

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.193 of 2017

Arising Out of PS. Case No.-149 Year-2013 Thana- MOUZAHDIPUR District- Bhagalpur

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Umashankar Yadav, Son of Kamal Yadav, aged about 47 years, R/o Village -
Khempur, P.S. - Nagara, District - Balia (U.P.), at Present House No. 124,
Nahar Bari Village - Dimapur, Nagaland.

... .. Appellant/s

Versus

State of Bihar

... .. Respondent/s

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with

CRIMINAL APPEAL (DB) No. 223 of 2017

Arising Out of PS. Case No.-149 Year-2013 Thana- MOUZAHDIPUR District- Bhagalpur

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Manoranjan Kumar, Son of Rajendra Prasad Sah @ Rajendra Prasad,
Resident of Village - Basant Rai, P.S. - Basant Rai, District - Godda
(Jharkhand).

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

(In CRIMINAL APPEAL (DB) No. 193 of 2017)

For the Appellant/s : Mr. Gouranga Chatterjee, Adv.
Mr. Nilanjan Chatterjee, Adv.
Mr. Sahil Kumar, Adv.
Mr. Anirvan Chaudhri, Adv.



For the State : Mr. Dilip Kumar Sinha, APP
(In CRIMINAL APPEAL (DB) No. 223 of 2017)
For the Appellant/s : Mr. Vikramdeo Singh, Adv.
Md. Najmul Hoda, Adv.
For the State : Mr. Dilip Kumar Sinha, APP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE HARISH KUMAR

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 17-05-2023

Cr. Appeal (DB) No. 193 of 2017 and Cr.
Appeal (DB) No. 223 of 2017 have been taken up
together and are being disposed off by this common
judgment.

2. Mr. Gouranga Chatterjee and Md. Najmul
Hoda, the learned Advocates, have appeared for the
appellants respectively in both the appeals. The State is
represented by Mr. Dilip Kumar Sinha, the learned APP.

3. Both the appeals are directed against the
judgment and order of conviction and sentence dated
23.12.2016 and 24.12.2016, respectively, passed in
G.R. No. 3431/13 (Tr. No. 6/17-9-2016) arising out of



Mojahidpur (Babarganj) P.S. Case No. 149/13, whereby the appellants have been convicted for the offences under Sections 20(b)(ii)(C), 23(c) and 25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (*in short the Act*) and have been sentenced to undergo rigorous imprisonment for 20 years, to pay a fine of Rs. 1,00,000/- each and in default of payment of fine, to suffer simple imprisonment for 20 months each for the offence under Section 20(b)(ii)(C) of the N.D.P.S. Act and rigorous imprisonment for 20 years, to pay a fine of Rs. 1,00,000/- each and in default of payment of fine, to further suffer simple imprisonment for 20 months each for the offence under Section 23(c) of the N.D.P.S. Act. No sentence has been imposed under Section 25 of the N.D.P.S. Act as sufficient punishment has already been awarded under Sections 20(b)(ii)(C) and 23(c) of the N.D.P.S. Act, 1985.

4. Both the sentences have been ordered to be run concurrently.



5. One Parshuram Singh (P.W. 7), who at the relevant time was the S.H.O., Babarganj O.P., in the District of Bhagalpur, had lodged the self-statement on 03.10.2013 at about 8.25 A.M. that he had received a secret information in the previous night at about 7.15 P.M. that one Nandlal Sah, who claims himself to be a dealer of rice and carries on his business in Aliganj Gangti Mohalla, has been using his premises for storing and selling *Ganja*. P.W. 7 also received an information, in the same context, that narcotics is also being stored in the godown of one Mahesh Sah and that there are chances of a heavy consignment of *Ganja* being brought in the house of one Nandlal Sah. On such secret information, P.W. 7 claims to have informed the superior police officers and on their direction, a team was constituted for raiding the premises of Nandlal Sah, Lakhanlal Sah and Mahesh Sah. With the raiding team, the house of Nandlal Sah and Lakhanlal Sah, both brothers, who resided in the same house in two different



floors, was raided. Simultaneously, a raid was conducted in the godown of Mahesh Sah. In the house of Nandlal Sah, his wife/Dolly Devi was available. The police party got themselves searched in presence of two independent persons, namely, Ramjiwan Sah and Sumit Kumar, when nothing incriminating was found on their person. Thereafter, necessary information was given to Dolly Devi and one Purnima Devi, the wife of co-accused/Lakhanlal Sah that the police party had arrived at their house on the tip-off that the premises are being used for storing narcotics.

6. In presence of the Assistant Superintendent of Police, Bhagalpur, a raid was conducted. Before that, the persons present in the house were given the information that they could have themselves searched before the nearest Magistrate, if they so desired, to which they denied.

7. During the course of search of the house of Nandlal Sah and Lakhanlal Sah, from a room, in the



eastern side of the house, nine packets containing narcotics were found. One digital weighing machine in operative condition was also found from that room. All the packets were weighed and the gross weight of all the nine packets was found to be 93.525 kgs. The contents of the packets appeared to be *Ganja*. At that place only, 25 gms. were taken out from each of the nine packets and those packets were sealed. Indian and Nepali currency notes were also found in one of the *almirahs* of that room. On account of such recovery, it was presumed by the raiding team that the premises of Nandlal Sah and Lakhanlal Sah was being used for storing *Ganja*, which was brought from Nepal and Bhutan in an unauthorized manner and the same was being sold from the residential premises only. Ornaments and currency notes were also found, which were seized and the seizure-list was duly prepared, which was signed by two of the independent witnesses.

8. Apart from afore-noted Dolly Devi and



Purnima Devi, wives of Nandlal Sah and Lakhanlal Sah respectively, two other persons were found, who disclosed their identity as that of the appellants, namely, Umashankar Yadav and Manoranjan Kumar.

9. Appellant/Umashankar Yadav claimed to belong to District Balia in the State of Uttar Pradesh, whereas the appellant/Manoranjan Kumar was found to be the resident of District Godda in the State of Jharkhand. Both the afore-noted appellants could not explain the reason for their having visited the house of Nandlal Sah and Lakhanlal Sah. Thus, they were also arrested on suspicion of indulging in the trade of narcotics.

10. The owners of the house, namely, Nandlal Sah and Lakhanlal Sah were found to be absconding. Thereafter, the godown of Mahesh Sah was also raided, after obtaining the keys of the godown from Purnima Devi, the wife of Lakhanlal Sah. Three vehicles were found in the premises, from the boot of which



vehicles, narcotics was recovered. From the godown, five tin trunks were found, which also contained *Ganja*.

11. A total of approximately 511 kgs. of Ganja was recovered in the joint raid of the houses of Nandlal Sah and Lakhanlal Sah and the godown of Mahesh Sah, which was in the custody of the wife of Lakhanlal Sah.

12. On the basis of the afore-noted recoveries, an F.I.R. was registered against Nandlal Sah, Lakhanlal Sah, both owners of the house in which the raid was conducted and the two appellants who were found present in the house without any explanation regarding their presence for the offences under Sections 20(b)(ii)(C), 23(c) and 25 of the N.D.P.S. Act, 1985.

13. The Trial Court, after examining nine witnesses on behalf of the prosecution and five on behalf of the defence, convicted and sentenced the appellants as aforesaid.

14. The learned Advocates appearing for



the appellants have questioned the judgment and order of conviction on the sole ground that except for the presence of the appellants in the house of Nandlal Sah and Lakhanlal Sah, which was no reason strong enough to suspect their complicity, there was no other material to bring home the charges against them under the N.D.P.S. Act, 1985. It has been urged on behalf of the appellants that the Trial Court completely ignored the evidence offered on behalf of the appellants that only per-chance, they had visited the house of Nandlal Sah and Lakhanlal Sah and were found present when the raid was conducted. Their explanation of their being on-route to Deemapur, Nagaland and Godda respectively was wrongly disbelieved, notwithstanding the documentary evidence in their favour with respect to the cause justifying their presence in the house where the raid was conducted.

15. We have examined the First Information Report, the evidence of all the members of



the raiding team and have found that huge quantity of narcotics was recovered from the joint raid of the house and the godown referred to above. Narcotics were kept in three vehicles also. A huge consignment was found to be stored in tin trunks in the godown owned by one Mahesh Sah.

16. We have also found from the deposition of P.W. 7 that necessary samples were drawn from the items recovered and were sent for chemical examination, which confirmed that the items recovered corresponded to *Ganja* but we have not been able to find any material so as to conclusively hold that the appellants were participants in the trade of narcotics, either as persons who had brought the consignments of narcotics or their being purchasers of the same. Both the appellants were resident of different regions; who had their own explanation for being present in the house at the time of raid. Both the appellants are distantly related to the wives of Nandlal Sah and Lakhanlal Sah and one of them



had to take part in an examination at Godda. Railway tickets and certificates from local *panchayat* functionaries were brought on record in proof the facts that the appellants had good moral character in their area and that they were not involved in any trade of narcotics.

17. True it is that while the appellants were questioned by the members of the raiding team about the reason for their presence in the house, they did not speak anything, but that by itself, namely, their silence, would be a ground to presume that they were part of the nefarious gang, which dealt with narcotics or were responsible for storage of narcotics in the house of Nandlal Sah and Lakhanlal Sah.

18. We have further found that no investigation was made with respect to cause of arrival of the appellants at the house where the raid had been conducted. The vehicles found in the premises of the godown of Mahesh Sah also did not belong to the



appellants. The appellants were not local persons having any place of business in the district where the raid was conducted. It would be too much from the evidence on record to even presume that they were purchasers of the narcotics in small or large quantities as nothing incriminating was found on their person.

19. Merely because the appellants were found present in the house where the raid had been conducted (their relationship with the owners of the house also could not be established), it was rather inappropriate for the Trial Court to have jumped to the conclusion that the appellants were in the trade of narcotics.

20. For the prosecution and conviction of the appellants in the present cases, it was needed to be decided whether they were in "possession" of the narcotics which was so seized during the course of raid. Can the appellants be said to be in "possession" of the narcotics so recovered because of their presence in the



same room is the question which has necessarily to be answered.

21. A *rubro ad nigrum*, anybody having the physical control and custody of a thing can be said to be in "possession" of that thing. However, the Courts have felt that attributing a meaning to "possession" within this strict sense, would amount to looking at the concept of "possession" in a narrow way. There has been a departure from the quintessential meaning of "possession" while interpreting provisions of law, especially Penal Statutes.

22. The "corpus" and "animus" doctrine is not the only worthy explanation of "possession". There are various strands of "possession", viz., "possession in fact", "possession in law", "corporeal possession", "possession of right" (incorporeal possession) so on and so forth. The meaning of the concept varies from case to case and context to context.

23. In ***Mohan Lal Vs. State of Rajasthan;***



(2015) 6 SCC 222, the Supreme Court explained away that the term "possession" consists of two elements. Firstly, it refers to the corpus of the physical control and the second, to the animus or intent of exercising the said control. In the context of narcotics drug laws, the term "possession" means actual control and care and management of the drug. But under the criminal law for conviction, "possession" may not always be actual, but it could be constructive as well.

24. For necessity, Section 35 of the N.D.P.S. Act, 1985 is required to be seen for understanding "possession" for the purposes of prosecution and conviction of an accused.

25. Section 35 of the Act reads as follows :-

"35. Presumption of culpable mental state.-(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the



accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.-In this section [?]culpable mental state[?] includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.”

26. Section 35 of the Act raises a presumption as to the knowledge and culpable mental state from the possession of illicit articles. “Conscious mental state” with respect to possession is necessary and that is the prime reason for enacting Section 35 of the N.D.P.S. Act, 1985”.

27. However, in **Noor Aga Vs. State of Punjab; (2008) 16 SCC 417**, the Supreme Court observed that no doubt there is a presumption of culpable mental state, but equally important is that fact



that an accused shall have the defence if he proves the fact that he had no such mental state with regard to possession and consequent act charged as an offence in the prosecution.

28. While discussing the import of Section 35 of the N.D.P.S. Act, 1985, the Supreme Court also referred to Section 54 of the Act, which places the burden to prove on the accused as regards possession of the contraband articles satisfactorily.

29. Section 54 of the of the N.D.P.S. Act, 1985 reads as hereunder :-

"54. Presumption from possession of illicit articles.-In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of-

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed



or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily."

30. The Supreme Court in **Noor Aga** (*supra*) explained that bare perusal of the two provisions shows that presumption would operate in the trial of the accused only in event the circumstances contained therein are fully satisfied and initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the



prosecution is beyond all reasonable doubt, but it is preponderance of probability on the accused. If the prosecution fails to prove the foundational facts so as to attracts the rigours of Section 35 of the Act, the *actus reus* which is possession of contraband by the accused cannot be said to have been established. [Also refer to ***Bhola Singh Vs. State of Punjab : (2011) 11 SCC 653; Dharampal Singh Vs. State of Punjab : (2010) 9 SCC 608; Avtar Singh Vs. State of Punjab : (2002) 7 SCC 419*** and ***Sorabkhan Gandhkhan Pathan Vs. State of Gujarat : (2004) 13 SCC 608***].

31. Only when possession is established, can the Court presume that the accused had the culpable mental state and that he had committed the offence. Thus, possession for convicting an accused means physical possession along with the animus to exercise control over such article. The animus and the mental intent are the primary and significant elements to show and established possession.



32. In the case in hand, we do not find any evidence that the consignment of narcotics was brought in the house by the appellants or that the appellants had any idea about the storage of the narcotics in the house of the other accused persons or that they had any control over the recovered substance.

33. Thus, we find the conviction and sentence of the appellants to be absolutely against the evidence on record.

34. Section 20 of the N.D.P.S. Act, 1985 provides for punishment for contravention in relation to cannabis plant and cannabis, either for cultivating or for producing, manufacturing, possessing selling, purchasing, transporting, importing inter-State or exporting inter-State or using cannabis. Whenever the contravention relates to cultivation, the punishment provided is rigorous imprisonment for a term which could extend to ten years along with fine which could extend to one lakh and if it involved small quantity, with a term of



rigorous imprisonment which could extend to one year or fine which could extend to ten thousand rupees. If the contravention related to a quantity which is lesser than the commercial quantity but greater than the small quantity, higher punishment of ten years could be awarded with a fine extending to rupees one lakh. If the narcotics involved is of a commercial quantity, the punishment provided is for a term which shall not be less than ten years but extendable to twenty years and fine which would not be less than one lakh but could be extended to rupees two lakhs.

35. Similarly, Section 23 of the N.D.P.S. Act, 1985 provides for punishment for illegal import into India, export from India or transshipment of narcotic drugs and psychotropic substances. And, Section 25 provides for allowing premises, etc. to be used for commission of the offence under the Act.

36. Even at the cost of repetition, we record that there is no evidence available to hold the



appellants to be in possession of the narcotics which was recovered.

37. They cannot even be saddled with constructive possession as they were visitors to the house for a short-while and that also, not without a reason, which would appear from the exhibits of the defence as also the deposition of the witnesses on behalf of the defence, who could not be discredited at the trial.

38. Mere presence of the appellants would be no evidence with respect to sale, purchase, transport, import or export of the narcotics which was recovered.

39. The appellants are not found to be residing overseas nor any investigation was made with respect to their credentials. It is not unusual that while on way to different destinations, distant relatives of the house owner visit him. It is only fortuitous that during their presence in the house, raid was conducted and recovery of narcotics was made.

40. There could be a strong possibility of



the appellants being innocent visitors to the house also.

41. For the appellants to be taken as participants in the business of narcotics, the prosecution was required to discharge the initial burden of holding that for the said wrong purpose, the appellants were present in the house. This could have been done by pitching in evidence of their having brought the narcotics or having come to the house for the purposes of purchase of the same or for distributing it or selling it in the market. Unfortunately, there is no material before us to come to that conclusion.

42. It is quite distressing for us to note that no investigation was made with respect to all these facts, especially when a huge consignment of 511 kgs. of *Ganja* was recovered from a house, a contiguous godown as well as three of the vehicles parked in the godown.

43. Similarly, the evidence is absolutely lacking with respect to the presumption that the



appellants had imported into India or were attempting to export from India or were involved in transshipment of narcotic drugs and psychotropic substances, for them to be convicted and punished for the offence under Section 23(c) of the N.D.P.S. Act, 1985. The ownership of the house, the godown and the vehicles have also not been established during the course of investigation. The appellants are not found to be either the owners of the house where the raid was conducted or the godown where also the narcotics was found or the vehicles which were found parked, from the boot of which, there was recovery of narcotics.

44. This, therefore, makes the conviction and sentence of the appellants under Section 25 of the N.D.P.S. Act, 1985 also highly unsustainable in the eyes of law.

45. This takes us to Section 313 Cr.P.C. statement made by the appellants, where they have denied to be in possession of any narcotics or to be in



any manner related with the recovered narcotics. In the 313 Cr.P.C. statement of the appellant/Manoranjan Kumar, he has clearly stated that from Haveli Kharagpur, he had to go to Godda. Since he could not get the train on time, he came to the house of the sister-in-law of his sister, when the raid was conducted. He was but never subjected to any question eliciting his response with respect to his presence in the house from where recovery was made.

46. Similar statement has been made by the appellant/Umashankar Yadav, who has explained that Dolly Devi, wife of Nandlal Sah, is his sister and that he was on way from Deemapur to Balia, but on way, had chosen to visit the house of his sister.

47. We have also examined the evidence of the defence witnesses who have not at all been cross-examined to discredit them for having come to the witness-box only for helping out the appellants.

48. Simple presence of a person at a place



where recovery of narcotics is made would not be any evidence worth its name for saddling such person with the charge of offences committed under the N.D.P.S. Act, 1985.

49. From the materials available, the appellants could be inferred to be innocent visitors to the house. Since it has not been proved beyond all reasonable doubts that the appellants had participated or had been participating in the drug trade or in any way facilitating the storage or presumed sale of the narcotics which was recovered, the conviction and sentence against them is highly unwarranted and unsustainable in the eyes of law.

50. We further find that both the appellants are in custody since 2013 and have thus spent ten years in jail. Who will expiate for this is the question which confront us in our faces.

51. We, thus, allow these appeals.

52. The impugned judgment of conviction



dated 23.12.2016 and the consequent order of sentence dated 24.12.2016 passed by the learned Additional Sessions Judge-IV-Cum-Special Court No.-II, Bhagalpur in G.R. No. 3431/13 (Trial No. 6/17-9-2016) arising out of Mojahidpur (Babarganj) P.S. Case No. 149/13 is, accordingly, set-aside.

53. The appellants, viz., Umashankar Yadav (in Cr. Appeal (DB) No. 193 of 2017) and Manoranjan Kumar (in Cr. Appeal (DB) No. 223 of 2017) are acquitted of the charges levelled against them. They are directed to be set at liberty forthwith unless their detention is required in any other case.

(Ashutosh Kumar, J)

(Harish Kumar, J)

Praveen-II/-

AFR/NAFR	AFR
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