

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.283 of 2017

Arising Out of PS. Case No.-4 Year-2013 Thana- PANCHRUKHI District- Siwan

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Santosh Ray, Son of Late Sheoji Ray, resident of village/Mohalla - Sadha
Dhola, P.S. - Chapra Mufassil, District - Saran at Chapra.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. B.N.K. Tiwary, Adv.

For the Respondent/s : Mr. A.M.P. Mehta, APP

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CORAM: HONOURABLE MR. JUSTICE SHAILENDRA SINGH
ORAL JUDGMENT

Date : 11-12-2023

1. The instant appeal has been filed against the judgment of conviction dated 02.11.2016 and order of sentence dated 10.11.2016 passed by learned Additional Session Judge-I, Siwan, in connection with G.R. No. 37 of 2013, Tr. No. 50 of 2016 arising out of Pachrukhi P.S. Case No. 04 of 2013, registered for the offences punishable under Sections 279, 337, 338 and 427 of the Indian Penal Code and Section 20b(ii)C of the Narcotic Drugs and Psychotropic Substances Act (in short N.D.P.S. Act), whereby and whereunder the appellant namely, Santosh Ray has been held guilty for the offence punishable under Section 20b(ii)C of the N.D.P.S. Act and sentenced to undergo rigorous imprisonment for ten years and a fine of rupees One lakh has also been imposed upon the appellant and in case of



non-payment of fine, he has been directed to undergo additional rigorous imprisonment for two years.

2. The substance of the prosecution's case is as follows:-

On 03.01.2013, the informant, then SHO of Pachrukhi P.S., was patrolling with other police officials and chowkidar and during that course, he got a secret information that narcotic material suspected to be *ganja* was being smuggled by a white colour *jeep* which was coming from *Chhapra* side and thereafter, he reached at *Paroli turn* with police party and when he saw the said vehicle coming speedily, he signalled the vehicle to stop but the vehicle was not stopped rather the same was driven in more speed by its driver and thereafter, in between *Paroli turn* and Gamhariya village, the jeep dashed against a tempo that resulted in injuries to some passengers riding in the tempo and both the *jeep* and *tempo* overturned at the side of road, after that, two persons got down from the jeep and started fleeing but one of them, was apprehended by the police party and the said person disclosed his name as Santosh Ray (appellant) but the second person managed to escape. The informant further revealed that the injured persons, who were riding in the tempo, were taken to *Primary Health Centre, Pachrukhi* and when the offending vehicle was searched then from a box, which was secretly made in the back portion of



the *jeep*, 52 white colour polythene packets each containing one kg *ganja*, were recovered and the apprehended accused (appellant) revealed that he had brought the seized material from one namely, Saroj Singh who was living in a rented house in Chhapra. The informant further revealed that in the presence of two persons namely Dina Nath Mahto @ Bandhu Mahto and Salman Ahmad, the seizure memo of the seized contrabands and seized jeep was prepared upon which both the independent persons made their signatures and thereafter apprehended accused, seized contrabands and jeep were brought at the police station and the seized contrabands were deposited in the *Malkhana* of the police station. The informant recorded his statement as Ext. 1, on that basis, the formal FIR bearing Pachrukhi P.S. Case No. 04 of 2013 was registered for the offences punishable under Sections 279, 337, 338 and 427 of the IPC and also under Section 20/22 of the N.D.P.S. Act which set the criminal law in motion. Thereafter, the investigation was started.

3. After completion of the investigation, the appellant was chargesheeted for the alleged offences of the FIR and the investigation was kept pending in respect of co-accused persons namely Kamlesh, Saroj Singh, Sahu and Prem Kumar Sah and



after that, the court concerned took cognizance of the alleged offences.

4. The appellant stood charged for the offences under Sections 279, 337 and 427 of the IPC and also stood charged for the offence under Section 20b(ii)C of the N.D.P.S. Act. As the appellant did not plead guilty hence he was put on trial.

5. During trial, the prosecution examined eight witnesses and in documentary evidence, proved the following documents and got them marked as Exhibits which are as under :-

Ext. 1 - Written application;

Ext. 2 – Formal FIR;

Ext. 3 - Seizure Memo;

Ext. 3/1 – Signature of one namely Salman Ahmad on the seizure memo;

Ext. 4 – FSL report;

Ext. 4/1 – Signature of one namely Neeraj Kumar on the FSL report;

Ext. 4/2 – Signature of the Director of FSL Department on FSL report;

Ext. 4/3 – A letter no. 2428 dated 15.07.2013 of the Director of FSL.



6. After completion of prosecution evidence, the main circumstances appearing against the appellant/accused from the prosecution's evidences were explained to him, which were denied by him and he claimed himself to be an innocent person. The appellant did not give any evidence in his defence.

7. The learned trial court acquitted the appellant of the charges for the offences punishable under Sections 279, 337, 338 and 423 of the IPC but convicted him for the offence punishable under Section 20b(ii)C of the N.D.P.S. Act. While convicting the appellant, the learned trial court mainly placed reliance upon the evidence given by the informant, Investigating Officer and witnesses of the seizure list and also placed reliance upon the FSL department's expert's opinion in respect of the seized narcotic material.

8. It has been argued by learned counsel for the appellant that the mandatory provisions of N.D.P.S. Act dealing with the search, seizure and sampling were not followed in respect of the seized material by the concerned police party.

9. It has been argued by learned APP for the State that the instant matter relates to the recovery of huge quantity of *Ganja* and the same was recovered from a *jeep* which was being driven by the appellant, who was caught red-handed from the



said vehicle when he attempted to flee on seeing the police party and in this regard sufficient evidence was given by the prosecution and the FSL report, which was proved during the trial, goes to show that the seized contrabands were *ganja*. He has further argued that the independent witnesses of the seizure also proved the recovery of the alleged narcotic materials and the conviction of the appellant for the offence punishable under Section 20b(ii)C of the N.D.P.S. Act is completely proper and legal and the instant appeal is liable to be dismissed.

10. Heard both the sides, perused the judgment impugned and evidences available on the case record of the trial court and also gone through the statement of accused.

11. As per prosecution's story, the alleged contraband kept in 52 white colour polythene packets was recovered from a *jeep* and the weight of each packet was 1 kg., accordingly, 52 kg. of the alleged contraband suspected to be *ganja* was recovered from the said *jeep*. As per prosecution, on seeing the police party, the *jeep* was not stopped by the accused persons rather they increased the speed of the *jeep* and in that course, the *jeep* dashed against a tempo and in that accident, some persons riding in the tempo sustained injuries and after accident, two persons got down from the *jeep*, out of them, one was apprehended at the



spot who disclosed his name as Santosh Ray (appellant). Though, the police seized the *jeep* and alleged contraband but no attempt was made to seize the said tempo and even passengers of the tempo, who sustained injuries in the alleged incident, were not produced as witnesses by the prosecution.

12. As per the FIR, the informant firstly received a secret information and thereafter, proceeded towards the place of recovery but he did not reveal any fact to show that he made aware the higher police officials regarding the said information and during the trial, the prosecution did not produce any material to show that the said information was reduced in writing after receiving of the same hence the mandatory requirement regarding the necessity to give the said information to higher police authorities was not followed by the informant, who is said to be then SHO of police station concerned and led the police party. The said circumstance goes against the prosecution.

13. When the Investigating Officer (P.W. 7) visited the place of recovery and accident, he did not find any sign of accident and he accepted that no any material was seized by him from the place of occurrence. After the alleged accident, the police ought to have seized the tempo and should record the statement of injured persons as the said accident was an



important part of the sequence of the alleged events but the police as well as prosecution remained careless in this regard.

14. As per the evidence of prosecution witnesses, the appellant was apprehended when he attempted to flee after getting down from the *jeep* but some of the prosecution witnesses stated that the appellant was driving the said vehicle and as per prosecution, the seized narcotic material kept in small packets was secretly hidden in the back portion of the *jeep* but the prosecution failed to establish that the appellant, if he is believed to be driver of the said vehicle at the time of recovery, had knowledge of the said contraband being loaded in his vehicle and in this regard, the prosecution did not give any evidence.

15. As per the informant (P.W. 3), after the accident several persons gathered at the place of occurrence and some prosecution witnesses deposed that the appellant was apprehended in fleeing position, so in such a situation, the prosecution was bound to prove that the appellant being driver of the alleged *jeep* had knowledge of the factum of carrying the alleged contraband in the alleged vehicle and the said burden was not properly discharged by the prosecution.

16. It is well settled principle of law that every narcotic contraband must be sealed after the recovery but in this regard,



the informant and the Investigating Officer completely remained careless. The informant who was then SHO of police station concerned deposed before the trial court that after the recovery, the seized contraband was handed over to the Investigating Officer with seizure memo.

17. The Investigating Officer, who was examined as P.W. 7, deposed in his cross-examination that he did not mention the date and time of receiving of the contrabands in the case diary and at that time, the seized contrabands were not sealed and the same were in 52 packets. He further deposed that he took sample from one packet only for chemical examination and the seized contrabands were not produced by him in the court and seized material was kept in *Malkhana* after taking sample but he did not mention the said details in the case diary.

18. From these facts, it is clearly evident that the Investigating Officer received the seized contrabands in unsealed condition and even he himself did not take any attempt to seal the said contraband after its receiving though as per his evidence the sample taken by him was sealed by him but the prosecution failed to produce the specimen of the said seal before the trial court.



19. From the statement of the Investigating Officer, it is clearly evident that the said sample was taken from one packet only for FSL examination. It is well settled principle that if same type of narcotic material is found in several packets then either sample should be taken from each and every packet if it is possible, or the materials kept in all such packets should be mixed and thereafter, sufficient number of samples should be taken for FSL examination but such procedure was not adopted by the Investigating Officer and as per his statement, the seized material was also not produced by him in the court when he was giving evidence. As per statement of this witness, the seized material was kept in *Malkhana* but in this regard, the prosecution did not produce and prove the necessary entry in the *Malkhana* register regarding the said depositing of the alleged contrabands in the *Malkhana* by the Investigating Officer.

20. From the evidence deposed by the Investigating Officer, it is clearly evident that while taking sample from the seized contrabands, any Magistrate or Gazetted Officer was not present and neither an inventory of the seized packets nor sampling which is said to have been made from one packet only was made before any Magistrate.



21. Here it is important to mention that the prosecution did not prove the quantity or weight of the contraband which was taken for the purpose of sampling from one of the seized packets and in this regard, the statement of P.W. 5 is relevant who deposed in the cross-examination that he could not state the weight of the sample.

22. P.W. 4, who is said to be an independent person, deposed in his examination-in-chief that he was present when the alleged *jeep* collided with a tempo and after the accident, the contrabands kept in 52 packets were recovered from the *jeep* and from the seized packets, one was opened and thereafter it was sealed and videography of that process was also made. The statement of this witness is completely contradictory to the statements of the Investigating Officer and Informant and moreover, the Investigating Officer did not state any fact to show that the videography of the process of search and seizure of the alleged contrabands was made, so evidence of this witness is completely unreliable and casts a serious doubt in the prosecution's allegation.

23. In the light of above discussed facts and evidences, this Court forms the opinion that the police officials who were part of the process of recovery and seizure of the contrabands as



well as of the sampling process completely remained careless in complying with the mandatory provisions of search, seizure and sampling relating to narcotic materials and the informant, who was then SHO of police station concerned, did not give any information to his higher police authorities regarding the secret information which is stated to have been received by him before proceeding towards the place of recovery and neither the informant sealed the seized contrabands nor the Investigating Officer took any attempt to seal them after receiving and the sample was taken only from one packet out of 52 packets so in such a situation, it can not be deemed that in other packets there was also prohibited narcotic material mainly on the basis of FSL report given in respect of the sample which was taken from one packet only and during trial, the seized contrabands were not produced before the trial court nor it was shown that the same had been destroyed after getting necessary permission from the trial court in the presence of a Magistrate and furthermore the sample, which is said to have been taken only from one packet, was not taken in the presence of a Magistrate, so in the light of these circumstances, the prosecution can not be deemed to have proved the alleged offence punishable under Section 20b(ii)C of the N.D.P.S. Act, for which the appellant was charged, beyond



reasonable doubt and in this regard, the approach of the trial court in convicting and sentencing the appellant for the said offence does not appear to be proper and legal. As such the judgment and order impugned convicting and sentencing the appellant for the offence punishable under Section 20b(ii)C of the N.D.P.S. Act are set aside and the instant appeal stands allowed. As the appellant was not granted bail during the pendency of this appeal and he had been languishing in jail from the date of his arrest i.e. 13.01.2013 hence he has served the sentence of ten years of rigorous imprisonment awarded upon him. However, let the judgment's copy be sent to the trial court as well as the Jail Superintendent concerned for needful action and for appellant's immediate release if he is still in jail on account of non-payment of fine amount imposed upon him by trial court if his custody is not required in any other matter.

(Shailendra Singh, J)

annu/-

AFR/NAFR	AFR
CAV DATE	NA
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