

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.580 of 2015

Arising Out of PS.Case No. -15 Year- 2010 Thana -MAINATAND District- WEST
CHAMPARAN(BETTIAH)

Brichha Yadav, Son of Late Gajar Yadav, Resident of village:
Gauripur Sukhalahi, P.S.- Mainatard, District: West Champaran.

..... Appellant/s
Versus
The State of Bihar Respondent/s
with

Criminal Appeal (SJ) No. 635 of 2015

Arising Out of PS.Case No. -15 Year- 2010 Thana -MAINATAND District- WEST
CHAMPARAN(BETTIAH)

1. Rajdeo Yadav Son of Late Satyanarayan Yadav, resident of
Pandeypur, P.S. - Sherawa, District - Parsa (Nepal).
2. Dhodha Paswan, Son of Late Nathuni Paswan, resident of
Jettpur Paraswa, P.S. - Sherwa, District - Parsa (Nepal).

..... Appellant/s
Versus
The State of Bihar Respondent/s
with

Criminal Appeal (SJ) No. 650 of 2015

Arising Out of PS.Case No. -15 Year- 2010 Thana -MAINATAND District- WEST
CHAMPARAN(BETTIAH)

Abul Hasan Son of Yasin Khan @ Yasin Miya Resident of Purani
Bazar Narkatiyaganj, P.S. - Shikarpur, District - West Champaran

..... Appellant/s
Versus
The State of Bihar Respondent/s

Appearance:

(In CR. APP (SJ) No.580 of 2015)
For the Appellant/s : Mr. Ram Adya Singh, Adv.
For the State : Mr. Sujit Kumar Singh, APP
(In CR. APP (SJ) No.635 of 2015)
For the Appellant/s : Mr. Bimlesh Kumar Pandey, Adv.
For the State : Mr. Sujit Kumar Singh, APP
(In CR. APP (SJ) No.650 of 2015)
For the Appellant/s : Mr. Bimlesh Kumar Pandey, Adv.
For the State : Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI



CAV JUDGMENT

Date: 18-07-2018

Criminal Appeal (SJ) No.580 of 2015 wherein Brichha Yadav is the appellant, Criminal Appeal (SJ) No. 635 of 2015 wherein Rajdeo Yadav , Dhodha Paswan are the appellants and Criminal Appeal (SJ) No. 650 of 2015 wherein Abul Hasan is the appellant commonly originate against the same judgment of conviction and sentence on account thereof, have been heard together and are being decided by a common judgment .

2. All the appellants named above have been found guilty for an offence punishable under Section 20(b)(ii)(c) of the NDPS Act and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to rupees one lac and in default thereof, to undergo S.I. for one year additionally, under Section 22(c) of the NDPS Act and sentence to undergo R.I. for ten years as well as to pay fine appertaining to rupees one lac and in default thereof, to undergo S.I. for one year additionally, under Section 23(c) of the NDPS Act and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to rupees one lac and in default thereof, to undergo S.I. for one year additionally with a further direction to run the sentences concurrently with a further direction of set off the period having undergone during course of trial as provided under Section 428 of the Cr.P.C. vide judgment of conviction dated 04.09.2015 and order of sentence dated 09.09.2015 passed by Fourth Additional Sessions Judge cum Special Judge, NDPS, West Champaran at Bettiah in Trial No.46 of 2010, NDPS Case No.21/2010 arising out of Mainatand P.S. Case No.15/2010.



3. Shivnarayan Ram, Officer-in-charge of Mainatand Police Station (PW.8) recorded his self-statement on 21.03.2010 at about 07:15 PM at the Darwaja of Brichha Yadav lying at village-Shukhalahi Govindpur disclosing therein that while he along with other police personal were engaged in conducting raid against the accused of Mainatand P.S. Case No.14/2009, at about 05:00 PM received confidential information regarding assemblage of smugglers at the house of Brichha Yadav of village Shukhalahi whereupon, raid was conducted and during course thereof, others managed to escape while three persons were apprehended from a room. Furthermore, on search, altogether 161.400 gms. of ganja were seized from the aforesaid room for which, search-cum-seizure list was prepared in presence of two independent witnesses Tara Singh and Ashok Yadav. During course of interrogation, they have confessed the guilt.

4. After registration of Mainatand P.S. Case No.15/2010 investigation commenced and concluded by way of submission of charge sheet facilitating the trial, meeting with the ultimate result, subject matter of instant appeal.

5. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. However, nothing has been adduced in defence.

6. In order to substantiate its case prosecution had examined altogether ten witnesses who are, PW.1-Tara Singh, PW.2-Ashok Yadav, PW.3-Ram Shankar Yadav, PW.4-Arun Kumar



Yadav, PW.5-Amerika Ram, PW.6-Jitendra Kumar, PW.7-Manohar Prasad, PW.8-Shiv Narayan Ram, PW.9-Sri Das Ram, PW.10-Mohan Mandal. Side by side also exhibited Ext.1 Series-signature of seizure list witnesses, Ext.2-seizure list, Ext.3-self-statemnt, Ext.4-formal FIR, Ext.5-FSL report. As stated above, nothing has been adduced at the end of the defence.

7. From the evidence available on the record, it is apparent that PW.1 and PW.2 are the seizure list witnesses who have simply exhibited their signature without supporting the case of the prosecution regarding recovery. No effort was ever taken at the end of prosecution on that very score. During cross-examination, they both have stated that nothing was recovered in their presence.

8. The remaining witnesses are the police officials. Save and except PW.6, PW.8 and PW.9 others are sepoy. During course of their evidence PW.3, PW.4, PW.5, PW.7, PW.10 have supported the case of the prosecution with regard to recovery as well as apprehending of the accused but, they have not deposed at least to substantiate the prosecution case that sample was prepared at that very moment nor they have stated that recovered articles were sealed at the place of recovery.

9. PW.6, PW.8 and PW.9 (Investigating Officer) though have supported the allegation but are completely silent over preparation of sample, sealing of the seized *ganja* and further, where the *ganja* was kept. From the evidence of Investigating Officer PW.9 paragraph 5 (examination-in-chief) that after taking



permission from the court he had sent the seized article for examination but, he failed to disclose on which day sample was prepared and further, as required three samples were prepared under proper seal. They are also not specific where sample was prepared by having some portion from each Bag. They are also absent about the quantity so kept for sample. From Ext.5, FSL report it is evident that the articles was dispatched vide memo no.988 dated 13.05.2010 through special messenger Chowkidar 2/3 Arun Kumar Yadav which was received at his end on 17.06.2010 that means to say covering more than a month without any explanation. It is further evident from the evidence of PW.8, the informant as well as I.O. PW.9 that they kept mum with regard to compliance of mandatory provision of Section 42(2) as well as 57 of the NDPS Act. It is further evident that so alleged seized ganja has not been produced in court during course of trial. Though the prosecution insisted upon inculpatory confessional statement of one of the accused, which is found inadmissible in the eye of law, and that being so, it could not be found hazardous to the appellants.

10. In *Gorakh Nath Prasad Vs. State of Bihar*
reported in ***AIR 2018 SC 704*** it has been held:-

“8. The remaining prosecution witnesses being police officers only, it will not be safe to rely upon their testimony alone, which in any event cannot be sufficient evidence by itself either with regard to recovery or the seized material being Ganja. No explanation has also been furnished by the prosecution for non-production of the Ganja as an exhibit in the trial. The benefit of doubt will, therefore, have to be given to the Appellant and in support of which learned Senior Counsel Shri Rai has relied upon



Jitendra and Another vs. State of M.P. ,(2004)10 SCC 562, and reiterated in Ashok alias Dangra Jaiswal vs. State of Madhya Pradesh, (2011) 5 SCC 123, as follows:-

“12. Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused.

13. It may be noted here that in Jitendera v. State of M.P., (2004) 10 SCC 562, on similar facts this Court held that the material placed on record by the prosecution did not bring home the charge against the accused beyond reasonable doubt and it would be unsafe to maintain their conviction on that basis. In Jitendra (supra), the Court observed and held as under:-

"5. The evidence to prove that charas and ganja were recovered from the possession of the accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW 7), Angad Singh (PW 8) and Sub-Inspector D.J. Rai (PW 6), there is no independent witness as to the recovery of the drugs from the possession of the accused. The charas and ganja alleged to have been seized from the possession of the accused were not even produced <https://indiankanoon.org/doc/853536/> before the trial court, so as to connect them with the samples sent to the Forensic Science Laboratory. There is no material produced in the trial, apart from the interested testimony of the police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the Forensic Science Laboratory were taken from the drugs seized from the possession of the accused.....”

6.The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of



panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned.....”

11. The facts of the prosecution case are markedly similar on account thereof, the judgment impugned would not survive and that being so, the conviction of the appellants is therefore held to be unsustainable in the eye of law and is accordingly set aside. All the appeals are allowed. Appellants are on bail, hence they are discharged from their liabilities.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	A.F.R.
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