

Shanti Devi and Another Vs. the State of Bihar

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Court : Patna

Decided On : Apr-10-2014

Judge : Aditya Kumar Trivedi

Appeal No. : Criminal Appeal (SJ) No. 763 of 2013

Appellant : Shanti Devi and Another

Respondent : The State of Bihar

Judgement :

1. Appellants, Shanti Devi and Fula Devi who have been found guilty for an offence punishable under Section 20(b) of the NDPS Act vide judgment of conviction dated 05.02.2013 and each of them sentenced to undergo R.I. for 10 years as well as fined Rs.1,00,000/- in default thereof to undergo S.I. of six months additionally vide judgment of sentence dated 11.02.2013 passed by Additional Sessions Judge, Ist-cum-Special Judge (NDPS Act), Gaya in connection with N.D. P.S. Case No.10 of 2010 arising out of Gaya Rail P.S. Case No.65 of 2009 have challenged under instant appeal.

2. PW-6, Gauri Shankar Gupta, Officer-in-charge of Gaya Rail P.S. recorded his self statement on 16.05.2009 at about 03:30 hours in the waiting room situated at platform no.1 disclosing therein that while he along with other G.R.P personnel were on night patrolling and during course thereof, have gone inside waiting room they found two women sitting near bags so picked up whereupon suspicion grew

followed with apprehension of both the women who were non than the appellants. On query both of them disclosed that all the bags contain dust of Ganja as well as Hemp. After opening the bag he also found the same. It has further been disclosed that altogether 20 bags were. It has further been disclosed that all the bags were sealed after taking out 1 Kg. therefrom as sample. Seizure list was also prepared at that very place in presence of one Munna Sao (PW-4) and Shankar Chaudhary (PW-7).

3. After registration of Gaya Rail P.S. Case No.65 of 2009 under Section 47(a) of the Excise Act along with 20(a), 22 of the NDPS Act. Investigation was taken up by PW-8, Bindeshwari Prasad Singh and after concluding the same, charge sheet was submitted thereunder on account of which, the trial proceeded and culminated in getting the appellants convicted in a manner as indicated above. Hence the instant appeal.

4. Altogether eight PWs have been examined on behalf of prosecution to support its case out of whom PW-1 is Sheo Shankar Ram, a constable, PW-2 is Md. Julfikar, a constable, PW-3 is Krishnadeo Singh, a constable, PW-4 is Munna Sao, seizure list witness, PW-5 is Rabindra Nath Thakur, ASI, PW-6 is Gauri Shankar Gupta, S.I. (Informant), PW-7 is Shankar Chaudhary, seizure list witness and PW-8 is Bindeshwar Prasad Singh, the Investigating Officer. Prosecution had also exhibited signature of seizure list witness as Ext.-1, 1/A, Ext.-2 Seizure List, Ext.-3 Written Report, Ext.-4- FSL Report.

5. The defence as is evident from mode of cross-examination as well as from statement recorded under Section 313 of the Cr.P.C. is of complete denial of occurrence. However, neither any DW nor an exhibit has been made on behalf of defence.

6. Manifold argument has been raised on behalf of appellant during course of challenging the finding of guilt and sentence recorded by the learned trial court. The first and foremost plea happens to be with regard to connectivity of the appellants with the alleged recovered article. On this score, it has been submitted that nothing has been recovered from the conscious possession of appellants. No luggage, cash, or any article which could have gone against the appellants

justifying their arrest being associated with those twenty bags of Ganja or æBhang? whatever may be. Not only this, the story happens to be improbable in the background of the fact that it was not a quantity which could have been carried by the appellants stealthily rather if the prosecution case is accepted, it weigh 1200 Kg. having kept in twenty bags. From the evidence of the witnesses, it is evident that the waiting room is fenced from three sides while open at only side that too having opening at platform no.1 and on account thereof, carrying of twenty bags from outside to inside without having interception during course thereof, was not at all possible. Therefore, unless and until there happens to be conclusive evidence which the prosecution lacks, conviction and sentence so inflicted by the learned lower court appears to be a thrust imposed upon appellants illegally, arbitrarily.

7. It has further been submitted that there happens to be reason behind that the prosecution neither at an initial stage nor during course of investigation has followed the mandate of law with regard to search, seizure, sampling in terms of NDPS Act. Furthermore, from the order dated 30-06-2009, it is evident that sampling not was made before learned Sessions Judge / Special Judge, rather the Investigating Officer produced a sealed bag with a prayer for permitting to get it transmitted to FSL for its examination which was allowed on the same day. However, from Ext.-4, it is evident that the aforesaid sample was produced before the laboratory on 14.07.2009, after expiry of at least thirteen days without having an explanation at the end of the prosecution where sample was, during the intervening period.

8. It has also been submitted that so far sampling is concerned, again there happens to be inconsistency amongst the evidence of the PWs on account of deposition which they made during trial. From self statement of PW-6 as well as from the evidence of PW-6, it is evident that he had kept 1 Kg. (approximately) from all bags and then sealed the same, however, is not corroborated by either PW-1, PW-2, PW-3, PW-4, PW-5, PW-7 and PW-8. PW-8, the Investigating Officer had not stated that during course of investigation he was handed over with the seized article along with sample which, PW-6 had claimed. Rather from his cross-examination para-4 it is evident that he on his own taken out sample from all

bags and got it mixed and then was sent to Forensic Science Laboratory for examination. Be that as it may, in the background of aforesaid process of sampling happens to be bad as well as in contravention of NDPS Case.

9. It has further been submitted that from Ext.4, it is evident that after examination of the sample, it has opined oedust like vegetable substances was the product of plant cannabis sativa?

10. On the basis of the aforesaid finding, it has been submitted that neither it happens to be œCharas? nor œGanja? and further the hemp though carries same botanical name but happens to be out of purview of NDPS Act. As such, the conviction and sentence recorded by the learned lower court happens to be unjustifiable from the materials available on the record.

11. Counter meeting with the submission raised on behalf of appellant, it has been submitted on behalf of learned Additional Public Prosecutor that hemp be a popular name but cannabis sativa has properly been identified in terms of Section 2(iv) of the NDPS Act and on account thereof, conviction and sentence recorded by the learned trial court happens to be in accordance with law. Now coming to the material evidence, it has been submitted that search seizure was made in accordance with Section 42 of the NDPS Act. It has further been stated that as per evidence of PW-6, compliance of Section 52 is also found. As such, there happens to be no procedural illegality lapses during course of investigation and on account thereof, the judgment of conviction and sentence needs no interference.

12. It is apparent from the record that no forensic expert has been examined though, as it appears the FSL report exhibit has been made in terms of Section 293 of the Cr.P.C. The FSL sample speaks the contents being cannabis sativa without bifurcating the same whether it happens to be opium, ganja or hemp. At the present juncture, it looks better to incorporate the definition so prescribed under Section 2 of the NDPS Act.

(iii) œcannabis (hemp)? means “

(a) charas, that is, the separated resin, in whatever form whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish;

(b) ganja, that is, the flowering of fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated; and

(c) any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom;

(iv) cannabis plant? means any plant of the genus cannabis;

That means to say the similar category of plant being identifiable by botanical name cannabis and falling under same category will also come and cover within the definition cannabis plant. However, the same has to be seen in the background of the definition itself. 'Charas' is found a product of separated resin while 'Ganja' happens to be the flowering of fruiting tops of cannabis plant. Its legal position has been bifurcated in two parts, the first one the small quantity and the second one commercial quantity. When the table is gone through on that very score to trace out the identity in consonance with the table, at Sl.No.23 the non-propriety name has been defined as cannabis and cannabis resin having the chemical name Charas, Hashish Extracts and Tinctures of Cannabis. While at Sl. No.55 it speaks with regard to 'Ganja'. However, no other form of cannabis sativa has been prescribed under the table. That means to say had there been identification of hemp under the NDPS Act in terms of Section 2 of the NDPS Act as suggested by learned Additional Public Prosecutor then certainly the small quantity as well as commercial quantity would have been prescribed therefor. Absence of those things is indicative of the fact that cannabis sativa a botanical name of hemp in its origin found excluded in terms of 2(iii)(a)(b) of the Act as it excludes the seeds and leaves. Therefore, the prosecution is required to place by relevant and cogent evidence that the seized dust was not the leaves, fruit of hemp, to attract application of NDPS Act.

13. Now coming to the merit of the case, it is evident that material exhibit was not at all exhibited during course of trial. It is also evident from evidence of the PWs more particularly Investigating Officer, PW-8 that there was non-compliance of Section 52(A) of the Act whereunder destruction was to be carried out in presence of Judicial Magistrate after having the sample preserved. In likewise manner inconsistency amongst the evidence of PW-6 as well as PW-8 with regard to handing over the seized article remained under mystery. Furthermore, how sampling was effected by PW-8 in the aforesaid background including the fact that by taking out sample from all the bags, again cast doubt regarding the process of sampling. Not only this, the non-explanation of retention of sample from 30.06.2009 to 13.07.2009 is another circumstance which bound to axe upon the prospect of prosecution case.

14. In Vijay Jain vs. State of Madhya Pradesh reported in (2013) 14 SCC 527 non-production of material exhibit before the trial court has been found adverse to prosecution case. it lacks better to incorporate the relevant para on this score:

œ9. Para 96 of the judgment of this Court in Noor Aga case [(2008) 16 SCC 417] on which the learned counsel for the State very strongly relies is quoted hereinbelow: (SCCp.464)

œ96. Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act.?

Thus, in para 96 of the judgment in Noor Aga case [(2008) 16 SCC 417] this Court has held that the prosecution must in any case produce the samples even where the bulk quantity is said to have been destroyed. The observations of this Court in the aforesaid paragraph of the judgment do not say anything about the consequence of non-production of the contraband goods before the court in a prosecution under the NDPS Act.

10. On the other hand, on a reading of this Courts 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.?

15. Thus, taking into account the totality of the event coupled with the infirmities persisting on the record, it looks improbable to accede with the finding recorded by the learned trial court. Consequent thereupon, the judgment of conviction and sentence rendered by the learned trial court is set aside. Appeal is allowed. Both the appellants are under custody, hence are directed to be released forthwith if not wanted in any other case.

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