

(2023) 08 PAT CK 0045

In the Patna High Court

Case No : Criminal Appeal (DB) No. 534 Of 2022

Sikindar Prasad Yadav @ Sikandar Prasad Yadav

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 01-08-2023

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 313, 374(2)
Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 8, 20, 20(b)(ii)(C),
23, 23(c), 24, 43, 52A, 52A(2)(b), 52A(2)(c), 52A(3), 53, 67

Citation : (2023) 08 PAT CK 0045

Hon'ble Judges : Chakradhari Sharan Singh, J; Nawneet Kumar , J

Bench : Division Bench

Advocate : Vikash Kumar Pankah, Pratiyush Kumar, Ramakant Sharma, Akshay Ashish

Final Decision : Allowed

Judgement

1. This appeal has been preferred by the appellant under Section 374(2) of the Code of Criminal Procedure, putting to challenge a judgment of conviction dated 18.07.2019 and an order of sentence dated 19.07.2019, passed by learned Sessions Judge-cum-Special Judge, East Champaran at Motihari in NDPS Case No. 39 of 2017 arising out of C.No. VIII(10)13/CUS/Seiz/NDPS/RXL/17/88 dated 08.04.2017, whereby the appellant has been convicted and sentenced as under:

Cr. Appeal (DB) No. 534 of 2022

Appellant

Conviction under Section

Sentence

Imprisonment

Fine (Rs.)

In default of fine

Sikandar Prasad Yadav @ Sikandar Prasad Yadav

20(b)(ii) (C) of NDPS Act

R.I. for 12 years

1,50,000/-

S.I for six months

23(c) of NDPS Act

R.I. for 12 years

1,50,000/-

S.I for six months

2. All the sentences have been ordered to run concurrently.

3. An Inspector posted at Land Customs Station, Raxaul, Binod Kumar Das (PW-2) filed a complaint petition in the Court of learned Sessions Judge-cum-Special Judge, NDPS, Motihari on 19.07.2017 (Exhibit-14) giving rise to the concerned NDPS Case No. 39 of 2017. The prosecution's story has been elaborately narrated in the said complaint petition. It is the prosecution's case that an information was received on 07.04.2017, that a person was carrying charas from a place Sirasiya (Nepal), for being handed over to someone at Raxaul Bus Stand, East Champaran Via-Kaurihar Chowk, Raxaul. The apparels which the person would be wearing while carrying the said contraband was also indicated in the secret information. A team was accordingly constituted for intercepting the said person and an intimation was sent in this regard to the Superintendent (Preventive) LCS, Raxaul. The team so constituted rushed towards the indicated place at 3:00 pm, and after waiting for a while, the person was spotted. He was signaled to stop, who was found to be carrying a black air-bag. The said person was asked to open his black air-bag in the presence of two independent witnesses (no independent witness was examined at the trial). Upon opening of the bag, some packets wrapped with brown coloured plastic adhesive tapes were found. On enquiry, the person disclosed his name as Sikandar Prasad Yadav (appellant) and told the custom officials that he was carrying charas which he had received from one Tapelal Sah of Sirasiya (Nepal), to be delivered to a person near the bus stand, to be found in a red shirt. Despite efforts made, the persons to whom the charas was intended to be handed over by the appellant could not be located by the DRI officials. It is further case that the appellant, his bag and both the independent witnesses were brought to LCS, Raxaul for further formalities. After arriving at the office, a personal search of the appellant was conducted in the presence of the Superintendent (Preventive) LCS, Raxaul and the said two independent witnesses, after obtaining the appellant's consent to be searched before a Departmental Gazetted Officer. No incriminating material/

document was recovered on personal search of the appellant. The bag was opened in his presence. A total of 17 packets of charas in rectangular shape were recovered from the said bag. The charas was weighed in the presence of the appellant and both the witnesses which was found to be 8.450 kgs (net). A seizure memo was thereafter prepared and the recovered charas, weighing 8.450 kgs, was seized on 07.04.2017 under Section 43 of the NDPS Act at 8:00 pm for violation of Section 8 of the NDPS Act. A copy of the seizure memo was handed over to this appellant also. Thereafter small quantities of charas from each of all the 17 packets were taken and mixed together and three representative samples (weighing approximately 25 gram each) were drawn from the mixed charas and kept in three separate small transparent plastic pouches. The said pouches were kept in three separate plastic coated envelopes in the presence of the appellant and two independent witnesses, which were sealed for sending them to the Joint Director, Chemical Laboratory, Customs House, Kolkata for chemical examination. The interrogatory statement of the appellant was recorded under Section 67 of the NDPS Act, wherein he confessed his culpability by saying that he was carrying 17 packets of charas which he had received from Tapelal Sah of Sirasiya (Nepal) for carrying the same to bus stand, Raxaul to be delivered to a person wearing a red shirt. He confessed that he was doing so under the allurements of payment of a sum of Rs. 2,000/-.

4. On a reasonable belief that the appellant had smuggled charas from Sirasiya (Nepal) Via- Kaurihar Chowk Raxaul and thereby breached the provision of Section 8 of the NDPS Act and, therefore, liable to punishment for the offences punishable under Sections 20, 23 and 24 of the NDPS Act, he was arrested on 08.04.2017 at 11:00 am, in exercise of power under Section 43 of the NDPS Act. He was produced before the court of learned District and Sessions Judge, Civil Court, Motihari on 08.04.2017 and was remanded to the judicial custody under the court's order.

5. As has been noted hereinabove, according to the prosecution's case, three samples were drawn by the custom officials themselves at the LCS office, Raxaul itself. One of them was sent for chemical examination to the Joint Director, Chemical Laboratory Custom House, Kolkata on 08.04.2017.

6. Before referring to subsequent facts mentioned in the said complaint petition, we consider it apposite to mention from the ordersheet of the court below that on 08.04.2017, after producing the appellant before the court of learned Special Judge, Motihari, an application was made seeking permission to send the samples marked as S-1 to CRCL, Kolkata and to keep the sample marked as S-2 and S-3 in the custody of Malkhana at Customs House, Raxaul. The prayer was allowed and the Investigating Officer was directed to submit the articles to the Authority.

7. It is evident from the complaint petition itself as well as the ordersheet of the trial court dated 08.04.2017, that the samples were not drawn in the presence of a Magistrate as contemplated under Section 52A (2) (b) of the NDPS Act and the

directions issued by the Supreme Court in the case of Union of India v. Mohanlal reported in (2016) 3 SCC 379.

8. Be that as it may, according to the prosecution's case a report dated 13.07.2017, was received from the office of Chief Chemical Examiner, Chemical Laboratory Custom House, Kolkata to the following effect:-

" The sample is in the form of blackish brown sticky material. It responds to the tests for resinous extract of plant cannabis sativa (charas)."

9. The remnant sample of charas returned with colorless transparent plastic pouch in sealed condition with facsimile of seal "CHEMICAL EXAMINER CAL CUS HOUSE No. 1" was deposited in the godown of customs, LCS, Raxaul.

10. With the accusation as noted-above, the complaint petition was filed on 19.07.2017, whereupon cognizance was taken and the appellant came to be charged for commission of the offences punishable under Sections 20(b)(ii)(C) and 23(c) of the NDPS Act read with Section 8 thereof.

11. At the trial the prosecution examined altogether 9 witnesses as under:-

Ram Karan Safi (PW-1), Custom Superintendent, who had supervised the seizure formalities, Binod Kumar Das (PW-2) the seizing officer and the complainant, Vijay Kumar Paswan (PW-3) a member of the raiding team, Bharat Kumar (PW-4), Custom Superintendent, who had apprehended the appellant and assisted in completing the seizure formalities, Sanjeev Kumar Jha (PW-5), Custom Superintendent, who had also participated in apprehending the appellant and assisting in completing the seizure formalities, Shashi Bhusan Singh (PW-6), Custom Inspector, who had apprehended the appellant and assisted in completion of seizure formalities, Mahboob Alam (PW-7), Custom Superintendent, who had assisted in completing the seizure formalities, Abhishek Kamal (PW-8), Custom Inspector, who was a member of the team, had apprehended the appellant and had assisted in completion of seizure formalities, Arun Nayan Prasad (PW-9), a formal witness, who proved certification papers for disposal of the seized contraband.

12. Apart from the oral evidence, the prosecution adduced following documentary evidence at the trial to substantiate the charge against the appellant:-

Sl. No.

Exhibits

Details

1.

Ext-1

Jama Talashi Vivarani

2.

Ext-2

Notice U/S 50 of N.D.P.S. Act

3.

Ext-3

Seizure Memo

4.

Ext-4

Panchnama

5.

Ext-5

Forwarding report to Joint Director, Chemical Laboratory, Customs House, 15/1, Strand Road, Kolkata

6.

Ext-6

Forensic Science Laboratory Report

7.

Ext-7

Summons u/s 67 of the N.D.P.S. Act

8.

Ext-7/1

Summons u/s 67 of the N.D.P.S. Act

9.

Ext-8

Interrogatory statement of the accused Sikindar Prasad Yadav

10.

Ext-9

Signature of P.W.2-Binod Kumar Dason Notice U/s 50 of
N.D.P.S. Act

11.

Ext-10

Weighing Chart

12.

Ext-11

Voluntarily statement of accused Sikindar Prasad Yadav.

13.

Ext-12

Arrest Memo

14.

Ext-13

Photograph of accused Sikindar Prasad Yadav

15.

Ext-14

Official Complaint Petition

16.

Ext-15

Certificate for destruction of seized goods

17.

Ext-16

List of N.D.P.S. cases ripe for destruction in LCS, Raxaul.

13. After closure of the prosecution's evidence the trial court questioned the appellant under Section 313 of the CrPC, referring to the evidence adduced at the trial on behalf of the prosecution, so as to give him an opportunity to explain the circumstances emerging against him based on the prosecution's evidence. The appellant denied the accusation of recovery of any contraband article from him and thus, he answered all the questions in negative.

14. The trial court, after having appreciated the evidence adduced at the trial reached a conclusion that the prosecution was able to prove the charge of commission of the offences punishable under Sections 20 (b) (ii) (C) and 23 (c) of the NDPS Act and sentenced him to imprisonment and fine as has been noted above.

15. Learned counsel appearing on behalf of the appellant has submitted that the finding of conviction recorded by the trial court is not at all sustainable for the

reason that the entire prosecution's case is based on the chemical examination of the samples sent by the custom officials to CRCL, Kolkata. It is a mandatory requirement under Section 52A(2)(b) of the NDPS Act as explained by the Supreme Court in the case of Mohanlal (supra) that soon after seizure is made, an application ought to have been made before the learned Special Judge for deputation of a Magistrate to supervise drawing of the samples. In the present case, this being an admitted fact that the samples were not drawn in the presence of the Magistrate, the entire case of the prosecution stands vitiated. He further submits that according to the prosecution's case, all the formalities of search and seizure were done in the presence of two independent witnesses, namely, Munilal Patel and Gauri Prasad. None of them were, however, examined at the trial which renders the entire search and seizure doubtful. He contends that in view of the decision of the Supreme Court in the case of Tofan Singh v. State of Tamil Nadu reported in (2021) 4 SCC 1, the statement of an accused recorded by a custom official under Section 67 of the NDPS Act, is not admissible in evidence. It has also been submitted that none of the samples which were drawn, according to the prosecution's case, after seizure of the contraband from the possession of the appellant were produced as material exhibits at the trial, which is a major lacuna and for this reason also the finding of conviction cannot be sustained.

16. Mr. Ramakant Sharma, learned senior counsel appearing on behalf of the Union of India has submitted that the custom officials followed due procedure while conducting the search after giving the appellant a choice to be searched either before Gazetted Officer or before a Magistrate. Once he gave a written consent to be searched before a Gazetted Officer, the search was conducted leading to recovery of contraband article from his possession in presence of the seizure list witnesses. He has submitted that the evidence of the witnesses may not be totally discarded only because they are custom officials as there is no reason to disbelieve their evidence. He has submitted that upon chemical examination, the substance recovered from the appellant's conscious possession has been found to be charas and in that background the trial court, after having noticed the evidence of the prosecution's witnesses has rightly recorded the conviction, which does not require any interference by this Court.

17. We have gone through the impugned judgment and order of the trial court and we have carefully analyzed the evidence adduced at the trial. We do not find any dispute over the fact that the sample was not drawn in the presence of a Magistrate.

18. The Supreme Court in case of Mohanlal (supra) decided on 28.01.2016 construing the provision under Section 52A of the NDPS Act has held in paragraph Nos. 15 and 16 as under:-

"...15. It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall

prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct..."

19. Further while summing up the issues relating to seizure, sampling and safe storage of the contraband articles under the NDPS Act issued following directions:-

"...31. To sum up we direct as under:

31.1. No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A, as discussed by us in the body of this judgment under the heading "seizure and sampling". The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order.

31.2. The Central Government and its agencies and so also the State Governments shall within six months from today take appropriate steps to set up storage facilities for the exclusive storage of seized narcotic drugs and psychotropic and controlled substances and conveyances duly equipped with vaults and double-locking system to prevent theft, pilferage or replacement of the seized drugs. The Central Government and the State Governments shall also designate an officer each for their respective storage facility and provide for other steps, measures as stipulated in Standing Order No. 1 of 1989 to ensure proper security against theft, pilferage or replacement of the seized drugs.

31.3. The Central Government and the State Governments shall be free to set up a storage facility for each district in the States and depending upon the extent of seizure and store required, one storage facility for more than one districts.

31.4. Disposal of the seized drugs currently lying in the Police Malkhanas and

other places used for storage shall be carried out by the DDCs concerned in terms of the directions issued by us in the body of this judgment under the heading "disposal of drugs..."

20. Evidently, the prosecution has not followed the mandatory safeguard stipulated under Section 52A(2)(b) of the NDPS Act and the law laid down in this regard by the Supreme Court in case of Mohanlal (supra).

21. Secondly, it is evident from an order passed by the court on 08.04.2017 on an application made by the Investigating Officer that the court had permitted to keep the remaining two samples, said to have been drawn, namely, S-2 and S-3 in the custody of Malkhana at customs, Raxual. These samples were not produced as material exhibits at the trial.

22. Thirdly, the independent seizure list witnesses, who, according to the prosecution's case, had witnessed the entire exercise right from the apprehension of the appellant till the samples were drawn were not examined. We do not find any explanation on record as to why they could not be examined. With these facts, we are of the view that it would be safe for us to uphold the conviction of the appellant based only on the evidence of the custom's officials.

23. We are of the view that failure on the part of the prosecution to draw samples in the presence of a Magistrate was a major lacuna. The prosecution failed to adhere to one of the important safeguards under Section 52A(2)(b) of the NDPS Act. Situated thus, we are of the view that the prosecution cannot be said to have proved the charge against the appellant beyond all reasonable doubt.

24. Accordingly, the appellant stands acquitted of the charge of offence punishable under Sections 20(b)(ii)(C) and 23(c) of the NDPS Act. The impugned judgment of conviction recorded by the trial court dated 18.07.2019 is hereby set aside. The order of sentence dated 19.07.2017 is also set aside.

25. This appeal is allowed.

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