

Akbar Hussain. Vs. State of Bihar.

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Court : Patna

Decided On : Oct-08-2010

Judge : Akhilesh Chandra, J.

Acts : Narcotic Drugs and Psychotropic Substances Act - Sections 20(b)(ii)(c), 50;
Code of Criminal Procedure (CrPC) - Section 313

Appeal No. : CRIMINAL APPEALS No.923 & 1009, BOTH OF 2007

Appellant : Akbar Hussain.

Respondent : State of Bihar.

Advocate for Def. : Ms. Shashi Bala Verma; Mr. Ashish Kr. Sinha, Advs.

Advocate for Pet/Ap. : M/s Rana Pratap singh; Rakesh Kumar, Advs.

Judgement :

1. Both these appeals arise out of common judgment passed by Sri Jitendra Mohan Sharma, Sessions Judge-cum-Special Judge, N.D.P.S. Act in N.D.P.S. Act Case nos. 2 and 2A, both of 2003 under Sections 20 (b) (ii) (c) of the N.D.P.S. Act, have been heard together and are being disposed of by this common judgment.

2. The appellants are respectively father and son, the son is appellant in subsequent appeal but was apprehended at the spot and was facing trial under original case during which his father co-named accused could subsequently been produced and remanded. A separate trial was initiated against him but

subsequently both the trials proceeded simultaneously and amalgamated.

3. The appellants have preferred the appeals against judgment of their conviction for the offence under Sections 20(b) (ii) (c) of the N.D.P.S. Act and sentenced to undergo rigorous imprisonment for 12 years each and also to pay fine of rupees one lac and twenty five thousand each and in default whereof to undergo further rigorous imprisonment for two years.

4. The prosecution case, in brief, is that the informant, Officer-in-charge, Simri Police Station on confidential information that the appellants are indulged in business of narcotic substance and have kept ganja in huge quantity in the house of one Harihar Sah, a co- villager, residing at Bokaro with his entire family. So higher authorities were informed and on getting due authorization a raiding team was organized and the team with all relevant persons including a Gazetted Officer, P.W.13, arrived at the house of appellants where out of several villagers assembled, two persons as independent witnesses were called. The father Sahamat Hussain was not available but his son, the appellant in latter appeal, was present with whose consent, initially search was conducted in the house of the appellants. Nothing was found there. However, the party proceeded towards nearby house of Harihar Sah under custody and control of the appellants one of the rooms was unlocked by Akber Hussain (the appellant) himself from the key in his pocket wherein huge quantity of ganja and its powder was recovered besides some weighing pot and watts. However, the raiding party was also prepared with independent weighing facility. The Ganja kept in four bags was, after weighing, it could come as 21, 24, 27 and 24 Kgs packs totaling 96 Kgs and in nine different packets ganja powder weighing 19, 20, 16, 14, 19, 20, 12 and 12 kgs totaling to 157 Kgs could be recovered in presence of the authorities. Appellant Akber Hussain was taken into custody. Samples were prepared and sealed. The raiding Party with the articles and apprehended accused returned to the Police Station. Subsequently, sample was sent for Chemical examination and after completion of investigation charge sheet was submitted against both the appellants.

5. Learned counsel for the appellants vehemently submitted that there is absolutely no material against them. As per prosecution, the Police was well

informed since beginning that the articles recovered are kept in the house of one Harihar Singh from where it was said to be recovered but there is none to say that the said house, which was in dilapidated condition, remained under control of the appellants. The lock and key also could not be produced at any point of time. First appellant was also not present at the spot. There is also no evidence to show that the appellants were indulged in any sort of business or had any such criminal antecedent. On the other hand, learned Additional Public Prosecutor, while supporting the findings of the court below, submitted that no interference is required. The room, from where articles were recovered, was personally un-locked by the appellant who not only admitted their control over the room but also he himself and was in custody of the key. This itself is sufficient to establish his conscious possession.

6. Before the trial court prosecution has examined altogether fifteen witnesses and, as it appears, after examination of first two witnesses, Ashok Kumar Jha, P.W.1, (informant) and Nandji Singh, P.W.2, (member of raiding party) trial in separated case against Sahamat Hussain proceeded after his remand on production from another case and these two witnesses have also been examined in this case respectively as witnesses no. 4 and 9 and prosecution witnesses no.3 and 4, Kaushal Mumar Singh and Md. Ekbal Ansari, the two independent witnesses on search and seizure, have also been examined in separated trial respectively as prosecution witnesses no. 1 and 2. Thereafter, Lal Babu Sah, Raj Kishore Upadhaya, Hare Ram Singh and Sahdeo Kujur, other members of the raiding party have been examined in both the cases as Prosecution Witnesses no. 5 to 8 only. Thereafter, Prosecution Witness no.1, Nandji Singh, in original case was examined as Prosecution Witness no.9 in separated trial and again witnesses no. 10, 11 and 15 respectively, Maheshwar Prasad Sharma, Raj Kumar Singh, Gagan Kumar Sudhakar, Manohar Marandi, Prabhu Sahay Eka, and Jitendra Kumar, as members of raiding party besides P.W.13, Manohar Marandi, is a Gazetted Officer and two Investigating Officers, P.W.12, Gagan Kumar Sudhakar and P.W.14, Prabhu Sahay Ekka, have been examined in both the cases commonly. One Jham Lal Thakur, appears examined as Prosecution Witness no.3 in separated trial only but there is no witness as Prosecution Witness no.9 in the original trial. Perhaps this is a clerical error nothing more and this witness Jham

Lal Thakur since declared hostile by the prosecution, might have been examined also for the original case but inadvertently it does not find mention as examined therein causing variation in numbering of the witnesses. Consequently there appears no witness as Prosecution Witness no.9 in original case.

7. The independent witnesses of search and seizure, P.Ws 3 and 4 in original case as well as P.Ws 1 and 2 in separated trial, have been declared hostile though they have simply admitted their respective signatures on seizure list, Exhibits 4/1 and 4/2, and P.W.3 in separated trial stated his ignorance about any profession of the appellants.

8. Other witnesses, though members of the raiding party as Police Personnel as well as a Gazetted Officer, P.W.13, in both the cases, are undisputedly consistent on the point that raid was initially conducted in the house of the appellant where nothing could be recovered but at the same time out of them Prosecution witnesses Ashok Kumar Jha, (para 2 page 4 as P.W.1 and para 4 as P.W.4 in separated trial), Nandji Singh, (para 3 as P.W.2 and P.W.9) Raj Kishore Upadhaya, (P.W.6 para-1) Hare Ram Singh, (P.W.7 para 2) and Sahdeo Kujur (P.W.8 para 3) are also consistent on the point that one of the rooms of the house of Harihar Sah which was under lock was unlocked by appellant Akber Hussain himself from the key kept in his pocket. All these witnesses were not even cross-examined on the point of this specific assertion that appellant Akber Hussain himself opened the lock from the key taking out of his pocket. In view of this now undisputed fact though for the first time in the statement under Section 313 of the Code of Criminal Procedure appellant Akber Hussain has denied without producing any other material / witness. This much can be said that the particular room was in full control of appellant Akber Hussain from where undisputedly in huge quantity recovery was made which have been proved to be ganja as per Forensic Science report.

9. The decision of the Apex Court in a case of Md. Aslam V. Narcotics Trial Bureau; (1996) 9 SCC 462, relied upon by learned counsel for the appellants on the point of conscious possession has no application in the case in hand with respect to appellant Akber Hussain as before the Hon'ble Court the place wherein

contraband drugs were kept was raided in absence of the accused and there was nothing to show that anyhow the accused was in control of the said flat ownership of which was also lying with another person. No doubt in absence of any independent witness the decision is applicable in the case of appellant Sahamat Hussain.

10. Similarly, another decision placed reliance by the learned counsel for the appellants is of Bombay High court in a case of Rubjane alias Smita Sanjib Bali V. State of Maharashtra; 1996 Cr.L.J. 148, but also of no avail to Akbar Hussain wherein name of the appellant was disclosed by a co-accused leading to the recovery of similar articles but in absence of the appellant there and besides some other technical ground as of non-putting the circumstances available against the appellant during examination under Section 313 of the Code of Criminal Procedure etc. said appellant was exonerated.

11. The learned counsel for the appellants further placed reliance upon a decision of this Court in a case of Md. Shafique V. State of Bihar (Patna); 1999 (2) East India Cr. Cases 285, wherein also the facts and circumstances was completely different. Some contraband articles were recovered from a close room of a factory in absence of the appellant and there was nothing to prove his presence or involvement at any point of time.

12. The learned counsel for the appellants, however, on the basis of decision of Apex Court in a case of Krishna Mohar Singh Dugal V. State of Goa; 2000 Cr.L. Journal 18, tried to laid emphasis that Police was well informed from before as appears from the prosecution case and consistent evidence of the witnesses that Ganja was kept in the house of Harihar Sah so only on the basis of recovery of the Ganja it cannot be said that it was done on the disclosure of the appellants and he cannot be held liable but again decision of the Apex Court is not going to help this appellant Akbar Hussain in any manner because in the case before the Apex Court recovery of Charas was made from a coconut tree standing in an open space so it was held that it cannot be said that it was the accused there who concealed the Charas there and it was found only on the basis of disclosure statement made by the accused. Whereas in the case in hand it is appellant Akber

Hussain who was custodian of the key of the lock under which the room of the house of Harihar Sah was locked and only after unlocking the same by the appellant contraband articles were recovered so it cannot be said that it was not under conscious possession of appellant Akber Hussain rather he alone is found and held to be in conscious possession of the contraband articles.

13. True it is that such search and seizure was made in absence of appellant Sahamat Hussain who was not available at the place during such search and seizure nor disclosed anything and there is no evidence at all of any independent witness to show that this appellant had anything to do with the articles except statement of the Police Officers and Police personnel based on some confidential information received from unknown sources. Had there been any independent witness to support such information as regard to involvement of appellant Sahamat Hussain or any documentary evidence about his custody and control over the house or particular room in question, position could have been different. But, in absence thereof only on such information and alleged statement of co-appellant, before police, even though being son and making statement leading to recovery but in absence of father it cannot be held that against appellant Sahamat Hussain prosecution has established its case, rather contrary the prosecution has failed to do so.

14. On behalf of the appellants though no argument was placed regarding Section 50 of the N.D.P.S. Act which reads as such:

"50. Condition under which search shall be conducted: - (1) When any Officer duly authorized under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in Sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the

person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorized under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973.

(6) After a search is conducted under Sub- section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy two hours send a copy thereof to his immediate official superior."

But in the list of books decision of Apex Court in Saiyad Md. Saiyad Umar Saiyad & Ors. V. State of Gujarat (SC); 1995 (2) East Cr. C. 21, also finds mention but this decision is also not applicable in the instant appeals as with the raiding party an independent Gazetted Officer, P.W.13, Manohar Marandi, was present under whose presence search was conducted. Had he being not present there and only search would have been conducted by Police Officials and Personnel it could have been incumbent upon them to disclose to the right of search in presence of Gazetted officer available to accused but in face of presence of P.W.13 the mandatory requirement is fulfilled.

15. To establish the seized articles being Ganja there is report of Forensic Science Laboratory as Exhibit-5 and there is no challenge to the same. Thus, undisputedly the articles recovered are contraband article as Ganja which was recovered in presence, control and conscious possession of appellant Akber Hussain and also produced before the trial court as material Exhibits. There is no controversy on such recovery and their respective weights. So needs to discussion in detail.

16. In view of the facts and circumstances, discussed above, finding no material against appellant Sahamat Hussain @ Sohamat Mian in Cr. Appeal no. 923 of

2007, his conviction and sentence is not sustainable. Accordingly, set aside and the appeal is allowed. He is at once ordered to be released if not required in any other case. But, simultaneously there is sufficient evidence against his son, appellant Akber Hussain of Cr.Appeal no. 1009 of 2007 and findings of the court below to the extent of his conviction and sentence needs no interference. Accordingly, said appeal is hereby dismissed.

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