

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.1015 of 2016

(Against the judgment of conviction, dated 13.07.2016, and order of sentence, dated 20.07.2016, passed by Shri Raj Kishore Pandey, Additional Sessions Judge-III, West Champaran, Bettiah in NDPS Case No. 88/2010, T.R. No. 13/2011, arising out of Mainatand P.S. Case No. 49 of 2010)

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Kabir Hazra, son of Bharosi Hazra, resident of village-Kehuniya
Vindhyavasini, P.S.-Pokhariya, District-Parsa (Nepal)

.... Appellant

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Arun Kumar Tripathi, Amicus Curiae

For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

Date: 11-11-2017

The instant jail appeal has been filed on behalf of the appellant who was convicted under section 22(c) of the Narcotic Drugs and Psychotropic Substances Act vide judgment dated 13.07.2016 and sentenced to undergo rigorous imprisonment for 10 years and a fine of Rs. one lakh and in default of payment of fine to undergo one year additional imprisonment.

2. The appellant, in fact, in the instant case remained in jail custody for nearly seven years.

3. Mr. Arun Kumar Tripathi, learned Amicus Curiae appearing on behalf of the appellant has submitted that in the instant case the appellant was convicted by the trial court is complete



disregard of settled principle of law of practice and procedure. He submitted that the trial court has convicted the appellant for the offence under section 22(c) of the Narcotic Drugs and Psychotropic Substances Act. The present case was registered as Mainatand P.S. case No. 49 of 2010 dated 02.10.2010 for the offence under sections 20, 22 and 23 of the Narcotic Drugs and Psychotropic Substances Act.

4. The prosecution case, in brief, is that as per informant of the case, the Head Constable B.O.P. Commander, Bheriharwa, 27 BSSB, Company, Narkatiyaganj reported to the In-charge Mainatand P.S. that on 2.10.2010 in the night during the course of patrolling he alongwith constables Nasir Ahmad, Pankaj Kumar, Rinkumani Nath and Sidalinge while passing through pillar no. 412, saw a person entering the Indian border from Nepal, 500 meter east border pillar and on being stopped and searched, the man disclosed his name as Kabir Hazra (appellant) and from his bag 12 kg. Nepali charas was seized.

5. The police after investigation submitted charge-sheet against the appellant under sections 20, 22, 23 27(A) and Section 29 of the Narcotic Drugs and Psychotropic Substances Act.

6. The Special Court took cognizance under sections 20, 22 and 23 of the Narcotic Drugs and Psychotropic Substances Act. However, charges were framed only under section 22(c) of the



Narcotic Drugs and Psychotropic Substances Act.

7. The appellant pleaded not guilty and as such he was subjected to trial and in the trial on behalf of the prosecution 8 witnesses were examined. They are P.W.-1 Krishana Dibree informant of the case. P.W.-2 Nasir Ahmad, P.W.3 Rinkumani Nath, P.W.-Pankaj Yadav, P.W.5 Singhal Durgesh, P.W.-6 Shri Das Roy I.O. of the case, P.W.-7 Janak Thakur and P.W.8 Jailal Sah.

8. In addition thereto, the prosecution has also placed on record the exhibits in the nature of seizure list, first information report, charge-sheet and formal first information report etc.

9. Mr. Tripathi appearing on behalf of the appellant submitted that in this case two basic facts have not been proved by the prosecution and as such the conviction of the appellant is unsustainable. He submitted that the alleged seizure of the contraband (Nepali charas) is the foundation of the case. The seizure list allegedly prepared in the presence of two witnesses namely Janak Thakur (P.W.-7) and Jailal Sah (P.W.-8). He pointed out that P.W.-7 Janak Thakur, the alleged witness of the seizure in his cross-examination has admitted that he signed on the paper on the asking of 'Darogajee' and no article was present in his presence at the time of signing on the paper as seizure list. The other seizure witness Jailal Sah has stated that his signature on the seizure list was forcibly procured by the



Darogajee and neither any article was placed before him nor he was read out the contents of the paper on which his signature was procured and on that basis, Mr. Tripathi submits that the foundation of the case at the seizure of the alleged Nepali charas from the bag of the appellant is not established in the case. He submits that neither the alleged Nepali charas was seized in the presence of independent witnesses nor seizure list was prepared in accordance with law as the seizure list witnesses have completely disowned and said that they have not seen the aforesaid seized article and on a plain paper they have put their signature on the pressure of the 'Darogajee' and in that view of the matter, he submits that when the seizure is not prepared in accordance with law, it creates serious doubts on the prosecution case in view of the deposition of the P.W.7 and P.W.8 the case against the appellant cannot be taken as proved. He further submits that in the instant case fallacy in the prosecution is also apparent with regard to weight of the alleged Nepali charas, the witnesses have made contradictory statements as to the weighment of the alleged Nepali charas allegedly seized from the bag of the appellant. He referred to the deposition of PW.2 who said that he does not know from where weight and scale was brought. He does not know whether the article was charas or not. He has not seen 'charas' earlier. He has also admitted that the seized article was not weighed in his presence nor



he signed on any document. P.W.-5 on the other hand stated that weighing machine is kept in the camp and and that the charas after seizure was weighed, the stand of keeping the weighing machine in the camp is not supported by other witnesses. Thus, Mr. Tripathi submits that the prosecution has not been able to establish that the alleged 'charas' was weighed and found 12 kg as entire prosecution case is based on the weighment allegedly taken in the camp and thereafter there is no case that it was weighed in the police station or any other place.

10. Mr. Tripathi next submitted that in the instant case P.W.-2 in his cross-examination has admitted that nothing was written in the camp in his presence. However, prosecution case is based on the premises that this P.W.2 is the author of the seizure list.

11. In view of the aforesaid, Mr. Tripathi submits that the entire prosecution case is based on mere suspicion. There is no definite case of seizure of the bag containing Nepali charas from the possession of the appellant. He also submits that no definite case of weighment of the bag and as such he submits that in that situation, when the materials are not sufficient to indicate that it was seized from bag in possession of the appellant and quantity of the Nepali charas was of the commercial quantity, convicting the appellant under section 22(c) of the Narcotic Drugs and Psychotropic Substances Act



and R.I. for 10 years and a fine of Rs. 1 lakh is totally unsustainable.

12. Mr. Bipin Kumar, APP appearing on behalf of the State submitted that in the instant case the appellant was found carrying Nepali charas from Nepal to India and as such the trial court has committed no error in convicting the appellant and sentencing him R.I. for ten years and a fine of Rs. one lakh.

13. After hearing the parties and on consideration of the facts of this case and submission of the learned Amicus Curiae appearing on behalf of the appellant, I find substance in the submission of the learned Amicus Curiae that no witnesses have supported the basis of case of prosecution, in fact, the prosecution witnesses nos. 7 and 8 in their cross-examination have admitted that they have not seen the article which was seized and on mere asking of 'Darogajee' they have put their signature as a witness and in such situation, I am of the view that no reliance can be placed on such seizure list. Similarly, I find substance in the submission of the appellant that prosecution has not been able to establish that there was actual weighment of the seized article and the weight of the charas was found to be 12 kg, In view of the contradictory stand of witnesses, I do not find any conclusive materials to demonstrate the actual weighment of the seized Nepali charas and established the instant case beyond reasonable doubt, thus, in the totality of facts



situation, I am of the view that the offence under section 22(c) of the Narcotic Drugs and Psychotropic Substances Act has not been established beyond reasonable doubt.

14. Accordingly, I allow the appeal, Set aside the judgment of conviction and order of sentence 13.07.2016 and 20.07.2016 passed by Additional Sessions Judge-III, West Champaran at Bettiah in N.D.P.S. Case No. 88 of 2010, T. R. No. 13 of 2011 arising out of Mainatand P.S. Case No. 49 of 2010.

15. The appellant, who is in custody, is directed to be released forthwith, if he is otherwise not required in any other case.

(Anil Kumar Upadhyay, J)

Ravi/-

AFR/NAFR	NAFR
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