

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.423 of 2003

=====

Sunil @ Sunil Kamkar @ Barak, Son of Rm Ikbali Prasad, resident of village –
Balihar, P.S. – Sarmera, District – Buxar.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

with

=====

Criminal Appeal (SJ) No. 426 of 2003

=====

Ranvijay Singh @ Raju Singh, Son of Nishi Kant Singh, resident of village –
Balihar, P.S. – Simari, district – Buxar.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

=====

Appearance :

(In CR. APP (SJ) No.423 of 2003)

For the Appellant/s : Mr. Digvijay Kumar Ojha, Advocate
Mr. Kamal Kishore Sinha, Advocate

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

(In CR. APP (SJ) No.426 of 2003)

For the Appellant/s : Mr. Digvijay Kumar Ojha, Advocate
Mr. Kamal Kishore Sinha, Advocate

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

=====

CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

C.A.V. JUDGMENT

Date: 31-07-2018

By way of the present appeal, appellants in both the
above mentioned appeals seek to challenge the judgment of
conviction dated 01.08.2003 and order of sentence dated 05.08.2003,
passed by Shri Anil Kumar Verma, the then District & Sessions
Judge-cum-Special Judge, Buxar in NDPS Case No. 5 of 2002, by
which the appellants in both the above mentioned appeals, stood



convicted under Section 20(b)(ii) (B) of N.D.P.S. Act and were sentenced to undergo R.I. for five years, each. By the said judgment, the appellants were acquitted from the charge under Section 47a of Bihar Excise Act, 1915.

2. Prosecution case as per the written report of S.I. Binay Kumar Sharma, Officer In charge, Buxar (M) police station, in short is that while he along with A.S.I. Nagdeo and some constables were on patrolling on 02.06.2002 at 10.30 A.M and reached to Buxar –Ara road near police station turning, at about 12.15 P.M., one Mini Bus with registration No. U.R.I. 1092 arrived from the side of Ara and routine checking was started and found that the two persons were sitting on seat nos. 4 and 5 upset and enquired them about the contents kept in the brief case, which was kept by them on their legs, on which, they disclosed that some *ganja* has been kept in the brief case, they were asked to open the said brief case and on opening, *ganja* contained in sky blue polythene wrapped with Times of India newspaper, was found and the same was seized in presence of two co-passengers, namely, Birendra Yadav and Bhupesh Kumar Dubey. The recovered *ganja* was weighed, which was found to be six kilograms. Thereafter, seizure list was prepared, which was signed by the witnesses as well as by the accused persons. Accused persons were asked about their right to be searched before the Magistrate, on which they refused to be searched in front of the Magistrate. It is also the



case of prosecution that superior officers were informed about the recovery on phone and sample of the recovered *ganza* was separately prepared for its chemical examination, which was kept in a tin container of *zarda* and rest of the *ganza* was also sealed. Signature of the witnesses as well as the driver and conductor of the said Mini Bus was taken and then again senior officers were informed.

3. On the basis of the above, a case being Buxar (Ind.) P.S. Case No. 8/2002 was registered under Section 20 of the NDPS Act as well as Section 47a of the Excise Act. The accused persons and along with the seized article were produced before the Special Judge, Buxar on 03.06.2002 and permission was obtained for sending the seized *ganza* for chemical examination to Forensic Science Laboratory. Charge-sheet was submitted against the accused persons on 31.07.2002 and report of the Forensic Science Laboratory was received on 27.02.2003 and it was found that the *ganza* was found in the sample sent for chemical examination.

4. Charges were framed against the accused- appellants under Section 20(b)(ii)(B) of N.D.P.S. Act as well as under Section 47a of the Bihar Excise Act, 1915.

5. In order to substantiate the charges, prosecution has examined altogether six witnesses, they are; P.W. 1 – Informant Binay Kumar, S.I. and Officer In charge, Buxar (M) police station, P.W. 2 – Binod Kumar, Driver of the police jeep, P.W. 3 – Constable Ram



Pravesh Singh, P.W. 4 – Sribhagwan Singh, Home Guard attached to Buxar (M) police station, P.W. 5 – Shiv Kumar, Technician of Forensic Science Laboratory, Patna and P.W. 6- Krishnadeo Choudhary, Investigating Officer.

6. The defence of the accused persons is of innocence as they were going for study and were caught by the police near Buxar Golambar and has falsely been made accused in this case and recovery of *ganza* has been shown to be recovered from their possession.

7. Post trial, learned Trial Court acquitted both the appellants from the charge under Section 47a of the Bihar Excise Act, 1915, however, he convicted the appellants in both the appeals under Section 20(b)(ii)B of the N.D.P.S. Act and sentenced them in the manner aforesaid.

8. Being aggrieved, the appellants preferred the present appeal.

9. Learned counsel for the appellants in both the above appeals assailed the judgement of trial court on the ground that in this case neither driver nor the conductor of the Mini Bus from which the alleged recovery was made, has been examined and on the petition of the defence, one seizure list witness, namely, Bhupesh Kumar was examined as court witness and he has not supported the prosecution case and has stated that nothing has been recovered in his presence, as



such, whole case is based on the evidence of police witnesses, who are interested. Moreover, there is contradiction between the evidence of witnesses, so far place of recovery is concerned as P.W. 1 and P.W. 6 has stated that recovery was from near the Bus and seizure list also shows the same but evidence of P.W. 3, who is constable and member of the patrolling team disclosed that the recovered article was brought to the police station and seizure list was prepared at the police station, that creates a doubt about the prosecution story and in such a situation, the appellants certainly deserve the benefit of doubt. It has also been submitted that there is no evidence that anything was recovered from the conscious possession of the appellants rather the recovery was made from a briefcase and there is absolutely nothing on record to show that the said briefcase belonged to either of the appellants and though it is alleged that the appellant Ranvijay Singh opened the briefcase by a key but that key has not been seized or produced by the police. However, learned Trial Court failed to appreciate these facts and convicted the appellants under Section 20(b)(ii)(B) of N.D.P.S. Act, which is not sustainable in the eye of law.

10. On the other hand, learned counsel appearing on behalf of respondent – State has supported the finding of guilt recorded by the trial court and submitted that in this case, there is recovery of *ganza* from Mini Bus, which was kept in a brief case and the same



was kept by the appellants on their legs and the said brief case was opened near the bus and *ganza* was recovered and the prosecution has taken the steps as provided under the NDPS Act for their right to be searched before the Magistrate but they refused. The evidence shows that the seized *ganza* was weighed and sample was prepared and the sample was sealed in a tin container and rest of the *ganza* was sealed and the same was produced before the Special Judge on very next day and as per the order of Special Judge, the seized contraband was sent for chemical examination and in the chemical examination, the seized contraband was found to be *ganja*. Further evidence also shows that the information with regard to recovery of *ganza* has also been given to the senior officers and before the court, from the *malkhana*, the seized contraband was produced before the Court and as such, there is compliance of provisions of NDPS Act, in this case and, therefore, there is no infirmity in the impugned judgment of trial court and conviction of appellants under Section 20 (b)(ii)(B) of the N.D.P.S. Act is just and proper.

11. In the background of the evidence of rival parties, from perusal of evidence, it appears that P.W.1 is the informant in this case and his evidence disclosed that during checking, he along with A.S.I. Nagdeo Rai, constables Binod Kumar and Ram Pravesh Singh and Home Guard Sri Bhagwan Singh, they came near the police gate and started checking the vehicles passing through the Ara Buxar main



road and intercepted one Mini Bus with Registration No. No. U.R.I. 1092 and found that two persons were sitting in the said bus and were upset and on enquiry, they disclosed their names and a briefcase was kept on their legs and interrogation, they disclosed that *ganza* had been kept in the said briefcase. His evidence disclosed that he informed them about their right to be searched before a Magistrate but they refused to be searched before the Magistrate and, thereafter, in the presence of the co-passengers Birendre Yadav and Bhupesh Kumar Dubey, briefcase was opened and *ganza* from a sky blue polythene wrapped in Times of India Newspaper was recovered. The said *ganza* was seized and it was weighed and it was found to be six kilograms and seizure list was prepared on which, signatures of driver and conductor along with the signatures of the accused persons were taken. He has also stated in his evidence in para -2 that sample of the said *ganza* was prepared and it was kept in a tin container of *zarda*. His evidence also disclosed that rest of the *ganza* was also sealed and signature of the witnesses and the accused persons were also taken and the S.P. Buxar and the S.D.P.O. Buxar were informed about the recovery of *ganza*. Self statement was recorded at the place of occurrence itself. Thereafter, they came along with the seized articles and the accused persons to the police station and lodged the F.I.R. His evidence further disclosed that on next day, the articles and accused persons were produced before the Special Judge and he has also



produced the material exhibits marked as M.R. No. 10/2002 obtained from *malkhana*. This witness has been cross-examined but except some minor discrepancies, there is absolutely nothing in his cross-examination to doubt his testimony.

12. P.W. 2 has been tendered for cross-examination.

13. P.W. 3 Rampravesh Singh, the member of patrolling party and he has supported the prosecution case of recovery of briefcase. However, he has stated in his evidence that after recovery accused persons were brought to the police station and the brief case was opened by one Birendra Yadav there was one more person with him and from attaché *ganza* was recovered kept in a polythene. He has identified his signature over the seizure list. In the cross-examination in para -2, he has stated that the seizure list was prepared near the vehicle itself.

14. P.W. 4 has also been tendered for cross-examination.

15. P.W. 5 is the technician of Forensic Science Laboratory and he has proved F.S.L. reported and stated that on chemical examination of specimen the dry flower substance contained in the tin container were found to be *ganza* containing Tetra Hydro Cannabinol, the chief toxicating ingredient. He has also been cross-examined but there is nothing in his cross-examination to doubt his testimony.

16. P.W. 6 is the Investigating Officer and he has supported the recovery of *ganza* and stated that place of occurrence was the Ara



Buxar main road and Rampravesh Singh told him that seizure list was prepared near the bus itself. The sample was sent for chemical examination as per order of Special Judge through contable Rajballabh Yadav on 03.06.2002, which was received in the F.S.L. on 10.06.2002. His evidence in para -10 further shows that on the basis of the confession of accused persons several places were raided but nothing was recovered.

17. Bhupesh Kumar, who is seizure list witness has been examined as C.W. 1 but he has denied that any seizure was made in presence of him. However, he has identified his signature and he has denied to have made any statement before the police.

18. Considering the evidence as discussed above, it appears that the prosecution evidence disclosed that one briefcase was recovered, which was kept by the appellants on their legs and opening the said briefcase *ganza* was found, which was weighed and sample was prepared and seizure list was also prepared. So far contradiction that P.W. 3 has stated that seizure list was prepared in the police station. It appears that evidence of P.W. 1 and P.W. 4 as well as the seizure list (Ext 1) clearly disclosed that seizure was made near the bus. In such a situation, if there is contradiction in the evidence of P.W. 3 that might be due to the long passage of time as he was deposing after three years of recovery. It further appears that the accused persons and the seized articles were produced before the



Special Judge, Buxar very next day and on the order of Special Judge, Buxar, the sample was sent to the Forensic Science Laboratory for its examination. The evidence also disclosed that the appellants were asked as to whether they wanted to be searched before the Magistrate but they refused. Further the evidence also disclosed that the information with regard to seizure of *ganza* was also given to the superior officers and the report of Forensic Science Laboratory shows that the sample sent for chemical examination was found to be *ganza* containing Tetra Hydro Cannabinol and material exhibit has also been produced before the Court, which has been brought from *malkhana* and *malkhana* no. has also been mentioned on that. All these evidences are consistent with regard to the recovery of *ganza* from the appellants and all the statutory provisions of NDPS Act, has also been followed.

19. Accordingly, I do not find any infirmity in the conviction of the appellants under Section 20(b)(ii) (B) of N.D.P.S. Act and the same is hereby affirmed.

20. However, so far sentence of the appellants is concerned, it appears from perusal of judgment that the appellants were aged about 22 years and 18 years respectively at the time of judgment in the year 2003 and at the time of occurrence, they must be aged about 21 and 17 years respectively and further the recovery is only six kilograms of *ganza*, which is quite less than the commercial quantity.



It further appears that the appellants had remained in custody for one and half years during pendency of Trial and there is nothing on record to show that they were involved in any other case or have ever misused the privilege of bail and as such, considering their young age, no fruitful purpose will be served to send them behind the bars to serve the remaining sentence, accordingly, the period of sentence is reduced to the period already undergone by them in judicial custody.

21. With the above modification in sentence, these appeals are dismissed.

(Vinod Kumar Sinha, J)

sunil/-

AFR/NAFR	AFR
CAV DATE	24.07.2018
Uploading Date	03.08.2018
Transmission Date	03.08.2018

