

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1109 of 2016**

Arising Out of PS. Case No.-27 Year-2010 Thana- GOVERNMENT OFFICIAL COMP.
District- East Champaran

=====

Md. Sarfaraj Ansari Son of Abtab Ansari, Permanent Resident of Village and P.O.- Nagra Bazar, District- Saran at Chapra Bihar, at present Residing at House No. 16, Maulana Azad Road, Koila Sadak, P.S.- Budge- Bude, District- 24, Pargana West Bengal.

... .. Appellant/s

Versus

The Union of India

... .. Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Vijay Shanker Srivastava, Adv.
For the Respondent/s : Mr Manoj Kumar Singh, (CGC)

=====

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE HARISH KUMAR

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 12-05-2023

Heard Mr. Vijay Shanker Srivastava, for the appellant and Mr. Manoj Kumar Singh, for the Union of India.

2. The appellant has been convicted under Sections 20(b)(ii)(C) and Section 23(C) of the Narcotic Drug & Psychotropic Substances Act, 1985 (for short the “NDPS Act”) vide judgment dated 24.08.2016 in N.D.P.S. Case No. 03 of 2010, by the learned Additional Sessions Judge-III-cum-Special Judge, East Champaran, Motihari and vide order



dated 29.08.2016, he has been sentenced to undergo R.I. for 15 years for offences under Sections 20(b)(ii)(C) as well as 23(C) of the NDPS Act, to pay a fine of Rs. 1 lac and in default of payment of fine to further suffer imprisonment for six months. The sentences have been ordered to run concurrently.

3. The appellant is the driver of the Tank Lorry which was intercepted by the raiding team. 59 packets of *ganja* containing approximately 520 Kgs. were recovered from the secret chamber of the Tank Lorry. Five persons were made accused in this case, out of whom, three were put on trial but only the appellant was convicted and sentenced whereas other two who are the joint owners of the vehicle (Tank Lorry) have been acquitted of all the charges.

4. The Trial Court has examined twelve witnesses and had perused eighteen exhibits for coming to the conclusion that the appellant was guilty of both the offences viz. under Sections 20(b)(ii)(C) as well as 23(C) of the NDPS Act.



5. The allegation has been made by Rajesh Kumar Chaudhary, Custom Inspector-cum-Seizing Officer-cum-Complainant (P.W.2), that during the course of routine checking, a Tank Lorry bearing Registration No. W.B. 19A-1157, was intercepted on 05.02.2010 at about 08:00 PM near Border check post of Land Customs Station, Raxaul. The Tank Lorry was coming from Birgunj (Nepal) side. When the vehicle was signalled to stop at the Indian Border, that was attempted to be evaded and the driver sped the vehicle but was intercepted with the help of the raiding team. The appellant had been driving the vehicle. He tried to flee away, in course of which, he received injuries but was promptly nabbed by the raiding team. In his presence, the Tank Lorry was searched. It was found that stealthily, in the secret chamber of the Tank Lorry, 59 packets of *ganja* were stashed.

6. From the preliminary finding of the contents of the packets, it was found to be Narcotics as it was emitting characteristic pungent smell. The bags were unloaded, counted and



quantified before the appellant and two other independent witnesses. The gross weight of the Narcotics was found to be 560 Kgs. but the net weight was ascertained to be 520 Kgs. It may be noted that the packets contained the flowering seeds and the stalks of the cannabis plant. The value of the recovered Narcotics was assessed to be worth Rs. 10,40,000/-, which assessment was made at the rate of Rs.2,000/- Kg. It further appears from the records that three homogeneous representative samples, each weighing 25 gms. were drawn by mixing representative samples taken out from different packets and were sealed before the appellant and two other independent witnesses. The sealed samples were sent to the Joint Director, Chemical Laboratory, Customs House, Kolkata along with the test memo for their chemical examination. The appellant had disclosed before the raiding team that he had been driving the said vehicle for last one year and had loaded the Narcotics near Narayani, somewhere in Nepal and had been proceeding towards Raiganj in the



district of West Bengal. He disclosed the name of co-accused persons, namely, Nand Kishore Sao and Sahjada Mallick, both residents of West Bengal, to be the joint owners of the Tank Lorry. The appellant further disclosed that he was offered an amount of Rs. 20,000/- for taking the Narcotics from Nepal to West Bengal for its sale in the market.

7. P.W.2 found that two of the chambers of the Tank Lorry were kept empty in order to mislead the raiding team and the packets containing Narcotics were stashed in two other chambers. It further appears from the records that without any delay, the samples so collected, numbered and sealed on 05.02.2010, were dispatched to the Joint Director, Chemical Laboratory, Kolkata on 06.09.2010. But, it was only on 10.03.2010, that the report came forthcoming from chemical laboratory, confirming that the sample sent to it corresponded positively as *ganja*. The sample was in the form of flowering tops consisting of leaves, seeds and stalks and reflected characteristics of



ganja. This assessment was made on the basis of microscopic, chemical and chromatographic examination; the result of all of which was that it was *ganja*. The vehicle also was seized and summons were issued to the other co-accused persons. The appellant had confessed that Nand Kishore Sao, the joint owner of the vehicle had given him free hand to load anything in case he needed money for taking to its destination the Tank Lorry.

8. The raiding team found clear involvement and complicity of all the accused persons including the appellant in smuggling *ganja* from Nepal to India, thereby making them liable for being prosecuted for offences under Sections 20(b)(ii)(C) and 23(C) of the NDPS Act. The other accused persons were also charged under Sections 27 and 29 of the NDPS Act.

9. It was submitted on behalf of the appellant that though in the first statement and the official complaint of P.W.2, it has been shown that all the formalities under Section 42 of the



NDPS Act, 1985, had been complied with but in fact, it had not been complied with. In this context, he referred to the statement of the witnesses wherein it has been recorded that samples were not drawn from all the packets. At the time of making samples and sealing the rest of the seized Narcotics, no photograph was taken.

10. From the deposition of the witnesses including that of P.W.2, it has been argued that no attempt was made to take the sample in duplicate as is required under the Standing Instruction Nos. 1/88 and 1/89 of the NCB with respect to search, seizure and sampling. As on date, it is governed by the NDPS (seizure, storage, sampling and disposal) Rules, 2022.

11. The balance of the seized Narcotics was also never sealed. It has further been argued on behalf of the appellant that there is nothing on record to indicate as to where was the rest of the Narcotics taken. No receiving Register of the *Malkhana* has been proved during the course of the trial. Only one Arvind Kumar Sinha, Godown



In-charge of Land Customs Station, Raxaul (P.W.11), has deposed before the Trial Court that he was in possession of the certificate of disposal of the Narcotics. This, it has been argued, would not satisfy the requirements under the NDPS Act, 1885 to fully confirm that the samples which were drawn from the consignment were the same which was deposited in the *Malkhana* and had been destroyed under the certificate of the Authorities. Not proving the same is fatal for the prosecution version, especially when there is a presumption of culpable mental state against an accused person and very stringent punishments have been provided for such offences.

12. Similarly, it has been argued, that none of the witnesses who were the members of the raiding team had testified to the fact that there was any preliminary test by UN Test Kit for P.W.2 to come to a preliminary conclusion that what was being seized was Narcotics and not anything else. Where was the weighment made is also not clear. Neither P.W.2 nor the other members of the raiding



team have come up with any specific statement that they were carrying the weighing machine along with the team. The other ground raised on behalf of the appellant is that no report was sent to the concerned authorities within 72 hours of the search and seizure of the Narcotics as contemplated under Section 42 of the NDPS Act. Lastly, it has been submitted that the complainant himself has investigated the case and thus it cannot be said that there was any fair investigation.

13. The appellant had resiled from his voluntary and interrogatory statement and had even raised a preliminary objection before the Trial Court that he was badly and brutally assaulted by the raiding party, leading to injuries on his person. It has wrongly been submitted that the injuries received by the appellant were caused to him when he wanted to flee away after jumping from the Tank Lorry during the course of search.

14. On these grounds, it has been urged that the conviction and sentence of the appellant



be declared bad in the eyes of law and facts, more so when the owners of the Tank Lorry have been acquitted of all the charges. There is a further refrain of the appellant that the sentence imposed against him is way too harsh and the Trial Court did not take into account relevant factors, especially that this was the first offence reported against the appellant and that he was the sole earning member and a person of young age.

15. As opposed to the aforementioned contentions, Mr. Manoj Kumar Singh, learned advocate for the Union of India, has submitted that the conduct of the appellant clearly establishes that he was guilty of smuggling the Narcotics from Nepal to Indian Border. The fact that he speeded of the vehicle on being signalled to stop and that he attempted to flee away is good enough evidence for a clear inference that the appellant had the knowledge that in the Tank Lorry, Narcotics were kept and that there was an attempt of the appellant to evade the arrest and seizure. He has further submitted that very adroitly two of the



secret chambers of the Tank Lorry were kept empty so as to mislead any raiding team. He further submitted that from the voluntary and interrogatory statement, it would appear that the appellant has not been put to any duress or coercion and he has accepted the fact that the Narcotics were loaded somewhere in Nepal to be brought inside the Indian Borders.

16. In response to the aforementioned argument on behalf of the appellant that there was non-compliance of Section 42 of the NDPS Act, Mr. Singh, for the Union of India, submitted that there was no prior information to the raiding team about any Narcotics being transported inside the country. The interception was made only while routinely checking the traffic at the Border Land Customs Station, when the vehicle in question was found coming from the Nepal side from which there was huge recovery of *ganja*. The samples were taken out from the packets, made into a homogeneous mixture and then sealed; each of the sealed packets containing approximately 24 gms. of the



mixture. Thus only because there is no statement of P.W. 2 or other members of the raiding team, that no photograph was taken of the samples or that of balance of Narcotics was not sealed or that there is no Register indicating that the balance of Narcotics were taken to the official *Malkhana*, the entire prosecution story cannot be disbelieved.

17. Mr. Singh has further submitted that according to Section 52A of the NDPS Act, the Narcotics are required to be destroyed subject to certain procedure to be followed. 52A(2) enjoins the authority that where any narcotic drugs, psychotropic substances, controlled substances or even conveyances is seized and forwarded to the concerned officer, an inventory has to be prepared with total details of the description, quality, quantity of the narcotics, the mode of packing, marks and numbers or such other identifying particulars which would indicate the country of origin of the narcotics and other relevant facts and the same has to be forwarded to a Magistrate for the purposes of certifying the correctness of the



inventory so prepared. In the presence of the Magistrate, the photograph of the drugs, substances and the conveyances are required to be taken for it to be rendered a true account. Sample is also required to be drawn in the presence of such Magistrate, certifying the correctness of any list of samples so drawn. Whenever such a request is made by the raiding authority or the authority seizing such narcotics, the Magistrate is obligated to allow such requests and if all these procedures are followed, then the inventory, the photograph and the list of samples certified by the Magistrate can be treated as primary evidence in respect of the evidence.

18. Arvind Kumar Sinha (P.W.11), though has only produced the certification document dated 04.11.2012 (Exts.15, 15/1, 15/2 and 15/3) but it was sufficient evidence to prove that 520 Kgs. of *ganja* were destroyed. P.W.11 had also produced Exts.17 to 17/13, in support of charge.

19. Thus, the argument of the appellant, it has been contended on behalf of the Union of



India, that there was no compliance of Section 52A is not correct and as noted above, mere omission of the witnesses to state such details in their deposition would not discredit the prosecution version. He has further submitted that there is a reason for making stringent provisions and providing for strict punishment in NDPS case. It does not remain an offence against an individual but is an offence against the society and the nation as a whole.

20. After having heard the learned advocates for the parties and having perused the records, we find that most of the requirements under Section 42 of the NDPS Act, have been complied with though we have not found any document on record or from the deposition of witnesses that a report regarding the seizure was forwarded to the authorized officer within 72 hours of the seizure, but such lapse in the present case would not be fatal to the prosecution case.

21. We also do not find that the samples were drawn in duplicate before the Magistrate or



any facsimile of the report was sent to the Magistrate. But, in the present set of circumstances, when the sample was drawn immediately and dispatched to the chemical laboratory at Kolkata, we have no reason to doubt the correctness of the prosecution version that the Narcotics were recovered from a Tank Lorry, which was driven by the appellant.

22. We do reckon that the deposition of the P.W.11, is only in lieu of the primary evidence of the Narcotics which were recovered viz., the certificate of destruction but that does not prove anything except that the Narcotics were destroyed and that its presentation may not be relevant for deciding the case.

23. Thus for not taking the photograph of the samples, we are not inclined to reject the prosecution case in its entirety.

24. However, we do take notice of the fact that the owners of the Tank Lorry have not been convicted by the Trial Court; that there is no direct evidence except for a voluntary statement of the



appellant which he has resiled that he loaded the Narcotics at Narayani in Nepal, thus bringing home the charges under Section 23(C) of the NDPS Act and; that the appellant had agreed to carry Narcotics for a paltry amount of Rs. 20,000/-.

25. Considering these aspects of the matter, in addition to the fact that the appellant was made accused in this case for the first time and there being complete absence of anything on record to indicate that his conduct in jail has not been satisfactory or that he has evinced any characteristics, which would tell us that he might return to recidivism or that he cannot be reformed and brought to the mainstream of the society, we hold that the sentence imposed against the appellant is way too harsh.

26. We have taken note of the fact that the appellant is in custody since 05.02.2010 and thus has spent more than thirteen years in jail.

27. We are, therefore, of the opinion that it would be sufficient if the sentence imposed on the appellant is reduced to the period which he has



already undergone in custody along with a fine of Rs.1,00,000/- (One lac), which is required to be paid or else the appellant would have to serve the sentence in case of non payment of fine as has been ordained by the Trial Court.

28. Thus, the appeal stands dismissed but with partial modification in the sentence of the appellant.

29. If the fine is paid, the appellant shall be released from the jail forthwith, unless his detention is required in any other case.

(Ashutosh Kumar, J)

(Harish Kumar, J)

Rohit/
Sunilkumar-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	16-05-2023
Transmission Date	16-05-2023

