

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No 850 of 2016

Arising Out of PS.Case No. -189 Year- 2010 Thana -BRAHMPURA District- MUZAFFARPUR

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Sunil Yadav Son of Dhamayan Rai Resident of Village- Khud Lawan Mirjapur,
P.S- Janta Bazar, District Saran at Chapra (Bihar)

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr Manoj Kumar, Advocate

For the S t a t e : Mr S N Prasad, APP

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CORAM: HON'BLE MR JUSTICE KISHORE KUMAR MANDAL

And

HON'BLE MR JUSTICE MADHURESH PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR JUSTICE KISHORE KUMAR MANDAL)

Date: 14-11-2017

The sole appellant stands convicted under Section 20 (ii) (C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, *the Act*) vide judgment dated 16.06.2016 passed by Additional Sessions Judge VI, Muzaffarpur in Brahampura Police Station Case No 189 of 2010. He was sentenced to suffer rigorous imprisonment for 15 years under Section 20 (ii) (C) of the Act and to pay a fine of Rs 1 lac. In default of payment of fine, he was to further suffer rigorous imprisonment for one year.

2 On the self-statement of the Station House Officer (PW 2), the first information report (Exhibit 2) was recorded on



25.11.2010. On secret information, the informant constituted a raiding team consisting of the police personnel including several PWs and went to Chandni Chowk. A pick up van, Tata – 407 bearing Registration No 1G-6058 was spotted coming from Muzaffarpur side. The pick up van was intercepted. The appellant, who was driving the vehicle, started fleeing away. On a chase, he was apprehended. A Magistrate (PW 6) was summoned. The pick up van was searched in presence of two independent witnesses. 1850 kgs of *Ganja* packed in 185 bags, each weighing 10 kgs, were found kept concealed under the bags of *choker* (powder). The body of the appellant was also searched and a mobile phone was recovered which too was seized. The seizure of the *Ganja* was effected in presence of two independent witnesses, namely, Md Nazam (PW 14) and one Arun (not examined). Such seizure was effected in presence of the Magistrate (PW 6). PW 13 Nand Kishore Kumar took up the investigation and on conclusion thereof, laid the charge sheet whereon cognizance was taken and the case came on the file of the learned trial Judge for disposal.

3 To prove the prosecution case beyond shadow of doubt, the prosecution examined 14 witnesses where after the statement of the appellant was recorded under Section 313 of Criminal Procedure Code (for short, *Cr P C*). The defence of the appellant was complete denial of the occurrence and his false



implication.

4 PWs 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12 are the police personnel including the informant who were part of the raiding team constituted by the informant (PW 2) on getting secret information about the transportation of huge quantity of *Ganja* on the vehicle. PW 13 is the Investigating Officer of the case. PW 6 is the Magistrate who was then posted as the Circle Officer and was requisitioned by the informant for effecting the search and seizure of the articles recovered from the pick up van driven by the appellant. PW 14 Md Nazam is one of the two independent witnesses in whose presence, the seizure of the contraband substance (*Ganja*) was made. After the seizure was effected, the samples were drawn and sent for analysis/examination by the Forensic Science Laboratory (for short, *the FSL*) under the orders of the Court. The FSL report Exhibit 6 certifies that the samples were of *Ganja*.

5 In consideration of the evidence on record, the learned trial Court found that there was no explicit reason for the prosecution to falsely implicate the appellant and that the evidence adduced on record conclusively proved the guilt of the appellant. Accordingly, he was convicted in the manner stated above.

6 Heard Mr Manoj Kumar for the appellant and Mr S N Prasad, learned APP for the State.



7 While criticizing the judgment, learned counsel for the appellant submits that the witnesses are only police personnels. The independent seizure witness i.e PW 14 has not supported the factum of recovery of *Ganja* (contraband substance) from the vehicle in course of his deposition. The another witness to the seizure was not produced by the prosecution. The seizure becomes doubtful. Indisputably, the person of the appellant was searched by the police but no contraband article was recovered from his personal possession. In doing so, the prosecution has, however, breached the provisions of Section 50 of the Act. Lastly, it has been submitted that the appellant has been made a scape-goat in the case. In the FIR itself, it has been stated/alleged that it was the owner of the vehicle who was deeply involved in transportation of the huge quantity of *Ganja*. The appellant, indisputably, is the driver of the vehicle who was carrying out the instructions of his master. He next submits that the appellant, being the first offender should not be given the excessive punishment.

8 Learned counsel for the State, on the other hand, supported the findings of guilt. He would argue that the *Ganja* was recovered from the conscious possession of the appellant. When the vehicle was intercepted, the guilty mind of the appellant made him to attempt to run away. He was, however, captivated. Immediately, a Magistrate (PW 6) was summoned and in his presence, his body was



searched and a mobile phone was recovered. Subsequently, in presence of two independent witnesses and the Magistrate, huge quantity of Ganja sealed in 185 packets were found in the pick up van concealed under the bags of powder. These facts eloquently proved that it was within the knowledge of the appellant that he was carrying contraband substance. Our attention was also drawn to Exhibit 6 which is the FSL report wherefrom it appears that the sample of the articles/substance recovered from the pick up van driven by the appellant was *Ganja*. Countering the submission of the appellant, he would argue that the *Ganja* was not recovered from his possession. If it was so then only the provisions of Section 50 of the Act shall have application. He next submits that the prosecution shall not fail only on the ground that every witness, except the seizure witness and Magistrate, are police personnel. He relied on the case of *M Prabhulal -Versus- Assistant Director, Directorate of Revenue Intelligence* reported in (2003) 8 Supreme Court Cases 449.

Section 50 (1) of the Act reads as under:

“50. Conditions under which search of persons shall be conducted.- (1)
When any officer duly authorized under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.”



9 In the case of *M Prabhulal (supra)*, the Apex Court held that on a bare reading of Section 50 of the Act, it is explicit that it shall have application only in case of personal search of an accused/person. It does not have application to search of a vehicle or container or a bag etc. Paragraph 6 of the judgment reads as under:

“6. Next, the learned counsel contends that the independent witnesses of the recovery of the contraband having not been examined and only police witnesses having been examined, the recovery becomes doubtful. Reliance is placed upon the decision in Pradeep Narayan Madgaonkar v State of Maharashtra. In the decision relied upon while observing that prudence dictates that evidence of police witnesses needs to be subjected to strict scrutiny, it was also observed that their evidence cannot be discarded merely on the ground that they belong to the police force and are either interested in the investigating or prosecuting agency, but as far as possible, corroboration of their evidence in material particulars should be sought. In that case the observations were made in the light of the fact that the police officials made an attempt to create an impression on the court that the two witnesses were witnesses of the locality and were independent, knowing fully well that one of the witnesses was under the influence of the police and available to police as he had been joining the raids earlier also that the other witness was a close associate of the said already available witness. The friendship between the two witnesses developed during the days of gambling when the police had admittedly conducted a raid at their den. It was observed that the very fact that the police officer joined the said two witnesses creates a doubt about the fairness of investigation coupled with the manner in which the statements had been recorded in that case. The observations relied upon have no applicability to the facts and



circumstances of the present case, particularly having regard to the confessional statements of the appellants which we have held were voluntary. On the facts of the case, recovery cannot be doubted for want of non-examination of independent witnesses.”

10 Present is a case where the *Ganja* was not recovered from the personal storage of the appellant. The prosecution case instead is that the vehicle driven by the appellant was searched in presence of the independent witnesses as well as the Magistrate (PW 6) and the *Ganja* was recovered packed in small packets and kept under the bags of husk (powder). We have no hesitation in negating the contention of the appellant that in effecting seizure of the contraband articles (*Ganja*), the prosecution acted in breach of the provisions contained in Section 50 (1) of the Act.

11 Next contention of the appellant is that the seizure of the contraband substance from the vehicle driven by the appellant has not properly been proved. A serious doubt is created when both the witnesses are not produced by the prosecution. Seizure witness (PW 14), in his deposition, has although accepted his signature on the seizure memo (Exhibit 4/1) but in his further examination, he has stated that such signature was obtained on a blank paper from a place where he was working as a painter. Counsel for the State, on the other hand, has argued that it was not necessary to produce both the seizure witnesses. PW 14, in his statement in Court, has not denied



his signature on the seizure memo (Exhibit 1).

12 In the case of Madho Das –Versus- The State of Bihar, 2008 (3) PLJR 111, this Court, while negating the submission, held as under in paragraph 20 of the judgment:

“20. We do not find any substance in the submission of Mr Jha. The seizure list witnesses have admitted their signatures on the seizure list. A large number of witnesses, who belonged to the Bureau, have stated about the seizure of the psychotropic medicines from the possession of the appellant and in that view of the matter, we are not inclined to reject the case of the prosecution only on the ground that two seizure list witnesses have not supported case of the prosecution.”

13 In the case present, apart from PW 14, the Magistrate (PW 6) had also signed which has been proved by him (Exhibit 4). We have perused the evidence of the informant (PW 2), the Magistrate (PW 6) as well as the evidence of the seizure witness (PW 14). We entertain no doubt in our mind that the prosecution has been able to prove satisfactorily the seizure of *Ganja* from the truck load driven by the appellant and that presence of *Ganja* on the pick up van was known to the appellant. Be noted that in his statement under Section 313 of Cr P C although the appellant has denied driving of the vehicle intercepted by the police but not the recovery of the *Ganja* there from.

14 One of the contentions of the appellant is that he is



the first offender. Even if the prosecution case is accepted, it shall distinctly appear that the main culprit of the offence had used the service of the appellant as the driver of the pick up van. He was not there when the vehicle was intercepted. The sentence imposed on him by the trial Court is too excessive. He would submit that the appellant belongs to the lower strata of the society and is a poor person.

15 Counsel for the State, on the other hand, submits that the huge quantity of *Ganja* was recovered from the loaded pick up van which was being transported by the appellant. It is an offence against the society and should be dealt with rather seriously. The punishment imposed by the trial Court is proportionate to the guilt proved against the appellant by the prosecution.

16 We have bestowed our consideration on the submissions made on this point by the parties.

17 In the light of the submissions advanced by the parties and on perusal of the evidence on record, the Court is unable to find a legal flaw in the finding of guilt recorded by the learned trial Court on evaluation of the evidence on record.

18 Another contention of the appellant is that no documentary evidence has been produced by the prosecution that on the relevant date, he was driving the vehicle. No driving licence was seized from his possession or from the vehicle and produced at the



trial. We see no substance in the said submission. Almost all witnesses have categorically stated about the interception of the vehicle in the wee hours of the date of occurrence which was being driven by the appellant and the recovery of the Ganja packets from the said vehicle. The witnesses have further stated that seeing the police intercepting the vehicle, the appellant had made an attempt to escape from the place of occurrence but was apprehended. In face of evidence of these witnesses whose statements have not been shown to us unacceptable, there is no substance in the aforesaid submission of the appellant.

19 It is next submitted that while recording the statement of the appellant under Section 313 of Cr P C, the trial Court has assessed his age as 40 years. The date of occurrence is 25.11.2010. He was hardly within 33 years of age. From the impugned order, we find that one of the contentions was also advanced on behalf of the appellant that he was the first offender. Counsel for the appellant argued that there is no recorded conviction against the appellant and that there is more likelihood of the appellant re-setting in the society after serving the sentence and contribute productively.

20 Having regard to the submissions advanced on behalf of the appellant, in our opinion, the ends of justice shall be met if the



sentence of rigorous imprisonment of 15 years imposed on the appellant by the trial Court is reduced to 10 years rigorous imprisonment.

21 Accordingly, the appellant is directed to suffer rigorous imprisonment for 10 years and to pay a fine of Rs 1 lac, as directed by the learned trial Court. In case, he defaults in payment of fine, he shall further undergo rigorous imprisonment for nine months.

22 The appeal is dismissed with the aforesaid modification to the minimum sentence, as provided by the Act.

(Kishore Kumar Mandal, J)

M.E.H./-

(Madhuresh Prasad, J)

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