

(2004) 02 PAT CK 0004

In the Patna High Court

Case No : Criminal Appeal (DB) No. 385 of 2003

Dina Nath Mishra

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 19-02-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 35, 54

Citation : (2004) 2 PLJR 639

Hon'ble Judges : Mridula Mishra, J; I.P. Singh, J

Bench : Division Bench

Advocate : Umakant Shukla, Rajesh Ranjan 1 and Dhananjay Kumar No. 2, for the Appellant; Ashwani Kr. Sinha, for the Respondent

Final Decision : Allowed

Judgement

I.P. Singh and Mridula Mishra, JJ.—The sole Appellant had been convicted u/s 20(b)(i) of the Narcotic Drugs and Psychotropic Substance Act, 1985 (hereinafter referred to as the "Act") and was sentenced to undergo R.I. for 15 years with a fine of Rs. 1,50,000/- and in default of payment of fine to undergo R.I. for a further period of two years.

2. The prosecution case in short is that the truck bearing No. HP-23-1773 turned turtle in a ditch in the night of 16/17.12.2000. The chowkidar, Sheonath Ram, was deputed to watch the over turned truck. The staff of the truck started unloading the bags from the truck in question. This chowkidar, Sheonath Ram, found that some small bags were also there in the bags of ginger. The chowkidar gave this information to the police station. Thereafter, the driver, cleaner and other staff ran away. Thereafter, the officer-incharge along with other constables arrived at the spot and found that 14 bags of ganja were kept concealed. The weights of the ganja were also estimated and it was found to be 382 kilograms having 50 kilograms in each bag. Some bags were also found to be in damaged condition. Thereafter, the seizure list (Ext.1) was prepared in presence of two

witnesses, namely, Rabindra Pandey and Pintu Pandey. The truck was coming from Siliguri and was going to Delhi. On the basis of the statement of the officer-in-charge the first information report was drawn up and a case u/s 20(b)(i) of the Act was registered.

3. In this case three witnesses, namely, Bhuneshwar Singh, A.S.I. (P.W.1), Had Nandan Pd. Singh (P.W.2) and Sibte Alam (P.W.3) have been examined. P.W.1, Bhuneshwar Singh, A.S.I, had stated that he was posted at Kotwa police station on 18.12.2000. According to him, the truck bearing No. HP-23-1773 had turned turtle and he deputed a chowkidar to watch the truck. Thereafter, he has stated that the chowkidar, Sheonath Ram, informed him on phone about the turning of the truck and he has also stated that ginger was loaded on the truck. Since the ginger was perishable item, the driver and khalsi were taking out the ginger from the truck. In that connection, the chowkidar saw that 14 bags of ganja were also kept in small bags inside the ginger bags). Thereafter, the seizure list was prepared by P.W. 2, Hari Nandan Pd. Singh, who was officer-in-charge, and it is marked as Ext. 1. He has also stated that Deputy Superintendent of Police has also put his signature on it. He has also stated that he did not see the Appellant and as such, he could not recognize him. P.W.2, Hari Nandan Pd. Singh, A.S.I., has also supported the case of the prosecution. According to him, he was officer-in-charge of the Kotwa police station on the date of occurrence and he received information that the truck bearing No. HP-23-1773 coming from Silliguri. Delhi was turned turtle near Mangra Chowkidar within Kotwa police station. He deputed chowkidar, Sheonath Ram, to watch the truck and he was informed by him that the staff of the truck were unloading ginger bags. He also noticed that ganja was kept inside the bags. He also entered the information in his station diary at serial No. 378 dated 18.12.2000. He also informed the Deputy Superintendent of Police and both of them reached at the place of occurrence and found 14 bags of ganja were kept concealed within the ginger bags. He prepared seizure list (Ext.2) in presence of two independent witnesses, namely, Rabindra Pandey and Pintu Pandey. P.W. 3, (sic) Alam, is the investigating officer in this case. He also fully supported the case of the prosecution. According to him, the truck bearing No. HP-23-1773 was turned turtle in a ditch. He also supported that chowkidar Sheonath Ram, was deputed there and thereafter, on the information of the chowkidar he along with P.W.2 went to the place of occurrence. He also supported the seizure list. According to him, 14 bags of ganja were kept concealed inside the ginger bags. The total weight of the ganja was found to be 382 kilograms and the weight of the ginger bags, which were 216 in number, was 108 quintals.

4. Learned Counsel for the Appellant has drawn our attention to paragraph-13 of the impugned judgment. According to him, the Spl. P.P. has conceded before the court below that neither any person was seen as staff of the truck nor any person was arrested at the spot. However, the court had relied upon the bail petition of the Appellant said to have been filed before the Trial Court on 11.1.2001, in which the Appellant had admitted that he was the driver of the

truck in question. In this connection, it was further stated that he has booked the truck for Delhi for the transportation of ginger.

5. Learned Counsel for the Appellant has submitted that filing of any such petition on behalf of the Appellant is strongly denied. A close look of the petition dated 11.1.2001 will go to support this contention. At the time of filing of this petition the Appellant was taken in custody, and it does not bear his signature. Of course it bears the signature of one Ramakant Rakesh and another Nageshwar Pd, both are advocates. On behalf of the Appellant it has been contended that the Appellant did not executed any vakalatnama in favour of these two advocates. In this connection, our attention has been drawn to the signature of the Appellant appearing on it. A comparison of his signature appearing on his statement made u/s 313 of the Code of Criminal Procedure, in short "Code", and even elsewhere in the case will show that they did not tally. Moreover, Nageshwar Prasad, advocate, who has signed on his petition, is also appearing on behalf of Mohanth Ram, the owner of the truck in question. He has filed a petition in the court on 11.1.2001 on behalf of Mohanth Ram and on the same day he accepted the vakalatnama on behalf of the Appellant.

6. On behalf of the Appellant it has also been submitted that Mohanth Ram, the owner of the truck has become hostile. Learned Counsel for the Appellant has further contended that Mohanth Ram had given false assurance to the Appellant that he will be released on bail but it did not happen. It has also been contended that statements made in the petition dated 11.1.2001 were all wrong statements about which he has no knowledge since no such petition was filed on his behalf otherwise he would not have accepted in that petition that he was the driver of the truck in question. Even the registration number of the truck is missing from this petition which was to be mentioned in its paragraph-4 which emphatically goes to prove that it was not filed by him since it cannot be expected by the driver of the truck that he does not even know its registration number. Considering the submission, we find force in the contention of the learned Counsel for the Appellant that he had not filed any such petition and it will not bind him. Another important thing to which our attention has been drawn on behalf of the Appellant is that in his examination u/s 313 of the Code no question was put to him about the circumstances appeared against him on the basis of the statement of witnesses made in this case. Another thing to be noted in this connection is that the entire case diary has been marked as Ext. 1. The case diary or evidence collected during investigation by police is for filing of chargesheet and it is not for deciding the case and cannot be admitted as evidence. In this case neither any seizure list witnesses nor any independent witnesses have been examined. Three prosecution witnesses examined in this case are all police officers, are only competent witnesses on point of recovery of contraband and not on point of involvement of Appellant. Learned court below has relied on Sections 35 and 54 of this Act and presumed his guilt but these provisions are not attracted under the facts and circumstances of this case, since Appellant has rebutted the claim of prosecution that he was driving the truck.

7. In the above facts and circumstances, the prosecution could not prove beyond reasonable doubt that the Appellant was the driver of the truck from which ganja was recovered as such the conviction and sentence passed by the court below are not sustainable and, accordingly, the Appellant is acquitted of the charge levelled against him.

8. It has been submitted on behalf of the learned Counsel for the Appellant that this Appellant is in custody, it is directed that he may be released forthwith, if not wanted in any other case.

9. In the result, this appeal is allowed.