

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.622 of 2017

Against the judgment of conviction dated 25.04.2017 and the order of sentence dated 28.04.2017 passed by Sri Ram Rang Tiwary, 7th Additional Sessions Judge-cum-Special Judge, East Champaran, Motihari in N.D.P.S. Case No. 14/25 of 2013/2016 arising out of Palanawa P.S. Case No. 08 of 2013, G.R. Case No. 63 of 2013

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Raj Kumar @ Raj Kumar Verma, aged about 45 years, S/o Late Mohan Lal, resident of Village- Maler Kotala, Sahadabad Colony, Manik Majara Road, Post & Tehsil- Maler, Kotala, P.S.- Amgarh, District- Sangroor (Punjab).

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Prakash Tiwari
Mr. Mahesh Kumar
For the Respondent/s : Mr. Abhimanyu Sharma, A.P.P.

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CORAM : HONOURABLE MR. JUSTICE RAKESH KUMAR

And

HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA)

Date: 09-02-2018

Heard learned counsel for the appellant and learned Additional Public Prosecutor, appearing for the State.

2. This appeal has been filed against the judgment of conviction dated 25.04.2017 and the order of sentence dated 28.04.2017 passed by Sri Ram Rang Tiwary, 7th Additional Sessions Judge-cum-Special Judge, East Champaran, Motihari in N.D.P.S. Case No. 14/25 of 2013/2016 arising out of Palanawa P.S. Case No.



08 of 2013, G.R. Case No. 63 of 2013, whereby and whereunder the appellant has been convicted under sections 20(b)(ii)(c) and 23(c) of the Narcotic Drugs and Psychotropic Substance Act (hereinafter referred to as the “N.D.P.S. Act”) and sentenced to undergo rigorous imprisonment for 15 years as well as to pay fine of rupees One Lac Fifty Thousand (Rs. 1,50,000/-) under section 20(b)(ii)(c) of the N.D.P.S. Act. The appellant has further been sentenced to undergo rigorous imprisonment for 15 years and also to pay a fine of rupees One Lac Fifty Thousand (Rs. 1,50,000/-) under section 23(c) of the N.D.P.S. Act. In default of payment of fine in both sections, the convict has further been sentenced to undergo rigorous imprisonment for 18 months. Both the sentences have been directed to run concurrently.

3. The facts of the case, in brief, is that one Prakash Chand Baswal/P.W. 4, Assistant Commandant, S.S.B. Bhelahi, East Champaran made a written information before the Officer-in-Charge, Bhelahi O.P. under Palanwa P.S. that on 27.01.2013 at about 00:10 A.M., he got secret information about smuggling towards East direction of Pillar No. 403 and accordingly, he constituted a raiding team under his leadership and reached at the Pillar No. 403. At about 4:00 A.M. one person was seen coming through the *Pagdandi* of a field. He was apprehended, who disclosed his name as Raj Kumar.



Thereafter, two more passerby persons, namely Mukesh Kumar/P.W. 5 and Ashok, were seen, who were stopped and requested to become witness in this case to which they agreed. Thereafter, the accused was informed about the secret information and was asked as to whether he would like to be searched by a Magistrate or Police, on which he became ready to be searched by Raiding Party. On search, from his under thermal paint on his thigh two yellow coloured packets and from his bag kept in his hand another packet of blue and red coloured were recovered. On inquiry, the accused replied that it is *Charas*. Thereafter, all the three packets were tested by Drug Detection Kit, on which the recovered materials were found to be *Charas*. On weighing the recovered materials was found 3 kg. On enquiry, the accused confessed that he has purchased the said *Charas* from one Braj Mohan of Vill. Akawa in Nepal and in this event, one Ganesh of Vill. Hasua in Nepal had helped him. He further confessed that he wanted to take the aforesaid *Charas* to Ludhiaya, Punjab. Thereafter, the accused was taken into custody and Seizure List was prepared.

4. On the basis of the aforesaid written statement of the informant/P.W. 4, Palanwa P.S. Case No. 08 of 2013 was registered on 28.01.2013 for the offence under sections 20(b), 22, 23 and 24 of the N.D.P.S. Act, in which appellant was made accused. After investigation, the Police submitted charge-sheet under sections 20(b),



22, 23 and 24 of the N.D.P.S. Act and the accused persons were sent up for trial. Thereafter, charges were framed against the appellant on 26.08.2013 for the offences punishable under sections 20(b)(ii)(c) and 23(c) of the N.D.P.S. Act, to which the appellant pleaded not guilty and claimed to be tried.

5. During trial, the prosecution has examined altogether 8 witnesses. P.W. 1/Jitendra, who was posted as Constable at S.S.B. Belahi. P.W. 2/Swapan Kumar Bouri, P.W. 3/Rajat Kundu, members of the Raiding Party. P.W. 4/Prakash Chandra Baswal, the informant. P.W. 5/Mukesh Kumar, Head Constable, S.S.B. 13th Battalion, Piprakothi, P.W. 6/Manoj Kumar Prabhakar, S.H.O., Banjariya, P.S., who was entrusted investigation of the case, P.W./7 Bhavnath Kumar, S.H.O. Kotwa P.S., who took the charge of the investigation from P.W. 6 and P.W. 8/Birendra Kumar Singh @ B.K. Singh, retired Sub-Inspector of the Police, Raxault P.S., who was posted at Belahi O.P. as Officer-in-Charge.

6. In order to prove the charges, the prosecution has proved the following documents as exhibits:

Notice for search (Exhibit-1), personal search Memo dated 27.01.2013 (Exhibit-2), Seizure List (Exhibit-3), Proforma for seizure (Exhibit-4), Medical Examination Report of the appellant (Exhibit-5), Confessional Statement of the appellant (Exhibit-6),



Written Application by the informant to S.H.O. Bhelahi O.P. (Exhibit-7), petition for permission to Chemical Test (Exhibit-8), Forwarding letter to F.S.L., Patna (Exhibit-9), Forwarding letter to C.F.S.L., Kolkata (Exhibit-9/1), petition before the Special Judge (Exhibit-8/1), Forwarding letter to C.F.S.L., Kolkata (Exhibit-9/2), Receiving receipt of Sample of F.S.L., Patna (Exhibit-10), Receiving receipt of Sample to Kolkata, (Exhibit-10/1), F.S.L. Report (Exhibit-11), Forwarding Report on written application (F.I.R.) (Exhibit-12) and Endorsement on written application (F.I.R.) (Exhibit-12/1).

7. The appellant in his statement under section 313 of the Code of Criminal Procedure has said that he is innocent and has falsely been implicated in this case. On behalf of the Defence, the signature of the accused on arrest memo prepared by the Officer-in-charge, Bhelahi O.P., 1st I.O. has been marked as Exhibit-A and signature of the Officer-in-charge of Bhelahi O.P. Sri B.K. Singh on Seizure-cum-production List has been marked as Exhibit-B.

8. In the present appeal, the impugned judgment of conviction and the order of sentence has been challenged mainly on two grounds i.e. the prosecution has failed to prove the case beyond all reasonable doubts against the appellant and the mandatory provisions of search and seizure as laid down under sections 42, 50 and 52A of the N.D.P.S. Act has not been followed.



9. Shri Prakash Tiwary, learned counsel appearing for the appellant submits that in the F.I.R., it has been said that 3 kg. *Charas* was recovered from the accused. It is quite improbable that when the accused was informed about his legal right of being searched in presence of the Magistrate, he denied to be searched before the Magistrate and became ready to be searched by the raiding party. He also did not feel necessary to take search of the members of the raiding party.

10. Further, the incidence is of 27.01.2013 at 4:00 A.M., when it would have been very cold in the night, at a place which is not near to any village, appearance of two independent witnesses and becoming ready to be witness to the seizure list creates doubt specially when since P.W.5 has said that there is no village near the place of occurrence and P.W. 4 has said that there is no village near the place of occurrence towards India.

These witnesses did not turn up during trial to depose in the case whereas on 27.01.2013 on a very cold night at 4 A.M. they became ready to be seizure list witness.

11. Learned counsel further contends that it is mentioned in the F.I.R. that the seized *Charas* was examined by the Drug Detection Kit, but neither the kit nor the report, prepared in this connection, has been produced before the Court. The seized *Charas*



was also not produced before the Court during trial. This creates doubt on the prosecution case. In this connection, learned counsel has placed reliance on the judgments of the Hon'ble Supreme Court in the case of *Viajy Jain Vs. State of Madhya Pradesh* reported in (2013)14 SCC 527 and in the case of *Jitendra & Anr. Vs. State of M.P.* reported in (2004) 10 S.C.C. 562.

12. Shri Tiwary further submits that it is not apparent from the F.I.R. as to whether the seized *Charas* or its sample was sealed or not. All the witnesses are silent on this point, except P.W. 3, who has specifically stated that sample was not sealed.

Further the application (Exhibit-8) for chemical examination of the seized *Charas* was filed on 18.06.2013 before the Special Judge although it was seized on 27.01.2013, but prosecution has failed to explain as to why such application was not made during the above five months.

13. Further submission is that by order dated 16.08.2013 (after about seven months of the alleged occurrence) the Special Judge, appointed Sri R.K. Bharti, for preparation of the sample, but neither Sri R.K. Bharti came forward for evidence nor any document has been brought on record to show that sample was prepared in presence of the Magistrate.

Further as per the Investigating Officer the seized



Charas was kept in *Malkhana*, but there is nothing on record to show as to when the seized *Charas* was kept in *Malkhana* and when it was destroyed.

14. In this case, apparently the seized *Charas* was not kept in *Malkhana*, the sample was not sealed, sample was not prepared in presence of the Magistrate even after appointment of Magistrate and the seized material was sent to laboratory examination after about one and half years of its seizure, in such circumstances, even if the F.S.L. Report (Exhibit-11) indicates that the sent sample is of *Charas*, it loses its significance.

15. Learned counsel further contends that P.W. 4/Prakash Chand Baswal, the informant, in his evidence has said that the accused was kept for 13-14 hours at the Pillar and from there he was taken to Raxaul Hospital, where it took 2-3 hours and thereafter, he was again taken to the Pillar where he was kept for about 10-15 minutes and thereafter he was taken to Bhelahi O.P.

It is not understandable as to what kind of action was taken during the aforesaid 13-14 hours, but even if it is taken to be true, then it took about 17-18 hours in this action.

But, the record depicts a different story. As per First Information Report, the accused was arrested at 4:00 A.M. on 27.01.2013 and he was medically examined (Exhibit-5) on the same



day at 1:15 P.M., but exhibits A and B show that he was handed over to the Police at 6:30 A.M. on 28.01.2013.

That means he was handed over to police after 24 hours of his arrest. However, during this period where the accused was, the informant is silent on this point, whereas P.Ws.1, 2, 3 and 5 have unanimously said that the accused was firstly taken to S.S.B. Camp., and thereafter, he was handed over to the Police Station.

Further, for 24 hours the accused was under the custody of the raiding party and as per the informant medical examination of the accused was conducted at Raxaul which took about 2-3 hours, but the raiding party did not feel necessary to inform any Magistrate although Sub-Divisional Magistrate was available at Raxaul.

16. In the background of the aforesaid submissions, learned counsel for the appellant submits that the judgment of conviction and order of sentence is fit to be set aside.

17. Learned Additional Public Prosecutor, appearing on behalf of the State, vehemently opposed the prayer of the appellant by contending that even if the whole prosecution story is taken to be false, the confessional statement of the accused recorded under section 67 of the N.D.P.S. Act is sufficient for awarding punishment. In support of this contention, learned counsel has placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Ram Singh Vs.**



Central Bureau of Narcotics, reported in A.I.R. 2011 S.C. 2490 as also in the case of *Raj Kumar Karwal Vs. Union of India*, reported in *(1990) 2 S.C.C. 409*.

18. Considering the facts and circumstance of the case, the materials available on record and the submissions advanced on behalf of the parties, this Court finds that the submissions advanced by the learned counsel for the appellant has force. In the present case, the independent witnesses with regard to the search and seizure, namely Mukesh Kumar and Ashok have not been examined. The remaining prosecution witnesses being Police Officers only, it will not be safe to rely upon their testimony alone. Further, no explanation has been furnished by the prosecution for non-production of the *Charas* as an exhibit in the trial. The non-production of the seized material is, therefore, considered fatal to the prosecution case. The benefit of doubt will, therefore, have to be given to the appellant. So far as the submission advanced by the learned Additional Public Prosecution is concerned, once it has come on record that the accused was kept at S.S.B. Camp. for 24 hours, then presumption can be drawn that the confessional statement has not been given voluntarily.

19. Besides the above, it is evident that in the present case there has been apparent violation of the provisions of sections 42, 50 and 52A of the N.D.P.S. Act. In this connection, the Hon'ble



Supreme Court in its judgment in the case of ***Gorakh Nath Prasad Vrs. State of Bihar, reported in 2017 S.C.C. OnLine S.C. 1505*** has held as follows:

“6. The N.D.P.S. Act provides for a reverse burden of proof upon the accused, contrary to the normal rule of criminal jurisprudence for presumption of innocence unless proved guilty. This shall not dispense with the requirement of the prosecution to having first established a prima facie case, only whereafter the burden will shift to the accused. The mere registration of a case under the Act will not ipso facto shift the burden on to the accused from the very inception. Compliance with statutory requirements and procedures shall have to be strict and the scrutiny stringent. If there is an iota of doubt the benefit shall have to be given to the accused”.

20. In view of the facts and circumstances of the case and discussions, as made above, this Court finds that the order of conviction of the appellant is not sustainable in the eye of law. Accordingly, the judgment of conviction dated 25.04.2017 and the order of sentence dated 28.04.2017 passed by Sri Ram Rang Tiwary, 7th Additional Sessions Judge-cum-Special Judge, East Champaran, Motihari in N.D.P.S. Case No. 14/25 of 2013/2016 arising out of Palanawa P.S. Case No. 08 of 2013, G.R. Case No. 63 of 2013, is,



hereby, set aside and the appeal is allowed. Since the appellant is in custody and judgment of his conviction and sentence has been set aside, it is, hereby, directed to release him forthwith, if not wanted in any other case.

(Arvind Srivastava, J)

(Rakesh Kumar, J) :

(Rakesh Kumar, J)

Shailendra/-

AFR/NAFR	A.F.R
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