

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1146 of 2017**

Arising Out of PS. Case No.-24 Year-2013 Thana- RAXAUL District- East Champaran

Vikesh Sah, Son of Hari Narayan Shah, R/o Village- Kemnia Barwa, P.S.- Birganj, District- Parsa Nepal.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Sanjay Kumar, Advocate
Mr. Ranjeet Kumar Singh, Advocate
Mr. Umesh Kumar Gupta, Advocate
For the Respondent/s : 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 : 10-04-2023

By the impugned judgment and order dated 04.07.2017/ 07.07.2017 passed by the learned 1st Additional Sessions Judge- cum- Special Judge, NDPS Act, East Champaran, Motihari in NDPS Case No. 23 of 13, arising out of Raxual P.S. Case No. 24 of 2013, 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	For 12 years	1,00,000/-	SI for six months

2. The prosecution's case, as disclosed in the First Information Report of the informant, Rajnandan Paswan (P.W.1)



dated 30.01.2013, is that during the course of patrolling, he had received an information from the Station House Officer (SHO) of Raxual Police Station, to the effect that huge quantity of *ganja* was being carried in a bullock cart for smuggling. Based on the said secret information, the informant proceeded towards the direction as was indicated in the information. At about 6:00 P.M., he noticed a vehicle coming from the opposite direction which was intercepted. Upon seeing the police party, the passenger on the said bullock cart attempted to escape but was immediately apprehended by the Police party.

3. Further allegation is that, in the meanwhile, an Inspector of S.S.B. at Pantoka, Mr. Swaraj Kamal with his team arrived there and in a joint operation of the Police and the S.S.B. personnel, the person apprehended was interrogated, who disclosed his name to be Vikesh Sah (the appellant) of Nepal origin. A thorough search was thereafter conducted of the said bullock cart in the presence of two independent witnesses, namely, Harendra Das (not examined) and Ram Bharose Das (not examined). This led to recovery of certain articles which was found to be '*ganja*', upon a test having been done by the drug detection kit which the S.S.B. personnel were carrying.

4. According to the First Information Report, altogether



60 kg contraband '*ganja*' was recovered from a box kept in the bullock cart. This led to registration of Raxaul P.S. Case No. 24 of 2013. The police upon completion of investigation submitted chargesheet against this appellant for commission of the offences punishable under Sections 20, 22, 23 and 24 of the N.D.P.S. Act.

5. The cognizance was taken by the Court based on the chargesheet so submitted and subsequently charges were framed against this appellant for commission of the offences punishable under the aforementioned sections of the N.D.P.S. Act. The appellant denied the charge and claimed trial. At the trial, the prosecution examined nine witnesses, namely, Rajnandan Paswan (P.W. 1, informant cum A.S.I.), Pawan Kumar Singh (P.W. 2, Constable, S.S.B. cum member raiding party), Munna Kumar Singh (P.W. 3, Head Constable of S.S.B., Raxaul), Dinesh Kumar (P.W. 4, Constable of S.S.B., Raxaul), Swaraj Kamal (P.W. 5, Inspector of S.S.B., Raxaul), Hareram Singh (P.W. 6, Hawaldar cum member of raiding party), Dinesh Yadav (P.W. 7, Constable cum member of raiding party), Sunil Kumar (P.W. 8, S.H.O. cum I.O. of the concerned Haraiya O.P.) and Rajiv Kumar (P.W. 9, Constable cum member of raiding party of Haraiya O.P.).

6. As has been noted above, it was the prosecution's case as disclosed in the First Information Report, that the search and



seizure of the seized articles was conducted in the presence of two independent seizure list witnesses. They have, however, not been examined at the trial. Apart from the oral evidence, as noted above, the prosecution also proved at the trial, the documentary evidence, namely, seizure list dated 30.01.2013 (Exhibit-1), written application (FIR, Exhibit-2), forwarding petition relating to sending of the sample to the Forensic Science Laboratory, Patna and Central Forensic Science Laboratory, Kolkata for its examination as Exhibit- 4 and 4/a, receiving receipt of sending the sample from FSL, Patna as Exhibit-5, formal FIR of Raxaul P.S. Case No. 24 of 2013 as Exhibit-6. FSL Report received from F.S.L., Patna in which sample of seized substance was found to be '*ganja*' came to be exhibited as Exhibit-7.

7. Upon closure of the evidence of the prosecution's witnesses, the trial court gave the appellant an opportunity to explain the circumstances which had emerged against him based on the evidence of the prosecution's witnesses in compliance of section 313 of the Code of Criminal Procedure. The appellant denied the circumstances emerging against him.

8. The learned trial court, after having examined the evidence adduced at the trial, reached a conclusion that the prosecution failed to establish the commission of the offence



punishable under section 23 (c) of the Act, inasmuch as, there was no evidence adduced at the trial that the said contraband article was being smuggled. The learned trial court, however, based on the evidence of the prosecution's witnesses concluded that the prosecution was able to establish commission of the offence punishable under section 20 (b)(ii)(c) of the N.D.P.S. Act, and accordingly imposed sentence of imprisonment for twelve years as has been noted herein above.

9. We have heard learned counsel appearing on behalf of the appellant and learned Additional Public Prosecutor for the State.

10. It has been submitted on behalf of the appellant that the contraband '*ganja*' said to have been recovered by the police and S.S.B. personnel were not produced before the court at the trial nor its destruction report had been adduced as an exhibit. Further, the sample of seized substance had not been obtained in presence of the accused.

11. Learned Additional Public Prosecutor for the State, on the other hand, has submitted that the search and seizure was made by the officials competent to cause search and seizure under the provisions of the N.D.P.S. Act, leading to recovery of '*ganja*'. The materials recovered have been found to be '*ganja*' by the



Forensic Science Laboratory and its report has been proved at the trial. He has accordingly submitted that the trial court has rightly recorded the finding of conviction against the appellant of commission of the offence by him punishable under sections 20(b) (ii)(C) of the N.D.P.S. Act.

12. We have carefully perused the impugned judgment and order of the trial court and the evidence adduced at the trial available with the lower court records. It emerges from the evidence adduced at the trial that the articles seized by the informant and the officials of the S.S.B. were not exhibited as material exhibit during the course of trial. Further, whereas the seizure according to the case of prosecution was made on 30.01.2013, the samples were sent to the C.F.S.L., Kolkata and F.S.L., Patna on 17.04.2013, i.e., nearly three months after the seizure of the said article. Such being the uncontroverted fact, in our opinion, the appellant deserves acquittal by giving him benefit of doubt in the light of the Supreme Court's decisions in the case of **Jitendra Vs. State of M.P.** reported in (2004) 10 SCC 562 and in the case of **Ashok Vs. State of M.P.** reported in (2011) 5 SCC 123.

13. The aforesaid two decisions have been relied upon by subsequent decision of the Supreme Court in the case of **Gorakh Nath Prasad Vs. The State of Bihar** reported in (2018) 2 SCC



305. Paragraph-6 of the said decision reads as under:-

6. In the facts of the present case, the independent witnesses with regard to the search and seizure, PW 2 and PW 3. having turned hostile deposing that their signatures were obtained on blank paper at the police station, the mere fact of a FSL Report (Ext. 8), being available is no confirmation either of the seizure or that what was seized was ganja, in the absence of the production of the seized item in court as an exhibit. The non-production of the seized material is therefore considered fatal to the prosecution case. The issue whether there has been compliance with Sections 42 and 50 of the NDPS Act loses its relevance in the facts of the case.

14. Noticing the Supreme Court's decisions in the case of **Jitendra** (supra) and **Ashok** (supra), the Supreme Court in the case of **Gorakh Nath Prasad** (supra) has held that it would not be safe to rely upon the testimony of remaining prosecution's witnesses being police officers only, which, in any event, cannot be sufficient evidence by itself either with regard to recovery or the seized material being 'ganja'.

15. In the present case, there is no explanation furnished by the prosecution for non-production of 'ganja' as an exhibit at the trial. We consider it apt to reproduce paragraph 7 of the Supreme Court's decision in the case of **Gorakh Nath Prasad** (supra) which reads as under:-

"7. The remaining prosecution witnesses being police officers only, it will not be safe to rely upon their testimony alone, which in any event cannot be d sufficient evidence by itself either with regard to recovery or the seized material being ganja. No



explanation has also been furnished by the prosecution for non-production of the ganja as an exhibit in the trial. The benefit of doubt will, therefore, have to be given to the appellant and in support of which learned Senior Counsel Shri Rai has relied upon Jitendra v. State of M.P2 and reiterated in Ashok v. State of M.P3 as follows: (SCC pp. 126-27, paras 12-13)

“12. Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused.

13. It may be noted here that in Jitendra v. State of M.P., on similar facts this Court held that the material placed on record by the prosecution did not bring home the charge against the accused beyond reasonable doubt and it would be unsafe to maintain their conviction on that basis. In Jitendra, the Court observed and held as under: (SCC pp. 564-65, paras 5-6)

5. The evidence to prove that charas and ganja were recovered from the possession of the accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW 7), Angad Singh (PW 8) and Sub-Inspector D.J. Rai (PW 6), there is no independent witness as to the recovery of the drugs from the possession of the accused. The charas and ganja alleged to have been seized from the possession of the accused were not even produced before the trial court, so as to connect them with the samples sent to the forensic science laboratory. There is no material produced in the trial, apart from the interested testimony of the police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the forensic science laboratory were taken from the drugs seized from the possession of the accused....

6. ... The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is



no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned."

16. In the instant case also, the seizure list witnesses have not be examined. The article seized by the police was not produced before the Trial Court as material exhibit. There has been delay of nearly three months in sending the samples for chemical examination to the Forensic Science Laboratory. Such being the situation the prosecution cannot be said to have established at the trial recovery of the contraband articles from the appellant's possession. Situated thus, we do not find it safe to uphold the impugned judgment of conviction recorded by the Trial Court.

17. In the result, the appellant stands acquitted of the charge of the offence punishable under section 20(b)(ii)(c) by giving him benefit of doubt.

18. Accordingly, the impugned judgment of conviction and order of sentence dated 04.07.2017/07.07.2017, passed by the learned 1st Additional Sessions Judge cum- Special Judge NDPS Act, East Champaran, Motihari in connection with NDPS Case No. 23 of 2013, arising out of Raxual P.S. Case No. 24 of 2013 is set aside.



19. The appellant is in jail custody. Let him be released forthwith if he is not required in any other case.

20. This appeal is accordingly allowed.

(Chakradhari Sharan Singh, J)

(Rajiv Roy, J)

Jagdish/-

AFR/NAFR	NAFR
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