IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.178 of 2021

Arising Out of PS. Case No.-187 Year-2020 Thana- GOVERNMENT OFFICIAL COMP.
District- Gopalganj

==

MANJAY KUMAR Son of Sri Brijnandan Rai Resident of Village - Chakmehsi, P.S. - Maniyari, District - Muzaffarpur.

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

==

with

CRIMINAL APPEAL (DB) No. 189 of 2021

Arising Out of PS. Case No.-187 Year-2020 Thana- GOVERNMENT OFFICIAL COMP.
District- Gopalganj

==

ARBIND RAI Son of Enardal Rai Resident Of Village- Mathurapur, P.S.- Manihari, District- Muzaffarpur

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

==

Appearance :

(In CRIMINAL APPEAL (DB) No. 178 of 2021)

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Adv
		Ms.Vaishnavi Singh, Adv
		Mr. Imteyaz Ahmad, Adv
		Mr. Ritwaj Raman, Adv
		Mr. Ritwik Thakur, Adv
		Mr. Pravin Kumar, Adv
		Mr. Purushottam Kumar, Adv
For the Respondent/s	:	Ms. Shashi Bala Verma, APP

(In CRIMINAL APPEAL (DB) No. 189 of 2021)

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Adv
		Ms.Vaishnavi Singh, Adv
		Mr. Imteyaz Ahmad, Adv
		Mr. Ritwaj Raman, Adv
		Mr. Ritwik Thakur, Adv
		Mr. Pravin Kumar, Adv
		Mr. Purushottam Kumar, Adv
For the Respondent/s	:	Mr. Sujit Kumar Singh, APP

==

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE JITENDRA KUMAR

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 13-09-2023

The appellants have preferred these appeals under Section 374(2) of the Code of Criminal Procedure assailing the judgment of conviction dated 23.01.2021 and an order of sentence dated 27.01.2021 passed by the learned Additional District & Sessions Judge-II-cum Special Judge Excise Act, Gopalganj in Excise Case No. 187 of 2020 arising out of Trial no. 4422 of 2021 whereby and whereunder, the appellants have been convicted and sentenced as under :-

Appellant Manjay Kumar in Criminal Appeal (DB) No. 178 of 2021

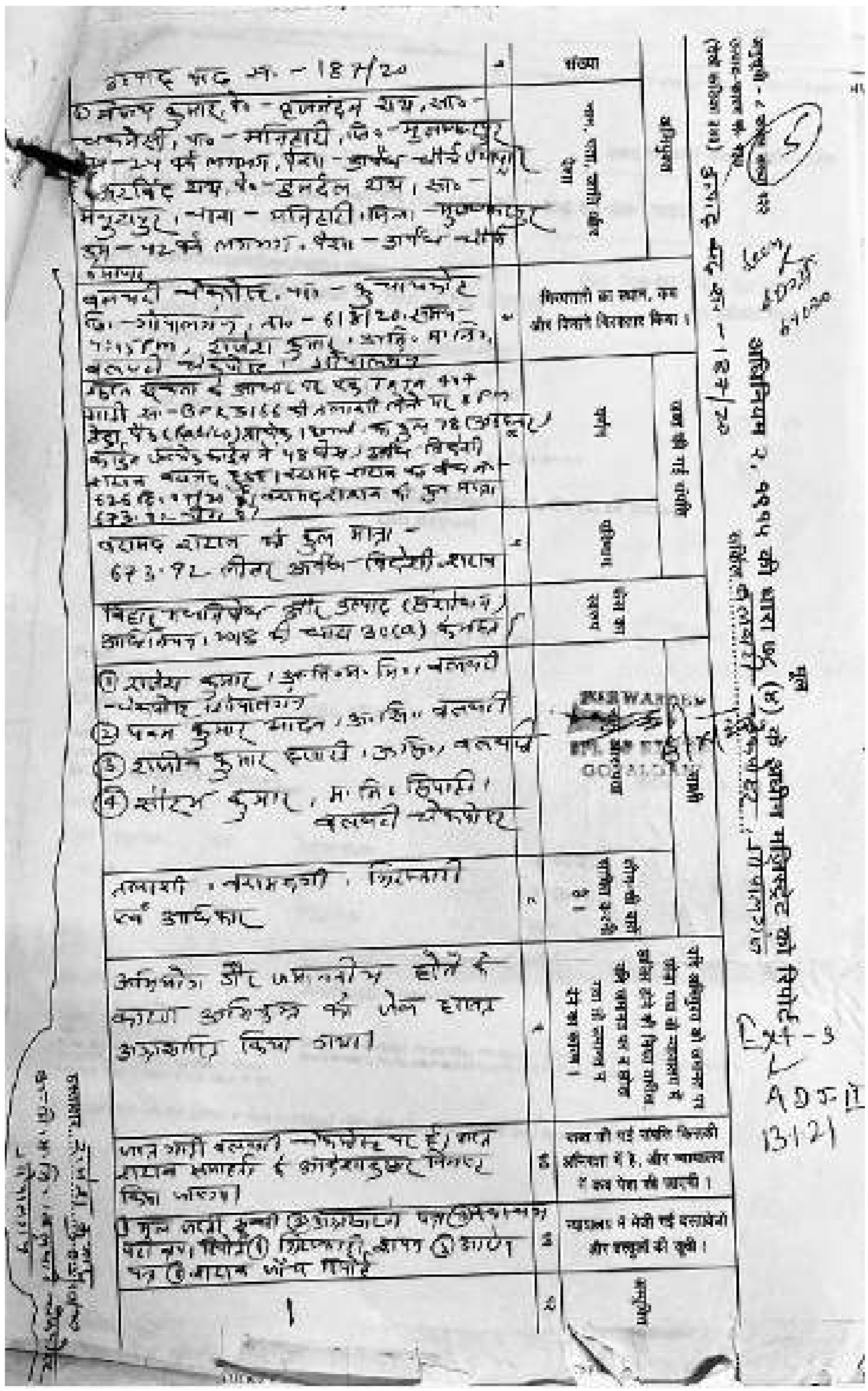
Penal Provision	**Sentence**		
	Imprisonment	**Fine (Rs.)**	**In default of fine**
Section 30(a) of the Bihar Prohibition & Excise Act, 2016	Rigorous imprisonment for life	Rs. 10 Lakh	S.I for one year

Appellant Arbind Rai in Criminal Appeal (DB) No. 189 of 2021

Penal Provision	**Sentence**		
	Imprisonment	**Fine (Rs.)**	**In default of fine**
Section 30(a) of the Bihar Prohibition & Excise Act, 2016	Rigorous imprisonment for life	Rs. 10 Lakh	S.I for one year

2. A Sub-inspector of Prohibition and Excise Department, Gopalganj, Rajesh Kumar (PW-1) in his forwarding report to the court of learned 2nd Additional District and Sessions Judge, Gopalganj on 07.08.2020, asserted that based on a secret information, a TATA 407 vehicle bearing registration No. BPK 3166 was searched at Balthari check post of Gopalganj leading to recovery of illicit Indian Made Foreign Liquor (IMFL) to the tune of 673.92 litre. Two persons, who are the appellants herein, were found occupying the vehicle and were arrested. In his said forwarding report, he made a request for sending the sample of the seized illicit liquor for chemical examination to the Excise Chemical Laboratory, Patna. It was further mentioned in the said report dated 07.08.2020, that the chargesheet would be submitted later, after investigation. A request was made also for remand of these appellants, who were remanded to the judicial custody by an order dated 07.08.2020. The Court allowed the request for sending the sample of the seized illicit liquor to the Excise Chemical Laboratory. From the trial court's records, it transpires that a prosecution report, upon completion of investigation, was submitted on 05.10.2020. We, in the peculiar facts and circumstances of the facts emerging from the records, consider it desirable to reproduce a scanned

copy of the said prosecution report marked as Exhibit-3:-


उत्पाद काण्ड सं. - 187/20

बरामद शराब की कुल मात्रा - 673.72 लीटर अंग्रेजी-विदेशी शराब

Ext-3

3. It is easily discernible on a close reading of the prosecution report that that it contains no additional material over and above the facts mentioned in the forwarding report dated 07.08.2020, except the result of the chemical examination. The result of the chemical examination (Exhibit-4) forms part of the prosecution report which according to the prosecution confirmed that the sample so sent was analyzed as per the Bihar Prohibition and Excise Act, 2016 (hereinafter referred to as the 'Excise Act' in short), which was found to be illicit liquor (Whiskey) having ethyl alcohol content 43.2 % v/v, an intoxicant.

4. Be that as it may, upon taking of cognizance of the offence punishable under Section 30(a) of the Excise Act, charges were framed against these appellants for commission of the offence punishable under the aforesaid provision. It would be pertinent to note that it is not the prosecution's case that either of the appellants are registered owner(s) of the vehicle from which the illicit liquor was seized. The prosecution report does not disclose as to who was the registered owner of the vehicle and as to whether the Excise Department intended to prosecute him or not. The prosecution report does not indicate seizure of the vehicle from which the illicit liquor was,

according to the prosecution, recovered and seized.

5. The charges for commission of the offence punishable under Section 30(a) of the Excise Act were framed against these appellants. The appellants denied the charges and claimed to be tried. Accordingly, they were put to trial.

6. At the trial, prosecution examined three witnesses namely, Rajesh Kumar the complainant (PW-1), and two constables Pawan Kumar Yadav and Saurabh Kumar, (PW-2 and PW-3), of the Excise and Prohibition Department, to establish the charge against these appellants. In addition to the evidence of these three prosecution's witnesses, the prosecution also brought on record, the following documentary evidence:-

> "(i) Seizure list (Exhibit-1)
> (ii)Signature of PW-2 on the seizure list (Exhibit-1/1)
> (iii) Signature of Saurabh Kumar (PW-3) on the seizure list (Exhibit-1/2)
> (iv) Arrest memo (Exhibit-2)
> (v) Prosecution report (Exhibit-3)
> (vi) Result of chemical examination (Exhibit-4)"

7. After closure of the prosecution's evidence, these appellants were questioned under Section 313 of the CrPC so as to give them an opportunity to explain the circumstances emerging against them based on the prosecution's evidence

adduced at the trial. The appellants denied the circumstances. The appellant Manjay Kumar, responding to one of the questions put by the trial court mentioned that he did not know about the presence of illicit liquor. We deem it proper to reproduce the examinations of these appellants under Section 313 of the CrPC, which are as under:-

> **"मंजय कुमार**
> प्रशन:- क्या आपने साथियों का साक्ष्य सूना है ?
> उत्तर:- जी हाँ |
> प्रशन:- आपके विरुद्ध साक्ष्य है कि आप दिनांक 06.08.2020 के संध्या 4:15 बजे ग्राम बलथरी चेक पोस्ट थाना कुचायकोट जिला गोपालगंज टाटा 407 वी.पी.के 3166 पर 673.92 एम.एल विदेशी शराब लेकर बिहार मे मद्य निषेध के बावजूद बेचने के नियत से परिवहन करते हुए रंगे हाथो पकड़े गये| क्या कहना है|
> उत्तर:-मुझे शराब के बारे मे पता नहीं था|
> प्रशन:-सफाई मे क्या कहना है|
> उत्तर:-निर्दोष हूँ | मजदूर आदमी हूँ |
>
> **अरविन्द राय**
> प्रशन:- क्या आपने साथियों का साक्ष्य सूना है ?
> उत्तर:- जी हाँ |
> प्रशन:- आपके विरुद्ध साक्ष्य है कि आप दिनांक 06.08.2020 के संध्या 4:15 बजे ग्राम बलथरी चेक पोस्ट थाना कुचायकोट जिला गोपालगंज टाटा 407 वी.पी.के 3166 पर 673.92 एम.एल विदेशी शराब लेकर बिहार मे मद्य निषेध के बावजूद बेचने के नियत से परिवहन करते हुए रंगे हाथो पकड़े गये| क्या कहना है|
> उत्तर:-जी नहीं |
> प्रशन:-सफाई मे क्या कहना है|
> उत्तर:-निर्दोष हूँ |”

8. The trial court after having appreciated the evidence on record, held the appellants guilty of the offence punishable under Section 30(a) of the Act and sentenced them to imprisonment and fine as has been noted above.

9. Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of the appellants has drawn the court's attention to Section 73 of the Excise Act, which empowers the officials mentioned therein to enter, inspect, search and seize any document, sample, equipment, conveyance, commodity, intoxicant material, raw material or any other item of concern. He has submitted that such power under Section 73 of the Excise Act, however, can be exercised "subject to such restriction as may be prescribed by the State Government". He has further submitted that the State Government has not prescribed any restrictions as contemplated under section 73 of the Excise Act, so far. He has further drawn our attention to Section 90 of the Excise Act, sub-section (1) of which provides application of the provisions of the Code of Criminal Procedure, 1973, relating to arrests, detention, searches, summons, warrants of arrest, search warrants and the production of persons arrested or articles seized, so far as, otherwise expressly provided in the Act. He has submitted that it is evident from the forwarding

report dated 07.08.2020 and prosecution report dated 05.10.2020, that complainant (PW-1) did not follow the mandatory requirement laid down under sub-section (4) of Section 100 of the CrPC. He has also submitted that there is no evidence at all of proper drawing of the sample. He has also submitted that the material exhibits were not produced at the trial. He has lastly, submitted that no question was put to these appellants by the trial court about the sample having been drawn, tested in Excise Chemical Laboratory found to be Whiskey (Alcohol) while examining the appellants under section 313 of the CrPC. The said question having not been put to the appellants under Section 313 of the CrPC, ought not to have been considered by the trial court while recording the finding of guilt. He contends failure to put this crucial question to the appellants at the trial has seriously prejudiced their defence.

10. Section 73 of the Excise Act read as under:-

> **“73. Power to enter, inspect, search and seize.** - Any of the following officers namely:
> (a) The Excise Commissioner; or
> (b) The Collector; or
> (c) Any block level officer and above of the District authorized by the Collector; or
> (d) Any Excise Officer; or
> (e) Any police officer not below the rank of [Assistant

Sub-Inspector]; or

(f) Any other officer or agency or force, armed or otherwise, authorized for this purpose by the State Government;

may, without warrant but subject to such restrictions as may be prescribed by the State Government, enter , inspect ,search any place at any time, day or night, and seize any document, sample, equipment, conveyance, animal, commodity, intoxicant, material, raw material or any other item of concern."

(underscored for emphasis)

11. Considering the submission advanced by Mr. Thakur with reference to Section 73 of the Excise Act that no restriction has been prescribed by the State Government, as contemplated under the said provision, we had requested Mr. P.K. Shahi, learned Advocate General to inform this Court as to whether such restrictions have been laid down or not. We have been informed by the learned Advocate General that so far, no restrictions have been prescribed by the State Government for exercise of power to inspect search and seizure conferred under Section 73 of the Excise Act. We need not to comment for the present, on the abject failure on the part of the state Government to prescribe the restrictions as statutorily required under the Act, moreso when the Act provides for stringent consequences of seizure of illicit liquor from the possession of a person. It is up to the State Government to prescribe restrictions as

contemplated under Section 73 of the Excise Act. We may, however, observe that failure on the part of the State Government to provide for the restrictions under the said provision may have far reaching consequences.

12. Ms. Shashi Bala Verma learned Additional Public Prosecutor appearing in Criminal Appeal (DB) No. 178 of 2021 and Mr. Sujit Kumar Singh, learned Additional Public Prosecutor appearing in Criminal Appeal (DB) No. 189 of 2021, for the State, have though attempted to defend the finding of conviction recorded by the trial Court but not with their usual vehemence, in the background of the peculiar facts and circumstances of the present case.

13. We have perused the impugned judgment of the trial court and the lower court's records. We have carefully appreciated the evidence adduced at the trial. We have given our thoughtful consideration to the rival submissions advanced on behalf of the parties.

14. Here is a case where there are three witnesses to the search and seizure of the illicit liquor, the first being the complainant, a Sub-inspector of Excise and Prohibition Department and the rest two others are the constables of the same department. The informant (PW-1) is said to have received

a secret information. There is no clue as to whether the said secret information was documented in any form or not. Further, Section 90 of the Excise Act clearly lays down that the provisions of CrPC shall apply in relation to the matters mentioned therein, including search and seizure. Section 100 of the Cr.P.C lays down the general procedure of search, sub-section (4) of which reads as under:-

> "(4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do."

15. In the present case, there is no evidence that the excise personnel made any attempt to call upon two or more inhabitants of the locality much less, the search having been made in their presence. Further, though an application was made before the learned court for sending the samples to the Excise Chemical Laboratory, there is no evidence of preparation of the sample. The material exhibits were not produced at the trial. The entire case of the prosecution in the court's opinion is full of lacunae and in the aforesaid background, the conviction, in our

opinion cannot be sustained. There is no gainsaying that the Bihar Prohibition and Excise Act, 2016 contains stringent provisions, Section 30(a) thereof provides for imprisonment for a term which may extend to life and with fine which may extend to Rs. 10 Lacs. It is well established principle of criminal jurisprudence that greater the punishment, stricter must be the proof.

16. In the present case, in our opinion, the prosecution has not been able to establish that the sample which was sent for chemical examination was drawn from the illicit liquor recovered from the vehicle. The search having not been made in accordance with the requirement of sub-section 4 of Section 100 of the CrPC weakens the prosecution's case further. We find force in the submissions advanced on behalf of the appellants that the trial court having not put the questions to the appellants as regards the finding of the Excise Chemical Laboratory, the same ought not to have been taken into consideration by the trial court for recording the finding of conviction.

17. For the reasons mentioned above, we do not find it safe to uphold the finding of conviction recorded by the trial court based on the evidence of three witnesses, all of whom are personnel of the Excise and Prohibition Department.

18. Accordingly, the impugned judgment of conviction dated 23.01.2021 and order of sentence dated 27.01.2021 passed by the learned Additional District & Sessions Judge-II-cum Special Judge Excise Act, Gopalganj in Excise Case No. 187 of 2020 arising out of Trial no. 4422 of 2021, are set aside.

19. Both these appeals are allowed.

20. Since the appellants are in custody, let them be released from jail forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

(Jitendra Kumar, J)

ranjan/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	03.11.2023
Transmission Date	03.11.2023