

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.169 of 2009

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Laxmi Thakur, son of Late Singhasan Thakur, resident of village-Chikani,
Post Office-Barawa, Police Station-Harpur, District-East Champaran
(Motihari).

... .. Appellant/s

Versus

State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Raghav Prasad-Advocate
For the Respondent/s : Mr. Sujit Kumar Singh-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

05-12-2018

Appellant Laxmi Thakur has been found guilty for an offence punishable under Section 20(b)(II) of the N.D.P.S. Act and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.25,000/- and in default thereof, to undergo S.I. for six months, additionally, by the Additional Sessions Judge, Fast Track Court-II, West Champaran at Bettiah vide judgment of conviction dated 22.11.2008 and order of sentence dated 25.11.2008, relating to Trial No.08 of 1994, arising out of Government Case No.02 of 1994.

2. Prosecution has been launched against the appellant at the behest of excise officials on an allegation that on 04.04.1994, while they were proceeding over Narayan Ghat Road, they found the appellant in suspicious circumstance, whereupon apprehended, searched out, in presence of witnesses



Kameshwar Prasad (PW-2), Amar Nath Mishra (not examined) and Harendra Sah (PW-3) and during course thereof, one kilogram Charas has been found from his possession. Consequent thereupon, the trial proceeded as is evident from the order sheet as a Complaint Case being governed by Excise Act and further, altogether two Pws were examined and then, on 17.04.1995, charge was framed under Section 20(b)(II) of the N.D.P.S. Act. It is evident that PW-1 and PW-2 never turned up after charge while PW-3, Harendra Sah has been examined on 13.06.2008 and after closure of the prosecution case, statement of the appellant/ accused was recorded under Section 313 of the Cr.P.C. and then, passing through Zigzag of the procedural law i.e. defence argument, the judgment impugned has been passed, subject matter of instant appeal.

3. 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 on his behalf.

4. After perusal of the record, it is evident that it happens to be hopelessly conducted case. The prosecution was not at all aware with the fact that whether this case should have been proceeded in accordance with N.D.P.S. Act or under the



Excise Act. In terms of definition of intoxicated substance so prescribed under Section 2(13) of the Excise Act does contain presence of charas and that being so, is punishable under Section 47 of the Excise Act. That being so, when the initiation of proceeding has been taken up at the end of the excise official, then in that circumstance, the excise officials were quite competent to investigate the case in accordance with Section 77 of the Excise Act and in likewise manner, was empowered to exercise the power of a police official, during course thereof, as provided under Section 78 of the Act. Had there been proper exercise at the end of the excise officials in accordance with Section 77 as well as 78 of the Excise Act, the matter would have been properly investigated, which none of the PWs has spoken. Apart from this, as per Section 82 of the Excise Act, the matter was required to be reported to the superior officials, which as per evidence of PW-1 as well as PW-3 completely kept silence.

5. So, had there been proper exercise of power by the excise officials in accordance with Excise Act, then in that circumstance, the prosecution would have under Section 47 of the Excise Act and paraphernalia so prescribed under Excise Act as indicated hereinabove, would have been the proper procedure



to be taken up at their end.

6. From the prosecution report, it is evident that same has been filed attracting the offences punishable under Section 20(b)(II) of the N.D.P.S. Act. Then in that circumstance, the procedure, the mandate, the requirement so prescribed thereunder were to be followed. There happens to be specific disclosure that from the physical possession of the appellant, one kilogram Charas was found and seized. That means to say, the recovery was on the basis of personal search. When the recovery was on the basis of personal search, then Section 50 of the N.D.P.S. Act was applicable. On account of applicability of Section 50 of the N.D.P.S. Act, the search-cum-seizure authority was under obligation to ask for whether the delinquent was inclined to be searched in presence of a Gazetted Officer and had there been such offer, then in that circumstance, it would have been on the appellant to have shown his inclination or not. Failure on the part of the prosecution, happens to be in utter contravention of Section 50 of the Act, whereupon a serious dent is found over the prosecution case. Moreover, from the deposition of PW-1, PW-2, PW-3, though it is evident that PW-2 has disowned the prosecution case and was declared hostile, the remaining PW-1 and PW-3 have not stated that articles were



sealed after preparation of the sample, sample was sent to an expert, through the process of the Court any report was there at the end of the expert, the matter was reported to the superior officials. Though, the material exhibit has been produced in Court and is made a material Exhibit No.1, but there happens to be absence of remark at the end of the learned lower Court that it was in sealed condition bearing the case number and further, with regard to its custody during the intervening period, which has also been kept in abeyance at the end of PW-1 as well as PW-3. Not only this, neither PW-1 nor PW-3 has stated that case was investigated upon.

7. Consequent thereupon, the finding recorded by the learned lower Court appears to be difficult to be concurred. Consequent thereupon, the judgment impugned is set aside. Appeal is allowed. Appellant is on bail, hence is discharged from its liability.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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