayay, S/o Vyasmuni Upadhayay, resident
of village- Balihar, P.S.- Simri, District- Buxar

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

With

=====

Criminal Appeal (DB) No. 766 of 2014

Arising Out of P.S. Case No. -53 Year- 2007 Thana -BUXAR INDUSTRIAL District- BUXAR

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Nishar Ahmad S/o Md. Sahjad, Resident of Village Baheri, P.S. Baheri
(Chandrashekhar Nagar), District Baliya.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

With

=====

Criminal Appeal (DB) No. 813 of 2014

Arising Out of P.S. Case No. -53 Year- 2007 Thana -BUXAR INDUSTRIAL District- BUXAR

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Bhola Prasad Son of Mot Sah @ Moti Sah, Resident of Baba Nagar, Syndicate
BXR. P.S.- Buxar Town, Distt - Buxar

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance:

(In CR. APP (DB) No. 737 of 2014)

For the Appellant/s : Mr. Shankar Dayal Singh with
Mr. Deepak Prasad Sinha, Advocates.

For the Respondent/s : Mr. Mr. Ajay Mishra, A.P.P.

(In CR. APP (DB) No. 766 of 2014)

For the Appellant/s : Mr. Om Prakash Upadhyay, Advocate.

For the Respondent/s : Ms. Shashi Bala Verma, A.P.P.

(In CR. APP (DB) No. 813 of 2014)

For the Appellant/s : Mr. Surendra Kumar Singh with

Mr. Prabhat Kumar Singh, Advocates.

For the Respondent/s :

Mr. A.K. Sinha, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE HEMANT GUPTA
and
HONOURABLE JUSTICE SMT. ANJANA PRAKASH
ORAL JUDGMENT

(Per: HONOURABLE SMT. JUSTICE ANJANA PRAKASH)

Date: 28-03-2016

Appellant in Cr. Appeal (DB) No. 737/2014, namely, Prem Upadhayay @ Prem Shankar Upadhayay, appellant in Cr. Appeal (DB) No. 766/2014, namely, Nishar Ahmad and appellant in Cr. Appeal (DB) No. 813/2014, namely, Bhola Prasad have been convicted under Section 20(B)(II)(C) of NDPS Act, 1985 and each of the appellants have been sentenced to rigorous imprisonment for 15 years and fine of Rs. 1,50,000/-, in default of which, simple imprisonment for three years, by judgment of conviction and order of sentence dated 03.07.2014 and 11.07.2014 respectively passed by the 1st Additional District & Sessions Judge-cum-Special Judge, Buxar in NDPS Case No. 05/07.

2. The case of the prosecution, according to PW4 Piranjeet Singh, Officer-in-charge, Industrial Police Station, Buxar is that on 23.08.2007, in course of checking vehicles in order to prevent crime, a motorcycle bearing registration no. UP 60F 8922 was intercepted, on which were seated two persons, namely, Santosh Upadhayay (absconding accused) and appellant Prem Upadhayay.



From their possession, one small packet was recovered which was allegedly Ganja. They refused search in front of a gazetted officer in terms of Section 50 of NDPS Act. The bundle contained two bags weighing 10 Kg. and 11 Kg each, totalling 21 Kg of alleged Ganja, were recovered. Two samples were drawn from each of the bags as also they were marked as S-1 and S-2. Rest of the Ganja was marked 'A' and sealed in presence of the witnesses and the accused persons and a copy of the same was given to them. On the disclosure statement of the apprehended accused, another Ambassador car bearing registration no. UP 70 K 4242 was intercepted and, from its dickey, allegedly 80 Kg of Ganja, bound in nine bundles, was recovered. On the car, Appellants Nishar Ahmad and Bhola Prasad were seated. Samples were once again drawn from each of the nine bundles which were marked as S-3 and S-4 and the remaining Ganja was sealed separately and marked as 'B'. The accused persons confessed that they were indulged in the business of selling narcotics substances.

3. During the trial, the prosecution examined altogether nine witnesses; out of whom PW6 Ravindra Tiwary and PW7 Uma Shankar Singh are formal witnesses on the point of seizure.

4. PW1 Balbir Singh Jaiswal was part of the inspection team along with the informant, who corroborated the factum of

apprehension of the three appellants and co-accused Santosh Upadhyay and the recovery of alleged Ganja. He also stated that from the recovered articles, samples were drawn by the Informant and a seizure list was prepared and given to the accused as also to the witnesses.

There is nothing of note in his cross-examination.

5. PW2 Kripa Shankar Ram, the next witness, is also on the same point as PW1 and corroborates the prosecution case to the best of his ability. We do not find anything which is notable for the purpose of disposed of the present appeal.

6. PW3 Ram Babu Singh was along with PW1 and PW2 as also the informant, who had intercepted the motorcycle and the Ambassador car, on which the present appellants were found boarded along with some incriminating articles which were weighed in their presence and samples were drawn. The seizure list was given to the accused as well as to the witnesses concerned. PW4 Piranjeet Singh is the informant, who stated that on 23.08.2007 while he was Officer-in-charge of Buxar Industrial Police Station, he made a written report. He proves the written report and his signature on the same which are marked as Exhibit 1 and Exhibit 2 respectively. The FIR is proved as Exhibit 3 and the signatures on the same as Exhibits 4 & 4/1. He stated that on 23.08.2007 at about 6:00 a.m. while he was on duty, he



intercepted a motorcycle bearing certain number; the activities of the occupants of which appeared suspicious. They were stopped and from their possession a bundle was recovered in which two packets of Ganja was found wrapped. The same was seized and a seizure list was prepared. After the Ganja was weighed, separate samples were drawn which were marked as S-1 and S-2 and the rest as 'A'. He also apprehended the Appellants Nishar Ahmad and Bhola Prasad from the motorcycle and from their possession, nine bundles of Ganja were recovered and a seizure list was prepared. Samples were drawn which were sealed and marked as S-3 and S-4 whereas the rest was marked as 'B'. They were thereafter sealed. He states that thereafter the accused persons were produced before the court along with the seized articles. He proves his signatures on the seizure list as Exhibit 5 and Exhibit 6. He also produced Malkhana receipt marked as Exhibit 7 dated 23.08.07 and proves the signatures of the accused persons on the documents. He proves other documents in respect to mobile phones, vehicles, which were seized, which is of no relevance in this appeal. He also categorically stated that after samples were drawn from 80 Kg of Ganja recovered from the dicky of the Ambassador car, it was put in a box and sealed, which he proves in court as Material Exhibit III.

He stated in his cross-examination that S-1 and S-2 were



the samples which were respectively drawn from 11 Kg and 10 Kg of Ganja seized from the motorcycle and he replies accordingly to the court query. He stated that the three packets, namely, S-1, S-2 and 'A' were kept in the Police Malkhana and that in the year 2009 he was sent to the FSL where he learnt that the samples were not received but he did not take any action in accordance with law in its respect. He stated that the Material Exhibit III was only a sample drawn from one which was marked as S-1, meaning that it was from 11 Kg of Ganja.

He also stated that the packet which was produced in court was not the one which had been seized by him and there was no special mark on the same nor could he say with certitude, on court query, that 80 Kg of Ganja, which he had seized, was put in the box which had been produced in the court.

7. PW5 Kapildeo Singh was part of the raiding team, who corroborated the statement / evidence of PW1, PW2, PW3 and PW4. There is nothing noteworthy in his evidence.

8. PW6 Ravindra Tiwary is a seizure witness, who proves his signature on the samples.

9. PW7 Uma Shankar Singh also stated that he disputed his signature on the seizure list but he proves his signature allegedly on the second seizure list which is marked Exhibit 18/1.

10. PW8 Tapeshwar Prasad Yadav is the investigating



officer, who stated that while he was posted at Industrial Town Police Station, Buxar, he received a written report of PW4. He recorded the statement of the informant in respect of the factum of the crime. He also stated that he sent the samples for testing to the FSL on the orders of the court after keeping it in a small box. He described the place of occurrence and his application before the court in respect of seizure, sending the articles for testing, which were marked as Exhibit 19 and Exhibit 21, and the forwarding report as Exhibit 22.

It is noteworthy that he did not elaborate on the procedure of drawing samples from the seized articles or of sending it to the FSL. He merely stated that he sought permission for sending the samples for testing.

11. PW9 Suresh Paswan was posted at the FSL, who received a sample on 22.05.2009 for testing which was contained in a clothe bag and was marked. He tested the article and got prepared a report which was duly signed and sealed and he identifies the same as Exhibit 23.

In his cross-examination, he explained that the sample was received only on 22.05.2009, i.e., two years after the occurrence, but the sample had not disintegrated and it was found to be flowering, formatting and unfinished.

12. On going through the evidence of the witnesses, we



find that no doubt the informant, PW1, PW2, PW3, PW4, PW5 have supported the factum of apprehension of the appellants and recovery of some incriminating articles from their possession. The FSL report on record reveals that the sample tested there was found to be Ganja, a narcotic substance. However, the important link in respect to the procedure in which the article was sent to the FSL is not explained by the prosecution. We note that in the FIR the informant stated that separate samples were drawn from each of the 11 bundles which were recovered, which was totalling 21 Kg. In court, he explained that only one sample which was marked as S-1 meaning sample drawn from 11 Kg of Ganja was sent for testing. However, since he was not the person who had sent the sample for testing, he was not qualified to testify on this factum. We also note that Exhibit 22 reveals that the Special Judge had accorded permission on 22.05.2007 itself for sending the samples for testing but why it was not sent immediately to the FSL is not known. We also note that he stated that he had been despatched to the FSL on 22.05.2009 and he found out that the samples had not yet been received there till such date. From the evidence of PW9 Suresh Paswan, we find that the sample was received two years later. The Investigating Officer is completely silent as to where and in what condition, in the intervening period, the samples had been kept. Where the sanctity of mandatory procedure of

sampling, despatch and test has not been observed, it is difficult to uphold the conviction of the Appellants.

12. Hence, in the result, the appeals are allowed. The judgment of conviction and order of sentence dated 03.07.2014 and 11.07.2014 respectively passed by the 1st Additional & Sessions Judge-cum-Special Judge, Buxar in connection with NDPS Case No. 05/07 is hereby set aside. The above named Appellants, who are in jail custody, are directed to be released forthwith, if not wanted in any other case.

(Hemant Gupta, J)

(Anjana Prakash, J)

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