

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.411 of 2013

Against the judgment of conviction dated 15.04.2013 and order of sentence dated 17.04.2013 passed by Sri Bhuybnanand Jha, learned 1st Additional Sessions Judge-cum-Special Judge, West Champaran, Bettiah, in Trial No. 22 of 2009 (arising out of Sikta P.S. Case No. 16 of 2009)

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Nandu Prasad Son of Kamal Mahto Resident of Village Bhiswa, P.S. Langri, District- Parsa (Nepal)

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Mukesh Kumar, Advocate.
Mr. Shivjee Singh, Advocate.
For the State : Mr. Bipin Kumar, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD
ORAL JUDGMENT

Date: 04-12-2015

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

2. This appeal arises out of judgment of conviction dated 15.04.2013 and order of sentence dated 17.04.2013 passed by Sri Bhuybnanand Jha, learned 1st Additional Sessions Judge-cum-Special Judge, West Champaran, Bettiah, in Trial No. 22 of 2009 (arising out of Sikta P.S. Case No. 16 of 2009) by which the appellant had been convicted for offence under 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 payment of fine of Rs. 1,00,000/- and in default of payment of fine further sentenced to

undergo simple imprisonment for one year.

3. The prosecution case as alleged in the First Information Report by the informant Nashib Singh, Inspector, S.S.B. E. Company 27 Battalion Sikta posted as Company Commander that on receipt of secret information he posted his employees and kept vigil at Pillar No. 408. At about 21.30 hours some people were seen coming from Nepal to India and some articles were on their head as soon as they reached near the patrolling party they started fleeing away and some people managed to flee away, but raiding party catch hold of one person during his fleeing away and disclosed his name as Nandu Prasad and from his possession 70 Kg. Nepali Ganja was recovered. On enquiry from the person who apprehended disclosed that with him there were three more associates with him and they had fled away after throwing articles and disclosed their names as Ram Swaroop, Sahjad and Ramayan.

4. On Fardbeyan of the informant, F.I.R. lodged and police after investigation submitted charge sheet. After submission of the charge sheet, cognizance taken and trial proceeded after framing of the charge for offence 20(b)(ii)(c) of N.D.P.S. Act for having possession of 70 Kg. Ganja.

5. During trial five witnesses were examined. P.W. 1 Arbind Bahadur Singh, he is also member of the raiding party and posted as S.S.B. Company Sikta and had deposed that having vigil at Pillar No.

408 on the date of occurrence i.e. on 16.05.2009 and has supported the prosecution case to the effect that appellant apprehended and catch hold by S.S.B. forces and recovery of 70 Kg. Ganja from the possession of the appellant. P.W.2 Ramanand Chauhan had come to say that on the date of occurrence he was posted at 27 Battalion Company and as per information he went to Pillar No. 408 and saw three-four persons coming from inside the border of Nepal and on seeing the raiding party they started flee away and one person apprehended and disclosed his name as Nandu Prasad and said article seized was Ganja. P.W. 3 Nasib Singh the informant and had disclosed the name of the person who flee away and 70 Kg. Ganja was recovered. Seizure list was prepared before two witnesses Rameshwar Prasad and Nasib Singh and had also proved the signature on the seizure list. Seizure list has been marked as Exhibit-2. P.W. 4 is witness of the seizure list and has stated that he identified his signature on the seizure list marked as Exhibit-3. However, he has deposed that he did not know about seizure list, he signed on the seizure list on saying by the Darogaji. P.W.5 Man Mohan Singh, is also member of the raiding party under Company Commander and raid had been conducted at Pillar no. 408 and some persons were seen coming from Nepal border then they chased and they flee away, but one person was apprehended disclosed his name as Nandu Prasad, though, I.O. namely, Bishundeo Singh his name has been mentioned

in the charge sheet, but has not been examined, though, documentary evidence has been proved in the case Exhibit 1 and 1/1 signature of informant and P.W. 4 on the seizure list, Exhibit-2 hand writing of P.W.3 on the written report and Exhibit-3 is report of F.S.L.

6. The trial court taking into consideration the evidence of witnesses and material proved convicted the appellant that witnesses have supported the prosecution case regarding recovery of Ganja and seizure list has been prepared regarding the said recovery of Ganja and report of F.S.L. it is apparent that articles seized from the possession of the accused was Ganja.

7. Learned counsel for the appellant however, challenged the order of conviction and sentence recorded by the trial court. It is submitted that, though, it is alleged that evidence adduced that appellant was arrested along with Ganja while crossing border near Pillar No. 408 coming from Nepal to India, but there is no evidence after seizure of Ganja where the same was kept from the date of occurrence till the same was sent to F.S.L. It has further been contended that after the seizure of Ganja, the Ganja was not sealed. There is no evidence that who took the representative sample. There is no evidence that whether the sample taken out from the seized article for sending it to F.S.L. There is no evidence where article seized was kept from the date of seizure till the sample taken and send to F.S.L. Further article seized was not produced either before



the court nor any certification of Magistrate has been proved to show that the same was produced before any court or any Magistrate nor there is destruction report that article seized was destroyed nor there is order to such effect by the Magistrate dealing with the seized article. Hence it is contended that F.S.L. report has not been proved whether representative sample was sent to F.S.L. and where representative sample was seized in this case. None of the witnesses have deposed that seized article ever sent for chemical analysis to ascertain that the article seized was Ganja. The trial court relied upon F.S.L. report under Section 293 of Cr.P.C. without any formal proof. It has further been contended that I.O. has not been examined in this case. There is nothing in the entire evidence that who gave sample and what mode adopted to take the representative sample nor there is any evidence that sample was taken out from the article seized.

8. The learned counsel for the State however contends that there is evidence that the article seized from possession of the appellant and F.S.L. report of the representative sample taken from the article seized was Ganja and hence prosecution has proved that article found in possession of the appellant was Ganja.

9. However, taking into consideration the respective submission, I proceed to consider the evidence in the light of submission. The prosecution case is that on secret information, the S.S.B.E. kept vigil at Pillar No. 408 and they apprehended Nandu

Prasad while other manages to escape and recover 70 Kg. alleged Ganja. The witnesses have supported the prosecution case with regard the recovery of alleged Ganja from the possession of the appellant.

10. Hence, prosecution has been able to prove the seizure of the Ganja from the possession of the appellant. However, next part of occurrence that after search and seizure of the article seized, there is no evidence where the seized article was kept and whether the representative sample was taken out for sending the same to F.S.L. In this regard it is apparent from the entire record and evidence of witnesses as well as documentary evidence that there is no evidence at all that after seizure of the article where seized article was kept. There is no evidence where representative sample was taken out from the seized article. There is no evidence who take out the representative sample. There is no compliance of Section 52 A of N.D.P.S. Act. Section 52 of N.D.P.S. Act provides that just after article seized was produced before Officer-in-Charge of the police station with regard to the said seized article. The Officer-in-Charge shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances which is relating for the identity and he shall also bound



to make an application to any Magistrate certifying the correctness of the inventory taking in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs and to draw representative samples. However, it is apparent that there is no compliance of Section 52 A of N.D.P.S. Act. Further, there is violation of Section 55 and 57 of the N.D.P.S. Act. However, Section 55 of N.D.P.S. Act provides that Officer-in-Charge of a police station shall take charge of and keep in safe custody of narcotic and psychotropic substance shall affix his seal on each article 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. However, Section 57 of the N.D.P.S. Act provides 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. There is no evidence regarding compliance of Section 52 A, 55 and 57 of the N.D.P.S. Act. Hence, virtually there is nothing to hold that article seized was narcotic and psychotropic substance, when there is no report placed before the Court that article seized was sent to F.S.L. and hence link regarding the fact that whether seized article is Ganja is missing and cannot be relied unless it is established that representative sample was sent from the seized article to F.S.L. by the Officer-in-Charge of the nearest police station. Hence, it is not established that representative sample taken from the seized article

and it is difficult to rely on the report holding that the seized article is Ganja.

11. Hence order of conviction and sentence recorded by the trial court without going into the question whether representative sample of the seized article was taken out from the seized article and sent to F.S.L. in view of the evidence and in this regard no relevance of F.S.L. report. Hence, in consequence the order of conviction and sentence recorded by the trial court is hereby set aside and **appeal is allowed**. The appellant is in jail custody be set at liberty forthwith if not required in any other case.

(Gopal Prasad, J)

m.p.
NA.F.R.

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