

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.623 of 2016**

Arising Out of PS. Case No.-48 Year-1986 Thana- GOVERNMENT OFFICIAL COMP.
District- Supaul

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Jageshwar Rai Son of Chulhai Rai, Resident of Village- Haripur Motipur, P.S.
Karjain Bazar, District- Supaul. Appellant/s

Versus

The State Of Bihar Respondent/s

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Appearance :

For the Appellant/s : Mr. M. S. Khan, Sr. Advocate
Mr. Chandra Bhushan Das, Advocate
For the Respondent/s : Mr. Manoj Kr. Singh, CGC.

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**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT**

16-08-2019

Sole appellant, Jageshwar Rai having been found

guilty for an offence punishable under Section 20 (b) of the NDPS Act, sentenced to undergo RI for ten years as well as to pay fine appertaining to Rs. 50,000/- (Fifty thousand), in default thereof, to undergo SI for three months, vide judgment of conviction dated 21.07.2016 and order of sentence dated 28.07.2016 passed by ^{1st} Additional Sessions Judge, Supaul relating to Special Case No. 04/1997.

2. A raiding party was constituted on an information received from Sri. R. Prasad, Superintendent, Custom regarding storage of Nepali Ganja by Jageshwar Rai of Village Motipur Haripur, PS-Karjain and accordingly, raid was conducted. On search, nothing has been found from his physical possession as well as from his house but, during course of interrogation, he disclosed to have concealed it under the heap of straw, as narrated, being at some distance, whereupon the



raiding party gone there and after removing the same 24 bags weighing 547 Kilograms of Nepali Ganja has been found, seized and for that, necessary formalities were performed including arrest of the accused, recording of inculpatory confessional statement.

3. After conducting an inquiry, the prosecution report was filed which happens to be the basis of the instant trial.

4. Defence case as has been pleaded, suggested as well as traced out from statement under Section 313 CrPC is that of complete denial, however, nothing has been adduced to justify the same.

5. As is evident, altogether eight PWs have been examined on behalf of prosecution in support of its case who are PW-1, Yogendra Pd. Azad, PW-2, Rajeshwari Prasad, PW-3, Ganga Pd. Sinha, PW-4, Mirza Beg, PW-5, Madhup Sharan, PW-6, Sri Prasad Rai, PW-7, Sri Prasad Rai and PW-8, Hari Pd. Rai. Side by side, has also exhibited Ext-1, Seizure list, Ext-2, Inquest of Seizure, Ext-3, interrogation of accused, Ext-4, Weight of seized Ganja of each bag, Ext-6, 6/1, 7, 7/1, Signature of witness Prasad Rai and Hari Prasad Rai on Seizure and confessional statement of accused respectively.



6. Gone through the evidence available on the record. From the form of the deposition, it is crystal clear that PWs-6 and 7 are the same persons. Once PW-6 was tendered, then how he has been examined as PW-7 is a matter of surprise. Be that as it may, so far status of the witnesses are concerned, PW-4 has been declared hostile. PWs-2, 3 have not claimed identification of the appellant/accused in the dock. That means to say, evidence of PW-1 and PW-5, the Custom Officials including that of PWs-7 and 8 are to be seen in consonance with the documentary evidence including so alleged statement of the appellant to be statement purported to be in accordance with Section 108 of the Customs Act.

5. It is needless to say that the statement of an accused recorded by a Custom Official is admissible in the eye of law as, the identity of the Custom Official has not been at par as a police and so, the barrier so prescribed under Section 26 of the Evidence Act is not at all applicable. In the aforesaid background, prima facie, the statement of the appellant would justify the conviction but could it be? The Hon'ble Apex Court times without number has observed that on account of stringent punishment so prescribed under the NDPS Act does put an obligation upon the prosecution to follow the mandatory



provision so prescribed thereunder in its true spirit. In light thereof, when the evidence on record has been gone through, it is apparent that none of the witnesses has stated that sample was prepared. Ganja was sealed. None has stated that sample was ever sent for chemical examination. The report is not on the record. Not only this, during course of evidence, neither the alleged seized Ganja nor the sample nay the destruction report, if any, nor representative sample in accordance with Section 52(A) of the NDPS Act has been brought up on record. That being so, it happens to be a case of no evidence. In the aforesaid background the presence of so alleged statement purported to be in accordance with Section 108 of the Customs Act loses its sanctity.

6. The Hon'ble Apex Court in the case of ***Mohinder Singh v. State of Punjab reported in AIR 2018 SC 3798*** has held as follows :-

“12. For proving the offence under the NDPS Act, it is necessary for the prosecution to establish that the quantity of the contraband goods allegedly seized from the possession of the Accused and the best evidence would be the court records as to the production of the contraband before the Magistrate and deposit of the same before the Malkhana or the document showing destruction of the contraband.

13. In *Vijay Jain v. State of Madhya Pradesh* (2013) 14 SCC 527, this Court reiterated the



necessity of production of contraband substances seized from the Accused before the trial court to establish that the contraband substances seized from the Accused tallied with the samples sent to the FSL. It was held that mere oral evidence to establish seizure of contraband substances from the Accused is not sufficient. It was held as under:

“10. On the other hand, on a reading of this Court's judgment in *Jitendra v. State of M.P.* (2004) 10 SCC 562, we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the Accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the Accused would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile. Again, in *Ashok v. State of M.P.* (2011) 5 SCC 123, this Court found that the alleged narcotic powder seized from the possession of the Accused was not produced before the trial court as material exhibit and there was no explanation for its non-production and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the Appellant.

7. Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower court is set aside. Appeal is allowed.



8. Appellant is under custody, he is directed to
be released forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J)

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