

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.44 of 2015

Against the judgment of conviction, dated 24.11.2014, and order of sentence dated 26.11.2014, passed by Shri Bipin Bihari Mishra, Additional District and Sessions Judge, II, West Champaran, in Tr. No. 44 of 2011 arising out of Gounha P.S. Case No. 57 of 2010

1. Naresh Sah son of Dhanesh Sah @ Dhanai Sah Resident of Village - Dindayal Nagar, Bagaha, P.S. Bagaha, District - West Champaran Appellant

Versus

1. The State of Bihar

.... Respondent

Appearance :

For the Appellant : Mr. Baxi S.R.P. Sinha, Sr. Adv. with
Mr. Vijay Kumar Singh No. 1, Adv.

For the Respondent : Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

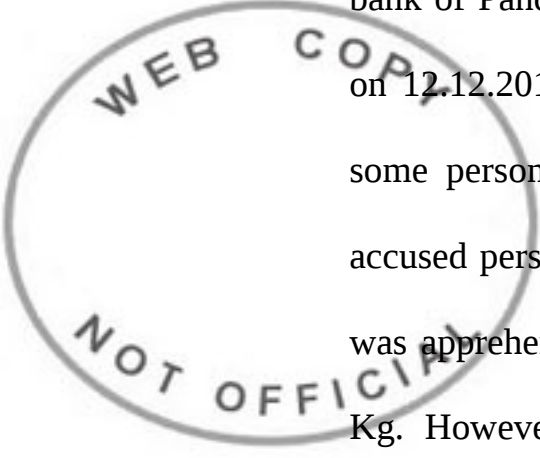
ORAL JUDGMENT

Date: 11-09-2015

Heard the learned counsel for the appellant and the State.

2. The appellant has been convicted under Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985, (hereinafter referred to as, “the Act”) and sentenced to undergo rigorous imprisonment for ten years and a fine of rupees one lakh and in case of non-payment of fine to undergo simple imprisonment for one year.

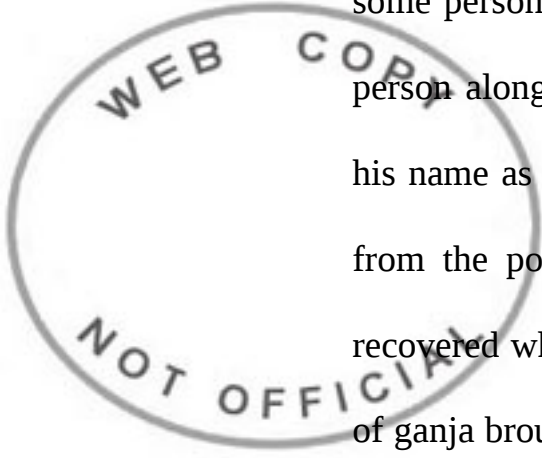
3. The prosecution case, as alleged in the first information report filed by the Company Commandant, D.G. Dhananjay Burman, 27th Battalion, Manguraha, Narkatiyaganj, P.W. 3 that on 11.12.2010 at about 08.30 P.M. he received a secret information that some smugglers are going to pass through Pandai river along with Napali ganja and on this information the informant constituted a raiding party of Subhash Chandra Rai, P.W. 1, Constable S. Kartiken, P.W. 6, Constable

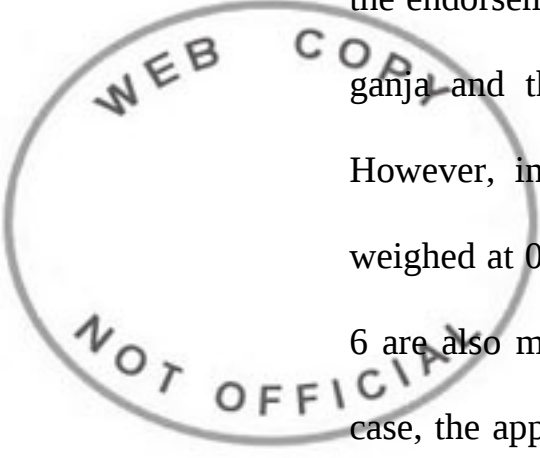


Chiranjivi Borey, P.W. 4, D.G. Raju Ghose, P.W. 5 and remained at the bank of Pandai river near Manguraha village. The, further, case is that on 12.12.2010 at 03.00 A.M. the party heard the sound of coming of some persons on which the raiding party challenged them, then, the accused persons started fleeing away after throwing ganja. One person was apprehended along with three bundles of ganja weighing about 50 Kg. However, respondent persons managed to flee away. From enquiry of the person, arrested, disclosed his name as Naresh Sah, the appellant. He, further, disclosed that he was taking ganja from Nepal to Bagaha, West Champaran. The seizure list of the seized ganja was prepared at the camp, after taking the accused at Camp where the ganja was weigh. On the fardbeyan the seizure prepared and statement of Naresh Sah recorded, the first information report lodged on the basis of the written report by the informant, P.W. 3. After lodging the first information report as Gounha P.S. Case No. 57 of 2010 for offences under Sections 20, 21 and 22 of the Act. The investigation proceeded, charge sheet submitted, subsequently the cognizance was taken and trial proceeded after framing of charge for offence under Section 22(c) of the Act.

4. During the trial seven witnesses were examined by the prosecution. They are Subhash Chandra Rai, P.W. 1. He has supported the prosecution case regarding the information received by the informant and, thereafter, constituting the raiding party and they concealed

themselves near the Pandai river and after hearing the sound of coming some persons they challenged and chased them and caught hold of one person along with ganja. The person who was apprehended, disclosed his name as Naresh Sah and has stated that one bundle ganja recovered from the possession of this appellant and two bundles of ganja also recovered which were thrown away and seized and all the three bundles of ganja brought to the Company Headquarter where it was weight as 50 Kg and there the papers were prepared and he has proved the signature on the seizure list, marked as Exhibit 1. P.W. 2 is Amit Kumar. He has also supported the prosecution case about the raid and search and seizure of ganja and has stated that D.G. Raju Ghose prepared the details of naka party on which he signed, which is marked as Exhibit 1/1 and brought the accused and ganja at the Bhaduraha Camp where it was weighed as 50 Kg and seizure list prepared and, thereafter, the seized ganja and the accused was handed over to Gounha Police Station and has identified the accused. P.W. 3 is the informant and he has also supported the prosecution case regarding the receipt of the information and constitution of raiding party. He has also proved that on his instruction Amit Kumar, Constable, has prepared the seizure memo and has proved his signature on the seizure memo, marked as Exhibit 2. He has, further, stated on his information apprehension memo was also prepared, which has been marked as Exhibit 3 and has stated that on his instruction Amit





Kumar has given the petition, which has been marked as Exhibit 4 and the endorsement on the said written report and has stated that the seized ganja and the accused was handed over to Gounha Police Station. However, in his cross examination he has stated that he ganja was weighed at 04.08 P.M. on 12.12.2010 and it was sealed. P.Ws. 4, 5 and 6 are also members of the raiding party and supported the prosecution case, the apprehension of Naresh Sah and recovery of ganja. However, P.W. 7 is the Assistant Sub Inspector of Police, Raj Kishore, the Officer-in-Charge of Gounha Police Station and he in his evidence has stated that on 12.12.2010 Inspector, D.G. Dhananjay Burman of Sashastra Seema Bal, gave a written report and seized 50 Kg of ganja along with the seizure list and arrest, made, produced Naresh Sah accused. He has proved his endorsement on the said written report marked as Exhibit 4/1 and has also proved the formal first information report which has been marked as Exhibit 5 and he proceeded with the investigation and recorded the confessional statement of the accused and made his signature. The said confessional statement marked as Exhibit 6. He, further, recorded the statement of the informant and witnesses and inspected the place of occurrence. He has, further, stated that on the order of the Court he sent the sample of the seized article to the Forensic Science Laboratory, Patna, on 14.03.2011 submitted charge sheet. In his cross examination he has stated that he had received the sealed ganja

bundles and has taken out ganja from each of the bundles. He has, further, stated that for testing the ganja, he sent the sample of ganja after making processes. The trial Court taking into consideration the evidence of witnesses convicted the appellant, as stated above, and held that the prosecution has been able to prove the charges beyond all reasonable doubts.

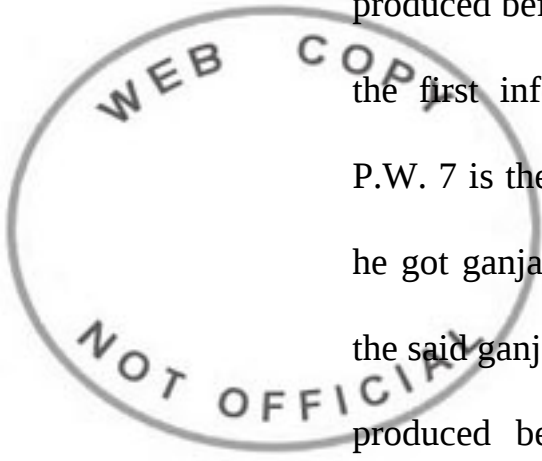
5. The learned counsel for the appellant has challenged the order of conviction and sentence. It is submitted that though in the first information report it is alleged that the Inspector, Sashastra Seema Bal, received the information and then constituted the raiding party, but, there is no compliance under Sections 42(1) and 42(2) of the Act. It has, further, been contended that the ganja was received on 12.12.2010 at the Police Station, but, the sample was dispatched on 15.02.2011 as per the Forensic Science Laboratory report. It has, further, been contended that the investigating officer, P.W. 7, has stated, in his evidence, that he sent the sample by the order of the Court on 14.03.2012 and the report has been received on 12.06.2012 and there is delay in sending the ganja and receiving the report and has placed reliance on decision reported in **A.I.R. 2011 SCW, 6651 (State of Rajasthan Vrs. Tara Singh)**. It has, further, been contended that there is some contradiction in the evidence of the witnesses regarding the apprehending the accused person and search and seizure and the Inspector being the member of the raiding

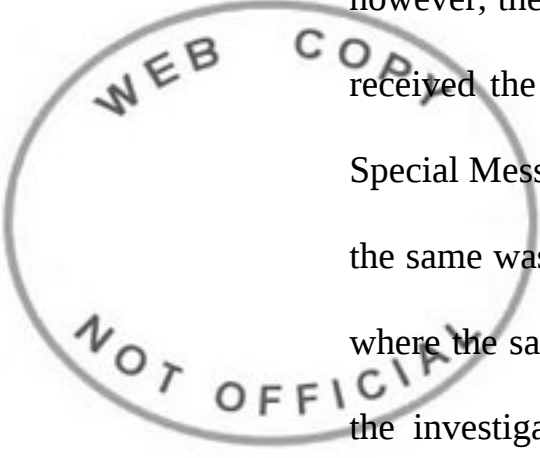
party.

6. The learned counsel for the State, however, contends that the prosecution has been able to prove the charges beyond all reasonable doubts as the witnesses have supported the prosecution case about the receipt of the information and subsequently the raiding party constituted, the appellant was apprehended on spot along with the bundle of ganja and seizure list prepared and the appellant was handed over to the Officer-in-Charge, Gounha Police Station and the first information report lodged, sample was sent for chemical examination and the report of the Forensic Science Laboratory received.

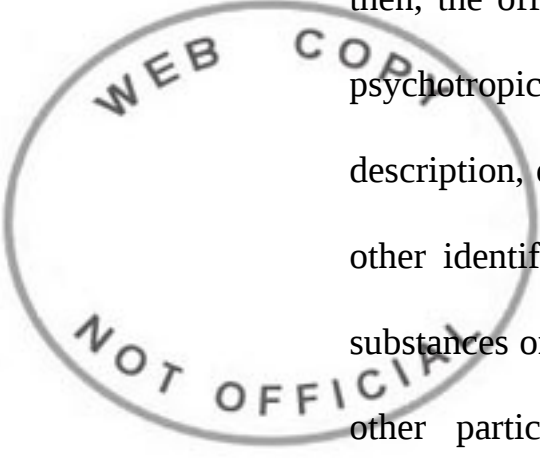
7. However, taking into consideration the respective submission in the light of the submissions made by the parties, it is apparent that P.Ws. 1 to 6 have supported the prosecution that on secret information that some smugglers are going to cross the river Pandai and raiding party constituted and were sent to river Pandai at village Manguraha where they kept themselves concealed and in the night when they heard sound of foot steps, they challenged on which the accused persons tried to flee away, however, they chased and caught hold of one person with one bundle of ganja and two bundles were thrown away. They caught hold of the accused, who disclosed his name and the bundles of ganja were taken to the camp where the seized ganja was weighed and search and seizure list prepared and, thereafter, the accused,

along with ganja and the written report as well as seizure list, were produced before the Officer-in-Charge, Gounha Police Station, on which the first information report lodged and the investigation proceeded. P.W. 7 is the investigating officer and he has stated in his evidence that he got ganja in sealed cover, however, there is no evidence that where the said ganja was kept. There is no evidence that whether the ganja was produced before any Magistrate for certification of the article as provided under Section 52A of the Act or not. There is neither any certification of the ganja by any Magistrate nor the ganja has been produced in the Court. There is no mention that whether the Officer-in-Charge of the Police Station, on receipt of the sealed ganja, affixed his seal or whether the sample was taken out with the seal of the Officer-in-Charge of the Police Station, hence, there is no compliance of Section 55 of the Act. There is no mention that after having arrested of the accused along with search and seizure, he within 48 hours gave full report of the particulars of arrest to his immediate officer in compliance of Section 57 of the Act. However, taking into consideration the fact of the case that the ganja was seized on 12.12.2010 and the same was produced to the Officer-in-Charge of the Police Station, but, there is no evidence that where the ganja kept. There is no evidence that the ganja was kept in the malkhana of the Police Station neither the register of malkhana has been proved nor there is any evidence that where the same was kept. The





most glaring aspect that the ganja was recovered on 12.12.2010, however, the report of the Forensic Science Laboratory mentions that he received the sample vide Memo no. 285, dated 15.02.2011, as per the Special Messenger, Assistant Sub Inspector of Police, Bhagwan Rai, but, the same was received on 14.03.2011, however, there is no mention that where the sample was kept from 15.02.2011 to 14.03.2011. More over, the investigating officer, in his evidence, has stated that he sent the sample by the order of the Court on 14.03.2011. However, there is no mention that in the evidence how the sample was taken on 15.02.2011 and whether the sample was taken from the article seized or not. There is no evidence with regard to the authenticity of Memo no. 285, dated 15.02.2011, advising the dispatch of parcel. The investigating officer, in his evidence, has not stated that when he taken the sample rather in his evidence in paragraph 4 of his deposition he stated that by the order of the Court, dated 14.03.2011, the sample of the seized article was sent to the Forensic Science Laboratory. If the sample was taken by order, dated 14.03.2011, but, the report of the sample received indicates that the sample sent was bearing Memo no. 285, dated 15.02.2011, i.e., prior to the date order taken for sending sample has not yet been explained, hence, the sanctity of the sample has become doubtful and this castes a serious doubt on the prosecution story. Section 52A of the Act provides that when a narcotic drugs and psychotropic substances has been seized



and forwarded to the Officer-in-Charge of the nearest Police Station, then, the officer shall prepare an inventory of such narcotic drugs and psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identification particulars of the narcotic drugs and psychotropic substances or the packet in which they are packed, country of origin and other particulars relating to identity of the narcotic drugs and psychotropic substances and he shall make an application any Magistrate for the purpose of certifying the correctness of the inventory so prepared, taking the photographs of such drugs or substance and certifying such photographs of the article taken, he shall also produce the material before the Magistrate for allowing to draw the representative sample of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

8. However, neither the articles produced before the investigating officer, the Officer-in-Charge of Gounha Police Station has got an inventory of the article prepared nor he produced it before any Magistrate nor he got the articles' photographs and produced before a Magistrate for certifying with such photographs of the article nor he took the representative sample before the Magistrate, hence, there is no certification of the correctness of any list of sample so drawn. There is no evidence that after receipt of the articles, the articles produced before

him, he made any seal for the same. There is neither any evidence that where the articles were kept nor it is proved that the articles were kept in malkhana register to prove that the articles were kept in malkhana nor he has proved the representative sample take out before any Magistrate and this casts a serious doubt that the sample sent for examination to the Forensic Science Laboratory were the samples taken from the articles, seized by the prosecution. Hence, the conviction recorded by the trial Court in view of these materials is not sustainable and there is a serious doubt on the prosecution story as sanctity of sample has not been maintained.

9. Hence, having regard to the fact that the order of conviction recorded by the trial Court is not sustainable and the prosecution has not been able to prove the charges beyond all reasonable doubts, as mentioned above, hence, the order of conviction is here **set aside** and the appeal is **allowed**. Since, the appellant is in custody, he is directed to be released forthwith if not wanted in any other case and he is discharged from the liability of his bail bond.

(Gopal Prasad, J)

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