

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.944 of 2011

Arising Out of PS.Case No. -0 Year- null Thana -null District- PATNA

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Bhulan Das @ Bhulan Ravidas S/O Prakssh Das R/O Village-Jethuli, P.S.-Fatuka,
District-Patna. Appellant.

Versus

The State of Bihar Respondent.

WITH

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Criminal Appeal (DB) No. 897 of 2011

Arising Out of PS.Case No. -0 Year- null Thana -null District- PATNA

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Gariban Das (Rabidas) S/O Late Ramdas (In F.I.R Descibed Bhadai Das) Resident
of Village- Jethuli, P.S- Fatuha, District- Patna. Appellant.

Versus

The State of Bihar Respondent.

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Appearance :

For the Appellants: Mr. Dharendra Kumar Sinha, Adv.

For the State : Mr. A.K. Sinha, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

AND

HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL)

Date: 28-07-2017

Both these appeals cropped up from the same Special
Case No.24 of 2009 have been heard together for final disposal.

2. Both these appeals have been preferred against the



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judgment of conviction dated 29.07.2011 and order of sentence dated 05.08.2011, passed by the learned Additional Sessions Judge-VII, Patna, whereby the appellants have been convicted under Section 20 (b) (ii) (c) and Section 25 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter in short referred as “NDPS Act”). The appellants have been sentenced for the offence under Section 20(b)(ii)(c) of the NDPS Act to undergo rigorous imprisonment for 15 years along with a fine of Rs.1.5 lac each and in default of payment of fine to further undergo three years R.I. Both the convicts were further sentenced to undergo 15 years R.I. and slapped with a fine of Rs.1.5 lac each under Section 25 of the NDPS Act and, in default of payment of fine, to further undergo three years R.I. All the sentences were directed to run concurrently.

3. The prosecution case, in brief, is that on 25.03.2009 the informant, Hari Shankar Jha (P.W.5) Sub-Inspector of Fatuha Police Station received secret information that huge quantity of Ganja has been concealed in the houses of the appellants, Gariban Ravidas and Bhulan Ravidas. On this information, informant along with Probationer Additional Superintendent of Police, Daljit Singh and other police personnel reached near the house of the appellants. Seeing the police party people started escaping. Thereafter, in presence of the independent witnesses, namely, Umesh Kumar (D.W.1) and Dhanesh Das (not examined) the house of the appellants



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were searched. During search 20 packets of Ganja wrapped in plastic was recovered from the house of Gariban Das. The ganja weighed 280 Kg. On search of house of Bhulan Das, 21 packets of Ganja wrapped in plastic bag along with two mobiles was recovered from his house. On measurement, the ganja weighed 294 Kg. Seizure list (Ext.1) of the contraband articles was prepared in presence of the independent witnesses. As both the accused persons as well as their family members were absconding, copy of the seizure list could not be handed over to them.

4. On the basis of the self-statement of Hari Shankar Jha (P.W.5) Sub-Inspector of Fatuha Police Station, a formal F.I.R. was registered under Section 20/22 of the NDPS Act against both the appellants. On the basis of F.I.R. and chargesheet, cognizance was taken under Section 20/22 of the NDPS Act. The case was transferred to the Court of Additional District and Sessions Judge 7th, Patna for trial. During course of trial, charges under Section 20 (b) (ii) (c) & 25 of the NDPS Act were framed against the appellants, to which they pleaded not guilty and claimed to be tried.

5. During course of trial, the prosecution has been able to examine altogether five prosecution witnesses. P.W.1-Bharat Singh, Sub-Inspector of Police and member of the raiding party, P.W.2-Pramod Kumar Roy, the Officer-in-Charge of Fatuha Police Station and member of the raiding party, P.W.3-Daljit Singh, the then



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Deputy Superintendent of Police and a member of raiding party and I.O. of the case as well, P.W.4-Arjun Prasad Yadav, A.S.I. was also a member of the raiding party and P.W.5-Hari Shankar Jha, the informant and member of the raiding party.

6. The statements of the appellants were recorded under Section 313 of the Cr.P.C. The case of defence is complete denial of the occurrence. The appellants examined one witness, namely, Umesh Kumar as D.W.1 in defence.

7. After hearing the parties and perusing the record, the learned lower trial court convicted the appellants for the offences punishable under Section 20 (b) (ii) (c) and 25 of the NDPS Act and sentenced them as mentioned in earlier paragraphs. Being aggrieved and dissatisfied with the impugned judgment and order of conviction and sentence, the appellants have filed aforesaid two separate appeals.

8. The point for consideration in this case is, as to whether the prosecution has been able to establish its case beyond all reasonable doubt or not.

9. It is submitted by learned counsel for the appellants that only the police officials, who were members of the raiding party have been examined by the prosecution though lot of people were present at the place of occurrence. The seizure list witnesses have not been examined by the prosecution. Hence the seizure list produced by the prosecution is nothing more than police paper. The aforesaid



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house from where the said contrabands are said to have been seized do not belong to the appellants. The prosecution has not adduced any cogent evidence in this regard. The material exhibits were not produced before the Court. The seized contraband was not sealed either by the informant or by the Officer-in-Charge at the police station. Sample of two packets of 250 gm. Ganja was prepared only from one packet when the sample should have been collected from all packets to establish that all the packets allegedly seized by the police were containing Ganja. The statements of witnesses are self-contradictory and inconsistent and are not reliable and worth credence. No written information of the occurrence was given by the informant to his superior police officer as required under Section 42 of the NDPS Act. Thus, the prosecution has miserably failed to substantiate its case. Advancing the aforesaid arguments, learned counsel for the appellants prayed for acquittal of the appellants.

10. On the other hand, learned A.P.P. advocating the correctness and validity of the impugned judgment and order of conviction and sentence passed by the learned Court has submitted that the impugned judgment and order of conviction and sentence has been passed by the learned lower Court by correctly appreciating the law and facts involved in the case and the same is correct, legal and valid as also sustainable in the eyes of law and there is no merit in these appeals and the same are liable to be dismissed.



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11. We have heard the parties and perused the record.

12. From perusal of the lower court records, it appears that the seized contraband was not produced before the Court rather the I.O. on 30.03.2009 had filed a petition before the learned Sessions Judge, Patna seeking permission for sending the seized contraband to Forensic Science Laboratory for its examination and the same was allowed accordingly. The prosecution has not given any explanation for non-production of the material object before the Court. Non-production of material object before the Court is not mere procedural irregularity rather a best evidence to prove that the alleged quantity of contraband was seized from the possession of the accused.

13. On perusal of the records, it appears that the two persons, namely, Dhanesh Das and Umesh Kumar before whom the house of the appellants were said to have been raided and the aforesaid contraband was recovered and seizure list has been prepared but seizure list witnesses have not been examined by the prosecution, instead the defence has examined one of them, namely, Umesh Kumar as a defence witness. But the said witness has not supported the prosecution case of raid of the houses of the appellants by the police personnel and recovery and seizure of the contrabands from their houses by them before him. Thus, the seizure list does not stand proved by the seizure list witnesses and the said seizure list is nothing but a document written by the concerned police officer.



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14. Section 42 (2) of the NDPS Act stipulates that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate superior official. From perusal of the self-statement of the informant, Hari Shankar Jha (P.W.5), it appears that on getting secret information about keeping huge quantity of Ganja by the appellants in their houses, he made a Sanha entry of the same and rushed to raid their houses along with the police personnel but there is nothing on record to show that on receiving the secret information and making sanha entry regarding the same he had sent either any information or copy of sanha to his immediate superior officer. Thus, there appears to be utter violation of the Section 42 (2) of the NDPS Act.

15. From perusal of the statements of the prosecutions witnesses, it appears that the sample of Ganja was not taken out from the seized Ganja at the place of occurrence. Though P.W.3-Daljeet Singh has stated in his examination-in-chief that two packets of sample of 250 gm of Ganja was prepared from the seized Ganja but he has not stated whether the aforesaid sample was prepared either on the place of occurrence or at the police station. Thus, in our considered opinion, no sample of the seized Ganja was prepared at the place of occurrence. There is nothing on record to show that seized Ganja was either sealed at the place of occurrence by the informant or at the



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police station by S.H.O. as none of the witnesses examined by the prosecution has stated so. The aforesaid aspect of the case creates serious doubt about the seizure of the aforesaid contraband, its quantity and taking a sample of the same and sending it to the F.S.L. for its examination.

16. Though as per the statement of P.W.3- Daljeet Singh sample of two packets of 250 gm of Ganja was prepared from the seized Ganja but there is nothing on the record to indicate as to from which packet the said sample was collected by the police or it was collected by mixing the contents of all the packets seized. As per the prosecution case 20 packets of ganja were seized from the house of the appellant- Gariban Das while 21 packets of Ganja was seized from the house of the appellant-Bhulan Das alias Bhulan Ravidas. Meaning thereby that neither the sample was collected from each packet of the seized Ganja separately nor by mixing the contents of all the packets together. Moreover the self statement of informant has not divulged the factum of preparing sample of Ganja from the seized one. The F.S.L. report is only regarding the sample sent to said to be collected from the same seized Ganja. Thus, the aforesaid aspect of the case creates serious doubt about the contents of all the packets seized from the house of the appellants.

17. Offence punishable under the NDPS Act and punishment provided therefor is very stringent and stern, so the strict



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provisions have been provided in the said Act. So that there may not be chance of false implication. In such view of the matter, the compliance of the provision which are mandatory in nature has to be considered seriously and non-compliance of such requirement will give rise to grave doubt.

18. Section 55 of the NDPS Act provides it as a mandatory requirement that after search and seizure, the seized article will be sealed by the officer, who seized it and concerned Officer-in-Charge of the police station will take charge of the seized article. Section 55 of the NDPS Act further provides that in case sample of seized narcotic article is taken then the same will be sealed by person seizing it and the Officer-in-Charge of the police station taking charge of the seized article. Though the informant S.I., Harishankar Jha (P.W.5) who had allegedly seized the contraband and S.H.O. of Fathua Police Station, namely, Pramod Kumar (P.W.2) have been examined by the prosecution but none of the aforesaid two witnesses have whispered about sealing of the aforesaid article and taking out of the sample from the seized contraband and the particular date and time of sealing the same. Thus, the basic and mandatory requirement of sealing of the article in view of provision of Section 55 of the NDPS Act at the time when it was handed over to the Officer-in-Charge of the police station has not been proved. The time of sealing of the article has not been proved. Since any sealing of the article was



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not proved at the time of seizure nor any exact date and time has been proved in taking of the sample by the informant or Officer-in-Charge grave doubt is entertained over the matter that actual article, which was seized has been the subject matter of the act of taking sample and the examination by the F.S.L. Hence, the appellants are entitled to benefit of doubt.

19. The Malkhana incharge has also not been examined by the prosecution to prove that the seized Ganja was kept in Malkhana intact and in safe custody. Thus, there is no material on record to establish that the seized Ganja was kept in safe custody.

20. From perusal of the record, it appears that the entire investigation of the case was made by P.W.3-Daljeet Singh as I.O. of the case. Though there appears to be another I.O. of the case, namely, P.W.4-Arjun Prasad Yadav, A.S.I. but he has only arrested the appellants and submitted the chargesheet in the case and has done nothing else in the investigation. The record further transpires that the said Daljeet Singh was a member of the raiding party as well so the investigation made by him cannot be said to be above board. It is the settled principle of law that member of the raiding party should not be the I.O. of the case as the true and impartial investigation cannot be expected from a person who himself happens to be a member of the raiding party.

21. Thus, considering the aforesaid facts and



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circumstances of the case, we find that the prosecution has utterly and miserably failed to bring home the charges levelled against the appellants beyond all reasonable doubt. Accordingly, both these appeals are allowed. The appellants are directed to be released from the custody forthwith, if not wanted in any other case.

(Prakash Chandra Jaiswal, J.)

Samarendra Pratap Singh, J. I agree.

Trivedi/-

(Samarendra Pratap Singh, J.)

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