

Rishikesh Bind and Surendra Kumar Vs. the State of Bihar

Rishikesh Bind and Surendra Kumar Vs. the State of Bihar

SooperKanoon Citation : sooperkanoon.com/131043

Court : Patna

Decided On : Jul-29-2005

Judge : Syed Md. Mahfooz Alam, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20 and 55; Bihar Excise Act, 1915 - Sections 47A; Code of Criminal Procedure (CrPC) - Sections 311 and 313

Appeal No. : Cri Appeal Nos. 686 and 758 of 2004

Appellant : Rishikesh Bind and Surendra Kumar

Respondent : The State of Bihar

Advocate for Def. : Satya Narain Prasad, Addl. PP

Advocate for Pet/Ap. : Vikram Deo Singh, Shambhu Prasad, Manoj Kumar and Dharmendra Kumar, Advs.

Disposition : Appeal dismissed

Judgement :

Syed Md. Mahfooz Alam, J.

1. Criminal Appeal No. 686 of 2004 filed by appellant Rishikesh Bind and Criminal Appeal No. 758 of 2004 filed by appellant Surendra Kumar were heard together as

both the criminal appeals arise out of the common judgment dated 8th September, 2004 passed in NDPS Act Case No. 21 of 2002 arising out of Simari P.S. Case No. 124/02, as such they are being disposed of by this common judgment. The judgment will be delivered in Cr. Appeal No. 686 of 2004.

2. Both these criminal appeals have been preferred against the judgment dated 8th September, 2004 and order dated 14th September, 2004 passed by Sri Anil Kumar Verma, District & Sessions Judge-cum-Special Judge, Buxar in NDPS Act Case No. 21 of 2002 arising out of Simari P.S. Case No. 124 of 2002 whereby the learned Special Judge has been pleased to convict both the appellants under Section 20(b)(ii)(B) of the Narcotic Drugs & Psychotropic Substances Act (hereinafter referred to as 'the Act') and accordingly, convict Rishikesh Bind has been sentenced to undergo rigorous imprisonment for a period of three years and also to pay a fine of Rs. 5000/- and in default to pay the fine, he is sentenced to undergo further imprisonment for a period of six months. The learned Special Judge has further been pleased to sentence appellant Surendra Kumar to undergo rigorous imprisonment for four years and also to pay a fine of Rs. 10000/- and in default to pay the fine, he is sentenced to undergo rigorous imprisonment for further period of six months.

3. The prosecution case, in brief, is that PW 3 Sahabuddin Khan, Officer Incharge of Simari Police Station was on law and order duty on 10.11.2002 on the occasion of Chhat festival. On that date at about 12.10 hours he was at Majhwari More accompanied by the members of the police force. In the meantime, he saw a motor-cycle coming towards Majhwari More. Two persons were sitting on the said motor-cycle but seeing the police personnel, the man, who was driving the motor-cycle, wanted to take U-turn but in haste the motor-cycle slipped and both the riders fell down. They wanted to run away but with the help of the police force, PW 3 apprehended both the persons. On interrogation, one of them disclosed his name as Surendra Kumar son of Chandrika Ram and another person disclosed his name as Rishikesh Bind, son of Simi Bind. Both the appellants disclosed their address as residents of Mohan Bitti, P.S. Dhina, District Chandauli, U.P. At the same time, two persons from the side of Bhojpur riding on another motor-cycle came there. They were Tilakdhari Pandey PW 6 and Avanish Pandey PW 7. In

their presence, PW 3 wanted to make search of the plastic bag hung on the shoulder of Surendra Kumar as well as of the dickey of the motor-cycle but both the persons did not allow PW 3 to make search and then PW 3 told them that they can be produced before a Magistrate or before a Gazetted Officer for their search whereupon Surendra Kumar and Rishikesh Bind agreed to give their search. Thereafter PW 5 Abdul Hamid, BDO-cum-Circle Officer-cum- Executive Magistrate, Simari and Dy. S.P. Dumraon, namely, Chandrama Prasad PW 1 were called and in the presence of the above named two persons, the air bag hung on the shoulder of Surendra Kumar and dickey of the motor-cycle were searched after doing legal formalities. On search of the air bag hung with the shoulder of Surendra Kumar, a red colour plastic covered bundle tied with Sutali said to be a piece of slab of Ganja weighing 6 (six) Kgs was recovered. On search of the dickey of the motor- cycle which was being driven by Rishikesh Bind, one red colour plastic covered bundle tied with Sutali said to be Ganja weighing 2 (two) Kgs was recovered. On interrogation, both the persons disclosed that they had purchased the same from one Basisth Singh of village Balihar at the rate of Rs. 2500/- per kg. Surendra Kumar also disclosed that the packets of Ganja which were sold to them were brought from the house of Antu Sah of village Balihar. After search and seizure of the recovered articles, PW 3 prepared the seizure list of Ganja and supplied the copy of the seizure list to Surendra Kumar and Rishikesh Bind who put their signatures on the seizure lists. The witnesses and the officers also put their signatures on the seizure lists.

Further case is that PW 3 took out small quantity of Ganja from both the seized packets for the purpose of sample and kept the same in sealed cover which were marked as Exts. A and B respectively. He also sealed the remaining recovered Ganja and marked the packets as Exts. A/1 and B/1. It is further said that on the sealed packets, SDPO, Executive Magistrate, two independent witnesses and both the appellants put their signatures. It is further said that both the appellants disclosed that they were engaged in illegal sale and purchase of Ganja. They also disclosed that they had purchased the same from village Balihar and in this illegal business of sale and purchase of Ganja several persons like Basisth Singh, Ravi Shankar, Shyam Bihari Singh, Antu Sah and others are involved. Rishikesh Bind also disclosed that in the year, 1990 also he was arrested with Ganja for which a

case bearing NDPS Act Case No. 7/90 was instituted and in that case he was convicted and sentenced to undergo rigorous imprisonment for 14 months. After doing all the formalities PW 3 recorded his self-statement on the basis of which simari RS. Case No. 124 of 2002 under the NDPS Act and Section 47 A of the Bihar Excise Act was instituted.

However, PW 3 on the order of the SDPO started investigation immediately after recording of self-statement and during investigation he recorded the statements of the witnesses, handed over the seized Ganja as well as the sample to the Malkhana Incharge and then after completing investigation submitted charge-sheet against both the appellants and one Shyam Bihari Singh alias Bihari Singh, who was acquitted by the trial Court by the impugned judgment. However, both the appellants were convicted and sentenced to undergo rigorous imprisonment, as stated above.

4. The contention of the learned counsel of the appellants is that the judgment and order of conviction and sentence passed against the appellants are bad in law as well as on facts as no independent witness has come forward to support the case of the prosecution with regard to recovery of Ganja from the possession of the appellants. The two independent witnesses, namely, Tilakdhari Pandey and Avanish Pandey, who are said to be the witnesses of the seizure, have not supported the prosecution case that packets of Ganja were recovered from the possession of the appellants and as such, the entire recovery is doubtful and so, the conviction of the appellants is bad in law. Further contention is that the alleged recovery of Ganja from the possession of the appellants is much below the commercial quantity and as such the punishment given to the appellants is very harsh. It has further been contended that the provision of Section 55 of the NDPS Act was not followed as no proper seal was put on the seized articles nor they were properly kept in Malkhana. It as further been submitted that there is no evidence on record to establish that Ganja was for sale and so, the maximum punishment which should have been awarded should be below six months. On the basis of the above submissions, the learned defence counsel has prayed to acquit the appellants.

5. On the other hand, the contention of the learned State counsel was that the judgment and order of the Special Judge are based on the materials available on record and search and seizure of Ganja from the possession of the appellants as well as keeping the articles in Malkhana are in accordance with the provision of law, as such, there is no necessity of interfering in the judgment of the Special Judge.

6. On perusal of the judgment of the learned Special Judge, it appears that the learned Special Judge has believed the evidence of PW 1 Shri Chandrama Prasad SDPO Dumarabn, PW 3 Sri Sahabuddin Khan Officer Incharge of Simari Police Station, PW 5 Abdul Hamid and PW 8 Ashok Kumar Jha and came to the conclusion that on the alleged date of the occurrence, appellant Surendra Kumar was carrying a bag containing a packet of Ganja weighing 6 (six) Kgs and that appellant Rishikesh Bind was also found in the possession of 2 Kgs Ganja kept in the dickey of the motor-cycle which was being driven by him. It further transpires that besides the oral evidence of the above said persons, the learned Special Judge has placed reliance upon Ext. 3 seizure list of Ganja recovered from the person of Surendra Kumar and Ext 3/1 seizure list of Ganja recovered from the possession of Rishikesh Bind. He has also placed reliance upon the report of the Forensic Science Laboratory, Patna which is Ext 8 and on scrutinising the oral as well as documentary evidence, he has found both the appellants guilty under Section 20(b)(ii)(B) of the NDPS Act.

7. Let me see whether the finding of the learned Special Judge is correct or not.

8. From perusal of the record of the lower Court, it appears that in this case the prosecution has examined altogether ten witnesses, i.e., PW 1 Sri Chandrama Prasad, PW 2 Rajendra Ram, PW 3 Sahabuddin Khan, PW 4 Dr. Kapileshwari Choudhary, PW 5 Md. Abdul Hamid, PW 6 Tilakdhari Pandey, PW 7 Avanish Pandey, PW 8 Ashok Kumar Jha. Two other witnesses, namely, Barhmeshwar Dubey and Triveni Dubey have also been examined under the provision of Section 311 of the Cr PC. They have been numbered as Court witness No. 1 and Court Witness No. 2. On behalf of the defence one DW namely, Baban Pathak has been examined as DW 1 who has deposed that Court witness No. 1 Brahmeshwar

Dubey and Court Witness No. 2 Triveni Dubey and one Sidahnath Dubey had sworn affidavits before the Notary Public in his presence. He has also proved the entries bearing No. .1186, 1198 and 1207 all dated 21.5.2004 from the Register of Notary Public to show that Court Witness Nos. 1 and 2 both had sworn affidavit that the police had not recorded their statements in connection with this case 124/2002. The entries have been marked Exts. A, A/1, A/2 respectively but unfortunately I could not trace out those Exhibits in the lower Court record. However those Exhibits were brought on record to discredit the testimony of Court witness Nos. 1 and 2 who have deposed against accused Shyam Bihari Singh only who has been acquitted by the Special Judge, as such these affidavits or entries with regard to the affidavits are not relevant for disposal of this appeal. Likewise the defence has also brought on record several other documents to prove that Court witness Nos. 1 and 2 were on inimical terms with accused Shyam Bihari Singh. Those documents have been marked as Exts. B, B/1, B/2, C and C/1 but the documents are not properly placed with the record. Although these documents are not relevant in this appeal as the concerned accused, namely, Shyam Bihari Singh has already been acquitted by the Special Judge but the manner in which the concerned Bench Clerk or Office Clerk has prepared the file is a matter of concern which shows that the concerned office clerk or Bench Clerk has got no knowledge how to prepare the file and where to put the Exhibits. In such a situation, it is desirable that proper action should be taken against the erring clerk for dereliction of his duty so that other clerical staff should take lesson and may not commit such mistake in future.

9. Out of remaining eight prosecution witnesses, PW 6 Tilakdhari Pandey and PW 7 Avanish Pandey are the witnesses of the seizure. On perusal of their deposition, it appears that although both the witnesses have accepted that they had put their signatures on the seizure lists and heir signatures with endorsement have been marked as Exts. 1/4, 1/5, 4/2 and 4/3, respectively but they have not supported the prosecution case that recovery of Ganja from the possession of the appellants was made in their presence. They have stated that they had put their signatures on blank papers. Thus, it appears that the seizure list witnesses have not supported the prosecution case regarding recovery of Ganja from the possession of the appellants.

10. PW 2 Sri Rajendra Ram and PW 4 Dr. Kapileshwar Choudhary appear to be formal witnesses as their evidence is not relevant so far seizure of Ganja is concerned. Likewise, the evidence of PW 8 is also riot very much material although he is second Investigating Officer in this case. Thus, so far as this case is concerned, the evidence of PW 1 Sri Chandrama Prasad, PW 3 Sahabuddin Khan (informant) and PW 5 Abdul Hamid is relevant. Amongst them, PW 3 is the most6 important witness being the informant as well as the investigating officer of this case. His evidence shows that he has fully supported the prosecution case as stated in his self-statement (Ext. 5). He has deposed that on 10.11.2002 he was posted at Simari Police Station as Officer Incharge of the said Police Station. On that date he was on law and order duty along with other police personnel at Majhward More. At about 12.10 hours he saw two persons coming on a motor-cycle but as soon as they saw the police personnel, the driver of the motor-cycle wanted to take U-turn and tried to run away but he along with the police force chased them and caught hold of them. He has further deposed that he asked both the persons to allow him to search their bodies as well as the motor-cycle but they refused and then PW 1 Sri Chandrama Prasad and PW 5 Abdul Hamid were called and in the presence of two other witnesses, namely, Tilakdhari Pandey PW 6 and Avanish Pandey PW 7, both the persons were searched and the dickey of the motor-cycle was also searched. He has further deposed that one air bag was hanging with the shoulder of Surendra Kumar and when the bag was searched, one packet of Ganja weighing 6 Kgs was recovered. He has further deposed that when the dickey of the motor-cycle was searched one packet of Ganja weighing 2 Kgs was recovered and accordingly, seizure lists were prepared. The seizure list of Ganja recovered from the possession of Surendra Kumar has been marked as Ext. 3 whereas the seizure list of Ganja recovered from the dickey of the motor-cycle of Rishikesh Bind has been marked as Ext. 3/1, PW 3 has further deposed that both the persons, namely, Surendra Kumar and Rishikesh Bind put their signatures on the seizure list as copy of the seizure list was supplied to each of the accused. He has also identified the signatures of both the appellants with their endorsement which have been marked as Exts. 4 and 4/1, respectively. He has further deposed that he took out **small quantity of Ganja from both the packets for preparing the sample and he gave identification mark on both the packets of

samples as Exts. A and B whereas the remaining Ganja were sealed in two different packets which were marked as A/1 and B/1. He has further deposed that all the persons present there including both the accused put their signatures on the samples as well as on the remaining packets of Ganja. He has further deposed that both the apprehended persons gave their statements before the Executive Magistrate PW 5 and confessed that they were carrying Ganja from village Balihar after purchasing the same from one Basisth Singh. They also confessed that they are involved in illegal trade of purchasing and selling of Ganja. This witness has been cross-examined at length but nothing has been found in the cross-examination which can demolish his evidence.

11. The evidence of PWs 1 and 5 corroborates the evidence of PW 3 as they have deposed that both the appellants were searched in their presence and in their presence packets of Ganja were recovered from their possession. PW 5 has further deposed that both the apprehended persons have made their statements before him and he recorded their statements. He has proved both the statements and on the basis of his evidence, the statement of Surendra Kumar has been marked as Ext. 9 whereas the statement of Rishikesh Pandaya been marked as Ext. 9/1, respectively. Thus, from the evidence of PWs 1, 3 and 5, it appears that all the three witnesses have fully supported the prosecution case that on the alleged date of the occurrence, Ganja kept in two different packets were recovered from the possession of the appellants. The evidence of PW 4 Dr. Kapileshwar Choudhary, Technical Officer in Forensic Science Laboratory, Patna and the report of FSL Ext 8 further corroborates that the packets which were recovered from the possession of the appellants had contained Ganja. Thus, on the basis of the above oral as well as documentary evidence, I have no difficulty in holding that the prosecution has been fully able to substantiate the charge levelled against the appellants.

12. It has been submitted on behalf of the appellants that since the seizure list witnesses i.e., PWs 6 and 7 have deposed that the recovery of Ganja was not made in their presence, as such, the learned Special Judge should have disbelieved the evidence of PWs 3 and 5 on the point of recovery of Ganja from the possession of the appellants as all the three witnesses are official witnesses

and they are highly interested to see that the prosecution case be proved. In reply to this argument, I would like to say that although it is true that PWs 6 and 7 have deposed that Ganja were not recovered in their presence but it appears that this is not the true statement of PWs 6 and 7 as both the witnesses have admitted their signatures on the seizure list as well as on the endorsements made on the seizure list. I am, therefore, of the view that on the basis of the evidence of PWs 6 and 7, the prosecution case cannot be disbelieved.

13. It has been submitted by the learned defence counsel that the provision of Section 55 of the NDPS Act was not properly followed by the informant and the samples and seized Ganja were not handed over to the Officer Incharge of the concerned Police Station, as such on this score alone the appellants deserve to be acquitted. In this regard the learned defence counsel has placed reliance upon the decision of Chattisgarh High Court in the case of Savitri alias Shoobha and Ors. (appellants) v. State of Chattisgarh respondent reported in 2001 Cri LJ 4602. In the case referred by the learned defence counsel, it was found that the provision of Section 55 of the NDPS Act was not properly complied with as there was no evidence that the articles which were kept in safe custody or the samples were properly sealed. So, the Hon'ble Court held that in absence of positive evidence to show that what was seized from the accused was kept intact and the sealed articles were Ganja and contrabands, conviction cannot be maintained. In my view, the decision referred above will not apply in this case, as in the instant case the informant is himself an Officer Incharge and he had himself sealed the recovered Ganja as well as the samples obtained from Ganja recovered from the possession of two appellants. The evidence on record establishes that recovered Ganja as well as samples were properly sealed by PW 3 and all the concerned persons including both the appellants had put their signatures on the seizure list. The evidence of Dr. Kapileshwar Choudhary, Technical Officer in FSL, Patna shows that the packets of samples were sent to the Forensic Science Laboratory under sealed cover. This shows that the provision of Section 55 of the NDPS Act was fully followed so far this case is concerned, I, therefore, hold that this argument is of no help to the defence counsel.

14. It has further been argued that since the quantity of Ganja recovered from the possession of the two appellants was not for the purpose of commercial use and the quantity of Ganja was much less than the commercial quantity, as such, the punishment given to the appellants is very harsh and should be modified. In reply to this argument, I have to say that since appellant Rishikesh Bind has himself admitted in his statement made under Section 313 of the Code of Criminal Procedure that he was once convicted in a case instituted under the provision of the NDPS Act, I am of the view that the imprisonment of three years awarded to him under Section 20(b)(ii)(B) of the NDPS Act is not a harsh punishment. Likewise, the punishment awarded to appellant Surendra Kumar, in view of the quantity of Ganja recovered from him i.e., 6 Kgs., does not appear to be harsh punishment and, therefore, I do not feel any necessity to interfere in the quantum of sentence awarded to the appellants.

15. In the result, I do not find any merit in both these appeals and as such, both the criminal appeals are hereby dismissed and conviction and sentence passed against the appellants in NDPS Act Case No. 21/2002 are hereby upheld and confirmed. Appellant Surendra Kumar is on bail and as such, his bail bonds are cancelled and he is further directed to surrender before the learned trial Court to serve out the remaining period of sentence.

16. Let a copy of this judgment be sent to the District and Sessions Judge, Buxar for taking necessary action against the erring clerk.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com