

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.48 of 2015

Arising Out of PS.Case No. -441 Year- 2012 Thana -KANKARBAGH District- PATNA

Pawan Kumar Rajak, S/o Late Nagina Rajak, resident of Ashok Nagar, Ram
Lakhan Path, Road No. 8, P.S. - Kankarbagh, District - Patna.

.... Appellant

Versus

The State of Bihar.

.... Respondent

Appearance :

For the Appellant/s : Mr. Rajendra Narayan, Sr. Advocate

Mr. Nawal Kishore Prasad, Advocate

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

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 19-02-2015

This appeal arises out of judgment of conviction dated 20.12.2014 and order of sentence dated 22.12.2014 passed by the learned 7th Additional Sessions Judge-cum-Special Judge, N.D.P.S., Patna in Special Case No. 34/12/Tr. No. 02/13 whereby the sole appellant has been convicted under Section 20(b)(ii)(C), 27A, 21(c) and 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “the N.D.P.S. Act”) respectively and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. 1 lakh and in default thereof to undergo rigorous imprisonment for six months under section 20(b)(ii)(C), R.I. for ten years and to pay a fine of Rs. 1 lakh and in default thereof, to undergo R.I. for six months under Section 27A, R.I. for ten years and to pay a fine of Rs. 1 lakh and in default

thereof to undergo R.I. for six months under Section 21(c) and R.I. for ten years and to pay a fine of Rs. 1 lakh and in default thereof, to undergo R.I. for six months under Section 22(c) of the N.D.P.S. Act with stipulation that all the sentences would be concurrent.

2. The first information report is based on the written report submitted by one Ramsevak Rawat, a Sub-Inspector of Police to the Officer-in-charge of Kankarbagh Police Station in which it has been alleged that on 1st October, 2012, while the informant was on morning patrolling duty along with constables Santosh Kumar Singh, Krishna Thakur and Janardan Kumar Yadav he got an information that some ganja smugglers with a purpose of business deal have assembled in the house of one Shakuntala Devi situated at Ram Lakhan Path, Ashok Nagar near Shiv Mandir and they have brought ganja from Nepal to Patna and they are trying to export the same outside Patna. It is alleged that thereafter, the informant gave information to the senior police officers and after receiving directions from them, they proceeded to the indicated place. At about 8.30 A.M. a raid was conducted and in presence of two independent witnesses namely, Chandan, son of Uma Shankar Prasad, resident of village and police station-Nagar Nausa, District-Nalanda and Ajit Kumar, son of Rishideo Prasad, resident of Mohalla-Ashok Nagar, Ram Lakhan Path, P.S.-Kankarbagh, Dist.-Patna, the informant inquired from the house owner Shakuntala Devi, wife of late Kameshwar Roy, who said that she had given a room on rent to the accused-appellant. In presence of the aforesaid two witnesses, the said indicated room was searched. The appellant was found present in the said room. In course of search from the west-north corner of the room, about 16 kg ganja kept in white coloured plastic gunny bag and about 7 kg ganja kept in yellow



coloured gunny bag were recovered. It has been alleged that in all 23 kg ganja kept in 23 packets were recovered from the place of occurrence. In course of interrogation, the appellant disclosed that the said room belongs to one Ravindra Yadav, resident of Patepur Miranpur, Distt.-Vaishali (Hajipur) who is engaged in the business of ganja. Due to non-availability of Magistrate, a seizure list was prepared as per law. A copy of the same was served on the appellant and he was arrested accordingly.

3. On the basis of the aforesaid written report made by the informant Ramsewak Rawat, Kankarbagh P.S. Case No. 441 of 2012 was registered under Section 20, 21, 22, 27 and 27A of the N.D.P.S. Act and investigation was taken up. After investigation charge sheet was submitted by the police before the Magistrate and after taking cognizance of the offence, the learned Magistrate committed the case to the Court of Sessions for trial. The trial Court framed charges under Section 20(b)(ii)(c), 27A, 21(c) and 22(c) of the N.D.P.S. Act to which the appellant did not plead guilty and, accordingly, the trial commenced.

4. In order to prove its case the prosecution has examined five witnesses. They are P.W. 1 Mani Kant Prasad, P.W. 2 Birendra Singh, P.W. 3 Janardan Kumar Yadav, P.W. 4 Ramsewak Rawat and P.W. 5 Kripa Shankar Sah. Apart from the oral testimony, the prosecution has also proved certain documents such as, seizure list (Ext.1), written report (Ext. 2), a copy of the petition filed in the Court of the District Judge (Ext. 3), signature of P.W. 5 Kripa Shankar Sah (Ext. 3/1), the two forwarding reports sent to the Director, Forensic Science Laboratory, Patna (Ext. 4 and 4/1) and Forensic Science Laboratory report (Ext. 5) in course of trial.

5. After examination of the prosecution witnesses, statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure. The appellant in his statement recorded under Section 313 of the Code of Criminal Procedure denied his involvement in any manner in the case. However, the defence did not examine any witness in support of innocence of the appellant.

6. After holding the trial, the Court below has convicted and sentenced the appellant in the manner prescribed hereinabove.

7. I have heard Mr. Rajendra Narayan, learned senior advocate appearing for the appellant and Mr. Binod Bihari Singh, learned Additional Public Prosecutor for the State.

8. Learned senior counsel appearing on behalf of the appellant has submitted that it is a case of no evidence as no prosecution witness has supported the prosecution case. The informant (P.W. 4) and his accompanying witness Janardan Kumar Yadav (P.W. 3) have contradicted each other on many points. He has submitted that P.W. 1 Manikant Prasad has categorically stated that the recovery of contraband was made from the room of Ravindra Yadav and the appellant has no connection with the house. The Investigating Officer has fully corroborated it and stated that all the items recovered from the house were of Ravindra Yadav. He has further submitted that several material witnesses were not examined by the prosecution and there is no explanation for their non-examination. Lastly, it has been contended that there is clear violation of the mandatory provision of Section 42 of the N.D.P.S. Act as neither the source through which the information was received has been disclosed; nor it has been written down and communicated to the superior officer by the informant of the case.

9. On the other hand, learned A.P.P. for the State has submitted that the Court below has correctly appreciated the evidence on record and convicted the appellant. According to him, the Forensic Science Laboratory report in respect of the contraband sent for test fully corroborates the prosecution case. He has further submitted that the informant and the investigating officer of the case have also corroborated the case of the prosecution.

10. In order to appreciate the rival submissions, I think it expedient to briefly discuss the evidence collected in course of trial.

11. P.W. 4 Ramsewak Rawat (informant) has re-narrated the story narrated by him in the written report. However, in his examination-in-chief itself, he has given a complete go-bye to the story of recovery of the contraband ganja from 23 separate packets. He has stated that the secret information received by him was entered in the station diary but he neither produced the same nor could he give the number of the same. He has stated that Shakuntala Devi's house is three storied. According to him, the room in which ganja was kept was not locked and the appellant was found sitting inside the room. He claims that due to non-availability of the Magistrate, the search and seizure was carried by him in presence of two independent witnesses.

12. P.W. 1 Manikant Prasad and P.W. 2 Birendra Singh are independent witnesses. P.W. 2 Birendra Singh, a neighbour of Shakuntala Devi, denied any seizure in his presence. The prosecution declared him hostile. He has been cross-examined by the prosecution but nothing relevant could come out in cross-examination.

13. P.W. 1 Manikant Prasad has categorically stated in

his deposition that the room in question from which the alleged recovery of ganja was made was taken on rent by one Ravindra Yadav and the seized ganja belongs to him. He has further stated in his deposition that the appellant has no connection with the house of Shakuntala Devi.

14. P.W. 3 Janardan Kumar Yadav, a police constable, who is said to be present along with informant at the time of raid, has stated in his deposition that in all 16 kg ganja was recovered and seized by the police. According to him, none was arrested at the time of occurrence. However, he immediately corrected himself by saying that the appellant was arrested. He states that the house of Shakuntala Devi is single storied. According to him, at the time of search and seizure about 150 persons had assembled at the place of occurrence. The room in question was locked but who unlocked it, he did not know. According to him, about 15 to 20 persons had gone inside the room and on saying of local people, the appellant was arrested.

15. P.W. 5 Kripa Shankar Singh, the Investigating Officer of the case, has identified the two forwarding report (Ext. 4 and 4/1) sent to the Forensic Science Laboratory, Patna. He has stated that the house of Shakuntala Devi is two storied. In course of investigation, it transpired that the room in question has been given to Ravindra Yadav on rent and it was learnt that he used to bring ganja from outside. He has also certified that the appellant has no criminal history and on search nothing incriminating was recovered from the house of the petitioner.

16. I have also perused the Forensic Science Laboratory report. The report has been proved under Section 294 of the Code of Criminal Procedure. The forwarding reports as contained in Ext. 3

would show that two samples of 25 gm and 50 gm respectively were sent to the Laboratory for scientific test. The F.S.L. report would show that the contents of the samples sent to the F.S.L. were found to be ganja containing Tetra Hydro Cannabinol (THC) as their chief intoxicating ingredient.

17. On appreciation of evidence on record, I find substance in the arguments advanced by the learned Senior counsel appearing on behalf of the appellant. Apparently, no witness has supported the prosecution case. The witnesses, who have been examined on behalf of the prosecution, have contradicted each other on material particulars. According to the informant (P.W. 4), the room from which the recovery of ganja was made was open at the time of raid but according to P.W. 3 Janardan Kumar Yadav, the room was locked. Further, according to P.W. 3 Janardan Kumar, the house of Shakuntala Devi was single-storied but according to the investigating officer of the case, it was two-storied and according to the informant (P.W. 4), it was three-storied. The witnesses are thoroughly inconsistent. Moreover, P.W. 1 Manikant Prasad has completely demolished the prosecution case. He has categorically stated that the room in question from where the recovery was made was taken on rent by one Ravindra Yadav and the appellant has no connection with the said room or the house of Shakuntala Devi. The investigating officer of the case has fully corroborated the statement of P.W. 1. He has stated that the items which were seized belonged to Ravindra Yadav. According to the FIR, 23 kg ganja was recovered from the room in question but P.W. 1 has stated that about 20-22 kg ganja was recovered whereas P.W. 3 Janardan Prasad Yadav has stated that only 16 kg ganja was recovered.

18. I find that the material exhibit i.e. ganja has never



been produced in the Court. It was necessary for the prosecution to establish by cogent evidence that the alleged quantity of ganja was recovered from possession of the appellant. The best course would have been that the seized material ought to have been produced during trial and marked as material exhibit. There is no explanation for failure to produce the material exhibit. Mere oral evidence as to recovery of ganja and by production of seizure list would not discharge the heavy burden which lies on the prosecution particularly when the evidence under which the prosecution is launched prescribes stringent punishment.

19. I also find that while drawing sample of the seized ganja, the signature of the accused was not taken. The two samples containing 25 gm and 50 gm respectively sent to the Forensic Science Laboratory for test would make no sense as it is not known from which packet of ganja the samples were drawn. The story of recovery of ganja from 23 packets has been given a complete go-bye by the informant of the case while deposing in the Court.

20. Apart from the aforesaid factual deficiencies in the prosecution case, there are several other legal infirmities which make the prosecution case wholly unreliable. According to the FIR, the informant proceeded to the place of occurrence along with other police constables on receipt of confidential information. He has stated that he received instruction from the superior officer of police to conduct raid but no superior officer has come forward to corroborate the statement of the informant. He states that he made a sanha entry in this regard. However, the sanha entry has also not been produced in the Court. There is nothing on record to suggest that any such information was ever written or communicated to any superior officer by the informant.

21. Learned senior counsel appearing on behalf of the appellant is correct in his submission that the mandatory requirement of Section 42 of the N.D.P.S. Act has not been complied with by the informant of the case at the time of conducting raid or even thereafter. Section 42 of the N.D.P.S. Act reads as under:-

“42. Power of entry, search, seizure and arrest without warrant or authorization.-(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish

evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between

sunset and sunrise after recording the grounds of his belief.

2. 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.”

22. In **Abdul Rashid Ibrahim Mansuri v. State of Gujarat** since reported in **(2000) 2 Supreme Court Cases 513**, a three Judge Bench of the Hon’ble Supreme Court held that compliance with Section 42 of the N.D.P.S. Act is mandatory and failure to take down the information in writing and forthwith transmit a report to immediate superior officer would cause prejudice to the accused. In **Sajan Abraham v. State of Kerala** reported in **2001 (6) Supreme Court Cases 692**, a three Judge Bench of the Hon’ble Supreme Court held that Section 42 was not mandatory and substantial compliance was sufficient.

23. In view of the conflicting opinion regarding the scope and applicability of Section 42 of the N.D.P.S. Act in case of **Karnail Singh v. State of Haryana**, the matter was referred to the Constitution Bench of the Hon’ble Supreme Court. In **Karnail Singh v. State of Haryana** reported in **(2009) 8 Supreme Court Cases 539**, the Hon’ble Supreme Court held that if there is total non-compliance with requirements of Sub-sections (1) and (2) of Section 42 of the N.D.P.S. Act, the same would be impermissible. However, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. The Hon’ble Supreme Court in paragraph no. 35 of the judgment held as under:-

“35. In conclusion, what is to be noticed is that *Abdul Rashid* did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did *Sajan Abraham* hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:-

(a) The officer on receiving the information (of the nature referred to in sub-section (1) of Section 42) from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42 (1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a



copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act.

Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001.”

24. From the evidence as discussed, hereinabove, I am of the considered opinion that there is total non-compliance with the provisions of Section 42 of the N.D.P.S. Act and in view of the Constitution Bench judgment of the Hon’ble Supreme Court in case of **Karnail Singh (supra)**, the conviction of the appellant would clearly be unsustainable on this ground alone.

25. In the facts and circumstances of the case, in my considered opinion, the appellant is entitled to an order of acquittal and, accordingly, the appeal is allowed and the judgment of conviction and order of sentence recorded against the appellant by the Court below are set aside. Since the appellant is in jail, he is directed to be released forthwith, if not required in connection with any other case.

(Ashwani Kumar Singh, J.)

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