

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.979 of 2019

Arising Out of PS. Case No.-17 Year-2015 Thana- NARKATIYAGANJ RAIL P.S. District-
West Champaran

OM PRAKASH KUMAR GUPTA @ OM PRAKASH GUPTA Son of Late
Durga Sao Resident of Village- Pantoka, P.O.- Mangalpur (Patani), P.S.-
Ramgarhwa, District- East Champaran (Motihari).

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant : Mr. M.N.Parbat, Senior Advocate
Mr. Praveen Prabhakar, Advocate
For the Respondent : Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH

and

HONOURABLE MR. JUSTICE RAJIV ROY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)

Date : 25-04-2023

The appellant has preferred this appeal under Section
374(2) of the Code of Criminal Procedure against the judgment of
conviction dated 14.06.2019 and the order of sentence dated
21.06.2019 passed by the learned District and Sessions Judge-
cum-Special Judge, West Champaran, Bettiah, in Sessions Trial
No. 25 of 2015, arising out of Narkatiaganj Rail P.S. Case No. 17
of 2015, whereby and whereunder the appellant has been
convicted and sentenced as under :-

Convicted under Sections	Imprisonment	Fine (Rs.)	In default of fine
20(b)(ii)(C) of the NDPS Act	R.I. for 12 years	1,00,000/-	Imprisonment for two years



2. Briefly narrated, it is the prosecution's case that based on a secret information that some persons were about to come from Nepal to India with *charas*, Sub-Inspector of Police, Chandrakesh Yadav (PW-5) constituted a search team and reached at the indicated place, i.e., the railway station Narkatiaganj at 03:15 p.m. Based on the details of the secret information, he apprehended two persons, namely, Om Prakash Gupta @ Om Prakash Gupta (the appellant) and Nawab Miyan. Upon search having been made, the raiding party recovered a bag from the possession of this appellant containing nine packets of *charas* weighing 4.50 kilograms. On personal search, certain other articles, i.e., mobile phone etc. were also recovered. Based on the information given to the Officer-in-charge of the police station by PW-5, the aforesaid Narkatiaganj P.S. Case no. 17 of 2015 came to be registered on 11.08.2015 for commission of the offences punishable under Section 20(b) (ii)(C), 21(c) 22/27A of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act) read with Section 34 of the Indian Penal Code.

3. The police, upon completion of investigation, submitted charge sheet against this appellant. It transpires that the second accused absconded from the processes of the criminal trial.



4. It appears from the impugned judgment of the trial court that both the persons were charged of commission of the offences punishable under Section 20(b)(ii)(C), 21(c) and 22(c) of the NDPS Act. The other accused, namely, Nawab Miyan remained absent, because of which his trial was separated of by an order passed on 08.08.2018 by the learned Special Court.

5. At the trial, altogether five witnesses came to be examined, all of whom were either members of the raiding team or the investigating officers.

6. The trial court, upon appreciation of evidence adduced at the trial, though held the appellant guilty of the offences punishable under Section 20(b)(ii)(C) of the NDPS Act, it reached a conclusion that the prosecution failed to establish the charge of commission of the offences punishable under Sections 20(c) and 22(c) of the NDPS Act, and accordingly, the appellant was acquitted of the aforesaid two charges.

7. We have heard Mr. M.N. Parbat, learned Senior Counsel appearing on behalf of the appellant and Mr. Abhimanyu Sharma, learned Additional Public Prosecutor for the State.

8. Mr. M.N. Parbat, learned Senior Counsel appearing on behalf of the appellant has submitted that it is evident from the FIR itself that the search and seizure was not made in the presence



of any independent witness. Further, the FIR does not mention the seizure list having been prepared and signed by the seizure list witnesses. He has submitted that an improvement has been attempted to be made during the course of trial by the PW 5 to develop a case that there were two independent witnesses, namely, Ramesh Kumar and Surendra Sah, were present at the time of search and seizure. He contends that Ramesh Kumar and Surendra Sah have not been examined at the trial nor their signatures are available on the seizure memo. He has also argued that the signature of the appellant is also not available on the seizure list (exhibit-1). He has further submitted that it does not appear from the evidence of the prosecution's witnesses adduced at the trial that the sample of the seized article was taken at the place of seizure for the same being sent for forensic examination. He has further argued, referring to the evidence of PW-4 (the second investigating officer), that the sample was belatedly sent to the Forensic Science Laboratory after 26.11.2015 for which there is no explanation available on record. It is also evident from the deposition of PW-4 that after having drawn the sample from the seized material, he had replaced the same in *Malkhana*, which did not bear signature of any officer. He has also argued that charge sheet was submitted on 30.11.2015, even without waiting for the result of examination



done by the FSL, Muzaffarpur, of the sample of seized contraband article for forensic examination. The report of the FSL, Muzaffarpur, was communicated to the District and Sessions Judge, West Champaran, Bettiah, on 14.12.2015. The report itself was prepared on 14.12.2015, which has been marked as exhibit-5. He has argued that the FSL report is not a public document and it has not been proved at the trial by any witness.

9. He has also pointed out patent contradictions in the evidence of the prosecution's witnesses on the point of as to had used the drug testing kit to identify the nature of the substance, which was seized during seizure.

10. Learned Additional Public Prosecutor appearing on behalf of the State has, however, submitted that the seizure was duly made by the police officials and in view of the report of the FSL to the effect that the articles seized from the appellant was *charas*, the finding of conviction recorded by the trial court cannot be faulted with. He has argued that the minor contradictions in the evidence of the prosecution's witnesses, as pointed out by the learned senior counsel appearing on behalf of the appellant on the point of use of drug testing kit, does not substantially affect the prosecution's case and on that basis the finding of conviction does not require interference.



11. We have considered the rival submission advanced on behalf of the parties, as noted above, and we have keenly perused the impugned judgment and order of the trial court as well as the evidence adduced at the trial. On perusal of the proforma of the seizure (exhibit-1), we find substance in submission made on behalf of the appellant that the same neither bears the signature of the seizure list witnesses nor the signature or LTI of the appellant. In the written report of PW-5, which is the basis for the registration of the FIR, there is no mention of the search and seizure having been made in the presence of any seizure list witness. At the trial, however, PW-5 claimed that he had prepared the seizure list at the place of seizure itself in the presence of two independent witnesses, namely, Ramesh Kumar and Surendra Sah. He deposed that 1-2 grams of *charas* was drawn from the yellow colour packet, which was recovered from the appellant for the purpose of testing by drug detection kit. He had not prepared any sample other than what he had taken out for the purpose of examination by the drug detection kit. Thereafter, he had sealed all of packets and handed over the accused and the articles seized from them to the police.

12. It is, thus, evident from the evidence of the informant (PW-5) himself that signature, neither of the accused



persons nor of the witnesses, in whose presence, according to him, the search and seizure was made, was obtained on the seizure memo.

13. Learned Additional Public Prosecutor has also not been able to explain the circumstance in which the signature of the search and seizure witnesses and the persons from whose possession the recovery was made was not obtained on the seizure memo.

14. This is also an admitted fact that the recovery of the alleged contraband articles was made on 11.08.2015. Though the report of the FSL dated 14.12.2015 has not been duly proved at the trial, the same is available on record. It can be easily discerned from the said report that on an advice to send the sample, the sample was sent on 26.11.2015, i.e., three and half months after the date of recovery and seizure of the said articles.

15. Before we record our conclusions, it would be pertinent to notice the evidence of PW-2, Sanjay Kumar, Deputy Commander SSB, who was the seniormost officer, leading the raiding party. In paragraph 5 of his evidence, he clearly deposed that he had not taken the signature of independent witnesses on the seizure list. In paragraph 13, he deposed that the signature or LTI of both the accused were not obtained on the seizure memo.



Further, in paragraph 20, he deposed that no sample was obtained in his presence at the police station.

16. The material exhibit was produced by PW-4 (second IO) at the trial, which was sealed. Over the seal, the description of the criminal case, i.e., Narkatiaganj Railway P.S. Case No. 17 of 2015 dated 11.08.2015, was noted and further 4.5 kilograms was mentioned out of which 300 grams was sent for forensic examination. As has been noticed above, according to the deposition of PW-4, steps was taken for the forensic examination of articles not before 26.11.2015. According to his evidence, he had opened the seal for the purpose of taking out the sample of 300 gram. There is no evidence as to in whose presence PW-4 had unsealed the sealed packet for the purpose of preparation of sample. The sealed packet, which was produced at the trial by way of material exhibit, did not bear the signature of any officer, except the initials of second IO (PW-4).

17. Taking into account a holistic view of the entire evidence on record, as noted above, we have no hesitation in reaching a conclusion that the search and seizure itself stood vitiated, the same having been done in the absence of any independent witness. We have reached this conclusion as we do not find signature of any independent witness over the seizure list.



PW-2 has specifically deposed that the signatures of the independent witnesses and the accused persons were not obtained on the seizure memo. Secondly, we do not find any justification for sending the samples for chemical examination more than three months after the recovery was made on 11.08.2015. We do not approve the manner in which the sample had been taken out by the second IO from sealed bag kept in *Malkhana*, which did not bear signature of any officer and merely case number of concerned case was mentioned. The sample was not taken in presence of any other competent person to prove that it was the same packet, which was recovered and seized by the police personnel on 11.08.2015. Accordingly, in our opinion, the entire case of the prosecution stands vitiated.

18. Situated thus, the conviction recorded by the trial court for the offences punishable under Section 20(b)(ii)(C) of the NDPS Act cannot be upheld. The finding of conviction deserves interference and same is accordingly set aside. As result of setting aside of the judgment of conviction dated 14.06.2019 passed by the learned District and Sessions Judge-cum-Special Judge, West Champaran, Bettiah, in Sessions Trial No. 25 of 2015, arising out of Narkatiaganj Rail P.S. Case No. 17 of 2015, the appellant stands



acquitted of the charge of offence punishable under Section 20(b)
(ii)(C) of the NDPS Act.

19. Accordingly, the appeal is allowed.

20. Let the appellant, who is in jail, be released
forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

(Rajiv Roy, J)

Pawan-Niku

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	17.05.2023
Transmission Date	17.05.2023

