

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.794 of 2012

Against the judgment of conviction and order of sentence dated 25.04.2012 and 30.04.2012 passed by Shri Harendra Nath Tiwary, Sessions Judge-cum-Special Judge, Bhabhua(Kaimur), in Sessions Trial No. 01 of 2010 (arising out of Bhabhua P.S. Case No. 358 of 2001, G.R. No. 1368 of 2001

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1. Rajgrihi Bind @ Rajgrih Bind S/O Bali Bind Resident Of Village Khurd Paharia, P.S. Bhabhua, District Kaimur At Bhabhua.

.... Appellant

Versus

The State Of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Rajani Kant Pandey, Advocate.

For the State : Mrs. Abha Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 08-09-2015

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

2. This appeal arises out of the judgment of conviction and order of sentence dated 25.04.2012 and 30.04.2012 passed by Shri Harendra Nath Tiwary, Sessions Judge-cum-Special Judge, Bhabhua(Kaimur), in Sessions Trial No. 01 of 2010 (arising out of Bhabhua P.S. Case No. 358 of 2001, G.R. No. 1368 of 2001 by which the appellant had been convicted for offence under Section 21(b) of N.D.P.S. Act and sentenced to undergo rigorous imprisonment for seven years and payment of fine of Rs. 50,000/- and in default of

payment of fine, further sentenced to undergo rigorous imprisonment for six months.

3. The prosecution case as alleged in the First Information Report by the informant Anil Kumar Karn, Officer-in-Charge of Bhabhua P.S. that while he was posted as Officer-in-Charge, on 12.12.2001 at 7.00 A.M. he received secret information that in Bhabhua Ward No. 1 in Chauni Mohalla some persons are engaged in business of selling of Heroin. He recorded Sanha and requested Anchal Adhikari to cooperate and on request, Shri Sudhanshu Kumar, Anchal Adhikari came to police station and the informant P.W.2 and P.W.4 along with reserved force, S.I. Sumari Prasad Mandal (P.W.1), Bara Lal Prasad (P.W.3) and Shib Narayan Singh (not examined) proceeded for Chauni Mohalla and on reaching Chauni Mohalla they saw three persons fleeing away and all the three persons apprehended and they disclosed their names Rajgrihi Bind, Jainuddin Ansari and Munna Mian and they were searched before the Magistrate and two independent witnesses Ramji Ram and Birendra Ram. From the pocket of full pant of Rajgrihi Bind 20 polythene pouch weighted 100 gram of Heroin had been recovered and from the left pocket of Kurta of Jainuddin Ansari 17 Puria of paper containing 3 gram Heroin was recovered and from the left pocket of Kurta of Munna Mian one polythene pouch containing 5 gram Heroin was recovered. All the

three persons enquired but they had not given any satisfactory reply nor produced any paper then article seized for preparing seizure list before two independent witnesses and the Magistrate and two independent witnesses signed on the seizure list.

4. On the self statement of Suresh Kumar Karn, F.I.R. was lodged and investigation proceeded. On the submission of charge sheet, cognizance taken, case committed to the Court of Sessions and then trial proceeded after framing of the charge.

5. During trial, five witnesses were examined on behalf of the prosecution and two witnesses were examined on behalf of the defence. P.W. 1 Sumari Prasad Mandal has supported the prosecution case regarding raid as he was member of the raiding party constituted by the Officer-in-Charge Anil Kumar Karn P.W. 2, constituting Anchal Adihari Sudhanshu Kumar P.W. 4 and other witnesses and stated that they went to Chauni Mohalla and there they caught three persons who tried to flee away and from the possession of this appellant 20 polythene packets containing 100 gram Heroin had been recovered. Seizure list had been prepared and two independent witnesses signed on it. He had proved seizure list marked as Exhibit-1. P.W. 2 is the informant who had also supported the prosecution case regarding information having been received. Thereafter, he constituted a raiding party along with Sumari Prasad Mandal, P.W. 1



and other witnesses and apprehended three persons at the place of occurrence. Seized Heroin from the pocket of the appellant before Anchal Adhikari, Sudhanshu Kumar P.W. 4 and two independent witnesses and the article seized was sealed. P.W. 3 Bara Lal Prasad and P.W. 4 Sudhanshu Kumar had also deposed to the effect that raid was conducted and three persons were apprehended and from the possession of appellant 20 polythene pouch containing 100 gram Heroin was seized for which seizure list prepared and seized article was sealed. P.W. 5 is seizure list witness, though, he had proved the signature on the seizure list, but had turned hostile. However, I.O. had not been examined in this case and there is no evidence to the effect whether sample was taken from the seized article. There was no evidence where the seized article was kept and there is no evidence whether article seized was sealed or sample taken was sealed and sent to F.S.L after taking out sample from the seized article. There is no evidence who took the sample and before whom sample was taken. However, F.S.L. report had been proved on petition filed by prosecution and F.S.L report marked as Exhibit-4. The F.S.L. report, though, suggests that vide Memo No. 1005, dated 22.12.2001 sample was received by Special Messenger Constable 332 Nand Kishore Singh, dated 06.02.2002 in connection with Bhabhua P.S. Case no. 358 of 2001 and it had been mentioned a Tin dibba enclosed within



cloth cover sample which was duly sealed with impressions of seal corresponding sample with the seal impression contained three paper packets marked 1, 2 and 3 said to be contained samples of Heroin. The paper packet marked (1) contained one polythene packet which contained 2.57 gms of brown powdery substances said to be 'Heroin' seized from the possession of Rajgrihi Bind. The paper packet marked '2' contained five small paper packets and each paper packet contained about 140 mg. of faint brown powdery substances said to be 'Heroin' seized from the possession of Jainuddin Ansari and '3' the paper packet marked '3' contained one polythene packet which further contained 2.38 gms of brown powdery substances said to be 'Heroin' seized from the possession of Munna Mian. Heroin was detected in brown powdery substances contained in polythene packets marked '1' and '3' and in the faint brown powdery substances contained in all five small paper packets marked '2' described above.

6. The trial court taking into consideration the fact convicted the appellant as mentioned above.

7. Learned for the appellant however contends that, though, recovery has been made from the possession of the appellant, but there is no compliance of Section 50 of N.D.P.S. Act as accused was not made aware of his right to be searched before any Gazetted Officer or before a Magistrate in compliance of mandatory provision



of Section 50 of N.D.P.S. Act. It has further been contended that article was seized from the possession of the appellant, but Investigating Officer not examined and there is no evidence that said seized article was sealed, there is no evidence that where the seized article was kept. There is no evidence whether sample taken from the seized article and same was sent to F.S.L. It has further been submitted that I.O. has not been examined in this case and neither any evidence on record to suggest that sample was taken from the article seized and sent to F.S.L. by the I.O. or before the Magistrate nor there is mentioned where seized article was kept nor there was mentioned seized article had been produced before the court.

8. Learned counsel for the State however, contends that since search was made before the Magistrate, there is no requirement for compliance of Section 50 of N.D.P.S. Act and when article seized in the presence of the Magistrate. It has further been contended document showing carbon copy of document regarding fact three packets having been sent to F.S.L. which has been placed on record and marked Exhibit-4 had been proved in this case. Hence it is submitted that if this document is taking into consideration, it can ample evidence that article seized was sent to F.S.L.

9. However, taking into respective submissions, I proceed to consider the evidence in the light of submissions made by the parties.



The prosecution case is that police got information that Heroin is being sold in Chawani Mohalla then the informant Officer-in-Charge, Bhabhua Police Station Anil Kumar Karn P.W. 2 along with police party proceeded with Circle Officer Sudhanshu Kumar P.W.4 and other police personnel, when they reached Chawani Mohalla then saw three persons fleeing away then they caught hold of the three persons and on search before P.W.4 Heroin was recovered from their pocket. P.W. 1 Sumari Prasad Mandal, P.W. 2 Anil Kumar Karn, informant, P.W. 3 Bara Lal Prasad, P.W. 4 Sudhanshu Kumar have supported the prosecution case and P.W. 5 Birendra Ram, seizure witness had turned hostile. P.W. 1 stated that on 12.12.2001 O/C Bhabhua along with Circle Officer and armed constable proceeded and caught three persons and from their pocket Heroin was recovered and seizure list prepared. P.W. 2 has stated that three persons were apprehended while fleeing away by chase and before two witnesses the police party first gave their search and then searched the appellant before Circle Officer and recovered Ganja in polythene pouch. P.W.3 has stated that three persons while fleeing away were chased and caught and on search Heroin was recovered from the possession of this appellant. P.W.4 Circle Officer has stated that three persons were arrested by Police armed force and on search Heroin recovered and accused arrested.

10. However, the Investigating Officer has not been examined



so there is no evidence where articles were kept after seizure and there is no evidence whether the article seized were sealed and there is no mentioned what amount of articles were taken from the seized articles. There is no evidence whether the sample taken from seized article and the same was seized to Forensic Science Laboratory. Further I.O. had not been examined in this case and there is no evidence to the effect that who send the sample or whether sample send from the seized article to hold article seized is Heroin.

11. However, it is true that a raiding party was constituted consisting of the Magistrate who was member of the raiding party and it has been brought in evidence that search and seizure made before him, but there is no evidence that appellant is informed his right. However, in decision reported in **(2000) 7 S.C. cases 477:-** it has been held “when a search is made by an empowered officer, who happens to be a gazetted officer, it is still obligatory for prosecution to inform the accused of his right to be searched before another nearest gazetted officer or before the nearest Magistrate in compliance with the mandatory requirement of Section 50- so where the accused himself requested for such search, and was denied on the ground that the arresting officer who conducted the search was a gazetted officer himself, held, the search was vitiated”.

12. Hence the fact that though, the search made without

awareing the appellant of his right to be searched before the authority like Gazetted Officer or Magistrate is fatal for prosecution.

13. Hence from the evidence of these witnesses, it is apparent that three persons including the appellant was arrested and from his possession in person i.e. from his pocket 100 gm. Heroin recovered on search before the Circle Officer. However, there is no violation that accused was ever informed and his right to be search before any Gazetted Officer or before nearest Magistrate in compliance with Section 50 of N.D.P.S. Act. However, the seizure list proved as Exhibit-1/1, but there is no signature or endorsement of the Circle Officer, P.W. 4 on the seizure list that the seizure was made before him. However, the Investigating Officer has not been examined.

14. There is nothing in the record to show that the article seized was sealed or where it was kept and further whether sample taken from the seized article and sample was sent to F.S.L. and it is not proper to place reliance on the report when there is no evidence that sample was sent to F.S.L. and who send the sample from the article seized and in the case.

15. Hence having regard to the fact that, though, there is no evidence that the article recovered from the possession of the appellant without compliance of Section, but there is no evidence that where the seized articles were kept. P.W. 2 the informant who was



Officer-in-Charge of the police station who conducted the search and seizure and prepared seizure list has not stated where the articles was kept. The I.O. has not been examined in this case to prove whether he took the sample from seized article and sent to F.S.L. There is no evidence regarding compliance of Section 52A of N.D.P.S. Act nor there is any evidence with regard to compliance Section 55 and 57 of the N.D.P.S. Act nor the seized article produced in Court. Moreover, the prosecution case is that police proceeded on secret information having been received. It is stated that said information was recorded as Sanha, but there is neither any compliance of Section 42(1) or (2) of N.D.P.S. Act. It is true that raid was made in the public place. It is not a case in which raid was conducted by the police while in patrolling duty rather it was a case that police received secret information and then proceeded, but there is no compliance of Section 42(2) N.D.P.S. Act nor there is compliance of Section 57 of N.D.P.S. Act.

16. Having regard to the fact, prosecution has not been able to prove the charge against the appellant and it is not proper to rely on F.S.L. report which has been marked as Exhibit-4 without having been proved that sample was sent from seized articles from the possession of the appellant and hence conviction and sentence recorded by the trial court suffers from various infirmities and trial

court misdirected for the reasons mentioned above. In the aforesaid circumstances, the conviction and sentence recorded by the trial court is hereby set aside and the appellant be set at liberty forthwith if not required in any other case.

17. Criminal appeal is accordingly allowed.

(Gopal Prasad, J)

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