

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.445 of 2021

Arising Out of PS. Case No.-60 Year-2017 Thana- BIDUPUR District- Vaishali

ANARJEET KUMAR Son of Jagdeo Singh Resident of Village - Mile Pakari,
P.S.- Bidupur, Distt.- Vaishali.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr.Md. Fazle Karim, Adv Mr. Ashish Kumar Ghosh, Adv Mr. Alexander Ashoka, Adv
For the Respondent/s	:	Mr.Ajay Mishra, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 25-07-2023

The appellant has preferred this appeal under Section 374(2) of the Code of Criminal Procedure against the judgment of conviction dated 21.09.2020 and order of sentence dated 28.09.2020 passed by the learned Additional Sessions Judge-I-cum-Special Judge, NDPS Act, Vaishali at Hajipur, in Bidupur



P.S. Case No. 60 of 2017, whereby and whereunder the appellant has been convicted and sentenced as under :-

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
under Section 20(b)(ii)(C) of the NDPS Act	Rigorous imprisonment for 13 years	1 Lakh	S.I for six months
under Section 414 of the IPC	Rigorous Imprisonment for 2 years	-----	-----

2. The Officer-in-Charge of Bidurpur Police Station under the district of Vaishali Lalan Prasad Choudhary (PW-3) is the informant. According to him, he received an information on 26.02.2017 at about 8:00 P.M. from S.O.G. (Special Operation Group), Patna, that a drug smuggler was likely to transport huge quantity of *ganja* which shall pass through his jurisdictional area. Based on the said secret information, he proceeded along with other police personnel namely Gyanendra Kumar Singh, Sub-Inspector of Police (PW-2), Ram Vinod Yadav, Assistant Sub-Inspector of Police (PW-1), Arun Rai, BHG (Bihar Home Guard) (PW-5). Ramji Bhagat, BHG (PW-8) and Lalan Ram (not examined) with the SOG team towards village Pakauli. The moment they reached Pakauli at 8:30 P.M., they noticed that a person was trying to escape in a speeding Magic van, which was chased and finally intercepted at Brahm Asthan Chowk.



Noticing presence of a posse of police personnel, the persons present nearby assembled out of whom, two persons namely Shiv Ranjan Singh (not examined) and Dineshwar Prasad Singh (PW-4) agreed to become witness to the intended search and seizure. The appellant was apprehended, who was driving the said magic van. He disclosed to the police team that he was engaged in illicit trade of contraband substances with his accomplice Pankaj Kumar. The personal search of the appellant was conducted by the team leading to no recovery of any incriminating material from his possession. Thereafter, search of the *magic van* was conducted, leading to recovery of substance like *ganja*, kept in five plastic bags. On weighment, the weight of the *ganja* so recovered was found to be 200 Kg, kept in 20 packets each containing 10 Kg. The informant further mentioned that samples in small quantities were drawn from the packets so recovered and in two packets, 24 gm each of the *ganja* so recovered were sealed by way of sampling.

3. According to the prosecution, the samples so drawn were sent for forensic examination. We find, however, based on the materials on record that even before receipt of the report from the Forensic Science Laboratory, charge-sheet was submitted by the police against the appellant on 18.05.2017 for



commission of the offence punishable under Section 8/20(b)(ii) (C) of the N.D.P.S. Act and Section 414 of the Indian Penal Code. Cognizance was subsequently taken and charges were framed against the appellant for commission of offence punishable under Section 20(b)(ii)(C) of the N.D.P.S. Act and Section 414 of the Indian Penal Code. The appellant denied the charge and claimed to be tried and accordingly, he was put on trial.

4. At the trial, eight witnesses came to be examined for prosecution including the seizure list witness Dineshwar Prasad Singh (PW-4), who though proved his signature on the seizure list, denied search of the truck and seizure of any article by the police in his presence. He was accordingly declared hostile at the instance of prosecution. Chandan Kumar, an officer of the Regional Forensic Science Laboratory, Muzaffarpur deposed as PW-7. The Investigating Officer deposed at the trial as PW-6. The other five prosecution's witnesses were members of the raiding team. It is noteworthy that according to the informant, a team of S.O.G. had given the secret information based on which the police personnel and the S.O.G. team had proceeded to the place where the seizure was made. No member of the said S.O.G. team was examined at the trial. The prosecution adduced



following documentary evidence at the trial:-

Exhibit-1	Seizure List	Prosecution	29.01.2020	Without objection
Exhibit-1/1	Signature of witness on the seizure list	DO	DO	DO
Exhibit-2	Arrest Memo	DO	DO	DO
Exhibit-2/1	Signature of the witness on Arrest Memo	DO	DO	DO
Exhibit-3	Written application	DO	DO	DO
Exhibit-3/1	Pagination	DO	DO	DO
Exhibit-4	Formal FIR	DO	DO	DO
Exhibit-5	Carbon copy of the forwarding letter for examination of Ganja	DO	25.02.2020	DO
Exhibit-6	FSL Report	DO	02.03.2020	DO
Exhibit-7	Letter no. 1519 annexed with FSL report	DO	DO	DO

5. After having appreciated the evidence of the prosecution’s witnesses, the trial court reached a conclusion that the prosecution was able to prove beyond all reasonable doubts, the charges for commission of the offences punishable under Section 20(b)(ii)(C) of the N.D.P.S. Act and Section 414 of the Indian Penal Code. For holding the appellant guilty of the offence punishable under Section 414 of the Indian Penal Code, the trial court was of the view that the appellant could not



produce the valid documents in respect of a magic van, recovered from him and, therefore, the said magic van was certainly a stolen property.

6. Assailing the impugned finding of conviction recorded by the trial court, Mr. Fazle Karim, learned counsel appearing on behalf of the appellant has submitted that apparently the samples were not drawn in the presence of a Magistrate which is evident from the F.I.R. and evidence of the prosecution's witnesses. Such lapse on the part of the prosecution amounts to breach of the mandatory requirement of Section 52A(2)(b) of the N.D.P.S. Act. He has further submitted that according to the First Information Report, 22 samples were drawn of 24 gm each, but the weight of *ganja* of the samples received by the Regional Forensic Science Laboratory, Muzaffarpur, was found to be 11.72 gm. He contends that this major discrepancy has remained unexplained by the prosecution. He has further submitted that it is evident from the report of the Regional Forensic Science Laboratory, Muzaffarpur dated 08.09.2017 (Ext. 6) that the sample for forensic examination was ordered to be dispatched by the Court on 08.03.2017, nearly 13 days after the date of alleged recovery, through a special messenger (S.I. Paneshwar Paswan). From the



said report, it further transpires that the sample was received in the Regional Forensic Science Laboratory, Muzaffarpur on 11.04.2017 i.e. more than a month from the date when it was dispatched to be delivered by special messenger in the office of the Director, Regional Forensic Science Laboratory, Bihar, Muzaffarpur. He has drawn our attention to the depositions of the prosecution's witnesses to submit that apparently, no step was taken to ensure that the samples were drawn in the presence of a messenger. He has also submitted that the seizure list witness has turned hostile and only police personnel have supported the prosecution's case and the finding of conviction recorded by the trial court is unjustified, particularly in the background of the fact that the sample was not drawn in the presence of a Magistrate.

7. Learned Additional Public Prosecutor, representing the State, on the other hand has submitted that though it is true, as would appear from the evidence adduced at the trial that the samples were not drawn in the presence of a Magistrate, no objection was taken on behalf of the appellant at the stage of the trial in this regard. He submits that at this stage, the appellant cannot be allowed to take a defence, which was not taken by him at the trial. He has further argued that it is evident from the



consistent deposition of the prosecution's witnesses that the magic van was intercepted by the police, which the appellant was found to be driving and the from the said magic van, 200 Kg of substance, which was subsequently found to be *ganja* upon forensic examination finding of conviction recorded by the trial court is justified and does not require any interference. He has further submitted that the trial court has rightly convicted the appellant for commission of the offence punishable under Section 414 of the I.P.C. since the appellant failed to produce any document in support of the vehicle which he was found in possession of.

8. We have carefully perused the impugned judgment and order of the trial court as well as the lower court's records and we have given our thoughtful consideration to the rival submissions made on behalf of the parties.

9. Before taking up the submissions advanced on behalf of the parties in relation to the appellant's conviction for the offence punishable under Section 20(b)(ii)(C) of the N.D.P.S. Act, we deem it proper to address the question of the appellant's conviction for the offence punishable under Section 414 of the I.P.C. It is apparent from the oral and documentary evidence as well as the reasoning assigned by the trial court that the



appellant's conviction for commission of the offence punishable under Section 414 is based on his failure to produce any document in support of the vehicle seized by the appellants. Section 414 of the I.P.C. read as under:-

“414. Assisting in concealment of stolen property.--Whoever voluntarily assists in concealing or disposing of or making away with property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”

10. Section 414 of the I.P.C. operates when a person is found to be voluntarily assisting in concealing or disposing or making away with a property which he knows or has a reason to believe to be a stolen property. To attract Section 414 of the I.P.C., the property must be stolen property. Section 410 of the I.P.C. defines stolen property as under:-

“410. Stolen property.-Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as "stolen property", whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without India. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.”

11. Section 410 of the Indian Penal code envisages that



a stolen property is the property, the possession whereof has been transferred 'by theft' or 'by extortion' or 'by robbery' and property which has been criminally misappropriated or in respect of which the criminal breach of trust has been committed. There is no evidence on record to the effect that at any stage, the vehicle was subject matter of robbery, criminal misappropriation or criminal breach of trust.

12. For the aforesaid reason, the finding of conviction of the appellant under Section 414 of the I.P.C. cannot be sustained as the property i.e. the magic van cannot be said to be a stolen property within the meaning of Section 410 of the I.P.C., based on the evidence on record.

13. Coming to the question of the appellant's conviction for the offences punishable under Sections 20(b)(ii) (C) of the N.D.P.S. Act, we find substance in submission made on behalf of the appellant that failure on the part of prosecution to draw samples in the presence of a Magistrate in conformity with the requirement under Section 52A(2)(b) of the N.D.P.S. Act is a major lapse. The requirement of drawing samples in the presence of a Magistrate mandated under Section 52A(2)(b) of the N.D.P.S. Act has been declared to be a mandatory requirement by Supreme Court in various decisions. Secondly,



the recovery of *ganja* according to the prosecution's case was made on 26.02.2017 whereas it was sought to be dispatched to the Regional Forensic Science Laboratory, Bihar, Muzaffarpur on 08.03.2017 through special messenger. Surprisingly enough, the sample which was dispatched through special messenger on 08.03.2017 reached the office of the Director, Regional Forensic Science Laboratory, Bihar, Muzaffarpur on 11.04.2017. There is no clue as to where and in what manner the samples were kept by Sub-Inspector Paneshwar Paswan. Thirdly, according to the First Information Report, two samples of 24 gm each of *ganja* were drawn one of which was sent to the Regional Forensic Science Laboratory, Bihar, Muzaffarpur. The quantity of *ganja*, however, received by the Forensic Science Laboratory as mentioned in the report (Ext. 6) was 11.72 gm only. The said disparity also creates a reasonable doubt.

14. For the reason that the samples were not drawn in the presence of a Magistrate and delay in delivery of the samples to the Regional Forensic Science Laboratory, Bihar, Muzaffarpur, has remained unexplained, it would not be safe for this Court to uphold the finding of conviction recorded by the trial court based on the evidence of only police personnel, in the facts and circumstances as noted above.



15. The impugned finding of conviction for the offences punishable under Section 20(b)(ii)(C) of the N.D.P.S. Act recorded by the trial court thus deserves interference. Consequently, the impugned judgment of the appellant's conviction dated 21.09.2020 for the offences punishable under Section 20(b)(ii)(C) of the N.D.P.S Act and Section 414 of the I.P.C. being unsustainable is hereby set aside. The appellant is acquitted of the charge for the commission of the offence punishable under Section 20(b)ii)(C) of the NDPS Act and Section 414 of the IPC. The order of sentence dated 28.09.2020 also stands set aside.

16. This appeal is allowed.

17. The appellant is in custody. Let him be released from the jail forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

Ranjan/Kundan

AFR/NAFR	NAFR
CAV DATE	NA
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