

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.647 of 2019

Arising Out of PS. Case No.- Year-0 Thana- District- East Champaran

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Ali Imam Gaddi Son of Suba Gaddi, Resident of Village - Sarakiya Tola,
P.O.:- Bhawa, Anchal- Sikta, P.S.- Balthar, Dist.- West Champaran.

... .. Appellant/s

Versus

1. The State of Bihar
2. The Union of India Through Deputy Commissioner, Lands Customs Station,
Raxaul, Dist.-East Champaran Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Rajesh Kumar Singh, Sr. Advocate
Mr. Manish Kumar Singh, Advocate
Mr. Ranvijay Narain Singh, Advocate
Ms. Akriti Aishwarya, Advocate

For the Respondent/s : Ms. Shashi Bala Verma, APP

For the Union of India : Mr. Manoj Kumar Singh, (C.G.C.)
Mr. Ankit Singh, Advocate

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE RAJIV ROY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 24-04-2023

This appeal has been preferred by the appellant under Section 374(2) of the Code of Criminal Procedure, putting to challenge the impugned judgment of conviction dated 07.05.2019 and the order of sentence dated 13.05.2019, passed by learned Sessions Judge/Spl. Judge, East Champaran, in N.D.P.S. Case No. 32 of 2017, arising out of the official Complaint case no. VIII(10)12/ cus / seiz / NDPS /RXL /2017 /



1097, whereby the appellant has been convicted and sentenced as under:

Appellant	Conviction under Section	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Ali Imam Gaddi	20(b)(ii)(C) of the NDPS Act	R.I. for twelve years	1,50,000/-	S.I. for six months
	23(c) of the NDPS Act	R.I. for twelve years	1,50,000/-	S.I. for six months

2. All the sentences have been ordered to run concurrently.

3. Heard Mr. Rajesh Kumar Singh, learned Senior Counsel appearing on behalf of the appellant and Mr. Manoj Kumar Singh, learned counsel for the Union of India.

4. The brief facts of the case are that the appellant was forwarded for judicial custody to the Court of learned District and Sessions Judge, Motihari by Santosh Lakra, Inspector LCS (Land Customs Station) Raxaul on 24.03.2017 with the following allegation:-

" Whereas a person namely Sri Aliimam Gadi, S/o Shri Suba Gadi, Village- Sarkaria Tola Bhavara, Anchal-Sikta, Distt. Paschim Champaran, PIN-845307 has contravened the provisions of section 8 of the Narcotics Drugs & Psychotropic Substances Act, 1985 by way of possession and transportation of contraband believed to be Charas (supposedly of Nepal origin) weighing



4.170 Kilograms (Net weight) [in 09 packets of rectangular shape] and valued at Rs. 8,34,000/- has been recovered from dicky of his Motor Cycle bearing Regn. No. BR22H-4447.

Whereas the above named person was apprehended by the officers of Land Customs Station, Raxaul in Collage Road, Ramgarhwa near Ramgarhwa Railway Gumti and the said contraband (believed to be Charas) was seized under the provisions of Section 43 of the said Act for violation of Section 8 of the said Act with the reasons to believe that they are liable for confiscation under Section 60 of the said Act.

Whereas such acts of commission by the above named person is punishable under the provisions of Section 20, 23 & 24 of the said Act. The above named person has been arrested by the undersigned under the provisions of Section 43 of the said Act at 11.15 hrs. of 24.03.2017 and is being produced before your honour for his judicial custody.

Original copies of the intimation letter to Superintendent (Preventive), Panchnama, Seizure Memo, Medical fitness report and voluntary and interrogatory Statement of the accused and the DRI-3 (History Sheet) are enclosed, in original for the needful."

5. After completion of the investigation an official



complaint petition came to be filed before the learned District and Sessions – cum- Special Judge, NDPS Act, Motihari under Section 36A of the Act. It is the case of the prosecution as disclosed in the written complaint of one Santosh Lakhra, Inspector, Land Customs Station, Raxaul (P.W.-1) that a specific information was received on 23.03.2017 to the effect that a person was carrying contraband stuff namely '*Charas*' from Bhisawa, Nepal to Ramgarhwa, East Champaran (Bihar) to handover the consignment to a receiver at the railway crossing situated near the College Road, Ramgarhwa, East Champaran (Bihar). After having received and updated the input that the carrier had already moved towards Ramgarhwa upon entering into the Indian territory on a red Hero Honda Motorcycle, wearing a cream colour shirt, a raiding team was formed which rushed toward Ramgarhwa under an intimation to the Superintendent (Preventive), LCS (Land Customs Station), Raxaul with two independent witnesses. At about 2:00 pm, the officers reached the College Road near railway crossing, Ramgarhwa and waited for the said person. As was secretly informed, a person driving a red motorcycle towards the College Road was seen, who was intercepted by the team. The team officials introduced themselves to the said person as the officers



of the Customs, LCS, Raxaul and asked him to open the dickey of the motorcycle. Upon opening of the dickey of the said motorcycle, the said Officer saw a black plastic polythene bag kept inside the dickey. On query made by the officials, the said person disclosed about the contents of black plastic polythene bag as cardamom. On having been asked by the Custom officials, he opened the plastic bags in which grey materials were seen. On strict interrogation, he accepted that the said article was not cardamom rather it was *charas*. Immediately, thereafter, the appellant was apprehended. The appellant, the recovered goods and both the witnesses, were brought to the LCS, Raxaul for completing further formalities. The motorcycle of the apprehended person was brought to the LCS, Raxaul by one of the members of the team. After having arrived at the office, personal search of the appellant was conducted in accordance with Section 50 of the NDPS Act in the presence of the Superintendent (Preventive), LCs, Raxaul and the said two independent witnesses. The appellant consented to be searched before the Departmental Gazetted Officer. During the search, an old, used and torn rexine pocket-purse was recovered from pocket of his pant. A laminated xerox copy of his voter ID Card, a card of North Bihar Gramin Bank and four passport size



photographs were also recovered.

6. Thereafter the said recovered black polythene bag was opened in his presence and both the witnesses. Total nine packets of *charas* in rectangular shape were recovered from the said bag. The *charas* was weighed in the presence of the appellant and the independent witnesses and found to be 4.170 Kilograms (net). The recovered *charas* and motorcycle were subsequently seized under Section 43 of the NDPS Act, on 23.03.2017 at 6:15 pm, for breach of Section 8 of the Act. After having taken small quantities of *charas* from each of the nine packets and mixed together, three representative samples (weighing approximately 25 gms each) were drawn from the mixed quantity and kept in three separate small transparent plastic pouches which were put in three separate plastic coated envelops. The three plastic coated envelops were sealed in the presence of the appellant and both the independent witnesses for sending it to the Joint Director, Chemical Laboratory, Customs House, 15/1 Strand Road, Kolkata. The Appellant's interrogatory statement was recorded under Section 67 of the NDPS Act by the Custom official, wherein he disclosed that he was carrying nine packets of *charas*. In his voluntary as well as interrogatory statement, he accepted his guilt. Based on the



reasonable belief that the appellant had illegally smuggled *charas* from Bhisawa, Nepal to Ramgarhwa, Bihar, and thus was liable to be punished under the provision of Sections 20, 22, 23 and 29 of the NDPS Act, he was formally arrested on 24.03.2017 at 11:15 hours under the provisions of Section 43 of the said Act and was produced before the learned Court of District and Sessions Judge, Motihari, from where he was remanded to judicial custody.

7. One sample of the seized *charas* was sent to the Joint Director, Chemical Laboratory, Customs House, Kolkata on 24.03.2017. The Chemical Examiner, Chemical Laboratory, Customs House, Kolkata reported that the sample was in the form of blackish brown sticky material which responded to the tests of resinous extract of plant *cannabis sativa* (*charas*). Subsequently, the Officer-in-Charge of Balthar Police Station was requested to inform the office about the appellant's criminal antecedent. A request was also made to the Superintendent, Land Customs Station, Sikta, for follow up action and address verification of the appellant.

8. One Habibullah Ansari was also summoned for his interrogation under Section 67 of the NDPS Act as regards the ownership of the motorcycle which was seized. He, in his



interrogatory statement, disclosed that the said Hero Honda Motorcycle was sold by him to the appellant.

9. With the aforesaid accusation of P.W.-1 in the official complaint Vide no. VIII(10)12/ cus / seiz / NDPS /RXL /2017 /1097, disclosing commission of the offences punishable under Sections 20(b)(ii)(C) and 23(c) of the NDPS Act, NDPS Case No. 32 of 2017 came to be registered.

10. The charge against the appellant was framed on 06.10.2017, for the offences punishable under Sections 20(b)(ii) (C) and 23 (c) of the NDPS Act. The appellant pleaded not guilty and he claimed to be tried. At the trial, altogether eight witnesses came to be examined.

11. It is noteworthy that none of the seizure list witnesses were examined at the trial. The complainant of the case (PW-1) Superintendent at LCS, Raxaul (PW-2) who had attested the seizure formality, the Superintendent had supervised the seizure formalities (PW-3) deposed as prosecution witnesses at the trial. Further, PW-5, PW-6 and PW-8 who had apprehended the appellant and were party to the seizure formalities deposed at the trial. PW-7 proved the certification of destruction of the seized *charas*. PW- 8 was also a member of the raiding party as an Inspector of Customs.



12. After closure of the evidence of the prosecution's witnesses, the appellant was questioned based on the evidence emerging against him at the trial, in compliance of the requirement under Section 313 of the CrPC.

13. The trial court, after having appreciated the evidence on record has concluded in his impugned judgment of conviction that the prosecution was able to establish the charge of commission of offences punishable under Section 20(b)(ii) (C) and 23(c) of the NDPS Act and accordingly, after having held him guilty of the aforesaid offences imposed sentence by an order dated 13.05.2019, as noted above.

14. Mr. Rajesh Kumar Singh, learned Senior Counsel appearing on behalf of the appellant has submitted that the alleged seizure of the contraband goods is patently illegal and, therefore, the entire case of the prosecution false flat. He has submitted that it is the case of the prosecution itself that the seizure list witnesses were chosen by the custom officials and they were asked to become witnesses in relation to a future seizure likely to take place upon interception based on secret information and a consequent search. He has contended that the method adopted by the custom officials of picking up the persons to become witnesses to search and seizure to be



conducted in future is contrary to the requirement under Section 100 of the CrPC. He has further submitted that it is also evident from the complaint itself that the seizure list was not prepared and the samples were not taken at the place of occurrence itself rather this entire exercise was done at the office of the LCS, Raxaul.

15. He submits that the seizure, being in violation of Sections 42, 43 and 50 of the NDPS Act, the genuineness of the seizure itself becomes doubtful and the finding of conviction recorded by the trial court is, therefore, unsustainable in law.

16. He contends that the deposition of P.W.-7 at the trial that the destruction certificate did not bear the signature of the Magistrate nor he was knowing as to when was the certificate was prepared is fatal for the prosecution as it could not establish with certainty the connection between the samples of the contraband drawn at the time of seizure and those which were destroyed. He has also contended that the report from the Forensic Science Laboratory does not reflect the correct weight of the sample which was sent for forensic examination. He has argued that though weight of the sample taken from the seized contraband was 25 gms, which was sent for forensic examination, the weight of the contraband received in the FSL



has been found to be 36.5 gms. The said discrepancy also casts serious doubt on the entire case of the prosecution of recovery of *charas* from the appellant's possession.

17. Mr. Manoj Kumar Singh, learned Central Government Counsel has on the other hand, submitted that the seizure of the contraband has been made strictly in accordance with the provisions of Section 43 and 50 of the NDPS Act. He contends that Section 42 of the NDPS Act shall have no application in the present facts as the recovery of the contraband articles were not made from the persons of the appellant, rather from the dicky of the motorcycle which the appellant was using.

18. After having perused the impugned judgment of conviction recorded by the trial court and the submissions advanced on behalf of the appellant, we are of the considered view that the Custom officials did not adhere to the procedure prescribed for seizure for two main reasons. Firstly, it is the case of the prosecution itself that the witnesses were selected by the Custom officials before the vehicle was intercepted. In fact, according to the prosecution's case, the raiding team was so constituted that even the witnesses were made to become part of the said team.



19. We have perused the seizure memo, wherein, the date, time and place of detection was originally typed as 23.03.2017 at 15:00 hrs at LCS, Raxaul, which has subsequently been changed by making handwritten corrections as "College Road, Near Railway Ghumti, Ramgarhwa". For the reasons unexplained, the seizure list witnesses were not examined at the trial. From the evidence of the complainant/P.W.-1, it appears that after a raiding team was constituted on receiving the secret information, the members of the raiding team had gone to a tea stall near the LCS office, Raxaul and had disclosed to the witnesses about the future operation and had requested them to be the witnesses. As they agreed, they proceeded towards College Road, Near Railway Ghumti, Ramgarhwa with the said two witnesses. He also deposed that after the appellant was brought to the LCS office, Raxaul, notice under Section 50 was given to the appellant, giving him an opportunity to be searched either before a Gazetted Officer or a Magistrate, whereupon, the appellant agreed to be searched by a Gazetted Officer and accordingly, a search was conducted in the presence of the said two witnesses and one R.K. Safi (P.W.-3), a Superintendent of Customs.

20. Be it noted that R. K. Safi (P.W.-3) had



constituted the raiding team on receipt of the secret information from an Inspector of Customs, Shashi Bhushan Singh (P.W.-4). From the evidence of P.W.-3, it does not appear that recovery of *charas* from the dickey of motorcycle was made in his presence. As we have noticed, the *charas* was recovered, according to the complainant, from the dickey of the motorcycle. Whereas the motorcycle was brought to the police station by another member of the raiding team, the appellant was brought to the LCS, Raxaul with other recovered items. Thereafter, the two witnesses and the appellant were asked to sit in the official vehicle and they were brought to LCS, Raxaul. It is rather surprising to note from evidence of PW-2, a Superintendent of Customs, Raxaul that he deposed in cross-examination (Paragraph-6) that the appellant was made to hold the stuff in his hand on his way from the place of detection (i.e. College Road, Near Railway Crossing, Ramgarhwa) to the office of the LCS, Raxaul. In such circumstance in the seizure memo, the name and address of the person from whom goods were seized at LCS, Raxaul has been mentioned as the name of the appellant. It is clear on conjoint reading of evidence of the prosecution's witnesses that the substance which according to the DRI official was found in the dickey of the motorcycle near



the railway crossing by the raiding team was shown to have been recovered from the appellant's personal possession at LCS Raxaul.

21. It is not clear from the evidence of the prosecution's witnesses as to from whom the recovery and seizure of the contraband articles were made before P.W.-3 at LCS, Raxaul. There is no evidence that the motorcycle was searched at LCS, Raxaul and from any part of it the *charas* was recovered.

22. Who was carrying the contraband articles and in what manner from the place of interception to the place where personal search of the appellant was conducted, become completely suspicious.

23. From the evidence of P.W.-2, it is further evident that on personal search of the appellant nothing was recovered except the wallet, a voter ID Card and a card issued by Gramin Bank and four passport size photographs. In his examination-in-chief he deposed that the nine packets of *charas* recovered from his possession on search was opened in LCS office, Raxaul. In his cross-examination, PW-2 disclosed that the complainant (PW-1) had disclosed to him that the *charas* was in dicky.



24. PW-4, another member of the raiding team deposed in paragraph 2 that he had brought the appellant, the seized articles and the motorcycle in his vehicle to the LCS office, Raxaul. His evidence is materially different from the evidence of PW.-1 who had deposed that the motorcycle was brought to the LCS office, Raxaul by another member of the team.

25. P.W.-5, one of the members of the raiding team also deposed in his evidence that the appellant was brought to the Custom office in a vehicle and the motorcycle was brought by a *havildaar*. During the course of search, the *charas* was recovered from dickey of the motorcycle of the appellant. According to the deposition of PW-5, another member of the raiding party, the recovery of *charas* was made from the dickey of the motorcycle at LCS, Raxaul. Based on a close analysis of the evidence adduced at the trial it can be easily discerned that whereas the alleged contraband was detected kept in the motorcycle of the appellant.

26. Further, we cannot loose sight of improper compliance of Section 50 of the Act. According to the case of the prosecution, the notice was given to the appellant (Exhibit-1), whereby, he was given an option to be searched in the



presence of the nearest Gazetted Officer or Magistrate, in response to which he had given his no objection. The said notice is in English language and the no objection has been written by one *Katib* Pradeep Kumar. The said *Katib* has not been examined at the trial.

27. Based on the discussion here-in-above, we notice that the prosecution cannot be said to have conclusively proved that the *charas* seized at the LCS office, Raxaul, was the same which according to the prosecution was recovered from the appellant's possession at a different place, i.e., College Road near railway crossing, Ramgarhwa, Raxaul. Further, it has come in the evidence that the appellant was unable to read and write, though he could put his signature only.

28. In such view of the matter, in our opinion, the finding of conviction recorded by the trial Court for the offences punishable under Section 20(b)(ii)(C) and 23(c) of the NDPS Act cannot be upheld based on the evidence of the Customs Officials only.

29. Accordingly, the impugned judgment of conviction dated 07.05.2019 and order of sentence dated 13.05.2019 passed by learned Sessions Judge/Spl. Judge, East Champaran, in N.D.P.S. Case No. 32 of 2017, arising out of



official Complaint case no. VIII(10)12/ Cus / Seiz / NDPS /RXL
/2017 /1097 is set aside.

30. This appeal is accordingly allowed.

31. Let the appellant, namely, Ali Imam Gaddi, be
released from jail forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

(Rajiv Roy, J)

kiran/nishant-

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