

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.88 of 2012

=====

(Against the Judgment of conviction dated 21.12.2011 and Order of sentence dated 23.12.2011 passed in Special Case 36 of 2004 by the Additional Sessions Judge-XI, Patna).

=====

Shyam Deo Rai, son of Late Sukhan Rai, resident of Moh.- Digha (XTTI), P.S.- Digha, District- Patna.

.... Appellant.

Versus

1. The State of Bihar.
2. Union of India.

.... Respondents.

=====

Appearance :

For the Appellant : Dr. Brahma Deo Prasad & Mr. Rakesh Kumar, Advocates.
For the State : Mr. Abhimanyu Sharma, A.P.P.

=====

CORAM: HONOURABLE JUSTICE SMT. ANJANA PRAKASH

and

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

(Per: HONOURABLE JUSTICE SMT. ANJANA PRAKASH)

Date: 11-09-2015

The sole appellant, Shyam Deo Rai, has been convicted under Section 21 of the N.D.P.S. Act and sentenced to Rigorous Imprisonment for 15 years and fine of Rs.1,00,000/- , in default of which, further Rigorous Imprisonment for two years vide Judgment of conviction dated 21.12.2011 and Order of sentence dated 23.12.2011 passed by the Additional Sessions Judge-XI, Patna, in Special Case 36 of 2004.

2. The case of the informant, Bachcha Singh, Officer Incharge of G.R.P., Patna, is that on 16.05.2004, he got information that



a looted mobile phone could be recovered from the house of the appellant, on which he constituted a raiding team and rushed to the house of the appellant, Shyam Deo Rai. It is said that 300 grams of smack and Rs.55000/-, kept on the cot, were seized. Police arrested the appellant and the co-accused, Dashrath Rai, from there. Thereafter, police raided the house of acquitted accused, Rajiv Kumar Singh, on an information given by the appellant that the smack used to be supplied by him. On raid having been made at his house, further 5 grams smack was recovered from there.

3. Appellant and Rajeev Kumar Singh were put on trial, out of which, Rajeev Kumar Singh was acquitted.

4. During trial, the prosecution examined 7 witnesses. P.W.1, Brahmdeo Prasad Alok, P.W.2, Bachcha Singh, P.W.3, Ajay Kumar Sharma, P.W.4, Shyed Nausad Ali, who were the members of the raiding party, were examined. P.W.5, Amir Lal Singh and P.W.6, Dipak Kumar Yadav, who were seizure list witnesses, have turned hostile. P.W.7, Brijesh Singh, was the Officer Incharge, who received the supervision note. He prepared the application for sending the material exhibits to the Forensic Science Laboratory, which was marked as Ext.3.

5. From the evidence of P.W.1, Brahmdeo Prasad Alok, we find that he was the A.S.I. in Digha Thana on the date of occurrence

where, Bachcha Singh (P.W.2) Officer Incharge of G.R.P., Patna, Niraj Kumar, A.S.I., and rest of police party, came on information that some stolen articles have been kept in Mohalla-Digha. He, Nausad Ali and Brijnandan Rai went to the house of appellant Shyam Deo Rai, where he was present alongwith Dashrath Rai. His house was searched, in course of which, 300 grams of smack, Rs.55000/-, injection, three wrist watches and a mobile were recovered. Seizure list was prepared in this regard. He further stated that then he reached the house of accused, Rajiv Kumar Singh, from where also some incriminating articles were recovered. He described the topography of two houses. It was suggested to him that brother of Rajeev Kumar Singh had given an application before the Chief Judicial Magistrate, Patna, that Officer Incharge of Digha and other police officers have been harassing them and demanding money and there is possibility of their being implicated in a false case.

6. P.W.2, Bachcha Singh, stated that when he was the Officer Incharge of Rail Police Station at Patna Junction and was investigating Patna Rail P.S. Case No.118 of 2004, he got information that the looted articles could be recovered from the accused in Digha, then he went to Digha Police Station and a raiding team was also constituted. Thereafter, they raided the house of Appellant Shyam Deo Yadav and found him and Dashrath Yadav sitting on a bed selling



smack. 300 grams smack and 61 pouches of smack, kept separately, weighing scale for selling smack , injection, Rs.55000/-, two pistols, five live cartridges, one discharged cartridge and one mobile were recovered from there. The seizure list was prepared by him in presence of Md. Shamim and Sunil Singh. None of whom have been examined by the prosecution. He marked the seizure list as Ext.1. On pointing of the appellant, the house of Rajiv Kumar Singh was raided from where also 5 grams of smack, kept in a plastic, was recovered. The next seizure list was also prepared by him in presence of Amir Lal Singh and Dipak Kumar Yadav, P.W.5 and P.W.6 respectively, which is marked as Ext.1/1. He stated that after the seizure, they went to the police station alongwith the arrested accused where Sri J. Karketa prepared the First Information Report on his own statement. The statement, which is in the own handwriting and signature of Sri J. Karketa, has been marked as Ext.2 and formal F.I.R. has been marked as Ext.2/1. He stated that the accused were kept in Hazat and the seized articles were kept in Malkhana. One Bhawani Shankar Prasad, S.I., was appointed as an Officer Incharge. He also described topography of the houses from where seizure was made. It was suggested to him that Rajiv Kumar Singh has been falsely implicated on account of his brother having filed a Sanha before the Chief Judicial Magistrate, Patna of harassment against the police officials posted at Digha.

7. P.W.3, Ajay Kumar Sharma, stated that he was posted at Patna Railway Junction as R.P.F. Post and on the date of occurrence, he started to investigate Rail Police Station Case No.118 of 2004 and rushed to Digha Police Station for their assistance since it was learnt that one accused resides in Digha locality. He was one of the persons alongwith the rest of the raiding party, who raided the house of the appellant, where they found the appellant and Dashrath Rai sitting on a Chowki alongwith incriminating articles. He stated that the Officer of Digha Police Station prepared the seizure list and handed it to the accused after it was signed by the witnesses who received the same. He further stated that on pointing of Shyam Deo Rai, the house of Rajiv Kumar Singh was raided where incriminating articles were recovered and seizure list of the same was also prepared. On seeing Ext.1, he stated that there are 13 items, which are mentioned in the seizure list and besides that another seizure list was also prepared in which rest items were mentioned but he did not know as to how many items were mentioned in the second seizure list. He further conceded that he was not the person, who had recovered the said articles. However, he stated that the recovered articles were weighed in his presence by the officer of Digha Police Station on the weighing scale which was available there. He was also questioned with regard to the house of the accused and there is nothing notable in his evidence in this regard.



8. P.W.4, Shyed Nausad Ali, was posted as A.S.I. at Digha Police Station. He stated that on the date of occurrence he alongwith Bachcha Singh (P.W.2), Ajay Kumar Sharma (P.W.3) and rest police officers raided the house of the appellant and found him sitting on the bed alongwith co-accused, Dashrath Rai and from there the incriminating articles mentioned above were recovered. He stated that the seizure list was prepared and given to Shyam Deo Rai. On the pointing of the appellant, the house of Rajiv Kumar Singh was further raided and incriminating articles were recovered from there. He stated that another cases under the Arms Act for the recovery of arms was lodged. In regard to recovery of incriminating materials, he stated that the same was weighed in his presence by Jonathan Karketa and it was sealed by him on the place of the occurrence itself. He was also questioned with regard to the recovery of the items from the house of Shyam Deo Rai as mentioned above.

9. P.W.5 and P.W.6 have turned hostile and did not support the factum of recovery in their presence.

10. P.W.7, Brijesh Singh, was the Police officer posted at Digha Police Station, who took over investigation on 04.07.2004. Thereafter, he received the supervision note upon which he acted. He stated that he had given an application for sending the articles for testing to the Forensic Science Laboratory to the Sessions Judge, after

which articles were sent there. He proved the application as Ext.3. He stated that the main Investigating Officer was Bhawani Shankar Prasad, who has now retired. He only submitted chargesheet.

11. From the aforesaid, we notice that neither the informant nor the Investigating Officer has been examined in the case and their non examination creates a serious doubt about the prosecution case inasmuch as the Court is deprived of any cogent material as to how samples were drawn from the recovered articles, how it was sealed and when it was sent to the Forensic Science Laboratory, Patna, for testing. The witnesses have stated that the article was sealed there and then but give no evidence as to drawing of samples. The manner of sealing is also not clarified.

12. From the evidence of P.W.7 we find that he stated that he had given an application for sending the articles to the Forensic Science Laboratory, Patna, after having joined on 04.07.2004, i.e. about two months later. The Forensic Science Laboratory report itself is dated 23.03.2010, yet another six years later.

13. Further, we find that the Forensic Science Laboratory Report has been marked as Ext.4 under the provisions of Section 293 of the Code of Criminal Procedure but no witness was produced on behalf of the prosecution to prove the same.

14. We conclude that in absence of examination of the

informant and Investigating Officer and reliable material with regard to weighing of recovered incriminating articles, sealing, drawing of sample, Court is left groping in the dark. Also weight of recovered articles, which is crucial in cases falling under the N.D.P.S. Act which is a stringent law and determines the sentence to be awarded, has not been conclusively proved. In such circumstances, when the prosecution has failed to prove cogent and reliable evidence in respect to adhering to the mandatory procedure, it would be highly unsafe to rely on the half-baked oral evidence of the witnesses on crucial points.

15. In the result, this appeal is allowed. The impugned Judgment of conviction and Order of sentence passed against the appellant is set aside. Appellant, who is in jail custody, is directed to be released forthwith, if not wanted in any other case.

(Anjana Prakash, J)

(Rajendra Kumar Mishra, J)

**Pradeep Srivastava/
N.A.F.R.**

U		T	
---	--	---	--