

IN THE HIGH COURT OF JHARKHAND AT RANCHI

(Criminal Appellate Jurisdiction)

Criminal Appeal (DB) No.695 of 2014

(Against the judgment of conviction dated 25.08.2014 and the order of sentence dated 27.08.2014, passed by the learned District & Addl. Sessions Judge-II, Latehar in N.D.P.S Case No. 08 of 2009)

1. Lacchu Ganjhu, son of late Jairam Ganjhu
2. Parana Ganjhu, son of late Sanichar Ganjhu
Both r/o-village-Lukaiya, PS-Chandwa, District-Latehar

... **Appellants**

Versus

The State of Jharkhand

... **Respondent**

(Heard through V.C on 07th April, 2021)

PRESENT

HON'BLE MR. JUSTICE SHREE CHANDRASHEKHAR

HON'BLE MR. JUSTICE RATNAKER BHENGRA

For the Appellants : Mr. Amit Kumar Choubey, Advocate

For the State : Mr. Shekhar Sinha, PP

Oral Judgment

07th April, 2021

Per, Shree Chandrashekhara, J.

Chandwa PS Case No. 28 of 2009 was registered on 04.03.2009 against Lacchu Ganjhu and Parana Ganjhu on the allegation of illegal cultivation of poppy plants. After the investigation charge-sheet was submitted under sections 15 and 21 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as N.D.P.S Act). In N.D.P.S Case No. 08 of 2009 a charge under sections 15, 18 and 21 of N.D.P.S Act was framed against Lacchu Ganjhu and under section 18 of N.D.P.S Act against Parana Ganjhu. During the trial the prosecution has examined eight witnesses out of whom PW3-Rakesh Thakur and PW5-Md Mahtab were tendered for cross-examination.

PW1-Rupesh Nayak who was the driver was declared hostile when he stated in the Court that he put his signature on the papers at the police station; that the bundle of poppy (posta) plants was tied with a cloth, and; that he cannot give description of the poppy plants. The learned District & Additional Sessions Judge-II, Latehar has held that the seizure witnesses have proved seizure of the illegal narcotic plants and the other witnesses such as PW2, PW4 and PW8 have also supported the prosecution case. Lacchu Ganjhu was convicted and sentenced to R.I for ten years with a fine of Rs. 1,00,000/- under sections 15 and 21 of N.D.P.S Act on each count separately. Lacchu Ganjhu was further convicted and sentenced to R.I for 10 years with a fine of Rs. 1,00,000/- under section 18 of N.D.P.S Act. The appellant, namely, Parana Ganjhu was convicted and sentenced to R.I for ten years with a fine of Rs. 1,00,000/- under section 18 of N.D.P.S Act.

2. On 04.03.2009 Shamim Ahamad Khan was posted as officer-in-charge of Chandwa PS. On the basis of his statement a First Information Report was lodged against Lacchu Ganjhu and Parana Ganjhu. In his statement recorded on 04.03.2009 at 11:30 AM in the village Lukaiya, Shamim Ahamad Khan has disclosed that on the basis of a secret information that poppy is cultivated in the field of Parana Ganjhu after making entry in the Station Diary he sent information to the Block Development Officer and asked him to participate in the proceeding as a Magistrate. Thereafter he proceeded for village Lukaiya with Ramdeo Ram Ravi and the police force and in course of enquiry he was told that Lacchu Ganjhu has cultivated poppy in the field of Parana Ganjhu. About one kilometer away from the village he found two persons removing Doda from the poppy field. On enquiry they disclosed their identity. On the boundary of the field he found four gunny bags and one plastic bag containing 50-60 kilograms Doda. On enquiry Lacchu Ganjhu and Parana Ganjhu admitted that Lacchu Ganjhu has cultivated poppy in the field of Parana Ganjhu. The poppy plants were seized in the presence of independent witnesses and he also put his signature on the same. Thereafter confessional

statement of Lacchu Ganjhu was recorded by Ramdeo Ram Ravi, the Investigating Officer.

3. The witnesses examined by the prosecution during the trial were official witnesses. The learned counsel for the appellants has raised a plea that the procedure prescribed for search and seizure was not followed, the prosecution has not established that poppy was cultivated in the agricultural field of Parana Ganjhu and, above all, on the basis of the evidence of official witnesses conviction of the appellants cannot be recorded under sections 15, 18 and 21 of N.D.P.S Act.

4. PW1 is the driver who was posted at the police station. He has stated that the officer-in-charge and the police force had proceeded for village Lukaiya and Doda was seized in his presence. In his cross-examination he has stated that he put his signature on the seizure-memo in the police station and poppy plants tied with the cloth were kept in a room. He has further stated that he does not know how a poppy plant looks like. At this stage he was declared hostile at the instance of the prosecution. PW2 is a constable who was member of the raiding party. He has stated that near the bank of a river in village Lukaiya he has seen two persons removing poppy with the sickle and on enquiry they disclosed their identity. He has further stated that a seizure-memo of Doda and opium (Aphim) was prepared by the officer-in-charge. In the cross-examination he has stated that there were 15-20 houses near the field from where seizures were made and at the time of seizure 3-4 other persons were also present there. PW3 and PW5 were tendered for cross-examination by the prosecution. PW4 and PW6 were also members of the raiding party. PW4 has also stated that on 04.03.2009 he accompanied the officer-in-charge, Ramdeo Ram Ravi and the Block Development Officer to Lukaiya village. Two persons who were cutting poppy plants from a field on enquiry disclosed their name. He has stated that a seizure-list was prepared in the field and a plastic jar containing opium was recovered from the house of Lacchu Ganjhu. In his cross-examination he has stated that 16 persons had gone to village

Lukaiya on motorcycle, all were police personnel. PW6 who was *Chowkidar* of *Sere Panchayat* has stated that poppy plants in 2-3 bags were brought at Chandwa PS. In his cross-examination he has stated that he put his signature on the seizure-memo at the police station.

5. In the evidence of these witnesses, we do not find any reference regarding compliance of sections 42, 43, 52 and 57. It is true that provisions of section 52 and 57 are directory and violation of these provisions would not *ipso facto* vitiate the trial or conviction, however, the investigating officer cannot ignore these provisions in entirety. The provisions of N.D.P.S Act have to be construed strictly and the safeguards provided therein have to be scrupulously and honestly followed. In "*Tofan Singh v. State of T.N.*" (2013) 16 SCC 31 the Hon'ble Supreme Court has held that N.D.P.S Act is a complete Code relating to narcotic substances, and dealing with the offences and the procedure to be followed for the detection of the offences as well as for the prosecution and the punishment of the accused.

6. The prosecution case against the appellants is based on cryptic and insufficient evidence. The chain leading to seizure and production of the contraband was completely broken. There is no evidence that the seized contraband was deposited in *Malkhana*. The *Malkhana* register was not produced and in-charge of *Malkhana* was not examined during the trial. The Block Development Officer who allegedly accompanied the raiding team was not examined by the prosecution. In "*Ashok v. State of M.P.*" (2011) 5 SCC 123 the Hon'ble Supreme Court has observed that seizure witnesses turning hostile may not be very significant by itself but before a conviction is recorded there must be connecting evidence. But, in the present case, there is no satisfactory evidence, either oral or documentary, to show that the seized contraband was cultivated by the appellants and report of the chemical examination was of the seized material.

7. The prosecution evidence, that there are several houses near the field from where Doda was seized and 4-5 other persons

were also present there at the time of seizure, creates doubt on the prosecution case that the seized materials belonged to the accused, and statement of the witnesses that poppy plants were tied with a cloth and they put their signature at the police station further erodes credibility of the prosecution case. The evidence of PW4 and PW6 has, in fact, completely clouded the prosecution case with serious doubts.

8. In "*Jitendra v. State of M.P.*" (2004) 10 SCC 562 the Hon'ble Supreme Court has observed as under:

"5. The evidence to prove that charas and ganja were recovered from the possession of the accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW 7), Angad Singh (PW 8) and Sub-Inspector D.J. Rai (PW 6), there is no independent witness as to the recovery of the drugs from the possession of the accused. The charas and ganja alleged to have been seized from the possession of the accused were not even produced before the trial court, so as to connect them with the samples sent to the Forensic Science Laboratory. There is no material produced in the trial, apart from the interested testimony of the police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the Forensic Science Laboratory were taken from the drugs seized from the possession of the accused. Although the High Court noticed the fact that the charas and ganja alleged to have been seized from the custody of the accused had neither been produced in the court, nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the Chemical Examiner in a properly sealed condition and those were found to be charas and ganja. The High Court observed, "non-production of these commodities before the court is not fatal to the prosecution. The defence also did not insist during the trial that these commodities should be produced". The High Court relied on Section 465 CrPC to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused."

9. PW7 who was the officer-in-charge has deposed in the Court that on 04.03.2009 he received secret information which was entered in the Station Diary as Sanha No. 86. On his request the Block Development Officer, Chandwa accompanied him to Lukaiya village. He has found two persons cutting poppy plants in

the field and on enquiry they disclosed their name Parana Ganjhu and Lacchu Ganjhu. He has seized 50-60 kilograms Doda in two plastic bags and one plastic sheet in presence of Ranthu Oraon and Spus Nayak. In his cross-examination he has stated that he has not recorded total area and description of the land in which poppy was planted. PW8 who is the investigating officer has stated that he recorded confessional statement of Lacchu Ganjhu who admitted that he had cultivated poppy over the land of Parana Ganjhu. He has further stated that the seized contraband was deposited in the *Malkhana*. Next day he forwarded the accused for judicial custody and on completion of the investigation submitted a charge-sheet against them under sections 15 and 21 of N.D.P.S Act. When he was examined in the Court he produced the FSL report. He has identified signature of Dr. A. K. Bapuli, Director of FSL. In his cross-examination he has admitted that he did not enquire about khata number, plot number and ownership of the field, and weight of contraband was not taken rather approximate weight was recorded. He did not record statement of the land owners of the adjoining fields and did not prepare the site map of the field. He has further admitted that he has not written in the case diary that before entering the house of Lacchu Ganjhu he made an offer for his search. He did not provide a copy of the seizure-memo to the accused and the seized contraband was produced in the Court after about two months.

10. In "*Alakh Ram v. State of U.P.*" (2004) 1 SCC 766 the Hon'ble Supreme Court has observed that the prosecution must prove that the property from which contraband plants were uprooted/seized belonged to the accused or that the accused has right over the property. It was further observed that:

"6. The above evidence is to be appreciated in the background of other evidence on record. Appellant Alakh Ram, his father and brothers owned 70 bighas of land. The prosecution has not produced any document to show that the property from which the ganja plants were uprooted belonged to appellant Alakh Ram exclusively. The witnesses who were examined in support of the prosecution also have not given any evidence to show that this property belongs to appellant Alakh Ram. There is no satisfactory

evidence, either oral or documentary, to show that the appellant has a right over the property from which the ganja plants were recovered. There is no evidence that the appellant cultivated these ganja plants. Having regard to the extent of the property and the number of plants recovered from that property, it cannot be said that these plants had been the result of cultivation. They may have sprouted there by natural process and the appellant or anybody who is the owner of the property must not have been diligent in destroying the plants. There is no evidence to prove that there was cultivation of ganja plants by the appellant and the Additional Sessions Judge wrongly convicted him as the evidence adduced by the prosecution was not carefully scrutinized by the Court. The High Court committed error in confirming the conviction and sentence of the appellant."

11. The prosecution has relied on the confessional statement of Lacchu Ganjhu which was recorded by Ramdeo Ram Ravi, S.I of Chandwa PS on 04.03.2009 at about 12:05 hours. In the confessional statement Lacchu Ganjhu has stated that he gathered information from his relatives that cultivation of poppy plants is quite profitable and so he approached Parana Ganjhu who had land near the river and started cultivation of poppy plants. The confessional statement of an accused is inadmissible in evidence and the primary reason for that had been distrust on the police action by the Courts.

12. In "*Queen Empress v. Babu Lal*" ILR (1884) 6 All 509, Mahmood, J., has observed as under :

"... the legislature had in view the malpractices of police officers in extorting confessions from accused persons in order to gain credit by securing convictions, and that those malpractices went to the length of positive torture; nor do I doubt that the legislature, in laying down such stringent rules, regarded the evidence of police officers as untrustworthy, and the object of the rules was to put a stop to the extortion of confession, by taking away from the police officers the advantage of proving such extorted confessions during the trial of accused persons."

13. Under section 67 of N.D.P.S Act an officer referred to in section 42 who is authorized by the Central Government or the State Government may, during the course of any enquiry in connection with the contravention of any provisions of this Act - (a) call for information from any person for the purpose of satisfying

himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder; (b) require any person to produce or deliver any document or thing useful or relevant to the enquiry; (c) examine any person acquainted with the facts and circumstances of the case. But any statement of an accused recorded under section 67 is treated as statement before a police officer and thus hit by section 25 of the Evidence Act.

14. In "*Tofan Singh v. State of T.N.*" 2020 SCC OnLine SC 882 the Hon'ble Supreme Court has held as under:

"158. We answer the reference by stating:

(i) That the officers who are invested with powers under section 53 of the NDPS Act are "police officers" within the meaning of section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

(ii) That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."

15. Even otherwise, confessional statement of a co-accused is weak piece of evidence and confession made by an accused must be subject to closure scrutiny and it needs to be corroborated by some other evidence.

16. In "*Haricharan Kurmi v. State of Bihar*" AIR 1964 SC 1184 the Hon'ble Supreme Court has observed that if a statement by an accused person is found to be voluntary and it amounts to a confession in the sense that it implicates the maker, it is not likely that the maker would implicate himself untruly, and so section 30 provides that such a confession may be taken into consideration even against a co-accused, however, the proper approach to adopt would be to consider the other evidence against the co-accused and if such evidence may sustain the charge framed against him the Court may turn to the confession with a view to lend assurance to the tentative opinion formed by it.

17. Subject to the exception provided therein, section 8 of Narcotic Drugs and Psychotropic Substances Act, 1985 provides that: no person shall – (a) cultivate any coca plant or gather any

portion of coca plant; or (b) cultivate the opium poppy or any cannabis plant; or (c) produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or transship any narcotic drug or psychotropic substance, except for medical or scientific purposes and in the manner and to the extent provided by the provisions of the Act. The prosecution evidence is that the appellants were found removing poppy plants from the field and Lacchu Ganjhu has suffered a disclosure statement admitting that he was cultivating in the field of Parana Ganjhu but, there is no independent supporting evidence to establish that the appellants were cultivating poppy in contravention of the provisions of N.D.P.S Act. The prosecution evidence that poppy plants were seized in the field belonging to Parana Ganjhu is not sufficient to fasten liability under sections 15, 18 and 21 of N.D.P.S Act upon the appellants.

18. In view of the aforesaid undisputed facts, we hold that the prosecution has failed to prove the charges against the appellants and, accordingly, the judgment of conviction dated 25.08.2014 and the order of sentence dated 27.08.2014 against the appellants, namely, Lacchu Ganjhu and Parana Ganjhu of R.I for ten years and a fine of Rs.1,00,000/- each under section 18 of N.D.P.S Act, and also against the appellant, namely, Lacchu Ganjhu of R.I for ten years and a fine of Rs. 1,00,000/- each both under section 15 and section 21 of N.D.P.S Act, passed by the learned District & Addl. Sessions Judge-II, Latehar in N.D.P.S Case No. 08 of 2009, are set-aside.

19. Mr. Shekhar Sinha, the learned Public Prosecutor states that the appellants, namely, Lacchu Ganjhu and Parana Ganjhu are in custody.

20. Accordingly, the appellants, namely, Lacchu Ganjhu and Parana Ganjhu who are in custody shall be set-free forthwith, if not wanted in connection to any other criminal case.

21. In the result, Criminal Appeal (DB) No. 695 of 2014 is allowed.

22. Let the lower Court records be sent to the Court

concerned forthwith.

23. Let a copy of the judgment be transmitted to the Court concerned and the concerned Jail Superintendent through 'Fax'.

(Shree Chandrashekhar, J.)

(Ratnaker Bhengra, J.)

Jharkhand High Court, Ranchi
Dated : 07.04.2021
Tanuj/
A.F.R