

Subhash Prasad and ors. Vs. State of Bihar

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Court : Patna

Decided On : Nov-18-2008

Judge : Samarendra Pratap Singh, J.

Acts : Narcotic Drugs and Psychotropic Substances Act - Sections 20, 20B, 23, 42, 42(1), 42(2), 50, 53, 55 and 57

Appeal No. : Criminal Appeal (S.J.) Nos. 1043 of 2006, 06, 07, 133 and 238 of 2007

Appellant : Subhash Prasad and ors.

Respondent : State of Bihar

Advocate for Def. : Additional Public Prosecutor

Advocate for Pet/Ap. : Krishna Kant Singh, Adv.

Judgement :

Samarendra Pratap Singh, J.

1. The aforesaid five appeals are being taken up together for hearing as they are analogous and arise out of the same Judgment. All these five appeals have been preferred against the judgment and order dated 7.12.2006, whereby the appellants therein have been convicted under Sections 20(b)(ii)(c) and 23(c) of the N.D.P.S. Act (in short the Act) and sentenced to undergo RI for ten years imprisonment and

to pay a fine of Rs. one lacs under each of the two counts, in default of payment of fine to further undergo RI for two years. However, both sentences were ordered to run concurrently.

2. The prosecution case as recorded on self statement of the informant, namely, Laldhari Prasad, Inspector cum officer in charge of Raxaul Police Station on 12.1.2002 at about 7.05 pm in short is as follows:

3. The informant got secret information that some smugglers have assembled in Mohan nagar tola of Raxaul in the house of accused Viswanath Prasad and Sukhari Prasad and are preparing to remove the smuggled goods concealed there. After making due station diary entry No. 300, dated 12.1.2002, a raiding party was constituted under leadership of Sushil Kumar, the SDPO, Raxaul comprising of the informant, Ranjan Kumar, the IO and other police officials. Raid was conducted on the two houses on the same day between 8 to 8.30 pm in presence of two independent witnesses, namely, Sambhu Prasad (pw 2) and Lal deo Prasad (pw 3). In course of raid, 11 kilograms of Charas and 22 packets measuring about 1/2 kilogram each, and one small piece of Charas measuring about 10 grams wrapped in a paper and knee caps kept in a white bag also concealed under the Bed of Vishwanath Prasad were recovered and seizure list was prepared. The persons arrested from the said room disclosed their names as Bhagmati Devi, wife of aforesaid Vishwanath Prasad, the owner of the house, the appellant of Cr. Appeal No. 238 of 2007, Baccha Prasad and Girdhari Prasad, appellants of Cr appeal No. 06 of 2007, both residents of village Keshari, Bablu Kumar, appellant of Cr.Appeal No. 1043 of 2006, also resident of village Keshari. Co-accused Vishwanath Prasad, however managed to escape and another accused Umesh Kushwaha escaped during the trial of the case.

4. From the house of co accused Sukhari Prasad, appellant of Cr.appeal No. 133 of 2007, five kilograms of Charas in 10 packets measuring about 14 kilograms each was recovered, concealed in a bag kept under a cot from east facing room. The owner of the house Sukhari Prasad, and co accused Badri Sah were arrested from the spot. However, the latter absconded during trial.

5. On the basis of self statement of co-accused Raxaul ps case No. 7 of 2002, dated 12.12.2002, was registered. The case was investigated by Sri Ranjan Kumar, SI of police and after investigation, charge sheet was submitted against all the accused/appellants mentioned above.

6. Leased Special Judge, Motihari took cognizance of offence and the case was subsequently transferred to the court of Addl. Sessions Judge, Motihari for trial. Charges were framed under Sections 20(b)(ii)(c) and 2(c) and 23 of the Act.

7. The prosecution examined altogether 17 witnesses who are as follows:

(PW 1) Kirishna Gopal Dwivedi, JM, 1st Class, Motihari, (PW 2) Shambhu Prasad, (PW 3) Dr Laldeo Prasad, (PW 4) Ram Ekwel Singh, Civil Zamadar of Raxaul PS, (PW 5) Ram Prasad Giri, orderly peon of Dy SP. (PW 6) Ashok Kumar Singh, Magistrate Constable, (PW 7) Md. Muslim, Driver constable, (PW 8) Prem Nath Ram, constable, (PW 9) Ram Krishna Singh, ASI of Raxaul PS, (PW 10) Shushil Kumar SDPO, (PW 11) Rajiv Singh, constable, (PW 12) Kailashpati Prasad, SI of Raxaul PS and in charge of malkhana of said PS, (PW 13) Laldhari Prasad, Inspector cum O/C of Raxaul PS (informant), (PW 14) Saryu Mahto, constable, (PW 15) Bundi Lal Manjhi, junior SI of Raxaul PS, (PW 16) Md. Aslam Khan, Body Guard of SDPO, Raxaul and (PW 17) Ranjan Kumar, SI (IO). The defence examined two witnesses, namely, Narad Sah and Virendra Sah as DWs 1 and 2 respectively.

8. Out of 17 aforesaid persons, PW. 1 is K.G. Dwivedi, the then Judicial Magistrate, 1st class, Motihari, who granted permission for chemical examination of the seized contraband. He stated that the seized contraband was produced before him on 21.3.2002. He also stated that sample of Charas were drawn from different packets and were sealed in his presence for chemical examination.

9. PW 2 (Sambhu Prasad) and PW 3 (Dr Laldeo Prasad) did not support the seizure and were declared hostile. PW 12 (K.P. Prasad) is the sub inspector of Raxaul police station. The seized motorcycle was kept in aforesaid Police Station. PW 13 is Inspector cum officer-in-charge of Raxaul police station and informant of the case. PWs 14 and 15 are formal witnesses and PW 17 is the Investigating

officer of the case.

10. PW 13, the informant supported his prosecution case. He stated that on getting information that smugglers have assembled with some goods in the house of Vishwanath Prasad and Sukhari Prasad, made a corresponding entry in station diary and informed the S.D.P.O., namely, Sushil Kumar, PW 10 and on his order a raiding party of PWs 4, 7, 9, 12 and 16 under the leadership of PW 10 was constituted. Thereafter in presence of two independent witnesses, they raided the aforesaid two houses and seized the aforementioned contraband materials. Six persons mentioned above present in the two houses were arrested. However, Vishwanath Prasad, owner of the one of the two houses managed to escape. He stated that he did not inform the officers of Excise and Customs Department regarding recovery. He also stated that signature of witnesses and accused persons were not taken on materials exhibits.

11. PW 10, the SDPO corroborated the evidence of the informant. He stated that on receipt of information, he came to the police station and constituted a raiding party and proceeded towards the house of Vishwanath Prasad and Sukhari Prasad in Mohalla Nega Road. He corroborated the factum of seizure of charas. PWs 4 and 9, Civil Jamadar and ASI also stated that they too went in raid and they also supported the version of PW 13, the informant. PW 5 stated that he is orderly peon of PW 10 and was also a member of raiding party which conducted raid.

12. PW 17, IO of the case stated in para 20 of his evidence that 1st list of sample sent to FSL was returned without examination, as signature on the seal was not legible and designation of forwarding officer was not mentioned. He stated that samples were again resent to FSL for chemical examination. Subsequently a report dated 14.11.2002 was received from FSL and has been marked as exhibit No. 6. The report shows the presence of Greenish brown solid substance, namely, Tetra Hydro connbinal Tat.C which constituted an important ingredient of Charas.

13. From the aforesaid evidence of witnesses it will appear that PWs 4, 6, 8, 9, 10, 11, 12, 13, 15, 16 & 17 have corroborated statement of each other regarding raid of houses of Vishwanath Prasad and Sukhari Prasad and recovery of 11 kilograms and 5 kilograms of Charas from their houses respectively. The defence examined

two witnesses on behalf of accused Babloo Kumar, appellant in Cr Appeal No. 133 of 2007. These DWs are Narad Sah and Birendra Prasad. DW 1 stated that accused Babloo kumar had come to his shop at about 4.30 pm for realizing his dues of Rs. 4,500/- and he further deposed that Babloo Kumar was arrested while he was moving in the market after he departed from the shop. DW 2 stated that he met appellant Babloo Kumar at the shop of DW 1.

14. After considering the evidence on record, the learned trial court found the appellants guilty under Sections 20(b)(ii) and 23 of the Act and sentenced all of them to ten years imprisonment and payment of fine of rupees one lacs each, under both the counts. Learned Counsel for the appellants raised the following points:

15. Learned Counsel for the appellants stated that the charges have not been duly proved against them. The non compliance of mandatory provisions of Act including Section 42(2), 53, 55 and 57 of the Act has rendered the prosecution case unsustainable in law. He also submitted that the informant did not have power of search and seizure and the Sub Inspector who investigated the case was not competent to do so.

16. It was submitted on behalf of accused Bachcha Prasad, appellant of Cr appeal No. 7 of 2007 that he had come to house of his brother-in-law, namely, Viswanath Prasad on a courtesy visit along with his friend Giridhari Prasad, (co-appellant) and Babloo Kumar, appellant of Cr appeal No. 133 of. It was submitted on behalf of Subhash Prasad appellant of Cr Appeal No. 6 of 2007 that he is neighbour of Vishwanath Prasad and had come to his house to ask for some flour and soon thereafter there was a raid. It is submitted on behalf of all these appellants that they have no concern with the alleged recovery of Charas from the house of Vishwanath Prasad as there is no evidence on record to show that they ever indulged in either purchase or sale of Charas or they brought the same to the house of Vishwanath Prasad. It was submitted on behalf of the appellant Bhagmati Devi, wife of Vishwanath Prasad that her presence in the house was very much natural, being house wife. It is also submitted on her behalf that there is no evidence to the effect that she indulged in purchase and sale of Charas with her

husband or she had knowledge that same had been concealed under the Cot.

17. Learned Additional Public Prosecutor appearing for the State of Bihar stated that contraband material had been recovered from the house of Vishwanath Prasad and Sukhai Prasad. The presence of appellants in the house at relevant period also shows their involvement. FSL report (exhibit 6) would also show that materials seized is very much Charas. He stated that the informant was empowered under Section 42 of the Act to conduct search and seizure and to institute a case.

18. The Act provides stringent measures for control and regulation of operation relating to drugs and psychotropic substances, obviously with a view to check trafficking in drug which is a menace to the Society. At the same time legislature has taken care by inserting certain provisions in the Act to ensure that the innocent is not implicated or booked under the Act. It is well settled that stringent punishment requires stricter adherence to the procedures provided in the Act. In view of the aforesaid object of the Act, this Court now proceeds to examine the points raised by the learned Counsel for the parties.

19. I first of all take up the appeal of Subhash Prasad, Bachcha Prasad, Girdhari Prasad, Babloo Kumar and Bhagmati Devi as they have a common defence. The aforesaid four persons are admittedly not the owners of the house which were raided. Subhash Prasad happens to be a neighbour. Bachcha Prasad happens to be brother in law of Vishwanath Prasad, the owner of house. Giridhari Prasad and Babloo Kumar both are friends of Bachcha Prasad, all being residents of village Kesharia. The prosecution has not brought any evidence on record to show that they indulged in trade of Ganja or narcotic drugs. There is no evidence on record that the Ganja which was recovered from the house of Vishwanath Prasad and Sukhari Prasad were brought by them. There is no evidence that the aforesaid Ganja was seized from their person or from their physical or conscious possession. In absence of any material to connect them with recovery of alleged Ganja from house of two different persons, namely, Vishwanath Prasad and Sukhari Prasad it would not be safe to uphold the conviction.

20. Now I taken up the case of Bhagmati Devi, wife of Vishwanath Prasad from whose house 10 grams of Ganja were recovered concealed under her bed. The presence of appellant in the house is very natural and obvious as she happens to be the wife of Vishwanath Prasad. Generally, husband is manager of the family and wife plays a supplementary role. There is no evidence on record to show that she was in possession of Ganja seized from room of Vishwanath Prasad. No overt act has been alleged against her. There is no investigation to the effect that she had played any role in concealing the Ganja in the house. In the aforesaid circumstances, the prosecution has failed to establish the charge under the NDPS Act.

21. Now remains the case of Sukhari Prasad, who in custody since the date of raid i.e. on 12.1.2002. Learned Counsel appearing on behalf of the appellants submits that raid and search were conducted by Inspector cum officer- in -charge of Raxaul Police Station at about 7.05 PM under the leadership of Sushil Kumar, SDPO, Raxaul. The raid was conducted after making due entry in the station diary as per Section 42(1) of the Act. If an empowered officer makes raid after sunset without warrant or authorization, he is bound to record the reasons for conducting such raid. Furthermore there was non compliance of Section 42(2) of the Act, which mandates that such report should be sent to superior official within 72 hours.

22. The empowered officer can conduct raid even after sun set without warrant or due authorization if he believes that the same would allow time and opportunity to the accused to conceal the drugs. However, he must record in writing the ground for such apprehension and belief. There is no evidence on record to show that there was compliance of aforesaid provisions. The aforesaid deficiency in the prosecution case not only makes the prosecution against Sukhari Prasad faulty but renders the same unsustainable against other appellants.

The Apex court in the case of Beckodan Abdul Rahiman v. The State of Kerala reported in 2002 (3) PLJR 216 has held that Section 42(2) of the Act is mandatory and non compliance of the same would affect the prosecution case. The relevant extract of paras 5 and 8 of the judgment is produced herein below:

After referring to host of judgments, the Constitution bench of the court held that the provisions of Sections 42 and 50 are mandatory and their non compliance would render the investigation illegal. It was reiterated that severer the punishment, greater the care to be taken to see that all the safeguards provided in the statute are scrupulously followed.

We are of the firm opinion that the provisions of Sub-section (2) of Section 42 and the mandate of Section 50 were not complied with by the prosecution which rendered the case as not established. In view of the violation of the mandatory provisions of the Act, the appellant was entitled to be acquitted. Both the trial court as well as the High Court have failed to consider this aspect of the matter which warrants the setting aside of the impugned judgment.

23. Furthermore, the articles were seized on 12.1.2002 and sent for chemical examination after 21/2 months. The seizure list witnesses did not support prosecution case and had turned hostile. The prosecution has not brought any evidence on record to show, as to where the seized contraband was kept for the aforesaid two months.

24. Having considered the facts and circumstances of the case and in view of procedural lapse, this Court finds that prosecution has failed to prove charges against appellants.

25 As a result, judgment and conviction dated 12.12.2006, passed by Sri R.K. Singh, Addl Sessions Judge, FTC 2, East Champaran, Motihari in Raxaul Police Station case No. 7 of 2002, Excise case No. 4/2002 Sessions Trial No. 284 of 2004 is set aside and they are discharged of their bail bonds. The appellants are directed to be released forthwith, if they are not wanted in any other case.

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