

Ganga Jali Devi Vs. the State of Bihar

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Court : Patna

Decided On : Sep-13-2006

Judge : Chandramauli Kumar Prasad and Rekha Kumari, JJ.

Acts : Narcotic Drugs Psychotropic Substances Act - Sections 8, 20 and 54; Bihar and Orissa Excise Act - Sections 47; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Criminal Appeal (DB) No. 203 of 2004

Appellant : Ganga Jali Devi

Respondent : The State of Bihar

Advocate for Def. : Lala Kailash Bihri Prasad, APP

Advocate for Pet/Ap. : Om Prakash Upadhyay and Mithilesh Kumar Upadhyay, Advs.

Disposition : Appeal allowed

Prior history : Rekha Kumari, J. 1. This is an appeal against the judgment dated 7.2.2004 passed by the Sessions Judge-cum-Special Judge (N.D.P.S.), Buxar, in N.D.P.S. Case No. 30 of 2002 by which he has convicted the appellant under Section 20(b)(ii)(c) of the N.D.P.S. Act for contravening the provisions of Section 8(c) of the Act by being in unlawful possession of 160.5 Kgs. of Ganja and has sentenced her to undergo rigorous imprisonment for 12 years and to pay a fine of

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Judgement :

Rekha Kumari, J.

1. This is an appeal against the judgment dated 7.2.2004 passed by the Sessions Judge-cum-Special Judge (N.D.P.S.), Buxar, in N.D.P.S. Case No. 30 of 2002 by which he has convicted the appellant under Section 20(b)(ii)(c) of the N.D.P.S. Act for contravening the provisions of Section 8(c) of the Act by being in unlawful possession of 160.5 Kgs. of Ganja and has sentenced her to undergo rigorous imprisonment for 12 years and to pay a fine of rupees one lakh and in default, to undergo further period of rigorous imprisonment for 2 1/2 years.

2. The prosecution case as revealed from the written report is that on 16.11.2002 at 2.00 p.m. the informant S.I. Vinay Kumar Sharma, Officer-in-charge of Buxar Industrial Area P.S. received a reliable information that some contraband ganja was kept concealed in the house of one Bali Kohar of village Barkagaon within his police station and that the contraband ganja might be recovered if prompt action was taken. On getting that information he made an station diary entry regarding the information and sent information about this to the Superintendent of Police, Buxar and also the S.D.P.O. Buxar. He also requested the Buxar police station on telephone for assisting him in conducting a raid. On the basis of his information the Superintendent of Police sent a letter authorizing him to conduct the search. In the meantime, a raiding party also reached to assist the informant in the raid. The informant, then along with S.I. Arjun Purti and others of Industrial Area Police Station and A.S.I. Nand Kishore Yadav and others of Buxar town P.S. started for Barkagaon village at 3.00 p.m. and reached there at 4.00 p.m. The S.D.P.O. Buxar also reached there along with armed forces. In the village, two independent witnesses, Chittaranjan Mishra and Salik Nonia were requested to be associated in the raid. Thereafter, after observing the rules of search under the leadership of S.D.P.O. they searched the house of Bali Kohar in presence of the witnesses. In the house, the appellant was present, who disclosed her name as Gangajali Devi and further informed that she was the wife of Bali Kohar. During search, in the

presence of the appellant and witnesses, seven bags of Ganja were recovered from a room of that house. On enquiry, the appellant informed that there was ganja in the bags and the bags were temporarily kept there by Kishun Dusadh and Ghanshyam Mishra as raid was going on in village Balihar. It is further said that the informant then immediately sent information on WLL phone to the Superintendent of Police, Buxar about the recovery of Ganja and in presence of the witnesses, he prepared the search-cum-seizure list. He gave one copy of the seizure list to the appellant. The bags were marked and weighed and it was found that they weighed total 160.5 Kgs. He took sample from each bag in presence of all concerned and kept the samples in a carton and by wrapping a cloth around it, sealed it. He also sealed the bags containing the remaining contraband article. Thereafter, he arrested the appellant and then on the self statement of the informant (Ext.5), the case was registered.

3. The police investigated the case and thereafter submitted the chargesheet against the appellant.

4. The appellant was charged under Section 20(b)(ii)(c) of the N.D.P.S. Act for contravening Section 8(c) of the N.D.P.S, Act. The appellant pleaded not guilty to the charge. Her statement under Section 313 Cr.P.C. is that she is innocent and the allegations are false. She has filed voter's photo identity card (Ext.A) of her husband and red card (Ext. B) to show that the house in question does not belong to them and they are residents, of village Sonbarsa, Anchal Buxar.

5. The prosecution, in order to substantiate the charge examined seven witnesses. Among them P.W. 1 Arun Prasad, Constable No. 193, was a member of the raiding party and a witness on the point of search and seizure. P.W. 4 Vinay Kumar Sharma, is the informant. P.W. 5, Krishnadeo Chaudhary, S.I., is the I.O., P.W. 6. Rambahal Singh, S.I. had simply submitted chargesheet against the appellant. P.W. 2 Parshuram Prasad, Constable, P.W.3 Shivmuni Singh, Constable, P.W.7, Arjun Purti S.I., who were also members of the raiding party, have been tendered for cross examination. They have not stated anything about the occurrence.

6. The learned Special Judge, after considering the evidence of the parties held that the prosecution has been able to prove the charge of possession of Ganja levelled against the appellant. He, therefore, convicted the appellant and sentenced her as mentioned above.

7. Learned Counsel for the appellant submitted that in this case, the independent witnesses have not been examined and, therefore, the recovery of the contraband from the house in question has not been proved. He further submitted that even if it be taken that the ganja was recovered from the above house, possession of the appellant in respect of the Ganja was not proved. He also referred to a decision of this Court in the case of *Ghuria Telin v. State* : AIR1961 Pat327 , to show that even if the house in question belonged to Bali Kohar, the appellant, being the subordinate member of the house, without any overt act on her part, even if she was present at the time of search, she cannot be said to be in possession of the contraband ganja making her liable under Section 20 of the N.D.P.S. Act.

8. At the outset, it may be mentioned that in a criminal trial more serious the offence, the stricter is the degree of proof and that the burden of proof never shifts and it is always the burden of the prosecution to prove its case beyond reasonable doubt on the basis of acceptable evidence.

9. Now, in order to appreciate the above submission of the learned Counsel, we have gone through the entire evidence.

10. From the evidence of P.W. 4 (the informant) it appears that he has supported the prosecution case and he has stated all the facts as have been mentioned by him in the Fardbeyan. He has stated that on getting information that in the house of Bali Kohar at village Barkagaon, narcotic drugs - ganja had been illegally kept concealed he made entry regarding it in station diary and sent information about it to the Superintendent of Police and the S.D.P.O. Buxar and obtained authorization letter (Ext. 2) to search the house and seize the contraband article. He has further stated that he then along with the raiding party and the S.D.P.O. took search of the house under the leadership of S.D.P.O. and in presence of independent witnesses after observing the rules of search and from a room he seized seven bags of Ganja which was weighed and was found to be 160.5 Kgs. in total weight. He has

also stated that he took samples from all the bags and kept them separately in packets and then kept the samples in a carton, wrapped the carton with a cloth and sealed it and he kept the remaining contraband wrapped in separate sealed cloth. He took signatures of the witnesses and the right thumb impression of the appellant on all the samples and other exhibits. He has proved the search-cum-seizure list (Ext. 3) which bears his signature and the signatures of the witnesses and the right thumb impression of the appellant. He has further stated that he gave one copy of the seizure list to the appellant. His evidence, then, is that on enquiry the appellant told that Kishun Dushadh and Ghanshyam Mishra had kept the ganja there during the raid of village Balihar and they had told that they would take away the ganja later on, and that he recorded the statement of the appellant. He has stated that the samples were sent to the Forensic Science Laboratory, Patna after obtaining the signature of the Special Judge in the forwarding letter.

11. P.W. 1 has corroborated the evidence of P.W. 4. He has also stated that he was a member of the raiding party and in his presence the house of Bali Kohar was searched and seven bags of ganja total weighing 160.5 kgs. were seized for which a seizure list was prepared. He has proved his signature (Ext. 1) on the seizure list. He has also stated that samples were taken from each bag, which were sealed and he had put his signature on it and had also put his signature on the specimen of the seat. His evidence also is that, on enquiry, the appellant had told them that as there was raid in village Balihar, Ghanshyam Mishra and Kishun Dushadh had temporarily kept the bags there.

12. P.W. 5 has stated that he had taken the charge of investigation on the instruction of the informant and had perused the F.I.R. and other documents and recorded the statements of the witnesses and inspected the place of occurrence and had sent the samples to the Forensic Science Laboratory on the orders of the Special Judge. The prosecution also filed the report of the Forensic Science Laboratory (Ext. 8) which shows that the samples contained Ganja. The prosecution has also produced the bags of Ganja (Material Exts. A to G) and other relevant documents.

13. Therefore, from the evidence of the above witnesses and the documents filed, it appears that on the date of occurrence, after observing the rules of search and seizure, the house in question was searched and 160.5 Kgs. of ganja kept in seven bags was recovered and seized. The evidence also shows that the appellant was present in the house.

14. The two independent witnesses who are said to have accompanied the raiding party have, however, not been examined, but there is nothing in the evidence of the two police witnesses discussed above to show that they are not trustworthy. Though they are interested witnesses but that is no ground to discard their testimony. So, when the evidence of the police witnesses inspires confidence, non examination of independent witnesses of the search and seizure would not be fatal to the prosecution case.

15. Therefore, there is not much substance in the first submission of the learned Counsel and on the evidence of the witnesses and the documents available, it can safely be held that 160.5 Kgs. of ganja kept in seven bags was recovered from the house in question.

16. Then, so far the question of possession of the appellant over the Ganja recovered, is concerned, the word 'possession' has not been defined in the Act. There are two elements of possession -- corpus and animus, a fact and a right. The two elements must be present in the case of possession and neither of them alone is sufficient to constitute possession. Hence, the test for determining whether person is in possession of anything is whether he is in general control of it.

17. In this case the evidence shows that during seizure of the contraband article the appellant was asked by the informant about the same and she had immediately replied that Kishun Dusadh and Ghanshyam Mishra had temporarily kept the bags there on account of raid in village Balihar. The said Ghanshyam Mishra and Kishun Dusadh have also been made accused in this case, but there is no evidence that they had not kept the contraband article there. Therefore, it is not proved beyond reasonable doubt that the appellant was in general control or dominion over the contraband Ganja.

18. Learned A.P.P. submitted that as the contraband article was recovered from the house of the appellant, a presumption under Section 54 of the Act would arise that she has committed the offence under Section 20 of the N.D.P S. Act and it was upto the appellant to rebut the presumption by proving that these two accused persons had kept the contraband there. But, as already mentioned, the burden of proof in a criminal trial never shifts and the presumption arises only when possession is proved.

19. In this case though the contraband was recovered from the house in Question in which the appellant was found, the prosecution case itself is that the informant had received information that the contraband had been kept concealed in the house of Bali Kohar. The evidence of P.W. 4 also is that the house of the said Bali Kohar was raided and contraband was seized from the house of Bali Kohar. Bali Kohar admittedly is the husband of the appellant. But, there is no evidence that any investigation was made as to whether Bali Kohar was living in the house or he had any role in keeping the contraband there. Being husband, Bali Kohar was the managing member of the family and it was incumbent upon the prosecution to eliminate him before fastening liability on the appellant. The evidence of P.W.5, the I.O. also is that during investigation it was not found that the appellant deals in Ganja, P.W. 1 has also said that at the time of search the daughter-in-law of the appellant was also in the house. In order to prove the offence under Section 20 of the N.D.P.S. Act it is also necessary that the possession must be exclusive requiring the elimination of other person. So, when the house belonged to the husband and there is no prosecution evidence that he was not living there or he has no hand in keeping the contraband there and the daughter-in-law of the appellant was also in the house, only due to the presence of the appellant in the house at the time of search, it cannot be said that she was in possession of the contraband.

20. The judgment shows that the learned trial court has relied on the evidence of the informant (P.W.4), P.W. 1 and the I.O. and came to the conclusion that the house in question was in exclusive possession of the appellant. But there is nothing in their evidence to show that the appellant was in exclusive possession of the house. He has also relied on a petition filed by the appellant in the court

wherein she has described the house in question as 'her' house. But, when the house belonged to her husband, if she has described the same as her house it cannot be said that she was in exclusive possession of the house. A wife describes her husband's house as 'her' house. Learned A.P.P. has referred to Ext. A (voter's photo identity card) and Ext. B (Red card) proved by the appellant and has submitted that the defence of the appellant herself is that her husband is a resident of another village Sonbarsa. But, the red card shows that the appellant lives with her husband and the evidence of the I.O. shows that village Barkagaon where the house in question is situated is in mauza Sonbarsa. So, it is not proved that the husband of the appellant has a separate house. Therefore, these exhibits also do not help the prosecution.

21. So, we find that there is no sufficient evidence to show that the house in question belonged exclusively to the appellant. A husband generally is the manager of the family and the wife plays a subordinate role. Hence, unless some specific overt act is proved against the wife, she cannot be held to be in possession of the contraband kept in house only because she was present there. She cannot also be held liable for abetment.

22. In the case of Ghuria Telin (Supra), the husband and wife were convicted under Section 47(a) and 47(f) of the Bihar & Orissa Excise Act for recovery of Excisable articles from the house. A Bench of this Court held that while being a subordinate member of the family, she cannot be said to be in power and control over the excisable articles kept in the house. A wife may be in custody of an article on behalf of her husband in his absence. But that does not mean that the wife can be held to be in possession.

23. The above decision applies fully in this case and in view of that decision also it cannot be said that the appellant was in possession of contraband article.

24. Thus, we find that the prosecution has not been able to prove that the appellant was in possession of the contraband recovered. The appellant, hence, cannot be held liable under Section 20(b)(ii)(c) of the N.D.P.S. Act.

25. In the result, this appeal is allowed and the impugned order of conviction and sentence is hereby set aside. The appellant is, acquitted. The appellant is directed to be released from jail custody forthwith if not required in any other case.

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