

Mohd. Shafique Vs. the State of Bihar

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Court : Patna

Decided On : Jun-30-1999

Judge : P.K. Deb, J.

Appeal No. : Criminal Appeal No. 112 of 1989 (S.J.)

Appellant : Mohd. Shafique

Respondent : The State of Bihar

Prior history : P.K. Deb, J. 1. This appeal has been preferred against the judgment and order dated 4.3.1989 passed by the Special Judge (2nd Additional Sessions Judge), Darbhanga, in Sessions Case No. 14 of 1988 convicting the accused-appellant under Section 20(b)(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985, shortly called as N.D.P.S. Act, and sentencing him to undergo rigorous imprisonment for four years. 2. The prosecution case, in brief, is that on 19.9.1987 Daya Shankar Rai, P.W. 9, th

Judgement :

P.K. Deb, J.

1. This appeal has been preferred against the judgment and order dated 4.3.1989 passed by the Special Judge (2nd Additional Sessions Judge), Darbhanga, in Sessions Case No. 14 of 1988 convicting the accused-appellant under Section 20(b)(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985, shortly

called as N.D.P.S. Act, and sentencing him to undergo rigorous imprisonment for four years.

2. The prosecution case, in brief, is that on 19.9.1987 Daya Shankar Rai, P.W. 9, the then officer-in-charge of Sadar Police Station, Darbhanga, received a confidential report to the effect that the accused-appellant, who was appointed as Chowkidar of cement pole factory, Katrahia, was still living within the premises of the factory although the said factory was closed down about one year back and that he had concealed Ganja within a room of the factory and was doing business with the same. A sanha entry was made on the basis of the report of the spy and then the officer-in-charge along with the A.S.I. Jogendra Prasad Singh went to the cement pole factory for the purpose of raid. On reaching there the outer gate of the factory was found to be locked. Then the neighbouring people were called and in their presence, the lock was broken and entry was made inside the factory and from inside the room of the factory which was also locked about 34 kgs. of Nepali Ganja could be recovered. The said Ganja was seized in presence of independent witnesses and the sample of it was made to be examined by an excise official, P.W. 8, who confirmed that the seized articles were Nepali Ganja. The accused-appellant surrendered before the Court below and he was remanded to custody.

3. After closure of investigation, police submitted charge-sheet under Section 20(b)(1), 23 & 25 of the N.D.P.S. Act, 1985. The Sessions Judge, who was acting as a Special Judge also under the notification of this Hon'ble Court, tried the case by framing charges against the accused-appellant under the said Sections of the N.D.P.S. Act.

4. For and on behalf of the prosecution as many as ten witnesses have been examined. P.W. 9, Daya Shankar Rai, is the informant in the case and also recovered the seized Ganja in question on search. P.W. 10, Jogendra Prasad Singh, is the A.S.I. then attached to Sadar Police Station, Darbhanga, had accompanied P.W. 9 and in his presence the alleged search and recovery was made. P.W. 8, Aftab Hussain Khan, is the Excise Sub-Inspector, who claimed to have examined the recovered Ganja and found the same as Nepali Ganja and injurious to human consumption, P.Ws. 1, Md. Mokhtar, P.W. 2, Tamanna Khan,

P.W. 3 Md. Mandal, P.W. 4 Naziruddin alias Nasir Ahmad, P.W. 5 Md. Muslim, P.W. 6 Md. Shaheed and P.W. 7 Md. Hasibur Rahman are the independent witnesses, who had their residence in the Mohallah Katarahiya Pokhar where the cement pole factory situates but none of these independent witnesses have supported the prosecution case although, according to the prosecution, raid was made in presence of them, and that search and seizure was also made in presence of some of these independent witnesses.

5. The defence case is the total denial of the prosecution case. The accused-appellant denied to have ever been appointed as Chowkidar of the cement pole factory or ever remained within the premises of the factory. According to him, he is a petty rickshaw puller and he has been falsely implicated in this case by his enemies. In support of his contention one D.W. 1 Md. Halim has also been examined.

6. After scrutinising the evidence on record learned Special Judge relied on the evidence of P.Ws. 8, 9 & 10 and he arrived at the conclusion that even if the independent witnesses turned hostile seizure and search could be proved beyond all reasonable doubt and that the article which was seized was Nepali Ganja unfit for human consumption and, as such, convicted the accused-appellant under Section 20(b)(1) of the N.D.P.S. Act.

7. While assailing the impugned judgment the learned Counsel appearing for and on behalf of the accused-appellant has submitted that the whole prosecution case falls as a castle of cards when the prosecution failed to prove the foundation of the case to the effect that Ganja in question was recovered from the possession/conscious possession of the accused-appellant.

8. This point was also raised before the Court below and it appears that the learned Special Judge has relied on evidence of P.Ws. 9 & 10 on this point, when they stated before the trial Court that when they reached for the purpose of raid they found the accused-appellant inside the boundary of the cement pole factory and on their demand to open the gate he fled away by scaling over the wall. But this fact was never supported by any of the independent witnesses nor that piece of material is available in the first information report which was filed by P.W. 9

himself. This is a vital matter which ought to have been mentioned in the first information report even if the same is not considered to be an encyclopedia of the prosecution case. The fact remains that the alleged Ganja was recovered from a closed room inside the cement pole factory and at the time of seizure or search was made no body was present inside that room or the factory not to speak of the accused-appellant. If the accused-appellant as alleged was proved to have scaled over the wall for the purpose of fleeing away then his guilt consciousness could have been connected with the search and seizure. But this fact is missing from the first information report itself. When the independent witnesses turned hostile and did not support the prosecution case regarding the search and seizure then and then only P.Ws. 9 & 10 embroidered the prosecution case by including the portion that at the time of seizure and search the accused-appellant was found to have fled away at the sight of the raiding party by scaling over the wall of the factory for establishing the offence. It remains the bounden duty of the prosecution for such an offence to prove the conscious possession of the articles of the offender. Here in the present case, it has never been proved by any cogent evidence to the effect that the accused-appellant was ever appointed as a Chowkidar of the cement pole factory and that even after lock up of that factory the accused-appellant remained inside the factory. On the other hand, there is evidence from the defence side which could not be dislodged to the effect that the accused-appellant is earning his livelihood by pulling a rickshaw. Other factual aspect of the case regarding the seizure, search and examination of the seized article as Nepali Ganja taking to be proved then also the case must fail against accused-appellant when it could not be proved his direct link with the seized article. Although the offence is a heinous one and detrimental to the society itself but when the vital part of the offence could not be proved from side of the prosecution I find that the conviction arrived at by the learned Special Judge is bad in the eye of law. It may be mentioned here that the sanha report has also not been proved except a vague statement to the effect that spy reported to the P.W. 10 in this respect. In that sanha report the name of the accused-appellant was mentioned as chowkidar and perhaps that had been considered as a gospel truth from side of the prosecution and they did not make any attempt to get proof of the fact, when the factum of conscious possession has not been proved the prosecution story must fail.

9. In the result, the appeal is allowed and the impugned judgment of conviction and sentence is hereby set-aside and the accused-appellant is relieved of his bail-bond.

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