

(2019) 09 PAT CK 0117

In the Patna High Court

Case No : Criminal Appeal (SJ) No. 1448, 1622, 1863 Of 2019

Shivam Kumar Singh @ Golu Singh And Ors

APPELLANT

Vs

State Of Bihar And Ors

RESPONDENT

Date of Decision : 17-09-2019

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 20(b)(ii)(B), 52(A)
Code Of Criminal Procedure, 1973 — Section 313, 428

Citation : (2019) 09 PAT CK 0117

Hon'ble Judges : Aditya Kumar Trivedi, J

Bench : Single Bench

Advocate : Prabhat Kumar Singh, Binod Bihari Singh, Prabhat Kumar Singh,
Sujit Kumar Singh, Ravindra Kumar, S.A. Ahmad

Final Decision : Allowed

Judgement

1. During course of consideration of the prayer for bail on behalf of respective appellants, lower court record has been gone through. After perusal of the same, it is evident that there happens to be gross error persisting on the record whereupon, the judgment impugned could not survive and on account thereof, instead of taking up prayer for bail, the appeals are being decided on its merit.

2. In Cr. Appeal (SJ) No. 1622/2019, Shivam Kumar Singh @ Golu Singh happens to be appellant, in Cr. Appeal (SJ) No. 1448/2019, Amit Kumar Singh happens to be appellant while Bablu Keshri and Munna Keshari happen to be appellant of Cr. Appeal (SJ) No. 1863/2019. All these three appeals originate against the common judgment of conviction dated 13.02.2019 and order of sentence dated 22.02.2019 passed by 2nd Additional Sessions Judge-cum-Special Judge, NDPS, Bhojpur, Arrah in connection with NDPS Case No. 19 of 2017 arising out of Ara Town PS Case No. 299/2017 whereby and whereunder all the appellants have been found guilty for an offence punishable under Section 20(b)(ii)(B) of the NDPS Act and each one has been directed to undergo RI for five years as well as to pay fine of Rs. 11000/- in default thereof, to undergo SI

for three months, additionally, with a further direction that the period having been undergone during course of trial, would be subject to set off in accordance with Section 428 of the CrPC, have been heard conjointly, and are being decided by a common judgment.

3. ASI, Pankaj Kumar Saini (PW 4) of Town PS recorded self statement on 01.06.2017 disclosing therein that after getting confidential information with regard to sale of Ganja at the kiosk by Bablu Keshri, an information was given to the O/C who informed the Superior Official as well as also informed SDM vide Memo No. 1685/17 dated 01.06.2017 for deputation of an Executive Magistrate in order to facilitate the police party to conduct a raid. Accordingly, Smt. Sunita Sneha, Executive Magistrate (not examined) was deputed under whom, a raiding party was constituted headed by O/C Ara Town PS along with him including ASI, Saurabh Kumar of DIU Branch, ASI, Ashok Kumar Singh, ASI, Budhan Singh, ASI, Shatrughan Singh, Constable, Manish Dubey, Constable, Ramesh Kumar Ram, Constable, Jagmohan Kumar Ram, Constable, Arun Kumar Chaubey, Constable, Jayendra Kumar Singh, Constable, Ranjit Kumar and they conducted raid at the kiosk of Bablu Keshri who was found sitting. He was apprehended and then, on interrogation, he disclosed his identity. Because of the fact that none of the independent persons volunteered to become the seizure list witness on account thereof, Constables, Manish Dubey as well as Jagmohan Kumar Ram were stamped as seizure list witnesses and in whose presence, there was search and during course thereof, Ganja was found in a Jhola weighing two Kilograms. On interrogation, Bablu disclosed that the Ganja is being supplied by Shivam Kumar Singh @ Golu Singh as well as Amit Kumar Singh. As per his information, they are to supply Ganja at the house of Munna Keshri. Accordingly, the raiding party have gone and cordoned at a point near Teenmuhani. After some time, they have found two motorcyclists whom they signalled to stop. They have unsuccessfully tried to slip but were apprehended, who on query, disclosed their identity as Shivam and Amit and further, in presence of aforesaid two witnesses, that means to say, Manish Dubey as well as Jagmohan Kumar Ram, as none turned up to become seizure list witnesses, from the Jhola possessed by Shivam, five kilograms of Ganja was found while from the Jhola of Amit, two kilograms of Ganja was seized. It has also been disclosed that from the pocket of Shivam, one SAMSUNG mobile has been seized.

4. It has further been disclosed that on interrogation, they have disclosed that the aforesaid Ganja was being carried to the place of Munna Keshri from the place of Dipu Singh and Mithilesh Singh, both of Masarh Village. Then thereafter, they conducted raid at the house of Munna Keshri and during course thereof, he was apprehended red handed while preparing sachets. Furthermore, his house was searched and during course thereof, six kilograms of Ganja was found from a plastic bag along with Rs. 92,500/- which happens to be sale proceed of the Ganja. Respective seizure lists were prepared. Respective accused were taken into custody and then they returned back to the police station.

5. After registration of Ara Town PS Case No. 299/2017, investigation commenced and completed by way of submission of charge-sheet, facilitating the trial meeting with the ultimate result, subject matter of these appeals.

6. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial. One DW has also been examined on behalf of appellant, Amit Kumar Singh.

7. In order to substantiate its case, the prosecution has examined altogether five PWs who are PW-1, Budhan Kumar Singh, PW-2, Jai Prakash Singh, PW-3, Ashok Kumar Singh, PW-4, Pankaj Kumar Saini and PW-5, Nirmal Kumar. Side by side, prosecution has also exhibited Ext-1, Signature of PW-4, informant on seizure list prepared at Gumti (stall), Ext-1/1, Signature of Manish Dubey on seizure list prepared at Gumti (stall), Ext-1/2, Signature of Jag Mohan Ram on seizure list prepared at Gumti (stall), Ext-1/3, Signature of Magistrate, Sunita Sneha on seizure list prepared at Gumti (stall), Ext-2, Signature of Pankaj Saini on seizure list prepared at Gausganj Road, Ext-2/1, Signature of Manish Dubey on seizure list prepared at Gausganj Road, Ext-2/2, Signature of Jag Mohan Ram on seizure list prepared at Gausganj Road, Ext-2/3, Signature of Magistrate, Sunita Sneha on seizure list prepared at Gausganj Road, Ext-3, Signature of Pankaj Saini on seizure list prepared at house of Munna Keshri, Ext-3/1, Signature of Manish Dubey on seizure list prepared at house of Munna Keshri, Ext-3/2, Signature of Jag Mohan Ram on seizure list prepared at house of Munna Keshri, Ext-3/3, Signature of Magistrate, Sunita Sneha on seizure list prepared at house of Munna Keshri, Ext-4, Writing and signature of informant on the Fardbeyan, Ext-5, Charge-sheet, Ext-6, Writing and signature of I.O. on the forwarding of the accused to the court, Ext-7, Chemical examination report of FSL, Patna, Ext-8, Chemical examination report of Chemical Laboratory Custom House, Kolkata. As stated above, one DW has been examined on behalf of Amit Kumar Singh. On behalf of rest of the appellants, nothing has been adduced.

8. It is evident from the record that PW-1 to PW-4 are members of the raiding party while PW-5 is the I.O.. It is further evident from the record that all the witnesses have substantiated the case of the prosecution to the effect that after getting confidential information which was communicated to the Officer Incharge, a letter of request was sent to the SDM for deployment of an Executive Magistrate to lead the raiding party whereupon, the Executive Magistrate has been reputed under whose leadership, the raiding party conducted a raid and from the kiosk of Bablu, Ganja was seized, in likewise manner, Amit Kumar Singh as well as Shivam Kumar Singh were apprehended, Ganja was seized from Jhola and further, on their pointing out, the place of Munna Keshri was raided and therefrom also, Ganja was seized. Really, the Ganja was seized is the question which is to be determined in the instant trial and for that, it is evident that so many seizure lists have been exhibited, corroborated by oral evidence but, there happens to be no physical production of Ganja, nay there happens to be disclosure at the end of the prosecution that they took steps for destruction of

the Ganja in accordance with Section 52(A) of the NDPS Act.

9. On account of non production of Ganja in court as material exhibit, has been considered adverse to the prosecution as has been held by the Hon'ble Apex Court in the case of Mohinder Singh v. State of Punjab reported in AIR 2018 SC 3798 and for better appreciation the relevant para is quoted below:-

"12. For proving the offence under the NDPS Act, it is necessary for the prosecution to establish that the quantity of the contraband goods allegedly seized from the possession of the Accused and the best evidence would be the court records as to the production of the contraband before the Magistrate and deposit of the same before the Malkhana or the document showing destruction of the contraband.

13. In Vijay Jain v. State of Madhya Pradesh (2013) 14 SCC 527, this Court reiterated the necessity of production of contraband substances seized from the Accused before the trial court to establish that the contraband substances seized from the Accused tallied with the samples sent to the FSL. It was held that mere oral evidence to establish seizure of contraband substances from the Accused is not sufficient. It was held as under:

"10. On the other hand, on a reading of this Court's judgment in Jitendra v. State of M.P. (2004) 10 SCC 562, we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the Accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the Accused would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile. Again, in Ashok v. State of M.P. (2011) 5 SCC 123, this Court found that the alleged narcotic powder seized from the possession of the Accused was not produced before the trial court as material exhibit and there was no explanation for its non-production and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the Appellant.

10. In its ancillary event, there happens to be disclosure at the end of PW-4, informant, out of two Kilograms Ganja recovered from the place of Bablu Keshri, sample was prepared to the effect of 20-25 Grams and was sealed in two envelopes whereupon, he along with Sunita Sneha (Executive Magistrate), accused, Bablu Keshri and both the seizure list witnesses have put their signatures and in similar fashion, the samples were prepared with regard to the recovered Ganja having from the possession of Amit and Shivam as well as from the place of Munna Keshri, that means to say, there would have been eight packets of the samples. When the evidence of PW-5, I.O. has been gone

through, in para-9, he has stated that 07.06.2017, sample was prepared out of seized Ganja which was in eight packets. Mark 'A' and 'B' was put corresponding to recovered Ganja from the possession of Bablu, Mark 'B' and 'B-1' for Shivam @ Golu, Mark C, 'C/1' for Amit and for Munna Keshri 'D and D/1'.

11. He took those samples to the Court and then, submitted a request for transmission of aforesaid samples before the FSL, Patna, Kolkata and, after getting permission from the Sessions Judge, he put those packets in the Tin Box and then, he sent the samples to Kolkata on 08.06.2017 while on 12.06.2017 to FSL, Patna. FSL report, Ext-7 relates with the finding recorded by the Chemical Laboratory Custom House, Kolkata. After going through the same, it is evident that gross weight of (A-1) (not stamped) = 22.01 gms, (B-1)= 19.8 gms, (C1)=25.9 gms and (D-1)=28.0 gms. Ext-8 is the report transmitted by FSL, Patna containing A, B, C, D and, from perusal of the same, it is evident that no weight is being prescribed therein. Had there been, then in that circumstance, it would have been compared with Ext-7. Furthermore, as per evidence of PW-4, sealing was at the spot itself containing the signature of the concerned while PW-5 has stated that the sample was prepared on 07.06.2017 at the police station and that happens to be the reason behind that neither in the Ext-7 nor in the Ext-8, there happens to be disclosure that the packets were containing signature of respective witnesses, accused and Executive Magistrate. In likewise manner, there happens to be no evidence to suggest with regard to storage of seized Ganja, as informant, PW-4 failed to disclose the place where seized Ganja was kept and in likewise manner, PW, I.O. failed to substantiate. PW-4 in para-19 has stated that sample was handed over to the I.O., PW-5, did not affirm. The most surprising feature is, absence of those incidents in the self statement whereupon, the informant was cross-examined under Para-18, whereunder, he stated that he is not remembering whether sample was taken out, sealed.

12. Apart from this, neither the Executive Magistrate nor the Officer In charge nay the other witnesses have been examined and whoever been examined as is evident, they had contradicted the scenario relating to preparation of sample which casts doubt in the background of non production of the material exhibit in the court.

13. Consequent thereupon, judgment of conviction and sentence recorded by the learned lower court, is hereby, set aside. All the appeals are allowed.

14. Appellants are under custody, hence are directed to be released forthwith if not wanted in any other case.