

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.821 of 2014

Arising Out of PS.Case No. -160 Year- 2009 Thana -BOCHAHAN District- MUZAFFARPUR

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1. Radhey Mahto @ Radha Mahto Son of Ram Prasad Mahto Resident of Village-
Deoria, P.S.-Pathlahiya, District-Parsa (Nepal).

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Diwakar Prasad Karn, Advocate
Mr. Chandra Shekhar Anand, Advocate
For the State : Mr. Satya Narayan Prasad, APP

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL
and
HONOURABLE MR. JUSTICE SANJAY KUMAR

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date: 02-03-2017

The appeal on behalf of the sole appellant is directed against the judgment of conviction dated 28.6.2014 recorded by the 5th Additional Sessions Judge, Muzaffarpur in Bochaha P.S. case No. 160 of 2009 whereby the charge levelled against the appellant was held to have been proved and he was held guilty under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act (for short 'the NDPS Act') and by order of sentence dated 07.7.2014 he was directed to undergo R.I. for 12 years, besides imposition of fine of Rs. 1,50,000/- (One Lac Fifty Thousand) with default clause.

(2) On the early morning of 03.12.2009, the SHO of Bochacha P.S. (PW-8) claims to be on the duty at Bhusahi Chowk



on NH-57, which connects Darbhanga to Muzaffarpur. A mini truck was seen coming from the side of Darbhanga. The driver was signaled to stop the vehicle. However, the vehicle did not stop. A chase was offered and the said vehicle was intercepted. Seeing this, it is alleged, that two accused persons from 02 sides of front doors of the vehicle disembarked and started fleeing away. A chase was offered and the appellant was apprehended. A search of the vehicle was carried out from where 104 packets of ganja each weighing 10 kgs were allegedly recovered bundled in coloured packets. According to the prosecution, they contained 'ganja' of Nepali origin. Under a seizure memo (Ext. 2), the same were seized. The appellant and the seized substance/articles were then taken to the police station. The prosecution case further is that on chemical analysis of the articles seized from the mini truck, the same were found as 'ganja'.

(3) On conclusion of investigation and filing of charge sheet, cognizance was taken and the charges were framed and read over to which the appellant pleaded not guilty and hence the trial.

(4) At the trial, the prosecution examined 08 witnesses. Few more documents were also proved at the trial such as Ext. 1(signature of PW-3 on the seizure memo), Ext. 1/1 (signature of PW-5 Lal Babu Rai on the seizure memo), Ext. ½ (signature of PW-7 on the seizure list), Ext. 2 and Ext. 2/1, the list of seized articles



and signature of the witness thereover respectively. Ext. 3 is the self statement of informant (PW-8), Ext. 4 is the signature of PW-8 on the formal FIR whereas Ext. 5 is the photo copy of the FSL report.

(5) We have heard Mr. Karn for the appellant and Mr. Satyanarayan Prasad APP for the State.

(6) On a close scrutiny of the evidence adduced by the prosecution and placed before us by the counsel for the appellant, we find that the prosecution case suffers from several legal defects which go to the root of the case. It is one of those cases where the prosecution has to suffer on account of non-compliance of the provisions of the Act and also the lackadaisical manner in which the prosecution proceeded with the case.

(7) According to the prosecution, the appellant was offered chase and was arrested at some distance. PW-5 who has allegedly signed the seizure memo has stated in para -4 that, in fact, the appellant was apprehended from the mini truck itself. That apart, the search and seizure as well as arrest of the appellant was not made in presence of any independent witness. The prosecution has examined Bikau Sah (PW-3) and Lal Babu Rai (PW-5) as the witnesses in whose presence the seizure list was prepared. The signature of these two witnesses have been marked as Exts 1 and 1/1. We have examined the seizure memo wherefrom it does not appear that the seizure was made in presence of the appellant. The said



seizure list bears thumb impression to give a look that the copy of seizure memo was handed over to the appellant. It may be emphasized here that the PW-8(informant) has made all attempts to show that PW-5 was an independent witness. He has gone to the extent of deposing that he was not a staff of the police party and actually he was running a line hotel at Bhushai chowk on the National Highway. We have turned to the evidence of PW-5 where he has clearly stated in his examination-in-chief that he is 'Choukidar' No. 6/9, posted at Bochacha P.S. and he constituted the police team which went to the place of occurrence, arrested the appellant and seized 10.4 quintals of 'Ganja' packed in 104 packets each weighing 10 kg. It may be pointed out here that PW-4 who constituted a member of the team operating on the said date has refused to identify the appellant in dock. We would again revert to the evidence of Lal Babu Rai (PW-5) where he has stated that at the time of the arrest of the appellant a crowd of more than 400 persons had assembled at that place. The prosecution, however, could not produce any independent witness except the police personnels to prove to the satisfaction of the Court that it was so done as suggested by the prosecution. Another punch witness, namely, Bikau Sah (PW-3) has turned hostile. In his examination-in-chief, he has stated that the seizure memo was not prepared in his presence. Only his signature was obtained thereon.

(8) We may, at this stage, note that although a



copy of the seizure memo was given to the appellant and his LTI was obtained thereon but the contents of the seizure memo does not explain the seizure of articles/substance from the possession of the appellant. The informant (PW-8), in his examination- in -chief at para 2 , has admitted that the seizure memo was not drawn by him or by the I.O. of the case (not examined) but it was prepared by A.S.I. Rajiv Kumar Singh whereon he put his signature. Rajiv Kumar Singh has not been examined by the prosecution. We thus, find that the prosecution has failed to examine any independent witness as to the recovery of the substance/ganja from the possession of the accused or from the mini truck of which he is said to be the khalasi. We shall now advert to another important and crucial point which would prove death knell to the prosecution case. The occurrence, according to the prosecution case, had taken place in the wee hours of 03.12.2009. The evidence is that thereafter the seized articles as well as the appellant were taken to the police station. Nearly 10 months thereafter on 7.10.2010 an application was filed by the I.O. stating that the seized articles are lying with him and he may be accorded permission to send the samples drawn for chemical analysis at the FSL. The same day, the Court granted the permission. This delay of 10 months in taking the aforesaid steps which was required in law to be done promptly throws the prosecution case under the wraps of suspicion and doubt. Even the 'ganja' (seized article) was not



produced as the material exhibit. We have further examined the evidence and the records to find out as to how the samples were drawn and, if so, in whose presence. Surprisingly, neither the evidence adduced by the prosecution nor the record throw any light on such drawing of samples from 10.4 quintals of ganja allegedly recovered/seized on the morning of 3.12.2009 by the informant (PW-8) packed in 104 packets. The Court, is not aware as to what quantity and from which packet the samples were drawn and sealed and thereafter dispatched for their chemical analysis. The informant (PW-8) in the 'Fardbeyan' (Ext. 3), has stated that each packet weighed 10 kgs. How this weight was assessed is also not known to the Court. There is no explanation or any evidence to this effect. To top it all, the prosecution relies on Ext. 5 which is the FSL report in order to demonstrate that the articles seized on the relevant date from the mini truck of which the appellant was khalasi was 'ganja'. We have examined the report. It is the Xerox copy which is not very legible. How the Xerox copy of the report came on the file of the Court and was exhibited without a formal proof is another grave legal defect in the case. We perused the order sheets of the learned trial Court dated 21.09.2010 and 07.10.2010. The Sessions Judge on 21.09.2010 took cognizance of offence under Section 20 of NDPS Act and the S.S.P Muzaffarpur was directed to submit FSL report. Thereafter the A.S.I. of Bochaha P.S. filed a petition seeking



permission to get it examined from Forensic Laboratory. The Court below allowed the prayer on the same day i.e. 07.10.2010 without getting the same certified. There is nothing on record to show that samples of required quantify was obtained from all the 104 packets separately and sent to F.S.L. under proper seal and signature. Thus, we find that the prosecution failed to prove this fact that seized articles were properly sealed in accordance with the provisions of NDPS Act and, in our view, the failure on the part of prosecution to prove proper sealing of the seized articles is fatal to the prosecution case. A prayer was made by the prosecution to mark the photo copy of the FSL report which was allowed without a formal proof. Had it been the original copy of the FSL report such prayer could have been allowed as the same may constitute a public document. This is not the case.

(9) We may underline here another fact which has distinctly appeared in the evidence of the prosecution. The witnesses have stated at variance about the quantity of the substance/articles said to be 'ganja' recovered from the vehicle on the said date. In the given facts they cannot be considered as minor contradiction in the evidence of the prosecution. With regard to the search and seizure of the articles from the mini truck, we have already noticed that the punch witness Bikau Sah (PW-3) had not supported the same and was declared hostile. Another witness Jay Mangal Singh (PW-7), in his



cross-examination, has clearly accepted that his signature was obtained on a plain paper. Although there was congregation of several persons at the time of effecting seizure of articles and arrest of appellant but the prosecution did not produce any of them which could have lent assurance to the Court. In the case of **Jitendra & Anr. vs. State of M.P. reported in (2004) 10 SCC 562** the Hon'ble Supreme Court of India in para 6 of the report observed thus:-

“6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchanama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchanama is nothing but a document written by the police officer concerned. The suggestion made by the defence in cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with the police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the Investigating Officer was also not examined. Against this background, to say that, despite the panch witnesses having turned hostile, the non-examination of the Investigating Officer and non-production of the seized drugs, the conviction under the NDPS Act can still be sustained, is far fetched.”

In the backdrop of the aforesaid, we find it



extremely difficult to sustain the conviction recorded by the learned Trial Court against the appellant.

(10) The appeal succeeds and the judgment of conviction dated 28.06.2014 and order of sentence dated 07.07.2014 passed against the appellant by the learned Trial Court are set aside. The appellant who is said to be in custody shall be set at liberty, if not required in any other case.

(Kishore Kumar Mandal, J)

Shyam/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	16/03/2017
Transmission Date	16/03/2017

(Sanjay Kumar, J)

