

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.353 of 2015

Against the judgment of conviction and order of sentence dated 07.05.2015 passed by Shri Samay Nath Srivastava, Additional District and Sessions Judge, IV, Muzaffarpur, in N.D.P.S. Case No. 2 of 2011/Tr. No. 45 of 2014

1. Ashok Kumar Son of Sri Dharam Narain, Resident of Village - Kharagpur, P.O. - Ruruganj, P.S. - Bidhuna, District - Auraiya (U.P.) Appellant

Versus

1. The Union of India Respondent

With

Criminal Appeal (SJ) No. 375 of 2015

1. Shyambir Son of Sri Maharaj Singh, Resident of Village Prem Nagar, P.S. - Achalda, District - Auraiya (U.P.) Appellant

Versus

1. The Union of India through Director, Directorate of Revenue Intelligence

.... Respondent

Appearance :

(In CR. APP (SJ) No. 353 of 2015)

For the Appellant : Mr. Madhusudan Kumar, Adv.

For the Respondent : Mr. Rajesh Kumar Verma, ASG

(In CR. APP (SJ) No. 375 of 2015)

For the Appellant : Mr. Nachiketa Jha, Adv.

For the Respondent : Mr. Sanjay Kumar, ASG

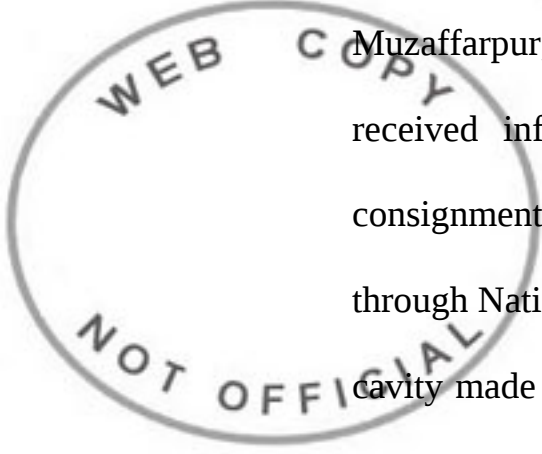
CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

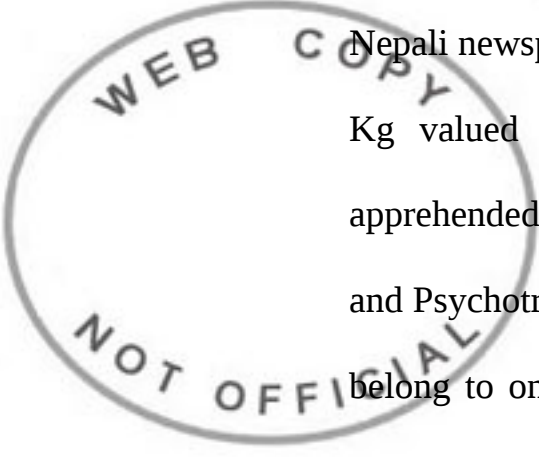
ORAL JUDGMENT

Date: 31-08-2015

Both these appeals have been heard together and are being disposed off by this common judgment as both arise out of the same prosecution report bearing DRI NDPS Case No. 2 of 2011 in which the appellants have been convicted under Sections 20(b)(ii), 22(c), 23 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, and have been sentenced to undergo rigorous imprisonment for ten years with fine of rupees one lakh each and for non-payment of fine to undergo simple imprisonment for two years each. However, it has been ordered that all the sentences shall run concurrently.

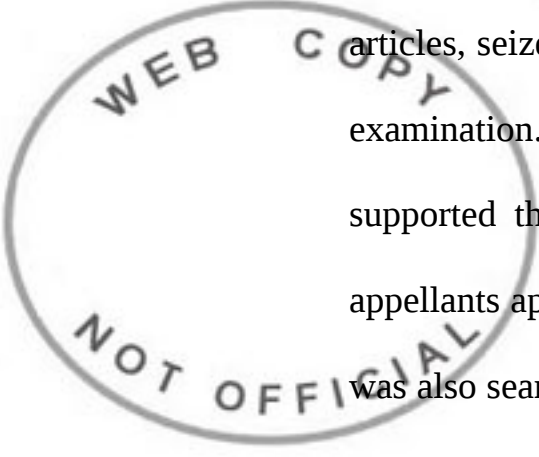
2. The prosecution case as alleged in the complaint by Anil Kumar Sharma, Intelligence Officer, DRI, Sub Regional Unit, Muzaffarpur, alleging therein that on 05.04.2011, the complainant received information from the DRI Zonal Unit, Lucknow, that a consignment of ganja is to be departed from Pipra Kothi to Gorakhpur through National Highway No. 28 kept concealed in a specially designed cavity made in a truck bearing Registration No. UP 84 9044 and then a team was constituted by DRI, Muzaffarpur, and the truck was apprehended at about 11.30 hours and two persons, namely, Shyambir and Ashok Kumar were apprehended from the truck and on search the cavity was located and found ganja in several number of packets wrapped in plastic sheet tied with sutli concealed in it. Due to the fact that night was dark and there was no light at the place where the truck was intercepted, the consignment, occupants, the witnesses and the truck were taken to the DRI office, Muzaffarpur. Further, case is that the occupants were searched of their persons in presence of independent witnesses, but, no contraband was recovered in their body search. However, a mobile phone was recovered from Ashok Kumar and, further, in the premises of DRI Office campus, Muzaffarpur, the said intercepted truck was thoroughly searched on 06.04.2011 at about 07.00 hours in presence of the intercepted occupants and the independent witnesses and on detailed search of the body of the said truck fifteen packets of ganja was recovered from the said specially designed cavity





made in the roof of the cabin of the said truck. It is, further, alleged that the said packets were same in shape and size and were wrapped in old Nepali newspaper and on weigh the gross weight was found to be 33.100 Kg valued at Rs.1,8,000/- approximately. The statements of the apprehended persons recorded under Section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985, and they disclosed that the truck belong to one Titu Yadav who has concealed the ganja packets in the cavity of the truck. Further, case is that seizure was made and three samples were also drawn in presence of both the occupants and independent witnesses kept concealed in plastic quoted envelops and their signatures were taken and the detailed information about the seized articles and the accused persons were sent to the Deputy Director, Regional Unit, Patna, by fax on 07.04.2011 at 04.10 hours and, thereafter, one sample of the said ganja drawn and duly sealed forwarded to the Chemical Laboratory, Custom House, Kolkata, for chemical analysis and the report was received that it was ganja and, thereafter, prosecution report was submitted and a Judicial Magistrate deputed for certifying the correctness of articles, seized, cognizance was taken, charge framed and during the trial six witnesses were examined.

3. P.W. 1 is Shivendra Satyarthi, Intelligence Officer, DRI, Muzaffarpur, who stated in his evidence that on receipt of the information, teach constituted and apprehended the truck having two persons, Shyambir and Ashok Kumar and they were searched and found



pecially designed cavity in the truck contained ganja wrapped in polythene bags. Panchnama prepared and also the seizure list of the articles, seized sample was taken from the packets and sent for chemical examination. P.W. 2 is Anil Kumar Sharma, the In-Charge, who also supported the case about the apprehension of the truck and the two appellants apprehended with the truck were searched as well as the truck was also searched and from the cabin about fifteen packets of ganja were recovered. P.W. 3 is Babu Lal Paswan also supported the prosecution case regarding apprehension of the truck and recovery of ganja after search of the person of accused and the truck. P.W. 4 is Ram Karan Shafi, Superintendent, Central Excise, Muzaffarpur, also supported the prosecution case regarding the apprehension of the truck, recovery of ganja and search and seizure. P.W. 5 is Karan Mahto a witness of panchnama and proved his signature on panchnama, marked exhibits 8 and 9. He is a betel shop seller and used to sell betel. P.W. 6 is the Inspector, Custom, Muzaffarpur.

4. The document proved in the case are Exhibit 1 to seizure memo, Exhibit 2 panchnama, Exhibit 3 statement of Ashok Kumar, the appellant, Exhibit 3/1 statement of Shyambir, the appellant, Exhibit 4 the inventory document, Exhibit 5 test report of the sample, Exhibit 6 fax message, Exhibit 7 signature of P.W. 4 on panchnama, Exhibits 7/1 to 7/5 signature of P.W. 4 and statement of accused Ashok Kumar, Exhibits 7/6 to 7/11 signature of P.W. 4 on the statement of

accused Shyambir, Exhibit 8 Entry no. 1 in godown register, Exhibit 9 instruction chart, Exhibit 10 certificate of seized goods and material Exhibits 1, 2 and 3 are sealed packets of respective samples, sealed packet of remained sample and sealed packet of sample produced at the time of remand of the accused. The trial Court taking into consideration, oral and documentary, convicted the appellants and sentenced as mentioned above.

5. The learned counsel for the appellants, however, challenged the order of conviction and sentence alleging therein that the seizure list witness, P.W. 4 is a betel seller, who sells betel and is contended that he is witness invariably in each and every case of recovery of ganja, hence, it is submitted that his evidence is not required to be relied upon and rest witnesses are only the witnesses of the Department and there is no independent witness to support the case of the prosecution. It has, further, been contended that there is no compliance of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985. it has been contended that the recovery made from the truck, but, they were not given opportunity or were reminded of the right to be searched before a gazetted officer, hence, contended that the non-compliance of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, has caused prejudice, hence, conviction and sentence, recorded by the trial is fit to be rejected and has placed reliance on various decisions.

6. The learned counsel for the Union of India, however, contended that the witnesses supported the prosecution case and there is no ground or law to reject the evidence of the official witnesses and nothing has been indicated by the learned counsel for the Union of India. The evidence of the police witness or official witness is not required to be rejected outright and even if P.W. 4 is not relied even then there are sufficient evidence regarding the recovery of the articles seized and sample taken was sent to Forensic Science Laboratory and report has been received that the articles seized was ganja. It has also been contended that the case falls under Section 43 of the Narcotic Drugs and Psychotropic Substances Act, 1985, the raid has been conducted at a public place on a vehicle while in transit and even then there is substantive compliance of Sections 42 and 43 of the Narcotic Drugs and Psychotropic Substances Act, 1985, and it has, further, been contended that Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, is applicable in a case of personal search and Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, is not applicable in a case when the recovery has been made from the cavity of the truck. It has, further, been contended that though there is evidence or material to search that the body of the accused persons was searched, but, no recovery has been made. It is contended that nothing was recovered from the body of the person on truck and relied upon a decision reported in **(2010) 9 SCC, 85 (Dehal Singh Vrs. The State of Himachal**

Pradesh) and it has been contended that if the search was made to find out the article possessed by them before lodging them in lock-up then it will not be a body search to attract Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, hence, it is contended that in the facts and circumstances of the case mere search of the body of the person will not attract to record a violation under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

7. However, taking into consideration the respective submissions, the question for consideration whether the conviction sustains or not. However, the submission made by the learned counsel for the appellants submits that though there is no independent witness, the mere evidence of official witness be not taken into consideration. However, there is no rule of law that the evidence of official witness to be outright rejected the evidence of official witnesses or private witnesses be there evidence can not be rejected outright. The mere alleging that P.W. 4 is a betel seller and he is witness in each and every case is no ground unless it is shown any infirmity in his evidence to reject his evidence. Hence, there is no merit in the submission that the evidence of official witness to be outright rejected.

8. However, the most vital issue in the case is with regard to the compliance of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985. it is pertinent to mention that compliance of Sections 42 and 43 of the Narcotic Drugs and

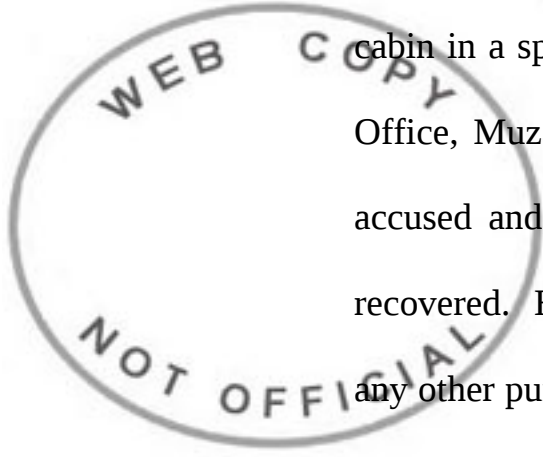
Psychotropic Substances Act, 1985, and more over the case falls under Section 43 of the Narcotic Drugs and Psychotropic Substances Act, 1985, hence, non-compliance of Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985, has no consequence as the raid has been conducted at a public place and the recovery has been made from the vehicle in transit, hence, there is no ground to record non-compliance of Sections 42 and 43 of the Narcotic Drugs and Psychotropic Substances Act, 1985, and the point has also not been emphatically raised by the appellants also.

9. However, most vital issue is regarding the non-compliance of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, however, taking into consideration the prosecution case in the complaint, itself, there is specific assertion in the complaint that the truck was apprehended on the raid at Pipra Kothi Chowk and then it was found that in a specially designed cavity made in the cabin of the truck contained ganja wrapped in plastic packet and the truck was taken to DRI Office, Muzaffarpur, for the reason that there was no arrangement for light and it was not though proper to seize and search the ganja on the place which due to darkness of the area and so the occupants of the truck, the independent witnesses were brought to DRI Office, Muzaffarpur, for detailed search as per the provision of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, body of both the occupants were searched in presence of the

independent witnesses, but, no contraband was recovered in the body search and, thereafter, it is said that in the DRI Office the truck was searched and on the detailed search of the body and the occupants of the said truck fifteen packets of ganja were recovered from the specially designed cavity of the cabin and, further, the evidence of the two witnesses P.Ws. 1 and 2 specifically stated about the search on the persons of the accused persons as well as search of the truck.

10. Having regard to these facts, the submission by the learned counsel for the Union of India relied upon a decision reported in **(2010) 9 SCC 85** (supra) is not sustainable as it was not a search while the accused persons were being taken to lock-up much after the search and seizure of ganja. However, the learned counsel for the Union of India had relied upon paragraph 18 of the judgment where the fact was that the vehicle was searched and charas was recovered from the vehicle and the person of the appellants were not searched as the recovery has been made from the vehicle. The provision of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, in our opinion was not required to be complied with that it is relevant to mention here that the appellants were not searched at the place where the vehicle was intercepted and searched, but, after they were arrested and brought to the Police Station their search was made to find out the article possessed by them before lodging them in lock-up. However, the fact as narrated in the decision is quite contrary different from the fact, at hand. Here under

the facts and circumstances of the case, at hand, the fact that the truck was apprehended and there it was found that the ganja secreted in the cabin in a specially designed cavity and then it was brought to the DRI Office, Muzaffarpur, there the search was made on the persons of the accused and, thereafter, the search was made of the cavity and ganja recovered. Here the search on the persons of accused alleged is not for any other purpose, but, the recovery has not been made from the persons of the accused, but, from the concealed cavity of the cabin. However, the further contention is that it has been mentioned that the search was made on the person of the body as per the provision of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, will not absolve his responsibility of indicating the accused of his right of his being searched before a gazetted officer. The learned counsel for the Union of India, however, contends that the searching was made before a gazetted officer is not required to say or indicate whether the accused persons required to be searched before a gazetted officer. However, it is well settled that even if the searching officer is a Government servant, the officer is required to make aware of the right of the accused of his being searched before a gazetted officer in compliance of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985. However, there is no averment at all in the entire arguments that whether while making a personal search of the appellant he was made aware of his right of being searched before gazetted officer. However, in this regard it is pertinent

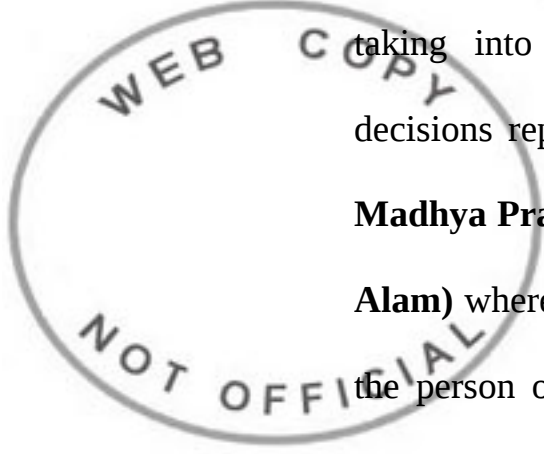


to refer a decision reported in **2014(2) B.B.C.J., 240 (State of Rajasthan Vrs. Permanand & Ors.)**. Here the fact that the conviction was solely based on recovery of opium from the bag of the respondent. However, the personal search of the person also conducted, but, no recovery was made from the person and there it has been held that if merely bag carried by a person is searched without there being any search of his person, Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, will have no application, but, if in addition to the search of the bag if the person of the accused is also searched and if there is no recovery from the person of the appellant even then Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, will have application and held that the breach of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, vitiated the search and resulted in judgment of acquittal of the appellants.

11. The learned counsel for the Union of India, however, relied upon Constitutional Bench decision reported in **(1999) 6 SCC, 172 (State of Punjab Vrs. Baldev Singh)** as well as **(2005) 4 SCC, 350 (State of H.P. Vrs. Pawan Kumar)**, a three Judges Bench, and submitted that when no recovery has been made from the person, Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, have got no application outright.

12. Having regard to the fact that decisions reported in **2014(2) B.B.C.J., 240 (supra)**, the Supreme Court has considered the

Constitutional Bench decision reported in **(1999) 6 SCC, 172** (supra) as well as the decision reported in **(2005) 4 SCC, 350** (supra) and after taking into consideration these decisions and two more reported decisions reported in **(2007)1 SCC, 450 (Dilip & Anr. Vrs. State of Madhya Pradesh)** and **(2009) 16 SCC, 644 (Union of India Vrs. Shah Alam)** where the fact contains that on the basis of information search of the person of the accused was conducted, but, nothing was found on their person, but on search of scooter, they were riding, the opium, contained in plastic, was recovered and even in that circumstance it was held that it was obligatory on the part of the officer to comply with the provision contained in Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, and a Court confirmed the acquittal in decision reported in **(2009) 16 SCC, 644** (supra) the heroine was first recovered from the bag and, thereafter, the person searched, but, nothing was recovered even then it was held that provision of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, having not been complied with for personal search. The High Court has rightly acquitted the respondents on that ground and taking into consideration the decision reported in **2014(2) B.B.C.J., 240** (supra) also taking into consideration that though the search before P.W. 5, J.S. Negi, the Superintendent, in the facts and circumstances of that case who was part of the raiding party held that Negi can not be called as independent officer, hence, the case at hand is squarely covered under the decision reported in **2014(2)**



B.B.C.J., 240 (supra).

13. Hence, I find and hold that non-compliance of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, has caused prejudice to the appellants and the trial again vitiated, but, the recovery of illicit articles becomes suspected and vitiating the conviction and sentence of the accused.

14. Having regard to the fact that the conviction has only been recorded on the basis of possession of illicit article recovered in violation of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, is not sustainable, hence, order of conviction and sentence, recorded by the trial Court is **set aside** the appeals are **allowed**. Since, the appellants are in custody, they are directed to be released forthwith if not wanted in any other case and they are discharged from the liabilities of their bail bonds.

(Gopal Prasad, J)

SA/-

U	√	T	√
---	---	---	---