

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No. 488 of 2011

Against the judgment of conviction and order of sentence dated 28.02.2011 passed by Sri Jagannath Singh, the learned 1st Additional Sessions Judge, Motihari, East Champaran in N.D.P.S. Case No. 49/14 of 2006/2008

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Kailash Sahani, S/O Late Bharat Sahani, R/O Village - Barwa, P.S. - Lakhaura,
Distt. - East Champaran

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Shri Baxi S.R.P. Sinha, Sr. Advocate
Mr. Vijay Kumar Singh No. I, Advocate

For the Respondent : Mr. Binod Bihari Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

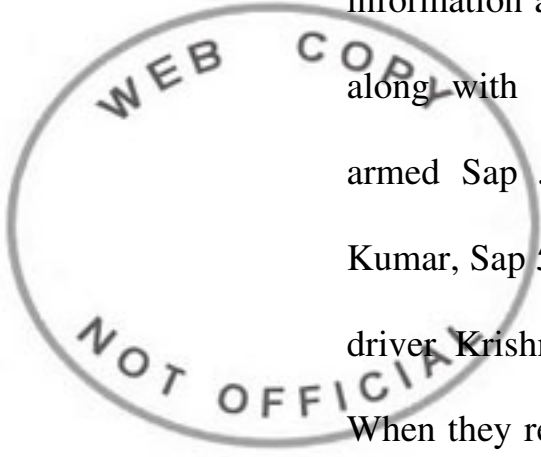
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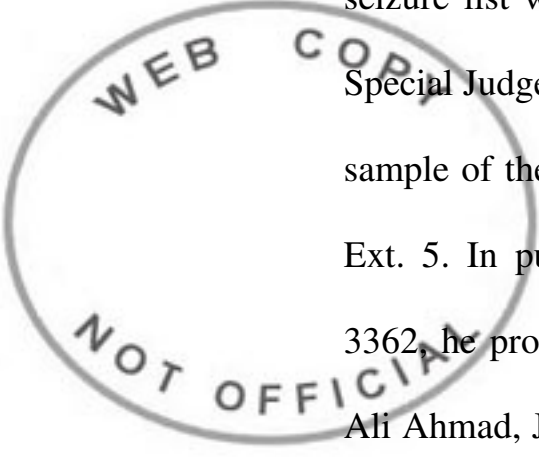
Heard learned counsel for the appellant and learned
Additional Public Prosecutor for the State.

2. The sole appellant has been convicted under Section 20(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act (for short the “N.D.P.S. Act”) and has been sentenced to undergo rigorous imprisonment for ten years and a fine of Rs.1,00,000/- and for non-payment of fine to undergo simple imprisonment for six months.

3. The prosecution case as alleged in the First Information Report recorded by the informant Kamal Kishore Singh (P.W.8) is that he was posted as Officer-In-Charge, Pakari Dayal Police Station and had written his self statement on 18.06.2006 stating that he received telephonic information that in front of Tekha at Fulwar Ghat on the bank of river Gandak ganja has been kept in a boat Dengi and

ganja smuggler was also there in the Dengi (boat). On the said information a sanha entry was recorded at 1:00 P.M. and the informant along with Sub-Inspectors Surendra Paswan, Sachidanand Paswan, armed Sap Jawans, namely, 1285 Chandradhan Yadav, 278 Vijay Kumar, Sap 557 Jai Niwas Sharma, 1653 Hare Krishna Tiwari and jeep driver Krishna Mohan Singh proceeded to the place of occurrence. When they reached there on the bank then saw one person sitting on a boat. He was apprehended and on being asked he disclosed his name as Kailash Sahani, the appellant and by his side 12 bundles of contraband ganja kept in 6 bags were recovered. On opening the packets, contraband ganja was recovered from those packets and on inquiry the appellant admitted and confessed that he brought ganja from Nepal to sell it to the local villager and confessed his guilt but did not produce any paper with regard to the ganja. The ganja was seized before the two independent witnesses P.W. 1 Udai Narain Singh and P.W. 6 Ragho Prasad Yadav and the seizure list was prepared. The said ganja was weighed about eighty kgs. and the appellant was taken into custody. On the self statement of the informant P.W. 8 the First Information Report was lodged. The investigation of the case was handed over to the Investigating Officer, P.W. 9, Surendra Paswan at the place of occurrence itself. He inspected the place of occurrence. The place of occurrence is Pulwar Ghat. The recovery was made from the boat about 100 yards western southern side on the bank. He recorded the

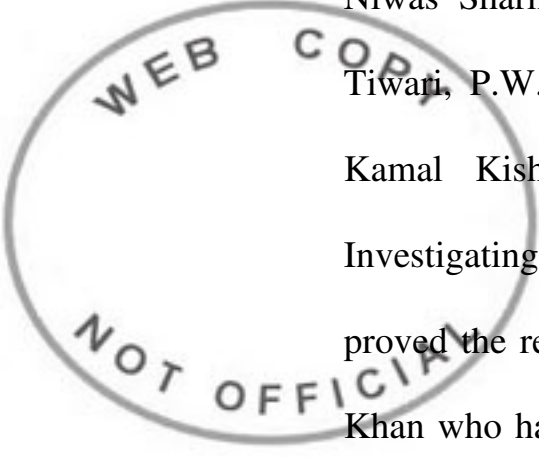




statements of the witnesses including the raiding party and also the seizure list witnesses. He filed an application before the Court of the Special Judge for deputation of a Magistrate for inquiry and sending the sample of the Ganja. The application filed by him has been marked as Ext. 5. In pursuance of the memo of the Special Judge bearing no. 3362, he produced the seized ganja on 11.07.2006 in the Court of Sri Ali Ahmad, Judicial Magistrate, Motihari for taking out the sample. He has proved the performa with signature as well as the signature of the Judicial Magistrate Sri Ali Ahmad by which the sample was sent and the said certificate of the Judicial Magistrate is Ext. 6. The said sample was taken out before the said Judicial Magistrate Sri Ali Ahmad in his Court from two bundles of the ganja seized and after investigation charge-sheet was submitted.

4. However, the charge-sheet was submitted but the report of Forensic Science Laboratory was received after submission of the charge-sheet. The report of the Forensic Science Laboratory has been proved, marked as Ext. 8.

5. On submission of the charge-sheet, cognizance was taken, case was committed to the Court of Sessions and during the trial eleven witnesses were examined by the prosecution. The witnesses examined are P.W. 1 Udai Narain Singh witness of the seizure list as the seizure was made before him though in his cross-examination stated that on the next day of the occurrence the Daroga called him and got his



signature on the plain paper, P.W. 2 Sachidanand Paswan, P.W. 3 Jai Niwas Sharma, P.W. 4 Chandradhan Yadav, P.W. 5 Hare Krishna Tiwari, P.W. 6 Ragho Prasad Yadav, P.W. 7 Vijay Kumar, P.W. 8 Kamal Kishore Singh, P.W. 9 Surendra Paswan who is the Investigating Officer, P.W. 10 Santosh Kumar Singh who has formally proved the report of SHO marked as Ext. 7 and P.W. 11 Safi Ahmad Khan who has proved Ext. 8 the attested copy of the FSL report. The documentary evidence adduced in the case is Ext. 1 signature of P.W. 1 on the seizure list, Ext. 2 is the seizure list itself, Ext. 3 is the self statement of the informant P.W. 8, on the basis of which formal First Information Report was lodged, Ext. 4 is the formal First Information Report, Ext. 5 is the application filed before the Special Judge by the Investigating Officer for taking the sample and Ext. 6 is the certificate of the Magistrate for sending the sample of the article seized to the Forensic Science Laboratory in the performa with signature of the Investigating Officer.

6. On consideration of the oral and documentary evidence, the trial Court convicted the appellant as mentioned above holding that the appellant was found in possession of the seized article and the prosecution has been able to prove its case and charge under Section 20 of the N.D.P.S. Act.

7. Learned counsel for the appellant, however, contended that in the First Information Report there is specific mention

that police received secret information and recorded it as sanha entry but said sanha entry has not been proved or brought on record. It has further been contended that the seizure list witnesses have turned hostile as they have not supported the prosecution case and the other witnesses who have come to support the prosecution case are all official witnesses. The two independent witnesses have not supported the prosecution case.

8. Learned counsel for the appellant has placed reliance upon a decision reported in 2011(1) PLJR 1054 in the case of Radha Devi @ Indu Devi vs. The State of Bihar. It has further been contended that the sample has been taken on 11.07.2006 but it was received in the Forensic Science Laboratory on 26.07.2006 and hence, there is delay in sending the sample. It has further been contended that neither the articles seized were sealed nor is there any evidence as to where the articles were kept from the date of seizure, i.e., 18.06.2006 to the date of taking out the sample 11.07.2006. It has further been contended that 12 bundles of contraband ganja kept in 6 bags were seized as per the evidence of the witnesses but there is no evidence as to whether the articles seized were sealed. There is also no mention as to where the articles seized were kept and there is no evidence that the sample was taken from each bundles, rather to the contrary there is evidence that the sample was taken only from two bundles. It has further been contended that ganja has been received in the Forensic

Science Laboratory after submission of the charge-sheet in December, 2007 and even prior to the receipt of the FSL report the charge-sheet has been submitted.

9. Learned counsel for the State, however, contended that non-production of the initial secret information is not fatal as the seizure has been made from the public place and only because the seizure list witnesses have turned hostile is no ground to reject the evidence of the official witnesses unless their evidence is not worthy of credence and further the official witnesses have consistently supported the prosecution case regarding the seizure and recovery of the articles from the boat near the appellant and hence, from the possession of the appellant and after search the articles were brought to the police station and thereafter produced before the Magistrate and the sample was taken in presence of the Magistrate and sent to the Forensic Science Laboratory in sealed cover and within reasonable time the articles have been destroyed. The sample was received on 26.07.2006 in the Forensic Science Laboratory and hence, it was contended that there is nothing in their evidence to disbelieve the FSL report received after long time, which may be due to long line and may be vexed with the work.

10. However, taking into consideration the respective submissions of the parties, the question for consideration is whether the prosecution has proved the charges.

11. However, in the light of the submissions made by

the parties, I proceed to consider the evidence of the witnesses.

However, the prosecution case is that on secret information the Officer-in-Charge of Police Station Pakri Dayal constituted a team and reached the place of occurrence and as per the informant found boat in which a person was sitting and beside him 12 bundles of ganja kept in 6 bags were found weighing about 80 kgs. were recovered. The witnesses P.Ws. 2, 3, 4, 5 and 7 who are the official witnesses have supported the prosecution case and recovery of ganja from the possession of the appellant. There is nothing in the evidence to disbelieve. However, P.Ws. 1 and 6, though are seizure list witnesses, have turned hostile.

12. The prosecution case regarding the recovery of ganja, search and seizure has been supported by the witnesses. There is nothing in the evidence to disbelieve and hence, merely because two witnesses P.Ws. 1 and 6 have turned hostile the prosecution case to the extent regarding the recovery of ganja from the boat cannot be rejected.

13. P.W. 8, the informant, has also supported the prosecution case regarding the recovery of ganja.

14. However, it may be noted that Section 42 (2) of the N.D.P.S. Act provides that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.]

15. However, going through the entire evidences, there

appears to be no compliance of Section 42(2) of the N.D.P.S. Act which is mandatory in nature. Neither P.W. 8 the informant nor P.W. 9 the Investigating Officer in their evidence have ever stated that they sent the said information to the Superior Officer. However, Section 43 of the N.D.P.S. Act provides for power of seizure and arrest in public place.

16. Here under the facts and circumstances of the case, the seizure has been made on the boat on the bank of the river at Phulwar Ghat and compliance of Section 42 of the N.D.P.S. Act is not required when the seizure has been made at public place or in transit during conveyance. The seizure has been made from the boat at a public place and is a public conveyance intended for use to the public place.

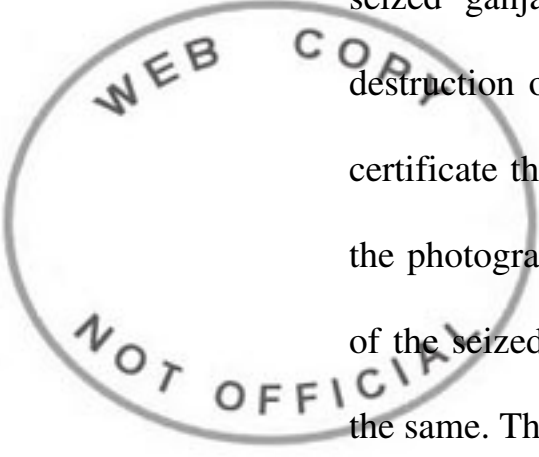
17. However, here the fact that as per the self statement of the Officer-in-Charge of the Police Station he received an information, entered a sanha entry and then proceeded with the party and made search and seizure. However, as per the evidence of P.W. 8 the informant proceeded with the team, apprehended the appellant along with the articles seized and then hand over the investigation to the Investigating Officer at the place of occurrence itself and he proceeded with the articles to the police station. From the evidence of P.Ws. 8 and 9 as well as other witnesses there is no mention that the articles seized were sealed. There is no mention in the entire evidence

as to where the articles were kept. Neither the register of Thana Malkhana has been produced and proved, nor the weight of twelve bundles of ganja have separately been mentioned.

18. However, it has come in evidence that an application was filed before the Special Judge, West Champaran, Motihari for deputing the Magistrate for taking the sample which is Ext. 5 and Ext. 6 is the certificate of the Magistrate that sample taken was sealed and Ext. 6 has been proved which only mentions, “certified that the sample of the narcotics seized in N.D.P.S. Case No. 49 of 2006, arising out of Pakaridayal P.S. Case No. 48 of 2006, is sealed in his presence for the purpose of its chemical examination by the concerned authority”. The signature of Surendra Paswan P.W. 9 has been proved, marked as Ext. 1/4. The said documents contain the endorsement that eighty kgs. ganja in six packets in twelve bundles were seized and it is mentioned that seventeen gram ganja is being sent to the Forensic Science Laboratory. However, P.W. 9 in his evidence has stated that the sample was taken from only two bundles of ganja seized. In the endorsement of the Judicial Magistrate, there is no mention that ganja was taken from each bundle, hence it is apparent that ganja was taken only from two bundles, which is a clear violation of the departmental instructions of taking ganja from each of the packets and hence, it is difficult to say that on the basis of the report of those samples that all the twelve bundles contained ganja when the

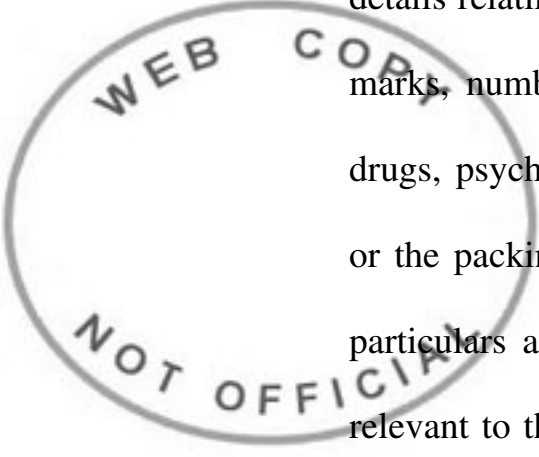
sample has only been taken from two bundles out of the 12 bundles seized containing 80 Kgs. The weight of each packets has not been taken separately and even if assuming that all the 12 bundles contained same amount of material then one packet contained only 6½ Kgs. of ganja and then two packets contained only 13 Kgs. which is less than commercial quantity.

19. However, the seized ganja has not been produced in Court nor a certificate of destruction of the said seized ganja has been produced and the Forensic Science Laboratory report received even accepted is said to be report with regard to the two bundles of ganja. The report is only with regard to 13 Kgs. which is not commercial quantity. The date of occurrence is 18.06.2006. The evidence of the witnesses says that the ganja seized was taken to the police station. However, there is no evidence that the said ganja seized were sealed at the spot or even after taking it to the police station. There is no evidence as to where the ganja was kept. Neither the Malkhana register of the police station has been produced nor is there any mention in the evidence of P.Ws. 8 and 9 as to where the ganja were kept. However, the said ganja was placed before the Magistrate on 11.07.2006 and it is said that the sample taken out from the said seized ganja from two bundles was sealed and sent. However, there is no mention that how many samples were taken and though in Ext. 6 it is mentioned seventeen grams sample taken. However, no representative sample



taken from the seized ganja has been brought before the Court nor the seized ganja has been produced nor a certification regarding the destruction of the said ganja has been proved. The Ext. 5 is only the certificate that the sample was taken from the seized ganja but neither the photograph of seized ganja was taken, nor is there any description of the seized ganja recovered, nor is there any order of destruction of the same. The F.S.L. report marked as Ext. 8.

20. However, having regard to the fact that the ganja was seized on 18.06.2006 and the sample was taken on 11.07.2006 but there is no mention whether the articles seized were sealed, whether the articles were kept, neither the Thana register has been proved nor there is anything in evidence by P.W. 8 the Officer-in-Charge P.W. 9 has said where the ganja has been kept and this is a blatant violation and cast a serious doubt whether the articles seized were produced in Court for taking sample and it cast serious prejudice on the report whether the report has been received in regard nor a certificate regarding the destruction. However, it is proper to note that there is no compliance of Section 52(2) of the Act. Section 52(2) provides that where any narcotic drugs, psychotropic substances, controlled substances or conveyances 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, psychotropic



substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of ----- (a) certifying the correctness of the inventory so prepared; or (b) taking, in the presence of such Magistrate, photographs of [such drugs, substances or conveyances] and certifying such photographs as true; or (c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn. (3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

21. Here under the facts and circumstances of the case, the articles were seized on 18.06.2006 and were taken to the police station but there is no mention where the articles were kept, there is also no mention that the said articles were kept in Malkhana as Malkhana register has not been produced and hence, there is non-compliance of Section 55 of the N.D.P.S. Act and there is no evidence

whether the seized ganja were kept from 18.06.2006 to 11.06.2006 when the articles were produced and this raised a doubt whether the articles seized were actually produced before the Magistrate, from which the sample was taken and further as per the evidence of the Investigating Officer, only from two packets the sample was taken and hence, there is non-compliance of these Sections 55 and 57 of the NDPS Act, hence, I give the appellant benefit of doubt. Therefore, I find and hold that the prosecution has not been able to prove the charges beyond reasonable doubt and the judgment of conviction and order of sentence dated 28.02.2011, passed by Sri Jagannath Singh, the learned 1st Additional Sessions Judge, Motihari, East Champaran in N.D.P.S. Case No. 49/14 of 2006/2008, are hereby set aside and the appeal is allowed. Let appellant, namely, Kailash Sahani who is in custody, be released forthwith if not wanted in any other case.

(Gopal Prasad, J.)

Kundan
N.A.F.R.

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