

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.104 of 2003

Arising Out of PS.Case No. -null Year- null Thana -null District- SASARAM (ROHTAS)

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Tunna Paswan @ Tunnu Paswan,S/o Rajgrih Paswan,Village-New Delia,District-Rohtas

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Parmeshwar Mehto, Advocate, Amicus Curiae

For the Respondent/s : Mr. Shivesh Chandra Mishra, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

Date: 20-01-2018

None appears on behalf of the appellant.

Considering the fact that the appeal in question is pending in court for last 15 years, Mr. Parmeshwar Mehta, Advocate, is appointed as Amicus Curiae to assist the Court on behalf of the appellant.

The appellant was convicted for the offence punishable under Section 21 of N.D.P.S.Act and sentenced to undergo R.I. for ten years as well as to pay fine to the tune of Rs. 1, 00000/-.

This appeal was admitted vide order dated 26.02.2003 and after receipt of the record, appellant was granted bail vide order dated 29.04.2003, which reads as follows:-

“The appellant remained incarcerated since



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25.11.1994 and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1, 00000/- .

Considering the facts and circumstances of the case and also the fact that the appellant has already undergone about 9 years as against sentence of ten years, he (Tunna Paswan @ Tunnu Paswan) is directed to be released on bail on furnishing bail bonds of Rs. 10,000/- (Rupees ten thousand) with two sureties of the like amount each to the satisfaction of the trial Court of the 5th Additional Sessions Judge, Rohtas at Sasaram in Dehri P.S.Case No. 446 of 1994”.

From the perusal of the order dated 29.04. 2003, it is now admitted position that appellant has already undergone nine years imprisonment out of ten years sentence.

The prosecution case is that on 25.11.1994 at about 12.30 P.M. the informant got secret information in the police Station that huge quantity of Heroine was being consumed in New Deliya under Dehri Police station and on the said secret information, the police party rushed to the place of occurrence and after seeing the police party, accused persons started fleeing. Thereafter, the appellant was apprehended and in the presence of independent witnesses, the said person disclosed his name as Tunna Paswan @ Tunny Paswan and after search 24 small puriyas containing Heroine, weighing 5



grams contained in the pocket of Tulsi Zafrani Zarda from the paint of the accused was recovered and after search, the seizure list was prepared and thereafter, a criminal case was lodged by the police against the appellant vide Dehri P.S. Case No. 446 of 1994 for the offences punishable under Sections 20 and 22 of the N.D.P.S. Act.

The police after investigation submitted charge sheet on 14.02.1995 against the appellant for the offences punishable under Sections 20 and 22 of the N.D.P.S. Act and thereafter, vide order dated 18.08.1995 charge was framed against the appellant for the offences punishable under Sections 18 and 21 read with Section 8 (C) of the N.D.P.S. Act and after framing of charge, the appellant did not plead guilty and claimed to be tried. The Trial Court after examination of witnesses, convicted the appellant under Section 21 of the N.D.P.S. Act and sentenced to undergo Rigorous imprisonment for ten years as well as to pay a fine of Rs. 1,00,000/- within two months.

Amicus Curiae, Mr. Parmeshwar Mehta, Advocate appearing on behalf of the appellant submitted that the prosecution has made pick and choose in the examination of the witnesses. He submits that without explaining reason for none examination of the



charge sheet witnesses, the prosecution has withheld charge sheet witnesses, the trial court in a most mechanical manner convicted and awarded sentence to the appellant. In the present case, charge sheet witnesses were not examined by the prosecution, as such, the Trial stands vitiated for withholding the material witnesses.

It is further contended that in the present case, seizure list witnesses have not been examined, which is serious infirmity in the trial and in the absence of examination of seizure list witnesses, the conviction of the appellant is improper and bad in law.

Learned counsel appearing on behalf of the State, Shri Shivesh Chandra Mishra submits that the Trial Court has rightly convicted the appellant under Section 21 of the N.D.P.S. Act, as such, the offender is not entitled to leniency. However, he admitted that the appellant has already undergone about nine years imprisonment as against the sentence of ten years. He submits that the infirmity in the trial are trivial and as such it is not relevant for the purpose of deciding the present appeal.

Considering the nature of allegation and after hearing the parties and on consideration of materials available on record, the



Court is of the view that the trial court has committed error in convicting the appellant as in the offence of serious nature, the court is obliged to convict the accused only when strict proof are available. In the present case, the prosecution has not examined the charge sheeted witnesses without any explanation and as such, it goes against the prosecution.

It has been settled by the **Apex Court in the Judgment reported in (2001) 6 SCC 608 in para 19** where the Court has examined the effect of none examination of material witnesses, who could have unfolded the true narrative of the case. None examination of the charge sheet witnesses and seizure list witnesses render the prosecution case under serious clouds. In addition thereto the Court notices, that the appellant had already been awarded sentence to undergo R.I. for Ten years and a fine of Rs. 1,00000/-, the appellant was granted bail in this Appeal on serving the incarceration of nine years.

In totality of facts and circumstances that the Dohri P. S. Case No. 446 of 1994 was instituted on 25.11.1994 and the appellant has remained in jail for nine years out of ten years, there is



no justification for sending the appellant to jail to serve remaining period in jail custody when the prosecution case suffers from many loopholes, accordingly the appeal is partly allowed. The conviction of the appellant in the instant case is not interfered with however the sentence is modified as period already undergone.

Under the aforesaid circumstances, the Appeal stands disposed of with the aforesaid modification. Since the appellant is on bail, he is discharged from the liabilities of bail bonds.

(Anil Kumar Upadhyay, J)

Sudha/-

AFR/NAFR	NAFR
CAV DATE	NA
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