

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.265 of 2015

Arising Out of P.S. Case No. -91 Year- 2008 Thana -NARPATGANJ District- ARRARIA
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KHAJAY RAM S/O LATE MUNGAI RAM RESIDENT OF VILLAGE
DURGAPUR, WARD NO. 1, POLICE STATION HANUMAN NAGAR,
DISTRICT SAPTARI (NEPAL).

.... APPELLANT/S

VERSUS

1. THE STATE OF BIHAR.
2. THE UNION OF INDIA THROUGH S.S.B. 18 BN BASMATIYA
TINKHAMBA CAMP, BASMATIYA O.P. BASMATIYA, DISTRICT
ARARIA.

.... RESPONDENT/S

WITH

=====

Criminal Appeal (SJ) No. 90 of 2015

Arising Out of P.S. Case No. -91 Year- 2008 Thana -NARPATGANJ District- ARRARIA
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BAHADUR RAM SON OF LATE BHUTAI RAM, RESIDENT OF VILLAGE-
ZANDOL, WARD NO.1, P.S.- MAHULI, DISTRICT- SAPTARI (NEPAL)

.... Appellant/s

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

=====

Appearance:

(In CR. APP (SJ) No.265 of 2015)

For the Appellant/s : Mr. Ranjeet Kumar Singh, Adv.

For the State : Mr. Bipin Kumar APP

(In CR. APP (SJ) No.90 of 2015)

For the Appellant/s : Mr. Ranjeet Kumar Singh, Adv.

For the State : Mr. Sujeet Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

C.A.V. JUDGMENT

Date: 23-02-2017

Criminal Appeal (SJ) No.265 of 2015 wherein
Khajay Ram is the appellant while Criminal Appeal (SJ) No. 90
of 2015 wherein Bahadur Ram is the appellant commonly
originate against the judgment of conviction dated 04.12.2014
and order of sentence dated 09.12.2014 passed by First



Additional Sessions Judge-cum-Special Judge, NDPS, Araria in Special Case No.17/2008, Trial No.22/2008 arising out of Narpatganj (Basmatia) P.S. Case No.91/2008 holding both the appellants guilty of an offence punishable under Section 23(c) of the NDPS Act and sentenced each of them to undergo R.I. for ten years as well as fine of rupees one lac in default thereof, to undergo R.I. for one year additionally, have been heard together and are being disposed of by a common judgment.

2. PW.9, Bipin Kumar Katara, Inspector, SSB filed written report on 21.04.2008 stating therein that on 20.04.2008 at about 08:00 PM while they were on surveillance, they found two persons crossing the border and on account thereof, challenged and apprehended. Subsequently thereof, they were searched and during course thereof, 350 gm of heroine was recovered from their possession.

3. On the basis of the aforesaid written report Narpatganj (Basmatia) P.S. Case No.91/2008 was registered whereupon investigation took up and after concluding the same, charge sheet was submitted. After taking cognizance of an offence on the basis of the materials having submitted under Section 173 Cr.P.C. trial commenced and concluded in a manner, subject matter of instant appeal.

4. The defence case as is evident from mode of



cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is of complete denial of the occurrence. However, neither any DW nor any kind of document were produced at the hand of the appellants, during course of trial.

5. In order to substantiate its case, prosecution had examined altogether ten PWs out of whom PW.1 is Lokaindra Sharma, PW.2 is Lalit Chandra Tiwari, PW.3 is Ashish Kumar Sangma, PW.4 is Subrato Mandal, PW.5 is Pankaj Kumar, PW.6 is Vishnu Dayal Tiwari, PW.7 is Biswajeet Ghosh, PW.8 is G. Parthiban, PW.9 is Bipin Kumar Katara and PW.10 is Raju Kumar. Side by side also exhibited Ext.1 seizure list, Ext.1 Series-Signature of witnesses over seizure list, Ext.2-signature of informant over written report, Ext.3-Signature of informant over proforma of arrest, Ext.4-Signature of informant over production cum seizure list, Ext.5-Signature of informant over interrogation relating to Khajay Ram, Ext.6-Signature of informant over confessional statement of Khajay Ram, Ext.7-Signature of informant over interrogation report of Bahadur Ram, Ext.8-signature of informant over confessional statement of Bahadur Ram, Ext.9-FSL report. Apart from this, alleged seized material has also been produced in court and been marked as material Ext.1.

6. All the witnesses, right from PW.1 to PW.9 who are



members of the SSB, 18th Battalion have substantiated the prosecution case regarding crossing of border by both the appellants their apprehension on that very score and further, on search from the possession of appellant Khajay Ram, 350 gm of heroine was seized kept in a bag. Furthermore, through PW.10, a police constable, formal in nature, alleged material exhibit has been produced before the court. Therefore, so far oral evidence is concerned, there happens to be consistency amongst the PWs over apprehension of both the appellants as well as recovery of 350 gm of heroine from the possession of Khajay Ram.

7. But, when the material available on the record have minutely been gone through, it is apparent that on account of non-adaptation of the mandatory provision of the law and further, on account of non-examination of the Investigating Officer whereupon performance of certain legal procedure is found un-explained and in the aforesaid background, the judgment of conviction and sentence recorded by the learned lower court became sketchy. In order to appreciate the infirmities persisting on the record, it is apparent that neither on the seizure memo prepared by PW.9 signature of both the appellants have been taken and in likewise manner, there happens to be absence on production cum seizure list though not exhibited but signature of PW.9 is found duly exhibited as



exhibit-4. It is further evident therefrom that the same was not prepared by the officer-in-charge or by the Investigating Officer rather it was prepared by somebody else which only contains the signature of PW.9 and not of any of the police official.

8. From the evidence of PW.1 to PW.9, it is apparent that none had disclosed regarding preparation of sample at the spot and on account of non-examination of Investigating Officer that remained unexplained. Though from the Ext.9, FSL report it is apparent that the seized article happens to be thebaine, a alkaloid of opium and the report was given after examination of two yellow colour polythene packets without identifying its weight in violation of order no.1/88, which prescribes the following procedures to be followed during course of sampling:-

“1.6 Quantity of different drugs required in the sample. *The quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the cases of Opium, Ganja and Charas/ Hashish where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also. The seized drugs in the packages/ containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.”*

“1.7 Number of samples to be drawn in each seizure case. *(a) In the case of seizure of single package/container one sample in duplicate is to be drawn. Normally it is advisable to draw one sample in duplicate from each package/container in case of seizure of more than one package/container. (b) However, when the package/ container seized together are of identical size and weight, bearing identical markings and the contents of each package give identical results*



on colour test by U.N. kit, conclusively indicating that the packages are identical in all respect/ the packages/ container may be carefully bunched in lots of 10 packages/ containers may be bunched in lots of 40 such packages such packages/ containers. For each such lot of packages/ containers, one sample in duplicate may be drawn. (c) Where after making such lots, in the case of Hashish and Ganja, less than 20 packages/containers remains, and in case of other drugs less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn. (d) If it is 5 or more in case of other drugs and substances and 20 or more in case of Ganja and Hashish, one more sample in duplicate may be drawn for such remainder package/containers. (e) While drawing one sample in duplicate from a particular lot, it must be ensured that representative drug in equal quantity is taken from each package/ container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.”

9. Moreover, the aforesaid exhibit-9 also speaks that the sample was transmitted through special messenger on 08.05.2008, which was received on 12.05.2008. Due to non-examination of the Investigating Officer, not only the aforesaid eventualities remained unexplained rather the custody of seized article after production also remained undisclosed and so, there happens to be complete absence on the record with regard to the material relating to compliance of Section 55 of the N.D.P.S. Act whereunder the seized property is to be kept in Malkhana and further, during course of sampling, the sample is to carry seal of the officer-in-charge.

10. Due to non-examination of Investigating Officer, the



delay in registration of the case is found unexplained in the background of the fact that from the evidence of PW.9 it is evident that accused was produced on 21.04.2008 at the P.S. along with written report then, under what circumstances, FIR was registered on 22.04.2008.

11. It is further evident from the evidence of PW.9, informant that he had not complied with mandatory provision as provided under Section 57 of the NDPS Act whereunder an information is to be given to the just superior official regarding apprehension of the accused as well as search and seizure of the contraband goods within next 48 hours.

12. Giving anxious look to the material available on the record coupled with non-performance of mandatory provisions as provided under the statute, it is apparent that the infirmities whatever been perceived herein before would ultimately give adverse impact upon the finding recorded by the learned trial court as a result of which, same is set aside. Appeal is allowed. Both the appellants are under custody, hence are directed to be released forthwith if not wanted in any other case.

13. At the present moment, it looks desirable to express anguish over activity of the prosecution, who either due to ignorance or incompetence always by passes compliance of mandatory provisions of law, and on account thereof, the accused who by his illegal activity ruin future of



youngsters affecting development of the nation, found scot free. Therefore, the high-ups should take pain to train the investigating officer, so that culprit should not get scarred.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	NAFR
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