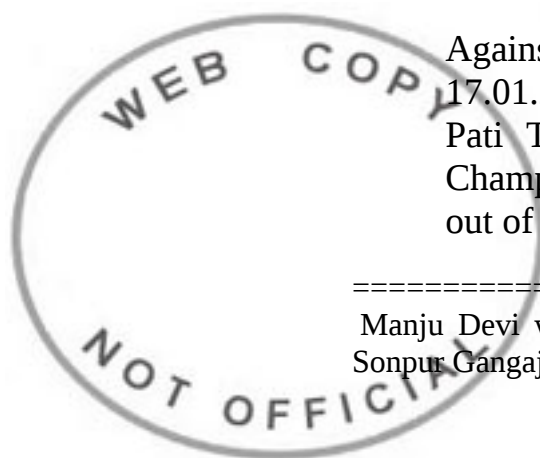




IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.106 of 2015

Against the judgment of conviction and order of sentence dated 17.01.2015 and 21.01.2015 respectively passed by Sri Rakesh Pati Tiwari, Additional District & Sessions Judge-VI, West Champaran, Bettiah, in Sessions Trial No. 49 of 2011 (arising out of Inarwa P.S. Case No. 01. of 2011

Manju Devi wife of Sahmat Ansari @ Sahmad Ansari Resident of Village - Sonpur Gangajal, P.S.- Sonpur, District - Saran at Chapra.

.... Appellant

Versus

The State of Bihar

.... Respondent

with

Criminal Appeal (SJ) No. 107 of 2015

Arising Out of PS.Case No. -1 Year- 2011 Thana -INARWA District- WESTCHAMPARAN(BETTIAH)

Raj Kumar Sah Son of Sri Thakur Sah, Resident of Village - Bheldi, P.S. - Bheldi, District - Saran at Chhapra.

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance :

(In CR. APP (SJ) No. 106 of 2015)

For the Appellant : Mr. Amrendra Nath Verma, Advocate.

For the State : Mr. Bipin Kumar, A.P.P.

(In CR. APP (SJ) No. 107 of 2015)

For the Appellant : Mr. Krishna Kant Singh, Advocate.

For the State : Mr. Z. Hoda, A.P.P.

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 30-11-2015

Heard learned counsel for the appellants and learned counsel for the State.



2. Two appeals have being heard together and disposed of by common judgment as two appeals arise out of the judgment of conviction dated 17.01.2015 and order of sentence dated 21.01.2015 recorded by Shri Rakesh Pati Tiwari, Additional District & Sessions Judge-VI, West Champaran, Bettiah, in Sessions Trial No. 49 of 2011 by which both the appellants had been convicted for offence under Sections 20(b)(ii)C of N.D.P.S. Act and sentenced to undergo rigorous imprisonment for ten years and payment of fine of Rs. 1,00,000/- and in default of payment of fine further sentenced to undergo rigorous imprisonment for one year. Further the appellants had been convicted for offence under Section 22 C of N.D.P.S. Act and sentenced to undergo rigorous imprisonment for ten years and payment of fine of Rs. 1,00,000/- and in default of payment of fine further sentenced to rigorous imprisonment for one year. Further the appellants had been convicted for offence under Section 23 C of N.D.P.S. Act and sentenced to undergo rigorous imprisonment for ten years and payment of fine of Rs.1,00,000/- and in default of payment of fine further sentenced to undergo rigorous imprisonment for one year. Further all the sentences were directed to run concurrently.

3. The prosecution case as alleged in the First Information Report by the informant Surendra Ram, S.I. Inarwa P.S. that on 08.01.2011 while he was on patrolling duty along with Constable No.

357 Jitendra Prasad, Constable No. 246 Chhittaranjan Prasad, Constable No. 509 Binod Kumar Yadav along with Assistant Commandant of B.O.P. Om Prakash Singh and Jawans of S.S.B., he received a secret information at Village- Khamiya that a Marshal vehicle in which a female and two male persons are coming from Nepal to enter India and tried to smuggle Ganja from Nepal. Thereafter, on received such information the entire party organised a Naka (secret barricading) near the Pillar No. 419 inside 200 meter from the border. At about 2.30 A.M. in the night they saw a vehicle coming from Nepal and soon the vehicle reach near the police party then the said vehicle was apprehended and on search nine packets of Ganja was recovered. With regard to those articles enquiry was made from the persons sitting in the vehicle and all of them disclosed that Ganja filled in these packets which were transported from Nepal to India for selling. The local Magistrate was informed and about 4.00 A..M. B.D.O. Maintand Sri Rajan Prasad came and in his presence on searching of nine packets all the packets containing 16 KG each so total 150 Kg. Ganja was recovered. On enquiry, the driver of the vehicle disclosed his name as Raj Kumar Sah and other persons sitting in the vehicle were Japan Rai and Manju Devi. They did not produce any paper of the recovered Ganja and document of marshal Jeep was also not present. Apart from that three mobile sets with SIM of Airtel

and Airtel were also recovered then Ganja was seized, accused persons were arrested and seizure memo was prepared. Police after investigation, submitted charge sheet. Cognizance was taken and trial proceeded after framing of the charge.

4. During trial, ten witnesses were examined by the prosecution. P.W. Jitendra Prasad Constable No. 357 posted in Inarwa P.S., P.W.2 Om Prakash Singh, Assistant Commandant, S.S.B., P.W. 3 Lakhvindra Singh posted in Inarwa head quarter, P.W. 4, Prem Singh, Havildar posted in Inarwa head quarter at the relevant time, P.W.5 Surendra Ram, S.I. Inarwa P.S. is informant and also I.O. in this case. Further this witness P.W. 5 is second witness and has stated that they handed over the Ganja to Officer-in-Charge Shri Priya Ranjan and had proved endorsement on the Formal F.I.R. in writing marked as Exhibit 4 and 5. He has further stated that Shri Priya Ranjan was transferred during investigation so handed over to investigation to him (P.W.5) on 14.06.2011. P.W. 6 Constable S.S.B. he was also member of the raiding party who conducted raid and apprehended the victim. P.W. 7 Constable S.S.B. member of the raiding party who conducted the raid and recovered nine bags which containing 16 Kg. Ganja in each packet. P.W. 9 Kailash Chandra Mina, Constable, also member of the raiding party. P.W. 10 Mukesh Kumar, a Constable of S.S.B. However, defence had also adduced six

witnesses. D.W. 1 Sahmad Ansari, D.W.2 Chote Lal Prasad, D.W.3 Prabhakar Kumar Giri, D.W.4 Rupesh Giri, D.W. 5 Serajul Mian and D.W.6 Ram Sundar Singh.

5. However, defence was set up accused that they have falsely been implicated and driver was taken mending jeep and he was apprehended.

6. The trial court taking into consideration the evidence of witnesses convicted the appellants holding that 150 Kg. Ganja was recovered from the conscious possession of the accused persons and search and seizure were made before the authorised persons.

7. Learned counsel for the appellants however challenged the order of conviction and sentence recorded by the trial court. It has been contended that, though, witnesses had supported about seizure and apprehended the vehicle in which appellants were sitting and it is stated, though, seizure list was prepared and seizure article were handed over to Officer-in-Charge of Inarwa Police Station. However, there is no evidence that where the seized articles were kept and neither seized articles were produced before the court nor there is any compliance of Section 52 (a), 55 and 57 of N.D.P.C Act. It has further been contended that article seized on 09.01.2011, but there is no evidence where said articles were kept and neither Malkhana register has been proved nor there is any evidence regarding disposal



of seized articles nor seized articles were produced before any Magistrate nor sample was taken before the Magistrate. F.S.L. report marked as Exhibit 6 which mentions that by Memo No. 746, dated 16.08.2011 a parcel was received by Special Messenger which was received in the office on 22.09.2011 in connection with Inarwa P.S. Case No. 01. 2011 and hence it is apparent that article seized on 09.01.2011 and sent it to F.S.L. 16.08.2011 and the period intervene was almost eight months, but there is no mentioned in this period where the articles were kept or sample was taken from the seized article in such manner there is no mentioned whether sample was taken from each packet or one packet and I.O. has not been examined in this case. Hence having regard to the fact articles seized is Ganja is missing.

8. Learned counsel for the State however contends that articles were seized in commercial quantity and F.S.L. report suggests that seized Ganja was Ganja.

9. Having regard to the fact I proceed to respective submissions for consideration whether prosecution has been able to prove the charges against the appellants.

10. The prosecution case that while police party along with S.S.B., persons were patrolling, they received secret information that Ganja was being smuggled by a Marshel Jeep from Nepal to India.

The patrolling party concealed themselves and when the vehicle appeared they apprehended the vehicle and Ganja was recovered from the said vehicle. 10 witnesses were examined in this case and all the witnesses were members of the raiding party and they have deposed that nine packets each containing 16 Kg. each and total 150 Kg. Ganja was recovered from the said vehicle. However, some witnesses have deposed that Ganja was weight at the place of occurrence and some witnesses have deposed that Ganja was weight at the police station. However, this contradiction regarding weighting Ganja at the place of occurrence or at the police station may not be considered fatal as there may be a human error. However, there is no evidence that where Ganja were kept. Ganja was seized on 09.01.2011 and F.S.L. report shows that aforesaid Ganja was sent to F.S.L. on 16.08.2011. However, there is no evidence where the seized Ganja was kept. There is no evidence whether articles seized were sealed at P.O. or even subsequently there is no evidence where the seized articles were kept. Further there is no evidence who took the sample from the seized article. There is no evidence whethet seized Ganja was produced before any Magistrate. However, there is no certification of the Magistrate that Ganja was seized ever produced before him or any order was taken from him. The seized Ganja was not even produced before the court.



11 However, Section 52(a) 1 of N.D.P.S. Act provides soon after the seizure, the Ganja seized be disposed of by such officer and in such manner as that Government may provide from time to time. Further Section 52(a) provides that when any narcotic drug or psychotropic substance has been seized and forwarded to the Officer-in-Charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-section 1 shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed country or origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose (a) certifying the correctness of the inventory so prepared; or (b) taking, in the presence of such Magistrate, photographs or such drugs or substances and certifying such photographs as true; or (c) allowing to draw representative samples or such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

12. However, Section 52(a) of N.D.P.S. Act regarding the

procedure for disposal of the seized article has not been followed nor any certification has been made nor photographs of the articles were taken nor sample was taken before any Magistrate and there is no evidence that sample was taken from the article seized and there is violation of Section 52(a) of N.D.P.S. Act.

13. Further Section 55 of N.D.P.S. provides that an Officer-in-Charge of a police station shall take charge of the article seized and keep it in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who maybe deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the Officer-in-Charge of the police station.

14. However, there is no evidence in regard to Section 55 of N.D.P.S. Act that article seized were sealed or the sample taken from seized article were sealed with the seal of the Officer-in-Charge of police station.

15. Further Section 57 provides that whenever any person makes any arrest or seizure, under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official

superior.

16. However, there is no compliance of Section 57 of N.D.P.S. Act.

17. Hence having regard to the fact, articles were seized not produced before any Magistrate. There is no evidence that sample was taken from the seized article, there is neither any certification of the Magistrate nor seized articles were produced before the Magistrate. nor there is any evidence that seized articles were sealed with seal of the Officer-in-Charge. There is no evidence sample was taken from the seized Ganja or kept in a sealed cover. There is no evidence that soon after the seizure samples were produced before any Magistrate to take sample and hence there is no evidence that sample was taken from the seized article and send it to F.S.L. and hence it is no proper to relied upon F.S.L. report in view of these evidences. Moreover, there is no explanation where the articles seized were kept from the date of seizure till the date the sample was sent to F.S.L. on 16.08.2011. There is no evidence in between 09.01.2011 to 16.08.2011 where seized articles were kept. Moreover, though, articles sent by Memo No. 746 dated 16.08.2011 but the same was received on 22.09.2011 much after a month and there is no explanation where the seized articles were kept during the period from 16.08.2011 to 22.09.2011 and this cast a serious doubt that the sample

send were sample of the article seized as no explanation has been given in this regard.

18. Regard being had to the fact, order of conviction and sentence recoded by the trial court is not sustainable and it is apparent that trial court not to go into the question where articles were kept and whether sample was taken from the seized article or in which packet. Further, articles seized on 09.01.2011 and sent it to F.S.L. on 16.08.2011 and in between the period where the articles were kept. Hence, it is prudent to rely on the F.S.L. report to record conviction. Hence, order of conviction and sentence recorded by the trial court is hereby set aside and both the appeals are allowed. The appellants in both the appeals are in jail custody be set at liberty forthwith if not required in any other case.

m.p.
N.A.F.R

(Gopal Prasad, J)

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